

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Subhasis Dasgupta.

S.A. 552 of 2008

**Smt. Sulekha Das
Vs.
Kalpana Sarkar & Anr.**

For the appellant/petitioner : Mr. Sounak Bhattacharya, Adv.

For the respondents : Mr. Indranath Mukherjee., Adv.
Mr. Tarapada Das, Adv.

Heard On : 07.12.2021, 14.12.2021

For Judgment : 21.02.2022

Subhasis Dasgupta, J:-

This Second Appeal has been preferred by appellant/defendant impugning the judgment and decree dated 25th March, 2008, passed by learned Civil Judge (Senior Division), 1st Court, Alipore, in Title Appeal No. 279 of 2006, reversing the judgment and decree dated 6th April, 2006, passed by learned Additional Civil Judge (Junior Division), 3rd Court, Alipore in Title Suit No. 35 of 2005, dismissing the suit *ex parte*.

Before coming to the core issues raised in this appeal, in context with the substantial question of law already framed by Division Bench of this Court, a reference to some revealing facts may be of good relevance. This

would, however, necessary for perfectly understanding of the dispute surfaced between the parties.

The suit property, mentioned in the Schedule to the plaint, originally belonged to one Radha Rani Sarkar, since deceased.

Admittedly, Radha Rani Sarkar inducted appellant/defendant in the suit property, as a licensee. After the demise of Radha Rani Sarkar on 13th February, 2000, plaintiffs, as legal heirs of Radha Rani Sarkar, directed appellant/defendant to quit and vacate the suit property.

Without caring for the direction of the plaintiffs, appellant/defendant indulged in raising illegal construction in the suit property. Local municipality issued a letter, dated 30th October, 2000, requiring appellant/defendant to stop construction.

Ultimately, a notice dated 28.12.2000, directing appellant/defendant to quit and vacate the suit property was issued.

Upon receiving the notice, appellant/respondent responded to such notice furnishing a reply stating therein that appellant/defendant on the strength of sale deed dated 02.12.1998, became the owner of the suit property, and thus raised question disputing with the alleged licence, stated to have been issued in favour of appellant/defendant.

Radha Rani Sarkar was alleged to be an illiterate lady, and at the material point of time she remained alone in the suit property, and had to be grossly dependent upon appellant/defendant for her living.

It was alleged by respondents/plaintiffs that taking advantage of her illiteracy, loneliness and simplicity, the appellant/defendant might have procured some signatures Radha Rani Sarkar, since deceased on some blank papers, and subsequently converted the same into instrument for her unlawful gain.

The reply of appellant/defendant, sent to respondents/plaintiff claiming her title to the suit property on the strength of a sale deed, got the plaintiffs' title clouded over the suit property, and accordingly filed suit for eviction of licensee from the suit property.

The suit was set for *ex parte* hearing due to non-appearance of appellant/defendant in response to summons being already issued, and it was ultimately dismissed *ex parte* by Trial Court.

Against the dismissal of suit, plaintiffs preferred appeal before the 1st Lower Appellate Court being Title Appeal No. 279 of 2006.

The appeal was allowed in part upon reversing the judgment of the Trial Court, thereby granting eviction decree after declaring that the appellant/defendant had no right, title and interest in the suit property, who was mere licensee therein.

Being aggrieved by and dissatisfied with the judgment granting eviction decree upon declaring appellant/defendant to be licensee by 1st Lower Appellate Court, the Second Appeal has been preferred impugning such judgment.

Division Bench of this Court framed following substantial questions of law:

- 1) Whether the Learned First Appellate Court committed substantial error of law by passing a decree of eviction before declaring the deed of sale, dated 2nd December, 1998 as forged, illegal and void?
- 2) Whether the Learned Courts below committed substantial error of law by not drawing an adverse inference against the plaintiff/respondent for non-production of certified copy of the sale deed dated 2.12.98 in terms of Section 65 of the Evidence Act?

The moot point requiring address by this Court is whether there can be a decree of eviction in part, holding appellant/defendant to be licensee solitarily in a case, when there was a composite prayer made in the prayer portion of the plaint, seeking a further decree of declaration that the alleged sale deed dated 02.12.1988 to be fraud, collusively prepared/manufactured, and as such not binding upon the respondents/plaintiffs. The said sale deed obviously got the title of the respondents clouded by reason of the assertion of appellant claiming her title and ownership to the property.

Mr. Sounak Bhattacharya, learned advocate appearing for the appellant adverting to the prayer portion of the plaint submitted that it was not a simplicitor suit for eviction of a licensee, and rather it was a suit for eviction of a licensee upon declaring the sale deed conferring right, title and interest upon the appellant/defendant to be forged, illegal and void.

Mr. Bhattacharya, further submitted that in spite of concurrent findings reached by both the courts below, that there could not be an

independent declaration holding the alleged deed of sale to be forged, illegal and void in absence of production of such sale deed, but erroneously proceeded to dispose of the controversy surfaced between the parties, as if it was a simplicitor suit for eviction of licensee. Argument was raised that appellant was inducted in the suit property as a licensee. Subsequently Radha Rani Sarkar during her life time executed a deed of sale, dated 02.12.1998 in favour of appellant/defendant conferring right, title and interest of suit property.

Mr. Bhattacharya submitted that a notice to quit and vacate (Exhibit-7) was served upon the appellant/defendant, which appellant/respondent received giving a suitable reply (Exhibit-8) disclosing therein that Radha Rani Sarkar being the predecessor of plaintiffs/respondents had already executed a sale deed dated 02.12.1998, and thus the appellant/defendant became the owner of the suit property thereby disputing with the eviction notice served upon her, with open assertion of a claim, based on right, title and interest, by virtue of such sale deed, as disclosed in the reply therein.

Upon referring para 10 of the plaint Mr. Bhattacharya, submitted that overt acts and conducts performed by the appellant/defendant on the strength of such sale deed, reasonably clouded the status of the plaintiffs/respondents to their claim as owners of the suit property, which would be construed to be an admission of the title of appellant/defendant in respect of the suit property. While making elaboration such issue, Mr. Bhattacharya submitted that though the sale deed dated 02.12.1998 conferred right, title and interest upon the appellant/defendant had been

sought to be declared to be illegal and void, and not binding upon respondents, on the ground of fraud being perpetuated by the appellant, but the particulars of commission of fraud could not be disclosed making due adherence to the provisions of Order VI Rule 4 of the Code of Civil Procedure, because the pleadings having relied upon the alleged fraud being committed by the appellant in manufacturing such sale deed by the appellant/defendant, such aspect should have been gone into by the First Lower Appellate Court, while granting part decree of eviction.

Mr. Bhattacharya, while challenging the impugned order also submitted that the First Lower Appellate Court granted eviction decree holding the appellant to be licensee particularly relying upon the provisions laid down in Order VIII Rule 10 of the Code of Civil Procedure, but without duly discharging obligation, vested to it in a manner, as already contemplated by the legislature, while deciding a suit *ex parte*.

It is thus emphasised that mere non-filing of written statement would not attract the provisions of Order VIII Rule 10 of the Code of Civil Procedure without considering the pleadings as a whole, to understand the real controversy surfaced between the parties, requiring adjudication by the Court. Such provisions, according Mr. Bhattacharya, had been erroneously applied without having understood the real purport of the provisions contained therein in context with the true contemplation of the legislature.

Reliance was placed Mr. Bhattachaya on such issue on a decision rendered by the Apex Court in case of ***Balraj Taneja and Anr. Vs. Sunil Madan and Anr.*** reported in ***(1999) AIR (SC) 3381: (1999) 8 SCC 396*** to

establish that the function of the First Lower Appellate Court stood at much higher pedestal compared to the Trial Court, since First Lower Appellate Court was the last fact finding Court in appeal.

Upon referring such decision Mr. Bhattacharya tried to impress upon the Court that the Court below should not have acted blindly merely because a written statement had not been filed by the defendant traversing the facts set out by the plaintiffs in the plaint. More duty of caution was attached with the function of the First Lower Appellate Court, while giving a decision in appeal, against the *ex parte* dismissal of the Trial Court.

Argument was further raised by Mr. Bhattacharya that whenever there was a composite prayer made before the Trial Court containing a very significant prayer therein seeking a further declaration holding the sale deed to be forged, illegal and void and also not binding upon the respondents, the Appellate Court ought to have visualised the ordinary and natural conduct of respondents, as to what prevented them from producing even the certified copy of the sale deed, disclosed by appellant in her reply (Exhibit-8), stating therein that on the strength of sale deed, dated 02.12.1998 the appellant/defendant became the owner of the suit property. The concept of better title of respondents, vide Exhibit-1 should not have been much stressed upon in a case, when alleged fraud had been disclosed to have been committed by the appellant/defendant without addressing the real controversy.

Profit was sought to be derived by Mr. Bhattacharya relying upon two decisions reported in **(1993) 2 Cal LT 334** delivered in the case of **Dibakar**

Mahato and Ors. Vs. Bhagabat Ch. Mahato and Ors. and a decision of Apex Court reported in ***AIR 1958 SC 706*** delivered in the case of ***Nani Bai Vs. Gita Bai*** to advocate his stand that it was purposefully suppressed by the respondents without calling for even production of certified copy, which could be very well admitted in evidence under Section 65(C) of the Evidence Act. It was admittedly not in the custody of the respondents, and in spite of the situation, no foundational pleadings was there as to why the respondents desisted from producing the certified copy of such sale deed for obtaining desired declaration, which obviously got the title of respondents/plaintiffs clouded.

Mr. Bhattacharya submitted that First Lower Appellate Court did not discharge the obligation in true sense of the terms, while granting eviction decree upon declaring the appellant/defendant to be a licensee.

Mr. Indranath Mukherjee, representing respondents/plaintiffs after supporting the order of the First Lower Appellate Court submitted that even after receiving summons, the appellant/defendant preferred to remain absent without filing any written objection traversing the facts contained in the plaint, but it is only in miscellaneous appeal, the appellant/defendant appeared in connection with injunction matter. Suit was admittedly set for *ex parte* hearing by the Trial Court, and finally it was dismissed by the Trial Court. In the appeal preferred against the order of dismissal by the respondents, the appellant/defendant chose to contest the appeal purposefully remaining absent in the Trial Court.

Upon resorting to Order VIII Rule 5, Mr. Mukherjee submitted that if the averments contained in the plaint remained unchallenged, or even if not denied specifically or by necessary implication, the allegation of facts incorporated in the plaint, shall be taken to be admitted. According to Mr. Mukherjee, both the courts below having concurred the findings already reached that it would be an unnecessary exercise to deal with the issue requiring production of certified copy of the deed disclosed in the reply of appellant/defendant (vide Exhibit-8), such findings should remain undisturbed.

While emphasising such submission Mr. Mukherjee, submitted that only on two situations there could be interference with the findings of fact. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where the Court has arrived at a finding by placing reliance on inadmissible evidence, which if omitted, an opposite conclusion was possible.

The finding of fact reached by the Trial Court, as already affirmed by the Appellate Court, regarding non-production of certified copy of the sale deed, allegedly in the name of appellant/defendant, which got the title of the respondents clouded, neither of the two situations, as stated hereinabove was attracted. Therefore, the respondents/plaintiffs could not be required to produce such sale deed, as alleged in the reply of appellant/defendant.

It was thus not at all obligatory on the part of the respondents to produce certified copy of such sale deed, taking steps therefor, Mr. Mukherjee argued.

Focussing on the conduct of the appellant/defendant, as already revealed in the submission, disclosed by Mr. Mukherjee, it was sought to be impressed upon the Court that when there was nothing to dispute with the title of respondents (vide. Exhibit-1), the concurrent findings of Court, as regards the requirement of production of certified copy of the sale deed, pursuant to the disclosure made in the reply of appellant/defendant, would must go unaltered, and the decree of eviction would automatically follow for the proof of title of respondents, and more so, upon revocation of the licence by notice to quit and vacate the suit property (vide Exhibit-7).

While challenging the substantial question of law framed in this case, Mr. Mukherjee, advertng to Section 100(5) C.P.C. submitted that High Court should not have formulated such questions of law, since alleged document disclosed in the reply of defendant (vide Exhibit-8) had not been in existence.

Reliance was placed by Mr. Mukherjee on a decision reported in **1996 (1) CLJ 557** delivered in the case of **Radha Prosad Sharma Vs. Sm. Bejoy Sett** that since it was a suit for eviction of licensee, which had already been revoked by issuing a notice to quit, the consequent recovery of possession incidentally involved the question of ownership, and the ownership of the respondents having already been proved adducing evidence, both oral and

documentary, the order of eviction passed by the First Lower Appellate Court should not be called into any question.

Reliance was also placed on a decision reported in **2001(2) CLJ 475** rendered in the case of **Kumaresh Majumdar Vs. Shrimati Binapani Sarkar & Ors.** to establish that respondents having proved her title in respect of the suit property, mere assertion of a claim of title on the strength of sale deed, allegedly disclosed in the reply (Exhibit-8) would not disentitle the respondents/plaintiffs from having a decree of eviction.

The citations referred by Mr. Mukherjee, reported in **1997 (4) SCC 713** delivered in the case of **Panchugopal Barua and Ors. Vs. Umesh Chandra Goswami and Ors.** and **1997(5) SCC 438** delivered in the case of **Kshitish Chandra Purkait Vs. Santosh Kumar Purkait and Ors.** may be of academic relevance in context with Section 100 C.P.C., particularly with reference to Section 100(5), but important thing to note is that the respondents should be put on notice with reference to the questions of law being framed, so that fair and opportunity to meet the points is extended, what is exactly contemplated by the legislature behind the enactment of Section 100(5) C.P.C.

Mr. Mukherjee, while supporting the impugned judgment of the First Lower Appellate Court, raised strong objection with regard to the applicability of the decisions, as cited by appellant, contending that such decisions were rendered in different factual matrix. The decisions, thus relied upon by the appellant, according to respondents, would be distinguishable on facts.

It was thus contended that since the respondents never expressed any admission in an unambiguous terms providing relevant averment in the plaint, the sale deed disclosed by the appellant in her reply could not be treated to be admitted, though it was apprehended that the signatures of the predecessors of respondents/plaintiffs might have been fraudulently procured for converting the same into an instrument.

Having considered the submissions advanced by both the parties, it appears that First Lower Appellate Court proceeded to grant decree of eviction thereby providing part decree basically relying upon the provisions of Order VIII Rule 5 C.P.C. assuming that in the absence of any written statement being filed traversing the allegations contained in the plaint, allegations of facts shall be taken to be admitted, and putting much importance upon Order VIII Rule 10 of the C.P.C., for want of written statement being filed to the suit.

It would also be profitable here to refer the prayers, as incorporated in the plaint, which may be mentioned as hereunder:

- i) ***“For a decree of declaration that the defendant has no right title and interest upon the suit property and the defendant was a licensee and after termination of license has become a trespasser,***
- ii) ***For a decree of declaration that alleged Deed of the defendant is forged, illegal and void,***
- iii) ***For a decree of eviction of the defendant from the suit property,***
- iv) ***For temporary injunction,***
- v) ***For any other relief or relieves as the plaintiffs are entitled under law and equity.”***

It would be of some relevance to reproduce para 10 of the plaint, which may be mentioned as hereunder:

“10) That all the above mentioned overacts and deeds of the defendant clouded the status of the plaintiff as a owner of the suit property which is required to be removed by way of declaration that the defendant and her family members were a mere licensee of the plaintiffs predecessor and after termination of the license the defendant has become a trespasser. Moreover the alleged Sale Deed dated 02.12.1998 is a forged document and is illegal and void. And further being a trespasser the defendant is liable to be evicted from the suit property. Hence this suit.

Upon reading all the averments contained in the plaint, particularly para 10 in context with the proposed prayers, as referred hereinabove, the most pertinent question comes up for determination as to whether the plea of the respondents/plaintiffs could be taken as a whole, or could be very well dissected for giving relief to the respondents upon construing the fabric of the suit to be a simplicitor suit for eviction of licensee. The answer to such question necessarily would be in negative. Upon reading the averments contained in the plaint and taking the same as a whole, it appears that the prayer No.2 claiming a decree of declaration that the alleged deed of defendant to be forged, illegal and void is something one, requiring adjudication incidental to and simultaneous with determination of the prime and principal relief, based on eviction of a licensee, because there had been conspicuous disclosure in para ‘10’ of the plaint that by reason of the reply, addressed to the respondents/plaintiffs asserting a title of appellant/defendant on the strength of a sale deed, clouded the title of the respondents/plaintiffs. The Court cannot be oblivious of the provisions available in the Code of Civil Procedure that Court in a proper case can

mould prayers, but such prayers must not be inconsistent with and self destructive.

The First Lower Appellate Court for the proof of better title of the respondents proceeded to grant part decree of eviction ignoring the real controversy surfaced between the parties. The reply given by the appellant is perceived to be the very substratum providing cause of action for the suit amongst others and it was lost sight of by the First Lower Appellate Court. Though there had been no written statement filed by the appellant/defendant responding to summons, but the First Lower Appellate Court was obliged to read each and every averments of the plaint to understand the real controversy between the parties and the reliefs sought to be obtained therefor.

In that view of the matter, it can not be perceived to be a simplicitor suit for eviction, and a decree of eviction can be easily granted merely upon proof of title of the respondents to the suit property together with proof of revocation of the licence, as already done in this case.

It would be most relevant here to use profitably the observation of the Apex Court rendered in the case of **Balraj Taneja and Anr. (supra)** made in para 30 of such judgment, which may be reproduced hereinbelow:

“30. As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in

the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub- rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8."

The obligation thus supposed to be discharged by the Trial Court as well as the First Lower Appellate Court, therefore, needs to be discharged in a most cautious manner with due circumspection. More so while discharging the appellate function, such duty stands at more higher pedestal compared to the Trial Court.

In view of the specific averment contained in para 10 of the plaint, revealing that by reason of the assertion of title of defendant on the strength of a sale deed in the name of appellant/defendant, the title of respondents got clouded, it was in such circumstances, the Court below ought not to have acted blindly, merely because there had been no written statement filed by the defendant. More and more careful consideration of the plaint in its entirety needed to be critically gone into with reference to the proposed prayers not by simply dissecting one prayer from the others. While reading together Order VIII Rule 10, and Sub-Rule 2 of Rule V Order VIII C.P.C., the essence of intention of the legislature would automatically come out, which deals the discretion of the Court requiring any such fact so admitted to be

proved, to pronounce a judgement in a case, where written statement has not been filed. A solitary look to the provisions of Order VIII Rule 10 without caring for the proviso appended to Sub-Rule 2 of Rule 5 of Order VIII C.P.C. is thus cannot be construed that the First Lower Appellate Authority had rightly exercised the discretion most judiciously and reasonably upon serving the requirements of law, in view of the proposed prayers of suit. Discretion vested to Court, if not exercised judiciously, reasonably and most rationally pertaining to the text under reference, cannot be regarded to have been exercised prudently. Non-requirement of production of certified copy of sale deed under Section 65(C) of Evidence Act, as observed by the Court below, does not pass the test of judicial exercise of discretion.

Since the First Lower Appellate Court granted part decree of eviction, before declaring the sale deed, dated 2nd December, 1998 as forged, illegal and void, without doing due adherence to the provisions Order VIII Rule 5 (2) read with Order VIII Rule 10 C.P.C., there had been sufficient infraction of law giving rise to the substantial question of law, already framed, and such question of law, though challenged by the respondents in the fashion, as already referred hereinabove, but the same is without any substance requiring no further elaboration on such issue.

The necessity of production of the sale deed of appellant/defendant, over which plaintiffs sought for declaration, simultaneously with a decree for eviction upon declaring the appellant/defendant to be licensee, would then automatically follow as a natural and inevitable corollary.

Para 10 of the plaint having already taken care of the reply of the appellant/defendant giving therein an open assertion claiming title to the suit property by virtue of a sale deed, which indeed got the title of the plaintiffs clouded, put an obligation upon respondents/plaintiffs for causing production of certified copy of such document taking steps well in advance therefor doing due adherence to the provisions of Section 65(C) of the Evidence Act, because the alleged sale deed was not in the custody of respondents/plaintiffs, and in such state of affairs, the certified copy of the alleged sale deed could have been very well produced before the Court below, which was very much admissible in evidence under the provisions of Section 65 (C) of the Evidence Act.

The decision thus referred by the appellant rendered in the case of ***Dibakar Mahato and Ors.(supra)*** and the decision of the Apex Court delivered in the case of ***Nani Bai (supra)*** has some direct and proximate relevance for the proper adjudication of this appeal.

Though Mr. Mukherjee sincerely tried to unsettle the stand of the appellant taken in this appeal under the behest of decision rendered in the of ***Radha Prosad Sharma Vs.(supra)*** that whenever the appellant admitted that she had been inducted as a licensee in the suit property, for the proof of title of the respondents to the suit property coupled with revocation of the licence requiring appellant to quit and vacate the suit property, there arose no necessity of causing production of certified copy of the alleged sale deed, as the same would be an unnecessary and unauthorised exercise for the want of sufficient particulars being furnished in the reply, but as has

already discussed that since it was not a simplicitor suit for eviction in context with the proposed prayers, the respondents were obliged to produce certified copy of the alleged sale deed, taking steps therefor, in due obedience to Section 65(C) of the Evidence Act, for the controversy surfaced between the parties to set at rest permanently. Such decision as referred by respondents would necessarily then be without any relevance.

As reiterated by the respondents time and again during the hearing process of this appeal that both the Courts below having negated the necessity of causing production of the certified copy of alleged sale deed, such findings should remain undisturbed, and such position was sought to be established taking recourse to a decision delivered in the case of ***Kumaresh Majumdar (supra)***, but such decision would be of no significant use, on the ground that mere proof of title of respondents, or even the better title would not automatically render the respondents entitled to a decree of eviction after causing dissection of the proposed prayers forgetting the essence of Order VIII Rule 5 (2) C.P.C.

Since the respondents were sufficiently put on notice to challenge the substantial question of law in terms of provisions laid down in Section 100 C.P.C., there is hardly any necessity of inviting any further elaboration in context with the two decisions, as referred by respondents rendered in the case of ***Panchugopal Barua (supra)*** and ***Kshitish Chandra Purkait (supra)***, even for academic exercise.

The argument advanced by the respondents, for the discussion made hereinabove, would not be an acceptable stand.

The appeal, therefore, succeeds.

The decree of the First Lower Appellate Court passed in Title Appeal No. 279 of 2006 reversing the judgment of the Trial Court in T.S. No. 35 of 2005 thereby granting part decree of eviction is set aside.

Office is directed to send one copy of judgment to the learned First Lower Appellate Court for information.

With this direction and observation, the appeal is disposed of.

Office is further directed to send down lower court records along with copy of the judgment to the learned Trial Court for information and necessary action after complying with the provisions of law.

Urgent certified copy of this judgment and order, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with the all necessary formalities.

(Subhasis Dasgupta, J.)