CALCUTTA HIGH COURT

S.B. Trading Co., Ltd

Vs.

Olympia Trading Corpn. Ltd

Suit No. 1335 of 1951

(Sarkar, J.)

26.07.1951

JUDGMENT

Sarkar, J.

1. In this suit, which is for ejectment, I have already delivered a judgment striking out the defense against ejectment, as the defendants had not complied with an order made under Section 14(4) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. Though the defense may have been struck out, the plaintiff has yet to prove its case before a decree can be passed in its favor, for the striking out of the defiance does not amount to an admission by the defendants of the plaintiff's claim. Of course, I am now only concerned with that part of the plaintiff's claim which deals with the ejectment of the defendants. When the plaintiff proceeded to prove its claim for ejectment the defendants claimed to take part in the proceedings to oppose the decree for ejectment. In the present judgment, I propose to deal with the defendants' right to oppose the decree for ejectment

2. The first ground on which the defendants pressed their claim is based on Ch. XIV, R. 3 of the rules of the Original Side of this Court. That rule provides that

> "where the suit is heard ex parte against any defendant, such defendant may be allowed to cross-examine, in person, the plaintiff's witnesses, and to address the Court."

Learned counsel for the defendants argued that his clients' defence having been struck out, the suit is being heard ex parte against them and therefore he is entitled to cross-examine and to address the Court, and he proposed to do so not as counsel but as agent of his clients. Mr. Roy for the plaintiff has contended that the ex parte hearing contemplated in this rule is the ex parte hearing provided under the Original Side Rules. He has drawn my attention to Rules 3 and 4 of Ch. IX of the Original Side Rules. The ex parte hearing contemplated in these rules takes place, when the defendant does not either enter appearance or fails to file a written statement. Mr. Roy contends that no other kind of ex parte hearing is contemplated by the rules and that being so, the ex parte hearing mentioned in Ch. XIV, R. 3 cannot be taken as including a case where the

defence after having been put in stands struck out. Though I am not prepared to reject this argument, I would prefer to rest my decision on a different ground. Section 14(4) of the Rent Act provides that upon default in paying the rent in terms of an order for payment thereof made under it,

> "the Court shall order the defense against the ejectment to be struck out 'and the tenant to be placed in the same position as if he had not defended the' claim to ejectment."

It seems to me that if I allow the defendants in this case to cross-examine the plaintiff's witnesses on their evidence as to the facts establishing the claim to ejectment and to address the Court with regard to that claim, I am really allowing the defendants to defend the claim against ejectment. Section 14(4) says that this the defendants cannot do. This view is supported by what P.B. Mukharji, J., said in *'Debendra Nath Dutt V. Satyabala dassi'[1],* The learned Judge said at p. 116 :

> "I have not been able to persuade myself to take the view that a suit can only be defended by filing a written statement or by "entering appearance" under the Rules.........A defendant in my judgment may ably and successfully defend a suit against him by cross-examination and arguments."

For this reason I am unable to hold that the defendants are in this case entitled to cross-examine the plaintiff's witnesses and address me on that part of this case which is concerned with their ejectment.

3. Then it was said by learned counsel for the defendants that under Section 14, sub-secs. (1), (2) and (3), I cannot, in any event, pass a decree in ejectment forthwith. These sub-ss. are set out below :

> "14.(1) - If in a suit for recovery of possession of any premises from the tenant the landlord would not get a decree for possession but for clause (i) of the proviso to sub-section (1) of Section 12, the Court shall determine the amount of rent legally payable by the tenant and which is in arrears taking into consideration any order made under sub-section (4) and effect thereof up to the date of the order mentioned hereafter, as also the amount of interest on such arrears of rent calculated at the rate of nine and three-eights per centum per annum from the day when the rents became arrears up to such date, together with the amount of such cost of the suit as is fairly allowable to the plaintiff-landlord, and shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order such aggregate sum) on or before a date fixed in the order.
> (2) Such date fixed for payment shall be fifteenth day from the date of the order, excluding the day of the order.
> (3) If within the time fixed in the order under sub-section (1), the tenant deposits in the Court the sum specified in the said order, the suit so far as it is a suit for recovery of possession of the premises, shall be dismissed by the Court. In default of such payment, the Court shall proceed with the hearing of the suit :

> Provided that the tenant shall not be entitled to the benefit of protection against eviction under this section if he makes default in payment of the rent referred to in clause (i) of the proviso to sub-section (1) of Section 12 on three occasions within

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> a period of eighteen months."

4. This is a case in which the plaintiff would not be entitled to a decree for possession, but for Section 12, (1), (i). That being so, the Court would be bound to give the defendants an opportunity to pay off all arrears and to dismiss the claim for ejectment if the arrears were paid off as directed by the Court. But the right to have this opportunity does not exist if the tenant makes default in payment of two months' rents on three occasions within a period of 18 months. That is the effect of the proviso appearing in the section after sub-section 3. Learned counsel for the defendants argued that an issue as to whether his clients had defaulted in payment of two months' rent on three occasions within 18 months therefore necessarily arises and has to be decided by the Court irrespective of whether his clients' defense had been struck out or not. Mr. Roy admitted that his clients will certainly have to prove that the proviso applied but he contended that in such proof the defendants cannot take any part; in other words he says he will prove that default in payment of two months' rents had occurred on more than three occasions within 18 months in a manner as if he was doing it in a case in which the defendants did not appear. He said that under sub-Section 1, in deciding whether the defendants should have an opportunity to pay off the arrears and thereby avoid an ejectment decree, the Court has to take into consideration the effect of an order made under sub-section 4. He said that the effect of that order in the present case is to strike out the defense and therefore the defendants could not oppose the proof of the facts giving rise to the applicability of the proviso. He further contended that his claim to the ejectment had been based on default in payment of two months' rents on more than three occasions within 18 months, and he drew my attention to the relevant paragraphs of the plaint in which this case had been made out. He also pointed out to me that the written statement denied these paragraphs in the plaint. Thus, he contended, the sole defense to the ejectment in this case was whether there had been default in payment of two months' rents on more than three occasions within 18 months, and that defense has already been struck out. It would be a curious result and really would amount to annulling the provisions of sub-section 4, if in spite of the defense being struck out the defendants were in a position to contest the applicability of the proviso. In my view, this latter argument of learned counsel for the plaintiff is plainly sound. The proviso itself says that on certain things happening "the tenant shall not be entitled to the benefit of protection against eviction under this section." So the proviso really contemplates a defense to the claim for ejectment, and if that defense is struck out, it must necessarily mean that it is no longer open to the defendants to contest the existence of the facts, giving rise to the applicability of the proviso. I therefore reach the conclusion that the defendants will not be allowed to take any part in the proceedings for proof of the applicability of the proviso.

5. Learned Counsel for the defendants took another point which is really germane to the matter which has been decided by my previous judgment. He said that an order under Section 14 (4) had to provide for 'deposit' and the order of Bachawat, J., of the 17th of May, 1951, provided for payment to the plaintiff and for this reason that order was really not an order under sub-section 4. The answer to this seems to be that the learned judge had expressly made the order under that

sub-section, and whether it was in terms of the sub-section or not is not for me to decide; if that order was not in those terms the defendants should have appealed. In the absence of the appeal I have to accept that it is an order under Section 14(4) as it is expressed to be. Then, again, it would be remembered that that order was by consent and, therefore, I take it the defendants waived the provision in the sub-section as to deposit in Court and agreed to the payment being made directly to the plaintiff as they had full right to do, and it is, consequently, no longer open to them to challenge the validity of the order on this ground.

6. The result, therefore, is that all the objections of the defendants are rejected and the plaintiff will now proceed to prove its claim to the ejectment and the defendants will not be allowed to take any part in the proceedings connected with such proof.
Order accordingly.