

Usha Dalmia Vs. Debashis Roy

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Court : Kolkata

Decided On : Jun-25-2008

Reported in : 2008(3)CHN837

Judge : Jyotirmay Bhattacharya, J.

Acts : West Bengal Premises Tenancy Act - Sections 5, 7, 13, 13(1), 17(2), 17(4), 30, 31 and 33

Appeal No. : S.A. No. 455 of 2004

Appellant : Usha Dalmia

Respondent : Debashis Roy

Advocate for Def. : Haradhan Banerjee and ;Partha Pratim Mukherjee, Advs.

Advocate for Pet/Ap. : Debasish Roy and ;Ambar Nath Banerjee, Advs.

Disposition : Appeal dismissed

Judgement :

Jyotirmay Bhattacharya, J.

1. This second appeal is directed against the judgment and decree dated 10th March, 2004 passed by the learned Additional District Judge, 13th Court at Alipore in Title Appeal No. 78 of 2003 reversing the judgment and decree dated 3rd April,

2003 passed by the learned Civil Judge (Senior Division), 9th Court at Alipore in Title Suit No. 21 of 2001 at the instance of defendant/appellant.

2. This appeal was admitted for hearing on 19th July, 2004 by the Division Bench of this Hon'ble Court. While admitting this appeal, the following substantial question of law was formulated by the Division Bench of this Hon'ble Court:

Whether the learned Judge in the lower Appellate Court substantially erred in law in holding that the notice given by the defendant/appellant is quite legal and it is implied that the appellant will surrender the tenancy of the suit premises and hand over the vacant and khas possession in favour of the plaintiff/respondent inasmuch as the learned Judge failed to consider the scope of the said letter and erroneously held that the same can be considered as a notice under Section 13(j) of the West Bengal Premises Tenancy Act?

3. Let me now consider the merit of the instant appeal with reference to the substantial question of law formulated by the Division Bench of this Hon'ble Court as aforesaid, in the facts of the instant case.

4. The plaintiff/respondent filed a suit for eviction of the defendant/appellant on the ground of default in payment of rent and also on the ground of 13(j), as the defendant failed and/or refused to vacate the suit premises in terms of the notice to quit given by the defendant of the plaintiff.

5. So far as the ground of default is concerned, both the Courts below refused to pass a decree for eviction against the tenant/defendant as the defendant deposited the entire arrear rent in terms of the order passed by the learned Trial Judge on the defendant's application under Section 17(2) of the West Bengal Premises Tenancy Act. The defendant was thus given the relief under Section 17(4) of the said Act.

6. Since the findings of the Courts below with regard to the ground of default have not been challenged by either of the parties in this appeal, this Court does not feel any necessity for considering the legality of such findings of the Courts below in the instant appeal. This Court, thus, concentrates only to the consideration of the

issue regarding the ground of 13(1)(i) of the said Act.

7. Admittedly a notice of surrender of tenancy was given by the defendant to the plaintiff on 22nd October, 1999. It is also an admitted fact that the defendant has not surrendered her tenancy in favour of the plaintiff in terms of the said notice. Hence the instant eviction suit was filed by the plaintiff against the defendant on the expiry of the notice period.

8. The defendant/respondent contested the said suit by filing written statement alleging that the said notice is not a notice to quit simpliciter. The defendant claims that in the said notice the defendant simply made a proposal to surrender her tenancy provided the plaintiff refunds a sum of Rs. 1,00,000/- which was kept in deposit as security towards rent to the defendant. The defendant further claims that since the plaintiff did not refund the said sum of Rs. 1,00,000/- to the defendant, the said defendant did not deliver possession of the suit premises to the plaintiff. The defendant thus claims that the defendant is still a tenant in the suit premises.

9. The learned Trial Judge, after considering the pleadings of the parties as well as the evidence adduced in the respective suit, held that the notice to quit was conditional and since the condition regarding refund of the advance rent was not fulfilled by the plaintiff, the plaintiff cannot demand possession from the defendant in terms of the defendant's said notice to quit. In short, the learned Trial Judge held that the defendant's said notice cannot be construed as a notice of surrender as merely a proposal for surrender subject to fulfilment of the condition as mentioned therein by the plaintiff, was given in the said letter.

10. The learned Trial Judge believed the defendant's claim regarding deposit of such advance rent of Rs. 1,00,000/- with the plaintiff as the plaintiff failed to cross-examine the defendant's witness effectively with regard to the defendant's claim regarding deposit of such advance money with plaintiff.

11. The learned Trial Judge thus dismissed the suit by holding that the said notice cannot be regarded as notice of surrender of tenancy as simply a conditional proposal was given therein.

12. The plaintiff, however, did not accept the said judgment and decree of the learned Trial Judge and thus an appeal was filed before the learned First Appellate Court for challenging the legality and propriety of the decree of the learned Trial Judge.

13. The learned First Appellate Court reversed the findings of the learned Trial Judge and thus the said appeal was allowed on contest and a decree for eviction was passed by the learned First Appellate Court in favour of the plaintiff on the ground of Section 13(1)(j) of the said Act.

14. The learned Appeal Court disbelieved the defendant's claim for deposit of advance rent of Rs. 1,00,000/- with the plaintiff for want of corroborative evidence. The learned First Appellate Court further held that the defendant's claim regarding deposit of advance rent cannot be believed as the defendant even in the earlier proceeding under Section 17(2) of the said Act, did neither claim adjustment of the said advance rent against the arrear rent which was found to be due and payable by the defendant, by the learned Court below nor the defendant referred to and/or made any attempt to prove the alleged deposit of such advance rent with the plaintiff in the said proceeding.

15. The learned Appeal Court thus held that the defendant's said notice should be regarded as an unconditional notice to quit and since the defendant failed to vacate the suit premises in terms of the said notice, the said defendant is liable to be evicted from the suit premises on the ground of Section 13(1)(j) of the said Act.

16. The propriety of the said judgment of the learned First Appellate Court is now under consideration before this Court in this appeal.

17. Since the fate of the instant appeal mostly depends upon construction of the defendant's said notice dated 22nd October, 1999, this Court feels that for convenient understanding of the merit of the suit, the contents of the said notice should be taken note of, Accordingly, the content of the said notice is set out hereunder:

P534, Raja Basant Roy Rd.

Calcutta-700029

22nd October, 99.

To

Shri Debasish Roy,

P 534, Raja Basant Roy Rd,

Calcutta-700029

Sub-Surrender of my tenancy.

Dear Sir,

I will surrender my tenancy of First Floor (North side) of P-534, Raja Basanta Roy Road, Calcutta-700029 from 31st December, 99.

Please acknowledge the same and return my rent which is deposited with you.

Thanking you,

Yours sincerely

U. Dalmia

18. This notice was marked as Exhibit-1 in the suit. On plain reading of the said notice, this Court cannot hold that simply a proposal of surrender of tenancy was given by the defendant in the said notice. In fact, the defendant very clearly and explicitly expressed her intention of surrender of her tenancy with effect from 31st December, 1999, in the said letter. The plaintiff was also called upon to accept such surrender and acknowledge the same by the said letter.

19. It is no doubt true that a request was made by the defendant to the plaintiff for return of rent which was deposited with the plaintiff. But, such request for return of rent cannot be construed as a condition for surrender of tenancy. Even in the said letter, the defendant did not mention that she will not surrender her tenancy from

31st December, 1999 unless the advance rent allegedly deposited with the plaintiff, is returned to the defendant.

20. By giving anxious consideration to the said notice itself, this Court has no hesitation to hold that the request for return of the advance rent was simply a request and not a condition for surrender of tenancy. As such, this Court agrees with the findings of the learned First Appellate Court regarding the nature of the said notice.

21. This Court, thus, holds that the said notice is a notice of surrender of tenancy and since the defendant failed to give up possession of her tenancy in favour of the plaintiff on the expiry of the last day of December, 1999, the plaintiff is entitled to get a decree for eviction on the ground of Section 13(1)(j) of the West Bengal Premises Tenancy Act as well as for mesne profit.

22. Though this Court holds that in view of the findings which were arrived at by this Court as mentioned above, this Court is not required to consider as to whether the defendant in fact paid a sum of Rs. 1,00,000/- to the plaintiff towards advance rent or not and further as to whether the defendant is entitled to get back the said advance rent from the plaintiff or not, but still then since both the Courts below contradicted with each other on the aforesaid rival claims of the parties after discussing the pleadings and evidence of the parties elaborately, this Court feels that it will not be proper to avoid adjudication of the said rival claims of the parties herein. This Court, thus, gives its own view on the said rival contention of the parties hereunder.

23. From the notice to quit, this Court finds that the defendant has not mentioned any specific amount which was allegedly deposited towards advance rent by the defendant with the plaintiff. Even the date when such deposit was made by the defendant to the plaintiff was not mentioned in the said notice.

24. Though in the written statement the defendant claimed that she paid to the plaintiff a sum of Rs. 1,00,000/- as refundable rent through her husband in her presence at the time of inception of tenancy on 12th February, 2001, but she did not mention anything about the deposit of such refundable rent with the plaintiff in

her application under Section 17(2) of the West Bengal Premises Tenancy Act which was filed by the defendant prior to filing of her written statement in the suit. The defendant also did not claim adjustment of the said deposit against the arrear rent which was found to be payable by the defendant to the plaintiff as per the order passed by the learned Trial Judge on 11th January, 2002 vide Order No. 12.

25. Such total silence on the part of the defendant regarding deposit of such refundable rent with the plaintiff in her earlier pleadings creates reasonable doubt in the minds of the Court regarding the defendant's claim for such deposit with the plaintiff. That apart, the defendant in her written statement claimed that such deposit was made by her husband in her presence at the time of inception of the tenancy and they jointly negotiated with the plaintiff, for deposit of such advance rent, but the defendant failed to give any corroborative evidence in this regard. When the plaintiff herself was a witness to the said transaction, she should have faced the box for proving the said transaction.

26. On scrutiny of evidence of the respective parties, this Court finds that though the plaintiff claimed that no such deposit was made by the defendant towards advance rent, but the defendant claimed that such deposit was made. The defendant's witness being DW-1 further stated in his evidence that at the time of such deposit, the defendant asked for proper receipt, but the plaintiff refused to grant such receipt. Since the plaintiff did not cross-examine the DW-1 on this part of his evidence, the learned Trial Judge held that the deposit of such advance rent by the defendant with the plaintiff is proved.

27. While holding as such, the learned Trial Judge did not consider the pleadings of the defendant in her written statement. On careful scrutiny of the pleadings of the defendant in her written statement, this Court finds that the defendant never pleaded the aforesaid material facts regarding the defendant's insistence for grant of receipt for such advance rent and the plaintiff's refusal to grant such receipt. Unless such material facts are pleaded in the pleadings, no Court can look into the evidence of the defendant in this regard as it is settled law of the land that no amount of evidence which is beyond the pleadings of the parties can be looked into by the Court. Thus, since there was no foundation of such evidence of the

defendant in the pleadings, the learned Trial Judge ought to have ignored the said evidence of the defendant.

28. That apart, Section 5 of the West Bengal Premises Tenancy Act makes it clear that demand of such advance rent exceeding one month's rent without the previous permission of the Controller, by the landlord in consideration of grant of tenancy, is illegal.

29. Section 7 of the said Act makes it clear that where any sum has been paid by the tenant to the landlord in contravention of the provisions of the Act, the Controller may, on application made to him within a period of six months from the date of such payment, order the landlord to refund such sum to the tenant or order adjustment of such sum against rent payable by the tenant.

30. The defendant, however, did not make any complaint earlier regarding payment of such advance rent of Rs. 1,00,000/- to the plaintiff as a consideration for letting the suit premises to her before the prescribed authority. The defendant did neither apply for return of such advance rent nor she prayed for adjustment of the said advance against future rent before the prescribed authority within the prescribed period of limitation.

31. Acceptance of such advance of Rs. 1,00,000/- for creation of tenancy by the plaintiff is also an offence under Section 30 of the said Act which prescribes imposition of penalty upon the landlord by way of fine which may extend to five times the amount claimed, demanded or received in excess of the rent by the landlord for the first instance.

32. Section 33 of the said Act prescribes the period of limitation for lodging a complaint against such offence before the prescribed authority.

33. Section 33 of the said Act provides that no complaint under Section 30 or Section 31 shall be brought against a person after the expiration of six months from the date of commission of the act in respect of which the complaint is brought.

34. The said six months limitation period for lodging such complaint has long expired. The defendant has neither applied for refund of the said advance rent nor applied for adjustment of such advance against future rent as per Section 7 of the said Act nor lodged a complaint against such alleged illegal demand of the plaintiff for creation of such tenancy as per Section 31 of the said Act.

35. In the aforesaid circumstances, this Court holds that had there been any bona fide case of the defendant regarding her alleged deposit of advance rent, she would not have sat idle for such a long time. Such long silence on the part of the defendant coupled with the inaction on her part in taking legal steps either for realisation of the alleged advance deposit or for punishing the plaintiff for such illegal demand, unequivocally proves that the defendant's claim for deposit of Rs. 1,00,000/- with the plaintiff towards advance rent, has not been proved in the instant case.

36. This Court, thus, is unable to believe that the defendant deposited a sum of Rs. 1,00,000/- with the plaintiff at the time of induction of such tenancy.

37. Accordingly, this Court does not find any merit in this appeal.

38. The instant appeal is, thus, dismissed on contest.

39. The judgment and decree of the learned First Appellate Court thus stands affirmed.

40. Urgent xerox certified copy of this judgment, if applied for, be supplied expeditiously after complying with formalities.