(1990) 03 CAL CK 0036

Calcutta High Court

Case No: Appeal from Original Decree No. 227 of 1986

Baidya Nath Karmakar		APPELLANT
	Vs	
Probhat Kumar Ghosh		RESPONDENT

Date of Decision: March 8, 1990

Acts Referred:

- Transfer of Property Act, 1882 - Section 108, 13(6)

Citation: (1995) 1 ILR (Cal) 281

Hon'ble Judges: S.S. Ganguly, J; S.P. Rajkhowa, J

Bench: Division Bench

Advocate: Gopal Lal De, for the Appellant;Samarendra Nath Mukherjee and Tarit Kumar Mitra, for the Respondent

Final Decision: Allowed

Judgement

S.S. Ganguly, J.
This is a tenant-defendant's appeal from the judgment and decree passed by the learned Judge. Nineth Bench, City Civil Court, Calcutta, in Ejectment Suit No. 142 of 1977.

2. The Plaintiff-Respondent and his mother who has died since sued the Defendant-Appellant in eviction from one shop-room in the ground floor of premises No. 8, Latoo Babu Lane, P.S. Burtolla, after service of the statutory notice on the grounds that (i) in pursuance of his business as a goldsmith the Appellant had been using polishing and drilling machines day and night which had damaged and had been damaging the building [s. 13(1)(d)] besides being (ii) a source of nuisance and annoyance to the other inmates and neighbors including the Respondent [s.13(1)(e)] that (iii) the Appellant had also closed up one of the windows of the shop-room by a brick-wall constructed inside the room [s. 1''3(1)(b)] and lastly (iv) that the room was required for the Respondent''s own use and occupation and for making substantial addition and alteration thereto. The defence was that (i) the

notice was bad since the tenancy was taken for manufacturing purpose, that (ii) the small polishing and drilling machines used by the Appellant for a short period could not create any vibration so as to affect the building or to cause any nuisance or annoyance to other inmates of the house and the neighbors, (iii) that the brick-wall was constructed by the Respondent to maintain the privacy of the female inmates of the house and, lastly, (iv) that the Respondent does not require the shop-room for his own use and occupation or for making substantial additions or alterations thereto.

3. On the Respondent''s prayer there was a local inspection of the disputed ''promises the report whereof is Ex.1. The Respondent examined himself and two other witnesses. The Appellant only examined himself. On a consideration of the materials on record the learned Judge has found that (i) the disputed building was being damaged by running of power driven machines by the Appellant; (ii) that the continuous running of power driven machines in the house caused nuisance and annoyance to the residents thereof and to the neighboring people as well ; (iii) that the Respondent reasonably required the disputed premises for making some additions and alterations therein ; (iv) that it was the Appellant who had walled up the window without the consent of the Respondent and, lastly, (v) that the notice u/s 13(6) was legal, valid and sufficient since the tenancy was not taken for manufacturing purposes, and on these findings he has decreed the suit. Hence this appeal.

4. It is urged from the side of the Appellant that the conclusions drawn by the learned Judge do not follow from the evidence and materials on record.

5. It is also urged that the materials, established do not make out any of the grounds on which eviction has been sought, it was also urged that the learned Judge''s decision on the point of the adequacy of the notice was erroneous since there is clear cut admission in evidence of the Respondent that the tenancy was taken for manufacturing ornaments. This point was not, however, pressed at the time of the hearing of the appeal.

6. In the peculiar facts and circumstances of the case, the

(1) Have the disputed premises or the house containing the same suffered any damage because of the running of the polishing and drilling machines by the Appellant ?

(2) Have the running of the said machines caused nuisance and annoyance to the other inmates of the house and neighbors ?

(3) Does the Respondent reasonably require the disputed premises for making some additions and alternations ?

(4) Has the Appellant constructed any permanent structure in the disputed premises without the permission of the Respondent ?

(5) To what relief, if any, is the Appellant entitled ?

Point no, 1.

7. It is urged from the side of the Appellant that there is no evidence on record to show that the house in question had Been damaged due to the running of the afore-mentioned machines-. A thorough scrutiny of the materials on record in deed shows that there is no evidence whatsoever to the house and, if so, what those damages were. The learned trial Judge observes that the Respondent sought to contend that the running of the machines caused damage and material deterioration to the house. It does not appear,. however, that the Respondent ever made any such statement in his deposition. It is admitted by both the parties that the house is more than 100 years old and that in places it is in damaged condition. From this the learned Judge concludes that those damages were caused by the vibrations of the running of the machines. This conclusion cannot be supported since the damages-might as well be due to the age of the building as also concluded by the learned Pleader Commissioner. The decision on mere conjecture and on no evidence whatsoever cannot, therefore, be supported. The point is decided accordingly.

Point No. 3.

8. The Respondent''s case as per the plaint is that he requires the disputed premises for making substantial additions and alterations thereto under the terms and conditions of the deed of partition dated December 22, 1972. That is also what he says in his deposition. From the deed of partition (Ex. 6) it appears that it authorised the Respondent to change and replace only the old beams. The Respondent also does not say anywhere what additions and alterations does he want to make, and admittedly he has not got any plan, made and sanctioned or any estimate drawn up. Yet the learned trial Judge concludes that the Respondent seeks to change the course of the sewerage running under the suit-premises and that, as such, the Respondent''s requirements of the suit-premises on that ground could not be brushed aside. The Respondent nowhere says that he requires the disputed room for changing the course of the sewerage. This conclusion of the learned trial Judge is also based upon no materia! whatsoever and cannot, therefore, be supported. The point is decided accordingly.

Point No. 4.

9. It appears that the void of one of the windows of the disputed premises has been filled up by brick-work and made one with the surrounding wall. Te parties blame each other for doing this. Though there is no evidence as to who did the filling up relying upon the fact that the void was filled up from inner side of the room ; the learned trial Judge concludes that this was done by the Appellant. Since the parties make each other responsible for the filling up, we feel that in the absence of some satisfactory evidence tills conclusion of the learned trial Judge also becomes

conjectural* Besides, it appears from the evidence of Nishith Kumar Ghosh (Respondent No. 3) that the filling up was done in 1970 before the partition was effected in 1972. Granting that the filling up was done by the Appellant, since there is no evidence that the Respondent or his co-sharers ever objected when the brick-work was going or even thereafter at any time-before the institution of the present suit in 1977, it must be held that they acquiesced in what was done not only when it was being done put also for a long time thereafter. Now after the passage of so many years the Respondent cannot be permitted to make a grievance of this and make it a cause of action for evicting the Appellants.

10. It is also doubtful if the construction made in this case comes under the category of ''permanent structure'' as contemplated by Section 108(p) of the Transfer of Property Act.

11. A structure (1) of some dimension, (2) built substantially (3) with the intention of enjoying it permanently, (4) which brings about a substantial change in the character of the demised premises and (5) which cannot be removed without doing irreparable damage to the demised premises may be called a permanent structure: Atul Chandra Lahiry Vs. Sonatan Daw, ; Pitambardas Kalyanji Bakotiya Vs. Dattatraya Krishnaji, ; Ratnamala v. Taran Singh Bawa 1988 (1) C.L.J. 464 (470). When on the other hand, the reverse is the case and the structure has'' been made for better enjoyment with the property being put to the same use as before ; such structure cannot be called a permanent structure ; Alisaheb Abdul Latif Mulla Vs. Abdul Karim Abdul Rahman Mulla and Others, Thus in the decision just mentioned a six feet high wall erected to provide privacy and in Pitambar v. Dattatraya a kitchen platform made with brick a cement were not held to be permanent structures. In the case at hand no independent or separate structure was made as such. Only the void of the window was filled up by the-structure. It could not be of any great dimension. It has not changed substantially the character of the disputed premises and obviously it can be dismantled without doing any great damages to the parent building. The void was filled up; allegedly, for maintaining the privacy of the inner quarters of the house. Obviously, this was done for better enjoyment without interfering with the use. of the property. In the circumstances stated-disagreeing'' with the learned trial Judge we are inclined to hold that the structure in the present case could not be considered as a structure.

12. We hold, therefore, that the structure in this case was not a permanent structure and granting that this was so and it was erected by the Appellant himself, we hold further that the Respondent cannot use it as a ground for evicting the Appellant from the disputed premises as they acquiesced in its erection.

Point No. 2.

13. Relying upon oral testimony of the Respondent himself and his witnesses Basudeb Sarbadhikary (P.W. 2) and Nishith Kumar Ghosh (P.W. 3) the learned trial

Judge has held that the vibration and noise caused by continuous running of the power driven machines by the Appellant in suit-premises from early morning till late in night caused nuisance and annoyance to the Respondent and the neighbors. How far this conclusion is tenable ?

14. Nishith Kumar Ghosh (P.W. 3) who claims to have inducted the Appellant, says that the tenancy was created for residential purpose. Considering that the tenancy was created without facilities of water and privy it becomes very difficult to believe him, more so, as it is nobody''s case that the Appellant ever used the disputed premises for residential purposes. The Respondent himself says, on the other hand, that the Appellant took the tenancy for running a business of manufacturing gold and silver ornaments. Some amount of noise was, therefore, inevitable and even installation and running of polishing machines etc. The question is, if the noise was so much as to cause annoyance and prove to be a nuisance to the Respondent and other neighbors. The defence case, it may be recalled is that the machines were run by motors having 1/2 and 1/4 horse power and that they were not likely to produce any vibration or considerable noise.

15. The Respondent says that the offending machines were installed in 1976 and they were removed about 2/3 years after filing of the suit i.e. in or about 1979-80. That also is the version of Basudeb (P.W. 2). They both are contradicted by Nishith (P.W. 3) who says that the machines were installed 1/2 years after the creation of the tenancy which, by the way, is also the case of the Appellant. Since the tenancy was " taken'' for manufacturing ornaments, trail version of the Appellant as corroborated by Nishith (P.W. 3) seems to be more probable. This weakens the case of the Respondent to a great extent since it shows that even though the machines were installed in 1966/67 the Respondent did not take any fruitful step with regard to them before-1977 when he filed the suit. If the noise \\and the vibration were so annoying and so much of a nuisance it is difficult to understand why the Respondent and the other neighbors put up with that tamely for such a long time. The Respondent and his witnesses say that they objected and complained against the noise and vibration. But it does not appear that any effective step was taken regard to that any time before the filing of the suit. We have already seen that contrary to what the Respondent says there is no indication that the alleged vibrations due to the running of the machines have caused any damages to the suit-premises or the building. It is also not possible now to find out if there was really any noise and what was the extent of the vibrations, if any, for the allegedly offending machines had been removed before the prayer for local inspection v*as made in December 1979. Had the prayer been made immediately after the filing of the suit, it would have .been possible to ascertain how far the allegations of the Respondent in this regard were true. This, however, was not done and the chance of producing the best evidence before the Court was lost. True the two witnesses support the case of the Respondent. But as we have seen above they are not also reliable persons. Besides Nishith (P.W. 3) is also a close relation of the Respondent

and there was enmity admittedly between Basudeb (P.W. 2) and the Respondent. In the absence of the best evidence no proper conclusion can be reached on such a vital point relying upon the evidence of such unreliable witnesses. It may also be pointed out that the Respondent did not examine any of the residents of the neighboring houses and-; we are also deprived of their reactions in this regard. Disagreeing with the learned trial Judge we are inclined, therefore, to decide this point in the negative.

16. In our view, none of the grounds of eviction has been established, in this case and the suit was bound to fail. There is also another defect which could have proved fatal. From the plaint and the notice to quit (Ex. 2) ft appears that the suit-premises comprised only one room. Yet from the report of the learned Pleader Commissioner it appears that the suit-premises comprise three rooms - one shop-room and two smaller adjoining rooms. The window, which was filled up appertains to one of the two smaller rooms. There is no explanation anywhere why eviction was sought for only from the shop-room when the tenancy comprised two other rooms also. The suit was, therefore, liable to fail on the ground of partial eviction also.

17. In view of what has been stated above the present appeal must succeed. Hence it is ordered, that the appeal is allowed on contest. The judgment aria! decree passed by the learned Ninth Judge, City Civil Court, Calcutta, in Ejectment Suit No. 142 of 1977 are hereby set aside and the said suit is hereby dismissed on contest. Parties do bear their costs all through.

S.P. Rajkhowa J.

18. I agree.