

13 12.12.23

Ct. No. 04

akd

F.M.A.T. 332 of 2023
CAN 1 of 2023

Sri Narayan Chandra Saha
Vs.
Sri Uttam Sharma

Mr. Samiran Giri,
Dr. R. P. Motilal,
Mr. Pabitra Biswas.
... for the appellant.

Mr. Debdutta Basu,
Mr. Sudip Sarkar,
Mr. Krishna Pada Santra.
... for the respondent.

The instant appeal arises from an order of remand passed by the 1st Appellate Court in Title Appeal No. 26 of 2021.

The plaintiff/appellant filed a suit for eviction of a monthly tenant, inter alia, on the ground of default and reasonable requirement envisaged under Section 6 of the West Bengal Premises Tenancy Act, 1997. It is stated in the plaint that the property originally belonged to his father namely Sri Santosh Chandra Saha, who during his lifetime entered into an agreement of tenancy, which was duly registered with the Registering Authority inducting the defendant/respondent in respect of a shop room at monthly rental of Rs.1,000/- payable according to the English Calendar.

The plaintiff traced his right, title and interest in respect of the suit premises on the strength of a Will made and published by the said Santosh Chandra Saha, since deceased, which is duly probated by a competent Court.

It is not in dispute that the original owner left behind him surviving two sons and five daughters, but by virtue of a Will the entire property was bequeathed upon two sons thereby excluding daughters to inherit the estate left by him. The application for probate was

resisted by one or more daughters by lodging caveat and filing affidavit in support thereof, but such objection could not be sustained and the application for probate was granted. Subsequently, the brother, who was beneficiary under the said Will, executed and registered a deed of gift in respect of his share in favour of the plaintiff/appellant.

It is further stated that a notice to quit was served upon the defendant/respondent, which would be evident from the fact that the reply to such notice was also given, which is the condition precedent for institution of a suit for eviction on one or more grounds enumerated under Section 6 of the said Act. The plaintiff averred that the accommodation available to him and his family members is scanty and, therefore, he reasonably requires the suit premises for him as well as for the benefit of the family members. It is further alleged that the defendant/respondent has neglected to pay the rent in respect of the shop room and, therefore, committed default exposing him liable to be evicted from the suit premises.

The defendant/respondent took a defence that there is no relationship of *landlord and tenant* and, therefore, the suit at the behest of the plaintiff/appellant is not maintainable. It is further averred that the tenancy agreement executed by and between the original owner and the defendant/respondent would reveal that the rent shall be collected by the said owner during his lifetime and after his death the youngest daughter, namely Rekha Sarkar, shall collect the rent and, in fact, the rent is being tendered and paid to the said Rekha Sarkar.

On the conspectus of the aforesaid stand taken by the respective parties in their pleadings, several issues were framed including an issue relating to

relationship of *landlord and tenant* and the Trial Court proceeded to determine the aforesaid issues after inviting the parties to adduce evidence in this regard. Interestingly, an application under Order XVI Rule 14 of the Code of Civil Procedure was taken out by the defendant/respondent inviting attention of the Court that the vital witness being the said Rekha Sarkar should be examined in order to conclusively determine the issue relating to the relationship of *landlord and tenant*.

By an order no. 51 dated 21st September, 2021 the Trial Court took up the said application but did not decide the same conclusively, as the concluding portion of the order would reveal that the decision in the said application was kept in abeyance till the final hearing of the suit. The Trial Court decreed the suit, as the plaintiff/appellant had been able to prove the grounds enumerated therein, which was assailed by the defendant/respondent before the 1st Appellate Court. The 1st Appellate Court remanded the matter, as according to it, the issue as to whether the suit is bad for defect of parties as well as the issue of default in payment of rent has to be decided on the basis of evidence of the said Rekha Sarkar.

The Trial Court further held that since the application under Order XVI Rule 14 of the Code filed by the defendant/appellant was not finally decided by the Trial Court, the impugned judgement is defective, infirm and cannot be sustained, as any interlocutory application remained pending, the final judgement shall be bad and illegal.

The 1st Appellate Court thereafter remanded the matter directing the Trial Court to decide the application under Order XVI Rule 14 of the Code after hearing both sides and by passing a reasoned order and

thereafter to pass a judgement and decree as per law.

Mr. Giri, learned Advocate appearing for the plaintiff/appellant, vociferously submits before us that the jurisdiction of the High Court in relation to an appeal against an order of remand is limited and the High Court should not travel beyond the boundaries of the order of remand or in other words the grounds assigned by the 1st Appellate Court while remanding the matter to the original Court and should not venture to decide the other issues. In support of the aforesaid contention reliance is placed upon a judgement of the Apex Court rendered in case of *Narayan vs. Kumaran & Ors.* reported in (2004) 4 SCC 26.

It is further submitted that in the penultimate paragraph the Trial Court, in fact, disposed of an application under Order XVI Rule 14 of the Code and, therefore, the findings of the 1st Appellate Court is erroneous and perverse being contrary to the record.

On the other hand, the learned Counsel for the defendant/respondent submits that the said Rekha Sarkar is a vital witness, who can throw light on the issue of collection rent on a monthly basis upon issuance of receipt in terms of the entitlement vested upon her on the basis of tenancy agreement. It is sought to be contended that the original owner in unequivocal terms agreed that he will collect the rent during his lifetime and after his death the said Rekha Sarkar being the youngest daughter shall collect the same. It is thus submitted that the relationship of 'landlord and tenant' has not been established as the said Rekha Sarkar is regarded as landlord in respect of the tenanted shop room.

Such being the points urged before us, we do not find any difficulty in the proposition of law enunciated in the said judgement of the Apex Court as noted above

that the moment the appeal is filed under the provisions of Order XLIII Rule 1 (u) of the Code of Civil Procedure, the Court shall confine its consideration to such portion of the judgement/order of the 1st Appellate Court which relates to the order of remand to be passed.

The relevant excerpts of the said judgement is quoted as under:

“17. It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the appellate court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under Order 43 Rule 1 clause (u) should be heard only on the ground enumerated in Section 100. We, therefore, accept the contention of Mr. T.L. V. Iyer and hold that the appellant under an appeal under Order 43 Rule 1 clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the lower appellate court.

18. The High Court of Rajasthan in Abdul Gani vs. Devi Lal held that the appeal under this clause should be heard only on the grounds

enumerated in Section 100 and not on question of facts as in the case of first appeal."

It is no longer res-integra that the scope of determination under Order XLIII Rule 1 (u) of the Code is restricted to the findings relatable to an order of remand and the High Court should not reopen all such issues, which are involved in the said appeal.

It is further held in the above noted decision that the scope under Order XLIII Rule 1 (u) of the Code is somewhat akin to Section 100 thereof, where the Court should avoid re-appreciation of the evidence or the facts but should confine its consideration on the findings of remand.

On meticulous reading of the entire judgement we find that the Appellate Court was swayed by the fact that an application under Order XVI Rule 14 of the Code of Civil Procedure was kept pending and remained undecided and, therefore, the Trial Court ought to have decided the said application before it embark its journey to the final destination of the suit. Though the Appellate Court noticed the order no. 51 wherein the Trial Court kept the decision in abeyance, but overlooked the material part of the findings returned by the Trial Court which without any ambiguity relates to the disposal of an application in the following:

"I am not inclined to discuss the other case laws as submitted by both the parties as either they are not relevant or the facts and circumstances of such cases are not applicable to the instant case. I also like to state that Rekha Sarkar is not a necessary party to this Case, as already discussed and so this Court is not inclined to call her as a Court witness and accordingly, the petition filed by the defendant to that effect is considered and rejected."

From the aforesaid observations, the findings of the 1st Appellate Court that the said application remained undecided runs counter to it and may be termed as an error apparent on the face of the record. Be that as it may, the findings of the 1st Appellate Court is perverse to the effect that it did not notice the fact that the said application was rejected by the Trial Court.

The question whether Rekha Sarkar is a material witness or not has to be considered in the perspective of the disputes or the issues involved in the said proceeding.

Both the parties have relied upon the tenancy agreement executed by and between the original owner and the defendant/respondent. The meaningful reading of the clauses and/or terms incorporated therein leaves no ambiguity that the tenancy was for a duration of five years, as the defendant/respondent was obligated to pay rent during the currency of the said tenancy. Though it is indicated therein that so long the original owner remained alive he will collect the rent and after his death the youngest daughter namely Rekha Sarkar shall be entitled to collect the same, but the Court must read the document as a whole in order to gather intention of the maker or the parties to the said agreement. All the terms of the agreement should be reconciled being complimentary to each other and it is the first and foremost duty of the Court to harmonize the aforesaid terms in a pragmatic manner. Any inconsistency or discrepancy appearing in different clauses, the canon of interpretation in this regard is required to be pressed in action.

The agreement is required to be read as a whole and not in a piecemeal, as every segregation is susceptible to create confusion or may defeat the very

intention of the contracting parties.

The learned Counsel appearing for the defendant/respondent is very much vocal in his submission that the moment the owner indicated in the said agreement that he will collect the rent during his lifetime and after his demise his youngest daughter, Rekha Sarkar, shall collect the same, it whittled down the earlier part of the recitals. In other sense it is sought to be contended that the tenancy is of perpetual or perennial in nature and, therefore, in terms of the said agreement Rekha Sarkar is collecting the rent.

We do not find the aforesaid contention having any Substance in terms of the well known principles of law that the tenancy created in respect of a part or a portion of the property is subject to the law governing it provided such tenancy comes within the purview of the Rent Restriction Act. The moment parties have limited the period of tenancy and the liability ceases upon expiration thereof by efflux of time, the other clauses have to be understood in such perspective and cannot be interpreted to frustrate or render such clauses otiose.

The intention was laudable and evident that during the currency of tenancy limited by a period of five years and if the original owner remained alive during such period, he would continue to collect the rent and if he expires, the youngest daughter shall be entitled to collect rent, which cannot be stretched beyond the duration of tenancy. The moment tenancy comes to an end upon expiration of the period limited thereby, it immediately sever the relationship of 'landlord and tenant' or 'lessor and lessee' and it is a contractual as well as the statutory duty of the lessee to deliver the possession to the owner/lessor as envisaged under Section 108 of the Transfer of Property Act.

We thus do not find from the terms and conditions as well as the recitals of the agreement that the said Rekha Sarkar is an important witness for the simple reason that even if it is proved that she has collected rent or continued to collect the rent, such right ceases upon expiration of the period of tenancy and cannot continue beyond the same.

In view of the above, the findings of the 1st Appellate Court is liable to be interfered with, which, in fact, is done by us, the same is hereby set aside.

Since the entire order of remand was hovering on the circumference of the application under Order XVI Rule 14 of the Code having not decided and there is no findings returned on the other issues or the merit in relation thereto, the 1st Appellate Court being the creature of statute is required to return its findings on all the issues afresh being the last Court of fact and law. The entire issue becomes at lurch and it is an ardent duty of the 1st Appellate Court to decide the appeal on the basis of the evidence adduced by the respective parties and the arguments so advanced.

Since the 1st Appellate Court has not decided the other issues more particularly the issue relating to reasonable requirement and default, we feel that the matter is required to be remitted to the 1st Appellate Court to reconsider the said appeal.

Accordingly, the 1st Appellate Court is directed to rehear the appeal after affording an opportunity of hearing to the respective parties and shall dispose of the same on or before 15th January, 2024 by recording proper reasons.

It goes without saying that in order to adhere the time limit indicated hereinabove, being mandatory and peremptory, the 1st Appellate Court shall refuse to grant unnecessary adjournment to either of the parties. In

the event, the 1st Appellate Court finds that the adjournment cannot be refused because of the grounds taken therein which is unforeseen and unavoidable, the endeavour shall be made to fix the matter on day to day basis so that the time limit set-forth hereinabove is strictly complied with.

With the above observations, the appeal and connected application are disposed of.

Let the judgement and order passed in the instant appeal be immediately communicated to the 1st Appellate Court through special messenger at the cost of the appellant. Such cost shall be put in by 15th December, 2023.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)