

In The High Court At Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Harish Tandon.
&
The Hon'ble Justice Madhuresh Prasad

F.M.A. No. 330 of 2023
CAN 1 of 2023

Sri Prabir Koley @ Prabir Kumar Koley
v.
Sri Subir Panja.

For the Appellant : Mr. Rabindra Nath Mahata,
Mr. Animesh Das,
Mr. Aritra Sankar Ray.

For the Respondent. : Mr. Subhasish Pachhal.

Heard on : January 05, 2024.

Judgment on : January 05, 2024.

The Court:- Though the instant appeal arises from an order of remand passed by the first Appellate Court, but we invited attention of the appearing Counsels on the proposition of law involved in the instant appeal so that the appeal can be conveniently disposed of without following the procedural aspect viz. bringing the Lower Court Records, preparation of paper books etc. Both the Counsels agreed to address the Court on the nuances of law applicable in this regard and we take up the matter for disposal of the instant appeal finally.

The facts are more or less undisputed. A suit for declaration of tenancy right was instituted by the respondent herein in respect of the suit premises alleging that the appellant issued rent receipts in his name and collected the rent up to the year 2015-2016. It is also not in dispute that

initially the tenancy stood in the name of the father of the respondent, who died in the year 2012 leaving behind him surviving the respondent, the only heir.

After receiving the summons the appellant appeared and disclosed his defence denying the allegations made by the respondent in the said suit and simultaneously made a counter-claim seeking recovery of possession as the respondent is a mere trespasser. It is alleged in the said counter-claim that in view of the definition of “tenant” engrafted under Section 2(g) of the West Bengal Premises Tenancy Act, 1997, the respondent cannot claim tenancy after the expiration of the period enshrined therein.

The Trial Court proceeded to decide the suit as well as the counter-claim and ultimately dismissed the suit thereby holding that the respondent has miserably failed to prove the tenancy right in respect of the suit premises and allowed the counter-claim directing the respondent to quit and vacate the suit premises unto and in favour of the appellant within sixty days from the date of the said decree. Admittedly only one appeal is filed by the respondent before the Court of Appeal below and the first Appellate Court remanded the matter, as an application under Order XLI Rule 27 of the Code of Civil Procedure was taken out by the respondent seeking leave to produce additional evidence in relation to the said tenancy upon production of the rent receipts.

Obviously the appellant took a plea that the aforesaid rent receipts are the outcome of forgery and the alleged signature appended thereto is a forged one. The Court of Appeal below allowed the said application under Order XLI Rule 27 of the Code and remanded the matter to the Trial Court for examination of the signature appended on the alleged rent receipts through an expert in order to find out the genuinity and veracity of the stands of both the parties.

Such being the undisputed facts as unfurled from the record, two points arose in the instant appeal. Firstly, whether a single appeal is competent/maintainable, when a decree in an original suit as well as the Counter-claim were drawn up and, therefore, the principle of res judicata would be attracted. Secondly, even if the rent receipts are issued in favour of the respondent after the death of the original tenant for such period enshrined in Section 2(g) of the West Bengal Premises Tenancy Act, 1997 would tantamount to creation of new tenancy or it is mere recognition of the heir as tenant for such limited period and such right diminishes upon the expiration of the period limited thereby.

We would like to deal with the second point first though conscious of the fact that if the first point is answered in affirmative, it would be a mere academic exercise to decide the second point, yet for the purpose of clear exposition of law we venture to decide the said point.

The definition of “tenant” has undergone a sea change in the West Bengal Premises Tenancy Act, 1997 with the definition of “tenant” given under the repealed Act, i.e. the West Bengal Premises Tenancy Act, 1956. The said definition under the repealed Act does not create any impediment in inheriting the tenancy by the heir in case of intestacy as joint tenant or tenant in common as the case may be, but the right of heritability has been bridled in the new definition of “tenant” provided under Section 2(g) of the West Bengal Premises Tenancy Act, 1997. It would be apposite and profitable to quote the said Section, which runs thus:

“(g) “tenant” means any person by whom or on whose account or behalf the rent of any premises is or, but for a special contract, would be payable, and includes any person continuing in possession after termination of his tenancy and, in the event of death of any tenant, also includes, for a period not exceeding five years from the date of death of such tenant or from the date of coming into force of this Act, whichever is later, his spouse, son, daughter, parent and the widow of his predeceased son, who were ordinarily living with the tenant up to the date of death of the tenant as the members of his family and were dependent on him and who do not own or occupy any residential premises, and 2[in respect of premises let out for non-residential purpose his spouse, son, daughter and parent who were ordinarily living with the tenant up to the date of his death as members of his family, and were dependant on him or a person authorised by the tenant who is in possession of such premises] but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction:

Provided that the time-limit of five years shall not apply to the spouse of the tenant who was ordinarily living with the tenant up to his death as a member of his family and was dependent on him and who does not own or occupy any residential premises, 2 Subs, by W.B. Premises Tenancy (Amendment) Act, 2002 (W.B. Act 14 of 2002) (w.r.e.f. 10.7.2001) for the following :

“in respect of premises let out for non-residential purpose his spouse, son, daughter and parent who were ordinarily living with the tenant up

to the date of his death as members of his family and were dependent on him". 3 Provided further that the son, daughter parent or the widow of the predeceased son of the tenant who was ordinarily residing with the tenant in the said premises up to the date of death of the tenant as a member of his family and was dependent on him and who does not own or occupy any residential premises, shall have a right of preference for tenancy in a fresh agreement in respect of such premises 1[on condition of payment of fair rent]. This proviso shall apply mutatis mutandis to premises let out for non-residential purpose."

It is thus manifest from the meaningful reading of the language used in the said definition clause that any person who is liable to pay rent in respect of the use and enjoyment of the property would be regarded as a tenant for the purpose of protection having provided in the said legislation. We are not unmindful of the fact that the Rent Restriction Act introduced by the States is the beneficial and welfare piece of legislation and, therefore, in order to interpret any of the provisions therein the object and purpose sublime the promulgation of the said Act has to be kept in mind. It is no gain saying that the word "includes" expands the horizon of the said definition and has been given a word of "wide import". In the said definition clause by using the word "includes" the Legislature imbibed within its such folds any person continuing in possession after termination of the tenancy and in the event of death of any tenant also includes his spouse, son, daughter, parent and the widow of his predeceased son but for a limited period of five years subject to the conditions that they were ordinarily living with the tenant up to the death of the tenant as a member of his family and were depended upon him and do not own or occupy any residential premises. Though initially the Section conveys an intention that it is applicable to residential tenancy, but the later part of the said definition extended its operation to non-residential tenancy as well and in the instant case the tenancy being non-residential, we find no hesitation in applying the said definition of "tenant" given under Section 2(g) of the Act of 1997.

However, an exception is carved out by incorporating the first proviso in the said definition clause, where the period of five years shall not apply to a spouse provided other conditions incorporated therein are found to exist. The question which boils down on a fact that the rent receipts were issued in favour of the respondent being the son as only heir of the deceased tenant during the said period constitute novation of a contract or creation of a new tenancy in respect of the suit premises.

As indicated in the definition clause a person, who is liable to pay rent in respect of the property given for the use and enjoyment thereof shall be regarded as a tenant and even on the death of the original tenant the person named therein would be treated as a tenant but for a limited period of five years subject to the fulfillment of the other conditions incorporated therein. The moment the landlord issued a rent receipt in the name of the heir upon the death of the original tenant within the said statutory period, such issuance of rent receipt is in tune with the definition of “tenant”, as the son is regarded as a tenant in respect of the suit premises but for a limited period as restricted in the said definition clause.

Not an iota of piece of paper is produced by the respondent that the appellant continued to accept the rent after the expiry of five years from the date of death of the original tenant nor any rent was received by acknowledging in any mode or form upon the issuance of the rent receipt in respect of the suit premises.

It is nobody’s case that the rent was accepted by the appellant upon expiration of the statutory period but it is a specific stand of the respondent that the rent was collected during the said statutory period and, therefore, the rent receipt issued in the name of the respondent, but for the said statutory period, can neither constitute a novation of contract nor would deem to have created a new tenancy but recognition of the respondent under the said definition clause.

The Division Bench of this Court in case of *Smt. Ratna Bose @ Basu vs. Smt. Jharna Mullick & Ors.* reported in (2017) 1 CHN 485 had an occasion to consider the status of a heir in respect of a tenancy after expiration of the period provided in the said definition clause. It is held that the moment the statutory period expires and a suit for recovery of possession is filed, it would be deemed that the suit is for recovery of possession against the trespasser as the heir has been kept outside the purview of the definition of “tenant” in the following:

“As such, we hold that the suit is essentially a suit for eviction of a trespasser which is well maintainable and since the suit is not against a tenant within the meaning of tenant as defined under West Bengal Premises Tenancy Act, 1997, the defendants are not entitled to get any protection against eviction under Section 6 of the said Act. Hence, we hold that the learned first Appellate Court was absolutely justified in holding that the suit is well maintainable and the plaintiff is entitled to

get a decree for eviction as the defendants have failed to prove a better title than the plaintiff in the suit property.”

Another Division Bench in case of *Nasima Naqi vs. Todi Tea Company Limited & Ors.* reported in (2019) 1 CHN 348 has extensively considered and interpreted the definition of “tenant” and held:

“23. The two principal legal questions are, thus, answered as follows:

i. The spouse of a deceased tenant is not entitled to protection from eviction in respect of premises let out for non-residential purpose beyond the period of five years from the date of death of the original tenant if such original tenant died after the coming into force of the Act of 1997.

ii. The spouse of a deceased original tenant does not have any right to have a fresh agreement executed in such spouse's favour in respect of any premises let out for non-residential purpose if the decree-holder landlord wishes to let out the premises afresh upon obtaining the decree or possession of the premises pursuant to the decree.

26. The status of the specified heirs of the original tenant, in terms of Section 2(g) of the Act of 1997, is that of tenants for a period of five years after the death of the original tenant, subject to such heirs meeting the other conditions specified in the provision; except that the spouse of an original tenant is entitled to life-time protection in case of premises let out for residential purpose. The status of all heirs of a deceased original tenant in all other cases, except for the spouse in respect of premises let out for residential purpose, is as permissive occupants akin to licencees and may even be no different from trespassers except that their entry into the premises was lawful and, to such extent, they may not be regarded as rank trespassers. In respect of premises let out for non-residential purpose, as in the present case, the status of tenant that the specified heirs of the original tenant enjoy, subject to fulfilling the other conditions, for a period of five years after the death of the tenant if the tenant has died after the coming into force of the Act of 1997, is completely lost after the expiry of the statutory period. Since it is only a tenant for whose eviction there is a statutory pre-condition of the issuance of a notice under Section 6(4) of the Act of 1997, in the case of an heir of the original tenant continuing in occupation of the non-residential premises after five years following the death of the original tenant when the original tenant died after the

coming into force of the Act of 1997, there is no requirement of any notice to be issued by the owner of the premises prior to the institution of a suit for eviction against such heir and on such ground.”

We thus do not find that the respondent can claim any tenancy in respect of the suit premises after the expiration of the period of five years from the date of death of the original tenant which is admittedly in the year 2012 and, therefore, there was no necessity of remanding the matter to the Trial Court for the purpose of ascertaining whether the rent receipt issued by the appellant is a forged one or not.

Reverting back to the first point, it is an admitted position that two separate decrees were drawn up by the Trial Court; one in relation to a dismissal of the suit filed by the respondent and the other in relation to a decree passed in the counter-claim. Undisputedly, a single appeal was filed by the respondent before the Court of Appeal below.

It is no longer *res-integra* that under Order VIII Rule 6-A of the Code of Civil Procedure, the counter-claim is treated as a cross-suit and the provisions relating to the plaint shall be applicable to the counter-claim as well, as the plaintiff is required to file written statement to the counter-claim. The moment the counter-claim is treated as a cross-suit, by virtue of the provisions under Order XX Rule 19 (2) of the Code a decree is to be drawn up on a disposal of the said counter-claim, which, in fact, has been done in the instant case. Since a single appeal was preferred before the Court of appeal below, the question is whether the principle of *res judicata* would apply in this regard.

On an identical situation the Apex Court in case of *Harbans Singh & Ors. vs. Sant hari Singh & Ors.* reported in (2009) 2SCC 526 held that if two suits are decided together and an appeal is filed against one of the decrees, the other decree attained finality and since the adjudication by a common judgement was made, it would attract the principle of *res judicata* in the following:

“16. The principle of *res judicata* in the aforementioned fact situation, in our opinion, has rightly been applied by the High Court.

17. Section 11 of the Code of Civil Procedure reads thus:

“11. *Res judicata*.—No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit

or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

18. *In Premier Tyres Ltd. v. Kerala SRTC [1993 Supp (2) SCC 146] this Court held: (SCC pp. 148-49, paras 4-5)*

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

5. Mention may be made of a Constitution Bench decision in Badri Narayan Singh v. Kamdeo Prasad Singh [AIR 1962 SC 338] . In an election petition filed by the respondent a declaration was sought to declare the election of the appellant as invalid and to declare the respondent as the elected candidate. The Tribunal granted first relief only. Both the appellant and the respondent filed appeals in the High Court. The appellant's appeal was dismissed but that of the respondent was allowed. The appellant challenged the order passed in favour of the respondent in his appeal. It was dismissed and preliminary objection of the respondent was upheld. The Court observed: (Badri Narayan case [AIR 1962 SC 338] , SCC p. 342, para 15)

‘15. ... We are therefore of opinion that so long as the order in the appellant's Appeal No. 7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a properly nominated candidate stands, he cannot question the finding about his holding an office of profit, in the present appeal, which is founded on the contention that that finding is incorrect.’

19. *In Union of India v. V. Pundarikakshudu & Sons [(2003) 8 SCC 168] this Court held: (SCC pp. 178-79, para 31)*

“31. In this case the District Judge as also the High Court of Madras clearly held that the award cannot be sustained having regard to the inherent inconsistency contained therein. The arbitrator, as has been correctly held by the District Judge and the High Court, committed a legal misconduct in arriving at an inconsistent finding as regards breach of the contract on the part of one party or the other. Once the arbitrator had granted damages to the first respondent which could be granted only on a finding that the appellant had committed breach of

the terms of contract and, thus, was responsible therefor, any finding contrary thereto and inconsistent therewith while awarding any sum in favour of the appellant would be wholly unsustainable being self-contradictory.”

We are not unmindful of the proposition that the provisions under Section 11 of the Code of Civil Procedure not only applies between the two suits but has applicability at different stages of the same proceeding. The moment the right of the parties is decided finally it cannot be reopened in a subsequent proceeding. The principles of res judicata is founded upon the public policy which admits with no ambiguity that every litigation must attain finality.

The moment two proceedings have been decided upon delivering a common judgement, such finding relates to the issue involved in the aforesaid two proceedings and if appeal is filed against any one, the findings in respect of the other would be deemed to have attained finality and, therefore, the principle of res judicata can be extended against the other.

In the instant case the respondent claimed tenancy right by instituting a suit in which the appellant filed a counter-claim alleging the status of the respondent as trespasser and claimed relief in the form of decree for recovery of possession. The moment the Court disbelieved the stand of the respondent that he is a tenant in respect of the suit property and allowed the decree for eviction, the appeal against any one of such decree would operate as res judicata and if it is held to be maintainable it would invite two inconsistent or mutually destructive judgement operating in the field.

We thus held that the appeal before the Court of Appeal below is not maintainable and hit by the principle of res judicata and, therefore, it was the foremost duty of the first Appellate Court to dismiss the said appeal instead of remanding the same to the Trial Court for such purpose.

The order impugned is thus set aside. Consequently the appeal filed before the Court of Appeal below being Title Appeal No. 103 of 2019 stands dismissed.

With the above observations the instant appeal and application are dismissed.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)