CALCUTTA HIGH COURT

Sukumar Guha

Vs

Naresh Chandra Ghosh

(Amaresh Roy , J.)

28.02.1967

JUDGMENT

Amaresh Roy, J.

1. This second appeal is by the tenant - defendant and arises out of a suit for ejectment from the premises in which the defendant is a tenant. Eviction was prayed for by the plaintiffs on the ground of reasonable requirement both for their own use and occupation and also for purposes of building and rebuilding including substantial additions and alterations under Section 13(1)(f) of the West Bengal Premises Tenancy Act, 1956. The suit was instituted by the two plaintiffs, the two brothers, who are the owners of the premises. The sole defendant contested the suit not only on the merits but also by contending that the notice terminating the tenancy had not been properly served. Both the courts have held in favour of the plaintiffs and a decree for eviction has been passed against the defendant. Against the judgment and decree passed in the appellate court the present second appeal has been preferred by the defendant.

2. The suit premises No. 28/10C Nakuleswar Bhattacharjee Lane is contiguous to and situate within the same boundary wall which includes two other premises bearing Nos. 28/10-A and 28/10-B Nakuleswar Bhattacharjee Lane. The plaintiffs are the owners of all the three premises. The ground floor of Premises No. 28/10-A Nakuleswar Bhattacharjee Lane is occupied by a tenant. The first floor of that premises and also both the ground and first floors of Premises No. 28/10B are occupied by the plaintiffs and their relations who are members of their family. The premises No. 28/10C which is the suit premises is also two-storied and whole of that premises is within the tenancy of the defendant.

3. It may be mentioned that the plaintiffs made a case that the notice terminating the tenancy under Section 106 of the T. P. Act was first sent by their lawyer, Mr. D. N. Lahiri by registered post to an address at Kanpur where the defendant resides for the purpose of his business. The Postal Registration receipt, Ext. 9, showed that a registered cover was sent from Calcutta on 5th

of November, 1962. The registered cover, Ext. 7 was returned to the sender with the endorsement to the effect "not found". That cover was addressed to "Sukumar Guha, 111A/218, Asoknagar, Kanpur (U. P.)". The defendant Sukumar Guha who deposed as D. W. 1 stated that his proper address was 111A/318, Asoknagar, Kanpur.

4. It is also the plaintiffs' case that after the registered cover, which according to his evidence contained the notice that has been proved as Ext. 8 in the case, was returned to his lawyer Mr. D. N. Lahiri, another letter containing a copy of that notice was sent by ordinary post under Certificate of Posting on 13-11-62 to the defendant Sukumar Guha addressed at 28/10-C Nakuleswar Bhattacharjee Lane, Calcutta which is the suit premises.

5. The plaintiffs' further case was that on 15th November, 1962, the plaintiff who has deposed as P. W. 6 tendered a copy of the notice to the mother of the defendant at the premises No. 28/10-C, Nakuleswar Bhattacharjee Lane. But the lady refused to accept the same and thereafter he affixed a copy of the said notice on the southern door of the suit premises. At that time Asit Kumar Halder, P. W. 7 and another person Tarak Nath Ghosh did happen to be present there and the signatures of those persons signifying the fact of tender of the notice to the lady and of affixing a copy thereof on the door of the premises has been deposed to by Asir Kumar Halder who has been examined as P. W. 7 and he has fully supported the plaintiffs.

6. Both the courts held that the letter containing the notice that was sent by registered post was not correctly addressed and therefore, there was no service of notice by that registered letter. But both the Courts held that the notice of ejectment was effectively served by sending it by Post under Certificate of Posting and also by affixing a copy of the said notice on the door of the suit premises.

7. Regarding the ground for ejectment for use and occupation by the plaintiffs both the courts held that the number of persons in the plaintiffs' family consists of 25 members which include not only the two plaintiffs and the wife and two children of plaintiff No. 1 but also their widow sister, two widows, father's sister and two sons of those two aunts who live there with their wives and six children. A paternal cousin of the plaintiffs' father's sister's son also lives with the plaintiffs as a member of his family. The accommodation that is available to the plaintiffs in the premises Nos. 28/10-A and 28/10-B are six rooms in premises No. 28/10-B, three rooms in the first floor in premises No. 28/10-A and also one room in the ground floor in that premises which the plaintiffs have obtained recently in their occupation from the tenant there. It was the plaintiffs' case that the accommodation available is not sufficient and they require in addition one drawing room, one kitchen, one store room, one Thakurghar, one study room for the boys and another study room for the girls and also three more rooms for use as bed-rooms. Both the courts have held that the plaintiffs require the accommodation in suit premises for their own use and

occupation.

8. Regarding the other ground for ejectment for the purpose of building and rebuilding and also for additions and alterations the plaintiffs produced a Plan sanctioned by the Corporation of Calcutta and adduced evidence to show that the construction works necessary for those purposes cannot be carried out without evicting the tenant-defendant from the whole of premises No. 28/10-C. Both the courts held that point in favour of the plaintiffs and also that the plaintiffs have the financial capacity to undertake the construction sanctioned by the Corporation of Calcutta. Those concurrent findings of the two courts below have resulted in the decree for eviction against the appellant.

9. For the tenant-defendant who is the appellant in this Court contentions have been raised both against the findings about effective service of notice to quit under Section 106 of the T. P. Act and the findings about reasonableness of the requirement under Section 13 of the West Bengal Premises Tenancy Act. Within each of those two broad points, Mr. Mukherjee has raised several branches in his arguments contending that there have been errors of law both by commission and omission in consideration of evidence relevant to the law applicable to those branches. For proper disposal of this appeal 1 shall deal with Mr. Mukherjee's arguments seriatim, and the contentions of Mr. Mitter for the respondents on each branch. For contending that the suit should fail for want of effective service of notice to quit, Mr. Mukherjee has referred to the terms and structures of Section 106 of the T. P. Act, as it now appears after amendment of 1929 by which the expression "sending by post" was added to the section. He acknowledges that law settled in this Court by the latest decisions of Division Beaches has been that Section 106, T. P. Act provides for four modes of service of notice: They are (1) Sending by Post to the Party (2) Tender or delivery to the party personally (3) Tender or delivery to the servant or relation at the residence of the party (4) Affixing the notice to a conspicuous part of the property.He also emphasizes that the 4th mode abovementioned is an alternative only to 2nd and 3rd mode and is available only when those two modes are 'not practicable'. Mr. Mitter does not contest that position in law as has been held in the decision reported in (1961) 65 Cal WN 1119, Radharani Dasi v. Angur Bala Dasi. But he points out that in the present case the notice was sought to be served by resorting to 1st, 3rd and 4th of those modes.

10. On the findings of the court below the 1st mode, i. e., service by Registered Post was not effective because the letter containing the notice was not addressed correctly. The 3rd and 4th modes have been held to be effective service. If anyone of those two modes succeeds the requirement of Section 106, T. P. Act has been satisfied. For the 3rd mode, Mr. Mitter has relied on presumption under Section 114, Evidence Act, that the letter (containing a copy of notice, Ext. 8) posted under Certificate of Posting was delivered to the addressee, i. e., the defendant

Sukumar Guha.

11. Mr. Mukherjee's criticism of that finding based on presumption under Section 114, Evidence Act is two-fold. First he says that presumption can be raised only when service has been by sending by Registered Post as Section 27 of the General Clauses Act provides. Even then, according to Mr. Mukherjee's contention, such presumption is rebutted when the defendant deposes in witness box and denies that the letter sent to him by post had been delivered to him, Reliance is placed on the decision in the case of *Gobinda Chandra Saha v. Dwarka Nath*[1]..

12. Mr. Milter points out that the decision in 19 Cal WN 489: (AIR 1915 Cal 313) was when Section 106, T. P. Act did not contain that part which now provides sending by post to the party. The phrase was added by Section 54 of amending Act XX of 1929 obviously to give effect to the decision reported in ILR 46 Cal 458: (AIR 1918 PC 102) Harihar Banerji v. Ramshashi Roy, which held that service by post is a recognised mode and pointed to the presumption arising from the fact of putting a notice to quit into post office. It is to be remembered that provisions regarding such presumption existed in Indian Law in Section 114, Evidence Act (illustration (f)) since 1872 and in Section 27, General Clauses Act since 1897. In Section 114, Evidence Act it was "may presume" while in Section 27, General Clauses Act "the service shall be deemed to be effected". But both the presumptions are rebuttable by proving the contrary.

13. At one stage Mr. Mukherjee faintly suggested that because Section 27, General Clauses Act, raises a presumption only for "posting by Registered Post", it should be held that presumption cannot be raised even under Section 114, Evidence Act in case of ordinary post or Certificate of Posting. In view of the history of legislation that added the relevant phrase in Section 106, T. P. Act and the language of the phrase that says only "sent by post" in the relevant part, I unhesitatingly reject that argument of Mr. Mukherjee and hold that though presumption under Section 27, General Clauses Act can only arise when the notice is sent by Registered Post, there may arise a presumption under Section 114, Evidence Act when notice is sent by ordinary post or under Certificate of Posting.

14. Mr. Mukherjee next contended that sending by post must be to the correct address of the party as has been held in the Privy Council decision Prahladrai Chooreewalla v. Commrs. for the Port of Calcutta. Correct address according to his argument would be at Kanpur in U. P. where the defendant was known to be residing and not at the address of the premises in suit within Kalighat Post Office at Calcutta. Not only so, Mr. Mukherjee also emphasized that for effective service by tender or delivery to the party himself or to one of his family or servants must be "at his residence" while service by affixing has to be "to a conspicuous part of the property", and he contended that property in suit is not necessarily the residence of the party. According to him residence is where the party is and is known to be actually residing at the time when notice is

sent.

15. Mr. Mitter contested every aspect of Mr. Mukherjee's contentions and argued that on the plain language of Section 106, T. P. Act, particularly its 2nd paragraph, service of notice by sending by post is not limited to registered post only and it can be effected by sending it to the party's correct address anywhere, not necessarily to his permanent address or to the suit premises. Mr. Mitter acknowledges the dicta in the Privy Council decision reported in 43 Cal WN 309: (AIR 1939 PC 11) but says correct address may be wherever mails addressed to the party ordinarily will reach him, wherever he may be for the time being. Mr. Mitter, however, accepts the contention that tender or delivery to a person in the family or a servant need be made at the residence. Rut he contends that such residence means usual place of residence of the tenant and his family and a residential premises taken on rent by the tenant is certainly his residence for the purpose of such tender or delivery of notice. For considering the merits of the opposing contentions of the two learned Advocates it is necessary to examine the provisions in the 2nd para of Section 106. T. P. Act. It reads:

> "Every notice under this section must be in writing signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered nr delivered personally to such party, or to one of his family or servants at his residence. or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

Modes of service of notice prescribed in that provision are mainly two:

(1) Either sent by post to the party who is intended to be bound By it (2) or tendered or delivered personally to such party.The third alternative is clearly an alternative to the second mode and is in its nature vicarious by effective tender or delivery to the party through a member of family or a servant at his residence. The fourth is a substitute for 2nd and 3rd when neither of those two modes is practicable and that 4th mode is affixing to a conspicuous part of the property. It has to be noticed that sending by post is not limited to any particular place but to the person concerned. Privy Council has held that the sending must be to a correct address of that person. Where that may be is not indicated in the section. That clearly shows that the Statute has left it to the facts in each particular case what can be tenant's proper address. The premises of the tenancy which is the property in suit may be such proper address and besides, any other address to which the notice is proved to have been sent by post may be proper address in the particulars of facts proved in the case. When the notice is proved to have been sent by post to such proper address, then only presumption may arise under Section 114, Evidence Act and a presumption shall arise under Section 27, General Clauses Act if the notice is proved to have been sent by Registered Post. That Section (Section 27, General Clauses Act) clearly indicates the nature of that

presumption by expressly saying that "the service shall be deemed to be effected ..... at the time at which the letter would be delivered in ordinary course of post." It is reasonable to hold that presumption under Section 114, Evidence Act (Illustration (f) when raised, shall be of that nature and no more. Both the presumptions are, however, rebuttable. When the cover containing the notice has been returned to the sender by the postal authorities, then that fact is direct proof of the fact that the notice sent by post was not delivered to the party to whom it was addressed. Whether it was tendered and, if so, to whom tendered, remain a matter to ascertain on evidence. If acceptable evidence is available, that it was tendered to the party personally, then such facts may bring the service of notice within the 2nd mode abovementioned. If however, tender or delivery is not to the party personally but to a member of his family or a servant, then it may be effective tender or delivery only when the notice was addressed to the residence of the party. Such personal tender or vicarious tender may be effective even if it was through the agency of post office, and proof of that tender comes from testimony of any person present at the event, and not only by examining the postman.

16. If the letter containing notice sent by post has not been returned to the sender, then it is a case where presumption operates. Whether such presumption has been rebutted depends on the acceptability of evidence denying tender or delivery offered by the defendant. Mere denial will not lead invariably to rebuttal of presumption properly raised. That has been held in this Court by the Division Bench in the case of Sushil Kumar Chakravarty v. Ganesh Chandra Mitra . That has been followed in a later decision to which I was a party which has been reported in *Chhaya Debi v. Lahoriram Prashar*[2].

17. In my view principal modes of service of notice mentioned in Section 106, T. P. Act are two, either by sending by post or by tender or deli very to the party. Other two modes are alternatives to 2nd mode of tender or delivery, first of those alternatives, i. e., 3rd mode, being vicarious tender or delivery but that must be at the residence of the party and second alter native, i. e., 4th mode, being in substitution of 2nd and 3rd modes when none of those two modes are practicable. Understood that way, 2nd mode is independent alternative to first, while 3rd and 4th modes are alternatives to second, the 4th mode being available only when neither 2nd nor 3rd mode is practicable. It follows that when 1st mode is satisfied either by proof and/or presumption, none of the other modes are necessary or relevant; when 2nd mode is satisfied by proof of tender or delivery either by evidence or by presumption regarding delivery or tender by postman, neither 3rd nor 4th mode is necessary or relevant. If 2nd or 3rd mode appears to have been practicable but has not been avail ed, giver of the notice cannot avail of the 4th mode. Even when 4th mode can be availed, affixing must be nowhere else than at the property in suit. Affixing even at the residence of the party is not sufficient, unless that residence is the property in suit.

18. In that background the meaning of the word "residence" occurring in Section 106, T. P. Act should be understood. It is clear that the two principal modes of service of notice above mentioned may be effective at any place though that place is neither the residence of the party nor the property in suit. But vicarious tender or service must be at his residence and nowhere else; affixing the notice must be at the property in Suit and nowhere else, not even at his residence if property in suit is not the residence.

19. In the present ease notice sent by registered post was not effectively served because it was not correctly addressed. A copy of the same notice was sent on 13-11-62 by post under Certificate of Posting addresed to the defendant at premises no. 28/10C Nakuleswar Bhattacharjee Lane, Kalighat which is the suit premises. Both the courts have held that by presumption under Section 114, Evidence Act, that notice should be held to have been properly delivered. Mr. Mukherjee has criticised the finding of the appellate Court below because he proceeded on the footing that he is bound to raise that presumption and has not considered whether it will be proper to act on the presumption that may or may not be raised under Section 114 of the Evidence Act. Mr. Mukherjee's contention has been that if the final Court of fact had devoted that consideration, upon the evidence in the case that the defendant was at the time living at Kanpur, it could not be properly presumed that the notice addressed to his Kalighat address was delivered to him in ordinary course of business. Mr. Mukherjee pressed for a remand of the case to the trial court for obtaining proper finding on that point.

20. Mr. Mitter has pointed out that there is definite evidence provided by defendant's own deposition that letters addressed to his Kalighat address are ordinarily received by him. Mr. Mitter has also argued us a matter of law that a letter addressed to a residential premises taken on rent by a person for residential purposes and where a section of his family resides is the correct address of that person though the person himself is away from the place for the time being. He, therefore, contended that the courts below raised the presumption properly and correctly for arriving at the finding on the point of fact and there is no case for remand.

21. Mr. Mitter also put his case on this point from another standpoint. That was by arguing that the presumption should at least be that the postman tendered or delivered the letter to a member of defendant's family residing at the premises in suit, which is his residence at Calcutta. If it be held that though defendant personally was at the relevant time at Kanpur then tender or delivery of notice to a member of his family or his servant will be effective service, which is the third mode available to the Plaintiffs.

22. In reply to this part of Mr. Mitter's argument Mr. Mukherjee for respondents strenuously argued that the suit premises cannot be held to be residence of the defendant at the teeth of the evidence that he lives in Kanpur and comes to live in the Kalighat house only Once in a year.

Mukherjee referred to Shorter Oxford Dictionary to insist that residence means usual dwelling place or abode of a person.

23. Taking into consideration these keen contentions raised between the two learned Advocates representing the two parties in this appeal, I have no hesitation in accepting both the contentions of Mr. Mitter, that a residential premises taken on rent for residential purposes by the defendant where a part of his family resides, is a correct address or the defendant where notice under Section 106, T. P. Act can be sent by post for effective service and that such a place is residence of the defendant within the meaning of that Section, though the defendant personally may be living elsewhere for the time being.

I have, therefore, arrived at the conclusion that the finding of the Courts below that notice sent by post under Certificate of Posting has been effective under Section 106 of the T. P. Act and Section 13 (6) of the West Bengal Premises Tenancy Act, 1956, is a proper and correct finding, though it is based on a presumption, that could be and has been properly raised and there is no scope for remand of that point to courts below.

24. As the 1st mode of service of notice has been held to have been effective, that is enough for holding against the appellant's contention, and the suit snail not fail on the ground of non-service of notice. There is necessity to consider if the 3rd and 4th modes of service were also effective. But I may observe that on the findings of fact arrived at by courts below 3rd mode of service by tender to a member of defendant's family was very much practicable and was in fact availed by the Plaintiffs. For that reason the 4th mode of service by affixing on the suit premises was not available in law to the plaintiffs.

25. On the other point of Mr. Mukherjee that plaintiffs are not entitled to a decree in their favour because grounds within Section 13(1)(f) have not been made out, he has attacked the findings and decision of the courts below by pointing to the plaint where all the alternative components in Section 13 (1) (f) have been mentioned as the grounds for reasonable requirement of the suit premises. Mr. Mukherjee contends that requirement for own use and occupation and requirement for building and rebuilding or for repairs and alterations cannot co-exist and in a way one cancels the other. I am unable to agree with Mr. Mukherjee on that interpretation of Section 13 (1) (f) because I hold that, though rare, it is quite contemplatable that owner of the premises may reasonably require the premises for his own use and occupation by adjusting and expanding the accommodation to his reasonable needs by building, rebuilding and by alterations and repairs necessary to be carried out for that reasonable purpose. Mere combination of more than one or all the grounds mentioned in Section 13(1)(f) does not spell out a legal defect for which the suit need fail.

26. Mr. Mukherjee next contended that reasonableness of requirement of the plaintiff has not been properly considered by the courts below and essential details about number of persons that plaintiffs family consists of and the extent of accommodation already available to them in premises Nos. 28/10A and 28/10B have not been examined properly. For obtaining a proper finding on that point also Mr. Mukherjee pressed for a remand. I, however, find that evidence in the case gives sufficient materials and findings of the courts below based on those materials are quite clear and definite, though the courts below could have mentioned in their judgments some more details of the reasons that impelled them to arrive at the findings in favour of the plaintiffs. But that crispness in details is not reason enough for making an order of remand upon consideration of the detailed evidence discussed by Mr. Mukherjee before me, I hold that the findings arrived at are not only clear and definite, but also, proper and correct findings that the plaintiffs reasonably require the premises in suit for their own use and occupation and for building and rebuilding and repairs and alterations necessary for adjusting and expanding the accommodation for their reasonable purpose.

27. One branch of Mr. Mukherjee's argument was pointedly directed to the content of the plaintiffs" family and the extent of expansive notion of membership of that family. Direct attack was launched against the claim that father's sister's sons and their wives and children can at all be considered to be members of plaintiffs' family.

28. Mr. Mukherjee contended that the dominant purpose of the Act, that is, West Bengal Premises Tenancy Act, 1956, is to protect a tenant against eviction and Section 13 carries out that purpose by prohibiting a decree for recovery of possession being made against the tenant except on the grounds specified in several clauses of Sub-section (1) of that section. He points out that Section 13 (1) (f) permits a decree for recovery of possession being passed against the tenant on the ground that the premises are reasonably required by the landlord (1) either for the purpose of building or rebuilding (2) or for making thereto substantial additions or alterations (3) or for his own occupation if he is the owner (4) or for the occupation of any person for whose benefit the premises are held. Mr. Mukherjee accepts that reasonable requirement of the landlord for his own occupation includes the accommodation reasonably necessary for occupation by not only the owner of the premises, but also his members of the family. He also accepts that in different environments and in different circumstances it has been held in several decisions of this Court that persons other than direct relations of the owner and servants, cooks and even residential private tutors for children have been included in making out a family for that purpose. But, Mr. Mukherjee argues that second degree cousins like tamer's sister's sons cannot be considered to be a member of the family, far less the wives and children of such cousins and a paternal cousin of such a cousin. Mr. Mukherjee's argument is that to include those persons for ascertaining the need of living space required by the owner of the premises is not at all reasonable because to do

so would be to deprive the tenant of the very protection that the Act as a whole, and Section 13 in particular, expressly provides. So, by leaving out those persons who are twelve in number, out of calculation, Mr. Mukherjee insists that even on the plaintiffs' own case the total number of persons in his family would consist no more than ten or twelve persons. Further Mr. Mukherjee referred to one sentence in the deposition of plaintiff No. 1 who deposed as P. W. 6 in this case where he said that his family consists of himself, his wife and two children. Taking those four persons with plaintiff No. 2 who is a bachelor and has neither a wife nor children, Mr. Mukherjee wanted this Court to fix the number of persons in the family of the plaintiffs to only five. He criticised the judgments of the two courts below in which these considerations have not been devoted and in both of which judgments the total number of the family has been accepted as twentyfive persons including the paternal aunt, two second-degree cousins and their wives and children and also a paternal cousin of one of those cousins.

29. In meeting these arguments on behalf of the appellant, the learned Advocate for the respondent Mr. Mitter has referred to the evidence in this case showing that the cousins of the plaintiffs who have fallen for particular attention of Mr. Mukherjee have been living as members of the family from the time of the father of the plaintiffs. Even before the defendant came as a tenant in these premises No. 28/10C, Nakuleshwar Bhattacharyya Lane, Kalighat in 1928 after the death of the plaintiffs rather, those cousins were looking after the plaintiffs when they were minors, and were so much identified as members of the family that many rent receipts granted to the defendant during the lone years have been signed by one or the other of those cousins on behalf of the owners of the premises. Mr. Mitter says that it is true that during those years those cousins have grown In age and have married and also begot children; but if they were members of the family before, the mere fact of their marriage and begetting children would not bring forthwith a change in such status, particularly so in the environment and social behaviourism of middle class Bengali families in the Thirties of the present Century. Mr. Mitter also points out that the narrow view of family urged by Mr. Mukherjee tends to leave out of calculation even the widow mother and widow sister of the two plaintiffs. According to Mr. Mitter's contention there cannot be a set formula as to whether width or narrowness should be applied for ascertaining the contents of any particular family and the decisions of this Court show clearly that the width varies not only with environment and outlook of the persons concerned, but also with the angle of vision in respect of social duties and responsibilities and also social rights acknowledged and adhered to those persons.

30. On this point I need only say that in my view the extent of the boundaries of the family depends on particular facts of each case and the structure and outlook of each family. No one can be dogmatic either way on such matters. Upon the evidence in the present case I consider that the courts below acted rightly in accepting the plaintiffs' case that the two cousins of the plaintiffs

were members of the family and that being so their wives and children must also be reckoned as members of the family. The paternal cousin of the aunt's son has no direct mood-relation with the plaintiffs. But that person also has been shown by evidence in this case to have been living with the family of the plaintiffs and can very well be considered to be a dependent, though not a blood-relation. Even leaving out that person, the number of persons in the plaintiffs' family is large enough to justify the finding of the courts below that the premises in occupation of the tenant are reasonably required for occupation of the plaintiffs and members of their family.

31. Mr. Mukherjee also contended that the requirement for building and rebuilding or for carrying out additions or alterations should not have been accepted as spelling out reasonable requirement. I nave already dealt with Mr. Mukherjee's contention that such ground cannot co-exist with the ground of reasonable requirement of the owner's own occupation. I have held against that contention as I have also held that the ground of the owner's own occupation has been established in the present case and that is sufficient to entitle the plaintiffs to a decree for eviction of the tenant, importance of this branch of Mr. Mukherjee's argument has lost much of its weight. But it is necessary to refer to Mr. Mukherjee's contention that the ground of building and rebuilding or additions, and alterations have not been made out in the present case, because, a witness for the plaintiffs who was an Engineer has answered a question in his cross-examination by saying that the structure in the open space in the premises can be built without disturbing the tenants in premises No. 28/10C. Nakuleswar Bhattacharyya Lane. It appears, however, that the evidence about the lay-out of the three premises Nos. 28/10A, 28/10B and 28/10C, Nakuleswar Bhattacharyya Lane, clearly indicates that between these structures of those premises and the road on its south there is a vacant space and the plan for rebuilding sanctioned by the Corporation authorities, which has been proved in evidence, clearly shows that the extent of building and rebuilding involves not only structural construction at the site of premises Nos. 28/10A and 28/10B, Nakuleswar Bhattacharyya Lane, but also involves substantial additions and alterations in 28/10C. The Engineer (P. W. 3) who deposed on behalf of the plaintiffs has proved by clear and unambiguous evidence that the construction for which plan has been sanctioned Honed by the Corporation authorities cannot be carried out without evicting the tenants from the premises No. 28/10C. The answer in cross-examination emphasised by Mr. Mukherjee appears clearly as an answer to a hypothetical question asked whether the vacant land in the south of 28/10C can be built upon without disturbing the tenants in that premises. That is entirely besides the point to be answered or to be considered in this case. The findings arrived at concurrently by the courts below are held to be proper findings. Mr. Mukherjee did not contest the finding of the Courts below that the plaintiffs have financial capacity to carry out the building and rebuilding.

32. I have reached the conclusion that this appeal should fail but I hold that in the particular circumstances of the present case the defendant should be given sufficient time to vacate the

premises where the defendant with his family has been living for a long time. This necessity for time is great for their finding an alternative accommodation to live in, in the present conditions prevailing in the city of Calcutta. Mr. Mukherjee in course of his arguments prayed for 3 years from to-day as a reasonable time for that purpose. On behalf of the landlord respondent Mr. Mitter has contended that 18 months upto the end of October, 1968 would be reasonable time for the tenant to find an alternative accommodation and to vacate the premises in suit. Taking into consideration their respective submissions and also the total circumstances in the case I hold that the decree for eviction should give time to the defendant without any conditions upto the 31st October, 1967 and if the defendant gives an undertaking to the trial court to vacate the premises and deliver to the plaintiffs vacant and peaceable possession of the premises in suit. The defendant should be given time till the end of February, 1969 on conditions that: --

(1) the defendant shall deposit and go on depositing in the trial court to the credit of the plaintiffs regularly month by month a sum equivalent to the monthly rent as compensation for use and occupation of the suit premises by the 15th of the month following the month for which it is due, to the credit of the plaintiffs, (2) if default is made of such deposits for two consecutive months the decree shall be executable immediately, (3) if the deposits are made as mentioned above, the plaintiffs will be entitled to withdraw the sum without security.

(4) If a written undertaking to deliver vacant and peaceable possession of the premises to the plaintiffs is not given to the trial court within three months from to-day, the decree for eviction shall be executable on the expiry of 31st October, 1967.

33. The appeal is dismissed with the modification of the decree as mentioned above. There will be no order as to costs.

Cases Referred.

119 Cal WN 489: (AIR 1915 Cal 313)
2(1903) 67 Cal WN 819