PATNA HIGH COURT

Mahabir Ram

Vs

Shiva Shanker Prasad

Civil Revn. No. 671 of 1966

(N.L. Untwalia, Tarkeshwar Nath and K.B.N. Singh, JJ.)

16.01.1968

JUDGMENT

Tarkeshwar Nath, J.

1. This application in revision by defendant No. 1 is directed against the order of the learned Munsif refusing him (defendant No. 1) the permission to cross-examine the witnesses of the plaintiffs on the question of title to the house in suit and the validity of service of the notice under Section 106 of the Transfer of Property Act.

2. The facts giving rise to this application are these : The opposite party Nos. 1 to 3 (plaintiffs) filed a title suit against the petitioner for recovery of arrears of rent and for evicting him from the house bearing holding No. 117 in Ward No. 10 of the Gays Municipality. The case of the plaintiffs was that the said house was allotted to Bipat Ram, father of plaintiffs 1 and 2 in a private family partition in the year 1933 and after the death of Bipat Ram, it was inherited by his three sons, Shiva Shankar Prasad, Hari Kishun Das and Sarju Prasad in equal shares. The right, title and interest of Sarju Prasad was sold in the year 1956 in Execution Case No. 1100 of 1956 in satisfaction of a decree obtained by one Shyammani Devi and the said interest was purchased by Gaya Prasad Dubey. On 20-6-1962 Gaya Prasad Dubey sold his interest in the said house to Phool Kuer, plaintiff-opposite party No. 3 (wife of plaintiff opposite party No. 1). Defendant No. 1 (petitioner) was a tenant of the plaintiffs in the said house, but he failed to pay the rent and thus the plaintiffs had the right to evict him.

3. The petitioner contested the suit in the grounds inter alia that the said house belonged to Sarju Prasad alone and his interest was purchased by him (the petitioner) in the name of Gaya Prasad Dubey, as he (the petitioner) had filed an application for being declared as an insolvent; in other words, Gaya Prasad Dubey was the benamidar and he had no real title in respect of the said house. In fact, Gaya Prasad Dubey was the Karpardaz of the petitioner and he was entrusted with the sale certificate for getting the petitioner's name mutated in the Municipality but instead of taking steps in that direction, he fraudulently executed a sale deed in favour of Phool Kuer. The petitioner thus claimed to be the full owner of the house in question and asserted that he was not a tenant of opposite party Nos. 1 to 3. The petitioner being the owner, there was no question of

payment of rent and any default by him

4. During the pendency of the said suit, the plaintiffs (opposite party Nos. 1 to 3) filed an application under Section 11A of the Bihar Buildings (Lease. Rent and Eviction) Control Act, 1947, hereinafter to be referred to as the buildings control Act for the sake of brevity for a direction to the petitioner to deposit the arrears of rent and future rent. There was a rejoinder to the said application, but at the time of the hearing, there was no contest by the petitioner and the said application was heard ex parte.

5. There were three plaintiffs in the said suit. The monthly rent was Rs. 25/- and each plaintiff claimed a particular share in this rent from defendant No. 1 every month. Learned Munsif found in his order dated 8-2-1964 that "the total amount payable to plaintiff Nos. 1, 2 and 3 as arrears of rent for the period up to Magh 1371 Fs. came to Rs. 400/- 391 2/3 and Rs. 191 2/3 respectively". He directed the petitioner on the same date to deposit the aforesaid amounts within fifteen days of that order and future rent by the 15th day of the following months. He further passed an order that "in the case of non-compliance of any of the aforesaid directions, the defense of defendant No. 1 to the extent of ejectment shall be struck off".

6. The petitioner did not comply with the said order and did not deposit the arrears of rent, as he claimed to be the owner of the house in question. On 24-2-1964 the learned Munsif made a note that the order dated 8-2-1964 had not been complied with.

7. The petitioner filed an application on 12-6-1964 for permission to amend his written statement by taking an objection that the plaintiffs not having given a notice under section 106 of the Transfer of Property Act, the suit for eviction was not maintainable. On 11-8-1964 the plaintiffs (opposite party Nos. 1 to 3) also filed an application for amending their plaint by including an averment that the notice under section 106 of the Transfer of Property Act was given to the defendants before the institution of the said suit. On 2-9-1964 the learned Munsif allowed the amendment of both the plaint and the written statement, as prayed for by the parties.

8. The hearing of the said suit commenced on 28-3-1966 and two witnesses were examined on behalf of the plaintiffs on that date. Some documents also were marked as exhibits on their behalf. On the same date the petitioner filed an application for permission to cross-examine the witnesses of the plaintiffs on the question of title in respect of the said house and in respect of the objection taken (by the petitioner) with regard to the notice under section 106 of the Transfer of Property Act. The learned Munsif adjourned the suit to 29-3-1966.

9. On 29-8-1966 the learned Munsif took the view that the defense of the petitioner having been struck off by order dated 8-2-1964, he had no right to cross-examine the plaintiffs' witnesses for setting up a defense against ejectment and accordingly, he rejected the said petition Being aggrieved by this order the petitioner has filed this application in revision.

10. In *Chaturbhuj Mistry v. Jagan Ram*[1], it was held that if the defense in regard to ejectment was struck out in accordance with the provisions of Section 11A of the
Buildings Control Act, that would also include defendants' plea against the plaintiffs' title and asserting their own title. The present application in revision came up first for hearing before a learned Judge sitting singly, but his Lordship referred it to a Division Bench for hearing, as he

took the view that the decision in 1967 BLJR 44 had to be reconsidered by a larger Bench, inasmuch as, the striking out of the defense as against ejectment meant only the striking out of the defense of the tenant as against his ejectment and not his defense either as d trespasser or as an owner of the property. The case was then placed before a Division Bench, but that Bench referred it to a still larger Bench, as earlier Division Bench decision, referred to above, had to be reconsidered, accordingly, the application has been placed before us for hearing.

11. The plaintiffs had asked for two reliefs in the said suit; the first one was for recovery of arrears of rent and the second one was for eviction of the petitioner. The petitioner asserted that he was the owner of the house and he was not a tenant of the plaintiffs. An order under section 11-A of the Buildings Control Act was passed against the petitioner, but he did not comply with that order with the result that his defense "to the extent of ejectment" was struck off. These facts are admitted. The question for consideration is as to what is the effect of that order passed on the 8th of February, 1964. In the present case, both the plaint and the written statement were amended so far the notice under section 106 of the Transfer of Property Act was concerned. Thereafter, the petitioner wanted to cross-examine the witnesses of the plaintiffs with regard to his objection regarding the said notice and on the question of title to the house, but his prayer was refused.

12. Learned counsel for the petitioner contended that the learned Munsif had acted illegally in the exercise of his jurisdiction in refusing the prayer of the petitioner to cross-examine the witnesses of the plaintiffs. The provisions of section 11A of the Buildings Control Act were considered in *Nagina Ram v. Bishwanath Prasad Khemani*[2], as well. In that case the suit was for arrears of rent and for eviction of the tenant defendant, on the grounds of default in payment of rent and the personal necessity of the plaintiff landlord. An order was passed against the defendant under Section 11A to deposit the arrears of rent, but that order not having been complied with his defense with regard to the claim for ejectment was struck off. Later on, the plaintiff amended his plaint by deleting the claim for arrears of rent and the suit was fixed for ex parte hearing. The defendant obtained a rule in this Court against the order of the learned Munsif fixing the suit for ex parte hearing. The contention on his behalf was that the suit could not be decided ex parte even with regard to the claim for ejectment and he had a right to cross-examine the witnesses produced on behalf of the plaintiff and disprove the claim of the plaintiff for ejecting him from the house in question. It was held that the learned Munsif was right in holding that the suit should be fixed for ex parte hearing and the petitioner (defendant) was not entitled to cross-examine any witness who might be produced on behalf of the plaintiff.

13. The learned Munsif took the view in the impugned order dated 29-3-1966 that the defendant (petitioner) had no right to cross-examine the witnesses of the plaintiffs for making up a defense against ejectment. In other words, the petitioner could not cross-examine the witnesses with regard to the validity or otherwise of the notice under
Section 106 of the Transfer of Property Act and on the question of title. In a suit for eviction of a tenant on the grounds mentioned in Section 11 of the Buildings Control Act, it is open to the defendant to take various defenses. A defendant can take the plea inter alia that he did not make any default in payment of the rent, the plaintiff landlord did not require the house for his own occupation, there was no breach of the conditions of the tenancy, the notice under Section 106 of the Transfer of Property Act was either not given or even if it was given, it was invalid and there was no relationship at all of landlord and tenant between the plaintiff and himself (defendant).

14. Section 11-A relates to the deposit of rent by tenants in suits for ejectment and this provision was enacted for the benefit of the landlords. This section is in the following terms :

> "11A. Deposit of rent by tenants in suits for ejectment. If in a suit for recovery of possession of any building the tenant contests the suit, as regards claim for ejectment, the landlord may make an application at any stage of the suit for order on the tenant to deposit month by month rent at a rate at which it was last paid and also the arrears of rent, if any; and the Court, after giving an opportunity to the parties to be heard, may make an order for deposit of rent at such rate as may be determined month by month and the arrears of rent, if any, and on failure of the tenant to deposit the arrears of rent within fifteen days of the date of the order or the rent at such rate for any month by the fifteenth day of the next following month, the Court shall order the defense against ejectment to be struck out and the tenant to be placed in the same position as if he had not defended the claim to ejectment. The landlord may also apply for permission to withdraw the deposited rent without prejudice to his right to claim decree for ejectment and the Court may permit him to do so. The Court may further order recovery of cost of suit and such other compensation as may be determined by it from the tenant."

15. The main characteristics of Section 11A are the following :

> (a) The landlord can make an application for an order on the tenant to deposit rent month by month and also the arrears of rent.
> (b) Before making an order for deposit the court has to hear the landlord and the tenant, if they so like.
> (c) It is the tenant who will be ordered to make the said deposit.
> (d) The Court has further to pass an order that in case of the failure of the tenant to make the said deposit within the stipulated time, the defense against ejectment shall be struck out. It necessarily means that the tenant's defense shall be struck out and then the tenant shall be placed in the same position as if he had not defended the claim to ejectment.

The emphasis throughout in this Section is on the word "tenant" and whatever defenses are open to him as a tenant against ejectment have to be struck out, in case of his failure to make the deposit under that provision. In other words, his defense qua tenant only would be struck out. If a defendant in a suit for his eviction on the grounds mentioned in Section 11 of the Buildings Control Act takes a defense that he was not the tenant of the plaintiff landlord and that the plaintiff had no title to the house in question and that he (defendant) was the owner of it, then that defense obviously is not in the capacity of a tenant, inasmuch as, there is a clear denial of the relationship of landlord and tenant.

16. I would first deal with the question as to whether the petitioner had a right to cross-examine the witnesses of the plaintiffs with regard to the plea taken by him recording the notice under Section 106 of the Transfer of Property Act. In *Niranjan Pal v. Chaitanya Lal Ghosh*[3], it was

held that unless a landlord determined the tenancy by giving a notice under Section 106 of the Transfer of Property Act, his action under Section 11 of the Buildings Control Act would be premature. The notice to the tenant under that section is given on the footing that the relationship of landlord and tenant subsists and the landlord wants to determine the tenancy. It is open to the tenant to take the plea that the said notice was not given or even if it was given, it was invalid on one ground or the other, but it is important to keep in view that the said plea is available to him as a tenant in the present case, the defense of the petitioner qua tenant has been struck out meaning thereby that he cannot set up any defense with regard to the said notice under Section 106 by cross-examining the witnesses of the plaintiffs. Similarly, the petitioner cannot adduce his own evidence on the point of non-service of the notice under Section 106 or the invalidity of the said notice. I am thus of the view that the prayer of the petitioner to cross-examine the witnesses of the plaintiffs on the point of notice has been rightly refused by the learned Munsif and he has not acted illegally or with material irregularity in the exercise of the jurisdiction in rejecting the implication of the petitioner to that extent.

17. The next question for consideration b as to whether the petitioner had a right to cross-examine the witnesses of the plaintiffs on the question of title to the house in suit. The moment a defendant in such a suit takes the defense that he is not a tenant of the plaintiff landlord and no relationship of landlord and tenant was ever created, the position is that such a defense is taken by him not in the capacity of a tenant. His defense may be that he himself was the owner of the house or that a third party was an owner, but all the same this defense is not a defense qua tenant of the plaintiff. In such a case even on the striking out of his defense against ejectment he cannot be debarred from cross-examining the plaintiffs' witnesses on the question of title or adducing his own evidence to prove either his title or that of a third party to the house in question.

18. Learned counsel, Mr. J.C. Sinha for the plaintiffs (opposite party Nos. 1 to 3) contended that the petitioner was not entitled to cross-examine the plaintiffs' witnesses even on the question of title and in support of it, he referred to the Division Bench decision of this Court in, 1967 BLJR 44. The petitioners in that case had instituted suits for the eviction of the tenants and for recovery of arrears of rent. During the pendency of the suits, they filed an application under Section 11A of the Buildings Control Act for a direction to the defendants to deposit the monthly rent and also the arrear rent due from them. The court, passed an order directing the defendants to deposit the arrear rent and the monthly rent within a certain time, but on
their failure to make the deposit their defense was struck out on the 24th of July, 1962 as provided under Section 11A. On the date of hearing, however, the defendants wanted to adduce evidence and cross-examine the plaintiffs' witnesses and that was permitted by the court on the 7th of August, 1963. The order of the court was that the written statement of the defendants had been struck off so far as their defense on the point of their eviction as tenants was concerned, but their other defences with regard to the title of the plaintiffs etc., taken by them would stand as they were. This order was the subject matter of revision at the instance of the plaintiffs. H. Mahapatra and A.B.N. Sinha, JJ. held that there was nothing wrong in the first part of that order and observed that on the failure of the defendant to make the deposit as ordered by the court, his defense in regard to ejectment had to be struck out and he would be deemed not to have claimed any defense against that relief of the plaintiff, but it did not mean that his other defence, for example, in regard to arrear rent as claimed by the plaintiff would stand struck out and it would be still open to such a defendant to show during the trial that either the whole amount claimed by the plaintiff or a part of it was not due from him. A question arose as to whether the defendant

whose defense was struck out under Section 11A would suffer and to be placed in a great predicament, if he succeeded in proving to the court's satisfaction at the final hearing of the suit that no rent was in arrears and this question was answered by their Lordships in the following manner :

> "We do not think that there will be any hardship to the defendant in such a case at all. His defense in regard to arrears of rent as claimed by the plaintiff will still be available to him to substantiate during the trial, and if he does so the court will come to the conclusion that no arrear rent was due to the plaintiff. Although the defendant's defense about ejectment is struck out, the court will not necessarily pass a decree for ejectment in all cases. Even where the defense is struck out, the plaintiff will still be required to adduce evidence in support of his claim. If his evidence falls short or if evidence of the defendant in regard to matters other than ejectment leads the court to the conclusion that none of the grounds mentioned in Section 11 for ejectment is present in a particular case, the plaintiff will not succeed in getting a decree for ejectment. It cannot, therefore be said that the provisions under Section 11A are utterly and always to the disadvantage of the defendant tenants."

In view of the observations, quoted above, there can be no doubt that even after striking out of the defense against ejectment; it is open to the defendant (tenant) to establish at the hearing of a suit that in fact rent was not in arrear provided the suit is for the realization of arrears of rent also. In the present case before us, there is no question about the petitioner's right to cross examine the plaintiffs' witnesses with regard to the arrears of rent and as such Mr. J.C. Sinha had nothing to say one way or the other with regard to the observations of their Lordships, quoted above, but he relied on the other part of that decision which is in the following terms :

> "In the written statement, the defendants raised a plea that they had title to the property, and the plaintiffs had no title over it. This was also in connection with the ejectment. If they would be permitted to lead evidence or prove their plea of title that will be only in answer to the plaintiffs' claim of ejectment of the defendants from the suit houses. If the defense in regard to ejectment was struck out, that would also include the defendants' plea against the plaintiffs' title and asserting their own title. That part of the order was obviously wrong, and, therefore, civil revisions nos. 1347, 1348 and 1349 of 1963 will have to be allowed, as far as the latter part of the impugned order is concerned."

These observations undoubtedly support the contention of Mr. J.C. Sinha that the particular defense against ejectment having been struck out, he was not entitled to cross examine the plaintiffs' witnesses on the question of title and prove his own title. It is perfectly true that the plea taken by the petitioners that he had title to the house, and the plaintiffs had no title over it, is a plea in connection with ejectment, but all the same it is not a plea in the capacity of a tenant or qua tenant. The attention of their Lordships does not seem to have been drawn to this aspect and character of the defense which is taken by a defendant in a suit for his eviction. I thus do not find any warrant for the proposition laid down that "if the defense in regard to ejectment was struck out, that would also include the defendants' plea against the plaintiffs' title and asserting their own title." I have already analysed the provisions of Section 11A and the correct meaning of the

words "the defense against ejectment" is the defense of the tenant or of the defendant, who is proved to be the tenant against ejectment. In other words, it is the defense of the tenant and tenant alone against ejectment which can be struck out. Mr. J.C. Sinha was extremely fair while giving his own interpretation of the provisions of Section 11A and in view of the word '"tenant" occurring at so many places in that section, whose defense could be struck off, he could not seriously press that striking out of a defense of the tenant against ejectment would mean that the defense with regard to the non-existence of the title of the plaintiff landlord also in respect of the house in question had to be struck out. For the reasons given above. I have to say with great respect that the view taken by their Lordships in Chaturbhuj Mistry's case, 1967 BLJR 44 that striking out of the defense in regard to ejectment meant that the defendant's plea against the plaintiffs' title and asserting their own title also had been struck out is not correct and the decision on that point cannot stand as a bar to the petitioner's cross-examining the witnesses of the plaintiffs on the question of title in the present case.

19. Mr. J.C. Sinha, however, urged that the order dated 8-2-1964 giving direction to the petitioner to make a deposit under Section 11A and laying down that on his failure to make the said deposit, his defense to the extent of ejectment would be struck off had become final and it, could not be questioned collaterally to the present application in revision. He contended that full effect should be given to that order whether it was right or wrong. In my opinion, there is no merit in this contention, inasmuch as, the petitioner is not trying to get that order reversed or modified in any manner in the present application. In fact, the question is as to what that order really meant ? It is open to the court which passed that order or a superior court to interpret that order, appreciate its true implication,'- and then act upon it.

20. Mr. J.C. Sinha finally submitted that the real effect of the order dated 8-2-1964 was that the learned Munsif had determined that the petitioner (defendant No. 1) was a tenant of the plaintiffs (opposite party Nos. 1 to 3) arid it was only on that footing that the petitioner had been directed to make the deposit under Section 11A, In other words, according to him, the relationship of landlord and tenant between the plaintiffs on one hand and the defendant No. 1 on the other had been finally determined and it was no longer open to the petitioner to contend that he was not a tenant of the plaintiffs. While developing this point, he went to the length of submitting that the moment there was a denial of a relationship of landlord and tenant between the plaintiffs on one hand and the defendant on the other, no order could be passed under Section 11A of the Buildings Control Act and the court could not direct the defendant to make any deposit whatsoever. He further submitted that in the event of denial of the relationship of landlord and tenant, the court should determine this question finally at the stage of the application under Section 11A and in case it found that there was no such relationship, the question of deposit would not arise at all and the suit itself should be dismissed. It is difficult to accept either of these contentions. Section 11A gave some relief to a landlord if a tenant happened to be a defaulter in paying the monthly rent. According to this section, it was open to a landlord in a suit for recovery of possession of any building to make an application at any stage of the suit for an order on the tenant to deposit monthly rent and the arrears of rent. The court had then to hear the parties if it chose to make an order for the deposit of rent. It was open to the landlord to withdraw the deposited rent without prejudice to his right to claim a decree for ejectment. In most of the suits of such a nature, the defendant takes up the plea that he was not a tenant of the plaintiff and that the plaintiff had no title to the building in question. If the contention of Mr. J.C. Sinha were to be accepted, then the mere denial of the relationship of landlord and tenant would make the

provisions of Section 11A nugatory and the jurisdiction of the court to pass an order under that section would be ousted. Such interpretation of the provisions of Section 11A cannot be accepted, and, in my opinion, the correct procedure for a court to adopt would be that it should tentatively examine the materials available on the record and determine whether the denial of relationship of landlord and tenant by the defendant or a dispute raised by him with regard to the title of the plaintiff was *bona fide* or a mere pretence and without any merit if the court finds that the said denial is merely for the sake of denial and that there was no substance in that denial, the court should proceed to make an order for deposit of rent if the other conditions laid down in that section are fulfilled.

21. The contention of Mr. J.C. Sinha that at the stage of the application under Section 11A, the question of relationship of landlord and tenant should be finally determined by taking all the evidence which the parties choose to produce is equally devoid of merit. Let me visualise as to what would be the result if that question is finally determined at that stage. The order of the court finally determining that question at that stage is not appealable and an application in revision against that order would hardly succeed within the four corners of Section 115 of the Civil Procedure Code. If the decision at that stage is in favour of the defendant to the effect that no relationship of landlord and tenant existed, then the plaintiff cannot prefer an appeal against that decision unless the suit itself is dismissed at that stage, but if the decision is against him (defendant), then he can be called upon to make the deposit and he will have no remedy until he prefers an appeal against the decree passed in that suit. It cannot then be held even from a practical point of view that the question of relationship of landlord and tenant should be finally determined at the stage of the application under Section 11A. At the stage of that application undoubtedly there are certain facts which have to be determined by the Court, and orders passed accordingly, but all those orders are subject to the final determination of the issues at the hearing of the suit. In fact, even in the case of, 1967 BLJR 44 relied upon by Mr. J.C. Sinha their Lordships held that even after the striking out of a defense against ejectment, it was still open to the defendant (tenant) to prove to the Court's satisfaction that no rent was due from him, if in that suit a decree for arrears of rent also was asked for. I would refer in this connection to the case of *Rishabh Sunder Das v. Shahabad Zila Harijan Kalyan Samiti*[4], Ramratna Singh, J. observed as follows :

> "... ... that some determination regarding the rate of rent has to be made when disposing of the application under Section 11A. That determination would be only for the purpose of satisfying the court prima facie about, the rate of rent and it must be done in a summary manner though at the time of final hearing of the suit the court has to decide finally the rate of rent payable."

22. On an application under Section 11A the court may determine as to what amount of rent was in arrears and at what rate rent was last paid. It. may happen that during the pendency of the suit for eviction the fair rent may be determined by the House Controller and in that case a question would arise as to the amount which the tenant should be asked to deposit. It was held in *Sobrati Rangrez v. Ganga Prasad*[5], that when during the operation of the order under Section 11A the fair rent has been determined by the House Controller there was nothing either in that section or in any other provision of the said Act to debar the court from revising its previous order and directing the defendant to pay rent at the rate at which it was determined by the House Controller.

The position thus is that the amount of rent which a tenant has to deposit under Section 11A can be varied from time to time in certain circumstances.

23. Another decision of this Court in *Parbati Kueri v. Sugan Chand Jain*[6], is relevant while interpreting the provisions of Section 11A. The suit there was for eviction and recovery of arrears of rent in respect of a house. The plaintiff opposite party No. 1 filed an application in the trial court under Section 11 A. but that application was opposed by the defendant petitioner on two grounds. The first ground was that there was no relationship of landlord and tenant between the parties and the second one was that there was no arrear of rent due to the plaintiff. The trial court recorded its findings holding that prima facie there was relationship of landlord and tenant between the parties and prima facie a certain sum was in arrears as rent. On those findings the court below directed the defendant to deposit the arrears of rent and monthly rent within a certain time failing which the defense against ejectment had to be struck off. The petitioner being aggrieved by that order contended that the trial court was not justified in going into either of the two questions as both had to be decided as substantial questions in the suit itself. G.N. Prasad, J. held that even if those questions had to be decided finally in the suit, the jurisdiction of the court in passing an order under Section 11A was not ousted and the court had to pass the necessary order on the petition by the landlord under Section 11A. "For that purpose it has to make a summary investigation with respect to both the questions raised by way of objection to the landlord's petition". In support of this view his Lordship
referred to a judgement of this Court *Azizur Rahman v. Abdul Amin*[7] where it was held that on an application under Section 11A it was incumbent upon the court to find out in a summary way on the materials before it whether the plaintiff's case in support of the petition under Section 11A was correct or not and the finding given at that stage was a finding only for the purpose of Section 11A of the Buildings Control Act. I am accordingly of the view that the questions arising under Section 11A have to be determined as that stage for the purpose of passing an order under that section and the same questions may have to be gone into finally at the time of trial, but that would be no bar to a tentative determination of the question of relationship of landlord and tenant at the earlier stage when the provisions of Section 11A are resorted to by the landlord.

24. Mr. J.C. Sinha put forward another objection that there was no warrant either in the Buildings Control Act or in the Civil Procedure Code for a piece-meal determination of a defense raised by a defendant that the plaintiff had no title to the house in question. There are, however, instances in which the Court has to determine at the initial stage as to whether a party to the suit has a prima facie case. I take the case of a plaintiff applying for an injunction and an interlocutory order in accordance with the provisions of order 39 of the Civil Procedure Code. On an application for such a relief, the court has to determine whether the plaintiff has a prima facie case and on which side lies the balance of convenience. If the court is satisfied that the plaintiff has a prima facie case and the balance of convenience is in his favour, an injunction can be issued against the defendant. This order for injunction, however, is subject to the result of the suit in case the suit is dismissed, then the order for injunction stands automatically vacated. Similarly, under the provisions of Order 38 of the Civil Procedure Code, there can be an order for attachment before judgement at the instance of the plaintiff, and at the time of passing that order, the court has to be satisfied that the plaintiff has made out a prima facie case for passing an order of that kind. In case, however, the plaintiff's suit is dismissed, then that order of attachment comes to an end, I am, therefore of the view that there is no merit in the contention raised by Mr. J.C. Sinha and it cannot thus be said that a certain controversy arising between the parties cannot

be tentatively determined at the initial stage of a suit. On the grounds, mentioned above. I would overrule the contention raised by Mr. J.C. Sinha that the order dated 8-2-1964 passed by the learned Munsif directing the petitioner to make the deposit meant that he had finally determined that the petitioner was the tenant of the plaintiffs.

25. In view of the contentions raised by Mr. J.C. Sinha, referred to above, it becomes necessary to lay down the procedure which a court has to adopt on an application under Section 11A of the Building Control Act :-

> (a) In case the defendant denies the relationship of landlord and tenant between the plaintiff and himself, the court has to examine the materials then available and come to a conclusion whether the said denial or a dispute as to the title of the plaintiff was *bona fide* or a mere pretence; and in case there is no prima facie merit in the laid denial, the defendant can be called upon to make the deposit if other conditions are fulfilled.
> (b) The court has to determine as to what was the rate of rent last paid and as to what amount of rent was in arrear, if any ? The order passed in this connection is subject to variation, inasmuch as, the House Controller may determine during the pendency of the suit that the fair rent of the house is somewhat different.

The orders passed at the stage of the said application under Section 11A are subject to the final decision on the very same questions in the suit.

26. On a consideration of the points urged by learned counsel for the parties. I am of the view that the learned Munsif acted illegally in the exercise of his jurisdiction in so far he refused the prayer of the petitioner to cross-examine the witnesses of the plaintiffs on the question of title to the house in suit. It is further open to the petitioner to adduce his own evidence to prove that either he had title to the house in question or that the plaintiffs had no title. The order dated 8-2-1964 for the striking out of the defense against ejectment does not debar the petitioner from cross-examining the witnesses of the plaintiffs on the lines, indicated above.

27. In the result, the application is allowed in part and the order dated 29-3-1966 Is modified to this extent that the petitioner is entitled to cross-examine the plaintiffs' witnesses on the question of title to the house in suit. The point in question not being free from difficulty, there will be no order for costs.

N. L. Untwalia, J.

28. I entirely agree.

K. B. N. Singh, J.

29. I agree.

Revision partly allowed.

Cases Referred.

[1]1967 BLJR 44
[2]1964 BLJR 197
[3]1964 B.L.J.R. 583 (FB)
[4]1965 BLJR 11
[5]1960 BLJR 661
[6] AIR 1967 Pat 415
[7] dated 28-11-1961 in Civil Revn. No. 710 of 1961