

(2009) 03 CAL CK 0026

Calcutta High Court

Case No: F.M.A. No. 687 of 2004

Sri Gopal Das Rathi

APPELLANT

Vs

Sri Sundarlal Mall and Another

RESPONDENT

Date of Decision: March 17, 2009

Acts Referred:

- West Bengal Premises Tenancy Act, 1997 - Section 17, 17(2), 17(4)

Hon'ble Judges: Rudrendra Nath Banerjee, J

Bench: Single Bench

Advocate: S.S. Mukherjee and Siddheswar Chandra, for the Appellant;

Final Decision: Allowed

Judgement

Rudrendra Nath Banerjee, J.

This appeal is directed against the judgment dated 4th July, 2002 passed by the District Judge, Purulia in Title appeal No. 96 of 2001, thereby sending back the title suit No. 23 of 1993 of the Court of Civil Judge (Junior Division), Purulia on remand for decision afresh on all the issues.

2. The plaintiff's case briefly stated, in the Court below was as follows:

3. The plaintiff, Gopal Das Rathi as the owner of the suit premises Instituted the suit for eviction of the defendants/tenants at a rental of Rs.150/- per month payable according to Sambat Calendar month on the ground of default and reasonable requirement for plaintiff's own use for starting a business.

4. It was also the case of the plaintiff that the suit property in holding No. J-570, Purulia Municipality originally belonged to joint Hindu family consisting of Hiralal Rathi, Seonath Rathi, who were governed by the Mitakshara School of Hindu Law. The property was acquired in the name of Gourishankar and Hanumandas Rathi by virtue of a sale deed dated 8th August, 1951. Thereafter on amicable partition amongst the members of the joint family dated 20th January, 1978, the suit property

was allotted to the share of the plaintiff and his brother Laxmi Narayan Rathi, who were the grand sons of Seonath Rathi. The defendants were occupying one shop room which is standing in the Northern Side of the holding described in the schedule of the plaint at a rental of Rs.150/- per month payable according to Sambat Calendar month. The plaintiff's brother having stopped giving any assistance to the family, the plaintiff intended to start a new business of wholesale dealership in the suit premises occupied by the defendant as tenant. The plaintiff had no other premises to start such business and accordingly he terminated the tenancy by serving one notice of ejectment on the expiry of the month of Bhadra 8. The defendants received the notice on 28th July, 1992, but as the notice was defective another notice dated 3rd November, 1992 was served upon the defendants terminating their tenancy with the expiry of the month of Poush and such notice was received by the defendants who also gave a reply to the same through their lawyer. It has been further stated by the plaintiff that previously there was a title suit for eviction against the defendants on the ground of default, but the defendants got protection against the grounds of default. In the present suit they cannot again get such protection.

5. The defendants contested the suit by filing written objection contending inter alia, that there was no service of legal and valid notice. It has been further contended that the defendant No. 2, Kamal Kishore Mall came into the suit premises being inducted by one Bal Mukunda Rathi at a rental of Rs.150/- per month according to Sambat Calendar month and at that time the plaintiff was not residing at Purulia. The plaintiff came to Purulia along with his brother and began to run a grocery business in 1977-78 in a room situated to the south of the suit premises. Accordingly, the plaintiff cannot be said to be sitting idle. The plaintiff has inducted a new tenant, who is running a business under the name and style Royal Dresses. The plaintiff has kept other two rooms under lock and key.

6. Upon the pleadings of both sides, 8 issues were framed by the Trial Court. Learned First Appellate Court by the impugned judgment observed that no specific issue has been framed whether the plaintiff has got no other reasonable accommodation elsewhere. Learned Court of first appeal also observed that learned Trial Court did not make any finding to the effect whether the tenancy was duly terminated and whether the notice of eviction was legal and valid. Learned Court of appeal has further observed that there has been serious illegality, as no finding was there in respect of the issue No.4 by the trial court.

7. Upon such observations learned first appellate court below has sent the suit back on remand to the trial court for adjudicating all the issues and additional issues and to deliver judgment afresh.

8. Being aggrieved by and dissatisfied with such judgment of the learned appellate Court below, the defendants/appellants have preferred this Miscellaneous appeal challenging the judgment of the learned Appellate Court.

9. It has been contended by Mr. S. Mukherjee, learned Advocate for the petitioner that the pleadings and evidences were all on the record. Even the evidence as to whether the plaintiff had any alternative accommodation elsewhere was also on record. Accordingly there was no necessity of remanding back the suit setting aside the decision of the suit and keeping it pending for an indefinite period. It has been further contended that the suit was remanded twice earlier and there is no necessity of further remanding the suit as the material evidence is already on record.

10. None appeared on behalf of the respondents although notices were sent under registered post with A/D and even notice was published in the newspaper. Learned Advocate for the respondent Nos. 1 and 2 also refused to accept the paper book under such circumstance the case has been taken up for hearing despite absence of the respondents.

11. Although it was a suit for eviction of a tenant under the West Bengal Premises Tenancy Act, there was no specific order u/s 17(2) of the said act. It appears that a date was fixed for hearing the petition u/s 17(2) of the West Bengal Premises Tenancy Act vide order no. 55 dated 15.05.1996 but subsequently the record was misplaced and the case was fixed for peremptory hearing.

12. Before entering into the evidence on record let us have a glance to the essential features of the judgment of the suit and appeals. The judgment dated 25th July, 1997, in Title Suit No. 23 of 1993 goes to show framing of 8 issues including the question as to the validity of notice of ejectment, ownership of plaintiff in respect of suit property and also the question of default in payment of rent. It was held that the notice was valid and duly served and the plaintiff had no reasonably suitable alternative accommodation. But the plaintiff has been held either owner or co-owner. Regarding the default it has been held that the defendants made default in payment of rent and cannot get any protection from eviction under the West Bengal Premises Tenancy Act. The suit was accordingly decreed.

13. The defendants preferred Title Appeal No. 63 of 1997. In the judgment of the appeal dated 30th November, 1999, a new question was raised as to whether the plaintiff purchased the suit property in the name of his son and with Laxmi Narayan Rathi, his brother. Accordingly, by such judgement, the judgment and decree of the Trial Court was set aside and it was sent back on remand for ascertaining the above point and to ascertain whether the plaintiff has reasonable requirement.

14. Upon such direction and judgment of remand the trial court below gave opportunities to the parties to adduce further evidence and the P.W. 2 and P.W. 3 were further examined and cross-examined and D.W.1 was also further cross-examined. Arguments of both sides were heard and the Trial Court delivered the judgment decreeing the suit for eviction. The defendants then preferred appeal being Title Appeal No. 96 of 2002. Learned Appellate Court observed by its judgment dated 4th July, 2002 that no specific issue as to whether plaintiff has any other

reasonably suitable accommodation elsewhere. It was further observed that the learned Trial Court did not ascertain as to whether the plaintiff was the sole owner and there was no specific finding over the specific issue No. 4. It has been further observed that learned Trial Court did not make any specific finding as to if notice of eviction is valid and duly served. Upon such observations in the body of the judgment learned Appellate Court has sent back this suit on remand.

15. Now the plaintiff/appellant has preferred this instant Miscellaneous appeal challenging the observations of learned Appellate Court.

16. Mr. Mukherjee, learned Advocate, appearing for the appellant has contended that there was no necessity of amending the plaint and that there was also no necessity to frame additional issue and that there was sufficient evidence already on record of reasonably alternative accommodation of the plaintiff. According to him, such being the position, there was no necessity of remanding back the suit and the court of First Appeal could have disposed of the appeal on the materials on record. In support of his contention Mr. Mukherjee has relied upon the decision reported in [Ashwinkumar K. Patel Vs. Upendra J. Patel and Others](#), . In paragraph 7 of the said decision it was observed that the High Court should not ordinarily remand a case under Order 41, Rule 23, C.P.C. to lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. It has been further observed in the said paragraph that when the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified.

17. It is very much settled that even after the order of remand by the learned first appellate court where it is found that the material evidences are on record and the case has been contested by both sides with knowledge of the case of the other side, there is no necessity of sending back the remand for framing further issue. The decision of the Supreme Court in Aswinikumar K. Patele's case (Supra) may be relied upon in this regard.

18. It is true that in the judgment dated 18th April, 2001 of learned Trial Court, the issue Nos. 1, 2, 3, 4 and 8 have been answered in favour of the plaintiff as if those issues were not pressed. Learned Trial Court practically has not applied its judicial mind in the matter when the issues were specifically disputed by the defendants in their written statement. It has been specifically held by learned Trial Court that the plaintiff has reasonable requirement for starting a business in the suit premises.

19. However, when the entire matter with evidence of respective sides is before this High Court, let me proceed to decide the case on facts and law to find out if the same justifies the decree of eviction of the defendants as passed by learned trial

Court.

20. Regarding the service of valid notice, it is found from exhibit 7, that the first notice dated 22nd July, 1992 was served upon defendants under registered post with A/D Card, exhibit-"9", terminating tenancy with the expiry of Bhadra 8, 2049 Sambat.

21. From the exhibit-"10", the subsequent notice dated 2nd November, 1992, it appears that the earlier notice has been waived and finally the tenancy has been terminated duly asking the defendants to vacate the suit premises from Pause Sudi "1" Sambat 2049.

Exhibit -"11" is the postal receipt. Exhibit -"12" is the A/D Card.

22. The notice was addressed to defendant No.1 and 2 but received by defendant No.2. The defendants sent a reply through their lawyer. Thus, both the defendants cannot now deny the service thereof and such service upon them is established. The service of notice has not been challenged during evidence, neither in cross-examination of P.W. 1, the plaintiff, nor by examination of D.W. 1, the defendant No.2.

23. The notice itself cannot also be said to be invalid or insufficient specially when the earlier notice being defective is waived. The issue No. 3 is accordingly answered in favour of the plaintiff.

24. Regarding the issue No. 4, that is the question of the ownership of the suit premises it can be said that such enquiry is required to be answered as the plaintiff's suit is for eviction on the ground of reasonable requirement. Exhibit "1", is the registered deed of purchase dated 8th August, 1951 by Hanuman Das Rathi and Gourishankar Rathi. The memo of partition dated 24th December, 1978, exhibit-"2" shows that the plaintiff and his brother Laxmi Narayan Rathi, got the property by partition. The compromise decree along with the compromise petition and plan attached thereto in Title Suit No. 66 of 1998 of the Court of Assistant District Judge, Purulia, marked Exhibit-"14", goes to indicate that the suit premises fell in the allotment of plaintiff. Such documents cannot be challenged or the property cannot be said to be joint between Laxmi Narayan Rathi and plaintiff when the other brother of the plaintiff, that is, Laxmi Narayan himself has been examined as P.W. 2. He has not challenged the ownership of the plaintiff, Gopal Das Rathi in suit property.

25. Such ownership of the plaintiff and his brother Laxmi Narayan Rathi, cannot also be challenged in view of the decision of Title Suit No. 200 of 1980 by the present plaintiff and his brother Laxmi Narayan Rathi. The said suit was also for eviction of the present defendants on the ground of default and reasonable requirement. In the judgment of Trial Court, the plaintiff's case of defendants' default was protected u/s 17 of the West Bengal Premises Tenancy Act. The plaintiff's other case

of reasonable requirement failed. In appeal, that is, in Title Appeal No. 8 of 1983, such judgment of dismissal of the suit was affirmed. But at the same time, the learned Lower Court's finding of ownership of the plaintiffs was also affirmed.

26. Thus, the present defendants are debarred, on the principle of resjudicata, from challenging the title of atleast of the present plaintiff and his brother Laxmi Narayan Rathi. Now this Laxmi Narayan Rathi being examined as P.W. 2 speaking of their mutual partition and compromise decree in the said Title Suit, there is no scope of challenging the ownership of plaintiff in respect of the suit property. From the oral and documentary evidences also the plaintiff's ownership of the suit property is well established.

27. In an attempt to show an alternative suitable accommodation of the plaintiff's, the defendants have pointed out to the ownership of the plaintiff of some other shop room of Radha Krishna More. Undisputedly, this property has been purchased by the present plaintiff's elder brother, Laxmi Narayan Rathi and the plaintiff's son Mahesh Chandra Rathi. Such version gets support from the very evidence of P.W. 2. There is also no evidence on record, nor was it necessary to determine who actually paid the consideration money, whether the plaintiff or his son. Nor was it necessary to determine if it was a Banami purchase by the plaintiff. Thus such question as to whether the plaintiff has reasonable requirement for the purpose of starting a business appears to have been established. Simply because two other rooms in the Radha Krishna More are lying under lock and key, as is evident from the report of the Commissioner for local inspection, the plaintiff's choice of suit room for his proposed business cannot be disbelieved.

28. In this connection the decision of the Supreme Court in [Ragavendra Kumar Vs. Firm Prem Machinery and Co.](#), and [Akhileshwar Kumar and Others Vs. Mustaqim and Others](#), may be relied upon. On the evidence on record it cannot be said that the landlord was not bonafide in advancing his case of requirement.

29. Furthermore, on the question of default, it appears that the defendants have admittedly paid rent to the plaintiff and his elder brother, Laxmi Narayan Rathi. It is admitted by the defendant No.1, as D.W.1 that he tendered rent to the plaintiff. It is further admitted by the D.W.1 that after all the letters of atonement exhibit - "4" series were sent by the said Laxmi Narayan Rathi to the defendants under registered post with A/D, the defendants did not pay any rent to the plaintiff. Such letters under exhibit - "4" series were sent under registered post with A/D and the defendant No.1 refused to accept the same. Such refusal cannot be disbelieved on the evidence on record. Thus, the plaintiff's sole land lordship cannot be denied and the notice of ejectment and the suit by the sole landlord cannot also be denied.

30. So far as the ground of default is concerned the same cannot be said to be for the first time during the tenancy. The first default by the self same tenant was protected against eviction u/s 17(4) of the West Bengal Premises Tenancy Act. But

there is no legal provision to protect the tenant who is virtually a repeated defaulter in payment of rent. Accordingly such ground is also established.

31. Thus considering all the facts and circumstances and materials on record, I am of the view that there is no necessity to send back the suit or appeal on remand further, as all the material facts are already on record. On a clear analysis of such material on record I have no hesitation to hold that the plaintiff has succeeded to prove the grounds of default and reasonable requirement of the suit premises and accordingly the plaintiff is entitled to get a decree of eviction.

32. Accordingly, the judgment and decree of the learned Appellate Court sending back the suit on remand is set aside.

33. The decree of eviction and Khas possession by the learned Court of Civil Judge (Junior Division), Purulia in Title Suit No. 23 of 1993 is hereby affirmed.

34. The defendants/respondents are directed to quit and vacate the suit premises in favour of the plaintiff within 2 months from this date, failing which the plaintiff/appellant shall have the liberty to execute the decree.

35. The plaintiff/appellant do also get a decree of mesne profits @Rs.150/- per month from the date of termination of tenancy till the date of eviction, subject to the payment of sufficient Court fees thereon. The quantum of mesne profit may be determined by suitable proceedings according to law.

36. The appeal is accordingly allowed.

37. There shall be no order as to costs.

Let urgent xerox certified copy of this judgment be supplied to the parties, if applied for.