

(2019) 09 CAL CK 0200

In the Calcutta High Court

Case No : Civil First Appeal (FA) No. 34 Of 2012

Bela Rani Goswami Since Deceased Represented By
Krishnendu Goswami & Ors

APPELLANT

Vs

Alok Roy Chowdhury & Ors

RESPONDENT

Date of Decision : 12-09-2019

Acts Referred:

West Bengal Premises Tenancy Act, 1997 — Section 2(g)

Citation : (2019) 09 CAL CK 0200

Hon'ble Judges : Ravi Krishan Kapur, J;Soumen Sen, J

Bench : Division Bench

Advocate : Rahul Karmakar, Gargi Goswami, Bidyut Kumar Banerjee

Final Decision : Allowed

Judgement

This appeal is directed against a judgment and decree dated 30th July, 2011 in a suit for eviction and for recovery of khas possession filed by the plaintiff against the defendants.

The learned Counsel appearing on behalf of the appellants has submitted that on a true and proper construction of Section 2(g) of the West Bengal Premises Tenancy Act, 1997 it is clearly established that the defendants are trespassers and the learned Single Judge has completely misdirected its mind and erred in holding that a fresh tenancy has been created between the plaintiff and the defendants. The learned Counsel has referred to the cross-examination of the DW-1 and the notice to quit to show that the defendants, at the relevant time, were not ordinarily living with the tenant upto the date of death of the tenant with the members of his family and were not depended on him.

Per contra, the learned Counsel appearing on behalf of the defendants/opposite parties has strongly relied upon a rent receipt issued by the appellant on 15th May, 2009 in favour of the defendant nos. 1, 2 and 3 to submit that after acceptance of the said amount, the plaintiff cannot treat the present defendants

as trespassers.

Shorn of details, Debal Roy Chowdhury was a monthly tenant in the plaintiff in respect of two rooms with common user of bath and privy on the first floor and one room on the second floor of premises No. 7B, Star Lane, Kolkata-700 006 at a monthly rent of Rs.300/- payable according to English calendar month. Debal Roy Chowdhury died in the year 2006 and at the time of his death, his widow, Amita Roy Chowdhury was ordinarily leaving as the tenant. Amita Roy Chowdhury on 14th April, 2009. The plaintiff contends that after the death of Amita Roy Chowdhury, the defendants illegally and wrongfully trespassed the suit premises and kept the same under lock and key without having any right, title and interest thereof. Accordingly, a notice to quit was issued on 30th October, 2009. In spite of receipt of the said notice to quit, the defendants neither replied to the said notice nor have they delivered the peaceful and vacant possession of the premises in question.

Under such circumstances, the plaintiff filed a suit for eviction. The defendants contested the proceeding by filing a written statement. In the written statement, it is alleged that the defendants were living with their parents till their demise. The plaintiff having special knowledge in this regard of her own had issued rent receipts in the name of the defendants. Since the death of their father, Debal Roy Chowdhury, the defendants along with their mother became the tenants of the suit premises and they were and are all along residing and living in the suit premises by paying monthly rent regularly in accordance with law. The defendants regularly paid their monthly rent directly to the plaintiff even after the death of Amita Roy Chowdhury. It is alleged that the plaintiff received monthly rent directly from the defendants but after refusal to issue rent receipt, the defendants started tendering their rent through money order and further on refusal of the same, the defendants were compelled to tender monthly rent in the office of the learned Rent Controller, Kolkata since the month of November, 2009.

At the trial, the plaintiff has denied creation of any fresh tenancy in favour of the defendants. The son of the plaintiff deposed on her behalf. The witness stated that Amita Roy Chowdhury paid rent upto the month of April, 2009 and after her death, the plaintiff did not accept any rent from her sons nor did the plaintiff issue any rent receipt in their names. The witness has also stated that the defendants did not use to reside with their parents and they were not dependent upon their father, Late Debal Roy Chowdhury. The defendants were orally requested to quit and vacate the premises when he visited the house of the plaintiff. Mr. Abhijit Roychowdhury was in visiting terms with the plaintiff. The witness, however, could not produce any evidence to show that the defendants were residing elsewhere and were not dependent upon the father, Debal Roy Chowdhury. During the cross examination of the defendant's witness, it has been revealed that the defendants have their own establishments and were not dependent on their father at the time of death of their father. The evidence of

Aniruddha Roy shows that that all the defendants have their own establishments and settled in life and were not dependent on their father at the time of death.

It is also significant to note that as opposed to the claim made by the defendants that they became joint tenants after the death of their mother, the rent receipts were issued only in the name of Amita Roy Chowdhury after the death of her husband which go to show that the plaintiff had never recognized the sons of Amita Roy Chowdhury to be the joint tenants along with their mother.

The contention of the plaintiff is that the possession of the defendants after the death of their mother is that of the trespassers needs to be assessed in the light of section 2(g) of the West Bengal Premises Tenancy Act, 1997. Section 2(g) of the Act defines 'Tenant' as:

"2(g): "tenant" means any person by whom or on whose account or behalf the rent of any premises is or, but for a special contract, would be payable, and includes any person continuing in possession after termination of his tenancy and, in the event of death of any tenant, also includes, for a period not exceeding five years from the date of death of such tenant or from the date of coming into force of this Act, whichever is later, his spouse, son, daughter, parent and the widow of his predeceased son, who were ordinarily living with the tenant up to the date of death of the tenant as the members of his family and were dependant on him and who do not own or occupy any residential premises, and [in respect of premises let out for non-residential purpose his spouse, son, daughter and parent who were ordinarily living with the tenant up to the date of his death as members of his family, and were dependant on him or a person authorised by the tenant who is in possession of such premises] but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction:

Provided that the time-limit of five years shall not apply to the spouse of the tenant who was ordinarily living with the tenant up to his death as a member of his family and was dependant on him and who does not own or occupy any residential premises:

Provided further that the son, daughter, parent or the widow of the predeceased son of the tenant who was ordinarily residing with the tenant in the same premises up to the date of death of the tenant as a member of his family and was dependant on him and who does not own or occupy any residential premises, shall have a right of preference for tenancy in a fresh agreement in respect of such premises [on condition of payment of fair rent]. This proviso shall apply mutatis mutandis to premises let out for non-residential purpose."

It is clear from the definition that sons not ordinarily living with the original tenant at the time of death and not dependant on him are not entitled to the protection of five years. In the instant matter the widow was extended the protection till her demise as she was living with the original tenant and was solely dependent on her with no other alternative accommodation on her own.

The evidence of the defendants clearly established that they do not come within the purview of five years benefit as they were not residing with their father and not dependant on her. Moreover, they have separate establishments.

It is trite law that mere acceptance of rent after the expiry of the period of tenancy without anything more does not automatically create a fresh tenancy. It is true that the assent of the lessor may be inferred from the acceptance of rent but what is relevant is if such acceptance was made with a view to create fresh tenancy. There is nothing on record to show that the plaintiff has demanded rent from the defendants after the death of Amita. In fact, the defendants have no right to claim tenancy soon after the death of the original tenant as they were not ordinarily residing with him and are dependant on him at the time of his death. There is no evidence that the sons of the original tenant were continuing in possession at the relevant time. The defendants appear to have sent occupation charges on their own volition for the month of May to August, 2009 when admittedly they were not tenant within the meaning of Section 2(g) of the Act.

It is also important to note that few months after the death of the mother of the defendants, a notice to quit was issued on 30th December, 2009 and was duly served upon the respondents. The respondents did not reply to such notice. The very fact that the plaintiff did not accept rent even if one assumes that there were some tender and acceptance thereof for the months of May, 2009 to August, 2009, by a single tender and not thereafter the said acceptance does not by itself create a presumption of a fresh tenancy in favour of the said defendants.

The learned Counsel for the appellant has relied upon a Single Bench decision of our Court in the case of Pulin Behari Shaw vs. Miss Lila Dey reported in AIR 1957 Cal 627 to show that mere acceptance of rent after expiry of the determination of the tenancy does not by itself create fresh tenancy. In the instant case, there was denial of receipt of rent for May to August, 2019. In any event notice to quit was issued immediately thereafter. Furthermore, even all things found in favour of the defendants they could not have claimed any tenancy beyond April 2011.

In the instant case, as we have noted earlier that the plaintiff has never recognised the defendants as tenants and it is an admitted position as revealed from the evidence that on the date of the death of the original tenant, the defendant were not ordinarily residing with the tenant and were not dependent upon the tenant.

Under such circumstances, we set aside the decree under appeal. The appeal is allowed.

In the event the defendants make over the possession of the premises in question by 15th November, 2019, the plaintiff has agreed not to make a claim any mesne profits from the defendants, failing which it would be open to the plaintiff to seek appropriate direction for appointment of a Commissioner to determine the mesne profits.

The Lower Court record may be sent down immediately.

The decree shall be drawn up as expeditiously as possible.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.