

(1948) 04 CAL CK 0009
In the Calcutta High Court
Case No : Civil Rule No. 2021 of 1947

Gurupada Haldar Jiban Krishna Das, a firm

APPELLANT

Vs

Arjoondas Goenka

RESPONDENT

Date of Decision : 09-04-1948

Acts Referred:

Citation : (1948) 04 CAL CK 0009

Judgement

Biswas, J.—This is a rule on behalf of the defendants in a suit for ejectment. The suit was tried in the Court of Small Causes, Calcutta, and was decreed by the learned Judge on 20th November 1947. Time was given to the defendants to vacate till 6th January 1948. This rule was obtained on 15th December 1947, with an ad interim stay of ejectment pending the disposal of this rule.

2. The plaintiff's case was that the defendants were monthly tenants under him in respect of a shop-room on the ground floor of premises No. 15, Mallick Street, Calcutta, on a monthly rental of Rs. 135, the tenancy being according to the Hindi Calendar expiring with the end of a month in terms of that Calendar. By a notice, dated 17th February 1947, corresponding to Falgoon Budhi 12, Sambat 2003, the plaintiff purported to determine the tenancy. The defendants were called upon to make over possession on the expiry of chait Sudi 15, sambat 2004, corresponding to 5th April 1947, that being the end of a month of the tenancy. The plaintiff further alleged that the defendants had sub-let a portion of the shop room to other people without his consent in writing. This last allegation was evidently made in view of the provisions of S. 12(1) , Calcutta Rent Ordinance, 1946. Section 12(1) provides as follows:

Notwithstanding anything contained in the T.P. Act, 1882, the Presidency Small Cause Courts Act, 1882, or the Indian Contract Act, 1872, no order or decree for the recovery of possession of any premises shall be made as long as the tenant pays rent to the full extent allowable by this Ordinance and performs the conditions of the "tenancy".

Then there follows a proviso consisting of several clauses, of which clause (b)

alone is relevant in this case, and it is to this effect:

Provided that nothing in this sub-section shall apply....(b) where in the absence of any contract to the contrary the tenant has, without the consent in writing of the landlord, sublet the premises in whole or in part.

3. Reading S. 12(1) along with cl. (b) of this proviso, the position appears to be that even in a case where under the Transfer of Property Act or under the Presidency Small Cause Courts Act or under the Indian Contract Act the landlord would be entitled to a decree for ejectment, the Ordinance would disentitle him to such a decree where the tenant pays rent to the full extent allowable by the Ordinance and performs the conditions of the tenancy. According to cl. (j) of S. 108, T.P. Act, it is, in the absence of a contract or local usage to the contrary, a condition of a tenancy that the lessee may sublet the whole or any part of his interest in the property. In other words, unless there is an express restriction on subletting by the terms of the tenancy, a tenant will be at liberty to sublet. Where, therefore, in the absence of a contract to the contrary, a tenant sublets, he cannot be said to be infringing the conditions of the tenancy. Proviso (b) to S. 12(1) of the Ordinance, however, provides that although that is the position under the general law as embodied in the Transfer of Property Act, the tenant will still lose the immunity from eviction conferred by S. 12(1), where in the absence of a contract to the contrary, the tenant has without the consent of the landlord in writing sublet the premises. In other words, the tenant will be entitled to claim the protection of the Ordinance in a case of subletting, only if he can show that he has sublet with the express consent in writing of the landlord. It will not be enough for him to rely on the general power of subletting which the Transfer of Property Act concedes to him. That power, as already stated, is a power to sublet, unless there is a restriction on subletting by the terms of the tenancy. What the Ordinance requires is that there must be an express consent in writing to the subletting in order that the tenant may get the benefit of the Ordinance.

4. In this state of the law as modified by the terms of the Ordinance it becomes necessary, therefore, for a landlord seeking to evict his tenant to prove not only that the tenant is liable to ejectment under the general law or under the contract of tenancy, but also that the tenant cannot claim protection from ejectment by reason of the provisions of the Ordinance, because he comes within the mischief of one or other of the provisos to section 12(1). In the present case the only part of the proviso, which was relevant, was clause (b) relating to subletting.

5. Reading the order of the learned Judge, I was in a state of doubt as to whether he had correctly appreciated the legal position, because he opened his judgment with this description of the suit: "This is a suit for ejectment on the ground of subletting," That led me to think that he overlooked that the ejectment was really based on the notice to quit, under which the landlord would be entitled to a decree of ejectment in accordance with the Transfer of Property Act. By merely proving such notice, he could not however, get a decree because of the Ordinance. It was necessary for him to prove the further fact that the tenant had

done something which debarred him from the protection which he would otherwise have been entitled to under the Ordinance. The plaintiff's case was that the tenant had sublet without the consent in writing of the plaintiff and he had therefore to prove that fact in addition to proving the service of notice to quit. Not one word, however, appeared in the judgment regarding the factum or validity of the notice to quit. This might be due, as I have already suggested, to the fact that the learned Judge had not correctly apprehended the legal position, or it might be due to the fact that the parties were not in issue at all at the trial upon the question of notice. At one stage I was inclined to direct a remand in order that the question of notice might be gone into, but instead of that, I gave the plaintiff a chance to file a supplementary affidavit in this Court in order to find out whether the question of notice had been at all contested in the Court below. That affidavit is now before me as well as an affidavit in answer. I am now satisfied that the parties had actually taken it for granted that if subletting was proved, there was nothing else to prove on the part of the plaintiff. In other words, it was assumed that if the plaintiff could bring case under cl. (b) of the proviso to S. 12(1) of the Ordinance, he would straightway be entitled to a decree, it being admitted or assumed that the notice to quit had been served and was sufficient in law. In the affidavit before me which has been filed by the plaintiff a letter is set out which was sent by the defendants through their lawyer in reply to the notice of ejectment. In that letter the allegation of subletting was expressly denied, but no specific denial was expressed as to the service or legality of the notice for ejectment. There is only one sentence stating that the defendants denied liability to vacate the shop room. I cannot regard this as a specific answer to the plaintiff's notice for ejectment which clearly called upon the tenant to vacate the premises on the expiry of the month of tenancy, treating the tenant as a monthly tenant.

6. That leaves the only question to be decided in the rule, to be whether the finding of sub-letting was a proper finding. The learned Judge says "under the circumstances I hold that there has been a subletting" Upon this Mr. Mukherjee's first point on behalf of the petitioner is that this is not a finding in terms of cl. (b) of the proviso to S. 12(1) of the Ordinance, because nothing is stated as to whether the subletting was with or without the landlord's consent in writing and whether there was or was not any contract to the contrary. Having regard to the specific case made by the plaintiff in the plaint and the form of the denial by the defendants, I have no doubt that it was not the defendants' case at any stage that they had sublet it with the consent in writing of the landlord. The case, on the other hand, was that there had been no subletting. That case has been definitely negatived by the Court. The terms of the tenancy have not been specifically proved. That only means that there was no restriction on subletting, and the tenant would therefore be entitled to sublet. If the tenant wanted to escape the mischief of cl. (b) it was the easiest thing for the tenant to show that he had sublet it with the consent in writing of the landlord. The plaintiff's case was that he had not given any such consent. There is no express statement in

evidence to that effect, but there can be no doubt that having regard to the defence, if there was subletting, it was only reasonable to suppose that the subletting had been without the consent of the landlord.

7. The second point made on behalf of the petitioner is that the subletting took place before the Ordinance came into effect; therefore the defendants were not hit by cl. (b) at all, as cl. (b) could not have retrospective operation. There is no substance in this contention. It may be that at the inception of the tenancy there was no question of obtaining the consent of the landlord in writing before the tenant could sublet. All the same the tenancy subsisted at the date of the Ordinance and continued during its currency. The sub-tenants were still there, and I do not see why the fact of subletting could be ignored for the purposes of applying the provisions of the Ordinance, merely because the subletting had taken place before the enactment of the Ordinance. Where the subletting continued till after the Ordinance was passed, that subletting, in my opinion, would be quite effective to attract the operation of cl. (b), unless it was shown by the tenant that he had obtained the consent in writing from the landlord to such subletting after the Ordinance had come into operation. It is enough for the plaintiff to prove that there had been subletting without the consent of the landlord. Even where such subletting commenced before the Ordinance came into operation, the fact would still remain that the subletting was without the consent of the landlord, unless the contrary was proved by the tenant. The second point raised by Mr. Mukherjee, therefore also fails.

8. In this view of the matter the rule is discharged with costs hearing fee one gold mohur.

9. The time to vacate which had been fixed by the learned Small Cause Court Judge expired on 6th January 1948. In lieu of that date I fix the 21st May 1948 as the date by which the defendants must vacate.