

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Bibhas Ranjan De

F.M.A 1253 of 2022

Smt. Kalpana Sadhukhan & Ors.

Vs.

M/s. Kwaliti Ice Cream (I) Ltd. & Anr.

For the Appellants

:Mr. Saumyen Datta, Adv.

Mr. Aniket Mitra, Adv.

Mr. Tapas Singha Roy, Adv.

Mr. Munir Ahmed, Adv.

Last Heard on

:11.12.2024

Judgment on

:13.02.2025

Bibhas Ranjan De, J.

1. The instant appeal has arisen out of an order of remand dated 19.02.2021 passed by the Ld. First Appellate Court, Ld. Additional District Judge, 6th Court, Alipore in connection with Ejectment Appeal no. 36 of 2012 wherein the judgement and

decree dated 18.09.2012 in connection with Ejectment Suit no. 68 of 2006 was set aside and remanded back for consideration afresh from the stage of argument.

Brief facts:-

2. According to the plaintiffs the background of the case in a nutshell is that the plaintiffs are the landlord and defendant no. 1 was a tenant and that tenancy was created by the predecessor-in-interest of the plaintiffs. Thereafter, allegedly the defendant no. 1 sublet the subject property to defendant no. 2 without the knowledge of the landlord and subsequently winded up their business and handed over the possession of the suit property to the defendant no. 2. The plaintiffs issued an eviction notice to no effect as the defendants did not vacate the said premises and hence an eviction suit being Ejectment suit no. 68 of 2006 was instituted at the behest of the plaintiffs in which defendant no. 1 did not appear but defendant no. 2 duly contested the suit by filing written statement. During the course of trial a good number of documentary evidences were exhibited on behalf of both the parties. Based upon which a judgment and decree dated 18.09.2012 was decreed in favour of plaintiffs by the Ld. Trial Court. Being aggrieved the defendant no. 2 filed an

appeal challenging the legality of the order impugned before the Ld. First Appellate Court in connection with Ejectment Appeal no. 37 of 2012. During the course of entire proceeding the defendant no. 2 tried to amend its written statement although unsuccessfully upto the Hon'ble Apex Court. Defendant no. 2 also wanted to adduce additional evidence before the Ld. First Appellate Court which was also rejected.

3. But, vide the impugned order dated 19.02.2021 the Ld. First Appellate Court decided to remand the matter back to the Ld. Trial Court from the stage of argument and granted opportunities to the parties to re-agitate and place all relevant materials already on record in support of their rival contentions. Being aggrieved, the plaintiffs/appellants have filed the instant appeal.

At the Bar:-

4. Ld. Advocate, Mr. Saumyen Datta appearing on behalf of the appellants has tried to make this Court understand that the Ld. First Appellate Court though discussed the case but did not decide on all the issues and kept the issue relating to default untouched. Mr. Datta has further submitted that the plaintiffs never accepted any rent from the defendant no. 2. Rather the

same was accepted from Defendant No. 1. By relying on the materials on record Ld. Counsel has argued that there is no landlord/tenant relationship between the appellants and defendant no.2.

- 5.** Mr. Datta has further highlighted the fact that the defendant no. 2 tried to amend its written statement before the Appellate Court through an application under Order VI Rule 17 of the Code of Civil Procedure (hereinafter referred to as CPC) which was dismissed upto Hon'ble Apex Court. Thereafter, the defendant no. 2 filed an application under Order 41 Rule 27 of CPC before the Appellate Court for introduction of new documents which was also rejected.
- 6.** Before parting with, Mr. Datta has vehemently submitted that defendant no. 1 & 2 are separate legal entities and in addition to that defendant no. 2 could not produce any scrap of paper to show that defendant no. 2 is the change of defendant no. 1 or the plaintiffs have ever accepted defendant no.2 as tenant. Therefore, it is contended that there is change of legal entity in the eye of law and for such change and act on the part of the defendant no. 2 is nothing but change of tenancy and not merely change of name of the tenant. As a result, the finding of

the Ld. First Appellate Court is based on non-exhibited documents and it is perverse in the eye of law.

7. In support of his contention, Mr. Datta has relied on following cases:

- ***Joyram Das vs. Sudhir Kumar Sen*** reported in **(2001) ILR 2CAL231**
- ***Delhi Stationers and Printers vs. Rajendra Kumar*** reported in **1990 AIR SC 1208**
- ***Prasad Technology Park Ltd. vs. Sub-Registrar and others*** reported in **2006 SCC 1 473**
- ***Pioneer Protective Glass Fibre p. Ltd. vs. Fibre Glass Pilkington Ltd.*** reported in **1984 SCC OnLine Cal 171**
- ***Ram Sarup Gupta (Dead) by Lrs vs. Bishun Narain Inter College and others*** reported in **1987 SCC 2 555**

8. Through the above judgments Mr. Datta has tried to distinguish the following ratios in order to further strengthen his submission:-

- Consideration of the relevant Sections of the Companies Act, 1956 would reveal that change of name of existing companies, does not result in its dissolution and incorporation of a new company under a new name. Section

21 of the statute permits a company to change its name in the manner as prescribed and nothing else. Ex facie, the section indicates that the company continues in a new name.

- If a person allows another to build on his land in furtherance of the purpose for which he had granted licence, subject to any agreement to the contrary (sic he) cannot turn round, later on, to revoke the licence. This principle is codified in Section 60(b) of the Indian Easements Act. Moreover, conduct of the parties has been such that equity will presume the existence of a condition of the licence by plain implication to show that licence was perpetual and irrevocable.
- Order 43 Rule 23A of the Code of Civil Procedure should be sparingly used as it is the public policy that a litigation is to be concluded finally as early as possible. Where, of course, remand is felt necessary after judicial consideration and when Rule 25 of Order 41 of the Code of Civil Procedure is not considered to be adequate, the appellate court may consider the question of an open remand. If the trial judge has considered the entire evidence and decreed the suit with a finding, in such a case, it is the duty of the appellate court to consider the matter as it stands and to give its own finding

in reversal of findings of the trial court. The appellate court should strictly comply with the provisions of Order 41 Rule 27 of the Code of Civil Procedure.

9. None appears on behalf of the respondents.

Analysis:-

10. The main grievance of the appellant is that the course adopted by the Learned Appellate Court is absolutely wrong for the reason that the suit was remanded with a direction upon the Trial Court to consider the evidence along with documents on record particularly on the issue of change of tenancy of the subjected premises i.e. conversion of private limited company into a public limited company which, in his opinion, does not amount to Sub-letting.

11. As a Prelude to our examination of the merit, I propose to reproduce the order of the Appellate Court, a decision that has far-reaching implications and sets that stage for our deliberation. The said order runs as follows:-

“ ... It has been strenuously argued on behalf of the appellant that at the time of service of the ejectment notice (Ext-3) on 07.03.2006 u/s. 6(4) of the West Bengal Premises Tenancy Act, 1997 the respondents/plaintiffs were very well aware that the defendant No. 1's name has been only changed and renamed as defendant No.2 from 8th August 1984 but with same Registration Number as will be evident from

the Fresh Certificate Of Incorporation Consequent On Change Of Name so issued by Registrar of Companies and marked as Ext-X1. In this regard the appellant/defendant also relied upon the photostat copy of its Memorandum and Articles of Association so marked as Ext-X2 to show that initially the name of the Company was Gay Ice Cream (Cal) Pvt. Ltd; then changed to Kwaliti Ice Cream (Cal) Pvt. Ltd.; then changed to Kwaliti Ice Cream Limited; then changed to Kwaliti Ice Cream (India) Limited and then to Kwaliti Ice Cream Pvt. Ltd and such changes took place due to amendment of Companies Act, 1956. The same find place in paragraph No. 6 of the written statement and DW-1 also corroborates the same. But I find from the record that such documents could not be exhibited during trial being Photostat copies and thus, no reliance can be placed upon it and in this regard I am at par with the finding so arrived by the Ld. Trial Judge. At the same time I am not at par with the finding of the Ld. Trial Judge that Kwaliti Ice Cream Pvt. Ltd admitted to have transferred whole business of the Company to M/s. Hindusthan Lever Limited as DW-1 has categorically deposed during cross-examination that it is only the business of Ice Cream which was transferred to M/s. Hindusthan Lever Limited prior to February 2007 and the remaining business was retained by them. It is also true that the change and transfer of business to M/s. Hindusthan Lever Limited at the behest of the defendant Company is dehors of pleading and the Ld. Court below should have taken into account that it is the settled law that no party should be permitted to travel beyond its pleading and those reliefs which are not founded on the pleadings cannot be considered and ought not be granted. In this regard I take a cue from the citations so relied upon by the Ld. Counsel for the appellant/defendant so reported in (1987) 2 SCC 555 (Supra) and (2011) 3 SCC 436 (Supra). I also find from Ext-6 that in terms of Special Resolution passed by the appellant Company in its Annual General Meeting held on 10th September 2010 it was converted into LLP(Limited Liability Partnership) under the provision of LLP Act, 2008 and it is the specific finding of the Ld. Trial Judge that the defendant No. 1 did not attorn the said facts of resolution and conversion to the respondents/plaintiffs. Attornment is an act by which

a tenant acknowledges his obligation to a new landlord. It has been held by the Hon'ble Apex Court in AIR 1967 SC 174 in the case of Uppalapati Veera Vs. Josyula that attornment implies a continuity of the tenancy created by the original landlord in favour of the tenant. It is in these circumstances that the existing tenant, for the rest of the period of his tenancy, agreed to acknowledge the new landlord as his landlord. Thus, the tenant by his acts substitutes the new landlord in place of the previous one. Once the tenant has agreed to accept the person claiming title from the previous landlord, it amounts to effective attornment in favour of the landlord who is no more dependent on the future conduct of the tenant by way of payment of rent or otherwise. In such backdrop, the finding so arrived at by the Ld. Trial Judge is capricious. It is also the trite law that mere change of name of a tenant and/or conversion of a tenant/Company which is a Private Limited Company into a Public Limited Company and vice versa, does not amount to sub-letting and/or creation of sub-tenancy. In this regard the citation so relied upon 14. Counsel for the appellant/defendant in the case of 2006(1) SCC 473 (Supra) and 1984 SCC Online Cal 171 (Supra) deserves consideration. Taking into account the entire aspect of the matter as appearing from the evidence on record I was of the considered view that all those aspects so discussed herein above were not properly addressed by the Ld. Trial Court below while passing the impugned Judgment which needs to be addressed properly for adjudication of the lis. Thus, I think that ends of justice will sub-serve if the Judgment impugned is set aside and the case is remanded back to the Ld. Trial Court below for consideration afresh from the stage of argument and after taking into consideration entire aspect of the matter and the evidence on record the Ld. Trial Court below will rewrite a fresh judgment at the conclusion of trial in accordance with law without being influenced by any of the observation made herein above. The Ld. Court below will give ample opportunity to both sides to re-agitate and place all relevant materials already on record before it in support of their rival contentions..."

12. In a significant reversal, the Appellate Court recorded its finding of **remand** on the issue of change of tenancy, which according to him had been inexplicably overlooked by Trial Court.

13. Learned Trial Judge delineated the issue of change of tenancy in the issue no. 5 which is now reproduced below:-

“ Issue No.5:-

From the above discussions it is seen that there is no relationship of landlord and tenant in between the plaintiffs and defendant no.2 and the relationship exist in between the plaintiff and defendant no.1. Now admittedly the defendant no.2 is in physical possession of the suit premises through its men and agents, though there is no privity of contract in between the plaintiff and defendant no.2 Exhibit 1 shows that the lease Agreement was made in between the predecessors in interest of the present plaintiff and the defendant no.1. There is/ was no agreement in between plaintiffs and defendant no.2.

D.W.1 who deposes on behalf of the defendant no.2

states that the name of the company has been changed in different material time. Initially, the name of the company.

the name of the company was cray Ice cream (cal) Pvt. Ltd and then changed to kwalky Ice cream (cal) pvt Ltd and then changed to kwalky Ice cream Ltd and then changed to Kwalky Ice cream (India) Ltd and then to kwalky Ice-cream pvt Ltd. However, there is no evidence on record on behalf of the defendant to corroborate the same.

It is admitted by D.W.1 that the business of the defendant company has been transferred to M/s Hindusthan lever Ltd before February, 2007.

On careful perusal of Exhibit Nos. 5,6,7 and 8 it appears to this court that there is no company in existence at present in the name of Kwalky Ice cream Pvt. Ltd i.e. the defendant no.1 and the kwalky Ice

cream Pvt. Ltd. was dissolved and converted into LLP (Limited liability partnership) in terms of special Resolution passed by the company in the A.G.M.(Annual General Meeting) held on 10th September, 2010 (Exhibit-6) and the designated name of the LLP as per the said special resolution is resolution is kwalky Icd cream (India) LLP, i.e. the defendant no.2. However, admittedly the defendant no.1 did not attorn the said fact of resolution and conversion to the plaintiffs. Moreover, it further appears to this court that the kwalky Ice cream PVT Ltd. admitted to have earlier transferred whole business of the company to M/s Hindusthan lever Ltd and Hon'ble company law Board vide its order dated 25th September, 2008 (Exhibit 5) allow the petition of the company for shifting its Registered office from West Bengal to National Capital Territory of Delhi and the same fact is admitted by D.W.1. Therefore, it is proved that defendant No.1 is not in possession of the suit premises and has sub-let the suit premises to defendant no.2 without the knowledge and consent of the plaintiffs.

Hence, the issue is decided in favour of the plaintiffs.”

14. Ld. Trial Judge, in terms of evidence, recorded his findings to the effect that defendant no. 2 was not a tenant in respect of subject premises through any kind of tenancy agreement whatsoever rather defendant no. 1 removed its office to Delhi and indicated defendant no. 2 as sub-tenant who is in possession of the suit premises, going into the issue of change of tenancy in absence of specific pleading to that effect.

15. It is intriguing to consider why the Trial Court chose to side step the pivotal question of change of tenancy.

16. It is not disputed that the issue of change of tenancy has not been delineated in the written statement in save and except change of Private limited to India Limited. But the Trial Court found from the admission in evidence that business of the defendant company transferred to M/s Hindustan Lever Limited whereas no evidence was adduced to corroborate change of tenancy delineated in paragraph 6 of the written statement.

17. To repair the follows, respondent/defendant filed an application under Order 6 Rule 17 of the CPC with a prayer for amending the grounds of appeal by incorporating the details of change in tenancy and also a petition under Order 41 Rule 27 CPC to adduce additional evidence before the Ld. Appellate Court in Ejectment Appeal No. 36 of 2012, on 05.05.2014 and 29.05.2014 respectively.

18. Both the applications were dealt with by the order dated 29.05.2014. The prayer of the application under Order 6 Rule 17 CPC was refused. The said order of refusal was challenged before a Co-ordinate Bench of this Court in C.O no. 1936 of 2014 which was concluded with a ruling that upheld the initial order of rejection and that issue was finally brought to a close with the order of the Hon'ble Supreme Court in S.L.P No. 1719

of 2016. However, the application under Order 41 Rule 27 CPC was directed to be heard along with Ejectment Appeal No. 36 of 2012.

19. Now it is very much pertinent to mention here that an application under Order 41 Rule 27 CPC was also rejected by the Learned Appellate Court on 05.12.2018 in Ejectment Appeal No. 36 of 2012.

20. Upon reviewing the record, it is evident that the respondent/defendant made a concerned effort to formally document the change of tenancy by filing two petitions i.e. under Order 6 Rule 17 CPC & under Order 41 Rule 27 CPC. But that effort was ended in smoke by the order of this Hon'ble Court and the Hon'ble Supreme Court.

21. In the aforesaid view of the matter, the Learned Appellate Court erred in remanding the suit to the Trial Court with instruction to rehear the same and render a new decision that too after giving opportunity to both sides to re-agitate the issue on the evidence already available on record. Learned Appellate Court, in my opinion, overlooked the findings of Learned Trial Court on the issue no. 5 pursuant to deliberations on the issue of subletting concerning the admissibility of defense witnesses.

22. On examination of findings of the Trial Court on issue no-5, I find that specifically the question of admitting defense witnesses resulted in the following key finding:-

“...Therefore, it is proved that defendant no. 1 is not in possession of the suit premises and has sub-let the suit premises to defendant no. 2 without knowledge and consent of the plaintiffs.”

23. Thus, I am of the humble view that the findings above do not justify any form of intervention or interference.

24. In the result, the appeal being no. FMA 1253 of 2022 stands allowed without any order as to costs. The Judgement dated 19.02.2021 passed in Ejectment Appeal no. 36 of 2012 is hereby set aside.

25. Connected application, if there be any, stands disposed of accordingly.

26. Trial Court Record be transmitted back immediately.

27. Parties to act on the server copy of this order duly downloaded from the official website of this Court.

28. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]