
(1993) 05 CAL CK 0024
In the Calcutta High Court
Case No : SA No. 172 of 1991

Calcutta Film Library and Associates

APPELLANT

Vs

Dr. Shila Sen

RESPONDENT

Date of Decision : 26-05-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 108

Citation : 97 CWN 925

Hon'ble Judges : Bhagabati Prosad Banerjee, J;A.K. Bhattacharyya, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, S.P. Roy Chowdhury and Sadhan Roy, for the Appellant; Ranadeb Choudhuri, Samir Chowdhury, Dilip Kr. Mondal and Chandan Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Bhagabati Prasad Banerjee, J.—This is an appeal filed by a tenant appellant against the judgement and decree passed by the 3rd Additional District Judge. Alipore in Title Appeal No. 276 of 1989 on 17th September, 1990 reversing the judgement and decree passed by the Second Additional Munsif Alipore passed in Title Suit No. 170 of 1986 on 29th April, 1989. The respondent landlady filed a suit for eviction of the defendant appellant from the premises No. 31/1, Lake Avenue, Calcutta-26 on the ground of default, change of user, nuisance and annoyance and reasonable requirement of the suit premises. The suit was dismissed by the learned trial Judge but findings of the learned trial Judge were reversed and the suit was decreed in favour of the respondent landlady. This appeal is at the instance of the defendant-tenant. Originally one Dhires Chandra Sen, the Executor to the estate of Giribala Devi filed the suit on 11.4.84 before the learned 3rd court Munsif contending, inter alia, that defendant no-1 was a tenant in the ground floor of the premises No. 31/1, Lake Avenue, Calcutta-26 in respect of the four living rooms, two bath-cum-privy, one kitchen, one varandah and one servant-room fully detailed and described in the schedule to the plaint

hereinafter referred to as the suit premises for brevity at a monthly rental of Rs. 500/- payable according to English calendar. That though the suit premises was let out for residential purpose of defendant No. 2 the partner of defendant No. 1, it was converted into a godown of Kanchan Fan and also a Film Laboratory without the consent in writing from the landlady, that defendants made material alterations in the corporation water main causing disruption of supply of water in the premises, that the defendants are guilty of conduct of nuisance and/or annoyance that the defendant acted in clear violation of the clauses (m) (o) and (p) of Section 108 of the Transfer of Property Act, that the roof of the building requires extensive repair for which the inmates of the second floor are required to come to ground floor and accordingly the plaintiff required the suit premises reasonably for building and rebuilding propose and also for own use and occupation, that a notice to quit was sent to the defendants requiring them to vacate the suit premises on the expiry of the month of January, 1984 and that as no heed was paid to the said notice, the plaintiff was constrained to institute the suit praying for eviction of the defendants from the suit premises and also for mesne profits.

2. During the pendency of the suit the probate of the will executed by Giribals Devi was obtained and accordingly the plant was amended by order No. 18 dt. 25.7.85 and the plaintiff Dr. Shila Sen was brought on record and the plaint was suitably amended incorporating the plaintiffs reasonable requirement for her own use and occupation. The tenant/appellant contested the suit by filing writtent statement. The learned trial Judge framed 73 issues. For the purpose of this appeal the relevant issues are given below :

- 1) Is this suit mainatnable?
- 2) Is the next notice to quit legal? Valid and sufficient? Was it duly served?
- 3) Are the defendants dafulter, in paymen of rent?
- 4) Does the plaintiff require the suit premises reasonably for her own use and occupation?
- 5) Have the defendant used the premises, let out for residential purpose, for any other purpose for more than four months without the consent in writing of the landlady?
- 6) Is the plaintiff entitled to get decree for eviction as prayed for?
- 7) To what relief, if any is the plaintiff entitled?

4. The defendant appeared and contested the suit after filing written statement denying the material ablegations made in the plaint and it has been specifically stated that the plaintiff does not require the suit premises reasonably for her own use and occupation, that the defendants are not defaulters in payment of rent and that the notice of ejectment is not legal, valid and sufficient.

5. With regard to the validity of the notice to quit, the lower Appellate Court held

that the argument of the lawyer for the appellant on this score is that the notice is perfectly within the meaning of the Section 13 (b) of the W.B.P.T. Act as it is one month's notice expiring with the month of tenancy. Admittedly the tenancy according to English month and the defendant was required to vacate the premises within 31.1.84 i.e. the last day of the English month. So the learned lawyer placed reliance on a series of cases in support of his contention that the notice to it must be construed not with a desire to find faults in it, which would render it defective. This principle was laid down by their Lordships of the Supreme Court in Bhagabandas Agarwalla Vs. Bhagwandas Kanu and Others, But the Id. lawyer of the respondents pointed out that in the cited decision the tenants were required to vacate with October, 1962 failing which they would to be construed as the trespasser from 1.11.62 So the Id. lawyer tried to differentiate the present case from the case discussed by their Lordships of the notice is liberally construed the intention of the land lady to terminate the tenancy on the expiry of the month of January 1984, and not earlier, is quite evident. Such a situation was discussed by their Lordships in the case reported in 46 CWN 366 whose the notice required to quit within 30th Chaitra. Their Lordships viewed that it was to be construed as to quit with the expiry of that date i.e. 30th Chaitra. A similar case was discussed in the decision reported in Ahumad Ali Biswas Vs. Jyotsna Kumar Bandopadhyay and Another, where a direction to vacate by 1st March was construed as a direction to vacate within Poush in Ismail Dada Bhamani Vs. Bai Zuleikhabai, Division Bench of the Bombay High Court also construed a notice asking to quit on or before date, on which the tenancy expires. In Baijnath Pandit Vs. Smt. Narvada Devi Kejariwal, also liberal construction of the notice was emphasised and it was concluded that a notice to vacate on or before last date of a month of tenancy was a good notice. A similar case was discussed in 60 CWN 308 and considered the notice of determination on 1st May as a good notice. The Division Bench of the Calcutta High Court in 87 CWN 278 viewed that if the notice is not strictly accurate it will be good and effective in law, if it is provided that inaccuracy is not for any fraudulent purpose.

So after a careful analysis of all these cases and the notice in question Ext. 14) I hold and conclude that fraudulent purpose has not been proved with regard to the alleged inaccuracy. On the other hand, from the notice it is sufficiently clear that it is one month's notice expiring with the month of January, 1984 and the defendants had no difficulty in understanding the report of the notice. So I hold and conclude that the Id. Munsif did not consider all these aspects and came to an erroneous decision in holding that the notice was not legal, valid and sufficient, and it was duly served. So the point No. 2 is answered in the affirmative.

6. The trial court answered all the issues in favour of the tenant appellant and against the respondent landlady. The lower Appellate Court which is the last court of fact reversed the issue No. 4. The lower appellate court held with regard to the issue relying upon the certain decisions of this court that deposit of the admitted rent within statutory period, i.e. along with application u/s 17(2) of the West Bengal Premises Tenancy Act considered to be an essential part, so when it

was indicated that there were admitted arrears and the tenant defendant failed to deposit the same with the application u/s 17(2) of the said Act. the application filed by the tenant on 18.5.1984 could not be construed as an application u/s 17(2) of the said Act. Accordingly the lower appellate court found that the finding made by the Id. trial judge on this issue was not tenable and it was held that the appellant was a defaulter in payment of rent and hence the plaintiff landlady was entitled to get eviction u/s 13 (1) (i) of the said Act.

7. With regard to issue of the reasonable requirement the trial court, inter alia, held "Admittedly, the plaintiff Shila Sen is getting Rs. 500/- p.m. as house rent from the defendants. From evidence of the P.M. 1 it is seen that the plaintiff Shila Sen and her daughter are getting Rs. 4640/- p.m. and Rs. 2000 p.m. respectively as salary and Honorarium. In short the income of the plaintiff and her daughter is more than Rs. 7000/- p.m. when this is so, had the plff. any present need and element of need for accommodation In Calcutta, she could have certainly an accommodation on some reasonable rate of rent during the pendency of the suit. When this is so, it can be safely said that the plff. has not need and/or no intention to reside in Calcutta alone or with any of her family members like husband, son or daughter. From evidences of the P.W. 1 and 2 it is seen that the plff. has been residing all along with all her family members. Considering the above. I answer the issues Nos. 8 and 9 in favour of the plff. and the issues nos. 10 and 11 against the plaintiff.

8. The lower appellate court on consideration of the evidence on record held that the requirement of the landlady was reasonable and the plaintiff-landlady required atleast 3 living rooms and considering the status of the landlady and relation a sitting room as well as dining room was necessary. Similarly, servant's room was also a reasonable requirement. So keeping in mind the facts and circumstances of the case, the lower appellate court held that the landlady had urgent need accommodation and as such was entitled to get a decree for eviction. In this the lower appellate court had considered the landlady's husband had a house in New Delhi on every material point the lower appellate court on assesment of evidence came to a conclusion that the requirement was just and reasonable. With regard to issue regarding change of user the lower appellate court have held that the tenancy was for residential purpose and without consent and permission from the landlady there was admitted changer of user in contravention of the provision of law.

9. Mr. Sakti Nath Mukherjee, learned advocate appearing on behalf of the appellant contented in the first place that when the lower appellate court found that there was default in reversing the finding of the learned trial Judge in that event the lower appellate court should have allowed the tenant appellant to make deposit in accordance with the provision of Section 17 (2 A) of the said Act under which the court was competent to grant instalments. Next it was submitted that originally the tenancy was granted for residential purpose in favour of the partner of the appellant firm but subsequently, the tenancy was

transferred from the name of the partner to the name of the partnership firm and that it is clearly indicative of the fact that the tenancy was for commercial and not residential purpose and as a matter of fact it was admitted that the part of the tenanted portion is used for residential purpose by the partner of the firm and rest is being utilised for non-residential purpose. In this connection it was submitted that even in case of change of user of the premises the court shall not grant a decree for eviction on the ground of change of user unless the court finds that the dominant purpose was non-residential. With regard to reasonable requirement of the plaintiff landlady it was submitted that there was no reasonable requirement of the land-lady in view of the fact that wherein on an application for recording subsequent events for assailing ground for reasonable requirement taken by the plaintiff-respondent. In the said application it was alleged that tenant appellant had definite information that the landlady and her husband were staying at Chittaranjan Park, New Delhi in a two storied building in which they had shifted about two years ago not only they purchased the said house they were the absolute owner of the said property. It was further stated that the husband of the landlady is working as a member of Steering Committee of World Bank, Non-Government Organisation and that he did not have any intention to give up his job in near future and it was stated since the husband of the landlady had a house in New Delhi he had no intention whatsoever to come to Calcutta and to settle down in Calcutta permanently. It was further alleged that the landlady had been working as an Assistant Editor of Indian Council of Historical Research, New Delhi and that she had no intention to come back to Calcutta taking premature retirement from the service. It was further alleged that the daughter of the landlady had been married during the pendency of the ejectment case and had been staying with her husband outside West Bengal and she runs her own business there. With regard to son of the landlady it was alleged that the said son had gone to U.S.A. during the pendency of the case and he had permanently settled down in U.S.A. and had no intention to come back to India in near future. This fact was controverted by the plaintiff landlady who stated that the daughter of the plaintiff was married in Calcutta and her son after completion of his studies in Jadavpur University and after being employed in Calcutta had gone to USA on a temporary training at the instance of his employer at Calcutta. It was further stated by her that she had been transferred to Calcutta during the year 1985 and thereafter had been working in Calcutta. Her husband has already retired from the service of Organisation of Voluntary Agency, for Rural Development. It was specifically averred that all these facts which had been stated in the said application had been taken into consideration either by trial court or by lower appellate court, after going through both oral and documentary evidences. It was further stated by her on affidavit that she occasionally visited New Delhi to meet her husband as well as for official works. It was denied that they were shifted two years ago to Chittaranjan Park, New Delhi or that purchased the said house two years ago as alleged. It was stated that the said house was constructed by her husband as long back as in 1975 and that her husband has been residing there since 1984 and that these facts are

already on record either in pleadings or in evidences oral or documentary. It was further denied that her husband has been working as a Member of Steering Committee of World Bank Non-Government Voluntary Organisation and that she had no intention to give up the job at all. It was further stated by her that her husband was now an Honorary Member of the Committee of Non-Government Organisation (NGO's from South Asia) in the field of Rural Development affiliated to World Bank and that this membership is neither an assignment nor a job. It was denied that her husband had no intention to come back in Calcutta and settle here. It was emphatically stated by her on affidavit that she is posted in Calcutta and working in Calcutta since 1985 as an Associate Editor of Indian Council of Historical Research having its Head Quarter in New Delhi and this these facts are all ready on record and should not be construed as subsequent events. It was farther submitted that her daughter had been married during the pendency of the suit having her matrimonial residence at Calcutta. It had been denied that she had been staying with her husband and running her own business outside West Bengal. With regard to the son's requirement she had emphatically denied that her son had permanently settled down in the U.S.A. and had no intention to come back to India. On the basis of the basis of the facts stated in the application Mr. Mukherjee stated that the landlady did not reasonably require the suit premises.

10. Mr. Ranadev Chowdhury, learned advocate appearing on behalf of the respondent-appellant landlady submitted that there was a clear case of default committed by the appellant. It was submitted that lower appellate court rightly considered the pre-suit invalid deposit u/s 22 of the said Act in the perspective of Section 13(1) (i) of the Act. It was submitted that there was pre-suit invalid deposit for several months in the year 1982 and 1984 and that the lower court considered the admitted arrears in the perspective of Section 17 of the said Act since admitted arrears were not deposited. Further it was pointed out by Mr. Chowdhury that the appellate court rightly held that there was no application u/s 17(2) of the said Act for the purpose of granting any relief to the tenant. It was submitted that on consideration of the aforesaid defaults in their individual perspective the finding of the lower appellate court could not be questioned. It was further submitted by Mr. Chowdhury that pre-suit invalid deposit could not be made u/s 17(2A) of the said Act so as to entitle the appellant to get the relief u/s 17(4) of the said Act. Relief u/s 17(2A) of the said Act was limited to deposit relating to section 17 only cannot extend to deposit u/s 22 of the Said Act. In this connection reference was made to the decision of this court in case of Hindustan Industrial vs. Chajdi Prasad More reported in 79 CWN 1017 in which it was held that the deposit of rent not in conformity with Section 22(I)(2) of the said Act were invalid deposits for the purpose of Section 17(4) of the said Act. With regard to reasonable requirement is concerned it was submitted that the case of the reasonable requirement was brought in before the trial court on the strength of amendment of the plaint, and that it was further submitted that the details of the requirement were highlighted. With regard to the appellant's case

it was submitted that at the stage of hearing of the suit the landlady's son who was a student of Jadavpur University and in the pendency of the suit he passed out and was employed in Calcutta, thereafter went to the U.S.A. for training and that there is no question of her son residing permanently in U.S.A. With regard to her daughters requirement it was submitted the daughter has been married in Calcutta and residing in Calcutta after marriage and that with regard to married daughter's requirement reference was made to a Division bench judgement of this Court in the case of Himangshu Bikash vs. R.M. Dutta, reported in (1991) 1 CLJ wherein married daughter's requirement was upheld. Mr. Chowdhury submitted relying upon the finding of the lower appellate court as also the facts stated on affidavit by the landlady wherein the appellant's version was denied and disputed.

11. The scope of the High Court in Second Appeal has been limited by effecting amendment in Section 100 of the Civil Procedure Code. Now the jurisdiction of the High Court is only confined to entertain such appeal as involves a substantial question of law specifically set out in the Memorandum of Appeal and formulated by the High Court. Only in a case where there is substantial question of law, the High Court can interfere. At least an important question of law must be there for the purpose of intervention of High Court in Second Appeal. The trial Court have held that there was no default, there was no change of user of the premises and there was no reasonable requirement of the plaintiff-landlady. On course, it is the judgement of reversal and that within the limited scope of second appeal the High Court can only interfere with the finding of the fact in a case where the findings are perverse. There are evidence on record and on the basis of the evidence on record the trial court has taken one view whereas the lower appellate court has taken a contrary view. Question is whether in Second Appeal it would be proper on the part of the court to weigh the evidence to find out the correctness of the findings made by to lower appellate court. If the lower appellate court have made a clear finding that the appellants were defaulter in payment of rent and that as the deposit for the admitted period was not made, application could not be construed as an application u/s 17(2) of the said Act. The view of the lower appellate court was that the deposit which are post suit relief could be granted but so far as pre-suit invalid deposit is concerned, the same could not be rectified and/or no relief could be granted in respect thereof. In any event these are highly disputed questions of fact and for consideration whereof the evidence in details has to be gone into which, in our view, could not be decided in the scope of the second appeal. If the facts are undisputed and if it involves at least mixed question of law and fact, the same could be examined in second appeal. True, the finding of the lower appellate court is that the granting of tenancy in favour of the firm on the face of it did not indicate the tenancy was for non-residential. It is clearly evident that the landlady in her deposition stated that she did not know whether the tenancy was granted for residential purpose or for non-residential purpose. Onus of proof of change of user was on the landlady. But such onus of proof was not discharged and in her evidence she

could not tell what was the real purpose for which tenancy was granted. Accordingly we are of the view in the absence of discharge of onus of proof a particular amount or fact of finding of the lower appellate court had been vitiated and we are of the view that the lower appellate court was not right in holding that there had been change of user for which there should be an order for eviction. In order to get a decree of eviction on the ground of reasonable requirement the case has to be made out by the landlord. In the instant case a case had been made out by the landlady and that the power of the court is to determine whether the requirement was reasonable or not and this question has been considered by the Division Bench of the court on which one of us was party in Himangshu Bikash's case (supra) and that the court while determining the reasonableness of requirement is not to act as guardian of the landlady, the court is only concerned about the reasonableness of requirement. In the absence of any specific evidence that son has left for USA for good, and the landlady and her husband had no intention to come to Calcutta, the requirement of the landlady could not be said to be unreasonable. It is for the landlady to decide where to stay. On the basis of the evidence on record which were found favour by lower court that the plaintiff landlady stays in Calcutta for the purpose of her service, such a finding of fact based on some evidence could not be interfered with by the High Court in Second Appeal. Where we are of the view that the view of the learned trial Judge that the landlady with her income and with her daughter's income could have hired an accommodation on some reasonable rent and that would satisfy her requirement if ex facie purpose. It is not for the court to suggest in a suit for eviction on the ground of reasonable requirement that landlady could have hired an accommodation on some reasonable rent or that since because the landlady is staying with her relations and there could not be any reasonable requirement for the landlady. It is for the landlady to decide where to stay and even assuming that the landlady stays permanently in Delhi and frequently comes to Calcutta that is also her reasonable requirement. Inasmuch as when the landlady comes to Calcutta she had a right to reside in her own house and it is not for the court to suggest while in Calcutta, she may stay in hotel or some friend's or relation's house. We are of the view that since husband and landlady had a house in Delhi it cannot be said that they had no reasonable requirement in her Calcutta home. In the present day society a person may have house in Delhi and Calcutta and that since because she had house in Delhi she cannot have any reasonable requirement in respect of Calcutta property. Within the scope of reasonable requirement it does not appear such reasonable requirement must be for a permanent and continuous need. In that event it is unnecessary to go into the question inasmuch as there had been a clear finding of the fact by the lower appellate court on the basis of assessment on evidence on record. The subsequent facts which are sought to be brought in this appeal on the basis of an application appears to be not subsequent but these facts were there before the courts below, as such those are not subsequent and on the basis of those subsequent events the findings of the lower appellate court could not be interfered with. The same was considered.

12. We are of the view that on the basis of the evidence on record it was impossible on the part of any court to hold that the son who had been sent for training to USA will not come back to Calcutta to stay with his wife and that the married daughter cannot come to Calcutta when her parents have a house in Delhi. These are all questions of fact and that we do not find any substantial question or any question of law which confers jurisdiction upon this Court to interfere with such finding of fact.

13. Accordingly, we do not find any merit in this appeal. Appeal is dismissed without any order as to cost. Judgement and decree passed by the lower appellate court dt. 17th September, 1990 passed in Title Appeal No. 276 of 1989 passed by the 3rd Additional District Judge, Alipore is hereby affirmed.

As prayed for let the operation of the above order be stayed for four weeks from date. let a xerox copy be given to the parties on the usual undertaking.

A.K. Bhattacharjee, J.

I agree.