

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

CO 79 of 2023

Fusie Chung Chen

vs.

Sri Muktalal Shaw

For the petitioner : Mr. Ramdulal Manna,
Ms. Chhabi Sen,
Ms. Manju Manna (Dey),
Mr. Sayan Mukherjee.

For the opposite party : Mr. Sakya Sen,
Mr. Pranay Mukherjee.

Hearing concluded on: 21.06.2023

Judgment on: 01.08.2023

Shampa Sarkar, J.:-

1. This revisional application has been filed challenging the order No.63 dated September 8, 2022 passed in Ejectment Suit No.96 of 2013 re-numbered as Ejectment Suit No.5497 of 2014. The order impugned was passed by the learned Judge, 4th Bench, Presidency Small Causes Court, Calcutta.

2. By the order impugned, the application filed by the petitioner under Order 1 Rule 10(2) of the Code of Civil Procedure, was rejected and a date was fixed for evidence of DW, as a last chance.

3. The eviction suit was filed on the ground of default and sub-letting.

4. The petitioner filed a written statement as defendant and questioned the maintainability of the suit. The claim of the plaintiff to be the karta of Mati Lall, Chuni Lall and Mukta Lall Shaw, a Hindu Undivided Family, was denied. The petitioner claimed that the said beauty parlour was a running business and the question of subletting did not arise, and the petitioner was not a habitual defaulter. That petitioner filed an application under Section 36 of the West Bengal Premises Tenancy Act, 1997 being R.C. Case No.128/36/2011 for an order of repair of the suit premises. That the plaintiff/opposite party contested the said proceeding. The prayer for repair was allowed on February 20, 2014. The monthly rent was paid by the petitioner to the plaintiff through an agent Mr. A.K. Chakraborty, who used to receive the monthly rent from the petitioner. That the ejectment suit was not maintainable against Blue Heaven Beauty Parlour, represented by the partners, mentioned in the cause-title of the plaint, as all of them had passed away. The petitioner, as the daughter of Kiam Wong Chung, became a partner along with her mother Chung Tseng Hsiu Ying after her father's demise. After the demise of her mother, the partnership got dissolved and the petitioner became the sole proprietor of the business, since October 12, 2000. Blue Heaven Beauty Parlour started running as a proprietorship concern. The petitioner obtained the certificate of enlistment from the Kolkata Municipal Corporation. Electricity connection was also provided by the CESC Ltd. in the petitioner's name. When a fire broke out in Park Street sometime in 2011, the plaintiff/opposite party wrote a letter dated October 22, 2011 to the business concern, addressing the petitioner as "Madam". In spite of the aforementioned facts, and having full knowledge that none of the

erstwhile partners were alive, Ejectment Suit No.96 of 2013 was filed before the learned Presidency Small Causes Court for eviction and recovery of Khas possession, against a non-existing partnership firm, which had no legal entity being represented by dead persons. Only when a notice had been published in the Telegraph on January 7, 2014, the petitioner came to know about the institution of the suit for eviction and recovery of khas possession in respect of the shop room No.20C situated on the ground floor of premises No.20, Park Street, Shakespeare Sarani Police Station, Kolkata 700016.

5. The petitioner filed an application under Section 7(1) and 7(2) of the West Bengal Premises Tenancy Act, 1997(hereinafter referred to as the said Act). Initially, the defendant in the suit was found to be a defaulter. On an application filed by the petitioner, the said order was modified by the learned Court below, inter alia, holding that the money receipts and challans which were filed by the petitioner, would show that the defendant was not a defaulter.

6. The plaintiff/opposite party filed an application under Order 14 Rule 1 of the Code of Civil Procedure for determination of two preliminary issues:-

- a) Whether the petitioner was competent to file the application and written statement in the suit and/or to represent the defendant in the suit;
- b) Whether there was any relationship of landlord and tenant between the plaintiff and the petitioner.

7. The learned Court rejected the said application on the ground that the above issues involved mixed questions of law and fact and could not be decided at the preliminary stage, without evidence. The learned Court

further held that as the plaintiff had not challenged the maintainability of the petitions under Sections 7(1) and 7(2) of the West Bengal Premises Act, 1997, by adopting a circuitous route, the plaintiff could not eliminate any contest to the suit. The defendant could not be non-suited.

8. When the evidence proceeded and progressed to some extent, the petitioner filed an application for addition of party. The petitioner reiterated the averments made in the written statement and stated that upon the death of her mother, she started to run the business as a sole proprietor. As per the deed of partnership dated December 1, 1969, the only daughter of the fourth partner became a proprietor in terms of Clause 15 thereof. That the suit was filed against dead persons who were described as partners of the partnership firm. The suit could not proceed against dead persons. The partnership firm had dissolved. The plaintiff was also well-aware that the partners had died and their heirs were not running the business. Thus, the petitioner was the sole heir of the fourth partner and hence was entitled to continue her business from the said property. Under such circumstances, the petitioner was not only a proper party, but was also a necessary party in the suit.

9. A written objection was filed by the plaintiff. It was contended that from the very inception, the petitioner was representing the defendant. The petitioner had filed the application under Sections 7(1) and 7(2) of the West Bengal Premises Act, 1997 and had also cross-examined P.W.1, namely, Mukta Lal Shaw. That the application for addition of party was filed only to delay the process. The fact that the petitioner was the only surviving heir of the deceased fourth partner, was incorrect. The petitioner was a sub tenant

and an interloper and did not have any manner of right, title and interest in respect of the property in question. The petitioner was liable to be evicted on the ground of subletting. The petitioner never represented the partnership firm. The provisions of Order 30 Rule 3 of the Code of Civil Procedure would not apply. That a sub-lessee or a sub-tenant did not have any right to be added as a defendant in a suit for eviction, on the ground of subletting.

10. The said application came up for hearing before the learned Court below on September 8, 2022. The learned Court below, upon discussing the facts, rejected the application on the ground that it was an admitted position that Blue Heaven Beauty Parlour was a tenant under the plaintiff. Blue Heaven Beauty Parlour was a partnership firm. The partnership firm was not a juristic person. In the absence of the partners, the right of tenancy could not be transferred. Upon the death of any partner during the subsistence of the tenancy, the newly inducted partner could not become a tenant in the eye of law. Further, as the petitioner failed to show any document which would indicate that her father was Kiam Wong Chung, the question of addition of the petitioner, as a party defendant in the suit, did not arise.

11. Mr. Sakya Sen, learned Advocate appearing on behalf of the plaintiff/opposite party submitted that the order impugned did not call for any interference. That the said order had been passed in consonance with the principles of law. That the suit was for eviction on the ground of default and subletting. The sub-lessee was not a necessary party in a suit for eviction. Learned Advocate submitted that a person who represented herself

as a defendant, contested the suit and also cross-examined the P.W.1, could not be added as a party in a suit which she was already contesting.

12. The following facts are available from the records and the submissions of the parties:-

a) The petitioner, upon coming to know of the eviction suit from the publication made in the Daily Telegraph, contested the suit by filing a written statement, as a defendant;

b) All along, the petitioner's case was that after the death of her father, she and her mother had become partners sometime in 1997. Upon the death of her mother, she started running the parlour as the sole proprietor. When the other partners died, none of the heirs of the other partners came forward to stake any claim in respect of the said business. The electricity bill, the certificate of enlistment and other documents, were all in the name of the petitioner as a proprietor. Communication was made to the petitioner by the plaintiff. The plaintiff was well aware that the petitioner was running the parlour. She was paying the rent to the agent of the plaintiff and had become a tenant;

c) On the application of the petitioner, the rent controller allowed repair of the premises on contested hearing, without deciding the question of tenancy;

d) Applications under Section 7(1) and (2) of the said Act had been decided at the instance of the petitioner and the defendant was held not to be a defaulter. The question of relationship of landlord and tenant was not raised at that stage. No objection was raised by the

plaintiff with regard to the petitioner's right to file the said applications;

f) Later, two preliminary issues were raised by the plaintiff as to whether the petitioner was entitled to contest the suit as a defendant and whether there was any relationship of landlord and tenant between the petitioner and the plaintiff.

g) The learned Court rejected the application under Order 14 Rule 1 of the Code of Civil Procedure, on merits, upon holding that as the issues involved mixed question of law and fact they could not be decided as preliminary issues. That the plaintiff was indirectly trying to prevent the petitioner from contesting the suit.

h) The suit proceeded, evidence was recorded. The petitioner was allowed to cross-examine the plaintiff.

i) The petitioner sought to add herself as a defendant in the suit, although she was contesting the same as a defendant, when she allegedly realized that the suit was defective and was running against dead persons.

13. Admittedly, the partnership firm is not a juristic person. There is no denial from the side of the plaintiff, in respect of the petitioner's contention, that the partners who had been impleaded in the suit as representatives of the partnership firm, had died.

14. The petitioner all along contented that the suit was running against a partnership firm which had been dissolved long time ago and none of the alleged partners of partnership firm, who had been impleaded in the suit, survived. The suit was proceeding against dead persons as also a non-entity.

15. With the aforementioned background, when the petitioner had specifically averred in the written statement that she had taken over the business and was running the same since 2000 as sole proprietor, upon obtaining necessary certificate of enlistment, trade licence etc., and especially when the learned Court below had allowed the petitioner to file the written statement and contest the suit, not adding the petitioner would amount to serious prejudice. The suit would proceed against dead persons. Moreover, the applications under Sections 7(1) and 7(2) were decided in favour of the defendant, represented by the petitioner. The learned Court had rejected the two preliminary issues, namely, relationship of landlord and tenant and the locus of the petitioner to contest the suit as a defendant, inter alia, on the ground that such issues did not involve pure questions of law, but mixed questions of law and fact and should be decided on evidence, at the trial.

16. The subsequent order of not adding the petitioner as a defendant in the suit will prevent the Court from adjudicating the issues involved in the suit, in the correct perspective. Non-addition of the petitioner in the present suit, will also give rise to multiplicity of proceedings. The finding that the petitioner was not entitled to be added because she could not show from the documents that she was the daughter of Kiam Wong Chung, should be decided at the trial. Further, the finding with regard to non-transferability of the tenancy upon the petitioner after the death of the partners, also goes to the merits of the suit and is a triable issue. The locus of the petitioner to represent the defendant or to contest the eviction suit has already been held to be decided at the trial and not as a preliminary issue

17. At the stage of addition of party, the Court was only required to see whether the presence of the petitioner would be necessary and proper, in the facts stated hereinabove. The consistent case of the petitioner was that the partnership firm had dissolved, the persons representing the partnership firm who were impleaded in the suit had died and the petitioner was running the business as a sole proprietor, upon payment of rent. The rent was allegedly accepted from the petitioner. Upon perusal of the rent receipt challan, the learned Court had already held that the defendant was not a defaulter.

18. Admittedly, all such issues raised by the petitioner and by the plaintiff are triable issues as already held by the learned court. When the learned court allowed the petitioner to contest the suit as a defendant and also to avail of the remedies under the law, for protection against eviction by taking resort to Sections 7(1) and 7(2) of the said Act, adding the petitioner as a defendant, was inevitable in the facts of this case..

19. The petitioner was allowed to participate throughout the proceeding. The defence of the petitioner has not changed. The petitioner always claimed to be the proprietor who was running the business on the basis of an agreement. She claimed to have become a partner with her mother and after demise of her mother, she continued to run the business as a sole proprietor. Supporting documents in respect of such claim have also been produced before the Court. The final adjudication of the status of the petitioner, as a tenant or as a sub-lessee or sub-tenant would be subject to trial on evidence. The addition of the petitioner as a party, does not change

the complexion of the suit, but is necessary for proper and effective adjudication of the suit.

20. The order impugned suffers from irregularity and is set aside. The learned Court below is directed to add the petitioner as a defendant in the suit and pass necessary orders for amendment of the cause title in the plaint. The observations made hereinabove are tentative and shall not prejudice the trial.

21. Under such circumstances, the revisional application is allowed.

22. There will be no order as to costs.

23. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)