

(2010) 10 CAL CK 0077
In the Calcutta High Court
Case No : S.A. No. 239 of 2007

Shrimati Purnima Banerjee and Others	APPELLANT
Vs	
Gopal Chandra Karmakar	RESPONDENT

Date of Decision : 05-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2010) 10 CAL CK 0077

Hon'ble Judges : Tarun Kumar Gupta, J

Bench : Single Bench

Advocate : Ashis Bagchi and R.N. Mahato, for the Appellant; Hiranmoy Bhattacharya and Mrinal Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Tarun Kumar Gupta, J.—This Second Appeal is directed against judgment and decree dated 30th October, 2006 passed by learned Civil Judge (Senior Division), Seventh Court at Alipore, District- 24-Parganas(South) in Title Appeal No. 165 of 2005 reversing the judgment and decree of eviction dated 27th July, 2005 passed by learned Civil Judge (Junior Division), Fourth Court at Alipore in Title Suit No. 177 of 2004.

2. The appellant/plaintiff's case, in short, is that the respondent/defendant was inducted as a tenant in respect of the suit shop room by the original plaintiff Narayan Chandra Banerjee since deceased according to English calendar month at a rental of Rs. 50/- per month. The defendant/tenant made illegal additions and alterations in the suit shop room and also caused damages to it and was also guilty of causing nuisance and annoyance. As original plaintiff Narayan Chandra Banerjee reasonably required the suit premises for his and his family members' use and occupation, he terminated the tenancy of the defendant by issuing a notice to quit and filed the suit. During pendency of the suit Narayan Chandra Banerjee died leaving the present appellants/plaintiffs as his legal heirs. The amended plaint was accordingly filed by the substituted plaintiffs to highlight the

change of circumstances. It is their case that appellant No. 4 Nilima Banerjee being married daughter of late Narayan Chandra Banerjee is staying in her matrimonial home. Presently, Smt. Purnima Banerjee and Shantana being wife and unmarried daughter of late Narayan Chandra Banerjee were residing in their village house at Chandandaha under Bishnupur P.S. which is far away from the suit house for want of accommodation. Sanjoy and Moloy Banerjee were facing inconvenience to run their business and were compelled to live separately leaving their mother and unmarried sister in a split up condition. The plaintiffs reasonably required the suit premises for the purpose of their own use and occupation and also for running business therein by Moloy Banerjee. Besides suit shop room there is no other reasonably suitable accommodation within Calcutta metropolitan area.

3. Respondent/defendant/tenant contested the suit by filing written statement followed by additional written statement denying material allegations of the plaint and the amended plaint, and contending inter alia that after induction in the suit shop room by original plaintiff Narayan Chandra Banerjee, since deceased, for running a grocery shop, he made some necessary repairs with the consent of his landlord. In the suit house there are only two rooms. One of which is suit shop room under occupation of the defendant and other shop room was under occupation of one Sunil. Said shop room of Sunil Seal has since come under the possession of the plaintiffs through execution of an ejectment decree. The plaintiffs' village house is not far from suit house. The said shop room cannot be conveniently used for the purpose of residence. During pendency of the suit the plaintiffs constructed a new one storied building consisting of several rooms adjacent to the suit room. Moloy Banerjee is running business and suit shop room is not required either for business of Moloy Banerjee or for residence of plaintiffs. The suit was liable to be dismissed.

4. On the basis of the pleadings of the parties, several issues were framed and learned Trial Court decreed the suit. However, in appeal learned Lower Appellate Court reversed the judgment of ejectment resulting this Second Appeal filed by the landlords.

5. At the time of admission of the second appeal the following substantial questions of law were formulated for the purpose of hearing of this appeal.

(1) Whether the learned Court of appeal below committed substantial error of law in setting aside the judgment and decree passed by the Trial Court by totally overlooking the fact that there are five plaintiffs who are all co-owners and at least they can claim one room for each one of them whereas the plaintiffs are in occupation of just three rooms.

(2) Whether the learned Court of appeal below committed substantial error of law in holding that the plaintiffs have three rooms in addition to the shop room by totally misreading the evidence on record.

6. During pendency of this appeal appellants filed one application being C.A.N.

No. 7582 of 2009 for taking note of some subsequent events mentioned in the application, for the purpose of disposal of the instant appeal. The subsequent events prayed to be noted were suicidal death of appellant No. 2 Moloy Banerjee on 15th August, 2007, appellant No. 3 Sanjoy Banerjee along with his wife and son have been residing at suit house occupying only two rooms being used as bed room and another as shop room, after the death of Moloy Banerjee appellant No. 1 Purnima Banerjee was not in a position to reside at village house and accordingly she resides in a tenanted house at 62/D Sarsuna Main Road, Kolkata-700061 on payment of rent of Rs. 100/- per month, appellant No. 3 has a son aged about nine years studying in St. Lawrence High School. Petitioner No. 1 is a senior citizen and petitioners require the suit room for their own use and occupation.

7. Respondent filed an affidavit-in-opposition denying the material allegations of the aforesaid application save and except the death of Moloy Banerjee and marriage of petitioner No. 2. It was also averred in said affidavit-in-opposition that birth of Aniket Banerjee, son of plaintiff No. 2, was not a subsequent event. During hearing learned advocate for the appellant, however, did not press this application being C.A.N. No. 7582 of 2009 for noting the subsequent events save and except the factum of death of Moloy Banerjee and marriage of Sanjoy Banerjee. Learned Advocate for the respondent/defendant/tenant did not raise any objection and accordingly, it is observed that only the factum of death of Moloy Banerjee and marriage of Sanjoy Banerjee will be taken into consideration as subsequent events at the time of disposal of this second appeal.

8. It appears that learned Trial Court granted the decree of eviction only on the ground of reasonable requirement and on no other ground.

9. However, learned First Appellate Court reversed the said judgment of Trial Court by observing that present accommodation of the plaintiffs was sufficient and that they did not reasonably require the suit shop room.

10. At the very outset, Sri Ashis Bagchi learned advocate for the appellant has submitted that learned Lower Appellate Court came to a wrong and perverse finding regarding reasonable requirement of the suit shop room by the plaintiffs by observing that beside the shop room the plaintiffs had three rooms in the occupation which was sufficient to meet the requirements of the plaintiffs. According to him, including the shop room the plaintiffs were in occupation of three rooms only and hence learned Lower Appellate Court passed the judgment on wrong notion and that on that score said judgment was perverse.

11. In this connection, he has referred a case law reported in 2010 (3) ICC 526 Dinesh Kumar v. Yusuf Ali wherein Hon'ble Apex Court held that though the second appeal u/s 100 C.P.C. was maintainable basically on a substantial question of law and not on facts, but if the High Court came to the conclusion that the evidence on record recorded by the Courts below were perverse being based on no evidence or based on irrelevant material, that it could be

entertained and that it was permissible for the High Court to reappreciate the evidence.

12. Sri Hiranmoy Bhattacharya learned advocate for respondent, on the other hand, has submitted that only cases involved substantial questions of law should be dealt with by High Court u/s 100 C. P.C. In this connection, he has referred case laws reported in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., and Mattulal Vs. Radhe Lal, .

13. There is no dispute that in the second appeal High Court is required to deal with substantial questions of law involved in a case and not facts, but it has been settled by the Hon"ble Apex Court through a catena of decisions that there was no prohibition to entertain the second appeal even on question of fact, provided that the Court was satisfied that the findings of the Courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter. (Vide Jagdish Singh Vs. Natthu Singh, Prativa Devi Vs. T.V. Krishnan, ; Smt. Satya Gupta Alias Madhu Gupta Vs. Brijesh Kumar, Ragavendra Kumar Vs. Firm Prem Machinery and Co., and Molar Mal (Dead) Through L.Rs. Vs. M/s. Kay Iron Works(P) Ltd.,

14. It came out from evidence on record that presently appellants/plaintiffs are in possession of one shop room measuring 7 ft. 3 inches X 15 ft. 10 inches, one bed room measuring 15 ft. X 10ft. 10 inches, one store cum kitchen measuring 4 ft. 6 inches X 7 ft. 8 inches. It further appears that the bed room is being used by appellant No. 3 Sanjoy Banerjee, who is married having a child, the store-cum-kitchen is being used as kitchen-cum-store room and the shop room is being used as the shop-cum-business room of appellant Sri Sanjoy Banerjee. The suit shop room was required for the purpose of residence, and also for shop room of appellant Moloy Banerjee since deceased. During evidence it came out that appellant No. 1 Purnima Banerjee was residing, at the time of filing of the suit, in their village house which, according to the plaintiffs, is 15 kilometers away from suit building and so for proper looking after of Smt. Purnima Banerjee being mother of other appellants/plaintiffs, she should have been brought to the suit house and be kept in the suit shop room for being used as her bed room. Though respondent/defendant took the plea that said ancestral house of the appellant was only 15 minutes" walking distance from the present residence of Sanjoy Banerjee but there was no evidence to that effect. Rather it appears that specific evidence of P.W.1 that the village house was at a distance of about 15 kilometers was not denied by the respondent/defendant during cross-examination. Admittedly, presently appellant No. 1 Purnima Banerjee is residing alone. By this time her husband and another son Moloy Banerjee have died. Her daughters have been married and residing in their respective matrimonial houses. Learned Trial Court was of the opinion that the plaintiffs could not be asked to reside in two places dividedly and accordingly, he has passed the decree of ejectment.

15. Learned Lower Appellate Court, however, did not take note of these facts

namely staying of widow elderly lady alone in a place which was quite a distant away from the place of residence of her son.

16. Learned Advocate for the respondent has, however, submitted that the appellants/plaintiffs did not get the present place of residence of Purnima Banerjee, be it village house or rented accommodation, inspected by an Advocate Commissioner to establish that the present accommodation was insufficient or inadequate. In this connection, he has referred case laws reported in 87 CWN 278 Romesh Kumar Vs. Atma Devi and Others, wherein Hon''ble Courts held that the possession of a premises by the landlord as a tenant ought not to be always considered unsuitable. The aforesaid case laws have no application in the facts and circumstances of the present case. In this case appellant/plaintiff No. 1 Purnima Banerjee being an aged widow lady is residing separately from her only living son's family for want of accommodation in the place where his son Sanjoy Banerjee resides. Even if her present accommodation, be it in ancestral house which is quite distant from the suit house, or in a rented house, was spacious but it cannot be said that desire of the appellant/plaintiffs to stay together, in the facts of the case, was unreasonable.

17. Learned First Appellate Court reversed the judgment of eviction on the wrong impression that besides the shop room the plaintiffs were in possession of three rooms though in reality they were in possession of three rooms including said shop room. I have already stated how the appellants/plaintiffs were using those rooms as it came out from Commissioner's report. It is true that there was no case either in the pleadings or in the evidence that all five co-owner plaintiffs required at least one room each. As such, there was no question of considering that question by learned Lower Appellate Court. However, it came out from the above discussion that learned Court of appeal below committed substantial error of law for holding that the plaintiffs were in possession of three rooms in addition to shop room by totally misreading the evidence on record. Admittedly, the landlord is the best judge of his need, however, it should be real, genuine and the need may not be a pretext to evict the tenant only for increasing the rent. From the evidence on record it is clear that suit shop room is reasonably required by the appellants for being used for accommodating aged widow appellant petitioner No. 1 Purnima Banerjee who is presently residing alone and away from the family of his only living son Sanjoy Banerjee. Accordingly, I am of the opinion that the claim of reasonable requirement of the suit premises by the appellants/plaintiffs was reasonable and that learned court of appeal below committed substantial error of law by misreading the evidence on record relating to present accommodation of the appellant/plaintiffs.

18. As a result, the appeal succeeds. However, I pass no order as to costs.

19. Admittedly, respondent/tenant is running a business (grocery shop) in the said shop room. I am of the opinion that respondent/tenant should be given reasonable time for searching out an alternative accommodation for running said business. I am also of the opinion that if respondent/tenant is given time for

about six months i.e., upto 31st March, 2011 then neither party will be prejudiced in any way. Accordingly, the judgment and decree dated 30th October 2006 passed by learned Civil Judge (Senior Division) seventh Court at Alipore, District - 24Parganas (South) in Title Appeal No. 165 of 2005 is hereby set aside by restoring the judgment and decree of eviction dated 27th July, 2005 passed by learned Civil Judge (Junior Division), Fourth Court at Alipore in Title Suit No. 177 of 2004.

20. However, respondent/tenant is given time till 31st March, 2011 to deliver vacant possession of the suit shop room to the appellants/plaintiffs, failing which the appellants/plaintiffs will be at liberty to put the decree into execution as per law.

21. Office is directed to send down the L.C.R. to the Lower Court along with a copy of this judgment expeditiously.

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