

(2013) 01 CAL CK 0064
In the Calcutta High Court
Case No : A.P.D. No. 304 of 2007

Bank of Baroda

APPELLANT

Vs

Banwarilal Gupta and Another

RESPONDENT

Date of Decision : 22-01-2013

Acts Referred:

Transfer of Property Act, 1882 — Section 116

Citation : (2013) 2 CHN 177

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Abhrajit Mitra and Mr. Sudeep Pal Chowdhury, for the Appellant;
Sakya Sen, Amitava Mukherjee and Mr. Sukrit Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Aniruddha Bose, J.—This matter has been referred to me as there was difference of opinion between two Hon'ble Judges of a Division Bench of this Court in deciding an appeal against the judgment of an Hon'ble Single Judge decreeing the suit of the respondents/plaintiffs for recovery of possession of certain portions of a premises in a summary proceeding under Chapter XIII A of the Original Side Rules of this Court. In the suit, the respondents/plaintiffs claimed recovery of possession, mesne profits and certain other reliefs in connection with a portion of premises No. 20, Jatindra Mohan Avenue, situated in Kolkata-700006. The premises in question was leased out to the appellant/defendant by executing a deed of conveyance on 24th December, 1996, by the owners of the premises at that point of time, Todi Investment Ltd. The initial lease period was for five years, with provision for renewal for a further term of five years. In the plaint, it has been pleaded that the extended period of five years was to expire on 1st January, 2006. It is the case of the plaintiffs, who are respondents in this proceeding that upon expiry of the contractual period, the defendant has no right to remain in possession of the suit premises or any part or portion thereof and the defendant was obliged to quit and deliver vacant and

peaceful possession of the suit premises to the plaintiffs. On expiry of the contractual period, according to the plaintiffs, the defendant is in wrongful and illegal possession on and from 2nd January, 2006. In connection with the said suit the plaintiffs had taken out an application under Chapter XIII A of the Original Side Rules with prayer for final judgment on the ground that the defendant had no defence to the claims of the plaintiffs. The learned Trial Judge upon holding that the defendant had no defence and far less any substantial defence to the claim of the plaintiffs to delivery of possession, decreed the suit in favour of the plaintiffs in terms of prayer (a) of the Master's Summons. This Judgment was delivered on 10th May, 2007. In prayer (a) of the Master's summons, the plaintiffs prayed for:

a. Summary judgment and decree for recovery of vacant and peaceful possession of the suit premises being entire basement, entire ground floor and the entire first floor in the building at the premises no. 20, Jatindra Mohan Avenue, PS. Burtolla, Kolkata more fully described in a Schedule being Annexure "A" to the grounds attached hereto;

The claims for mesne profits and other reliefs, however, was relegated for trial in the suit.

2. The said judgment was appealed against by the defendant/appellant, in which two Hon'ble Judges of this Court have taken differing views. Before I refer to the opinions of the two Hon'ble Judges and the points of difference emerging from their Lordships' opinions, narration of certain factual aspects of the controversy which resulted in institution of the suit would be necessary. The initial deed of lease was executed on 24th December, 1996 between Todi Investments Ltd., (being the predecessor-in-interest of the plaintiffs) and the defendant. Rent was stipulated to be Rs. 36,740/- to be paid month by month on or before 3rd day of the succeeding month. Clause 5 of the deed stipulated:

PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that the Lessor will, on the written request of the Lessee made not less than one calendar month before the expiration of the term hereby created, if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the Lessee herein contained, grant to the Lessee a renewal of the lease of the demised premises for one further period of 5 years from the expiration of the term hereby granted at the rent increased by 15% of the then rent in respect of such further period and containing the same covenants and provisions as are herein contained excluding this present covenant for renewal.

3. Case of the plaintiffs is that on expiry of the initial term of lease on 31st January, 2001, at the request of the defendant, the predecessor of the plaintiffs agreed to renew the lease for a further period of 5 years. It is also the case of the plaintiffs that rent was increased by 15% to Rs. 42,251/- per month for the second term. In their affidavit-in-opposition to the affidavit in support of the Master's Summons, the defendant, however, denied this. The subject premises

was conveyed by the original lessor, i.e. Todi Investments Ltd., to the plaintiffs, being the respondents in this proceeding, on 20th September, 2002. The defendant was duly informed of the said fact, and thereafter the defendant had been paying rent to the plaintiffs. It has been contended on behalf of the plaintiffs that the extended period of the lease was due to expire on 1st January, 2006, and the defendant was required to deliver vacant and peaceful possession of the subject premises to the plaintiffs after expiry of 1st January, 2006. Admitted position is that the plaintiffs had been pressing for enhancement of rent for continuation of the lease and by a written communication through their learned Advocates dated 21st September, 2005, sought enhancement of rent to Rs. 35/- per square foot, on expiry of 1st January, 2006. It was indicated in the said letter that the defendant's proposal for fresh lease could be considered if the defendant were inclined to pay rent at the enhanced rate. The defendant had responded to this communication stating that the rent quoted was on the higher side and a fresh proposal for rent was requested. The plaintiffs, through their learned Advocates sent another letter dated 11th November, 2005, informing the defendant that the rent asked for was the prevailing rent in the locality. It was also stated in this letter that if the defendant had any intention of continuing in lawful occupation of the premises, then they ought to enter into appropriate agreement with the plaintiffs by 30th November, 2005. The defendant was further informed that unless they entered into appropriate arrangement, it would be presumed by the plaintiffs that the defendant had no intention to continue in the premises "subsequent to expiry of the present arrangement by efflux of time" and in such a situation, the plaintiffs would proceed accordingly. It has been alleged by the plaintiffs in the plaint that the defendant had not responded to the letter of the plaintiffs' Advocates issued on 11th November, 2005. Thereafter, the plaintiffs through their learned Advocates sent a further letter dated 19th December 2005, by which, in substance the defendant was required to deliver vacant and peaceful possession of the suit premises on expiry of 1st January, 2006. For the purpose of adjudication of the present proceeding this letter of 19th December, 2005, is of significance. I am accordingly reproducing below the material portion of the text of this letter, originating from the learned Advocates for the plaintiffs:-

Please refer to our letter dated 11 November 2005 whereby we had requested you to enter into appropriate agreement with our client by 30 November 2005 as the present lease in respect of the abovementioned premises would be expiring by efflux of time on the expiry of 1 January 2006.

This is to put on record that you have not entered into any agreement with our client for lawfully continuing in possession of the above-mentioned premises beyond expiry of 1 January 2006. Please further note that if you fail to do so then you would be in wrongful and illegal possession of the said premises and our clients shall be constrained to initiate appropriate legal proceeding against you for your ejection and/or eviction therefrom and shall also claim mesne profits at the rate of Rs. 17,431/- per diem calculated at the rate of Rs. 35/- per

square foot per month and municipal taxes including commercial surcharge @ 54% and shall also hold you liable and responsible for all other costs and consequences resulting therefrom.

Please therefore note that you are bound and obliged to quit, vacate and deliver up quiet, vacant and peaceful possession of the said premises to our client on expiry of 1 January 2006.

4. The main issue which was urged at the appellate stage was as to whether the defendant had a good defence to require trial on evidence or not. The main ground of appeal is that there was no admission on the part of the appellant/defendant which would have warranted invoking of the summary procedure contained in Chapter XIII A of the Original Side Rules of this Court. The basic defence of the defendant is that they had become tenant under the principle of holding over and this defence was highlighted in their affidavit-in-opposition to the affidavit of the plaintiffs filed in support of the Master's Summons. The other issue which requires to be adjudicated upon is as to whether this could be a defence requiring a trial. It was also urged on behalf of the plaintiffs that the aforesaid letter of their learned Advocates dated 19th November, 2005 would constitute a valid notice to quit in terms of Section 106 of the Transfer of Property Act, 1886. The latter issue was raised by the plaintiffs, as it was argued on their behalf that even if the principle of holding over applied in the case, then also the lease stood determined by the said notice. In such circumstances, the plaintiffs contended, further trial would be redundant, as under law there would be no defence left for the defendant to insist on regular trial.

5. Opinion of one of the Hon'ble Judges of the Division Bench is that the judgment and decree passed by the learned Trial Judge is correct in law. His Lordship observed that there was no dispute on factual score and no improvement was likely to occur at the final hearing of the suit. Final solution to the suit, His Lordship opined, depended upon the legal question involved in the appeal. On the question of application of the principle of holding over, His Lordship opined, relying on a judgment of a Division Bench of this Court in the case of Renuka Seal and Others Vs. Sabitri Dey and Others,) that the learned Trial Judge had correctly construed the legal provisions in passing the decree for recovery of possession. His Lordship further observed:-

The problem can be viewed from another angle. Assuming that the appellant was a tenant by way of holding over the prevalent tenancy law would not protect its right. It was liable to vacate upon termination of the lease. The present lease expired by efflux of time after completion of the lease period being twenty years (original ten years and extended ten years). Notice dated November 11, 2005 demanding possession was duly served upon the appellant as would appear from page 54 of the Paper Book. Hence on any ground whatsoever the appellant has no legal right to stay back withholding possession.

6. A contrary view was expressed by the other Hon'ble Judge of the Division

Bench. Prima facie opinion of His Lordship was that the lessee had become a tenant of the demised premises from month to month. His Lordship observed:-

As per term of renewal clause of the demised premises the lessee was entitled to renewal of the lease for one further period of five years expiring on 01.01.2006. Here we find that after expiry of such further period, the lessee remained in possession and it paid rents to the lessors who accepted the same up to February, 2006, i.e., the lessors had accepted the rent for the demised premises for the month of January, 2006 and February, 2006. But the lessors refused to accept the rent for the month of March, 2006 when the same was tendered by the lessee by way of banker's cheque. Similarly, the rent for April, 2006 was also tendered by the lessee to the lessors and the latter refused to accept the same. So the position remained that after expiry of the lease for the second term, the lessors accepted rents from the lessee signifying the fact that both the parties had waived the terms of the lease relating to extension of the same. The lessee submitted an affidavit dated 7th day of November, 2006 stating such averment in several paragraphs of the affidavit. We do not find any reply from the record against such claim of the lessee. So such averment stands not denied by the lessors. The decision reported in Renuka Seal and Others Vs. Sabitri Dey and Others, is over the fact that the original lease was for 21 years with a clause for renewal for a further period of 10 years. After lapse of that period the lessor filed the suit for eviction on the ground of efflux of time. But in the matter in dispute before us, we find that both the parties to the lease deed had abandoned the term of the lease relating to renewal/extension resulting in the situation that the lessee became a tenant month by month at the enhanced rate as per agreement...

In that context, His Lordship observed that the plaintiffs could not prima facie get a decree under Rule 6 of Chapter XIII A of the Original Side Rules of this Court. Thus, one of the Hon'ble Judges was of opinion that the appeal should fail, whereas the other view was that the appeal should be allowed and the claim of the plaintiffs for decree of recovery of possession ought to be decided in trial of the suit.

7. So far as this appeal is concerned, the scope of examination is as to whether the defendant had made out a case for defence which would disentitle the plaintiffs from obtaining decree for recovery of possession in a summary proceeding. It is on this point Their Lordships differed. To sustain their stand the defendant thus are to demonstrate that the defence to be set up by them cannot be a sham or illusory defence (Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation,). As I have already observed, the main case of the defendant is founded on the principles of holding over. In this judgment, I am not required to determine as to whether the case for holding over was clearly established or not, but as to whether the defence on that ground could be prima facie made or not, so as to entitle the defendant to contest the suit through regular trial. Argument of the learned Counsel for the plaintiffs is that the said

principle would not apply in this case as the provisions contained in Section 116 of the Transfer of Property Act would apply only in cases where the lessee remained in possession after determination of lease and the lessor accepted rent thereof, and in this case no such rent was accepted. The Hon'ble Judge whose view is that the suit should be tried in regular course by way of trial had found that rent was accepted for the months of January and February 2006. Learned counsel for the plaintiffs, however, submitted that this finding was not supported by records.

8. In this case, admittedly there was no fresh execution of deed of lease after the initial term of five years had lapsed. In the case of *Renuka Sil (supra)*, a Division Bench of this Court, construing the provisions of the renewal clause which was subject-matter of dispute in that proceeding observed, referring to an earlier decision of this Court reported in AIR 1977 Cal 278:-

35. The facts of the instant case is akin to the concept of extension of lease though the expression renewal was loosely used in Clause (5) of the said registered lease deed dated 25th June, 1969. In fact, the said renewal clause makes it clear that once the option for renewal is exercised by the lessee and the lessee agrees to pay the rent at an enhanced rate as the provision contained in the said clause, the lessors are left without any discretion but to accept such option and to renew the said lease for a further period of ten years.

9. Distinction has been made in several authorities between the expressions "renewal" and "extension" used in a deed of lease, while dealing with disputes arising out of construction of such deed. This distinction is of importance, because in the case of mere extension of lease, no fresh execution of a lease deed is necessary. But in the case of renewal, a fresh deed of lease is required to be executed between the parties. This difference has been examined by the Supreme Court in the cases of *Provash Chandra Dalui and Another Vs. Biswanath Banerjee and Another*, and *State of U.P. and Others Vs. Lalji Tandon (Dead)*, and *Hardesh Ores Pvt. Ltd. Vs. Hede and Company*, . In the judgment of the Supreme Court in the case of *Lalji Tandon (supra)* this difference or distinction has been explained:-

13. In India, a lease may be in perpetuity. Neither the Transfer of Property Act nor the general law abhors a lease in perpetuity. (Mulla on the Transfer of Property Act, 9th Edn., 1999, p. 1011) Where a covenant for renewal exists, its exercise is, of course, a unilateral act of the lessee, and the consent of the lessor is unnecessary. (*Baker v. Merkel*, also Mulla, *ibid.*, p. 1204) Where the principal lease executed between the parties containing a covenant for renewal, is renewed in accordance with the said covenant, whether the renewed lease shall also contain similar clause for renewal depends on the facts and circumstances of each case, regard being had to the intention of the parties as displayed in the original covenant for renewal and the surrounding circumstances. There is a difference between an extension of lease in accordance with the covenant in that regard contained in the principal lease and renewal of lease, again in accordance

with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed, as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month, as the case may be.

10. The renewal clause which was subject of controversy in the case of Renuka Sil is different from the renewal clause contained in the deed of lease which is the subject of dispute in the suit out of which the present proceeding arises. Construing the renewal clause in the case of Renuka Sil (*supra*), the Hon''ble Division Bench found that in that case, the clause for renewal was akin to a clause for extension, but the expression "renewal" was loosely used. In the renewal clause with which this Court is concerned, *prima facie*, bilateral acts involving the lessor and lessee is contemplated and the lessee is required to make request in writing to the lessor not less than one calendar month before the expiry of the term for renewal of the lease, for one further period of five years. In this case, there is no evidence that there was any written request to that effect. Thus, even if after expiry of the initial term, rent was hiked at the rate stipulated in the renewal clause, it cannot be automatically concluded that there was renewal of lease, as a consequence of which no further act was expected to be undertaken by the parties.

11. In this proceeding, I am not deciding as to whether there was "holding over" or not. I am deciding here as to whether defence against the claim for recovery of possession on the ground of determination of lease because of efflux of time or on the ground of determination of lease by notice in terms of Section 116 of the Act could be *prima facie* made out or not. From the records and materials available, I do not think it can be concluded that there was automatic renewal. Moreover, in the affidavit-in-opposition of the defendant before the learned Trial Judge, a point was taken that the plaintiffs had accepted rent for the month of February 2006. One of the two Hon''ble Judges who differed in their opinions found that rent was accepted for the months of January and February 2006. For these reasons, I do not think trial in this case could be dispensed with altogether. The defence outlined on behalf of the defendant in this case in my opinion cannot be rejected outright as being sham or illusory so as to attract the ratio of the judgment of the Supreme Court in the case of *Mechanic Engineers and Manufacturers* (*supra*).

12. Next comes the question as to whether the notice dated 19 December 2005 constituted a notice u/s 106 of the Transfer of Property Act or not, by which the lease agreement stood determined. The Hon''ble Judge who was of the view that

the appeal ought to be dismissed had referred to the prevailing tenancy law in His Lordship's judgment and observed that after the notice of 11th November, 2005 was served upon the defendant, the defendant was liable to vacate the premises upon termination of lease. To determine the lease, however, in such circumstances also, notice as contemplated in Section 106 of the Transfer of Property Act is necessary. The notice dated 11th November, 2005, sought to notify the defendant that on expiry of 1st January, 2006, the arrangement between the parties would expire by efflux of time. This notice cannot be construed to be a notice in terms of Section 106 of the Act.

13. The other notice to which my attention has been drawn is the notice dated 19th December, 2005. In the earlier part of this judgment, text of this notice has been reproduced. It was urged on behalf of the plaintiffs that by this notice, the lease was duly terminated, and the suit was instituted on the basis of this notice. To contend that a notice under the aforesaid provision has to be construed liberally, three authorities have been cited on behalf of the plaintiffs. These are Parwati Bai Vs. Radhika, Bhagabandas Agarwalla Vs. Bhagwandas Kanu and Others, and Ahmad Ali Vs. Mohd. Jamal Uddin,). But I find from the notice of 19th December, 2005 that there is no indication that the said notice was for determination of the tenancy. In the case of Pannalal Sagarmal Vs. Central Bank of India,) this aspect of law was examined and it was held:-

17. The notice that the plaintiff relies on does not communicate an obvious decision to determine the lease. The notice proceeds on the basis that the lease stood determined and requires the defendant deliver up possession. The act of termination of the lease on the part of the lessor, that should be apparent in notice u/s 106 is missing in this case. Even if the notice is generously construed in the plaintiffs favour it would leave such room for doubt as would allow a defendant to squeeze through in a summary application for eviction.

14. On behalf of the plaintiffs on this point an unreported judgment of a Division Bench this Court in APOT No. 10 of 2011 (Steel Authority of India Ltd. Vs. Manish Agarwal & Ors.) decided on 19 September 2011 was relied upon. But in this judgment, there is finding that the tenancy in question was terminated on the expiry of fifteen days from the date of receipt of the notice. The ratio of this judgment does not assist the plaintiffs. In my opinion, the said notice of 19th December, 2005 per se cannot be construed to have determined the lease. Referring to the pleadings, learned counsel for the plaintiffs had also argued that the defendant never questioned the validity of the said notice by contending that this was not a notice u/s 106 of the Act. On this basis, it was asserted on behalf of the plaintiffs that the defendant could not be allowed to raise this point under the principle of estoppel. But notice u/s 106 of the Transfer of Property act is a requirement of law before determination of lease. It would not be permissible to supply or read into such notice statements which have been omitted. Defect in such notice cannot be cured under the principles of waiver or estoppel, as such requirement in a notice is statutory stipulation.

15. For these reasons, in my opinion, the defendant in this case has disclosed materials which I consider to be sufficient to entitle him to defend the suit. In my opinion, the learned Trial Judge ought not to have decreed the suit in a proceeding brought under Chapter XIII A of the Original Side Rules of this Court. The learned Trial Judge ought to have had assessed the strength of the defendant's case under the principle of "holding over" and the scope of the notice dated 19th December, 2005 ought to have been examined. I accordingly agree with the view of the Hon'ble Judge who opined that the appeal should be allowed, and the dispute ought to be resolved in a regular trial. I am of opinion in this case that the defendant has demonstrated a state of facts from which it can be inferred that in the trial, the defendant would be able to establish a defence to the plaintiffs' claim. The plaintiffs are not entitled to summary judgment and the defendant ought to be granted leave to defend the suit. I am also of opinion, that the defendant would be entitled to defend the suit provided they pay to the plaintiffs occupation charges month by month equivalent to rent at the market rate from the date of institution of the suit. I am imposing this condition considering the strength of the defendant's case in my assessment.

16. I accordingly allow the appeal on condition that the defendant should pay the occupation charges at the prevailing market rate from the date of institution of the suit. But it is not possible for me on the basis of materials available to decide what would be the actual prevailing market rate. The parties accordingly shall be at liberty to apply before the learned Trial Judge for determining the occupation charges at the market rate which shall be subject to the final decision in the suit. I have been apprised by the learned counsel appearing for the parties that in pursuance of direction of the Hon'ble Division Bench, the defendant at present is paying a sum of Rs. 1,00,000/- per month. Let this amount be continued to be paid till the occupation charge is determined at the market rate in terms of this judgment and order.

17. The judgment under appeal accordingly stands set aside as I am in agreement with the Hon'ble Judge who opined that the appeal ought to be allowed. The suit may be decided by the learned Trial Judge holding trial on evidence on fulfilment of condition stipulated in this judgment.

18. Urgent photostat copy of this order be supplied to the parties if applied for subject to compliance of all requisite formalities. Parties shall bear their own costs.