

Form No. J (1)

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Biswajit Basu.

SA No. 35 of 2017

IA No: CAN 01 of 2017 (old CAN 2031 of 2017)

CAN 02 of 2017 (Old CAN 2033 of 2017)

CHIRANJIB MITRA & ANOTHER.

VS.

KEYA ROY & OTHERS.

For the appellants:

Mr. Aniruddha Chatterjee,
Mr. Surya Prasad Chattopadhyay,
Mr. Arjun Samanta,
Mr. Ankit Chatterjee.

For the respondents:

Mr. Probal Kumar Mukherjee, Sr. Adv,
Mr. S.P. Tewary,
Mr. Abhijit Tewary.

Heard on : 04.07.2022

Judgment on : 05.08.2022

Biswajit Basu, J.

1. This is a second appeal by the plaintiffs-landlords against the appellate decree dismissing the plaintiffs' ejectment suit. The plaintiffs filed the said suit being Ejectment Suit No. 24 of 2008 before the learned Judge,

4th Bench, Presidency Small Causes Court of Calcutta for eviction of the defendants, the respondents herein, on the grounds that the plaintiffs require the suit property for their own use and occupation and for the use and occupation of the members of their family, the defendants have sublet the suit property without obtaining prior written permission from the plaintiffs and they are also defaulter in payment of rent since September, 2005.

2. The suit was contested by the defendant no. 1 only. The said defendant in her written statement apart from denying the plaint case, took a specific defence that Ajay Narayan Roy (hereinafter referred to as 'Ajay'), was the original tenant and he used to stay in the suit property along with his four brothers, since deceased in joint mess. The said Ajay died on October 31, 1983 and after his death, the rent receipts were issued in favour of his brother, Ranjit Narayan Roy(hereinafter referred to as 'Ranjit') as the head of the family, who happened to be the husband of the said defendant.

It is the further case of the defendant no. 1 that on the death of Ajay, the said tenancy devolved upon his widow and four sons which is still continuing, as such the suit is not maintainable due to non-service of notice of eviction upon all the said heirs of Ajay.

3. The learned Trial Judge by his judgment and decree dated June 15, 2015 overruled the aforesaid objection holding that non-service of notice of eviction upon the heirs of Ajay did not affect the maintainability of the said suit since the said heirs by allowing Ranjit to pay rent to the landlords and to get the rent receipts issued in his name, had surrendered the tenancy

which devolved upon them on the death of Ajay. The learned Trial Judge decreed the suit on two-fold grounds i.e. the plaintiffs require the suit property for their own use and the defendant no.1 has sublet a portion of the suit property in favour of two sons of Ajay on receipt of rent.

4. The defendant no.1, aggrieved by the said judgment and decree of the learned Trial Judge, preferred the connected Title Appeal No. 36 of 2015. The learned Judge, 3rd Bench, City Civil Court at Calcutta by the impugned judgment and decree dated December 23, 2016 has set aside the judgment and decree of the learned Trial Judge. The Appeal Court below although affirmed the findings of the learned Trial Judge regarding the plaintiffs' requirement of the suit property but set aside the findings on the issue of subletting. The Appeal Court below however has dismissed the suit holding that the tenancy was in the name of Ajay and after his death, his heirs, particularly his two sons who are admittedly residing and occupying a portion of suit property are also tenants and the suit is not maintainable in their absence.

5. The instant second appeal was admitted by the Hon'ble Division Bench under Order XLI Rule 11 of the Code of Civil Procedure to answer the following substantial questions of law:-

i) Whether the learned appeal Court has committed substantial error in law in not appreciating from the materials on record that it has been proved beyond doubt that fresh tenancy was created in favour of Ranjit Narayan Roy after the death of Ajay Narayan Roy whilst the erstwhile landlord collected rent from said Ranjit Narayan Roy and thereafter from defendants by

issuing rent receipts since death of Ranjit Narayan Roy?

ii) Whether the learned appeal Court has committed substantial error in law in not appreciating that legal heirs of Ajay Narayan Roy surrendered their tenancy and fresh tenancy was created in favour of Ranjit Narayan Roy after the death of Ajay Narayan Roy?

6. This Court, considering the respective cases of the parties felt necessary to frame the following additional substantial question of law:-

“In view of the definition of ‘tenant’ under Section 2(g) of the West Bengal Premises Tenancy Act, 1997, whether a defence is available to the respondents that the suit for eviction is not maintainable without the heirs of the deceased original tenant being impleaded as defendants?”

7. Mr. Aniruddha Chatterjee, learned counsel for the appellants on the first two substantial questions of law submits that on the death of the original tenant in the year 1983, a new jural relationship of landlord and tenant emerged between the plaintiffs and Ranjit in respect of the suit property on payment of rent and acceptance thereof. One of the sons of the said original tenant, Dibyendu Narayan Roy deposed in the suit as D.W.2 and has admitted in his evidence that after the death of his father, all rent receipts were issued in the name of Ranjit to which neither he nor his brothers raised any objection. They never attempted to deposit rent in their own names in respect of the suit property either before the Rent Controller or filed any suit to get the rent receipts issued in their names. He submits that the attendant circumstances coupled with the conduct of the heirs of Ajay leads to an inevitable conclusion that the tenancy which they inherited on the death of their father, was impliedly surrendered by them.

Mr. Chatterjee, in support of his argument, cites decisions of three Hon'ble Division Benches of this Court in the case of **SMT. SUMILITA BHATTACHARYA & ANR. VS. SMT. NILA CHATTERJEE** reported in **1989(2) CLJ 351**, in the case of **SANTOSH KUMAR MITRA & ANR. vs. SMT. SNEHALATA ROY & ORS.** reported in **(2000) 2 CHN 30** and in the case of **BISWARANJAN MAITY vs. ANJANA SENGUPTA & ORS.** reported in **(2016) 3 CHN 662**.

8. On the third substantial question of law, Mr. Chatterjee submits that Ajay died in the year 1983, even if it is assumed that on his death by virtue of Section 2(h) of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as 'the said Act of 1956' in short), the said tenancy was inherited by his widow and four sons, but the said Act of 1956 being replaced by the West Bengal Premises Tenancy Act, 1997 (hereinafter referred to as 'the said Act of 1997' in short) which came into force with effect from July 10, 2001, by virtue of Section 2(g) thereof, the said four sons, could at best, claim the right of the said tenancy till the expiry of five years from the date of death of Ajay or from the date of coming into force of the said Act of 1997, whichever is later, regardless of the fact that they had inherited the said tenancy by operation of Section 2(h) of the said Act of 1956. He, to buttress his said argument, cites the decision of the Hon'ble Division Bench of this Court in the case of **SRI SUSHIL KUMAR JAIN VS. PILANI PROPERTIES LTD.** reported in **(2017) 4 Cal LT 575 (HC)**.

He further submits that the tenancy of Ajay, if at all existed, has extinguished on the death of his widow, therefore, the Appeal Court below

has committed substantial error of law in dismissing the suit for not impleading sons of Ajay as parties to the suit.

9. Mr. Probal Kumar Mukherjee, learned senior advocate for the respondents on the other hand, submits that the plaint case of the suit is that Ranjit was the tenant under the plaintiffs and the defendants have inherited the said tenancy on his death, no case of surrender of the tenancy of Ajay has been made out in the plaint, as such, the plaintiffs are not entitled to put forward such new ground of their claim that the said tenancy was surrendered by the heirs of Ajay, without amending their pleadings as required under Order VI Rule 7 of the Code of Civil Procedure.

10. The next contention of Mr. Mukherjee is that there is no provision of implied surrender of tenancy either under the said Act of 1956 or under the said Act of 1997. In both the said rent-control legislations, the provision of surrender of tenancy mandates service of at least one month's notice expiring with a month of the tenancy by the tenant to the landlord. He submits that when the statute requires a thing to be done in a particular manner, the same must be done in the said manner or not at all, in furtherance of his said argument, he submits that neither Ranjit was competent to surrender the tenancy of his brother nor there is anything on record to suggest that on the death of Ajay, his heirs surrendered the said tenancy. The rent receipts were issued in the name of Ranjit as sons of Ajay were minor at the relevant point of time, nonetheless, issuance of such rent receipt neither suggests surrender of the tenancy nor creation of a new tenancy in favour of Ranjit.

11. Mr. Mukherjee quotes paragraph 449 from the 4th edition, Volume 27 of the Halsbury's Laws of England, to contend that surrender is implied only when the tenant remains in occupation in a capacity inconsistent with his being tenant, which is absent in this case. He refers Hill and Redmann's Laws on Landlord and Tenant, 16th edition, page 451 to submit that implied surrender does not follow from an agreement made during the tenancy for variation of the terms of the agreement unless there is some special reason to infer a new tenancy, for instance, the parties make the change in rent in the belief that the old tenancy is at an end. Mr. Mukherjee cites the decision of the Hon'ble Supreme Court in the case of **Suresh Kumar Kohli vs. Rakesh Jain and Another** reported in **(2018)6 Supreme Court Cases 708** to contend that the status of the heirs and legal representatives of the deceased tenant are of joint tenants.

12. Mr. Mukherjee, in response to the contention of Mr. Chatterjee on the third substantial question of law, submits that Ajay died on October 31, 1983 and on his death the tenancy devolved upon his heirs by operation of Section 2(h) of the said Act of 1956 and such devolution since was occurred prior to July 10, 2001 i.e. the date of said Act of 1997 coming into operation, Section 2(g) thereof has no manner of application, in this case.

13. Having heard the learned counsel for the parties and on perusal of the materials-on-record, it appears that to answer the first two substantial questions of law formulated in this second appeal, it is necessary to determine whether the tenancy of Ajay after his death was surrendered by

his heirs and thereupon, a new jural relationship of landlord and tenant was created between the plaintiffs and the said Ranjit.

14. The plaintiffs alleged that such surrender of tenancy of Ajay was implied, the word 'implied' means which is not directly expressed but existing inferentially. Inference of implied surrender of a tenancy is to be drawn from the facts and circumstances of each case, there cannot be any straightjacket formula to draw such inference. The conduct of the tenant who alleged to have surrendered his tenancy is a crucial consideration to draw such inference. The heirs of the deceased tenant claimed to have inherited the tenancy, they may be recognised as such but the heirs remained mute, cannot, as has been held by the Hon'ble Division Bench of this Court in the case of **SMT. SUMILITA BHATTACHARYA (supra)**. Another Hon'ble Division Bench in the case of **SANTOSH KUMAR MITRA (supra)** has held that a case of implied surrender can be inferred from the evidence and conduct of the defendants. In the case of **BISWARANJAN MAITY (supra)**, Hon'ble Division Bench of this Court has held that all the brothers and sisters accepted the elder brother as the real tenant of the suit premises, the tenancy of the other brothers and sisters was impliedly surrendered.

15. Ajay died in the year 1983 leaving behind his widow and four sons. The conduct of the said heirs of Ajay and the attendant circumstances are relevant in determining the issue of implied surrender of the tenancy of Ajay. The said Act of 1956 was the relevant rent control legislation governing the incidents of his tenancy when Ajay died and by virtue of Section 2(h) thereof, the heirs of Ajay who were ordinarily residing with him, inherited

the said tenancy. None of the said heirs, after the death of Ajay, tried to tender rent to the landlords or to get the rent receipt issued in their names. They also never objected issuance of rent receipt in the name of Ranjit. On the contrary, two sons of Ajay, namely Dibyendu and Krishnendu, who are residing in a portion of the suit property started paying rent to the defendant no. 1. In this background, it can be safely concluded that upon surrender of the tenancy of Ajay by his heirs, a new tenancy was created in favour of Ranjit. In this context it would be relevant to quote the following excerpt from the paragraph 378 of the Hill and Redman's law of Landlord and Tenant, 16th Edition at page 454:-

“..unless the landlord reserves his rights against the original tenant. Receipt of rent from a person in possession may be evidence of the landlord's acceptance of him as tenant, whether he is a stranger....”

16. The defendant no. 1 did not bring any evidence on record to sustain her allegation that Ajay held the tenancy as the head of the family of himself and his four brothers, rather the said allegation is in stark contrast to her another defence that the tenancy of Ajay is still continuing after his death, as such the suit is not maintainable without serving eviction notice upon the heirs of Ajay and without impleading them as parties to the suit. The letter of the defendant no.1 dated July 07, 2007 demolishes both of her aforesaid defences inasmuch as by the said letter she demanded issuance of rent receipts in her name in exclusion of all others. She proved the said letter as Exhibit-1 in course of the trial of the application under Section 7(2) of the said Act of 1997. Creation of a new tenancy in favour of Ranjit can

safely be inferred from the said letter also. The paragraph 449 of Halsbury's Laws of England, 4th Edition, Volume 27 and the excerpts referred from page 451 of Hill and Redman's Law of Landlord and Tenant, 16th Edition do not fit in with facts and circumstances of the present case, as such are of no relevance to answer the said two substantial questions of law, so is the decision of the Hon'ble Supreme Court in the case of **Suresh Kumar Kohli (supra)**.

17. The plaintiffs' suit was a suit for eviction of the premises tenants simplicitor. The contesting defendant in such a suit took a defence in her written statement that on the death of the earlier tenant, his heirs became tenants and the said tenancy continued as such, therefore, to maintain the suit, notice of eviction was required to be given to the said heirs. The burden of proving the existence of the tenancy of the earlier tenant is upon the defendant and on discharge of the said burden, onus shifts upon the plaintiffs to disprove the existence of the fact alleged by the defendant. In order to discharge the said onus, the plaintiffs are required to bring evidence to make the Court believe that the fact asserted by the defendant does not exist. The plaintiffs, in doing so, are not raising any new ground of claim or contain any allegation of fact inconsistent with their previous pleadings, as such, the suggestion to rule out the evidence adduced by the plaintiffs to disprove the said defence of the defendant no. 1 for want of pleadings by applying the provision of Order VI Rule 7 of the Code of Civil Procedure is entirely misconceived, as such, rejected.

18. The provision of Section 19(2) of the said Act of 1956 and the provision of Section 12(2) of the said Act of 1997 are the provisions of notice to give up possession by a tenant, such notice may be regarded as an incidence of surrender of tenancy but cannot stand alone to infer such surrender. The Legislature, in its wisdom, by not legislating any specific provision for surrender of tenancy in the relevant rent control legislation rather has allowed flexibility in drawing inferences of implied surrender of tenancy from the conduct of the landlord and tenant. Therefore, this Court is unable to accept the submission of Mr. Mukherjee that implied surrender of tenancy cannot be inferred in the absence of any specific provision to the said effect in the relevant rent control legislation.

This Court on the discussions made above concludes that the Appeal Court below has committed substantial error of law in holding that no case of implied surrender of tenancy has been made out, in consequence the first two substantial questions of law framed in this second appeal are answered in affirmative.

19. Let me now proceed to deal with the third substantial question of law. The facts relevant to answer the aforesaid question of law are not in dispute. The original tenant died on October 31, 1983 leaving behind his widow and four sons. The said widow is also dead. Two sons, out of the said four sons of the original tenant, namely Dibyendu and Krishnendu are residing in a part of the suit property.

20. The Appeal Court below held that the two sons of Ajay, who are residing in the suit property are also tenants along with the defendants of

the suit, as such, without serving the notice of eviction upon them and in their absence, the suit is not maintainable. The Appeal Court below took note of the provision of Section 2(g) of the said Act of 1997, nonetheless applied the provision of Section 2(h) of the said Act of 1956 to come to the aforesaid conclusion on the ground that the said original tenant died in the year 1983 i.e. prior to the said Act of 1997 came into operation.

21. The findings returned by the Appeal Court below on the issue is not sustainable inasmuch as irrespective of the devolution of the said tenancy by virtue of Section 2(h) of the said Act of 1956 upon the heirs of Ajay, the said heirs cannot be regarded as tenants after the expiry of the period of five years from the date of death of the said original tenant or from the date of commencement of the said Act of 1997, whichever is later in terms of Section 2(g) thereof and in view of the decision of the Hon'ble Division Bench of this Court in the case of **SUSHIL KUMAR JAIN (supra)**, the said issue is no longer *res integra*.

22. In the said case of **SUSHIL KUMAR JAIN (supra)**, it has been held that the contention if the original tenant died prior to the 1997 Act coming into force, the heirs of the original tenant who were covered by the definition of "tenant" under Section 2(h) of the 1956 Act would have to be regarded as original tenants within the meaning of the expression in Section 2(g) of the 1997 Act. Clearly, such an interpretation is impermissible and absurd. To clarify, paragraphs 11 and 12 of the said decisions are quoted below:-

"11. The 1997 statute replaced the 1956 legislation and changed the fundamental bases in certain cases. Just as certain classes of tenants have been given

protection under the 1997 statute, the landlords of certain classes of tenants have been freed from the claustrophobic clutches of the 1956 Act.

12. Though the present matter primarily hinges on the quantum of rent paid for the residential tenancy by the appellants herein or their predecessor-in-interest, the appellants insist that since the death of father K.C. Jain, the original tenant, in the year 2000 was anterior to the 1997 Act coming into effect on July 10, 2001, a right vested in the joint tenants under the 1956 Act which could not have been taken away by the 1997 Act. Such contention amounts to suggesting that when a rent control legislation creates or confer right, it cannot be curtailed by a subsequent legislation. Such contention is exceptionable and cannot be countenanced. In a sense, the contention amounts to this: that if the original tenant died prior to the 1997 Act coming into force, the heirs of the original tenant who were covered by the definition of “tenant” in Section 2(h) of the 1956 Act would have to be regarded as original tenants within the meaning of the expression in Section 2(g) of the 1997 Act. Clearly, such an interpretation is impermissible and absurd.”

The ratio of law laid down in the case of **SUSHIL KUMAR JAIN (supra)** was followed in **SATYANARAYAN MORE & ANOTHER vs. MS. MILAGRINA ROSE CORREIA ALIAS MILLIE CORREIA** reported in **(2020) 3 CAL LT 501(HC)**, another Hon’ble Division Bench decision of this Court. This Court, also, in its judgment dated July 20, 2022 passed in SA No. 186 of 2017 **(M/S. MANGALIC ENTERPRISE VS. SWAPAN KUMAR DAS & ORS.)** expressed agreement with the aforesaid proposition of law laid down in the said reports.

Therefore, even if it is assumed that the tenancy of Ajay on his death was devolved upon his heirs but after the expiry of the said period of five years, none of the heirs of Ajay, far less, his two sons in possession of a part

of the suit property can be treated as tenants, therefore, the defence of the contesting defendant no. 1 that the suit is not maintainable for not impleading the heirs of Ajay, his said two sons in particular or for non-service of notice of eviction upon them is not available to her. The third substantial question of law is therefore answered accordingly.

23. The finding of the Appeal Court below on the issue of subletting is not interfered with since such interference would be beyond the scope of the substantial questions of law under consideration in the present Second Appeal, more so, the Appeal Court is right in reversing the findings of the learned Trial Judge on the said issue as the quality of evidence and degree of proof necessary to establish the ground of subletting are lacking in the present case. However, the concurrent findings of both the Courts below on the issue of reasonable requirement of the plaintiffs for the suit property neither are under challenge nor deserve interference, as such the suit must succeed on the said ground alone.

In consequence of the discussions made above, S.A. 35 of 2017 is allowed; the judgment and decree dated December 23, 2016 passed by the learned Judge, 3rd Bench, City Civil Court at Calcutta in Title Appeal No. 36 of 2015 except the findings on the issue of subletting, is set aside and the judgment and decree dated June 15, 2015 passed by the learned Judge, 4th Bench, Presidency Small Causes Court at Calcutta in Ejectment Suit No. 24 of 2008, except on the issue of subletting, is restored. There shall be no order as to costs.

The Department is directed to send down the Lower Court Records to the Court below immediately.

IA No: CAN 01 of 2017 (Old CAN 2031 of 2017)

CAN 02 of 2017 (Old CAN 2033 of 2017)

In view of the disposal of the appeal, no further orders need be passed on the connected applications, both filed by the appellants for reception of additional evidence in appeal and injunction. The said applications being CAN 01 of 2017 and CAN 02 of 2017 respectively, are disposed of accordingly without any order as to costs.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)