
(2011) 08 CAL CK 0069

In the Calcutta High Court

Case No : G.A. No. 2013 of 2008 and C.S. No. 93 of 2008

Hoare Miller and Co. Ltd.

APPELLANT

Vs

Bank of India

RESPONDENT

Date of Decision : 23-08-2011

Acts Referred:

Transfer of Property Act, 1882 — Section 106, 111A, 53A

Citation : AIR 2011 Cal 239 : (2012) 1 CALLT 529 : (2012) 5 CHN 347

Hon'ble Judges : I.P. Mukherji, J

Bench : Single Bench

Advocate : Abhrajit Mitra, A. Roy and Uttam Mondal, for the Appellant; D.S. Mullick, Dipak Das and N. Jaiswal, for the Respondent

Judgement

I.P. Mukherji, J.—This is a chapter XIII A Application.

2. It was allowed and the suit decreed on 29th June, 2010. Thereafter an application was taken out by the Defendant. The decree was passed ex parte at the second call. The application was for setting aside such ex parte decree. Without much contest the decree of 29th June, 2010 was set-aside on 5th August, 2010. The reason was that this Court was of the view, which was accepted by both sides that it was better to pass a decree on contest.

3. Thereafter, this application has been appearing in my list for sometime and was ultimately taken up on 11th August, 2011 for hearing. Hearing was concluded on that date.

4. There is a building known as Haore Miller House at 15, Ganesh Chandra Avenue, Kolkata - 13. The Plaintiff and the Defendant executed an agreement on 4th June, 1993. By it they purported to let out office space measuring 4360 sq. ft. in a part of the ground and basement floors of the building, to the Defendant. The duration of the alleged lease was from 1st January, 1993 to 31st December, 1997. This agreement was neither stamped nor registered but the Defendant came to occupy the property and paid rent according to the lease. The rent last

paid was Rs. 42, 134 for December, 2007.

5. A firm of solicitor acting for the Plaintiff issued the notice dated 20th August, 2007 to the Defendant. The first paragraph of the notice said that Defendant had been granted "tenancy" from 1st January, 1993 till 31st December, 2007 and that it was expiring on the above date. The Defendant was called upon to vacate the property and deliver its possession to the Plaintiff. Perhaps keeping the defective agreement in mind, subsequent paragraphs of the notice said that the Plaintiff intended to terminate the "tenancy" after 31st December, 2007, u/s 106 of the Transfer of Property Act, 1882.

6. There is No. contest whatsoever about the agreement being unstamped or unregistered. Mr. Abhrajit Mitra, learned Counsel appearing for the Plaintiff concedes that the agreement cannot be termed as a lease. But nevertheless since the duration of the lease expired on 31st December, 2007, there was No. defect in the second part of the notice intending to terminate the monthly tenancy after 31st December, 2007, anticipating an argument to be advanced, based on the rule of part performance in Section 53A of the Transfer of Property Act, 1882 that before the expiry of the term specified in the agreement, the Plaintiff could not terminate the tenancy.

7. Furthermore, it was nobody's case that the West Bengal Premises Tenancy Act, 1997 applied because the property was being used for commercial purpose and the rent was over Rs. 10, 000/- per month.

8. However, the learned Counsel for the Defendant Bank cited Section 111A of the Transfer of Property Act, 1882 which provides for determination of a lease by efflux of time limited thereunder. He also placed Sub-section (h) read with Section 106 of the Transfer of Property Act, 1882. He tried to argue that two notices, each under one of the two provisions of the Transfer of Property Act, 1882 are bad. Two notices cannot be issued concurrently. He relied on a single line in paragraph 15 of a decision in the case of Kusum Agarwalla v. Biswabhusan Bose reported in 1977 (I) CLJ 561 one portion in paragraph 15. I read the paragraph now:

15. ...We, however, are of the opinion, that a lease can be determined under any of the provision of Section 111(a) to (h) of the Transfer of Property Act and if it is proved that the lease is determined under any of the provisions of Section 111(a), (b), (c), (d), (e), (f) and (g) of the Act, then the notice u/s 111(h) which brings in Section 106 of the Transfer of Property Act will not be required at all. After determination of tenancy u/s 111(a) to (g), further determination of tenancy cannot arise.

9. He also relied upon in the case of Pannalal Sagarmal Vs. Central Bank of India, where brother Sanjib Banerjee J. had granted the Defendant leave to contest the suit. The reason why leave was granted was that the Court was not at the stage of the Chapter XIII Application absolutely certain whether a notice issued u/s 106 of the Transfer of Property Act, evinced an intention to determine the lease

after a particular date.

10. In my opinion the notice dated 20th August, 2007 is perfectly in order. I do not understand how an alternative case cannot be made out in the notice. That is what has been tried to be made out. The first part of the notice assumes the agreement to be a deed of lease and to have terminated by efflux of time on 31st December, 2007. The second assumes it, in the alternative, to be a monthly tenancy and determines it with more than one month's notice. The judgment in the case of Kusum Agarwalla v. Biswabhusan Bose reported in 1977 (I) CLJ 561 (Supra) only says that if a lease is already determined, say under Sub-Section 111(a) of the Transfer of Property Act, 1882, by efflux of time, the lease has come to an end. Therefore, there is No. need for further determining the lease under 111(h). In this case the second part of the notice assumes that the lease does not determine by efflux of time because of the defective deed of lease. Hence, the alternative notice in the second part to determine it u/s 111(h) read with Section 106 of the said Act. Only if one determination is conclusive then there cannot be a second determination. That is not the case here. In the case of Pannalal Sagarmal Vs. Central Bank of India, there was substantial doubt in the mind of the Court regarding the intention to determine the case. Therefore, leave to defend was given.

11. In this case for the above reason, there is No. doubt in my mind, that the Defendant has No. defence whatsoever to the claim of the Plaintiff. Therefore, the Defendant had No. right to remain in the property after 31st December, 2007. The claim for mesne profit has to be determined.

12. For the reasons above I reaffirm and reiterate the findings in my judgment dated 29th June, 2010. They are as follows:

13. Therefore, this Chapter XIII A application is quite well founded. I pass a final judgment and decree in terms of prayer [a] of the Master's Summons. I hold that the occupation of the Defendant from 1st January, 2008 is wrongful and such wrongful occupation is continuing.

14. In the circumstances, I am of the view that an inquiry should be made of mesne profit as prayed for. I appoint Mr. Partha Sarathi Basu, Senior advocate and member of the bar Library Club as Commissioner to determine mesne profit in accordance with law preferably, within a period of three months from the date of this judgment/decreed. The Commissioner will be paid a remuneration of 600 G.Ms. per sitting. Such determination may be made as expeditiously as possible preferably before the above time period. The Commissioner will file his report in the Registry by that date.

15. This application is partly disposed of by the decree as above with liberty to mention the application after the report of the Commissioner has been filed in Court for passing a decree for mesne profit.

16. Let the decree be drawn up expeditiously.

17. Department and all parties concerned are to act on a signed photo copy of this order on the usual undertakings.

18. Urgent certified photocopy of this judgment/ order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.