
(1979) 11 CAL CK 0015

Calcutta High Court

Case No: None

Sri Dilip Kumar Roy
and Others

APPELLANT

Vs

Sanatan Tewari and
Another

RESPONDENT

Date of Decision: Nov. 28, 1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Section 115#Evidence Act, 1872 " Section
78#Presidency Small Cause Courts Act, 1882 " Section 11, 38, 69

Citation: (1979) 11 CAL CK 0015

Hon'ble Judges: Ganendra Narayan Ray, J

Bench: Single Bench

Advocate: Dipankar Ghosal, for the Appellant; Narayan Das, for the Respondent

Judgement

Mr. Justice Ganendra Narayan Ray

1. This Rule is directed against Order dated 17th January, 1979 passed u/s 38 of the
Presidency Small Causes Courts Act by the Full Bench,

Small Causes Court, Calcutta in Title Suit No. 2673 of 1974 setting aside the judgment
passed by the learned Judge, 6th Bench of the said Court.

It appears that the petitioners instituted a suit being Suit No. 2673 of 1974 of the 6th
Bench of the Calcutta Small Causes Court against the

opposite parties for recovery of arrears of rent in respect of premises No. 19E, Shib
Sankar Mullick Lane, Calcutta. The plaintiff-petitioners

contended that the opposite parties were thika tenants and defaulted in payment of rent
since Baisakh 1375 B.S. and the suit was filed for

realization of the rent from Agrahayan 1378 B.S. upto Jaistha 1381 B.S. because the other arrears had become barred by limitation at the time of

institution of the suit. It appears that in the written statement filed in the said suit by the defendants there was an averment to the effect that the

property in question was required to be registered under the Land Registration Act and as no such registration was effected, the landlord was

precluded from realizing rents u/s 78 of the Land Registration Act.

2. It appears that initially the suit was instituted against the opposite party No. 1 but subsequently the opposite party No. 2 was also impleaded as

a party defendant and the trial court on consideration of the facts and circumstances of the case came to the finding that it was the opposite party

No. 1 who alone was the tenant and as such the decree for rent as prayed for by the plaintiff petitioners was passed by the learned Judge, Small

Causes Court, Calcutta. Against the said decree passed by the learned Judge, Small Causes Court, Calcutta, an application u/s 38 of the

Presidency Small Causes Courts Act for a new trial was made and on the said application, a Special Bench commonly known as Full Bench was

constituted and against the adjudication made by the Full Bench the instant revisional application has been made by the plaintiff petitioners. It

appears that the judgment of the trial court was set aside by the impugned order passed by the Full Bench on a finding that since there was a

dispute that the plaintiff landlords were not entitled to recover arrears of rents for not registering the property u/s 78 of the Land Registration Act,

such question was required to be decided by the learned trial Judge after giving the parties proper opportunity of being heard. It may be stated in

this connection that before the Full Bench, an information slip issued by the Office of the Calcutta Collectorate was filed on behalf of the plaintiffs

and it appears from the said information slip that the property in question was within Sutanati area of the then City of Calcutta and at the relevant

time the property was not required to be registered u/s 78 of the Land Registration Act. The learned Full Bench was of the view that the said

information slip could not be held to be a conclusive proof of the fact that the property in question was in the Sutanati area and was not required to

be registered. The Full Bench was of the view that opportunities should be given to the parties to adduce proper evidence to establish as to

whether the disputed property was within an area wherein registration u/s 78 of the Land Registration Act was necessary and whether such

registration was made or not. The learned Full Bench after setting aside the judgment of the trial court sent the matter back on remand before the

trial Court for adjudication in the light of the observation made in the said judgment of the Full Bench.

3. Mr. Ghosal learned Counsel appearing for the plaintiff petitioners contended before me that the Full Bench acted illegally and beyond its

jurisdiction in setting aside the judgment passed by the trial court when a finding of fact was made by the trial court on consideration of the

materials on record. Mr. Ghosal contended that the powers to be exercised by a Full Bench u/s 38 of the Presidency Small Causes Courts Act are

not the powers of an appellate authority but the powers to be exercised u/s 38 are powers similar to revisional powers u/s 115 of the Code of Civil

Procedure. Mr. Ghosal also contended that although there was averment in the written statement that the landlords were not entitled to realise rents

for not getting the properties registered under the Land Registration Act, no evidence was led by the tenant who clearly admitted in evidence in the

trial that the plaintiffs were his landlords and he was a tenant in respect of the property in question. Mr. Ghosal contended that if a person admits

some one to be his landlord, then the liability to pay rent to such landlord is there on such admission and if a party wants to avoid such liability for

some special reasons, it is for such party to lead evidence in support of his claim that though a tenant, he is not required to pay rent as claimed by

the landlord. Mr. Ghosal contended that the learned Full Bench, on an utter misconception of the facts and circumstances of the case, misplaced

the onus on the plaintiffs and on such misconception of the onus of proof by the plaintiffs, held that the allegation that the property in question was

required to be registered under the Land Registration Act is got to be proved and as proper and sufficient materials were not placed before the

Court to substantiate the respective claims of the parties, there should be a fresh trial by the learned Judge after giving the parties opportunities to

adduce evidences in that regard. Mr. Ghosal submitted that pleading is no evidence and none of the defendants gave any evidence whatsoever to

the effect that the property in question was within an area where registration u/s 78 of the Land Registration Act was necessary. When admittedly

the plaintiffs were the landlords in respect of the disputed premises and the defendants admitted that they were tenants under the plaintiffs, no onus

lay on the plaintiffs to prove that the property was not required to be registered because it was outside the area wherein such registration u/s 78

was necessary at the relevant time. Mr. Ghosal further submitted that in any event information slip issued by the Calcutta Collectorate showing that

the property in question was not required to be registered at the relevant point of time should have been considered by the learned Full Bench and

the learned Full Bench was wrong in not relying on the said information slip which according to Mr. Ghosal must be held to be a certified copy of a

public document.

4. Mr. Das learned Counsel appearing for the defendant opposite parties contended that under the provisions of Section 38 of the Presidency

Small Causes Court Act, the Full Bench was quite competent to consider whether there has been a misunderstanding of the facts by the trial Judge.

Mr. Das contended that Section 38 does not limit the proceeding to only question of law although the court exercising power u/s 38 is not a full

fledged court of appeal. Mr. Das contended that even within the limited scope of Section 38 the Full Bench had the authority to consider as to

whether the right of a landlord to realise rents in respect of a property in question had existed or not and whether the said property was required to

be registered u/s 78 of the Land Registration Act or not and whether the landlord was precluded from realizing rents for not registering the

property. In this connection, Mr. Das referred to a decision of this Court made in the case of (1) Everest Cine Corporation (P) Ltd. and Another

Vs. Khuku and Another, P.B. Mukharji, J. (as His Lordship then was) held in the said decision that the language of Section 38 does not limit the

proceeding to only questions of law. At the same time it is true that it is not the language of regular appeal. But even taking it as a limited appeal or

even taking the view that it is a kind of revisional application, there does not appear to be any warrant to confine this provision of Section 38 only

to technical points of law. The basis of ordering a new trial is often the basis of facts either being irrelevantly introduced or wrongly kept out. It is

unwise to import ideas of English Statutes like the English County Courts Act when the language is not exactly similar with the language of Section

38 of the Presidency Small Cause Courts Act. It is equally unwise to proceed on the tacit or implicit assumption that because the Small Causes

Court is not a Court of record or a Court from whose judgment there is no system of regular appeal, Section 38 must only be construed as limited

to points of law.

5. It appears that there is nothing in the Act itself regarding the formation of the Full Bench to dispose of the matters u/s 38. The only provision in

the Act about formation of a Bench with more Judges than one is found in Sections 11 and 69 of the Presidency Small Causes Court Act. The Act

also does not declare that the Full Bench is to accept and dispose of the appeals from original trials. But the Act provides for the consideration of a

judgment of the Small Causes Court by the Full Bench with a power to order new trial or alter, set aside, or reverse the decree or order. The

aforesaid power obviously indicates the powers of the superior court and therefore, the Full Bench or Full Court by necessary implication

exercises a power of a superior court with a power to set aside and/or reverse the order of the trial Judge. There are conflicting decisions of

different High Courts as to his scope of the power to be exercised u/s 38 by a Full Bench and in the decision of this Court referred to herein before

P. B. Mukherji, J. (as His Lordship then was) indicated that the powers exercise u/s 38 is not strictly appellate powers and it is also not

circumscribed by the very limited power to be exercised in the revisional jurisdiction as in the case u/s 115 of the Code of Civil Procedure. It

however appears from the various decisions made by different High Courts including this Court that u/s 38 a new trial may be granted on any of

the following grounds: -

- (1) Improper admission or rejection of evidence.
- (2) Mistake or misapprehension of fact or law on the part of the Judge.
- (3) Improper allowing of refusing an amendment.
- (4) Judgment is manifestly against the weight of evidence.
- (5) Discovery of material evidence not allowed after evidence of the parties is over but before judgment.
- (6) Material irregularity, error or defect in the proceedings affecting the issues.
- (7) Want of jurisdiction or wrongly exercising jurisdiction.
- (8) Want of fair and proper trial.
- (9) Decree or order is contrary to specified law or usage having the force of law.
- (10) Trial Court did not apply its mind to the points for determination of issues in the suit.
- (11) Substantial error in procedure resulting in grave injustice.
- (12) Principles of natural justice and equity were not followed.

6. In my view, within the scope and ambit of Section 38 of the Presidency Small Clauses Court Act a new trial could have been directed if the

court held that there was no proper understanding of the evidences for basing a finding required to be made and/or the trial court failed to consider

the particular issue involved in the proceeding. I am, however, of the view that the information slip issued by the Calcutta Collectorate is not a

certified copy of a public document. Information slip contains information, purported to have been derived by referring to public records. It may

reasonably be expected that public officers giving such information have taken care to see that the information is correct. But such information slip

is not the certified copy of the public document. As such, an information slip cannot be held to be a certified copy of a public document u/s 78 of

the Indian Evidence Act. But in the facts and circumstances of the case, it appears to me that there is no scope to consider as to whether the

property in question was required to be registered under the Land Registration Act and the landlords were precluded from claiming rents for not

registering the property under the said Act at the relevant point of time because the defendants did not lead any evidence whatsoever to discharge

their initial onus to prove that the property was within an area where the said Act was attracted to the relevant point of time. In my view, when the

tenant admitted the plaintiffs to be landlords in respect of the disputed property, under the general law the tenant has an obligation to pay rent. If

the tenant takes a special plea that under a special Act the liability to pay rent is not there it is for the tenant to substantiate such case. In my view, a

mere averment in the written statement that the rent is not payable in respect of the property in question for want of registration u/s 78 of the Land

Registration Act will not absolve the responsibility of the tenant to pay rent in respect of the property in question. In the facts of the case, onus

squarely lay on the tenant to show that the property in question was within an area where the said provisions of section 78 of the Land Registration

Act were applicable at the relevant time. If the said initial onus was discharged by the tenant it was for the landlords to establish that such

registration was made thereby entitling him to claim the rents. The said initial onus not having been discharged in the instant case there was no

occasion for the Full Bench to direct for re-trial for the purpose of finding out as to whether the property was within an area or not where

registration u/s 78 was necessary. Accordingly, I am inclined to accept the contention made by Mr. Ghosal that the Full Bench misconceived the

facts of the case and such misconception placed the said onus on the landlord and directed for re-trial.

7. This Rule therefore succeeds and the order passed by the Full Bench is set aside and the order of the trial Court is affirmed. There will be,

however, no order as to costs.

Let the records be sent down as quickly as practicable.