

IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A. 95 of 2016
CAN 2 of 2010
CAN 4 of 2010
CAN 8 of 2023

PRADIP DHAR
VS.

ANIL KARMAKAR (DECEASED)
REPRESENTED BY SMT. SUPRIYA DAS

For the Appellant : Ms. Sabita Mukherjee Roy Chowdhury, Adv.
Mr. Subhojeet Mukherjee, Adv.

For the Opposite party : Mr. Debductta Bose, Adv.

Hearing concluded on : 21st September, 2023

Judgement on : 19th October, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and decree passed by learned 10th Court, Civil Judge, Senior Division at Alipore in Title Appeal No. 153 of 2008, affirming thereby the judgement and decree passed by learned Civil Judge, Junior Division, 2nd Court, Alipore in Title Suit No. 193 of 2003.
2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.
3. Briefly stated, the plaintiff being the owner of the suit property granted leave and licence to the defendant to possess the suit property and for that they entered into an agreement dated 29th December, 1997

for a period of five years commencing from 1st February, 1994 which would continue till the last day of January, 2003. It was agreed upon by and between the parties that the licence fee would be Rs. 1800/- per month for first three years and Rs. 2000/- per month for the remaining two years. The plaintiff through Advocate gave a letter to the defendant asking him to quit and vacate the suit property and to deliver peaceful possession thereof with the expiry of last day of February, 2003. But the defendant claimed that he was occupying the suit property as a tenant and not as a licensee with license fees.

4. The defendant contested the suit by filing written statement denying all material allegations and also filed a counter claim. According to the defendant of the suit he paid a sum of Rs. 42,000/- as advance to the plaintiff, who received the said amount and it was agreed upon by and between the parties that the said sum of Rs. 42,000/- would be adjusted at the rate of Rs. 300/- per month. Therefore, according to the defendant, the plaintiff could not maintain any suit for his eviction before adjustment of the said sum of Rs. 42,000/- or till the end of 2011.
5. In his counter claim the defendant stated that he is not a licensee. The alleged agreement of license is obtained fraudulently by way of misrepresentation. It is contended further that the defendant of the suit, being the plaintiff of the counter claim that they are the tenants governed under the West Bengal Premises Tenancy Act, 1997 under the defendant of the counter claim in respect of suit premises.
6. The plaintiff of the original suit as defendant of the counter claim by filing separate written statement denied the contention made in the counter claim.

7. Learned Trial Court after considering the pleadings of the parties framed issues and answered the issue in favour of the plaintiff of the suit and dismissed the counter claim, filed by the defendant. Aggrieved by the said judgement of learned Trial Court the defendant preferred the appeal and made an unsuccessful attempt to get the judgement reversed. But the defendant did not challenge the judgement in connection with the counter claim.
8. The second appeal was admitted on substantial questions of law and one such substantial question of law is : “In view of the admitted fact the parties were not relations and that period of induction was for 5 years that too on payment of amount of money, which was to be enhanced after the expiry of three years from the date of induction, the learned courts below ought to have held for the parties of overcoming the provision of the West Bengal Premises Tenancy Act, the agreement was described as that of creation of a licensee.”
9. Heard Ms. Sabita Mukherjee, learned Counsel for the appellant. It is submitted by Ms. Mukherjee that admittedly Exhibit-3 is an agreement prima facie creating relationship between the licensor and the licensee but the mere nomenclature is not sufficient to determine the nature of the relationship. The defendant and the plaintiff admittedly are not relations. The defendant was in a need of occupation and the plaintiff was need of an occupant. Thus they came together and the owner of the property decided to part with possession of the suit property to the defendant. Pursuant to the agreement. Exclusive possession over the property in suit was delivered to the defendant in lieu of Rs. 1800/- per month for three years and subsequently enhanced Rs. 200/- per month.

The plaintiff actually wanted to circumvent the statutory obligation as laid down under the tenancy Act and in order to deny or deprive the defendant of his statutory protection got the document executed under the caption licensee agreement. But in spirit this document Exhibit-3 is eloquent on the status of the parties, as landlord and tenant. It was a tenancy agreement. It is further adverted by Ms. Mukherjee and quite rightly that on 21st June, 2000 a sum of Rs. 42,000/- was taken by the landlord plaintiff from the defendant of the suit to repair the property and there would be adjustment of the said sum at the rate of Rs. 300/- per month. Drawing attention of the Court to the fact that the plaintiff knew that the contractual relationship or jural relationship between the parties is that of landlord and tenant, which is why he had to issue notice of termination. In case of licensee the plaintiff had no obligation to issue notice but in case of a tenant, the plaintiff being a landlord had the obligation to terminate the tenancy, with clear one calendar months notice, which was filed in this case. According to Ms. Mukherjee, learned First Appellate Court as well as learned Trial Court failed to appreciate the said fact and committed error in passing the impugned judgement. To buttress her point Ms. Mukherjee places her reliance upon the judgement of Hon'ble Gujarat High Court in ***Irji Lavji Makwana vs. Partners of Business Running in the Name of Rainbow Screen Shades & Ors.*** reported in **AIR 1979 Gujarat 178** and submits that using of the terms like lease or license, lessor or licensor, rent or license fee are not by themselves decisive of the nature of the right created by the document. An effort should be made to find that whether the deed confers a right to possession exclusively coupled with transfer of right to enjoy the property

there has been brought with those merely right to use the property while possession is retained by owner. The conduct of the parties before and after creation of lis is of relevance for finding out their intention.

10. According to Ms. Mukherjee, since the defendant was given possession in lieu of money payable every month for three years and for remaining two years at an enhanced rate, learned Trial Court ought to have held that the defendant was a tenant and he cannot be evicted in the breach of the statutory protection available to a tenant under the Tenancy Act.
11. Refuting such contention Mr. Debdutta Basu, learned Counsel for the plaintiff/respondent submits that admittedly the defendant filed a counter claim which has the status of suit or cross suit and the counter claim was dismissed. The defendant did not challenge the said order of dismissal by preferring an appeal. Therefore, he cannot raise the issue in the second appeal to upset the concurrent findings of learned Courts below. Rigour of Section 11 of the Code of Civil Procedure cannot be ignored or circumvented. Therefore, according to Mr. Basu, learned First Appellate Court had no other option but to uphold the judgement of learned Trial Court.
12. The defendant having accepted the verdict of learned Trial Court that virtually accepted that the defendant is not a tenant, learned First Appellate Court could not have decided the issue in a different manner in view of Section 11 of the Code of Civil Procedure. To buttress his point Mr. Basu relies upon the judgement of Hon'ble Apex Court reported in ***Harbans Singh & Ors. vs. Sant Hari Singh & Ors.*** reported in **AIR 2009 SC 1819**, ***Rajni Rani vs. Khairati Lal*** reported in **(2015) 2 SCC**

682 and the judgement of Hon'ble Division Bench of this High Court in ***Prasanta Sett vs. Alo Mookerjee & Anr.***

13. Section 11 of the Code of Civil Procedure says :-

“Section 11. res-judicata

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

14. Counter claim preferred by the defendant in a suit, it goes without saying, is in nature of cross suit and by a statutory command even if the suit is dismissed the counter claim shall remain alive for adjudication. As per Order 8 Rule 6A(2) the Court is to pronounce a final judgement in the same suit both on the original claim and also on the counter claim. The plaintiff can file application for exclusion of counter claim put forth by defendant concern. The decision taken in counter claim can have the status of a decree and the determination should be conclusively put to rest the rights of the parties. In *Rajni Rani (supra)* Hon'ble Apex Court held :-

“A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree.”

15. In *Harbans Singh (supra)* Hon'ble Apex Court held :-

“14. Section 11 of the Code of Civil Procedure reads thus:

"Section 11 - Res judicata.-- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

15. In Premier Tyres Limited vs. Kerala State Road Transport Corporation [1993 Suppl. (2) SCC 146], this Court held:

"...The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment or decree in a connected suit is not appealed from...."

16. Therefore, learned First Appellate Court, in my humble opinion, committed no error in passing the impugned judgement affirming the decree of learned Trial Court. The defendant has chosen his inaction by not challenging the decree dismissing the counter claim he preferred. Therefore, the issue becomes res-judicata and thereby the defendant cannot claim the status of tenant.
17. The appeal therefore, cannot be accepted to upset the concurrent findings of the Courts below. The impugned judgement does not warrant any interference. Consequently, the appeal stands dismissed however, without cost. Pending applications, if any, stand disposed of.
18. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.

19. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)