

Sri Dilip Kumar Barman Vs Sri Bhaskar Roy and Another

Court: Calcutta High Court

Date of Decision: Dec. 20, 2012

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 41 Rule 27, Order 41 Rule 27(1)(b), 100 West Bengal Premises Tenancy Act, 1956 – Section 13(1)(h), 13(4), 13(6)

Hon'ble Judges: Tarun Kumar Gupta, J

Bench: Single Bench

Advocate: S.P. Roychowdhury, Mr. Jiban Ratan Chatterjee, Mr. Hiranmoy Bhattacharya and Mr. D. Chowdhury, for the Appellant; P.K. Das, Aniruddha Chatterjee, P.C. Paul Chowdhury and Mr. S. Chowdhury, for the Respondent

Final Decision: Dismissed

Judgement

Tarun Kumar Gupta, J.

The defendant/tenant is the appellant against this judgment affirming an ejectment decree passed by learned Trial

Court. Original plaintiff Smt. Aparna Roy filed a suit being Title Suit No. 367 of 1996 in the Court of learned Civil Judge (Senior Division), 2nd

Court, Sealdah praying eviction and recovery of khas possession of the suit premises against the defendant/tenant, on the grounds of unauthorized

change of user of the suit premises from residence to business purpose, violation of Section (M), (O) and (P) of the Transfer of Property Act by

illegal permanent construction without written consent of the plaintiff and also for reasonable requirement of the same for use and occupation of

original plaintiff and her family members including her married daughter. Said suit was filed after giving a statutory notice u/s 13(6) of the West

Bengal Premises Tenancy Act, 1956.

2. The defendant contested said suit by filing a written statement denying material allegations of the plaint. It was contended inter alia that with the

consent of the landlord he started to use the address of the suit premises as a mailing address of his business under the name and style M/s. Banani

Properties and for that purpose he used to pay an amount of Rs. 450/- per month extra to the plaintiff. He denied the other allegations and prayed

for dismissal of the suit with cost.

3. Learned Trial Court framed several issues. Both parties adduced evidence, both oral and documentary. Learned Trial Court after contested

hearing decreed the suit and passed a decree of eviction on the ground of reasonable requirement of the suit premises by the original plaintiff and

her family members and also for using the suit premises by the defendant tenant other than the purpose for which it was let out by a judgment dated

31st of March, 2004.

4. The defendant/tenant preferred an appeal being Title Appeal No. 50 of 2004 and learned Additional District Judge, Fast Track Court, 3rd

Court at Sealdah dismissed said appeal after concurring with the aforesaid findings of learned Trial Court. Hence, is this second appeal at the

instance of the defendant tenant. This second appeal was admitted by the learned Division Bench on the following substantial questions of law.

I. Whether the learned Court of appeal below committed substantial error of law in affirming the Decree of eviction on the ground of reasonable

requirement without considering the case of partial eviction in terms of Section 13(4) of the West Bengal Premises Tenancy Act;

II. Whether the learned Court of appeal below committed substantial error of law in not taking into consideration the fact that after the death of the

original plaintiff there being no further amendment of plaint, requirement of the substituted plaintiffs as per the original case can be fully satisfied

from the accommodation available to the plaintiffs themselves;

III. Whether the learned Court of appeal below committed substantial error of law in passing a decree on the ground that the defendant had

converted the property for business purpose, merely because the address was used for the purpose of communication to the defendant for his

business;

IV. Whether in the absence of any evidence showing that any actual business was carried on in the property, the learned Courts below committed

substantial error of law in passing a decree for eviction on the ground of using the property for other than residential purpose, merely because the

address of the defendant was used for the purpose of his business.

5. During pendency of this second appeal the appellant/tenant filed an application being CAN No. 5676 of 2011 praying for permission to

produce some documents by way of additional evidence. The appellant/tenant also filed an application being CAN No. 5678 of 2011 praying for

taking note of some subsequent events as well as an application for amendment of written statement being CAN No. 5677 of 2011. At the prayer

of learned counsel for the appellant/tenant said application for amendment of written statement being CAN No. 5677 of 2011 was taken up for

hearing and was rejected on contest vide Order dated 8th December, 2011. However, other two applications stated above were heard along with

the main appeal.

6. The appellant tenant has filed the application being CAN No. 5678 of 2011 praying to take note of some subsequent events as stated in para 8

of said application. According to said application after death of the original plaintiff (Aparna Roy) her only son Bhaskar Roy (respondent No. 1) is

residing in the suit building with his wife. It is further case that the elder daughter of Mr. Bhaskar Roy has been married and is residing elsewhere

with her husband. It is further case that the younger daughter of Mr. Bhaskar Roy is also residing outside West Bengal and that the daughter of

original plaintiff namely Rangana Roy alias Sen (respondent No. 2) is residing in United Kingdom along with her husband and children and that she

has no intention to return to Kolkata for residing in the suit building. On account of the death of original plaintiff Aparna Roy the plaintiffs do not

require Thakur Ghar and that present available accommodation of the substituted plaintiffs is sufficient to cater their need.

7. The respondent landlords have, however, filed an affidavit in opposition denying those allegations and asserting inter alia that the respondent No.

1 Rangana Roy visits the suit house with her family members at least thrice a year and stays in the suit house. It is further alleged that though

Ujjayantee Moitra, the elder daughter of respondent No. 1 has since been married in 2006 and presently resides at Kasba but she often stays along

with her parents when her husband remains out of station in connection with his duties. It is further stated that the younger daughter Oisha Roy

studies in M.S. University Baroda and often visits there for her academic commitments but resides in the suit house. It is further submitted that the

requirement of the landlord did not diminish on the ground of those alleged subsequent events.

8. The appellant tenant has, however, filed an affidavit in reply denying the averments made in the affidavit in opposition.

9. The appellant tenant has filed said application being CAN No. 5676 of 2011 praying the leave of the Court for production of additional

evidence. The appellant petitioner has referred to several documents, the nature of which has been described in para 9 of said application and

xerox thereof was annexed with said application. According to the appellant petitioner those documents will go a long way to show that the

appellant tenant along with his family members is residing in the suit premises and that those documents could not be produced earlier in spite of

due diligence when the decree appealed against was passed. The respondent O.P.s. have filed an affidavit in opposition denying material

allegations of the application and contending inter alia that production of those documents are not required for the purpose of disposal of the

appeal and that the requirements under Order 41 Rule 27 of the CPC have not been complied and hence said application is liable to be dismissed.

10. As usual the appellant petitioner has filed an affidavit in reply denying the allegations made in the affidavit in opposition and further supporting

his assertions in the original application.

11. Mr. S.P. Roychowdhury, learned senior counsel appearing for the appellant tenant, submits that after death of the original plaintiff Aparna Roy

the substituted plaintiffs did not make any amendment in the plaint to justify requirement of the suit premises for their own use and occupation after

said change of circumstances. He further submits that after death of the original plaintiff his daughter was substituted as one of the plaintiffs but did

not state that she requires any room in the suit house for her occupation. Mr. Roychowdhury further submits that an appeal is a continuation of the

suit and that the landlord must show that not only at the time of initiation of the suit but also at the time of passing of the decree in the last court the

requirement of the suit premises was subsisting. In support of his contention he refers a case law reported in Hasmat Rai and Another Vs.

Raghunath Prasad, He further submits that subsequent events having bearing on the final outcome of the suit should be brought on record by

amendment of pleadings. In this connection he refers case laws reported in B. Banerjee Vs. Smt. Anita Pan, and Om Prakash Gupta Vs. Ranbir B.

Goyal, He further submits that no amount of evidence can be looked into upon a plea which was never put forth in the pleadings. In this connection

he refers case laws reported in Smt. Chander Kali Bai and Others Vs. Shri Jagdish Singh Thakur and Another, and AIR 1930 57 (Privy Council) .

According to Mr. Roychowdhury after death of the original plaintiff Aparna Roy plaintiffs do not require either a bedroom or a Thakur Ghar or a

Veg kitchen for her exclusive use. He further submits that in absence of any specific evidence preceded by amendment of pleadings that elder

daughter of respondent No. 1 is still staying off and on in the suit house even after marriage or that the younger daughter of the respondent No. 1

was still requiring a room for her tuition, the court should not consider those alleged requirements which were projected earlier. According to Mr.

Roychowdhury seven rooms other than one covered space with the size of 20 ft. 8 inches X 6 ft. and two bath and privies are more than sufficient

to cater the present requirements of the respondent landlords.

12. Mr. P.K. Das, learned senior counsel appearing for the respondent landlords, on the other hand, submits that after the 1976 amendment the

scope of Section 100 of the CPC has been drastically curtailed and narrowed down. According to him, High Court can interfere u/s 100 of the

CPC only in a case where substantial question of laws are involved. According to him, there is no scope of reappreciating evidence and interfering

with finding of fact of the learned Courts below unless it can be shown the same was contrary to law or that it was based on no evidence at all or

was perverse. In support of his contention he refers case laws reported in Gurdev Kaur and Others Vs. Kaki and Others, , Mattulal Vs. Radhe

Lal, and Smt. Krishnawati Vs. Shri Hans Raj,

13. He next submits that the connotation of the term ""need"" or ""requirement"" should not be artificially extended nor its language so unduly stretched

or strained so as to make it impossible or extremely difficult for the landlord to get a decree for eviction. He further submits that once it is proved

by landlord that the suit accommodation was required bona fide by him for his and his family members" use and occupation and as such

satisfaction withstands the test of objective assessment by the court of facts then choosing of the accommodation which would be reasonable to

satisfy such requirement has to be left to the subjective choice of the needy. The court cannot thrust its own choice upon the needy.

14. In this connection he refers case laws reported in Mst. Bega Begum and Others Vs. Abdul Ahad Khan (Dead) by Lrs. and Others,

Akhileshwar Kumar and Others Vs. Mustaqim and Others, and M.L. Prabhakar Vs. Rajiv Singal,

15. He next submits that if the law permitted the eviction of the tenant for the requirement of the landlord ""for occupation as a residence for himself

and members of his family"" then the requirement was both of the landlord and the members of his family and on his death the right to sue did

survive to the members of the family of the deceased landlord. He further submits that many of the substituted heirs of the deceased landlord are

undoubtedly the members of his family and married daughters and the children of a deceased family member in the circumstances are to be

considered as members of the family of the deceased landlord.

16. In this connection he refers case laws reported in Shantilal Thakordas and Others Vs. Chimanlal Maganlal Telwala, , Shakuntala Bai and

Others Vs. Narayan Das and Others, Sm. Parimal Bala Roy and Others Vs. Santosh Kumar Bhattacharya, and 2010 (1) CLJ 153 (Jugal Krishna

Sarkar vs. Ranjit Kumar Das).

17. I have considered the submissions made by learned counsels of the parties as well as case laws referred by them on this issue. In a case of

eviction of a tenant on the ground of reasonable requirement of the suit premises by the landlord for his as well as his family members" own use and

occupation the landlord has to establish that his requirement is a genuine one. The landlord has to establish something more than a mere desire but

certainly less than absolute necessity. Whether the landlord reasonably requires the suit premises or not, is certainly a question of fact. Admittedly,

both the courts below came to a concurrent finding of fact that the landlords reasonably require the suit premises for their own use and occupation.

However, such concurrent findings of fact of learned courts below cannot be interfered by a court of second appeal unless it is shown that the

same was based on no evidence or based on extraneous matters. Again, admittedly an appeal is a continuity of the suit. So, the reasonable and

bona fide requirement of the landlord must subsist till disposal of the second appeal. As such, subsequent events, if any, touching the bona fide

requirement of the landlord and his family members are required to be considered by the court of appeal.

18. The requirement of the plaintiff landlady (Sunanda Roy and her family members) was projected as follows:-

19. One bedroom, one Thakur Ghar and one veg. kitchen for exclusive use of the original plaintiff, Sunanda Roy, since deceased, one bedroom

for her son (respondent No. 1 and his wife), two bedrooms for her sons" two unmarried daughters aged about 18 years and 12 years, one study

room for their study, one bed room for the whole time maid servant, one drawing room, one dining room, one store room and one non-veg

kitchen. So, as per said projection the respondent plaintiffs require as many as 12 rooms.

20. Admittedly, the original plaintiff Sunanda Roy has died during pendency of the appeal in the Lower Court and her heirs namely her son and

daughter have been substituted in her place. In the plaint plaintiff elaborated the requirement of herself as well as her family members including her

married daughter and there was also evidence on that score. As such, it did not require amendment of plaint on the account of death of the original

plaintiff Sunanda Roy to further highlight the requirement of the substituted plaintiffs. During evidence in the Trial Court present respondent No. 1

as the son of the original plaintiff deposed as P.W. 1 and categorically stated that the original plaintiff's daughter (respondent No. 2), who used to

stay in America with her husband and children, comes with her family members and stays in the suit building. Learned courts below assessed said

requirement of the married daughter of the original plaintiff and found it to be genuine. There is no scope of interference on that issue in this forum.

21. It appears from the averments made in the application being CAN No. 5678 of 2011 as well as the affidavit in opposition and affidavit in reply

filed in connection with said application that respondent No. 1's elder daughter has since been married and is residing in her husband's place. It

also came out that the younger daughter of the respondent No. 1 is studying in a university at Baroda. It is asserted by the respondents that said

married daughter of respondent No. 1 off and on comes to the suit house to reside with her parents during temporary absence of her husband but

there is neither any pleading through amendment nor any evidence to that effect. Under these changed circumstances the requirement of one

bedroom for the elder daughter of respondent No. 1 cannot be considered at this stage. But in the absence of any evidence that the younger

daughter of respondent No. 1 is staying permanently out of West Bengal her requirement of one bedroom cannot be denied. However, the

requirement of one study room for use by the two school going sisters no longer exists in view of the subsequent admitted events. In the written

affidavit-in-opposition the respondent No. 1 averred that his mother-in-law and one whole time maidservant were also staying with him in the suit

house and that he requires rooms for their stay. The story of staying of the mother-in-law of respondent No. 1 is a new one and it is neither backed

by evidence nor by pleadings. Admittedly, the original plaintiff Sunanda Roy has since died and her requirements namely one bedroom, one Thakur

Ghar and one veg kitchen have since been evaporated. Now in view of the changed circumstances most of which are admitted, the respondents

landlords require one bedroom for respondent No. 1 and his wife, one bedroom for respondent No. 2, one bedroom for respondent No. 1's

younger daughter, one drawing cum guest room for occasional stay of the married daughter of respondent No. 1, one kitchen, store room and one

dining room-all total seven rooms. As per Commissioner's report the landlords were in possession of seven rooms, one covered space measuring

20 ft. 8 inches X 6 ft, two bath and privies and one space under stairs for keeping unused articles. Out of those seven rooms two rooms one

measuring 13 ft. 2 inches X 12 ft. 6 inches and one 20 ft. 6 inches X 6 ft. were used as kitchen cum dining and kitchen respectively. After the

death of original plaintiff Sunanda Roy there is no longer any need for having two kitchens, one non-veg and another veg. As such, the kitchen

room measuring 20 ft. 6 inches X 6 ft. can easily be used for any other purposes. Again, the covered space measuring 20 ft. 8 inches X 6 ft. can

also be used for any other purpose as desired by the respondent landlords. It is thus palpable from the above discussions that in view of the

admitted changed circumstances namely death of the original plaintiff Sunanda Roy and marriage of respondent No. 1's elder daughter, the present

available accommodation of the landlords substantially satisfies their requirement. Keeping in mind the principles "live and let live" I am of the

opinion that in the facts and circumstances of the case there is no need of passing of any order of even partial eviction of the tenant on the ground

of reasonable requirement of the suit premises by the landlords.

22. Mr. S.P. Roychowdhury, learned senior counsel for the appellant tenant, submits that learned courts below also granted eviction decree on the

ground of change of user though there was practically no clinching evidence on that score. According to Mr. Roychowdhury the appellant tenant

was only using the address of the suit premises as a mailing address of his business under name and style M/s. Banani Properties and that it did not

amount to change of user. According to Mr. Roychowdhury, using the address of the premises as the mailing address of the tenant's business

cannot be branded as using the suit premises for a purpose other than the residential purposes. In this connection he refers a case law reported in

1985 (1) CHN 84 (Sm. Ana Ghosh vs. R.D. Anklesaria). In this connection Mr. Roychowdhury further submits that the application being CAN

No. 5676 of 2011 praying for permission to produce some documents by way of additional evidence under Order 41 Rule 27 of the CPC may be

allowed so that it can be shown that appellant tenant was using the suit premises for his residence and that only the address of the same was

permitted to be used as the address of his business concern. In this connection he refers case law reported in K. Venkataramiah Vs. A.

Seetharama Reddy and Others,

23. Mr. Das, learned senior counsel for the respondents, on the other hand, submits that if residential premises is used for any other purposes

without written consent of the landlord then the tenant is liable to be evicted u/s 13(1)(h) of the West Bengal Premises Tenancy Act, 1956. In

support of his contention he refers case law reported in M. Arul Jothi and Another Vs. Lajja Bal (Deceased) and Another, 1985 (1) CHN 40

(Giridharilal Soni vs. Maya Roy), Sachindra Kumar Ghosh Vs. Prativa Devi and Mono Ranjan Dasgupta Vs. Suchitra Ganguly and Others,

24. It came out from the evidence on record that the appellant tenant tried to made out a case that the address of the suit premises was only used

as the mailing address of his concern namely M/s. Banani Properties and that too within the knowledge of the original landlady and for that purpose

he used to pay Rs. 450/- per month in addition to the rent. However, during evidence the appellant tenant failed to establish that he obtained any

consent not to speak of written consent from the original landlady or that he made any payment to her on that score. It came out from the evidence

of learned courts below that this issue was thoroughly discussed by them on the basis of materials on record. It came out that no specific address

of the registered office of said Banani Properties Pvt. Ltd. was disclosed either in the memorandum of association or in the certificate of

incorporation of said concern. It also came out from the evidence on record that the defendant tenant has purchased a residential flat at Mayfair

Road, a posh locality in Kolkata and that his wife and son are residing in America. Admittedly the suit premises was let out to the appellant tenant

only for the residential purposes. Learned courts below came to a finding of fact on the basis of evidence on record that the tenant was using the

suit premises for the purpose of running his business M/s. Banani Properties Pvt. Ltd. and started to reside elsewhere. Admittedly, there was no

written consent of the landlady for using the suit premises other than residential purposes. Both the courts came to concurrent findings of fact on

that issue in favour of the landlords and against the tenant. Admittedly, at the time of hearing of the second appeal u/s 100 of the CPC there is no

scope of reappreciating the evidence as a third court of finding of fact. The appellant tenant through his application being CAN No. 5676 of 2011

has prayed for production of additional evidence as disclosed in para 9 of said application. It appears that those are copies of letter dated 20th of

May, 2011 issued by Standard Chartered Bank in favour of the appellant at the address of the suit property, a copy of the income tax refund

advice dated 14th of December, 2010 issued in favour of Banani Barman i.e., wife of the tenant at the address of the suit property, a copy of the

telephone bill of May, 2011 in the name of the tenant at the address of the suit property, a copy of the identity card issued by the automobile

association of Eastern India in favour of the petitioner tenant, a copy of the statement of account dated 31st of March, 2011 issued by ICICI Bank

in favour of Banani Barman, the wife of the appellant tenant at the address of the suit property, a copy of the envelope containing the cheque book

in respect of the bank account standing in the name of the appellant tenant sent by ICICI bank at the address of the suit property, a copy of the

passport of the petitioner tenant showing the suit property as the permanent address. These documents by itself do not show that the petitioner

tenant or his family members are residing in the suit premises as admittedly the wife and son of the petitioner tenant are residing in America. Even

then, some of the documents were sent in her name in the address of the suit premises as because said address was given to the concerned

authority at an earlier date. As these documents by itself are not going to establish that the appellant tenant was also continuing to use the suit

premises as a residence, I am of the opinion that no useful purpose will be served by allowing this application at this stage. It is true that under

Order 41 Rule 27(1)(b) a party may be allowed to produce additional evidence if the appellate court requires any document to be produced or

any witness to be examined to enable it to pronounce judgment. Said principle was elaborated in the case of K. Venkataramiah (ibid). I have

already stated that those documents, in view of other evidence on record, will not be sufficient to reverse the findings of fact of learned courts

below that the defendant tenant was guilty of using the suit premises for purposes other than residential purposes for over 4 months without the

written consent of the landlady.

25. Accordingly, I reject said application and confirm the findings of the learned courts below on this issue.

26. As a result, the decree of eviction passed by learned courts below on the ground of violation of Section 13(1)(h) of the West Bengal Premises

Tenancy Act, 1956 is hereby confirmed.

27. The applications stand disposed of accordingly.

28. The appeal is hereby dismissed on contest.

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

30. 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 the learned counsels of the parties, if applied for.