

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

C.O. No. 3341 of 2018

Indira Majumder

Vs.

Usha Holding Enclave Private Limited and Others

For the petitioners : Mr. Jayanta Mitra,
Mr. Samit Talukdar,
Mr. Ranjit Kumar Basu,
Ms. Shebatee Datta

For the opposite party
nos. 1 to 11 : Mr. Shaktinath Mukherjee,
Mr. Aniruddha Chatterjee,
Mr. Surya Prasad Chattopadhyay

For the opposite party
nos. 12 to 14 : Mr. Suman Dey

Hearing concluded on : 17.12.2018

Judgment on : 09.01.2019

Sabyasachi Bhattacharyya, J.:-

1. The present revisional application has been preferred against an order dated May 8, 2017 passed by the executing court, dismissing the petitioner's application for injunction made in connection with an application under Order XXI Rules 97 to 101 of the Code of Civil Procedure, bearing Miscellaneous Case No. 773 of 2010.

2. The petitioner resisted a decree passed against one Krishna Gopal Mondal, being the son of late Balahari Mondal, in favour of the Opposite Party nos. 1 to 8.

3. The admitted facts of the case are as follows:

One Maulvi Marful Huq was the original owner of the suit property. The said Marful gave leases in respect of the said property to one Ramdas and one Phani Bhusan Mondal. Subsequently, Phani Bhusan Mondal transferred his interest to Ramdas, thereby rendering Ramdas the sole lessee in respect of the suit property.

The said lease in favour of Ramdas was described to be a yearly lease and executed by a *kabuliyat* dated October 29, 1913. Thereafter a fresh lease was executed in similar tune on April 16, 1916.

Ram Das built structures, both *pucca* and *kutchha*, on the said property, as per permission granted in the *kabuliyats*. Such structures were made primarily for the purpose of running a rice mill.

Thereafter, one Kalipada Sardar obtained a money decree against the said Ramdas. Such decree was put into execution and Kalipada himself purchased the rights of Ramdas in respect of the suit property in an auction sale in connection with the resultant execution proceedings.

4. Subsequently, one Balahari Mondal purchased the said interests in the property from Kalipada by a registered sale deed dated April 24, 1940.

5. Balahari, by a Will dated August 2, 1975, bequeathed the said property to the wives of his three brothers-in-law, namely, Durga, Nihari and Kanak.

6. Balahari died on March 20, 1975 and the said Will was probated.

7. Indira, that is, the present petitioner, claims by inheritance as the daughter of Nihari, after Nihari's demise.

8. On the other hand, the Opposite Party nos. 1 to 11 claim through a purchase from the grandson of Marful dated July 30, 1992.

9. It is relevant to mention that Balahari, at the time of his death, left Padmabati, his wife and daughter of Ramdas, and Krishna Gopal, his son, as his heirs and legal representatives.

10. Subsequently, the present Opposite Party nos. 1 to 8 filed an eviction suit against Krishna Gopal, who ultimately conceded the suit.

11. It is argued by learned Senior Counsel for the petitioner that 'thika tenancy', under the Calcutta Thika Tenancy Act, 1949, envisaged structures being erected and/or acquired by the 'thika tenants'. Section 11 of the said Act contained a bar regarding the devolution and transfer of such properties.

12. In the year 1953 the said bar, contained in Section 11, was omitted from the statute.

13. The bar, however, was re-introduced on and from November 2, 1981 under Section 6(3) of The Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981. Learned Counsel submits that even if the devolution of interest by virtue of the Will of Balahari to Nihari and others was to be considered as a posthumous transfer of property, the same took effect on the death of Balahari on October 20, 1975, that is, at a point of time when the bar as to transfer was omitted (in 1953) and before it was reintroduced on November 2, 1981. Even the probate of the said Will was granted on September 9, 1980, that is, in the said interregnum.

14. It is thus submitted that the bequest in favour of the petitioner's mother Nihari and other legatees of Balahari by virtue of his Will was valid and the

interest claimed by the petitioner by inheritance on the death of Nihari, one of the legatees, was sanctioned by law.

15. However, learned counsel for the petitioners argues, the purported sale dated July 30, 1992 by the grandsons of the original owner Marful in favour of the Opposite Party nos. 1 to 8 was invalid, being barred under Section 6(3) of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981, which had come into force in the meantime, on and from November 2, 1981.

16. Moreover, it is argued that in view of the transfer by virtue of the Will of Balahari having previously taken effect on the demise of Marful, and in view of his grandsons having no further interest in the property, in any event the sale, by virtue of which the Opposite Party nos. 1 to 8 claim title, could not pass any title in favour of the said opposite parties.

17. It is further submitted that the eviction suit, from which the present miscellaneous case arises, was not maintainable and not binding on the petitioner, since the same was filed only against Krishna Gopal, being one of the heirs of Balahari, who represented only his own interest and not that of the other legatees of Balahari. The collusive nature of the suit, it is argued, is evident from the concession given by the defendant Krishna Gopal for the eviction decree.

18. It is further argued on behalf of the petitioner that though there was a semblance of admission as to the suit property not being a thika tenancy in the original application under Order XXI Rules 97 to 101 of the Code of Civil Procedure, the said defect was cured by a subsequent amendment, whereby it was introduced that the suit property was a thika tenancy.

19. It is further argued that the *kabuliyats* themselves would indicate that the structure was raised by Ramdas, whose interest ultimately devolved upon the

present petitioner through various modes. It is submitted that the first transfer was only of a vacant land, on which Ramdas raised structures worth the name.

20. Learned Senior Counsel for the petitioner next submits that one Abdul Hashem, being an heir of Marful, admitted the suit property to be a thika tenancy, as reflected in an order dated April 23, 1962 passed in a miscellaneous case bearing No. 261 of 1958. A photocopy of a certified copy of the said order has, in fact, been annexed to the revisional application as annexure-‘I’ thereto.

21. Learned Senior counsel for the petitioner thereafter submits that a Division Bench judgement of this court dated November 8, 1949, in an appeal from an original decree passed in a suit between Abul Hashem, the heir of Marful, and another and Balahari Mondal and others, recorded inter alia that Ramdas, after expiry of the term of the lease, held over as a yearly tenant, which was accepted by both parties. However, the said finding was arrived at prior to the commencement of the West Bengal Thika Tenancy Act, 1949. It is argued that no yearly tenancy could have been created by the *kabuliyats*-in-question, since those were unilateral documents executed by the lessee and were not registered. Such *kabuliyats* were not coupled with corresponding acceptance by the landlord, and as such, amounted at best to a jural relationship in the nature of monthly tenancy.

22. In support of his submission, learned Senior Counsel for the petitioner cites a Full Bench judgement of this court, reported at *AIR 1987 Cal 326 (Lakshmi Moni Dasi versus State of West Bengal.)*. By relying on the said judgement, learned counsel elaborates the position of law at the time when the Calcutta Thika Tenancy Act, 1949 came into force.

23. Learned Senior Counsel for the petitioner next argues, on the strength of a judgment reported at *(1997) 3 SCC 694 [Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and another]*, that a stranger to the decree, occupying the decretal

premises in his own right and offering resistance to the execution of the decree, can request the Executing Court to adjudicate upon his resistance and obstruction without being insisted upon that first he must hand over possession and then only move an application under Order XXI Rule 99 of the Code of Civil Procedure. It is submitted that Order XXI of the Code lays down a complete code for resolving all disputes pertaining to execution of a decree for possession obtained by a decree holder. Such obstruction cannot be bypassed and the obstructionist compelled to lose possession first and then to agitate his right under Order XXI Rule 99.

24. In support of the said proposition, the petitioner relied on a judgment reported at (1995) 1 SCC 242 [*Noorduddin vs. Dr. K.L. Anand*], where it was held inter alia that when the appellant has been claiming right, title and interest in a property, the appellant's possession, pending adjudication, needs to be protected by interim orders and the Court is enjoined to adjudicate the appellant's claim and record a finding, allowing or rejecting the same. Thus, it is argued by the petitioner that the Executing Court ought to have granted an injunction as prayed for by the petitioner almost for the mere asking, in view of a prima facie case having been made out by the petitioner.

25. On the other hand, Learned Senior Counsel appearing for the Opposite Party nos. 1 to 11 argues at the outset that it will be evident from the *kabuliyats* of 1913 and 1916 that the property was not a thika tenancy at all. Placing reliance upon the 1913 deed, learned counsel submits that the transferred land already contained buildings thereon, which would be evident from the said deed itself. Placing reliance on the 1916 deed, learned Counsel argues that the said deed contemplated categorically that whatever structures were raised on the suit property by Ramdas, would vest in the owner thereof, that is, Marful. It was specifically provided in the said deed that all right, title and interest of the lessee, that is Ramdas, would revert back to the owner. It is thus argued that since the lessee was not the

owner of the structure, nor could be said to have acquired the same, no Thika tenancy was created within the contemplation of either the 1949 Act or the 1981 Act.

26. Learned senior counsel for the opposite party nos. 1 to 11 submits, on the basis of a judgment reported at *AIR 1952 Cal 380 [Abdul Hashem and another vs. Balahari Mondal and others]*, that a Division bench of this Court held in the said judgment that after the expiry of tenure under the *kabuliyat* dated April 16, 1916, Balahari Mondal was “holding over” the suit property as a yearly tenant. It is argued that, under Section 116 of the Transfer of Property Act, “holding over” can take place only after the determination of the lease and that the determination of the tenure covered by the *kabuliyat* of 1916 attracts the consequences indicated in those of 1913 and 1916, namely, whatever title Balahari had in the structures ceased to exist and vested in the lessor. As such, Balahari could only be termed as a premises tenant.

27. In this context, learned senior counsel cites a judgement reported at *AIR 1958 SC 789 (Dr. K.A. Dhairyawan and others –vs- J.R. Thakur and Others)*, where it was laid down that if the structures on a property were agreed to be returned to the lessor on expiry of the lease, no title in respect of such structures was created in favour of the lessee. By placing reliance on the said judgment, it was argued that under Section 108 of the Transfer of Property Act, normally a lessee can remove all structures and buildings erected by him on the demised land before expiry of the lease. It was only necessary for him to return the land on the termination of the lease in the same condition as he took it. The ownership of the building, in this case, lay with the lessors and not with the lessees. Section 108 of the said Act did not prevent the lessees from contracting to hand over any building or structure erected on the land by them to the lessors without receiving any compensation. In other words, although under Section 108 the lessees had the right to remove the building, by the contract they had agreed to hand over the same to the lessors without the right to receive compensation on the termination of the lease, the matter being entirely one of contract

between the parties. Such a contract, however, did not transfer ownership in the building to the lessors while the lease subsisted.

As a premises tenant, Balahari had no right to transfer the tenancy by Will. In support of this proposition, learned senior counsel cites a judgment reported at (1994) 3 SCC 481 [*Vasant Pratap Pandit vs. Dr. Anant Trimbak Sabnis*].

28. Learned Senior Counsel for the opposite party nos. 1 to 11 next argues that a Thika tenancy could only be created in respect of *kutchha*, that is, temporary structures. He submitted that the term 'Thika' means 'temporary' or 'impermanent'. In this context, learned counsel cites an unreported judgement of a co-ordinate bench of this court dated November 19, 2003 passed in *W.P. No. 1851 of 2002 (Usha Holding and Enclave (p) Ltd. & Anr. –vs- C.M.C. & ors.)*. In the said writ petition, Krishna Gopal Mondal, son of Balahari Mondal, was one of the respondents. The matter pertained to the present disputed property. It was recorded in the said order by the learned Single Judge that the present disputed property was not a Thika tenancy. Such conclusion was arrived at on the premise that the structures on the suit property were not *katcha* or temporary. It is argued that since the State was worst affected by such conclusion and chose not to challenge the same, the said finding has attained finality and the petitioner has no locus standi to re-open such finding.

29. Learned counsel next cites a special bench judgement of this court reported at 1987(2) CHN 148 (*Lakshmi Moni Dasi versus State of West Bengal*), also in support of the proposition that if the suit property comprised of *Pucca* structures, no Thika tenancy could be created.

30. Placing reliance next on the two *kabuliyats*, of 1913 and 1916 respectively, it is argued that the said deeds make it evident that the structures created by Ramdas were mostly of permanent nature, befitting the running of a rice mill. Hence, there cannot arise any question of the suit property being a Thika tenancy and

Ramdas or his successor, including the present petitioner, having acquired any right therein.

31. It is next argued that in the application under Order XXI Rules 97 to 101 of the Code itself, no allegations of collusion were raised by the petitioner against Krishna Gopal and as such, since Krishna Gopal was one of the co-heirs of Balahari along with the petitioner, the Doctrine of Representation would apply, binding the petitioner to the concessions made by Krishna Gopal in the eviction suit. As such, it is argued, the petitioner could not claim any independent title under Order XXI Rule 101 of the Code of Civil Procedure, but had to step into the shoes of Krishna Gopal in respect of the suit property.

32. It is next argued that Section 5(3) of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 provides that any question as to whether a property is a Thika tenancy or not and questions pertaining thereto will have to be decided by a Thika Controller and not the civil court. Hence, since the proceeding filed by the petitioner under Order XXI Rules 97 to 101 of the Code has the character of a suit, the same could not be filed before the executing court which is a Civil Court and not the Thika Controller.

33. As the application of the petitioner under Order XXI Rules 97 to 101 also involves adjudication upon the question as to whether the properties are Thika tenancy or not, the same was not maintainable before the civil court at all.

34. Learned senior counsel for the Opposite Party nos. 1 to 11 places reliance on *Sarkar's Code of Civil Procedure (11th Edition), 2007* and the explanation given at page 1914 thereof as regards the Doctrine of Representation, as argued by him previously.

35. In reply, the petitioners cites a judgment reported at (2015) 14 SCC 203 [*Nemai Chandra Kumar and others vs. Mani Square Limited and others*], in

support of the proposition that there can be a thika tenancy even if there are *pucca* structures on the premises-in-question and thika tenancies are not restricted to properties having *kutch*a structure. It is further argued that Section 10A of the Calcutta Thika Tenancy Act, 1981, conferred the right to erect *pucca* structure, also indicating the proposition as referred to above. The opposite party nos. 1 to 11 say that a review petition is pending in the Supreme Court against the said cited judgment.

36. The moot question in contention is, whether the petitioner could make out a prima facie case to go for trial in the present case.

37. The first question which arises in such context is, as to whether the decretal property could be labelled as a thika tenancy at all. In view of the judgment reported at (2015) 14 SCC 203 cited by the petitioner, even lands with *pucca* structures could comprise thika tenancies. Although it was argued on behalf of the opposite party nos. 1 to 11 that the said judgment of the Supreme Court is under review, such development does not take away anything from the binding effect of the judgment, till such judgment is recalled or reviewed by the Supreme Court.

38. It is also seen that all the successive Thika Tenancy Acts (of 1949, 1981 and 2001) contemplate structures being 'raised' or 'acquired' by the lessee. In the present case, admittedly Ramdas raised some of the structures and acquired some at the inception of 1913 *kabuliyat* and thereafter. Thus Ramdas and his successors-in-interest became thika tenants in respect of the disputed property by operation of law immediately upon raising/acquiring such construction and commencement of the successive thika tenancy statutes. Such conferment of the status of thika tenant by operation of law was irrespective of the surrender clause in the *kabuliyats*, in respect of the structures. It can be argued by the petitioner that vested rights as thika tenants

were created in favour of first Ramdas, and then his successors-in-interest, thereby rendering the surrender clause otiose.

39. In the event it can be argued suit properties are thika tenancy properties, the posthumous transfer in favour of the predecessors-in-interest of the present petitioner, by the Will of Balahari, was valid since the execution of the Will, the death of the testator as well as grant of probate fell in the interregnum between the deletion of the bar to transfer, contemplated by the successive Thika Tenancy Acts, and re-introduction of the said bar, between 1953 and 1981.

40. However, the purported transfer in respect of the opposite party nos. 1 to 11 by the heirs of Marful was barred by the Thika Tenancy Act, which was then in force.

41. Taking into consideration the scheme of Order XXI Rules 97-101 of the Code of Civil Procedure, the said provisions contemplate implementation of an eviction decree under Rule 99, only upon adjudication of disputes raised by a third party-judgment resistor almost as a matter of right, unless the dispute raised by such objector is *ex facie* sham. A conjoint reading of Rules 99, 100 and 101 of the Order XXI of the Code of Civil Procedure unerringly indicate to such a conclusion.

42. Another argument made by the opposite party nos. 1 to 11 is, as to whether the executing court, being a civil court, could transcend the bar provided in Section 5 (3) of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 and decide the question as to whether the suit property is a thika tenancy property or not.

43. In order to decide such question, the language of Order XXI Rule 101 of the Code of Civil Procedure is to be looked into in its entirety. The said provision is as follows:

“101. Question to be determined. – All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application, and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.”

Thus, the provision as to the executing court having jurisdiction to decide all questions arising between the parties is supplemented by a *non obstante* clause, excluding the operation of any other law for the time being in force. This exclusion covers the Thika Tenancy Act of 2001, which is not only a State Act, as opposed to the Code of Civil Procedure, which is a Central Act, but operates in the specialized sphere of thika tenancies while the Code confers jurisdiction on civil courts.

Moreover, the entire self-contained scheme of Order XXI Rules 97 to 103, being to consolidate all disputes and avoid multiplicity, would be frustrated if bars to jurisdiction of civil courts of other statutes were to be taken into consideration.

An executing court assumes the character of a unified forum for resolution of all disputes arising *inter se* between the decree holders, judgment debtors and third parties claiming independent interest in respect of the decretal property, and cannot be equated with a ‘civil court’ in its restricted sense, attracting the bar contained in the Thika Tenancy Act of 2001.

44. Taking all the facets, discussed above, into consideration, it is seen that the petitioner was successful in making out at least a sufficiently strong prima facie case to go for trial in the proceeding under Order XXI Rules 99 to 101 of the Code.

45. It is well-settled that, in order to get an injunction/stay of eviction, only a prima facie case, meaning thereby a triable issue, is to be made out by the petitioner. The petitioner need not prove her/his case to the hilt, as in the final adjudication of a suit or a proceeding under Order XXI Rules 99 to 101 of the Code.

46. Putting the petitioner's case to such a test, it can readily be concluded that the executing court ought to have granted a stay and/or injunction in favour of the petitioner, thereby staying its hands in respect of execution of the connected eviction decree and/or protecting possession of the petitioner. However, obviously, such stay and/or injunction ought to be qualified by a condition of payment of occupation charges commensurate with the area and locality of the premises-in-question.

47. Accordingly, C.O. No. 3341 of 2018 is allowed on contest, thereby setting aside the impugned order and granting unconditional stay of all further proceedings in Ejectment Execution Case No. 47 of 2008 pending before the Civil Judge (Junior Division), Second Court at Alipore, as well as injunction restraining the opposite party nos. 1 to 11 from disturbing the peaceful possession of the petitioner in respect of the decretal property, for one month from this date.

48. The matter is remanded to the executing court for assessing the occupation charges which is to be imposed as a condition for such stay and injunction, commensurate with the area and locality of the decretal property. Such assessment will have to be made within a fortnight from the date of communication of this order to the executing court.

49. Liberty is given to the petitioner to pray for extension of the said interim order before the Executing Court itself, subject to satisfaction of any condition which may be imposed by the Executing Court in the meantime.

50. The injunction application filed by the petitioner in the Executing Court in connection with Miscellaneous Case No. 773 of 2010 is thus disposed of.

The unconditional stay and injunction granted herein will stand extended till disposal of the miscellaneous case upon compliance of the condition of occupation charges imposed by the executing court, by the petitioners.

51. The Civil Judge (Junior Division), Second Court at Alipore, District: South 24 Parganas is requested to dispose of the Miscellaneous Case No. 773 of 2010 pending before it as expeditiously as possible, without granting any unnecessary adjournment to either side, preferably within six months from the date of communication of this order to the said Court.

52. There will be no order as to costs.

53. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)