
(2018) 05 CAL CK 0191
In the Calcutta High Court
Case No : C. O. No. 1130 of 2018

Sk. Ekramuddin

APPELLANT

Vs

Basudeb Ghosh And Others

RESPONDENT

Date of Decision : 15-05-2018

Acts Referred:

West Bengal Premises Tenancy Act, 1997 — Section 35, 44
Code of Civil Procedure, 1908 — Section 115A, 151, Order 39 Rule 1, 2
Constitution Of India, 1950 — Article 227

Citation : (2018) 05 CAL CK 0191

Hon'ble Judges : SABYASACHI BHATTACHARYYA, J

Bench : Single Bench

Advocate : Shebatee Datta, Bidyut Kumar Banerjee, Arnab Roy, Priyanka Mondal, Dinabandhu Mukherjee

Final Decision : Allowed

Judgement

This application under Article 227 of the Constitution of India has been filed by a defendant in an eviction suit against orders, whereby both the courts

below have refused to grant repair to the petitioner. In the suit for eviction, the petitioner took out an application praying for leave to effect repair of

the structure standing on the suit land at his own costs, undertaking not to change the nature and character of the structure in existence.

It may be noted that no adjustment of the costs of repair was claimed from the rent, nor was a direction sought on the plaintiff to effect such repair.

Such application for repair being opposed by the landlord/opposite party no. 1, the trial court refused the same, primarily on the ground that the

petitioner had not specified the nature of repair. Since the application for repair was captioned as one under Order XXXIX Rules 1 and 2 of the Code

of Civil Procedure, the petitioner preferred an appeal against such refusal, giving

rise to Miscellaneous Appeal No. 154 of 2016, which was ultimately dismissed by the appellate court.

In the appellate court, the petitioner had sought for a commission and it was evident from the commissioner's report, as per the findings of the appellate court itself, that the suit property was in a dilapidated condition with only a portion of the roof existed at the time of commission. The walls were found to be cracked and damaged. Foul water was found inside the room dripping from a broken pipe. The condition of the suit property was in such utter state of disrepair, that the appellate court went to the extent of holding that the report, and the grim picture of the suit property it projected, were sufficient indicators of the fact that the defendants were not actually using the same for business or any other purpose whatsoever. The appellate court went on to hold that it was impossible to run a business from a room which had incomplete roof, damaged walls and foul water flooding its floors.

It was argued by the petitioner that in view of the Commissioner's report, repair ought to have been granted by the appellate court. Such contention is opposed on behalf of the plaintiff/opposite party no. 1. Learned senior advocate for the opposite party no. 1 submits that it was evident that the petitioner was not residing in the suit premises and as such, repair was rightly refused by the courts below. Secondly, it was argued, that the repair application was vague and, in the event repair was allowed, it would be doubtful as to exactly what repairs were to be effected. The third contention made out by the opposite party no. 1 was that the application was hit by Section 35 of the West Bengal Premises Tenancy Act, 1997 and the Controller under the said Act had power to pass such an order, not the civil court.

The fourth ground urged by the opposite party no. 1 was that the repair, in effect, had not been sought in respect of the suit property at all. After hearing both sides, there appears to be some doubt in the mind of the court as to whether an appeal was maintainable against an order of refusal of repair. Although captioned as an application under Order XXXIX Rules 1 and 2, the repair application was in effect under Section 151 of the Code of Civil Procedure, and the order of repair, if granted, would have to be under the inherent power of the court. As such, no miscellaneous appeal lay

against such an order.

However, since it is settled that revisional jurisdiction is part of the appellate jurisdiction, such technicalities are chosen by this Court to be ignored. In

effect, the appellate court can be deemed to have exercised a revisional jurisdiction in effect. Yet, even if such technicalities are ignored, after the

amendment of the Code of Civil Procedure, no application could lie under Section 115A of the Code before the appellate court below against the order

refusing repair, as the same, if otherwise decided, would not have finally disposed of the suit. However, since both sides submitted to the jurisdiction of

the appellate court, it would be the plaintiff/opposite party no. 1, who would be hurt most if the matter is remanded again for rehearing on the repair

application upon taking note of the Commissioner's report filed in the appellate court.

Even, if it is held otherwise, there would be no merger of the trial court's order with the appellate court's judgment, since the entire findings of

the appellate court and the conclusion would be entirely without jurisdiction and it would be the trial court's order, which would prevail. The

findings arrived at by the appellate court on the basis of the Commissioner's report, which is already on record and has vital bearing upon the

repair work, would then have to be overlooked and a new commission directed, ultimately entailing a futile exercise not enuring to the benefit of either

side.

As such, to obviate such technicalities, this Court decides to deal with the prayer for repair on merits. The objection as to the trial court having no

jurisdiction to take up the repair application is not tenable in the eye of law, since the reliefs prayed for in the repair application have no connection

with the provisions of Section 35 of the West Bengal Premises Tenancy Act and as such, the bar stipulated in Section 44 of the said Act is not at all

applicable.

The petitioner prayed for repairing the suit property himself at his own costs and did not seek any direction to the landlord to effect such repair, or in

the alternative for adjustment of costs of repair from rent. Hence, the exercise of power to grant repair would be construed to be one under the

inherent powers of the court. A perusal of the schedule of the plaint and the repair application would show that substantially the prayer for repair is in

respect of the suit property itself.

The objection taken by the opposite party no. 1, in tune with the appellate court's finding, that the tenant is not residing at the suit premises, would

be neither here nor there and have no bearing upon adjudication of the prayer for repair. Whatever may be the actual scenario, would be decided in

the suit itself and it would be entirely beyond the charter of any court to consider the question as to whether the tenant is actually running any business

in the suit premises or not while deciding an application for repair.

As such, since already a Commissioner's report is on record and stands unchallenged by both the sides, albeit in appeal, which would not have

been maintainable, a pragmatic approach is to be adopted and no other futile exercise is necessary. This Court is of the opinion that in view of the

Commissioner's report itself, repair should be carried out immediately.

Accordingly, C. O. No. 1130 of 2018 is allowed, thereby setting aside the orders of both the courts below and permitting the petitioner to carry out

repairs to the suit property in terms of the repair application, read with the contents of the Commissioner's report filed in Miscellaneous Appeal

No. 154 of 2016. Such repairs will be carried out by the petitioner in the presence of the representative of the opposite party no. 1. Due notice of the

exact dates and times of repair would be informed to such representative or to the opposite party no. 1 by the petitioner before effecting repairs. The

opposite party no. 1 will have liberty to take objection to such repair before the trial court in the event the petitioner seeks to change the entire nature

and character of the suit property.

The trial court will be permitted to pass appropriate orders in such event. The entire repair work has to be carried out by the petitioner within thirty

days from today, subject, of course, to any objection taken by the opposite party no. 1. It is made clear that the trial court will have the liberty to turn

down the objections or upheld those, depending upon whether actually the nature and character of the suit was being changed. There will be no order

as to costs. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.