IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

SA 39 of 2006

Parul Dey & Ors.

Vs

Debrani Mondal

For the Appellants	:	Mr. Souradipta Banerjee Ms. Fatima Hassan
Heard on	:	05.09.2023
Judgment on	:	22.09.2023

Ajoy Kumar Mukherjee, J.

1. This second appeal has been preferred against judgment and decree both dated October, 25th, 2005 passed by learned judge, 12th Bench, City Civil Court, Calcutta in Title Appeal No. 30 of 2003 arising out of judgment and decree passed by learned judge, 5th Bench, Small Causes Court, Calcutta, in Ejectment Suit No. 166 of 2000 on 30th January, 2003

2. The appellant herein as plaintiff being the owner of the suit property filed aforesaid Ejectment Suit against the respondents herein who are premises tenant in respect of suit property, at a rental of Rs. 85/- per month, payable according to english calendar month. In the said suit plaintiff /appellants alleged that the defendants have stopped payment of rent since June, 1993 and as such defendants are defaulter in payment of

rent. It was further alleged in the plaint that the suit premises is reasonably required for the use and occupation of the family members of the plaintiff, since they have no other suitable accommodation. The Trial court decreed the suit vide judgment and decree dated 30th January, 2003 on the ground of default and reasonable requirement

3. Being aggrieved and dissatisfied with the said judgement passed by the Trial Court, the defendant preferred first appeal before the Chief Judge, City Civil Court, which was subsequently transferred to Judge, 12th Bench, City Civil Court, Calcutta for disposal. Learned First Appellate Court, after hearing the parties allowed the appeal and set aside the judgment and decree dated 30.01.2003 passed by learned judge, 5th Bench Small Causes Court, Calcutta in Ejectment Suit No. 166 of 2000.

4. During the hearing of the second appeal the Respondents are not represented. Following substantial questions of law were framed by the Division Bench of this court, while admitting the Appeal on 27.01.2006.

(i) *Whether the learned court of appeal below committed substantial error of law in reversing the judgment and decree passed by the learned trial judge on the ground that no reliance could be placed upon the depositions of P.W Nos. 1 and 2 by totally overlooking the fact that apart from the fact that they are the constituted attorney of the plaintiffs, they are also acquainted with the facts of the case and in their personal capacity they are entitled to depose in favour of the plaintiffs;*

(ii) *Whether the learned court of appeal below committed substantial error of law in reversing the judgment and decree passed by the learned trial judge on the ground that as the wives and children of two sons of the plaintiffs reside in the native village, there was no necessity of accommodation for those two sons in Kolkata by ignoring the fact that for want of sufficient accommodation they are unable to bring their wives and children in Kolkata;*

(iii) *Whether the learned court of appeal below committed substantial error of law in not taking into consideration the admitted fact that as sons of the plaintiffs are carrying on business of ration shop in Kolkata, there was no reason for disbelieving the case of reasonable requirement pleaded by the plaintiffs for the use and occupation of those sons;*

(iv) *Whether the learned court of appeal below erred in law in taking into consideration the fact that the tenanted accommodation of one of the sons of*

the plaintiffs was surrendered in favour of the landlord by totally overlooking the fact that in this suit the plaintiffs have not prayed for accommodation for the said son who holding the tenancy.

DECISION

5. In the present case the plaintiff's son Bimal Kr. Dey has signed the plaint as constituted attorney of plaintiff Basudeb Dey, who also deposed in the said Ejectment Suit before the Trial Court as PW-2. It is not in dispute that plaintiff Basudev initially executed power of attorney in favour of his son Bimal Kr. Dey. Now defendant has attacked plaintiffs' case contending that subsequently said plaintiff again executed power of attorney in favour of his nephew Abhijit Dey, without cancelling the power of attorney executed by him earlier in favour of Bimal Kr. Dey and as such evidence adduced on behalf of plaintiffs cannot be relied upon in support of plaintiff's case as PWs have no authority to depose.

6. Learned Trial Court while dealing with the said issue came to the finding that attorney holder Bimal Kr. Dey who is the son of plaintiff has adduced evidence as PW-2, so there is no irregularity in respect of the evidence adduced by the PW-1 and PW -2 on behalf of the plaintiff.

7. However, learned First Appellate Court while dealt with the said issue relied upon the judgment reported in ***AIR 2005 SC 439*** and came to the finding that evidence of PW-1 and PW-2 on the strength power of attorney executed by the plaintiff in their favour cannot be relied upon in support of plaintiff's case. The first Appellate Court observed that a power of attorney holder can appear, plead and take action on behalf of the party, who executed the power of attorney but cannot become a witness on behalf of the party who executed the power of attorney. In this context, court below

further observed that the term "acts" used in rule 2 of order III of the Civil Procedure Code does not include the act of power of attorney holder as witness on behalf of the party who executed the power of attorney. Court below further held that the evidence of PW-2 could have been relied in support of plaintiffs case, if it was shown that the plaintiff was incapable of adducing evidence due to his old age and illness and in the absence of such evidence, court below could not believe plaintiffs case based on evidence adduced by PW-1 and 2 on behalf of the plaintiffs.

8. Mr. Banerjee learned counsel appearing on behalf of the Appellant/plaintiff in this context submits that the observation made by the court below on the basis of the reported Judgment in ***Janki Basudev Bhojwani Vs. Induslnd Bank Limited*** reported in **AIR 2005 SC 439** is absolutely improper and incorrect. In the said judgment, it has been observed that power of Attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge, he has about the case, he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. He in this context relied upon a Division Bench judgment of this court in ***Nikhil Mondal Vs. Nemai Chandra Dey*** reported in ***2022 (2) ICC 603,*** wherein the Division Bench of this court while considering the second appeal on similar set of circumstances distinguished the aforesaid judgment reported in **AIR 2005 SC 439** and made specific observations in Paragraph 6 to 15, the gist of the said observation would be highlighted that the evidence of a constituted attorney will be called in question only in cases where facts and circumstances establish that the evidence adduced by the constituted

attorney is beyond his knowledge and is only within the special knowledge of the of the principal.

9. In the present case admittedly the suit was filed for eviction on the ground of default and reasonable requirement. It is not in dispute that the plaintiff executed power of attorney first to his son Bimal who has deposed as PW-2. Said Bimal as PW-2 has filed and proved the power of attorney dated 13.10.1999 which is marked as exhibit 12. In examination-in-chief in paragraph 3, said PW-2 has categorically stated that he collected rent from the defendant and the rent receipt were issued by his father with his signature. While dealing with issue of reasonable requirement, plaintiff in his plaint has categorically stated that his son Bimal has been residing with his family in a rented accommodation at 8/C Balak Dutta Lane Kolkata. In such view of the matter it is absolutely unbelievable that Bimal in whose favour plaintiff first granted power of attorney and who has deposed as PW-2 is not aware about the issue of payment of rent by the defendant /tenant or about the issue of reasonableness of plaintiffs requirement, specially when said Bimal has put signature in the plaint as constituted attorney of plaintiff, Basudev Dey.

10. A Division Bench Judgment of this court in ***Renu Tiwary Vs. Dwarka Service station*** reported in **2020 SCC Online Cal 2283,** Court has made specific observation that there is no impediment on the constituted attorney to depose on behalf of the principal provided the facts which are within the personal knowledge of the principal cannot be proved through constituted Attorney. The constituted attorney who is in the helm of transaction since the inception may be regarded as a competent witness

to depose on behalf of the principal. In the present case as stated above there is no scope to say that the allegation/case of default in payment of rent, made by the tenant/ respondents were within special knowledge or personal knowledge of the principal/plaintiff only, specially when there is no denial in the cross examination of PW-2 who stated that he used to collect rent from the defendant and rent receipts were issued by his father /plaintiff. Similarly the defendant in the cross examination had not denied the signature of the PW-2 who put it as constituted attorney of plaintiff Basudev Dey in the plaint. Accordingly said PW-2 Bimal Kr. Dey is well acquainted with contents of the plaint as well as grounds of default and reasonable requirements to depose on behalf of the plaintiff by dint of power of attorney in support of plaintiffs plaint case. Court below was palpably wrong in coming to the finding, since without revoking power of attorney granted in favour of Bimal, the second power of attorney was granted in favour of his niece /PW-1, so neither the evidence of PW-1 nor the evidence of PW-2 can be relied, in support of plaintiffs' case. Such observation is absolutely meritless and cannot stand when plaintiff in para 8 of the plaint has clearly averred that plaintiff has appointed his second son Bimal as his lawful constituted attorney for him and on his behalf with all power as stated in power of attorney dated 13.10.1998.

11. As regards plaintiffs case of reasonable requirement, it has been contended in the plaint that plaintiff has five sons out of which Shyamal is the eldest one and aforesaid Bimal is the second son and the name of his third, fourth and fifth son is Amal, Nirmal, and Parimal. Plaintiff categorically pleaded in his plaint that Bimal is residing at a rented

accommodation whereas Shyamal Amal and Nirmal are compelled to reside without their family members. Their wives and children, due to dearth of accommodation residing at their native place at Arambagh, Hooghly. His Third and fourth son Amal and Nirmal are married and for which two tenanted rooms are required for their own use and occupation. Plaintiff by way of amendment also pleaded that he requires one more room in the ground floor for the accommodation of his elder brother who is suffering from serious age old ailments and has been residing at the upper floor, with physical disability. PW-1 is the son of plaintiff's said elder brother who has also deposed in support of plaintiff's reasonableness of requirements. The trial court while dealt with the issue of plaintiffs' requirements relied upon judgments reported in **2001 (2) Cal.L.T 09 (H.C)** and **2001(2) SCC 355** and came to a finding that the requirement of the landlord must be determined on the basis of convenience of the landlord and members of his family and the totality of their circumstances and must be suitable in sense of size. Trial Court specifically observed that tenant cannot force land lord to split up landlord's family, which claim is unreasonable and unjustified, specially when family/children of the sons of the plaintiff are residing at the native village at Ananta Nagore, Arambagh, Hooghly and in this context relying upon the judgment of Kerala High Court in ***AIR 2002 NOC 173,*** Trial Court held that tenant cannot dictate landlord regarding his choice of eviction. Accordingly court below came to conclusion that plaintiff and his sons and their family members have no sufficient accommodation in Calcutta and accordingly the plaintiff reasonably requires the suit premises for accommodation of his sons/family members.

12. However, when the First appellate Court had taken up said issue of reasonable requirement came to a finding that there is no evidence on record to show that the other sons of plaintiff got ration card at any address in Kolkata, showing that they have been living in Kolkata having their conjoint business of ration cum grocery shop at 35 Shankar Ghosh Lane Kolkata-6. On the contrary exhibit E and E-1 and evidence of PW-2 disclosed that the two sons of the plaintiff namely Nirmal and Parimal applied before the concerned authority at Arambagh for cancellation of their ration cards which existed at their native place at Arambagh in 2002 during pendency of Plaintiff's suit. Court below further held that PW-2 surrendered his rented accommodation at 8/C Balak Dutta Lane during pendency of the suit in 1997 and had the plaintiff required suitable accommodation for his sons namely Amal Nirmal or Parimal, they would not have surrendered their tenancy at 8/C Balak Dutta Lane in 1997.

13. Such observation of the court below is baseless in view of the fact that even if Bimal, for some reason or other had surrendered his tenancy in favour of his landlord that does not mean that getting tenancy by Amal, Nirmal and Parimal in the said surrendered premises was automatic. It is always the choice of the landlord, whom he will induct as tenant. There was no such compulsion on Bimal's landlord to induct other sons of plaintiff as tenant in place of Bimal nor Bimal's landlord was bound to induct Amal, Nirmal and Parimal as tenant even if any request was made on their behalf for their induction. Moreover the observation of the court below that during pendency of suit in the year of 2002 only, the plaintiffs' sons namely Nirmal, Parimal applied for cancellation of their ration card, which stood in the

ration office at Arambagh, shows that they were not resident of Kolkata at the time of filing the suit, does not find any substance in view of the fact that it is not disputed that the family members of the plaintiffs son are residing in the native village. Since the case of split up of family due to dearth of accommodation has been pleaded, Ration card may not be conclusive proof about their stay in Arambagh, specially when they also run ration shop in Calcutta. They might have continued their ration card in Arambagh for some reason or other and even if they made prayer for cancellation of ration card at Arambagh in the year of 2002 before the sub-divisional controller food and food supply, Arambagh which are marked exhibit E and E/1, even then there is no bar to take into account that subsequent event while considering the reasonableness of plaintiffs' requirement.

14. It is settled law that reasonable requirement would depend on whether the landlord is able to establish a genuine element of need for the premises and what is genuine need certainly depend upon facts and circumstances of each case. In the present case considering the background of the sons of the plaintiff who are unemployed and that business is the available option and tenanted premises was the only space available for their accommodation, the genuine need for the premises stood affirmed.

15. Court below erroneously came to a conclusion without any basis and purely on assumption that it is hardly believable that sons of plaintiff are compelled to stay in the ration cum grocery shop at 35, sankar Ghosh Lane, when PW-2 admitted that Ration cum grocery shop have been running with the help of two other employees. It is not understandable how it can be

concluded that plaintiffs sons are not compelled to stay in ration sop, as sons of plaintiffs have engaged two employees for smooth running of their grocery cum ration business. It is not even the case of tenant/defend that plaintiff's sons have sufficient accommodation in sankar Ghosh lane for their family children.

16. The word "requires" connotes something less than absolute necessity and *bonafide* means absence of intent to deceive. If I judge plaintiffs requirement in the touch stone of said two words., I find that plaintiff's requirement cannot be said to be fanciful. There is no such law that the landlord/owner could be deprived of using his own premises in order to accommodate the tenant, when it establishes that plaintiff and his sons are badly in need of accommodation and that need can only be satisfied by way of evicting the defendant/tenant from the suit premises. It is also settled law that it is for the landlord to decide how and in what manner he should live and he is the best judge of his residential requirement.

17. Apart from the ground of reasonable requirement Mr. Banerjee on behalf of Appellant argued on another question by indicating that in the plaint plaintiff has specifically averred in paragraph 2, that the defendants/tenants are defaulter in payment of rent since the month of June, 1998 and thereby has defaulted for two months within a period of twelve months. The Trial Court while disposing the said issue observed that it reveals from exhibit B collectively (rent receipts/challans) that the defendants filed challans in support of payment of rent but it reveals from the said challans that defendants failed to show that they have deposited rent for the period of June, 1993 to March, 1994 and March, 2002 till the

date of passing the order and as such Trial Court came to a conclusion that the defendants are defaulter in payment rent and said issue was disposed of against the defendants and ultimately eviction decree was passed on the ground of default.

18. However, learned First Appellate Court while dealt with the said issue observed that the finding of the Trial court that the defendants were defaulter in payment of rent for the period from June, 1993, to March, 1994 and from March, 2002 till the date of deliver of judgment was erroneous in view of the fact that the defendants deposited current rent and arrear rents complying with the provisions of section 17(1) and 17(2) of the Act of 1956 in terms of order dated 15.04.1995. Court below further held that the challans submitted by the defendants disclosed that the defendants deposited current rent and arrear rents complying with the provisions under sections 17 (1) and 17(2).

19. It appears that the aforesaid observation made by the learned court below is devoid of merit. Learned Trial Court has categorically observed the period of default in payment of rent which are from June, 1993 to March, 2004 and March, 2002 onwards and it was also observed that there had been non-compliance of the order No.12 dated 15.05.1995. Learned First Appellate Court did not give any reason in reaching the aforesaid observation that there is no default, when record reveals that the challans in support of payment for the aforesaid period as pointed out in the judgment of the Trial Court, have neither been marked as exhibit nor had been filed before the learned Trial court or before the First Appellant Court. In the absence of specific evidence in support of deposit of rent made by the

defendants/tenants for the aforesaid period, the court below was not justified in coming to the conclusion that the defendants have in compliance with sections 17(1) and 17(2) have deposited current rent and arrear rent and is not a defaulter and for which he is entitled to get protection under section 17(4) of the Act of 1956. Such observation in the absence of evidence is a perverse finding having not based on evidence and is not sustainable in the eye of law.

20. In my view the court below has committed mistake in setting aside the judgment of the Trial court. The finding of the court below is practically based on no evidence and finding is such that no reasonable man can reach such finding on the basis of the materials on record.

21. Such being the position the second appeal is allowed. The judgment and decree passed by the First Appellate Court on 25.10.2005 in Title Appeal NO. 30 of 2003 is hereby set aside and judgment and decree passed in ejectment suit no. 166 of 2000 by the 5th Court of the Small Causes Court dated 30.01.2003 is hereby affirmed.

There will be no order as to costs.

22. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)