

(2014) 12 CAL CK 0007

Calcutta High Court

Case No: C.O. No. 540 of 2007 and CAN Nos. 2092, 70 of 2014

Rubi Mukherjee

APPELLANT

Vs

Salim Jawed

RESPONDENT

Date of Decision: Dec. 23, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13, 151
- Constitution of India, 1950 - Article 227
- West Bengal Premises Tenancy Act, 1956 - Section 17(1), 17(2A)

Citation: (2015) 2 CALLT 133 : (2015) 3 CHN 27 : (2016) 1 WBLR 573**Hon'ble Judges:** Subrata Talukdar, J**Bench:** Single Bench**Advocate:** Dipankar Dasgupta and Falguni Bandopadhyay, Advocate for the Appellant; Probal Mukherjee and Pawan Kr. Gupta, Advocate for the Respondent

Judgement

Subrata Talukdar, J.

In this application under Article 227 of the Constitution of India the order dated 16th December, 2006 passed by the Ld. District Judge-in-charge, Purulia in Misc. Appeal No. 10 of 2006 thereby allowing the Misc. Appeal by treating it as a civil revision is under challenge. By filing the said Misc. Appeal No. 10 of 2006 the order dated 20th February, 2006 passed by the Ld. Munsif (now Civil Judge, Junior Division), Purulia in Misc. Case No. 124 of 2003 arising out of Title Suit No. 85 of 1997 in the matter of Salim Jawed vs. Smt. Indira Mukherjee and others was under challenge.

2. The short facts of the case are as follows:-

i) The present petitioner is the defendant No. 3 in the suit. The father of the petitioner, one Jagannath Mukherjee since deceased, was the tenant in respect of one shop room being Municipal Holding No. 205/121 commonly styled as Mukherjee Pharmacy situated at Chaibasa Road (Post Office More) within Ward No. 5 of Purulia Municipality under one

Sk. Ahmed Ali Sodagar, son of late Hazi Hossain Sodagar at a monthly rent of Rs. 50/-. After the demise of the said Jagannath Mukherjee, his wife, Smt. Indira Mukherjee and daughters, Rina Mukherjee, Rupa Mukherjee and the present petitioner, Rubi Mukherjee, became the joint tenants in respect of the said shop room.

ii) That on the basis of a registered Deed of Gift dated 28.12.1989 the present Opposite Party (for short OP), who is the plaintiff in the suit, became the owner of the premises in which the said shop room is situated.

iii) That the petitioner claims to have resided at the house of her maternal uncle in Bankura for education purposes since the year 1992 till the date of the expiry of her mother, Smt. Indira Mukherjee. The said Jagannath Mukherjee died on 19th December, 1994. After the death of Jagannath Mukherjee, his widow, Smt. Indira Mukherjee used to look after the pharmacy business till her death on 6th July, 2001. After the death of the widow, the petitioner started looking after the pharmacy business while her other sisters are married and residing elsewhere.

iv) That sometime around September 2003 the petitioner came to learn from one Gulam Mustafa, being the brother-in-law of the plaintiff, that the plaintiff has obtained a decree for eviction in respect of their tenanted shop room. On coming to learn of such fact the petitioner rushed to court and after making necessary enquiries found that Title Suit No. 85 of 1997 was instituted by the plaintiff against the mother of the petitioner and others praying, inter alia, for eviction and recovery of khas possession. As already recorded earlier in this judgment the petitioner was impleaded as the defendant No. 3.

v) That all the defendants, except the petitioner, appeared before the Ld. Trial Court and filed separate applications under Sections 17(1) and 17(2A) of the West Bengal Premises Tenancy Act, 1956 (for short the 1956 Act). Since the petitioner did not get any summons from court she claims to have no knowledge of the suit and therefore could not appear in the same.

Title Suit No. 85 of 1997 was decreed ex-parte on 26th August, 2003. On obtaining the information regarding the decree the petitioner filed Misc. Case No. 124 of 2003 under Order 9 Rule 13 read with Section 151 CPC for recalling the ex-parte decree. In her application under Order 9 Rule 13 CPC the petitioner took the point that she was not aware of the institution of the suit till 18th of September 2003 on which date she was purportedly informed regarding the ex-parte decree dated 26th August, 2003. During the lifetime of her mother she used to look after the said shop room and after her death on 6th July, 2001 the petitioner is managing the same. Since the mother of the petitioner died long before the ex-parte decree was passed, the said decree is non-est in the eyes of law.

vi) The OP-1/plaintiff contested the said Misc. Case No. 124 of 2003 by filing his written objection on 30th April, 2004. According to the OP-1, the petitioner refused to receive

summons of the suit.

vii) By order dated 20th February, 2006 the said Misc. Case No. 124 of 2003 was allowed on contest by the Ld. Munsif, Purulia. The Ld. Munsif was pleased to, inter alia, record that the signature of the petitioner does not appear from the vakalatnama of the defendants filed in court and it also appears that the summons sent to the petitioner were returned unanswered.

The Ld. Munsif was further pleased to record that the plaintiff could not prove during taking of evidence that the petitioner was actually served with the summons and the petitioner could manage to prove that she stayed in Bankura for her education from 1992 up to the death of her mother on 6th June, 2001. Further, according to the Ld. Trial Court the plaintiff ought to have taken steps for substituting the legal heirs of the deceased Indira Mukherjee. The Ld. Trial Court therefore believed the case made out by the petitioner that the summons were not served upon her and therefore set aside the ex-parte decree.

viii) After setting aside of the ex-parte decree and restoration of Title Suit No. 85 of 1997 the petitioner claims to have taken steps in the suit. Meanwhile, the plaintiff challenged the order of the Ld. Trial Court allowing the Misc. Case by filing Misc. Appeal No. 10 of 2006 before the Ld. District Judge at Purulia.

ix) Although the petitioner took the objection of maintainability of the Misc. Appeal before the Ld. District Judge, the Ld. Court treated the Misc. Appeal as a revisional application and allowed the same.

Being aggrieved by the order dated 16th December, 2006 allowing Misc. Appeal No. 10 of 2006 by treating the same to be in the nature of a revisional application, the petitioner has filed the present application being CO 540 of 2007.

3. The Ld. Additional District Judge, 1st Court, Purulia while allowing Misc. Appeal No. 10 of 2006 held as follows:-

a) That against the order dated 20th February, 2006 passed by the Ld. Trial Court allowing the application under Order 9 Rule 13 CPC no appeal lies in the eyes of law. Therefore the present appeal be treated as a revision for purpose of disposal.

b) That the defendants appeared in the suit on 6th June, 1997 by filing vakalatnama and they also prayed for time to file their written statement. On the 1st of July 1997 they filed an application for depositing rent and also filed applications under Sections 17(1) and 17(2A). The Ld. Trial Court by Order No. 25 dated 10th September, 1998 allowed the defendants to deposit arrear rents and to pay current rents.

c) Challenging the order dated 10th September, 1998 the plaintiff preferred a revisional application which was registered as civil revision No. 6 of 1999. The said revisional

application was finally decided on 18th December, 2000 and the order of the Ld. Trial Court dated 10th September, 1998 was set aside.

d) That the defendants prayed for time to file their written statement which was granted by the Ld. Trial Court up to 30th April, 2003 as a last chance. However, on non-filing of the written statement the ex-parte decree was passed by the Ld. Court on the 4th of August 2003. Thereafter on 22nd September, 2003 Misc. Case No. 124 of 2003 was filed for setting aside the ex-parte decree.

e) In the light of the above facts the Ld. Appellate Court took the view that the defendants, including the present petitioner, were aware of the suit and took steps in the same. However, due to their laches the defendants failed to protect their interest in the suit resulting in the ex-parte decree dated 4th August, 2003.

f) The Ld. Appellate Court further took the view that the case records before the Ld. Trial Court were not properly maintained. As a result the vakalatnama and several other papers could not be found with the records. However, from the order-sheets it transpires that all the defendants appeared and prayed for protection under Section 17(2A) of the 1956 Act. However, the protection granted to the defendants for depositing arrear and current rents by the order of the Ld. Trial Court dated 10th September, 1998 was ultimately set aside by the revisional court on 18th December, 2000 and thus the defendants became defaulters in the eyes of law.

g) The Ld. Appellate Court also found that the order dated 20th February, 2006 setting aside the ex-parte decree by allowing Misc. Case No. 124 of 2003 failed to reflect the abovenoted facts and mentioned the only fact that the absence of a proper vakalatnama on record is a sufficient cause for setting aside the ex-parte decree. However, in the opinion of the Ld. Appellate Court from a perusal of the order sheets it is evident that the defendants appeared and took steps in the suit by filing application under Section 17(2A) of the 1956 Act and thereafter took time up to 30th April, 2003 for filing written statement. However, such written statement was not filed.

h) The Ld. Appellate Court also took the view that in spite of an opportunity to deposit the rents the defendants failed to deposit both the arrear and the current rents.

4. Therefore the Ld. Appellate Court found no reason to set aside the ex-parte decree. Misc. Appeal No. 10 of 2006 was accordingly allowed by awarding a cost of Rs. 5000/- against the contesting defendants.

5. Sri Dipankar Dasgupta, Ld. Counsel appearing for the petitioner submits that the order impugned passed by the Ld. Appellate Court has occasioned grave injustice to the petitioner. According to Sri Dasgupta, the petitioner was prevented by bona fide circumstances from contesting the suit. Sri Dasgupta relies upon the findings of the Ld. Trial Court to the effect that from the vakalatnama it does not transpire that the present petitioner, as defendant No. 3, received summons in the suit and contested the same.

6. Sri Dasgupta points out that the order of the Ld. Appellate Court is full of surmises and therefore the petitioner ought to have been given the opportunity of contesting the suit.

7. Per contra, Sri Probal Mukherjee Ld. Senior Counsel appearing for the OP/plaintiff/landlord submits that the present petitioner is responsible for dragging the matter on false and frivolous grounds. Even before this Hon"ble Court the present petitioner is delaying the matter. Sri Mukherjee submits that the OP is being prevented from enjoying the fruits of his decree and the suit was rightly decreed ex-parte since the defendants were found to be default in the payment of rents and also failed to file their written statement even after the lapse of six years--a fact which was correctly noticed by the Ld. Appellate Court.

8. Heard the parties. Considered the materials on record.

9. At the very outset this Court notices the order dated 10th September, 1998 passed by the Ld. Trial Court. The Ld. Trial Court was pleased to, inter alia, find the defendants to be in arrears of rent covering the period of 65 months. The defendants were therefore directed by the Ld. Trial Court to pay the arrear rent in instalments as well as to go on paying the current rent. The Ld. Trial Court was pleased to fix 19th of January, 1999 for filing written statement.

10. This Court further notices the view taken by the Ld. Appellate Court that in spite of the direction to pay the arrear rents as noted above, the defendants did not pay the arrear rents and interest as per law. In such view of the matter the Ld. Appellate Court found the defendants to be "confirmed defaulters". The confirmation of default is noticed from a contemporaneous application numbered CAN 70 of 2014 filed in connection with the main application being CO 540 of 2007 whereby the present petitioner has, inter alia, prayed before this Court leave to deposit the arrear rent alongwith statutory interest.

11. This Court also notices that the Ld. Appellate Court was pleased to find in addition to the default committed by the defendants, the fact that up to 30th April, 2003 time was taken to file written statement. For six years such written statement was not filed and ultimately the defendants stood in further default of even non-filing of the written statement.

12. It furthermore transpires from the documents on record before this Court that the petitioner was arrayed as the defendant No. 3 in Title Suit No. 85 of 1997. By her own admission the petitioner claims to have been looking after the pharmacy business running in the tenanted shop room after the death of her mother, the defendant No. 1, the late Indira Mukherjee. According to the case made out on behalf of the petitioner her remaining two sisters, viz. the defendant Nos. 2 and 4, are married and residing elsewhere. In such view of the matter this Court is of the considered opinion that it was incumbent upon the petitioner to take steps in the suit after the death of her mother on 6th July, 2001, i.e. the date from which the petitioner claims to be looking after the pharmacy

business in the tenanted shop room.

13. However, the Ld. Appellate Court has noticed that up to 30th April, 2003, i.e. nearly two years after the death of the defendant No. 1 neither the petitioner nor the other defendants took steps to file the written statement and therefore allowed the suit to be decided ex-parte. Moreover, the petitioner did not take any step to clear the default in the payment of rent although she claims to be running the pharmacy business in the tenanted shop room.

14. In the opinion of this Court the lacuna noticed by the Ld. Trial Court pertaining to non-filing of the vakalatnama and the purported absence of papers have been adequately taken care of by the Ld. Appellate Court on perusal of the order sheets connected to Title Suit No. 85 of 1997. The Ld. Appellate Court was pleased to find from the order sheets that all the defendants, including the present petitioner, being the defendant No. 3, appeared and took steps in the suit by filing an application under Section 17(2A) of the 1956 Act. The Ld. Appellate Court, in the further opinion of this Court, correctly noticed that the Ld. Trial Court was merely persuaded by the purported absence of vakalatnama in the records but failed to notice the bundle of facts pertaining to the proceeding in the suit as recorded in its order sheets. It does stand to reason that the order sheets, on which the Ld. Appellate Court correctly relied, reflect the records of and the steps taken in the suit.

15. This Court therefore finds that the Ld. Appellate Court had sufficient reason to disbelieve the story embroidered by the petitioner in Misc. Case No. 124 of 2003. From the records it is noticed that the ex-parte decree was passed on 4th August, 2003 and the narration in the Misc. Case No. 124 of 2003, for obvious reasons, commences from 22nd of September 2003.

16. This Court further finds that in appropriate circumstances a competent court is not denuded of its powers to treat an appeal as a revisional application. Useful reference may be made in this regard to the observations of the Hon"ble Apex Court in [Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat](#), . Moreover, it does not appear that such challenge has been taken by the petitioner in the grounds of CO 540 of 2007. It is also evident before this Court that, on the death of the defendant No. 1, Indira Mukherjee, the tenanted estate was adequately represented through the other defendant Nos. 2, 3 and 4, being the joint successors-in-interest of the original deceased tenant, their father, Jagannath Mukherjee.

17. In the backdrop of the above discussion this Court finds no reason to interfere with the order impugned dated 16th December, 2006 passed in Misc. Appeal No. 10 of 2006 by the Ld. District Judge-in-Charge, Purulia.

18. CO No. 540 of 2007 is thus dismissed.

19. In view of the dismissal of the main application no further order needs to be passed in the connected applications which are dismissed as infructuous.

20. There will be, however, no order as to costs.

21. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.