

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

PRESENT:

**The Hon'ble Justice Nishita Mhatre
And
The Hon'ble Justice R. K. Bag**

F.M.A.T. No. 50 of 2015

With

C.A.N. 1146 of 2015

Debrabata Mukherjee

... Appellant

vs.

Arup Guha and Ors.

... Respondents

For the appellant :Mr. Ashis Kumar Sanyal
Mr. Basudeb Gayen
Mr. Amar Kumar Bhowmick
Mr. Sandip Kundu

For the respondents :Mr. Saptangshu Basu
Mr. Ganesh Prasad Shaw
Mr. Farhan Faffar

Heard on : 23.03.2015

Judgment on : 24.04.2015

Nishita Mhatre, J.:

1. Being aggrieved by the decision of the Trial Court dated 12th December, 2014 in Title Suit No.2015 of 2009, the appellant has approached this Court. By the impugned order the Trial Court has held that it had no jurisdiction to entertain the suit and therefore, passed an order under Order 7 Rule 11 of the Code of Civil Procedure (for short "CPC") rejecting the plaint. The Court was of the view that the plaint

could not be entertained as it was barred by the provisions of the West Bengal Premises Tenancy Act, 1997 (hereinafter referred to as “WBPT Act, 1997”).

2. A brief chronology of facts is required to be mentioned in order to comprehend the relationship between the parties. The appellant filed proceedings under Section 26(3) of the WBPT Act, 1997 in which he prayed for a declaration that he was a direct tenant of M/s. Chamaria Properties Private Limited, i.e., the Respondent No.4 herein. The application was dismissed on 19th June, 2012 by the Controller on the ground that the Controller was barred from passing any order in view of the fact that litigations between the parties were pending in the civil courts.

3. Proceedings under Section 41 of the Presidency Small Cause Courts Act, 1882 (hereinafter referred to as “the Act of 1882”) were filed by the Respondent Nos. 2 and 3 on 17th December, 2003 for recovery of possession of the suit premises from the appellant herein. The Respondent Nos. 2 and 3 contended in the aforesaid application that the appellant was their licensee. They claimed possession of the premises in view of the fact that the licence had been terminated. The Small Cause Court passed an order for recovery of the *khas* possession of the suit property on 9th April, 2009. The Court further directed the appellant to vacate the suit premises within two months of the order. Admittedly this

order has not been challenged by the appellant in any court of law. Therefore, it has attained finality.

4. Title Suit No.2015 of 2009 was filed before the City Civil Court by the appellant on 28th April, 2009. The appellant sought a declaration that he is a lawful sub-tenant of Respondent No.1 herein in respect of the suit premises. He also prayed for a declaration that the order passed in SCC Suit No.655 of 2003 under Section 41 of the Act of 1882 on 9th April, 2009 was not binding upon him and was void *ab initio*. An injunction was sought restraining the Respondent Nos.2 and 3 from executing the order passed in the application filed under Section 41 of the Act of 1882.

5. An application was filed under Section 47 of the Act of 1882 by the appellant, praying for a stay of the proceedings in SCC Suit No.655 of 2003 till the title suit filed before the City Civil Court was decided. The application was allowed by the Small Cause Court on 28th July, 2009. Respondent Nos.2 and 3, being aggrieved by that order, approached this Court by preferring revision application being C.O. No.3025 of 2009. On 19th November, 2010 a learned Single Judge of this Court set aside the order passed by the Small Cause Court on 4th August, 2009 by which the proceedings under Section 41 of the Act of 1882 had been stayed. The learned Single Judge held that the pendency of the title suit before the City Civil Court would not impede the progress of the proceedings in SCC Suit No.655 of 2003 in view of Section 49 of the Act of 1882. That order

of the learned Single Judge has attained finality as it has not been challenged by the appellant.

6. Respondent Nos.2 and 3 who are the partners of Respondent No.4 firm, preferred an application before the Small Cause Court on 29th August, 2011 for execution of its order dated 9th April, 2009. They also prayed for the recovery of possession of the suit premises. The possession was to be delivered on 16th January, 2012. An application under Order 39 Rules 1 and 2 of the CPC was moved by the appellant in the pending title suit on 16th January, 2013. The City Civil Court granted the prayer of the appellant and stayed the execution of the order passed by the Small Cause Court.

7. Aggrieved by that order of the City Civil Court, Respondent Nos.2 and 3 filed FMA No.1944 of 2013. It was contended on behalf the Respondent Nos. 2 and 3 that the Trial Court had stayed the proceedings without deciding whether it had the jurisdiction to do so and whether a prima facie case had been made out to grant an injunction.

8. The Division Bench of this Court, to which one of us (Mhatre, J.) was a party, accepted the contention on behalf of the Respondent Nos.2 and 3 that the question whether the City Civil Court had jurisdiction to entertain the suit, was a mixed question of law and facts. The Division Bench observed that there was no finding of the City Civil Court as to whether a prima facie case exists in favour of the appellant before

granting interim relief. The Division Bench found that an appropriate application would have to be filed by Respondent Nos.2 and 3 before the City Civil Court for it to decide whether it had jurisdiction to entertain the suit. Thus without setting aside the order passed by the City Civil Court, the appeal was disposed of by directing the City Civil Court to consider the question of its jurisdiction to entertain the suit in the event an appropriate application was made before it by Respondent Nos.2 and 3. All issues including that of the jurisdiction of the City Civil Court to entertain the suit were left open to be agitated before the City Civil Court.

9. Accordingly, the application was submitted by Respondent Nos.2 and 3 under Order 7 Rule 11 read with Section 151 of the CPC for rejection of the plaint. The City Civil Court after hearing the parties has opined that in view of the provisions of West Bengal Premises Tenancy Act there was a bar for the City Civil Court to entertain the suit. The plaint was thus rejected.

10. Mr. Ashis Kumar Sanyal, the learned Counsel for the appellant has submitted that the City Civil Court has erred in rejecting the plaint on the ground that the provisions of the West Bengal Premises Tenancy Act barred its jurisdiction. He has pointed out that the appellant in his suit before the City Civil Court has prayed for a declaration that he is a sub-tenant of Respondent Nos.1 - Arup Guha who was a tenant of Respondent Nos.2 and 3. The learned Counsel has further submitted that the appellant could seek a declaration regarding his status as a sub-

tenant only in a civil court and not before the Rent Controller under the Premises Tenancy Act. He pointed out that it is only after such a declaration was obtained by the appellant from the City Civil Court regarding his status that he could approach the Controller for further relief such as fixation of rent etc. He also submitted that the Controller had earlier dismissed the proceedings filed by the appellant on the ground that he had pursued his remedy in the civil court and thereby the Controller's jurisdiction was barred. The learned Counsel further submitted that after the amendment of the Premises Tenancy Act, the Controller had no jurisdiction to decide the status of a person vis-à-vis the premises occupied by him. The learned Counsel urged that the provisions of the Act of 1882 specifically enable a person aggrieved by the decision of the Small Cause Court under section 41 of that Act of 1882 to prefer a title suit before the appropriate forum. The learned Counsel further argued that since the Small Cause Court had found the appellant to be a licensee, he could not have that status rectified except by filing the proceedings before the civil court. According to the learned Counsel the status of an occupant of any premises could only be determined by a civil court.

12. Mr. Saptangshu Basu, the learned Counsel appearing for Respondent Nos.2 and 3, has argued that the conduct of the appellant has been mala fide and he has tried to subvert the orders passed by various courts and authorities in order to continue in the suit premises. The learned Counsel submitted that the City Civil Court had rightly

rejected the plaint as it had no jurisdiction to decide the status of the appellant. He pointed out that under Sections 26(2) and 26(3) of the WBPT Act, 1997 it is only the Controller who had jurisdiction to decide the status of an occupant of any tenanted premises.

13. There is no dispute that the Controller had rejected the plaint of the appellant filed under Section 26(3) of the WBPT Act, 1997 on 19th June, 2012 on the ground that it had no jurisdiction to entertain the same. That order has not been challenged at all by the appellant. It is also not in dispute that an order of eviction was passed under Section 41 of the Act of 1882 in SCC Suit No.655 of 2003. The appellant has been found to be licensee by the Court and he has been ordered to be evicted. This order of the Small Cause Court has not been challenged by the appellant. Instead, he resisted his eviction and refused to hand over the vacant and peaceful possession of the suit premises to the bailiff of the Court on 16th January, 2012. A report to that effect has been submitted by the bailiff to the Court. The Chief Judge, Small Cause Court, passed an order on an application filed under Order 21 Rule 97 read with Rule 108 by Respondent Nos.2 and 3 for police help to execute the decree. The Court directed that the possession of the suit premises should be delivered on 19th January, 2013 through the Court bailiff with police help. An application under Order 39 Rules 1 and 2 of the CPC was filed by the appellant on 16th January, 2013. The injunction application of the appellant/plaintiff was heard on 18th January, 2013 and the City

Civil Court restrained the Respondent Nos.2 and 3 herein from executing the order dated 9th April, 2009 passed in SCC Suit No.655 of 2003.

14. Now the question is whether the City Civil Court has jurisdiction to entertain the suit filed by the appellant. Mr. Sanyal, the learned Counsel for the appellant, has urged that the only declaration that the appellant seeks from the City Civil Court is that he is a sub-tenant of the Respondent No.1 – Arup Guha. He submitted that the appellant is not seeking an order for fixing the rent and therefore he need not approach the Controller.

15. There is no dispute that an application had been filed under Section 41 of the Act of 1882 by the landlord to evict the appellant. Under Section 41, the landlord is entitled to serve the occupant a notice calling upon him to remove himself from the suit premises and on refusal of the occupant to do so, the landlord can move the Court under Section 41 of the Act of 1882 for issuance of summons. The burden is on the occupant to show cause as to why an order should not be issued to compel him to deliver possession of the property. There is no dispute in the present case that the appellant was found to be a licensee by the Small Cause Court under Section 41 of the Act of 1882 and therefore, it had directed the appellant to vacate the suit premises. The appellant tried to obtain a stay of these proceedings by making an application under Section 47 of the aforesaid Act. Then the appellant filed the suit before the City Civil Court to establish his title as a sub-tenant. This is

permissible under Section 49 of the aforesaid Act of 1882. Section 49 provides that the recovery of possession of any immovable property under Chapter VIII is not a bar in instituting the suit in the civil court, i.e., the High Court or any civil court having jurisdiction for trying the title in respect of the property.

16. Mr. Sanyal is right when he submits that it is only the civil court, namely, the City Civil Court in this case which can adjudicate the title to the suit property.

17. We have perused the provisions of Section 26 of the WBPT Act, 1997 which have been pressed into service by Mr. Basu. These provisions do not in any manner confer on the Controller the power to decide the title in respect of the suit property or the status of a person vis-à-vis the suit property. All that the Section provides is that if the landlord finds that premises have been sublet, he is entitled to issue notice terminating the sub-tenancy. However, if he has not been informed of the creation of the sub-tenancy or where the landlord has not consented in writing to the creation of the sub-tenancy, the Controller may, on an application made by the landlord or by the sub-tenant, declare that the interest of the tenant in so much of the premises as has been sublet shall cease and that the sub-tenant shall become a tenant directly under the landlord. The Controller is also empowered to fix the rents payable by the tenant and the sub-tenant to the landlord. Thus, the Controller cannot decide the status of an occupant of premises

where no notice has been given. The proceedings under Section 41 cannot be considered as notice envisaged under Section 26 of the WBPT Act, 1997. The Controller would therefore be faced with an order under which the Small Cause Court finds the occupant is a licensee. In such circumstances, the only option that such an occupant would have to establish his title in respect of the property is to approach the civil court.

18. The facts in the case of ***Abdul Kayum Mahomed Hoosein Pitalvala v. Ebrahim Abbasbhai Harianivalla*** reported in ***AIR 1960 Bombay 338*** were similar to the facts in the present appeal. The Bombay High Court has held that even though an order of ejectment could be passed under Section 41 of the Act of 1882, the jurisdiction of the Bombay City Civil Court would not be barred to decide whether the plaintiff who was occupying the suit premises was a sub-tenant.

19. In the case of ***Asutosh Chakraborty v. Sm. Rani Sundari Devi & Ors*** reported in ***1959 Calcutta Law Journal 117*** this Court considered the provisions of Section 16(3) of the WBPT Act, 1956. The Court observed that the Controller could declare the tenant's interest in so much of the premises as has been sublet had ceased and that a sub-tenant had become a tenant directly under the landlord. The dispute in that case was not whether the occupant was a sub-tenant, but as to how much of the premises had been sublet. Therefore, this case has no application to the facts in the present case.

20. Mr. Basu, has placed reliance on the judgment in the case of ***Haripada Bhowmick v. Krishna Chand Arora & Ors.*** reported in ***1964 Calcutta Weekly Notes 199.*** In this case Section 16 of the WBPT Act, 1956 was interpreted and this Court held that the provision of Section 16(3) could be invoked even in case of disputed sub-tenancies. This judgment again is not relevant of the facts in the present case when there is already a finding of the Small Cause Court that the appellant is a licensee, he could not have approached the Controller contending that he was a sub-tenant. The Court merely interpreted that the provisions of Section and concluded the case of the sub-tenancy in Sub-Section (3) of Section 16 with reference to Sub-Section (2) would be a case of sub-tenancy either in the whole or in a part of the premises without either the oral or written consent of the landlord. The Court observed that Sub-Section (3) of Section 16 comes into operation at the instance of the sub-tenant or the landlord where either the sub-tenant and/or the tenant has given notice. The Court observed that in most cases where the sub-tenant claims relief under Section 16(3), the tenant's interest would be affected because the sub-tenancy was disputed. As stated earlier this judgment has no application to the facts before us.

21. The prayers in the plaint filed by the appellant indicate that the appellant is seeking a declaration of his title vis-à-vis the suit property. Such a declaration can obviously not be granted by the Controller who is only empowered to ascertain which part of the premises are tenanted and which part is in occupation of the sub-tenant. The appeal is thus

allowed. The impugned judgment and decree of the City Civil Court is set aside. The suit is remanded for hearing it afresh before a City Civil Court. In view of the appeal being allowed, the application for injunction being CAN No.1146 of 2015 has become infructuous and the same is disposed of as such.

22. Urgent certified photocopies of this judgment, if applied for, be given to the learned Advocates for the parties upon compliance of all formalities.

(R. K. Bag, J.)

(Nishita Mhatre, J.)