

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.20621 of 2021

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IA No: CAN 1 of 2022

**Cossipore Kanch Sangh and another
Vs.
Union of India and others**

For the petitioners	:	Mr. M.M. Verma, Mr. Abhishek Verma, Ms. Punam Verma
For the Union of India	:	Ms. Sumita Sarkar
For the respondent no.2	:	Mr. Souvik Nandy, Mr. Snehashis Sen, Mr. Abhishek Banerjee
Hearing concluded on	:	02.12.2022
Judgment on	:	19.12.2022

Sabyasachi Bhattacharyya, J:-

1. The petitioner no.1-Club is a society registered under the West Bengal Societies Act, 1961 and petitioner no.2 is its Secretary. The writ petition has been filed, challenging a Notice dated September 24, 2004 whereby the Kolkata Port Trust (KoPT) asked for possession of the disputed premises to be handed over to the KoPT by the petitioners and payment of Rs.16,67,633/- as arrears of rent and taxes for the period between June, 1998 and August, 2004 in respect of occupation. In the said Notice, it was pleaded that a long term lease for 20 years was given to the petitioner from

August 2, 1992 without any option for renewal. An allegation of unauthorised construction was also made therein.

2. The petitioners have also challenged a Bill dated September 24, 2004 containing a demand for compensation for alleged unauthorised use of occupation of KoPT-property by the petitioners.
3. The petitioners have also sought for a Rule in the nature of mandamus, commanding the respondents to grant rent receipts in the names of the members of the petitioner no.1-club after fixing the rate of rent and refunding the premium of Rs.5,27,040/- with interest as well as returning the Kisan Vikash Patras (KVPs) of value Rs.1,58,500/- for encashment by the petitioners.
4. It is argued by the petitioners that although negotiations were initially going on for grant of lease to the petitioner, ultimately the petitioners were granted monthly tenancy upon payment of the amount of Rs.5,27,040/- and deposit of KVPs worth Rs.1,58,500/-, as per the demand of the KoPT.
5. It is argued that the individual members of the petitioners, who were all along in possession of the premises, were granted individual monthly tenancies by the KoPT and, as such, the said members have been in authorised occupation of the said premises in such capacity.
6. In the absence of any termination of such tenancy in accordance with law, it is contended that the members of the petitioner no.1 have remained in authorised occupation, which was never rendered 'unauthorised' for the purpose of attracting the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (for short, "the 1971 Act).

7. It is further submitted that no Notice under sections 4 and 7 of the 1971 Act were ever served by the KoPT on the petitioners. In fact, a proceeding under Section 5 of the 1971 Act was initiated against the petitioner without arriving at any preliminary finding that the petitioners are unauthorised occupants in respect of the property as envisaged in Section 4 of the said Act.
8. Learned counsel for the petitioners also argues that the proceeding for eviction and recovery of alleged arrear of rents are, in any event, palpably time-barred.
9. Learned counsel cites guidelines to prevent arbitrary use of powers to evict genuine tenants from public premises under the Control of Public Section Undertakings/financial institutions, published in the Gazette of India, Part-I, Section 1 dated June 8, 2002 *vide* Resolution No.21013/1/2000-POL.1 dated May 30, 2002. In Clause 2(iii) thereof, it is stipulated that a person in occupation of any premises should not be treated or declared to be an unauthorised occupant merely on service of Notice of termination of tenancy, but the fact of unauthorised occupation shall be decided by following the due procedure of law. Further, the contractual agreement shall not be wound up by taking advantage of the provisions of the 1971 Act.
10. It is submitted that the said guidelines have been blatantly violated in the present case.
11. It is contended by the petitioners that, since there was no registered lease-deed for a period of 20 years executed between the parties, as alleged in the Notice dated September 24, 2004, there was no valid Notice under Section

4 of the 1971 Act. That apart, the said Notice did not terminate the monthly tenancy of the petitioner, which is still existing.

12. The petitioners, it is submitted, were granted the right to continue in possession on December 7, 1991 by accepting substantial security money and, as such, are not in “unauthorised occupation” within the contemplation of Section 2(g) of the 1971 Act.
13. Learned counsel cites an unreported Judgment of a co-ordinate bench of this Court in *W.P. No.771 (W) of 2012 [Cossipore Commercial Society and others Vs. The Board of Trustees for the Port of Kolkata]*, along with other writ petitions, *vide* Order dated April 9, 2019 wherein it was held that in cases of tenancies granted under Section 111 of the Major Ports Act, 1963, the provision under Section 106 of the Transfer of the Property Act, 1982 does not apply.
14. Learned counsel next cites *Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and others*, reported at *AIR 1980 SC 226*, which was also relied on by the co-ordinate bench in *Cossipore Commercial Society* (supra).
15. It is argued that if the landlord accepts rent from the person in possession of a void lease, an inference of tenancy would follow as per *Biswabani Pvt. Ltd. (supra)* and *Asif Vs. Jadunath*, reported at *AIR 1931 PC 79*.
16. The petitioners further cite *New Delhi Municipal Committee Vs. Kalu Ram and another*, reported at *(1976) 3 SCC 407*, in support of the proposition that under Section 7 of the 1971 Act no claim could be made beyond three years.

17. Thus, the Demand Notice dated September 24, 2004 for alleged arrear of rents for the period from June, 1998 onwards was barred by the law of limitation, apart from the Notice itself being bad in law.
18. The KVPs submitted by the petitioners have expired and, despite repeated requests of the petitioners, have not been returned by the KoPT for renewal.
19. Learned counsel for the petitioners places reliance on another unreported Judgment of co-ordinate bench in *C.O. No.1876 of 2014 and C.O. No.1877 of 2014 (Bhatpara Paper Mills Vs. The Board of Trustees for the Port of Kolkata and others)* dated December 23, 2015, where it was reiterated that the Limitation Act, 1963 applied to the proceedings under the 1971 Act.
20. Learned counsel next argues that the KoPT-Authorities played fraud upon the Estate Officer by contending that there was a lease of 20 years between the petitioner no.1 and the KoPT beginning on August 02, 1992, whereas no such lease was ever executed.
21. Initiation of the proceedings under Sections 4 and 7 of the 1971 Act and non-production of the alleged lease-deed before the Estate Officer or this Court, is also a fraud, it is argued, as held by the Supreme Court in *S.P. Chengalvaraya Naidu (dead) by legal heirs Vs. Jagannath (Dead) by legal heirs and others*, reported at (1994) 1 SCC 1.
22. The petitioners next cite *Ram Chandra Singh Vs. Savitri Devi and another*, reported at (2003) 8 SCC 319, for the proposition that non-production of relevant document is a fraud.
23. Learned counsel for the petitioners next submits that initially the KoPT, through counsel, had submitted that they were agreeable to the prayers made in the writ petition. However, upon subsequent change of counsel,

the KoPT sought to resile from such position and opposed the writ petition on merits. It is argued that the respondents are estopped by law, as contained in Section 115 of the Evidence Act, 1872 from changing their stand, as they cannot approbate and reprobate in the same breath.

- 24.** In support of such proposition, the petitioners cite *Rajasthan State Industrial Development & Investment Corpn. Vs. Diamond & Gem Development Corpn.*, reported at (2013) 5 SCC 470 and *Nagubai Ammal Vs. B. Shama Rao*, reported at AIR 1956 SC 593, *CIT Vs. V. MR. P. Firm Muar*, reported at AIR 1956 SC 1216 and *Ramesh Chandra Sankla Vs. Vikram Cement*, reported at (2008) 14 SCC 58 and other judgments of the Supreme Court.
- 25.** The KoPT contends that Notice under Sections 4 and 7 of the 1971 Act were duly served on the writ petitioner no.1. The said Show-Cause Notices dated September 26, 2007 also find mention in the order dated August 9, 2021, whereby the Estate Officer directed the petitioners to file their written objection and the parties to file written submissions in the proceeding initiated by the KoPT under Sections 5 and 7 of the 1971 Act.
- 26.** It is submitted that there was no bar for the Estate Officer to proceed with the said proceeding in the absence of any order of stay passed by any court.
- 27.** It is submitted that the writ petition ought to be dismissed due to availability of alternate remedy in the form of an appeal under Section 9 of the 1971 Act against the Estate Officer's Order dated August 9, 2021. In support of such submissions, learned counsel for the KoPT cites *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and another*, reported at AIR 1961 SC 1506.

28. It is submitted that the petitioners are unauthorised occupants and defaulters in paying rent and occupation charges which have fallen due since long, calculated up to November 9, 2022 for a sum of Rs.9,34,48,669.82p (principal along with interest).
29. Apart from that, the petitioners are liable to pay damages, compensation and further interest in respect of the plot of land-in-question till actual date of handing over possession to the KoPT.
30. A long-term lease was entered into between the parties for 20 years with effect from August 2, 1992, without any option for renewal in respect of land measuring about 3019.44 square meter. The same expired long back and a Notice of termination of the said lease was also served on the petitioners on September 24, 2004 on two fold grounds of unauthorised construction and default in payment of arrear rents and taxes for the period from June, 1998 to August, 2004.
31. It is argued by the KoPT that the petitioners are deliberately seeking to drag the eviction proceeding initiated under the 1971 Act against them and do not deserve any equity under the law.
32. Learned counsel for the KoPT places reliance on *Jiwan Dass Vs. Life Insurance Corporation of India*, reported at 1994 Supp (3) SCC 694 for the proposition that the 1971 Act, under Section 2(g), postulates that tenancy can be determined for any reason whatsoever and a public authority is entitled to use the public premises to the best of its advantage and a commercial venture. The doctrine of livelihood cannot be extended to the area of commercial operation. The claim of the KoPT regarding arrears of

rent, compensation and damages, it is argued, is not arbitrary or unreasonable but as per law.

33. The Limitation Act is not applicable to the proceeding pending before the Estate Officer, KoPT, which is not a Civil Court governed by the Code of Civil Procedure. The writ petitioners, it is argued, acknowledged their relationship as debtor and Section 25 of the Indian Contract Act, 1872 debars the petitioner from taking any plea of limitation.
34. By citing *Sarup Singh Gupta Vs. S. Jagdish Singh and others*, reported at (2006) 4 SCC 205, learned counsel for the KoPT submits that even acceptance of rent after determination of tenancy or on expiry of the lease period cannot be said to be the landlord's conduct signifying assent to continuance of the lease.
35. Hence, it is argued, the writ petition is devoid of any merit and should be dismissed with costs.
36. One of the objections taken by the KoPT is that the reliefs in the present writ petition are barred by the principle of *res sub-judice*. Upon examination of the averment of the present writ petition itself, it is seen that the petitioner has virtually admitted in paragraph no.43 of the writ petition that the first relief sought in WP No.1006 of 1999 corresponds with relief A sought in the present case. From paragraph no.46 of the present writ petition, it is revealed that the first prayer in WP No.20636 (W) of 2006 is virtually identical with relief B sought in the present writ petition. The said reliefs are the principle reliefs sought in the present writ petition as well as the previous writ petitions. The previous two writ petitions were

dismissed for default and restoration applications are pending in that regard.

- 37.** Such dismissal for default, which stands till restoration is allowed, if at all, obviates the scope of applying the principle of *res sub-judice*.
- 38.** However, applying the principle of Order IX Rules 4 and 9 of the Code of Civil Procedure, 1908, the writ petitioners are barred from seeking similar reliefs in the present writ petition.
- 39.** Another objection taken by the KoPT is that a challenge lay under Section 9 of the 1971 Act to the Order dated August 9, 2021, whereby written notes and written objections were directed to be filed by the Estate Officer.
- 40.** However, the availability of such provision is not an absolute bar to a challenge under Article 226 of the Constitution of India, particularly in view of the fact that by the said Order, the rights and liabilities of the parties were not finally settled.
- 41.** However, for other reasons, it cannot be said that this Court shall interfere under Article 226 of the Constitution. The simple reason is that several disputed questions of fact, for adjudication of which detailed evidence is required to be appreciated, have been raised in the present writ petition.
- 42.** The first such question is as to whether the petitioner has been a monthly tenant or a lessee under the KoPT. In the event the petitioner is a monthly tenant, it might be argued that the said tenancy has not been properly terminated, since the quit notice issued by the KoPT alleged the petitioners to be a lessee in respect of the property. The issue as to whether the petitioners are in “unauthorised occupation” within the contemplation of Section 2(g) of the 1971 Act is dependent upon the question as to whether

there was due and lawful termination of the jural relationship existing between the petitioner and the KoPT, if any.

43. The next factual query arises for consideration is whether any notice under Sections 4 and 7 of the 1971 Act was served on the petitioners by the KoPT at all. Although the petitioners have disputed such service in their writ petition, the KoPT has categorically submitted that such notice was actually served on the petitioners.
44. The effect of the judgment in *Kalu Ram* (supra), cited by the petitioners with regard to applicability of the Limitation Act to proceedings under the 1971 Act cannot be prejudged within the scope of the present writ petition, more so, since the question is arguable as at least a portion of the arrear rents, falling within the period of limitation, is not barred by limitation even if the argument of the petitioners is accepted.
45. *Bhagwandas Agarwala Vs. Bhagwan Das Kanu*, reported at (1977) 2 SCC 646, also cited by the petitioners, pertains to validity of an eviction notice. However, in view of the ratio of *Jiwan Dass* (supra) cited by the KoPT, tenancy can be determined for any reason whatsoever under the 1971 Act.
46. The next arguable issue is whether the petitioners are actually guilty of default in payment of rent and/or making unauthorised construction on the premises-in-question, as alleged by the KoPT.
47. In any event, in the absence of any specific order of stay of any court of law, there was no bar for the Estate Officer to proceed with the proceedings initiated by the KoPT under the 1971 Act against the petitioners.
48. The petitioners, in fact, participated before the Estate Officer by filing written objection. Hence, all the factual issues which have arisen herein

are sub-judice before the Estate Officer, who is the appropriate authority in law to decide on all such issues upon appreciating evidence, if produced by the parties. It is well within the jurisdiction of the Estate Officer also to decide on whether the petitioners fall within the contemplation of 'unauthorised occupants' as envisaged in the 1971 Act.

- 49.** In the event any conclusive findings are rendered on such issues by this writ court, the effect will be to pre-judge the proceeding pending before the Estate Officer, where the same issues are in contention.
- 50.** Moreover, in the event an adverse order is passed finally by the Estate Officer against the petitioners, it is always open to the petitioners to prefer an appeal under Section 9 of the 1971 Act, which will be a more efficacious relief, since disputed questions of both fact and law can be decided by the Estate Officer, unlike the writ court.
- 51.** Thus, the exercise of power under Article 226 at the present juncture would be premature and beyond the scope of the writ court's jurisdiction.
- 52.** There are several nitty-gritties of fact which are to be examined for deciding the various issues and sub-issues raised by the parties, one of them being whether the petitioners were accepted as monthly tenants by conduct by the KoPT by virtue of issuing rent receipts to the petitioners.
- 53.** The judgments cited by the petitioners mostly dwell on the aforesaid issues and, therefore, cannot be applied at the present juncture in view of the matter being sub-judice before the Estate Officer.
- 54.** There are several components of the arguments of parties, including the effect of the payment of Bank Draft dated December 7, 1991 of an amount of Rs.5,27,040/- and Kisan Vikash Patra worth Rs.1,58,500/- by the

petitioners to the KoPT. The question as to whether there was a consensus *ad idem* inasmuch as the KoPT offer for lease dated May 5, 1997, read in conjunction with the reply dated July 14, 1997 thereto by the petitioners is concerned, is also to be adjudicated in the context of the available materials.

55. Hence, it would not be prudent for the writ court to enter into adjudication on the said issues on merits by appreciating evidence at this stage. All such issues are best left for adjudication before the Estate Officer, where proceedings are pending at present.
56. Accordingly, W.P.A. No.20621 of 2021 and CAN 1 of 2022 are disposed of by granting liberty to the parties to urge all points raised in the present writ petition on merits in the pending proceeding between the parties before the Estate Officer. It is made clear that the merits of the contentions have not been entered into by this Court and it will be open to the Estate Officer to decide all such issues independently in accordance with law without being influenced in any manner by any of the observations made herein.
57. There will be no order as to costs.
58. Urgent certified copies, if applied for, be issued by the department on compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)