

(2008) 03 CAL CK 0002
In the Calcutta High Court
Case No : S.A. No. 451 of 2001

Shri Gouri Sankar Chakraborty

APPELLANT

Vs

Smt. Moni Bhattacharjee and Others

RESPONDENT

Date of Decision : 06-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2008) 3 CALLT 273

Hon'ble Judges : Sadhan Kumar Gupta, J

Bench : Single Bench

Advocate : Haradhan Banerjee, Saroj Kumar Poddar, Rajlakshmi De and Sourav Banerjee, for the Appellant; Sabyasachi Bhattacharyya and Shehnay Tareq Mina for Respondent No. 5 and Sundar Gopal Bhattacharyya, for Respondent Nos. 1 to 4 and 6 to 11, for the Respondent

Final Decision : Allowed

Judgement

Sadhan Kumar Gupta, J.—This Second Appeal has been preferred against the judgment dated 26/9/2000 passed in Title Appeal No. 64 of 2000 by the learned Additional District Judge, 13th Court, Alipore, whereby he affirmed the decision of the learned Civil Judge (Junior Division), 4th Court, Alipore in Title Suit No. 181 of 1998.

2. The fact leading to the filing of the present appeal is that the plaintiff/appellant became the owner of the suit property situated in the ground floor of the suit house being No. 12/1C, Chanditala Lane, by virtue of the Will executed by his father Late Kali Sankar Chakraborty. Probate was duly obtained in respect of the said Will. The defendants are the tenants in respect of the suit premises and they were staying there as such from the time of Late Kali Sankar Chakraborty. After obtaining the probate of the Will, the plaintiff became the owner/landlord in respect of the said premises and the defendants are the tenants under him.

Plaintiff's family consists of himself and there sons and their children. As the

plaintiff has got no other reasonable suitable accommodation elsewhere, so the plaintiff required the suit premises for the use and occupation of his family. At present, as the plaintiff has got no accommodation elsewhere, so he is staying with his family in the flat of his brother Jyoti Sankar Chakraborty situated in the first floor of the suit premises as a licensee under him. Said Jyoti Sankar Chakraborty asked the plaintiff to vacate the said flat so that he can enjoy his flat exclusively. As such, the plaintiff is badly in need of a self-contained flat and his requirement will be fulfilled if he gets possession of his flat situated in the ground floor of the building now under the occupation of the defendants/respondents. According to the plaintiff he requires the suit premises for his own use and for the use of his sons. That apart he is required to provide accommodation to his full time servant.

3. Under such circumstances, the plaintiff served a notice upon the defendants/respondents asking them to vacate the suit premises. But as the defendants/respondents did not vacate the premises in question, so finding no other way out, the plaintiff/appellant filed the suit before the Court below praying for eviction of the defendants/tenants from the suit premises.

4. The defendants/tenants contested the suit by filing written statement, wherein they denied the claims of the plaintiff/appellant. They flatly denied the relationship of landlord and tenants in between them. They also denied that the plaintiff required the suit premises for his own use and occupation. According to the defendants the plaintiff and his family members are residing in the suit house in different portions and as such, they have got no dearth of accommodation, as claimed in the plaint. The defendants/tenants further denied that the plaintiff is staying in the flat of his brother Jyoti Sankar Chakraborty in the first floor of the suit house as a licensee under him, as claimed by the plaintiff. The defendants/tenants claimed that the plaintiff has sufficient accommodation elsewhere and as such, he did not require the suit premises for his own use and occupation. The defendants have prayed for dismissal of the suit.

5. Upon the above pleadings the learned Trial Court framed several issues and thereafter, after considering the materials on record and after hearing the parties, she was of the opinion that the plaintiff failed to establish that he had no suitable accommodation elsewhere and he reasonably required the suit premises for his own use and occupation. In the judgment the learned Trial Court also disbelieved the claim of the plaintiff on the ground that the plaintiff failed to get his present accommodation available in the suit house inspected, by way of appointing local inspection commission. As such, the learned Trial Court was of the opinion that in absence of such inspection, it was not possible for the Court to come to a conclusion as to whether the plaintiff had sufficient accommodation for his family members. Taking into consideration all these facts, the learned Trial Court was pleased to reject the contention of the plaintiff and dismissed the suit.

6. Being aggrieved and dissatisfied with the said Judgment, the plaintiff preferred an appeal and the learned First Appellate Court by his impugned judgment was

pleased to confirm the Judgment, so passed by the learned Trial Court and held that the plaintiff failed to establish that he required the suit premises for the use and occupation of himself and his family members. In addition to that the learned First Appellate Court further held that the plaintiff had adequate accommodation in Giridi and as such, he was not entitled to get an order of eviction of the defendants/tenants from the suit premises. Against this judgment of the learned First Appellate Court, this Second Appeal has been preferred.

7. It appears from the record that at the time of admission of the appeal, learned Division Bench was pleased to frame two substantial questions of law on 12/7/2001 and by the order dated 11/10/2001 question No. 2 was modified as there were some defects. The fact, as it stands now, is that following two substantial questions of law were framed by the learned Division Bench so far as the hearing of this Second Appeal is concerned.

i) Whether the Courts below erred in law substantially by holding that since the plaintiff is having a business at Giridi, he would not be entitled to get a decree for eviction on the ground of reasonable requirement for own use and occupation in respect of the suit premises which is at Calcutta?

ii) Whether the Courts below erred in law substantially by holding that the reasonable requirement of the plaintiff/appellant would be satisfied as the mother of the plaintiff/appellant had got a house on the basis of a Will executed by the admitted owner of the said house but not probated?

In addition to this, on 8/1/2008, after hearing the learned advocates for both the sides, another substantial question of law, as mentioned below, was framed:

iii) Whether the judgments of both the Courts below suffer from non-appreciation of the materials available in the record and whether both the judgments suffer from perversity due to the wrong approach taken by the Courts below?

8. On the basis of the above substantial questions of law, learned advocates for both the sides made their submissions.

9. At the very outset, it may be pointed out that the plaintiff has claimed that he is the owner of the suit premises. An attempt has been made by the defendants/tenants to deny the ownership of the plaintiff so far as the suit premises is concerned. But it appears from the evidence on record that the suit house belonged to the plaintiffs father Late Kali Sankar Chakraborty and he executed a Will in respect of the suit house. Probate has been obtained in respect of the said Will and the same was marked as Exhibit-I in the Court below. From the said Will it appears clearly that the suit premises, which is situated in the ground floor of the suit-house, was allotted in favour of the plaintiff/appellant. Both the Courts below came to the conclusion that from the materials on record there was no doubt that the plaintiff is the owner of the suit premises by virtue of the said Will.

10. Now the plaintiff has claimed that he requires the suit premises for himself and also for the use of his family members. According to the plaintiff, he has got

no reasonable suitable accommodation elsewhere except the suit premises and as such, the defendants/tenants should be evicted from the said premises in order to accommodate the plaintiff and his family members. It may be pointed out that there is no dispute that the defendants/respondents are staying in the suit premises along with their family members as tenants. Although, an attempt has been made that there was no relationship of landlord and tenant in between the plaintiff and the defendants, but it appears from the judgment of both the Courts below that this claim of the defendants was rejected after consideration of the materials on record. Substantial evidence has been adduced on behalf of the plaintiff/appellant to establish the relationship of landlord and tenant in between the parties. As such I do not think that it is permissible for the defendants/tenants to raise this point at this stage. I find no reason to differ with this finding of the learned Courts below.

11. Be that as it may, let us now see how far the plaintiff/appellant has been able to prove that he reasonably requires the suit premises. From the evidence, it has transpired that at that material time plaintiffs family consisted of 10 members including himself, his sons, daughter-in-law and their children. Undoubtedly, if the plaintiff has got no accommodation elsewhere, so the plaintiff certainly can claim that he requires the suit premises for accommodating his family members and for that reason the defendants/respondents should be evicted therefrom. But in order to justify this claim, the plaintiff is bound to prove that he has got no accommodation elsewhere. Let us now see how far the plaintiff has been able to prove that he has got no reasonable suitable accommodation elsewhere. In support of his claim, the plaintiff has adduced evidence. In, his evidence the plaintiff has claimed that at present he is staying in the first floor of the suit-house, which belongs to his brother Jyoti Sankar Chakraborty, as a licensee under him. He has further claimed that Jyoti Sankar Chakraborty already asked him to vacate the said flat immediately. In order to corroborate this claim, the plaintiff has examined Jyoti Sankar Chakraborty as a witness in this suit. Said Jyoti Sankar Chakraborty, in his evidence, clearly stated that the plaintiff/appellant is staying in his flat temporarily as a licensee under him and as he is at present facing difficulty in accommodating his own family members, so he asked the plaintiff to vacate his flat. This claim was countered by the defendants/respondents. But except giving some suggestions in denial to the claim of the plaintiff, there is nothing positive to dispute this claim of the plaintiff. So from the evidence on record, it appears that the accommodation which the plaintiff is now enjoying in the first floor of the suit-property cannot be said to be reasonable and suitable in nature particularly when the said accommodation is precarious in nature. Simply because the plaintiff is now staying in his brother's flat, that cannot be the reason for denying the plaintiff to enjoy his own property which is the suit premises now under the occupation of the defendants/respondents.

12. The defendants/respondents further contended that the suit-house is a two-storied building and in the roof there is another room along with bath and kitchen. According to the defendants in the second floor flat one of the plaintiffs

son is staying with his family members and after the death of the mother of the plaintiff her room, situated in the roof, is also under the occupation of the plaintiff and his sons. That the plaintiffs son is in occupation of the second floor and one room in the roof in the suit house is not disputed. According to him, his son is staying in that portion temporarily as because the ground floor flat which is under the occupation of the defendants has not yet been vacated by them. According to the plaintiff he intends to stay along with his son and other family members in the suit premises and for that eviction of the defendants from the suit premises is necessary. The plaintiff has claimed that the possession of the plaintiffs son in respect of the second floor and one room in the roof of the building cannot be said to be reasonable and suitable as because the plaintiff is not the sole owner of the said rooms. In this respect the learned advocate for the appellant drew my attention to the Will, wherefrom it will appear that the second floor flat of the suit house was kept as a jointly property of the brothers and it has transpired from the evidence that the other portion of the suit house which are in occupation of the plaintiff's sons at present temporarily, also belong to the brothers jointly. From the Will it appears that if there were any further construction in the suit house, then that would be the Joint property of all the brothers. That apart it has also been stated in the Will that the rooms which were under the occupation of the mother of the plaintiff would be enjoyed by all the brothers after the death of the mother. It is the admitted position that the mother of the plaintiff is now dead. As such, the second floor flat and the room in the roof of the building must be held to be the joint family property of all the brothers and the plaintiff and his sons have got no exclusive interest therein. As such, the possession of a joint family property cannot, under any circumstances, be as claimed by the considered to the defendants/respondents.

13. In this respect, the learned advocate for the appellant cited decision reported in 2007 (3) ICC 175 [Julieta Antonieta Tarcato v. Suleiman Ismail], wherein he Apex Court clearly observed "Even if we ignore the fact, one cannot compel the owner of the premises which exclusively belongs to her to share accommodation with a co-owner of hers in another premises. The appellant being the owner of the suit premises, her need being bonafide and reasonable, it would be unfair to compel her to share the accommodation in another premises with its co-owners".

14. So far as this suit is concerned, I have already pointed out that the size of the family of the plaintiff suggests that he required the suit premises for accommodating his family as because he has got no reasonable suitable accommodation elsewhere. The accommodation of the plaintiff, which is at present available to him cannot be said to be reasonable and suitable, one being in the capacity of a licensee and the other being in the capacity of a joint owner in a joint family property. In view of the decision of the Apex Court, as cited above, I am of the view that instead of allowing the plaintiff to enjoy his own property, the Court cannot compel him to continue with his possession in the flat as a licensee or being a co-owner of another flat. There cannot be any dispute that all the brothers have got share in the second floor and in the room situated

in the roof of the building and the other brothers can always raise objection regarding the exclusive possession by the son of the plaintiff. As such, under such circumstances, I have got no hesitation to hold that simply because the plaintiff is in occupation of the flat of his brother as a licensee and his son being in occupation of a joint family property, that cannot be a reason for depriving him of his requirement to possess his own property viz. the suit premises by way of evicting the defendants therefrom.

15. The defendants/respondents tried to set up a case that the requirement of the plaintiff/appellant is not at all a bonafide one as he has sufficient accommodation in the suit-house, as discussed above. In this respect the learned advocate for the plaintiff/appellant by citing the decision reported in 1996 (5) Sc 635 (Miss Meenal Eknath Kshirsagar v. Traders & Agencies and Anr.) submitted that "bonafide requirement of the landlord" cannot be denied at the instance of the tenant simply on the ground that the landlord has other accommodations elsewhere which may be either insecure or inconvenient. In the said decision it has been held that "It is for the landlord to decide how and in what manner he should live and that he is the best Judge of his residential requirement. If the landlord desirous to beneficially enjoy his own property when the other property occupied by him as a tenant or on any other basis is either insecure or inconvenient, it is not for the Courts to dictate him to continue to occupy such premises". I have already pointed out that it has been established from the evidence on record that the landlord has got bonafide requirement of the suit premises. As such, the present accommodation of the landlord in the suit-house, as discussed above, cannot be a bar for the landlord getting possession of the suit premises by way of evicting the defendants/tenants therefrom.

16. It appears that the learned trial Court practically dismissed the suit on the ground that no commission for holding local inspection was undertaken at the instance of the plaintiff and as such, in absence of such commission it was not possible for the Court to come to a decision regarding the actual requirements of the plaintiff and also the fact as to the accommodation available to the plaintiff in the suit-house. But it appears that the learned Trial Court, while making such observation, did not look into the evidence properly. So far as this suit is concerned, it appears that one local inspection commissioner was appointed and he submitted his report after inspecting the suit premises and he was also examined in connection with the suit. So the observation that no commission was held in the suit premises, is not at all correct. Be that as it may, possibly the learned Trial Court wanted to impress that there was no commission held in order to show the present accommodation available to the plaintiff in the suit-house. It may be pointed out here that the absence of any such commission cannot be the sole ground for refusal of the prayer of reasonable requirement, as done by the Id. Trial Court. If from the materials on record a clear picture is available regarding the present accommodation of the plaintiff in the suit-house, then there may not be any necessity for holding any local inspection. After all the purpose of appointing local inspection commissioner is to collect evidence. If that

evidence is available from the oral evidence of the parties, then there may not be any necessity for holding any local inspection commission. So far as the present suit is concerned, it appears from the evidence of the plaintiff as well as from the evidence of the defendants that a clear picture was available before the Court below regarding present accommodation available to the plaintiff in the suit house. I fail to understand as to how it could be observed that in absence of any local inspection commission no decree of eviction of the tenant could be passed. In the Judgements, learned Courts below tried to explain this fact in another way by observing that unless the commission work is done in respect of the present accommodation of the plaintiff in the suit house, the nature and manner in which the plaintiff is occupying those rooms could not be ascertained. I am afraid that this observation of the Courts below, cannot at all be accepted.

17. Be that as it may, even if we look into the exhibit list, then it will appear that the observations of the learned Courts below are not at all correct. It appears that the local inspection commission was held in respect of the suit house, although, in connection with another suit which filed by one of the landlords against another tenant. Said report was marked as Exhibit without any objection being raised and that learned commissioner was also examined as a witness. At that time no objection was raised and as such it is not permissible at this stage for the defendants to raise this objection that the said commission report cannot be taken into consideration in the present suit as the defendants did not get any opportunity to cross-examine the commissioner. But it appears from the decision reported in Sarat Chandra Rakhit Vs. Sarala Bala Ghosh and Others, the Division Bench clearly observed to the effect "The report and map prepared by a commissioner in one suit can be admitted in another suit and the commissioner being examined". So far as this suit is concerned, I have already pointed out that the said commissioner who held commission in respect of the suit house although, in connection with another suit, was examined during trial and he duly proved his report. At that time no objection was raised. Under such circumstances, I am of opinion that it is always open for the Court to consider the said report of the Id. commissioner as additional evidence. However, I have already pointed out that the said report of the commissioner has practically got little relevancy in view of the fact that the present accommodation of the plaintiff in the suit house has been clearly brought into the record by oral evidence from the side of the plaintiff as well as by the defendant himself. Under such circumstances, I do not agree with the findings of the Courts below that in absence of any local inspection commission in this respect no decree for eviction on the ground of reasonable requirement could be passed. After all from the report of the commissioner it would not be proved that the manner and status by which the plaintiff and his son are at present occupying some of the rooms of the suit house.

18. It appears from the judgment of the learned First Appellate Court, in addition to the other grounds, he was pleased to hold that as it transpired from the evidence on record that the plaintiff had a house at Giridi within the State of

Bihar, so it must be held that the plaintiff has reasonable suitable accommodation elsewhere and as such, he is not entitled to get a decree for eviction against the defendants in respect of the suit premises. But it appears that this point was not specifically taken in the written statement. But during the trial, evidence was led to that effect and the plaintiff also admitted that he has got a house at Giridi where the plaintiff and his brothers have got a family business of Mica. But I fail to understand as to how this accommodation at Giridi can be said to be reasonable and suitable for the plaintiff who is admittedly residing at Calcutta. Learned First Appellate Court observed that the plaintiff and his son are staying at Giridi in connection with their business. But this observation of the learned First Appellate Court appears to be not at all correct and it is clearly beyond the evidence on record. Even if we accept the contention that the plaintiff has a house situated at Giridi, then that cannot be said to be a reasonable and suitable accommodation to accommodate his family at Calcutta. From the evidence of the P.W. 1 and P.W.2 it has been clearly established that the plaintiff and his sons are staying at Calcutta. As such, the accommodation at Giridi cannot be said to be reasonable and sufficient for the plaintiff and his family members. He was not at all justified in rejecting the prayer for eviction of the defendants from the suit premises on the ground that the plaintiff has got a house at Giridi. The reasoning, as given in this respect by the learned First Appellate Court, appears to be thoroughly improper and I have got no hesitation to hold that the learned First Appellate Court was not at all justified in considering the accommodation available at Giridi to be sufficient for accommodating the plaintiff's family at Calcutta.

19. Learned Advocate for the defendants/respondents argued that both the Courts below, on the basis of the available evidence on record, came to the conclusion that the plaintiff was not entitled to get a decree for eviction against the defendants in respect of the suit premises. According to him, this concurrent finding of fact cannot be reconsidered by the Second Appellate Court in exercise of the power given u/s 100 of the Code of Civil Procedure. According to him, one may differ with the findings of fact, as arrived at by the Courts below, but that does not mean that in the Second Appeal the High Court will interfere with such concurrent finding. That a different view is possible from the facts available on the record, cannot be a ground for the High Court to interfere with the concurrent findings of fact, as arrived at by the learned Courts below. There cannot be any dispute in respect of this legal position. But at the same time, it is now the settled position that concurrent finding of fact can be looked into and reconsidered by the High Court if it appears as it that while arriving at such a decision the Courts below followed a wrong approach and came to such a conclusion without properly appreciating the material evidence available in the record. So far as this suit is concerned, it appears clearly that the approach of both the Courts below in coming to the conclusion is clearly wrong. That apart, from the discussion, as made above, it is also clear that the evidence as available in the record, was not properly taken into consideration by the Courts below

while passing the judgements. Both the Courts below considered the accommodation of a licensee and also considered the accommodation in a joint family property to be sufficient for denying the prayer for eviction of the defendants from the suit premises. But I have already pointed out that accommodation of a premises as a licensee or any accommodation in a joint family property cannot be said to be reasonable and suitable and I have got no hesitation to hold that this approach of the Courts below in deciding the dispute in between the parties, is absolutely wrong in nature which ultimately resulted in the failure of justice. In addition to that, the learned First Appellate Court also travelled beyond the pleadings while holding that the accommodation of the plaintiff, as available at Giridi, to be sufficient in nature. Since it has been established that the plaintiff and his family members are staying at Calcutta, so this finding of the learned First Appellate Court that the accommodation available at Giridi within the State of Bihar is reasonable and suitable, cannot be supported and in my considered opinion it has resulted in perversity in passing such a judgment.

20. Therefore, from my above discussion, I am of opinion that the judgments, as passed by both the Courts below suffer from perversity resulting in the failure of justice and as such, the Judgments cannot be sustained and those should be set aside immediately. Since I have already pointed out that the plaintiff has been able to establish that he reasonably requires the suit premises for the use and occupation for his family members, so he is entitled to get a decree for eviction against the defendants. As such, in my considered opinion both the Courts below were wrong in dismissing the suit and since the plaintiff/appellant has been able to establish that he requires the suit premises reasonably and he has got no reasonable suitable accommodation elsewhere, so a decree of eviction should be passed in his favour by way of evicting the defendants/tenants from the suit premises. All the questions are answered accordingly.

21. In the result, the appeal and the same is allowed on contest but without costs. The judgment dated 26/9/2000 passed in Title Appeal No. 64 of 2000 by the learned Additional District Judge, 13th Court, Alipore is set aside. The Title Suit 181 of 1998 be decreed in favour of the plaintiff on contest against the defendants/tenants. The plaintiff is entitled to get possession of the suit premises by way of evicting the defendants/tenants from the suit premises. The defendants are given three months" time to vacate the suit premises amicably in favour of the plaintiff failing which the plaintiff will be at liberty to execute the decree in accordance with law.

Send a copy of this judgment along with L.C.R. to the Trial Court below at once for information and necessary action.

Xerox certified copy, if applied for, be handed over to the parties on urgent basis.