Susanta Sen Vs Kunal Shukla and Another

Court: Calcutta High Court

Date of Decision: Dec. 6, 2012

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 1 Rule 8, Order 5 Rule 20, Order 8 Rule 1, Order 9 Rule 13
West Bengal Premises Tenancy Act, 1956 â€" Section 17
West Bengal Premises Tenancy Act, 1997 â€" Section 7(2)

Citation: (2013) 1 CALLT 242 : (2013) 2 CHN 304

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Jishnu Chowdhury, Mr. Mayukh Maitra and Ms. Shreya Burman, for the Appellant;Jiban Ratan Chatterjee and Mr. Badal Saha, for the Opposite Party No. 1, for the Respondent

Judgement

Sanjib Banerjee, J.
The plaintiff in a suit for eviction on account of sub-letting and default in payment of rent complains of a recent order by

the trial court accepting the first defendant"s written statement some four years after the institution of the suit without appreciating that no plausible

explanation had been proffered by the first defendant for the inordinate delay. The first defendant is represented after notice and submits that since

the writ of summons was neither served nor deemed to have been served on him, it was magnanimous on the first defendant"s part to condescend

to file the written statement without insisting on the service of the summons; and, rather than the first defendant having been undeservingly rewarded

by the order impugned allowing him to contest the suit, the first defendant has allowed a glaring lacuna on the plaintiff"s part to be glossed over.

2. In the plaint relating to Title Suit No. 536 of 2008 filed in the Alipore Court, the plaintiff claims to be the owner of a second floor flat at premises

No. 32H, Sarat Bose Road, Calcutta-700 020 and says that the suit premises were let out to the first defendant at a monthly rent of Rs. 1,100/-.

The relationship between the plaintiff and the first defendant is governed by the West Bengal Premises Tenancy Act, 1997. The plaint claims that in

March, 2006 the first defendant left for Singapore with his family and settled thereat; that the first defendant had illegally made over possession of

the suit premises to the second defendant and his wife who came to be in possession thereof without the written consent of the plaintiff; and, such

conduct entitled the plaintiff to possession of the premises. The plaintiff claims to have determined the tenancy of the first defendant by a notice

dated September 27, 2007 which was issued to the first defendant by registered post. The plaintiff seeks eviction, arrears rent and Mesne profits.

3. The plaintiff states that shortly after the service of the notice to quit addressed to the first defendant at the suit premises, the sister of the first

defendant instituted Title Suit No. 1094 of 2007 before the Alipore Court seeking a declaration that such sister was a monthly tenant under the

plaintiff herein at the suit premises and a consequential injunction restraining the present plaintiff from disturbing such person''s peaceful possession

of the premises. A copy of the plaint relating to Title Suit No. 1094 of 2007 has been appended to the present petition wherein it has been stated

that the mother of the plaintiff in the earlier suit was inducted as a tenant at the premises in question in 1964 and the quantum of monthly rent was

periodically enhanced. The mother is said to have died in November, 2001 and the plaintiff in the present suit is alleged to have accepted the first

defendant herein as the tenant after his mother''s demise. It is also averred in the plaint that early in 2006 the first defendant herein ""temporarily left

for Singapore with his family keeping the suit premises under the care and control of the plaintiff."" The sister of the first defendant herein claimed in

her suit that she resided at the suit premises with her two daughters and her husband resided in Asansol where he had his business. The previous

suit remains pending and the plaintiff herein harps on paragraph 10 of the plaint relating to the earlier suit where the first defendant''s sister has cited

a letter of June 28, 2007 addressed by the plaintiff herein to the first defendant herein at the suit premises and a subsequent ejectment notice issued

on behalf of the plaintiff herein.

4. The present suit was filed on February 26, 2008 and the writ of summons was attempted to be served by registered post on the first defendant

which returned with the postal endorsement ""not claimed"". The plaintiff refers to an order dated November 20, 2008 directing substituted service

of the writ of summons to be effected and insists that the first defendant has all along been aware of this suit and emphasises on the first

defendant''s sister admitting receipt of the notice to quit at the suit premises and the present occupants thereat being an uncle and aunt of the first

defendant. The first defendant''s sister applied to be added as a party to the present suit. Such application, filed in early 2010, claimed, inter Alia,

that the first defendant and his family had left for Singapore and the sister enjoyed a good relationship with the first defendant. The sister also

asserted, at paragraph 8 of her application for being added as a party to the instant suit, as follows:

8) That by receiving the money order from the present applicant tenancy of the suit premises has been created in favour of the present applicant,

so, in order to avoid the situation, the present plaintiff through his Solicitor sent a letter to the defendant No. 1 at his address at Singapore with a

false allegation that the defendant No. 1 has created subtenancy by delivering possession of the suit property tot he defendant No. 2.

5. The sister of the first defendant also maintained in her said application that the second defendant herein did not reside in the suit premises and

that it was such sister who was in exclusive possession thereof.

6. By an order of February 24, 2010, the sister''s application was dismissed. A civil revisional petition carried from such order to this court was

dismissed with the observation that the sister was neither a necessary nor a proper party to the present suit.

7. The plaintiff says that upon the various ploys by the first defendant to delay the present suit through his sister having failed, the first defendant

was left with no alternative but to enter the fray; which he did by carrying a one-page application to the trial court in May, 2012. Such application,

verified by the first defendant''s affidavit, claimed that no summons had been served on the first defendant and that the first defendant had come to

know of the suit only on May 13, 2012 when he came to Calcutta for his personal business. The first defendant asserted in his said application that

he contacted advocate on May 14, 2012 and was desirous of contesting the suit by filing his written statement and a petition u/s 7(2) of the 1997

Act. His exact statement was that ""he was staying at Singapore and recently came back to India and he did not receive any summons"" relating to

the suit.

8. The plaintiff herein filed a written objection to the first defendant''s application, insisting that the first defendant was aware of the pendency of the

suit but was only waiting in the wings and did not put in an appearance till it was absolutely necessary. The plaintiff suggested in the written

objection that the first defendant had made a dishonest attempt to stall the suit at a time that it had been set down for ex parte hearing.

9. The trial court allowed the first defendant''s application by the order impugned dated July 30, 2012 on the ground that despite the notice to quit

having been issued to the first defendant in Singapore, the plaintiff had indicated the first defendant''s address at the suit premises and, in such

circumstances, the first defendant could not be said to have been served the writ of summons which was attempted to be delivered to him at the

suit premises. The order reasoned that the adherence to time under amended Order I Rule 8 of CPC ""should not ordinarily be construed as

mandatory as procedure is always subservient to and is in aid to justice."" The trial court found sufficiency in the cause shown by the first defendant

and observed that it was more desirable for a suit to be disposed of on merits.

10. The plaintiff has referred to a judgment reported at Parasran Laluram Mawar Through Power of Attorney Vs. Indravadan Natwarlal Shah,

where the Gujarat High Court agreed with the order of the trial court that service on the defendant-tenant at the suit premises was sufficient when

the defendant had left the country without indicating his address abroad to the landlords. The facts in the Gujarat case bear a close resemblance to

the facts herein. The revisional petitioner before the Gujarat High Court was the tenant against whom eviction was sought on the ground of

wrongful sub-tenancy and unlawful assignment of the suit premises. The writ of summons was served on the tenant at the tenanted premises where

he did not reside, but the suit was contested by the alleged subtenants and unlawful assignees. The suit was decreed and the plaintiffs found to be

entitled to possession. A first appeal by the unlawful sub-tenants and assignees was dismissed and a revisional petition therefrom stood rejected.

The decree-holders levied execution proceedings. Following a public notice issued in course of the execution proceedings, the tenant applied for

the decree to be set aside on the ground that he was not aware of the suit as he had not been served the writ of summons. Appeals were carried

from the relevant orders by the tenant which were also dismissed. Such orders of dismissal were sought to be revised before the High Court. The

High Court referred to the trial court recording that the summons in the suit had been affixed to a conspicuous part of the suit premises and

disregarded the tenant''s contention that since the tenant resided abroad service of the summons could not have been said to have been effected on

the tenant.

11. The plaintiff has carried a Division Bench judgment of this court reported at Satya Chorone Roquittee Vs. Suresh Chandra Pal and Others, for

the proposition that a notice to quit may be served on the tenant by affixing it on the door of the tenanted premises. The plaintiff suggests that the

service of the writ of summons against a tenant in an eviction suit by affixing the same at a prominent part of the suit premises should, similarly, be

held to be good service. The plaintiff says that substituted service was effected by way of abundant caution. The substance of the plaintiff''s

argument is that since the first defendant''s sister claimed to be in possession of the premises and was aware of the notice to quit, the affixation of

the writ of summons at a prominent place of the suit premises should hold good in the circumstances.

12. The first defendant relies on Order VIII Rule 1 of the Code in support of the submission that the law mandates the service of the writ of

summons on a defendant before the time starts running for the defendant to present a written statement of his Defence. The first defendant

contends that since the plaintiff was aware that the first defendant was a resident of Singapore and had admitted as such in the plaint, the plaintiff

could thereafter not have sued the first defendant by indicating the tenanted premises as the first defendant''s address. It is submitted that the

situation did not arise for the plaintiff to resort to substituted service under Order V Rule 20 of the Code as service of the summons at an address

where the plaintiff knew that the first defendant did not reside could never result in the first defendant keeping out of the way for the purpose of

avoiding service or render impossible the service of the summons on the first defendant in the ordinary way. The first defendant insists that

substituted service is the exception and not the rule.

13. The first defendant has referred to a judgment rendered by a Division Bench of this court on a reference. The matter referred to the Division

Bench in the judgment reported at Surendra Chandra Bhowmick Vs. Pritimoyee Gupta and Others, was as to whether the date of appearance in

the suit for the purpose of Section 17 of the West Bengal Premises Tenancy Act, 1956 would be the date of appearance in proceedings under

Order IX Rule 13 of the Code by the defendant-tenant. The first defendant relies on the observation at paragraph 7 of the report that the mere fact

that the defendant appeared in an application under Order IX Rule 13 of the Code or that the defendant had knowledge of the ex parte decree

would not amount to his appearance in the suit. The relevance of the judgment cannot be appreciated in the present context where the issue is as to

whether, in view of the 2002 Amendment to the Code, a defendant could walk in anytime and file his written statement merely on the allegation

that he had not been served the writ of summons but was otherwise aware of the institution of the suit without the defendant demonstrating by

cogent evidence how the defendant came to know of the institution of the suit for the court''s satisfaction to be recorded that the written statement

was sought to be tendered within time or that it could not be furnished within time despite the best diligence on the part of the defendant.

14. The further decision placed by the first defendant, reported at Madan Mohan Das Vs. Kartick Chandra Das and Another, covers a case

where the writ of summons was actually not served on the defendant and the defendant appeared to file the written statement beyond ninety days.

The facts in that case are clearly distinguishable since the matter which is in issue in the present case is as to whether the service of the writ of

summons at the tenanted premises ought to be considered as good service on the first defendant.

15. It cannot be missed in the instant case that the suit was instituted on the ground of wrongful sub-letting of the residential suit premises by the

defendant to another. The trial court had also to be alive to the fact that the first defendant''s sister launched a suit shortly upon a notice to quit

being issued to the first defendant, though no such notice had been issued to the sister. It is also significant that the plaintiff has alleged that an uncle

of the first defendant has been wrongfully put in possession of the suit premises though the sister of the first defendant claims, in her suit, to be in

possession thereof. There does not appear to be any bad blood between the first defendant and his sister or between the first defendant and those

at present alleged to be in occupation of the premises. At least, the first defendant did not make out such a case in the sketchy application that he

filed for his written statement to be taken on record.

16. The service of a notice to quit on a tenant should, ordinarily, be regarded as good if it is effected at the tenanted premises or is addressed to

and despatched in the usual course to the tenanted premises. It should, generally, be no different in case of a writ of summons, particularly if it is

sought to be served on the tenant of the residential suit premises at the suit premises. It is possible that a tenant may be temporarily away from the

suit premises and the court may, in some circumstances, be satisfied that despite the service being attempted or effected at the residential suit

premises, it may not have been adequate. But it would be difficult to accept that a tenant covered by the protection accorded under the tenancy

laws would remove himself from the residential suit premises and be permitted to complain that the service of the writ of summons, by affixation

thereof at the suit premises in the tenant''s physical absence therefrom, should not be regarded as good service.

17. Civil courts in this country remain clogged with unmeritorious claims and fanciful defences which either rely on technicalities or bank on the

perceived inability of courts to expeditiously dispose of matters. Order VIII Rule 1 of the Code embraces the fundamental principle of natural

justice that a person against whom a claim is made should be served the statement of claim and afforded a reasonable opportunity to deal with the

same. But just as the principle of natural justice is no longer regarded as absolute, it is the substance of Order VIII Rule 1 of the Code which has

to be appreciated rather than being overwhelmed by the technical compliance therewith. In eviction suits, in particular, the court should see through

a dodgy or technical Defence and ascertain the substance thereof. The court should also be alert in not encouraging undue delay that undeserving

occupants thrive on. There has been a paradigm shift in the law relating to tenancy and the policy under the new regime gives protection to tenants

in some cases and, equally, recognises the landlords'' rights. In a way, it remedies the lopsided approach that was once deemed to be necessary in

this State in the days following the Independence and the welcome influx of families from across the border in erstwhile East Pakistan. In course of

time, the protection accorded to tenants and occupants outlived the purpose and became an engine for oppressing landlords.

18. The approach to a matter of the present kind has to be guided by constitutional principles. Courts would be more lenient to a less-privileged or

less-educated tenant; and, understandably so. But if the tenant seeking protection under the tenancy laws by virtue of the quantum of rent paid

seeks to make a mockery of the legal protection by oppressing the landlord, courts needs to be more discerning and sift the one class from the

other. In this case, the tenant enjoying a lucrative property in an upmarket south Calcutta residential colony was admittedly not in possession of the

property and was in Singapore for several years. Yet, the tenant appears to have held on to the property at nominal rent with either an uncle and

his family or the tenant''s sister being put in possession thereof and the landlord left in the lurch. While it is possible for a complete Defence being

set up by the first defendant at the trial of the suit - and it is dangerous to prejudge matters at this stage - there were sufficient pointers that should

have prompted the trial court to either assess the bonafides of the first defendant as to his inability to present his written statement earlier or to

impose conditions for the acceptance of the written statement. The trial court''s approach may not have been flawed in its zeal to require a matter

to be disposed of on merits, but it should have balanced the scales and not accepted first defendant''s written statement unconditionally on the

strength of the vague and unsubstantiated allegations in the relevant application.

19. Since the first defendant''s written statement has already been accepted, the ends of justice would be met in this case if only a condition is

attached to the acceptance. The first defendant''s written statement as filed will remain on record if a sum of Rs. 2 lakh is deposited by the first

defendant in the trial court within a fortnight from date. Such deposit will be invested by way of a fixed deposit in a nationalised bank and the

proceeds therefrom will be held to the credit of the suit and be made over to the first defendant if the suit fails or be paid to the plaintiff by way of

costs if the claim is decreed. In default of the deposit being put in within the time indicated, the first defendant''s written statement will be taken off

the file and the suit will proceed ex parte as against the first defendant.

20. CO No. 3121 of 2012 is disposed of by modifying the impugned order accordingly, with a request to the trial court to ensure that the suit is

disposed of as expeditiously as the business of the court would permit and, preferably, within a year from the date of deposit of an authenticated

copy of this order.

21. There will be no order as to costs. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to

compliance with all requisite formalities.