
(2020) 06 CAL CK 0019

In the Calcutta High Court

Case No : Tender Second Appeal (SAT) No. 243 Of 2019, Civil Application (CAN) No. 7408 Of 2019

Zubaida Begum @ Zubeda Khatun And Others

APPELLANT

Vs

Anwar Ali And Another

RESPONDENT

Date of Decision : 03-06-2020

Acts Referred:

Constitution Of India, 1950 — Article 142

Code Of Civil Procedure, 1908 — Order 41 Rule 11

West Bengal Premises Tenancy Act, 1997 — Section 6, 6(4):/West Bengal Premises

Tenancy Act, 1956 — Section 2(g), 2(h)

Citation : (2020) 06 CAL CK 0019

Hon'ble Judges : Harish Tandon, J;Abhijit Gangopadhyay, J

Bench : Division Bench

Advocate : Kushal Chatterjee, Rahul Karmakar, Debabrata Roy

Final Decision : Dismissed

Judgement

The Court: The unsuccessful tenants have filed the instant second appeal challenging the concurrent finding of facts raising a question of law whether a suit for eviction of a tenant shall be defeated and/or rendered non-maintainable if one of the heirs of the deceased tenant is not impleaded as party therein.

The plaintiffs/respondents filed a suit for eviction of tenants inter alia on the ground of reasonable requirement and default. The said suit stood decreed both on the ground of reasonable requirement and default by the trial court and such judgment and decree is affirmed by the first appellate court.

The plaint proceeds on the assertion that originally the suit premises belonged to one Abdul Wahed, who sold, transferred and conveyed the same to the plaintiff no. 1 and his brother, namely, Wahed Ali by executing and registering the deed of sale in the year 1997. Subsequently, the said brother, namely, Wahed Ali sold his undivided share therein to the plaintiff no. 2, the wife of plaintiff no. 1, in the year 1999 and, thus, the plaintiffs became the owners of the said suit property.

Initially, the suit premises was let out to one Zainal Abedin as monthly tenant in respect of one room with varandah having tile shed on the ground floor at a monthly rental of Rs. 25/- payable according to the English calendar. The original tenant died on 22nd November 2000. A notice dated 18th November 2003 was served upon the defendants/appellants under Section 6(4) of the West Bengal Premises Tenancy Act, 1997 and thereafter the suit for eviction was filed against them. It is pleaded in the plaint that the plaintiffs are residing at the tenanted premises i.e. 11-D, Charu Khansama Lane with great difficulties and, therefore, reasonably require the suit premises for their own use and occupation and for the occupation of their dependants. It is further pleaded that the family of the plaintiffs consists of themselves with five school going children and such rented accommodation is not reasonable suitable for their occupation. It is further stated that the defendants have defaulted in payment of rent since November 2000 and, therefore, exposed themselves liable to be evicted from the tenanted premises.

Apart from the general denial of such assertions, a plea has been taken in the written statement that one of the sisters of the original tenant, namely, Saida Khatoon has not been impleaded as party in the said suit and, therefore, the suit is bad for non-joinder of necessary party. It is further pleaded that the plaintiffs have several accommodations in or around the city of Kolkata and, therefore, there is a lack of element of need in such requirement. On the aforesaid factual matrix, the parties deposed in the matter and the suit was ultimately decreed in favour of the plaintiffs/respondents, which was affirmed by the first appellate court.

Learned Advocate for the appellants argues two points before us, which, according to him, raise a substantial question of law for admission under Order XLI Rule 11 of the Code of Civil Procedure. Firstly, it is argued that upon the death of the original tenant, all his heirs succeeded to the tenancy and if one of such heirs was left out and not impleaded in the suit, the suit itself is bad. To buttress the aforesaid submission, reliance is placed upon a three-Judge Bench decision of the Supreme Court rendered in case of Textile Association (India) Bombay Unit vs. Balmohan Gopal Kurup and another, reported in (1990) 4 Supreme Court Cases 700, a two-Judge Bench decision rendered in case of Kumar Jagdish Chandra Sinha and others vs. Eileen K. Patricia D'Rozarie (Mrs), reported in (1995) 1 Supreme Court Cases 164 and a Division Bench judgment of this Court in case of Jaharlal Saha and others vs. Pradip Saha and others, reported in (2006) 1 Calcutta High Court Notes 513. Secondly, it is contended that in absence of any local commission, the ground for reasonable requirement cannot be proved and having not done so in the instant case, both the courts ought to have held that the plaintiffs/respondents have miserably failed to prove their requirements as reasonable.

Since at the time of admission under Order XLI Rule 11 of the Code of Civil Procedure, the respondents have no right of audience and the matter remains

with the appellants and the Court, we proceeded to decide the matter as to whether such points involve substantial question of law.

The entire argument hovers around the decision cited by the appellants for the proposition that upon the death of the contractual tenant, tenancy devolves upon his heirs and legal representatives and if any one of them is left out, it is not only that the entire tenancy has not been determined but also the suit is not maintainable.

In case of Textile Association (India) Bombay Unit (supra), the original tenant died leaving behind his widow, two sons and daughters and the suit was instituted against the widow, son and a daughter leaving another son, the respondent no.1 therein. The suit was decreed ex parte on the ground of failure to pay arrears rent and such decree was put into execution and the possession was also recovered by the landlord. Subsequently, the respondent no.1 therein filed a suit challenging the said ex parte decree having not binding upon him and upon dismissal thereof and the affirmance by the first appellate court as well as the High Court, the matter reached the Supreme Court. The Apex Court found that the respondent no.1 was as much the tenant with the mother and brother and the ex parte decree was set aside. However, by exercising the powers under Article 142 of the Constitution of India, the respondent no.1 was directed to be impleaded as party to the said eviction suit.

In Kumar Jagdish Chandra Sinha and others (supra), the point, which felt for consideration, relates to a definition of a tenant enshrined under Section 2(h) of the repealed Act i.e. the West Bengal Premises Tenancy Act, 1956. The definition of a tenant appearing in the said repealed Act engulfs two categories of tenants i.e. contractual tenant and statutory tenant. A point was raised whether a person continuing in possession after the death of the original tenant being his heirs can be said to fulfil the said definition provided he ordinarily resides with the tenant at the time of his death, can be extended to a contractual tenant as well. The Apex Court held that the condition enshrined is relatable to a statutory tenant and not contractual tenant in these words:

"The matter can be viewed from another angle also. If the words "such person's death" are to refer to both the clauses relating to contractual tenant and statutory tenant, as suggested by Dr. Ghosh, it would mean that the right of tenancy, which, before the amendment of Section 2(h) was to devolve upon all the heirs of a contractual tenant would, after the amendment, be limited to those heirs who were ordinarily residing with him at the time of his death and not all. Such an extravagant interpretation would militate against the purpose, spirit and letter of the amendment."

The Division Bench of this Court in the case of Jaharlal Saha and others (supra) relied upon a three-Judge Bench decision of the Supreme Court in case of Textile Association (India) Bombay Unit (supra) and held that the ratio of the said judgment appears to be that a suit for eviction against the heirs of the tenant is

not maintainable in absence of any one of such heirs. The Division Bench further held that not only the suit is bad for non-joinder of necessary party but the entire notice to threat of suit is also invalid.

Subsequent to the Division Bench judgment in case of Jaharlal Saha and others (supra), a three-Judge Bench of the Supreme Court in case of Shakuntala Vasant Pahadi & Ors. Vs. Purushottam Vasant Pethe & Ors., reported in (2007) 3 Supreme Court Cases 123 held that the moment the entire estate of the deceased tenant is adequately represented by some of the heirs, non-impleadment of other heirs shall not invalidate the decree nor the suit can be said to be bad for non-joinder of necessary party in these words:

"2. The appellants filed a suit for eviction in the year 1977 impleading therein wife of one Vasant Pethe, who was the original tenant and died in the year 1969. The said suit was decreed against the wife of Vasant Pethe and decree passed by the trial Court has been confirmed and the same attained finality, the matter having not been taken to any higher Court. For execution of the said decree, an execution petition was filed. In the meantime, children of Vasant Pethe filed another suit in the year 1987 challenging the validity or otherwise of decree passed in the eviction suit referred to above filed in the year 1977 on the ground that at the time of death of their father who was the original tenant, they were minors and they along with their mother were residing in the rented premises, as such were necessary parties in the said eviction suit and they having not been made parties, the decree passed in such a suit was not binding upon them.

3. The said suit was dismissed by the trial Court and the decree of the trial Court was confirmed on appeal being filed by the plaintiff-respondents. Thereafter, the plaintiffs filed a writ petition in the High Court challenging the judgments rendered by the trial Court as well as the appellate Court. By the impugned order, the High Court has allowed the writ petition, set aside the judgments rendered by the trial Court as well as the appellate Court and decreed the suit on the sole ground that as the plaintiffs who were some of the heirs of the original tenant Vasant Pethe, were not impleaded in the eviction suit wherein only their mother was impleaded, who was only one of the heirs of the original tenant Vasant Pethe, the eviction decree passed therein was not binding upon them. Hence, this appeal by special leave.

4. In the present case, in spite of service of notice, the plaintiff-respondents have not appeared before this Court to contest the prayer made herein. Learned counsel for the appellants submitted that if an original tenant dies leaving behind more than one heir, it is not necessary under law to implead all the heirs in a suit for eviction but the same can be filed only against one of the heirs who could have represented interest of the deceased tenant; in other words, his interest has been looked after in a bona fide manner, but if there is any clash of interest between the person concerned and his assumed representation or if the latter due to collusion or for any other reason mala fide neglects to defend the case, he cannot be considered to be a representative. Reliance in this connection has been

placed upon decision of this Court in *Surayya Begum (Mst) v. Mohd. Usman* (1991) 3 SCC 114. In our view, in the absence of any allegation and proof against the mother, showing collusion with the landlord or mala fide neglecting the interest of her sons i.e. the plaintiffs, present case is squarely covered by the aforesaid decision of this Court, as such the High Court was not justified in decreeing the suit."

The later three-Judge Bench of the Supreme Court relied upon a two-Judge Bench of the said Court in case of *Surayya Begum vs. Md. Usman*, reported in (1991) 3 SCC 114, wherein the *Textile Association (India) Bombay Unit* (supra) was considered and distinguished on the facts. Though the *Surayya Begum* (supra) was considered by the Division Bench of this Court in case of *Jaharlal Saha and others* (supra) but rendered inapplicable in view of the larger corum Bench in *Textile Association (India) Bombay Unit* (supra). The Division Bench held that the decision of the Supreme Court by a larger corum is binding on the lesser corum Bench and any contrary view if taken therein is not a binding precedent as the High Court is bound by a larger corum decision. The effect of the aforesaid decisions invite a larger issue to be addressed on the concept of binding precedents, more particularly, when the later decision, even if delivered by lesser corum but extends and clarifies the proposition of law declared by a Bench of higher corum. The said point, in our opinion, does not require to be delved in deep as the points urged before us can be conveniently decided on the change in the law.

The definition of tenant in the repealed Act has seen a significant change in subsequent enactment. The repealed Act defines tenant being inclusive of both contractual and statutory tenants but restricts the heritability in case of statutory tenant. In *Kumar Jagdish Chandra Sinha and others* (supra), the Apex Court propels the distinction between a contractual tenant and statutory tenant. It is no doubt true that on the death of a contractual tenant, tenancy being a heritable estate, all his heirs succeed to such estate but the position would be different in case of a statutory tenant. The word "such" appearing in definition section of the repealed Act manifestly convey the legislative intent that the restriction of heritability is applicable in case of death of a statutory tenant and not to the contractual tenant. It is no gain saying that on the death of the contractual tenant, his heirs succeed to a tenantable estate and the suit for eviction must be filed against them. There is also a concept of doctrine of representation having its applicability in this regard as held in a later three-Judge Bench decision of the Supreme Court in case of *Shakuntala Vasant Pahadi & Ors.* (supra).

Admittedly, the instant suit is filed under Section 6 of the later enactment i.e. the West Bengal Premises Tenancy Act, 1997 on the ground of default and reasonable requirement. The tenant is defined in Section 2(g) where heritability is restricted. Section 2(g) is reproduced as under:

"2(g). "tenant" means any person by whom or on whose account or behalf the

rent of any premises is or, but for a special contract, would be payable, and includes any person continuing in possession after termination of his tenancy and,, in the event of death of any tenant, also includes, for a period not exceeding five years from the date of death of such tenant or from the date of coming into force of this Act, whichever is later, his spouse, son, daughter, parent and the widow of his predeceased son, who were ordinarily living with the tenant up to the date of death of the tenant as the members of his family and were dependent on him and who do not own or occupy any residential premises, and [in respect of premises let out for non-residential purpose his spouse, son, daughter and parent who were ordinarily living with the tenant up to the date of his death as members of his family, and were dependant on him or a person authorised by the tenant who is in possession of such premises] but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction:

Provided that the time-limit of five years shall not apply to the spouse of the tenant who was ordinarily living with the tenant up to his death as a member of his family and was dependent on him and who does not own or occupy any residential premises.

Provided further that the son, daughter parent or the widow of the predeceased son of the tenant who was ordinarily residing with the tenant in the said premises up to the date of death of the tenant as a member of his family and was dependent on him and who does not own or occupy any residential premises, shall have a right of preference for tenancy in a fresh agreement in respect of such premises [on condition of payment of fair rent]. This proviso shall apply mutatis mutandis to premises let out for non-residential purpose."

Though the definition of "tenant" given in a repealed Act as well as the later enactment is expansive and engulf both the contractual and statutory tenant but the legislatures conspicuously omitted the use of the word "such" and replaced it by the word "any". Such change assumes importance as it erodes the restricted heritability both in case of contractual and statutory tenant. The expression "in the event of death of any tenant" in place of "in the event of such tenant" encompasses both the contractual and statutory tenant otherwise it will defeat the very purpose of significant change having brought consciously in the later enactment. In both the cases i.e. contractual and statutory tenant the spouse, son, daughter, parents and the widow of pre-deceased son has a restricted heritability for a period of five years from the date of the death of such tenant or from the date of coming in force of the said Act provided they were ordinarily living with the tenant up to the date of his death as a members of the family and were dependent upon him and also do not own or occupy any residential premises. However, the first proviso appended to the said Section dilutes the period of five years in case of spouse of a tenant, who was ordinarily living with him as a member of the family at the time of his death and dependent upon him and do not own the house.

The intention of the legislation can be gathered not only from the object and purpose of the enactment but also from the meaningful reading of the language employed therein provided it does not invite any ambiguity in it. The word "any" having replaced the word "such" cannot be given a restrictive meaning or its applicability to the statutory tenant but to both the classes of tenants i.e. contractual and statutory. The other conditions attached on the heritability of the persons named therein are also required to be satisfied to fulfil the definition of a tenant and any other interpretation contrary to such legislative intention to frustrate the very purpose and render such provision unworkable and otiose, should be guarded against.

Textile Association (India) Bombay Unit (supra) was decided as if there is no restriction on the heritability of the estate left by the tenant and, therefore, the suit for eviction against some of the heirs leaving the others is not maintainable. Even in case of Kumar Jagdish Chandra Sinha and others (supra), the Apex Court was considering the case on a repealed enactment and the interpretation of the word "such" assumes importance. The Division Bench in case of Jaharlal Saha and others (supra) was also on a repealed enactment. The aforesaid decisions in the perspective of the changed definition of the "tenant", may not be a guiding factor or a silver line in dark cloud.

Admittedly, said Saida Khatoon is not impleaded as party in the said suit though she was the eldest child of the deceased tenant. The cross-examination of the defendants' witness has to be seen in the light of the discussions made herein above. It is specifically stated in the cross-examination that she was given in marriage when the said witness was 10 to 12 years old and admittedly resides in her matrimonial house. Though the court found that she is one of the heirs entitled to inherit the tenantable estate upon the death of her father yet she does not fulfil the conditions incorporated in the definition section i.e. Section 2(g) of the West Bengal Premises Tenancy Act, 1997.

By virtue of the definition given in Section 2(g) of the later enactment, the heirs named therein do not automatically come within the purview thereof and the conditions attached thereto are also required to be looked into. The persons named therein can be regarded as tenants upon the death of contractual or statutory tenant provided they were originally living with the deceased tenant up to the date of his death as members of the family and were dependent upon him and also do not own or occupy any residential premises. Admittedly, said Saida Khatoon after her marriage is residing in her matrimonial house and, therefore, was not originally living with the deceased tenant nor was dependent upon him at the time of his death.

We, thus, do not find any ambiguity and/or infirmity in the judgment both by the trial court and the first appellate court so far as it relates to a non-impleadment of Saida Khatoon.

Reverting to the second point, we gave our anxious consideration and do not find

any substance therein. Indubitably, the plaintiffs/respondents are the owners and landlords of the defendants/appellants, as no challenge is thrown thereupon. Section 6 of the later enactment, more particularly, the ground of reasonable requirement incorporated therein also received a significant change from the ground of reasonable requirement in the repealed enactment. In order to succeed in a suit for eviction on the ground of reasonable requirement filed under the repealed enactment, the plaintiff has to prove three things, namely, he is a owner of the suit premises, he reasonably requires the suit premises for his own use and occupation and he is not in possession of the reasonable suitable accommodation. In the later enactment the first condition relating to ownership of the property is conspicuously omitted and the landlord was entitled to get the decree for eviction on such ground even if he is not the owner thereof.

Once the relationship of landlord and tenant is established, it is no longer open to the tenant to challenge the title of the landlord to the said property. The definition of landlord in the later enactment is wide enough and any curtailment to such definition shall be opposed to the very purpose for which it has been so incorporated. What is required to be proved by the landlord to succeed in a suit for eviction on the ground of reasonable requirement or that he reasonably required the suit premises for his own use and occupation and for the occupation of the family members and dependents, he is not in possession of the reasonable suitable accommodation within the defined territorial limits. The concept of reasonable suitable accommodation is not mere subjective but to be judged objectively.

A plea was taken by the defendants/appellants that the plaintiffs/respondents have various accommodations in or around the city of Kolkata but could not be proved by convincing evidence. However, the defendants/appellants came forward and deposed that they are the tenants of one room in another premises and also exhibited the rent receipts as well as the other documents in support thereof. There is no dispute on the composition of the family of the plaintiffs/respondents, which consists of themselves and five school going children. There is no dispute raised on the extent of tenancy and a plea has been taken that in absence of any local commission the plaintiffs/respondents cannot succeed in getting a decree on the ground of reasonable requirement.

It is no doubt true that in order to ascertain whether the plaintiffs/respondents are in possession of reasonable suitable accommodation and also for the purpose of partial eviction, it is imperative that a commission should be held to ascertain the extent of the accommodation available to both the parties. The moment the evidence is adduced by the plaintiffs/respondents that they are in possession of the tenanted premises under another landlord, such tenanted premises cannot be regarded as reasonable suitable accommodation. The plaintiffs/respondents shall always be under threat of eviction and such accommodation is precarious. It is not necessary that the plaintiffs/respondents should prove by a positive act of their landlord, which may be termed as threat of eviction. Even if the notice of

termination is not issued by the landlord of the plaintiffs/respondents yet their occupation as tenants therein is always precarious and threat of eviction is eminent. The law does not prevent the landlord to occupy his house which he owned or otherwise possessed simply because his occupation as tenants in another premises is sufficient to cater the need. It would be preposterous to suggest that such tenant would suffer decree of eviction from his landlord and thereafter will approach the landlord to give possession of his premises. In the backdrop of the aforesaid fact and more particularly on the composition of the family, mere failure to appoint a local commissioner for inspection is not fatal.

Since both the courts have found that the plaintiffs/respondents reasonably requires the suit premises for their own use and occupation and the occupation of their family members, we do not find any substantial question of law involved in the instant appeal.

Accordingly, the appeal is, thus, dismissed.

In view of the dismissal of the appeal itself, the connected application for stay being CAN 7408 of 2019 has become infructuous and the same is also dismissed.

There shall, however, be no order as to costs.