

IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A. 201 of 2016

SMT. SANTI MOYEE MANNA & ORS.

VS.

SWAPAN CHATTERJEE & ORS.

For the Appellants	: Mr. Gopal Chandra Ghosh, Adv. Mr. Rajdeep Bhattacharyya, Adv.
For the respondent no. 1	: Mr. Sukanta Chakraborty, Adv. Mr. Anindya Halder, Adv.
Hearing concluded on	: 30 th November, 2023
Judgement on	: 8 th December, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and decree passed by learned Civil Judge, Senior Division, 2nd Court, Alipore, 24 South Parganas in Title Appeal No. 243 of 2013, affirming thereby judgement and decree passed by learned Civil Judge, Junior Division, 2nd Court, Alipore in Title Suit No. 233 of 2004.
2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.
3. Briefly stated, the plaintiff being the executrix of the estate of late Puspa Rani Devi instituted a suit for eviction of the defendants who were the joint tenants in respect of 'A' schedule property on the ground of non payment of rent at the rate of Rs. 27/- according to Bengali Calendar

month, since Poush, 1396 B.S. for committing various acts in the breach of provision Clause (m) (o) (p) of Section 108 of Transfer of Property Act.

4. It is contended by the plaintiff that the defendants without permission of the plaintiff demolished the southern and eastern wall of a room and constructed new pacca wall encroaching a portion of common courtyard. GI shed and wooden window with frame have been replaced by asbestos sheet and window made of iron. The height of the room was increased. The plaintiff that apart reasonably requires the suit premises. Statutory notice was serviced upon the defendants calling upon them to quit and vacate the suit property which was not adhered to despite receipt of the same. Hence the suit.
5. The defendant nos. 1, 4, 5, 7 and 9 contested the suit by filing written statement denying all material allegations made in the plaint.
6. It is the specific case of the defendants that the courtyard and passage are under the exclusive possession and enjoyment of the defendants. There are two bed rooms which are accessible from the main entrance through the said courtyard. They denied to have failed to pay rent month by month. It is further adverted by the defendants that the plaintiff previously instituted Title Suit No. 89 of 1974 seeking their eviction but the suit was dismissed. The defendants have paid rent against receipt till the time rent was refused by the plaintiff. The defendants denied to have done anything in the breach of the provision of Clause (m) (o) (p) of Section 108 of Transfer of Property Act.
7. It is adverted that due to wear and tear the GI shed roof got damaged and the defendants were compelled to replace the same as the plaintiff, despite being requested did not take any step. Nothing was done in

respect of suit premises which could be detrimental to the physical condition of the property. Plaintiff has reasonably suitable accommodation elsewhere.

8. Upon perusal of the pleadings of the parties learned Trial Court framed the following issues :-

1. Is the suit maintainable?
2. Was any notice to quit duly served? If yes, was it legal, valid and sufficient?
3. Are the defendants defaulters in payment of rent?
4. Have the defendants done any contrary to the Clauses (m)(o)(p) of the Section 108 of the T.P. Act?
5. Is the plaintiff owner of the suit premises?
6. Does the plaintiff reasonably requires the suit property for her own use and occupation?
7. Does the plaintiff have any alternative accommodation elsewhere?
8. Is there any relationship of landlord and tenants between the parties?
9. To what other relief, if any, is the plaintiff entitled?

9. After considering the evidence on record learned Trial Court answered issue no. 4 in favour of the plaintiff. Consequently, the suit was decreed.

10. The defendants made an unsuccessful attempt in getting the said decree passed by learned Trial Court reversed by preferring Title Appeal

No. 243 of 2013. Hence this second appeal which was admitted on the following substantial question of law :-

Whether the learned courts below were justified in passing a decree for eviction on the ground of violation of Clauses (m)(o)(p) of Section 108 of the Transfer of Property Act relying upon the Commissioner's report which does not disclose as to whether construction of one room was made by the appellants subsequent to the creation of tenancy of the tenant or the said room had its existence at the time of creation of the tenancy and was included within the tenancy of the defendants/appellants?

11. Mr. Gopal Chandra Ghosh, learned Counsel assailing the impugned judgement passed by learned Trial Court submits that there is no evidence to show that the appellant-tenant has committed any act to diminish the value of the property in any manner whatsoever. Therefore, learned Trial Court had no reason to pass the decree for eviction. It is contended by Mr. Ghosh that the old tin shed was replaced by the new asbestos shed which by no stretch of imagination could be held to be detrimental to the health of the building. It is strenuously submitted by Mr. Ghosh that in order to obtain a decree under Clause (m) (o) (p) of Section 108 of Section of Transfer of Property the plaintiff is to prove that the defendants have destroyed or reduced the value or utility of the building materially and permanently. In absence of any such evidence on record, learned Trial Court could not have passed the order of eviction and learned First Appellate Court committed error and pronounced the impugned judgement absolutely on misreading of evidence. It is

submitted that a wall was constructed in the suit premises but the question is whether such construction of wall did make any structural change of substantial nature, is the crucial question and there is no evidence to infer that by the act of the defendants any structural change was effected. According to Mr. Ghosh, in determining the question what is necessary is to consider the nature and character of the construction and its extent. The tenant is not expected to live in a room where water percolates from tin shed room. Therefore, the in-action of the plaintiff-landlord to repair the premises was sufficient for the tenant to undertake the repair work without causing any material alteration.

12. To buttress his point Mr. Ghosh relies upon the following decisions of Hon'ble Apex Court :-

1. **WARYAM SINGH VS. BALDEV SINGH** reported in (2003) 1 SCC 59.
2. **BRIJENDRA NATH BHARGAVA & ANR. VS. HARSH WARDHAN & ORS.** reported in (1988) 1 SCC 454.
3. **G. REGHUNATHAN VS. K.V. VARGHESE** reported in (2005) 7 SCC 317.
4. **OM PRAKASH VS. AMAR SINGH & ORS.** reported in (1987) 1 SCC 458.
5. **G. ARUNACHALAM (DEAD) THROUGH LRS. & ANR. VS. THONDARPERIENAMBI & ANR.** reported in (1992) 1 SCC 723.

13. Mr. Ghosh further submits that the defendants have been residing in the suit property for nearly 80 years. They wanted to continue in the property as tenant under the plaintiff and for that the defendants are ready to enhance the quantum of rent. This Court may provide an opportunity to the defendants to approach the authority for fixation of fair rent. To buttress his point Mr. Ghosh places his reliance on the

decision of Hon'ble Apex Court in a Civil Appeal in the case **KRISHAN KUMAR VS. KRISHAN NATH & ORS.** being **Civil Appeal No. 9809 of 2010.**

14. Refuting such contention of Mr. Ghosh, Mr. Sukanta Chakraborty, learned Counsel for the respondent submits that the evidence of witnesses to indicate that the defendants being the tenant committed certain acts in the breach of Clause (m) (o) (p) of Section 108 of Transfer of Property Act which is one of the grounds for eviction of a premises tenant under Section 6(1)(f) of the West Bengal Premises Tenancy Act, 1997.
15. Drawing my attention to the testimony of witnesses Mr. Chakraborty submits that P.W. 1, the land lady stated that the defendants as tenant extended the area of the room by dismantling the walls on the eastern and southern side. They have removed the wooden doors and windows and filed window made of iron and for that they did not take any permission. From the testimony of P.W. 1 and P.W. 2, it is apparent that the defendants not only fixed the iron grill window with glass panes after removing the wooden windows, they raised the height of the room and constructed concrete loft and concrete shelf in the suit premises. P.W. 3, Engineering Commissioner has given his report and opined that the defendants made certain changes in construction. His report Exhibit-6 demonstrates that the defendants as tenant made certain construction and those are permanent in nature.
16. From the side of the defendants Ms. Sumita Manna adduced evidence as D.W. 1 and from her evidence we find that her father was inducted as tenant nearly 80 years ago in respect of two rooms and two

kitchens and one kitchen was converted into bed room. It is further found from her evidence that she is now married and she has been residing with her husband, who stays at Fakir Halder Lane, Kolkata-26.

17. Section 108 of the Transfer of Property Act postulates :-

“Section 108 in The Transfer of Property Act, 1882

108. Rights and liabilities of lessor and lessee.—In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left;

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell 3[or sell] timber, pull down or damage buildings 3[belonging to the lessor, or] work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto;

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes;"

18. Exhibit-6, the report of the Engineer Commissioner reveals that some construction was made in the suit premises including a concrete loft in one of the rooms and it goes without saying that such construction is permanent in nature. There is no evidence to indicate that the defendants took permission of the landlord before undertaking such work of construction. Such evidence is sufficient to justify the impugned judgement.

19. I have perused the judgements relied upon by Mr. Ghosh.

In *Waryam Singh (supra)* the provision of Section 108 Clause (m) (o) (p) of the Transfer of Property Act and there was no evidence to prove that value and utility of the property was affected.

In *Brijendra Nath Bhargava (supra)* no material alteration was caused by the wooden structure.

In *G. Reghunathan (supra)* there is no evidence indicating construction, permanent in nature, diminishing the value of the property.

In *Om Prakash (supra)* a partition wall was constructed and tin shed was extended which did not cause any structural change.

In *G. Arunachalam (supra)* wooden planks of the door was changed without removing the frame unlike the case in hand.

20. There is nothing to suggest that the rent acts of different States are based on which all these judgements, were pronounced, are in pari-materia with the provision as laid down under West Bengal Premises Tenancy Act, 1997 under Section 6(1)(f) of the Premises Tenancy Act.

21. It goes without saying that judgement of Courts are not to be construed as statute there is always a peril in treating the words of judgement as though they are words in a legislative enactment, and it is to be remembered that judicial utterance are made in the settings of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between the conclusions of two cases. Unless and until the facts and circumstances in a cited case is in pari-materia in all respect with the facts and circumstances of the case in hand, it will not be proper to treat an earlier case as precedent to arrive at a definite conclusion. (2002 AIR SCW 1334/4217/ 2006 AIR SCW 6216 at 6221)
22. Clause (f) of Section 6 of the West Bengal Premises Tenancy Act enunciates where the tenant has done any act contrary to the provision of Clause (m) (o) (p) of Section 108 of Transfer of Property Act, he would be liable for eviction. Even if it is assumed that there is no evidence that by the act of the defendants value of the property was diminished or damage is caused to the building. But Clause (p) is one of the grounds for eviction and in this case when it is proved that the defendants made a concrete construction, permanent in nature, I do not find any reason to interfere with the concurrent findings of learned Courts below.
23. Consequently, the appeal fails. The defendants are directed to quit and vacate the suit premises within two months from the date failing which the plaintiffs will be at liberty to put the decree into execution.
24. Mr. Ghosh, learned Counsel for the defendants submits that the defendants want to continue as tenant in respect of the suit property and for that they are ready to enhance the quantum of rent, Hon'ble Supreme

Court in **MOHAMMAD AHMED & ANR. VS. ATMA RAM CHAUHAN & ORS.** reported in **AIR 2011 SC 1940** held :-

“21. According to our considered view majority of these cases are filed because landlords do not get reasonable rent akin to market rent, then on one ground or the other litigation is initiated. So before saying omega, we deem it our duty and obligation to fix some guidelines and norms for such type of litigation, so as to minimise landlord-tenant litigation at all levels. These are as follows:-

(i) The tenant must enhance the rent according to the terms of the agreement or at least by ten percent, after every three years and enhanced rent should then be made payable to the landlord. If the rent is too low (in comparison to market rent), having been fixed almost 20 to 25 years back then the present market rate should be worked out either on the basis of valuation report or reliable estimates of building rentals in the surrounding areas, let out on rent recently.

(ii) Apart from the rental, property tax, water tax, maintenance charges, electricity charges for the actual consumption of the tenanted premises and for common area shall be payable by the tenant only so that the landlord gets the actual rent out of which nothing would be deductible. In case there is enhancement in property tax, water tax or maintenance charges, electricity charges then the same shall also be borne by the tenant only.

(iii) The usual maintenance of the premises, except major repairs would be carried out by the tenant only and the same would not be reimbursable by the landlord.

(iv) But if any major repairs are required to be carried out then in that case only after obtaining permission from the landlord in writing, the same shall be carried out and modalities with regard to adjustment of the amount spent thereon, would have to be worked out between the parties.

(v) If present and prevalent market rent assessed and fixed between the parties is paid by the tenant then landlord shall not be entitled to bring any action for his eviction against such a tenant at least for a period of 5 years.

Thus for a period of 5 years the tenant shall enjoy immunity from being evicted from the premises.

(vi) The parties shall be at liberty to get the rental fixed by the official valuer or by any other agency, having expertise in the matter.

(vii) The rent so fixed should be just, proper and adequate, keeping in mind, location, type of construction, accessibility with the main road, parking space facilities available therein etc. Care ought to be taken that it does not end up being a bonanza for the landlord.”

25. The defendants since wish to continue as tenant, liberty is given to the defendants without prejudice to the rights of the parties to approach the plaintiff to allow the defendant(s) to occupy the property, if she agrees to do so, by creating new tenancy on new terms and conditions within fifteen days from date in the light of the judgement in *Atma Ram Chauhan (supra)*.

26. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.

27. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)