

Joy Nath Goala and Others

Vs

Bhabani Prasad Choudhary and Others

Civil Appeal No. 1829 of 1997

(K. Ramaswamy, G. T. Nanavati JJ)

03.03.1997

ORDER

1. Delay condoned.
2. Leave granted. We have heard the counsel on both sides.
3. This appeal by special leave arises from the judgment of the Guwahati High Court, made on 29-11-1990 in Second Appeal No. 34 of 1983.
4. The admitted position is that one Susil Goala, the predecessor-in-interest of the appellants in respect of the property in question had purchased the same on 8-5-1946. The further admitted position is that in a suit for eviction initiated in the year 1947 a compromise decree came to be made on 26-1-1948 under which the respondents who were tenants in the property had undertaken to vacate the premises after expiry of three years. The period had expired on 25-1-1951 but the respondents did not surrender possession of the premises. Consequently, after eviction notice was given in the year 1977, the suit for declaration of title to and ejection of the respondents from the premises was sought and after trial, the trial court decreed the suit and on appeal it was confirmed. But in second appeal, the learned Judge reversed the decree and dismissed the suit on the finding that one Bhuban Choudhury was the co-tenant with the respondents and he was not made a party to the suit; as a consequence, the suit was bad for non-joinder of the necessary party. The High Court has also found that the appellants had been in possession for not more than 12 years and that, therefore, the suit is not maintainable. Thus this appeal, by special leave.
5. We find force in the contention of Shri N. R. Choudhury, learned counsel for the appellants, that the view taken by the High Court is wholly incorrect. As regards the first point, Bhuban Choudhury was a tenant at one point of time and, in fact, in the prior suit filed in 1947, he had not claimed any interest and had remained only the pro forma defendant to the suit and the respondents had suffered consent decree. It was also an admitted position that the suit was filed against the respondents and not against Bhuban Choudhury who disclaimed interest. In the cross-examination of the appellant it has been suggested that : "I do not know where Bhuban Choudhury is. After getting written statement I did not make enquiry about Bhuban Choudhury. " This suggestion amounts to an implied admission that Bhuban Choudhury was not residing in the premises in question. It clearly appears that Bhuban Choudhury was not claiming any interest as a licensee under the compromise decree, dated 26-1-1948 nor was he in possession of the suit premises. As a consequence, the omission to implead Bhuban Choudhury was of no consequence and the suit was not bad for non-joinder of necessary parties.

6. It is seen that the respondents have not pleaded adverse possession in a the pleadings nor has an issue been raised in that behalf. When the appellants claimed their title to the property on the basis of the sale deed, unless the respondents establish by evidence aliunde by pleading adverse possession and proof of disclaimer of their right in their possession as licensees asserting their own right to remain in possession disclaiming the title of the appellant, the question of adverse possession would not arise. It was neither pleaded as an issue nor has any finding been recorded by the courts below. The High Court was clearly in error in recording the finding that the appellants had not proved that the respondents were not in possession of the property adverse to the appellants' right. Therefore, the question of adverse possession of the respondents does not arise.

7. Under these circumstances, it is contended for the appellants by Shri Sanyal, the learned Senior Counsel, that under the Assam Non- Agricultural Urban Areas Tenancy Act, 1955, the respondents cannot be ejected as they are the tenants of the premises. Even this sifting stand has no firm foothold and has become slippery and stands no scrutiny. It is seen that by application of Section 5 of the Act, with a non obstante clause, if a person comes into possession as a tenant 5 years prior to the Act coming into force and constructs the house on the land with the permission of the landlord, the tenant cannot be ejected except in accordance with the provisions of the Act. Section 5 of the Act, therefore, has no application to the facts in this case. It is not the case of the respondents that they are continuing to pay the rent or that they have within five years of the coming into force of the Act, obtained permission and constructed the building. On the facts in this case, it is seen that they have been in possession prior to 1946. After the term in the consent decree expired, they have remained in unlawful possession without any right or interest in the property.

8. Once the tenancy has been terminated by a compromise decree, they cannot claim their continuance as tenants unless there is a further agreement between the landlord and tenant, after the decree. That is not the case of the respondents. Therefore, the Act is clearly inapplicable to the fact-situation.

9. The appeal is accordingly allowed. The judgment and decree of the High Court stand set aside and that of the trial court and appellate court stand confirmed. No costs.