
(1984) 11 CAL CK 0009
In the Calcutta High Court
Case No : A. O. D. No. 409 of 1982

Girdharilal Soni

APPELLANT

Vs

Sm. Maya Roy

RESPONDENT

Date of Decision : 26-11-1984

Acts Referred:

West Bengal Premises Tenancy Act, 1956 — Section 13(1), 13(1)(ff), 13(1)(h), 15(1)(h), 17

Citation : 89 CWN 343

Hon'ble Judges : Shamsuddin Ahmed, J; Mookherjee, J

Bench : Division Bench

Advocate : Bankim Dutt, N. Bose and R. Bose, for the Appellant; Saktinath Mukherjee and Samaresh Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Mookerjee, J.—The defendant appellant was a monthly tenant under the plaintiff in respect of Flat No. 4 consisting of two rooms, a kitchen and a privy in the first floor of Premises No. 110, Baithakkhana Road at a rent of Rs. 82- per month payable according to English calendar. The plaintiff respondent brought a suit against the defendant in the City Civil Court, Calcutta for eviction, inter-alia on the ground that she reasonably required the suit premises for her use and occupation, the defendant had been using the suit premises for the purpose other than the purpose for which the premises had been let out to him, the defendant was a defaulter in payment of rent since April, 1973 and that he had caused material damages and/or additions and alterations to the suit premises. The defendant tenant contested the said suit. The learned Judge, 13th Bench, City Civil Court, Calcutta has passed a decree for eviction of the defendant tenant on the ground that the plaintiff reasonably required the suit premises for use and occupation of herself and the members of her family. The defendant tenant in compliance of the order made u/s 17(2) read with section 17(2A) of the West Bengal Premises tenancy Act had deposited all arrears and current rent. Therefore, no adjustment decree on the ground of default was passed and the

tenant was given relief u/s 17(4) of the Act. The learned Judge of the court below found that although the premises had been let out for residential purposes, the defendant had been occupying the suit premises for residence as also for carrying on business and, therefore, he was not liable to be ejected: u/s 15(1) (h) of the West Bengal Premises Tenancy Act; 1956.

2. Being aggrieved, thereby, the defendant tenant has preferred the instant appeal.. During the pendency of this appeal the husband of the plaintiff died. Mr. Bankim Dutt, learned advocate for the appellant, has submitted that the plaintiff was already in occupation of reasonably suitable accommodation and she did not require the premises occupied by the defendant appellant for her own use- and occupation. Mr. Dutt has also submitted that the court below was not right in finding that the defendant had been using any part of the suit premises for business purposes and in any event unless the entire premises be used for purpose other than the residential purpose, clause (h) of section 13(1) of the West Bengal Premises Tenancy Act has no manner of application.

3. At the time of the hearing of this appeal the learned advocate for the appellant did not dispute that "he was granted the Tenancy only for residential -purposes (vide clause (4) of the Tenancy Agreement Ext. 5), In paragraph 4 of her plaint the plaintiff averred that she had come to know that the defendant was using the said premises for purposes other than that for which the premises had been let put to him. He had been carrying on a business from the suit premises under the name and style M/s. Industrial Powder Manufacturing Syndicate for more than 4 months in violation of the tenancy agreement dated 1st November, 1962. The defendant in paragraph 5 of his written statement white dealing with the allegations made in paragraph (4) of the plaint averred "The defendant is carrying on the business under the name and style of M/s. Industrial Powder Manufacturing Syndicate in the premises ever since the year 1962 with the knowledge and consent of the plaintiff". He, however, denied that the- business as carried by him constituted a breach or made the user of the premises for a purpose other than for which the property was let out to him.

4. We agree with the learned Judge of the trial court that the defendant tenant had taken, the premises for residential purposes in order to use the same as his family quarters. We have already mentioned that in paragraph (5) of his written statement the defendant had clearly admitted that he was carrying on a business in the suit premises since the year 1966. He however, failed to prove his claim that the plaintiff had consented to use the suit premises for business purposes. Therefore, such user of the suit premises for his business purposes as unauthorised. We are not prepared to accept the evidence of the defendant, Girdharilal Soni D. W. 1, that he did not at all carry on any business in the suit premise D W.1 1, Girdharilal, did not even try to explain his admission made in his written statement that he was carrying on business in the said premises. In course of his deposition, he himself admitted that the name-plate, M/s. Industrial Powder Manufacturing Syndicate was affixed on the outer door of the suit flat.

The defendant also admitted that he had his Gaddi in one of the rooms of the said premises and that he did not obtain any permission of the landlord for fixing the aforesaid sign-plate. His belated claim of taking oral permission from his landlord was clearly false. Kesardeo Soni, D. W. 2, who was the defendant's brother, also admitted about the existence of the said sign-board at the suit premises. The defendant's witnesses however claimed that the defendant and his family had continued to use the suit premises as their residence. Girdharilal, D. W. 1, stated that he had two sons, two daughters and his wife in his family. His elder brother's family consisted of three persons. There were only two rooms in the suit premises. Therefore, it was highly improbable that both the defendant's own family and his elder brother's family still resided in the said two rooms. The defendant admitted that he possessed ration-cards but he did not produce them and establish that the suit premises was mentioned there as his address. The defendant also admitted that since 1962 he held another tenancy at Premises No. 20, Christopher Road. He had his office at 8, Camac Street and was paying rent at rate of Rs. 1200/- per month. The defendant also admitted that he had a three room residential flat at Acharya Prafulla Chandra Road. He kept his car in the "garage situated in the said premises. He also admitted that, he had taken Acharya Prafulla Chandra Road flat for the purpose of residence of the defendant's joint family. D. W. 2, Keshardeo although claiming that he lived at Premises No. 110, Baithakkhana Road, even in his examination-in-chief he had stated that they often spent their nights at their premises at Acharya Prafulla Chandra Road. D. W. 2 did not at all sound convincing when he claimed that the defendant and his family still resided on the suit premises. Kailash, the defendant's nephew D. W. 4 at one stage said that the defendant still lived at 110, Baithakkhana Road and then thereafter said that all of them lived at the premises situated at Acharya Prafulla Chandra Road. He claimed that they took meals at 110, Baithakkhana Road. According to D. W. 4, only occasionally the defendant, his wife and his relations spent nights at 110, Baithakkhana Road. This itself would indicate that the defendant was no longer using the suit premises as his usual place of residence. D. W. 4 admitted that the defendant had shifted his telephone to his residence at Acharya Prafulla Chandra Road.

5. In view of the above evidence even if the plaintiff in her evidence recorded in commission could not clearly say what was being exactly done inside the suit premises, it may be safely concluded that the defendant practically admitted that he was using the suit premises also for business purposes and that the suit premises was no longer his usual place of residence. He and his family ordinarily resided at his Acharya Prafulla Chandra flat. Even if the defendant's witnesses are believable, then the defendant casually and on some occasions spent his night or some time took his meal in the suit premises. Therefore, the learned Judge of the court below was not justified in concluding that the defendant still occupied the suit premises for his own residence "and as well as for carrying on business. Once it is found that the defendant admittedly carried on-business in the suit premises, then even if some of his men were living there the suit

premises could no longer be treated as the defendant's residence.

6. The decision in the case of *Lakshman Sandu Sintre vs. Balkrishna Keshab Shetty* AI.R. 1925 Bombay 398 relied upon by the learned Judge of the trial court was not relevant." In the said case the defendant tenant and his family were residing in the suit premises but during the day time the defendant worked as a tailor in the same premises. A Division Bench, of the Bombay High Court upheld the defendant tenant's claim that the premises was a dwelling house and he was entitled to protection under the Bombay Rent (War Restrictions) Act, 1918 and held, that merely because a portion of such premises was being used for business purposes, the premises did not cease to be a dwelling house for the purpose of enjoying the protection under the Bombay Rent (War Restrictions) Act, 1918. The Division Bench of the Bombay High Court in the said reported case had. no occasion to consider whether or not the user of a part of the premises for a purpose other than the residential purpose for which it had been let out would come within the mischief of any provision of the Bombay Act for being in pari materia with section 13(1) (h) of the West Bengal Premises Tenancy Act, 1956.

7. Mr. Mukherjee, learned advocate for the respondent has submitted that the appellant tenant had ceased, to use the suit premises as his residence and he had been using, if not the entire premises but substantial portion of the suit premises, for his business purpose. Therefore, he was liable to be evicted u/s 13(1) (h) of the West Bengal Premises Tenancy Act, 1956. In support of his submission Mr. Mukherjee has relied upon the decision of Anil Kumar Sen and B. C. Roy, JJ, in the case of *Kalachand Nawn v. Panchanan Banerjee* ILR 1976(1) Gal. 41. The Division Bench, inter-alia held that the test of diversion of a premises to an user other than that for which it had been" let out, must be the test of substantial use and in case a tenant had put the major part of the suit premises to an user other than for his residence for which it had been let out, section 18(1) (h) of the West Bengal Premises Tenancy" Act, 1956 would have its application. We respectfully agree with the aforesaid interpretation of section 13(1) (h) of the said Act. In paragraph (12) of their judgment, Anil Kumar Sen and B. C. Roy, JJ. in the case of *Kalachand Nawn vs. Panchanan Banerjee* (supra), rejected the extreme contention that diversion to an use of a portion of the premises for a purpose other than that for which the premises had been let out would mean that the premises were being used for a purpose for which It had not been let out. As already noted, the Division: Bench in the case of *Kalachand Nawn vs. Panchanan Banerjee* (supra), adopted the test of substantial user and held that when a major part of the suit premises had been let out, clause (h) of section 13(1) of the West Bengal Premises Tenancy Act would be applicable.

8. M. M. Dutt and R. K. Sharma, JJ., in the case of *Bimal Chandra Bose vs. Srtsh Krishna Goswami* (Letter's patent Appeal No. 231 of 1974 arising out of P. A. No. 205 of 1968; disposed of on 19th September, 1975) similarly held only when the

major portion of a premises which had been let out for residential purpose is diverted for any other purpose the tenant would be liable to be ejected u/s 13(1) (h) of the West Bengal Premises Tenancy Act. But when only small portion of the premises is used for non-residential purposes the section 13(1) (h) of the West Bengal Premises Tenancy Act would not be attracted.

9. We have already referred to the evidence adduced in the case which indicated that it was not believable that the defendant and his family had continued to reside in the suit premises. Admittedly, the defendant had taken tenancy of a residential flat at Acharya Prafulla Chandra Road. The suit premises consisted of two rooms and the defendant's brother Keshardeo, claimed that he and his family consisting of his wife and adult son, were living in the suit premises. Therefore, it was not probable that the defendant, his wife and his two sons and two daughters even occasionally spent their nights at the suit premises. Such occasional stay even if true, would be merely casual acts and it could not be held that the defendant had continued to use the suit premises as residence for himself and the members of his family. Again, even if, occasionally the defendant took his meal at the said premises it would not establish that the suit premises is still his residence. While deciding whether or not the defendant was liable to be ejected u/s 13(1) (h) of the West Bengal Premises Tenancy Act, the court below was not justified in considering whether the defendant had transferred or assigned or sublet the suit premises. In case the defendant did not transfer possession of the suit premises but failed to occupy the suit premises as his residence for more than four months, he would be liable to be evicted u/s 13(1) (h) of the said Act. In the instant case, we have already noted that in his written statement the defendant had admitted that he had been carrying on business in the suit premises and, therefore, even if some of the defendant's men were sleeping in the night the suit premises can no longer be considered as defendant's residence. When the defendant carried on business from the suit premises consisting of only two rooms and, even one, of the rooms was being used for defendant's business purpose, we are bound to hold that the substantial portion of the suit premises was being used for business purpose other than that of the residence of the defendant. The defendant, D. W. 1, had admitted that his Gaddi, i.e., office is in one of the rooms,,We accordingly conclude that the defendant have been using substantial portion of the suit premises for his business purposes and for more than four months and he had also ceased to use the suit premises as his own residence. Therefore, the plaintiff is entitled to evict him u/s 13 (1) (h) of the West Bengal Premises Tenancy Act. We set aside the contrary finding made by the trial court.

10. As already stated, the learned Judge of the trial court passed the decree in favour of the, plaintiff on the ground that she reasonably required the.suit premises for her own use and occupation. At the time of, the institution of the suit the plaintiff's family consisted or herself, her husband and her younger daughter, who was employed as a Cardiologist at the South Eastern Railway Hospital, Garden Reach. The plaintiff's two elder daughters were already married

and were living in their respective Houses. The plaintiff's existing accommodation consisted of three rooms in the first floor of the Premises No. 110, Baithakkhana Road and two rooms in the second floor of the same premises. The learned Judge of the court below accepted the plaintiff's "case that the said two rooms in the second floor were in a state of disrepair and therefore unusable. Therefore, the said two second floor rooms were left out of consideration for deciding whether the plaintiff and her family was already in occupation of reasonably suitable accommodation.

11. During the pendency of the suit the plaintiff's husband died. The plaintiff's younger daughter, Dr. Jagatdhatri Roy, had stated in her deposition given in the court below that she proposed to "start private practice and for that purpose she needed one room in the suit premises as her chamber. Even after obtaining the instant adjustment decree Dr. Roy, the younger daughter of the plaintiff has continued to work. as whole time Medical Officer at Garden Reach Railway Hospital and she had not yet started private practice. The plaintiff can legitimately claim that she required three bed-rooms; one for herself, one for her unmarried daughter, Dr. Jagatdhatri Roy, who although still in service is likely to frequently visit her home. We agree with the trial court that one other bed room ought to be provided for use of married daughters and their children who visit the plaintiff's house and stay there. The plaintiff may also reasonably claim one room for her deities, Sri Radhakrishna, Durga and. Narayan. With regard to the servants employed in the plaintiff's house-hold, the court has observed that they may be accommodated in the passage or the verandah and no separate room for them was essential. Sm. Jagatdhatri Roy in her evidence had stated that they had no dining space and they are in their father's room. At the time of the hearing of this appeal, Mr. Saktinatli Mukherjee, learned advocate appearing- on behalf of the plaintiff respondent, has submitted that requirement of dining-cum-sitting space for the, plaintiff and her family was reasonable and therefore, even if we take into consideration the two second floor rooms, the plaintiff's existing accommodation was insufficient. We have considered the Commissioner's report and also the oral evidence and we are unable to concur with the learned Judge of the trial court that the said two second floor rooms were unusable. According to the Commissioner's report, the said, two rooms were in a state of disrepair and the floor of one of the rooms was not cemented; According to the Commissioner's, report, there were two verandahs on both sides of the second floor rooms and there were electric lines inside the rooms. The learned Commissioner found a wooden chouki almirahs and other assorted articles inside these rooms, Perhaps some repairs were necessary for making the said two second floor rooms habitable but it was. not claimed that any structural alteration would be necessary. Therefore, in addition to the first floor rooms the plaintiff must be held to be in occupation of the said two second floor rooms. In our view, the said existing accommodation was adequate for the requirement of. the plaintiff and her family and therefore, she was not entitled to obtain a decree u/s 13(1) (ff) of the West Bengal Premises Tenancy Act. We have already noted

that the defendant having complied with the requirements of sub-sections (1) and (2A) of section 17 of the said Act, he was entitled to relief u/s 17(4) of the said Act in respect of ground of default in payment of rent. But we have found that the plaintiff is entitled to recover possession u/s 13(1) (h) of the West Bengal Premises Tenancy Act, 1956 because the defendant had been using a substantial portion of the suit premises for his business purposes.

12. We accordingly dismiss the appeal without any order as to costs. In view of the order passed in the appeal, the cross-objection is dismissed without any order as to costs.

The appellant is granted six month's time to vacate the suit premises.

Shamsuddin Ahmed, J.

I agree.