

**(2001) 08 CAL CK 0051**

**Calcutta High Court**

**Case No:** Civil Appellate Jurisdiction F.M.A.T. No. 99 of 2001

Khairul Khan

APPELLANT

Vs

Viswamitra Ram Kumar and  
Others

RESPONDENT

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**Date of Decision:** Aug. 20, 2001

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 101, Order 21 Rule 97, 144
- West Bengal Premises Tenancy Act, 1956 - Section 14(1), 16, 16(1)

**Citation:** (2002) 3 CALLT 428 : (2001) 3 CHN 325 : (2001) 2 ILR (Cal) 454

**Hon'ble Judges:** Tarun Chatterjee, J; Asit Kumar Bisi, J

**Bench:** Division Bench

**Advocate:** Bidyut Kr. Banerjee, Jiban Ratan Chatterjee and Kaushik Dey, for the Appellant; Swapan Kr. Mallick and L. Haque, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

A.K. Bisi, J.

The instant appeal has been preferred by the appellant against Order No. 238 dated 14.9.2000 passed by Shri B.K. Samanta, Judge-in-Charge, 9th Bench, City Civil Court, Calcutta in Misc. Case No. 2022 of 1999 arising out of Title Execution Case No. 10 of 1994. By the impugned order, the Executing Court has rejected the petition under Order 21 Rule 101 of the CPC filed by the present appellant Md. Khairul Khan as an appellant before the Executing Court.

2. As per the case of the present appellant he is a monthly sub-tenant of Shri Dilip Kr. Dey in respect of a portion of the shop-room lying and situated in the ground floor at premises No. 15, Radha Bazar Street since renumbered as 16A, Radha Bazar Street, Police Station Hare Street, Calcutta at a monthly rental of Rs. 150/- per month payable according to English Calendar month. The sub-tenancy of the petitioner was created by the respondent No. 4 Dilip Kr. Dey on 23rd December, 1977 and both the

appellant/petitioner and the respondent No. 4 duly notified the creation of the sub-tenancy in respect of the decretal premises to the superior landlord namely M/s. Fidahusen Ahmedbhoy and Zainulbhoy Ahmedbhoy, a registered partnership firm having its office at 9, Ganesh Chandra Avenue, Calcutta immediately within a week from the date of such creation of tenancy as provided u/s 16(1) of the West Bengal Premises Tenancy Act, 1956 on 30th December, 1977. Having been duly notified as to the creation of such sub-tenancy of the appellant in respect of the decretal premises the aforesaid superior landlord gave necessary consent in writing to the appellant on 9th January 1978. On 4.12.98 for the first time the appellant came to know from one Md. Habib Rahman that the opposite parties filed a Misc. case being No. 1757 of 1995 under Order 21 Rule 97 of the CPC in the City Civil Court at Calcutta for the purpose of executing a decree passed against the respondent No. 4 in another Misc. Case u/s 144 of the CPC with the help of the police by way of giving delivery of possession of the entire shop-room including the decretal premises. The appellant obtained necessary information on 23.12.98 whereby he came to know that Title Execution Case No. 10/94 was filed by the respondent Nos. 1 to 3 on 9.2.94 against the respondent No. 4 before the Registrar, City Civil Court, Calcutta and that the said execution case relates to the shop room including the sub-tenancy of the appellant at premises No. 16A, Radha Bazar Street, Calcutta. It was alleged by the appellant that he was a sub-tenant under the respondent No. 4 in respect of a portion of the shop room at the said premises in accordance with law. It was further alleged by the appellant that in collusion with the respondent Nos. 1 to 3 and with ulterior motive and mala fide intention, the fact as to the existence of a decree sought to be executed was deliberately suppressed to evict the appellant from his existing lawful possession in respect of the suit premises. The appellant, however, alleged that as he was a duly notified sub-tenant, he could only be evicted under the provisions of West Bengal Premises Tenancy Act, 1956 and not otherwise. The appellant further alleged that as per amended provisions of the CPC when the execution proceeding relating to the decretal premises was pending for delivery of possession thereof filing of fresh suit was a bar. By filing the Misc. Case the petitioner/appellant sought determination of all questions relating to his independent right, title and interest as a lawful and notified sub-tenant under the respondent No. 4 in respect of the decretal premises. The appellant prayed for an order that the decree sought to be executed by the respondent Nos. 1 to 3 in Misc. Case No. 1757/95 with the police help was not binding upon him, inasmuch as, the same was not executable so far as the decretal premises was concerned.

3. The Misc. Case was contested by the respondent Nos. 1 to 3 by filing a written objection. It was averred inter alia, in their written objection that the appellant was not the representative of the judgment debtor being respondent No. 4 nor did he offer any resistance on 3.8.95 out of which the Misc. Case No. 1757 of 1995 arose. On his own showing the appellant was at best a sub-tenant without consent of the landlord in writing and such sub-tenancy without the consent of the landlord in

writing was illegal under the provisions of law and confers no independent legal right to the appellant to occupy the premises in question. The respondent Nos. 1 to 4 apprehended that the appellant was set up by respondent No. 4 to delay the execution proceeding. It was further stated that on 22.5.92 the judgment debtor took possession of the suit premises from the decree holder in execution of the decree passed in Title Suit No. 107 of 1989 and prior to that admittedly the decree holder was in possession. During the pendency of the litigations the respondent No. 4, Dilip Kr. Dey made no whisper as to the alleged subtenancy nor at any point of time the alleged sub-tenant was ever in possession. Other material allegations contained in the petition were denied by the respondent Nos. 1 to 3 in their own objection.

4. The plea taken by the respondent No. 4 was that sub-tenancy was created with the knowledge and the consent of the landlord and the appellant was a sub-tenant of the respondent No. 4 who was carrying on business in the decretal premises. It was admitted by the respondent No. 4 that the appellant was a notified sub-tenant under the superior landlord M/s. Fidahusen Ahmedbhoy and Zainulbhoy Ahmedbhoy, a registered partnership firm.

5. On consideration of the evidence on record the Executing Court disbelieved the case of sub-tenancy of the appellant under the respondent No. 4 in respect of the decretal premises and consequently the application under Order 21 Rule 101 of the CPC filed by the appellant was dismissed.

6. Being aggrieved by the impugned order passed by the Executing Court the appellant has preferred the instant appeal contending inter alia, that the Executing Court erred in law as well as in fact in dismissing the application filed by the appellant without considering the pros and cons of the subject matter and the materials on record.

7. The sole point for arising for decision in the instant appeal is whether or not the Executing Court was justified in dismissing the petition under Order 21 Rule 101 of the CPC filed by the present appellant.

8. As per the case of the appellant he was a sub-tenant under the respondent No. 4 Dilip Kr. Dey and the said sub-tenancy on and from 23rd December, 1977 was created with the consent in writing of the previous landlord and the decree sought to be executed by respondent Nos. 1 to 3 in Misc. Case No. 1757 of 1995 was not binding on him. It is submitted by the learned Advocate for the appellant that since sub-tenancy of the appellant under respondent No. 4 Dilip Kr. Dey was created with the consent of the previous landlord in writing regarding the sub-tenancy, the appellant has got independent legal right as sub-tenant under respondent No. 4 in respect of the decretal premises and as such the decree sought to be executed by the respondent Nos. 1 to 3 against the judgment debtor is not binding upon him and the same is not executable. To repudiate the above contentions raised by the

learned Advocate for the appellant it was submitted by the learned Advocate for contesting the respondent Nos. 1 to 3 that no prior consent in writing of the landlord was obtained prior to the creation of the alleged sub-tenancy of the appellant under respondent No. 4 of the decretal premises.

9. The crux of the matter on which the fate of the instant appeal hinges is whether or not any sub-tenancy of the appellant under respondent No. 4 in respect of the decretal premises was created with prior consent in writing of the landlord.

10. The learned Advocate for the appellant had drawn our attention to the relevant document dated 9.1.78 marked as Exhibit 3 to show that consent of the landlord in writing was taken with regard to the creation of the said sub-tenancy of the appellant under respondent No. 4 in respect of the decretal premises. He had further drawn our attention to the letter dated 30.12.77 (Exhibit 2) which was written by the present appellant to the landlord seeking consent for the said sub-tenancy. Copy of the notice dated 28.12.77 was also shown by the learned Advocate for the appellant to us to indicate that the original tenant the respondent No. 4 duly notified the landlord that he created sub-tenancy in favour of the present appellant on and from 23rd December, 1977 in respect of the decretal premises. Relying on these documents the learned Advocate for the appellant argued that his client was inducted as sub-tenant under respondent No. 4 Dilip Kr. Dey in respect of the decretal premises with the knowledge and consent of the landlord and since his client was a notified sub-tenant under the provisions of law the decree passed against the judgment debtor would not be executable against him since he had not been made party to the said decree.

11. The learned Advocate for the contesting respondent Nos. 1 to 3 argued that the prior consent of the landlord was not taken at all for creation of the alleged sub-tenancy. He further challenged genuineness of the aforesaid documents relied on by the learned Advocate for the appellant.

12. On perusal of the materials on record including the above-noted documents relied on by the learned Advocate for the appellant to buttress up his contention of sub-tenancy of his client in respect of the decretal premises we find that such sub-tenancy in favour of the present appellant was alleged to have been created by the present respondent No. 4 in respect of the decretal premises on and from 23rd December, 1977 and after creation of the alleged sub-tenancy the original tenant respondent No. 4 intimated the same to the landlord by his notice dated 28.12.77. It further appears that the notice as to creation of the sub-tenancy purported to have been sent by the appellant to the landlord was dated 30.12.77. The appellant claimed to have obtained consent as to creation of the sub-tenancy from the landlord on the basis of the letter dated 9.1.78. The Executing Court specifically pointed out in its order that the said document dated 9.1.78 had shown acceptance of induction of the sub-tenant Khairul Khan by Dilip Kr. Dey on 27.12.77 but that was not sufficient to show that the consent was granted by the landlord prior to creation

of the sub-tenancy though the respondent No. 4 Dilip Kr. Dey clearly stated in his evidence that after obtaining written permission from the landlord he inducted the sub-tenant. Considering this aspect of the matter the Executing Court was not in a position to believe that by the said document the sub-tenancy was created in accordance with law.

13. Section 14(1)(a) of the West Bengal Premises Tenancy Act, 1956, lays down specifically that after the commencement of this Act no tenant shall, without the previous consent in writing of the landlord, sublet the whole or any part of the premises held by him as a tenant. Section 16(1) of the said Act provides that where after the commencement of the Act, any premises is sublet either in whole or in part by the tenant with the previous consent in writing of the landlord, the tenant and every sub-tenant to whom the premises is sublet shall give notice to the landlord in the prescribed manner of the creation of the sub-tenancy within one month from the date of such subletting and shall in the prescribed manner notify the termination of such sub-tenancy within one month of such termination. On a plain reading of the aforesaid provisions embodied in Sections 14 and 16 of the West Bengal Premises Tenancy Act respectively we find that previous consent in writing of the landlord as contemplated u/s 14(1) of the Act is the mandatory requirement for creation of sub-tenancy by the tenant in respect of the premises, Section 16 makes provision for creation and termination of sub-tenancies to be notified by the tenant and sub-tenant to the landlord. Unless the requirement of the previous consent in writing of the landlord as envisaged u/s 14(1) of the West Bengal Premises Tenancy Act is complied with by the tenant, Section 16 of the said Act will not come into operation. In the case we are seized of it is manifestly clear that the sub-tenancy in respect of the present appellant Khairul Khan is alleged to have been created by the original tenant Dilip Kr. Dey in respect of the decretal premises on and from 23.12.77 and the original tenant Dilip Kr. Dey is stated to have intimated as to creation of the said sub-tenancy to the previous landlord on 28.12.77 and the document dated 9.1.78 indicates that the previous landlord gave the alleged consent to such subletting on 9.1.78. This particular document dated 9.1.78 on which the learned Advocate for the appellant has relied can in no way indicate prior permission of the landlord for creation of the alleged sub-tenancy in favour of the appellant by the original tenant against whom the decree has already been passed. Even if it is accepted for the sake of argument that the said document dated 9.1.78 is indicating of subsequent ratification of the said sub-tenancy by the landlord, that will not improve the case of the appellant for the simple reason that subsequent ratification of the said sub-tenancy by the landlord, even if there be any, cannot override the mandatory requirement of prior consent of the landlord in writing which is a sine qua non for creation of sub-tenancy as envisaged u/s 14(1) of the West Bengal Premises Tenancy Act. In this context, we are clearly of the view that estoppel or acquiescence by the conduct of the landlord with regard to creation of subtenancy or subsequent ratification of sub-tenancy by the landlord who has not

given prior consent cannot override the statutory requirements. Section 14(1)(a) of the West Bengal Premises Tenancy Act makes it obligatory on the part of the tenant to create sub-tenancy with the previous consent in writing of the landlord. Since no such prior consent in writing of the landlord was taken, the present appellant can in no way be treated as a sub-tenant in respect of the decretal premises in the eye of the law. That apart, in absence of such prior consent in writing of the landlord the plea of subtenancy raised by the appellant loses all its credibility.

14. Another curious feather emerging from the materials on record is that it is an admitted fact that the judgment debtor Dilip Kr. Dey who took possession of the decretal premises from the decree holder in execution of the decree passed in Title Suit No. 107/89 on 22.5.92 made no whisper of any sub-tenancy as alleged. There is nothing credible on record to indicate that at any point of time the present appellant who is the alleged subtenant was ever in possession of the decretal premises. Under the above circumstances there is justifiable ground to hold that the present appellant Khairul Khan filed the application under Order 21 Rule 101 of the CPC on the plea of the alleged sub-tenancy solely for the purpose of delaying the proceeding relating to execution of the decree lawfully obtained by the decree holder respondent Nos. 1 to 3 against the judgment debtor respondent No. 4.

15. For the foregoing reasons, we find that the plea of the appellant as to the alleged sub tenancy is wholly unsustainable on the face of the evidence on record and as such the Executing Court was justified in dismissing the petition under Order 21 Rule 101 of the CPC filed by the present appellant. The instant appeal being devoid of any merit is liable to be dismissed.

16. The appeal is accordingly dismissed. The impugned order being Order No. 238 dated 14.9.2000 passed by Shri B.K. Samanta, Judge-in-Charge, 9th Bench, City Civil Court, Calcutta in Misc. Case No. 2022 of 1999 is affirmed.

All interim orders stand vacated.

There will be no order as to costs.

Urgent xeroxed certified copy be given to the parties, if applied for.

T. Chatterjee, J.

17. I agree.