

(1991) 09 CAL CK 0035
In the Calcutta High Court

Case No : Appeal from Original Decree No. 374 of 1987, F.A. No. 374 of 1987

Lakshman Chandra Saha

APPELLANT

Vs

Smt. Bansari Mukherjee

RESPONDENT

Date of Decision : 03-09-1991

Acts Referred:

Transfer of Property Act, 1882 — Section 108

West Bengal Premises Tenancy Act, 1956 — Section 13, 13(1)

Citation : AIR 1992 Cal 148

Hon'ble Judges : L.M. Ghosh, J; Amarabha Sengupta, J

Bench : Division Bench

Advocate : Mr. Jahar Chakraborty and Miss Mitali Bhattacharjee, for the Appellant; Mr. Bidyut Kumar Banerjee and Miss Shila Sarkar, for the Respondent

Judgement

L.M. Ghosh, J.—Ejectment Suit No. 1241 of 1976 was filed in the City Civil Court, Calcutta against the defendant. The defendant was a monthly tenant under the plaintiff in respect of premises No. 173-A, Upper Chitpur Road, Calcutta, now renumbered 562-A, Rabindra Sarani, P.S. Sham-pukur. According to the plaintiff, the defendant became a tenant in respect of two rooms only on the ground floor at a monthly rent of Rs. 60/-, payable according to the English Calendar month. There is no dispute regarding the rate of rent, but the defendant pleaded that he not only rented two rooms on the ground floor, but also a space for kitchen, common" bath and privy. The grounds of ejectment were default since January, 1975, conversion of the tenancy to residential purpose from business purpose and reasonably requirement. The plaintiff also referred to the fact that he served notices to evict dated 22-12-75, requiring the defendant to evict with the expiry of the last date of January, 1976. The two ejectment notices came up with postal remarks "not claimed". The plaintiff averred that a similar notice was served through her son, but the defendant, although present, refused to accept the notice and so a copy of the notice was affixed to the outer door. The plaintiff claimed that an endorsement to that effect was made by the plaintiff's son, who went to serve the notice.

2. The plaintiff later amended the plaint. The ground of reasonable requirement was elucidated by giving a full account of the members of the plaintiffs family. By the amendment, the plaintiff also placed on record that she was not in possession of any other reasonably suitable accommodation. The plaintiff sought to clarify the position with regard to the accommodation available in premises No. 562-A, Rabindra Sarani and in 17-1, Tarak Chatterjee Lane. The defendant, in his written statement, denied all the grounds. The service of notice of ejectment was also denied. The default was explained and it was submitted that as the plaintiff did not accept any rent in lump sum under the previous arrangement, the defendant began to deposit rent with the Rent Controller, Calcutta and after the institution of the suit, in Court. With regard to the ground of reasonable requirement, it was submitted that the plaintiff had sufficient accommodation in Tarak Chatterjee Lane premises and also in premises No. 173-A Upper Chitpur Road. The case that the defendant converted the property for residential use from business purpose was also denied.

3. The parties went to trial with these pleadings.

4. The Ld. trial court decreed the suit on the ground of reasonable requirement and also on the ground of conversion. With regard to the ground of default, the Ld. trial court noticed that the defendant was regularly depositing the current rent month by month. Accordingly, he did not pass decree on the ground of default. The service of notice was also accepted by the Ld. trial court. Against the judgment and decree of the Ld. trial court, the defendant/tenant has preferred this appeal.

5. It has already been noticed that the Ld. trial court did not pass any decree on the ground of default. So we are confined to the grounds of conversion and reasonable requirement.

6. Mr. Chakraborty, the Ld. advocate appearing for the appellant, has argued that even if there has been conversion, that is not prohibited by the West Bengal Premises Tenancy Act. His next argument has been that the property was let out for mixed purpose and so factually, there could not be any question of conversion. Mr. Banerjee, the learned advocate appearing for the respondent, has submitted that in fact there has been conversion and that is within the prohibition of the West Bengal Premises Tenancy Act.

7. The submission of Mr. Chakraborty, that this type of conversion, as alleged, can never constitute offence under the West Bengal Premises Tenancy Act, cannot be accepted as a principle of universal application in all cases. The allegation of the plaintiff/ respondent is that the property was leased out for business purpose but the defendant converted into residential purpose. According to Mr. Chakraborty, if the property was let out for residential purpose and then converted into business purpose then that would come within the strict prohibition of Clause (h) of S. 13(1) of the West Bengal Premises Tenancy Act. But Mr. Chakraborty has missed that apart from clause (h), there is Clause (b) of

S. 13 (1) of the West Bengal Premises Tenancy Act, which sets out that it is offensive when the tenant or any person residing in the premises let out to the tenant has done any act contrary to the provisions of Clauses (m), (o) and (p) of S. 108 of the Transfer of Property Act. That brings us to a consideration of the provisions of S. 108 of the Transfer of Property Act. Of the several clauses of S. 108 of the Transfer of Property Act, we are concerned with clause (o) of that Section. Clauses (m) and (p) are not attracted at all, since there are no such allegations. Clause (o), however, requires consideration. It lays down that the tenant must not use, or permit any other to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not opened when the lease was granted, or commit any other act which is destructive or permanently injurious thereto. If we look to the words that the tenant must not use the property for a purpose other than that for which it was leased, in insulation, it might suggest at first glance that even conversion from business purpose to residential purpose would be bad. On scrutiny of the Section, we are, however, of the view that that is not the spirit of Cl. (o) of S. 108 of the Transfer of Property Act. In essence, the user must have some prejudicial effect upon the property, destructive or injurious in nature. That would be clear if we follow up the clause and consider the expression "or commit any other act which is destructive or permanently injurious thereto". This last expression must be considered in juxtaposition with "must not use for a purpose other than that for which it was leased". The reasoning is easy to follow; the tenant cannot change the user so as to affect the interest of the landlord or physically impair the property. The prohibition does not appear to be absolute, as in the case of S. 13(l)(h) of the West Bengal Premises Tenancy Act. The provision of Clause (o) of S. 108 of the Transfer of Property Act is intended to prohibit a user which might affect the property. That clearly is the spirit of the provision, when the last words are considered. We have to specifically consider the effect of the expression "or commit any other act". Any other has a link with the previous part of the clause; that is, the other acts must have also a tendency to affect the property. So we are of the view that even if the tenant just converted user from office to residential purpose, without affecting the property, that would not come within the prohibition of any of the statutes. That apart, factually also, the case of conversion appears to be without any basis. PW-2, who has come to support the plaintiff's case, has answered that he was only 10 or 12 years old when the original letting out was made. Now P W 2, the son of the plaintiff and the person who practically has taken the responsibility of carriage of proceedings for the plaintiff, is not competent to prove the original contract, as he was only a little boy. Admittedly, there was no written contract. How then it is proved that there was a subsequent conversion of user, if the original contract itself is not proved? Then another significant circumstance is to be considered and it is that admittedly, the defendant rented not only two rooms, but also a cooking space on the ground floor. That is the clear admission of PW-2 himself, the main witness for the plaintiff. If it was for the purpose of business merely, no cooking

space would be let out. When there is absence of evidence regarding the initial contract and when instead we get that a cooking space was included in the tenancy, there cannot be any basis for the conclusion that the property was let out for business purpose merely. The ground of conversion cannot be sustained in law or on fact. No decree can be passed on that ground.

8. The other ground is the ground of reasonable requirement. The suit property consists of two rooms on the ground floor, a cooking space, etc., of 173-A, Upper Chitpur Road, which is now 562-A, Rabindra Sarani. Admittedly, the plaintiff has been residing at No. 17-1, Tarak Chatterjee Street. According to the evidence of PW 2, the plaintiff has in her possession one bed room, one study room and one kitchen in the house of Tarak Chatterjee Lane. PW-2 has also given an account as to the members of the family. They are the plaintiff, her husband, her three adult sons and her unmarried daughter. The brothers of PW-2, that is the sons of the plaintiff, are aged 33, 28 and 22 respectively. The sister of PW-2 (the daughter of the plaintiff) is aged 20. If this position as to the members of the family is accepted, and if the accommodation be also such as narrated by PW-2, undoubtedly it makes out a case of acute shortage of accommodation. There is no dispute as to the members of the family of the plaintiff. In the plaint, the case of the daughter was not pleaded, but that position has been accepted by the defendant in his evidence. Therefore, the mere omission in the plaint is to be ignored when we find the real picture. Thus, there could be no dispute about the size of the plaintiff's family. The only other consideration is whether the plaintiff is in possession of reasonably suitable accommodation. The assertion of the plaintiff that she has in her occupation one bed room, one study room and one kitchen room within 17/1, Tarak Chatterjee Street, must be proved by her. But we feel that the plaintiff has not proved that she is in possession of so much only and no more. Now, according to PW-2, Tarak Chatterjee Lane property is a joint property and has not yet been partitioned. There are other rooms in that house and the plaintiff's version is that they are in the possession of co-sharers. The plaintiff is to disclose clearly what are these rooms and who possess these rooms. PW-2 says that the rooms in the occupation of uncles, were also shown to the Commissioner. But the Commissioner has said that he was not allowed to inspect the other rooms by the plaintiff on the plea that those were joint family properties. The Commissioner is PW-1. Then PW-2 has answered that there was no writing to indicate the plaintiffs possession at Tarak Chatterjee Lane. He has not cited the uncles to depose in the case. This approach of the plaintiff is not viewed with favour. The plaintiff must make a full disclosure. Keeping the Court in darkness about the other rooms, is not a proper approach. If the other rooms are occupied by the other co-sharers, at least some of them could be examined. Therefore, not allowing any visual inspection of the other rooms and not calling any witness to account for the possession of those rooms, is not full account of the real position. It is for the plaintiff to prove the case of reasonable requirement on the ground that she is not in possession of any reasonably suitable accommodation. Then there is another house, premises No. 562-E,

Rabindra Sarani. It is elucidated from PW-2 that the brother of PW-2 is in occupation of one room. According to him, that brother is a tenant in respect of a shop room in the said premises under all the shebaitis. That shop room was under lock and key, when the Commissioner inspected the premises. The Commissioner could be shown the condition of the room -- whether it is being used by Sujit, the brother, as a shop room or for residential purpose. This again is another act which goes to show that the plaintiff is not making full disclosure.

9. We are of the view that the plaintiff has failed to prove that she is not in occupation of a reasonably suitable accommodation, as she has not made full disclosure. The ground of reasonable requirement cannot be accepted.

10. Both the grounds relied on by the plaintiff fail.

11. As regards service of notice also, we feel that the same has not been strictly proved. Exts. 5 and 5(a) are the notices. The defendant was required to vacate with expiry of the last day of January, 1976. The notices are dated 22nd Dec. 1975. Exts. 4 and 4(a) are postal endorsement. It is found that there were endorsements on 15-1-76 "not claimed". It is not exactly clear what is meant by "not claimed". Even if it be taken as refusal, the said refusals were made only on 15-1-76. Thus, clear one month's notice was not given. So, the notice to quit was not sufficient. Mr. Banerjee, the Ld. advocate for the respondent has referred to the decision of M/s. Madan and Co. Vs. Wazir Jaivir Chand, for the principle that the proper interpretation should be to read the word "served" when "sent by post", if the article is correctly and properly addressed to the tenant. We find that that was in a different context. There, the postman called at the address on two dates, but, having failed to find there either the addressee or any person authorised to receive the notice on his behalf, returned it with the endorsements "left without address, returned to sender". Their Lordships observed that if the tenant was staying in the premises, there could be no reason why it could not be served on him; and if he was compelled to be away for some time, all that he had to do was to leave necessary instructions with the postal authorities either to detain the letters for some time or forward them to the address where he had gone. In the case in hand it was not a case of "not found". In this case in hand, it was sought to be proved that the notices were refused, by proving "not claimed". If it amounted to refusal, there was refusal not earlier than 15-1-76. So, service can be said to have been effected at most on 15-1-76. That was short service.

12. Then personal service of notice by PW-2 is sought to be proved. Ext. 6 is the notice with the endorsement of PW-2 that the tenant refused to accept one copy of the notice after signing on the other copy. It is further recited in Ext. 6 that in the circumstances, the notice was affixed to the outer door. PW-2 is the plaintiff's son and virtually he has been prosecuting the suit on behalf of the plaintiff. He is very much interested in the matter. There is no supporting witness for proving the service of notice. In Ext. 6 also it is not recited that the notice was offered in the presence of independent witnesses. It is also interesting to note that in Ext. 6, it is mentioned that the defendant had refused to accept the

notice. Before the suit was filed, the party could not be described as a defendant. And the notice must have preceded the suit. That might be a just misdescription, but considering that PW-2 is the only witness regarding the service of notice, we do not feel it safe to rely upon that.

13. The service of a valid and proper notice has also not been proved. The suit was bound to fail on that ground also.

14. There is yet another aspect of the matter. The plaintiff seeks recovery of possession of two rooms on the ground floor. But it has now transpired that the defendant was also given a kitchen or a cooking space on the ground floor. According to the plaint, it was a cooking space merely. That is the evidence of PW-2 himself. Whether it be called a kitchen or a cooking space, that space must be made part of the plaint property. Mr. Banerjee has argued that the boundaries have been given clearly. Even then, the plaint schedule refers to two rooms on the ground floor and recovery of possession of those two rooms could be obtained. So on the basis of it, the suit is bad for a prayer of partial eviction. The suit is bad on that ground also.

15. Considering all the aspects, we find that the judgment and decree of the Ld. trial court cannot be sustained. The appeal is allowed. The judgment and decree of the Ld. trial court are set aside. The suit be dismissed on contest against the defendant without costs. We also make no order for costs of this appeal.

Amarabha Sengupta

16. I agree.

17. Appeal allowed.