

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**S. A. No. 373 of 2006
with
CAN 2 of 2012 (Old CAN 598 of 2012)
with
CAN 7 of 2021
with
CAN 8 of 2021**

**Smt. Dipsikha Chakraborty and another
Vs.
Arun Kanti Basu and Sabita Basu, both deceased, substituted by
their heirs and legal representatives Samita Bardhan Majumdar
and another**

For the appellants	:	Mr. Surajit Samanta, Mr. Balai Lal Sahoo, Mr. Biswajit Samanta, Mr. Sankha Prasad Ray, Ms. Sohini Samanta
For the respondents	:	Mr. Samir Kumar Dutt, Mr. Subrata Mukherjee
Hearing concluded on	:	12.08.2022
Judgment on	:	23.08.2022

Sabyasachi Bhattacharyya, J:-

1. The predecessor-in-interest of the present respondents instituted a suit bearing Title Suit No.252 of 1998 against the predecessors of the defendant/appellant, in the 2nd Court of Civil Judge, Senior Division at Barasat, District- North 24 Parganas for declaration that five documents dated August, 1993, purportedly executed by the plaintiff

in favour of the defendant no.1, are invalidated, inoperative, illegal and void in the eye of law and not binding on the plaintiffs and that the possession of the ground floor flat of the said premises under cover of the said documents by the defendants is unauthorised and illegal, a decree of *khas* possession declaring the defendants as trespassers, for permanent injunction and *mesne* profits.

2. The said suit was contested by the defendant no.1 Smt. Dipsikha Chakraborty (the present appellant no.1) by filing a written statement, thereby denying the material allegations made in the plaint.
3. Upon hearing both sides, the Trial Judge dismissed the said suit on contest without costs. Being thus aggrieved, the plaintiffs preferred an appeal bearing Title appeal no.62 of 2005, which was ultimately allowed on contest by the Additional District Judge, Fast Track Court No.1 at Barasat, thereby reversing the decision of the Trial Judge and decreeing the suit in part, declaring an agreement of assignment (Exhibit 1) and an agreement for tenancy (Exhibit 2), both dated August 13, 1992, as void documents and directing the defendants to vacate the suit property in favour of the appellant no.1 within three months.
4. Being aggrieved by the said judgment, the defendants/appellants have preferred the instant Second Appeal bearing S.A. No.373 of 2006.
5. The Second Appeal was admitted on three substantial question of law, formulated as below:

- i) Whether the learned First Appellate Court committed substantial error in law in reversing the judgment and decree of the Trial Court?
 - ii) Whether the learned First Appellate Court committed substantial error in law in not accepting the appellant at least as tenants if not owners?
 - iii) Whether the learned First Appellate Court committed substantial error in law in not holding that the suit is barred in view of the provisions of Sections 7, 8, 10 and 21 of the West Bengal Land (Regulation of Transfer) Act, 1993 (hereinafter referred to as, “the 1993 Act”)?
6. At the time of hearing, a fourth substantial question of law was formulated as follows:

Whether due to subsequent change of law the defendant/appellant acquired a right to validate the disputed assignment?
7. An application for production of additional evidence bearing CAN 7 of 2021, filed by the appellant, was directed to be heard and ultimately heard along with the Second Appeal itself.
8. Learned counsel for the defendant/appellant submits that the Appellate Court substantially erred in law in reversing the judgment and decree of the Trial Court, whereby the suit was dismissed, merely on the ground of alleged illegality being perpetrated by the parties.
9. It is submitted that, in any event, the appellant was at least a tenant in respect of the suit property by virtue of the tenancy agreement

dated August 13, 1993. Therefore, it is argued that the First Appellate Court erred in law in proceeding on the premise that the appellant was an 'unauthorised occupant' in respect of the suit property.

- 10.** That apart, it is submitted that the Appellate Court erroneously applied the 1993 Act inasmuch as the said Act, upon amendment, was scheduled to come into effect as per the date given in the subsequent Notification to be issued by the Government. However, such Notification having never been issued, it is contended that the 1993 Act, which allegedly rendered the transaction invalid, could not be invoked at all.
- 11.** Although there was a restrictive clause in the original lease deed issued by the Government in favour of the plaintiffs in respect of transfer of the property, it is submitted that the documents impugned in the suit were not illegal at the juncture when they were entered into.
- 12.** It is argued that even if, for the sake of argument, it is assumed that the 1993 Act was given effect to, it has been admitted by the plaintiffs/respondents that they were all along willing to execute a transfer deed in favour of the defendant/appellant.
- 13.** In fact, it is argued that the appellant also admitted in evidence that a substantial amount was received by the respondents for the purpose of such transaction, that is, the agreement for assignment dated August 13, 1993.

14. Having received allegedly Rs.7 lakh and admittedly Rs.3 lakh as consideration, the respondents could not be permitted to resile from the said agreement.
15. Even if the plaintiff failed to substantiate his case on the basis of the pleadings and materials-on-record, the suit was rightly dismissed by the Trial Court, it is argued.
16. The Appellate Court, it is submitted, proceeded on the premise that the agreement of assignment dated August 13, 1993 was alleged to have effected a transfer. However, the document was admittedly an agreement and did not operate as a present transfer even as per the defendants' version.
17. Learned counsel for the appellant further argues that the reason attributed by the Appellate Court for passing a decree in favour of the plaintiffs, being primarily the purported illegality of the parties, is not a valid ground for decreeing the suit of the plaintiff, in the absence of the plaintiff having substantiated the plaint pleadings.
18. Learned counsel for the appellant places reliance on an unreported judgment of a Co-ordinate Bench of this Court dated September 27, 2018 passed in *MAT No.1263 of 2017 with CAN 8785 of 2017 [The State of West Bengal Vs. Biswajit Cha]*, wherein it was found that the 1993 Act never came into force. The mere issuance of a single rent receipt could not establish the case made out by the defendant of tenancy in respect of the premises.
19. In view of the documents entered into between the parties being *de hors* the law, it is argued, the said documents were illegal and could

not confer any right on the defendants inasmuch as the suit property is concerned. Hence, the occupation of the defendants was patently unauthorised and the Appellate Court was justified in passing a decree of eviction upon declaring the Exhibits 1 and 2 to be void documents.

20. Learned counsel for the respondent places reliance on a three-judge bench decision of the Supreme Court reported at *AIR 1962 SC 554 [Dr. H.S. Rikhy and others Vs. The New Delhi Municipal Committee]* for the proposition that the use of the word 'rent' is not conclusive of the relationship between the parties. It may be used in the legal sense of recompense paid by the tenant to the landlord for the exclusive possession of premises occupied by him. It may also be used in the generic sense, without importing legal significance of compensation for use and occupation.
21. Learned counsel next cites a Division Bench judgment of this Court reported at *AIR 1958 Cal 713 [Pranballav Saha and another Vs. Sm. Tulsibala Dassi and another]*, where it was held that in general course, refuse to give relief to a party to an illegal contract who either founds his cause of action upon it or who is necessarily to disclose or plead the illegality to sustain his cause of action. An agreement, the object or consideration of which is unlawful as defined in Section 23 of the Contract Act, it was held, is unlawful and void. In general a *particeps criminis* cannot obtain refund of money paid under an unlawful agreement, it was further observed.

- 22.** Learned counsel for the respondents then cites another Division Bench judgment of this Court reported at 2022 (2) ICC 28 (Cal) [*Kashinath Saha Vs. Maya Rani Baidya & Ors.*] to elaborate the scope of Section 100 of the Code of Civil Procedure. The conclusion arrived at by the First Appellate Court in appreciation of the evidence-on-record, it was found, does not call for any interference in the second appeal. A second appeal can only be admitted provided a substantial question of law is involved. If it is essentially a question of fact, unless the findings are perverse and contrary, the second appeal cannot be admitted.
- 23.** Learned counsel next cites AIR 1974 SC 1596 [*Mattulal Vs. Radhe Lal*], also to elaborate the scope of a second appeal, arguing that no interference is justified in second appeal inasmuch as the present case is concerned.
- 24.** Insofar as the additional substantial question of law is concerned, it is argued that the said question does not comprise a substantial question of law involved in the present case.
- 25.** It is submitted by learned counsel for the respondent that the concerned Official Gazette Notification dated June 22, 2012 (published on June 25, 2012) clearly provides that it would come into force with immediate effect. As such, only prospective, and not retrospective, effect could be given to the said Notification, which arguably confers a right on the defendants to have a transfer in their favour.
- 26.** Upon hearing learned counsel for the parties, it is evident that the documents sought to be produced by way of the application under

Order XLI Rule 27 of the Code of Civil Procedure are primarily Notifications published in the Official Gazette and as such, judicial note can be taken of the same in any event.

- 27.** A peculiar fact which catches the eye in the first instance is that the Government lease deed in favour of the plaintiffs dated May 29, 1973, by virtue of which the plaintiffs' claim a restriction to the transfer of property in favour of the defendants, has not been produced by the plaintiffs or, for that matter, by the defendants at any point of time during the litigation.
- 28.** It is found from the records that six documents were executed on August 13, 1992 -an agreement for assignment, a loan agreement, an agreement for tenancy, an irrevocable General Power of Attorney, a Will and an Affidavit-cum-Declaration. A conspicuous feature of the case is that, the Appellate Court recorded the admission of the plaintiff no. 1 that the plaintiff no.1 intended to obtain permission from the beginning for the transfer of the suit property in favour of the defendants, but could not do so in view of the subsequent Notification of the year 1993.
- 29.** Although the respondents have sought to bypass the documents-in-question by creating a cloud relating to the execution thereof, it was specifically observed by the Appellate Court itself that the appellant no.1 stood firm in his claim that he wanted to transfer the suit property to the respondent no.1 although such transfer was not permitted in law.

- 30.** It is seen from the findings of both the courts below that a rent receipt was produced in evidence, along with the tenancy agreement itself, dated August 13, 1993 to substantiate at least a case of tenancy in favour of the defendants. There cannot be any apparent conflict between executing an agreement of assignment simultaneously with an agreement of tenancy. Whereas the agreement, coupled with the rent receipt, in the absence of rebuttal by the respondents, substantiates the case of a tenancy being created in favour of the defendant, simultaneously the agreement of assignment was also entered into by the parties.
- 31.** The plaintiff/respondent during his evidence as PW1 admitted that he himself made corrections in the drafts in some of the impugned documents, which were all executed on the same date. It was also found by the Appellate Court that the language of the documents makes it clear that all the documents had been drafted by experts. Moreover, the plaintiff no.1 was held by the Appellate Court to be a highly qualified person holding high and responsible posts during his service life. It was not, therefore, probable that the plaintiff no.1 signed on the document of transfer only consciously and he signed upon the other documents on the misrepresentations made by the defendants, without being aware of the contents and consequences thereof.
- 32.** Although none of the original documents have been filed, it was admitted by both the parties that six documents were actually executed. Moreover, the documents were admitted in evidence and

marked as Exhibits upon dispensation of formal proof thereof. Hence, there cannot arise any occasion to dispute the execution of the documents consciously by and between the parties.

- 33.** Since the plaintiffs admittedly had the intent all along to transfer the property pursuant to the agreement of assignment, and the other documents dated August 13, 1993, the concoction sought to be made out by the plaintiff/respondents to the effect that they were misled into executing the documents on misrepresentation cannot be accepted.
- 34.** Since the documents were actually executed between the parties, coupled with the fact that the plaintiffs admittedly wanted to transfer the property in favour of the defendants, there could not arise any occasion for the defendants to seek specific performance of contract, since there was no refusal at any point of time to honour the agreement of assignment. Even if it is argued that the filing of the suit itself should be deemed to be a refusal on the part of the plaintiffs to abide by the agreements, even during pendency of the suit and in evidence, as recorded by both the Courts, the plaintiffs continued to express the intention to transfer the property in favour of the defendants, but allegedly were not being able to do so due to bar of law (as recorded by the appellate court in its judgment).
- 35.** Inasmuch as the alleged legal bar is concerned, there is nothing on record to substantiate such stand of the respondents.
- 36.** In the unreported Co-ordinate Bench judgment in *Biswajit Cha* (supra), in paragraph 20, the learned Single Judge categorically

observed that the 1993 Act came into operation on March 4, 1997 but thereafter, by issuing a Government Order on March 20, 1998, the operation of the said Act was kept in abeyance temporarily.

- 37.** The West Bengal Government Land (Regulation and Transfer) Act, was subsequently amended in 2009 and published in the Calcutta Gazette after receiving the assent of the Governor, providing that the said Act would come into force only on such date and areas as the State Government would by Notification appoint. However, no such Notification was ever published, as recorded in paragraph 20 of the cited judgment.
- 38.** The plaintiffs have cited nothing to rebut or show that such position of law was ever disagreed with or reversed by any superior or collateral forum. In fact, the learned Single Judge, in the said judgment, had referred to another judgment in *Pawan Kumar Agarwal*, to reiterate that the 1993 Act was still in limbo.
- 39.** Insofar as the 2012 Notification, annexed to the Order XLI Rule 27 application, is concerned, the same clearly puts an end to unauthorised transfers and seeks to increase revenue in Government Exchequer as declared in Clause 4 of the Notification itself. By virtue of the said Notification, upon payment of a transfer fee, the allottees of Salt Lake properties like the suit property, were permitted to be transferred in favour of a third party. However, such transfer fees were excepted in case of blood relations, etc.
- 40.** Clause 10 of the Notification provides that the same would come into effect immediately.

- 41.** However, its immediately preceding Clause 9 stipulates that all existing pending applications/cases would come under the purview of the said Notification. It is noteworthy that the present litigation was pending at that juncture, since appeals are deemed to be continuations of suits. In fact, the second appeal itself had been preferred and was pending adjudication at the relevant juncture, that is, on June 22, 2012, when the Notification was issued and subsequently published on June 25, 2012. Hence, the operation of the said Notification would apply to the pending litigation, that is, the present suit property.
- 42.** However, we need not go so far as to explore the applicability of the 2012 Notification in view of the previous finding that the 1993 Act itself was amended to be given effect from the date of Notification, which never saw the light of day. Thus, no law has been cited by the plaintiff to invalidate transfer of Salt lake properties in favour of third parties at any point of time.
- 43.** The impugned deeds were evidently executed by the plaintiffs, knowing fully well the impact thereof, even going by the findings of the first appellate court. There being no legal bar and the plaintiffs admittedly intending to transfer the property pursuant to the said documents in favour of the defendants, the excuse of the plaintiffs of legal bar is rendered lame.
- 44.** The only bar which could have been applicable to such transfer was the purported restriction in the Government lease by virtue of which the plot-in-question was allotted by the Government in favour of the

plaintiff for 999 years. However, the said document having been withheld by the plaintiffs themselves, there is nothing before the courts to substantiate the alleged restriction in transfer. Even if the plaintiff case is to be placed on its highest pedestal, the restrictions stipulated in the Government Lease on 1973 would at best operate as a contractual bar of transfer, which was binding between the Government (lessor) and the plaintiffs/lessees.

- 45.** In any event, the said clause could not be binding on the defendants/transferees, who were not parties to the original lease deed. The transaction in contravention of the contractual bar might, in the worst-case scenario, be labelled as irregular but not outright illegal. Even if the plaintiffs entered into the agreement knowing the bar stipulated in the plaintiffs' lease, they cannot be subsequently permitted to take advantage of their own wrong.
- 46.** The plaintiffs, having admittedly intended to transfer the property in favour of the defendants and entering into as many as five documents on the same date, that is, August 13, 1993, it is clear that the plaintiffs gave out the intention to transfer the property in favour of the defendants. Not stopping there, the plaintiffs admittedly took a substantial amount of consideration, not less than Rs.3 lakhs for the intended transfer and delivered possession to the defendants. Hence, the plaintiffs are squarely bound by the doctrine of Estoppel from resiling from their original intention to transfer the property in favour of the defendants, although there might have been a contractual restriction enforceable by the Government against the plaintiffs.

- 47.** Thus, the entire theory sought to be propounded by the plaintiffs with regard to the bar of transfer in favour of the defendants is not tenable in the eye of law.
- 48.** It is nobody's case that the plaintiffs transferred the property outright in favour of the defendants. The documents themselves show that the intention of the parties for entering into the said documents in conjunction with each other was to enter into an agreement for assignment of the property in favour of the defendants/appellants.
- 49.** Hence, the premise of the Appellate Court that no transfer took place between the parties, is beside the point.
- 50.** Both the Trial Court and the Appellate Court found that the plaintiffs could not establish their case. The Trial Court in fact categorically and rightly held that the evidence of PW-1 suffers from inherent contradiction on every count.
- 51.** The entire evidence of the plaintiffs go on to show that mutually exclusive pleas have been taken by the plaintiffs in the case. In fact, if the plaintiffs/respondent no.1 had intended to obtain permission for transferring the suit property in favour of the defendants from the very beginning, there did not exist any legal bar to do so. Even if the Appellate Court's finding, that the parties failed to substantiate their case on evidence, is accepted, it is well-settled that the plaintiff has to stand or fall on his own case and cannot rely on any laches of the defendants to get a decree from the civil court. Hence, even if according to the Appellate Court the plaintiff failed to substantiate his case, the dismissal of the suit ought to have been maintained by the

Appellate Court, in view of the plaintiffs having failed to discharge their burden of proving their own case.

52. The doctrine of *pari dilecto* was entirely misinterpreted by the Appellate Court. Even if both the parties could be said to have perpetrated illegality, the courts ought to have refused to grant relief to either party. In such a case, it is the plaintiff whose suit should have been dismissed, as done by the Trial Judge.
53. However, the said theory is not applicable in the present case, since the plaintiffs have failed to establish any legal bar at the relevant point of time, that is, on August 13, 1993, to prevent the transfer in terms of the deeds entered into between the parties, in favour of the defendants.
54. Inasmuch as the judgment of *Dr. H.S. Rikhy* (supra) is concerned, mere jugglery with the word 'rent' does not help the respondents much in the present appeal, since, admittedly a tenancy agreement was specifically entered into by the parties on August 13, 1993. The said agreement, coupled with the sole rent receipt admitted by the parties, would create a sufficient presumption in favour of the existence of at least a tenancy in favour of the defendants, which signifies that the relief of *khas* possession sought by the plaintiffs, without complying with the necessary prior conditions under the Rent Control Act, is not tenable in the eye of law.
55. Even otherwise, the combined effect of the several documents entered into between the parties, in the absence of any evidence to vitiate the

said documents, would be to render the finding of the lower Appellate Court, that the parties committed illegality, perverse and bad in law.

56. That apart, the occupation of the defendants, either as tenants or even as permissive occupiers, on the strength of the passage of consideration and execution of the agreement of assignment, created a substantial right in favour of the defendants. Such right of possession and enjoyment in respect of the suit property was indefeasible even as per the documents challenged in the suit.
57. *Pranballav Saha's* case (supra) is not applicable, since the object of the agreement of assignment entered into between the parties could not be shown to be unlawful by the plaintiffs, at least inasmuch as the defendants are concerned.
58. In the present case, the judgment and decree of the First Appellate Court are vitiated by patent perversity inasmuch as the same was based without evidence to substantiate the findings.
59. Inasmuch as the substantial questions of law formulated in the present second appeal are concerned, the aforesaid discussions clearly lead to the conclusion that the substantial question nos. (i) and (ii) have to answered in the affirmative, since the First Appellate Court committed a substantial error of law in reversing the judgment and decree of the Trial Court and in not accepting the appellants at least as tenants, if not owners.
60. Inasmuch as the third question is concerned, the same is answered in the negative inasmuch as the 1993 Act never came into operation in view of its subsequent amendments. As such, none of its Sections,

including Sections 7, 8, 10 and 21, could be relied on by the First Appellate Court to hold that the suit was barred.

61. Inasmuch as the fourth and additional question of law is concerned, the same also has to be answered in the affirmative, since, in any event, the 2012 Notification conferred on the defendants/appellants a right to validate the assignment intended by the parties.
62. The respondents' contention, that the additional question was not a substantial question of law involved in the *lis*, cannot be accepted since the same plays an integral part in the present adjudication.
63. In any event, the answer to the said question becomes redundant in a sense since the 1993 Act never came into force, as such, negating the plaintiff's contention that there was a legal bar for the plaintiffs to transfer the property in terms of the assignment agreement in favour of the defendants at any point of time.
64. In view of the above, the First Appellate Court's judgment and decree cannot stand the test of legality. Accordingly, S.A. No.373 of 2006 is allowed on contest, thereby setting aside the judgment and decree dated January 31, 2006 passed by the Additional District and Sessions Judge, First Fast Track Court, at Barasat, District-North 24-Parganas, in Title Appeal No.62 of 2005 and reviving the judgment and decree dated March 31, 2005 passed by the Civil Judge (Senior Division), Second Court at Barasat in Title Suit No.252 of 1998, whereby the said suit was dismissed. The said suit, thus, stands dismissed.

65. Accordingly, all connected applications bearing CAN 2 of 2012 (Old CAN 598 of 2012), CAN 7 of 2021 and CAN 8 of 2021 are disposed of.
66. There will be no order as to costs.
67. Decree be drawn up accordingly.
68. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)

Later:

After passing of the judgment, learned counsel appearing for the respondent seeks an order of stay of operation of the judgment passed today.

However, in view of the judgment having the effect of reviving the dismissal of a suit, the grant of any stay order would virtually tantamount to allowing any challenge to the said judgment, prior to such challenge being preferred by the respondent at all.

As such, the prayer for stay is refused.

(Sabyasachi Bhattacharyya, J.)