Samsul Arfin and Others Vs Zamurad Sultana and Others

Court: Calcutta High Court

Date of Decision: July 26, 2012

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 27
Evidence Act, 1872 â€" Section 114(e)
West Bengal Premises Tenancy Act, 1956 â€" Section 17(4), 2(d)

Citation: (2012) 4 CHN 625

Hon'ble Judges: Prasenjit Mandal, J

Bench: Single Bench

Advocate: S.P. Roychowdhury, Mr. Dilip Kumar Mondal and Ms. Kavita Rani, for the Appellant;Sabyasachi Bhattacharjee, Chandradoy Roy and Mr. Shenaz T. Mina, for the Respondent

Judgement

Prasenjit Mandal, J.
This second appeal is directed against the judgment and decree dated July 26, 2007 passed by the learned Additional

District Judge, 1st Court, Alipore in Title Appeal No. 80 of 2007 thereby reversing the judgment and decree dated February 27, 2007 passed by

the learned Civil Judge (Senior Division), 6th Court, Alipore in Title Suit No. 37 of 2006. The plaintiffs/respondents herein filed a suit being Title

Suit No. 452 of 1979 for ejectment against the predecessor-in-interest of the appellants from the premises in suit as described in the schedule of

the plaint before the learned Civil Judge (Senior Division), 6th Court, Alipore, inter alia, on the ground of default and reasonable requirement in the

year 1979. The said suit was subsequently re-numbered as Title Suit No. 37 of 2006. The defendants contested the said suit by filing a written

statement denying the material allegations made in the plaint and both the parties had adduced evidence in support of their respective contentions.

On the analysis of evidence on record, the learned Trial Judge held that a legal and valid notice to quit had been duly served upon the original

tenant (now deceased). While disposing of the said suit, the learned Trial Judge recorded that so far as the ground of default is concerned, the

original tenant was entitled to get the benefit of Section 17(4) of the West Bengal Premises Tenancy Act, 1956.

2. So far as the ground of reasonable requirement is concerned, the learned Trial Judge held that the plaintiffs had proved that they were not in

possession of sufficient accommodation, but, dismissed the suit on the ground that another premises being premises no. 70, Ripon Street belonging

to the landlords had not been inspected and as such, the plaintiffs had failed to prove that they were not in possession of sufficient accommodation

elsewhere. Accordingly, the said title suit was dismissed by the learned Trial Judge.

3. Being aggrieved by the said judgment and decree of the learned Trial Judge, the landlords preferred an appeal being the Title Appeal No. 80 of

2007 and by the impugned judgment and decree, the learned First Appellate Court allowed the appeal on contest and it passed a decree of

eviction of the defendants from the premises in suit.

4. Being aggrieved by the judgment and decree of the First Appellate Court, this second appeal has been preferred by the defendants/tenants.

5. At the time of admission of the second appeal, the following substantial questions have been framed for decision:-

1) Whether the suit as framed was maintainable in law in view of the fact that all the plaintiffs were not the landlords of the defendants in respect of

the premises in suit?

2) Whether the notice to quit can be taken to be legally served upon the defendants when the defendants denied the service of such notice without

examining the Postal Peon?

3) Whether in view of specific findings made by the learned Trial Court regarding each issue framed by it the judgment of the Learned Lower

Appellate Court can be taken to be perverse one?

6. The second appeal was heard in part on April 19, 2012 by this Bench and then when the second appeal was fixed for further hearing, the

appellants filed an application under Order 41 Rule 27 of the C.P.C. for adducing further evidence (being the C.A.N. No. 4035 of 2012) on April

26, 2012. The respondents filed an affidavit-in-opposition and then the appellants also filed an affidavit-in-reply. Thereafter, the second appeal as

well as the C.A.N. application No. 4035 of 2012 were taken up for hearing together and the hearing was concluded on July 19, 2012.

7. So far as the substantial question no. 1 is concerned, that is, maintainability of the suit on the ground that all the plaintiffs were not the landlords

of the defendants, from the materials on record, it reveals that there are many land-owners of the premises in suit, but each of them did not induct

the original tenant. But, only four of the landlords made an agreement with the original tenant for letting out the premises in suit to the original tenant.

As noted above, when the suit is for ejectment on the ground of reasonable requirement, the land-owners are to file the suit for ejectment

irrespective of the fact that all the land-owners did not induct the original tenant. In fact, this issue was not pressed by the learned Advocate for the

appellants. Therefore, this substantial question of law, I hold, need not be discussed more. This substantial question of law is decided in favour of

the plaintiffs/respondents herein.

6. So far as the substantial question no. 2 is concerned, that is, notice to quit, I find that both the Courts below, upon analysis of evidence, came to

the findings that the notice to quit had been duly served upon the original tenant. It may be noted herein that as per materials on record, the notice

to quit was sent by Registered Post with A/D by the predecessor-in-interest of the plaintiff no. 1 and the plaintiff nos. 2 to 4 to the predecessor-in-

interest of the defendants. The postage stamp was prepaid and the notice had been returned with the remark "not claimed". This happened in the

year 1979. The learned Trial Judge had commented that the original tenant was interested to refuse the notice when the same was tendered to him.

It is the personal knowledge of the original tenant. Since, at the time of recording evidence, the original tenant had already expired, the learned Trial

Judge dealt with matter as per provisions of Section 28 of the Bengal General Clauses Act and the other decisions cited by him in the impugned

judgment.

7. The learned Trial Judge had also recorded that the original plaintiffs issued a notice to quit under Certificate of Posting and such fact had been

proved. So, a presumption will lie that the said notice sent under Certificate of Posting must have reached its destination, i.e., to the original tenant.

Not only that the learned Trial Judge had recorded that another notice was affixed on the wall of the premises in suit. Upon analysis of such

evidence on record, the provisions of the Bengal General Clauses Act and the decisions referred to by the Bar, the learned Trial Judge was of the

view that the notice to quit had been duly served upon the original tenant sent at 47, Samsul Huda Road.

8. So far as the plaintiffs, namely, Ayesha Bibi and Rajia Bibi are concerned, they are not the landlords as per definition of the landlord in Section

2(d) of the 1956 Act. Mr. Roychowdhury has also referred to the decision of Ratanlal Bansilal & ors. v. Kishorilal Goenka & ors. reported in AIR

1993 Calcutta 144 particularly paragraph nos. s 147 & 148 and thus, he submits that Ayesha Bibi and Rajia Bibi cannot be the landlords. The suit

cannot survive.

9. Mr. Roychowdhury has also referred to the decision of Mono Ranjan Dasgupta v. Suchitra Ganguly & ors. reported in AIR 1989 Calcutta 14

and thus, he submits that the presumption of due service is not obligatory one under the provisions of Bengal General Clauses Act but optional one

u/s 114(e) of the Evidence Act. It was a matter of 1979 and so, I hold that much stress should be given on the materials on record and the law of

presumption. Yet since the suit was for ejectment on the ground of reasonable requirement, the notice was given on their behalf also though,

Ayesha Bibi and Rajia Bibi were not the parties to the tenancy agreement.

10. The plaintiffs have contended that the two premises being 47A and 47B, Samsul Huda Road had been amalgamated into premises no. 47 and

this fact had been clarified from the decisions of C.O. No. 555 of 1993 and C.O. No. 637 of 2001. At present, it is clear that suit premises is now

numbered as 47, Samsul Huda Road and the notice was sent at that address.

11. The learned Trial Judge held that the notice was not valid as the same was not given by the landlords as defined in Section 2(d) of the 1956

Act but other persons also.

12. By referring the decision of Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana, particularly paragraph no. 8, Mr. Roychowdhury

has contended that the postal remark "refused" when rebutted by the defendant on oath, unless, the postman was produced, the statement of the

defendant on oath must prevail. With due respect to Mr. Roychowdhury, I am of the view that in the instant situation, this decision will not be

applicable. Here the notice was tendered to the original tenant in the year 1979 and at the time of recording evidence, the original tenant had

already expired and his heirs and successors are denying that the original tenant had not refused it. It was the personal knowledge of the original

tenant and so, after lapse of so many years, it is difficult to believe in the statement of the successors of the original tenant. In a suit for ejectment,

the termination of tenancy by a notice to quit is a must and so, when such a recourse was adopted by the landlords, I find that the landlords

attempted to serve the notice to quit upon the original tenant by various ways as indicated above. Such different ways were adopted to ensure the

service of notice because the landlords understood, unless the termination of the tenancy was effected, the suit would fail. So, the probability that is

expected that the landlords would take all measures to effect service of notice to quit upon the original tenant as had been done in the instant case.

Therefore, I am of the view that this decision shall not be applicable in the instant situation and on overall consideration of the entirety of the

evidence on record, probability and the law of presumption, it has been held that the notice was duly tendered to the original tenant and the same

was "not claimed" by the original tenant.

13. By referring the decision of Parekh Brothers Vs. Kartick Chandra Saha and Others, , Mr. Roychowdhury has contended that since the six

plaintiffs were not parties to the agreement, all the six plaintiffs were not at all the landlords of the defendant and so, the findings of the Lower

Appellate Court cannot be supported. The said decision is with regard to a suit for ejectment on the ground of default and not for reasonable

requirement. Therefore, I am of the view that this decision is not applicable in the instant case.

14. The Appellate Court did not accept the view of the learned Trial Judge on the issuance of notice by six co-owners and held that the said notice

of ejectment issued by the six original plaintiffs/co-owners of the suit premises should well be treated as valid inasmuch as the suit being one for

ejectment on the ground of reasonable requirement, all the six notice givers should file the suit for ejectment. The said notice Exhibit 11 dated June

25, 1979 was sent on behalf of the six plaintiffs being the owners of the suit premises and as such, they were treated as plaintiffs.

15. One month''s clear notice was given. Therefore, the Appellate Court had analysed the evidence on record. Though, the defendants denied the

service of notice and the postal peon who tendered letter to the original tenant in 1979 could not be examined, yet materials on record had been

taken into consideration by the learned First Appellate Court and it had rightly concluded that a legal and valid notice was duly served, though, the

examination of the postal peon was not done under the above circumstances. Therefore, this substantial question of law is also decided in favour of

the plaintiffs.

16. So far as the substantial question no. 3 is concerned, I find that the learned Trial Judge had failed to appreciate the evidence that the premises

no. 70, Ripon Street was no longer in the possession of the plaintiffs. The evidence on record has proved that the said premises on 70, Ripon

Street had already been sold out long time back in the year 1964 and particulars of the deed etc. had been given at the time of deposition. This

was enough for verification for the tenants if they wanted to do so. They were not required to be a party to the said deed of that premises and as

such, they were not parties to the deed. So, for that reason, the statement of the plaintiffs cannot be discarded. Therefore, the findings of the

learned Trial Judge that it has not been proved whether the plaintiffs have any other accommodation elsewhere, cannot be supported.

17. During the argument, Mr. S.P. Roychowdhury has pointed out by referring the application under Order 41 Rule 27 of the C.P.C. that the

premises at 39T, Broad Street belonging to the plaintiffs has come to the notice only on the day before the date of filing the said application on

April 26, 2012. In this regard, I find that the plaintiffs have categorically denied the contention of the defendants. It is their clear statement that this

premises was very much known to the appellants long time back. Both the Courts below have come to the concurrent findings about the genuine

need of the accommodation for the plaintiffs. According to the plaintiffs, the said premises is owned by the son of plaintiff Gholam Samdani,

namely, Ghulam Syedain. It is a twostoried building having four bedrooms in total, two drawing rooms and two kitchens. Ghulam Syedain has six

members in his family, namely, Ghulam Syedain himself, his wife, two unmarried daughters of 18 years and 16 years age who have completed their

Higher Secondary and Madhyamik Examinations respectively, one son studying in Class VIII and a married daughter and so, the need for

accommodation in respect of them becomes satisfied by such four bedrooms and drawing rooms available at 39T, Broad Street. So the

application under Order 41 Rule 27 of the C.P.C. and the connected affidavits filed by the parties bears the materials regarding the premises at

39T, Broad Street. The Courts below made an allocation of three rooms to Gholam Samdani - one for Gholam Samdani and his wife, another for

one married son, namely, Ghulam Shabbir and the third for two minor sons of the married son, namely, Ghulam Shabbir who has his wife and two

sons. The Courts below did not allocate any room of the suit premises for Ghulam Syedain on the ground that he has been residing at 39T, Broad

Street..

18. The appellants filed an affidavit-in-reply of the opposition filed by Gholam Samdani denying the fact. Yet, I do not find any sound evidence in

support of the contention of the appellants that they came to know such fact only on April 20, 2012. This is, I hold, nothing but a step to delay the

end of litigation started in the year 1979.

19. Mr. S.P. Roychowdhury, learned Senior Advocate appearing for the appellants has contended by referring the decision of Hasmat Rai and

Another Vs. Raghunath Prasad, that the ground of personal requirement must continue to exist till the final determination of the case and so, the

Appellate Court must take cognizance of subsequent events showing that the landlord''s requirements have been met, and must mould the trial

Court''s decree accordingly. I agree with such proposition.

20. Mr. Roychowdhury has also referred to the decision of Mst. Bega Begum and Others Vs. Abdul Ahad Khan (Dead) by Lrs. and Others, on

''reasonable requirement'' and ''own occupation'' and thus, he submits that concurrent findings of fact are misapplied and overlooking has taken

place in respect of some essential features, appropriate steps may be taken in order to prevent grave and substantial injustice.

21. Mr. Roychowdhury has referred to the decision of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., and submits that in deciding the

second appeal, the substantial question of law must have a material bearing on the outcome of a case and such question must have an answer for a

just and proper decision of a case. He has also contended that a completely new point raised before the High Court for the first time, held, would

not be a question involved in the case, unless it went to the root of the matter.

22. By referring the decision of Ratanlal Bansilal and others Vs. Kishorilal Goenka and others, also, Mr. Roychowdhury submits that the appellants

cannot be debarred from raising such substantial question of law when the matter came to their knowledge even at the belated stage. Therefore,

the application under Order 41 Rule 27 of the C.P.C. must be allowed formulating questions and the matter may be sent to the learned Trial Judge

for recording evidence.

23. Mr. Sabyasachi Bhattacharjee appearing for the respondents has referred to the decision of Gaya Prasad v. Pradeep Srivastava reported in

(2001) 2 SCC 604 and thus, submits that in the matter of consideration of the bona fide requirement of the landlord, the landlord should not be

penalised for the slowness of the legal system. The crucial date for deciding the bona fide of the requirement of the landlord is the date of his

application for eviction. Subsequent developments during the pendency of eviction petition occurring because of slowness of process of litigation

itself and made use of by sitting tenants, held, cannot be made the basis for denying the landlord relief when the litigation at last reaches the final

stages.

24. The appellants did not raise such contention earlier but at the time of making argument for the second day of hearing of the second appeal. If

the matter is sent back to remand for decision on the application under Order 41 Rule 27 of the C.P.C., it will be another round of litigation over

the matter causing more delay of the disposal of the suit. Moreover, as recorded above, the need for accommodation of the family of Ghulam

Syedain, son of the respondent no. 11, namely, Gholam Samdani had not been taken into consideration by the Courts below at the time of making

allocation. So, if for argument''s sake it is presumed that such an accommodation exists as stated by Gholam Samdani, respondent no. 11 in the

opposition which is not controverted by showing further accommodation by reply, the material observations as to the need of the plaintiffs remain

unaltered because of the fact that the need of Ghulam Syedain was not at all taken into consideration at the time of allocation by the Courts below.

The application under Order 41 Rule 27 of the C.P.C. its opposition and reply are the enough materials for consideration of the need of Ghulam

Syedain. They are made part of the record of this second appeal. I hold that there is no need of sending the matter on remand. Therefore, I am of

the view that the materials on record is enough for proper adjudication of the disputes between the parties relating to reasonable requirement.

25. In consideration of all such decisions, the decision of Gaya Prasad (supra) appears to be more adept in the instant situation. So, in

consideration of this decision of Gaya Prasad (supra) and the above observations, I am of the view that the application under Order 41 Rule 27 of

the C.P.C. should be disposed of with the above observations. There is no need of formulating questions and sending the record on remand for

recording evidence.

26. Both the Courts below have come to the concurrent findings relating to allocation of the rooms required for the plaintiffs and the members of

their family and the First Appellate Court has come to the conclusion that the premises in suit is required reasonably for the plaintiffs for their own

use and occupation. This conclusion, according to my opinion, is not perverse at all. So, the matter in dispute could well be adjudicated on the

basis of materials on record.

27. In that view of the matter, I am of the opinion that there is no scope of interference with the impugned order.

28. Accordingly, this second appeal fails to succeed and is, therefore, dismissed.

29. The application being C.A.N. No. 4035 of 2012 is disposed of in the manner indicated above.

30. The judgment and decree dated July 26, 2007 passed by the learned Additional District Judge, 1st Court, Alipore in Title Appeal 80 of 2007

is hereby affirmed. The defendants / appellants herein are hereby directed to deliver vacant possession of the suit premises in favour of the plaintiffs

/ respondents herein within 30 days hereof failing which the plaintiffs / respondents will be at liberty to execute the decree through the Court.

31. However, there will be no order as to costs. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for

the parties on their usual undertaking.