
(2012) 03 CAL CK 0064

In the Calcutta High Court

Case No : S.A. No. 157 of 2008 and CAN 9863 of 2010

Nirban Basu

APPELLANT

Vs

Smt. Gayatri Bhattacharjee

RESPONDENT

Date of Decision : 20-03-2012

Acts Referred:

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

Citation : (2012) 03 CAL CK 0064

Hon'ble Judges : Tarun Kumar Gupta, J

Bench : Single Bench

Advocate : Amal Krishna Saha and Mr. Dibyendu Chatterjee, for the Appellant; Bhaskar Ghosh, Suhrid Sur and Ms. Sebatu Dutta, for the Respondent

Final Decision : Allowed

Judgement

Tarun Kumar Gupta, J.—Plaintiff-landlord is the appellant in this case of reversal of decree of eviction passed by learned Lower Appellate Court.

2. The appellant-plaintiff filed the said Title Suit being Title Suit No. 138 of 2004 in the Court of learned Civil Judge, 3rd Court, Senior Division, 24-Parganas (South), alleging as follows:-

The defendant was inducted as a tenant in the suit premises at a monthly rental of Rs. 3000/- (Rupees three thousand only) per month in terms of an agreement dated 12th January, 1988 which was signed and executed on next day. The suit premises was let out for residential-cum-educational purposes. But from the very inception, the defendant started using the premises as an educational institution without residing therein in utter violence of the terms of the agreement and there were exchange of letter between the parties on this issue. The defendant also encroached upon the garden and passage on the ground floor. She also illegally converted kitchen, garage etc. into classrooms and her men were found to cook in the corridor causing damage to the building and she was also guilty of acts of nuisance and annoyance. The defendant was also guilty of parting with

possession of the suit premises to a third party who was carrying on a school for commercial purposes. The plaintiff also reasonably required the suit premises for his and his family members' use and occupation. The tenancy of the defendant was terminated by sending a notice dated 5th November, 1988 which was duly received by the defendant. Another copy of notice was personally tendered to the defendant on 18th November, 1988 when she refused to accept the same. As defendant did not vacate the suit premises in spite of service of said notice, the suit for ejectment was filed.

3. The defendant filed a written statement alleging, inter alia, that she took the suit premises on rent for the purpose of starting a school within the knowledge of the landlord. The plaintiff was aware of running of one school in the suit premises from the very beginning and took advance for the purpose of renovation and was also personally present in the inaugural function of the school. From the very inception, the defendant was running the said school within the knowledge of the plaintiff-landlord as per terms of the written agreement and that a caretaker/darwan was kept in the suit premises for protection of the school properties and accordingly the agreement was made for using of the suit premises as residential-cum-educational purpose. The suit was liable to dismiss.

4. Several issues were framed including issues as to whether defendant was using the suit premises for some other purposes other than residence (issue No. 3), and whether defendant sublet the suit premises without the consent of the landlord (issue No. 4).

5. Learned trial court passed the decree of ejectment only on the ground of using the suit premises for some purposes other than residence. However, learned trial court decided other issues relating to grounds of ejectment in the negative.

6. However, in the appeal preferred by the defendant-tenant, the decree of eviction passed by learned trial court was set aside by the impugned judgment and decree dated 29th July, 2006 passed by learned Additional District and Sessions Judge, Fast Track Court, 6th Court, Alipore, 24 Parganas (South).

7. At the time of admission of second appeal the following substantial questions of law were framed:-

(1) Whether having regard to the statutory provisions of Section 13(1)(h) of the West Bengal Premises Tenancy Act together with the agreement executed and admitted by and between the parties, the learned First Appellate Court was justified in reversing the decree for eviction passed by the learned Trial Court?

(2) Whether the learned First Appellate Court was justified in refusing to grant the decree for eviction u/s 13(1)(h) of the West Bengal Premises Tenancy Act by holding that without proof of nuisance and annoyance, the decree for eviction u/s 13(1)(h) of the said Act cannot be passed?

8. During hearing another substantial question of law was framed at the prayer of Learned Counsel for the appellant namely, :

Whether in view of the evidence on record and own admission of the defendant that the school is running by the Managing Committee of the School in the suit premises and she is getting her monthly salary from the Managing Committee, the Court of Appeal below erred in law in not holding that the defendant has assigned, sub-let and/or parted with possession of the suit premises.

9. Mr. Amal Krishna Saha, Learned Counsel for the appellant/plaintiff submits that tenancy of the suit premises was taken under written agreement for using the same for residential-cum-educational purposes but in utter violation of said agreement respondent defendant was using the suit premises for running a school under the management of the Managing Committee and that she never resided in the suit premises and rather is a permanent resident of Salt Lake. He further submits that the defendant was also acting as a headmistress in said school and is also receiving salary from the Managing Committee. According to him, this proves beyond any doubt that defendant tenant was not only guilty of changing the mode of user from residential-cum-educational purposes to exclusively educational purpose but also guilty of subletting the suit premises to a third party namely the school authority without written consent of the landlord. According to him, the purpose of tenancy was residential-cum-educational and that the dominant purpose was residential and that educational purpose was incidental thereto. He further submits that the defendant tenant was liable to be evicted not only for changing the mode of user u/s 13(1)(h) of the W.B.P.T. Act., 1956 but also for subletting and/or parting with possession of the suit premises u/s 13(1)(a) of the Act, 1956. In support of his contention he refers a case law reported in 1985 (1) CHN page 40 (Giridharilal Soni vs. Sm. Maya Roy) wherein it was held that once it was found that the defendant admittedly carried on business in the suit premises, then even if some of his men were living there, the suit premises could no longer be treated as a defendant's residence.

10. He also refers case laws reported in Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others, and Shantilal Rampuria and Others Vs. Vega Trading Corporation and Others, to impress upon this Court that as defendant tenant handed over possession of the entire suit premises in favour of the school being run by a Managing Committee without written permission of the plaintiff landlord, defendant was guilty of subletting u/s 13(1)(a) of the Act, 1956 and that learned Courts below failed to take note of the same.

11. Mr. Bhaskar Ghosh, Learned Counsel for the respondent/defendant, on the other hand, submits that Section 13(1)(h) of the Act, 1956 is attracted only when the tenancy was exclusively for residential use but in the case in hand, the tenancy was for both residential as well as educational purposes and hence Section 13(1)(h) of the Act cannot be attracted for using the suit premises for running a school. He further submits that the suit premises was taken on rent for being used for residential-cum-educational purposes and that the plaintiff landlord was aware from the very inception that said tenancy was taken for running a school by the defendant and also for keeping caretaker/darwan for

guarding the school properties and hence there was no violation of the terms of the agreement. He further submits that defendant being proprietor of the school there was no question of subletting or parting with possession of the suit premises in favour of the school which is managed by a Managing Committee. In this connection he draws the attention of the Court about the evidence of defendant (D.W.1) wherein she categorically deposed that she took the tenancy for running a school in the suit premises and that as per terms of said agreement the school was started after making publication in the newspapers and that plaintiff was present in the inauguration ceremony of starting of the school and the plaintiff was very much aware of the intention of the defendant regarding the mode of use of the suit premises. He further submits that defendant further deposed that not only during school exams but also during puja holidays she resided in the school premises and that most of the evidence remained unchallenged during cross-examination. According to him, there was neither any change of user nor any subletting and that learned Lower Appellate Court was justified in reversing the decree for ejectment on the ground of change of user. In support of his contention he referred a case law reported in AIR 1968 Supreme Court page 438 (Miss S. Sanyal vs. Gian Chand) wherein it was held that when a premises was let out for residential and non-residential purposes the contract of tenancy was single and indivisible and hence it cannot be divided into two contracts. The admitted position of the case as it appears from materials on record as well as from the submissions of Learned Counsels of the parties may be summarized as follows:-

- (1) The plaintiff let out the suit premises to the defendant in terms of an agreement dated 12th of January, 1988 for being used for residential-cum-educational purposes.
- (2) The defendant started a school upto class-VIII in the suit premises from the very inception.
- (3) There were advertisements in the daily renowned newspapers regarding opening of said school in the suit premises.
- (4) Though the defendant was the owner of the school but it was managed by a Managing Committee.
- (5) The defendant being headmistress in said school gets salary like other teachers from the Managing Committee.
- (6) There is a caretaker for guarding the school premises in the suit premises.
- (7) Defendant used to reside in Sunny Park at the time of entering agreement and later on started to reside at Salt Lake. Defendant sometimes resided in the school during school exams and also for some period during school vacation.
- (8) There were series of correspondence between the parties commencing from April, 1998 (Ext.5 series) as to the meaning of the term "residential-cumeducational purpose".

(8a) Plaintiff wanted to mean that suit premises was let out for being used as residence with liberty to use it also for coaching students i.e., for educational purposes.

(8b) Defendant tenant, on the other hand, claimed that suit premises was let out for the purpose of running a school and also for being used as residence of the caretaker/darwan.

(9) The plaintiff landlord resides in the first floor of the suit premises with his family members.

(10) Very near to suit premises there was another school in that locality.

12. Learned Trial Court passed a decree on the ground of change of mode of user of the suit premises from residential to the purpose i.e., running a school. Learned Trial Court based his judgment with the observation that defendant tenant did not reside in the suit premises though it was let out for residential purpose. He further observed that suit premises consisting of only three rooms, kitchen, bath, privy and garage cannot be conceived to be used as a full-fledged school. He further observed that as defendant did not reside in the suit premises it amounted to change of user within the meaning of Section 13(1)(h) of the Act of 1956.

13. Learned Lower Appellate Court, on the other hand, observed that "residential-cum-educational purpose" means using of the suit premises both for residential as well as educational purposes and that residential purposes need not mean permanent and de facto residence. According to him, the expression "residential purpose" contemplates not only permanent residence but also temporary residence. According to him, the words "residential purposes" used in the agreement must be construed to mean not only de facto or actual residence but also a temporary or de jure residence. According to him, the evidence of the defendant/tenant (D.W.1) that he took tenancy of the suit premises mainly for running a school or that there were advertisement in newspapers for running said school and that plaintiff landlord was present in the inauguration ceremony and also took advance for making some remodeling and was aware from the very inception about the intention of the defendant for running a school and also the physical running of the school, remained almost unchallenged during evidence. Accordingly, learned Lower Appellate Court held that as the suit premises was let out for both residential and educational purposes, the fact of running of a school having temporary stay of defendant therein did not make any violation of the terms of the agreement and hence it did not amount to change of user of the residential premises for other purposes.

14. There is no denial that the suit premises was let out for residential-cum-educational purposes. The term "cum" means in addition to. If we use said plain english meaning of the word "cum" then the purpose of tenancy becomes "residential" and in addition to "educational purpose". If the tenancy was meant for running a school simpliciter then the tenancy would have been for educational

purposes only. If a school is run in a premises then it is expected that a caretaker/darwan will stay in the school premises to guard properties of the school. For staying of a darwan or night guard or caretaker in the school premises the tenancy was not required to include the term "residential" in addition to the term "educational purposes". Even if the word "residential" was intended to be included for staying of a darwan in the school premises for guarding school property then the term would have been "educational-cum-residential purposes" and not "residential-cum-educational purposes". The term "cum" does not mean "and". Said term "cum" means in addition to. When the tenancy was for residential-cum-educational purposes then as per agreement the suit premises should have been used for residence as well as for educational purposes. If defendant tenant used to stay in the suit premises and also used even a major portion of the same for running an educational institution it could have been said that there was no violation of the terms of the agreement or that there was no change of user. Casual stay of the defendant in the school premises for a few days either during examination period or during puja holidays cannot be said to use the suit premises for the purpose of residence also. The case law referred by Learned Counsel for the respondent tenant is not applicable in the facts of this case as in said case the premises were let out for both residential and non-residential purposes whereas in the present case the premises was let out for residential purpose together with permission to use it for educational purposes also. There is no denial also that from the very inception i.e., from April, 1998 there were series of correspondence between the parties when plaintiff landlord raised objection to use of the suit premises as a full-fledged school by the defendant tenant without using the same for residential purposes.

15. It is also pertinent to note that suit premises consists of only three rooms, kitchen, bath, privy and garage. From the description of the suit premises as per schedule of the plaint as stated above it is unthinkable to a reasonable and prudent man that it can be used for running a full-fledged school upto class-VIII. The report of the Commissioner also revealed that kitchen and garage are being used by the defendant tenant as class rooms of the school. Even if it is admitted for argument's sake that landlord was aware that a school was going to be started in the suit premises in view of the clause "educational purposes" in the agreement even then it cannot be said that landlord was aware that suit premises would be used only for school and not for residence of the defendant. Again, even if the landlord became aware of using of the suit premises only for running a school and not for residence of the defendant tenant, still in absence of any consent in writing for said exclusive mode of use, Section 13(1)(h) of the Act 1956 can be attracted. As alleged casual stay of the defendant tenant in the suit premises or the stay of any caretaker of the school in the suit premises did not amount to using the suit premises for residential purposes, the defendant tenant was guilty of violating Section 13(1)(h) of the Act of 1956.

16. Accordingly, I am of the opinion that the impugned judgment of the learned Lower Appellate Court reversing the decree of ejectment passed by learned Trial

Court on the ground of change of mode of user was not sustainable in law.

17. The Learned Counsel for the appellant landlord also prays for an ejectment decree on the ground of subletting/assignment. It is true that the school situated in the suit premises is being run by a Managing Committee. It is not also denied that the defendant tenant who also acts as headmistress of said school gets salary from said managing committee like other teachers. But the defendant being proprietor of the school cannot be said to sublet or parted with possession of the suit premises within the meaning of Section 13(1)(a) of the Act of 1956. Accordingly, I do not find any infirmity in the judgment of learned Court below in the matter of refusing to grant any ejectment decree on that score. No other point was agitated before this Court at the time of hearing of this second appeal.

18. In view of the discussions as made above the impugned judgment of learned Lower Appellate Court is not sustainable in law and is accordingly set aside by restoring the judgment of the learned Trial Court.

19. As a result, the appeal is allowed on contest but without costs. The judgment and decree of learned Appellate Court is hereby set aside.

20. In view of disposal of the appeal the pending application (CAN No. 9863 of 2010) becomes infructuous and stands disposed of.

21. Admittedly, the defendant tenant is running a school in the suit premises. It is true that said school is still unaffiliated to any board but there is no denial that the students are reading in said school. Under these circumstances if said school is asked to be removed from suit premises within a short notice then not only the school authority but also the students will face immense difficulty. Accordingly, I am of opinion that the defendant tenant may be given sufficient time before asking her to vacate the suit premises provided she gives necessary undertaking to that effect. The appellant tenant is permitted to hand over vacant possession of the suit premises to the respondent landlord on or before 30th September, 2012 provided an undertaking to that effect is given by the appellant tenant in the learned Trial Court within one month from this date failing which the decree would be executable just on expiry of said one month.

22. Send down Lower Court records along with a copy of this judgment to the Lower Court at the earliest.

23. Urgent photostat certified copy of this judgment be supplied to Learned Counsel/counsels of the party/parties, if applied for.