

Durgadas Moondhra Vs. Devendra Kumar Sarawgee and ors.

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Court : Kolkata

Decided On : Apr-28-1999

Reported in : (1999)2CALLT603(HC)

Judge : Vinod Kumar Gupta and ;Pradyot Kumar Sen, JJ.

Acts : [Specific Relief Act, 1963](#);; [Transfer of Property Act, 1882](#) - Section 108;; [West Bengal Premises Tenancy Act, 1956](#) - Sections 3 and 13;; [Indian Trusts Act, 1882](#) - Sections 36, 71 and 73;; Indian Registration Act - Section 17(1)

Appeal No. : Civil Appellate Jurisdiction Appeal from Original Decree Tender Nos. 529 and 530 of 1998

Appellant : Durgadas Moondhra

Respondent : Devendra Kumar Sarawgee and ors.

Disposition : Appeal dismissed

Judgement :

V.K. Gupta, J.

1. By this common Judgment we propose to dispose of these two appeals together which arise out of the Judgment and Decree dated 14th December, 1987 in two Title Suits, being Title Suit No. 45 of 1987 and Title Suit No. 46 of 1987 pending in the court of Learned 2nd Assistant District Judge at Alipore. Whereas Title Suit

No. 45 of 1987 was Instituted by a set of six plaintiffs namely, Devendra Kumar Sarawgee and 5-6 others against the sole defendant Durga Das Moondhra, Title Suit No. 46 of 1987 was instituted in the court below by the sole plaintiff Durga Das Moondhra against a set of defendants namely, Devendra Kumar Sarawgee and 5-6 others. The case of the Plaintiffs in T. S. No. 45 of 1987 was that the plaintiffs were co-owners of premises No.3 Alipore Park Place, Calcutta (suit premises) and that the sole defendant was the tenant of the suit premises which was let out to him for a period of 21 years commencing from 1st March, 1955 and expiring on 29th February 1976 by an Indenture of Lease made and executed between the parties on 1st February 1956 at a monthly rent of Rs. 700/-. The plaintiffs in this suit claimed the relief for vacant possession against the sole defendant on the ground that the period of 21 years as fixed in the Lease Deed had expired and that the defendant despite demand had not handed over the vacant possession of the suit premises to the plaintiffs. The case of the plaintiffs was that the lease period had expired by efflux of time on 29.02.1976 and since the lease was for a period of 21 years, the protection of the provisions relating to evictions contained in the West Bengal Premises Tenancy Act was not available to the sole defendant and therefore he was liable to hand over the vacant possession of the suit premises to the plaintiffs. The defendant in the written statement resisted the suit of the plaintiffs primarily and mainly on the ground that, even though the Lease Deed was executed on 1st February, 1956 for a period commencing from 1st March, 1955, and was for a period of 21 years, this Lease Deed was void ab initio and that sometime in October 1964 while the defendant was in occupation of the suit premises as a month to month tenant, the son-in-law of one of the owners of the suit premises namely Sm. Bhagwani Debi approached the defendant by an offer for execution of a Lease for a period of 51 years starting from 1980, The case of the defendants was that this son-in-law namely, Mr. A. K. Jhunjhunwala confirmed that Bhagwanl Debt was agreeable for extention/ execution of a fresh Lease for a period of 51 years from 1st March, 1980 and that thereupon the defendant wrote a letter dated 9th October 1964 confirming the agreement for execution of such Lease Deed for a period of 51 years, renewable for a fresh period of another 51 years after the expiry of the original 51 years. In short, the defence of the defendant was that the defendant was not liable to eviction from the

suit premises on the ground of the Lease Deed dated 1.02.1956 having expired by efflux of time (21 years starting from 1st March 55 and ending on 29.02 '76) and that he was entitled to remain in occupation of the suit premises for a period of 102 years starting from 1st March, 1980. Various other defences were also raised in this suit by the defendant, including the defence of non Joinder of the necessary and proper parties and the maintainability of the suit on some grounds. In Title suit No. 45/87 accordingly, based on the pleadings of the parties the following 15 issues were framed by the trial court :

1. Is the suit maintainable?
2. Have the plaintiffs any cause of action for filing this suit?
3. Is the suit barred by limitation?
4. Is the suit barred by the principles of waiver, estoppel and acquiescence?
5. Are the plaintiffs entitled to get the decree as prayed for?
6. To what other relief, if any, are the plaintiff entitled?
7. Is the suit had for misjoinder and non-Joinder of parties? is Kishen Lal Poddar a necessary party in this suit?
8. Is the lease dated 1st February 1956 legal & valid?
9. Is the defendant a monthly tenant in respect of the suit premises?
10. Is there any privity of contract between the plaintiffs and the defendants? Are the plaintiffs landlords of the defendant?
11. Are the plaintiffs 5 and 6 legally, properly and validly appointed as trustees in respect of the suit premises under the deed of family arrangement and trust created by late Babulal Sarawgee as required by law in this behalf?
12. Is the appointment of any of the plaintiffs No.5 and 6 hit by the provision of section 17(1) of the Indian Registration Act?

13. Are the plaintiffs particularly plaintiff No. 3 Smt. Bhagwant Debi estopped and debarred from proceeding against the defendant in the instant suit?

14. What were the shares of the owners of the suit premises as on 1.3.55 and 1.2.56?

15. What are the shares of the plain tills in the suit premises sheared of unnecessary details the facts leading to the institution of the suit by Durgadas Moondhra against Bhagwanl Debi and five others claiming for declaration, specific performance and other reliefs?

2. Title Suit No. 46 of 1987 was filed by the sole plaintiff Durga Das Moondhra against six defendants and in this suit precisely the sole plaintiff Durga Das Moondhara sought a declaration and consequential relief against the defendants with respect to the suit premises that a Lease Deed for a period of 51 years with a further option for another 51 years came to be executed in his favour by the defendants commencing from 1st March, 1980 at a monthly rent of Rs. 1250/- for the first 51 years and thereafter at a monthly rent of Rs. 1550/- for the subsequent 51 years. The sole basis of this contention of the plaintiff in Title Suit No.46 of 1987 was the letter dated 9th October 1964 written by D.R. Moondhra and addressed to Smt. Bhagwant Devi and the letter of the same date i.e. 9th October 1964 written-by Bhagwanl Devl to D.R. Moondhra wherein she confirmed the contents of his letter dated 9th October 1964. His further case was that he paid a sum of Rs. 5000/- as advance for execution and registration of the Lease Deed and that since he was although ready and willing to perform all obligations under the Agreement contained in the letter dated 9.10.64, he prayed for a decree for Specific Performance of the agreement contained in the said letter dated 9.10.64 and therefore was entitled to continue to remain in possession of the suit premises as a monthly tenant until execution and registration of the Lease Deed for a period of Initially 51 years commencing from 1.03.80, extendable to another 51 years thereafter. In Title Suit No. 46 of 1987 accordingly, and based on the pleadings of the parties the following 11 Issues were framed by the trial court.

1. Is the suit maintainable?

2. Has the court jurisdiction to try this suit?
3. Is the deed of lease dated 1.2.56 valid?
4. Is the plaintiff a monthly tenant in respect of the premises in suit at a rental of Rs. 700/- payable to the English Calendar?
5. Is the plaintiff entitled to a declaration that the plff. Is a monthly tenant of the premises in question?
6. Is the plaintiff entitled to a decree for specific performance as prayer for?
7. To what other relief or reliefs is the plaintiff entitled? Addl. Issues.
8. What are the shares of the lessor of the deed of lease dated 1.2.56?
9. Do the defendants own the entire suit premises?
10. Has the plaintiff any right to challenge the ownership of the defendants on the suit property?
11. Is the plaintiff entitled to a decree for specific performance of contract in terms of letter dated 9.10.64?

3. Vide the Judgment and Decree Impugned in these two appeals accordingly the trial court allowed and decreed T.S. 45 of 87, but dismissed T.S. 46 of 87 by returning findings in T.S. 45 of '87 in favour of the plaintiffs and returning findings in T.S. No.46 of '87 against the Plaintiff. It is in this background that these two appeals have come up for hearing before us.

4. The suit property is situated at No.3 Alipore Park Place, Calcutta. One James Lyle Baron sold the suit property to Fool Chand Sarawgee in 1926 through an indenture executed on 9th December 1926. After purchasing this property in 1926, Fool Chand Sarawgee put it in the common notch potch of the Joint family property which later on however was dissolved with the result that the property came to be owned and possessed Jointly by Fool Chand Sarawgee and his brother Chiranjilal Sarawgee in equal shares. In so far as Fool Chand was

concerned, his one half ownership of the property was shared equally among himself, his wife Munni Devi and son Babu Lal. In other words, in 1926 the suit property was owned jointly between the family Fool Chand Sarawgee consisting of himself, his wife and son on the one hand in half-share and Chiranji Lal Sarawgee in the other half-shares.

5. On 20th November, 1933 a Deed of Indenture was executed between Fool Chand Sarawgee, Munni Devi, his wife, and Babu Lal his son whereby Babu Lal relinquished his claim in respect of the suit property and was given an amount of Rs. 35,000/- in lieu thereof which he expended by creating a private Family Trust through the Instrumentality of the said Deed of Indenture executed on 20th November 1933 whereby he appointed Mahabir Prosad Jagnani and Kissenlal Poddar as two Trustees. Even though by this Deed of Indenture Babulal Sarawgee had relinquished all his claims in respect of the suit property, later on the two Trustees appointed by Babu Lal Sarawgee purchased from Ghiranji Lal 5 annas share out of his 8 annas share of the suit property with the result that whereas Fool Chand and Munni Devi Jointly continued to remain the owners of 8 annas share of the suit property (half ownership), Chiranji Lal's share was reduced from 8 annas to 3 annas, 5 annas share having been in the meanwhile purchased by the two Trustees of Babu Lal. On 19th March '71 Fool Chand died. His 4 annas share in the suit property devolved by Inheritance upon his wife Munni Devi and his son Babu Lal in equal shares, namely 2 annas each. It might be remembered that as at the time of death of Fool Chand his wife Munni Devi was co-owner of the property along with himself and, after his death she was the co-owner of her 4 annas share in her own right and by devolution of 2 annas share of Fool Chand by inheritance, she became co-owner to the extent of 6 annas share, Babu Lal being the owner of other 2 annas which had devolved upon him by inheritance on the death of his father Fool Chand. Babu Lal however conveyed his 2 annas share to his mother Munni Devi on 23.08.1941. On the same date, i.e. 23.08.1941 Chiranji Lal, the other co-owner of the suit property to the extent of 3 annas as uptill that date, also sold his said share of 3 annas to Munni Devi vide an Indenture of conveyance executed on that date. As on 23rd August 1941 therefore the ownership of the suit property comprised as under :--

Manni Devi -- 11 annasThe Trust created by Babu Lal -- 5 annas.

6. On 23rd October 1942 Manni Debi died. Before her death however she had executed her will dated 3rd December 1941. By the said Will and Testament, Manni Debi had appointed Chiranjilal Sarawgee, Choteylal Sarawgee, Shyam Lal Jagnal and Smt. Bhagwanl Debi as her Executors. It may also be noted and kept in mind that on her death, Manni Devi left behind her sole surviving son Babu Lal Sarawgee and her grandsons Devendra Kr. Sarawgee and Mohendra Kr. Sarawgee.

7. Out of the Manni Devi's ownership to the extent of 11 annas share of the suit properly, whereas 9 annas share was by virtue of her own acquiring and purchasing, 2 annas share had devolved upon her by inheritance on the death of her husband Fool Chand Sarawgee. Consequent upon the death of Manni Devi this share of 2 annas therefore devolved upon her sole surviving son Babu Lal. Babu Lal sold this 2 annas share to one Salish Ch. Seal by an Indenture Deed dated 1st March 1944. Satis Ch. Seal however in turn by an Indenture Deed dated 31st March 1944 sold the said share to Bhagwanl Devi and her two children namely, Devendra Kr.-Sarawgee and Mohendra Kr. Sarawgee. Because of such transfers therefore the suit property was Jointly owned as under :

Ownership of Trust -- 5 annasOwnership of the -- 9 annasExecutors of the Will of
Munni DeviOwnership of Bhagwani -- 2 annas.Devi and her son

Such ownership of the property was valid as far as the filing of the two Suits was concerned.

8. The aforesaid detailed graphic account right from 1926 up till the stage of the filing of the suits including the stage of execution of the Lease Deed dated 1.02.'56 would go to show and indicate as to who were persons who were responsible to execute the Lease Deed and as to whether the suit filed by 6 plaintiffs namely D. K. Sarawgee and others against the sole defendant Durga Das Moondhra was maintainable or not in so far as the joinder of necessary and proper parties was concerned and whether the suit in any form suffered from the mischief of either non joinder or misjoinder of necessary or proper parties. In order to decide the

question of Joinder, mis-joinder or non-joinder of necessary or proper parties we also have to go into the historical and graphic account of the Trust created by Babu Lal Sawaggee by the Indenture Conveyance executed on 20th November, 1933, as has already been noticed- As has been noticed, by his Indenture Babu Lal, after having relinquished his claim and Title in respect of the suit property had created a Trust by expending Rs. 35,000/-. He had nominated the following two persons as Joint Trustees :

Mahabir Prasad Jagnani

and Kissenlal Poddar.

Undoubtedly sometime between 1.02.56, the date when the Lease Deed was executed and 18.02.1980, the date when the suit was filed by six plaintiffs, Mahabir Prasad Jagnani had died. In terms of section 73 of the Trusts Act Kissenlal being the sole surviving and continuing Trustee had appointed Sheo Kumar Jagnani as Trustee in place of Mahabir Jagnani. On 5th March, 1980 however, through a letter written by Kissen Lal and addressed to Bhagwani Debi he resigned himself as a trustee and sought discharge in terms of section 71 of the trusts Act. In terms of section 73 of the Trusts Act the other surviving continuing trustee namely, Sheo Kr, Jagnani appointed Sohan Lal Rula as the other Trustee in place of Kissen Lal Poddar on 28th March, 1980. Sohan Lal also died and Sheo Kumar Jagnani, the surviving continuing Trustee on 6th February 1984 appointed S.P. Bagaria as the Trustee in place of Sohan Lal Rula. In so far as the question of legal and valid discharge of Kissen Lal Poddar as a Trustee is concerned, he undoubtedly stood discharged as a Trustee in terms of section 71 of the Trusts Act since he himself, voluntarily and by his own consent resigned as a Trustee. As far as the consent of the beneficiaries regarding his resignation is concerned, this also can be safely gathered and Implied from the fact that the Trustees, one after another were appointed in place of Kissen Lal Poddar and the beneficiaries had consented to the appointment of new Trustees in his place and the discharge of other Trustees. The four beneficiaries namely, Bhagwani Debi and her three sons therefore had always consented to the discharge of Kissen Lal Poddar. If there was any doubt of such consent it could always be gathered and inferred from the

fact that these four beneficiaries had filed the Suit as co-plaintiffs along with the two Trustees namely Sheo Kr. Jagnani and Sohan Lal Rula. S.P. Bagarla was added later on because of the death of Sohan Lal Rula. We have therefore to doubt in our mind that the suit as filed by the respondent-plaintiff against the appellant-defendant Durga Das Moondhra being Title Suit No.45 of 1987 did not at all ever suffer from either mis-Joinder of parties or non-Joinder of parties.

9. That takes us to the main defence raised by the appellant in both the suits regarding the agreement contained in the communication dated 9th October 1964 whereby, according to the appellant the parties had agreed that a Lease Deed commencing from 1st March 1980 would be executed between the parties and the property in question would be given on lease to the appellant for a period of 51 years starting from 1st March 1980 and after the expiry of this initial period, a renewal thereof for another period of 51 years would also be permissible. We may say, very very categorically, and quite emphatically, that the defence set up by the appellant was wholly mis-conceived, totally unfounded; it was without any basis or foundation and was totally devoid of any factual support. Undoubtedly the Appellant does not dispute the execution of the Lease Deed dated 1st February 1956. The appellant made a half-hearted but Inconsistent plea that even though this Lease Deed was for a period of 21 years starting from 1st March 1955, yet it contained a clause for renewal for a further period of 4 years at the end of 21 years and that the appellant had exercised his option of such renewal vide a letter dated 30th December 1975 written by the Solicitors of the appellant and addressed to Bhagwani Debi. Very very surprisingly however, the appellant neither in the suit filed by him (Title suit No. 46 of 1987) nor in the written Statement filed by him in answer to Title suit No. 45 of 1987 raised this as a defence since the entire case set up by the appellant in both the suits was about the lease for 51 years and extendable to another 51 years, based on the communication dated 9th October 1964. We can therefore safely presume that the only case set up by the appellant in the court below was about the agreement contained in the letter dated 9th October 1964 and that the only specific performance that the appellant was seeking was with regard to the execution of a lease for a period of 51 years starting from 1st March 1960, with an option for further renewal of 51 years thereafter. In any event the letter dated 30th December 1975 was replied by the

respondents on 24th March 1976 on the ground that the appellant was a defaulter in the payment of rent and that he had committed breach of the terms of the lease apart from the fact the lease had itself come to an end by efflux of time. On this question of renewal of four years after the expiry of 21 years we must hasten to add that the stipulation contained in the Lease Deed was not actually for renewal of lease by a term of four years but for extension of the lease period from 21 years initially to four more years, aggregating to 25 years in all. Such intention of the parties is clearly explicit from stipulation contained in Clause (g) of the Lease Deed wherein it is clearly mentioned that the extension of the Lease for a period of 25 years in aggregate would be subject to the sanction granted by the competent court having Jurisdiction in the matter. It is common knowledge that under section 36 of the Trusts Act, Trustees cannot execute any Lease of the Trust property for any period exceeding 21 years without the permission of the competent civil court. This stipulation in the Lease Deed therefore, about the permission of the competent civil court for executing the Lease for a period of 25 years clearly meant that the parties intended that, beyond 21 years, four more years would amount to extending the original period from 21 years to 25 years and not renewing the lease for a period of 4 years, independent of the original of 21 years.

10. Let us now come to the claim of the appellant about the agreement contained in the letter dated 9th October 1964. The very opening part of this letter refers to the discussion that the appellant had with one A.K. Jhunjhunwala, the representative of Bhagwani Devi (A. K. Jhunjhunwala is her son in-law). The opening part of this letter reads as under :--

'After various discussions had with your representative Sri A. Jhunjhunwala, the extension of the period of existing lease in respect of the above promises for a further period of 51 years from the date of the expiry of the present lease with further option of 51 years has been agreed to between myself and yourself on the following terms and conditions :

1. That from the date of expiry of 25 years (inclusive of 4 years option which has been already exercised by me) under the Indenture of lease dated 1st February

1956. the Lease will be extended for a period of 51 years certain with option on my part for the renewal thereof for a further period of 51 years.

2. That the extension of the period shall be in continuation of the present lease.

3. That a sum of Rs. 75,000/- (Seventy five thousand) will be paid as Selaml and/or premium by me to you in the manner following :--

(a) Rs. 5,000/- (Five thousand) payable forthwith in respect whereof a cheque is enclosed herewith in your favour.

(b) Balance sum of Rs. 70,000/- (Seventy thousand) will be paid at the time of execution and registration of the Lease for the extended period.

4. Rent will be paid monthly at the rate following :

(i) For the unexpired residue of the term of the demise under the Indenture of Lease dated 1st February 1956 inclusive of the option period thereunder an additional sum of Rs. 300/- per month will be paid aggregating in all the monthly rent of Rs. 1,000/- for such period.

(ii) For the certain period of 51 years of the extended period at the rate of Rs. 1,250/- only per month.

(iii) For the option period of 51 years, if such option is exercised by us, the rent will be paid at the rate of Rs. 1550/- only per month.'

11. At the very outset it is to be seen that Bhagwani Debi in her deposition in the court below denied absolutely having entered into any such agreement with the appellant. Secondly, as already noticed, under section 36 of the Trusts Act, no Lease exceeding 21 years in respect of a Trust property can be executed without the permission of a principal civil court. Undoubtedly in this case such a permission from the court was neither ever asked for, nor was granted. Thirdly, even if it is assumed that Bhagwani Devi was party to such an agreement and had consented to the terms contained in the letter of 9th October 1964, her consent by itself was wholly meaningless and totally immaterial since she was not the sole or absolute owner of the property, the property admittedly was owned by other

persons in co-ownership with her. Undoubtedly none of these other co-owners were even alleged by the appellant to have either consented to such agreement or to be parties to the same. Apart from the aforesaid patent legal and factual infirmities in the story put up by the appellant, we find that the events are so improbable that no sensible person can ever infer any agreement between even Bhagwani Debi and the appellant. Here are a very reasons for this.

12. In respect of a property for which originally lease is expiring in 1976, after being in force for 21 years, the owners would agree to let out the property for a period of 102 years on a paltry advance of 5,000/- and on receiving a total consideration amount of Rs. 75,000/- (The appellant says that it was later on raised to Rs. 1,75,000/- by issuance of a corrigendum to the letter dated 9.10.64). Actually the entire case of the appellant was made out by the appellant himself revolves around the acceptance of advance of Rs. 5,000/- by Bhagwani Debi. We have very carefully scanned through the entire evidence and find that even though it was stood proved that Bhagwani Debi had never consented to such an arrangement and that in any event Bhagwani Devi was only one of the several co-owners of the property, no evidence was led to show that this amount of Rs. 5,000/- was actually received by Bhagwani Debi. Undoubtedly it was sought to be proved that a cheque for Rs. 5,000/- was debited from the Bank Account of the appellant but whether this cheque was in the name of Bhagwani Devi or, the amount of this Cheque was credited into the Bank account of Bhagwani Devi, or whether this Cheque was actually meant for her, or whether the amount of this Cheque was ever received by her, none of these facts was at all either brought into evidence or otherwise proved by any possible means. A property in Alipore Park Place, perhaps the most prestigious area of Calcutta was, according to the appellant, sought to be given on lease for a period of 102 years at a monthly rent of Rs. 1250/- for an initial period of 51 years, starting from 1980 and expiring in the year 2031; and the rent agreed according to the appellant thereafter, that is after 2031 would be Rs. 1550/- per month. In fact the appellant himself brought into evidence the fact that the Solicitors had prepared a draft of the proposed Lease Deed for this 102 years based on the agreement of 9th October 1964. When we looked into this draft of the proposed Lease Deed we found that undoubtedly the draft itself expressly stipulated that apart from Bhagwani Devi, various other

lessors were to become parties to the lease Deed. This draft therefore, on the own showing of the appellant would establish that Bhagwani Debi was not the sole or exclusive owner of the property. In any event, we have already observed that even Bhagwani Debi in her evidence in the court below clearly and categorically had denied having entered into any such arrangement with the appellant.

13. The entire case of the appellant rests on the edifice of the so-called agreement supposedly entered into between the appellant and Bhagwani Debi through A. K. Jhunjhunwalla culminating in issuance of the letter by the appellant on 9th October, 1964 and the issuance of the so-called confirmation in writing by Bhagwant Devi on the same date. This is the sheet-anchor of the appellant's case. Without an iota of hesitation we must say that the very hypothesis regarding the said agreement is totally shorn of any basis. The two letters of 9th October, 1964 do appear to us to be the culmination of only a manipulative and creative skill of the appellant, totally unsubstantiated by any corroborative evidence, either contemporaneously or otherwise. There is no support base whatsoever in respect of these two letters as far as the evidence goes. Their very existence apart, which doubtedlessly is shady, the contents of the appellant's letter of 9th October '64 not only bely commonsense but are so contrary to even the every basic tenets of probabilities in law and fact, that the contents by themselves go to prove that the letters actually either did not exist at all or were created by a manipulative process.

14. In the light of the above discussion therefore we have no doubt that the appellant totally failed to substantiate his defence or his plea about any agreement executed on 9th October, 1964 or at any other time with regard to any arrangement regarding the proposed lease for any period beyond 1976. The original lease of 21 years having stood expired by efflux of time on 29.02.1976, the appellant was liable to be evicted from the suit property.

15. We find ourselves in complete agreement with the findings returned and recorded by the court below on all the issues in both the suits. We accordingly also uphold the judgments and decrees in both the suits decreeing Title Suit No. 45 of 1987 and dismissing Title Suit No. 46 of 1987.

The appeals accordingly are dismissed with costs throughout. Interim directions shall stand vacated Immediately and forthwith.

P.K. Sen, J.

I agree.

The Court

After the Judgment was pronounced, the learned Advocate for the appellant made on oral prayer for staying the operation of this judgment. The oral prayer upon consideration is rejected.

We direct that the xerox certified copy of this judgment be provided to the parties urgently.

16. Appeal dismissed

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