

(2015) 04 CAL CK 0107
In the Calcutta High Court
Case No : C.O. 531 of 2015

Momita Ghosh

APPELLANT

Vs

Partha Pratim Ghosh and Others

RESPONDENT

Date of Decision : 01-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 21 Rule 101, 144
Constitution of India, 1950 — Article 142
Protection of Women From Domestic Violence Act, 2005 — Section 17, 17(1)
Transfer of Property Act, 1882 — Section 106, 111

Citation : (2015) 4 CHN 63

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Hiranmay Bhattacharyya, Tanmoy Mukherjee and Sounak Bhattacharyya, for the Appellant

Final Decision : Allowed

Judgement

Harish Tandon, J—Though the matter appeared today under the heading "Extension of Interim order", but on the insistence of the learned advocate for the opposite party No. 2 the main revisional application is taken up for final disposal.

2. This revisional application is directed against the order No. 12 dated 12th February, 2015 passed by the learned Civil Judge (Senior Division), Baruipur in Miscellaneous Case No. 5 of 2015, by which an application for stay of the execution proceeding is rejected.

3. Before dealing with the legal issues involved in the case, it may be apt to narrate the undisputed facts.

4. The opposite party No. 2, who is admittedly the owner in respect of the suit-premises, let out the same to the husband of the petitioner. It goes without saying that the husband was a contractual tenant in respect of the suit-premises

paying the monthly rent as agreed upon. The petitioner has married the opposite party No. 1 and subsequently developed differences between them, which led to the initiation of a matrimonial proceeding before the competent Court. It appears that the opposite party No. 1 left the suit-premises keeping the petitioner therein and started residing elsewhere.

5. The landlord instituted a suit for eviction against the tenant, opposite party No. 1 herein, on the ground that the period given in the statutory notice has expired. Essentially the said suit was instituted under Section 111 of the Transfer of Property Act, as according to the landlord the West Bengal Premises Tenancy Act, 1997 does not apply to the said tenancy.

6. The said suit ultimately was posted for ex parte hearing and the Trial Court passed the ex parte decree, as there was no contest by the opposite party No. 1. While the decree was put into execution and after coming to know that the possession shall be recovered and the petitioner shall be evicted from the suit-premises, an application under Order XXI Rule 101 of the Code of Civil Procedure was taken out for determination of right, title and interest in respect of the suit-premises. The said application was registered as Miscellaneous Case No. 5 of 2015, which is still pending before the learned Civil Judge (Senior Division), Baruipur. The petitioner prayed for stay of the Title Execution Case No. 6 of 2013 instituted by the opposite party No. 2 pending disposal of the said Miscellaneous Case.

7. The Executing Court though recorded that a plea of collusive decree is taken in the said application, but proceeded to dismiss the application for stay. It further appears that the judgement of the Supreme Court rendered in case of B.P. Achala Anand Vs. S. Appi Reddy and Another, AIR 2005 SC 986 : (2005) 1 DMC 345 : (2005) 2 JT 233 : (2005) 3 SCC 313 : (2005) 2 SCR 3 : (2005) 1 UJ 378 was cited before the Executing Court, who without making endeavour to go through it by one stroke of pen did not accept the ratio laid down therein, as it is distinguishable on facts.

8. The revisional application was admitted by this Court having found that a prima facie case is made out and the ratio laid down in Anwarbi Vs. Pramod D.A. Joshi and Others, (2000) 10 SCC 405 are required to be considered and to find out whether there is parity in facts or not.

9. Learned advocate for the petitioner submits that it is the duty of the Executing Court to determine the right, title and interest of a person, who approached the Court under Order XXI Rule 101 of the Code of Civil Procedure, more particularly when a serious allegation of collusion is made out therein. He further submits that the Court should not have rejected the application for stay, as by the time the adjudication is made, the petitioner shall be out of possession in execution of the decree and has to bear further burden of litigation for restitution of possession under Section 144 of the Code of Civil Procedure.

10. He relies upon a judgement of the Supreme Court rendered in case of

Anwarbi (supra) and B.P. Achala Anand (supra) and submits that the wife is a necessary and proper party in a suit for eviction instituted by the landlord against the husband, as unmeritorious suit shall be decreed ex parte and the wife would suffer the most as she will be evicted from the matrimonial house after the husband disassociated his company from her.

11. Learned advocate for the opposite party No. 2 vehemently submits that the wife has no right to claim an interest in respect of the premises, which was let out to the husband as the said premises cannot be brought within the definition of "a shared household" defined under the Protection of Women from Domestic Violence Act, 2005.

12. In support of the aforesaid contentions the reliance is placed upon a Single Bench Judgement of Delhi High Court in case of Neetu Mittal Vs. Kanta Mittal and Others, AIR 2009 Delhi 72 : (2008) 152 DLT 691 : (2008) 106 DRJ 623 : (2008) 12 ILR Delhi 189 and a judgement of the Supreme Court in case of S.R. Batra and Another Vs. Smt. Taruna Batra, (2007) 3 CTC 219 : (2007) 1 DMC 1 : (2007) 146 PLR 425 : (2006) 13 SCALE 652 : (2007) 3 SCC 169 : (2006) 10 SCR 1206 Supp : (2007) 1 UJ 7 : (2007) AIRSCW 1088 : (2006) 8 Supreme 1002 .

13. He further submits that since the tenancy is outside the purview of the West Bengal Premises Tenancy Act, 1997, a notice under Section 106 of the Transfer of Property Act was issued and upon expiration of the period provided therein, the suit for recovery of possession was filed against the husband, who despite service of summons chose not to contest the same. He strongly submits that the husband is still residing in the same premises, which can be deciphered from the cause-title of the Matrimonial Suit and, therefore, his client cannot be said to have acted contrary to law and the decree is competent to be executed in accordance with law.

14. At the very outset, this Court must record that the question involved in the present dispute whether the suit-premises is within the ambit of West Bengal Premises Tenancy Act, 1997 or not, is still begging an answer. It appears from the statements made by the petitioner that the husband has voluntarily left the premises keeping the wife in possession and, therefore, the wife will suffer most if the execution is allowed to be proceeded with.

15. To my mind the question is squarely covered by a Three Judges Bench decision of the Supreme Court rendered in case of B.P. Achala Anand (supra). In the said case the landlord issued a statutory notice upon the husband, who was admittedly the tenant in respect of the suit-premises and subsequently instituted a suit for eviction. The husband appeared in the suit and initially pretended to contest the same, but the moment he scented that the eviction would not affect him, as he is already residing elsewhere, discontinued his appearance, which constrained the Court to put the suit at the ex parte board. The wife subsequently appeared and wanted to intervene in the said proceeding as a necessary and proper party.

16. The order passed under Order I Rule 10(2) of the Code of Civil Procedure ultimately reached before the Supreme Court and it would be worth noting the opening sentence of the said judgement, which reflects the mind of the Hon'ble Judges, that "Unusual fact situation posing issues for resolution is an opportunity for innovation". An argument was advanced before the Supreme Court that the Rent Control Act stands on a different pedestal than the matrimonial laws, which contains the provisions for maintenance and, therefore, the landlord cannot be bound by the personal litigation under the matrimonial law.

17. The Apex Court in paragraph 13 of the said judgement elaborately enunciated the law, which runs thus:

"13. The position of law which emerges on a conjoint reading of the Rent Control Legislation and Personal Laws providing for right to maintenance - which will include the right to residence of a wife, including a deserted or divorced wife, may be examined. The Rent Control Law makes provision for protection of the tenant not only for his own benefit but also for the benefit of all those residing or entitled to reside with him or for whose residence he must provide for. A decree or order for eviction would deprive not only the tenant of such protection but members of his family (including the spouse) will also suffer eviction. So long as the tenant defends himself, the interest of his family members merges with that of the tenant and they too are protected. The tenant cannot, by collusion or by deliberate prejudicial act, give up the protection of law to the detriment of his family members. So long as a decree for eviction has not been passed the members of the family are entitled to come to the court and seek leave to defend and thereby contest the proceedings and such leave may be granted by the court if the court is satisfied that the tenant was not defending - by collusion, connivance or neglect--or was acting to the detriment of such persons. Such a situation would be rare and the court shall always be on its guard in entertaining any such prayer. But the existence of such a right flows from what has been stated hereinabove and must be recognized. Persons residing with the tenant as members of his family would obviously be aware of the litigation and, therefore, it will be for them to act diligently and approach the court promptly and in any case before the decree of eviction is passed as delay defeats equity. Such a prayer or any dispute sought to be raised post decree by a member of family of the tenant may not be entertained by the court."

18. The ultimate conclusion can be noticed from paragraphs 32 and 33 of the said report, where the Apex Court recognized the right of the wife to intervene in an eviction suit instituted against the husband treating her as necessary and proper party. It would be relevant to quote paragraphs 32 and 33 of the said judgement, which runs thus:

"32. In our opinion, a deserted wife who has been or is entitled to be in occupation of the matrimonial home is entitled to contest the suit for eviction filed against her husband in his capacity as tenant subject to satisfying two conditions: first, that the tenant has given up the contest or is not interested in

contesting the suit and such giving up by the tenant-husband shall prejudice the deserted wife who is residing in the premises; and secondly, the scope and ambit of the contest or defence by the wife would not be on a footing higher or larger than that of the tenant himself. In other words, such a wife would be entitled to raise all such pleas and claim trial thereon, as would have been available to the tenant himself and no more. So long as, by availing the benefit of the provisions of the Transfer of Property Act and Rent Control Legislation the tenant would have been entitled to stay in the tenancy premises, the wife too can continue to stay exercising her right to residence as a part of right to maintenance subject to compliance with all such obligations including the payment of rent to which the tenant is subject. This right comes to an end with the wife losing her status as wife consequent upon decree of divorce and the right to occupy the house as part of right to maintenance coming to an end.

33. We are also of the opinion that a deserted wife in occupation of the tenanted premises cannot be placed in a position worse than that of a subtenant containing a claim for eviction on the ground of subletting. Having been deserted by the tenant/husband, she cannot be deprived of the roof over her head where the tenant has conveniently left her to face the peril of eviction attributable to default or neglect of himself. We are inclined to hold - and we do so - that a deserted wife continuing occupation of the premises obtained on lease by her husband, and which was their matrimonial home, occupies a position akin to that of an heir of the tenant-husband if the right to residence of such wife has not come to an end. The tenant having lost interest in protecting his tenancy rights as available to him under the law, the same right would devolve upon inhere in the wife so long as she continues in occupation of the premises. Her rights and obligations shall not be higher or larger than those of the tenant himself. A suitable amendment in the legislation is called for to that effect. And, so long as that is not done, we, responding to the demands of social and gender justice, need to mould the relief and do complete justice by exercising our jurisdiction under Article 142 of the Constitution. We hasten to add that the purpose of our holding as above is to give the wife's right to residence a meaningful efficacy as dictated by the needs of the times: We do not intend nor do we propose the landlord's right to eviction against his tenant to be subordinated to wife's right to residence enforceable against her husband. Let both the rights coexist so long as they can."

19. From the ratio as laid down in the said judgement, there is no hesitation in my mind that the husband if chose not to contest the suit for eviction filed against him, when the wife is residing therein, the wife should be allowed to be added as a co-defendant in the said suit, so that the landlord may not easily walk-away with the ex parte decree and throw away the wife from the matrimonial house. Once the allegation as to the collusion is made out in an application, which cannot on a bare reading of the averments be ruled out. It is a duty of the Executing Court to determine the right, title and interest of the person, who may ultimately be evicted if the execution is allowed to be

proceeded with. Collusion is a secret arrangement between two individuals to achieve a goal, which otherwise may or may not be, if an adjudication or determination is made. The sinister motive to injure or affect the third party is required to be determined on evidence and cannot be thrown at the threshold.

20. It is apparent in the instant case that the husband did not contest the suit for eviction and an ex parte decree was passed by the Court. Though the landlord had pretended unawareness and stated against any secret arrangements having made with the tenant, but the same is required to be considered on a full-fledged trial permissible under Order XXI Rule 101 of the Code of Civil Procedure.

21. Let me consider the judgements cited by the landlord in support of his contention that the wife has no right to resist the decree for eviction passed against the husband. In case of Neetu Mittal (supra) the mother-in-law filed a suit against the daughter-in-law and the grandchildren for permanent injunction restraining them from forcibly and illegally entering into the house owned by her. It appears that the son and the daughter-in-law were separated as the son took a flat on rent for his residence and intended to reside therein. The daughter-in-law was trying to enter into the property owned by the mother-in-law taking a plea under the Protection of Women from Domestic Violence Act, 2005.

22. A reliance was placed before the Supreme Court rendered in case of S.R. Batra (supra) where the Apex Court held that under 17(1) of the said Act provides the right to residence in a shared household, which would only mean the house belonging to or taken on rent by the husband or the house which belongs to the joint family of which the husband is a member. Since the subject house was exclusively owned by the mother-in-law and so long she is alive, the husband cannot claim any right in respect thereof, it was ultimately held that the said house cannot be brought within the definition of "shared household" under the Protection of Women from Domestic Violence Act, 2005.

23. The aforesaid case is apparently distinguishable on facts, rather this Court finds that the observations made by the Supreme Court in case of Neetu Mittal enure to the benefit of the petitioner. Admittedly the tenanted premises stands in the name of the husband and not in the name of any third party. Section 17 of the Protection of Women from Domestic Violence Act, 2005 imbibe within the shared household the rented premises of the husband and it would be relevant to quote paragraph 28 from the judgement of the Supreme Court delivered in case of S.R. Batra & Anr. (supra) in this regard, which runs thus:

"28. As regards Section 17(1) of the Act, in our opinion the wife is only entitled to claim a right to residence in a shared household, and a "shared household" would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. The property in question in the present case neither belongs to Amit Batra nor was it taken on rent by him nor is it a joint family property of which the husband Amit Batra is a member. It is the exclusive property of appellant No. 2, mother of Amit

Batra. Hence it cannot be called a "shared household".

24. Once an objection is raised to an execution under Order XXI Rule 101 of the Code, a statutory duty is cast on the Executing Court to determine the right, title and interest of the said person and pending such adjudication the position should not be allowed to be altered or taken away. The reliance in this regard can be conveniently made to a judgement of the Supreme Court rendered in case of Anwarbi Vs. Pramod D.A. Joshi and Others, (2000) 10 SCC 405 , wherein it is held:

"4. Learned counsel for the appellant has contended that the appellant is being repeatedly threatened with dispossession. We, therefore, make it clear that the possession of the appellant cannot be disturbed except in accordance with law; and that in view of the obstruction raised by her to the execution of the said decree, the rights of the obstructionist will have to be decided in appropriate proceedings, in accordance with law. Unless and until such proceedings terminate in favour of the decree-holder, the decree-holder cannot take possession and the appellant is entitled to retain possession."

25. This Court, therefore, finds that the Trial Court have committed illegality and infirmity in rejecting the application for stay filed by the wife pending disposal of the said Miscellaneous Case.

26. The order impugned is thus set aside.

27. The Executing Court is directed to consider the said Miscellaneous Case No. 5 of 2015 after giving an opportunity of hearing to the opposite party No. 2 and shall make efforts to dispose of the same as expeditiously as possible.

28. Pending disposal of the said Miscellaneous Case No. 5 of 2015, there shall be stay of all further proceeding in Title Execution Case No. 6 of 2013.

29. The revisional application is thus allowed.

30. There will be no order as to costs.