

Prosun Kumar Dey Vs. Provash Kumar Dey

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Court : Kolkata

Decided On : Dec-20-2006

Reported in : 2007(2)CHN630

Judge : Tapan Kumar Dutt, J.

Acts : [Presidency Small Cause Courts Act, 1882](#) - Sections 41 and 43; ;
[Constitution of India](#) - Article 227

Appeal No. : C.O. No. 2077 of 2005

Appellant : Prosun Kumar Dey

Respondent : Provash Kumar Dey

Advocate for Def. : P.B. Bhowmick, ;Namita Dey and ; Sukumar Paul, Advs.

Advocate for Pet/Ap. : Pradip Kumar Chakraborty, ;Tanmoy Kumar Ghosh,
;Madhukrishna Gayen, ;Arindam Sen and ;Sanjay Lal Mal, Advs.

Judgement :

Tapan Kumar Dutt, J.

1. The present application under Article 227 of the [Constitution of India](#) has been filed by the defendant/petitioner challenging an order dated 18.04.2005 passed by the learned Chief Justice, Court of Small Causes of Calcutta in SCC Suit No. 115

of 2004 whereby an application under Section 41 of the Presidency Small Cause Courts Act for recovery of possession, filed by the plaintiff/opposite party, was allowed. This is an unfortunate dispute between the father (plaintiff/opposite party) and his son (defendant/petitioner). The case of the opposite party is that the opposite party is absolute owner of the suit property and he inducted the petitioner as a licensee in the suit property for business purposes without any licence fee. The opposite party requires the suit property for his own use and occupation and asked the petitioner to vacate the suit property but, in spite of notice to vacate, the petitioner did not vacate and hence the said application for recovery of possession was filed.

2. It appears that the petitioner contested the said application by taking a stand that the petitioner was given possession of the suit property by the opposite party but since the premises in question belonged to the grandfather of the petitioner, the petitioner has acquired special right, title and interest therein and that the opposite party has no right to evict the petitioner from the suit property.

3. It appears from the impugned order that it was argued on behalf of the defendant/petitioner before the learned Court below that since the petitioner was born in the premises in question which is the paternal property of the plaintiff/opposite party, the defendant/petitioner has acquired a special right in such property and the plaintiff/opposite party cannot pray for recovery of possession treating the defendant/petitioner as a licensee. Another point that was argued before the learned Court below on behalf of the defendant/petitioner was that the defendant/petitioner is a licensee without any fees and such licence without any fees cannot be treated as a licence in the strict sense of the term. The learned Court below found that the notice to quit was legal and valid and it was duly served upon the defendant/petitioner.

4. It appears that the defendant/petitioner had raised the question of applicability of Section 41 of the Presidency Small Cause Courts Act (hereinafter referred to as the said Act). The decision of this Hon'ble Court reported at 2003(1) CLJ 337 Smt. Kalyani Devi (Das) v. Sri Tarapada Das was referred to by the learned Court below. In paragraph 5 of the said reported case this Hon'ble Court was pleased to

observe as follows:

5. In the State of West Bengal, however, the provision of Section 41 is different which includes not only the tenant but also the person occupying the premises under permission. Although the Bombay High Court held that the suit could not be filed on the basis of a tenancy if the licence was gratuitous but provision of Section 41 of the Presidency Small Cause Courts Act as applicable in West Bengal is different and any person occupying property within the local limits of the Small Causes Court on the basis of permission can be evicted after the determination or withdrawal of the said permission. The view expressed by the learned Chief Judge, Small Causes Court, Calcutta relying on the aforesaid judgment of the Bombay High Court reported in AIR 2001 Bombay 470 is not correct as the said judgment of the Bombay High Court is based on Maharashtra Amendment of the said Section 41 which admittedly does not include the gratuitous licence. In the State of West Bengal the provision of the said Section 41, however, includes the person occupying the premises on the basis of permission.

5. Therefore, there cannot be any dispute about the applicability of Section 41 of the said Act to the facts of the instant case. A plain reading of Section 41 of the said Act, as it stands applicable in West Bengal, would show that a person who is in occupation of a property by way of permission of another person can also be called upon to show cause as to why he should not be compelled to deliver up the property that may be in dispute.

6. The learned Advocate for the defendant/petitioner submitted that the permission was given by the plaintiff/opposite party to the defendant/petitioner for the purpose of running a business using the address in question. The said learned Advocate submitted that the consent given by the plaintiff/opposite party to the defendant/petitioner was in respect of doing business. According to the said learned Advocate such permission does not come under Section 41 of the said Act since according to the said learned Advocate, the permission was in relation to the business and not in relation to any possession of the suit property. This Court finds it very difficult to accept such argument made on behalf of the defendant/petitioner. When a person gives permission to another person to do business at a particular

place and the person to whom such permission is granted occupies that particular place for the purpose of doing his business, it is obvious that the permission was granted to do business by occupying the property. Therefore, permission was in respect of the business and also in respect of the occupation of the property at which such business may be carried on. Therefore, in the instant case, it appears that there is no dispute that permission was granted by the plaintiff/opposite party to the defendant/petitioner to start a business without any licence fees in the property in dispute. Paragraph 4A and some other paragraphs of the said application under Article 227 of the [Constitution of India](#) will indicate that there is no dispute with regard to the permission granted by the plaintiff/opposite party to the defendant/petitioner. Therefore, the argument of the defendant/petitioner's learned Advocate that the permission granted in the instant case does not come within the provisions of Section 41 of the said Act is not acceptable to this Court and this Court finds that the permission that was granted by the plaintiff/opposite party to the defendant/petitioner also included the permission to occupy the property in dispute.

7. The learned Advocate for the defendant/petitioner cited the decision reported at 2002(2) CLJ 68 Damodar Narayan Singh v. Sardar Hira Singh and Anr. while submitting that a son, that is the defendant/petitioner in the instant case, cannot be a licensee in respect of a residential house of the father, that is the plaintiff/opposite party in this case, for such stay in such residential house. In answer to such submission of the defendant/petitioner's learned Advocate, the learned Advocate for the plaintiff/opposite party referred to the decision reported at 2003(1) CLJ 64 Ajit Kumar Saha v. Amar Kumar Saha. Damodar Narayan Singh's case was a judgment delivered by an Hon'ble Single Judge and Ajit Kumar Saha's case was a judgment delivered by an Hon'ble Division Bench of this Court. In paragraph 18 of Ajit Kumar Saha's case the Hon'ble Division Bench was pleased to observe as follows:

18 Therefore, in our opinion, when the law prevailing today does not recognise any right of a major son in respect of an ancestral property in a family governed by Dayabhaga School of Hindu Law, observations made in the case of Damodar Narayan Singh (supra) by a learned Single Judge cannot be held to be a good law.

particularly when it did not notice the Division Bench judgments above referred to. Moreover, a perusal of the judgment in the case of Conrad Dias of Bombay (supra), we are of the opinion there also law was not decided which could lead to a decision in respect of such rights regarding immovable property.

8. In such circumstances, the submission of the defendant/petitioner's learned Advocate cannot be accepted and the law as it stands today has been indicated by the Hon'ble Division Bench in paragraph 18 of Ajit Kumar Saha's case, as quoted above. It appears from the submissions made by the learned Advocates for the respective parties that a Title Suit being T.S. No. 1863 of 2003 has been filed by the defendant/petitioner against the plaintiff/opposite party and others praying for a declaration and injunction in the City Civil Court at Calcutta and the Learned Judge, 8th Bench, City Civil Court at Calcutta, by order dated 14.07.2004 disposed of the appellations for injunction on consent of the parties in the said suit, by directing the parties in the said suit to maintain status quo as on that date till the disposal of the suit and also that the ingress and egress of the respective suit premises must not be obstructed by any party of the suit till final disposal of the suit. From the statements made in paragraph 17 of the application under Article 227, it appears that the said suit is pending in the City Civil Court at Calcutta. From a reading of paragraph 8 of the affidavit-in-opposition it appears that the plaintiff/opposite party has not disputed the fact of pendency of the said suit in the City Civil Court at Calcutta and the plaintiff/opposite party has also not disputed the existence of the interim order of injunction passed by the City Civil at Calcutta. But from a perusal of a certified copy of the order dated 20.12.2005 it appears that the learned 8th Bench, City Civil Court, Calcutta decreed Title Suit No. 1863 of 2003 on contest by restraining the defendants in the said suit from disturbing the plaintiffs (in the said suit) possession in the suit property without recourse to law. Thus, it appears that the said Title Suit No. 1863 of 2003 has since been disposed of. The certified copy of the said order dated 20.12.2005 which was produced in Court be kept on record. Thus the effect of the said decree is that the plaintiff/opposite party in the instant case will not be able to disturb the defendant/petitioner's (in the instant case) possession in the suit property without recourse to law.

9. The defendant/petitioner's learned Advocate cited a decision reported at 2003(1) CLJ 334 Smt. Srimati Dassi v. Sri Sri Iswar Giridhari Jew and Anr. There can be no dispute with regard to the legal proposition that a proceeding under Section 41 of the said Act is not a suit and the order passed under Section 43 of the said Act is not a decree. This Court is of the view that if a regular suit between parties is brought before the City Civil Court then in that event the order that may be passed under Section 43 of the said Act shall be subject to the order and/or decree that may be passed in such regular suit. But if there is no contrary order and/or decree passed in such regular suit before the City Civil Court, then in that event there is no legal impediment in passing an appropriate order under Section 43 of the said Act. The applicant in a proceeding under Section 41 of the said Act is entitled to obtain relief as contemplated in the said Section 41, if the circumstances so warrant and the conditions laid down in Section 41 are fulfilled, without being compelled to file a regular suit. Even in a case where the applicant's case comes squarely under the provisions of Section 41 of the said Act and such applicant is compelled to file a regular suit for recovery of possession of a suit property, then in such event the provisions of Chapter VII of the said Act would become meaningless.

10. In the instant case the learned City Civil Court has decreed the suit that was pending before it by ordering that the plaintiff/opposite party (in the instant case) shall not disturb the defendant/petitioner's (in the instant case) possession in the suit property without recourse to law. From the facts stated above it is clear that the plaintiff/opposite party has taken recourse to law and has obtained an order for recovery of possession of the suit premises as mentioned in the schedule to the application by evicting the defendant/petitioner therefrom. It also appears that there is nothing on record to show that there is any order and/or decree to the contrary by any competent Court having jurisdiction in the matter. It further appears that the defendant/petitioner did not ever obtain an order of stay of proceedings under Section 41 of the said Act from any competent Court. Of course, the order for recovery of possession upon the application under Section 41 of the said Act could not have been given effect to till the said Title Suit No. 1863 of 2003 was disposed of, in view of the fact that an interim order of status quo and/or injunction had existed till the disposal of the suit. Now, that the said suit has

been disposed of, as indicated above, this Court is of the view that the impugned order can now be implemented.

11. In view of the discussions made above, this Court is not inclined to interfere with the impugned order which may now be implemented in accordance with law. The application under Article 227 is thus disposed of.

12. Urgent xerox certified copy of this order, if applied for, be given to the parties on compliance of usual formalities.

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