REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. _____OF 2009
[Arising out of Special Leave Petition (Civil) No. 10194 of 2007]

BISWANATH AGARWALLA … APPELLANT

Versus

SABITRI BERA & ORS. … RESPONDENTS

WITH
CIVIL APPEAL NO. _____OF 2009
[Arising out of Special Leave Petition (Civil) No. 15058 of 2007]

BISHWANATH AGARWALLA … APPELLANT

Versus

SABITRI BERA & ORS. … RESPONDENTS

J U D G M E N T

S.B. SINHA, J.

1. Leave granted.

2. Whether a Civil Court can pass a decree on the ground that the defendant is a trespasser in a simple suit for eviction is the question involved in this appeal.

It arises out of a judgment and order dated 17th August, 2006 passed by a learned single judge of the Calcutta High Court in C.O.A. No. 253 of 2006 in RVW No. 2671 of 1996.

3. The suit premises is a shop situate in a small town commonly known as Raghunathpur in the district of Purulia. Appellant herein is said to have entered into possession of the suit premises in the year 1970. Originally, he claimed to have come into possession in the said premises pursuant to or in furtherance of an agreement for sale entered into on or about 18th March, 1970 by and between him and S.K. Abdul Wahid Molla, the father of Safiqur Rahaman.

The respondents purchased the suit premises from Safiqur Rahaman on 21st July, 1980 by three registered deeds of sale.

4. Indisputably, the respondent No.1 filed a suit being Title Suit No.88 of 1990 in the Court of Munsif, Raghunathpur, District Purulia (West Bengal) inter alia praying for eviction of the appellant from the suit premises

and mesne profit claiming themselves to be the owners and landlords thereof.

He prior to institution of the suit also served a notice upon the appellant in terms of Section 106 of the Transfer of Property Act asking him to handover peaceful and vacant possession alleging that he had been a tenant therein on a monthly rental of Rs.45/- under his vendor Safiqur Rahaman.

5. Appellant denied and disputed that he had ever been a tenant of Safiqur Rahaman at any point of time. The relationship between them was, thus, denied and disputed.

6. The learned trial judge having regard to the rival pleadings of the parties framed the following issues:

> "1) Have the plaintiffs any cause of action to bring this suit?
>
> 2) Is the suit maintainable in its present form?
>
> 3) Is the suit barred by law of limitation?
>
> 4) Is the suit barred by provisions of the S.R. Act?
>
> 5) Is the suit barred by the principle of waiver, estoppel and acquiescence?

6) Have the plaintiffs landlord and tenant relationship with the defendant?

7) Have the plaintiffs served valid notice u/s 106 of the T.P. Act?

8) Have the plaintiffs right, title and interest in the suit property?

9) Are the plaintiffs entitled to get the decree as prayed for?

10) To what other reliefs, if any are the plaintiffs entitled?

The learned trial judge opined:

i. The plaintiffs have proved to be the owner of the suit property having purchased the same from the admitted owner S.K. Abdul Wahid Molla;

ii. The defendant has failed to prove his independent title over the suit property.

iii. The plaintiffs have failed to prove the relationship of landlord and tenant in between the plaintiffs and the defendant

iv. The plaintiffs having failed to prove the tenancy are not entitled to a decree.

7. The respondent No.1 preferred an appeal thereagainst marked as Title Appeal No. 20/1993. By a judgment and order dated 31st May, 1995, the learned Appellate Court held that although the plaintiffs have failed to prove the relationship of landlord and tenant by and between them and the defendant or that the defendant had been let into the tenanted premises on leave and license basis, the plaintiffs - respondents are entitled to a decree for possession on the basis of his general title.

8. The learned First Appellate Court also rejected the appellant's contention that he has acquired title by adverse possession.

It was held:

> "It is needless to mention the learned Munsif of the court below in the body of the judgment, at the time of discussion (page 20 begins) issue nos. 6 and 8 on being satisfied by the plaintiffs chain of documents of their title over the suit premises and in such a position, the plaintiffs were entitled to get the decree for recovery of possession as owner of the suit premises and in this regard decision so referred by the learned lawyer of the appellants as reported in AIR 1984 ROC 78 Allahabad page A 35, and other decision so reported in AIR 1984 Allahabad page 66 completely on the flat point of the suit in favour of the plaintiffs and where it has been clearly stated in a suit for eviction by the plaintiffs against the defendant under the relevant provision of Transfer of Property Act where title of

> the plaintiffs over the suit property being proved and the relationship of landlord and tenant not proved, in spite of the same, the plaintiffs or proving the landlords title are entitled to get recovery of possession of the suit premises from the defendant as owner thereof and what in fact, happened in the given facts and circumstances, out of which this appeal arose.
>
> xxx xxx xxx
>
> For the discussion made above and on the existing materials on the case record and when the plaintiffs proved their title and ownership over the suit premises by virtue of Ext. 4 series and on the other hand the defendant as per their written statement failed and neglected to discharge his onus on proving his right or permanency in the suit premises as tenant or otherwise, the plaintiffs suit must succeed and the findings of the learned Munsif in deciding the issue Nos. 6 and 8 particularly the contents of the issue no. 6 are not at all satisfactory and cannot be sustained in law in the given facts and circumstances of the case and as such the irresistible conclusion from the above discussion is that the judgment and decree so passed by the Ld. Munsif is not tenable in law and the plaintiffs are entitled to get the decree for eviction against the defendants. As a result, the appeal succeed in part on contest. "

9. By reason of the impugned judgment, the High Court dismissed the Second Appeal preferred by the appellant, opining:

> "I am sorry to say that such submission on the part of the appellant cannot be accepted. A person can

be in possessory right in various ways i.e. licensee/tenant/permissible possession holder/ adverse possession holder/trespasser. But, the onus heavily lies with the tenant to prove in what capacity he is occupying the premises as the landlord is not in a position to claim any recovery of the possession as against him since there is no landlord and tenant relationship. In the instant case, the schedule land under the deed of gift and so-called agreement for sale are different. So far as the execution of Deed of gift is concerned, it has been sufficiently proved. So far as payment of rent is concerned, that has been stated in the cross-examination. The only failure is about the non-disclosure of the rent receipt. But, simply such statement will not develop the case of adverse possessory right of the tenant, which he has claimed now before the second appellate court. Therefore, when he is not claiming to be a tenant at best, he can claim as a licensee of the premises in question whereunder the title of the landlord has already been proved by virtue of the document. Therefore, such licensee is estopped from questioning the title of the landlord as per Section 116 of the Indian Evidence Act, 1872. Tenancy is not proved, therefore, he is not a tenant. He is not claiming to be the licensee although he could have, therefore, I cannot compel him to be licensee. The remaining, if any, is permissive occupation, which is as good as license. However, it is well settled that the permissible occupation cannot be regarded as adverse possessory right. Adverse possession is not proved. Therefore, the remaining capacity, if any, is trespasser. It is far to say that a trespasser can challenge the title of the landlord. Under such situation the presumption, which has been drawn by the lower appellate court is an appropriate presumption on that score."

10. A review application filed thereagainst by the appellant has also been dismissed by the High court.

Both the aforementioned orders are in question before us.

11. Mr.V. Prabhakar, learned counsel appearing on behalf of the appellant would contend:

i. No substantial questions of law having been formulated by the High Court, a jurisdictional error has been committed by it in passing the impugned judgment.

ii. The relationship of landlord and tenant and/or the licensor and licensee having not been proved, the High Court as also the First Appellate Court committed a serious error in passing the impugned judgment on the premise that the appellant was a trespasser.

12. Mr. R.K. Gupta, learned counsel appearing on behalf of the respondents, on the other hand, would support the impugned judgment, contending:

i. Even in a suit for eviction, the plaintiffs would be entitled to obtain a decree for possession relying on or on the basis of his title.

ii. In a suit for eviction, it is for the defendant to show that he has a right to remain on the tenanted premises either as a permanent tenant or otherwise.

13. The plaintiffs served a notice on the defendant under Section 106 of the Transfer of Property Act. Such notice evidently was served on the premise that the defendant – appellant was his tenant. He denied and disputed the same. The plaintiff in his plaint disclosed the cause of action for the suit having arisen on and from 1st October, 1990 from which date the monthly tenancy had ceased to exist. The plaintiff prayed for grant of mesne profits at the rate of Rs.3/- for each day for wrongful occupation of the premise as after the termination of tenancy the defendant was to be treated as a trespasser.

14. Paragraph 10 of the plaint reads as under:

> "10. That for the purpose of jurisdiction and court fee the value of this suit for prayer (A) is laid at Rs. (sic) For eviction a tentative court fee of

> Rs.100/- is paid for future mesne profits to a decree."

How much court fee was paid and on what basis has not been disclosed.

The reliefs prayed for by the plaintiffs are:

> "a) A decree for eviction of the defendant from the schedule premises, be passed against the defendants.
>
> b) A decree for mesne profits in case eviction is allowed, at the rate of Rs.3/- per day from (sic) be passed against the defendants as scheduled in schedule-II and III below and for future mesne profits uptil delivery of possession of suit property at the rate the court is pleased to order for which tentative court fee is paid at present."

15. It is not clear what amount of court fee was paid. Presumably, the court fee was paid of one year's rent that is calculated on the basis of twelve months' rent at the rate of Rs.45/- in terms of Section 7(xi)(cc) of the Court Fees' Act, 1870.

Section 4 of the Court Fees' Act, 1870 reads as under:

> "**4. Fees on documents filed, etc., in High Courts in their extraordinary jurisdiction;-** No document of any of the kinds specified in the First or Second Schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction; or in the exercise of its extraordinary original criminal jurisdiction;
>
> in their appellate jurisdiction; - or in the exercise of its jurisdiction as regards appeals from the judgments (other than judgments passed in the exercise of the ordinary original civil jurisdiction of the Court) of one or more Judges of the said Court, or of a division Court;
>
> or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence;
>
> as Courts of reference and revision. – or in the exercise of its jurisdiction as a Court of reference or revision'
>
> unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said Schedules as the proper fee for such document."

For obtaining a decree for recovery of possession, court fees are required to be paid in terms of Section 7(v) of the Court Fees' Act, 1870 i.e., according to the value of the subject matter of the suit.

16. We will have to proceed on the basis that whereas the plaintiff proved his title, the defendant could not. The learned trial judge has held that the defendant could not prove the agreement of sale.

The High Court formulated the following points in the form of question which are as under:

> "6. Have the plaintiffs landlord and tenant relationship with the defendant?
>
> 7. Have the plaintiffs served valid notice u/s 106 of the T.P. Act."

17. Was, in the aforementioned situation, a suit for recovery of possession maintainable is the question.

The landlord in a given case although may not be able to prove the relationship of landlord and tenant, but in the event he proves his general title, may obtain a decree on the basis thereof. But in a case of this nature, a defendant was entitled to raise a contention that he had acquired an indefeasible title by adverse possession.

In Radha Devi and Ors. v. Ajay Kumar Sinha [1998 (2) BLJR 1061], the Patna High Court accepted that a landlord is entitled to obtain a decree of

eviction on the basis of his general title, though he could not prove the relationship of landlord and tenant. It was opined:

> "…In other words, where there is relationship of landlord and tenant, order of eviction be passed on the existence of any one of the grounds mentioned in Section 11 of the said Act. It is, therefore, clear that proof of relationship of landlord and tenant gives right to a landlord to get an order of eviction under the provisions of the aforesaid Act…"

In Champa Lal Sharma v. Smt. Sunita Maitra [(1990) 1 BLJR 268], it was held:

> "It is also well settled that one such relationship is admitted or established, tenant would be estopped and precluded from challenging the title of the landlord and if he does so, under the general rule, make himself liable for eviction on that ground.
>
> It, therefore, logically follows that a finding of existence of relationship of landlord and tenant is a sine qua non for passing a decree for eviction against a tenant except in a case, as mentioned hereinbefore the plaintiff on payment of ad valorem Court fee may obtain a decree for eviction on the basis of his general title.
>
> *** *** ***

> It is, therefore, evident that the court has to ultimately decide the question as to whether the plaintiff in case his title is in dispute, would be entitled to withdraw the rent so deposited by the tenant or not. It, therefore, makes the position, in my opinion, absolutely clear that before the said question is decided finally so as to enable the court to come to a decision whether the plaintiff landlord is entitled to a decree for eviction or not must come to the finding that there exists a relationship of landlord and tenant by and between the plaintiff and the defendant, if such an issue is raised. In absence of any such finding the court will have no jurisdiction to pass a decree of evidence as against the defendant in such a suit."

[See also Deepak Kumar Verma and Ors. v. Ram Swarup Singh 1992 (1) BLJR 102]

A defendant as is well known may raise inconsistent pleas so long they are not mutually destructive.

In Gautam Sarup v. Leela Jetly and Ors. [(2008) 7 SCC 85], this Court held:

> "22. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may

> be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

An issue as to whether the defendant was a trespasser or not, thus, was required to be framed.

18. Mr. Gupta, however, would rely upon a decision of this Court in Bhagwati Prasad v. Shri Chandramaul [(1966) 2 SCR 286]. Gajendragadkar, C.J. therein was dealing with the rules of pleadings. It was opined that although the rules of pleadings should be adhered to; when parties go to the trial knowing fully well the points he is required to meet, the Court may not insist on the strict application thereof, stating:

> " When Mr. Setalvad was pressing his point about the prejudice to the defendant and the impropriety of the course adopted by the High Court in confirming the decree for ejectment on the ground of licence, we asked him whether he could suggest to us any other possible plea which the defendant could have taken if a licence was expressly pleaded by the plaintiff in the alternative. The only answer which Mr. Setalvad made was that in the absence of definite instructions, it would not be possible for him to suggest any such plea. In

our opinion, having regard to the pleas taken by the defendant in his written statement in clear and unambiguous language, only two issues could arise between the parties : is the defendant the tenant of the plaintiff, or is he holding the property as the licence subject to the terms specified by the written statement? In effect, the written statement pleaded licence, subject to the condition that the licence was to remain in possession until the amount spent by him was returned by the plaintiff. This latter plea has been rejected, while the admission about the permissive character of the defendant's possession remains. That is how the High Court has looked at the matter and we are unable to see any error of law in the approach by the High Court in dealing with it.

In support of its conclusion that in a case like the present a decree for ejectment can be passed in favour of the plaintiff, though the specific case of tenancy set up by him is not proved, the High Court has relied upon the two of its earlier Full Bench decisions. In Abdul Ghani v. Musammat Babni I.L.R. 25 All. 256 the Allahabad High Court took the view that in a case where the plaintiff asks for the ejectment of the defendant on the ground that the defendant is a tenant of the premises, a decree for ejectment can be passed even though tenancy is not proved, provided it is established that the possession of the defendant is that of a licensee. It is true that in that case, before giving effect to the finding that the defendant was a licensee, the High Court remanded the case, because it appeared to the High Court that that part of the case had not been clearly decided. But once the finding was returned that the defendant was in possession as a licensee, the High Court did not feel any difficulty in confirming the decree for

> ejectment, even though the plaintiff had originally claimed ejectment on the ground of tenancy and not specifically on the ground of licence. To the same effect is the decision of the Allahabad High Court in the case of Balmakund v. Dalu I.L.R. 25 All. 498"
>
> (Emphasis supplied).

The said decision itself is an authority for the proposition that it was necessary to bring on record some evidence that the defendant was a licensee and he could not have raised any other alternative plea. It was followed by a learned Single Judge of the Allahabad High Court in Shri Ram & Anr. vs. Smt. Kasturi Devi & Anr. [AIR 1984 Allahabad 66], stating:

> "15. Lastly, it was argued for the appellants that there is no relationship of landlord and tenant as between Smt. Kastoori Devi on the one hand and Sri Ram or Satya Pal. on the other. The trial court was of the view that no such relationship has been made out. This finding was, however, reversed by the lower appellate court and not without cogent basis. Sri Ram admits that one Desh Rai was the tenant in this part of the house who vacated. Sri Ram thereafter came in the said portion of the house. In cross-examination, he admitted also that it was agreed between him and Smt Kastoori Devi what would be treated as the rent for the said portion. Further the case of the appellants is that on January 20. 1970, Sri Ram got this portion allotted

> in his name. All these are pointers in the direction that there was relationship of landlord and tenant and not that Sri Ram has been residing in that portion of the house as licencee of Smt. Kastoori Devi. This apart the suit for eviction brought by Smt. Kastoori Devi against them does not fail even if it is assumed that there was no relationship of landlord or of tenant or that Sri Ram was in the position of a mere licensee. The licence has been determined by registered notice given by Smt. Kastoori Devi already. In the plaint. Smt. Kastoori Devi referred expressly to her title to the house by virtue of the will executed in her favour by the husband. The law is settled that even if Sri Ram was the licensee, Smt. Kastoori Devi can, on the basis of title claim eviction even though she has set up the case that there was the relationship of the landlord and tenant and assumed that the same is not established, vide Bhagwati Pd. v. Chandramaul AIR 1966 SC 735. Abdul Ghani v. Mst. Babni (1903) ILR 25 All 256 (FB) Bal Mukund v. Dalu (1903) ILR 25 All 498 (FB)."
>
> (Emphasis supplied)

19. Mr. Gupta would further rely upon a decision of the Calcutta High Court in Hajee Golam Hossain Ostagar vs. Sheik Abu Bakkar [AIR 1936 Calcutta 351] to contend that the defendant in a suit for ejectment was bound to show that he had a right to remain on a land permanently wherefor the onus would be on him. That case related to a agricultural tenancy. A simple tenancy can be terminated by service of notice under Section 106 of the

Transfer of Property Act. Once a valid notice is served, the tenant becomes trespasser.

The situation, however, has undergone a sea change after almost all the States have enacted the premises tenancy Acts governing the conditions of tenancy in respect of house premises. The State of West Bengal has also enacted the West Bengal Premises Tenancy Act, 1956.

In terms of the 1956 Act, the tenant upon termination of tenancy does not become a trespasser. He becomes a statutory tenant (loosely called).

When, however, a defendant is a trespasser and is sued as such, the situation would be totally different. Plaintiff must file a suit having regard to the cause of action thereof. The Court, in a given case, mould the relief having regard to the provisions of Order VII Rule 7 of the Code of Civil Procedure, but the said provision cannot be applied in a situation of this nature.

20. We, therefore, are of the opinion that it is not a case where by non framing of an issue as to whether the defendant – appellant was a trespasser or not he was not prejudiced. Had such an issue been framed he could have brought on record evidence to establish that he had the requisite animus

possidendi, particularly in view of the fact that it has been held by the courts below that he was not put in possession by the predecessor-in-interest of the plaintiffs in terms of an agreement for sale or otherwise. If he has not been able to prove the agreement, he could have taken the other plea, i.e., he has acquired indefeasible title by adverse possession. He is said to have been in possession of the suit premises for more than twelve years prior to the institution of the suit. The question as to whether he acquired title by adverse possession was a plausible plea. He, in fact, raised the same before the appellate court.

21. Submission before the First Appellate Court by the defendant that he had acquired title by adverse possession was merely argumentative in nature as neither there was a pleading nor there was an issue. The learned trial court had no occasion to go into the said question.

22. We, therefore, are of the opinion that in a case of this nature an issue was required to be framed. Furthermore, the High Court while determining the issues involved in the Second Appeal should have formulated questions of law.

In Dharam Singh vs. Karnail Singh & Ors. [(2008) 9 SCC 759], this Court held:

> "6. In response, learned Counsel for the respondents submitted that on considering the memorandum of appeal and the grounds indicated therein, the High Court had allowed the second appeal and, therefore, there was nothing wrong. It is stated that after considering the materials on record, the High Court had recorded its findings that the suit deserves to be dismissed.
>
> xxx xxx xxx
>
> 9. A perusal of the impugned judgment passed by the High Court does not show that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated. That being so, the judgment cannot be maintained.
>
> xxx xxx xxx
>
> 15. Under the circumstances, the impugned judgment is set aside, we remit the matter to the High Court so far as it relates to Second Appeal No. 285 of 2000 for disposal in accordance with law. The appeal is disposed of on the aforesaid terms with no order as to costs."

{See also Koppisetty Venkat Ratnam (D) through LRs. v. Pamarti Venkayamma [(2009) 4 SCC 244]}

23. However, we are of the opinion that keeping in view the peculiar facts and circumstances of this case and as the plaintiffs have filed the suit as far back in the year 1990, the interests of justice should be subserved if we in exercise of our jurisdiction under Article 142 of the Constitution of India issue the following directions with a view to do complete justice to the parties.

i. The plaintiffs may file an application for grant of leave to amend his plaint so as to enable him to pray for a decree for eviction of the defendant on the ground that he is a trespasser.

ii. For the aforementioned purpose, he shall pay the requisite court fee in terms of the provisions of the Court Fees Act.

iii. Such an application for grant of leave to amend the plaint as also requisite amount of court fees should be tendered within four weeks from date.

iv. The defendant – appellant would, in such an event, be entitled to file his additional written statement.

v. The learned trial judge shall frame an appropriate issue and the parties would be entitled to adduce any other or further evidence on such issue.

vi. All the evidences brought on record by the parties shall, however, be considered by the court for the purposes of disposal of the suit.

vii. The learned trial judge is directed to dispose of the suit as expeditiously as possible and preferably within 3 months from the date of filing of the application by the plaintiffs in terms of the aforementioned direction (i).

24. The appeals are allowed with the aforementioned directions. No costs.

……..……J.
[S.B. Sinha]

..……..……J.
[Deepak Verma]

New Delhi;
August 4, 2009