

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

CO 3100 OF 2014

GURDEEP SINGH

-VERSUS-

CHATURBHUJ PANDEY AND ANOTHER

For the Petitioner: Mr Hiranmay Bhattacharya, Adv.,
Mr Tanmay Mukherjee, Adv.,
Mr Sounak Bhattacharya, Adv.

For the Opposite Party No.1: Mr S.P. Ray Chowdhury, Sr Adv.,
Mr Ramdulal Manna, Adv.,
Mr Pradeep Kumar Ojha, Adv.

Hearing concluded on: November 13, 2014.

BEFORE

SANJIB BANERJEE, Judge
Date: November 18, 2014.

SANJIB BANERJEE, J. :-

The propriety of a decree allowing a claim made under Section 6 of the Specific Relief Act, 1963 has been called into question in the present proceedings under Article 227 of the Constitution. The legal issue that has arisen is whether under such provision the landlord of a property can recover possession thereof from an unauthorised sub-tenant, who has entered into possession of the property without the consent of the landlord but with the previous consent of the tenant who was in possession.

No appeal or review lies from any decree passed in a suit instituted under the said provision in view of sub-section (3) thereof. The question involved here is of the jurisdiction of the suit court to entertain the claim on the basis of the averments in the plaint.

The facts are not of much relevance since the opposite party-plaintiff accepts that if the legal question is answered against the landlord-owner, the decree has to be reversed and the suit dismissed. But the case made out in the plaint needs to be noticed. The plaintiff claimed to be the donee of the suit property. The plaintiff averred that the first defendant was a tenant in respect of an area of 150 sq. ft on the ground floor of the premises owned by the plaintiff. The plaintiff alleged that on February 6, 2010 the first defendant made over possession of the tenanted premises in favour of the petitioning second defendant by sub-letting the same. The plaintiff asserted that as the undisputed owner of the suit premises, the plaintiff was in constructive possession thereof through the first defendant and the present petitioner's possession thereof amounted to dispossession of the plaintiff therefrom, entitling the plaintiff to invoke Section 6 of the said Act to obtain possession of the suit premises from the petitioner herein.

Section 6 of the said Act of 1963, which is in *pari materia* with Section 9 of the repealed predecessor statute of 1877, must first be seen:

“6. Suit by person dispossessed of immovable property. – (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought –

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.”

The first limb of the provision prescribes who may apply thereunder and in what circumstances. It is elementary that the title to the property is, generally, of no consequence in a suit instituted under Section 6 of the said Act as the key feature thereof is the dispossession of the plaintiff or of any person through whom the plaintiff claims, provided the dispossession is in respect of an immovable property and such dispossession is without the consent of the person in possession otherwise than in due course of law. The relief that may be granted is for restoration of the possession in favour of the person dispossessed if such person is the plaintiff; or, in favour of the plaintiff even if the plaintiff was not the person dispossessed, provided the plaintiff establishes that he can validly claim possession through the person dispossessed, whether by virtue of constructive possession through the person dispossessed or otherwise. The last limb of the provision contemplates that notwithstanding possession of the suit premises being restored to the person dispossessed therefrom or to the plaintiff who claims through the person dispossessed, any person may institute a suit to establish his title to such property to recover possession thereof. Such recovery of possession may even be from the decree-holder in the claim under Section 6 of the said Act.

Thus, the dispossession complained of in an action under Section 6 of the said Act, must be without the consent of the person in possession thereof otherwise than in due course of law. If the dispossession is shown to be with the consent of the person dispossessed or if the dispossession is demonstrated to be in due course of law notwithstanding the lack of consent of the person dispossessed, the suit under Section 6 of the said Act would fail.

Paragraphs 6 and 7 of the plaint, which were made the basis for the decree sought under Section 6 of the said Act, are set out to appreciate the nature of the claim:

“6) That the Defendant no. 2 who have no right, title or interest over the said suit property as such who is nothing but a trespassers who have been inducted by the Defendant no.1 in the said Tenanted portion which is morefully described in the schedule ‘B’ hereunder and thereby sub-let the same without the consent or permission of the plaintiff which is not permissible by the law.

“7) That it is to be mentioned here that since long time the defendant no.1 have tried to do the same but every occasion the plaintiff raised objection and protest but on 6.2.2010 at about 10.30 a.m. the Defendant no.1 sub-let the said tenanted right, and handover the physical possession of the said tenanted portion to the Defendant no.2 illegally and thereby dispossess the plaintiff from his right, title and interest over the said tenanted portion which is described in the schedule ‘B’ hereunder.”

Upon the petitioner herein formulating the legal question and the plaintiff accepting that the answer thereto would decide the matter, it is the plaintiff who has been required to sustain the decree. The judgment-debtor has, thereafter, not been called upon.

The plaintiff says that it cannot be doubted that when a tenant is inducted by the owner of an immovable property into such property, the tenant may have physical possession thereof, but it is the landlord-owner who is in constructive possession of the property through the tenant. The plaintiff maintains that the word “dispossessed” in the opening part of Section 6 of the said Act does not refer to actual physical possession and should not be interpreted to carry a restrictive meaning. The plaintiff suggests that since the applicable rent law, governing the property and the tenancy, prohibited sub-letting of the suit premises by the first defendant without the previous consent of the landlord, such sub-letting has to be regarded as illegal and void and, as a consequence, the plaintiff has to be seen to have been dispossessed from the suit premises upon possession thereof being surrendered by the tenant to the petitioner herein. The argument goes on that since the petitioner herein entered into possession of the premises without the consent of the plaintiff, who is admittedly the owner of the suit property, and the act of sub-letting was illegal, and as such otherwise than in due course of law, the plaintiff had met with the primary criterion enunciated in Section 6(1) of the

said Act and, consequently, entitled to the decree of possession obtained on its own steam.

The plaintiff first refers to a recent judgment reported at (2010) 3 SCC 385 (*Sadashiv Shyama Sawant v. Anita Anant Sawant*) where the views of several High Courts on the corresponding provision of the 1877 statute have been noticed. The claim in that case was that a tenant under the plaintiff had been “forcibly dispossessed” by the contesting defendants who “threw away his (*the tenant’s*) articles and took possession of the suit property.” On the basis of such facts as recorded in paragraph 3 of the report, the Supreme Court proceeded to consider, as evident from paragraph 9 of the report, “whether a landlord can sue a trespasser for immediate possession where his tenant has been dispossessed ...”

The Supreme Court noticed the contrary views of the Madras High Court and the Nagpur Judicial Commissioner before quoting with approval the views taken by the Calcutta, Bombay, Pepsu and Patna High Courts that a landlord could maintain a suit under Section 9 of the 1877 Act to recover possession where his tenant in exclusive possession had been dispossessed forcibly by the act of a third party. The plaintiff in the present case seeks much sustenance from the observation in the several High Court judgments noticed by the Supreme Court that the concept of possession in Section 9 of the 1877 Act was not confined to actual physical possession. But it must be said that the contexts in which the High Court judgments noticed by the Supreme Court were rendered were quite distinct from the admitted position in the present case that the first defendant-tenant “handover (*sic*) the physical possession of the said tenanted portion to the Defendant No.2 illegally and thereby dispossess the plaintiff ...” Indeed, the concluding sentence in paragraph 21 of the Supreme Court judgment is a complete answer to all that the plaintiff has to say:

“21. A landlord by letting out the property to a tenant does not lose possession as he continues to retain the legal possession although actual possession, user and control of that property is with the tenant. By

retaining legal possession or in any case constructive possession, the landlord also retains all his legal remedies. As a matter of law, the dispossession of tenant by a third party is dispossession of the landlord. The word “dispossessed” in Section 6(1) must be read in this context and not in light of the actual possession alone. If a tenant is thrown out forcibly from the tenanted premises by a trespasser, the landlord has implied right of entry in order to recover possession (for himself and his tenant). Similarly, the expression “any person claiming through him” would bring within its fold the landlord as he continues in legal possession over the tenanted property through his tenant.”

The plaintiff has also placed a judgment reported at AIR 1958 Raj 287 (*Raghuvar Dayal v. Hargovind*), which was noticed in the Supreme Court judgment cited by the plaintiff. Though a substantial part of paragraph 18 of the Rajasthan judgment has been quoted by the Supreme Court, it must be remembered that the question before the Supreme Court was not identical to either the consideration before the Rajasthan Court or the issue that has arisen in the present case. In *Raghuvar Dayal*, plaintiff Hargovind claimed to be the owner of a shop let out to one Shivchand, who was also impleaded in the subsequent suit under Section 9 of the 1877 Act. The plaintiff alleged that Shivchand in collusion with Raghuvar issued a rent note in Raghuvar’s favour in March, 1950. On the basis of such rent note, Raghuvar brought a suit for ejectment against Shivchand which was decreed in November, 1950. In execution of the decree, Raghuvar got possession of the shop from Shivchand. Thereupon Hargovind instituted a suit under Section 9 of the 1877 Act alleging collusion between the parties to Raghuvar’s suit. The trial court and the High Court held that Shivchand colluded with Raghuvar and “suffered a compromise decree for ejectment being passed against him.”

It is evident that the dispossession of Shivchand through execution of the collusive compromise decree was not regarded by the trial court or the Rajasthan High Court as dispossession in due course of law within the meaning of the relevant expression in Section 9 of the 1877 Act. It is apparent that the dispossession of Shivchand was without his consent as it was in course of the

execution of the decree, but the decree itself was a product of fraud and, hence, not in due course of law.

Another Supreme Court judgment, reported at (2004) 4 SCC 664 (*Sanjay Kumar Pandey v. Gulbahar Sheikh*), is cited by the plaintiff for the proposition that since no appeal or review is permitted against a decree passed in a suit instituted under Section 6 of the said Act of 1963, a regular suit should be filed for establishing title to the suit property and a High Court should not interfere with the decree except when a case of interference is made out within the well-settled parameters of the provision. A judgment reported at AIR 1985 Patna 374 (*Kumar Kalyan Prasad v. Kulanand Vaidik*) has also been brought by the plaintiff where the Patna High Court held that a decree-holder in a regular suit, who had been given symbolic possession by the bailiff but had been forcibly dispossessed by the judgment-debtor thereafter, could recover possession from the judgment-debtor in a summary suit under Section 6 of the said Act.

It can be appreciated that the course of action adopted by this plaintiff may have been in desperation since regular eviction suits, filed for recovery of possession after expiry of a lease by efflux of time or for sub-letting, languish in courts for years and decades. This plaintiff may have perceived that the limited scope of Section 6 of the said Act may allow him to recover possession against an unauthorised sub-tenant easier and quicker than what would take to prosecute a regular suit. But at the same time, it cannot be lost sight of that though the possession of an unauthorised sub-tenant is akin to that of a trespasser (under the local rent laws) upon the landlord suing for his eviction, an unauthorised sub-tenant does not necessarily come into possession of the property by dispossessing the person in possession without the consent of such person. If the possession of the tenant of the tenanted premises can be regarded to be the constructive possession of the landlord through the tenant, for the purpose of Section 6 of the said Act, the consent of the tenant in possession of the tenanted

premises to be dispossessed by the sub-tenant can be regarded as sufficient consent that would defeat an action on the basis thereof under such provision.

In all of the judgments quoted in the Supreme Court case of *Sadashiv Shyama Sawant*, other than that of the Rajashtan High Court, the issue was whether the landlord of a tenant who had suffered forcible dispossession could seek and obtain recovery of possession from the trespasser in proceedings under Section 9 of the 1877 Act, whether or not by impleading the tenant in the action. Such a situation, which also covered the Supreme Court case, has not arisen here. Merely because the reasoning in the relevant discussion in the Rajashtan High Court judgment in *Ragubhar Dayal* was endorsed by the Supreme Court in the context of the issue before the Supreme Court, does not amount to the outcome in the Rajashtan judgment being affirmed. In any event, the Rajashtan judgment, which was also not in the context of recovery of possession from an unauthorised sub-tenant, has to be seen in the light of the petitioner before the Rajashtan High Court having obtained possession under a decree which was found to be otherwise than in due course of law since it was collusive.

It would be more appropriate that the right of a landlord to recover possession of the tenanted premises from the trespasser who has forcibly dispossessed the tenant be seen as a right conferred by the expression “he or any person claiming through him may, by suit, recover possession thereof” appearing in Section 6(1) of the said Act. The dispossession has to be of the person in possession, but the action may be instituted by a person who has been dispossessed or by any person claiming through the person who has been dispossessed. The landlord of the dispossessed tenant can, in such circumstances and by virtue of the locus recognised in the relevant expression, be entitled to recover possession from the trespasser who has forcibly dispossessed the tenant otherwise than in due course of law.

Such interpretation would avoid an anomaly that may arise in a case of forcible dispossession of a tenant otherwise than in due course of law by a

trespasser. It cannot be said that upon a landlord instituting a suit under Section 6 of the said Act in such a case and the tenant also instituting a suit for recovery of his possession, the landlord would be allowed to recover possession thereof or retain it in preference to the dispossessed tenant. In all of the cases noticed by the Supreme Court in *Sadashiv Shyama Sawant*, the dispossessed tenant showed no interest in recovering possession or did not initiate the action therefor. In the circumstances, the Supreme Court judgment has to be confined to the situation that it covered and not extended by any quirk of judicial reasoning to a situation where the person in possession is dispossessed with his consent. A person possessing a superior title than the person dispossessed without his consent otherwise than in due course of law may be entitled to recover possession of the property under Section 6 of the said Act from the wrong-doer who has caused the dispossession, or even from any other person subsequently put into possession by such wrong-doer; provided the person dispossessed does not seek to recover his lost possession. If the person dispossessed has a better right to recover possession under the said provision than a person with a superior title to the subject immovable property, it follows that the right under such provision of the person superior in title to the person dispossessed to claim possession is by virtue of such superior's right of possession being claimed through the person dispossessed. Possession may be actual or constructive, but the word used in the provision is "dispossessed" and dispossession implies an overt act which is directly suffered by the person in actual possession and only indirectly or consequentially suffered by any person in possession of the property through another.

Since the admitted position in this case is that the petitioner herein came into possession of the suit premises with the consent of the first defendant tenant, the remedy under Section 6 of the said Act was not available to the plaintiff as the landlord of the recalcitrant tenant, whatever the plaintiff's other rights may be.

The decree impugned dated June 30, 2014 passed in Title Suit No. 402 of 2010 by the Civil Judge (Junior Division), VI Court at Alipore is set aside and the plaintiff is left free to pursue the plaintiff's remedies against the petitioner herein in accordance with law without being prejudiced by any observation herein.

CO 3100 of 2014 is allowed, but without any order as to costs.

Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.)