

**THE HIGH COURT OF TRIPURA
AGARTALA**

RSA No.23 of 2015

1. Shri Dhananjoy Chakraborty @ Babun,
son of late Arun Kumar Chakraborty,
care of New Reliable Watch Company,
Jamtala, Udaipur, P.O. & P.S. R.K. Pur,
District : South Tripura, now Gomati

2. Sri Panna Chakraborty, son of late Arun Kumar Chakraborty,
East Bank of Jagannath Dighi, Udaipur, Near the house of
Sri Raja Ghosh, P.O. & P.S. R.K. Pur,
District : South Tripura, now Gomati

3. Sri Dipak Chakraborty @ Buitta, son of late Arun Kumar
Chakraborty, care of New Reliable Watch Company, Jamtala,
Udaipur, P.O. & P.S. R.K. Pur,
District : South Tripura, now Gomati

4. Sri Manna Chakraborty, son of late Arun Kumar
Chakraborty, care of New Reliable Watch Company, Jamtala,
Udaipura, P.O. & P.S. R.K. Pur,
District : South Tripura, now Gomati

5. Smt. Rinku Chakraborty (Bhattacharjee) @ Tukku, wife of
Sri Pradip Bhattacharjee of North Badharghat, Milan Chakra,
Adarsha Pally, P.S. Amtali,
District : West Tripura

.....Defendant-Appellants

- Vs -

Shri Jadab Ch. Saha,
Son of late Raimohan Saha,
Resident of Village & P.O. Rajarbag,
Udaipur, P.S. R.K. Pur,
District : South Tripura, now Gomati

.....Plaintiff-Respondent

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellants : Mr. S. Deb, Sr. Advocate
Mr. Somik Deb, Advocate

For the respondent : Mr. A.K. Bhowmik, Sr. Adv.
Ms. A. Banik, Advocate

Date of hearing : 21.07.2016

Date of delivery of : 29.09.2016

Judgment and order
Whether fit for reporting : NO

Judgment and Order

This is an appeal under section 100 of the CPC from the reversal judgment dated 28.04.2015 delivered in T.A. No. 8/2013 by the District Judge, Gomati Judicial District, Udaipur.

2. At the time of admission, the following substantial questions of law was formulated by this court for hearing the appeal :

"Whether in absence of any notice to the appellants No. 5 under section 106 of Transfer of Property Act, 1882, the suit for ejectment as filed by the plaintiff-respondent is maintainable, having regard the admitted position that by the notice only, the plaintiff-respondent sought to terminate the lease ?"

The appellants were however, given liberty to raise any other substantial questions of law.

3. The essential fact to this appeal may be laid at the outset. The respondent herein, instituted a suit for ejectment of tenants and recovery of possession and arrears of rent with

compensation from the appellants. Hereinafter, the respondent and the appellants would respectively be referred to as the plaintiff and the defendants while making reference to the parties. The plaintiff purchased the suit land as described in the schedule of the plaint, by the registered sale deed No. 1-59 on 07.01.2008. The land was purchased from the legal heirs of the previous owner, Parimal Ranjan Chakraborty who had the title and possession of 0.015 acre of land , comprised in Khatian No. 2268 and plot No. 1470 and 0.006 acre of land comprised in Khatian no. 2268, plot No. 1522/3717.Parimal Ranjan Chakraborty purchased the said land by the registered sale deed No. 1-1628 dated 19.05.1986 and took delivery of possession from the previous owners, Manindra Ranjan Karmakar and Gopal Ch. Karmakar. The record of right was mutated in the name of Parimal Ranjan Chakraborty and was recorded as the holder of title in R.S. Khatian No. 491, new plot No. 3611 measuring 0.016 acre and plot No. 3612/9622 measuring 0.005 acre. Parimal Ranjan Chakraborty inducted one Badal Karmakar who was the owner and occupier of the commercial plot at the adjacent East as the tenant with effect from 25 kartika 1393 B.S. When Parimal Ranjan Chakraborty purchased the said land, the predecessor of the defendants, Arun Kr. Chakraborty was a tenant under Badal Karmakar and was running his watch business on the shop of Badal Karmakar. He continued his business till he shifted his business to the suit land as tenant with effect from 1st Baishak, 1402 B.S. Parimal Ranjan Chakraborty admittedly inducted Arun

Kr. Chakraborty as his monthly tenant on condition of paying rent at Rs. 300/- per month. After death of Arun Chakraborty on 04.01.2001, the defendants continued in the suit property as the "joint tenants".

4. The plaintiff's case is that the defendants through the defendant No. 1 paid a sum of Rs.1800/- as rent to Parimal Ranjan Chakraborty for a period of 6 months with effect from 1st Baishak, 1403 P.S. to the end of Asvin, 1403 B.S. at Rs. 300/- per month. When the plaintiff acquired the ownership of the said land, the defendants were requested to pay the arrear of rent but the defendants did not make such payment. The plaintiff thereafter by the notice dated 16.01.2008 [1st Magha, 1414 B.S.] under Section 106 of the Transfer of Property Act, 1882 determined the monthly tenancy in respect of the suit property. The defendants No. 1,3 and 4 were duly served and they received the notices prior to 1st Magha, 1414 B.S. corresponding to 13.02.2008. Notice on the defendant No. 2 could not be served as the other defendants could not say the whereabouts of the defendant No.2.

5. Since the defendants after determination of tenancy did not deliver the possession to the plaintiff, the plaintiff instituted the suit for purpose of their eviction, recovery of possession of the suit property, and realization of arrears of rent and compensation.

6. According to the defendants, the previous owners made a proposal to Arun Kr. Chakraborty for sale of the suit

land/premises and the consideration money was settled. Arun Kr. Chakraborty paid to the previous owners a sum of Rs. 10,000/- and the possession of the suit property was handed over to Arun Kr. Chakraborty but later on the previous owners stated that they would not execute and register any sale deed unless an additional amount of Rs. 20,000/- be paid beyond the settled amount of Rs.30,000/-. Though the previous owner expressed his willingness to return their money as paid thereafter to them by Arun Kr. Chakraborty. The suit land was purchased by Parimal Ranjan Chakraborty and he requested him to vacate the suit premises but Arun Kr. Chakraborty did not hand over the possession and had been possessing the suit property adversely and continuously denying the right, title and interest. On 03.04.1993, Arun Kr. Chakraborty handed over the entire business along with the possession of the suit land to his son, the defendant No.3, Dipak Chakraborty. By prescription, the right to recover the suit land has been extinguished and hence the suit cannot be decreed. Initially the defendant No.5 was not added as the party, but later on by way of amendment, she was impleaded. Since after receipt of summons she did not participate the suit proceeded against her ex parte by the order dated 16.11.2009.

7. The following issues were framed by the trial court for adjudication of the suit :

1. Has the plaintiff cause of action behind this suit ?

2. Whether Sri Arun Kr. Chakraborty (now deceased) the predecessor in interest of defendants was the monthly tenant of Parimal Ranjan Chakraborty the original owner of suit premises

and if so, whether defendants after the death of their father continued to be in the same status ?

3. Whether the purchase deed of plaintiff vide No. 1-59 dated 7.1.2008 in reference to the suit premises is valid or not ?

4. Whether the defendant No. 3 has perfected his right, title and interest on the suit property by way of adverse possession ?

5. Whether the plaintiff is entitled to get decree as prayed for ?

6. What other relief /reliefs the plaintiff is entitled ?"

8. On recording and appreciating the evidence, the trial court [the court of Civil Judge, Jr. Division, Udaipur, South Tripura] by its judgment dated 29.04.2013 in the suit [T.S. 07/2008] returned its finding that Arun Kr. Chakraborty was never the tenant of Parimal Ranjan Chakraborty as there is no such document to prove such tenancy though one rent receipt [Exbt.1] has been admitted in the evidence. But the claim of adverse possession by the defendants has been discarded by the trial court despite acknowledging the possession of the defendants. The said judgment dated 29.04.2013 was challenged by the plaintiff by filing an appeal under section 96 of the C.P.C. being T.A. 08/2013 in the court of the District Judge, South Tripura, Udaipur, [as it then was]. By the impugned judgment, the said appeal was allowed. In the judgment dated 28.04.2015 it has been observed as under :

"Here in the instant case, defendant No. 3 was a tenant in the suit premises and in course of time he stopped the payment of rent and the plaintiff-appellant gave him notice for payment of arrear rent. When it was not paid then the suit is filed for eviction. Defendant-respondents contended that they acquired right, title and interest in the suit property by way of adverse possession. By giving additional evidence in this case the plaintiff-appellant proved that suit land was purchased by Parimal Rn. Chakraborty from Gopal Karmakar and Manindra

Karmakar by registered sale deed vide No. 1-1628 and those were executed in the year 1986 and on the strength of those deeds Parimal Rn. Chakraborty acquired right , title and interest and his legal heirs got that property on inheritance which is not challenged. Therefore, on careful scrutiny of the evidence on record, it is established that the plaintiff-appellant acquired the right, title and interest over the suit property on the strength of sale deed on 7.1.2008 and on his title possession also established. Evidence on record failed to establish that defendant No.3 perfected his right, title and interest over the suit property by way of adverse possession. Learned Civil Judge, Junior Division failed to decide the issue No. 3 properly but decided the issue No. 4 rightly."

9. Based on the said observation the appellate court has declared by the impugned judgment that the plaintiff is entitled to get the decree of eviction of the defendants from the suit land/premises and to get arrears of rent amounting to Rs. 10,800/- but no other relief as prayed, has allowed by the first appellate court. It is to be noted that the plaintiff filed a petition under Order 41, Rule 27 of the CPC for accepting some additional documents i.e. the original sale deed and khatian in the name of the previous owner in the evidence. By the order dated 22.02.2014 [in T.A. 08/2013] the said prayer for additional evidence was allowed.

10. The defendants being aggrieved challenged the said order dated 22.02.2014 by filing a petition under Article 227 of the Constitution of India being CRP 21/2014 in this court. But the said challenge was turned down by the High Court by its judgment and order 03.07.2014 observing that it would not exercise its jurisdiction to interfere with the order dated 22.02.2014. However it has been observed that admissibility of the additional evidence

should only be considered at the time of final hearing. A copy of the said order dated 03.07.2014 is available in the LCRs.

11. Mr. S. Deb, learned senior counsel appearing for the appellants [the defendants] even though initially had raised objections on admissibility of the additional evidence, but when he was confronted with the judgment and order dated 03.07.2014 delivered in CRP No. 21/2014 he had recalled all those objections. According to Mr. Deb, learned senior counsel since the notice under Section 106 of the T.P. Act was not served on the defendant No. 5, the suit was not maintainable against her for ejectment. Mr. Deb, learned senior counsel has further contended that the tenancy was a joint tenancy. The defendant No. 3 was in possession. Mr. Deb, learned senior counsel has fairly submitted that the defendant no. 3 did receive the notice along with other two defendants. Further he has conceded that the defendants did not carry out any appeal or any other action against the concurrent finding refusing their claim of adverse possession.

12. Mr. A.K. Bhowmik, learned senior counsel appearing for the respondent [the plaintiff] has submitted that the defendant No.5 [the appellant No. 5 herein] did neither appear to contest the suit nor did she appear in the appeal. Having referred to a part of Para-13.vii of the written statement filed by the defendants no. 2,3 and 4, he has contended that the defendants other than the defendant No. 3 had no right in the tenancy as they have clearly waived their right by asserting as under :

"All on sudden in the month of December 1993 said Arun Kr. Chakraborty became seriously ill and due to his illness, he became unable to run his business. So on 03.04.1993 he provided defendant No.3 solely in the said business in place of him, considering his sincerity and honesty in business and Arun Kr. Chakraborty on 03.04.1993 handed over the entire business along with the possession of the suit premises in favour of defendant No. 3, in presence of his other sons and daughter."

[Emphasis added]

13. That apart, Mr. Bhowmik, learned senior counsel has referred to the deposition of the witnesses particularly of PW-4, Smt. Chameli Chakraborty, wife of late Parimal Chakraborty who has categorically stated as under :

"On 20.07.2010 I have submitted my evidence in chief on affidavit. I am acquainted with signature of Parimal Chakraborty. Witness identified Exbt. 1/1, 12/2 & 13/2, I also know the signature of Dhananjoy Chakraborty my nephew. Accordingly the signature of Dhananjoy Chakraborty in Exbt. 1 is hereby marked Exbt. 1/2 . On 13th August , 2007 myself, my sons namely Sourav Chakraborty and Gourav Chakraborty and daughter Shilpi Chakraborty executed a registered power of Attorney in favour of Kanu Chakraborty. Witness identified Exbt. 3 and also identified the signatures of Sourav Chakraborty, Gourav Chakraborty and Shilpi Chakraborty which was accordingly marked as Exbt. 5/1, 5/2, & 5/3 respectively. Witness also identified her signatures in every page of that Power of Attorney which are accordingly marked as Exbt. 5/4 series."

Thus Mr. Bhowmik learned senior counsel appearing for the respondents in this appeal has submitted that the creation and continuance of the tenancy has been substantially proved by the plaintiff. By raising the plea of adverse of possession, the defendants have acceded that they were defaulting in payment of the monthly rent. Thus, there is no infirmity in the finding returned by the first appellate court.

14. For appreciating the rival contentions, this court has scrutinized the records and found that on 16.11.2009 the following order was passed by the trial court :

"Plaintiff is present through his Ld. Advocate.

Process issued upon the deftd. No. 5 (newly added) returned after proper service, but she did not appear.

Hence, suit shall proceed ex-parte against her.

All other defdts. are present through their Ld. Advocate Mr. S.K. Bhattacharjee."

15. It does not appear that the defendant No. 5 ever made any attempt by approaching the trial court to get the said order recalled or set aside. Further, there had been no attempt by any defendant to contest the statement made in Para -13.vii of the written statement filed by the defendants No. 2,3 and 4 stating that Arun Kr. Chakraborty 'provided defendant No. 3 solely in the said business in place of him, considering his sincerity and honesty in business and Arun Kr. Chakraborty on 03.04.1993 handed over the entire business along with the possession of the suit premises in favour of defendant No. 3 in presence of other sons and daughter.' In view of this, if it is proved by the plaintiff that he has taken notice under Section 106 of the T.P. Act on the defendant No. 3 only, the requirement of notice is to be held totally satisfied. The finding in respect of the tenancy is squarely supported by the cogent evidence. Even one of the LRs of late Parimal Ranjan Chakraborty, has clearly stated that the rent receipt Exbt. 1 is signed by the defendant No. 1. Thus, the defendants, according to

this court, are estopped to raise any plea which is beyond the province of tenancy or its determination.

16. Having held so, the judgment of the first appellate court is affirmed and the appeal being bereft of substance is dismissed.

Draw the decree accordingly.

Send down the LCRs thereafter.

The stay order passed on 09.10.2015 in I.A. 390/2015 [in RSA 23 of 2015] stands vacated.

JUDGE

Sabyasachi. B