

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

MAT 1294 of 2023

Bharat Petroleum Corporation Limited & Anr.

Vs.

Delight Grih Nirman Pvt. Ltd. & Ors.

For the Appellants : Mr. Sanjib Kumar Mal, Adv.
Mr. Bimalendu Das, Adv.
Mr. Shomrik Das, Adv.

For the Respondent : Mr. Abhratosh Majumdar, Sr. Adv.
No. 1 : Mr. Manoj Malhotra, Adv.
Mr. Supratim Dhar, Adv.
Mr. Ravi Kumar Dubey, Adv.
Mr. Amitava Mitra, Adv.
Ms. Antara Chowdhury, Adv.

Hearing Concluded on : September 20, 2023
Judgement on : September 27, 2023

DEBANGSU BASAK, J.:-

Introduction.

1. Appellants have assailed the judgement and order dated April 26, 2023 passed by the learned Single Judge in WPA 1387 of 2022.

2. By the impugned judgement and order, the learned Single Judge has allowed the writ petition filed at the behest of the private respondents and directed the appellants to

deliver peaceful vacant possession of the premises to the private respondents upon removal of the structures thereon within 3 months from the date of the judgement and order and to pay arrears of market rent to the private respondents in respect of such premises from January 1, 2016 till the delivery of possession.

Contentions of the Appellants.

3. Learned advocate appearing for the appellants has contended that, the writ petition filed at the behest of the private respondents was not maintainable. He has contended that, the writ petition was for evicting the appellants from the premises concerned. The appellants had entered into the premises concerned legally, being put into possession thereof under a Deed of Lease. In view of availability of statutory, alternative, efficacious and speedy remedy available to the private respondents, the parties ought to have been relegated to a suit.

4. Learned advocate appearing for the appellants has contended that, Section 5 of the Specific Relief Act, 1963 expressly provides the adjudication of disputes in respect of an immovable property should be by way of a suit.

5. Learned advocate appearing for the appellants has contended that, the writ petition did not contain any prayer for mesne profit assuming, though not admitting that, the writ petition was maintainable. However, the learned Single Judge has proceeded to grant mesne profit to the private respondents. He has also contended that, there was no basis for calculation of the mesne profit disclosed in the impugned judgement and order. He has drawn the attention of the Court to the prayers made in the writ petition.

6. Learned advocate appearing for the appellants has submitted that, assuming though not admitting, that the learned Single Judge could have granted mesne profit, then also, there was an issue of limitation involved. The learned Single Judge has granted mesne profit from January 1, 2006 while the writ petition was filed in 2022. At best, the learned Single Judge could have granted mesne profit for 3 years from the date of filing of the writ petition. In support of such contention, he has relied upon Article 52 of the Limitation Act, 1963. He has also relied upon **(2014) 2 Cal LJ 64 (Hindusthan Consultancy & Services Ltd. vs. State of West Bengal & Anr.)** in support of his contention.

7. Learned advocate appearing for the appellants has contended that, the appellants were denied an opportunity of filing affidavits in opposition to the writ petition. He has however pointed out that, the appellants were directed to file a report which the appellants did. He has also referred to the pleadings in such report where, the appellants had prayed for leave to file further report and/or an affidavit dealing with the allegations made in the writ petition. The learned Single Judge did not grant the appellants such opportunity.

8. Learned advocate appearing for the appellants has relied upon **2021 volume 6 Supreme Court Cases 707 (Opto Circuit India Limited vs. Axis Bank and Others)** for the proposition that, if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and in no other manner. He has also relied upon **2023 SCC Online Cal 2342 (Indian Oil Corporation Ltd. and Others vs. Sikha Ghosh & Ors.)** in support of the contention that, writ petition for eviction was not maintainable. He has therefore contended that, the impugned judgement and orders should be set aside.

Contentions of the Private Respondents.

9. Learned Senior Advocate appearing for the private respondents has contended that, the appellants never prayed for filing affidavits in opposition to the writ petition. In support of such contention, he has relied upon the orders passed by the learned Single Judge from time to time in the writ petition.

10. Learned senior advocate appearing for the private respondents has relied upon the list of dates and contended that, the lease in favour of the appellants had expired long time ago. The appellants being authorities within the meaning of Article 12 of the Constitution of India were obliged to act as model tenants and vacate the tenanted premises immediately on expiry of the lease. The appellants not having done so, the private respondents were entitled to enforce their constitutional right as to property by way of a writ petition. He has contended that, the writ petition was maintainable. In support of such contention, he has relied upon **1999 volume 4 Supreme Court Cases 450 (Hindustan Petroleum Corporation Ltd. and Another vs. Dolly Das)** and **2021 volume 13 Supreme Court Cases 121 (National Company vs. Bharat Petroleum Corporation Limited and Another).**

He has contended that, provisions of Section 7 of the Caltex (Acquisition of Shares of Caltex Oil Refining (India) Ltd and of the undertakings in India of Caltex (India) Ltd) Act, 1977 were pari materia with Section 5 (2) of the Burma Shell (Acquisition of Undertakings in India) Act, 1976 and therefore, the ratio of ***Hindustan Petroleum Corporation Ltd (supra)*** would apply.

11. Relying upon ***2021 volume 13 Supreme Court Cases 489 (Raj Pal Singh vs. Commissioner of Income Tax, Haryana, Rohtak)*** learned Senior Advocate appearing for the private respondents has contended that, the appellants herein on the expiry of the term of the lease was in possession without the consent of the landlord. The appellants has therefore possessed the property as a tenant at will.

12. Learned Senior Advocate appearing for the private respondents has drawn the attention of the Court to the response of the appellants to the notice to quit. He has contended that, the notice to quit did not disclose any just defence to the claim for eviction. As model tenants, the appellants were obliged to have vacated the leased premises on the expiry of the term of the lease.

13. Learned Senior Advocate appearing for the private respondents has contended that, subsequent to **2022 SCC Online SC 920 (Nimai Chandra Kumar vs. Mani Square Ltd. and Others)** all petrol pumps who claimed themselves to be thika tenants had come out of the purview of the thika tenancy. Therefore, the defence of thika tenancy was never available to the appellants.

14. Distinguishing **Sikha Ghosh (supra)** learned Senior Advocate appearing for the private respondents has contended that, the ratio therein was limited to the peculiar facts and circumstances of that case as noted in such judgement. He has therefore contended that, the appeal should be dismissed.

Findings.

15. A Lease Deed had been executed between the predecessor in interest of the appellants and the predecessor in interest of the private respondents in respect of Premises No. 137 A, Belighata Road, Kolkata, and Premises No. 6, Nafar Koley Road, Kolkata. Such Deed of Lease had a Clause namely, Clause 4 permitting renewal of the lease for a further period of 10 years and renewal for further 2 periods of 10 years each.

16. The predecessor in interest of the private respondents had moved a writ petition being CR No. 7731 (W) of 1983 along with an application for interim relief challenging inter alia, the vires of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981. In such writ petition, an order dated February 10, 1984 had been passed directing stay of the operation of the Act of 1981 and the rules framed thereunder in respect of the two premises concerned. Such order had also restrained the predecessor in interest of the private respondents and the State Government from selling/disposing of the two premises and/or interfering with the possession and enjoyment of the same by the appellants. The Court had also restrained the parties to the lease from taking any steps for renewal of the lease. The Court had however, permitted the appellants to hold the premises concerned on the same terms and conditions as prevailing immediately before the Act of 1981 having come into operation.

17. The predecessor in interest of the private respondents had renewed the lease in favour of the appellants with effect from January 1, 1986 on the terms and conditions contained

in the lease deed dated January 21, 1966 for a further period of 10 years.

18. The records of the writ petition being CR No. 7731 (W) of 1983 had been transferred to the West Bengal Land Reforms and Tenancy Tribunal upon the establishment and formation thereof in 2005. On transfer, such writ petition had been renumbered as TA 1614 of 2005 before the learned Tribunal. It has been contended that, the interim order passed in CR No. 7731 (W) of 1983 stood vacated by operation of law after expiry of 12 weeks from the date of transfer of the proceedings to the learned Tribunal as no application was made for modification or extension of the order dated December 17, 1985.

19. The appellants had transferred a sum of Rs. 16,250 in the name of the predecessor in interest of the private respondents in June 2006 and the same was returned to the appellants under cover of a letter dated June 6, 2006 by the predecessor in interest of the private respondents.

20. By a letter dated July 18, 2006, the predecessor in interest had returned further amount which the appellants had deposited in the bank account of the predecessor in

interest of the private respondents. This had been repeated on September 12, 2006 and October 16, 2006.

21. By a registered Deed of Conveyance dated December 28, 2006, the predecessor in interest of the private respondents had sold the premises in favour of the private respondents. The private respondents had withdrawn TA No. 1614 of 2005 from the West Bengal Land Reforms and Tenancy Tribunal on January 28, 2021. The Assistant Collector, Kolkata (North) of Kolkata Municipal Corporation had issued a certificate dated February 22, 2021 acknowledging that the premises in question was not a thika affected property.

22. The private respondents had issued a notice to quit dated June 8, 2021 requiring the appellants to vacate the premises in question. Another letter had been issued on behalf of the private respondents on August 31, 2021. The appellants had responded thereto by a letter dated October 28, 2021. Thereafter, the private respondents had filed the writ petition resulting in the impugned judgement and order.

Writ petition, its prayers and proceedings.

23. In the writ petition filed by the private respondents, by an order dated July 11, 2022 the learned Single Judge had called for a report in the form of an affidavit from the appellants with regard to the contention of the private respondents as made in the writ petition. The appellants had filed the report in the form of an affidavit as called for by the learned Single Judge. In paragraph 11 of such report in the form of an affidavit, the appellants had prayed for leave to prefer any additional report in the form of an affidavit and/or an affidavit in opposition for complete adjudication of the disputes in question. The private respondents had dealt with such report by filing exception in the form of an affidavit.

24. The private respondents had prayed for two primary reliefs in the writ petition. One prayer was for a writ of certiorari with regard to records forming the basis of the appellants having been in possession of the premises concerned and the other relief was for a writ of mandamus commanding the appellant to quit, vacate and hand over peaceful possession of the premises to the private respondents. The private respondents did not pray for any

mesne profit. The private respondents also did not pray for arrears of rent.

Arrears of rent.

25. By the impugned judgement and order, the learned Single Judge has not only directed eviction but also directed payment of arrears of rent at market rate from January 1, 2006 till the date of handing over of possession. Learned Trial Judge has however not fixed the market rate nor has the learned Trial Judge laid down any parameters for fixation of the marked rate or the authority to fix such marked rate of rent. As noted above, the private respondents did not pray for arrears of rent in the writ petition.

26. *Hindusthan Consultancy & Services Ltd. (supra)* has, in a suit inter alia for mesne profit held that, the plaintiff was entitled to compensation for a period of three years prior to the date on which the suit was instituted.

27. In the facts and circumstances of the present case, since, there was no prayer for grant of mesne profit and no basis has been disclosed in the writ petition for issuance of a direction for payment of arrears of rent at market rates from January 1, 2006, such a direction in its entirety is set aside.

We have not decided on the point of limitation of such claim in view of our direction as contained hereinafter.

Maintainability of the Writ Petition.

28. Whether the learned Single Judge was correct in directing eviction of the Appellants, who are Article 12 authorities, from an immovable property, possession whereof they had entered into by virtue of a Deed of Lease, is an issue which has fallen for consideration in this appeal. The learned Trial Judge has directed eviction, in a writ proceeding, against the appellants who are indisputably Article 12 authorities.

29. As has been noted above, the appellants had entered into the premises by virtue of a Deed of Lease which contains a clause for periodic renewal for a period up to 30 years. Again, as noted above, the predecessor in interest of the private respondents had approached the High Court under Article 226 of the Constitution of India and obtained interim order relating to the premises concerned and the lease in view of the provisions of the Act of 1981 coming into being. Such writ petition had been withdrawn on January 28, 2021. The interim order passed in the writ had stood vacated sometime in 2006 going by the claim of the private respondents.

30. The private respondents have made available to the Court, records which suggest that, there is a third party interest created in respect of the premises in question with another entity operating a petrol pump at the premises concerned. The terms and conditions of the entry of such third party has not been made available to the Court. The third party is also not a party respondent in the present appeal and had not been included as a respondent in the writ petition by the private respondents. In fact, the writ petition does not contain any pleadings as to existence of a third party in respect of the premises concerned.

31. Right to approach the High Court under Article 226 of the Constitution of India has been held to be a part of the basic structure of the Constitution. Such a right cannot be curtailed by a statute. However, Courts have held that, jurisdiction under Article 226 of the Constitution of India should be exercised with circumspection when the writ petitioner has an alternative, speedy and efficacious remedy available. At the same time, it has been held that, existence of statutory alternative remedy which may be speedy and efficacious also, is not a complete bar to the exercise of writ

jurisdiction by a High Court. Notwithstanding the existence of a statutory, alternative, speedy and efficacious remedy, a Writ Court can exercise writ jurisdiction in the event, a fundamental right of citizen has been breached, or where the authority concerned has acted wholly without jurisdiction or where, there has been a breach of the principles of natural justice or where the vires of a statute has been questioned. In scenarios other than those noted in the preceding sentence, where, there exist alternative remedy Writ Courts have been indisputably slow in exercising writ jurisdiction.

32. Courts have held that, a writ petition, as against the State or an instrumentality of the State, cause of action for which arises out of contractual obligation is maintainable. Existence of disputed questions of fact has also been held not to be a complete bar to the exercise of writ jurisdiction. Courts have entertained writ petitions in respect of contractual obligations where, the action and/or non-action on the part of the State or the instrumentality of the State was vitiated by arbitrariness.

33. Therefore, when a Writ Court is faced with a writ petition against the State or an instrumentality of the State,

reliefs of which are sought to be based on contract or tort such Writ Court is required to adjudge its maintainability on the tests :-

- (i) whether, fundamental rights of the writ petitioner was breached or
- (ii) whether, the authority concerned acted wholly without jurisdiction or
- (iii) whether there has been breach of principles of natural justice or
- (iv) whether the vires of a statute was under challenge or
- (v) is the action/non-action complained of vitiated by arbitrations in respect of cause of action based on contract.

If answers to those queries are in the negative, then, a Writ Court would not ordinarily interfere and leave the parties to avail of the alternative remedies.

34. Applying the tests noted above, in the facts and circumstances of the present case, no fundamental right of the private respondents has been violated by the Oil Company. It is debateable as to whether the Constitutional

right to property has been violated or not. The appellants had entered the property validly. Their continued occupation has to be adjudicated after taking into various aspects including whether the private respondents and their predecessor in interest had acted in violation of order of injunction restraining transfer. The appellants cannot be said to have acted without jurisdiction or in breach of principles of natural justice. No challenge has been thrown to any statute as ultra vires. Action of the appellants in continuing to remain in possession cannot be held to be vitiated with arbitrariness. Decision of the appellants not to vacate cannot be held to be baseless, irrational and unreasonable.

35. Writ Courts have refused to exercise writ jurisdiction where there exist alternative remedy not on the premise that, writ jurisdiction stands ousted by such existence, but as a self-imposed restriction on consideration of the facts and circumstances of each case.

36. The private respondents indisputably have an alternative remedy by way of a suit for eviction. They have chosen to invoke the writ jurisdiction and the learned Judge has exercised discretion in allowing its invocation. Learned

Judge has relied upon ***Hindustan Petroleum Corporation Ltd (supra)*** as an authority for the proposition that, Writ Court can direct eviction of an Article 12 authority from an immovable property.

37. *Hindustan Petroleum Corporation Ltd (supra)* has observed that, in absence of constitutional and statutory rights being involved a writ proceeding would not lie to enforce contractual obligation even if it is sought to be enforced against the State or to avoid contractual liability arising thereto. It has also observed that, in the absence of any statutory right violation, recourse under Article 226 cannot be availed to claim any money in respect of breach of contract or tort or otherwise. In the facts of that case, it has found that, the oil company had sought to exercise powers under Section 7 of the Caltex (Acquisition of Shares of Caltex Oil Refining (India) Ltd and of the undertakings in India of Caltex (India) Ltd) Act, 1977 and therefore, though the other consequences may be contractual in nature, the exercise of the right being under a statute, the writ petitioner was held to be entitled to approach the Writ Court.

38. Learned Senior Advocate appearing for the private respondent had contended that, Section 5 (2) of the Burmah Shell (Acquisition of Undertakings in India) Act, (Act 2 of 1976) is *pari materia* with that of Section 7 of the Act of 1977 and therefore, the ratio of ***Hindustan Petroleum Corporation Ltd (supra)*** is attracted. Although, such a contention may seem attractive, however, in the facts of the present case, unlike the oil company involved in ***Hindustan Petroleum Corporation Ltd (supra)*** the appellants did not exercise any powers under Section 5 (2) of the Act of 1976. No right of the private respondents had been violated by the appellants purporting to act under the Act of 1976. Therefore, reliance on ***Hindustan Petroleum Corporation Ltd (supra)*** is misplaced.

39. The private respondents have relied upon ***National Company (supra)***, in support of the contention that, the oil company therein also suffered an order of eviction in a writ petition. ***National Company (supra)*** has taken into consideration the provisions of the Madras City Tenants Protection Act, 1921. In the facts of that case, it has been found that, when oil companies are not in actual physical

possession of the building constructed by them on lease hold land they are not entitled to be protected under Section 9 of the Act of 1921 and therefore, a writ petition was found to be maintainable.

40. In the facts of the present case, nothing has been placed before us to establish, the provisions of the Act of 1971 are *pari materia* with the Madras City Tenants Protection Act, 1921.

41. In ***Raj Pal Singh (supra)*** the Supreme Court has dealt with the scope of Section 116 of the Transfer of Property Act, 1882 and noted the distinction between a tenant continuing in possession after the termination of the term of the lease with the consent of the landlord and a tenant being so without his consent. In the present case, rents had been deposited in the bank account of the predecessor in interest of the private respondents as landlords of the appellants on a number of occasions. Such deposit of rent has also been returned by the predecessor in interest of the private respondents. The legal implication of the deposits of rent and as to whether, such rent had been deposited with or without the consent of the landlords should ideally be adjudicated in a regularly

instituted suit between the parties. We are not suggesting that, a Writ Court is not empowered to take evidence, if a need with regard thereto has arisen. However, in the facts and circumstances of the present case, there are various disputed questions of facts which require consideration, ideally on trial by a regular Civil Court in a suit.

42. Moreover, a Suit Court would be better placed to regulate the respective rights of the parties in relation to the premises concerned. As has been noted above, there may be a third party whose entitlement to remain in possession may come up as an issue for consideration. A Suit Court would be better placed in view of the provisions of Order 21 Rule 97 to 101 to decide on the issue as to the entitlement of parties claiming possession or right, title and interest in respect of the premises concerned after an order of eviction is passed. A Suit Court has the requisite mechanism to execute a decree for eviction while a Writ Court may not be equally equipped with a detailed execution procedure as appearing in the Code of Civil Procedure, 1908.

43. In the facts of the present case, some issues have arisen which ideally, a Suit Court, after affording the parties

an opportunity to lead evidence should decide. The predecessor-in-interest of the private respondents had approached the Writ Court and obtained an order of injunction restraining the predecessor in interest of the private respondents from selling the immovable properties concerned. Such writ petition had been ultimately withdrawn on January 28, 2021 with the predecessor in interest of the private respondent selling the immovable property concerned on December 28, 2006. Whether the interim order passed in the writ petition had survived till January 21, 2021 when such writ petition was withdrawn, is a relevant issue since it impinges upon the title of the private respondents to the property concerned and consequently their right to approach the Writ Court. Evidence with regard to such an issue has to be considered. Moreover, the deposit of rent, subsequent to the expiry of the Deed of Lease, in the account of the predecessor in interest of the private respondents also requires due consideration.

44. As noted above, the predecessors in interest of the private respondents had approached the High Court by a writ petition, challenging, inter alia, the vires of Calcutta Thika

Tenancy (Acquisition and Regulation) Act, 1981. The Act of 1981 has, inter alia, provision for vesting of the interest of the owner in respect of thika land. The appellants had taken a stand that, the premises stood vested with the State by virtue of the Act of 1981. There was divergence of judicial pronouncements as to what would constitute thika land. Such controversy has been set at rest in ***Nimai Chandra Kumar (supra)*** which was decided on July 22, 2022. The appellants had responded to the notice to quit dated August 31, 2021 by their response dated October 28, 2021 where they had taken inter alia, the stand, then permissible, of thika tenancy.

45. On a conspectus of the defences arrayed by the appellants to the eviction through a writ petition, it cannot be said that they are moonshine, or of no consequence or of no substance.

46. The Co-ordinate Bench in ***Sikha Ghosh & Ors. (supra)*** has held that, a writ petition seeking eviction of an oil company was not maintainable. Much has been said that, the Court in ***Sikha Ghosh & Ors. (supra)*** observed that there were peculiar facts and circumstances to that case. No doubt,

the ratio laid down in a judgement is to be applied if the factual scenario is the same.

Conclusion.

47. In view of the discussions above, the issue framed in paragraph 28 herein is answered in the negative, against the private respondents and in favour of the appellants

48. We are of the view that, since various disputed questions of facts are involved and issues have arisen between the parties, it would be appropriate that, the parties resolve such disputes and issues in a regularly instituted Civil Suit.

49. The impugned judgement and order of the learned Single Judge dated April 26, 2023 is set aside and the parties are relegated to a suit.

50. MAT 1294 of 2023 is therefore, allowed without any order as to costs.

[DEBANGSU BASAK, J.]

51. I agree.

[MD. SHABBAR RASHIDI, J.]