

Court No. 652

CO 1002 of 2018

17.03.2023

(AD 77)

(S. Banerjee)

Smt. Basanti Roy
Vs.
Sri. Mihir Mitra & Ors.

with
CAN 1 of 2019
(Old CAN 160 of 2019)

Mr. Kushal Chatterjee
Mr. Arunava Ganguly
Mr. Ajay Chowdhury

... for the petitioner

Affidavit of service filed by the petitioner is taken
on record.

Being aggrieved and dissatisfied with the order
dated 21st February, 2018, passed by learned Civil
Judge (Sr. Division), 10th Court at Alipore in Ejectment
Appeal No. 35 of 2014 arising out of Ejectment Case No.
297 of 2004, the present application under Article 227
of the Constitution of India has been preferred.

Petitioner contended that the petitioner along
with plaintiffs/proforma opposite parties filed a suit for
ejectment, mesne profit against opposite parties herein,
being aforesaid Ejectment Case No. 297 of 2004. Said
suit was taken up for final hearing by the trial court
and trial court was pleased to pass a judgement and
decree directing the opposite parties herein to quit,
vacate and deliver Khas peaceful vacant possession of

the suit property in favour of the plaintiffs within three months.

Challenging aforesaid judgement and decree, the defendant no. 2/opposite party herein preferred the aforesaid appeal being Ejectment Appeal No. 35 of 2014. During pendency of the said appeal the appellant/opposite party herein filed an application under Order XLI Rule 27 of the Code of Civil Procedure for admission of the document annexed thereto as an additional evidence. The petitioner herein filed written objection against the said application. The appellate court by the impugned order was pleased to allow defendant/opposite party's aforesaid application under Order XLI Rule 27 of the Code of Civil Procedure directing the appellant to file certified copy of the document annexed with the application.

Mr. Kushal Chatterjee, learned counsel appearing on behalf of the petitioner, submits that the court below ought to have heard the said application under Order XLI Rule 27 of the Code along with the ejectment appeal and not in an isolated manner. He further contended that the court below have failed to appreciate the fact that the documents sought to be relied upon is not at all germane to the present issue, in view of the fact that the opposite parties herein have ceased to be a tenant under the provision of the West Bengal Premises

Tenancy Act, 1997 and as such the court below ought to have rejected the said application seeking additional evidence filed by the defendant/opposite party herein.

Learned advocate for the opposite party submits that plaintiff has sufficient alternative accommodation and the court below was pleased to overlook that the plaintiffs have not come to the learned court with clean hands as plaintiffs have alternative accommodation at Rustamji Street at 186-A, S. P. Mukherjee Road, consisting of 12 rooms and the Trial court did not give any credence to the report submitted by the learned Commissioner. Opposite party defendant further contended that the plaintiffs/owners constructed a G+5 storied building in the property situated at 15, Mondal Temple Lane, New Alipore with the assistance of M/s. S. R. Realtor Private Limited and sold some of their portion of the flats to prospective purchasers, keeping the rest for themselves. Accordingly opposite party contended that the plaintiffs/petitioners have sufficient accommodation in Kolkata within 10 KMs from suit property and the ground of reasonable requirement, which is the issue involved in the ejectment suit, ought to be demolished particularly in view of the fact that the aforesaid fact was intentional suppression by the plaintiff while dealing with the said suit. He further contended that the aforesaid facts were not within the knowledge of the defendants/opposite parties and as

such they could not produce the same before the court below. Now they have learnt about the said alternative accommodation of the plaintiffs and as such they have sought for filing the certified copy of the deed by way of an additional evidence, which the trial court rightly allowed and as such the order impugned does not call for any interference.

Considered the submissions made by both the parties. At the very outset it is to be made clear that it has not been appraised herein as to whether issue pertaining to Section 2(g) of the West Bengal Premises Tenancy Act, 1997 was raised and/or considered by the Trial court or not. Be that as it may, from the application filed under Order XLI Rule 27, it appears that defendant/tenant has taken a specific plea of suppression of fact by plaintiff while obtaining decree, contending that plaintiffs have constructed G+5 storied building at 15, Mandal Temple Lane, New Alipore and sold some of their portion of the flats to prospective purchasers keeping the rest for themselves and by way of additional evidence they want to brought before the court, certified copy of one such deed executed by plaintiffs in favour of one of such purchasers in respect of a flat in the building at 15, Mandal Para Lane. It is appellant's further case that he came to know about such fact during pendency of the said appeal.

Plaintiffs/respondents dealt with the said allegation stating that said property was developed much after filing of the suit and the proceeds of the sale was used for their personal requirement.

Now in view of the case of ***Union of India -Vs.- Ibrahim Uddin & Anr.***, reported in **(2012) 8 SCC 148** it has been categorically held that the issue of additional evidence before the appellate court at a belated state can be considered, provided:

- i) that there are relevance of the documents in respect of the issue involved in the case;
- ii) the circumstances under which such an evidence could not be led in the court below; and
- iii) Whether the applicant had prosecuted his case before the court of law diligently and as to whether such evidence is required to pronounce the judgment by the appeal court.

Since the suit has been decreed inter alia on the ground of reasonable requirement, such issue is a substantial issue which Trial court did not have any scope to consider while passing the decree. Therefore, after the suit was decreed there is no other way for the appellant than to run to the competent authority to

procure the document, which may determine the fate of the suit and which also could decide the entitlement of the plaintiff and the defendant. The respondents have taken the plea that defendant/tenant cannot dictate the landlord, which accommodation is most suitable for him, but even such issue of alternative reasonable accommodation could not be ascertained, if a party is given a chance to examine the document by rendering it into evidence.

If Section 107 is read with Order XLI, Rule 17(b) of the Code, the words “on for any other substantial cause” appears as, for any other substantial cause, the appellant court requires additional evidence. It is well settled that the admissibility of additional evidence depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgement. In other words whether the appellate court is able to pronounce judgement on the materials before it without taking into consideration, the additional evidence sought to be adduced. In the present context at the cost of repetition it can be stated that the suit was decreed on the ground of reasonable requirement and the issue of reasonable requirement has a direct bearing upon the question of landlord’s possession of other suitable accommodation in that area. It is true that the general principle is that the appellate court should not travel outside the record of

the lower court and cannot take evidence in appeal. However, as an exception, Section 107(1)(d) read with Order XLI Rule 27, enables the appellate court to take additional evidence in order to remove the cloud of doubt over the case and if the evidence has a direct and important bearing on the main issue in the suit.

In view of the above, I find nothing to interfere with the order impugned and as such it does not call for any interference.

CO 1002 of 2018 is accordingly dismissed.

However, if the issue raised before court below as to whether the opposite parties ceased to be a tenant under Section 2(g) of the Act of 1997, such issue shall be kept open before court below for disposal in accordance with law without being influenced by any observation made herein.

(Ajoy Kumar Mukherjee, J.)