
(1980) 09 OHC CK 0008
In the Orissa High Court
Case No : Original Jurn. Case No. 429 of 1978

Health Stores and Others

APPELLANT

Vs

Musamat Rahima Bai and Others

RESPONDENT

Date of Decision : 15-09-1980

Acts Referred:

Orissa House Rent Control Act, 1958 — Section 7

Citation : AIR 1981 Ori 81 : (1980) 50 CLT 500

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : N. Mukherjee, for the Appellant; S.K. Dey, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—This is an application under Article 226 of the Constitution for a writ of certiorari and challenge is to the order of eviction passed by the Controller and upheld in appeal.

2. M/s. Health Stores is a registered partnership firm of which the other petitioners are partners. Opposite Party No. 1 is the landlady of the premises located within the town of Cuttack of which the firm is a monthly tenant. The tenancy began with a rent of Rs. 90/- in the year 1958 which was enhanced to Rs. 120/- and ultimately to Rs. 146/- per month. Opposite party No. 1 started a proceeding u/s 7 of the House Rent Control Act in H, R. C. Case No. 59 of 1976 alleging that the tenancy was for opening of a shop, but the premises was being used as a godown as a result of which the same was being damaged; the landlady's son wanted to run his own business in the disputed premises and as such the house was required in good faith for occupation of a member of her family. On behalf of the tenant, both the pleas were denied. It was pointed out that the disputed premises was of the size of 28 feet x 12 feet. The firm had already been running a shop in the name and style of M/s. Health Stores on the opposite side of the premises intervened by the municipal road and the tenancy was for the purpose of storing articles to be sold in the shop. There was no deviation in the

purpose of the tenancy. It was also pleaded that the landlady's son was a teenager continuing studies and there was, therefore, no bona fide in the claim of personal requirement.

In the proceedings before the Controller, three witnesses in all were examined on behalf of the landlady and the tenants examined one of them. The landlady did not examine herself. P. W. 1, her husband, and P. W. 2, her son, were, however, examined. The landlady also examined another tenant of hers as P W. 3.

The Controller by his order dated 29th April 1977, did not accept the landlady's story that the tenanted premises was meant for location of a shop and there was deviation of the agreement in utilising it as a godown. He also did not find any damage to the premises. He, however, accepted the plea of bona fide requirement and directed eviction.

The appellate authority sustained the order of eviction by his decision dated 13th of January, 1978. The order of eviction as upheld in appeal is assailed in this application.

3. Mr. Mukherjee for the petitioners contends inter alia :--

(i) P. W. 2 was not a member of the family of the landlady and, therefore the application was not maintainable u/s 7 (4) of the Act.

(ii) There was no clear pleading as to the bona fide requirement. The statute is intended to protect the tenant from eviction. It was the obligation of the landlady to establish bona fide requirement by appropriate pleading and adequate evidence. The landlady has failed to establish the same. Adverse inference should have been drawn for the non-examination of the representative of Metalex.

4. In the application for eviction, the landlady had described P. W. 2 as her son. P. W. 1 also referred to P. W. 2 as his son, but for the first time P. W. 2 in his cross-examination admitted that P. W. 1 was not his natural father. As it appears, P. W. 2 is the son of the landlady through a former husband. Mr. Mukherjee strenuously contended before us that P W. 2 would not be a member of the family of the landlady. This plea had not been raised in the written statement, nor was the question canvassed either in the original forum or before the appellate authority. This seems to be a contention raised for the first time in the writ application. Section 7 (4) of the Act provides:--

"The landlord may, subject to the provisions of this Act, apply to the Controller for an order directing the tenant to put him in possession of the house, if he requires the house in good faith for the occupation or use of himself, any member of his family or of any person or persons for whose benefit the house is held by him."

It is conceded by Mr. Dey for the opposite parties that unless P. W. 2 would be a member of the family of the landlady, Sub-section (4) would have no application

and the application for eviction would not be tenable. There is no dispute that P. W. 2 is the son of the landlady through her former husband. According to Mr. Mukherjee, P. W. 2 would not be a member of the family of the landlady. No direct authority has been placed before us to support such a proposition. Admittedly, under the Mohammedan Law, P. W. 2 would be an heir of the landlady. There is direct blood relationship between the landlady and P. W. 2 he having been born out of her womb. Mr. Mukherjee has failed to produce any authority to support his proposition that in a set of facts like the one before us, Jr. W. 2 would not be a member of the family of the landlady. We are, therefore, not inclined to entertain this plea. 5. Admittedly the landlady has several premises in the locality which have been rented out to different tenants. As it appears, some of the other premises had fallen vacant either before the commencement or during the pendency of this proceeding. The landlady did not put P. W. 2 in possession of such premises for his business venture. The evidence as to the point of time of vacancy is not very positive and clear; besides, it has been the consistent view of this Court that which would be an appropriate premises for the landlord is a matter exclusively left to him to decide and it would become difficult for the Controller to determine such a dispute. We are, therefore, not inclined to accept the submission of Mr. Mukherjee that the application for eviction should have failed on the ground that other premises were lying vacant when the landlady was pressing for eviction of the petitioners from the present premises.

6. The next question for consideration is as to the bona fide requirement of the premises. The appropriate plea in support of the ground for eviction is to be found in para 3 (d) of the application, where it was stated :--

"The petitioner's son Khalid Mohammad wants to start a business of his own and for the said purpose the scheduled premises are required in good faith for the use of the petitioner's son."

No details were obviously given as to the business proposed to be set up by Khalid. Khalid has given his age as 20 on 11-4-1977. The application was filed on 31st May, 1976. Khalid was, therefore, hardly 19 years of age when the application was filed. That the premises was necessary for locating a dealership business of Metalex Industries was not disclosed in the petition for eviction. For the first time, P. W. 2 stated about it in his deposition. He also proved a letter dated 17th March, 1975, stated to have been written by the Metalex Industries to him. By then Khalid was hardly 18. Though P. W. 2 has stated that one Jagdish Lal was the proprietor of Metalex Industries, no such person has been examined. In Ext. 1, the letter, one of the requirements indicated is that there should be show-room facility with an area of 500 square feet or above. Admittedly, the premises in question affords accommodation of hardly 340 square feet. In para 16 of the Controller's order, this fact has been taken note of and the learned Controller has stated --"...P. W. 2 categorically states that he informed the exact space area after receipt of Ext. 1. Though the Metalex has not replied in writing

Sri J. Lal told him that the house to be vacated with Rupees 15,000/- would enable to obtain agency from the firm. Since Sri Lal is the proprietor of the firm, he did not insist to give a letter in writing to that effect. It is not the case of the opposite party that he does not know Mr. Lal. O. P. W. 1 states that Sri Lal is known to him. He has (should have) very well contradicted P. W. 2 by examining Sri Lal. No attempt has been made to establish by opposite parties that if the area is less than 500 square feet in no circumstances Metalex would have given the agency. In absence of such categorical statement, I have no ground to believe (sic) the testimony of P. W. 2 on this point."

The appellate authority did not pointedly examine this aspect of the matter and remained content by saying that:--

"... Thus, from the evidence of P. Ws. 1 and 2 it has been satisfactorily proved that P. W. 2 wants to start a business for which the suit house is required. The learned Controller who had seen the witnesses depose has believed the evidence of P. Ws. 1 and 2 regarding the bona fide requirement of the suit house by the respondent and I agree with him. From the materials on record it has been proved that P. W. 2 has taken all reasonable steps for starting the business. He wants to take the dealership of Metalex Industries which is evident from Ext. 1. It is quite likely that after getting accommodation he will apply for Bank guarantee. Without suitable accommodation it is not wise to apply for a Bank guarantee since he has to pay interest....."

Burden lies on the landlord to establish existence of bona fide requirement. As already pointed out, Lal of Metalex Industries has not been examined. The letter clearly indicated that for taking a dealership of Metalex Industries, a minimum built-in-area of 500 square feet or above was necessary. No letter has been produced by the landlady that less than 500 square feet would also be adequate for the purpose of the new business. Since terms had been offered under Ext. 1 in writing it should have been the duty of the Controller to look for documentary evidence altering the terms or at least to look for a representative of the Metalex Industries to support the stand of the landlady. The Controller clearly went wrong in placing the burden on the tenant to establish the negative by examining Lal of Metalex Industries that the version of P. W. 2 about the oral representation of Lal was not true. The appellate authority did not examine the relevant aspect of the matter to find out whether the plea of P. W, 2 was acceptable. Since the alleged bona fide requirement was with reference to a specified business, the appellate authority should have examined this aspect of the matter to find out whether the plea of bona fide requirement had been made out.

If the protection under the Act was not available, the tenant could be evicted at the choice of the landlord. Legislative mention behind the protecting Act is to afford protection against eviction. The burden, therefore, lay on the landlord to satisfy the Controller that he should pass an order of eviction by waiving the protection granted by statute. This had to be discharged by the landlord and not by the tenant.

Mr. Mukherjee also contended that the underage of P. W. 2 and the feasibility of a business being started by him was a feature which should have been taken into account by the Controller as also the appellate authority. Since we are proposing to remit the matter to the appellate authority for a fresh disposal of this aspect of the matter, we express no opinion and would leave it to Mr. Mukherjee to canvass that before the appellate authority.

7. The writ application succeeds. The impugned appellate decision is quashed and the matter is remitted to the Chief Judicial Magistrate of Cuttack constituted as the appellate authority under the House Rent Control Act for a fresh disposal of the appeal. The only question which shall be examined by the appellate authority on the materials already existing on record is as to whether the bona fide necessity as claimed by the landlady has been established in accordance with law, so as to justify an order of eviction. The appellate authority shall dispose of the appeal expeditiously.

Costs shall abide the event.

Das, J.

8. I agree.