

(2001) 08 CAL CK 0049**Calcutta High Court****Case No:** S.A. No. 149 of 1997

Santosh Kumar Mazumdar

APPELLANT

Vs

Rekha Bose (Smt.)

RESPONDENT

Date of Decision: Aug. 8, 2001**Acts Referred:**

- Transfer of Property Act, 1882 - Section 108
- West Bengal Premises Tenancy Act, 1956 - Section 13(1), 18A

Citation: (2001) 2 ILR (Cal) 409**Hon'ble Judges:** Pranab Kumar Chattopadhyay, J**Bench:** Single Bench**Advocate:** Jotirmoy Bhattacharjee and Rudranil De, for the Appellant; Bidyut Kumar Banerjee and Ashok Kumar Mazumdar, for the Respondent**Final Decision:** Allowed**Judgement**

Pranab Kumar Chattopadhyay, J.

This appeal is directed against the judgment and decree both dated August 2, 1996 passed by the Learned Additional District Judge, Second Court, Howrah in Title Appeal No. 171 of 1991 affirming the judgment and decree both dated May 27 1991 passed by the Learned Munsif, Third Court, Howrah in Title Suit No. 315 of 1985. The suit was filed by the Plaintiff/Respondent as the owner of the holding No. 36 Rajballav Saha Lane, Howrah on several grounds including the grounds of default, building and re-building of the suit premises and also for causing damage to the suit premises and thereby violating the provisions of Clause (m), (o) & (p) of Section 108 of the Transfer of Property Act.

2. The Plaintiff/landlord mentioned in the plaint that the Defendant/tenant raised unauthorised permanent construction in the suit premises and also neglected to pay the monthly rent. The contention of the Plaintiff is that the suit premises require urgent re-construction on eviction of the tenant as the same is in dilapidated

condition. The Defendant Appellant contested the claims of the Plaintiff mentioned in the plaint and opposed the prayer of eviction by filing written statement before the Trial Court. In the said written statement Defendant/ Appellant challenged the validity and/or legality of the grounds of eviction and contended that the Plaintiff/ landlord is interested in evict the Defendant/tenant at any cost to achieve illegal material gain. The Defendant/ tenant, submitted that necessary protection under statute should be made available to the tenant/Defendant against illegal demand of the landlord/Appellant.

3. Considering the materials on record and upon hearing the submissions of the Learned Advocate of both the sides Learned Munsif came to the findings that, the Defendants/Appellant is a tenant under the Plaintiff of the landlord and the Defendant/Appellant is not a defaulter though the said Defendant/Appellant has violated the provisions of Clauses (m), (o) & (p) of the Section 108 of Transfer of Property Act by raising a permanent construction of Bathroom and also for constructing septic privy within the suit holding. The Learned Munsif, however, rejected the prayer of the landlord for a decree of eviction on the ground of building and rebuilding of the suit premises.

4. Both the parties in the suit were not happy with the said judgment of the Learned Munsif. The Defendant/ tenant preferred to original appeal challenging the findings of the Learned Munsif regarding the alleged construction of the permanent nature and the Plaintiff/landlord also preferred a cross appeal challenging the decision of the Learned Munsif in respect of rejection of the prayer for eviction on the ground of building or rebuilding of the suit premises. The Learned Judge of the Lower Appellate Court decided both the original appeal and the cross appeal preferred against the impugned judgment passed by the Learned Munsif and passed the judgment and decree dismissing the Title Appeal preferred by the Appellant/Defendant. However the cross appeal preferred by the Plaintiff/landlord was allowed on contest. The Learned Judge of the Lower Appellate Court declared that the Plaintiff is entitled to get a decree of eviction on both the ground of building and re-building u/s 13(1a) and u/s 13(1 b) of the West Bengal Premises Tenancy Act. The Learned Judge of the Lower Appellate Court affirmed the decree of eviction passed by the Learned Munsif though the finding of the said Munsif regarding the construction of the bathroom and the rejection of the prayer of eviction on the ground of building and re-building were not approved.

5. The tenant/Defendant thereafter filed the instant Second Appeal which was admitted by this Hon"ble Court on the grounds stated in the Memo of Appeal but no questions were formulated as substantial questions of law for the purpose of decision in the instant Second Appeal. Considering the grounds mentioned in the memorandum of appeal following questions are formulated:

1. Whether the Learned Court below was justified in passing a decree for eviction on the ground of violation of Clauses (m), (o) & (p) of Section 108 of the Transfer of

Property Act for making construction even outside the tenancy.

2. Whether the decree for eviction on the ground of Section 13(1)(f) of West Bengal Premises Tenancy Act can be passed in the absence of a sanctioned building plan.

6. Mr. Jotirmoy Bhattacharjee, Learned Advocate appearing on behalf of the Appellant submitted that the septic privy was never constructed by his client namely Defendant/tenant and the same was constructed according to the Appellant by Howrah Municipal Corporation under the Calcutta Urban Development Project Scheme. Admittedly a service privy was existence in the suit premises which was converted to septic privy. As a matter of fact, the Appellant/Defendant herein filed a petition for amendment of the written statement before the Lower Appellant Court on the ground that the septic privy was constructed by the Howrah Municipal Corporation under the aforesaid C.U.D.P. project and the said amendment was allowed.

7. It has also been recorded in the judgment of the Lower Appellate Court that the Learned Advocate for the Appellant relying on the exhibits E and F and referring to the statements of D.W. 4 & D.W. 5 submitted that the septic privy was constructed by Howrah Municipal Corporation under the C.U.D.P. project and the same has been specifically mentioned in the letter of the councilor of the Municipal Corporation, Mr. Binoy Roy.

8. Mr. Bhattacharjee further contended that the septic privy had admittedly been constructed outside the tenancy and as such according to the Appellants provision of Section 108 of the Transfer of Property Act cannot be made applicable. It has also been contended on behalf of the Appellant that by the said construction of the septic privy access of landlord and other occupants have not been obstructed and therefore, violation of Clause (p) of Section 108 does not arise. According to the Learned Counsel of the Appellant Clause (p) of Section 108 of Transfer of Property Act has no manner of application in absence of specific pleading and proof and this case can be heard only on the ground of alleged violation of Clause (m) of Section 108 simpliciter.

9. It is the contention of the Learned Counsel of the Appellant that the construction of septic privy was done by Howrah Municipal Corporation and the Defendant specifically adduced evidence and the corporation people also adduced evidence to substantiate that the said construction of septic privy was done by Howrah Municipal Corporation under project called the C.U.D.P.

10. Learned Counsel of the Appellant also referred to various portions of the evidences of D.W. 1, D.W. 4 and D.W. 5 in this regard. Mr. Bhattacharjee, Learned Counsel for the Appellant cited the decisions Deb Chatterjee v. Helena Ghosh 1990 (11) C.H.N. 346 paras. 9, 10, R. Roy v. B.K. Patra 1998 (II) C.H.N. 362 paras. 14, 15, 20, 21, 22 and 23 and contended that provisions of Clauses (m), (o) and (p) of Section 108 of Transfer of Property Act will not be applicable at all in the present case as the

septic privy was constructed outside the tenancy.

11. Mr. Bhattacharjee further submitted that provision of Section 13(1)(b) of the West Bengal Premises Tenancy Act will not be applicable in the present case as Appellant/ tenant has done nothing contrary to the provisions of Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act. Learned Counsel of the Appellant contended that the finding of the Lower Appellate Court regarding construction of the septic privy as permanent in nature is totally perverse as the tests for ascertaining the nature of construction have not been adverted to. Following decisions have also been cited by the Learned Counsel of the Appellant in this regard, Kanta Devi Arora v. Snehalata Sen 1992 (11) C.H.N. 217 paras, [Om Prakash Vs. Amar Singh and Others,](#).

12. Mr. Bhattacharjee contended that construction of septic privy cannot be regarded as a construction of permanent nature as the same can be removed without causing any damage to the structural strength of the main building. Furthermore, according to Mr. Bhattacharjee by the said construction of septic privy no change of accommodation has been made. According to the Learned Counsel of the Appellant nature of the construction of septic privy was never discussed by the Learned Munsif of the Trial Court and by the Learned Judge of the Lower Appellate Court.

13. Mr. Bidyut Banerjee, Learned Senior Counsel appearing on behalf of the Plaintiff/Respondent submitted that a construction outside the tenancy but within the suit holding violates Clauses (m), (o) and (p) of the Transfer of Property Act. Mr. Banerjee cited decisions of this Hon'ble Court [Brohmananda Das Vs. Nagendra Chandra Sarkar,](#) and Kalpana Dhar v. Subodh Kumar Paul 1978 (11) C.L.J. 292. Mr. Banerjee also referred to the tests laid down by this Court as well as by the Supreme Court for ascertaining the nature of a structure i.e. is whether a structure can be said to be a permanent structure or not. The cases cited by Mr. Banerjee in this regard are mentioned [Atul Chandra Lahiry Vs. Sonatan Daw, ; Suraya Properties Private Ltd. Vs. Bimalendu Nath Sarkar, ; Venkatlal G. Pittie and Another Vs. Bright Bros. \(Pvt.\) Ltd.,](#).

14. Mr. Banerjee referred to various portions of the judgment of the Lower Appellate Court and submitted that the Learned Judge of the Lower Appellate Court discussed in details in respect of the construction of septic privy before coming to the specific finding that construction was permanent in nature and such construction would make the Defendant/tenant liable for eviction.

15. The Learned Counsel of the Plaintiff submitted that construction even outside the tenancy will violate Clause (p) of Section 108 of the Transfer of Property Act. The decisions cited in this regard by the Learned Counsel are mentioned hereunder Krishnadas Roy v. Basanta Kumar Serf"; Kalpana Dhar v. Subodh Kumar Paul.

16. The Learned Counsel of the Plaintiff also sought to distinguish the judgment cited earlier by the Learned Counsel of the Appellant as R. Roy v. B.K. Patra by contending that the said judgment is per in curium, as the said judgment did not take into consideration earlier Division Bench judgment Kalpana Dhar v. Subodh Kumar Paul and therefore submitted that the said judgment should be virtually treated as honest. Mr. Bhattacharjee, Learned Counsel of the Appellant, however, sharply reacted to the aforesaid submission of Mr. Banerjee and submitted that the said judgment R. Roy v. B.K. Patra cannot be held as per in curium for the simple reason that effect of the decision Kalpana Dhar v. Subodh Kumar Paul has been duly taken into consideration in the judgment R. Roy v. B.K. Patra {Supra}. Mr. Bhattacharjee further submitted that the decision Kalpana Dhar v. Subodh Kumar Paul (Supra) is in conformity with the judgment Krishnadas Roy v. Basanta Kumar Sett 1978 (1) C.L.J. 465 as the said judgment was noted and discussed in the judgment Kalpana Dhar v. Subodh Kumar Paul (Supra).

17. From the aforesaid discussions, it is clear that a septic privy had been constructed outside the tenancy area but within the suit holding and now an important issue is to be decided by this Court as to whether construction outside the tenancy but within the suit holding would violate Clauses (m), (o) and (p) of Section 108 of Transfer of Property Act.

18. In the present case, nothing appears from the evidence on record that by the construction of septic privy access of landlord and or other occupants of the premises has been obstructed in any manner. It has also not been established that any substantial change has been made in respect of the character of the suit premises in view of the construction of the said septic privy. Furthermore, any kind of structural change of substantial character has also not been established and therefore it cannot be said that in view of the construction of septic privy any material alteration has been caused. The decisions cited by the Learned Advocate of the Plaintiffs are clearly distinguishable and the decisions submitted by Mr. Bhattacharjee, Learned Counsel of the Appellant are very much applicable in the facts of the present case. Mr. Bhattacharjee also cited Brijendra Nath Bhargava and Another Vs. Harsh Wardhan and Others, and submitted that in the present case no structural change of substantial character has been established and I find much force in such submission.

19. On behalf of the Appellants a specific case was made out before the Lower Appellate Court in respect of construction of septic privy by the Howrah Municipal Corporation. The Defendant had admittedly produced relevant documents which were produced before the Learned Lower Appellate Court and adduced evidence (both oral and documentary) to prove that Howrah Municipal Corporation constructed the septic privy. The exhibits (E) and (F) are two important documents which cannot be overlooked or ignored. It is clear from the letter of councilor Binoy Roy (exhibit "E") that Howrah Municipal Corporation constructed the said septic

privy under the C.U.D.P. programme. From the letter of Prasun Chatterjee dated July 15, 1991 (marked for identification as "X") it appears that the septic privy at the suit holding was installed by the Howrah Municipal Corporation. It may be noted that said Prasun Chatterjee was the overseer of the Howrah Municipal Corporation and in-charge of C.U.D.P. scheme. The said Prasun Chatterjee also categorically deposed before the Lower Appellate Court in the following manner:

◆ the septic privy was constructed by Howrah Municipal Corporation under the development◆.

20. The son of the Defendant, namely D.W. 3, in his evidence before the Learned Munsif specifically stated that the Defendants did not convert the service privy of the suit premises into a septic privy. Furthermore, the construction of septic privy has been admittedly made under the ground level and the same is obviously in the type of a reservoir. A Division Bench of this Court in the judgment Surya Properties (P) Ltd. v. B. Nath (Supra), specifically held that "permanent structure" for the purpose of Clause (p) of Section 108 of the Transfer of Property Act would not include a reservoir built of brick and concrete. Supreme Court also in the judgment Venkat Lal v. Bright Bros. (P) Ltd. (Supra) approved the aforesaid view of this Court.

21. One other important aspect is that the Howrah Municipal Corporation was and still is entrusted with the duty and responsibility to maintain health any hygienic condition in the corporation area and for this purpose like any other civic bodies it had undertaken the scheme to convert service privy into septic privy for the purpose of improvement of the health and hygienic condition in the respective area within Howrah Municipal Corporation. From the evidence of D.W. 4 and exhibits (E) & (F), it has been established that Howrah Municipal Corporation undertook a scheme for conversion of service privy into septic privy and it has also been conclusively proved that Howrah Municipal Corporation constructed the septic privy at the suit premises. The finding of the Lower Appellate Court to the effect that nothing has emerged from the evidence to show conclusively that the Howrah Municipal Corporation constructed the septic privy is not correct and the said finding is obviously perverse as the same is contrary to the evidence on record.

22. The Learned Judge of the Lower Appellate Court also held as hereunder:

◆ there is nothing before me to show that Howrah Municipal Corporation ignoring all the established rules and procedure would encroach upon the land of a citizen to erect construction out of its own accord◆. I have every reason to hold that the defdt./tenant took all possible initiatives without seeking◆ permission of the landlord for conversion of the septic tank ◆.

23. From the aforesaid finding of the Judge of the Lower Appellate Court it is. clear that the said Learned Judge only refused to believe that Howrah Municipal Corporation erected any construction encroaching the land of a citizen out of its own accord and also held that the Defendant/tenant took all possible initiatives for

conversion of the septic tank. It appears from the evidence on record that Howrah Municipal Corporation had undertaken a scheme under Calcutta Urban Development project for conversion of service privies into septic privies and under the said scheme converted the service privy of the suit premises into septic privy. If the Defendant/tenant took any initiative and influenced the authorities of the Howrah Municipal Corporation to convert the service privy into septic privy under the C.U.D.P. scheme then such an initiative can under no circumstances attract the mischief of Section 108 of the Transfer of Property Act.

24. The health and hygienic condition of the suit premises and its surrounding areas bound to be improved by the aforesaid conversion of the service privy into septic privy and thereby the suit holding has been developed for the benefits of the landlord. In a civilized society if any scheme is undertaken for improvement of the health and hygienic condition of an area that should be encouraged and I am surprised to note that in the present case steps taken for improvement of health and hygienic condition of the suit premises and its surrounding areas have been taken as grounds for eviction of a tenant on the alleged plea that the tenant took initiative in this regard. Steps taken for improvement of the health and hygienic condition of the suit premises and its surrounding areas resulted in considerable improvement of the suit premises. This cannot be a ground for eviction of the tenant as is sought to have been done in the instant case by treating the aforesaid act within the mischief of Section 108 of the Transfer of Property Act and thereby holding the tenant liable for eviction on that ground alone.

25. I do not agree with the aforesaid finding of the Learned Judge of the Lower Appellate Court as in my opinion the said finding of the Learned Judge is patently erroneous. If the tenant had at all taken any such initiative then same should be encouraged instead of treating the same as a ground for eviction. In view of the aforesaid circumstances, I hold that in the present case construction of septic privy outside the tenancy cannot violate the Clause (p) of Section 108 of the Transfer of Property Act as the septic tank is virtually a reservoir and it has not been established also before the Courts below that by the said construction of septic privy access of the landlord and/or other occupants of the other portions of the suit premises have been obstructed in any manner.

26. Accordingly, I am constrained to hold that the Learned Judge of the Lower Appellate Court came to the finding regarding the construction of the septic privy as permanent in nature in absence of any evidence and therefore, such finding should be held as perverse. From the materials on record it is abundantly clear that Howrah Municipal Corporation converted the service privy into the septic privy at the suit premises and therefore Appellant herein should not be held responsible for the construction of the said septic privy at the suit premises and so the finding of the Learned Judge of the Lower Appellate Court is totally erroneous on this point.

27. The next ground urged by the Appellant is about the validity of the decree passed by the Courts below for eviction of the tenant on the ground of Section 13(1)(f) of the West Bengal Premises Tenancy Act even in the absence of a sanctioned building plan.

28. Mr. Bhattacharjee, Learned Counsel of the Appellant submitted that sanctioned building plan in the present case is absolutely necessary in order to justify the claim of the landlord that the suit premises is reasonably required for the purpose of rebuilding.

According to the Appellant sanctioned building plan alone can justify whether the portion occupied by the tenant is reasonably required for the purpose of building and re-building of the premises in question and also can establish whether the building and re-building of the suit premises warrants the vacating of the suit premises by the tenant. Mr. Bhattacharjee contended that there are other tenants in the said suit premises and unless the sanctioned building plan is produced it cannot be established that the construction cannot be proceeded with at the suit premises without evicting the Defendant/ tenant only.

29. It has further been contended on behalf of the Appellant that in view of Section 18A of the West Bengal Premises Tenancy Act, landlord should put the tenant back into the possession of the premises after completion of the building of re-building. Section 13(1)(f) of the West Bengal Premises Tenancy Act is controlled by the provision of Section 18A of the said Act. Therefore, it has been contended by the Appellant that whether any specific provision has been made by the landlord for restoration for the tenancy to the Defendant u/s 18A of the West Bengal Premises Tenancy Act could be established only on the basis of the sanctioned building plan and not otherwise.

30. Learned Counsel of the Appellant specifically contended that in a case where the landlord is claiming a decree on the ground of building or re-building and or additions or alterations of the premises in question under Clause (f) of Sub-section (1) of Section 13 of the West Bengal Premises Tenancy Act, the landlord must establish before the Court that he is ready with necessary fund and sanctioned building plan to start with the construction and such construction can be carried out immediately if the premises in vacated by the tenant.

31. Mr. Bhattacharjee cited following decisions in support of his contention, Sahadeb Chandra Paul and Others Vs. Manmatha Nath Mondal and Another, and Sarashibala Roy (Smt.) and Ors. v. Monorama Roy (Smt.) and Ors. 1986 (1) C.H.N. 253 paras. 10, 11 .

32. Mr. Banerjee. however, appearing on behalf of the landlord submitted that the sanctioned building plan is not absolutely necessary in order to pass a decree on the ground of Section 13(1)(f) of the West Bengal Premises Tenancy Act. Mr. Banerjee further submitted that the building plan was duly submitted before the Howrah

Municipal Corporation Authorities in the year 1987 for the purpose of obtaining necessary sanction and necessary fee has also been paid by the landlord at the time of submission of the plan. On behalf of the Plaintiff it has been contended that relevant papers and documents have also been produced before the Trial Court as the proof of the means of the landlord and the same have been admitted into evidence and marked as exhibits. According to Mr. Banerjee sanctioned building plan is not required as a matter of rule. Mr. Banerjee cited following decisions in support of his contention, Ram Kumar Keshori v. The State 1981 (11) C.L.J. 387 and Jamal Ara Begum v. D.P. Guha and Ors. 1991 (1) C.L.T. 357 para. 7.

33. Mr. Jotirmoy Bhattacharjee, however, distinguished the aforesaid decisions on the ground that in both the case mentioned hereinabove sanctioned building plans were produced before the Court.

34. In my opinion, aforesaid cases cited by Mr. Banerjee have no manner of application in the facts and circumstances of the present case. The sanctioned building plan is required for the purpose of ascertaining whether the landlord is ready for construction and whether for effecting such construction tenant must vacate the premises or in other words to ascertain whether without vacating the tenanted portion construction is possible. Furthermore, from the sanctioned building plan it would also appear whether necessary provision has been made for restoration of the tenanted area to the tenant after completion of the construction.

35. In order to prove the bona fide of his pleas the landlord should satisfy the conscience of the Court with adequate materials that he is ready to start the construction work immediately after vacation of the tenanted portion of the premises by the tenant and the landlord should also establish before the Court that he is ready with the necessary fund and sanctioned building plan for the purpose of proceeding with the construction work of the building without any delay.

36. In the present case suit was not initially filed on the ground of building and re-building and after a laps of two years the said ground of building and re-building was incorporated by amendment. Admittedly, till today building plan has not been sanctioned and accordingly the landlord has miserably failed to prove his bona fide in respect of his claim for the decree for recovery of possession on the ground of building and re-building. Landlord must establish before the Court that the premises in question is reasonably required for the purpose of building and re-building and a decree for recovery of possession on the said ground u/s 13(1)(f) of West Bengal Premises Tenancy Act can be passed only when the landlord successfully establishes that the premises is reasonably required for the purpose of building and re-building. In the present case from the materials on record it appears that the landlord has miserably failed to establish that the suit premises is reasonably required for the purpose of building and re-building.

37. The Respondent also prepared a supplementary affidavit incorporating certain facts and prayed for leave of this Court to allow the Respondent to file the same in order to take into consideration certain facts stated therein while disposing of the instant appeal.

38. I am not inclined to grant such leave to the Respondent as no further facts can be taken into consideration afresh at the time of hearing of the instant Second Appeal. Accordingly, I reject the prayer of the Respondent in this regard and refuse to take into consideration of the facts mentioned in the said supplementary affidavit.

39. The cross objection filed by the Respondent herein is also devoid of any merit as the Learned Judge of the Lower Appellate Court correctly held that there was existence of a bathroom in the suit premises and the Defendant/tenant did some repairing of the same as the landlord refused to undertake such repair. In my opinion Learned Judge of the Lower Appellate Court rightly upset the finding of the Learned Munsif on this point. I affirm the decision of the Learned Judge of the Lower Appellate Court in this regard and reject the cross objection filed on behalf of the Plaintiff/ Respondent herein.

40. For the aforementioned reasons, the contentions of the Appellant should be upheld. The instant Second Appeal is, therefore, allowed and the judgment and decree passed by both the Learned Courts below are hereby set aside. The suit filed by the Plaintiff also stands dismissed accordingly.

41. In the facts and circumstances of this case, there will be, however, no order as to costs.