(2011) 1 CHN 372

Calcutta High Court

Case No: F.M.A. No. 434 of 2008

Sri Annada Kumar Biswas		APPELLANT
	Vs	
Smt. Sandhya Rani Biswas		RESPONDENT

Date of Decision: Nov. 23, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 24, Order 7 Rule 8, 107
- Transfer of Property Act, 1882 - Section 106
- West Bengal Premises Tenancy Act, 1956 - Section 13(6), 17(2)(2A)

Citation: (2011) 1 CHN 372

Hon'ble Judges: Tapan kumar Dutt, J

Bench: Single Bench

Advocate: G.C. Ghosh, for the Appellant; Hiranmoy Bhattacharya, for the Respondent

Judgement

Tapan kumar Dutt, J.
This Court has heard the Learned Advocates for the respective parties.

2. The Appellant filed T.S. No. 333 of 1997 against the Respondent and other persons for a declaration that he is a tenant under the Respondent in respect of the property in dispute. The Appellant"s case was that he being a monthly tenant under the Respondent at an yearly rent of Rs. 5000/-the Appellant has been in exclusive possession of the suit property where he carries on his business. The Respondent and another Defendant in the said suit contested the said suit by filing written statement. The Respondent"s case was that the Appellant who came from Bangladesh was permitted to carry on the business of the Respondent as a caretaker so that the Appellant and his family could make a living out of the income from the said business, as the relationship was cordial. According to the Respondent, the Appellant committed a breach of trust and procured certain paper concerning the business in his own name to make a wrongful gain. The Respondent"s

further case was that the Appellant was never a tenant in the suit property.

3. The Respondent filed T.S. 441 of 1998 which was renumbered as T.S. 158 of 2002 against the Appellant praying for recovery of possession of the suit property by ejecting the Appellant therefrom. The Respondent''s case was that the Appellant accepted his position as a caretaker of the said business but being ill advised by his brother Haridas the Appellant filed the said T.S. 333 of 1997 wherein he claimed to be a tenant. The Respondent''s further case was that on being legally advised, the Respondent revoked the licence granted to the Appellant and subsequently issued a notice dated 18.9.1998 through his learned Advocate stating that in case such tenancy (as claimed by the Appellant in T.S. 333 of 1997) is proved then in that event the Respondent determines such alleged tenancy with the expiry of the month of October, 1998; and there shall be no relationship of landlord and tenant on the expiry of 31.10.1998; the Respondent directed the Appellant to make over vacant and peaceful possession of the suit property to the Respondent on the expiry of 31.10.1998 and on failure of the Appellant to do so the Respondent shall file a suit for eviction against the Appellant. The Appellant failed to comply with the notice dated 18.9.1998 and hence the suit was filed. The suit was filed inter alia on the ground of the Respondent''s reasonable requirement for own use and occupation. The Appellant contested the said suit by filing a written statement.

4. The aforesaid two suits were heard analogously by the learned Trial Court and the learned Trial Court decreed the said T.S. 333 of 1997 in part by declaring that the Appellant herein is a bona fide monthly tenant in the suit premises and the Respondent and also the Defendant No. 2 in T.S. 333 of 1997 have no right to dispossess the Appellant herein from the suit premises without due course of law. The learned Trial Court dismissed the said T.S. 158 of 2002.

5. The learned Trial Court found inter alia that the Appellant is a tenant under the Respondent and not a caretaker. It appears from the judgment of the learned Trial Court that it was argued on behalf of the Appellant that as long as the Appellant''s suit for declaration of tenancy-right is pending and until the Appellant is adjudicated as a tenant it cannot be said that the Appellant is a tenant in the suit premises. It was also argued on behalf of the Appellant before the learned Trial Court that the notice dated 18.9.1998 cannot be treated as a notice u/s 13(6) of the said West Bengal Premises Tenancy Act, 1956 and the said notice is not legally valid and sufficient. The learned Trial Court found that from Ext.7 (notice) it will appear the Respondent did not accept the Appellant as a tenant and even in evidence the Respondent''s witness was not ready to accept the Appellant as a tenant and, therefore, the status of the Appellant would depend upon the result of T.S. 333 of 1997. The learned Trial Court found that no cause of action for T.S.158 of 2002 arose on and from 1.11.1998 after the expiry of October, 1998 and that the cause of action will arise on the date of result of the T.S. 333 of 1997 and that even though notice was served upon the Appellant the said notice is not legal, valid and sufficient and the said notice cannot be treated as a notice u/s 13(6) of the said Act of 1956. In view of such findings the learned Trial Court did not decide the issues regarding

default in payment of rent and reasonable requirement for own use and occupation.

6. Challenging the aforesaid judgment and decree passed by the learned Trial Court in T.S. 158 of 2002 the Respondent filed T. A. 100 of 2004 which was placed before the learned Additional District Judge, Fast Track Court, 6th Court at Alipore. The learned Lower Appellate Court by judgment and decree dated 19th April, 2006 allowed the said appeal by setting aside the judgment and decree passed by the Learned Trial Court in T.S. 158 of 2002 and by sending T.S. 158 of 2002 back on remand to the learned Trial Court for a fresh decision in the light of the issues recast in the body of the judgment after restoring T.S. 333 of 1997 to its original file and number. The learned Lower Appellate Court further directed the learned Trial Court to consider the evidence already on record and to decide any application for local inspection, if filed by any of the parties, and to re-write the judgment on the basis of such evidence and local inspection. The learned Lower Appellate Court found, inter alia, that in the proceeding u/s 17(2)(2A) of the said Act of 1956 in the said ejectment suit it was held that Appellant was a tenant under the Respondent and the Appellant had defaulted in payment of rent. The learned Lower Appellate Court found that the order passed u/s 17(2)(2A) has already been complied with by the Appellant and Respondent has already withdrawn the amount deposited in Court in connection with the said proceeding.

7. It appears that it was argued before the learned Lower Appellate Court on behalf of the Respondent that the learned Trial Court was under an obligation to decide the issue of Respondent''s reasonable requirement of the suit premises since the Respondent had made out a case that if the Appellant was proved to be a tenant in that event too the Respondent was entitled to a decree because she reasonably requires the suit premises and the notice determining the tenancy of the Appellant u/s 13(6) of the said Act of 1956 had already been served upon the Appellant. It was argued on behalf of the Appellant before the learned Lower Appellate Court that the said notice was premature and illegal and that there could not have been any cause of action for the ejectment suit pending decision of T.S. 333 of 1997.

8. The learned Lower Appellate Court was of the view that the learned Trial Court committed a mistake by giving a total go-by to the Respondent''s alternative plea of tenancy of the Appellant as has been the Appellant''s case in his plaint in T.S. 333 of 1997 and in the written statement in T.S. 158 of 2002. The learned Lower Appellate Court relied upon the decision reported in 1952 SCA 116. The said learned Court found that the finding of the learned Trial Court that the status of the Defendant in T.S. 158 of 2002 was dependent upon the result of T.S. 333 of 1997 was not a perfect appreciation of the evidence on record. The learned Lower Appellate Court found that the said notice u/s 13(6) was sufficient and legal and the finding of the learned Trial Court in this regard was a misappreciation of facts and circumstances of the case and law relating to tenancy. The learned Lower Appellate Court was also of the view that there is evidence on record so as to determine the issues regarding reasonable requirement and default in payment of rent and absence of determination of such issues resulted in miscarriage of justice. The

Appellant pointed out before the learned Lower Appellate Court that no local inspection was held. The learned Lower Appellate Court remanded back the suit to the learned Trial Court for a fresh decision after recasting the issues as contained in the impugned Judgment. The learned Lower Appellate Court also observed that the judgment of the learned Trial Court is liable to be set aside irrespective of the fact whether any appeal was preferred against the decision of T.S. 333 of 1997 or not.

9. The learned Advocate for the Appellant submitted that the learned Lower Appellate Court could not have set aside the entire judgment as it contained the judgment passed in T.S.333 of 1997. He submitted that no appeal was preferred by the Respondent against the judgment and decree passed in T.S. 333 of 1997. It appears from the impugned judgment that the learned Lower Appellate Court did also set aside the judgment passed in T.S. 333 of 1997. It is not necessary to discuss this point in further details since the learned Advocate for the Respondent submitted that the judgment and decree passed in T.S. 333 of 1997 stand as those were not challenged by the Respondent. In other words, in question of trying the two suits analogously any further does not arise since T.S. 333 of 1997 already stands disposed of and it was not the subject-matter of appeal before the learned Lower Appellate Court nor is it the subject-matter in this appeal. Therefore, this Court holds that the learned Lower Appellate Court acted illegally in setting aside the judgment and decree passed in the said T.S. 333 of 1997. In such circumstances, the question of maintainability of T.S. 333 of 1997, question of cause of action for such T.S. 333 of 1997 and the question whether the Appellant was a tenant or a caretaker do not arise any further as such questions have already been decided in T.S. 333 of 1997. Accordingly, issue Nos. 1 and 2, as re-cast by the learned Lower Appellate Court, are applicable only in respect of T.S. 158 of 2002. Issue No. 3, as recast by the learned Lower Appellate Court, is no longer open for any decision since the learned Trial Court has already held that the Appellant was a tenant in the suit property; therefore, such issue No. 3 stands deleted. The issue No. 8 (as recast by the learned Lower Appellate Court) is applicable only in respect of T.S. 158 of 2002. The other issues, as recast by the learned Lower Appellate Court, pertains to T.S. 158 of 2002 and, therefore, such recast issues need not be interfered with. Such recast issues appear at page 43 of the paper book.

10. The next point submitted by the learned Advocate for the Appellant was that the ejectment-notice (Ext-7) was illegal, invalid, bad in law and on the basis of such notice the ejectment suit was not maintainable. The said learned Advocate submitted that the said notice was a speculative one and it could not have been issued under the law until the Appellant''s suit was decreed. He cited a decision reported at Chidda Ram Vs. Naru Mal and Another, in support of his contention that a notice to quit must be clear, unequivocal and no condition can be set in such notice. The facts of the said reports involve a notice u/s 106 of the Transfer of Property Act and it appears from a reading of such notice that after the landlord had called upon the tenant to vacate the tenanted premises on the expiry of the 30th day of the receipt of the notice, the landlord further stated in such notice that the rent that was being paid by the tenant was absolutely insufficient and the tenant

was required to pay rent at an enhanced rate with effect from a certain future date. In such circumstances, it was held by the Hon''ble Court in the said reports that the intention to terminate the tenancy was not unconditional but conditional which condition could be complied with by the tenant by agreeing to pay an enhanced rate of rent and avoiding termination of tenancy. The Hon''ble Court, in the said reports, was pleased to observe that a notice terminating the tenancy must be unconditional, unequivocal and clear, that is to say, a tenant whose tenancy is intended to be terminated and who is asked to quit has no power left in him to arrest the effect of such notice and the tenancy must stand terminated on the expiry of the notice-period. In the facts and circumstances of the said reported case the Hon''ble Court held that the said notice u/s 106 of the Transfer of Property Act was not an effective notice.

11. In the instant case the contents of the notice of suit and/or notice to quit does not give any power to the Appellant to arrest the effect of the notice. There does not appear to be any condition set in such notice. The notice in question is a notice to quit and/or notice of suit and it did not give any option to the Appellant to continue with the tenancy as claimed by him after the period specified in the said notice. The effectiveness of the notice was not delayed and/or postponed till the decision in the suit filed by the Appellant. In the notice dated 18.9.1998 (i.e. the notice in question) it has been stated that in case the tenancy is proved then in that event too the Respondent determines such alleged tenancy with the expiry of the month of October, 1998 and there shall be no relationship of landlord and tenant with the expiry of 31.10.1998 and the Appellant was directed to make over vacant and peaceful possession of the suit property on the expiry of such date. Thus it is clear that the said reported case cannot be of any assistance to the Appellant in the facts of the instant case.

12. With regard to the point on notice the learned Advocate for the Respondent submitted that the tenancy, if any, could not have commenced from the date of the decree and it must have started from the time when there might have been an agreement of tenancy between the parties. According to him, the decree is only a confirmation of the relationship of landlord and tenant between the parties and the decree does not create the relationship of landlord and tenant. Learned Advocate for the Appellant emphasized on the fact that the Plaintiff took the stand in her pleadings and in the evidence that the Appellant was a licencee/caretaker and the Respondent did not admit the Appellant to be a tenant and, accordingly, the Respondent could not have issued the notice to quit until the Appellant''s suit was decided.

13. According to the Respondent''s learned Advocate the Respondent''s witness P.W.1 had to state that he does not admit the Appellant to be a tenant because by that time the notice to quit had already been issued. The said learned Advocate submitted that the learned Trial Court while holding that the notice to quit was bad in law failed to consider the Respondent''s alternative case that in the event the tenancy alleged by the Appellant is proved then too the tenancy may be treated as determined with the expiry of the month of October, 1998 and the relationship of landlord and tenant would cease to exist with the

expiry of 31.10.1998 and the Appellant would be treated as a trespasser on and from 1.11.1998.

14. The Respondent''s learned Advocate cited a decision (Sriniwas Ram Kumar Vs. Mahavir Prasad and Ors. (1952) SCA 116). In the said case the Hon''ble Supreme Court was pleased to observe that a Plaintiff may rely upon different rights alternatively and there is nothing in the CPC to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The Hon''ble Supreme Court was further pleased to observe that when the alternative case, which the Plaintiff would have made, was not only admitted by the Defendant in his written statement but was expressly put forward as an answer to the claim which the Plaintiff made in the suit, there would be nothing improper in giving the Plaintiff a decree upon the case which the Defendant himself makes. Thus, according to the Respondent''s learned Advocate, since the Appellant himself pleaded tenancy in respect of the suit premises the service of notice to quit upon the Appellant was proper and valid.

15. The said learned Advocate for the Respondent cited a decision (Bhagwati Prasad Vs. Shri Chandramaul, . It appears from the said reports that in a suit for ejectment the Defendant admitted the title of the Plaintiff in regard to suit property and pleaded that he was to remain in possession of the house until the amount spent by him in the construction was returned by the Plaintiff. The Plaintiff led evidence about the tenancy set up by him and the Defendant led evidence about the agreement on which he relied. The common basis of both the pleas was that the Plaintiff was the owner and the Defendant was in possession by his permission. In such a case, the Hon''ble Court held, the relationship between the parties would be either that of a landlord and tenant, or that of an owner of a property and a person put into possession of it by the owner''s licence --- no other alternative was logically or legitimately possible. According to the Respondent''s learned Advocate the learned Trial Court failed to consider the said reports.

16. The learned Advocate for Respondent cited a decision (The secretary of State for India in Council Vs. Madhusudan Mukherjee. 36 CWN 918) wherein the Hon''ble Court was pleased to hold that the giver of a notice is not bound to admit the person to whom it is given as a tenant and that a notice is good notwithstanding that the addressee is described therein as a trespasser. The learned Advocate for the Respondent submitted that even if the landlord does not admit the addressee of the notice to be a tenant he can still issue a notice u/s 13(6) of the West Bengal Premises Tenancy Act, 1956 on the basis that a competent Court may ultimately find that there had been a relationship of landlord and tenant in between the parties. Thus, according to the said learned Advocate, the Plaintiff/Respondent was wholly justified in issuing the notice of suit.

17. The said learned Advocate cited another decision (Mohammed Yusuf Vs. Ram Chandra Singh and Another, wherein it appears that in case of a notice of suit u/s 13(6) of the said Act of 1956 the Hon''ble Court held that if there is a threat to adopt legal proceedings in such a notice it is clear that the legal proceedings contemplated in such

notice in the context of what precedes the threatened adoption of such legal proceeding and also what follows, cannot be anything else than a suit for eviction. However, in the instant case it is found that on the Appellant''s failure to comply with the notice there is a clear threat that the Respondent will sue for eviction.

The said learned Advocate cited another decision (Bhagabandas Agarwalla Vs. Bhagwandas Kanu and Others, in support of his contention that a notice to quit must not be read in a hyper-critical manner but it must be construed in a common sense way.

18. The learned Advocate for the Respondent referred to the provisions of Order 7 Rule 8 CPC while contending that the Plaintiff can seek relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds.

19. The learned Advocate for the Respondent submitted that the learned Lower Appellate Court should have held that local inspection was not necessary since the Defendant did not dispute the present accommodation of the parties. He further submitted that in case the learned Lower Appellate Court had thought that local inspection was absolutely necessary it could have itself passed an order for appointment of a Commissioner to hold local inspection. He referred to Section 107 CPC in support of his submissions. He further submitted that the learned Lower Appellate Court should decide the suit finally if evidence, already on record, is sufficient. According to him, the learned Lower Appellate Court should have decided the suit finally on the basis of the evidence on record as the Appellant did not dispute the present accommodation of the parties and as such no local inspection is necessary. He referred to the provisions of Order 41 Rule 24 CPC in this regard and also cited a decision (Promotho Nath Mazumdar v. Nagendra Nath Mazumdar. 33 CWN 1211) in support of his aforesaid contention.

20. The notice dated 18.9.1998 has been discussed in details above and this Court has already found above that the case reported at Chidda Ram Vs. Naru Mal and Another, cannot be of any assistance to the Appellant in the facts of the instant case. This Court finds that the said notice dated 18.9.1998 is not a conditional notice and it is clear, unequivocal and unambiguous. The learned Trial Court declared that the Appellant herein is a bona fide monthly tenant in respect of the suit premises. This does not mean that by virtue of the judgment and decree passed by the learned Trial Court the Appellant became a tenant. It is only a finding of the learned Trial Court that the Appellant has been a tenant at all material points of time. Such finding of the learned Trial Court clearly implies that the Appellant had been a tenant when the said notice of suit was issued. It does not appear to this Court that the said notice was issued in violation of Section 13(6) of the said Act of 1956 in any way. The said Section 13(6) stipulates that the notice must precede the filing of the suit for eviction except when the suit is filed on certain grounds as mentioned in Section 13(6) itself. The argument made by the learned Advocate for the Appellant that the Respondent took the stand that the Appellant was a caretaker/licencee and the Respondent could not have issued the said notice is without any substance as it will appear from the facts of the instant case that the Respondent has made out an

alternative case that in the event the alleged tenancy is proved then in that event the tenancy should be treated as determinated with the expiry of the month of October, 1998 and the relationship of landlord and tenant would cease to exist with expiry of 31.10.1998 and the Appellant would be treated as a trespasser on and from 1.11.1998. Sriniwas Ram Kumar''s case (Supra) as discussed above fully supports the case of the Respondent herein. The learned Advocate for the Respondent was right when he submitted that the learned Trial Court failed to consider Bhagwati Prasad''s case (Supra). The decision reported at 36 CWN 918 (Supra), which has been discussed above, can be appropriately applied to the facts of the instant case and such reports fully supports the submissions made by the learned Advocate for the Respondent that the Respondent was wholly justified in issuing the said notice of suit. This Court is of the view that the relationship of landlord and tenant in between the parties to the suit did not commence from the date of the judgment and decree passed by the learned Trial Court but it commenced from an earlier point of time when in fact the Appellant was inducted in the suit premises as a tenant by the Respondent. The learned Trial Court''s judgment and decree is only a confirmation of such fact.

21. It appears that in the instant case no local inspection was held in respect of the accommodation of the parties and the learned Lower Appellate Court was of the view that the suit should be sent back on remand for a fresh decision leaving it open to the parties to pray for local inspection before the learned Trial Court in connection with the issue regarding reasonable requirement since the learned Lower Appellate Court has felt the importance of holding local inspection for deciding the issue regarding reasonable requirement. In the facts and circumstances of the case, this Court is not inclined to interfere with such finding of the learned Lower Appellate Court. The argument made by the learned Advocate for the Respondent that the learned Lower Appellate Court could have itself passed an order for appointment of local inspection commissioner if it had thought it to be necessary, is also not an acceptable argument since in the instant case the learned Trial Court has not made any finding with regard to the issue of the alleged reasonable requirement for own use and occupation of the Respondent. It will not be proper to allow the parties to skip a forum thus totally obviating the necessity of the first Court of facts to come to an independent finding on such issue.

22. In view of the discussions made above the instant appeal is disposed of by affirming the impugned judgment and decree passed by the learned Lower Appellate Court subject to the modifications as indicated below.

23. The question of maintainability of T.S. 333 of 1997, the question of cause of action for such T.S 333 of 1997 and the question whether the Appellant was a tenant or a caretaker do not arise any further as such questions have already been decided in T.S. 333 of 1997. Accordingly, issue Nos. (1) and (2), as recast by the learned Lower Appellate Court, are applicable only in respect of T.S. 158 of 2002. Issue No. (3), as recast by the learned lower Appellate Court, is no longer open for any decision since the learned Trial Court has already held that the Appellant was a tenant in the suit property. Therefore,

such issue No. (3) stands deleted. The issue No: (8), as recast by the learned Lower Appellate Court, is applicable only in respect of T.S. 158 of 2002. The other issues, as recast by the learned Lower Appellate Court, pertain to T.S. 158 of 2002 and, therefore, such recast issues are not interfered with.

24. There will, however, be no order as to costs.

25. Let a certified Xerox copy of this Judgment, if applied for, be given to the parties on compliance of usual formalities.