

07 24.11.2020
AN Ct. No. 23

C.O. 1075 of 2020
with
I.A. No.: CAN 1 of 2020 (Old No. CAN 5358 of 2020)

Dr. Sandeep Kumar Lakhotia
-vs.-
Dr. Archan Kumar De

Mr. Saurabh Prasad
Mr. Iftexhar Munshi

... for the petitioner

Mr. Siddhartha Lahiri
Mr. Debraj Dutta

... for the opposite party

In a suit for eviction governed under the West Bengal Premises Tenancy Act, 1997, hereinafter referred to as the 1997 Act, three applications have been taken – one by the defendant and two by the plaintiffs.

The application by the defendant is for repair of the suit premises, filed on or about 30.09.2015. The plaintiff's application under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 was filed on 21.03.2016. The plaintiff's other application is under the provisions of Order XXXIX Rule 7 read with Section 151 of the Code of Civil Procedure, 1908, the date of filing of which is not known.

All the three applications have been disposed of by a common order dated 03.02.2020 being the impugned order in the instant revisional application.

The plaintiff says that in an eviction suit an application under the provisions of Order XXXIX Rule 7 is allowed as a matter of course to enable the plaintiff to

demonstrate that the portion under his occupation is not sufficient to cater his needs and as such he reasonably requires the premises let out to the defendant.

The petitioner as the plaintiff has filed the suit inter alia on the ground that the reasonable requirement are for damages having been caused to the demised premises resulting in breach of the tenant's obligation under the provisions of Section 108 (m), (o) and (p) of the Transfer of Property Act, 1882.

The petitioner says that unless an Engineer Commissioner is appointed under the provisions of Order XXVI Rule 9, the extent of damage caused by the defendant to the demised premises cannot be ascertained. The petitioner at the same time says that his application under the provisions of Order XXXIX Rule 7 of the Code should have been also allowed instead of being rejected as the plaintiff's accommodation to prove its reasonable requirement cannot be ascertained by the Court unless the local inspection is held.

The petitioner further submits that the learned court below erred both in law as well as in facts while rejecting the plaintiff's application under Order XXVI Rule 9 and Order XXXIX Rule 7 of the Code of Civil Procedure.

The petitioner also says that by allowing the application for repair made by the opposite party, the learned court below has also erred as the damages allegedly caused to the demised premises will be wiped off, in the event, the repair is carried out prior to the same

being inspected by either the Engineer Commissioner or by the Advocate Commissioner for local inspection.

The petitioner has relied upon a judgment reported in 1995 (2) CLJ 496 (*Amar Singh Saini vs. Rup Chand Das & anr.*) in support of his contention.

On behalf of the opposite party, by relying upon the avernments made in the plaint, it is submitted that the plaintiff is aware about the area under the occupation of the defendant and as such there is no need for appointment of the Advocate Commissioner for ascertaining the area under occupation of the defendant in the demised premises.

The opposite party further submits that the two applications made by the plaintiff are nothing but a ploy to collect the evidence.

In a previous application made by the opposite party in the court below, an advocate Commissioner was appointed. The said advocate Commissioner has filed his report wherefrom the condition of the suit property is crystal clear. The court below after considering such report has allowed the application for repairs made by the opposite party.

In the event, the said two applications filed by the petitioner are allowed, it will amount to court assisting a party to collect the evidence which is in common parlance referred to as a fishing out of the evidence.

After going through the materials on record, the

impugned order and the submissions made on behalf of the parties, I find that the scope of interference into the order impugned is very limited and is only to the extent of appointing Advocate Commissioner for local inspection for the purpose of inspecting the property under plaintiff's occupation and prepare sketch map for the same.

So far as the other points of reference in the application under Order XXXIX Rule 7, in serial No. 'b' and 'd' of the Schedule to the Order XXXIX Rule 7 application are concerned, the learned court below was absolutely right in rejecting the application. Clear reasons for rejection has been given.

With regard to the points of reference mentioned in the Schedule of the petitioner's application under Order XXVI Rule 9 of the Code, I am of the view that the same, if allowed, will amount to collection of evidence and the court in that event will assist the petitioner in collecting the same which is impermissible in law.

So far as the inspection of the defendant's-opposite party premises is concerned, apart from the fact that the plaintiff-petitioner is aware of the area under the occupation of the defendant, the plaintiff is also in possession of the sanctioned plan as apparent from Serial 'h' to the Schedule of the Order XXVI Rule 9 application of the petitioner.

In any event, the Advocate Commissioner appointed at the instance of the opposite party-defendant in a previous application not being the subject matter of

this revisional application, has filed his report which has been annexed to the revisional application and has been duly considered by the court below.

On a perusal of the said report, an idea of the condition of the premises under the occupation of the opposite party will be apparent. In fact, the learned court below after considering such report has allowed the application for repair by the opposite party.

In the facts and circumstances as aforesaid, the order impugned dated 03.02.2020 is modified to the extent that Khandekar Aftabuddin, the advocate who was appointed as the Commissioner by the learned court below on a previous occasion, is appointed as the Advocate Commissioner in the petitioner's application under Order XXXIX Rule 7 of the Code for the following work:

“a) To note the extent of accommodation if any at present available to the plaintiff at Premises No. 162/C/498, Prince Anwar Shah Road, Police Station – Lake, Kolkata – 700045 and to take the measurement and the mode of user of the same in the said premises.

b) To draw a rough sketch map showing accommodation of the plaintiff if any at Premises No. 162/C/498, Prince Anwar Shah Road, Police Station – Lake, Kolkata – 700045.”

The Commissioner will complete the whole exercise within 31.12.2020 and shall file his report immediately thereafter in the learned court below where the suit is pending. The parties being present shall communicate the server copy of this order to the

Commissioner. It is needless to mention that the Commissioner shall give notice to the petitioner and the opposite party of the date and time when he will be carrying out the work as indicated hereinabove.

The remuneration of the Advocate Commissioner will be fixed by the learned court below at the time when the report is filed by the said Commissioner. The petitioner being the plaintiff in the suit pending before the learned court below shall bear the expenses of the Commissioner.

The instant revisional application stands **disposed of** accordingly without any order as to costs. Consequently, in view of the above, the connected application being CAN 5358 of 2020 also stands disposed of.

Urgent certified photostat copy of this order, if applied for, shall be given to the parties as expeditiously as possible on compliance of all necessary formalities.

(Arindam Mukherjee, J.)