

(1991) 04 CAL CK 0013

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 384 of 1984

Sri A.S. Nagi

APPELLANT

Vs

Sm. Pronati Mazumdar

RESPONDENT

Date of Decision : 24-04-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 100
Transfer of Property Act, 1882 — Section 108
West Bengal Premises Tenancy Act, 1956 — Section 13(1)

Citation : (1992) 1 CALLT 182

Hon'ble Judges : Monoranjan Mallick, J; Manabendra Nath Roy, J

Bench : Division Bench

Advocate : S.P. Roy Choudhury, Phani Bhusan Das and Suniti Sengupta, for the Appellant; Sudhis Das Gupta and Ashoke Kumar Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Monoranjan Mallick, J.—This is an appeal against the judgment and decree passed by Additional District Judge third Court, Alipore in title appeal No. 132 of 1982 dated 7th Feb, 1983 affirming the judgment and decree passed by subordinate Judge third Court, Alipore in title suit No. 4 of 1977 dated 22nd day of Dec. 1981.

2. The facts which are necessary to dispose of the present appeal may be briefly stated as follows :

The plaintiff-respondent filed the title suit No. 489 of 1977 for a decree for eviction against the defendant-appellant, a premises tenant in the ground floor 16/7 Temple Garden, "B" Block, New Alipore specifying originally two grounds, namely, (1) that the defendant had caused damage resulting material deterioration of the suit premises and (2) that he was using a portion of the suit premises for illegal and immoral purposes. By amendment the plaint it was alleged that the defendant had transferred the common garage by allowing a motor car being No. WMC 5134 which upon enquiry was found to be registered in

the name of M/s. General Services of 74, Block "O", New Alipore to be kept there. Prayer for permanent injunction was made for restraining the defendant from keeping in the garage the said car belonging to the third party to avoid damages to the property of the plaintiff and her husband. Another prayer for injunction was made for restraining the defendant from causing disturbances, from repairing or maintaining of the electric installation of the entire premises No. 16/7 Temple Garden, Block "B", New Alipore.

3. The defendant contested the suit by filing written statement as well as additional written statement denying all the material allegations made in the plaint as well as in the amended plaint.

4. The learned Trial Judge granted the decree for eviction against the defendant-appellant on three grounds, namely, that the defendant was using a portion of the premises for illegal and immoral use, that he was guilty of acts of waste and negligence, the resulting in material deterioration of the premises in suit and that the defendant sublet the garage to the owner of WMC 5134. The learned Trial Judge, however, having found that in a suit for eviction it is not necessary to grant for decree for permanent injunction, dismissed the prayer for permanent injunction.

5. Being aggrieved the defendant preferred appeal before District Judge, Alipore and the learned Additional District Judge, Alipore who heard the appeal affirmed the decree for ejection only on the ground of subletting. He, however, held that the respondent's plea that the appellant who using a portion of the premises for illegal and immoral purposes is not believable more so, when no such particulars regarding such illegal and immoral use have been specified in the plaint- As regards the grounds of wilful damage of the suit premises causing its material deterioration of the suit premises, the learned appellate Judge has held that for such damage the respondent landlady filed a money suit, being money suit No. 28/1975, got an ex parte decree and defendant who also paid Rs. 2,500/- to the plaintiff as damages and relying on Benoy Bhusan Dasgupta Vs. Sm. Sabitri Banerjee, held that the above ground for eviction is hit by Order 2 Rule 2, C.P. Code.

6. Being aggrieved by such decree for eviction passed against the appellant on the ground of subletting the defendant has preferred the second appeal contending, inter alia, that both the learned Trial Judge and learned appellate Judge made an error of law by illegally taking the view that the appellant sublet the garage, that the garage not being an exclusive garage let out to the defendant appellant but a common garage in which the tenant was only had the right of a garage space for his car along with that of the car belonging to the plaintiff's husband, then the appellant not having exclusive possession of such common garage could not transfer possession of the same to any third party and consequently there is a substantial question of law involved in this appeal and the decree for eviction of the ground for subletting is liable to be set aside. It is also contended that the respondent-plaintiff did not make subletting a ground for

eviction and only by amendment of plaint prayed for permanent injunction restraining the defendant appellant from allowing the car No. WMC 5134 in the common garage in question and in the circumstances the Courts below committed a great illegality by treating that by amendment another ground for eviction, namely, a ground of subletting had been added to the plaint and both of them considering a ground not taken by the appellant respondent for eviction as a ground of eviction committed a great illegality which requires interference in second appeal.

7. The plaintiff respondent has filed a cross-objection challenging the learned Appellate Judge's findings on the two other grounds for eviction taken by the plaintiff respondent in the plaint.

8. We would first take up as to whether any error of law was actually committed by the Courts below in granting decree for eviction on the ground of illegal subletting.

9. It is a fact that in the original plaint no such ground was taken. But by amending para 8 of the plaint by incorporating para 8(b), it was alleged that by allotting the owner of the Motor Car No. WMC 5134 to keep the said car in the garage, the defendant has transferred possession of the garage to a third party without the knowledge and consent of the landlord. After making the above averment it was also alleged that the owner of the said car was using the garage of the sweet-will without a notice to the plaintiff which constitute a danger of theft of damage to the motor car of the plaintiff and of her husband and that the defendant should be restrained from causing the aforesaid damages to the property of the plaintiff and her husband. The above averments made in paragraph 8(b) to the plaint clearly indicates that the plaintiff landlady had made a clear averment in para 8(b) that the defendant had transferred the possession of the garage to a third party without knowledge and consent of the landlord. Therefore, we are satisfied that by amendment the plaint a new ground for illegal subletting or transfer of the garage in question to a third party without the knowledge and consent of the owner has been taken. It is now well-settled that a new ground for eviction not originally taken can be taken by amending the plaint. The learned Trial Judge has framed a specific issue as to whether the defendant sublet the garage in the suit premises to an outsider without previous consent in writing of the plaintiff.

10. Evidence was also taken for that added ground for eviction and thereafter a finding was arrived at. The learned Appellate Judge also considered as to whether actually there was a subletting of the garage by the defendant appellant to a third party without the consent in writing of the plaint or not and answered it in the affirmative. We do not find from any of his judgments that any such plea was taken by the appellant either before the learned Trial Judge or before the learned appellant Judge that the plaintiff respondent did not take any new ground of sub-letting by amending the plaint. In that view it is not open before this court for the learned Advocate for the appellant to urge that the plaintiff

respondent did not add a ground of subletting by amending the plaint and by amending the plaint only a new relief for a decree for permanent injunction against the plaintiff appellant was sought for.

11. Mr. Roy Choudhury appearing on behalf of the appellant has submitted that the garage in which the defendant appellant had the right to garage his car is a common garage in which there is not only space for keeping the defendant's car but also a car belonging to the plaintiff-respondent and her husband that, it being a common garage the tenant did not have any exclusive possession therein and that as the tenant had no exclusive possession in such garage he could not sublet such garage space to any third party and even if the plaintiff's averment in this respect be taken in its face value the main ingredient of sub-letting namely, the transfer of exclusive possession being absent in this case there could be no subletting, assignment or transfer of the common garage space in the common garage to any third party and the error of law committed by the learned Trial Judge as well as by the learned appellate Judge is substantial and in this case a substantial question of law, therefore, arises for this Court to interfere with such finding of the courts below that the defendant appellant was guilty of illegal subletting of the garage to a third party without previous consent of the plaintiff landlady in writing. In support the Supreme Court decision of Dipak Banerjee Vs. Lilabati Chakraborty, and Calcutta High Court decision Ana Ghosh Vs. R.D. Anklesaria, have been referred to.

12. On behalf of the respondent it is contended that the appellant tenant had been given a space in the garage which was part of his tenancy, that he had exclusive possession and control over such garage space, even though it was a common garage where not only the car of the defendant but also the car of the plaintiff and her husband was kept, the plaintiff had exclusive control over such garage space being part of the tenancy without any control or hindrance on the side of the plaintiff respondent and such garage space even if in a common garage was absolutely capable of being transferred to a third party and the fact that a car of a third party could be kept in such garage clearly indicated that the defendant appellant was in a position not only to enjoy without any restraint or hindrance from the side of the plaintiff-respondent to keep his own car but also to transfer possession of such space to a third party and that it clearly indicates that the defendant-appellant had exclusive possession of such garage space and when the defendant in his evidence did not controvert the evidence of the plaintiff's husband that he had transferred possession of such garage space to the owner of WMC 5134 then it was a clear finding of fact concurrently made by two courts below that there was illegal subletting. It is also pointed out that when the exclusive possession of the said garage space was transferred as a fact then the presumption arises that the same was for monetary consideration and the onus is upon the defendant appellant to rebut that presumption and the defendant has failed to rebut the presumption and the concurrent findings of facts of both the courts below should not be disturbed in this second appeal.

13. In *Dipak Banerjee Vs. Lilabati Chakraborty*, Supreme Court has clearly held that in order to prove the tenancy or sub-tenancy two ingredients have to be established, firstly, the tenant or the sub-tenant must have exclusive right of possession or interest in the premises or part of the premises in question and, secondly, that the right must be in lieu of payment of some compensation or rent. In the division bench judgment of *Ana Ghosh Vs. R.D. Anklesaria*, the similar observation has been made by the division bench of High Court. The learned Advocate in the respondent does not dispute the above proposition of law. But according to him the fact that a third party could keep his own car in the garage space allotted to the defendant-appellant as part of his tenancy clearly establishes that the such third party was given exclusive possession of such garage space, that whether such garage space was in a common garage or not is immaterial and when the defendant in his evidence did not deny that the owner of WMC 5134 was keeping his car in the garage space which is part of his tenancy the first ingredient as mentioned in the above Supreme Court decision has been clearly established and when the exclusive possession of the third party in the common garage has been established in evidence, the onus lies upon the defendant tenant to explain how the third party was in possession of the garage because it was within his special knowledge to disclose.

14. On considering the evidence of plaintiff's husband adduced before the learned Trial Judge it is found that the plaintiff's husband had clearly stated in his evidence that the defendant had transferred the owner of the car No. WMC 5134 to be kept in the garage in which the tenant used to keep his own car, he has also stated in his evidence that on enquiry from the Motor Vehicles Department it has transpired that the said motor car belongs to M/s. General Service of No. 24, Block O, New Alipore. The defendant in the additional written statement denied that fact and took the plea that after his own car WMB 8900 was stolen, he purchased the car No. WMB 1651 and kept the same in the garage. But in the evidence the defendant has not made any whisper about such averment made in the additional writ ten statement. Therefore, the evidence of the plaintiff's husband in this respect has gone unchallenged. So, before the learned Trial Judge it was proved that the defendant transferred possession of the garage space to the owner of WMC 5134. The defendant also did not explain under what circumstances such transfer was made. There is nothing to dispute that the defendant could keep his own car in the common garage without any control and hindrance from the side of the plaintiff landlady. He could also allow the car of a stranger to be kept in that garage and the landlady was not in a position to prevent such transfer of possession. The arrangement which the parties had for possessing the said garage is clearly revealed in the complaint made by the plaintiff's husband to police letter dated 12th March, 1979 and marked as Ext. 9(E). He stated in that letter that the garage is a two-car one and one set of keys was made over to Sri Negi. Therefore, both the plaintiff and the defendant were using the garage by opening and locking the garage with the keys respectively with the plaintiff as well as with the appellant Therefore, even

though the garage was a common garage, the defendant could as part of his tenancy use such garage to keep his own car and also was in position to transfer possession of such garage to a stranger and the stranger could also use it exclusively as it was a two-car garage and the defendant after transferring possession of the said garage to a third party was not in a position to use it along with such transferee and his transferee's possession was to the complete exclusion of the defendant tenant. In that view we are unable to hold that the garage being a common garage the tenant could not transfer the exclusive possession of such garage space to a third party. It is a concurrent finding of fact of both the courts below that the defendant transferred possession of the garage space to the owner of car WMC 5134 for which no previous consent of the landlady was obtained. On behalf of the respondent the Supreme Court decision of *Rajbir Kaur and Another Vs. S. Chokesiri and Co.*, has been cited where the Supreme Court has held that in a suit for eviction on the ground of subletting if exclusive possession of the sub-tenant is established and the version of the tenant as to particulars of the transaction is found unacceptable in the particular facts and circumstances of the case, it may not be impermissible for the court to draw an inference that the transaction was entered into with monetary consideration and it is upon the tenant to rebut this.

15. In *Sachindra Nath Shah Vs. Santosh Kumar Bhattacharya*, it has been held that in order to constitute sub-letting there must be parting of legal possession in favour of the alleged sub-tenant and the parting of legal possession means the possession with the right to exclude others. In this case we have already indicated that the defendant has not taken any step to controvert the evidence adduced by the plaintiff's husband that he had transferred the possession of the garage space allotted to him to the owner of WMC 5134. By transferring such possession to that third party the tenant-appellant could not keep his car in that garage. So, he was excluded completely from that garage space by transferring his possession of such garage space to a third party. No explanation has been given by the defendant appellant as regards the circumstances under which such possession was transferred. Therefore, regard being had to the above decision of Supreme Court we shall have to presume that the same was done for monetary consideration.

16. In view of the above we are satisfied that both the courts below were justified in holding that the defendant-appellant by transferring legal possession of the garage space in the common garage to a stranger without the previous consent of the landlady has become liable for eviction under Clause (a) of Section 13(1) of the West Bengal Premises Tenancy Act 1956. The appeal, therefore, fails.

17. We would now take up the cross-objection filed by the respondent. The learned appellant Judge has set aside the finding of the learned Trial Judge that the appellant was using the premises for illegal and immoral purposes. The Respondent challenges this finding by filing this cross-objection. The learned

appellate Judge found that in the plaint no particulars were given as to how the defendant was using the premises for illegal or immoral purposes and has observed that failure to do so was fatal and the evidence that is sought to be laid at the time of the trial, therefore, suffers from infirmities. He has also observed that the evidence adduced by the plaintiff regarding such illegal or immoral user was too improbable to accept.

18. It is a fact that in the plaint it is only vaguely alleged that the defendant was using the premises for illegal or immoral purposes- Only in evidence it was sought to be alleged that their servant Chandra was bringing young girls in the servant's room in order to enjoy them for this carnal satisfaction and was also permitting others to do so. The defendant-appellant resides in the ground floor with the members of the family including female folks. It is not at all probable that they being respectable persons would permit their servant to do such immoral acts. The learned appellate Judge on discussing the evidence of the witnesses disbelieved their testimony.

19. The learned appellate Judge being the final court of facts we in second appeal should not interfere with such finding of facts when we are satisfied that the learned appellate Judge has sufficient ground to take the view which he took. Therefore, we are unable to accept the contention of the respondent that the learned appellate Judge committed illegality in holding that the landlady failed to prove that the appellant tenant was using the premises for illegal or immoral purposes.

20. The second ground on which the respondent challenges the appellant judgment in his findings that the plaintiff-respondent having filed a money suit for the damages caused by the defendant-appellant in the premises and having obtained such decree which was also satisfied by the defendant-appellant could not take the same ground in a subsequent suit for eviction and his suit for eviction on that ground is hit by Order 2 Rule 2 C.P. code. Mr. Sudhish Dasgupta the learned Advocate for the respondent submits that only because a suit for compensation for the damages caused by the defendant was filed by the plaintiff-landlady, this would not debar him from filing a subsequent suit for eviction when by causing such damage the defendant has also become liable to be evicted under Clause (b) of Section 13(1) of the West Bengal Premises Tenancy Act.

21. Mr. Roy Choudhury the learned Advocate appearing for the appellant has drawn our attention to a judgment of the learned single Judge of this court reported in Benoy Bhusan Dasgupta Vs. Sm. Sabitri Banerjee, which was also referred to by the learned appellate Judge. In that decision the question before the learned Judge was whether after obtaining a decree for mandatory injunction directing the defendant-tenant to restore the room to that former position, a subsequent suit on the ground that the tenant had contravened Clauses (m) and (o) of Section 108 of the Transfer of Property Act was maintainable or not. The learned Judge in that decision has held that after obtaining such decree for a mandatory injunction by repairing the damages, a subsequent suit on the ground

of violation Clauses (m) and (o) of Section 108 of the Transfer of Property Act is not maintainable. In this particular case before filing the present ejectment suit the respondent-landlady filed money suit No. 28 of 75 claiming damages on the ground that the tenant had caused material damages to the suit premises and a decree of Rs. 2,500/- was passed against the respondent and it is an admitted fact that the defendant-tenant had paid such damages. When the plaintiff-respondent filed such suit cause of action to file a suit for eviction on the ground of violation of Clauses (m) and (o) of Section 108 of the Transfer of Property Act arose. But she did not file such a suit for eviction along with such claim for damages and opted to file only a money suit for damages. Therefore, subsequent to such filing of such damage suit, a suit on the ground of violation of Clauses (m) and (o) of Section 108 of the Transfer of Property Act is clearly hit by Order 2 Rule 2 C.P. Code and the learned appellate Judge did not commit any illegality in holding that in this suit for ejectment the plaintiff-respondent could not claim for decree for eviction for the violation of Clauses (m) and (o) of Section 108 of the Transfer of Property Act when such suit on the above ground is barred by Order 2 Rule 2 C.P. Code.

22. In the result the cross-objection filed by the respondent is dismissed.

23. Therefore, we dismiss both the appeal and the cross-objection. We also direct the parties to bear the respective costs of this appeal and cross-objection themselves.

M.N. Roy, J.,

24. I agree.