

13.03.2024
Court No. 19
Item no.21
CP

C.O. No. 303 of 2024

Sri Ajoy Bhiwaniwala @ Ajay Sharma
Versus
Sri Sandeep Bazaz

Mr. Dilip Kumar Samanta
Mr. Biswapriya Samanta

...for the petitioner.

Mr. Debjit Mukherjee
Mr. P. Jana
Ms. Susmita Chatterjee
Mr. Kaustav Bhattacharya
Mr. S. Chakrabarty

....for the opposite party.

1. The revisional application arises out of an order dated December 7, 2023, passed by the learned Judge, 3rd Bench, City Civil Court at Calcutta in Misc. Case No. 592 of 2020. The Misc. Case No. 592 of 2020 was filed in connection with Title Execution Case No. 64 of 2018.
2. The petitioner raises the point of maintainability of the suit by filing an application under Section 47 of the Code of Civil Procedure. According to the petitioner, the decree was a nullity as the same was passed by the learned City Civil Court in ignorance of the amendment brought in by Notification No. 2475-1 dated October 25, 1999, being the Presidency Small Causes Courts (West Bengal)

Amendment Act, 1999. Accordingly, the Presidency Small Causes Courts would have jurisdiction to decide the suit in terms of Clause (3) thereof.

3. In the present case, the suit was filed before the City Civil Court at Calcutta and the suit was decreed by the City Civil Court. Accordingly, the decree of eviction should not be executed. The decree could not be satisfied as the decree was a nullity on the ground of lack of jurisdiction of the court which passed the decree.
4. The learned court took up the application under Section 47 of the Code of Civil Procedure and dismissed the same with the following reasons:-
 - a) The suit for eviction under Section 2(g) of the West Bengal Premises Tenancy Act, 1997 was not for eviction of a premises tenant, but eviction of a trespasser.
 - b) The learned decretal court had already held that the petitioner was a trespasser by operation of Section 2(g) of the West Bengal Premises Tenancy Act.
 - c) The contention of the petitioner was hit by the principles of *res judicata* as the

maintainability of the suit had been decided by the learned City Civil Court.

d) The issue of nullity of the decree thus, could not be proved by the petitioner.

5. Mr. Samanta, learned advocate for the petitioner submits that the decree was passed in ignorance of law and the same was a nullity. A decree which was a nullity could not be executed. Question of satisfaction and discharge of such decree would not arise. The amendment was not considered and any suit under the the West Bengal Premises Tenancy Act would have to be decided by the Presidency Small Causes Court. Mr. Samanta further relies on the decisions of the Hon'ble Apex Court in the matter of Ajudh Raj & ors. vs. Moti s/o Mussadi, reported in (1991) 3 SCC 136 and in the matter of Most Rev. P.M.A. Metropolitan & ors. vs. Moran Mar Marthoma & anr., reported in 1995 Supp (4) SCC 286.

6. Mr. Samanta submits that the lack of jurisdiction with regard to the subject-matter, could be raised at any time and the learned executing court erred in not holding that the point should have been raised before the trial court.

7. Mr. Mukherjee, learned advocate appearing on behalf of the opposite party, submits that the suit was instituted in the City Civil Court at Calcutta with the specific pleading that the petitioner was a trespasser. The point of maintainability of the suit was decided by the learned City Civil Court, inter alia, holding that the petitioner was a trespasser. Such order was affirmed in the appeal by this court and the Hon'ble Apex Court rejected the special leave application. In the appeal as well, the jurisdiction of the City Civil Court was urged, but the Hon'ble appellate court did not deal with such issue at all, as the issue had become academic and the benefit of Section 2(g) could not be given to the son of the original tenant. The SLP was dismissed.
8. It is further submitted that the suit was not one contemplated under the the West Bengal Premises Tenancy Act, 1997. Mr. Mukherjee further relies on the decision of the Hon'ble Apex Court in matter of ***Hiralal Shaw vs. Ganga Shaw & ors.***, reported in ***(2019) 11 SCC 596***. A similar point arose before the Hon'ble Apex Court as to whether a suit under the Section 2(g) of the Premises Tenancy Act which was being heard by the Presidency Small

Causes Court, should be transferred to the City Civil Court, once the tenant died and five years had lapsed thereby rendering the person in occupation to be a trespasser by operation of law. The Hon'ble Apex Court decided that the issue as to whether the person in occupation became an encroacher by operation of law under Section 2(g) of the Premises Tenancy Act or continued to be a tenant, shall be decided by the learned Small Causes Court and if the finding was such that the occupier was not a tenant by operation of law, the plaint could be returned to be presented before the court of appropriate jurisdiction, i.e., the City Civil Court.

9. In this case, when the maintainability of the suit has been decided and the petitioner has failed upto the Hon'ble Supreme Court, the issue attained finality. The finding of the learned trial judge was that the eviction of the defendant would take place by operation of law.

10. There is a clear finding that the petitioner is a trespasser by operation of law. The question of non-executability of the decree would not arise. The Hon'ble Apex Court dealt with a

similar issue in ***Hiralal Shaw (supra)***. The facts

of the case were as follows:-

3. The suit was filed for eviction on many a ground. Though the evidence was recorded by the Small Cause Court, the plaintiff realising that the suit would not be maintainable for eviction as the respondents had ceased to be the tenants in law as per Section 2(g) of the Act, he filed Application No. 803 of 2013 before the High Court of Calcutta under Section 24(5) of the Code of Civil Procedure seeking transfer of the case to the regular court on the foundation that the respondents were no more tenants and hence, the regular civil court would have jurisdiction.

4. The High Court referred to certain decisions which pertain to vested rights of tenants but did not record a finding. However, the conclusion [Hiralal Shaw v. Ganga Shaw, 2014 SCC OnLine Cal 11286] recorded by the High Court reads as follows : (Ganga Shaw case [Hiralal Shaw v. Ganga Shaw, 2014 SCC OnLine Cal 11286] , SCC OnLine Cal paras 46 & 47)

“46. Having heard the learned Advocates for the respective parties one fact that clearly emerges is that there is no pleading at all in the plaint to the effect that the contesting opposite parties have lost their right of tenancy in the suit premises on the expiry of five years from the date of death or from the date of coming into force of the said Act of 1997, whichever is later. As discussed above, it will appear that the reading of the plaint indicates that the contesting opposite parties were asked to vacate the suit premises with the expiry of March 2002 or whenever tenancy month expires next but not on the expiry of five years as contemplated under the said Act of 1997. As discussed above, it will also appear that the plaintiff was willing to accept rent from January 2002. The learned Advocate for the contesting opposite parties also submitted that in the affidavit of evidence-in-chief the plaintiff-petitioner did not make out any case as contemplated under the said Act of 1997 insofar as the right of having protection from eviction for a period of five years as contemplated under the said Act of 1997 is concerned. The learned Advocate for the contesting opposite parties was right in

submitting that even if the prayer made in the application under Section 24 CPC is allowed the City Civil Court concerned cannot decide the suit in the absence of the necessary pleadings. The said learned Advocate was right in submitting that on the basis of the pleadings as it stands the prayer for transfer cannot be allowed. It is difficult to say, on the basis of the pleadings in the plaint, as pointed out by the learned Advocate for the contesting opposite parties, that the Small Cause Court concerned has lost its jurisdiction. It is true that the learned Advocates for the respective parties have made their submissions, as already noted above, but this Court is of the view that the matter can be disposed of on factual basis that the argument made by the learned Advocate for the plaintiff-petitioner is not supported by any appropriate pleading in the plaint.

47. In view of the discussions made above, the prayer for transfer as made in the application under Section 24 of the Civil Procedure Code is rejected and the said application under Section 24 CPC is, accordingly, dismissed.”

The submissions were as follows:-

“6. Mr Abhijit Sengupta, learned counsel for the respondents, per contra, would contend that the second proviso to Section 2(g) would protect the respondents inasmuch as the landlord by conduct has accepted the respondents as tenants and, therefore, in praesenti, they are the tenants and the Small Cause Court would still have jurisdiction to deal with the lis.

The Hon’ble Apex Court held as follows:-

7. On a perusal of the order passed by the High Court, we find that it has though proceeded to delineate on the vested right yet not recorded any finding and, therefore, we are not obliged to deal with the same. Suffice it to state that the High Court has rejected the application on the ground of pleadings.

8. We have been apprised that the evidence before the Small Cause Court is closed and the issue relating to the tenancy and trespasser is going to be argued as the evidence had been led on that score. A court is always entitled to deal with the existence

of its jurisdiction on the basis of certain facts which are in the jurisdictional realm. Therefore, in the fitness of things, it would be appropriate that the Small Cause Court record a finding with regard to the status of the respondents and if it expresses the view that they are not the tenants but encroachers, then it can take recourse to Order 7 Rule 10-A of the Code of Civil Procedure. Needless to say, if it comes to hold that they are the tenants, it shall proceed in accordance with law. The Small Cause Court is directed to dispose of the suit within a period of four months from today. Be it noted, we have not expressed any opinion on the merits of the case.”

11. The revisional application is dismissed.
12. The decisions cited by Mr. Samanta would not enure to the benefit of the petitioner under special facts and circumstances. There is no quarrel with the amendment which Mr. Samanta relies upon, but the said amendment would not apply in this case.
13. There shall be no order as to costs.
14. Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)