

02     **07.11.**  
**2024**  
Ct. No. 08

Ab

**FMAT 421 of 2024**  
**IA No. CAN 1 of 2024**

**Aditya Kasat**  
**Vs.**  
**Uttam Kumar Das and others.**  
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**Mr. Mainak Bose,**  
**Mr. Rishabh Karnani,**  
**Mr. Anurag Bagaria,**  
**Mr. Aniket Nanda.**

**... for the appellant.**

A disgruntled appellant is desperately attempting to get the ex parte ad interim order of injunction in a manner, which would deprive the right of a person in possession to use and enjoy the usufruct therefrom.

Admittedly, the respondent no. 1 approached the Thika Controller claiming that the properties is comprised in thika tenancy and he is a thika tenant. The Thika Controller passed an order declaring his right, title and interest as thika tenant and, therefore, his rights and the liabilities comes within the ambit of the West Bengal Thika Tenancy (Acquisition and Regulation) Act 2001 (in short 'said Act'). Subsequent to the acquisition of the said property by the plaintiff/appellant, it was noticed that the respondent no. 1 has been declared as thika tenant and an approach was made to a higher authority and direction was passed to dispose of the matter.

However, an observation was made by the higher forum that in the event any third party interest is created in respect of the subject property or any part thereof or in the event there is any contemplation to create a third party interest, the same should be notified to the competent authority as well as the appellant.

After the matter was remitted to the Thika Controller to take a conscious decision in presence of the

appellant, the Thika Controller took up the proceeding and ultimately held that the respondent no. 1 is not a thika tenant. As a resultant effect, the property in question is kept outside the purview of the said Act.

Taking advantage from the said decision, the present suit is filed for recovery of possession, permanent injunction and mesne profit against the respondents herein. In the said suit, an application for temporary injunction was taken out seeking an order of temporary injunction against the respondent no. 7 to deposit the lease rent with the Court or to pay the same to the appellant till the disposal of the suit. The Trial Court succinctly and vividly narrated the facts adumbrated herein above and declined to pass an ex parte ad interim order of injunction in such form, which is assailed before us.

Mr. Mainak Bose, learned Advocate appearing on behalf of the appellant, vociferously submits that a person, who has no title in respect of a property or in other words, a trespasser, cannot be permitted to use and enjoy the fruits of the properties either by letting out or by creating any interest in lieu of the consideration and, therefore, the Trial Court has committed error in not passing the ex parte ad interim order of injunction. He arduously submits that once the Court found the title in favour of the appellant, there is an infirmity in the ultimate decision where the ex parte ad interim order of injunction was refused. He heavily relies upon a judgment of the Apex Court rendered in case of **Bijay Kumar Manish Kumar HUF vs. Ashwin Bhanulal Desai**, reported in **(2024) 8 SCC 668** in support of the contention that there is no fetter on the part of the Court in directing the occupant to deposit the present prevalent market rent despite the fact that there was no eviction decree or order for recovery of possession having passed against him. According to him, the present case stands on a higher pedestal than that of the case involved in

the above report, as the respondent no. 1 has no right, title and interest in respect of a property and, therefore, he cannot reap the benefits of the property. He further submits that the creation of a lease in favour of the respondent no. 7 is subsequent to the order passed by the higher authority or in other words, in contravention thereto and, therefore, the Court should view the matter in such perspective while allowing the prayer of ex parte ad interim order of injunction.

We have given anxious consideration to the gamut of the arguments advanced by Mr. Bose, but could not persuade ourselves to the proposition sought to be argued for the reasons stated herein after.

Admittedly, the respondent no. 1 is in settled possession and the law respect possession unless such possession is disrupted by an order of the Court or a decree passed by the competent Court. The respondent no. 1 approached the Thika Controller claiming right under the said Act, which was initially granted, but later on it was held that the property does not come within the peripheral of the said Act; as a consequential effect, the right of the respondent no. 1 as a thika tenant was denied.

Be that as it may, a person, who is found in settled possession if deals with the properties unless evicted therefrom, such action has to be tested after valid order or a decree passed by the Court for his removal therefrom. Naturally, the concept of mesne profit/damages envisaged under the Code of Civil Procedure is activated and/or applied on getting an order of eviction, which is also highlighted by the Apex Court in **Bijay Kumar Manish Kumar HUF (supra)**. However, the Apex Court in the above report passed an order on an interlocutory application pending the Special Leave Petition upon the respondent therein to deposit the rent prevalent at the relevant point of time in order to show the bona fide.

A decision is what is decided in the facts of a case and in order to cull out the ratio; the Court must look into the distinguishing features. One stray sentence or the observation made in the Court may not ordinarily constitute a ratio of the decision, which is to be deciphered upon reading the full text of the judgment and the point sought to be answered and/or determined therein. In the given report, a suit was filed by the landlord on forfeiture of a lease for non-payment of lease rent. The defence was taken by the respondent that the premises is not governed under the Transfer of Property Act but under the West Bengal Premises Tenancy Act, 1956 and, therefore, the suit is not maintainable.

A preliminary issue was directed to be framed and decided by the Court at the first instance. Such issue was decided in favour of the landlord by the Trial Court, but the same was reversed by the High Court. According to the High Court, the tenancy is governed by the West Bengal Premises Tenancy Act and not by the Transfer of Property Act and, therefore, the suit under Transfer of Property Act is not maintainable.

The order of the High Court was assailed before the Supreme Court and amidst the pendency thereof, the interlocutory applications were filed alleging that the respondent cannot be permitted to continue in occupation without payment of any consideration.

In the backdrop of the above, the Apex Court was placed with the lease executed between the parties and on behalf of the landlord therein. A report was filed evincing the prevalent market rental at the locality. Though the Apex Court was conscious of the right to claim mesne profit/damages arises after the eviction order is passed yet the Court found that the moment a person is allowed to remain in possession on the strength of a grant having accorded prior thereto, he should not be permitted to stay without any consideration thereto. The Apex Court also found that

the valuer's report on ascertainment of the prevalent market rental of the property remain unchallenged and, therefore, the denial of monetary benefit accruing from the property would amount to unjust enrichment in the following:

“Having considered the submissions made across the Bar, we note that the disputed nature of the lease deed, in other words, its continuation or forfeiture on account of non-payment is heavily contested and stemming therefrom, so is the nature of payment to be made. We also note that the location of demised premises is in the heart of Kolkata and if the submissions of the petitioner are to be believed, they have been deprived of rent for a considerable period of time. Taking a lock stock and barrel view of the present dispute, the averments and the documents placed before us, we may record a prima facie view, that the respondent tenant has for the reasons yet undemonstrated been delaying the payment of rent and/or other dues, payable to the petitioner applicant landlord. This denial of monetary benefits accruing from the property, when viewed in terms of the unchallenged market report forming part of the record is undoubtedly substantial and as such, subject to just exceptions, we pass this order for deposit of the amount claimed by the petitioner applicant, to ensure complete justice inter se the parties.”

In the above report, admittedly, there was a relationship of a lessor and lessee or landlord and tenant between the parties. The written documents were also executed by the parties therein evincing the extent of the occupation and the consideration in lieu of the rent. Though the Apex Court has directed the deposit of the present market rental of the property, but on the basis of an unchallenged report in presence of the parties. The ratio laid down in the said judgment cannot be universally applied towards the situation when the plaintiff has applied for an ex parte ad interim order of injunction.

A person has a right to the property even if such right has been subsequently taken away, unless the

possession is disrupted, he cannot be deprived to use and enjoy the property on the strength of such possession. Any wrongful gain is susceptible to be determined and may be provided to a person entitled thereto, but unless such situation arise, it would not be proper for the Court to pass an ex parte ad interim order of injunction depriving a person of certain rights, which may have diminished and/or diluted subsequently by means of a judicial fiat.

The Court has issued a show-cause against the respondent with a view that their presence is necessary before the Court embarked its journey on the peripheral of an interim order to be passed therein, which cannot be said to be infirm and/or illegal. The Trial Court was conscious of the mandates given under Order XXXIX Rule 3 of the Code of Civil Procedure, which provides that the Court should not pass an order in absence of defendant unless the delay in passing the order would defeat the very purpose. It is also mandated therein that while embarking thereupon, it is obligatory on the part of the Court to record the reasons.

We are conscious that the consideration at the time of passing the ex parte ad interim order of injunction is different than the consideration at the time of disposal of the temporary injunction application. Even if the Court finds the prima facie case having made out yet if the Court finds that there is no eminent threat that would be caused in the interregnum, it is imperative to issue notice upon the defendants and decide the same in their presence.

We, thus, do not find there is any ground warranting interference with the impugned order. The appeal is dismissed.

In view of the dismissal of the appeal itself, the connected application being CAN 1 of 2024 has become infructuous and the same is also dismissed.

In view of the pendency of the appeal, time to put

in the requisites as directed by the Trial Court in the impugned order is extended for one week from date.

Urgent Photostat certified copy of this order, if applied for, be given to the parties within three days from the date of the application.

**(Harish Tandon, J.)**

**(Prasenjit Biswas, J.)**