

(1961) 08 CAL CK 0013
In the Calcutta High Court
Case No : A.F.A.D. No. 718 of 1956

Rupeswari Debi

APPELLANT

Vs

Lokenath Hosiery Mills

RESPONDENT

Date of Decision : 31-08-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 105, 11

Transfer of Property Act, 1882 — Section 106

West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 — Section 21

Citation : AIR 1962 Cal 608 : (1962) 1 CALLT 359 : 66 CWN 414

Hon'ble Judges : C.N. Laik, J

Bench : Single Bench

Advocate : C.C. Ganguly and Gyan Chand Tandon, for the Appellant;
Ganganarayan Chandra and Ajit Kumar Bose, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Laik, J.—This appeal is on behalf of the plaintiff and it arises out of a suit for ejectment under the Rent Control Act, 1950. The plaintiff's case in short was that the defendants were a firm and were monthly tenants in respect of the entire premises No, 28-B, Nalin Sarkar Street, Calcutta at a rate of rent of Rs. 97-3-6 per month. Only ground for ejectment was that the defendants defaulted in paying rents for two months each, on more than three occasions in course of 13 months. I may state here that no other particulars of default have been given in the plaint but it transpires from evidence that the defendants defaulted in payment of rent for two units from the month of May to September, 1951 for short payment of only 6 pies each month and the third unit is for November and December, 1951.

2. In spite of alleged default in 1951 the notice for ejectment was not sent before 4th February, 1954 and thereafter the present suit was instituted on the 24th May, 1954. The defence was two-fold. Firstly, the notice was invalid and insufficient and secondly that the defendants were not defaulters. The learned

Small Cause Court Judge did not accept both the defences and therefore decreed the suit. The defendants thereafter preferred an appeal before the Special Bench of the Court of Small Causes, Calcutta and the learned Judges allowed the appeal. In allowing the appeal it has been held that the defendants are not defaulters because there is no evidence of default for the month of June 1951. Nonetheless the learned Judges held that though the defendants paid the sum of Rs. 177-1-3 representing both the owners' and occupiers' share of taxes and the balance sum of Rs. 17-5-9 was also deposited on 22-8-1955, being the rent due from November, 1951, still the defendants were not entitled to deduct the occupiers' share of the consolidated rate. The learned Judges committed a mistake by not looking into the records by holding that the deposit of Rs. 17-5-9 was made on 22-8-1955, which is not a fact. The record shows that the sum was deposited on 15-1-1952. Lastly even if the defendants were defaulters for the month of November and December, 1951, as held by the learned Judges, they were not held to be defaulters for the earlier two units.

3. On the question of notice the learned Judges held that the tenancy was for manufacturing purposes and therefore 15 days' notice was insufficient and in consequence the learned Judges allowed the appeal, as I have already stated.

4. Aggrieved by the said judgment and decree the plaintiff has preferred the present appeal in this Court. The defendants have also filed a cross-objection for not allowing them to deduct the sum of Rs. 177-1-3p. towards rent.

5. Mr. Ganguly appearing on behalf of the appellant contended, in the first place, that the notice is sufficient and his grounds are that the premises when let out, was not exclusively for manufacturing purposes, but was for a mixed purpose, that is, for manufacturing as well as for residential purpose and therefore 15 days' notice was sufficient in view of the provisions of Section 106 of the Transfer of Property Act. In support of the said contention Mr. Ganguly referred me to the decision reported in *Sati Prasanna Mukherjee and Others Vs. Md. Fazel*, . He also referred me to an unreported decision of Chatterjee, J. in *S. A. No. 391 of 1958, Chandra Kanta Jha v. Badrinarain Shaw*, in support of his proposition that without sufficient materials on the record, as in the present case, it cannot be held that the tenancy is being used for manufacturing purposes. In the second place Mr. Ganguly contended that there is no escape from the defendants being defaulters, as it is admitted that there was a short payment of 6 pies each month which will be borne out by Ext. 3 series, that is, the money order coupons. He said that under the provisions of Section 2 read with Sections 12 (1) (i) and Section 14 of the 1950 Act, rent must be the entire rent even including the said shortage of 6 pies. He also contended that payment to the Corporation or payment to the municipal authorities of the shares of taxes in the absence of a contract or agreement would not be tantamount to payment of rent to the landlord and in support of the said contention he referred me to the decision in *ILR (1951) 1 Cal 627 Manmatha Nath Sadhukhan v. Abdus Sobhan*.

6. Mr. Chandra on behalf of the respondents tried to answer, so far as the question of notice is concerned, by saying that there is already an application filed (in respect of the very premises which is the subject-matter of the present appeal and which has been marked Ext. 1 in this case) under the provisions of Section 9 of the Act of 1948, by the plaintiff appellant for standardization of rent, in which the plaintiff herself admitted that the premises are being used for manufacturing purpose and the same was not for residential purpose. On the basis of the said application the plaintiff has obtained an order in her favour for an increase of 25 per cent of the rent and therefore Mr. Chandra contended that the said application and the order passed thereon are res judicata between the parties and it will not be open to the plaintiff appellant now to contend that the tenancy was not for manufacturing purpose.

7. On the question of default, Mr. Chandra contended that none of the coupons--Ext. 3 series, relates to any year. Only months of May onwards, except the month of June, are mentioned in those coupons and therefore it cannot be said that the plaintiff has been able to prove that his clients were defaulters from May to September, 1951 on the basis of the said money order coupons. Moreover he contended, that assuming it was short by 6 pies each month, nonetheless the plaintiff accepted the said rent and it will be a waiver on her part to say now that the defendants have committed defaults and in support of his contention, he referred to Section 21 of the 1950 Act which lays down that the deposit of rent will not be a waiver, as there is no mention therein about the remittance of rent by money order.

8. As to the last unit of default, namely, for November and December, 1951, Mr. Chandra says that his client were forced to pay the municipal taxes on notice or demand and the decision cited by Mr. Ganguli does not apply to the facts of the present case. Mr. Chandra also referred me to a decision reported in Karnani Properties Ltd. Vs. Augustin, , and tried to contend that even if the payment to the municipal authorities is a voluntary payment, still, according to the said decision, it should be taken as payment of rent to the landlord.

9. Now so far as the first point as to notice is concerned, my opinion is that the notice is not sufficient and the suit should fail on this ground alone. It is admitted that the defendant firm are running a hosiery factory in the premises. Though it appears from the evidence that one of the rooms in the 1st floor is being occupied by one of its officers for residence, in my view, the same would not make the purpose of the tenancy a residential purpose or a mixed purpose, that is, both for manufacturing and for residential purpose. In the decision reported in Sati Prasanna Mukherjee and Others Vs. Md. Fazel, , the relevant clause in the lease was to the following effect:

"....I shall occupy the same for dwelling purposes, for setting up a press and for ordinary business purposes."

On interpretation of this clause P. B. Mukherji J. held that the same was a lease

for multiple purpose and does not come within the meaning of "manufacturing purpose" in Section 105 of the Transfer of Property Act. But so far as the facts of the present case are concerned, there is no purpose like dwelling purpose except occupation of one room in the 1st floor, as I have already stated, and the principal purpose is for manufacturing purpose. In my view, the said decision does not support Mr. Ganguli's argument. In the Bench decision reported in 50 Cal WN 441 : AIR 1946 Cal 317 *Joyanti Hosiery Mills v. Upendra Chandra Bijan Kumar Mukherjee* dealt with a case of a hosiery factory and his Lordship held, Blank J. agreeing with him, that the same was a lease for manufacturing purpose within the meaning of Section 106 of the Transfer of Property Act. Chatterjee J. in the said unreported decision which is a case of bakery business, has held that to decide whether a business is for manufacturing purpose or not, would depend whether the same is being made on a large scale or a smaller scale and as there was no finding in that case, according to Chatterjee J. his Lordship sent the matter back to the court of appeal for arriving at a finding as to whether it was let out for making bread, biscuits or cakes on a large scale. It appears that the attention of, his lordship was not drawn to the said Bench decision in 50 Cal WN 441: (AIR 1946 Cal 317) and the decision in *Sati Prasanna Mukherjee and Others Vs. Md. Fazel*, . In view of the principles laid down in the said decisions. I am sorry I am unable to accept the principles of law laid down by Chatterjee J. in his said unreported decision.

10. As to Mr. Chandra's point that the said Ext. I, viz., the application for standardization of rent is *res judicata*, I am afraid I am unable to accept the said contention. It is now a settled law that the reasoning is not *res judicata* but the decision is. Though in the said application it has been stated by the plaintiff that the tenancy was for manufacturing purpose, but nonetheless, in my view, Mr. Chandra cannot argue that the statement made in the said application for standardization of rent would operate as *res judicata* between the parties. On this proposition I am supported by the Bench decision of this Court reported in *Profulla Chandra Vs. Prabartak Trust*, . There is another thing. The plaintiff's own witness has stated that when the defendant took settlement, they did so for starting a hosiery factory, though he immediately added thereafter "and also for residential purpose". In my view, the said addition is an afterthought, as has been rightly stated by the Special Bench Judges in the Court of appeal below.

11. Mr. Ganguli further contended that a distinction must be drawn between the purpose and the user of the tenancy and he referred to Schedule A, Clause 3 of the Rent Control Act, 1950. According to him, though the premises were being used for hosiery factory but the original purpose was not as such. Hence he can take advantage of Section 106 of the Transfer of property Act by contending that it was not for manufacturing purpose. I am afraid I cannot accept the contention of Mr. Ganguli, because if the premises are required and used for manufacturing purposes to the knowledge of the landlord or the lessor, which fact I find is based on evidence in the present case, still then six months' notice would be necessary. I may refer in this connection to the decision in *William Jacks and Co.*

Vs. Joosab Mahomed, . Hence Mr. Ganguli's contention on the point of notice fails. It is also curious to note that nothing has been mentioned in the plaint about the purpose of the tenancy.

12. On the next ground, that is, on the ground of default, my view is that the defendants are not defaulters. I find from the challan that when the money order coupons, were first filed, they were seven in number but only five of them have been marked which are Exts. 3 to 3 (d). There is no explanation as to where the two other money order coupons are or when they have been taken out and/ or why they have not been marked as exhibits. It is curious that in none of these money order coupons the year is mentioned. The onus was on the plaintiff to prove that the defendants were defaulters and it was not for the defendants to say that they were not defaulters. It is extremely difficult for a court to hold that these money order coupons relates to the year 1951. Secondly it was also not proper on the part of the plaintiff not to state any particulars either of any month or of any year either in the notice or in plaint or in the subsequent application, u/ s 14(4). For the first time at the time of giving evidence, she sought to make out a case as mentioned above. It was a surprise for the defendants and it was difficult for them to give evidence in rebuttal, then and there.

13. I cannot accept the contention of Mr. Chandra that mere acceptance of the money order, though admittedly less than the agreed rent, will amount to a waiver on the part of the landlord and in my view the provisions of Section 21 of the 1950 Act are of no help to Mr. Chandra.

14. But I agree with the contention of Mr. Chandra that there is no default at least for the last unit, that is, for November and December, 1951 because the defendants were forced to pay the said sum of Rs. 17/-1-3 on 13-12-51 and the balance on 15-1-52. The defendants' witness has stated in examination in chief that there was an agreement that the landlord would pay both the owners' and occupiers' share of taxes and there is no cross-examination on this point by the lawyer appearing on behalf of the plaintiff. Now if there be such an agreement and the defendants are compelled to pay the Municipal taxes on behalf of the plaintiff, in my view, it should be regarded as payment of rent to the landlord. The decision cited by Mr. Ganguli, viz. ILR (1951) 1 Cal 627 does not help him as it relates to voluntary payment and the facts of the said decision are entirely different from the facts in the present case. I might say that the Supreme Court decision mentioned above as cited by Mr. Chandra is of no help to him because the same relates to amenities and conveniences, which is not the case here.

15. Of course, I cannot help observing that the reasonings of the learned Judges that because the defendants were mills or the tenancy stands in the name of the firm and not in the name of individual partners, the tenancy could never be residential, are faulty and cannot be accepted.

16. In the result, the judgment and decree of the Court of appeal below are modified. The appeal is dismissed. The cross-objection is allowed.

17. There will be no order as to costs in both the appeal and the cross-objection.