

(2013) 09 CAL CK 0043

Calcutta High Court

Case No: F.M.A. No. 1944 of 2013

Tapan Kumar Mitra and Another

APPELLANT

Vs

Debabrata Mukherjee and
OthersRESPONDENT

Date of Decision: Sept. 20, 2013**Citation:** (2014) 1 WBLR 685**Hon'ble Judges:** Nishita Nirmal Mhatre, J; Kanchan Chakraborty, J**Bench:** Division Bench

Judgement

Nishita Mhatre, J.

This appeal is directed against the order dated 18th January, 2013 of the City Civil Court in Title Suit No. 2015 of 2009. The brief facts of the present appeal are as follows:--

An application being R.C. case No. 172 of 2002 was filed u/s 26(3) of the West Bengal Premises Tenancy Act, 1997 by respondent No. 1 claiming that he was the sub-tenant of M/s. A.K. Guha & Co. since 1985. He prayed for a declaration that he was a direct tenant under M/s. Chamarta Properties Private Limited, respondent No. 3 herein. While this application was pending, the appellants who claim to be partners of the aforesaid firm filed proceedings u/s 41 of the Presidency Small Cause Courts Act, 1882 on 17th December, 2003 for recovery of possession of the suit premises from the respondent No. 1 herein. The contention of the appellants was that respondent No. 1 was their licensee and therefore, they claimed possession after terminating the licence. On 9th April, 2009 the Small Cause Court passed an order for recovery of Khas possession of the suit property and directed the eviction of respondent No. 1 within two months. That order has become final as the respondent No. 1 has not challenged it before any Court.

2. The respondent No. 1 has filed Title Suit No. 2015 of 2009 before the Small Cause Court on 28th April, 2009. The respondent No. 1 has sought a declaration from the City Civil Court that he is a lawful sub-tenant of Arup Guha, i.e., respondent No. 2

herein. A declaration that the order passed by the Small Cause Court in S.C.C. Suit No. 655 of 2003 on 9th April, 2009 in proceedings u/s 41 of the Presidency Small Cause Courts Act is not binding the respondent No. 1 and is void ab initio has also been prayed for. Respondent No. 1 has further sought an injunction restraining the appellants from executing the order passed by the Small Cause Court.

3. On 30th April, 2009 Respondent No. 1 filed an application u/s 47 of the Presidency Small Cause Courts Act praying for stay of proceedings in S.C.C. Suit No. 655 of 2003 till the disposal of the Title Suit filed before the City Civil Court. That application was allowed by the Small Cause Court on 20th July, 2009. The appellants approached this Court by preferring a revision application being C.O. No. 3025 of 2009 on 19th November, 2010. The learned Single Judge of this Court set aside the order passed by the Small Cause Court by which the proceedings were stayed in view of Section 49 of the Presidency Small Cause Courts Act. The learned Single Judge held that the pendency of the Title Suit before the City Civil Court was not an impediment for continuing with further proceedings in S.C.C. Suit No. 665 of 2003 in view of Section 49 of the Presidency Small Cause Courts Act. The order of the learned Single Judge has not been assailed by the respondent No. 1 and, therefore, it has attained finality.

4. The appellants moved the Small Cause Court on 29th August, 2011 for execution of its order dated 9th April, 2009 and for recovery of the possession of the suit premises. The date for delivery of possession was fixed on 16th January, 2012. The respondent No. 1 resisted his eviction from the suit premises and moved an application on 16.01.2013 under Order 39, Rules 1 and 2 of the CPC in the pending Title Suit. An affidavit-in-opposition was filed to the injunction application by the appellants. The City Civil Court granted the prayer of respondent No. 1 and stayed the execution of the order passed by the Small Cause Court. The City Civil Court did not accept the contention of the appellants that the suit had been filed with ulterior motives and only to deprive the appellants from their right over the suit premises and passed the impugned order to avoid multiplicity of proceedings.

5. Aggrieved by the order passed by the City Civil Court the appellants have filed the present appeal.

6. Mr. Saptangshu Basu, learned Counsel for the appellants submitted that the City Civil Court has no jurisdiction or power to stay the order passed by the Small Cause Court in any proceedings. He submitted that before passing an order granting interim relief it is the duty of the Court concerned to ascertain whether it has the necessary jurisdiction to decide the suit. He urged that in view of the provisions of Section 26(3) of the West Bengal Premises Tenancy Act, 1997 the jurisdiction of the Civil Court is ousted and specifically barred as the dispute between the parties relates to a declaration of the sub-tenancy in favour of the respondent No. 1. He pointed out that such a declaration that the sub-tenancy has ceased and that sub-tenant has directly become a tenant of the landlord can be made only by the

Controller appointed under the West Bengal Premises Tenancy Act and not by the City Civil Court. Moreover, according to the learned Counsel while passing the impugned order the City Civil Court has failed to record a finding that a prima facie case exists for granting interim relief to the respondents.

7. Mr. Basu has relied on the judgments in the case of [Calcutta Cosmopolitan Club Ltd. Vs. Bhanwarlal Bhandari and Others](#), , [Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others](#), , [Dwarka Shaw Vs. Ram Chabika Mishra](#), , and [Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another](#), in support of his submissions.

8. Mr. Sibaji Sen, learned Counsel appearing for the respondent No. 1, on the other hand, urged that the arguments advanced on behalf of the appellants regarding the lack of jurisdiction of the City Civil Court to decide the Title Suit has been raised for the first time before this Court without there being any pleadings either before the City Civil Court or before this Court. He pointed out that the memo. of appeal preferred in this Court does not contain a ground relating to the jurisdiction of the City Civil Court. He submitted further that the respondents cannot be "ambushed" by the appellants by raising the issue relating to jurisdiction in this Court, without there being any pleadings, as it is a mixed question of law and fact. The learned Counsel further urged that there is an inherent lack of jurisdiction in the Small Cause Court under Sections 41 and 47 and the Controller acting u/s 26(3) of the West Bengal Premises Tenancy Act to issue a declaration as prayed for by the Respondent No. 1. The learned Counsel has also brought to our notice Sections 18, 19(2) and 19(g) of that the Presidency Small Cause Courts Act to substantiate his submission that the Small Cause Court has no jurisdiction to decide a Title Suit and it is only the City Civil Court which is competent to entertain such a suit.

9. Mr. Sen has relied on the judgments in the case of [Mohd. Amin Vs. Kausar Ali and Others](#), , [Ajit Kumar Moitra alias Dilip Sen and Others Vs. Dilip Kumar Sen and Another](#), and [Dipen Mukherjee and Another Vs. Sm. Sandhyarani Chatterjee](#), .

10. The first issue which we will consider is whether we should decide the issue of jurisdiction of the City Civil Court to entertain the suit. Mr. Basu has vehemently urged that the appellants have not been able to evict the Respondent No. 1 despite obtaining favourable orders at every stage. He submitted that although the appellants had not raised the issue of jurisdiction before the City Civil Court it was open to them to raise the issue at any stage, indeed, even in the Supreme Court or execution proceedings. He further urged that assuming the appellants had not raised the issue regarding the jurisdiction of the City Civil Court to entertain the suit, it was necessary for the Court to suo motu ascertain the same before granting the interim relief. The observations of this Court in the case of Calcutta Cosmopolitan Club (supra) and the judgment of the Supreme Court in Urban Improvement Trust, Jodhpur (supra) have been pressed into service by Mr. Basu. In Calcutta Cosmopolitan Club (supra), the Division Bench of this Court observed that the Court

while passing an order in the nature of interim relief cannot be oblivious to the question of jurisdiction or its competence to pass an order. The Court has to examine whether it has jurisdiction or not and has to prima facie satisfy itself that it does, on the basis of the pleadings in the plaint, even if the issue of jurisdiction is not raised; the Court cannot assume jurisdiction. Relying on the case of Shiv Kumar Chadha (supra) the Court held that before granting interim relief the Court must arrive at a prima facie conclusion that it has jurisdiction to entertain the suit and grant interim relief. The Supreme Court in Urban Improvement Trust, Jodhpur (supra) has held that the decree passed by a Court without jurisdiction over the subject matter, or, on any other ground which goes to the root of its exercise of jurisdiction or inherent jurisdiction, and if there is a lack of such jurisdiction, the decree is a nullity and is non est. Such an issue can be decided even when the objection is raised in execution proceedings.

11. Mr. Sen has relied on the aforesaid judgments in support of his submission that the City Civil Court did have the necessary jurisdiction to entertain the suit, considering the fact that the relief claimed was a declaration that the respondents were sub-tenants and that such a declaration of title can only be granted by a Civil Court. He submitted that the factual aspect in the present case is similar to that in the case of Ajit Kumar Moitra (supra) where this Court had held it is only the City Civil Court which has the power to decide the tenancy rights of a party.

12. The main plank of Mr. Basu's argument appears to be the provisions of Section 26(3) of the West Bengal Premises Tenancy Act. Under this Section a declaration can be made by the Controller that the interest of the tenant in the part of the premises occupied by the subtenant ceases and that the sub-tenant has directly become the tenant of the landlord. However, such a declaration is to be preceded by a notice to the landlord. Thus the issue as to whether the City Civil Court has jurisdiction to entertain the suit is a mixed question of law and fact. There is no doubt that the Court must consider, on the face of the pleadings before it and the prayers sought, whether it has jurisdiction to entertain the suit. In the present case we are of the opinion that it would be in the interest of justice to permit the appellants to raise the issue of jurisdiction before the City Civil Court by filing an appropriate application. The City Civil Court will consider the same in accordance with law, obviously after hearing the parties. Whether the ratio of the decision in the case of Ajit Kumar Moitra (supra) would apply to this case although the provisions of the West Bengal Premises Tenancy Act were not considered is an aspect which the City Civil Court must consider.

13. We are, therefore, not inclined to set aside the order of the City Civil Court which has been impugned before us. In the event the appellants file an appropriate application before the City Civil Court, questioning its jurisdiction, the same will be decided within eight weeks of the application being filed. Appeal disposed of accordingly.

14. The City Civil Court, while passing the impugned order has not drawn any conclusion as to whether a prima facie case exists before granting interim relief. The Court ought to have considered the balance of convenience, the hardship to the parties and whether the granting of interim relief would aid in the final disposal of the suit. Unfortunately, the City Civil Court has failed to examine these aspects before granting interim relief. The Court will examine this aspect afresh, bearing in mind the principles enunciated by the Supreme Court and this Court for granting interim relief, when it decides the issue of jurisdiction.

15. We make it clear that we have not touched the merits of the case regarding the jurisdiction. All the issues which have been raised before us by the parties can be raised before the City Civil Court. Urgent certified photocopies of this judgment, if applied for, be given to the learned Advocates for the parties upon compliance of all formalities.

Kanchan Chakraborty, J.

I agree.