

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

C.O.3073 of 2022
Dr. Binoy Ranjan Roy
VS.
Smt. Kabita Shaw

For the Petitioner :Mr. Rahul Karmakar, Sr.Adv.
Mr. Sounak Mukherjee, Adv.

For the opposite party :Mr. Debdipto Banerjee, Adv.
Mr. Soumen Banerjee, Adv.
Mr. Sanjoy Dutta, Adv.

Last Heard On :**08.01.2025**

Judgment On : 21.03.2025

Bibhas Ranjan De, J. :

1. The instant revision application has been filed by the petitioner challenging the order dated 14.12.2021 passed by the Ld. Civil Judge Junior Division, 1st Court, Sealdah in connection with a suit for eviction being Ejectment Suit no. 48 of 2012 whereby the

Ld. Trial Court rejected an application preferred under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as CPC) filed by the petitioner for amendment of the plaint.

Brief Facts:-

2. On 14.06.2012 the petitioner had instituted an Ejectment Suit for recovery of possession under relevant provisions of the West Bengal Premises Tenancy Act, 1997 (hereinafter referred to as WBPT Act) on the ground of default and reasonable requirement which was registered as Ejectment Suit no. 48 of 2012. The original tenant namely Bhola Nath Shaw died on 14.02.2011. It is the case of the petitioners that as the tenancy was commercial in nature, it was succeeded in terms of Section 2(g) of the WBPT Act by the widow of the original tenant. During pendency of such suit the specific protection of five years which is granted by the Statute expired, due to efflux of time and as a sequel the defendant became a trespasser. Therefore, the petitioner filed an amendment application on 21.01.2020 with a prayer to convert the present suit to an eviction suit under Section 2(g) of the WBPT Act which was rejected by the Ld. Trial Judge by virtue of the impugned order. Hence the petitioner preferred the instant

revision application under Article 227 of the Constitution of the India for setting aside of the same.

At the Bar:-

3. Ld. Sr. Counsel, Mr. Rahul Karmakar, appearing on behalf of the petitioner by relying on the settled proposition of law has submitted that in case of commercial tenancy the lifetime interest of the widow to succeed a tenancy of her deceased husband is not available unlike the residency tenancy. Mr. Karmakar has further added that after death of the original tenant the defendant succeeded to the said tenancy. The suit was filed within five years tenure as provided under Section 2(g) of the WBPT Act and therefore the defendant was a tenant within the meaning of such provision. Therefore the suit was filed under the provision of Section 6 of the said Act and immediately after 14.02.2016 the defendant became a trespasser when the tenure of said five years expired from the death of the original tenant.
4. In support of this contention, Mr. Karmakar has averred that the cause of action of the defendant being declared as a trespasser arose only after declaration of such law by the Hon'ble Apex Court in the month of November, 2019. Therefore, under no

circumstances the petitioner would have sought for incorporation of the present ground of eviction earlier.

- 5.** Mr. Karmakar has also contended that only by acceptance of rent by the landlord, protection enjoyed by the heirs of a deceased tenant under the Section 2(g) of the WBPT Act cannot be converted into a new tenancy and immediately upon the expiration of such protection, the existing heirs who are being treated as a tenant for limited purpose shall be rendered as trespasser.
- 6.** Before parting with, Ld. Counsel has concluded that while adjudicating an amendment application, the Court is required to look into whether the amendment sought for changes the nature and character of the suit and whether the same is required to address the real controversy in issue. The Trial has not commenced in the suit and as such, the rigours of the proviso to Order VI Rule 17 of the CPC shall not apply.
- 7.** Mr. Karmakar further continued that the suit was filed for eviction of the defendant who claimed to be the widow of the original tenant. The suit was filed within 5 years from the death of the original tenant. Therefore, it had to be filed under the provisions of Section 6 of the WBPT Act. The heir of the original

tenant immediately after the expiry of the said 5 years was rendered a trespasser as it was commercial tenancy and as such by operation of law the petitioner is entitled to incorporate such ground being a subsequent fact in the present suit. Therefore, the nature and character of the suit which was originally filed for eviction of the heir of a deceased tenant remains the same. As the real controversy in issue being the eviction of the heirs of the original deceased tenant remains the same even after the amendments are permitted, thus, under no circumstances, the nature and character of the suit can be claimed to be converted if the present amendment is allowed.

8. In order to further substantiate his argument, Mr. Karmakar has relied on the ratios of the following judgments on the identical issue:-

- ***Nasima Naqi vs. Todi Tea Company Limited and others***
reported in **2018 SCC OnLine Cal 16823**
- ***Nasima Naqi vs Todi Tea Company Ltd. and Others***
reported in **2019 SCC OnLine SC 1601**
- ***Mangalic Enterprise vs. Swapan Kumar Das and others***
reported in **2022 SCC OnLine Cal 2036**

- ***Assistant Commissioner, Income Tax Rajkot vs. Saurashtra Kutch Stock Exchange Limited vs. Saurashtra Kutch Stock Exchange Limited*** reported in ***(2008) 14 Supreme Court Cases 171***
- ***Narain Prasad Aggarwal vs. State of Madhya Pradesh*** reported in ***(2007) 11 Supreme Court Cases 736***
- ***Samir Kumar Kundu vs. Dipali Roy and others*** reported in ***2019 SCC OnLine Cal 8172***
- ***Sri Prabir Koley @ Prabir Kumar Koley vs. Sri Subir Panja*** reported in ***2024 0 Supreme (Cal) 647***

9. Per Contra, Ld. Counsel, Mr. Debdipto Banerjee, appearing on behalf of the opposite party at the very outset has argued that the said amendment application is mala fide and changes the nature and character of the suit, as rightly observed by the Learned Trial Court. Therefore, there is no requirement for any sort of interference with the impugned order.

10. Mr. Banerjee has further argued that it is the specific case of the petitioner that the opposite party became a sole tenant in respect of the suit property and that the opposite party has sent letter through her Advocate claiming tenancy right and the petitioner has admitted the opposite party as tenant. The

petitioner also sent attornment letter to the opposite party which was accepted by the defendant as tenant and a relationship of landlord and tenant was created between the plaintiff-petitioner and the defendant-opposite party. The plaintiff also admits receiving of rent from the opposite party. Such categorical admission made by the petitioner that there is a new relationship of landlord and tenant between the petitioner and the opposite party, cannot be allowed to be withdrawn by way of an amendment by causing prejudice to the opposite party as the whole cause of action of the suit shall be altered.

- 11.** In his concluding argument, Mr. Banerjee has raised a pure question of law that the said amendment application is barred by the principles of constructive res judicata and/or the doctrine of waiver. The second amendment application which is subject matter of challenge in the instant revision application is also barred by the principles of constructive res judicata as the plea of Section 2(g) of the WBPT Act, if at all is said to be applicable in the instant case, the same was available at the time of preferring the first amendment application but that was not taken up by the petitioner herein in the first amendment application, in spite

of having knowledge of the date of death of the initial original tenant.

12. In support of his contention, Mr. Banerjee has taken assistance of following cases:-

- ***State of U.P. vs. Nawab Hussain*** reported in **(1997) 2 Supreme Court Cases 806**
- ***Asgar and others vs. Mohan Varma and others*** reported in **(2020) 16 Supreme Court Cases 230**
- ***P. Dasa Muni Reddy vs. P. Appa Rao*** reported in **(1974) 2 Supreme Court Cases 725**
- ***Arce Polymers Private Limited vs. Alphine Pharmaceuticals Private Limited and others*** reported in **(2022) 2 Supreme Court Cases 221**

13. In the cases of ***Nawab Hussain*** (supra) & ***Asgar*** (supra) the Hon'ble Apex Court while discussing about the principle of constructive *res judicata* observed that same set of facts may give rise to two or more causes of action and in such a case if a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation then it would aggravate the burden of litigation. It is indeed necessary to raise the bar of *res judicata* by suitably

construing the general principle of subduing a cantankerous litigant.

- 14.** In cases of *P. Dasa Muni Reddy* (supra) & *Arce Polymers Private Limited* (supra) the Hon'ble Supreme Court has tried to shed light on the concept of waiver by observing that waiver is an intentional relinquishment of a known right. Waiver applies when a party knows the material facts and is cognizant of the legal rights in that matter, and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege. Waiver can be contractual or by expressed conduct in consideration of some compromise. However, a statutory right may also be waived by implied conduct, like, by wanting to take a chance of a favourable decision. The fact that the other side has acted on it, is sufficient consideration.

Analysis:-

- 15.** As a preliminary measure, it would be judicious to commence by reproducing the pertinent provisions that form the foundation of our discussions thereby providing a comprehensive framework for ensuing analysis:-

“ 2(g) of the WBPT Act-

(g) "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 predeceased 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 dependent on him and who do not own or occupy any residential premises, and 2 [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 authorised 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, 2 Subs, by W.B. Premises Tenancy (Amendment) Act, 2002 (W.B. Act 14 of 2002) (w.r.e.f. 10.7.2001) for the following : "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 dependent on him". 2 Provided further that the son, daughter parent or the widow of the predeceased 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 dependent 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 1 [on condition of payment of fair rent]. This proviso shall apply mutatis mutandis to premises let out for non-residential purpose.”

Order 6 Rule 17 CPC-

[17. Amendment of pleadings. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence. the party could not have raised the matter before the commencement of trial.]

16. After considering rival contentions, it appears that the sole point of contention in this revision application is whether the application for amendment has the effect of altering the fundamental essence and character of the suit, thereby raising questions about the potential application of such a modification.

17. Mr. Karmakar has astutely contended that the widow of original tenant shall have no protection under the provision of Section 2 (g) of WBPT Act in respect of any commercial

tenancy i.e a shop room which is the subject matter of the suit.

18. Notwithstanding, the aforementioned assertions, Mr. Banerjee has countered that, subsequent to demise of her husband, the original tenant, the defendant did indeed tender a letter of attornment, which was duly accepted by the landlord/petitioner herein. Mr. Banerjee has further endeavored to enlighten this Court regarding the purported creation of a novel tenancy, thereby attempting to establish a fresh lease hold arrangement.

19. From the rival contentions, a tapestry of truth emerges, woven from the following admitted facts that shine like beacons:-

- a. Subject premises is one shop room i.e. for non-residential purpose.
- b. One Mr. Bhola Nath Shaw, husband of the petitioner, was inducted as tenant initially in respect of suit shop room. Mr. Bhola Nath Shaw died on 14.02.2011.
- c. The suit was filed in the year 14.06.2012.

d. The defendant/petitioner herein has been occupying the subject premises for non-residential purpose for more than 5 years.

e. The amendment application was filed in the suit after 5 years of death of original tenant.

20. Notwithstanding, the commencement of trial, the proviso to order 6 Rule 17 of the CPC graciously permits the amendment of pleadings, but only when the parties seeking such amendment can convincingly demonstrate that, despite exercising utmost diligence and due care, he was unable to gather requisite information.

21. Further, it is pertinent to note that the applicability of Section 2(g) of the WBPT Act in the context of non-residential premises has been unequivocally settled by the esteemed Co-ordinate Bench of this Hon'ble Court (**Nasima Naqi**) supra, as well as the Hon'ble Apex Court (**Nasima Naqi**) supra, through their landmark judgements, which have laid down the following principles:-

“ 23. The two principal legal questions are, thus, answered as follows:

i. The spouse of a deceased tenant is not entitled to protection from eviction in respect of premises let out for non-residential

purpose beyond the period of five years from the date of death of the original tenant if such original tenant died after the coming into force of the Act of 1997.

- ii.** *The spouse of a deceased original tenant does not have any right to have a fresh agreement executed in such spouse's favour in respect of any premises let out for non-residential purpose if the decree-holder landlord wishes to let out the premises afresh upon obtaining the decree or possession of the premises pursuant to the decree.”*

22. Notwithstanding, the fact that amendment application was submitted after considerable lapse of five years following the demise of the original tenant, specifically relating to non-residential premises, the defendant's contention that a fresh tenancy had been established subsequent to the passing of the original tenant presents a compelling narrative that warrants careful consideration.

23. I am of the humble view that the factum of furnishing a letter of attornment, as well as creation of tenancy, presents a complex and intriguing confluence of factual and legal consideration, thereby rendering it to be a multifaceted and nuanced issue that necessitates a meticulous examination of both the underlying facts and the applicable legal principles, through trial of the suit.

- 24.** Consequently, the proposed amendment, being a subsequent event, cannot be construed as an attempt to alter the fundamental essence and character of the suit, thereby preserving the original contours of the litigation.
- 25.** As a sequel, the revision application being no. C.O. 3073 of 2022 stands allowed. The Order impugned in this revision application stands set aside.
- 26.** Proposed amendment stands allowed. Plaintiff/petitioner herein is directed to file amended plaint within the time prescribed by the Ld. Trial Court and the defendant/opposite party herein is also at liberty to file additional written statement within the time fixed by the Ld. Trial Court.
- 27.** Interim order, if there be any, stands vacated.
- 28.** Connected applications, if there be, also stand disposed of accordingly.
- 29.** Parties are permitted to communicate this order to the Ld. Trial Court forthwith.
- 30.** Parties to act on the server copy of this order duly downloaded from the official website of this Court.

- 31.** Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]