

**(1954) 04 CAL CK 0018**

**Calcutta High Court**

**Case No:** Appeal from Appellate Decree No. 887 of 1953

Sardar Singh

APPELLANT

Vs

Bimal Krishna Basu

RESPONDENT

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**Date of Decision:** April 15, 1954

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 107(2)
- West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 - Section 12(1)

**Citation:** 59 CWN 430 : (1956) 2 ILR (Cal) 421

**Hon'ble Judges:** P.N. Mookherjee, J

**Bench:** Single Bench

**Advocate:** Radhakanta Mukherjee, for the Appellant; Bonbehari Mukherjee, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

P.N. Mookerjee, J.

The Plaintiff Bimal Kumar Basu is the executor to the estate of late Jatindra Nath Sarkar who was the admitted owner of the suit premises No. 26/1A Deodar Street at Ballygunge in the south suburbs of Calcutta. It was a small two-storeyed building-comprising four rooms, two in the ground floor and two in the first, with a small passage,-a covered hall, according to the Appellant,-connecting the two rooms on each floor. It appears also reasonably clear from the affidavits, filed before me, that the kitchen, the water-tap and the reservoir are on the ground floor although there are two privies, one in each floor.

2. In or about the year 1939, the then owner Jatindra Nath Sarkar let out the suit premises to the two Defendants Bhag Singh and Sardar Singh on a monthly basis and the said tenancy continued after Jatindra's death under the present Plaintiff. In March 1951, the Plaintiff terminated the Defendants' tenancy by an appropriate notice to quit and, thereafter, on May 26, 1951, the present suit for ejectment was

instituted in the second court of the munsif at Alipore. One of the material allegations in the plaint was to the effect that the suit premises were required "bona fide" (reasonably) by the Plaintiff executor "for the use and occupation of the "beneficiaries for whose benefit the said premises is "held". There is no dispute that under Jatindra's will, his daughter, Sm. Swarnalata Ghose, obtained the suit property in absolute right so that, upon her death during the pendency of the present suit, her only son, Samir Kumar Ghose, became entitled to the same. Samir Kumar's father Jamini Kanta is also alive.

3. Various defences were taken to the suit but they were all overruled by the learned munsif and, as the Defendants did not agree to "partial eviction", he did not consider the question of applicability of the proviso to Section 12(1)(h) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, to the present case.

4. The material findings of the learned munsif were:

(i) that the Defendants' tenancy had been duly terminated by the proper service of an appropriate notice to quit.

(ii) that "the Plaintiff requires the suit premises reasonably "for the use and occupation of Samir Kumar the "legatee" and

(iii) that "the Defendants Nos. 1 and 2 are to vacate the suit premises as a whole when they are reluctant to share a portion of the same".

5. In the course of his judgment the learned munsif went on to observe that "the Defendants Nos. 1 and 2 are very unreasonable "in their attitude" and that "the balance of inconvenience and "difficulty is on the Plaintiff's side when compared with the "advantages and disadvantages of the Defendants 1 and 2". It was further found by the learned munsif that "the disadvantage of Defendant No. 1 is practically nothing and the "disadvantages of Defendant No. 2 can easily be avoided".

6. From the decision of the learned munsif an appeal was taken by the Defendants which was eventually heard by the learned Additional District Judge, third court, Alipore. At the hearing of this appeal the only point which appears to have been pressed was that, in the facts and circumstances of the present case, a decree for "partial eviction" only ought to have been passed and a prayer was actually made before the learned appellate Judge to allow the Defendants "to occupy the first floor of the disputed "premises at a proportionate fair rent to be fixed by the court in "accordance with the provisions of the proviso to Clause (h) of "Section 12(1) of the West Bengal Premises Rent Control "(Temporary Provisions) Act XVII of 1950". The Defendants' contention and their prayer as set out above, were not accepted by the learned Additional District Judge. The learned Judge also found as a fact that "the notice to quit was duly served on "the Defendants". He also expressly affirmed the finding of the learned munsif that "the Plaintiff reasonably requires the "disputed premises for the use and occupation of the legatee "Samir Kumar Ghose" for

reasons, discussed in his appellate judgment. He further held that, as the Defendants did not agree but actually objected to "partial eviction" before the learned munsif, they were not entitled to agitate that question before the appellate court. In the above view of the matter the learned Additional District Judge dismissed the Defendants' appeal.

7. Before me the case was fully argued by the learned advocates of the parties and, having given the matter my best consideration, I have reached the conclusion that this appeal must fail.

8. It has been found by both the courts below that the notice to quit was duly served on the Defendants. That finding of fact is binding upon me in second appeal, but, even apart from that, it seems to me that it is entirely right on the merits. I find also no defect in the said notice. It thus follows that the Defendants' tenancy was validly terminated by the due service of a proper notice to quit.

9. On the question of the Plaintiff's reasonable requirement also I do not find the least justification for interfering with the concurrent finding in the Plaintiff's favour. The test of "comparative advantage and disadvantage" has been correctly applied by the courts below and in drawing up the "statutory "balance-sheet" in that regard no error appears to have been committed by them. I am fully convinced that, on the materials on record, the Plaintiff's case in that behalf has been clearly established. A decree for ejection, either total or partial, must, therefore, follow.

10. The point that now remains is the question of the applicability of the proviso to Section 12(1)(h) to the present case and the availability of its benefits to the tenants-Defendants. The point has been answered in the negative by the learned Additional District Judge upon the view that, when the tenants actually refused to agree to partial eviction before the learned munsif they were not entitled to claim the benefit of the proviso at the appellate stage. It seems to me that the view of the learned Judge is substantially correct and I have, little doubt that, in the facts and circumstances of this case, the relief was rightly refused to the "tenants".

11. Generally speaking, when a case comes up before the appellate court it is the correctness and propriety of the judgment under appeal which is its primary point for consideration. If that judgment was rightly passed it is normally not open to the appellate court to interfere with the same. There are no doubt exceptions to this general rule, but the rule itself is not affected by these exceptions. While, therefore, I am not prepared to hold that the word "court" in the proviso to Section 12(1)(h) of the Rent Control Act of 1950 only means the trial court and does not and cannot refer to the appellate court,- and this view accords with the general powers of the appellate court u/s 107(2) of the CPC and, indeed, is aided by the same-the fact that the tenant did not agree to "partial eviction" and refused the benefit, available to him under the statutory proviso may well be a relevant consideration and justify a refusal of relief at the appellate stage. If circumstances had changed in the

meantime or if the question had been overlooked or refused consideration at the earlier stages, the appellate court is certainly entitled to consider the matter and give effect to the proviso to protect the tenant from total eviction but, subject to such exceptions and the like, the trial court's decision, if rightly made, ought not to be interfered with. I do not think that this general rule of law was intended to be affected by the Legislature, the use of the word "shall" notwithstanding in the proviso to Section 12(1)(h) of the Rent Control Act of 1950, and, in my opinion, the statute should be read in that light. In the present case, I am unable to hold that the Defendant-Appellants have brought their case within the exceptions, indicated above, and, accordingly, the decision of the lower appellate court, refusing to give them relief under the statutory proviso to Section 12(1)(h) of the Rent Control Act of 1950, must be affirmed.

12. There is also another consideration on which the Appellant's claim of partial protection would fail. On the materials before me I am not convinced that, In the present case, the Plaintiff's "reasonable requirement" which has been amply made out would be substantially satisfied by evicting the Defendants from a part only of the disputed premises and, from the affidavits, filed before me, it is also reasonably clear that the two families, namely, of Samir Kumar and of Defendant No. 2, with which we are here principally concerned cannot be properly accommodated in the suit premises. There is, accordingly, no scope for the application of the statutory proviso (vide. Section 12(1)(h)) to the case. These two findings are also sufficient to dispose of the Appellant's extreme contention, raised before me, that the Plaintiff's suit ought to fail on the authority of the observations of this Court in the case of [Bhulan Singh and Others Vs. Ganendra Kumar Roy Chowdhury](#), , and the Bombay decision in the case of [Vithaldas Bhagvandas Vs. Nagubai M. Joshi](#), , or that, even apart from the proviso to Section 12(1)(h), only a decree for "partial eviction" ought to be given in this case on the authority of the Bombay case, reported in *Khundanmal Dowlatram v. Lakhmichand Chhogmal* ILR (1921) 45 Bom. 1294.

13. In the above view of the matter I hold that, although the word "court" in the proviso to Section 12(1)(h) of the West Bengal Premises Rent Control Act of 1950, is not, in my opinion, restricted to the trial court but includes the appellate court as well, that is of little assistance to the Appellant before me, and he is not entitled to the benefit of the said proviso.

14. This appeal must, therefore, fail and it should be dismissed with costs.

15. Before me, however, the Appellant has made a prayer for some time to vacate the suit premises. In the circumstances of the case I am inclined to grant him time till the end of May 1954 in the first instance and, if, within that time, a proper undertaking is given by the Appellant to this Court to quit by the end of September 1954 and pay up all arrears of rent, and/or mesne profits within the said period, the Appellant will be entitled to stay in the suit premises till the end of September 1954. The dismissal of the appeal will be subject to this provision.

16. Subject as aforesaid I dismiss this appeal with costs to the Plaintiff-Respondent.