

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

S.A 459 of 2007

Sri. Santosh Roy

-Vs-

Administrator General of West Bengal

For the Appellant: Mr. Rahul Karmakar, Adv.

Heard on: 7th January, 2021.

Judgment on: 14th January, 2021.

BIBEK CHAUDHURI, J. : –

1. Judgment of reversal passed in Title Appeal No.71 of 2000 by the learned Additional District Judge, Fastrack, 3rd Court at Sealdah is under challenge in the instant appeal by the plaintiff of Title Suit No.529 of 1989.

2. One Narendra Kumar Chakraborty as plaintiff filed Title Suit No.529 of 1989 against one Hemanta Kumar Chattopadhyaya, the defendant praying for eviction, recovery of possession and mesne profits under the West Bengal Premises Tenancy Act, 1956 (hereinafter described as the said Act) on the ground of default, subletting and reasonable requirement.

3. The suit was decreed by the learned Civil Judge (Junior Division), 2nd Court at Sealdah holding, inter alia that the defendant had parted with and/or sublet the suit premises in favour of his younger brother Subhash Chattopadhyaya and permanently left the suit premises. The learned trial judge also held that before filing of the suit the landlord/plaintiff served legal, valid and sufficient notice under Section 13(6) of the said Act.

4. The defendant preferred an appeal before the learned Additional District Judge, Fastrack, 3rd Court at Sealdah which was registered as Title Appeal No.71 of 2000. The learned Judge in First Appellate Court, however, came to the finding that the original defendant did not part with possession of the suit premises in favour of his brother and the plaintiff/respondent failed to prove his case of subletting within the requirement of Section 13(1)(a) of the said Act. Accordingly the appeal was allowed.

5. The plaintiff (hereinafter described as the appellant) has preferred the instant second appeal assailing the judgment and decree passed by the First Appellate Court reversing the judgment and decree passed by the trial court. The appeal was admitted for hearing under Order 41 Rule 11 of the Code of Civil Procedure on the following substantial questions of law:-

- i) Whether the learned Court of appeal below committed substantial error in law in reversing the judgment and decree passed by the learned trial court?

- ii) Whether the learned Court of appeal below committed substantial error in law in not appreciating that the family of the defendant/respondent was not a Hindu Undivided Family and therefore exclusive possession of the brother of the defendant/respondent in the tenanted portion of the suit premises constitutes an act of sub-tenancy for which ejectment under Section 13(1)(a) of the West Bengal Premises Tenancy Act, 1956 can be ordered?
- iii) Whether the learned Court of appeal below committed substantial error in law in not taking into consideration that in case of a creation of sub tenancy consent from the landlord in writing is mandatory and such consent cannot be implied or waived by the landlord under any circumstances?

6. It is pertinent to mention here that during the pendency of the suit the original plaintiff sold out the suit property to one Santosh Roy and he impleaded himself as plaintiff in the suit vide order dated 1st February, 1995 passed by the learned trial judge.

7. The moot substantial question of law involved in the instant appeal is therefore, whether the finding of the learned Judge in First Appellate Court in adjudicating the question as to whether the defendant/respondent had parted with or sublet the suit premises is perverse due to non-consideration of evidence on record or improper

finding of fact on shifting onus of proof of certain facts upon the appellant on the question of sub-tenancy and if such finding is to be treated as perverse or not.

8. The case of the plaintiff/appellant on sub-tenancy is that the defendant was inducted as a tenant in respect of the suit premises at a monthly rental of Rs.120/- payable according to the Bengali calendar month. Sometime after the inception of the tenancy, the defendant sublet the suit premises to Sri. Subhash Chattopadhyaya without written permission of the plaintiff and parted with possession of the entire suit premises in favour of him. After parting with possession, the defendant started residing separately in his official quarters under the Railways and after his retirement, he has been residing at Kasba. Subhash Chattopadhyaya, the brother of the defendant has been residing in the suit premises though there is no privity of contract of tenancy between the appellant and the said Subhash Chattopadhyaya.

9. The case of the defendant/respondent, on the other hand, is that he took tenancy of the suit premises for himself as well as his family members consisting of his parents and brothers and sisters. Subhash Chattopadhyaya is the youngest brother of the defendant. He is fully dependent upon the defendant since the date of inception of tenancy. The defendant took tenancy for the benefit and user of his parents, minor brothers, sister and others. Though the defendant used to reside elsewhere, Subhash Chattopadhyaya being his family member has been staying in the suit premises from the very beginning and the case of the

plaintiff and allegation of the plaintiff regarding creation of sub-tenancy by the defendant in favour of his brother is false, frivolous and concocted.

10. The learned Civil Judge (Junior Division), 2nd Court at Sealdah held that the defendant was inducted as a tenant in 1972. At the time of induction of the defendant, Subhash Chattopadhyaya did not stay with the defendant in the tenanted premises. In other words Subhash Chattopadhyaya came to stay in the tenanted premises subsequently. The learned trial judge came to such decision on due consideration of exhibit-B, electoral role for the year 1981 where the name of Subhash Chattopadhyaya did not appear. The said document remained unchallenged and unrebutted by the defendant. It was also found by the learned trial judge that in course of evidence the defendant (DW1) clearly admitted that his family is separate from the family of Subhash Chattopadhyaya and he resides at Kasba in his own house. Subhash Chattopadhyaya has been residing in the suit premises. Thus the learned trial judge held that the plaintiff has been able to prove that the defendant had parted with possession of the entire suit premises in favour of his brother.

11. The learned Judge in First Appellate Court, on the other hand rejected the finding of the learned trial judge on the ground that the defendant was able to prove that the tenancy was created for the benefit of his family members and his family consisting of his brother Subhash Chattopadhyaya amongst others. Secondly, it was held by the learned Judge in First Appellate Court that the defendant specifically pleaded that in the tenancy agreement it was stipulated that the tenancy was created for the

benefit of the family of the defendant. The plaintiff failed to produce the said tenancy agreement to rebut the pleadings of the defendant. According to the learned First Appellate Court, onus shifts upon the plaintiff to rebut the case of the defendant because he prayed for a decree of eviction on the ground of sub-tenancy.

12. The learned First Appellate Court further held that though it was within the knowledge of the plaintiff/appellant that the brother of the respondent used to reside in the suit premises, he went on accepting rent from the defendant without any objection. This goes to suggest that there was implied consent of the plaintiff in favour of the occupation of the suit premises by Subhash Chattopadhyaya. He further held that but for non-production of tenancy agreement, an adverse presumption could be drawn under the provision of Section 114(g) of the Evidence Act against the plaintiff and the reasonable conclusion ought to have been that the defendant took tenancy for the benefit of his brother and the said brother is lawfully residing in the suit premises. He is not a sub-tenant.

13. Mr. Rahul Karmakar, learned Advocate for the appellant at the outset draws my attention to the definition of tenant in Section 2(h) of the said Act. It states-

S.2(h) - "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 the termination of his tenancy or in the event of such person's death, such of his heirs as were ordinarily residing

with him at the time of his death, but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction.

14. According to Mr. Karmakar payment of rent and possession of rented accommodation by the tenant are two important ingredients within the meaning of Section 2(h) of the said Act. Question of having possession of tenanted premises by the persons other than the tenant as of right arises only after the death of the original tenant. Such right is also limited to such of his heirs as were ordinarily residing with him at the time of his death.

15. It is further submitted by Mr. Karmakar that the Premises Tenancy Act of 1956 does not, stipulate the idea of creation of tenancy by one person for the benefit and residence of others.

16. In the instant case admittedly the defendant permanently left the suit premises to his own house at Kasba delivering exclusive possession in favour of his brother Subhash Chattopadhyaya. It is also admitted by DW1 that Subhash Chattopadhyaya is residing in the suit premises and the family of defendant No.1 and Subhas's family are separate. In view of such candid admission, I fail to understand as to why and how the learned Judge in First Appellate Court held otherwise and came to the finding that the appellant failed to prove that the defendant had parted with possession of the suit premises in favour of his brother.

17. It is true that the plaintiff in his plaint pleaded that an agreement for tenancy was created before induction of defendant No.1 as a tenant in

respect of the suit premises. He further, did not produce the said tenancy agreement during evidence. The learned First Appellate Court drew up an adverse presumption holding, inter alia that had the agreement been produced in Court, it would have been seen that the tenancy was created for the benefit of family members of the defendant. The decision of the learned Judge in the First Appellate Court is absolutely erroneous on this score because of the fact that the party who pleads in the affirmative is under obligation to prove his case. The clear and unequivocal case of the defendant is that the tenancy was created for the benefit of his family members and family consisted of his brother Subhash Chattopadhyaya. The burden was on the defendant to prove the said fact by adducing positive evidence. He could have notified the plaintiff/appellant for production of the agreement for tenancy. He could have taken the recourse of the Order XI of the Code of Civil Procedure to produce the tenancy agreement. However the defendant did not take any such step. Under such circumstances, the learned Judge grossly erred in law in shifting the onus to prove the defence case upon the plaintiff on the basis of rule of adverse presumption.

18. In **Miss. D. Ennis vs. M/S. Calcutta Vyapar Pratisthan** reported in **AIR 1991 Cal 152**, the appellant left India permanently delivering possession of the suit premises to a third party without the consent of the landlord, written or verbal. This Court was pleased to hold that the law by now is well settled in such a case where a third party is found to be in exclusive possession of the tenanted premises, the burden lies on the

tenant to explain the situation, this being within his special knowledge, and in the absence of direct and cogent evidence from either party the Court will be entitled to consider the available circumstantial evidence and the probabilities to be drawn from the same and conclude that the premises were sublet and/or that the parting with possession was for payment of consideration. In **Bhairab Chandra Nandan vs. Ranadhir Chandra Dutta** reported in (1988) 1 SCC 383 the tenant permanently shifted his residence elsewhere leaving the tenanted premises entirely to his brother for occupation without obtaining landlord's permission. The Hon'ble Supreme Court in such fact situation was pleased to hold that the brother of the tenant was a sub-tenant and not a licensee under him. The same principle is reiterated in **Parvinder Singh vs. Renu Gautam** reported in 2004(4) SCC 794.

19. The law relating to proof of subletting is so consistent that citation of judicial pronouncement by the Apex Court and different High Courts is no longer necessary to make the judgment unnecessarily lengthy.

20. For the reasons stated above I am of the considered view that the learned Judge in First Appellate Court erred in law in allowing the appeal filed by the defendant/respondent.

21. Therefore the instant appeal is allowed.

22. The judgment and decree of dismissal passed in Title Appeal No.71 of 2000 reversing the judgment and decree passed in Title Suit No.529 of 1989 is set aside and the judgment and decree passed in Title Suit No.529 of 1989 is affirmed.

23. The defendant/respondent is directed to quit, vacate and deliver peaceful possession of the suit premises within 60 days from the date of this judgment failing which the appellant is at liberty to put the decree passed by the learned trial judge in Title Suit No.529 of 1989 in execution.

24. There shall however be no order as to cost.

(Bibek Chaudhuri, J.)