

01.08.2023
Court No. 19
Item No.23
CP

C.O. 513 of 2023
Smt. Suchitra Paul & anr.
Vs.
Sri Rathin Mullick & ors.

Mr. Sounak Bhattacharya
Mr. Anirban Saha Ray
Mr. Sounak Mandal

...for the petitioner.

Mr. Sourav Sen
Ms. Adrisnata Chakraborty

....for the opposite party.

The revisional application arises out of orders dated September 7, 2022, September 23, 2022 and November 28, 2022, passed by the learned Judge, 5th Bench, Small Causes Court at Calcutta in Ejectment Suit No. 203 of 2013.

By the order dated September 7, 2022, the suit was fixed for ex parte hearing by the learned Trial Judge. By the next order dated September 23, 2022 the suit was adjourned but was again fixed for ex parte hearing. By the order dated November 28, 2022, the prayer of the defendants/petitioners to file a written statement was rejected.

Mr. Bhattacharya, learned advocate for the defendants/tenants/petitioners, submits that the suit was decreed ex parte on November 21, 2016. The plaintiffs got a decree of recovery of khas possession

of the suit premises upon evicting the petitioners therefrom. The learned court, upon considering the validity of the notice to quit and default, passed the decree of eviction. The learned trial court found that the evidence of the plaintiffs (both oral and documentary) had remained uncontroverted. Accordingly, the suit was decreed.

The defendants preferred an appeal being Title Appeal No. 28 of 2017 before the learned City Civil Court, 12th Bench at Calcutta. The learned lower appellate court observed as follows:

“The Order no. 2 dtd 28.08.2015 in the Ejectment suit no. 203/13, whereby the suit has been posted for ex parte hearing on refusal to accept the cost for acceptance of the written statement due to the non-compliance with the order of the Hon’ble High Court, has been confirmed by the Hon’ble Court in C.O. No. 4289 of 2015 on 16.03.2016. As such the suit has rightly been conducted and tried ex parte against the defendants by and before the Ld. Trial Judge and as such there is no scope of application U/O. 41, Rule 27 CPC at the instance of the defendants/appellants. The plain reading of the impugned judgment turns out that the Ld. Trial Court has missed to mention the specific ground on which the decree for eviction stands in his judgment, while he has not decided the plea of reasonable requirement, resorted to by the plaintiffs. The appellate Forum is not supposed to function as Trial Court for decision on the question of reasonable requirement. In view of the said infirmities in the judgment the Ld. Trial Court is required to decide the case and written judgment afresh, which is why this is a fit case to send the suit back on remand. In the original suit, the question as to the decision and disposal of the petition u/s 7(1)(2) West Bengal Premises Tenancy Act before disposal of the suit falls within the domain of Trial Court before whom the petitioners may raise the

point and the appellate forum has no scope to look into and decide that question in this Appeal against the final judgment and decree under challenge.

In the result, the Title Appeal succeeds in part on contest. Memo of the Appeal is correctly stamped.”

However, the learned court after making such observations ordered as follows:

“That this Title Appeal no. 28/17 is allowed in part on contest against the respondents without costs. The impugned judgment and decree dtd. 21.11.16 are set aside and the suit is sent back on remand for decision with instruction to the Ld. Trial Court to decide the case and write judgment afresh after affording opportunity of hearing to the respondents/plaintiffs.”

Mr. Bhattacharya submits that in an appeal preferred by the defendants which was allowed in part and the suit was remanded for fresh hearing, the right of the defendants to file the written statement could not be taken away. Hence, the learned Trial Judge erred in not allowing the written statement to be filed. Mr. Bhattacharya further relies on the observations made in the concluding paragraph of the said judgment with regard to the disposal of the applications under Sections 7(1) and 7(2) of the West Bengal Premises Tenancy Act, 1997. The court observed that it was not for the appellate court to decide such applications but it was the duty of the learned Trial Judge to decide such applications as well.

Mr. Sen, learned advocate for the plaintiffs, submits that the suit was remanded for an adjudication on the ground of reasonable requirement meaning, thereby, the plaintiffs' onus to prove the reasonable requirement in respect of the suit property as the ground for eviction was to be discharged and only if the plaintiffs could prove the same, the suit should have been decreed. Mr. Sen refers to the ordering portion of the judgment of the lower appellate court and submits that the appeal was allowed in part, insofar as, it related to the plaintiffs not proving the ground of reasonable requirement. The learned appellate court directed that the case should be heard and the judgment should be delivered afresh upon affording opportunity of hearing to the plaintiffs. The learned appellate court upheld the order passed by the learned Trial Judge directing ex parte hearing of the suit. Hence, the defendants cannot be granted any opportunity either to file a written statement or to contest the suit.

Having heard the learned counsel for the respective parties, this court comes to the following findings:

- a) The learned Trial Judge decreed the suit without considering the ground of

reasonable requirement and without deciding the said issue on merits.

- b) It was for the plaintiffs to prove that they required the property for their own use and occupation and they did not have any other reasonable suitable accommodation. This issue could not have been decided by the learned Trial Judge without the plaintiffs discharging their onus under the law.
- c) On the above defect in the decree, the judgment and decree passed by the learned trial court granting the plaintiffs a decree of recovery of possession, upon eviction of the defendants, was set aside.
- d) The lower appellate court allowed the trial court to proceed with the matter afresh upon hearing the respondents/plaintiffs and write a fresh judgment.
- e) The learned Trial Judge was blowing hot and cold after the remand and there are various orders which show that after the remand, the defendants were allowed to contest and then the order was recalled subsequently.

However, the scope for reopening the issue as to whether the defendants were entitled to file a written statement does not arise as the said issue

had attained finality. The suit was, in any event, proceeding ex parte. The defendants had not filed their written statement as per the direction of the High Court. The learned lower appellate court did not interfere with the direction of the trial judge that the suit should proceed ex parte.

A mention with regard to the pendency of the applications under Sections 7(1) and 7(2) of the West Bengal Premises Tenancy Act, 1997 would not ipso facto amount to an implied overruling of the decision of the learned Trial Judge to proceed ex parte.

However, Mr. Sen's contentions that only the plaintiffs were entitled to advance arguments is not accepted. When the appeal was allowed in part, at the behest of the defendants, the correct interpretation of the order of the learned lower appellate court would be that although the defendants would not be entitled to file any written statement, and their defence will be treated as struck off, but the defendants shall be entitled to cross examine the plaintiffs with regard to the plaint case and advance arguments only on the plaint case without setting up any defence or without arguing their own case.

This order is being passed under Article 227 of the Constitution of India, in order to correct the errors in the decisions of both the learned courts

below, only to render complete justice to the parties. Otherwise, the decision in the appeal will be an empty formality and the defendants' partial success in the appeal will be of no value.

The parties are at liberty to approach the learned court below on the basis of the server copy of this order so that dates may be fixed by the learned court below for cross examination of the PW and for arguments.

The suit shall be disposed of within three months from the date of communication of this order.

The revisional application is accordingly disposed of.

There shall be no order as to costs.

Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)