Jainarain Agarwala Vs S. Banerjee

A. O. D. No. 582 of 1965

Court: Calcutta High Court

Date of Decision: Dec. 16, 1983

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 5 Rule 19#West Bengal Premises Tenancy Act, 1956 â€" Section 13, 13(1)(i), 17(1), 17(3), 17B

Citation: 90 CWN 279

Hon'ble Judges: S.N. Sanyal, J; A.K. Sen, J

Bench: Division Bench

Advocate: R. N. Mitra, S. N. Mukherjee, Sudhis Das Gupta and Nirmal Banerjee, for the Appellant; S. P. Sen, for the Respondent

Judgement

Sanyal K. Sen, J.
This Appeal from Original Decree is instance of the tenant-defendant and is directed against judgment and decree dated

February 5, 1965 passed by the (sic) Judge, 6th Bench, City Civil Court, Calcutta in (sic) Suit No. 41 of 1963. There is a cross-objection at the

instance of the plaintiff respondent. We have heard the appeal and the cross-objection together. The defendant was a tenant in respect of a room

on the first floor of premises No. 27B, Chittaranjan Avenue, Calcutta under the plaintiff. He was paying rent of Rs. 70/- and since he was enjoying

the electricity provided for by the landlord he was paying a sum of Rs. 7/- per month towards electricity charges on separate receipts. On January

7, 1963 the plaintiff instituted the aforesaid suit for eviction against the tenant defendant on two fold grounds, namely that the tenant defendant was

in default in payment of rent since August 1962 and secondly on the ground that in breach of the agreement the tenant defendant was using the

premises as his residence though let out for. office purposes and such user constituted nuisance and annoyance to his neighbors including the

landlord.

2. The summons of this suit being sent for service through the process server, the process server effected service by affixation on a report that the

defendant had refused to accept the summons. This report being placed before the Court, the court by its order dated February 7, 1963 neither

accepted the service as good in terms of Order 5 Rule 19 of the Code nor expressly rejected the service. On the other hand, the court instead

directed that for better satisfaction of the court a registered post card may be served upon the defendant fixing February 25, 1963 for appearance

and orders. Such registered post card was issued and was returned with postal endorsement ""refused"" and the court on March 11, 1963 recorded

the following order ""Plaintiff files Hazira. R.P.C. returned with the postal endorsement ""Refused"" which is a prima facie evidence of good service.

Defendant does not appear. Lay before the learned Judge, Bench VI for ex parte hearing"".

3. Before the suit could be taken up for ex-parte hearing the defendant appeared on March 26, 1963. He appeared on an allegation that the

summons had been suppressed by the plaintiff/landlord since, according to the defendant, the plaintiff was long since trying to evict the defendant

from the suit premises and had been harassing him by initiating different proceedings. A prayer was made for leave to appear and defend the suit

and that was allowed. On March 28, 1963 the defendant filed an application for leave to deposit the rent month of March 1963 in court and that

was allowed. 3, 1963 the defendant filed an application under Sections of the West Bengal Premises Tenancy Act 1956 as it their praying for

permission to deposit the arrears of rent (sic) for three months from August to October 1962. The (sic) was given necessary permission to do so at

his own (sic) and a sum of Rs. 250/- calculated at the rate of rent of Rs.77(sic) per month was deposited by the tenant defendant towards the

arrears with interest. It appears clearly from the application u/s 17(1) filed by the tenant defendant that he was taking the plea that the monthly rent

is Rs.77/- which is inclusive of electric charges and not Rs. 70/- excluding electric charges as pleaded by the plaintiff in the plaint. Thus a dispute as

to the rate of rent was clearly raised in this application. After having deposited the said sums towards the arrears he continued to deposit the

monthly rent month by month at the rate of Rs. 77/- all in time and in that background on May 22, 1963 the plaintiff filed an application u/s 17(3)

of the said Act. We prefer to quote the grounds pleaded in this application which were as follows :

That the summons was served on the defendant on 21st January 1963 and a registered post card sent from. this Hon''ble Court was refused by the

defendant on 19th February 1963 which is a valid service in law. That your petitioner states that the defendant not having deposited the rent for the

entire period of default. plus the statutory rate of interest on the entire amount of default within one month of the service of summons on him in the

instant suit he has not complied with section 17(1) of the West Bengal Premises Tenancy Act, 1956.

4. Accordingly, it was prayed that the defense of the defendant against delivery of possession should be struck out. This application was hotly

contested by the tenant defendant. At one stage the learned Judge rejected the application u/s 17(3) of the said Act upon a finding that the

summons of the suit not having been, served upon the defendant and the arrears for the three months August to October 1962 having been duly

deposited along with interest within a. month from the date of appearance of the defendant there is no ground for striking out the defense. The

plaintiff moved this Court in revision against the said order and this Court without going into the merits set aside the said order and remanded the

application for re-consideration on evidence to be taken. After remand the evidence was taken and the question that was agitated before the

learned Judge was as to whether the summons was really served upon the defendant or not. Considering the evidence the learned Judge by an

order dated August 12, 1964 held that the service effected by affixation by the process server on January 21, 1963 was a valid service. The

learned Judge however, rejected the plaintiff''s claim that there was a further service on February 19, 1963 when he rejected the endorsement of

refusal made by the postal peon in view of the evidence on record as not a genuine one. Having held as such the learned Judge proceeded to

conclude ""the deposit of arrears of rent for the months of August September and October 1962 together with interest was made on April 6, 1964.

But in view of the fact that the summons had been served on January 21 1963 there was no compliance with the provision of section 17(1) of the

Act XII of 1956. I accordingly hold that the defense against delivery of possession must be struck out.

5. The defense having been struck out the suit was taken up for exparte hearing. The plaintiff led evidence. The evidence so led does not appear to

us to be very happy or sufficient. Be that as it may, the tenant defendant was allowed to contest the suit only on the point of notice. At the trial

following six issues were framed.

1. What is the rate of rent and if the rent is inclusive of electric charges ?

2. Is the defendant a defaulter in payment of rent as alleged in the plaint ?

3. Is the demised premises being used otherwise than for the purpose for which it was let out ?

4. Was any statutory notice or notices served on the defendant? If so, are those valid, legal and sufficient ?

5. Is the suit at all maintainable ?

6. To what relief, if any, is the defaulter entitled?

6. So far as issue No. 1 is concerned, the learned Judge came to the conclusion that the monthly rent payable by the tenant defendant was Rs. 70/-

and it was exclusive of electric charges. So far as issue No. 2 is concerned, it appears to us that the learned Judge proceeded to consider on the

basis that the default was for three months August, September and October 1962. All the plea raised on behalf of the defendant with regard

thereto having been over-ruled he concluded that the defendant is a defaulter in payment of rent as contemplated u/s 13(1)(i) of the West Bengal

Premises Tenancy Act. Issue No. 3 ''was not pressed. Issue No. 4 was answered in favour of the plaintiff when it was held that the notice served

was legal and valid. The plea of the defendant that the month of tenancy should be counted from 15th of a month was over-ruled. Issue No. 5 was

not pressed and issue No. 6 was answered in favour of the plaintiff by giving the plaintiff a decree for eviction. This is the decree which is the

subject matter of challenge before us in the present appeal. We shall come to the cross objection later after we dispose of the appeal.

7. Mr. Mitter appearing in support of this appeal has raised three points. In the first place, it has been contended by Mr. Mitter that the learned

Judge was in error in allowing the plaintiff''s application u/s 17(3) of the said Act by an order dated August 12, 1974 and thereby striking out the

defense of the defendant. The second point raised by Mr. Mitter is to the effect that even for the ex-parte hearing the plaintiff''s evidence being

insufficient and the plaintiff not having led any evidence with regard to the existence of any. of the grounds contemplated by section 13 the decree

for eviction is not sustainable in law. Thirdly, it has been contended by Mr. Mitter that even upon the plaintiff''s own evidence the month of tenancy

should have been accepted as. one beginning from 15th of the month and ending on the 14th of the month following so that the notice with

reference to the English Calendar month was an invalid notice.

All the points thus raised by Mr. Mitter has been strongly contested by Mr. Sen appearing on behalf of the plaintiff respondent. We shall refer to

the contentions of the learned Advocate in more details when we deal with the points raised before us. But, in our opinion, this appeal should

succeed on the first point raised by Mr. Mitter so that the other two points raised need not be decided by us.

8. There is no dispute that the defendant''s defense has been struck out by the learned Judge by an order dated August 12, 1964. If this order be

unsustainable in law then the ex-parte decree which followed cannot be sustained for the simple reason that by the order aforesaid the defendant

has been decided the right to ''defend a suit. The question raised before us with reference to the impugned order dated August 12, 1964 is ""a very

short one. As we have indicated hereinbefore the learned Judge has found that the arrears for three months August, September and October 1962

were deposited with the statutory interest on April 6, 1963 when the defendant appeared on March 26 1963. The deposit was made within the 30

days from the date of appearance though on the material date the date of appearance was not of much consequence on the statutory provision as it

stood. But even on the statutory provision prevailing at the time the date of service of summons was material because the limitation prescribed was

30 days from the date of service of the summons. In the present case as we have indicated hereinbefore there were two attempts for service. The

first attempt was through the process server who effected service by affixation on January 21, 1963 with an endorsement of refusal. The learned

Judge disbelieved the defense case that the defendant was not there at the suit premises on the date of the service so effected. Having done so he

concluded that service so effected by the process server must be accepted as good service. The plaintiff relied further upon a second service which

was through the registered post card returned with endorsement dated February 19, 1963 that it had been refused. So far as this service is

concerned, the learned Judge has accepted the defense case that on that date namely February 19, 1963 there could have been no refusal by the

tenant defendant as he was not there at the place of service being present in Court fighting a cause against the landlord. The question which arises

for our consideration is as to whether the learned Judge is justified in accepting the alleged service dated January 21, 1963 as good service or not.

Under the provisions of Order 5 when service is effected under Rule 17, as it was purported to have been done by the process server, the Court is

to apply its judicial mind to the process server''s return and his declaration. On application of judicial mind the Court unless it decides to make

further enquiries, ""shall either declare that summons has been duly served or order such service as it thinks fit"". In the present case as we have

indicated hereinbefore the court for the purpose of the suit did not really accept the service by affixation as a valid service and did not record any

declaration to that effect. On the other hand, the Court directed fresh service by issue of registered post card though as a precautionary measure

and for better satisfaction of the Court. It was strongly contended by Mr. Sen before us that this order of the Court must be read as an order

accepting the service necessary declaration contemplated by Rule 19 being implied in its terms. We would have been happy to accept such a

contention, but we are unable to do so for other reasons. The First reason is that the Court was adopting the alternative to the acceptance of

service contemplated by Rule 19 and adopting alternative is a clear indication of rejecting the first of the option viz. acceptance. That apart the

declaration of the Court contemplated by Rule 19 obviously means the declaration based on satisfaction of due service, but the order indicated that

the court wanted to have better satisfaction so that its satisfaction at that stage was not sufficient to accept the service.

9. Our attention was drawn by'' Mr. Sen to the provision of Rule 20 and it was sought to be contended by Mr. Sen that when Rule 20 was not

adopted by the Court it necessarily implies that the Court had accepted the service. We are unable to accept this contention because the Court

might have directed a fresh service in a manner otherwise than Rule 20, but that is a fresh service prescribed as alternative to acceptance of the

service already effected. Even if the alternative adopted was irregular one that does not load to the conclusion that the original service had been

accepted by the Court. The learned Judge in disposing of the application u/s 17(3) unfortunately failed to appreciate that service effected on

January 21, 1963 was not accepted as good service for the purpose of the suit. If it was not a good service for the purpose of the suit we fail to

appreciate how it can be so for the purpose of striking out the defense of the defendant for not making the deposit of the arrears in terms of section

17(1) of the Act with reference to the date of such service. The other service has been rejected by the learned Judge. Though it was suggested to

us by Mr. Sen that we should accept that service to be a valid service we are unable to do so for the simple reason that in the present case the

defendant had examined himself to deny on oath that no registered post card was tendered to him on February 19, 1963. There is also

corroborating evidence to show that he was not present on the said date. In the face of such evidence it was necessary to examine the postal peon

but that was not done. In our view, therefore, the learned Judge was right in holding that the statutory presumption of service arising out of the said

endorsement of refusal dated February 19, 1963 stands rebutted by the evidence adduced. We are, therefore, of the opinion that the order dated

August 12, 1964 allowing the application u/s 17(3)of the Act is clearly erroneous and cannot be sustained.

10. Incidentally it was contended by Mr. Sen that if we set aside this order we should remand the said application for reconsideration once more

on the ground that even if the deposit was made in time the deposit is otherwise invalid since the amount deposited was Rs. 77/- instead of Rs.

70/-. We are, however, unable to do so for the simple reason that was not the plea raised by the plaintiff in his application u/s 17(3). We have set

out the grounds pleaded in the application u/s 17(3) to show that the only ground pleaded was that the deposit being beyond time was invalid in

law. There was no plea that the deposit by itself was otherwise invalid.

11. In the result, this appeal succeeds. The order made u/s 17(3) of the said Act being set aside the consequent decree has to be re-opened. The

application u/s 17(3) is dismissed. We, therefore, set aside the decree and remand the suit for retrial in accordance with law.

12. Now we proceed to consider the cross-objection preferred by the plaintiff. In fairness Mr. Sen has conceded that grounds Nos. 1 to 3 are not

sustainable as grounds of cross-objection and he is not pressing them. Grounds Nos. 4 and 5 are grounds which are to be re-adjudicated on

evidence when the matter goes back. The decree as passed cannot be sustained on those two grounds nor any relief can be granted by us at this

stage on the basis thereof. Therefore, the grounds so made out will now await adjudication at the trial when the matter goes back. There is other

ground, namely ground No. 6. In this ground the plaintiff raised an objection that the learned Judge in the trial court was in error in not framing an

issue with regard to the nuisance and annoyance, but as we have indicated hereinbefore issues were framed at the instance of the plaintiff with

reference to the averment made in paragraph 3 of the plaint. Therefore, a limited issue was framed as to whether the defendant had been using the

premises for a purpose other than for which it was let out. Even that issue was not pressed. Therefore, the other allegation in paragraph 3 regarding

the nuisance was not really pressed at the trial and not having done so it is not open to the plaintiff now to raise a cross-objection that the Court

was wrong in not framing an issue in that regard. The cross-objection, therefore, is disposed of accordingly.

13. There is an application made on behalf of the appellant under the provisions of Ordinance No. VI of 1 967. Since the appeal succeeds the

application becomes in fructuous and is disposed of accordingly.

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14. So far as this miscellaneous appeal is concerned, it arise out of a proceeding u/s 17B of the West Bengal Premises Tenancy Act for reopening

the decree itself which has been set aside. This miscellaneous appeal, therefore, becomes in fructuous once the decree itself is set aside. We,

therefore, dispose of the miscellaneous appeal. accordingly. There will be no order as to costs.

S.N. Sanyal, J.

I agree.