**(2012) 12 CAL CK 0001**

**Calcutta High Court**

**Case No:** S.A. No. 56 of 2010

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| Dilip Kumar Kundu | | APPELLANT |
| | Vs | |
| Gobinda Prosad Bhattacharya | | RESPONDENT |

**Date of Decision:** Dec. 20, 2012

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 108, 108(m), 108(p)
- West Bengal Premises Tenancy Act, 1956 - Section 13(1)(b), 17(4), 34, 35

**Hon'ble Judges:** Tarun Kumar Gupta, J

**Bench:** Single Bench

**Advocate:** Tapabrata Chakraborty, Mr. Kumaresh Dalal and Mr. Abhijit Basu, for the Appellant; Sabyasachi Bhattacharyya and Mr. Suman Ghosh, for the Respondent

**Final Decision:** Allowed

**Judgement**

Tarun Kumar Gupta, J.

This appeal arises out of a judgment and decree dated 18th November, 2008 passed by the learned Additional District Judge, Fast Track Court-II, Krishna Nagar, Nadia in Title Appeal No. 20 of 2006 reversing the judgment dated 29th July, 2005 and decree thereof passed by the learned Civil Judge (Junior Division), Nabadwip, Nadia in Title Suit No. 110 of 2001. The respondent as plaintiff files a suit for eviction against the appellant/tenant on the grounds of default, damage and violation of conditions of clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act. According to the plaintiff, the defendant was a tenant under the plaintiff at a rental of Rs. 14/- per month payable according to Bengali calendar month and he defaulted in payment of rent since Poush 1394 B.S. It is further case that the defendant illegally converted the service privy into a pour flash privy by illegally blocking the passage of the plaintiff landlord and also raised a tin shed room on the roof of said tenanted portion without any authority. Accordingly, the plaintiff landlord filed a suit for eviction after serving statutory notice upon the defendant tenant.

2. The appellant/defendant tenant contested the said suit by filing written statement denying material allegations of the plaint. It is contended, inter alia, that as the suit premises is situated in a low area which is flooded not only by flood water but also by rain water, the defendant was compelled to raise a tin shed temporary structure in the roof of the suit premises for shelter of his family members during rainy season. It is further alleged that service privy was converted into pour flash privy as per direction of the Nabadwip Municipality within the knowledge of the plaintiff landlord.

3. Learned trial court framed several issues including an issue as to whether the defendant was defaulter and whether the plaintiff landlord was entitled to get a decree of eviction on the grounds as alleged in the plaint. Learned trial court after contested hearing dismissed the suit for eviction by observing that the plaintiff failed to make out any case of causing damage by raising permanent structure by the defendant tenant. Learned trial court also granted protection to the defendant tenant against the eviction on the ground of default u/s 17(4) of the West Bengal Premises Tenancy Act. Learned trial court further held that the structure on the roof was nothing but temporary in nature and that it cannot be said to be a permanent in nature calling for eviction of the defendant tenant.

4. However, in the appeal preferred by the plaintiff landlord, learned lower appellate court set aside the judgment of the learned trial court and decreed the eviction suit on the ground that the conversion of the service latrine into pour flash privy and construction of the room on the roof of the tenanted portion were not found to be made with consent, not to speak of written consent of the landlord and hence the defendant tenant was guilty of violation of clauses (m), (o) and (p) of Section 108 of Transfer of Property Act and was liable to be evicted on that score.

5. The defendant tenant has filed the second appeal. The following substantial questions of law were formulated for hearing of the second appeal:-

(i) Whether the learned court of appeal below committed substantial error of law in treating the action of the appellant in making construction of a pour flash privy as violative of clause (m), (o) and (p) of Section 108 of the Transfer of Property Act when, in the earlier suit, the appellate court has directed demolition of such privy with further direction upon the respondent to construct a sanitary privy in accordance with the Municipal Rules within a specified period?

(ii) Whether the learned court of appeal below committed substantial error of law in overlooking the fact that a landlord cannot take advantage of his own wrong by not complying with the mandate of Municipality by demolition of service privy and constructing sanitary privy in lieu thereof which was complied with by the tenant without taking permission of the landlord?

(iii) Whether the learned lower appellate court substantially erred in law by treating the construction made by the defendant in the roof with tin shed as a permanent construction

to attract Section 108(m), (o) and (p) of the Transfer of Property Act?

6. Mr. Tapabrata Chakraborty, learned counsel for the appellant tenant, submits that learned Lower Appellate Court passed a decree of eviction by holding that the conversion of the service latrine into pour flash privy and construction of a tin shed room on the roof of the tenanted portion amounted to erection of permanent structures on the suit property. According to him, it came out from the evidence on record that as the suit premises was situated in a low area at Nabadwip and it was flooded even during rainy season, the appellant tenant was compelled to erect a temporary structure with tin shed on the roof of his ground floor tenanted portion for protection of his family members. He submits that it cannot be said to be a structure of permanent nature. In support of his contention he refers case laws reported in Dayanand Gupta Vs. Gobind Lall Bangur and Others, and Edmuond Francis Heberlet and Another Vs. Mustt. Fatima Khatoon and Others,

7. He next submits that the present respondent landlord earlier filed a suit being Title Suit No. 160 of 1994 against this appellant tenant for demolition of the pour flash privy constructed by the tenant with the assistance of the Nabadwip municipality in place of service privy and that learned Trial Court decreed said suit permitting the defendant to retain said pour flash privy for a period of five months and to get the lawful opportunity to have service supplied according to law. He next submits that there was an appeal against said judgment being Title Appeal No. 114 of 1997 and that though the appeal was dismissed but there was a direction upon the landlord to arrange for construction of a sanitary latrine in place of pour flash privy in the suit premises within six months on demolition of the pour flash privy. He submits that though there was a direction upon the landlord but the landlord did not take any step to comply said order of the learned Lower Appellate Court. According to him, service privy is not only a source of health hazard but also a slap on the human dignity and so the municipalities took programmee of converting said service privy into pour flash privy/sanitary privy on receipt of token amount from owner/occupier of the premises. According to him, conversion of said service privy into pour flash privy by the tenant even against the objection of the landlord cannot be treated to be a valid ground for eviction.

8. Mr. Sabyasachi Bhattacharyya, learned counsel for the respondent landlord, on the other hand, submits that though there was no evidence that the walls of the structure made by the tenant in the room of the suit premises were made of concrete but from the evidence of the appellant tenant it was clear that he made said construction for giving the same a permanent status and hence it should be deemed to be a structure of permanent nature.

9. He next submits that the appellant tenant could have moved the Rent Controller u/s 34 and/or 35 of the West Bengal Premises Tenancy Act, 1956 for conversion of the service privy into pour flash privy. According to him, without resorting to the legal provisions he illegally converted the service privy into pour flash privy at his risk and that it amounted to construction of a permanent structure without consent of the landlord to attract violation of

Section 108(p) of the Transfer of Property Act which is a valid ground of eviction u/s 13(1)(b) of the West Bengal Premises Act, 1956.

10. There is no denial that the dispute was going on between the appellant tenant and the respondent landlord over conversion of the service privy into pour flash privy by the tenant and that Title Suit being No. 160 of 1994 was filed by the landlord on that score. The judgment of said suit was marked Ext. 2. Against the decree of mandatory injunction passed in said suit, the tenant preferred an appeal being Title Appeal No. 114 of 1997. It appears from the judgment of said appellate court that though the appeal was dismissed but a direction was given upon the landlord to arrange for construction of a sanitary latrine in place of the pour flash privy in the suit premises within six months on demolition of the same. Admittedly, the landlord did not comply with said order of the Lower Appellate Court. It is true that the tenant did not put said decree of Lower Appellate Court into execution to compel the landlord to construct a sanitary latrine in place of pour flash privy. But it came out from the evidence on record that as landlord refused to give the permission for said conversion, the tenant informed the municipality about said refusal of permission by the landlord and that the municipality in terms of the scheme of conversion of service privy into pour flash privy arranged for said conversion. This came out from the judgment of said Title Suit No. 160 of 1994 (Ext. 2). It is true that the defendant tenant could have approached the Rent Controller u/s 34 and/or 35 of the Act of 1956 for said conversion of service privy into pour flash privy. In the absence of taking such steps at least theoretically the plaintiff landlord had a right to file an eviction suit u/s 13(1)(b) of the West Bengal Premises Tenancy Act of 1956 for raising a permanent structure namely construction of pour flash privy in place of service privy without obtaining consent from the landlord. But there was a move from the side of the municipalities for abolition of service privy and introduction of sanitary latrine/pour flash privy in its place. Said move was taken mainly for two purposes. The first one was from the sanitary point of view as continuation of service privy was a health hazard not only to the users but also to the close neighbours. The second one was from the social point of view as continuation of the service privy was an insult to the human dignity. In the backdrop of this scenario we have to judge whether the present act of the appellant tenant of replacing service privy by a pour flash privy with the assistance of the local municipality but without obtaining any consent from his landlord amounted to erection of a permanent structure thereby being liable to be evicted for violation of Section 108(p) of Transfer of Property Act in terms of Section 13(1)(b) of the act of 1956. A sense of proportion in social assessment is of the judicial essence. The irresistible inference despite the ingenious argument to the contrary is that the provision of Section 13(1)(b) of the Act of 1956 should not be applied for said conversion of the service privy into a pour flash privy in response to a scheme of the local municipality.

11. However, I make it clear that the aforesaid construction cannot and should not be equated with any other work of construction of permanent nature by the tenant in the suit premises.

12. Admittedly, the appellant tenant constructed a tin shed structure on the roof of his tenanted premises on the ground of taking shelter thereunder during flood time. Now the question is whether said tin shed room can be branded as a permanent structure within the meaning of Section 108(p) of the Transfer of Property Act. In the case laws of Dayanand Gupta (supra) and Mustt. Fatima Khatoon (supra) the Division Bench of this Court elaborately discussed after referring various case laws as to which structures can be said to be of permanent nature. It was held therein that in order to hold structure being a permanent one it must be of such a character that it cannot be removed without damaging and/or impairing substantially any portion of the demise premises. It was further held that unless those conditions are satisfied it cannot be said to be a structure of permanent nature. In the case in hand, I have already stated that there is no evidence to show that the walls of said tin shed room were made of bricks or that those were erected in such a manner that they cannot be removed without damaging the other part of the structure. If that be the position then said tin shed room cannot be said to be a structure of permanent nature attracting the wrath of Section 108(p) of the Transfer of Property Act. It appears that learned Lower Appellate Court failed to take note of the salient features which constitute a structure to be a structure of permanent nature and accordingly came to a palpable wrong decision.

13. Accordingly, I find and hold that the impugned judgment and decree of eviction passed by learned Lower Appellate Court is not sustainable in law in the backdrop of the peculiar facts and circumstances of this case.

14. As a result, the appeal is hereby allowed on contest. The impugned judgment and decree of eviction passed by learned Lower Appellate Court are hereby set aside.

15. However, I pass no order as to costs.

16. Send down Lower Court records along with a copy of this judgment to the Lower Court at the earliest. Urgent photostat certified copy of this judgment be supplied to learned counsels of the parties, if applied for.