
(2000) 04 CAL CK 0037

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction F.A. No. 49 of 1998

Smt. Mira De

APPELLANT

Vs

Shri Mahendra Nath Biswas and Another

RESPONDENT

Date of Decision : 28-04-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Evidence Act, 1872 — Section 107, 10B

West Bengal Premises Rent Control (Temporary Provisions) Act, 1948 — Section 11(1)

West Bengal Premises Tenancy Act, 1956 — Section 13(1), 13(4), 17(2A), 18(1)

Citation : (2000) 3 CALLT 208

Hon'ble Judges : Samaresh Banejea, J;Gorachand De, J

Bench : Division Bench

Advocate : Mr. S.P. Roychowdhury and Mr. Prodyot Kr. Nandi, for the Appellant;Jiban Ratan Chatterjee, for the Respondent

Judgement

G.C. De, J.—This appeal by the plaintiff landlord is directed against the Judgment and decree dated 27.1.95 passed by Shri B. K. Dutta, Judge of the fourth Bench, City Civil Court, Calcutta In Ejectment Suit No. 297 of 1988. The tenant defendant appeared and contested this appeal.

2. Briefly stated the plaint case is that the plaintiff is the absolute owner of the premises No. 10A, Nilmanl Dutta Lane, Calcutta-12 and the defendant was a tenant under her in respect of the entire first floor in the said premises at a monthly rental of Rs. 160/- payable according to English calander month, that as the plaintiff requires the suit premises reasonably for her own use and occupation and she has no other" reasonably suitable accommodation elsewhere and as the defendant was a defaulter in payment of rent since September, 1987 and also the defendant was guilty of annoyance, nuisance and misconduct, the tenancy was determined on the basis of a notice of ejectment duly served on the defendant but the defendant having failed to comply with the directions in the notice and did not vacate the premises on the expiry of the period of notice, the suit was filed praying for eviction of the defendant from the suit premises and

also for other reliefs.

3. The defendants appeared and contested the suit after filing a written statement denying all the material allegations made in the plaint and it is specifically agitated that the plaintiff is not the full owner of the suit premises, that the defendants were Joint tenants in respect of the suit premises along with another room at 10B, Nilmanj Dutta Lane at a monthly rental of Rs. 170/-, that they are not defaulters in payment of monthly rent and that they were not guilty of annoyance, nuisance and misconduct and that the plaintiff landlord does not require the suit premises reasonably as the existing accommodation is sufficient to accommodate her family. Accordingly, a prayer was made for dismissal of the suit.

4. On the basis of the respective pleadings the learned Judge framed the following Issues :

- (1) Is the suit maintainable in its present form, and prayer?
- (2) Was any notice of ejectment served upon the defendant? If so, is the said notice legal, valid and sufficient?
- (3) Is the defendant defaulter in payment of monthly rents?
- (4) Does the plaintiff reasonably require the suit premises for the use and occupation of herself and for the members of her family?
- (5) Is the defendant guilty of annoyance, nuisance and misconduct?
- (6) Is the plaintiff entitled to get a decree for ejectment and recovery of khas possession of the suit premises against the defendant?
- (7) To what other relief or reliefs, If any, is the plaintiff entitled?

5. The parties adduced evidence and after hearing argument of both sides and on appreciation of the evidence adduced, the trial Court came to a finding as hereunder :

Issue No. 1 : The issue was not pressed and the trial Court answered it in favour of the plaintiff;

Issue No. 2 : The trial Court on the basis of the endorsement on the AD Card and the evidence adduced by the parties came to a finding that the notice was legal, valid and sufficient and it was duly served upon the defendants:

Issue No. 3 : The Issue was not pressed before the trial Court and on the basis of the Joint petition filed by the parties, the petitions u/s 17(2) and 17(2A) of the West Bengal Premises Tenancy Act were disposed of by Order No. 19 dated 16.11.89 with a finding that there was no arrear of rent. Accordingly, the trial Court came to a finding that the defendants were not defaulters in payment of rent;

Issue No. 5 : The Issue was not pressed before the trial Court;

Issue No. 4, 6 and 7 : The trial Court came to a conclusion that the plaintiff purchased half share in the suit property and became a co-owner, that the defendants failed to prove a joint tenancy at a rental of Rs. 170/-, that the suit tenancy under the plaintiff at a monthly rental of Rs. 160/- was proved, but as the plaintiff after the purchase of the suit property In the year 1984 started a book binding business there her claim for reasonable requirement of the suit premises for her own use and occupation is not tenable and that the plaintiffs existing accommodation was sufficient to accommodate her for which she was not entitled to get a decree of eviction against the defendants for her own use and occupation.

6. At the hearing of the appeal, an application was filed by the plaintiff under Order 41 Rule 27 of the CPC supported by an affidavit with a prayer to allow her to produce eight documents, marked as annexures A, B, C, D, E, F, G and H for demolishing the comment of the trial Court that the plaintiff did not become the absolute owner of the premises No. 1DA, Nilmanl Dutta Lane. The details of the annexures are Indicated below :

(I) Annexure "A" is an advertisement in the Bengali dauly, Anandabazar Patrlka on 29.11.1964 Indicating that Shri Kartick Ch. Dutta was missing from 12.8.64, the publisher of the advertisement was Ganesh Ch. Dutta of 9g/3, Bose Pukur Road, Calcutta-42.

(ii) Annexure "B" is a letter addressed to Smt. Uma Sashl Dutta of 95/ 3, Bose Pukur Road, Calcutta-42 from the Office of DIG (CID). West Bengal as regards missing of her son, Kartick Ch. Dulta since 12.8.64.

(iii) Annexure ."C" is a leter dated 21.9.65 from the CID, West Bengal addressed to Uma Sashl Dutta in the same address requesting her to supply the finger print of her missing son, Kartick Ch. Dutta.

(iv) Annexure "D" is another letter date 10.2.65 written by Deputy Commissioner of Police (Detective Department), Calcutta to Shri Ganesh Ch. Dutta of 95/3. Bose PukarRoad. Calcutta-42 Intimating that the missing report of his brother Kartick Ch. Dutta was forwarded to the Missing Persons Squad. Calcutta.

(v) Annexure "E" is a letter dated 29.8.64 addressed to Shri Kartick Ch. Dutta from Executive Engineer, Calcutta Central Division No.I, Central Public Works Department calling the attention that Shri Kartick Ch. Dutta was absenting himself from duty from that office without any Intimation from 12.8.64.

(vi) Annexure "F" is another letter dated 19.8.64 addressed to Shri Karllick Ch. Dutta from the Office of Assistant Engineer, Calcutta Central Division No.I Intimating that he was absenting from his office without any intimation from 12.8.64.

(vii) Annexure "G" is another letter dated 14.8.67 from CID, West Bengal

addressed to Smt. Uma Sashi Dutta informing that the missing of her son was getting the attention of the department and result would be communicated in due course;

(viii) Annexure "H" is another letter dated 3.12.64 issued from the office of the Chief Minister's Secretariat, Writers' Buildings, Calcutta addressed to Smt. Uma Sashi Dutta intimating that her complaint as regards tracing out her missing son, Kartick Ch. Dutta was receiving attention.

7. All these annexures are with regard to the missing of one Kartick Ch. Dutta with effect from 12.8.1964 and undoubtedly all such correspondence were between 1964 to 1967, that is long before the filing of the present suit on 29.4.1988. It is already stated above that the trial Court in its judgment came to a conclusion that Ganesh Ch. Dutta became a co-owner in respect of half share of the suit property, as it has not been proved that his brother Kartick is alive, and u/s 10B of the Evidence Act there is no presumption that Kartick is dead. Admittedly, one Uma Sashi Dutta was the owner of the suit property and she had two sons, Ganesh Ch. Dutta and Kartick-Ch. Dutta. It is claimed by the plaintiff's husband (PW 1) that Kartick Ch. Dutta became untraced for the last thirty years and as such Ganesh Ch. Dutta became the absolute owner of the entire suit premises, and the plaintiff, by dint of her purchase of the suit property from Ganesh Ch. Dutta, became the absolute owner of the suit property. The trial Court came to a finding that as relevant documents in Support of the evidence of the PW 1 on this score were not produced before the Court, it was not possible to come to a conclusion that Kartick Ch. Dutta was not heard of for more than seven years and accordingly, it was viewed that Ganesh Ch. Dutta inherited half share from her mother Uma Sashi Dutta in respect of the suit property and hence the plaintiff purchased only the half share in the suit property.

8. It was clarified in the application under Order 41 Rule 27 of the CPC that the annexed documents could not be produced in the trial Court as the plaintiff was unaware of the existence of those documents and only after disposal of the suit, a thorough search was made in different offices and has been able to collect copies of those papers in support of the evidence adduced by Ranjit Kr. De [PW]) before the trial Court that Kartick Ch. Dutta became untraced for the least thirty years. It is already stated above that all those documents were of 1964 to 1967 and hence, it cannot be conceived of that those were manufactured for the purpose of this suit. On the other hand, no affidavit in opposition has been filed against the said application under Order 41 Rule 27 of the CPC in spite of direction for affidavits and in course of hearing of this appeal, the learned counsel for the respondents practically did not object to the acceptance of these papers which are old documents of above thirty years. We are also satisfied that the appellant has been able to establish that notwithstanding the exercise of due diligence, such documents were not within their knowledge and could not, after the exercise of due diligence, be produced before the trial Court at the time of passing of the decree. We did not find any reason to disallow the prayer of the

present appellant and accordingly, we allowed these documents to be produced in Court for the finality of the litigation."

9. It is needless to mention that the trial Court has already come to a finding without these documents, that Ganesh Ch. Dutta became the owner of the half share In respect of the suit property after the death of his mother Uma Sashi Dutta and rightly held that as a co-owner can maintain the suit for eviction on the ground of reasonable requirement. But these documents are sufficient to indicate that the other brother of Ganesh Ch. Dutta namely Shri Kartick Ch. Dutta, became untraced since 12.8.64. No convincing evidence was adduced before the trial Court by the defendants to show that Kartick was alive within 30 years, and hence the burden of proving that he is dead never shifted on the plaintiff u/s 107 of the Evidence Act. On the other hand, on the basis of oral and documentary evidence it is proved by the plaintiff that Kartick was not heard of for more than seven years since 12.8.64 and undoubtedly at the time of execution of the Sale Deed In favour of the plaintiff in the year 1984 by Ganesh. So on the basis of the documents produced, we come to a conclusion that Ganesh Ch. Dutta became the absolute owner of the premises No. 10A, Nilmani Dutta Lane, Calcutta and the plaintiff on the basis of the Deed of Conveyance dated 17.8.84 (Ext. 1) became the absolute owner of the said property. The finding of the trial Court that the plaintiff became the half owner in respect of the suit property is set aside and it is concluded that the plaintiff is the absolute owner in respect of the premises No. 10A, Nilmani Dutta Lane, Calcutta and the defendants are tenants under the plaintiff in respect of the suit premises. In this connection, we confirm the finding of the trial Court that the defendants are monthly tenants in respect of the suit property at a monthly rental of Rs. 160/-.

10. Actually in this appeal, the learned counsel for the appellant attacked the finding of the trial Court in respect of reasonableness of the claim of the plaintiff. Since we have already set aside the finding of the trial Court and have come to a conclusion that the plaintiff became the absolute owner of the suit premises, so the points for consideration in this appeal are--(i) Does the plaintiff reasonably require the suit premises for the use and occupation of herself and for the members of her family? (ii) Is the plaintiff entitled to get a decree for recovery of possession in respect of the entire suit premises? (iii) To what other relief or reliefs, If any, is the plaintiff entitled?

11. All these points are taken up together for the convenience of discussion. Be it mentioned here that we have examined the evidence on record and we have come to a conclusion that the suit is maintainable in its present form, that the notice of ejectment is legal, valid and sufficient and is duly served upon the defendants, that the defendants are not defaulters in payment of rent and that the defendants are not guilty of annoyance, nuisance and misconduct. So the findings of the trial Court on these Issues do not call for any Interference and we confirm the finding of the trial Court thereunder.

12. Admittedly, the plaintiff purchased the two storeyed suit property on 17.8.84

and she get possession In the ground floor consisting of the following accommodation as can be ascertained from the Commissioner's report :--

(i) Room No.1 :--8" x 11"; (ii) Room No. 2 :-- 8" x 12"; (iii) Room No. 3 :--4" x 7" (without any window or door and the roof Is of pollythene sheet); (iv) Partly covered and partly open space--6"4" x 10"6"; (v) another covered space on the southern side with the measurement 5"6" x 7"6"; (vi) on the northern portion, there is privy and water tank.

It transpires from the Commissioner's report as well as from the evidence adduced by the party that the room No. 1 is being used as a bed-room, room No. 2 Is being used partially for book binding works. The item No. 3 hereInabove mentioned is used as a Thakur Ghar. The other two spaces are used as kitchen and bathroom.

13. The evidence on record Indicates that the first floor, that is the suit premises, has the same accommodation as was found by the learned Commissioner in the ground floor. Of course, the defendants did not allow the Commissioner to hold local inspection of their premises. But it is also proved on the basis of oral evidence that the tenants are also In occupation of two big room, one small room and two other spaces in the first floor. The contention of the learned counsel of the respondent tenant is that the existing accommodation of the landlord is sufficient and there is no requirement of any further space. It is also urged that the Book Binding business of the plaintiff was started 4/5 years after the purchase of the house mainly for the purpose of evicting the Defendant Placing reliance on the decision reported in Kanailal Dutta Vs. Sadhan Chandra Santra, the learned counsel for the respondent forcibly argued that the existing accommodation being sufficient a landlord cannot, by bringing In others--namely the book binding business, claim additional accommodation by evicting the tenant. It is also argued that the plaintiff does not require the suit premises for bringing his printing business from the tenanted accommodation at 4, Nilmani Dutta Lane inasmuch as the alleged eviction suit against the husband of the plaintiff is a collusive one.

14. It appears that the trial Court without detailed discussion came to a finding that the plaintiff has no urgent need or requirement for the suit premises as she started the book binding business 4/5 years after the purchase of the house. But it is not clear to us as to why the starting of a book binding business In the suit premises shall be construed as waiving of the requirement of the plaintiff for further space. The word "occupation" of the landlord in section 13(i)(i) of the West Bengal Premises Tenancy Act is not restricted to residence only. Occupation under the Act may be for the purpose of residence or for the purpose of business or for both the purpose. Residence may be one of the purposes of the occupation but need not necessarily be the only purpose. Such a view was taken by Mr. P. B. Mukherjee, J. in Puspallata Debt v. Dincsh Chandra Das (85 CLJ 74) while analysing the word "occupation" in proviso (i) of section 11(1) of the West Bengal Premises Rent Control Act, 1948. The word "occupation" with the same

force is applicable in section 18(1)(f) of the W.B. Premises Tenancy Act, 1956.

15. In the present case the landlady had the option to use the purchased premises for her own use and occupation--partly for residential and partly for her book-binding business for augmenting Income to her family consisting of husband, two sons and one daughter and a dependent sister. At the time of starting of the book-binding business in the year 1988-89 (4/5 years after the purchase in 1984), the sons were aged about 17 yrs. and 14 yrs. and the daughter was aged about 11 yrs. as can be ascertained from the evidence. So at that point of time the plaintiff somehow accommodated her family and the book-binding business In the ground floor of the suit building. But for that reason it cannot be said that as soon as she started the business she had no residential problem. The requirement of the plaintiff for her own occupation Includes residential and business purpose and the plaintiff IT-landlord had the full choice to select the portion to be used as residential and for business.

16. In this connection it is to be mentioned that the principle adopted in *Kanallal Dutta* (supra) has no manner of application in this suit. In the cited decision the landlord to justify his additional requirement wanted to bring the son-in-law in his family as a member. But in the present suit the binding business of the plaintiff is part and parcel of her own use and occupation. So, we take the view that the book-binding business of the plaintiff is a part of her reasonable requirement and she can claim eviction of the tenant for accommodating that business.

17. At the time of filing of the suit the family of the plaintiff consisted of her husband, two sons, one daughter and one sister-in-law. At present, both the plaintiff and her husband have become aged and the sons are aged 29 and 26 years and the daughter is aged 23 years. The sister-in-law also stays with them. The learned counsel for the respondents drawing our attention to the provisions of section 13(4) of the West Bengal Premises Tenancy Act urged that partial eviction of the defendants from the suit premises will meet the requirement of the plaintiff and that the defendants are agreeable to part with a portion of the tenanted premises.

18. It is already indicated above that actually there are two big rooms in each floor with other spaces. The plaintiff is in occupation of two such rooms though it is claimed that she requires at least one room for living with her husband, one room for her son, one room for her daughter and sister-in-law, one study room as the sons and daughters are students, one Thakur Char and one room for shifting their Printing Press from the tenanted accommodation at 4, Nilmanil Dutta Lane as the landlord has started an eviction suit. The materials on record are sufficient to indicate that the said printing press business of the plaintiff is in a tenanted accommodation and occupation of such tenanted premises in precarious possession and not suitable accommodation and hence, it is rightly claimed that a room is needed for bringing back the said Printing Press business in the suit building. It appears that the trial Court did not consider the said

accommodation of the plaintiff as precarious and without coming to a definite conclusion on this point, took a view that the plaintiff does not require the suit premises reasonably.

19. After a careful scrutiny of the evidence on record, we take the view that starting of a book binding business in the suit house after the purchase of the house does not indicate that the plaintiff's requirement of one room for bringing back the Printing Press in the suit premises is false and afterthought. The materials are on record to prove the existence of the book binding business and the precariousness of the existing accommodation for the printing press business in the rented house. In fact, the requirement of one room in the suit building for the book binding business and another space for bringing back the printing has been proved to be genuine and reasonable and we come to the conclusion that the plaintiff requires a room and a space in the suit building for accommodating their book binding business and the printing press.

20. Thus the evidence on record are sufficient to prove that the plaintiff requires at least one room for herself and her husband, one room for her two sons, one room for her daughter and sister-in-law, one room for book binding business, one space for bringing back the printing press from the rented house, one room for the use as a Thakur Ghar and one room for using as a study room. So, the existing accommodation of the plaintiff and the available accommodation in the entire suit premises will meet the said requirement of the plaintiff and no portion of the suit premises can be spared for accommodating the defendants, and releasing the balance to the plaintiff by way of partial eviction of the defendants.

21. For the reason stated above we are of the view that the trial Court failed to appreciate the evidence on record properly and misdirected Itself in coming to a conclusion that the plaintiff has failed to prove her urgent need in respect of the suit premises. In fact, the trial Court misdirected itself in appreciation of evidence on record and fell in error. Hence the finding of the trial Court on this issue is liable to be set aside and we come to a conclusion that the plaintiff has been able to prove that she is the sixteen annas owner in respect of the suit premises, that she requires the suit premises reasonably for her own use and occupation and for the members of family and that she has no other reasonably suitable accommodation elsewhere. The plaintiff accordingly is entitled to get a decree for eviction against the defendants. The appeal therefore succeeds and the same is hereby allowed. The Judgment and decree of the trial Court are hereby set aside, the plaintiffs do get a decree for eviction against the defendants.

22. The defendants are directed to vacate the suit premises within three months from this date falling which the plaintiff shall be at liberty to recover khas possession by putting the decree into execution. Considering the circumstances, parties to bear their own costs of this appeal.

S. Banerjea, J.

23. I agree.

24. Appeal allowed