

(1989) 02 CAL CK 0036**Calcutta High Court****Case No:** S.A. No. 872 of 1983

Smt. Santasila Kar and Others

APPELLANT

Vs

Smt. Sumati Roy and Others

RESPONDENT

Date of Decision: Feb. 20, 1989**Citation:** 94 CWN 227**Hon'ble Judges:** Nirendra Krishna Mitra, J**Bench:** Single Bench**Advocate:** Haradhan Banerjee, for the Appellant; Shmaprasanna Roy Chowdhury, Prabir Kr. Bhattacharjee and Bulu Chatterjee, for the Respondent**Final Decision:** Dismissed**Judgement**

Nirendra Krishna Mitra, J.

Title Suit No. 90 of 1980 was filed by the original plaintiff Sri Bilash Chandra Roy against the defendant in the First Additional District Court of the learned Munsif of Howrah for eviction of the defendants and for mesne profits, inter alia, on the allegation that the plaintiff was the owner of Holding No. 21/1, Umesh Banerjee Lane, P.S. Sibpur, Dist - Howrah and the defendants were tenants under him in respect of one room with attached verandah in the said holding at a monthly rental of Rs. 30.80 paisa per month payable according to the English Calendar and in addition to the rent, service charges of Rs. 1.32. paisa was also payable per month by the defendants to the plaintiff for their said tenancy. The accommodation of the plaintiff, who was also residing in the same holding, was quite inadequate for him and his family members and as such the suit premises was reasonably required by the plaintiff for his own use and occupation and also for the use and occupation of his family members. The plaintiff's family consisted of 10 (ten) members including himself, his wife, three sons and five daughters. The said suit was decreed in favour of the landlord by the learned Munsif but on appeal, the lower appellate court remanded the matter to the trial court for re-hearing after giving the plaintiff an opportunity, to amend the plaint, as according to the lower appellate court, there

was no averment in the plaint whether the plaintiff had any other alternative reasonably suitable accommodation. Opportunity was also given to the plaintiff to lead further evidence to prove his reasonable requirement and to take out a local inspection for showing the extent of his present accommodation. After remand, the plaintiff got his plaint amended, the statement which were controverted by the defendants in their additional written statements and a Commissioner was also appointed for holding a local inspection in respect of the suit premises and considering the inspection report of the Commissioner and also the evidence adduced by both the parties the learned Munsif again decreed the suit in favour of the plaintiff on September 7, 1982 inter alia upon a clear finding that the present accommodation of the plaintiff in the suit premises was not sufficient and he would require the suit premises for his own use and occupation and also for the use and occupation of his family members. An appeal being Title Appeal No. 340 of 1982 was preferred by the defendants against the said judgment and decree of the Id. Munsif and the Id. Additional District Judge, 1st Court, Howrah by his judgment and decree dated April 8, 1983 dismissed the appeal affirming those of the trial court after going through the evidence on record and also the Commissioner's report, inter alia, upon a finding that there was no escape from the conclusion that the plaintiff had been able to reprove his case of reasonable requirement of the suit premises for his own use and occupation. So far as the defendants' plea taken in the appeal and also in their additional written statement that the plaintiff had obtained possession of one more room in the suit premises because the tenant of that room had vacated the same, the lower appellate court came to a clear finding that except the defence suggestion that the room occupied by the tenant Sukumar had come in occupation of the plaintiff, there was no independent and reliable evidence to prove that fact. Being aggrieved by the said judgment and decree of the lower appellate court, the defendants has preferred the present second appeal in this Hon'ble Court. As the original plaintiff died in the meantime, his heirs, who are the respondent in the present appeal, were duly substituted in his place and stead in the said second appeal. In the present second appeal, an application for bringing in certain subsequent facts on record to the effect that the plaintiff obtained possession of some other rooms in the suit premises in the meantime, was filed by the appellants, wherein it was categorically stated that the plaintiffs obtained possession of an extra room in the suit premises during the ejectment proceeding which was converted into a sweetmeat shop which would prove that the plea of reasonable requirement of the suit premises by the plaintiffs was not genuine. Affidavit-in-opposition and also affidavit-in-reply were filed by the respective parties in connection with the said application.

2. Mr. Banerjee, Id. Advocate for the appellants, submits that the judgments of the Courts below were passed on an erroneous view of the fact more so when the trial court failed to frame an issue to the fact whether the plaintiffs had reasonably suitable accommodation elsewhere which fact was also overlooked by the lower

appellate court and that the plaintiffs had also failed to prove the fact that they had no other reasonably suitable accommodation elsewhere and according to Mr. Banerjee omission to frame such an important issue and also the failure on the part of the plaintiffs to lead evidence on the same has caused miscarriage of justice in the matter and therefore, according to him the judgments and decrees of the courts below cannot be sustained in law.

3. Mr. Bhattacharjee, learned Advocate for the respondents, however, has submitted after remand, the plaintiffs had amended the plaint by incorporating the fact that they had no reasonably suitable accommodation elsewhere and although the plaintiffs did not lead any specific evidence to prove the said plea, since the defendants in their additional written statement also did not dispute the said statement of the plaintiffs and their case mainly hinged on the point that the Commissioners report was inconsistent and that the plaintiffs were in occupation of more rooms in the suit premises and they also could use some unfinished rooms in the suit premises to suit their purpose, the findings of the courts below given after a detailed discussion of the evidence on record regarding the accommodation available to the plaintiffs in the suit premises were findings of fact and should not be disturbed in second appeal.

4. Having heard the learned Advocates for the parties, I am, however, of the view that the present second appeal is concluded by findings of fact. In second appeal, the High Court should not ordinarily reappraise the evidence and disturb the concurrent findings arrived at by the courts below if such findings are on facts unless it can be proved that such findings are perverse or that the same had been arrived at without considering any material evidence on record. In this case both the courts below have discussed the evidence on record elaborately in coming to their conclusions. As observed already, previously although the suit for re-hearing by giving opportunity to the plaintiff to take the plea that they had no reasonably suitable accommodation elsewhere and also to lead fresh evidence regarding their accommodation available in the suit premises on elsewhere. After remand the plaintiffs had amended the plaint stating in no uncertain terms therein that they did not have any reasonably suitable accommodation elsewhere, and in the additional written statement filed by the defendants, such plea was not specifically challenged. No doubt, after remand no additional issue was framed to the effect as to whether the plaintiffs had reasonably suitable accommodation elsewhere and the plaintiff also did not lead any evidence on the said fact but the defendants too did not controvert the said statement of the plaintiffs by leading any counter evidence. Although, it is submitted by Mr. Banerjee that since no additional issue was framed on the point whether the plaintiffs had no occasion to lead any evidence in the matter, but this is a well-settled principle of law that when the parties went to the trial knowing fully well their respective cases and led all the evidence not only in support of their respective cases but also in refutation of the case of other side, it cannot be said that absence of any specific issue was vital to the case or that there

had occurred a mis-trial vitiating the proceeding and the suit cannot be dismissed on this narrow ground. When the parties have adduced evidence knowing their respective cases, trial is not vitiated for non-framing of issue; no remand order for framing proper issue is also justified for the case. Failure to frame issue is not vital if the parties lead evidence being conscious of the points in controversy. Reference may be made to the decisions of the Hon'ble Supreme Court on such point in the cases of Nedunuri Kameswaramma Vs. Sampati Subba Rao, ; Kunju Kesavan Vs. M.M. Philip I.C.S. and Others, . In the present case the plaintiffs have proved by giving sufficient evidence that the present accommodation of the plaintiffs in the suit premises is quite insufficient for them which fact could not be disproved by the defendants although the defendants led counter evidence and it can not be said that the defendants could not lead any evidence to counter the plaintiff's pleading that the plaintiff had no other reasonably suitable accommodation elsewhere on the ground the defendants were taken by surprise since such plea was taken by the plaintiffs for the first time at the time of trial. In the present case the original plaint was amended incorporating the specific plea that the plaintiffs had no other reasonably suitable accommodation elsewhere. Certainly, the defendants could lead evidence to counter such pleading of the plaintiffs and they had an ample opportunity to lead such evidence and if there was such evidence before the courts below, certainly there could not have been a decree in favour of the plaintiffs as that would have immediately demolished the plaintiffs' prayer for decree for eviction against the defendants on the ground of reasonable requirement in respect of the suit premises.

5. Moreover, it also appears from the record that an additional issue in the form of Issue No. 5 was framed in the suit to the following fact :

Has the plaintiff been successful in proving his case of reasonable requirement?

Such issue, in my view, embraces not only the question whether the plaintiffs' present accommodation in the suit premises was sufficient or that whether they reasonably required the suit premises for their own use and occupation, but also the question whether the plaintiffs had got any reasonably suitable accommodation elsewhere indirectly, or even obscurely.

6. So far as the application filed by the appellants in the present second appeal for bringing certain subsequent facts on record is concerned, which in my view is more or less in the form of an application for acceptance of additional evidence, going through the said application and the counter-affidavit and affidavit-in-reply filed in connection with the same, according to me the matter should not be remitted back for retrial giving opportunity to the parties to lead further evidence to prove the facts stated in the said application at this stage. Moreover, I am of the view, the considering the extent of accommodation available to the plaintiffs in the suit premises as well as the plaintiffs' family members it can be held that even if the statements made in the said application and the affidavit-in-reply including the

allegations as made in the affidavit-in-reply that some portion of the premises in question was being used for business purpose after getting possession of the same by the plaintiffs, are accepted, that would not change the position materially or at all against the plaintiffs in any way. The decision cited by Mr. Banerjee in the case of Hari Chand Moti Ram Vs. Santokh Singh and Another, is also distinguishable on facts. That was a case where requirement of the suit premises was for the personal residence of the landlord but in the present case the suit property was required for the own use and occupation of the plaintiffs as well as for their family members.

7. Furthermore, regarding the submissions made by Mr. Banerjee that it was open to the plaintiffs to repair the dilapidated room in the suit premises to get more accommodation and such inaction on their part would disentitle them to get a decree against the defendants on the ground of reasonable requirement I only say that possession of a reasonable accommodation of the landlord must be with reference to the state in which the accommodation of such landlord is at the material time. Simply because some remedies were available to the plaintiffs for remedying the inconveniences, it cannot be said that the plaintiffs ought to have availed of those remedies before they can approach the Court for appropriate relief. In otherwise, reasonable requirement ha to be decided on the existing accommodation of the landlord and I rely on the decisions of this Hon"ble Court in the cases Hemangini Devi v. Sukumar Basu & Anr., (59 CWN 395) and Jogesh Chandra Sen Vs. Sm. Kiron Bala Saha, in coming to such conclusion. I, therefore, hold that the plaintiffs are not in occupation of any reasonably suitable accommodation either at the suit premises or elsewhere and I find no reason to interfere with the findings arrived at by the Courts below while decreeing the suit and dismissing the first appeals as their findings, as I have already stated, are findings of fact and I find no perversity in those findings. The result is that the judgment and decree of the lower appellate court are hereby confirmed and this second appeal is dismissed without any order as to costs. The appellants are given time till the end of September, 1989 to vacate the suit premises provided they file a written undertaking to this Court to that effect within a fortnight from date and till they vacate the suit premises they would go on paying mesne profits at the rate of the monthly rent last paid by them, month by month within 15th of each succeeding month directly to the plaintiffs jointly or to any one of them for which due receipts would be granted to them. In default, the decree would at once become executable.