

15.09.2023
Sl. No.2(DL)
srn/CP

C.O. No. 3576 of 2022

Smt. Niva Ghosh & Ors.

Versus

Sri Bijoy Kumar Das & Ors.

Mr. Debjit Mukherjee,
Ms. Susmita Chatterjee,
Ms. Dipanwita Ganguly,
Mr. Kaustav Bhattacharya,
Mr. S. Chakraborty

...for the Petitioners.

Mr. Bikash Shaw,
Mr. Bhaskar Paul

...for the Opposite Parties.

The revisional application arises out of an order dated November 9, 2022 passed by the learned Civil Judge (Junior Division) 2nd Court at Howrah in Title Suit No.1345 of 2021.

By the order impugned, the learned court below allowed an application under Order I Rule 10(2) of the Code of Civil Procedure filed by the wife of the tenant. According to the learned court below, the wife was a necessary party as the husband was missing.

Reliance was placed on a decisions of the High Court as also the Hon'ble Apex Court in this regard. First decision relied upon by the learned court below was in the matter of

Durga Das vs. Solace and Associates reported in (2013) 1 ICC 307 (Cal), wherein the Calcutta High Court held that a necessary party was a party without whom no decree would be effectively passed and a proper party was one in whose absence an effective order could be passed, but whose presence was necessary for complete and final adjudication of the issue involved. The learned court below drew support from the decision of the High Court while passing the order impugned.

The other decision relied upon is the decision in Ramesh Hirachand Kundanmal vs. Municipal Corporation of Greater Bombay reported in (1992) 2 SCC 525. It was held by the Hon'ble Apex Court that an application for addition of party could be allowed if the court was of the view that the party sought to be added was either a necessary party or a proper party.

Further reliance was placed in the matter of Savitri Devi vs. District Judge, Gorakhpur & Ors. reported in AIR 1999 SC 976, wherein the Hon'ble Apex Court discussed the power of a civil court in adjudicating an application under Order I Rule 10 of the Code of Civil Procedure. The Apex Court held that in order to avoid multiplicity of proceeding, a person could be added as a party for effective disposal of the suit.

Reliance was also placed on the decision of the Calcutta High Court in the matter of Hiran Bala Devi & Anr. vs. Prodyut Kr. Mondal & Ors. reported in 1990(1) CHN 447(Cal), wherein the Calcutta High Court held that in a suit for eviction of the tenant on the ground of default in payment of rent and reasonable requirement, the wife could be added as a party to contest the suit as she was residing in the suit premises with her children, and the defendant did not contest the suit.

Mr. Mukherjee, learned Advocate appearing on behalf of the petitioners submits that the law is well settled that in a suit for eviction, a jural relationship subsists between the landlord and the tenant. No other third party can be added to the proceeding. The plaintiff as a *dominus litis* could not be compelled to implead a third party, unless the third party can prove that he or she was a necessary party and the suit could not proceed in his or her absence. Reference is made to the decision of Kanaklata Das & Ors. Vs. Naba Kumar Das & Ors. reported in (2018) 2 SCC 352 and Jugal Denre vs. Goutam Denre & Anr. reported in (2020) 2 ICC 29. A plain reading of the provision of Order 1 Rule 10 of the Code of Civil Procedure indicates that a person could be joined as a party to the suit either as a plaintiff or defendant, if in the discretion of the court, the presence of such person was necessary in order to

enable the court to factually determine the issues involved in the suit. In an eviction suit, the wife and the children of the tenant are neither necessary parties nor proper parties as there exists no jural relationship between the landlord and the family of the tenant. It is only the tenant who is entitled to contest the suit by setting up his defence.

Mr. Mukherjee further submits that the facts are also required to be discussed in this case as the wife sought to be added as a party on the ground that her husband was not known and was missing. Drawing inference from the provisions of the Indian Evidence Act, 1872, the wife sought to be added as a party on the ground that the whereabouts of her husband was not known for a very long time.

According to the Mr. Mukherjee, the advantage which has been given to a widow of the tenant, cannot be given to the opposite party in this case on the ground that the police reports and other documents would indicate that the husband was neither missing nor were his whereabouts not known, but he was absconding. The police had completed the investigation and filed an FRT indicating that the husband of the opposite party, who is the tenant and the defendant in the suit, was absconding in order to avoid proceedings against him and the wrath of the persons who he had already cheated.

The learned Advocate for the opposite parties submits that the wife was using the suit property. A decree of eviction would affect her adversely. Thus, any proceeding before a court of law, which may affect the right of the opposite party could not be decided in her absence. She would be deprived of her right to protect her own interest in the suit property. It has been further alleged that the husband has not kept any contact with the wife and she has no alternative remedy, but to protect her own possession by contesting the suit. Under such circumstances, the wife was not only a proper party, but a necessary party. Reliance has been placed on the decision of the Hon'ble Apex Court in the matter of Savitri Devi (supra). The learned counsel contends that the Hon'ble Apex Court had held that any person, at any stage of the proceeding, could be impleaded as party, for proper and effective adjudication of the dispute and also to avoid multiplicity of proceedings.

The learned counsel for the opposite parties further submits that the suit is not maintainable as the same had been filed under the Transfer of Property Act, although the West Bengal Premises Tenancy Act, 1997, would be applicable. It is also submitted that notice under Section 6(4) of the said 1997 Act had not been served.

Having heard learned counsel for the respective parties, the following factual aspects are not in dispute:

- a) The husband is the tenant.
- b) The husband is missing, but the police authorities were of the opinion that he was absconding but alive.
- c) There is no declaration from any court of law which would lead this court to draw a presumption on the basis of Section 108 of the Evidence Act.
- d) The husband did not contest the suit by filing a written statement.

First and foremost, this court finds from the pleadings in paragraphs 5, 6 and 7 that the suit is on the ground of default, commission of acts contrary to the provisions of Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act and reasonable requirement. The ground of reasonable requirement has been elaborately pleaded in paragraph 7. The factum of issuance of a notice terminating the tenancy is mentioned in paragraph 8. It is for the plaintiffs to prove the grounds of eviction and service of notice concerning termination of tenancy.

In a suit for eviction, filed by a landlord, only the tenant is a necessary party. The landlord is required to plead and prove two things to enable him to claim a decree for eviction

against the tenant from the tenanted premises. First, that there exists a relationship of landlord and tenant between the plaintiff and the defendant and, secondly, the ground on which the eviction is sought for, exists and is proved. The right of the wife of the tenant and his children to continue to use the premises is not a relevant consideration in the suit for eviction, when the tenant is alive.

Lastly, the plaintiff is the *dominus litis* and cannot be compelled to make any third person, a party to the suit. Moreover, there is nothing on record to show that there has been a declaration by a court of law that the tenant has been missing for more than seven years which would give rise to a presumption that he was no longer alive. In the absence of such declaration, the right of the wife to continue with the suit or participate in the suit as a tenant (widow) does not arise.

A similar question was decided in the decision of Jugal Denre (supra). The suit was filed against one Chandu Charan Denre for eviction of a licensee and recovery of khas possession against one of the brothers . Jugal Denre, another brother of Chandu Charan filed an application, inter alia, for addition of party on the ground that his mother, who had allegedly gifted the property to the son (plaintiff in the case) was residing in the premises for the past 50 years with her

other children. The deed of gift, by which the property was acquired by the plaintiff had not been disclosed to the others. The same was a fraudulent transfer. Hence, the brother of the plaintiff, as the son of the donor, was a necessary party to the suit. The applicant claimed joint title and possession. The learned trial court rejected such application. A revisional application was filed by the aggrieved party before this court. The court held that a third party could not pray for addition in an eviction suit on the ground that he was in possession of the suit property. This Court is also of a similar view. Wife of the tenant, who did not participate in the proceeding is neither a necessary party nor a proper party. Non-participation of the tenant amounts to his defence being struck off. The wife could not show rent receipts issued in her favour or letter of attornment.

In a decision of *Hiran Bala Devi* (supra), the High Court had allowed the wife to be added as a party in an eviction suit on the ground that the wife had taken a specific plea, that in the absence of the husband she had been paying the rent to the landlord and the landlord had accepted the rent from the wife. The suit was filed by the subsequent purchasers who had also issued a letter of attornment in favour of the wife and had accepted the rent. In the said situation and on the ground that

the husband was residing separately from his wife, the prayer of the wife for being impleaded in the suit had been allowed.

With regard to the decision in the matter of Savitri Devi (supra), the addition of a stranger purchaser was allowed as the Hon'ble Apex Court was of the view that as the stranger purchaser could always proceed by filing a separate suit to protect his title in respect of the suit property, in order to avoid multiplicity of proceedings, addition of party could be allowed.

All the cases, cited by Mr. Paul, learned advocate for the opposite parties, are distinguishable and not applicable in the case in hand.

However, the Hon'ble Apex Court in Modula India vs. Kamakshya Singh Deo, reported in 1989 AIR 162, held that in a suit where the defence was struck off or was proceeding undefended, the right of cross-examination of the defendant, could not be denied. The defendant had a right to cross-examine the plaintiff on the plaintiff's case without setting up a defence or by making submissions beyond the plaint case.

Section 120 of the Evidence Act provides that in all civil proceedings, the husband or wife of any party to the suit, shall be competent witness for each other. Thus, the only relief that

can be granted to the opposite party (wife) is the right to cross-examine the plaintiffs on the plaint case without setting up any defence of her own. Such cross-examination is allowed in view of the provision of law that the wife can be a witness on behalf of her husband. Thus the opposite party No.1 will have the right of cross-examination.

Under such circumstances, the order impugned is set aside. The learned court below shall proceed in accordance with law.

The revisional application is, thus, disposed of.

There shall be no order as to cost.

Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)