

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 1942 of 2022

Smt. Anjali Mitra

VERSUS

Smt. Nishi Sehgal & Anr.

For the petitioner:

Mr. Partha Pratim Ray, Adv.

Mr. Chiranjib Sinha, Adv.

Mr. Dyutiman Banerjee, Adv.

For the opposite party no. 2:

Mr. Saunak Bhattacharya, Adv.

Mr. Saunak Mondal, Adv.

Mr. Anirban Saha Ray, Adv.

Judgment on: June 09, 2023

Biswaroop Chowdhury,J:

The petitioner before this court is a landlord plaintiff in a suit for eviction and is aggrieved by an order dated 06/07/2022 passed by learned Civil Judge Senior division 9th Court Alipore south 24 Parganas in Ejectment Suit 14 of 2021 allowing the prayer for addition of party filed by the applicant opposite party no2.

The case of the petitioner may be summed up thus;

1. The petitioner filed a suit for eviction and mesne profits and damages against the opposite party no-1 before the learned Rent Controller at Alipore, which was subsequently transferred to the learned Civil Judge, Junior Division 6th Court at Alipore being Eviction suit No.104 of 2013. The same was eventually transferred to the Civil Judge (Senior Division) 9th Court at Alipore for lack of pecuniary jurisdiction and was registered as Ejectment Suit No. 23 of 2018 and renumbered as Ejectment Suit No. 14 of 2021.
2. The Opposite party no - 1 was a monthly tenant under the petitioner at a monthly rent of Rs. 5500/- The case was instituted on the ground of default in payment of rent since October 2002 and on the ground of reasonable requirement and for causing damage to the suit property.
3. The defendant/opposite party no-1 entered appearance and filed written statement through her husband, the opposite party No. 2 being her husband who was contesting the suit on her behalf.
4. The Opposite party no - 1 filed an application under section 7 (1) and 7 (2) of the West Bengal Premises Tenancy Act 1997 which was contested before the Learned Trial Court. The opposite party no - 2 deposed on behalf of the opposite party no - 1 in the same application and it has been admitted that the opposite party no - 1 is the sole tenant of the suit property. The said application was disposed by learned Trial Court on 25.03.2011.
5. The opposite party no - 1 being aggrieved by the order passed by learned Trial Court in section 7 (1) and 7 (2) Application of West Bengal Premises Tenancy Act 1997 moved an application under Article 227 of

the Constitution of India before this Court being C. O.2036 of 2011 and the same was dismissed by his Lordship the Hon'ble Justice Ashok Kumar Das Adhikary. However three weeks time was granted to make the entire payment.

6. On 21.12.2017 the petitioner received a letter from the opposite party no - 1 herein that she has not empowered the opposite party no - 2 herein to represent her in the suit and the opposite party no - 2 in a fraudulent manner is representing her in the trial Court below.
7. The husband of the opposite party no - 1 filed an application under Order 1 Rule 10 (2) read with section 151 of the code of civil procedure for impleading himself as a defendant in the said suit. The said application was heard on affidavits and allowed.
8. The petitioner being aggrieved by the order dated 06/07/2022 passed by Learned Civil Judge (Senior division) 9th Court Alipore South 24 Parganas in Ejectment Suit 14 of 2021, has come up with the instant application.

It is the contention of the petitioner that the learned Judge erred in not considering that the opposite party no - 2 does not have any independent right of tenancy over the suit property. It is further contended that the learned Trial Court erred in law by not considering that it is the admission of the opposite party no - 2 that the opposite party no - 1 is the tenant in respect of the suit property. It is also contended that the learned trial court erred by not considering that there is no concept of benami tenancy.

Pursuant to filing of this application notice was issued upon the opposite parties. Opposite party no - 2 entered appearance and contested the application but opposite party no - 1 did not appear in spite of service of notice.

Heard learned advocate for the petitioner and learned advocate for the opposite party no - 2. Perused the petition filed and materials on record.

Learned advocate for the petitioner submits that the learned Trial Judge erred in adding opposite party no - 2 as defendant in the suit. Learned advocate further submits that the learned Trial Judge erred in interpreting the definition of tenant as provided under section 2 (g) of the West Bengal Premises Tenancy Act 1997. It is submitted by the learned advocate that under Section 2 (g) of the West Bengal Premises Tenancy Act 1997 unless the original tenant dies his spouse does not step into the shoes of the original tenant. As the original tenant is alive her husband opposite party no - 2 does not come into the picture. Learned advocate for the petitioner draws attention to the deposition of opposite party no - 2 in application under section 7 (1) and 7 (2) of the West Bengal Premises Tenancy Act 1997 and submits that the opposite no 2 has admitted opposite party no - 1 as tenant in the suit property hence there is no scope to take a contrary stand. Learned advocate further draws attention to the letter dated 21.12.2017 marked annexure-F and submits that the letter addressed by opposite party no - 1 to the petitioner clearly shows that the opposite party no - 2 is not empowered to represent the opposite party no - 1 and opposite party no - 1 original tenant has expressed her unwillingness to retain possession of the suit property.

Learned advocate for the opposite party no - 2 submits that the learned trial court has rightly added his client as a party for adjudicating the suit. Learned advocate for the opposite party no - 2 produces a letter dated 22.12.2017 issued by opposite party no - 1 to opposite party no - 2 by which the power of attorney issued in favour of opposite party number 2 is revoked. Hence opposite party no - 2 is not authorized to represent opposite party no - 1. Learned advocate further draws attention to the letter dated 01.12.1991 issued by opposite party no - 1 to the petitioner whereby the said opposite party requested the petitioner to issue rent receipts jointly in the name of opposite party no - 1 and opposite party no - 2. Learned advocate also draws attention to the letter dated 24/12/1991 issued by Anjali Mitra the petitioner herein wherein she has made the following statement.

“This is with reference to your letter dated 1.12.91 concerning your request for issuing joint rent receipts in the name of your husband and yours. May I point out that granting your request is slightly difficult as we have to alter our entire contract which is yet to expire. However your husband is welcome to use the premises for his business purposes as long as you remain our tenant. Your husband is also permitted to put up one display board required for the business purposes not extending more than the front window on either side”.

Learned advocate for the opposite party no - 2 further submits that the communication between the petitioner and the opposite party no - 1 will go to show that there was an intention of both the petitioner and the opposite party no - 1 to make it a joint tenancy in the name of opposite

party no - 1 and opposite party no - 2. Learned advocate also submits that the conduct of the petitioner and the opposite party no - 1 will go to show collusion between them. Learned advocate submits that the tenancy is benami. The following decisions are relied upon by the learned advocates.

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Ruma Chakroborty.

Vs

Sudha Rani Banerjee and Another

Reported in (2005) 8 Supreme Court Cases. 140

Hiran Bala Debi

Vs

Prodyut Kumar Mondal

Reported in (1991) 1 Cal LT-32.

Jyostna Rani Sarkar.

Vs

Keya Majumdar alias Mithu Majumdar and anr.

Reported in 2013 SCC On line Cal – 20078.

B.K. Dutta.

Vs

Sm. Nita Nandan and another

Reported in 1984 SCC online Cal-76.

Siddheswar Bannerjee.

Vs

M/S. Kesharshyam Construction Pvt Ltd and Anr.

Reported in 2014 SCC Online Cal-4658.

B.P. Achala Anand.

Vs

S. Appi Reddy and Another

Reported in (2005) 3 SCC P-313.

Unreported decision

in. C.O. 4203 of 2018.

Balmer Laurice and Co. Ltd.

Vs

Soumendra Kristo Dutta and ors.

Upon hearing the Learned Advocates and considering the facts of the case this Court is of the view that in order to decide the right of opposite party no-2 to be added as party in the Ejectment Suit pending before the Learned Trial Court it is necessary to consider the definition of tenant under

Section 2(g) of the West Bengal Premises Tenancy Act 1997 and the provision contained in Order I Rule 10 of the Code of Civil Procedure.

Section 2(g) of the West Bengal Premises Tenancy Act 1997 defines tenant as follows:

“tenant’ means any person by whom or on whose account or behalf the rent of any premises is or, but for a special contract would be payable and includes any person continuing in possession after termination of his tenancy and in the event of death of any tenant also includes for a period not exceeding five years from the date of death of such tenant, or from the date of coming into force of this Act whichever is later, his spouse, son daughter parent and the widow of his pre-deceased son who were ordinarily living with the tenant up to the date of death of the tenant as the members of his family and were dependant on him and who do not own or occupy any residential premises, and [in respect of premises let out for non-residential purpose his spouse son daughter and parent who were ordinarily living with the tenant up to the date of his death as members of his family and were dependant on him or a person authorized by the tenant who is in possession of such premises] but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction:

Provided that the time limit of five years shall not apply to the spouse of the tenant who was ordinarily living with the tenant up to his death as a member of his family and was dependent on him and who does not own or occupy any residential premises:

Provided further that the son daughter parent or the widow of the pre-deceased son of the tenant who was ordinarily residing with the tenant in the said premises up to the date of death of the tenant as a member of his family and was dependant on him and who does not own or occupy any residential premises, shall have a right of preference for tenancy in a fresh agreement in respect of such premises [On condition of payment of fair rent]

This proviso shall apply mutatis mutandis to premises let out for non-residential purpose.”

Order 1 Rule 10 of the Code of Civil Procedure provides as follows:

10(1) Suit in name of wrong plaintiff – where a suit has been instituted in the name of wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona-fide mistake and that is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

2. The Court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the Court to be just, Order that the name of any party improperly joined whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the

Court effectually and completely to adjudicate upon and settle all the questions involved in the suit be added.

3. No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability.

4. Where a defendant is added the plaint shall unless the Court otherwise directs be amended in such manner as may be necessary and amended copies of the summons and of the plaint shall be served on the new defendant and if the Court thinks fit on the original defendant.

5. Subject to the provisions of the Indian Limitation Act 1877 (15 of 1877) Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

Upon perusing the provisions contained in Order 1 Rule 10(2) of the Code of Civil Procedure although it appears that Court is empowered to add anybody as party whose presence is necessary to enable the Court to completely adjudicate upon and settle all the questions involved in the suit but where a suit is instituted under a special statute the requirement of the said statute should be complied in the suit proceedings.

As West Bengal Premises Tenancy Act 1997 is a special Statute which provides the definition of Landlord and tenant a suit for eviction of a tenant under the said statute must fulfill the ground for eviction and the definition of landlord and tenant. Thus when a person claims himself as a tenant under the West Bengal Premises Tenancy Act 1997 before Court or Competent authority under the said Act he has to fulfill the requirement of

the definition of 'tenant' under Section 2(g) of the West Bengal Premises Tenancy Act 1997.

Upon plain reading of the definition of tenant as appearing in Section 2(g) of the West Bengal Premises Tenancy Act 1997, it will appear that the said definition does not include the spouse so long the original tenant is alive.

Now the question to be decided is whether a person can be added as a party in an ejectment suit when there is an allegation of collusion between landlord and original tenant, and allegation of benami tenancy. In order to decide such question it is necessary to consider some judicial pronouncements.

In the case of Ruma Chakroborty Vs Sudha Rani Banerjee and Another reported in (2005) 8 SCC. P-140 the Hon'ble Supreme Court observed as follows:

"32". In our opinion a deserted wife who has been or is entitled to be in occupation of the matrimonial home is entitled to contest the suit for eviction filed against her husband in his capacity as tenant subject to satisfying two conditions first that the tenant has given up the contest or is not interested in contesting the suit and such giving up by the tenant-husband shall prejudice the deserted wife who is residing in the premises, and secondly the scope and ambit of the contest or defence by the wife would not be on a footing higher or larger than that of the tenant himself. In other words such a wife would be entitled to raise all such pleas and claim

trial thereon as would have been available to the tenant himself and no more. So long as by availing the benefit of the provisions of the Transfer of Property Act and Rent Control legislation the tenant would have been entitled to stay in the tenancy premises, the wife too can continue to stay exercising her right to residence as a part of right to maintenance subject to compliance with all such obligations including the payment of rent to which the tenant is subject. This right comes to an end with the wife losing her status as wife consequent upon decree of divorce and the right to occupy the house as part of right to maintenance coming to an end.'

In the case of B.P Achala Anand Vs S. Appi Reddy and Another reported in (2005) 3 SCC. P. 313. The Hon'ble Supreme Court observed as follows:

'The position of law which emerges on a conjoint reading of the rent control legislation and personal laws providing for right to maintenance which will include the right to residence of a wife including a deserted or divorced wife, may be examined. The rent control law makes provision for protection of the tenant not only for his own benefit but also for the benefit of all those residing or entitled to reside with him or for whose residence he must provide for. A, decree or order for eviction would deprive not only the tenant such protection but members of his family (including the spouse) will also suffer eviction. So long as the tenant defends himself the interest of his family members merges with that of the tenant and they too are protected. The tenant cannot by collusion or by deliberate prejudicial act give up the protection of law to the detriment of his family members. So long as a decree

for eviction has not been passed the members of the family are entitled to come to the Court and seek leave to defend and thereby contest the proceedings and such leave may be granted by the Court if the Court is satisfied that the tenant was not defending by collusion, connivance or neglect-or was acting to the detriment of such persons. Such a situation would be rare, and the Court shall always be on its guard in entertaining any such prayer. But the existence of such a right flows from what has been stated hereinabove and must be recognized. Persons residing with the tenant as members of his family would obviously be aware of the litigation and therefore it will be for them to act diligently and approach the Court promptly and in any case before the decree of eviction is passed as delay defeats equality. Such a prayer or any dispute sought to be raised post-decree by a member of the family of the tenant may not be entertained by the Court.'

In the Case of Hiran Bala Debi Vs Prodyut Kumar Mondal reported in [1991] 1 Cal LT – 32 a Learned Single Bench of this Court observed as follows:

The fact remains that her husband the defendant-tenant does not contest the suit. So the wife opposite party no-2 has to suffer the result of an ex-parte decree. Despite her plea that the landlords accepted rent all throughout from her since her husband left her in 1977 she cannot be heard to say that there is no default in the payment of rent, in a suit for eviction on the ground of default and reasonable requirement of the landlord. She cannot tell the Court either that the plea of reasonable

requirement of the landlord is not bona fide. As a matter of fact the requirement under Section 13 of the West Bengal Premises Tenancy Act have to be proved in order to get a decree for eviction also otherwise the decree for eviction is void. Supreme Court refused to grant a stamp of sanction of a compromise or consent decree which was benefit of a finding that those grounds for eviction existed in Kaushalya Devi Vs K.P. Banshal, AIR-1970. S.C.838; Roshanlal Vs. Mandanlal AIR 1975 S.C. 2130 Nai Bai Vs. Lala Rammarain AIR-1978 S.C. 22. In this case the grounds pleaded by the landlord cannot be tested by cross-examination. Court has to swallow the ex-parte evidence of default and reasonable requirement even though the grounds may not survive on being tested by cross-examination. Under such circumstances the wife presumably takes refuge under Order 1 Rule 10(2) of the Code of Civil Procedure.'

In the case of Jyostna Rani Sarkar Vs Keya Majumder alias Mithu Majumder and anr reported in 2013 4 ICC P666, a Learned Single Bench of this Court observed as follows:

'The case of a divorced wife stands on a little different footing. Divorce is termination of the matrimonial relationship and brings to an end the status of wife as such. Whether or not the divorced wife has the right of residence in the matrimonial home, would depend on the terms and conditions in which the decree of divorce has been granted and provision for maintenance (including residence) has been made.'

In the case in hand admittedly a decree of divorce has already been passed as far back as in 2008 against the O.P. No. 1 wife after contested

hearing. No appeal has been filed against said decree of divorce. As such the status of the O.P. No. 1 is that of a divorced wife of OP No. 2 tenant. Admittedly no order of maintenance and/or of provision for residence was passed at the time of passing the decree of divorce. It is true that the O.P. No.1 divorced wife has filed an application praying for maintenance at the rate of Rs. 10,000/- per month from O.P.No.2 husband under Section 25 of the Hindu Marriage Act being Misc. case No. 47 of 2008 and that the same is pending. But as on date the O.P.No.1 being a divorced wife of O.P.No.2 tenant has no order of residence in the suit premises in her application under Section 25 of Hindu Marriage Act. There was also no privity of contract in between O.P. No.1 divorced wife and petitioner/plaintiff landlord. Under those circumstances the O.P. No. 1 divorced wife had no right be added as a party defendant to contest the pending eviction suit. As such the order impugned is liable to be set aside.'

In the case of Sidheswar Banerjee Vs. M/S Kesharshyam Construction Pvt. Ltd. And Anr. Reported in 2014 SCC Online Cal-4658 a learned Single Bench of this Court was pleased to observe as follows:

'4. It may however be noted in this connection that exercise of inherent power under Section 151 is not warranted if the action proposed to be taken under inherent powers can be effectively taken under the express provisions of the Civil Procedure Code. It appears to me that if the opposite party no.2 is allowed to be impleaded as a party defendant in the suit for raising the dispute that he has an independent right as a tenant in the disputed premises and he and not his wife is the real tenant under the

plaintiff then a simple suit for ejection of an admitted tenant will be converted into a title suit.'

Upon hearing the Learned Advocate and considering the Judicial decisions relied upon it appears to this Court that both the Hon'ble Apex Court and this Court have laid down the proposition of law where a deserted wife can contest a suit for eviction instituted against her husband when the husband is not contesting the said suit. The law is also made clear as to the right of a Divorced wife in an eviction suit when there is provision for residence at matrimonial home in the decree of divorce. However as the present case does not deal with right of divorced wife or deserted wife to be added as party in an eviction suit but the right of the husband of a tenant to be added as party to the said suit when the wife is not contesting the case it stands slightly on a different footing.

As a learned Single Bench of this Court in the case of Siddheswar Banerjee (supra) held that if any addition of party is allowed to raise dispute about existence of independent right in eviction suit the said suit will be converted to title suit it is necessary to consider as to how far the said decision is applicable to the facts of the case.

In the case of Sidheswar Bannerjee (supra) the dispute was with regard to the claim of being a partner of partnership firm with a prayer to be added party in eviction suit, and the person against whom eviction suit was instituted was contesting the suit. In the instant case the opposite party no-1 being wife of opposite party no-2 is not contesting the suit at present. Moreover the opposite party no-1 who is recorded tenant of the suit property

is not living at the suit property and have instituted a Divorce Suit against her husband. The opposite party no-2 is residing at the suit property and have prayed for being added as a party. Thus this case is slightly different from the case of Sidheswar Bannerjee (supra) In the instant matter as the attention of this Court is drawn on the letter issued by landlord/petitioner upon opposite party no-1 permitting the opposite party no-2 to do business and the letter issued by the opposite party no-1 to the petitioner that the said opposite party does not want to retain the possession of the suit property, and the allegation that there is collusion between the petitioner and the opposite party no-1 necessary enlightenment should be drawn from the decision of P. Achola Anand (supra).

The Hon'ble Supreme Court in the case of B.P. Achala Anand (supra) observed that the rent control law makes provision for protection of the tenant not only for his own benefit but also for the benefit of all those residing or for whose residence he must provide for A decree or order for eviction would deprive not only the tenant of such protection but members of his family (including the spouse) will also suffer eviction. So long as the tenant defends himself the interest of his family members merges with that of the tenant and they too are protected. The tenant cannot by collusion or by deliberate prejudicial act give up the protection of law to the detriment of his family members. So long as a decree for eviction has not been passed the members of the family are entitled to come to the Court and seek leave to defend and thereby contest the proceedings and such leave may be granted by the Court if the Court is satisfied that the tenant was not defending by

collusion connivance or neglect or was acting to the detriment of such persons. In the instant case as the recorded tenant is not contesting the suit and not residing at the suit property due to matrimonial dispute between herself and her husband and the husband of opposite party no - 2 is residing at suit property and have alleged collusion between opposite party no-1 and the petitioner and benami tenancy the Learned Trial Court should consider the application for addition of party for the purpose of finding as to whether there is collusion or connivance between the petitioner, and opposite party no - 1 or if the tenancy is benami. On the basis of the finding the Court should decide as to whether the prayer for addition of party should be allowed or refused.

Upon perusal of the order of Learned Trial Court nowhere it appears that the Learned Court has arrived at a finding that there is collusion between petitioner and opposite party no-1 or there is benami tenancy although such allegations were made in the petition for addition of party. Thus the matter should be remitted to the Learned Trial Court for reconsidering the application made under Order 1 Rule 10(2) by the opposite party no-2. However as the issue of collusion and benami tenancy requires evidence the application under Order 1 Rule 10(2) filed by the opposite party no-2 shall be decided on evidence and not merely on affidavits.

Thus this Revisional Application stands allowed. Order dated 6/07/2022 passed by Learned Civil Judge (Senior Division) 9th Court Alipore South 24 Parganas in Ejectment Suit 14 of 2021 is set aside. The matter is remitted to the Learned Trial Court for reconsideration of the application

under Order 1 Rule 10(2) of the Code of Civil Procedure filed by applicant/opposite party no - 2 on evidence. Learned Trial Judge is requested to expedite the suit.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

Biswaroop Chowdhury,J