
(1982) 11 CAL CK 0001
In the Calcutta High Court
Case No : A.O.D. No. 988 of 1980

Sachindra Kumar Ghosh

APPELLANT

Vs

Prativa Devi

RESPONDENT

Date of Decision : 30-11-1982

Acts Referred:

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

Citation : (1982) 11 CAL CK 0001

Hon'ble Judges : P.K. Banerjee, J

Bench : Single Bench

Advocate : S.C. Mitter, A.M. Dhar and Jyotirmoy Guha, for the Appellant;
Saktinath Mukherjee, Basudeb Banerjee and Debaprosad Mukherjee, for the
Respondent

Final Decision : Dismissed

Judgement

P.K. Banerjee, J.—This appeal at the instance of the defendant arises out of a suit for eviction on three different grounds. But we are concerned only with one ground in this second appeal at the present moment that is section 13(1)(h) of the West Bengal Premises Tenancy Act in respect of tenant's use of the tenancy for the purpose other than the residential purpose for more than four months without consent in writing of the landlord. The fact of the case in a nut shell is that the defendant is a monthly tenant under the plaintiff in respect of ground floor flat viz. 3 bed rooms, kitchen, privy etc. in Premises no. 23A, Sahanagar Road, P.S. Tollygunge at a rental of Rs. 120/- per month according to English calendar. It is stated that the defendant is using the said premises for business purpose for manufacturing Dhoop without the written consent of the plaintiff, although the said premises was let out for residential purpose only and as such the plaintiff served a notice of ejection asking the defendant to vacate the premises with the expiry of the month of October 1973. The defendant not having complied with the said notice, a suit was filed against him by the plaintiff. By filing a written statement the defendant contested the suit and denied that

the plaintiff required the premises in question for her own use and occupation. But in so far as the allegation of using the premises for business or manufacturing purpose is concerned, the defendant contended that he was carrying on the said business in the suit premises for a long time with the consent of the plaintiff. Therefore, he is not liable to be evicted u/s 13(1)(h) of the West Bengal Premises Tenancy Act. The court of first instance dismissed the suit. On appeal the decree being reversed, the present second appeal has been preferred by the defendant.

2. The moot question which arises for my consideration is whether the ejectment decree passed by the appellate court is sustainable.

3. Mr. Mitter on behalf of the appellants contended that the defendant was inducted as tenant in 1954 and he was carrying on the said business with the knowledge of the plaintiff all the time. Therefore, it is argued by Mr. Mitter that as the tenancy began before 1956 Act came into force, the plaintiff cannot have a decree u/s 13(1)(h) of the West Bengal Premises Tenancy Act, 1956. Mr. Mitter further contended that the plaintiff having knowledge of the manufacturing business being carried on by the defendant, has waived his right even if it is assumed that the defendant is carrying on a business in the residential house. Mr. Mitter relied upon a case of Sant Ram vs. Rajindar Lal and others reported in 1979(2) Supreme Court Cases 274 in support of his contention. Mr. Mitter also relied upon Redman's Law of Landlord and Tenant, 8th Edition at page 375 in support of his contention.

4. Mr. Mukherjee on behalf of the respondent, however, contended that 1979(2) S.C. Cases does not apply in the facts of the present case because the premises is let out for residential purpose exclusively and unless written consent is obtained by the defendant from the landlord, it cannot be converted into any purpose other than the residential purpose. Mr. Mukherjee, however, contended that in the present case no written consent was taken by the defendant from the plaintiff landlord.

5. In so far as the decision reported in 1979(2) S.C. Cases, page 274 is concerned, it appears to me that it does not fit in with the facts of the present case. Admittedly, in the present case this is not disputed that initially the defendant took the premises for residential purpose in respect of three bed rooms. It is also not disputed, as evident from the defendant's witness no. 1, that he was carrying on business for manufacturing Dhoop in two of the three bed rooms. It is clear from their own exhibits filed by the defendant that in their company's letter head their head office is shown as 12, Chowringhee Road and 23A, Sahanagar is stated to be their factory. No written permission was obtained from the landlord for carrying on the business and/or manufacturing Dhoop in the said premises after 1959. On the other hand, it appears that they applied for electric meter for commercial use in 1961 and it is alleged that they had taken consent from the husband of the plaintiff in 1971 for running 1 Horse Power Motor in their laboratory. This is exhibit "B" produced on behalf of the defendant.

Ext. B, in my opinion, is not at all admissible in evidence because it is a photostat copy. On the other hand, the case of the defendant was patently wrong that he had taken permission from the landlord, the present respondent. Admittedly, Ext. B which is a photostat copy, is not a permission given by the landlord for the purpose of carrying on business in the premises. If at all it can be interpreted as consent given by the husband of the plaintiff for taking electric connection, but it is not clear for what purpose, even if it is held that this is admissible in evidence. But in my opinion, as the original has not been produced, the photostat copy is not admissible as secondary evidence and there is no evidence of any of the persons who have seen the original from which the photostat copy was taken. In the circumstances, therefore, it cannot be said that the written permission was taken by the defendant from the landlord for conversion of use of the premises having three bed rooms for manufacturing. Dhooop at least in two bed rooms which are being occupied by the defendant.

6. The next question which has been contended by Mr. Mitter is that as the landlord had full knowledge of the breach of covenant, it amounts not only to waiver of the past breach, but to a licence to continue the breach in future. Mr. Mitter relied upon the opinion of Chief Justice Cockburn in *Griffin Vs. Tomkins* (1880), 42 L. T. 359. This has been quoted at page 375 of the book of Redman on Law of Landlord and Tenant, 8th Edition which runs as follows :

in the case of a covenant of this description, where the lessor, with full knowledge of the breach, waives the forfeiture by acceptance of rent, it amounts not only to waiver of the post breach but to a licence to continue the breach in future. But in the case of a covenant not to use premises in a prohibited way, which the tenant broke by sub-letting to a weekly lodger, there was a continuing breach that is a renewed act every week during which the sub-letting took place, and it was held that the lessor, notwithstanding he had received rent with knowledge of the breach, could maintain ejectment in respect of continued user after the receipt of rent.

It is quite clear that after 1956 Act came into force if Dhooop manufacturing business is to be continued in a residential premises, written consent is to be taken from the landlord which was not admittedly taken. In the case reported in 1979(2) SC Cases the Supreme Court held in page 278 at Paragraph 7 that "not that oral permission to divert the user to a different purpose is sufficient in the face of the statutory requirement of written consent". In the present case it is statutorily required u/s 13(1)(h) of the West Bengal Premises Tenancy Act, and that if a residential premises is used for any other pur-written consent from the landlord is a condition precedent and without such consent the tenant is liable to be evicted u/s 13(1)(h) of the Act. In that view of the matter, in my opinion, there is no merit in this appeal.

7. The appeal is accordingly dismissed, but without any order of costs. In view of dearth of accommodation in the city it will not be possible for the appellant to get accommodation soon and as such I am inclined to give him time upto 30th of

November, 1983 from today on condition that he will file an undertaking within 31st of January, 1983 to this effect that he will vacate the premises on or before 30th of November, 1983 and will go on paying the mesne profit at the rate of Rs. 120/-per month according to English calendar till he vacates on the date as aforesaid. The first of such payment must be made by 15th of December, 1982 and thereafter by 15th of each succeeding month, The payment of mesne profit for the month of November, 1983 must be made positively by 15th of November, 1983 In default of filing the undertaking or in default of any of the payments on the dates as aforesaid, the decree will be executable at once.