

Tarakpada Kirti Vs. Ruplekha Chatterjee

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Court : Kolkata

Decided On : Sep-28-1977

Reported in : AIR1978Cal189

Judge : Pradyot Kumar Banerjee and ;Ganendra Narayan Ray, JJ.

Acts : [Transfer of Property Act, 1882](#) - Sections 111 and 114A; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 1, Rule 3 - Order 2, Rule 2

Appeal No. : A.F.A.D. No. 115 of 1976

Appellant : Tarakpada Kirti

Respondent : Ruplekha Chatterjee

Advocate for Def. : P.N. Mitter, ;R.N. Mitra and ;N.K. Chaturvedi, Advs.

Advocate for Pet/Ap. : Guruprosad Ghose and ;Tapan Das, Advs.

Disposition : Appeal dismissed

Judgement :

G.N. Ray, J.

1. This second appeal is directed against the judgment and decree passed in Title Appeal No. 7 of 1975 of the 6th Court of the Additional District Judge, Alipore, whereby the judgment and decree passed in Title Suit No. 25 of 1955 of the 2nd

Court of the Subordinate Judge, Alipore was affirmed. This appeal has been preferred by the defendant who, as aforesaid, lost in both the courts below. The plaintiff respondent instituted the Title Suit No. 25 of 1957 for eviction of the defendant appellant from the suit land being premises No. 56/2, Hazra Road, Calcutta and for recovery of arrears of rent and for mesne profits.

2. The case of the plaintiff was inter alia that Sri Charu Chandra Ganguli, father of the plaintiff Sm. Ruplekha Chatterjee, inducted the defendant into a plot of land being premises No. 56/2, Hazra Road measuring 6 cottahs 9 chittaks under a registered lease dated January 15, 1955 for a term of 15 years commencing from January 1, 1955 and ending on December 31, 1969 at a monthly rental of Rs. 140 for the first five years, then Rs. 150 for the next five years and thereafter Rs. 170 for the last five years. It was stipulated in the registered agreement that the rental should be paid in advance by the 15th of the month for which the rent is due. There was also a default clause in the registered indenture of lease to the effect that if the rent for three consecutive months would fall in arrears the lease would be forfeited and the lessor would have the right of re-entry. There was another clause in the indenture of lease that the defendant would not sublet more than half of the road frontage or more than half of the total area of the Land and in case of the breach of the said term, the lease would be forfeited and the lessor would have right of re-entry. The said Sri Charu Chandra Ganguly by a deed of trust dated December 24, 1964 transferred the said property to the plaintiff as trustee and the defendant attorned to the plaintiff as his landlady and had been paying rent to her. The plaintiff brought the said suit for eviction of the defendant on the ground that rent from February, 1966 to January, 1967 had remained unpaid by the defendant and that the defendant had also sublet more than half of the road frontage and also more than half of the total area of the leasehold land in breach of the express covenant in the said indenture of lease. By a notice dated December 16, 1966 the said lease was forfeited by the plaintiff and as the defendant failed to make over vacant possession after removing the structures made on the said land, the aforesaid Title Suit was instituted for eviction of the defendant and for arrears of rent amounting to Rs. 1,930 and also for mesne profits.

3. The said suit was contested by the defendant by filing a written statement inter alia denying the contentions of the plaintiff and it was averred by the defendant that he had developed the leasehold land at a cost exceeding R. 26,000 and the original lessor viz. Charu Chandra Ganguli had verbally agreed to adjust the money spent by the defendant against the future rent payable by him but such adjustment was deferred. If such adjustment was made the defendant would not be found to be a defaulter. The defendant also contended that under a verbal and also written permission given to the defendant by the said Charu Chandra Ganguli he had sublet more than half of the land and as such there was no contravention of any covenant under the lease deed.

5. It appears that a local inspection was directed by the trial court and a Pleader Commissioner was appointed for the purpose and on the report of the Pleader Commissioner, it transpired that the defendant had sublet more than half of the area in contravention of the covenant under the said registered lease. On consideration of the materials on record and the evidences adduced by the parties, the trial court decreed the suit in favour of the plaintiff both on the ground of default and also on the ground of subletting in contravention of the term of the lease. Against the said judgment and decree of the trial court the defendant preferred the said Title Appeal No. 7 of 1975 and the said appeal was also dismissed with costs and the judgment and decree of the trial court were affirmed. As aforesaid, against the said judgment and decree of the Court of appeal below, the instant appeal has been preferred by the defendant appellant.

6. Mr. Guruprosad Ghose the learned Advocate for the appellant contended that the suit was barred under Section 114-A of the Transfer of Property Act and the proviso to the said section was not attracted in the facts and circumstances of the case. It was contended by Mr. Ghose that if the whole of the premises was not transferred or leased out to other persons by the defendant, the proviso to Section 114-A could not have any manner of application. In the instant case, as pointed out by Mr. Ghose, there was no sub-lease by the defendant in respect of the entirety of the leasehold interest but only portions thereof had been leased out and there was express permission from the landlord to give sub-lease of portions of the leasehold land to other persons. In this connection Mr. Ghosa referred to a

decision reported in (1924) 130 LT 570 (Russel v. Beecham). In the said decision Lord justice Scrutton held that a covenant against parting of possession of a part of premises is not within Sub-section (6) of Section 14 of the Conveyancing Act, 1881 and therefore, a notice under Sub-section (1) was necessary before the plaintiff could bring action for re-entry. Mr. Ghose pointed out that the provisions of Section 14 of the Conveyancing Act, 1881 were similar to the provisions of Section 114-A of the Transfer of Property Act. Relying on this decision Mr. Ghose submitted that it was incumbent on the landlord to give notice to remedy the alleged breach of the covenant namely giving sub-lease to more than half of the land and in the absence of any such notice by the landlord to remedy the breach, the action for re-entry by the landlord was not maintainable in law. Mr. Ghose next contended that during the pendency of the appeal the period of lease for 15 years had expired but such subsequent fact could not be taken into consideration by this Court because a suit for ejectment on the ground of expiry of the lease by efflux of time will necessarily introduce completely new cause of action on which the suit had not been instituted by the plaintiff landlord. Referring to a decision reported in AIR 1941 FC 5 Mr. Ghose submitted that the said case only decided a general proposition that subsequent facts having bearing to the dispute between the parties may be taken into consideration but Mr. Ghose contended that there are some limitations in taking into consideration of the subsequent facts and one of such limitations is that if there is a distinct cause of action on which the suit is based, the said cause of action cannot be substituted by different cause of action and amendment for introducing such new cause of action should not be allowed. For this proposition Mr. Ghose relied on a decision reported in 48 Ind App 214: AIR 1922 PC 249, Mr. Ghose further contended that in any event, even if subsequent events should be taken into consideration by the court, in the facts of this case, such consideration should not be made because the suit which was originally instituted by landlord was not maintainable in law and as such it was a dead suit and by taking recourse to subsequent facts a dead suit cannot be revived. Mr. Ghose submitted that as no opportunity was given to the defendant to remedy the breach by giving a notice under Section 114-A of the Transfer of Property Act the subsequent event as to expiry of lease by efflux of time could not be considered because non-service of notice under Section 114-A of the T.P. Act was a

disentitling factor which precluded consideration, of the subsequent facts, Mr. Ghose then contended that the defendant was a thika tenant in 1961 and by taking 15 years' lease, the relationship of the defendant as a thika tenant under the plaintiff did not cease to operate and at best it could be said that in view of some specific terms of the said 15 years' lease the incidence of thika tenancy was only eclipsed but with the expiry of the said lease all incidences of the thika tenancy started operating with full force. Mr. Ghose also urged that as sub-tenants were inducted by the defendant with the knowledge of the plaintiff, the suit was not maintainable because of not impleading the said subtenants.

7. Mr. P.N. Mitter the learned Advocate appearing for the plaintiff respondent submitted that in view of proviso to Section 114-A of the Transfer of Property Act the question of any notice under the said section could not and did not arise. Referring to the decision reported in (1924) 130 LT 570, Mr. Mitter pointed out that the view of Lord Justice Scrutton was not the majority view and the proceeding was disposed of on the basis of the majority view based entirely on different considerations. Mr. Mitter further pointed out that in any event in view of the proviso to Section 114-A of the Transfer of Property Act, the provisions of Conveyancing Act, 1881 should not be made applicable. It appears to us that in the case reported in 130 LT 570, *Atkin and Vance L.JJ.* based their judgment on the finding that the covenant in question did not restrain a tenant from subletting part of the premises and the co-tenant was also ambiguous and might not prevent parting with part only with lessor's interest in a part of the premises. They did not base their decision on the view of Scrutton L.J. We also agree with the view of Mr. Mitter that the proviso to Sub-section 114-A of the Transfer of Property Act does not limit the operation of the said proviso in case of leasing out a part only. It appears to us that the purpose of giving notice under Section 114-A is to give a defaulting lessee an opportunity to remedy the breach but where the lessee had sublet the leasehold land or portions thereof such breach cannot be remedied by the lessee simply on his own volition because remedying the breach by the lessee may very well be frustrated by the sub-lessee who has some rights under the lease granted to him by the lessee. It appears to us that it is for that reason no distinction has been made in the proviso to Section 114-A of the Transfer of Property Act as to any sub-lease given to the entirety of the lease-hold interest or

a sub-lease given in respect of a part of the premises. We, therefore, agree with the contention of Mr. Mitter that the defendant was not entitled to any notice under Section 114-A of the Transfer of Property Act. Mr. Mitter further contended that the suit was never a dead one and even assuming the suit was defective or not maintainable in law, the said suit cannot be said to be dead so long the same is not dismissed or it abates. Mr. Mitter contended that the subsequent fact as to expiry of lease by efflux of time should be taken note of by this Court because such subsequent fact has bearing on the determination of the dispute between the parties as to whether the lease-hold interest of the defendant has come to an end and he is liable to be evicted from the suit land. In this connection Mr. Mitter refers to a decision reported in : AIR1977 Cal108 where this Court took into consideration the expiry of the lease by efflux of time during the pendency of the appeal. Mr. Mitter also referred to a Bench decision of this court made in the case of R. D. Ankleseria v. Kamala Ray reported in : AIR1977 Cal464 where also subsequent events on which the suit was not initially based were taken note of by this court in the matter of disposing of the appeal. Reference may be made in this connection to the decision of the Supreme Court reported in : [1975]3SCR958 wherein Krishna Iyer J. held that subsequent events having bearing on the adjudication of the disputes between the parties should be taken note of for shortening the course of limitation and for ends of justice if there is no disentitling factor for such consideration. As we have already held that the defendant was not entitled to any notice under Section 114-A of the Transfer of Property Act and as we are also of the view that the suit was not a dead one .and there was no question of reviving the dead suit by introducing a subsequent fact viz. the expiry of lease by efflux of time, we do not think that there is any disentitling factor which will preclude the court from taking into consideration of the said subsequent event viz. the expiry of the lease by efflux of time. It is pertinent to point out in this connection that the suit is basically a suit for eviction of the defendant on the ground that the defendant had lost his right under the lease and expiry of the lease by efflux of time is only one of the grounds for which the defendant loses his right to remain in possession of the leasehold land under the lease in question. Mr. Mitter also argued that the defendant was not entitled to claim thika tenancy under the plaintiff. The plaintiff was granted lease in respect of the land and it was only

after one and half years, of the said lease the defendant erected certain structures. As such, he was not entitled to claim as thika tenant under the plaintiff. Mr. Mitter pointed out that in any event the defendant was initially inducted in 1951 but in 1955 the defendant accepted the said registered lease for 15 years and by accepting the said lease in 1955 the original lease must be held to have been surrendered and new lease commenced under the said registered indenture of lease for 15 years. Mr. Mitter pointed out that illustration under Section 111(f) of the Transfer of Property Act amply applies to the facts of the present case. We think Mr. Mitter's contention is of substance and the same should be accepted. The defendant is not entitled to claim any other tenancy in view of his accepting the registered lease in 1955 which had also been duly acted upon by the parties.

8. So far as non-maintainability of the suit on the ground of nonjoinder of other sub-tenants, Mr. Mitter contended that sub-leases were created in 1962 and a sub-lease is bound to fall with the headlease and it is not necessary to implead the sub-tenants. In any event, it cannot be contended that the suit is not maintainable for non-joinder of sub-lessees for such sub-lessees cannot be held to be necessary parties so that in their absence suit was not maintainable in law. We are of the view that this contention of Mr. Mitter should also be accepted and we do not think that the suit is not maintainable because sub-lessees were not impleaded by the plaintiff.

9. Accordingly this appeal must fail and we dismiss the same but we make no order as to costs in the facts and circumstances of the case.

10. As prayed for, let there be stay of operation of this order till 31st of December, 1977. Thereafter, the execution proceeding may continue.

P.K. Banerjee, J.

11. I agree.