
(1975) 03 CAL CK 0018
In the Calcutta High Court

Case No : Appeal under Clause 15 of Letters Patent No. 78 of 1973

Kalachand Nawn	Vs	APPELLANT
Panchanan Banerjee		RESPONDENT

Date of Decision : 19-03-1975

Acts Referred:

Transfer of Property Act, 1882 — Section 108
West Bengal Premises Tenancy Act, 1956 — Section 13, 13(1), 13(4), 13(6)

Citation : (1976) 1 ILR (Cal) 411

Hon'ble Judges : B.C. Ray, J;Anil K. Sen, J

Bench : Division Bench

Advocate : P.N. Mitter and A.N. Banerjee, for the Appellant;H.K. Hitter and N.K. Mitter, for the Respondent

Final Decision : Allowed

Judgement

Anil K. Sen, J.—This is an appeal under Clause 15 of the Letters Patent by the Plaintiffs and it arises Out of a suit for eviction of the tenants-Defendants whose tenancy is governed by the provisions of the West Bengal Premises Tenancy Act, 1956, (hereinafter referred to as the said Act) which was decreed by the learned Judge, Ninth Bench, City Civil Court, Calcutta, but was dismissed by our learned brother S.K. Chakravarty J. in F.A. No. 733 of 1964 of this Court.

2. The Plaintiffs are the three brothers Kalachand, Probodh Chandra, Kartik Chandra and the four other heirs and legal representatives of a predeceased brother of the Plaintiffs Nos. 1 to 3, late Subodh Chandra. On a combined notice dated January 14, 1963, terminating the tenancy with the expiry of the month of February 1963 and also giving a notice of suit u/s 13(6) of the Act, the Plaintiffs instituted the suit for eviction of the Defendants from premises No. 55/8, Grey Street, Calcutta, barring a part thereof separately let out to other shop-owners. According to the Plaintiffs the tenants-Defendants are not entitled to claim any protection from eviction under the provisions of the said Act inasmuch as the Plaintiffs reasonably require the entire suit premises for their own occupation and

also because of wrongful diversion to a different use of the suit premises by the Defendants.

3. On the Plaintiffs' case as made their family consists amongst others seven male members and four adult female members and the accommodation available to them at premises No. 133/2B, Ram Dulal Sarkar Street, where they are now living with four bed-rooms, one kitchen, one store and one drawing room, is inadequate so much so that unmarried male earning members of the family could not be given in marriage for want of accommodation. Thus, it was claimed they reasonably require the suit premises for their own occupation. On the other hand, it was alleged, the Defendants had shifted their residence from the suit premises to a house of their own at No. 2, Ram Krishna Lane and had diverted the suit premises, which was originally let out for residential purposes, to a different use altogether when it was being used as a tutorial coaching home. Accordingly, it was claimed they should be given a decree for eviction--the Defendants having forfeited their protection under the Act on the grounds referred to hereinbefore.

4. The suit was contested by the two Defendants on various defences. The Defendants denied the claim that the Plaintiffs reasonably required the suit premises for their own occupation. They could not deny that they were running a tutorial coaching home in the suit premises but claimed that the suit premises were not originally let out for residential purposes only. They pleaded invalidity and insufficiency of the notice as also defect of parties and absence of relationship as on the parties to the suit on record.

5. The suit being tried on evidence the learned Judge in the trial Court could not reject the Plaintiffs claim that their existing accommodation at premises No. 133/2B, Ram Dulal Sarkar Street, is not sufficient if the family is to grow on the adult male members being given in marriage. But even then the learned Judge overruled the Plaintiffs' case of reasonable requirement on a process of reasoning which had been subjected to strong criticism by Mr. Mitter, learned Counsel for the Plaintiffs. The learned Judge comes to the conclusion that the members of the family if they stand as they are the Plaintiffs can well accommodate them in the five bed-rooms available to them at premises No. 133/2B, Ram Dulal Sarkar Street, with a store, a kitchen and a drawing room cum lawyer's chamber at the ground floor of the said premises. According to the learned Judge's assessment, the 84 year old widowed mother, the widow of the predeceased brother Subodh and the unmarried daughter of the Plaintiff No. 2. Probodh can be accommodated in one bed-room, the Plaintiff No. 2 and his wife can be accommodated in one bed-room, Gour (son of the Plaintiff No. 1 Kalachand), his wife and child can be accommodated in one bed-room and the Plaintiffs Nos. 1 and 3 can be accommodated in one bed-room so that five bed-rooms, according to the learned Judge, are sufficient to accommodate all these family members though he found at the same time a little more accommodation for a comfortable living even of these members, as they are, would have been

desirable. He discarded the Plaintiffs' case of requirement of the suit premises for meeting the need of the expanding family on the view that even in the suit premises they could avail of only five bed-rooms not bigger in size so that accommodation in the said premises would not meet the requirement of the Plaintiffs and hence, he held that the case of reasonable requirement had, not been made. The findings of the learned Judge on both these aspects have been subjected to serious criticism by Mr. Mitter as pointed out hereinbefore and we shall consider the merit of such criticism hereinafter when we consider this issue on facts. This is how the learned Judge in the trial Court rejected the Plaintiffs' case of reasonable requirement.

6. On the point of diversion of the suit premises to an use other than the use for which it was let out, the learned Judge in the trial Court found that the suit premises were let out for residential purposes only. He overruled the defence that the premises Were let out for residential and other purposes. The finding in this respect was arrived at on the admission of the Defendants' witness and the other evidence including the evidence of its user since the inception of the tenancy. The learned Judge overruled the defence claim that some of the Defendants were still residing in suit premises and he found that the Defendants had shifted to their own house at No. 2, Ram Krishna Lane, Calcutta. He further found that major part of the premises have been converted into tutorial coaching home admittedly run by the Defendants as a business of their own under the control of a managing committee consisting of some of the Defendants and others. Having found such diversion in the use, the learned Judge in the trial Court went on to consider how far thereby the Defendants forfeited their protection under the provisions of Section 13 of the said Act. He held that Section 13(1)(h) could not be availed of by the Plaintiffs inasmuch as upon the Plaintiffs' own case the tutorial coaching home was being run from February 1963, which would be less than 4 months on the date of institution of the suit though would be more than 4 months from the date of hearing. According to him, the period of 4 months prescribed by Section 13(1)(h) must be completed prior to the institution as otherwise the Plaintiffs would not have any right of action against the Defendants for their eviction by bringing their case under the relevant clause of Section 13 of the Act. He, however, held that although the Plaintiffs may not be entitled to avail themselves of Clause (h), still such diversion to a different use by the Defendants being contrary to Section 108, Clause (o) of the Transfer of Property Act, 1882, the Defendants would forfeit their protection u/s 13(1)(b) of the said Act. On facts, the learned Judge overruled the other defence taken. This is how he decreed the Plaintiffs' suit.

7. The Defendants preferred an appeal on facts to this Court which was heard and disposed of by our learned brother S.K. Chakravarty J. by judgment and decree dated February 4, 1971, which is now under appeal before us. Our learned brother, though not on assessment of evidence, comes to the conclusion that some of the Defendants are living in the suit premises though they along with others are running a tutorial coaching home there at the same time.

According to him, running of such a tutorial coaching home does not mean that the premises are being used for a purpose other than residential though he did not set aside the finding of the learned trial Judge that the suit premises had been let out only for residential purposes. The underlying reason for such a conclusion arrived at by our learned brother is that the diversion to a different use of a portion would not make it an user of the premises for purposes other than residential. Our learned brother further held that such diversion per se would not be doing any act contrary to Section 108(o) of the Transfer of Property Act as that would amount to only a technical waste not prohibited by the said clause so that in the absence of any injury to the premises because of such diversion in use it cannot be held that Section 108(o) of the Transfer of Property Act and consequently Section 13(1)(b) of the said Act are at all attracted. He relied on a part of Mulla's annotation to support such a conclusion. This is how our learned brother reversed the decision of the learned Judge in the trial Court to the effect that the Defendants had forfeited their protection under the said Act because of their wrongful diversion of the suit premises to an use other than the use for which it was let out. On the question of requirement our learned brother agreed with the findings of the learned Judge in the trial Court and held that the accommodation available to the Plaintiffs at their present residence could not be found to be absolutely insufficient though they would be more comfortable if they could get two or three rooms more. He observed and found--

I might have gone so far as to hold it reasonable if they had asked for two or three rooms in the suit premises to accommodate the growing family. Some of the unmarried adults could use some rooms in the suit premises for living or taking meals at their present house, but I do not think that it would be reasonable to oust the tenants who had been living in the premises for about 30 years from the entire premises to give some more comfort to the Plaintiffs.

Though not on appraisalment of the evidence on record our learned brother concluded and agreed with the learned Judge in the trial Court that the accommodation available at the suit premises would not be appreciably much more than their present accommodation.

In the result, on the findings as aforesaid our learned brother set aside the decree and dismissed the Plaintiffs' suit.

8. Mr. Mitter, learned Counsel for the Plaintiffs Appellants, has assailed the decision of our learned brother both on law and on facts on both the two issues in regard to the Plaintiffs' reasonable requirement and the Defendants' forfeiture of their protection for wrongful diversion to an use of the suit premises different from the, use for which it was let out. Mr. Mitter has, at the same time, assailed the relevant conclusions of the learned Judge in the trial Court to the extent they are against the Plaintiffs also on the aforesaid two issues. In the first place, Mr. Mitter has contended that our learned brother erred in law in thinking that diversion to an use of a portion of the suit premises different from the use for which the premises had been let out would not mean that the premises are being

used for purposes other than for which the same had been let out or would not come within the mischief of Section 13(1)(b) and (h) of the said Act. Secondly, Mr. Mitter has contended that our learned brother was in error in thinking that in order to constitute a breach of Section 108(o) of the Transfer of Property Act diversion in the use by itself is not sufficient. What is necessary is some resulting injury to the premises concerned. According to Mr. Mitter, our learned brother misread the annotation of Mulla and the observation so made in a different context. What has been said there, according to Mr. Mitter, is that such diversion per se, as in English law, may not be actionable to support a claim of injunction. But, that does not mean that such diversion is not within the prohibition H of Section 108(o) of the Transfer of Property Act. On the issue of requirement Mr. Mitter has first contended that both the Courts below not having rejected the Plaintiffs' case of their present accommodation being inadequate for a family which is to grow on eligible male members being given in marriage reasonable requirement has been well established. Whether the Court will grant eviction in respect of the entire premises or a part thereof is a statutory obligation of the Court so that our learned brother was in error in rejecting the claim on the ground that the Plaintiffs had not asked for eviction from two or three rooms but have sought for eviction of the Defendants from the entire house. It is pointed out by Mr. Mitter that our learned brother fails to appreciate that no landlord can seek partial eviction of his own nor any suit on such a claim is maintainable. Lastly, it has been contended by Mr. Mitter that both the Courts below were grievously in error in their comparative assessment of the accommodation available in the two premises and in holding that the accommodation available in the suit premises would not be sufficient or at least much more than the accommodation now available to the Plaintiffs in their present residence. Hence, it is argued by Mr. Mitter that the Courts below having found that the Plaintiffs are in need of more accommodation for giving the eligible male members in marriage, wrongly overruled their claim of eviction on an erroneous assessment that the suit premises would not furnish better or greater accommodation to them.

9. The points thus raised by Mr. Mitter have been contested by Mr. Hemanta, Krishna Mitter, learned Counsel for the Respondents who made his best endeavour to support the decision of our learned brother now under appeal.

10. We propose to consider the two issues referred to hereinbefore separately and we proceed first to consider how far the Plaintiffs can succeed on their plea that the Defendants have forfeited their protection under the said Act because of their wrongful diversion of the suit premises to an use other than the use for which it had been let out. On facts, it has well established that the suit premises were let out only for residential purposes. That has been admitted by the Defendants own witness and that is also well established by other evidences including the evidence of the user by the Defendants of the suit premises since the inception of the tenancy. The finding of the learned Judge in the trial Court in favour of the Plaintiffs in this respect has been accepted by our learned brother

and has also not been assailed by the learned Counsel for the Defendants. On the extent of diversion the learned Judge in the trial Court has found that all the Defendants had left the suit premises for the purpose of their residence and have shifted to their own house at No. 2, Ram Krishna Lane. The defence case that some of the Defendants are still residing in the suit premises had not been accepted by the learned Judge in the trial Court as he could not believe that an unmarried brother of the Defendant No. 2 would be residing in the suit premises and would be taking his meals at premises No. 2, Ram Krishna Lane at a long distance from the suit premises. On the evidence and particularly on the report of the pleader commissioner the learned Judge in the trial Court has found that major part of the suit premises are being used for running the tutorial coaching home. Not considering these findings with reference to the evidence on record our learned brother has proceeded more as an accepted surmise that some of the tenants are actually living in the suit premises while running the tutorial coaching home in a portion thereof. The extent of such user has also not been considered by our learned brother. On evidence, we are unable to accept the finding of our learned brother in this respect. On the other hand, the evidence on record including the evidence of the defence witness clearly establishes that both the tenants-Defendants have shifted their residence to their own house at 2, Ram Krishna Lane, major part of the suit premises is now being used for the tutorial coaching home, some of the rooms are lying vacant--one or two rooms being given to the use of some relations of the Defendants. This being the position it is not correct on the part of our learned brother to hold that some of the tenants-Defendants are actually living in the suit premises. We feel inclined to agree with the learned trial Judge that the defence case that one of the brothers of the Defendants is still residing in the suit premises and having his meal at the Defendants' new house is not believable. Thus, we conclude the Defendants themselves have given up the suit premises for their residential use and further, they are using major part thereof for running a tutorial coaching home, an use which is other than the use for which the suit premises were let out.

11. That being the position we should first consider how far because of such user the tenants-Defendants should forfeit their protection under the said Act on the provisions of Section 13(1)(h) so that the Plaintiffs would be entitled to a decree for eviction. Section 13(1)(h) provides:

Where premises let out for residential purpose have been used for any other purpose for more than 4 months without the consent in writing of the landlord.

That the major part of the premises have been put to use other than the one for which it had been let out is well established. So also the absence of any consent in writing by the landlord, no such consent having been proved. The only question which still remains to be considered is how to calculate the time prescribed, i.e. the time of more than 4 months. Admittedly, 4 months had not been completed on the date of institution of the suit but had been completed on

the date of hearing. The learned trial Judge held that when such wrongful diversion in use is a part of the cause of action the user for more than 4 months must be established on the date of institution of the suit. Our learned brother in the first appeal has not considered this aspect. We are, however, unable to agree that such wrongful user constitutes a part of the cause of action. The cause of action for the suit arises on the determination of the tenancy. In our opinion, Mr. Mitter, the learned Counsel for the Appellants, is right in his contention that Section 13 in providing a protection to the tenants forbids the Court from making any order or decree for recovery of possession until any of the grounds set out therein have been made out. The Court is, therefore, to find out whether any of the grounds as in Section 13(1) exists only for the purpose of seeing as to whether the statutory bar on exercise of the Court's power to grant a decree or order has been removed or not. Such grounds by themselves do not give rise to any part of the cause of action for the suit. Reference may be made to two decisions of this Court in the cases of Haji Mohammad Ekramal Haque Vs. Rebati Bhusan Mukherjee and Others and Dwarkin and Son Ltd. v. Hari Singh 58 C.W.N. 1012. Non-existence of any of the grounds is a condition precedent for the maintainability of the suit. Such being the effect and implication of Section 13(1) and the grounds having their relevance to the exercise of powers of granting a decree or an order, normally it would be sufficient if the ground is established or found to be in existence at any point of time before the passing of the decree or making the order. We have said normally because we are not generalising to mean that such will be the position with all the clauses of Section 13(1). But unless the context means or indicates otherwise, such will generally be the position. This conclusion of ours finds support from a Single Bench decision of this Court in the case of Bhutan v. Ganendra 84 C.L.J. 157 (165) which was later affirmed on appeal by the Division Bench Bhulan Singh and Others Vs. Ganendra Kumar Roy Chowdhury, and the decisions in the cases of Petroleum Workers Union Vs. A. Mohamed and Co., Madras, and Harcourt v. Lowe (1919) 35 T.L.R. 255. This being the position, in our opinion, a ground contemplated by Section 13(1)(h) having been made out by the Plaintiffs at the hearing and before the decree, the Defendants forfeited their protection under the provisions of the said Act and the Plaintiffs are entitled to a decree for eviction.

12. Mr. Hemanta Krishna Mitter appearing on behalf of the tenants-Defendants has strongly contended that the term "premises" in Section 13(1)(h) means the entire premises so that until the entire premises is put to an use different from the use for which it was let out, the tenants-Defendants would not incur the liability of forfeiting their protection under the law. Thus, he has strongly supported the view taken by our learned brother that diversion to an use of a portion of the premises other than the use for which the premises had been let out would not mean that the premises are being used for a purpose for which it had been let out. He had drawn our attention to other clauses in the same section where the Legislature had used "premises" or a part thereof in contradistinction to the language used in Clause (h) as aforesaid. To contest such

a contention and to support his own contention in this respect Mr. Mitter, the learned Counsel for the Appellants, on the other hand, had drawn our attention to a number of English decisions in the cases of *Tendler v. Sproule* (1947) 1 All. E.R. 193, *Segal Securities Ltd. v. Thoseby* (1963) 1 Q.B. 887, *Hobson v. Tulloch* (1898) 1 Ch. 424 and *German v. Chapman* (1877) 7 Ch.D. 271 in contending that such diversion in respect of a minor part of the demised premises would constitute breach of the prohibition contemplated by Section 13(1)(h). For our present purpose it would not be necessary for us to consider how far the extreme proposition contended for by Mr. Mitter, counsel for the Appellants, to the effect that such wrongful diversion even in respect of a minor part of the premises would constitute forfeiture of the protection u/s 13(1)(h) is correct or be accepted. In our opinion, however, the test must be the test of substantial use and substantial, part thereof. The Legislature might not have used the term "premises" or "any part thereof, but when they used the term "premises" and intended to introduce a prohibition on the tenant not to use the premises, which had been let out for residential purposes for a purpose other than residence, the prohibition would lose all its effect and importance if the tenant-Defendant can avoid the consequence by merely contending that he had left out one of the rooms of the entire premises out of the diverted use. This is the reason why we have come to the conclusion that the test must be the test of substantial use and if it is established, as in the present case, that the tenants-Defendants have substantially altered the use by putting the major part of suit premises to an use other than the residence for which it had been let out, Clause (h) would have its application and the tenant-Defendant would lose his protection under the Act.

13. On the conclusion as above the Plaintiffs are entitled to succeed on the application of Section 13(1)(h) and it would be wholly unnecessary for us to go into and decide the other much debated question whether such diversion per se would come within the prohibition of Section 108(o) of the Transfer of Property Act and as such, Section 13(1)(h) of the said Act. Nor would it be necessary for us to decide which of the two Courts below who have differed in their views on the point was correct in its conclusion.

14. On the question of requirement we have come to the conclusion that the concurrent findings of the Courts below can hardly be supported. We have pointed out hereinbefore that both the Courts below have upheld the Plaintiffs' claim that they have a requirement, of an accommodation more than what is provided by their present residence at 133/2B Ram Dulal Sarkar Street. Four of the Plaintiffs have attained their marriageable age and they need to be married but could not be given in marriage as admittedly there is no accommodation available to them when married at their present residence. This position having been established by the evidence and accepted by the Courts below we are unable to appreciate how by a process of strange reasoning the Courts below could have overruled the Plaintiffs' claim in this respect. In our opinion, Mr. Mitter, learned Counsel for the Appellants, is well justified in his comments that our learned brother was proceeding on an error in thinking that on the need as it

now exists, the Plaintiffs should have asked for possession of two or three rooms from the suit premises so that the unmarried adults could be given in marriage living in those rooms but at the same time having their meals at their present residence at Ram Dulal Sarkar Street which are not quite near each other. First of all, our learned brother fails to take note of the fact that no Plaintiff landlord can institute a suit for partial eviction. We could have well appreciated if our learned brother had given the Plaintiffs a decree for partial eviction under the provision of Section 13(4) of the Act. But, we fail to understand how the Plaintiffs not coming with such a prayer could be a ground for dismissal of the suit in its entirety notwithstanding the finding made at the same time that they had at present requirement for their, own occupation. Mr. Mitter, learned Counsel for the Appellants, has strongly assailed the assessment as made by the learned Judge in the trial Court and as accepted by our learned brother in the first appeal for showing how the Plaintiffs eight in number with a number of other adult members in the family could be hoarded into the five bed-rooms at their present residence. We are of the opinion that though there is ample substance in this criticism of Mr. Mitter it is not necessary for us to enter into any detailed consideration of this aspect. This aspect of the findings of the Courts below is based on an assumption that the family of the Plaintiffs must remain as it is. In our opinion, however, there is no reason why the Court should proceed upon any such assumption when on the findings of the Courts below at least four of the Plaintiffs had attained the age of marriage and could not be given in marriage only because of dearth of accommodation. This aspect was negated by the Courts below on a finding that the accommodation available at the suit premises would not be appreciably more than what it is now at the Plaintiffs' present residence. Such a conclusion, however, is unsupportable on the evidence on record.

* * * *

(The Judges then considered the evidence and arrived at a finding that the accommodation available at the suit premises would be sufficient to meet the requirement of the Plaintiffs or at least would provide appreciably better and greater accommodation to them).

* * * *

15. We have also considered as to whether on the facts eviction of the Defendants from a part of the suit premises could be sufficient to meet the requirement of the Plaintiffs. Here, we are of the opinion that if we could enforce the Plaintiffs to live in two establishments as suggested by our learned brother in the first appeal we could properly meet the requirement of the Plaintiffs by giving them a partial eviction from a part of the suit premises. But, in our opinion, it would be grossly unjust and unreasonable for a Court to enforce two establishments on the Plaintiffs, one at a long distance from the other for their living so that the Plaintiffs reasonably require the entire suit premises for their own occupation and a partial eviction would not meet such requirement.

16. On the conclusion as above, this appeal succeeds and the judgment and decree of our learned brother in the first appeal is set aside and that of the trial Court is restored though on grounds both on requirement and on the ground that the Defendants have forfeited their protection under the Act by wrongfully diverting the suit premises to use for at purpose other than for which it was let out to them. The Plaintiffs-Appellants would be entitled to the costs. The appeal is, therefore, allowed with costs.

B.C. Ray J.

17. I agree.