

(2018) 12 CAL CK 0122

In the Calcutta High Court

Case No : Civil First Appeal No. 162 Of 2018, Tender First Appeal No. 504 Of 2017, Civil Application No. 3699 Of 2018

Nasima Naqi

APPELLANT

Vs

Todi Tea Company Limited And Others

RESPONDENT

Date of Decision : 19-12-2018

Acts Referred:

West Bengal Premises Tenancy Act, 1997 — Section 2(g), 3, 3(f), 6, 6(4), 7, 7(4)

Citation : (2018) 12 CAL CK 0122

Hon'ble Judges : Sanjib Banerjee, J;Suvra Ghosh, J

Bench : Division Bench

Advocate : Hironmoy Bhattacharyya, Sounak Bhattacharyya, Debanjan Das, Debjit Mukherjee, Deepak Kumar Jain

Final Decision : Dismissed

Judgement

SANJIB BANERJEE, J.

1. One of the judgment-debtors who has suffered an eviction decree in respect of premises let out for non-residential purpose is in appeal, primarily on the ground that as the spouse of the deceased original tenant she is entitled to protection under the West Bengal Premises Tenancy Act, 1997 and no decree for eviction could have been passed against her otherwise than in accordance with Section 6 of the said Act.

2. The facts are more or less admitted and are reflected in the judgment and order impugned dated August 4, 2017 passed by the VII Bench, City Civil Court at Calcutta. One Mohammad Naqi was inducted as a tenant in respect of shoproom No.23 on the ground floor of premises No.2 Lalbazar Street, Kolkata-700001 at a monthly rent of Rs.235.95/- payable according to the English calendar and subject to the terms and conditions as contained in an agreement dated May 6, 1988 with the landlord. An interest-free deposit of Rs.12,000/- was made by the original tenant at the time being inducted into the

commercial premises. In July, 2003 the original tenant died leaving behind the appellant, his widow, and the defendant nos. 1 and 2 sons as his only heirs. In the suit filed in the year 2010, the landlord sought a decree for eviction on the ground that the limited protection enjoyed by the heirs or the like of a tenant was not available beyond five years of the death of the original tenant in view of Section 2(g) of the said Act of 1997.

3. The defendants set up myriad grounds of defence but, thankfully, the appellant confines the challenge principally to the ground that a spouse of a deceased tenant is entitled to life-time protection from eviction in respect of premises let out for non-residential purpose under Section 2(g) of the said Act.

4. The alternative contention of the appellant is that even if the spouse of a deceased tenant is not found to be entitled to life-time protection from eviction in respect of any premises let out for non-residential purpose, the second proviso to Section 2(g) of the said Act confers a right on the spouse to require the landlord to execute a fresh agreement of tenancy in respect of the relevant premises, on condition of payment of fair rent, for the duration of the life of such spouse.

5. It is, thus, that Section 2(g) of the Act falls for consideration in the context of the rights of a spouse of a deceased tenant in respect of premises let out for non-residential purpose. More precisely, the twin legal issues that have arisen in the appeal are as follows:

i. Whether the spouse of a deceased original tenant is entitled to life-time protection from eviction in respect of premises let out for non-residential purpose?

ii. If the answer to the first legal issue is against the spouse, whether such spouse has a right to have a fresh agreement executed in such spouse's favour, on condition of payment of fair rent, in respect of the premises let out for non-residential purpose?

6. The 1997 Act has replaced the West Bengal Premises Tenancy Act, 1956 and has been enacted to provide for the regulation of certain incidents of tenancy of premises in Kolkata, Howrah and some other areas in West Bengal. The avowed object of the Act is to balance "the interests of both the landlords and the tenants and also ... stimulates future construction to meet the growing demands for housing."

7. Chapter III of the Act of 1997 is at the heart of such statute as Section 6 included in such chapter provides for the protection of tenants against eviction. Section 7 of the Act of 1997 provides further protection in case of a default in payment of rent and, as long as the tenant complies with the orders passed for making good the default, no decree for eviction on the ground of default in payment of rent can be passed unless there is a repeat default within the meaning of Section 7(4) of the Act.

8. It must also be noticed that unlike the predecessor statute of 1956, the Act of

1997 accords protection to only certain classes of tenants. As to which classes of persons are entitled to protection under the said Act of 1997, reference must be made to the definition of "tenant" in Section 2(g) of the Act of 1997, and to the exemption provision in Section 3 of the Act.

9. There is no dispute in the present case that the suit premises in the present case would qualify as premises let out for non-residential purpose within the meaning of Section 3(f) of the Act. The suit premises lie within the limits of the Kolkata Municipal Corporation and the monthly rent in respect thereof was not more than Rs.10,000/-.

10. The moot question is whether the appellant herein can be regarded as a tenant; or, as the spouse of the deceased tenant, the appellant herein is entitled to be included in the extended meaning of tenant in Section 2(g) of the Act of 1997. Such provision, which is the key to the legal questions raised in this appeal, provides as follows:

"2. Definitions. -

(g) "tenant" means any person by whom or on whose account or behalf the rent of any premises is or, but for a special contract, would be payable, and includes any person continuing in possession after termination of his tenancy and, in the event of death of any tenant, also includes, for a period not exceeding five years from the date of death of such tenant or from the date of coming into force of this Act, whichever is later, his spouse, son, daughter, parent and the widow of his predeceased son, who were ordinarily living with the tenant up to the date of death of the tenant as the members of his family and were dependant on him and who do not own or occupy any residential premises, and in respect of premises let out for non-residential purpose his spouse, son, daughter and parent who were ordinarily living with the tenant up to the date of his death as members of his family, and were dependant on him or a person authorised by the tenant who is in possession of such premises but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction:

Provided that the time-limit of five years shall not apply to the spouse of the tenant who was ordinarily living with the tenant up to his death as a member of his family and was dependant on him and who does not own or occupy any residential premises:

Provided further that the son, daughter, parent or the widow of the predeceased son of the tenant who was ordinarily residing with the tenant in the said premises up to the date of death of the tenant as a member of his family and was dependant on him and who does not own or occupy any residential premises, shall have a right of preference for tenancy in a fresh agreement in respect of such premises on condition of payment of fair rent. This proviso shall apply mutatis mutandis to premises let out for non-residential purpose."

11. Section 2(g) of the 1997 Act is somewhat inarticulate and confusing in its wording and has already been interpreted variously during the short duration of about 17 years that the Act of 1997 has been in force. The convoluted expression of the definition of "tenant" in the relevant provision could have been avoided or simplified by making clear distinctions, for a start, between residential and non-residential premises and between the original tenant and such of his heirs or others who may be regarded as tenant after the death of the original tenant. However, the substantive portion of the provision, sans the provisos, can be expressed in the following words as being applicable in respect of premises let out for non-residential purpose.

"tenant" means any person by whom or on whose account or behalf the rent of any premises is or, but for a special contract, would be payable, and includes any person continuing in possession after termination of his tenancy and, in the event of death of any tenant, also includes, for a period not exceeding five years from the date of death of such tenant or from the date of coming into force of this Act, whichever is later, ... and in respect of premises let out for non-residential purpose his spouse, son, daughter and parent who were ordinarily living with the tenant up to the date of his death as members of his family, and were dependant on him or a person authorised by the tenant who is in possession of such premises but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction:

12. Since the legal questions here are confined to the rights of the spouse of an original tenant or the heirs or the like of an original tenant in respect of premises let out for non-residential purpose, for the present context, the definition may be further simplified as follows:

"tenant" ... in the event of death of any tenant, also includes, for a period not exceeding five years from the date of death of such tenant or from the date of coming into force of this Act, whichever is later, ... and in respect of premises let out for non-residential purpose his spouse, son, daughter and parent who were ordinarily living with the tenant up to the date of his death as members of his family, and were dependant on him or a person authorised by the tenant who is in possession of such premises but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction:

13. The first proviso, clearly, does not apply to premises let out for non-residential purpose. It is only the second proviso that applies *mutatis mutandis* to premises let out for non-residential purpose. By incorporating the change in the second proviso in terms of the command of "*mutatis mutandis*", such second proviso, insofar as it would apply for premises let out for non-residential purpose, would read as follows:

Provided further that the son, daughter, parent or the widow of the predeceased son of the tenant who was ordinarily residing with the tenant ... up to the date of

death of the tenant as a member of his family and was dependant on him and who does not own or occupy any non-residential premises, shall have a right of preference for tenancy in a fresh agreement in respect of such premises on condition of payment of fair rent.

14. Now, when the material part of the substantive provision in Section 2(g) of the Act of 1997 is read with the applicable proviso relevant to premises let out for non-residential purpose, the entirety of the provision can be seen to be as follows:

"tenant" ... in the event of death of any tenant, also includes, for a period not exceeding five years from the date of death of such tenant or from the date of coming into force of this Act, whichever is later, ... and in respect of premises let out for non-residential purpose his spouse, son, daughter and parent who were ordinarily living with the tenant up to the date of his death as members of his family, and were dependant on him or a person authorised by the tenant who is in possession of such premises but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction:

Provided further that the son, daughter, parent or the widow of the predeceased son of the tenant who was ordinarily residing with the tenant ... up to the date of death of the tenant as a member of his family and was dependant on him and who does not own or occupy any non-residential premises, shall have a right of preference for tenancy in a fresh agreement in respect of such premises on condition of payment of fair rent.

15. Once the provision is so simplified as above, the answers to the legal questions raised appear in clear light. The original tenant in this case died in July, 2003. Since such date of death was after the Act came into force on July 10, 2001, if the remainder of the month of July, 2003 were discarded, no heir or person authorised by the original tenant to be in possession of the suit premises could legally claim to be a tenant in respect of the suit premises in terms of Section 2(g) of the Act of 1997 on or after August 1, 2008. As a consequence, no protection under Chapter III of the Act of 1997 was available to any heir of the original tenant in this case or any person authorised by the original tenant to be in possession of the suit premises with effect from August 1, 2008. The status of the defendant occupants at the suit premises stood reduced to mere occupants at the pleasure of the landlord; but since the law of the realm requires any person in possession of an immovable property to be removed therefrom only by procedure established by law, after August 1, 2008 the landlord here was entitled to bring a suit for eviction, which the defendant occupants at the suit premises could never have resisted on the basis of any perceived protection under the Act of 1997.

16. A fundamental legal principle must be noticed in the present context that, ordinarily, the rights relating to immovable properties are governed by the

Transfer of Property Act, 1882 as that is the general law of the land; but it is possible to eclipse such general law by according protection to a class of persons under any rent control legislation. The ancillary principle is that no rights vest in a tenant under a rent control law that has been repealed or amended since any rent control law has only the effect of keeping the general law in abeyance in its operation and leaving the field open for the general to operate once the protection is removed: whether by altering the class of persons continuing to be protected by virtue of their status or on the basis of the quantum of rent pertaining to the property in question.

17. In the light of what is apparent on a plain reading of the provision insofar as it is applicable in the present case, the appellant's contention that the spouse of the deceased original tenant enjoys a special right does not hold. That is because the first proviso would not apply to any premises let out for non-residential purpose and, more importantly, the spouse of an original tenant has been conferred no right under the second proviso which applies to premises let out for non-residential purpose.

18. It is not necessary to try to comprehend the need for the distinction between the spouse of an original tenant in respect of premises let out for residential purpose and the spouse of an original tenant in respect of premises let out for non-residential purpose; and it is best to accept the legislative command for what it unambiguously provides for on a plain reading thereof. Thus, the spouse of an original tenant, which original tenant enjoyed protection under the Act of 1997, will continue to enjoy the protection under the statute in respect of residential premises, irrespective of the number of years that may have passed after the death of the original tenant, as long as such spouse was ordinarily living with the original tenant till the original tenant's death as a member of the original tenant's family, such spouse was dependent on the original tenant and such spouse does not own or occupy any residential premises. On the other hand, it is only the children or the parents or the widow of predeceased sons of the original tenant who are given limited rights in respect of non-residential premises under the second proviso to Section 2(g) of the Act, subject to such persons fulfilling the same criteria: that they were ordinarily residing with the original tenant till the death of the original tenant as members of the family of the original tenant, that they were dependent on the original tenant and that they do not own or occupy any non-residential premises. For good or bad, the spouse of a deceased original tenant is not accorded such right under the second proviso.

19. It may be observed that this may be a colossal case of casus omissus. In the context of premises let out for residential purpose, both the provisos to Section 2(g) of the Act apply. Since the first proviso exclusively deals with the continuing rights of the spouse of an original tenant in respect of premises let out for residential purpose, subject to the conditions stipulated therein, the lesser rights conferred by the second proviso to the other heirs of an original tenant would be

inapplicable in the case of the spouse. However, in the last sentence of the second proviso to Section 2(g) of the Act clearly specifying that it would be such proviso that would apply *mutatis mutandis* to premises let out for non-residential purpose, the operation of the first proviso is barred in respect of premises let out for non-residential purpose: thus, the case of the spouse may have been overlooked by the legislature in respect of premises let out for non-residential purpose. But such a huge omission is not corrected by judicial engineering of a statutory provision. If it is a mistake, it has to be left at that till such time that such perceived error is corrected by the legislature.

20. Classically, and particularly in respect of any beneficial legislation such as a rent control legislation, the court may be liberal in going by the intention of the statute to override the defects of its wording in a particular provision; but the court's authority to do so is restricted by recognised canons of interpretation. It is possible that in this case since the spouse of a deceased original tenant could not have been included in the second proviso to Section 2(g) of the Act in respect of premises let out for residential purpose, while making the second proviso applicable, *mutatis mutandis*, to premises let out for non-residential purpose, the State legislature may have overlooked that the case of the spouse in respect of premises let out for non-residential purpose was not included. This is why, the entire provision has been described earlier to be confusing and convoluted. There is also a legal principle as old as the hills that when out of more than one, the statute mentions only one, it necessarily implies that the others are excluded for that purpose. The Latin maxim is *expressio unius est exclusio alterius*, literally meaning, whatever has not been included has by implication been excluded. In the spouse of an original tenant being included in the substantive body of the provision and such spouse being excluded from the second proviso, the interpretation has per force to be that the spouse has not been conferred the right recognised in the second proviso. Further, in the use of the word "This" in the last sentence of the second proviso to Section 2(g) of the Act, there is a clear intention to exclude the operation of the first proviso in respect of premises let out for non-residential purpose. In such circumstances, to introduce the case of the spouse in the second proviso in respect of premises let out for non-residential purpose would amount to judicial legislation, which is impermissible. For, if judges had the authority to expound on what was perceived to be the intention of the legislature without restricting themselves to the clear words of the statute, the judiciary may usurp the law-making function.

21. Even if the limited rights conferred on the heirs of an original tenant by the second proviso to Section 2(g) of the Act were to be read to also be applicable to the spouse of an original tenant, such rights would not be enough to resist an eviction decree sought by the landlord against the spouse, in respect of premises let out for non-residential purpose, after the expiry of five years after the death of the original tenant if such death was after the said Act came into force. The effect of the second proviso and the limited rights conferred thereunder are just like the embargo that would operate on a landlord who has obtained a decree on

the ground of reasonable requirement. Just as such a landlord decree-holder is not entitled to let out the decretal premises within close proximity of obtaining the decree or the possession of the decretal premises pursuant to the decree, similarly, if a landlord, who has obtained an eviction decree on the ground that the heirs of the tenant have continued in occupation of the tenanted premises beyond the period of five years after the death of the original tenant after the said Act has come into force, wishes to let out the decretal premises within any reasonable time of obtaining the decree or obtaining possession of the decretal premises pursuant to the decree, he has to offer the same to the relevant heir, subject to such heir fulfilling the statutory conditions and subject to rent under the fresh agreement being fair rent.

22. In the present case only the widow of the original tenant has come up in appeal and not the other heirs. Since the widow of an original tenant has not been conferred even the limited rights under the second proviso to Section 2(g) of the Act in respect of premises let out for non-residential purpose, the appellant herein cannot even insist that the decree-holder landlord may not let out the premises afresh to any other if the appellant offers to pay fair rent in respect of the decretal premises in the event the landlord chooses to let out the premises afresh after obtaining the decree or the possession of the non-residential premises pursuant to the decree.

23. The two principal legal questions are, thus, answered as follows:

i. The spouse of a deceased tenant is not entitled to protection from eviction in respect of premises let out for non-residential purpose beyond the period of five years from the date of death of the original tenant if such original tenant died after the coming into force of the Act of 1997.

ii. The spouse of a deceased original tenant does not have any right to have a fresh agreement executed in such spouse's favour in respect of any premises let out for non-residential purpose if the decree-holder landlord wishes to let out the premises afresh upon obtaining the decree or possession of the premises pursuant to the decree.

24. The respondent has referred to three recent judgments of this court: two Division Bench judgments reported at (2017) 1 CHN (Cal) 485 (Ratna Bose @ Basu v. Jharna Mullick) and (2017) 4 Cal LT 575 (HC) (Sri Sushil Kumar Jain v. Pilani Properties Limited) and another unreported judgment of a single bench rendered on December 13, 2017 in CO 1534 of 2017 (Smt. Dipali Halder v. Chandan Das) to support the judgment and decree herein and suggests that the appellant has no right to remain in occupation of the decretal premises and could not have resisted the eviction suit on any ground whatsoever.

25. In Ratna Bose an eviction suit was filed against the heirs of the original tenant who resided with the original tenant till the time of his death. Such suit was filed after the expiry of five years from the date of death of the original tenant. The spouse of the original tenant had predeceased the original tenant

and the date of death of the original tenant was after the Act of 1997 came into force. The ground that was urged in seeking to prefer a second appeal in this court was that no notice was issued under Section 6(4) of the Act of 1997 prior to the institution of the suit. A Division Bench of this court held, on a perusal of the plaint, that the plaintiff had not framed the suit for eviction under the scheme of Section 6 of the Act of 1997 and that the suit was filed after the expiry of five years from the date of the death of the original tenant "not by treating the defendants as tenants, but by treating the defendants as trespassers". The court concluded, at paragraph 11 of the report, that "the suit is essentially a suit for eviction of a trespasser which is well maintainable and since the suit is not against a tenant within the meaning of tenant as defined under West Bengal Premises Tenancy Act, 1997, the defendants are not entitled to get any protection against eviction under section 6 of the said Act." The above judgment has been brought by the decree-holder in the context of the mild murmurs on the part of the appellant herein that since no notice of any kind was issued prior to the institution of the eviction suit, the suit was not maintainable. Such ancillary issue requires to be dealt with.

26. The status of the specified heirs of the original tenant, in terms of Section 2(g) of the Act of 1997, is that of tenants for a period of five years after the death of the original tenant, subject to such heirs meeting the other conditions specified in the provision; except that the spouse of an original tenant is entitled to life-time protection in case of premises let out for residential purpose. The status of all heirs of a deceased original tenant in all other cases, except for the spouse in respect of premises let out for residential purpose, is as permissive occupants akin to licencees and may even be no different from trespassers except that their entry into the premises was lawful and, to such extent, they may not be regarded as rank trespassers. In respect of premises let out for non-residential purpose, as in the present case, the status of tenant that the specified heirs of the original tenant enjoy, subject to fulfilling the other conditions, for a period of five years after the death of the tenant if the tenant has died after the coming into force of the Act of 1997, is completely lost after the expiry of the statutory period. Since it is only a tenant for whose eviction there is a statutory pre-condition of the issuance of a notice under Section 6(4) of the Act of 1997, in the case of an heir of the original tenant continuing in occupation of the non-residential premises after five years following the death of the original tenant when the original tenant died after the coming into force of the Act of 1997, there is no requirement of any notice to be issued by the owner of the premises prior to the institution of a suit for eviction against such heir and on such ground.

27. Even under the Transfer of Property Act, 1882 it is only a continuing lease of an immovable property from month to month which is required to be terminated by either party by a notice. A lease which stands determined by efflux of time does not statutorily require any notice to be issued before a suit for eviction is brought by the lessor against the erstwhile lessee continuing to remain in possession despite the tenure having run out. Similarly, a licencee is not required

to be given a written notice for eviction proceedings to be brought against him by the owner or licensor as long as there is an averment in the plaint that the licence has been terminated to the knowledge of the licensee. In such a situation, the service of a copy of the plaint relating to the eviction suit is regarded as a notice to quit, if no earlier notice in such regard is proved. Thus, an heir or the like of an original tenant who is accorded protection under the said Act of 1997 for a limited period after the death of the original tenant, is not required to be served any notice prior to a suit for eviction being brought against such person in respect of the premises in question.

28. The landlord has referred to the judgment in *Pilani Properties Limited* for the recognition of the law at paragraphs 22 to 26 of the report to the effect that there is no question of any right being vested in a tenant under a previous rent control law if a subsequent rent control statute replaces the previous and does not accord any protection to a class of tenants, including such person, protected under the previous regime.

29. In the case of *Dipali Halder*, the suit for eviction was again brought after the expiry of five years from the date of death of the original tenant and after the coming into effect of the Act of 1997. A notice was issued prior to the institution of the suit, calling upon the heirs of the deceased original tenant to hand over possession of the premises let out for residential purpose upon the expiry of the period during which such heirs enjoyed protection under the Act of 1997. The mere issuance of such notice, or even if the notice had referred to reasonable requirement or any other ground under Section 6 of the Act of 1997, could not have had any impact on the eviction suit if the plaint relating to the eviction suit clearly spelt out that it was founded on the right of the landlord under the Act of 1997 to obtain possession of the premises let out for residential purpose after a period of five years had expired from the date of death of the original tenant after the Act of 1997 came into effect. Indeed, in *Dipali Halder*, proceedings under Section 7 of the Act of 1997 were dismissed on the ground that such provision did not apply to a suit brought for the eviction of heirs of an original tenant after the expiry of the statutory period. The order of the trial court was left undisturbed.

30. All three judgments cited by the plaintiff instruct that after the protection accorded to the heirs or the like of the original tenant stands removed upon the expiry of the statutory period following the death of the original tenant, such heirs or the like cannot defend an eviction suit brought by the landlord on any grounds under the Act of 1997, except for the spouse of the original tenant who enjoys life-time protection from eviction in respect of premises let out for residential purpose.

31. In the light of the above discussion, the answers to the principal legal issues raised and the answer to the ancillary issue regarding non-service of any notice to quit prior to the institution of the suit, there is no merit in this appeal and, since only the spouse of the deceased original tenant has preferred the appeal

and such spouse does not have a right of first refusal under the second proviso to Section 2(g) of the Act of 1997 in the event the landlord seeks to let out the premises afresh, the appellant is found entitled to no relief at all. FA 162 of 2018 and CAN No. 3699 of 2018 are dismissed.

32. There will, however, be no order as to costs.

33. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

34. Let a copy of this judgment be reached to learned Advocate General.