

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE MADHURESH PRASAD

SAT 3 of 2024
CAN 1 of 2024
Asit Kumar Pal alias Ashit Kumar Pal alias Asit Pal
Vs.
Sankar Nath Shaw

Appearance:

For the Appellants : **Mr. Abhijit Basu, Adv.**
Mr. Arghya Kamal Das, Adv.

Judgment On : **22.04.2024**

Harish Tandon, J.:

The suit for eviction of a monthly tenant filed by the respondent stood decreed by the Trial Court on the ground of default and/or reasonable requirement and such decree is affirmed by the First Appellate Court. The tenant/defendant has filed the instant Second Appeal before this Court which is posted for hearing under Order 41 Rule 11 of the Code of Civil Procedure for admission.

Though the right of Second Appeal is provided under Section 100 of the Code of Civil Procedure but circumscribed with the condition that there must be an involvement of substantial question of law. There is no fetter on the part of the Second Appellate Court to dismiss the appeal without serving

a notice upon the respondents under Order 41 Rule 11 of the Code of Civil Procedure. We invited the Counsel for the appellant to address us in order to ascertain whether the instant case involves substantial question of law which is sine qua non under Section 100 of the Code.

The respondent filed Title Suit no. 164 of 2013 in the 2nd Court of Civil Judge, Junior Division, Chandannagar, Hooghly for eviction of the appellant inter alia on the ground of default, building, rebuilding and reasonable requirement. The plaint proceeds that the plaintiff/respondent acquired an absolute right, title and interest in respect of the said property on the basis of several deeds executed by his brothers, who were a co-sharer along with the plaintiff/respondent on the death of their predecessor. Earlier, Title Suit no. 50 of 2009 was filed by all the brothers including the plaintiff/respondent on the ground of default and the reasonable requirement against the present appellant which was dismissed on technical grounds. Subsequently, after acquiring the absolute right, title and interest as the other brothers have divested their right, title and interest in favour of the plaintiff/respondent, the present suit is filed. It is further averred that the defendant/appellant is defaulter in payment of rent and having got the protection under Section 7(4) of the West Bengal Premises Tenancy Act, 1996 in an earlier suit, he has exposed himself to be evicted on the ground of default as he failed and neglected to pay rent even thereafter. The plaint further proceeds that the plaintiff/respondent has four sons out of which one is running a business in a very small room but the other two sons have no separate place of business or employment although they gathered experience in dealing with the business by assisting the plaintiff/respondent

and for their business purposes the suit premises is reasonably required. It is further averred that the plaintiff/respondent is running a business from tenant of premises and, therefore, by making a suitable construction in the suit property he would also be able to shift his business thereto and shall be able to provide a separate business spaces to his aforesaid two sons. It is categorically stated in the petition that the plaintiff/respondent is not in possession of reasonable suitable accommodation for his business purposes.

The defendant/appellant in his written statement admitted that he is a sole tenant after the death of his father by virtue of an agreement having entered into with his other co-heirs but denied the requirement as pleaded by the plaintiff/respondent. It is a specific stand of the appellant that previously there were three tenanted shop room at the scheduled property and a three separate suits for their eviction were filed by all the brothers of the plaintiff/respondents which ended into a compromise. Subsequent to the said compromise, the structure was demolished by making construction of a two shop rooms which is occupied by the plaintiff/respondent and his brothers. The parties adduced evidence in support thereof and also tendered the judgment rendered in an earlier suit filed by all the brothers including the plaintiff/respondent against the defendant/appellant which was marked exhibit.

The Counsel for the appellant submits that the Court while passing a decree on the ground of default should have considered that the same being the first default, the protection under Section 7(4) of the said Act should be extended to the appellant. It is further submitted that the deposits made in favour of all the four sons including the plaintiff-appellant in the earlier Title

Suit no. 50 of 2009 should be considered as a valid discharge and cannot be said to be an invalid deposits. It is further submitted that an application under Order 41 Rule 27 of the Code of Civil Procedure was filed without mentioning the provision and, therefore, the Court ought to have taken into account the additional evidence and committed error in dismissing the same. It is further submitted that the suit is filed within the mischief period provided under Section 6 sub-Section (5) of the said Act and, therefore, is liable to be dismissed as premature.

Taking a plea of default, the first and foremost duty which we feel is to find out as to whether a protection under Section 7(4) of the said Act was extended to the defendant/appellant and subsequently, he has further defaulted in payment of rent disentitling him to get the further protection. Section 7(4) of the Act provides that in the event the tenant deposits the rent under sub-Section (1) or (2) of Section 7 of the said Act, no order for delivery of possession of the premises shall be passed in favour of the landlord on the ground of default in payment of rent. The proviso inserted thereto indicates that the moment the tenant has availed such relief once and makes a further default in payment of rent for 4 months within the period of 12 months or any of the successive rental periods, further protection cannot be extended to the tenant. The said Section 7(4) of the Act is quoted as under:

“7(4). If the tenant makes deposit or payment as required by sub-section (1) or sub-section (2), no order for delivery of possession of the premises to the landlord on the ground of default in payment of rent by the tenant, shall be

made by [the Civil Judge], but he may allow such cost as he may deem fit to the landlord:

Provided that the tenant shall not be entitled to any relief under this sub-section if, having obtained such relief once in respect of the premises, he again makes default in payment of rent for four months within a period of twelve months or for three successive rental periods where rent is not payable monthly.

In order to decide the said point it would be appropriate to see whether such protection was extended to the petitioner in an earlier suit instituted against him. The judgment rendered in Title Suit no. 50 of 2009 is to be seen to find out whether any protection was extended to the petitioner under the aforesaid provision. It appears therefrom that the defendant was alleged to have defaulted in payment of rent since Falgun 1405 B.S. and on receipt of the summons entered appearance and deposited the rent in terms of the order passed by the Court under sub-Section (2) of Section 7 of the said Act. The judgment of the earlier suit would further reveal that the defendant filed a challan showing the deposit of the instalment granted in respect of an arrear of rent and the Court found that he has complied the order passed under Section 7(2) of the said Act and, therefore, is entitled to protection in the following:

“Plaintiffs do further app to have filed the challans (Exbt. A series) showing payment of rent since Sharavana 1416 B.S. till the existing month. He has also filed a document i.e. a challan towards deposit of Rs. 5000/- towards first instalment. As such the plaintiffs have complied the order u/s 7(2) of W.B.P.T Act and he is entitled to protection, as such the defendant cannot be ordered of eviction on the ground of defaulting.”

It is manifestly clear from the above narrated observation of the Court that on compliance of the provisions contained under sub-Section (1) and (2) of the said Act, the protection was extended to the appellant under Section 7(4) of the said Act. Though there is no mentioning of Section 7(4) in the said Order yet, from the meaningful reading of the finding so returned it is reasonably inferred that such protection was extended to the defendant/appellant. Such being the position we have to ascertain whether there was any further default within the mischief of the proviso contained in Section 7(4) of the said Act. The finding of the Appellate Court in the impugned judgment reveals that by Order no. 5 dated 06.03.2014 an application under Section 7 (2) of the Act filed by the appellant was disposed of holding that there is an arrear in payment of rent of Rs. 1309/- which is required to be deposited. Admittedly, the rent in respect of the premise is Rs.70/-payable according to the Bengali calendar month. By no stretch of imagination, we can infer that the default is not within four successive months from the arrear at Rs. 1309/-. The moment the defendant/appellant has committed a default in payment of rent for four consecutive months within a period of 12 months, he cannot get protection under Section 7(4) of the Act after having availed such protection in an earlier suit for eviction. We thus do not find any infirmity in the order of the Trial Court as well as First Appellate Court that the defendant/appellant has exposed himself liable to be evicted on the ground of default in payment of rent.

So far as an application under Order 41 Rule 27 of the Code filed by the defendant/appellant before the First Appellate Court is concerned, we

find that the said application was taken out for recording the subsequent events happened during the currency of the appeal before the First Appellate Court. We are not unmindful of the proposition of law that non-mentioning of the Section is not fatal. The Court must look into the averments made in the said application and apply the suitable provision of the law as the determination is required to be made on merit. There is no fetter on the part of the Court to construe the said application to have been filed under a particular provision of the statute on the meaningful perusal of the contents of the said application. The copy of the application is annexed to an application for stay wherefrom it appears that the appellant/defendant intended that after getting the possession from one of the tenant, a signboard is put on the above shop room inviting a person to take on rent which shows that the plaintiff/respondent do not have any requirement of the suit premises. A plea of Stall no. 22 at the Tarakeswar Market is also taken as a subsequent event and running the business therefrom is also averred therein. We do not find any fetter on the part of the Court to take note of a subsequent event provided the same has a material bearing on the decisions to be taken in the said litigation. Order 41 Rule 27 of the Code of Civil Procedure provides that the Appellate Court may permit any parties to adduce additional evidence provided the ground enumerated therein are duly satisfied. All the aforesaid plea which is perceived by the defendant/appellant to have taken place during the pendency of the instant appeal does not appear to us to be construed as a subsequent event for which the additional evidence is required to be adduced. It appears from the judgment of the Trial Court that the aforesaid plea was taken in the suit

itself and the Trial Court after taking into consideration the aforesaid facts returned its finding based on reasons which does not appear to be of such nature that would debar the plaintiff/respondent to seek a decree for eviction. Even a plea the signboard having put containing the expression “to let” was taken before the Trial Court and, therefore, cannot be said to be a subsequent event during the pendency of the appeal. The plea of evidence regarding Stall no. 22 at Tarakeswar Market has also been taken not only in the written statement but also in the argument at the time of final disposal of the suit which also cannot be taken as a subsequent event for which the additional evidence is required to be produced. Furthermore, the application does not reveal any document in support of the aforesaid contention to have been disclosed and, therefore, we do not find that the conditions provided in Order 41 Rule 27 of the Code of Civil Procedure has been complied with and/or fulfilled.

So far as the plea that the suit was instituted one year from the date of acquiring an interest in the suit property as provided under Section 6(2) of the said Act is concerned, we do not find that the said Section creates any embargo in the facts of the present case. The expression “a landlord has acquired his interest in the premises by transfer” cannot be given a restrictive meaning nor shall apply to a case where the landlord has a subsisting right as a co-owner. Admittedly, the plaintiff/respondent was a co-owner along with his brothers and subsequently acquired an absolute right, title and interest as the other brother have divested their title into him. The law does not put any obstacle on the co-owner/co-sharer to institute a suit against the tenant for his eviction provided the other co-

owners do not object to it. The plaintiff/landlord had a subsisting title into the property as a co-owner and if he acquires an absolute right by dint of purchase or gift from the other co-owners, he cannot be regarded as a person having acquired the interest in the premise for the first time. The judgment of this Court rendered in ***M/s. Nathmal Radhakrishnan vs. Smt. Radharani Nandi*** reported in **90 CWN 518** can be gainfully applied wherein it is held that if the plaintiff who was already a co-owner landlord in respect of a premises and having enlarged his interest by any devise, it does not bring any change in the status *vis-à-vis* the tenant and, therefore, Section 13 (3a) cannot be attracted in the following:

“23. In my considered view, the opening words of Sub-s. (3A) namely, ‘where a landlord has acquired his interest in the premises by transfer’ refer only to a person who had no interest in the premises before the transfer that is a transferee-landlord and not to a person who was already a co-sharer landlord of the tenant sought to be evicted as well as a co-owner of the premises itself.

25. From what goes above, I am firmly of the opinion that the embargo imposed by sub-s. (3A) can never apply to the present case. Ratan, as has been seen, was already a co-sharer landlord of the defendant and also a co-owner of the premises to the extent of a moiety share. The purchase of the remaining moiety share of Jalabarani and her three sons had merely the effect of enlarging his interest both as a co-sharer landlord and as a co-owner of the premises. Other than enlargement of his interest the transfer did not bring about any change in his status vis-a-vis the tenant. Therefore, by no stretch of imagination can it be said that he acquired his interest in the suit premises as a landlord by purchase. In view of the foregoing discussions I find myself unable to accept the contention of Mr. Dasgupta

that the suit was hit by sub-s. (3A) of S. 13 of the West Bengal Premises Tenancy Act and was liable to be dismissed.”

The Apex Court in case of **V.N. Sarin vs Major Ajit Kumar Poplai & Anr.**, reported in **AIR 1966 SC 432** held that the bar in institution of a suit by a transferee landlord is only attracted to a situation where the transferee has no pre-existing right in respect of the premises and acquired such right for the first time on the strength of a deed as follows:

“13. In dealing with the present appeal, we propose to confine our decision to the narrow question which arises before us and that relates to the construction of Section 14(6). What Section 14(6) provides is that the purchaser should acquire the premises by transfer and that necessarily assumes that the title to the property which the purchaser acquires by transfer did not vest in him prior to such transfer. Having regard to the object intended to be achieved by this provision, we are not inclined to hold that a person who acquired property by partition can fall within the scope of its provision even though the property which he acquired by partition did in a sense belong to him before such transfer. Where a property belongs to an undivided Hindu family and on partition it falls to the share of one of the coparceners of the family, there is no doubt a change of the landlord of the said premises, but the said change is not of the same character as the change which is effected by transfer of premises to which Section 14 (6) refers. In regard to cases falling under Section 14 (6), a person who had no title to the premises and in that sense, was a stranger, becomes a landlord by virtue of the transfer. In regard to a partition, the position is entirely different. When the appellant was inducted into the premises, the premises belonged to the undivided Hindu family consisting of Respondent 1, his father and his brother. After partition, instead of the undivided Hindu family, Respondent 1 alone had become landlord of the premises, we are satisfied that it would be unreasonable to hold that allotment of one parcel

of property belonging to an undivided Hindu Family to an individual coparcener as a result of partition is an acquisition of the said property by transfer by the said coparcener within the meaning of Section 14 (6). In our opinion, the High Court was right in coming to the conclusion that Section 14(6) did not create a bar against the institution of the application by Respondent 1 for evicting the appellant.”

Since the plaintiff/respondent was the co-owner landlord *vis-à-vis* the defendant/appellant, it cannot come under the mischief of Section 6(2) of the Act after enlarging his share and becoming an absolute owner thereof. We thus do not find that the points urged before us involves a substantial question of law. The appeal is thus dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Madhuresh Prasad, J.)