(1960) 09 CAL CK 0023

Calcutta High Court

Case No: Civil Rule No, 3753 of 1958

R. Doraiswami		APPELLANT
	Vs	
Madhabilata Ghosh		RESPONDENT

Date of Decision: Sept. 13, 1960

Acts Referred:

- Constitution of India, 1950 - Article 227
- Distress Amending Act, 1908 - Section 6
- West Bengal Premises Tenancy Act, 1956 - Section 16, 16(2), 16(3), 16(5), 28
- West Bengal Premises Tenancy Rules, 1958 - Rule 4

Citation: (1961) 2 ILR (Cal) 536

Hon'ble Judges: Chatterjee, J

Bench: Single Bench

Advocate: J.K. Sen Gupta and Sethi K. Dutta, for the Appellant;Jatin Ch. Banerjee and Haripada Saha Advs., for the Respondent

Judgement

Chatterjee, J.
These applications, are under Article 227: of the Constitution and relate to Section 16 of the West Bengal Premises Tenancy Act of 1956.

2. The Petitioner before me is the tenant. The opposite party No. 1 is the landlord and the opposite party No. 2 is the subtenant. The applications were filed on or about August 27, 1956 by the landlady opposite party No. 1 before the Rent Controller for a declaration that the tenancy of the Petitioner-tenant had ceased and the sub-tenant, opposite party No. 2, had become a direct tenant of the landlord, opposite party No. 1. The applications were opposed by the Petitioner tenant on the ground that the notice was not legal, valid and sufficient and further the sub tenancy had been created with the written consent of the then landlord, S.C. Ghosh. On February 26, 1958, the Bent Controller dismissed the applications on the ground that the notice, u/s 16(5) of the Act was defective and not valid in, law. Against that

the landlady, opposite" party No. 1, filed an appeal. The appellate authority allowed the appeal. There was a cross-objection filed by the Petitioner but that was dismissed. Against them the present petitions have been filed.

3. The West (Bengal Premises Tenancy Act of 1956 came into force on March 30, 1956. On June 26, 1956, a notice purporting to be u/s 16(2) was issued by the sub-ten ant to the landlord. No notice was given by the tenant to the landlady. This notice appears to have been received by the landlord on June 30, 1956. The present applications were filed "on or about August 27, 1956.

The questions that were urged in the Courts below have not been urged here. The question that have been urged here are questions relating to construction of Section 16 of the Act and the jurisdiction of the Rent Controller to entertain the applications in, question. Section 16(2) has no application to the facts of this case. Therefore, we are not called upon to consider that Sub-section. Section 16(2) has to be considered. The portion that has to be considered is "Where before the commencement of the "Act, the tenant has sub-let any premises either in whole or in "part, the tenant and the sub-tenant to whom the premises have "been sub-let shall give notice to the landlord of such sub-letting "in the prescribed manner within three months of the commencement of the Act and shall in. the prescribed manner notify the "termination of such sub-tenancy within one month of such "termination". It appear at the date when the notice was issued, i.e., on June 26, 1956, nothing had been prescribed about the manner of the notice.

4. The first contention of Mr. Sen Gupta is that as the manner of notice had not till then been prescribed, there is no question of serving a notice in the prescribed manner and hence the notice is bad. It is indeed true that the manner of the notice had not then prescribed and, therefore, no notice could have been given in the "prescribed manner" but a notice was given informing the landlord of all the relevant matters, viz., the name of the sub-tenant, the rate of rent, the portion occupied they were all given, but regarding the date of the commencement of the sub-tenancy nothing definite was given and in that view of the matter it is stated that the notice was bad. All that was stated in. the notice was that the sub-tenancy had been in existence for about 13 years. The question is whether because of this discrepancy the notice is bad.

5. This question, has three aspects. The first is:

Whether the date of the sub-tenancy, which was created long before the creation of the sub-tenancy in question, a material part of the notice, and the second is, whether formal compliance of the rules, which were framed thereafter, is necessary or substantial compliance is enough.

6. In order to understand that we must refer to Rule 4. The first part of sub-rule of Rule 4 says about the manner of service of notice and there is no complaint against that. The second part of the sub-rule is as follows:

Location of the premises let to the tenant with a description thereof sufficient for identifying the same and the only thing that has not been complied with is Sub-rule (f) which is date of creation/termination of the sub-tenancy. Now we must remember that Sub-Section 1 refers to sub-tenancies after the Act. Sub-Section 2 refers to sub-tenancies before the Act and Rule 4 covers both. The date of the creation of the sub-tenancy is material so far as a sub-tenancy created after the Act; because notice must be within a month of creation. But, if a sub tenancy is created before the Act, the actual date is not very relevant because the notice must be three or six months after the Act came in force (except for the purpose of testing the correctness of the statement). As people, long before the Act of 1956, say,-13 years before the Act came into force, had no occasion to make a special note of the date of the sub-tenancy and as that date is material only for the purpose of showing whether there was a real sub-tenancy or not and the date would not affect the order that may be passed u/s 16(3), I find no reason to say that the actual date of "the sub tenancy was indispensable. Banerjee, J. has decided this point in a case reported in Dilip Narayan Roy Choudhury v. Amarendra Kumar Dutta (1959) 64 C.W.N. 284 . Banerjee, J. held that even in spite of the words "shall give a notice" it was not mandatory but merely directory. I may add that provisions are not considered to be mandatory if there is no consequence attached to non-compliance J.K. Gas and Plant v. Emperor AIR [1947] F.C. 38 (41). Therefore, it would ordinarily not be mandatory. But Mr. Sen Gupta says that rule does not ordinarily apply to law of procedure. This is really not a procedural matter. The substantive right of the tenant would cease and a new right will be created between the landlord and the sub-tenant. Mr. Sen Gupta next says that this rule will be considered not retrospective but merely prospective. As no rule had till then been framed, there could be no question of a notice in the prescribed manner. Therefore, if within time somebody has taken the care to give a notice, which is substantially in compliance with the provisions of the Act, it is an accident but no compliance of the Act at all.

7. I may refer to the case between (1945) L.R. 72 I.A. 156 (Privy Council) . The Bengal Money Lenders Act contemplated the protection of assignees under Sub-Section 5 of Section 36 stating that "Nothing in this "section shall affect the rights of any assignee or holder for value 4''if the court is satisfied that the assignment to him was bona "fide or that he did not receive the notice referred to in Clause (a), "Sub-Section 1 of Section 28". It was held in this High Court that as no notice could have been given before the Act came into force, the assignee could not be protected. The Judicial Committee in the aforesaid case did not agree with this view. Here a notice was actually given and in substantial compliance of the provisions of the Act though not in formal compliance of the rule and, therefore, I have no hesitation in holding that this notice must be considered to be a proper notice under the Act, specially as I have held that the provision is directory. The provision is in affirmative that is some reason to hold that it is directory. (Refer to Vitafood v. Enus Shifting [1939] 1 All. E.R. 513.

8. I may finally add that the view taken by Banerjee, J. is amply supported by precedents and authorities. "When Section 6 of "the Law of Distress Amending Act (1908) (C-53) empowered a "superior landlord- to whom his tenant owned rent" to serve upon any under-tenant or lodger a notice (by registered post addressed to such under-tenant or lodger upon the premises) "requiring all future payment of rent to be made directly to "him," it was held that this section was enabling and not imperative and did not exclude personal service (vide-Maxwell''s Interpretation of Statutes-9th Edition, p. 377). The statute Law said that the notice should be by registered post but it was given by personal service. That was not understood to mean that the notice would be of no effect, if not served in the prescribed manner viz., by registered post. The statute only enabled the landlord to serve the notice by registered post but statute did not exclude personal service. Section 16 similarly enabled the sub-tenant to serve a notice upon the landlord and further enabled him to serve that notice in a particular prescribed manner but there is no exclusion. A notice may be necessary but the form that was given was merely enabling and did not exclude substantial compliance. I, therefore, over-rule the first argument of Mr. Sen Gupta. The next question, raised by Mr. Sen Gupta was regarding the jurisdiction of the Rents Controller to entertain the applications in question.
9. I may now refer to the relevant provision. Mr. Sen Gupta referred to Sub-Section 3 which is as follows:

Where in any case mentioned in Sub-section (2) there is no consent in writing of the landlord and the landlord denies that he gave oral consent, the Controller shall on an application made to him in this behalf either by the landlord or the subtenant within two months of the date of the receipt of the notice of sub-letting by the landlord or the issue of the notice by the sub-tenant, as the Case may be, by order declare that the tenant''s interest in so much of the premises as has been sub-let shall cease and that the sub-tenant shall become a tenant directly under the landlord from the date of the order.

10. Mr. Sen Gupta says that this is a case to which Sub-section (2) applies and an application was made to him by the landlord but this notice, which is the foundation of the jurisdiction not being a proper notice, the Rent Controller had no jurisdiction to entertain the petition. According to Mr. Sen Gupta, the jurisdiction of the Rent Controller is founded on two things, (a) an application, together with (b) a notice in the prescribed manner. If no application is made to the Rent Controller, he can do nothing. There is no dispute about that. If an application is made without a notice in the prescribed manner, Mr. Sen Gupta says that he had no jurisdiction to entertain the application. He further says that this application was not filed within two months of the issue of the notice. Therefore, the Rent Controller had no jurisdiction to entertain the petition and was barred by the period prescribed, viz., two months.

11. With regard to the first part of the argument Mr. Sen Gupta refers to a decision of the Supreme Court in Rai Brij Raj Krishna and Another Vs. S.K. Shaw and Brothers,

. According to Mr. Sen Gupta, the law empowers the Controller to entertain an application if there is a notice in the prescribed form and this notice is in substance sine qua non regarding jurisdiction. According to Mr. Sen Gupta, the Controller has no jurisdiction to determine whether the notice is in the prescribed manner or not; but it is only if the notice is in the prescribed form that he can exercise jurisdiction. If he goes into the question whether the notice is good or not and then decides the notice to be good or not, he merely usurps a jurisdiction not vested in him by law. In this case there being no notice in the prescribed manner, the Bent Controller had no jurisdiction to entertain the petition. Mr. Sen Gupta further relies on the object of the amending Act by which the period for notice was extended. The object of the amending Act is stated to be that "the West Bengal Premises Tenancy "Rules, 1958 which prescribes the manner of giving such "notices could not be published earlier than June 28. 1950". As "a result, majority of the tenants and the sub-tenants could not give the required notices to the landlord under the, said Sub-section within the prescribed period which expire on June 30. 1956."

12. According to Mr. Sen Gupta, it is clear from this object that it was the intention of the Legislature that only when the prescribed manner under the rules was published, a sub-tenant could give a notice and, therefore, could thereafter apply for being declared a direct tenant. According to Mr. Sen Gupta, therefore, the object of the West Bengal Act XVIII of 1957 clearly supports the interpretation that no action could be taken u/s 16(2) till the rules were published. Hence, a notice not being either in the prescribed form or being issued at a time before the rules came into force, would be no notice, and, therefore, the Controller could have no jurisdiction as the notice must be considered to be nonest.

13. We have, therefore, to interpret the section. Reading Sub-Section 3 we find the following conditions:

(a) There is no consent in writing of the landlord and the landlord denies such consent.

(b) There is an application to the Controller.

(c) The application may be by the landlord or the subtenant.

(d) The application must be by the landlord within two months of the date of the receipt of the notice of sub-letting or the application by the sub-tenant must be within two months of the date of the issue of the notice by the sub-tenant.

14. If these conditions are fulfilled, the Controller may make an order on the application. I must say that Mr. Sen Gupta did not accept that the application must be made by the landlord within two months of the receipt of the notice and by the subtenant within two months of the issue of the notice. According to him, if it is made by the landlord, it must also be made within two months of the issue of the notice by the sub-tenant. I am afraid, I cannot accept this interpretation because of

the clause "as the case may be". That shows that when it is an application by the landlord, it must be within two months of the receipt of the ''notice by the landlord and when it is by the subtenant, it should be within two months of the issue of the notice. The clause "as the case may be" is quite clear and means the same thing as "respectively." Hence, I must over-rule the contention of Mr. Sen Gupta that the application was barred by time as not made within two months. It was indeed not within two months of the issue of the notice but it was within two months, of the receipt of the notice. As the application is by the landlord the relevant date would be the date of the receipt of the notice because the landlord knows the matter from the date he receives the notice and the sub-tenant knows the matter from the date he issues the notice and each of them has been given the same period of two months from the date of receipt or the date of issue, as the case may be. Now again I go back to the question of jurisdiction. I have stated the conditions under which the Rent Controller can exercise his jurisdiction. None of these conditions refers to a notice under the prescribed form. A notice gives a right but the notice is not the foundation of jurisdiction. There is nothing in Clause (3) which excludes the power of the Rent Controller to consider whether the notice is good or not. This section in any part of it does not imply that the jurisdiction of the Rent Controller is founded upon a notice in the prescribed manner but the foundation of that jurisdiction is an application made within two months of the notice. In my opinion, notice may be the foundation of the right but not foundation of jurisdiction.

15. I shall now discuss the aforesaid Supreme Court decision and the decision of Lord Esher, M.R., in Queen v. Commissioner for Special Purposes of the income tax Act (1888) 21 Q.B.D. 313. Coming now to these cases, we see that the first condition for the application of the section is that there shall be a sub-tenant. It is not necessary for me to discuss at this stage whether the Rent Controller has been given any exclusive jurisdiction to determine whether the alleged sub-tenant is really a sub-tenant or not. But unless he finds that there is a sub-tenant there is no further question in the application. He has got to determine that point if raised and if he finds that there is a sub-tenant, it is only in that case that he can exercise jurisdiction. The next thing that he has got to find is whether there has been a notice. If there is a notice then he is entitled to pass an order but then again he has got to consider that, if he finds that there is no notice, then, of course, he will have no jurisdiction but, in any case, he has to decide the question of notice. Whether the notice in the prescribed manner is enabling or imperative that is another question and I have already decided that provision regarding the prescribed manner is merely enabling. Keeping this in mind, he can certainly decide whether there is a notice or not. If he decides that there is a sub-tenancy and further he finds that there is a notice in accordance with law and further if he decides that the application was made within two months of the notice, it is then only he will have power in the matter. Therefore, the statute has not based the foundation of the jurisdiction on the notice in the prescribed form but the right to become a direct tenant depends

on the notice. If Sub-section (2) is contrasted with Sub-section (3) the words "prescribed manner" are present in Sub-section (2) but absent in Sub-section (3). For the aforesaid reasons, I cannot accept the argument that Sub-section (3) contemplates a notice in the prescribed manner as a foundation of the jurisdiction, of the Rent Controller.

16. In that view of the matter, the Rules are discharged.

17. In the circumstances of the cases, I make no order as to costs.

18. Let the records be sent down as early as possible.