

22.02.2021.
Item No. 19

S.A.T. 321 of 2019
With
C.A.N. 1 of 2019 (Old No. C.A.N. 9584 of 2019)

Apurba Ghosh Roy
Vs.
Sambhu Roy Chowdhury.

Mr. Sounak Bhattacharya.
... for the appellant.

The subsequent owner of the property has adopted an innovative device to get the tenant thrown out from the tenanted property by filing a suit seeking declaration that the subject property having found in dilapidated and ruinous condition requiring immediate repair, but such repair can be done by him and not by the tenant.

As indicated above, the plaintiff/appellant is a subsequent purchaser and took shelter under the plea that at the time of purchase the vendor being the original owner never disclosed that the said shed/shop room is in possession of a tenant and, therefore, no right, title and interest have ever created in favour of the defendant/respondent. It is alleged that the said defendant being a resourceful and influential person in the locality and the plaintiff being the alien thereto could not resist the claim of the defendant who attempted to repair the said shed/shop room.

Curiously enough, there is a further statement in the plaint that the plaintiff was forced to sign the papers evincing the permission to repair the shed/shop room by the defendant. The defendant entered appearance and challenged the stand of the

plaintiff that he does not have any semblance of right, title and interest in respect of the said shed/shop room. He categorically asserted that he was inducted as tenant way back in late 1970 and thereafter was paying the rent to the then owner against a rent receipt having granted to him. Subsequently, the said owner refused to grant rent receipt, which constrained the defendant to tender the said rent by money order and upon refusal, the rent is being deposited in the office of the Rent Controller. He produced the rent receipts, which were marked as Exhibit-A series.

The trial court proceeded to decree the suit disbelieving the stand of the defendant that he is a tenant in respect of the said premises on the premise that the rent receipt contains the premises no. 59/2A, Pratapaditya Road, whereas the suit premises has been numbered as 59/2A/1A, Pratapaditya Road. Because of the so-called discrepancy, the trial court answered the issue no. 4 against the defendant and decreed the suit of the plaintiff/appellant declaring that he being the owner is also entitled to carry out the repairing work in the suit properties and the defendant is restrained permanently from entering into the suit premises and also from obstructing the plaintiff in carrying out such repair work therein.

The defendant challenged the said judgment and decree before the first appellate court, who held that the findings recorded by the trial Judge on the rent receipt so issued is unsustainable and untenable. It is further held that once the admitted owner has issued the rent receipt of a premises, which was later on partitioned amongst the co-sharer, it is improbable that tenancy would evaporate on the event of partition and the rent receipt, which

was earlier issued, creating such right will loose its legal efficacy.

Mr. Sounak Bhattacharya, learned Advocate appearing on behalf of the appellant, attacks the judgment and order of the first appellate court on two grounds; firstly, the first appellate court cannot declare the status of the defendant in a suit simplicitor for a declaration as to the right to repair the suit premises, in absence of any counter claim filed in this regard and, secondly, the first appellate court even after returning its finding on the ownership of the plaintiff/appellant that the defendant has no right to repair in such capacity, proceeded to dismiss the suit as a whole.

So far as the first point is concerned, we do not find that there is any substance in it. A suit was filed by the plaintiff with categorical assertion that the defendant has no semblance of right, title and interest in respect of the suit property and what is expected from the defending litigant is that he would claim any status or title to the property if he has therein to defeat the claim of the plaintiff. In fact, the defendant categorically averred in the written statement that he is a tenant in respect of the suit premises and in order to prove the same has filed rent receipts as well as the deposit of rent in the office of the Rent Controller, which were exhibited in the suit.

It is no longer *res integra* that the issues are not framed simplicitor on the averments made by the plaintiff in the plaint. Order XIV of the Code of Civil Procedure envisaged that the court shall frame the issues after hearing the learned Advocate for the plaintiff and the defendant as well as the pleadings filed in the suit. If the plaintiff has asserted that the defendant has no title and status in respect of the

suit premises and, on the other hand, defendant has claimed such status as tenant, it raises an issue in the suit and precisely for such reason the issue no. 4 was framed by the trial court. There was no objection raised by the plaintiff at the time of framing of the issue that such issue does not germane to the suit or being outside the scope of the controversy raised between the parties but allowed the court to proceed in deciding such issue obviously upon permitting the parties to adduce evidence in support of their respective stand. The moment the appellate court has decided the claim against the plaintiff, such point is projected in this second appeal saying that it involves substantial question of law.

There is no fetter on the part of the court to decide the status of the parties if the status is in issue in absence of any further counter claim to be filed seeking declaration of such status. We do not find any difficulty in taking a special defence available to the defendant upon a status in respect of the subject property to be taken in the written statement without filing any counter claim.

Reverting to the second point raised before us, what is manifest from the stand of the plaintiff is that the owner of the premises has a right to repair any portion thereof and no third party, be a tenant, licensee or otherwise, is entitled to repair it. One can fully appreciate the sentimental values inculcated in such owner who has the intention to protect his property and not to be dissipated or destroyed even by a person inducted as a tenant. If the plaintiff as a owner showed his intention to repair the suit property, we do not find any difficulty in permitting him to do so but such permission should not be treated as blessings from the court to deprive the

rightful claim of the defendant as tenant in respect thereof.

The aforesaid observation is made for the simple reason that the concurrent finding is recorded by both the courts below that the said shed/shop room is in a dilapidated condition and, in fact, main door has decayed and destroyed by passage of time. Since the order, which we propose to pass, in our opinion, may not affect the right of the defendant, we propose to modify the decree in their absence so that the defendant would be in a position to occupy the shed/shop room in a more better and suitable environment.

We, thus, modify the decree of the first appellate court to the extent that the plaintiff/appellant shall repair the said shed/shop room within three months from date and before such repair work is ensued, a notice shall be given to the defendant, who is entitled to monitor the entire repair work.

The time limit given hereinabove is mandatory and if the same is flouted and/or violated for any reason whatsoever the plaintiff shall pay compensation to the defendant assessed at Rs. 5,000/- per diem from the date of expiry of the period indicated herein above till the defendant takes up the responsibility to complete the repair work, which shall be taken immediately by the defendant as and when he feels so.

The permission to the plaintiff/appellant to repair the suit premises shall not be construed to diminish any right of the defendant nor confer any special right into the plaintiff and the tenanted premises shall be returned to the defendant at the same rate of rent as lastly paid.

The instant second appeal is, thus, disposed of.

In view of the disposal of the appeal itself, the connected application being C.A.N. 1 of 2019 (Old No. C.A.N. 9584 of 2019) has become infructuous and the same is also disposed of.

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

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(Harish Tandon, J.)

(Kausik Chanda, J.)