

inder Sengupta Vs. Sm. Prova Rani Chakraborty and anr.

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Court : Kolkata

Decided On : Jul-19-1983

Reported in : AIR1985Cal218,88CWN379

Judge : Pradyot Kumar Banerjee and ;Ram Krishna Sharma, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 100 - Order 6, Rule 17; ;
[West Bengal Premises Tenancy Act, 1956](#) - Sections 13(1), 13(3A) and 17(4);
;West Bengal Premises Tenancy (Second Amendment) Act, 1969 -

Appeal No. : A.F.A.D. No. 961 of 1980

Appellant : inder Sengupta

Respondent : Sm. Prova Rani Chakraborty and anr.

Advocate for Def. : Saktinath Mukherjee, ;Ramapati Roy and ;Deba Prosad Mukherjee, Advs.

Advocate for Pet/Ap. : Mani Ghosh, ;Prasun Ghosh and ;Hazari Pr. Roy Chowdhury, Advs.

Disposition : Appeal partly allowed

Judgement :

Banerjee, J.

1. This appeal by the defendant arises out of a suit for recovery of Khas possession. The plaintiffs are the owners by purchase of premises No. 139A, Rash Behari Avenue by a deed of conveyance dated 5th June, 1973. The defendant, it is alleged, is a tenant under the plaintiffs in respect of a flat on the second floor of the suit premises described in Schedule 'A' to the plaint at a rental of Rs. 675/- per month. It is further alleged that the defendant did not pay rents from February, 1975 onwards and he is guilty of committing nuisance and annoyance by using abusive languages and of threatening the plaintiffs and the family members. It is stated further that the flat was let out to the defendant for residential purposes but he has sub-let a portion to Kunjalal Mahabir Prasad for carrying on business in the suit flat. The defendant, it is alleged, forcibly occupied one garage on the western side of the suit premises, one small mezzanine room and open terrace on the second floor as described in the Schedule 'B' to the plaint. On these grounds the plaintiff's filed the suit on 9th Feb. 1976. The plaintiffs applied for amendment of the plaint on 28-4-1977. The plaintiffs had purchased the suit premises on 5th June, 1973. On 28th April, 1977 the plaintiffs filed an application for amendment of the plaint introducing two new grounds for eviction of the defendant from the said flat. One of the grounds is that the plaintiffs required the suit flat for their own use and occupation as their present accommodation is insufficient as also the defendant without their consent converted the English type of privy commonly known as 'commode system' into an Indian style by raising pucca construction. The defendant contested the suit by filing written statement, contending inter alia, that he is a tenant in respect of both the Schedules, 'A' and 'B' to the plaint, since the time of the vendor of the plaintiffs. It is further stated that 'B' Schedule property, including the garage, is a part of the tenancy. The plaintiffs, it is alleged, did not collect rents for the months of Feb. and Mar. 1975. Thereafter the defendant sent the rents for those two months by Money Orders but the plaintiffs refused to accept rents by Money Orders. Hence the defendant went on depositing the rent with the Rent Controller since April 1975. It is further alleged that the notice to quit is bad, invalid, illegal and insufficient. The defendant denied the allegations of sub-tenancy. On these grounds both the Courts below held in favour of the plaintiffs. Hence the appeal by the defendant.

2. On behalf of the defendant, Mr. Ghosh contended that the suit was filed within 3 years after the purchase of the premises by the plaintiffs on the ground of default and committing nuisance. Application for amendment was made on 28-4-77 and granted on 27th June, 1977. The decree was passed on that ground alone. It is argued that in view of Section 13(3A) of [West Bengal Premises Tenancy Act, 1956](#) the amendment could not have been allowed and therefore the decree on the ground of reasonable requirement cannot be sustained.

3. Mr. Saktinath Mukherjee on behalf of the respondents-plaintiffs contended firstly that the Courts below ought to have held that the defendant was in default in payment of rent for two months within the period of 12 months. Secondly it is argued that the Courts below have held that the defendant is a trespasser in the part of the premises, and therefore the defendant has committed nuisance within the meaning of Section 13(1)(e) of the West Bengal Premises Tenancy Act. Thirdly it is contended that the amendment was granted beyond 3 years after the purchase though the suit was filed within 3 years from the date of purchase. Mr. Mukherjee contended that the amendment was made, the Courts below directed to pay the costs and the cost was accepted and as such there was a waiver of objection regarding the amendment of the plaint.

4. In so far as the plaintiff's plea of default is concerned, it must be stated that in the written-statement filed by the defendant it has been admitted that the defendant has not paid rent for the months of February and March 1975, and therefore there is no question that the defendant is a defaulter for two months within the period of 12 months but being a first defaulter, no decree for eviction on that ground can be passed in view of the provision of Section 17(4) of the West Bengal Premises Tenancy Act.

5. Mr. Ghosh very fairly did not argue that there was no default at all even after the admission of the defendant about the default for the months of Feb. and Mar. 1975. We have, therefore, no option but to hold that the defendant has failed to pay the rent of two months within the period of 12 months and, therefore, must be held to be a defaulter but is entitled to the relief under Section 17(4) of the West Bengal Premises Tenancy Act. Next question mooted by Mr. Mukherjee is

nuisance coming under Section 13(1)(e) of the Act. It is argued by Mr. Mukherjee that both Courts below held that the defendant has taken forcible possession of the suit premises. Therefore they are trespassers in respect of the 'B' Schedule properties and the 'B' Schedule properties are not part and parcel of the defendant's tenancy. Mr. Mukherjee however contended that if this finding is correct then this constitutes nuisance and annoyance within the meaning of Section 13(1)(e) of the West Bengal Premises Tenancy Act. Issue No. 5 framed in the suit regarding the nuisance and annoyance is as follows : Is the defendant guilty of committing nuisance and annoyance as alleged Is that the defendant and his men used filthy languages and threatened the plaintiffs and husband of the plaintiff No. 2 with dire consequences. Both the Courts below, however, held against the plaintiffs on this issue.

6. Mr. Mukherjee relied upon the cases reported in AIR 1947 Lah 296 and (Niader Mal v. Ugar Sain) on that score. It must be stated that the defendant claimed to be a tenant in respect of A and B Schedule properties. Both the Courts below held that the defendant is a tenant of 'A' Schedule properties and the defendant has no right in respect of the 'B' Schedule properties. In the cases reported in AIR 1947 Lah 296 and (Niader Mal v. Ugar Sain) it was held, inter alia, that every inconvenience, discomfort or annoyance is not, however, sufficient to constitute a nuisance and the act of a tenant in stopping the other occupants of the premises from using the bath-room and the latrine which they are entitled to use would constitute both nuisance and annoyance within the meaning of Section 13(1)(j) of the Delhi and Ajmer Rent Control Act making such tenant liable to be evicted. In para 6 of the said judgment, it was held that a mere encroachment of a part of the building may in certain circumstances amount to a nuisance.

On the basis of this judgment, Mr. Mukherjee contended that here, both the Courts below held that the defendant is a trespasser in respect of the 'B' Schedule properties and as such committed nuisance under Section 13(1)(e) of the West Bengal Premises Tenancy Act. In our opinion, in this second appeal, Mr. Mukherjee cannot get a decree by making out a new case which was not put forward in the Courts below.

7. Most important point, however, in this case was that the amendment of the plaint in a suit which was filed within 3 years after the purchase can be allowed or not on the ground on which a decree was not obtainable had the suit been filed within the said period. It appears to us that the amendment of the plaint could not be allowed in view of the Division Bench judgment reported in : AIR1982 Cal407 (Sudha Mukherjee v. Sankar Chatterjee) with which we respectfully agree. Their Lordships of the Division Bench speaking through Anil Kumar Sen, J : held inter alia as follows :

'Where the amendment sought for was solely for the purpose of circumventing the legal bar imposed by Sub-section (3A) of Section 13 of the [West Bengal Premises Tenancy Act, 1956](#), which well barred the suit on the date it was instituted if the real ground in support of such a suit had been pleaded in the plaint, the amendment should not have been allowed.'

It has been further held that 'it is well settled that even in cases of such amendments, the date of original presentation of the plaint continues to remain the date of the suit. In cases of amendments which do not change the nature and character of the suit or do not attract Section 21 of the Limitation Act, there is no resultant change of the date of the suit'.

8. Mr. Mukherjee, however, contended that this case was decided in a revisional application preferred against an order of amendment itself and therefore this will not apply in the present case. Their Lordships of the Division Bench considered the effect of the case reported in : [1975]2SCR774 (B. Banerjee v. Smt. Anita Pan). Mr. Mukherjee, however, relied heavily on the judgment of the Supreme Court reported in : [1975]2SCR774 (B. Banerjee v. Anita Pan) in particular paragraphs 19 and 28 of the said judgment. In our opinion, the said judgment sought to say about litigation then pending and the date of the amendment and not in respect of the suit filed after the date of amendment of the West Bengal Premises Tenancy Act, 1969. It will appear from the said judgment that the Supreme Court is of the opinion that since the new Clauses (f) and (ff) are included by the Amendment Act in Section 13 of the basic Act and since the suit in question, as they stood, do not seek eviction on those grounds they will have to be

dismissed on account of the omnibus inhibition on recovery of possession contained in Section 13 itself. However, as far as possible the Courts must avoid multiplicity of litigation. Therefore the Supreme Court directed the plaintiff to file fresh pleadings setting out their grounds under Clauses (f) and (ff) of Sub-section (1) on that date,

9. It must be remembered that the Supreme Court has made that observation in respect of the suit filed before the amendment of Section 13(1)(f) and (ff) of the West Bengal Premises Tenancy Act in order to save the numerous litigations which were filed before the amendment and the Supreme Court judgment saved them from being dismissed. This question was considered by this Hon'ble Court in a Division Bench judgment in : AIR1982 Cal407 (Sudha Mukherjee v. Sankar Chatterjee). Their Lordships of the Division Bench considered the effect of the Supreme Court judgment that the amendment of the plaint by addition of grounds coming under Section 13(1)(ff) is not permissible if the suit has been filed within 3 years from the date of the purchase by the landlord. We respectfully agree with the view expressed by the Division Bench and hold that Mr. Mukherjee's contention on this score that the Court has power to treat a suit to have been instituted at a subsequent date in order to shorten the litigation is not permissible.

10. Mr. Mukherjee further contended that when the amendment was allowed giving costs to the defendant, the defendant waived this objection to such amendment. It is argued by Mr. Mukherjee that due to the waiver of this plea the landlord cannot now argue that the amendment cannot be allowed because according to Mr. Mukherjee this right is for the benefit of the landlord/tenant and the benefit can be waived by the landlord/tenant. In our opinion this is a public policy of the legislation between the landlord and the tenant in order, as the Supreme Court has said, to minimize this speculative suit by the landlord who cannot maintain a suit under Section 13(1)(ff) of the Act and by some transferee landlord who can very well get the advantage of Section 13(1)(ff) of the Act, this plea being against the public policy cannot, in our opinion, be waived by a particular tenant or landlord. It is a right and obligation of the landlord and the tenant alike coming within the mischief of Section 13(1)(ff) read with Section 13(3A) of the West Bengal Premises Tenancy Act. The provision protects the

tenant from the eviction suit brought by a transferee landlord within 3 years from the date of purchase and prohibits a suit by a transferee landlord on the ground of Section 13(1)(f) and (ff) of the Act within the said period. The view we take it is not necessary for us to refer to the cases reported in : AIR1964 Pat275 and AIR 1933 Mad 410. This according to us covers all the points argued by Mr. Mukherjee on the main aspects of the case. Mr. Mukherjee further argued that Schedule 'B' properties were not the subject-matter of the tenancy. From the Exhibit being 'Rent Receipts' it is quite clear that the defendant is a tenant in respect of properties mentioned in 'A' Schedule to the plaint. It has been held by both the Courts below that 'B' Schedule properties are not the subject-matter of the tenancy. Both the Courts below held concurrently that 'B' Schedule properties have been trespassed by the defendant. We agree with the finding of both the Courts below that 'B' Schedule properties have been trespassed by the tenant-defendant. Therefore the landlord-plaintiff is entitled to the possession in respect of the 'B' Schedule properties. 'B' Schedule properties are not the subject-matter of the tenancy of the defendant. We are of the opinion, therefore, that except that the defendant has a right of ingress and egress to the staircase and the passage from the road side to the staircase and the staircase leading to the second floor of the defendant to which the defendant has right of ingress and egress common with the others, the defendant is not a tenant in respect of 'B' Schedule properties. In that respect, therefore, the appellant is a trespasser in respect of the 'B' Schedule properties. The plaintiff is, therefore, in the occupation of western side of the suit premises, namely, one . garage, one small mezzanine room and open terrace on the second floor as described in the 'B' Schedule properties, subject to the right of the defendant of the ingress and egress through the passage and staircase, leading to the suit premises as described in Schedule 'A' property, the defendant is a monthly tenant at the rate of Rs. 675/- per month. We are not, however, going to the merits of the case of the plaintiff in so far as the reasonable requirement is concerned. In view of our finding that the suit under Section 13(1)(ff) is not maintainable on the reason stated hereinbefore and we have not gone into the merits of the contentions that whether the plaintiff has reasonably suitable accommodation or not and/or that the plaintiff does not require the premises for his own use and occupation.

11. In the result, the appeal succeeds in part to the extent that the plaintiff cannot get a decree for recovery of possession in respect of the flat on the second floor of the suit premises as described in Schedule 'A' properties. It is further declared that the defendant is a defaulter in payment of 2 month's rents within the period of 1 year being February and March, 1975 on admission but the plaintiff is not entitled to a decree in view of Section 17(4) of the West Bengal Premises Tenancy Act being first default. The plaintiff's suit for eviction in so far as the Schedule 'B' properties are concerned is decreed and the defendant also deliver the vacant possession thereof to the plaintiff within 3 months from date subject to the right of ingress and egress through the said Schedule 'B' properties as is necessary for the enjoyment of the Schedule 'A' properties.

12. The appeal, therefore, succeeds in part to the extent hereinbefore stated.

13. There will be no order as to costs.

Sharma, J.

14. I agree.