IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APELLATE SIDE

The Hon'ble **JUSTICE SUVRA GHOSH**

W.P.A. 1387 of 2022

Delight Grih Nirman Pvt. Ltd
v/s.
Bharat Petroleum Corporation Limited & Others

For the Petitioner:	Mr. Abhratosh Majumder, Adv. Mr. Ravi Kumar Dubey, Adv.,
For the BPCL:	Mr. Bikramaditya Ghosh, Adv. Mr. A.B. Das, Adv. Mrs. Srijoni Chongdar , Adv.
Hearing Concluded on:	13.03.2023
Date:	26.04.2023

SUVRA GHOSH, J. :-

1. The writ petitioner has inter alia prayed for issuance of writ in the nature of mandamus commanding the respondents to quit, vacate and handover peaceful possession of the property at 137A, Beliaghata Road, Kolkata – 700010 and at 6 Nafar Koley Road, Kolkata – 700010.

2. M/s. Burmah Shell Oil Storage and Distribution Company of India Limited (hereinafter referred to as "Burmah Shell"), the predecessor in interest of the first respondent entered into a lease with the predecessor in interest of the petitioner by virtue of a deed of lease dated 21st January, 1966 in respect of the plots in question for a period of 10 years commencing from 1st January, 1966 with option for renewal on the part of the lessee for the purpose of storage and sale of petroleum products, motor accessories etc. either by itself or by duly appointed agents and dealers. There was a covenant for renewal of the lease for two consecutive periods of 10 years each upon observance and performance of all terms and conditions stipulated in the deed by the lessee. On 24th January, 1976 Bharat Refineries Limited acquired complete ownership of Burmah Shell's interests in India under Burmah Shell (Acquisition of undertaking in India) Act, 1976 and was named as Bharat Petroleum Corporation Limited. The lease hold right granted in favour of Burmah Shell having been transferred by operation of law in favour of Bharat Petroleum Corporation Limited (hereinafter called the BPCL), the latter became lessee in respect of the premises under the terms and conditions contained in the deed of lease of 1966.

3. The BPCL stopped payment of lease rent from May, 1982 to the lessors claiming to be thika tenant within the meaning of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 and in a writ petition filed by the lessors being CR no. 7731 (W) of 1983, inter alia, challenging the alleged vesting of the land under the Act of 1981, this Court, by an interim

order passed on 17th December, 1985, stayed the operation of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 and the Rules there under in respect of the premises in question till further order. The Court restrained the lessors and the State Government from selling/disposing of the said premises and interfering with the peaceful possession of the lessee therein and the lessee was allowed to possess the premises upon payment of rent to the lessors. In view of the said order the period of lease was extended for a further period of 10 years w.e.f. 1st January, 1986 and thereafter for another 10 years which extended till 31st December, 2005. The lessee was not entitled to any further extension of the lease period despite which it surreptitiously deposited the lease rent in the bank account of the erstwhile lessors which was refunded to BPCL.

4. In view of the West Bengal Land Reforms and Tenancy Tribunal Act, 1997, the writ petition was transferred to the Tribunal by this Court.

5. The matter was permitted to be withdrawn on prayer of the petitioner by an order passed on 28th January, 2021.

6. Despite several requests made by the petitioner to the respondents to hand over possession of the premises, they are continuing to enjoy possession of the property illegally and are trespassers therein in absence of any lessor-lessee relationship between the parties. Having acquired title in respect of the premises by dint of a deed of indenture executed on 28th December, 2006, the petitioner sent representation to the respondents requesting them to vacate the premises but to no effect. The respondents are running a

petrol pump in the premises which is operated by a dealer and also have a car parking business therein.

7. Referring to a letter issued by the Assistant Assessor Collector on 22nd February, 2021, learned counsel for the petitioner has submitted that the premises in question is not a thika effected property. The respondents admitted that the original lessors accorded express permission to the predecessor in interest of the respondents to erect pucca structures in the premises and dig tanks therein for the purpose of their business activities. The Amendment Act of 2010 in the Act of 2001 conferring right upon a thika tenant to erect pucca structure in the land in question with the permission of the Controller was given prospective effect from November 1, 2010 and is not applicable in the case of the respondents. The lessee, therefore, cannot be termed as thika tenant. Taking this Court to the Burmah Shell (Acquisition of Undertaking in India) Act, 1976, learned counsel has submitted that statutory lease governed by the said Act provides for renewal of the lease in section 5 (2) of the Act. It is not the case of the respondents that the lease was renewed in terms of the said provision of law.

8. The petitioner was constrained to accept rents from the respondents till 2005 in terms of the interim order passed by this Court and lease rent deposited by the respondents thereafter was refunded to them by the petitioner. Since the respondents are in illegal occupation of the premises after expiry of the period of lease, they should be evicted therefrom since wrongful possession cannot be held to be settled possession. The BPCL has

claimed to be thika tenant and in the alternative non-agricultural tenants, thus taking an inconsistent stand.

9. Learned counsel has distinguished the authorities relied upon by the respondents and has placed reliance on the following judgments:-

   i. Nemai Chandra Kumar (D) Thr. Lrs. And Others v/s. Mani Square Ltd. and Others reported in 2022 Supreme Court Cases Online SC 920,

   ii. Hindustan Petroleum Corporation Ltd. And Another v/s. Dolly Das reported in (1999) 4 Supreme Court Cases 450,

   iii. Sikha Ghosh and Others v/s. Indian Oil Corporation Ltd. and Others reported in 2022 SCC Online Cal 2334.

10. Per contra, learned counsel for the respondents has submitted that by virtue of the deed of lease, vacant land was leased out to the predecessor in interest of the respondents and the construction on the land was made by them in terms of clause (I)(3) of the deed. The application for interim order praying for stay of operation of Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 and the Rules thereunder filed by the predecessor in interest of the petitioner on 10th December, 1984 in the earlier writ petition was allowed by the Court, thereby indicating that the earlier writ petition was filed on the premise that the land in question was covered under the said Act. The writ petition was transferred to the Land Reforms and Tenancy Tribunal and was subsequently withdrawn as a result of which the land in question was restored to its earlier character. The letter issued by the

Assistant Assessor Collector on 22nd February, 2021 can under no circumstances come to the aid of the petitioner since the predecessor in interest of the petitioner who filed the earlier writ petition on the anvil of the land being thika property, is estopped from taking a contrary stand later on.

11. The respondents/their predecessor in interest were/are in settled possession of the property since 1966 and such settled possession cannot be unsettled by invoking writ jurisdiction. The relief of the petitioner lies under section 5 of the Specific Relief Act.

12. In terms of the provision of the Act of 1981, the land in question has vested with the State and the respondents are direct tenants under the State. The land being thika property, transfer of the same in favour of the petitioner by the erstwhile lessor without permission of the Thika Controller as amended by the Act of 1981 is bad in law. Even if it is assumed that the Act of 1981 is not applicable in respect of the subject premises, the respondents have to be considered as non-agricultural tenants within the meaning of The West Bengal Non Agricultural Tenancy Act, 1949.

13. The petitioner stepped into the shoes of his predecessors in 2006 and allowed the respondents to continue to possess the property since then. The writ petition is therefore barred by inordinate delay and laches. No constitutional or statutory right of the petitioner is infringed which entitles the petitioner to seek any remedy herein. The issue of the property being a thika property or not needs to be adjudicated by the proper forum and

cannot be entertained by this Court in exercising jurisdiction under Article 226 of the Constitution of India.

14. Learned counsel has distinguished the judgments relied upon by the petitioners and has placed reliance on the authorities in East India Hotels Ltd. v/s. Syndicate Bank reported in 1992 Supp (2) Supreme Court Cases 29; Ganges Manufacturing Co. v/s. Soorujmull and Others reported in 1880 Supreme Court Cases Online Cal 6; S. Vaidhyanathan v/s. Government of Tamil Nadu and Others reported in 2018 Supreme Court Cases Online Mad 11643; Brigadier K.K. Verma And Another v/s. Naraindas C. Malkani reported in 1953 SCC Online Bom 7 in support of his contention.

15. It is the admitted position that the deed of lease was executed by and between the predecessor in interest of the petitioner and the predecessor in interest of the respondents on 21st January, 1966 for a period of 10 years commencing from 1st January, 1966 with option for renewal for two consecutive periods of 10 years each and the lease finally expired on 31st December, 2005. It is further admitted that the respondents are running a petrol pump in the leasehold property through dealer appointed by them. The petitioner acquired title in respect of the property by virtue of a deed of indenture executed on 28th December, 2006.

16. At the outset, the issue of delay and laches raised by the respondents needs to be addressed. It is a fact that the lease expired on 31st December, 2005 and after having acquired the property in 2006, the petitioner has approached this Court by the present writ petition on 25th January, 2022.

Record reveals that the petitioner/his predecessor in interest approached the respondents through several communications requesting the latter to deliver vacant possession of the premises in his favour, the earliest communication being made on 18th July, 2006. It is trite law that though the Limitation Act does not strictly apply to claims in a writ petition, relief can be refused in case of long or unreasonable delay. In the present case, since the petitioner has time and again requested the respondents to vacate the property and deliver peaceful possession thereof in his favour, the cause of action in the writ petition is a recurring cause of action and is continuing till date. In view of the same, the question of limitation does not apply to the present case and the writ petition, therefore, cannot be said to be barred by inordinate delay and laches. The fact situation in the authority in S. Vaidyanathan (supra) is distinguishable from the present case and has no manner of application in this case.

17. The respondents have contended that since the earlier writ petition was filed on the premise that the land in question was covered under the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 the petitioner is estopped from taking a contrary stand in this writ petition. It appears from the record that the earlier writ petition was filed challenging the operation of the Act of 1981 in respect of the premises in question, thereby indicating that the predecessors in interest of the petitioner at no point of time admitted the property to be thika property. Therefore the authority in Ganges Manufacturing Company (supra) is not applicable in the facts and

circumstances of the present case since the question of applicability of rules of estoppel does not arise.

18. Section 6 of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 defines a thika tenant as hereunder:-

> 6. "*Thika Tenant means any person who occupies, whether under a written lease or otherwise, land under another person and is or about for a special contract would be liable to pay rent, at a monthly or at any other periodical rate for that land to that another person and has erected or acquired by purchase or gift any structure or such land for residential, manufacturing of business purpose and includes the successor-in-interest of such person.*"

19. The nature of structure put up by the tenant in the demised premises has a bearing over the question relating to thika tenancy. It is trite law that construction of kutcha structure on the leasehold land is a sine-qua-non for constituting thika tenancy. The expression "any structure including pucca structure" was inserted in the definition of thika tenancy by the Amendment Act of 2010. Admittedly the structures raised in the premises in question are pucca structures. Also, the lease seized to exist on and from 1st January, 2006, that is, much prior to introduction of section 10A to the Act. The said proposition of law has been discussed by the Hon'ble Supreme Court in the authority in Nemai Chandra Kumar (supra) wherein the Hon'ble Court has held that question of land comprising thika tenancy with erection or acquisition of pucca structure by the thika tenant came to be provided for

only from 1st November, 2010 and not before. There was no existing lease on the said date which could have taken the appellants within the frame of thika tenancy on 1st November, 2010.

20. By a letter issued on 22nd February, 2021 in reply to a letter issued by the petitioner, the Assistant Assessor Calcutta, North Division has informed upon verification of office records that the premises in question is not a thika property. This letter is not the sole document on the anvil of which it can be held that the property in question is not a thika property. The letter only supports the observation made by this Court that the land having pucca structures thereon cannot be termed as a thika property. As such, the question of obtaining permission from the Thika Controller prior to transfer of the property in favour of the petitioner does not arise.

21. In the alternative, the respondents have claimed to be non-agricultural tenants within the meaning of the West Bengal Non-Agricultural Tenancy Act, 1949 in section 2(5) of the said Act, a “non-agricultural tenant” has been defined as a person who holds non-agricultural land under another person and is, or but for a special contract would be, liable to pay rent to such person for that land but does not include a person who holds any premises or part of any premises, situated on non-agricultural land and erected or owned by another person, and who is, or but for a special contract would be, liable to pay rent for such premises or such part of the premises to such person. Section 43 of the Act envisages that a non-agricultural tenant shall pay rents yearly according to the Bengali year. The deed of lease demonstrates that monthly rent is payable by the lessee during

the lease period. Also, nowhere has the lessee claimed to be a non-agricultural tenant prior to the writ application. In view of the same, the respondents cannot be said to be non-agricultural tenants in respect of the premises in question.

22. The respondents claim to be in settled possession of the property since 1966 and submit that such settled possession cannot be unsettled by this Court in exercising writ jurisdiction. Learned counsel for the respondents has placed reliance on the authority in East India Hotels Limited (supra) in this connection. It appears that in view of conflicting judgments in the said matter, the matter was referred to the Hon'ble the Chief Justice of India for constituting a larger bench for resolving the conflict. Therefore this judgment cannot come to the aid of the respondents in the present case.

23. The respondents sought to establish their claim in respect of the property by virtue of holding over in terms of section 116 of the Transfer of Property Act, 1882 and acquiescence on the part of the lessor/petitioner. Section 116 of the Act of 1882 is set out:-

> *"116. Effect of holding over.- If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month,*

according to the purpose for which the property is leased, as specified in section 106."

24. In the present case, the petitioner was constrained to accept rents from the respondents till 2005 in terms of the direction of the Court. Rents tendered to the petitioner by the respondents thereafter were not accepted by the petitioner and several communications were made by the petitioner to the respondents requesting them to deliver peaceful vacant possession of the property. Therefore it cannot be said that the lease was automatically renewed from time to time or the lessor acquiesced continuity of possession of the lessees. The provision laid down under section 116 of the Act of 1882 is not applicable in the facts and circumstances of the present case. It is pertinent to refer to an observation made by the Hon'ble Supreme Court in the authority in Bhawan Ji Lakhamshi v/s. Himatlal Jamnadas Dani reported in (1972) 1 SCC 388 to the effect that the act of holding over after expiration of the term does not create a tenancy of any kind. A new tenancy is created only when the landlord assents to the continuance of the erstwhile tenant or agrees to accept rent for the continued possession of the land. It is also not the case of the respondents that attempt was made by the Central Government to approach for renewal of the lease before expiry of the same under section 5(2) of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976.

25. Learned counsel for the respondents has distinguished the authority in Hindustan Petroleum Corporation Limited (supra) and submitted that the said authority deals with quashing of statutory notice of renewal under

section 7 of The Caltex [Acquisition of shares of Caltex oil refining (India) Limited and of the undertakings in India of Caltex (India) Limited] Act, 1977.

26. True, the judgment deals with a statutory lease, renewal of which is governed under section 7(3) of the Act. Nevertheless, observation of the Hon'ble Supreme Court in the said judgment that if the facts pleaded are of such nature which do not involve any complicated question of fact needing elaborating investigation, the High Court can exercise writ jurisdiction under Article 226 of the Constitution is relevant herein. The ration laid down in the said judgment is applicable in the fact situation of the present case.

27. In terms of the deed of lease executed w.e.f. 1st January, 1966 possession of vacant land was handed over to the respondents/their predecessor who were allowed to use the land for storage and sale of petroleum products, motor accessories, etc., either by itself or by duly appointed agents and dealers and were granted further liberty to make excavations therein for tanks and construction of buildings or structures as may be required for a petrol service station, at their own cost. The renewal clause in the lease enumerates that the lease shall be renewed for a further period of ten years commencing from the date of expiry and further two periods of ten years each on payment of monthly rents. The lease expired on 31st December, 2005 in absence of any provision for further extension. The respondents have not sought renewal of the lease period in terms of the Act of 1976 or otherwise and have been possessing the property in question without having any legal right therein. As discussed earlier, the respondents cannot be said

to be in settled possession of the premises on acquiescence on the part of the petitioner since the petitioner has neither assented to the possession of the respondents, nor accepted any rent from them after expiry of the lease. The respondents, therefore, have no alternative but to deliver peaceful vacant possession of the premises to the petitioner within 3 months from this date and pay arrears of market rent to the petitioner from 1st January, 2006 till the date of delivery of possession in favour of the petitioner.

28. In the light of the discussion made herein above, the writ petition succeeds.

29. The respondents are directed to deliver peaceful vacant possession of the premises to the petitioner upon removal of the structures thereon within 3 months from date. The respondents are further directed to pay arrears of market rent to the petitioner in respect of the said premises from 1st January, 2006 till the date of delivery of possession in favour of the petitioner.

30. There shall however be no order as to costs.

31. Since no affidavit is invited, the allegations contained in the writ petition are deemed not to be admitted.

32. Urgent certified website copies of this judgment, if applied for, be supplied to the parties expeditiously on compliance with the usual formalities.

(Suvra Ghosh, J)