
(2007) 03 CAL CK 0082
In the Calcutta High Court
Case No : S.A. No. 314 of 2002

Atlas and Union Jute Press Co. Ltd.

APPELLANT

Vs

Kingslay Industries Limited

RESPONDENT

Date of Decision : 29-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Companies Act, 1956 — Section 391, 391(2), 394, 394(1)
Foreign Exchange Regulation Act, 1973 — Section 29
West Bengal Premises Tenancy Act, 1956 — Section 13(1)

Citation : (2007) 3 CHN 674

Hon'ble Judges : Tapan Mukherjee, J

Bench : Single Bench

Advocate : Suchit Kumar Banerjee and Indranil Banerjee, for the Appellant; Udayan Roy, for the Respondent

Judgement

Tapan Mukherjee, J.—This appeal at the instance of the plaintiff is directed against the judgment and decree passed by the Id. First Appellate Court in Title Appeal No. 56 of 2000 affirming judgment and decree passed by Id. Trial Court in T.S. No. 62 of 1996 dismissing the suit.

2. The plaintiff brought the suit against the original defendant, a monthly tenant on the ground of transferring the tenanted premises to the present defendant company Kingslay Industries Limited by the erstwhile defendant company Kingslay Corporation Private Limited without express consent in writing of the plaintiff. It is the case of the plaintiff by virtue of a scheme of amalgamation the erstwhile defendant company being Kingslay Corporation Private Limited transferred all the properties, rights and interest including the tenancy right in respect of the suit premises to the defendant No. 2 company Kingslay Industries Limited by the order of the Hon'ble High Court dated 8.5.95 in company Petition No. 39 of 1995 connected with company application being No. 289 of 1994. The said transfer is also in violation of the provision u/s 13(1)(a) of the West Bengal Premises Tenancy Act 1956 and as such the defendant is liable to be evicted

from the tenanted premises. The notice of the plaintiff for evicting the suit premises fell on deaf ears of the defendant and hence this suit for ejectment and damages was filed.

3. The original defendant No. 2 i.e., the transferee contested the suit contending that original defendant company has got no existence at all consequent upon the scheme of amalgamation approved by the Hon"ble High Court and all the right, title and interest of the outgoing company stood vested with present defendant. The defendant has taken away all the liabilities of the said company. The question of subletting, assigning or transfer is absolute a myth and question of violation of the provision u/s 13(1)(a) of the West Bengal Premises Tenancy Act does not arise. The present defendant is now the monthly tenant in place and instead of Extinct Company. The notice is illegal.

4. Id. Trial Court dismissed the suit and in appeal Id. First Appellate Court dismissed the appeal affirming the judgment and decree of the Id. Trial Court. Then the plaintiff preferred this second appeal.

5. At the time of admission of appeal it was held that the appeal will be heard on the substantial question of law as formulated in the ground Nos. xiii, xv, xvi which are reproduced below:

xiii. For that the learned Judges of both the Courts below erred in law in not following or not considering or ignoring the ratio of the decisions delivered by the superior Courts and reported in All India Reporter 1986 SC page 1218 & 1989(1) Calcutta High Court Notes, page 150 cited before them, which they were bound to follow and by not considering the same or following the same or ignoring the same amounted to judicial impropriety.

xv. For that the Courts below failed to correctly appreciate the ratio of the judgment reported in Madras Bangalore Transport Co. (West) Vs. Inder Singh and Others, and erred substantially in law in applying the same to the facts of this case.

xvi. For that the Courts below failed to correctly appreciate on the peculiar facts of the case reported in Madras Bangalore Transport Co. (West) Vs. Inder Singh and Others, it was held that there was no subletting. The said decision is distinguishable on facts with the impugned judgment.

6. It has been contended by the Id. Lawyer for the appellant that every company is the body corporate under the Companies Act. The earlier company being Kingslay Corporation Private Limited and present Kingslay Industries Limited are two different companies having separate and distinct existence. As a result of scheme of amalgamation approved by the Hon"ble Court by order dated 8.5.95 on the company petition No. 39 of 1995 connected with company application No. 289 of 94 Under Sections 391(2) and 394 of the Companies Act evidenced by the certified copy, Exbt. 5 both the transferor company Kingslay Corporation Private Limited and the transferee company Kingslay Industries Limited were

amalgamated since 1.4.94 and as a result of such transfer all the properties, assets and liabilities of the transferor company immediately before the amalgamation including lease, tenancy and agency and all other interests and rights in or arising out of property have been transferred to the transferee company. It has been contended by the Id. Lawyer for the appellant that such transfer is in contravention of Section 13(1)(a) of the West Bengal Premises Tenancy Act. Id. Lawyer for the appellant has further contended that there was no continuance of tenancy and the defendant Kingslay Industries Limited is to be considered as sublessee or transferee and the plaintiff is entitled to get the decree of ejectment u/s 13(1)(a) of W.B.P.T. Act.

7. Id. Lawyer for the appellant has further contended relying on the ruling, reported in AIR 1986 at page 1218 or in General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., that the facts and circumstances of the said case before the Hon'ble Apex Court are similar to the facts and circumstances of this case. In that case by order of amalgamation u/s 394 of the Companies Act the interest, rights of the transferor company in all its properties including leasehold interest, tenancy rights and possession were transferred and vested in the transferee company voluntarily and the transferor company was dissolved and it ceased to exist for all practical purposes in the eye of law. The Apex Court held that the same amounted to contravention of Section 10(2)(a) of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act regarding restriction of subletting or transfer as well as terms and conditions of the rent agreement. Even in a case of involuntary transfer or transfer of tenancy right by virtue of a scheme of amalgamation sanctioned by the Court by its order Under Sections 391 and 394 of the Companies Act the transfer will come under the purview of Section 10(2a) of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act. Id. Lawyer for the appellant has further contended that the Id. First Appellate Court admitting that the facts and circumstances appearing in the said case before the Apex Court are identical with the facts and circumstances of this case did not adopt the ratio in that case but arrived at an erroneous finding and failed to correctly appreciate the ratio of the judgment reported in Madras Bangalore Transport Co. (West) Vs. Inder Singh and Others, and also in Madras Bangalore Transport Co. (West) Vs. Inder Singh and Others, and Id. First Appellate Court erred substantially in law in applying the said ratio of the judgment reported in that case to the present case. Id. Lawyer for the appellant has also placed his reliance upon the ruling reported in General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., , 1989(1) CHN 150 , Madras Bangalore Transport Co. (West) Vs. Inder Singh and Others, , Madras Bangalore Transport Co. (West) Vs. Inder Singh and Others, , 1994 - 2 - LW 443 (SC) , Cox and Kings Ltd. and Another Vs. Chander Malhotra (Smt), , Singer India Ltd. Vs. Chander Mohan Chadha and Others, , Singer India Ltd. Vs. Chander Mohan Chadha and Others, and Bhagwati Prasad Khaitan and Others Vs. Turner Morrison and Company Limited, .

8. Id. Lawyer for the respondent has contended that the questions for

consideration are as to who sublet to whom and whether after amalgamation same Board of Directors, same Management, same Controlling Authority continued.

9. In this case the transferee company stepped into the shoes of the transferor company with the same Director, same Management and same Controlling Authority after the amalgamation and there was no transfer of tenancy by virtue of said amalgamation. Both the companies had no distinct legal entitles and the original company merged with the latter company and the two companies were different only in name but one for all practical purposes and the question of subletting or transferring the suit premises does not arise and there cannot be a decree u/s 13(1)(a) of the West Bengal Premises Tenancy Act.

10. Ld. Lawyer for the respondent placed his reliance upon the ruling reported in AIR 1986 SC at page 1564. Ld. Lawyer for the respondent has also challenged the validity of the notice of ejectment served upon Kingslay Corporation Private Limited.

11. It is undisputed that the previous company Kingslay Corporation Private Limited was a tenant in respect of suit premises under the plaintiff. Exbt. 5, the order of Hon"ble Court passed in respect of the application under Sections 391(2) and 394 of the Companies Act shows that the scheme of amalgamation of the earlier company Kingslay Corporation Private Limited with Kingslay Industries Private Limited was sanctioned by the Hon"ble Court u/s 394(1)(b) of the Companies Act. The question is whether such amalgamation amounted to transfer of the tenancy right of the earlier company by way of subletting to the latter company in violation of provision of Section 13(1)(a) of the West Bengal Premises Tenancy Act. It appears that by order of amalgamation the interest, rights of the transferor company in all its properties including leasehold interest, tenancy rights and possession were transferred and vested in the transferee company voluntarily and the transferor company was dissolved and it ceased to exist for all practical purposes in the eye of law. So such amalgamation amounts to transfer of original company's tenancy right by way of subletting in violation of Section 13(1)(a) of the West Bengal Premises Tenancy Act. The facts and circumstances of this case are similar to the facts and circumstances of the case reported in General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., relied by the Id. Lawyer for the appellant. In that case also the appellant company filed a company petition in the High Court u/s 394 of the Companies Act for sanction of a scheme and its amalgamation with another company appellant No. 2. The scheme provided that appellant No. 1 and all its property, rights, powers of every description including all leases and tenancy rights be transferred and vested or deemed to be transferred or vested in the appellant No. 2. The High Court sanctioned a scheme. Consequently the appellant No. 1 company stood dissolved. The question was whether the amalgamation amounted to transfer of the tenant companies right under the lease by way of subletting and as such it violated Section 10(ii)(a) of the A.P.

Buildings (Lease, Rent and Eviction) Control Act as also the terms of the rent agreement. The Apex Court held that the A.P. Acts prohibits in specific terms both subletting as well as the transfer for assignment of the interest of the tenant. Section 2(ix) of the Act makes it clear that any person placed in occupation of a building by the tenant cannot be deemed or considered to be tenant in respect of the premises in which the said person is to be in possession within the meaning of the said Act. In the case by order of amalgamation the interest rights of the transferor company in all its properties including leasehold interest, tenancy rights and possession were transferred and vested in the transferee company voluntarily and the transferor company was dissolved and it ceased to exist for all practical purposes in the eye of law. That amounted to contravention of Section 10(ii)(a) of the A. P. Act as well as of the terms and conditions of the said rent agreement thereby making the transferee company liable to be evicted from the tenanted premises. Even in case of an involuntary transfer or transfer of the tenancy right by virtue of a scheme of amalgamation sanctioned by the Court by its order under Sections 391 and 394 of the Companies Act the transfer will come within the purview of Section 10(ii)(a) of the Act.

12. As already observed Id. Lawyer for the respondent has placed his reliance upon the ruling reported in AIR 1986 SC at page 1564 and has contended that the two companies had the same Directors and same shareholders and they were two only in name but one for practical purposes. There was substantial identity between the two companies and the question of subletting does not arise.

13. It appears from the evidence of D.W. 1 that the Directors of both the companies are the same. The return submitted by both the companies which were Exbt. A, B and C show that the Directors of both the companies were the same.

14. Id. First Appellate Court held that both the companies had no distinct, legal entities and after amalgamation the original company merged with the present defendant company absolutely under the same Management and Board of Directors for all practical purposes and the present defendant company simply stepped into the shoes of the original defendant company and that there has been no incidence of transfer of tenancy and Id. First Appellate Court endorsed the finding of the Id. Trial Court. The decision relied by the Id. First Appellate Court is reported in AIR 1986 SC at page 1564. The facts and circumstances of that case before the Apex Court are different from the facts and circumstances in this case. In that case the firm carrying on transport business was in possession of a premises as tenant. The firm founded a limited company with its partners Directors. The company was formed to circumvent to ban against the firm for operating in a particular area. The firm was appointed agent of the company and the company as the agent of the firm. The firm (tenant) allowed the company to operate from its tenanted premises along with it. Both the company and the firm had their sign-boards at the premises and they were both registered under the

Delhi Shops and Establishments Act as having their offices at the disputed premises. The owner of the disputed premises filed eviction petition against the firm on ground of subletting. It was held there that there was no subletting assignment or parting with possession of the premises by the firm to the limited company so as to attract Section 14 . The firm continued to be in occupation of the premises even after the private limited company came in. The firm never effaced themselves. The firm allowed the private limited company, to function from the same premises but the private limited company, though a separate legal entity, was in fact a creature of the partners of the firm and was the very image of the firm. The limited company and the partnership firm were two only in name but one for practical purposes. There was substantial identity between the limited company and the partnership firm. As such even though the firm and the company were distinct legal entities there was no subletting or assignment. In this case the earlier company parted with possession of the premises to the latter company. The earlier company was dissolved. The latter company was not the image of the earlier company. Both the companies were not only two in name but also two for all practical purposes. The mere fact that the Director of the earlier company is the Director of the latter company does not make both the companies one for all practical purposes and the question of transfer by way of subletting comes in. So, the principles laid down in the ruling reported in Madras Bangalore Transport Co. (West) Vs. Inder Singh and Others, do not apply to the present case.

15. In the case reported in 1994 - 2 - LW 443 (SC) relied by the Id. lawyer for the appellant premises was leased to an individual for being used as a school, allowed by the lessee to be used for the same purpose by a registered society having an elected management. In such circumstances, although the original lessee participated as Secretary in the management of the society the said act of letting out of the premises by the original lessee amounted to subletting. It was held by the Apex Court that the test to determine a sublease is whether legal possession, i.e. possession with the right to include and exclude others, still remains with the original lessee. Once she is merely a secretary, this test is not answered.

16. In the case reported in Cox and Kings Ltd. and Another Vs. Chander Malhotra (Smt), there was transfer of business and leasehold interest by foreign company to Indian company and there was application of a tenant a foreign company u/s 29 of FERA for permission to carry on its business rejected by RBI and the company was ordered to wind up its business. Subsequently, with the permission of RBI the Indian company incorporated in which the foreign company having 40% share. Pursuant to agreement between the two companies, the Indian company becoming the assignee with all rights and liabilities and subject to observance of the terms and conditions of all the tenancy rights contained in the leases or agreements for lease under which the same were being held by the foreign company. Accordingly, the Indian company was carrying on the same business in the premises without obtaining written consent of landlord. It was

held that it amounted to subletting or at least assignment and constituted a ground for eviction u/s 14(1)(b) of the Delhi Rent Control Act. The contention the transfer of leasehold interest was under statutory compulsion not sustainable.

17. In the case reported in *Singer India Ltd. Vs. Chander Mohan Chadha and Others*, ; relied by Id. Lawyer for the appellant where the question of eviction on the ground of subletting u/s 14(1)(b) of Delhi Rent Control Act arose and where American company was amalgamated with Indian company under the scheme of amalgamation sanctioned by High Court by order under Sections 391 and 394 of the Companies Act and there was transfer of tenancy right by virtue of scheme of amalgamation not contemplated by provisions of Act and order of eviction was held proper by the Apex Court. It was held there that the applicability of Section 14(1)(b) of the Delhi Rent Control Act depends upon occurrence on a factual situation namely subletting or assignment of otherwise parting with possession of the whole or any part of the premises by the tenant. Whether it is a voluntary act of the tenant or otherwise and also for reasons for doing so are wholly relevant and can have no bearing. It was further held that even there is an order of a Court sanctioning the scheme of amalgamation under Sections 391 and 394 of the Companies Act whereunder the leases rights of tenancy or occupancy of the transferor company got vested, in and becoming property of the transferee company it would make no defence in so far as the applicability of Section 14(1)(b) is concerned as the Act does not make any exception in favour of a lessee who may have adopted such course of action in order to secure compliance of law.

18. In the case reported in *Bhagwati Prasad Khaitan and Others Vs. Turner Morrison and Company Limited*, relied by the Id. Lawyer of the appellant there was question of eviction on the ground of subletting and transfer of a possession in favour of a subsidiary company at the instance of a holding company in lieu of payment of money and it was held by this Court that the said transfer of possession amounted to transfer, assignment or subletting within the meaning of Section 13(1)(a) of the West Bengal Premises Tenancy Act.

19. In the ruling reported in 1989(1) CHN 150 where there was a subletting it was held that a tenant or tenants by subsequently forming a company and permitting the company to use and to operate from the same premises may not be held to have transferred or sublet the premises particularly where the tenant or tenants without parting with the possession of the premises is or are exercising substantial control over the company. But whereunder the original tenant in its original capacity has also expressly entered into a jural relation of landlord and tenant with the new company which is obviously a distinct and separate legal personality by releasing rent from the company and or otherwise it cannot in law still be urged that the original tenant has not sublet to the company solely because it is also in its substantial control of the company. The Court may, if necessary, pierce the corporate veils to undo fraud and illegality or to do justice. But the corporate authorities cannot be allowed to put on and put

off their veils of corporate personality at their pleasure to suit their purpose and surely not to evade the operation of social welfare legislations like the West Bengal Premises Tenancy Act which condemns and penalises unauthorised subletting in mandatory terms.

20. In the said case ruling reported in General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., was relied.

21. In view of my above discussions I hold that the original tenant Kingslay Corporation Private Limited transferred the tenancy right and possession by way of subletting without the previous consent of the landlord - and thus the said tenant violates provision of Section 13(1)(a) of the West Bengal Premises Tenancy Act and the transferee company i.e., Kingslay Industries Limited is liable to be evicted from the tenanted premises.

22. The Id. Courts below erred in law in not following the ratio of the decisions reported in General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., , General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., and 1989(1) CHN 150. The Courts below also failed to appreciate the ratio of the judgment reported in Madras Bangalore Transport Co. (West) Vs. Inder Singh and Others, and erred substantially in law in applying the said ratio to the facts of the present case and they failed to appreciate the peculiar fact in the said case reported in Madras Bangalore Transport Co. (West) Vs. Inder Singh and Others, .

23. As regards validity of notice Id. First Appellate Court has come to a clear correct finding and I have nothing to disturb the same.

24. In the result, the appeal succeeds.

25. The appeal is allowed on contest with costs. The judgment and decree passed by the Courts below are hereby set aside. The suit is decreed on contest with costs against the defendant Kingslay Industries Limited. The plaintiff do get a decree for recovery of khas possession of the suit premises from the defendant. The defendant is directed to vacate the suit premises within a month failing which the plaintiff will be at liberty to execute the decree. The plaintiff do also to get decree of mesne profit to be calculated in a separate proceedings under Order 20 Rule 12 CPC on payment of proper Court-fees.

Appeal succeeds.

Appeal from Appellate Decree (S.A.) No. 314 of 2007

Appeal preferred on the 14th December, 2001

against

The decree dated 18th September, 2001 passed by Shri B. Banerjee, Civil Judge, Senior Division, (Assistant District & Sessions Judge), Sealdah in Title Appeal No. 56 of 2000 affirming the decree dated 28th February, 2000 passed by Shri B. N.

De, Learned Civil Judge (Junior Division) at Sealdah in Title Suit No. 62 of 1996.

1. Atlas and Union Jute Press Co. Ltd. an existing company within the meaning of Companies Act, 1956 having its registered office at Premises No. 8, B.B.D. Bag, P.S. Hare Street, Calcutta.

....Plaintiff/Appellant.

vs.

1. Kingslay Industries Limited, a company duly incorporated under the Companies Act, 1956 having its registered office at Premises No. 7, Chittaranjan Avenue, Calcutta- 72.

....Defendant/Respondent

Appeal valued at Rupees 12,500 (Rupees Twelve Thousand Five Hundred) Upon this appeal coming up for hearing before the Hon"ble Tapan Mukherjee, one of the Judges of this Court,

For hearing on 12th day of February, 14th and 15th day of March 2007 and for judgment on 29th March, 2007.

It is ordered and decreed that the appeal be and the same is hereby allowed.

And it is ordered and decreed that the decrees passed by the learned Courts below are hereby set aside and the suit is decreed against the defendant.

And it is further ordered that the plaintiff shall and do get khas possession of the suit premises by evicting the defendant.

And it is further ordered that the defendant shall vacate the suit premises within a month from date failing which the plaintiff will be a liberty to execute the decree.

And it is further ordered that the plaintiff do also get decree of mesne profit to be calculated in separate proceedings under Order 20 Rule 12 CPC on payment of proper Court fees.

And it is further ordered and decreed that the defendant shall and do pay to the plaintiff Rs. 92/- (as per details at foot being the amount of costs incurred by the plaintiff in this Court.

And it is further ordered and decreed that the defendant shall and do pay to the plaintiff being the amount of costs incurred by the plaintiff in the lower Court.

Hearing Fee Rs. 85.00 Paper Book Cost Rs. 7.00 Total Rs. 92.00 Dated this the Twenty Ninth day of March, Two Thousand Seven.