

(1979) 07 CAL CK 0024

Calcutta High Court

Case No: None

Amar Prasad Gopta

APPELLANT

Vs

Arun Kumar Shaw

RESPONDENT

Date of Decision: July 27, 1979

Acts Referred:

- Transfer of Property Act, 1882 - Section 109, 37

Citation: 84 CWN 281

Hon'ble Judges: R.K. Sharma, J; M.M. Dutt, J

Bench: Division Bench

Advocate: R.C. Deb, Dipankar Gupta and Nirmala Kumari Chaturvedi, for the Appellant; Sunil Krishna Dutt, for the Respondent

Final Decision: Dismissed

Judgement

1. This appeal is at the instance of the plaintiff and it arises out of a suit for eviction.
2. The case of the plaintiff was that on a partition among the plaintiff, his brother Rabi Prosad Gupta and the heirs of his other two brothers, Ramaprosad and Hariprosad, the shop rooms comprised in premises No. 1/Am Chowringhee Road, Calcutta were allotted to the plaintiff and his said brother Rabi Prosad Gupta, the major portion being allotted to the plaintiff and a small portion to his said brother Rabi Prosad. It was the plaintiff's case that after the partition, it was mutually agreed by and between the parties that the defendant who was a monthly tenant in respect of the said premises under all the co-sharers from before the partition at a monthly rent of Rs. 902/- would pay to the plaintiff Rs. 800/- per month as rent with effect from the 1st day of May, 1962 for the portion of the shop rooms allotted to him. The defendant paid rent tot the plaintiff at the rate of Rs. 800/- per month up to June, 1962. It was alleged that the defendant defaulted in payment of rent from the Month of July 1962 up to the month of January 1963. He also sublet and/or otherwise transferred or assigned a part of the said portion being the portion

allotted to the plaintiff without the previous consent in writing of the plaintiff. Further, it was alleged that the said portion was reasonably required by the plaintiff for the purpose of making substantial addition and alteration thereto for raising a partition wall. The plaintiff determined the tenancy of the defendant of the part allotted to the plaintiff by a notice dated December 12, 1962 and called upon him to vacate and deliver up vacant possession of the same on the expiry of the month of January 1963. But the defendant did not comply with the notice and hence the plaintiff instituted the suit for his eviction.

3. The defendant entered appearance in the suit and contested the same by filing a written statement. His case was that he never agreed to pay rent for Rs. 800/- per month for the plaintiff's portion. It was alleged that before the partition, although the tenancy was jointly held by four sets of landlords, the rent was severally paid by him in four equal shares. By a notice dated May 15, 1962 jointly signed by all the co-sharer landlords including the plaintiff, he was informed that the said premise No. 1/A, Chowringhee Road, Calcutta had been allotted to the share of the plaintiff and his brother Rabi Prosad and the rent will be apportioned later on. In order to maintain good relationship and without prejudice to his right he paid Rs. 1090/- to the plaintiff and his said co-sharer towards the rent for May and June 1962 and to send rent bills accordingly. By a letter dated October 5, 1962, of which a copy had been forwarded to the plaintiff, Rabi Prosad Gupta informed the defendant that they had mutually agreed that for the present Rabi Prosad would get Rs. 130/- per month and the plaintiff would get the balance. When, however, rent was tendered to the plaintiff he avoided to accept the same on various excuses. It was alleged that rents due to the share of Rabi Prosad had all along been paid and accepted by him and that rents payable to the share of the plaintiff had been deposited in the office of the Rent Controller, Calcutta. In short, the case of the defendant was that in spite of the partition among the plaintiff and his co-sharers, the original tenancy of Rs. 902/- per month remained a single tenancy of which only rent payable to the plaintiff and Rabi Prosad was apportioned and, as such the suit for eviction of the defendant from a portion of his tenancy was bad and not maintainable. He denied that he had sub-let or assigned the said premises or the portion allotted to the plaintiff's case of reasonable requirement.

4. The learned Judge, 3rd Bench, City Civil Court, Calcutta came to the finding that the plaintiff had failed to prove his case of requirement of the suit premises. He held that the plaintiff had failed to prove that the defendant had sub-let or assigned the said premises. He, however, held that the defendant was a defaulter in payment of rent for the months of July 1962 to January 1963. Further he held that the original tenancy that was held by the defendant was still continuing and, accordingly, the suit was bad for partial eviction and also for not impleading the other co-sharer landlord, namely, the said Rabi Prosad. He found that the combined notice to quit and of suit was duly served and the same was legal and valid. But in view of his finding that the suit was bad for partial eviction, he dismissed the suit. Hence this

appeal.

5. Mr. Dipankar Gupta, learned Advocate appearing on behalf of the plaintiff-appellant, has not challenged before us the finding of the learned Judge against the plaintiff's case of reasonable requirement of the portion of the said premises allotted to him and of subletting of the same by the defendant. He has, however, challenged the finding of the learned Judge that the original tenancy of the defendant under the plaintiff and his brother Rabi Prosad was still continuing and the suit was, accordingly, bad for partial eviction. He has placed strong reliance on the provision of section 109 of the Transfer of Property Act which provides as follows :

109. Rights of lessor's transferee. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

6. It is contended on behalf of the plaintiff appellant that on the transfer of the suit premises being the portion of the said premises No. 1/A Chowringhee Road, Calcutta, the plaintiff has acquired all the rights of the original lessors as to the part of the premises allotted to him. Such rights, according to him, include the right to evict the tenant from the part transferred. In other words, it is contended that on such transfer on partition, the tenancy was split up and the plaintiff became the sole landlord of the defendant in respect of the part transferred to him.

7. Section 109 provides for the rights of the transferee upon the transfer by the lessor of the property leased, or any part thereof, or any part of his interest therein. It is now well settled that partition is not a transfer. But it has been held by a Division Bench of this Court in [Shankar Shaw Vs. Anukul Ch. Bose](#), that for the purpose of section 109 of the Transfer of Property Act partition is a transfer.

We may proceed on the basis that on partition among the plaintiff and others there has been a transfer in favour of the plaintiff in respect of the portion of the premises allotted to him.

8. In view of the provision of section 109 of the Transfer of Property Act, the transferee of a part of the property transferred shall possess all the rights of the lessor. It has been stated already that the contention of the appellant is that by virtue of the transfer of the portion of the said premises to the plaintiff, the plaintiff has acquired all the rights of the lessors in respect of the part of the premises including the right to eject the defendant from that part. It is true that the transferee of the part of the premises acquires all the rights of the lessor, but the question is whether the lessor had any right to evict the lessee from a part of the premises. There can be no doubt that the lessor cannot evict the lessee from a part of the property leased. Moreover, except as provided in section 13(4) of the West Bengal Premises Tenancy Act, 1956, no Court shall pass a decree for partial eviction. Indeed a suit for a decree for partial eviction is not maintainable. As the lessor has no right to evict the lessee from the part of the property, it is absurd to think that section 109 of the Transfer of Property Act has conferred such a right to the transferee of a part of the property as contended on behalf of the appellant.

9. Our attention has been drawn to the fact that there was an apportionment of rent between the plaintiff and his brother Rabi Prosad Gupta, and that the defendant had agreed to pay to the plaintiff his share of rent at the rate of Rs. 800/- per month. Indeed, it appears that for a few months the defendant had paid rent to Rs. 800/- per month and Rs. 145.48 per month to Rabi Prosad Gupta. It is, however, clear from the letters written by the plaintiff and his said brother claiming their respective shares of rent at the above rates with effect from May 1962 that the said rates of rents were claimed subject to final adjustment at a future date [Ext. B(1)]. There was, however, no final adjustment of the rate of rent. But even assuming that there was an apportionment of rent as contended on behalf of the appellant, such apportionment, in our opinion, had not the effect of serving the tenancy. u/s 37 of the Transfer of Property Act, the tenant is bound to apportion rent. The third paragraph section 109 also provides for apportionment of rent by mutual agreement among the lessor, the transferee and the lessee, failing which the same may be made by the Court. The relationship of landlord and tenant arises out of a contract. A contract between the defendant and his erstwhile lessors, namely, the plaintiff and his co-sharers, was in respect of the whole of the premises. It is not understandable how after a partition there can be new tenancies in respect of different parts of the premises allotted to the co-sharers without fresh contracts with the tenant. It is not the case of the plaintiff appellant that there has been a fresh contract between him and the defendant whereby a fresh tenancy has been created in respect of the part of the premises allotted to the plaintiff. In these circumstances, we are unable to accept the contention that as there had been an apportionment of rent, the tenancy was split up and a new tenancy came into

existence for the part of the premises allotted to the plaintiff.

10. Much reliance has been placed on behalf of the plaintiff appellant on the decision of a learned single Judge of the Madhya Pradesh High Court in Subhash Chandra v. Radhaballabh Saligram, AIR 1972 M.P. 207. In that case, it has been held that even if one owner leases out the property, the lease must always be held to be subject to the condition that on transfer of a part of the property the lease shall stand severed *protanto*. This decision no doubt supports the contention of the plaintiff appellant, but most respectfully we differ from the view expressed in that decision. On the other hand, we may refer to a decision of Bachawat J (as he then was) in Durgarani Devi v. Mahiuddin, 86 C.L.J. 198. His Lordship, after considering a few decisions, observed as follows :

It is, therefore, quite clear that one of the joint landlords could not terminate the tenancy before partition by a notice to quit. I do not see how his position is improved after partition. There is no severance of the tenancy by reason merely of such partition. There is no separate demise in respect of the divided part of the reversion and the landlord to whom a divided part of the reversion has been allotted acquires no right by reason merely of the partition to terminate the tenancy by giving notice to quit as to that part.

11. In the instant case, there was no demarcation of the portion allotted to the plaintiff. The defendant was not also told about the portion of the premises allotted to the plaintiff. The notice to quit also does not specify the plaintiff's portion, nor any such specification has been made in the plaint. In these circumstances, apart from anything also, a Court cannot pass any effective decree. Such a portion which is yet to be determined is not a premises within the meaning of section 2(f) of the West Bengal Premises Tenancy Act, 1956. In the first instance it is not demarcated by metes and bounds and secondly, it has not been let separately. It is, however, contended that it may not be "a premises" within the meaning of section 2(f) and the provisions of the West Bengal Premises Tenancy Act may not apply, but there is no difficulty in applying the provisions of the Transfer of Property Act. This contention is not tenable. Before partition, the tenancy was governed by the West Bengal Premises Tenancy Act, 1956 and consequently the defendant had some protection against eviction. It is unthinkable that upon partition such protection will be lost to the defendant and he will be relegated to the stark realities of the Transfer of Property Act. For these reason also, the plaintiff is not entitled to succeed.

12. The learned Judge has held that the notice to quit is legal and valid. We do not, however, agree with the learned Judge. A notice to quit by one of the landlords in respect of a part of the premises is undoubtedly a bad notice. The learned Judge is, therefore, not right in holding that the notice to quit is legal and valid. No other point has been argued in this appeal.

13. For the reasons aforesaid, this appeal fails and it is dismissed. In view of the facts and circumstance of the case, there will be no order for costs.

Sharma, J.

14. I agree.