
(2011) 08 CAL CK 0183

In the Calcutta High Court

Case No : S.A. No. 621 of 2007 and C.A.N. 4088 of 2004

Ram Krishna Ghosh Mondal and Others

APPELLANT

Vs

Sri Chitta Ranjan Mondal

RESPONDENT

Date of Decision : 19-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25, Order 41 Rule 27

Transfer of Property Act, 1882 — Section 108

West Bengal Premises Tenancy Act, 1956 — Section 17(4)

Citation : (2011) 08 CAL CK 0183

Hon'ble Judges : Tarun Kumar Gupta, J

Bench : Single Bench

Advocate : Asish Kumar Bagchi, Amal Krishna Saha, Chitta Ranjan Chakraborty and Debnath Mahato, for the Appellant; Arunava Jana and Basudeb Gayen, for the Respondent

Judgement

Tarun Kumar Gupta, J.—This Second Appeal is directed against judgment and decree dated 30th March, 2002 passed by learned District Judge, Howrah in Title Appeal No. 246 of 1999 reversing the judgment and decree of eviction dated 20th September, 1999 passed by learned Civil Judge (Junior Division), 7th Court, Howrah in Title Suit No. 67 of 1981.

2. Appellant/Plaintiff's case after several amendments of the plaint is that they were owner of the suit house through a registered deed of conveyance dated 11th February, 1976 and that Defendant who was a tenant under the previous owner namely Keshab Chandra Roy Chowdhury and his wife Smt. Naresh Prova Devi in respect of suit premises at a rental of Rs. 85/- per month, continued to be a tenant under the Plaintiffs. The Defendant defaulted in payment of rent and was guilty of causing waste and damage as well as of causing violation of the provisions of (M),(O),(P) of Section 108 of Transfer of Property Act. It was further case that the suit property was reasonably required by the Plaintiffs for starting Homeopathy practice by Plaintiff No. 1's son who passed Homeopathy. It was further case that in spite of termination of tenancy of the Defendant/tenant

by sending a notice he did not vacate the suit premises.

3. The Respondent /Defendant contested the suit by filing written statement followed by several additional written statement. The Respondent/Defendant denied material allegations of the plaint and contended inter alia that he was a Thika tenant under Keshab Chandra Roy Chowdhury and made constructions on suit land and that Plaintiffs illegally dispossessed Defendant from a portion of the suit property on 25th of August, 1987. It was further case that suit property would be acquired by Howrah Improvement Trust and hence Plaintiff could not get any decree of ejectment.

4. After contested hearing learned Trial Court opined that Respondent/Defendant was a tenant under the Plaintiffs who were owners of the suit property by purchase and that the tenancy was terminated through a notice and that the Plaintiffs were entitled to get a decree for ejectment on the ground of default. However, learned Trial Court did not pass any ejectment decree on any other ground including the ground of requiring the suit property by the Plaintiffs for use of their son as a Homeopath doctor.

5. Respondent/tenant filed an appeal being Title Appeal No. 246 of 1999 in the Court of learned District Judge, Howrah against said judgment and decree of ejectment on the ground of default.

6. The Appellant/Plaintiffs also filed a cross appeal as No. decree was passed on the ground of reasonable requirement.

Learned Appellate Court found that Respondent /tenant was entitled to get protection against eviction on the ground of default u/s 17(4) of the West Bengal Premises Tenancy Act, 1956 and accordingly, he set aside the impugned judgment and decree of ejectment on the ground of default. Learned First Appellate Court, however, concurred with learned Trial Court on other issues including the issue as to the reasonable requirement. As a result, the cross appeal was dismissed.

7. During pendency of this appeal an application being CAN No. 4088 of 2004 under Order 41 Rule 27 of the CPC was filed by the Appellant Plaintiffs to adduce further evidence in support of their claim that suit premises was reasonably required for use of Plaintiff No. 1's son who was practising Homeopathy.

8. Both the appeal and the application were taken up for hearing together.

9. During hearing Mr. Asish Kumar Bagchi, learned advocate for the Appellants, submits that learned Trial Court rejected the Plaintiff's claim of reasonable requirement of the suit premises for being used by Plaintiff No. 1's son who passed Homeopathy, as a chamber on the ground that No. document was filed to show that the son of the Plaintiff has started his medical profession. According to Mr. Bagchi, the Appellants may be permitted to prove the enclosed documents namely certificate of enlistment issued by Howrah Municipal Corporation from year to year in favour of Plaintiff No. 1's son as Homeopath consultant, challans

showing payment of professional tax by Plaintiff No. 1's son, income tax returns filed by the Plaintiff No. 1's son as a Homeopath practitioner. According to Mr. Bagchi "the reasonable requirement" is a continuing cause of action and that if Appellants are not permitted to adduce further evidence in terms of the instant application resulting dismissal of the appeal then Appellant /Plaintiffs have to file a suit for ejectment on the same ground de novo causing unnecessary harassment to the parties. Accordingly, Mr. Bagchi has prayed for allowing this application and for remand of the suit to the Lower Appellate Court for permitting the parties to adduce further evidence on the point of not only proving these documents but also on the issue of reasonable requirement of the suit premises by the Appellant/Plaintiffs.

10. Mr. Arunava Jana, learned advocate for the Respondent, has strongly opposed this application by submitting that a party cannot be permitted to fill up his lacuna by permitting him to adduce further evidence at the time of hearing of the Second Appeal. He has further submitted that the instant application under Order 41 Rule 27 of the CPC was not maintainable as those documents were well within the custody of the Appellants during pendency of the trial or at least during pendency of the first appeal.

11. Mr. Jana has further submitted that one of the grounds of dismissing Appellant/Plaintiffs' claim for reasonable requirement of the suit premises was that Appellant/Plaintiffs did not take any step whatsoever at any stage and even during the hearing of the appeal in the Court of Lower Appellate Court for local inspection of the suit premises as well as premises under their possession and control to establish that they had No. reasonably suitable accommodation elsewhere for the purpose for which suit premises was sought for, or that suit premises was a reasonably suitable accommodation for their purpose.

Order 41 Rule 27 of the of the CPC runs as follows:

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

12. On plain reading of the provisions of Order 41 Rule 27 of the CPC it is clear that an application under said Section can be allowed if any of the three conditions mentioned therein are fulfilled. The first condition is that the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted. The alternative second condition is that the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after exercise of due diligence, be produced by him at the time when the decree appealed against was passed. The third alternative condition is that the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

13. In the case in hand, the first condition is not applicable as there is No. case of refusal to admit evidence.

14. Trial Court judgment was passed on 20th September, 1999 and the Lower Appellate Court judgment was passed on 30th March, 2002. Some of the documents namely certificate of enlistment issued by Howrah Municipal Corporation from time to time, challans showing payment of professional tax and income tax returns were found to be in custody of the present Appellants at the time of hearing of the appeal in the Lower Appellate Court. But it is a fact that some more documents of the same nature of some subsequent years were also annexed to substantiate Appellants'/Plaintiffs' claim of reasonable requirement. I am of opinion that the instant application under Order 41 Rule 27 of the CPC may be allowed for ends of justice but subject to payment of some cost by Appellants to Respondent.

15. It appears from the impugned judgment dated 30th March, 2002 passed by learned Lower Appellate Court that though it came out from evidence that during pendency of the suit present Appellants /Plaintiffs made further construction in the suit holding but Appellant/Plaintiffs did not take any step to establish that in their existing accommodation or in the added new accommodation there was No. reasonably suitable accommodation for being used for the purpose for which the suit was filed. It further appears from the judgment impugned that Appellant / Plaintiffs did not pray to make local inspection of the suit premises to show that the same was suitable for being used for the purpose for which they were requiring the same.

16. At the time of admission of the second appeal the following substantial question of law was framed.

17. Whether the lower Appellate Court was justified in dismissing the suit for eviction even on the ground of reasonable requirement or ought to have remanded the said issue in exercise of his power under Rule 25 of Order 41 of the CPC for finding after holding a local inspection?

18. Order 41 Rule 25 of the CPC runs as follows:

19. Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefore, within such time as may be fixed by the Appellate Court or extended by it from time to time.

20. As per provision of said Section if the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take additional evidence required.

21. It appears that in the Trial Court No. specific issue was framed as to whether Appellants/Plaintiffs have reasonably suitable accommodation elsewhere to meet their demand. Non-framing of said issue would have been of No. consequence if both parties adduced evidence on that score in support of their respective stand. But in the case in hand it appears that No. evidence was also led by either side on this point. It is thus apparent that for non-framing of said specific issue both sides were misled resulting tendering of No. evidence on that score. Again, for non-framing of said issue there was No. prayer for local inspection of the available accommodation of the Plaintiffs vis-?-vis the suit premises.

22. Accordingly, I am of opinion that learned Lower Appellate Court failed to exercise the jurisdiction so vested on him under Rule 25 of Order 41 of the CPC and should have remanded the case to the Trial Court for framing said specific issue with liberty to parties to adduce further evidence on that score by applying for local inspection and/or by other mode.

23. In view of the above discussions the instant appeal is allowed by way of setting aside the impugned judgment of Lower Appellate Court so far it relates to issues No. (6) and (8). Learned Lower Appellate Court is hereby directed to frame a specific issue i.e., whether the Plaintiffs had any reasonably suitable accommodation elsewhere for meeting the need of reasonable requirement as claimed in the suit. Learned Lower Appellate Court shall permit the parties to adduce further evidence, if any, on that point.

24. Learned Lower Appellate Court shall also permit the Appellants/Plaintiffs to adduce further evidence under Order 41 Rule 27 of the CPC for proving the documents namely certificate of enlistment issued by Howrah Municipal

Corporation in the name of Plaintiff's son from time to time, challans showing payment of professional tax and income tax returns as per law subject to payment of a cost of Rs. 5001/- by the Appellants/Plaintiffs to the Respondent/Defendant within a time frame to be fixed by learned Lower Appellate Court. Only on payment of said cost within the time frame learned Lower Appellate Court will allow the Appellant/Plaintiffs to prove those documents as per law. After conclusion of evidence, if any, of both sides learned Lower Appellate Court shall hear argument only on issue Nos. (6), (8) and the additional issue so framed and thereafter shall pass judgement as per law. In this connection I like to mention that No. other issue is required to be reopened as those have already been disposed of by the judgment impugned and there was No. submission against findings relating to those issues. As this is an old suit of 1981 learned Lower Appellate Court is requested to complete the entire process within six months from the date of receipt of the case record along with a copy of this order.

The appeal stands disposed of accordingly.

25. Send down lower Court record along with a copy of this judgment to learned Lower Appellate Court at the earliest.

26. Urgent xerox certified copy of this judgment be supplied to learned Counsel / Counsels of the party/parties, if applied for.