

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Rajasekhar Mantha

And

The Hon'ble Justice Supratim Bhattacharya

FA 29 of 2008

With

IA No: CAN 2 of 2008(Old CAN 7738 of 2008)

Asis Ghosh and others

Vs.

Smt. Munaiamma Devi & Ors.

For the appellant : Mr. Probal Kumar Mukherjee
Mr. Kaushik Dey
Mr. Soumyajit Mishra

For the respondent : Mr. Wasim Ahmed

Heard On : 07.08.2023

Judgement Delivered On : 19.09.2023

Supratim Bhattacharya, J.:-

- 1.** The instant appeal has been preferred by the appellant/plaintiff being aggrieved by and dissatisfied with the Judgment and order passed by the Ld. Judge of the City Civil Court, Vth Bench at Calcutta on 28.09.2007 in Title Suit No. 283 of 2004.
- 2.** Through the aforementioned Judgment the Ld. Trial Judge has been pleased to dismiss the said suit on contest seeking declaration that the respondent/defendant has trespassed into the suit premises and has no right to occupy the suit premises and further prayer for recovery of khas possession of the suit premises.
- 3.** The original plaintiff in the title suit was Dr. Pannalal Ghosh who was the sole and absolute owner of the suit premises, being situated at 5 Kyd street, P.S. Park Street, Kolkata -700016, by virtue of a deed of gift.

On the demise of the said Dr. Pannalal Ghosh initially all his legal heirs and successors, being brothers and sisters had been substituted as appellants. Thereafter except Asis Ghosh all the remaining appellants have been transposed to the category of the proforma respondents, as because letter of administration has been granted in respect of the will of the said Pannalal Ghosh solely in favour of the said Asis Ghosh.
- 4.** The appellant in the instant appeal is one of the legal heirs of the original plaintiff/landlord while the respondent was the defendant.
- 5.** The Ld. Counsel appearing on behalf of the appellant during exhaustive arguments has submitted as follows:

- i)** That the Title Suit was filed praying for a declaration that the defendant is a trespasser and has no right to occupy the suit property.
- ii)** He has further submitted that one Violate Chesney, since deceased, was a monthly tenant under the original plaintiff/landlord in respect of a self contained flat consisting of two rooms, kitchen, bath and privy in the first floor of the suit premises situated at 5, Kyd Street, P.S. Park Street, Kolkata-700016.
- iii)** He has further submitted that the said Violate Chesney expired on 06.02.2003 without having any issue and legal heir.
- iv)** He has further submitted that the respondent /defendant was a domestic help of the said Violate Chesney.
- v)** He has also submitted that on the death of the said Violate Chesney the said respondent/defendant trespassed into the suit property and since then she is in wrongful occupation of the suit property being a trespasser.
- vi)** He has further submitted that the respondent/defendant has not acquired any right over the suit property.
- vii)** The Ld. Counsel has further submitted that the contention of the respondent/defendant that by a registered will dated 12.04.1985 the said Violet Chesney, since deceased,

bequeathed her right of tenancy in respect of the suit premises, is not at all tenable in law.

viii) The Ld. Counsel has cited two judgments of the Hon'ble Apex Court which are as follows:

a) 2019 SCC (Online) SC 1601.

b) (1994) 3 SCC 481.

ix) Stressing upon the aforesaid facts and circumstance and also relying upon the authorities cited, the Ld. Counsel has prayed for allowing the instant appeal by setting aside the impugned judgment.

6. The Ld. Counsel appearing on behalf of the respondent has submitted the following:

i) That the respondent/defendant used to reside with the said Violate Chesney during her lifetime and the relationship between the said Violate Chesney and the respondent was like mother and daughter.

ii) He has further submitted that the said Violate Chesney by a Will dated 12.04.1985 which has been registered, bequeathed the right of tenancy in respect of the suit property in favour of the respondent.

iii) He has further submitted that the respondent has taken steps to obtain probate of the said Will and as such the

respondent has acquired the right of tenancy in respect of the suit property.

iv) Relying upon the aforesaid facts and circumstances the Ld. Counsel appearing on behalf of the respondent has submitted that the impugned judgment has been correctly delivered as such the instant appeal be dismissed.

7. To appreciate the moot point (*supra*) it would be apt to consider the judicial authorities on such issue. The question came up for consideration before the Hon'ble Apex Court *In Re: Jaspal Singh Vs. Additional District Judge, Bulandshahar and Others* in the context of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 as amended in 1976 (for short UP Act) reported in (1984) 4 SCC 434 wherein at Paragraphs 8, 9, 10 and 11 the law has been laid down as follows:

"8. This leads us to the next contention that the appellant is a tenant within the meaning of Section 3 (a) of Act 13 of 1972:

"3. In this Act, unless the context otherwise requires—

(a) 'tenant', in relation to a building, means a person by whom its rent is payable, and on the tenant's death—

(1) in the case of a residential building, such only of his heirs as normally resided with him in the building at the time of his death;

(2) in the case of a non-residential building, his heirs;

The appellant would be a tenant within the meaning of Section 3(a) only when he is an heir. The appellant is not a son but only a nephew of Naubat Singh. He, however, claims to be an heir on the

*basis of a will executed by Naubat Singh conveying all his rights and properties including the tenancy rights in respect of the disputed shop in his favour and that he had been helping Naubat Singh in his business for the last several years and continued to remain in possession of the shop even after the death of Naubat Singh. Accordingly he was entitled to the benefit of Section 14. We have already dealt with the question whether the appellant was entitled to the benefit of Section 14 as it stood prior to its amendment in 1976 and also of the amended provisions of Section 14 and we have negatived the contention of the appellant. Therefore, the precise question for consideration would -be whether the appellant is an heir within the meaning of Section 3(a) on the basis of the will executed in his favour by Naubat Singh. There seems to be a cleavage of opinion on this point in various High Courts. The Allahabad High Court in *Rukmani Devi v. III Addl. District Judge, Kanpur* [1977 All Ren Cas 72] and *Munni Lal v. Shiv Dei* [1981 All Ren Cas 6 (Short Notes of Cases 13)] held that the question as to who are heirs of the deceased tenant, will be decided in accordance with the personal law of the tenant, as this Act does not lay down the list of heirs on whom the tenancy should devolve. In some of the Rent Control Acts list of the heirs has been specified for the purpose of devolution of tenancy on the death of the tenant. A Division Bench of the Punjab and Haryana High Court in *Gulzara Singh v. Tej Kaur* [AIR 1961 Punj 288] on the other hand held:*

“Generally speaking, ‘heirs’ are those persons whom the law declares to be entitled to the estate of a deceased person, and in common legal parlance the word ‘heir’ like the expression ‘heir-at-law’ undoubtedly connotes and is suggestive of a person who succeeds to the estate in case of intestacy under the statutes of succession. But in common speech, this word is also not infrequently used to indicate those who come in any manner to the ownership of any property by reason of the death of the owner or persons upon whom the property devolves on the death of another either by law or by will.

In other words, it is indicative of persons entitled by will or otherwise to share the estate of the deceased. It is thus true that technically the word ‘heir’ may be distinguishable from the word ‘legatee’ but it is also at times used in its more general and comprehensive sense as indicating a person upon whom the property devolves on the death of another and hence when the

intent is clear, the word 'heir' may well be treated as equivalent to 'legatee' or 'devised'. The true scope, effect and significance of this word is, therefore, in all cases a question of intention which has to be determined principally on a consideration of the object and purpose of the statute in which it is used.

Thus, the word "heir" has been construed both in a wider as well as in a narrower sense. Which sense will be applicable to the facts of a particular case will depend upon the intention and scheme of a particular legislation in which the question occurs. This will also raise an allied question whether the tenancy rights could be devised by a will. It will be relevant at this stage to refer to material provisions of the Act.

9. The word "family" has been defined in Section 3 (g) of the Act:

"(g) 'family', in relation to a landlord or tenant of a building, means, his or her—

(i) spouse,

(ii) male lineal descendants,

(iii) such parents, grand parents and any unmarried or widowed or divorced or judicially separated daughter or daughter of a male lineal descendant, as may have been normally residing with him or her,

and includes, in relation to a landlord, any female having a legal right of residence in that building;"

Section 11 deals with the prohibition of letting without allotment order. It reads:

"Save as hereinafter provided, no person shall let any building except in pursuance of an allotment order issued under Section 16."

Section 12 deals with a deemed vacancy of building in certain cases and reads:

"(1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if—

- (a) he has substantially removed his effects therefrom, or*
- (b) he has allowed it to be occupied by any person who is not a member of his family, or*
- (c) in the case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere.*

(2) In the case of non-residential building, where a tenant carrying on business in the building admits a person who is not a member of his family as a partner or a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building.

Section 13 provides for restrictions on occupation of building without allotment or release, and reads:

“Where a landlord or tenant ceases to occupy a building or part thereof, no person shall occupy it in any capacity on his behalf, or otherwise than under an order of allotment or release under Section 16, and if a person so purports to occupy it, he shall, without prejudice to the provisions of Section 31, be deemed to be an unauthorised occupant of such building or part.”

Section 15 casts an obligation on the landlord or the tenant to intimate vacancy to the District Magistrate. Section 16 deals with allotment and release of a vacant building. Section 20 puts a bar of suit for eviction of a tenant except on specified grounds enumerated therein.

10. From a survey of these provisions it will be clear that if a tenant parts with possession of the premises in his possession, the same would be treated as vacant. There are restrictions in the case of a residential building that the tenant will live only with the members of his family and after he has allowed the same to be occupied by any person who is not a member of his family, the tenant shall be deemed to have ceased to occupy the buildings. In the case of a non-residential building, when a tenant is carrying on business in the building, admits a person who is not a member of his family as a partner or a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building. If a tenant sublets the premises, he is liable to ejectment. Obviously, therefore, there are restrictions placed by the Act on the right of the tenant to transfer or sublet the tenancy rights and he can keep

possession of the building or premises for himself and for the purpose of his family, for his business and for the business of his family members. He obviously, cannot be allowed to transfer a tenancy right. A fortiori, the scheme of the Act does not warrant the transfer of the tenancy right to be effective after his lifetime. Thus, the appellant was neither a tenant of the disputed shop nor he was an heir of Naubat Singh, the original tenant. Besides, on a plain reading of the will it is evident that the will has been executed in respect of other properties including his business but not in respect of the tenancy rights. The High Court also recorded a finding to the effect that there was no will in respect of the tenancy rights of the disputed shop.

11. Having given our anxious consideration to the questions involved in the case we see no reason to differ from the finding of the High Court. The appeal is accordingly dismissed but in the circumstances of the case the parties are allowed to bear their own costs."

- 8.** At this stage it would be now necessary to set forth Section 2(g) of the West Bengal Premises Tenancy Act, 1997 (for short, the 1997 Act) which defines a tenant as follows:

"2. (g) "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 termination of his tenancy and, in the event of death of any tenant, also includes, for a period not exceeding five years from the date of death of such tenant or from the date of coming into force of this Act, whichever is later, his spouse, son, daughter, parent and the widow of his predeceased son, who were ordinarily living with the tenant up to the date of death of the tenant as the members of his family and were dependent on him and who do not own or occupy any residential premises, and in respect of premises let out for non-residential purpose his spouse, son, daughter and parent who were ordinarily living with the tenant up to the date of his death as members of his family and were dependent on him but shall not include any person against

whom any decree or order for eviction has been made by a court of competent jurisdiction:

Provided that the time limit of five years shall not apply to the spouse of the tenant who was ordinarily living with the tenant up to his death as a member of his family and was dependent on him and who does not own or occupy any residential premises: Provided further that the son, daughter, parent or the widow of the predeceased son of the tenant who was ordinarily residing with the tenant in the said premises up to the date of death of the tenant as a member of his family and was dependent on him and who does not own or occupy any residential premises, shall have a right of preference for tenancy in a fresh agreement in respect of such premises. This proviso shall apply mutatis mutandis to premises let out for non-residential purpose.”

9. Now applying the said law laid down in (1984) 4 SCC 1880 (*supra*) in the context of Section 2(g) of the 1997 Act, it is evident that the restrictions on a tenant in the case of a residential building restricting the passing of the tenancy only to members of his family as understood by law shall apply *pari materia* to the facts of this case. Section 2(g) of the 1997 Act has clearly restricted the passing of tenancy in terms more explicit than Section 3 (a) of the UP Act (*Supra*) for a period not exceeding 5 years from the date of death of the original tenant upon his spouse, son, daughter, parent and the widow of his pre-deceased son who were ordinarily living with the tenant up to the date of his death.
10. There is no material provided by the Defendant/Respondent to demonstrate that during the lifetime of the original tenant, Violate Chesney, the defendant was formally and legally adopted by Violate

Chesney as her daughter. From the certificate of baptism and birth (Exhibit-A) in respect of the respondent/defendant, it reveals that Violate Chesney was the sponsor of the respondent and not her mother. In the aforesaid document itself there is a column for mentioning the name of the parents being 'Parents name' wherein the following names have been mentioned 'Ramu Thevar & Mariamma Ramu' and under the column surname it has been mentioned as 'Boovalingam', so from the aforementioned document it transpires that the respondent/defendant is not the daughter of Violate Chesney. Not being the daughter or heir of the original tenant that is Violate Chesney, since deceased, the respondent is not entitled to inherit the right of tenancy which belonged to the said Violate Chesney. The right of inheritance in respect of a tenancy right belongs only to the spouse and the children. In the instant case, the respondent not being the child of Violate Chesney is not entitled to inherit the right of tenancy.

- 11.** The Defendant/Respondent cannot assert a right of tenancy within the meaning of Section 2 (g) of the 1997 Act on the basis of the Deed of Will which is merely demonstrative of a testamentary deposition without proving *familyship*. To the mind of this Court, the Ld. Trial Court failed to apply its mind to the legal position that notwithstanding the agreement of tenancy (Ext. 4) executed between Violate and the plaintiff/appellant referring to the *tenant* as inclusive of *her heirs, successors, executors, administrators, legal representatives and/or*

assigns, such a definition cannot be read beyond and/or are repugnant to the statutory restrictions imposed by Section 2(g) of the 1997 Act restricting the passing of a tenancy on the death of the original tenant, in this case Violate Chesney. To the further mind of this Court, the Deed of Will purportedly executed by Violate Chesney in favour of the Defendant/Respondent cannot be construed to be an instrument for transfer of a tenancy right since such a right being statutorily defined and restricted is neither property nor an estate of a deceased tenant which can be disposed of by a Will or testament. In this connection this Court must notice the principles correctly culled out from the law laid down in (1984) 4 SCC 434 (*supra*) in a judgement reported in (2004) SCC Online Cal 38 : (2004) 1 CLT 600 at Paragraph 19:

“19. Now, it has to be seen that whether by way of testamentary succession the legatee of a Will can be a heir within the meaning of the West Bengal Premises Tenancy Act read with Hindu Succession Act. As has already been quoted section 30 of the Hindu Succession Act deals with testamentary disposition. Now, whether a tenant is capable of disposing of the tenancy right by way of Will, considering its language thinking about the object of introduction of the provisions of section 2(h), section 13 and section 14 of the West Bengal Premises Tenancy Act by the legislature it can be very well said that the tenancy right is not a property or not an estate of the tenant which can be disposed of in favour of anybody by way of Will or testament. In the instant case the appellant was in no way related with the deceased tenant Lakshmi Rani Dutta and the appellant claimed his right only on the basis of the Will. Now, in the instant case, since after the death of the tenant, no one was there to represent the deceased tenant Lakshmi Rani Dutta, the Administrator General was made party defendant and decree was made against the Administrator

General. The appellant herein though claimed an independent right ultimately but as would appear from the facts and circumstances of the case it could not be established by him that he was an heir ordinarily residing with the tenant. If it is taken for granted that he was ordinarily residing with the tenant then also he cannot be the heir as to get protection under West Bengal Premises Tenancy Act inasmuch as the tenant is not capable of disposing of the tenancy as the property by virtue of any Will. I respectfully agree with the observation made by the Hon'ble Apex Court in the decision reported in AIR 1984 SC 1880 (supra) and held that considering the provisions of the different status that is section 5 of the Transfer of Property Act, Order 22, Rule 4 of the Code of Civil Procedure, section 29 and 30 of the Hindu Succession Act and mainly considering the provisions of West Bengal Premises Tenancy Act, 1965, keeping the objects of this enactment of 1965 in its spirit, in my opinion, the transfer of tenancy right by a tenant through a testamentary disposition is not a valid transfer or this transfer does not confer any tenancy right on the transferee."

- 12.** This Court further notices that the Ld. Trial Court has inferred that from the Will it can be gathered that there was mother-daughter relationship between Violate Chesney and the Defendant/Respondent. At the same time, the Ld. Trial Court has also held that the Defendant is not the legal heir of Violate Chesney. In the view of this Court, such inference deduced from the recitals in the Will by the Ld. Trial Court that there existed a mother-daughter relationship between Violate Chesney and the defendant completely goes against all canons of legal heirship flowing out of the concept of the family of a tenant as envisaged by Section 2(g) of the 1997 Act. As already discussed above that from the Baptism and Birth Certificates of the Defendant/Respondent (Ext.A), Violate Chesney was only the *sponsor* of the defendant and not her mother.

- 13.** With further regard to the discussion above, the Ld. Trial Court has clearly erred in creating a legal fiction of a mother-daughter relationship when no such family relationship actually existed. It is a matter of apprehension that if such legal fiction is to be universally adopted and applied, the laws of tenancy including the passing of the tenancy upon the death of a tenant shall become *de jure* unworkable and vulnerable to abuse. This Court therefore finds that the Ld. Trial Court has contradicted itself by holding on the one hand that the defendant has inherited the tenancy right with regard to the suit premises, while on the other hand holding that she is not an heir of Violate Chesney. This Court accordingly holds that the Defendant /Respondent was not a tenant under the Plaintiff/Appellant on the death of the original tenant, Violate Chesney.
- 14.** In view of the finding of this Court as above that the Defendant/Respondent was not a tenant this Court further holds that the Defendant/Respondent was not entitled to a *notice to quit* from the Plaintiff/Landlord. This Court finds substance in the assertion of the Plaintiff/Landlord that the Defendant/Respondent is a trespasser in the suit premises and the Plaintiff/Landlord is accordingly entitled to a Declaration along with recovery of Khas possession.
- 15.** This Court must also notice that the Defendant/Respondent cannot claim a right of tenancy. In other words, only on the basis of depositing rent with the Rent Controller and continuing to do so, the

Defendant/Respondent cannot claim to be a tenant which is impermissible in law. In the absence of a specified substantive right, the Defendant/Respondent is barred from claiming herself as a tenant merely on the basis *as if* she is the daughter of the original tenant, the late Violate Chesney.

- 16.** Before parting with this discussion, this Court must notice the law discussed *In re: Banwarilal Jalan vs. Pramod Kumar reported in 2011(3) CHN (Cal) 257*, wherein a coordinate Bench of this Hon'ble Court was pleased to observe in Paragraphs 23 and 24 as follows:

“23. Thus, if a tenant governed by the Act of 1997 merely executes a Will bequeathing the tenancy right in favour of a third party, such fact will not afford any right in favour of the landlord to evict the tenant because such act on the part of the deceased tenant does not amount to either transfer or assignment or subletting of his tenancy right and from the very moment of the death of the tenant, the tenancy right will lawfully vest in the persons mentioned in Section 2(g) of the Act.

24. The moment a tenant governed by the aforesaid Act dies, his right in tenancy will devolve upon the persons as indicated in the definition of tenant given in Section 2(g) of the Act by operation of law. The framing of the definition of tenant in the Act is mandatory in nature as would appear from the initial phrase “tenant means” employed therein. We have already indicated that by a Will a right in a property can be conveyed only if the law of the land permits such disposition. In the case before us, the Act of 1997 has laid down the specific line of succession in favour of limited heirs of a tenant and that too, to a limited extent as indicated in Section 2(g) of the Act. Thus, a tenant by way of testamentary disposition

cannot overcome the rigour of the provisions contained in Section 2(g) of the Act quoted above.”

17. For the foregoing reasons, the Judgment impugned of the Ld. Trial Court stands set aside.
18. **F.A. 29 of 2008 with IA NO. CAN 2 of 2008 (Old CAN 7738 of 2008)** stands accordingly **allowed**.
19. The Appellant/Plaintiff/Landlord is entitled to the Decree in terms of the prayers made in the Plaint.
20. Let the LCR be sent to the Ld. Trial Court. **Registry** to take steps.
21. Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.
22. Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree,

(Supratim Bhattacharya, J.)

(Rajasekhar Mantha, J.)