

(2011) 03 CAL CK 0101

In the Calcutta High Court

Case No : A.P.D. No. 346 of 2010 G.A. No. 2590 of 2010 and C.S. No. 288 of 2007

Kanoria Jute and Industries Limited

APPELLANT

Vs

Saraf Agencies Private Limited

RESPONDENT

Date of Decision : 01-03-2011

Acts Referred:

Transfer of Property Act, 1882 — Section 106, 111, 113

Citation : AIR 2011 Cal 77 : (2011) 3 CHN 1 : (2011) 8 RCR(Civil) 2228

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Surojit Nath Mitra, Arindam Mukherjee and Deepak Jain, for the Appellant; Anindya Kumar Mitra, Abhrajit Mitra, Aniruddha Mitra and Urbi Roy, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of a Defendant in a suit for eviction, arrears of rent and mesne profit and is directed against the judgment and decree dated 30th July, 2010 passed by a learned Single Judge of this Court by which His Lordship in exercise of power conferred under Chapter XIII A of the Original Side Rules of this Court passed a decree for eviction by holding that the Defendant had no good defence against the claim of eviction on merit nor could the Defendant disclose such fact as might be deemed sufficient to entitle him to defend. As regards the other prayer of mesne profit and arrears of rent, His Lordship, however, held that those prayers should be carried to the trial. His Lordship further granted costs of 6000 G Ms against the Defendant.

2. Being dissatisfied, the Defendant has come up with the present appeal.

3. The facts giving rise to filing of this appeal may be epitomized thus:

a) There is no dispute that there existed a relationship of landlord and tenant between the Plaintiff and Defendant and such tenancy is governed by the

provisions of the Transfer of Property Act as the rate of the contractual rent was Rs. 22,150/- a month and as such, by virtue of the provisions contained in the West Bengal Premises Tenancy Act, 1997, its operation for the purpose of eviction would be excluded and the same should be governed by the provisions of the Transfer of Property Act.

b)According to the Plaintiff, by a registered notice to quit dated May 22, 2007, the tenancy of the Plaintiff was determined in terms of Section 106 of the Transfer of Property Act by asking the Defendant to deliver vacant and peaceful possession of the premises within a month from the date of such notice. It was further indicated that upon the expiry of the period mentioned in the notice, the Defendant would be regarded as a trespasser and the Plaintiff would be entitled to claim damages at the rate of Rs. 10,000/- per diem.

c)The Plaintiff further alleged that such notice of eviction was received by the Defendant on May 29, 2007 and a copy of the postal acknowledgement card was appended to the plaint and the application for summary judgment. According to the Plaintiff, despite due receipt of such notice, the Defendant did not respond thereto or act in accordance therewith and consequently, the suit was instituted in the first week of December, 2007.

d)In the application for summary judgment, the Plaintiff has disclosed a letter dated January 3, 2008, issued by the Defendant containing the following admission:

As per the discussion held with the undersigned with you, we are giving the following proposal to liquidate the entire dues of Rs. 1,991,206.82 (Nineteen Lacs Ninety One Thousand Two Hundred Six and Paise Eighty Two Only) against outstanding of Rent and other costs up to 31/12/2007 as per details enclosed. We shall pay 25% of the above mentioned amount immediately after receipt of your confirmation and the remaining outstanding amount shall be paid to you by a Bank Guarantee equivalent to one month Rent and Taxes every month, kindly give the proforma of the Bank Guarantee to enable us to discuss the matter with the bank.

We shall pay the current Rent & Taxes, further we state that if our financial position improves we will liquidate the dues earlier also.

We also submit that we will fulfil the commitments and won't give you opportunity for any complain and keep the good neighborly relation with you.

We solicit your co-operation in this regard and waiting for an early reply.

(Emphasis supplied by us).

e) The Plaintiff, thus, prayed for a summary judgment in terms of Chapter XIII A of the Original Side Rules.

f) The aforesaid prayer of the Plaintiff was opposed by the Defendant by filing affidavit thereby specifically disputing the claim that any notice to quit was

served upon the Defendant. The averment relating to service of notice was made in paragraphs 12 and 13 of the plaint. Those two paragraphs are quoted below:

12. The Plaintiff by a notice dated 22nd May, 2007 has terminated the monthly lease of the Defendant with effect from expiry of one month from the date of receipt of the said notice by the Defendant. A copy of the said notice is annexed hereto and marked with letter "F". The notice was duly served upon the Defendant by registered post on 22nd May, 2007. A copy of the acknowledgement due and showing receipt of the said notice by the Defendant on 29th May, 2007 is annexed hereto and marked with letter "G". By the said notice the Plaintiff also claimed mesne profit at the rate of Rs. 10,000/- per diem in case the Defendant fails to vacate the demised portion on the expiry of the notice period.

13. The period of one month from the date of service of the notice expired on 29th June, 2007 and since that the Defendant has remained in wrongful possession of the demised portion as a trespasser.

g) The statements contained in the aforesaid two paragraphs were dealt with by the Defendant by way of an affidavit in paragraphs 13 and 14 and those two paragraphs are quoted below:

13. With reference to paragraph 12 of the said application, it is denied that the Plaintiff by any purported Notice dated 22nd May, 2007 has terminated or could terminate the monthly tenancy of the Defendant either with effect from the expiry of one month from the date of receipt of the said Notice by the Defendant as alleged or at all. The Defendant denies and disputes the legality, validity, correctness and existence of the purported notice a copy whereof has been annexed to the said application, marked with the letter "F". It is further denied that the purported Notice was duly or otherwise served upon the Defendant by registered post on 22nd May, 2007 or on any other date as alleged or at all. It is still further denied that the coy (sic, copy) of the purported acknowledgement due card does or can show the receipt of the purported Notice by the Defendant on 29th May, 2007 as alleged or at all. The Defendant denies and disputes the legality, validity and correctness of the purported acknowledgement due card a copy whereof has been annexed to the said application, marked with the letter "G". It is also denied that in the purported Notice the Plaintiff could claim mesne profit at the rate of Rs. 10,000/- per diem or at any other rate from the Defendant or there was or could be any question of the Defendant vacating the suit premises either on expiry of the period mentioned in the purported Notice as alleged or at all. Without prejudice to the aforesaid and on the contrary strongly relying thereof, the Defendant states that after issuance of the purported Notice dated 22nd May, 2007, the Plaintiff has raised bills on the Defendant for the monthly rent for the months of July and August, 2007 and the Defendant has accepted such bills. In views (sic. view) of such issuance and acceptance of rent bills as aforesaid, the purported Notice dated 22nd May, 2007 was waived by consent of the parties. In this connection, copies of such bills for the monthly

rent of July and August, 2007 raised by the Plaintiff on the Defendant are annexed hereto and collectively marked with the letter "C".

14. With reference to paragraph 13 of the said application, it is denied that any purported notice was served on the Defendant on 29th May, 2007 or the alleged period of one month did or could expire on 29th June, 2007 as alleged. It is further denied that the Defendant has remained in wrongful possession of the suit premises(s) as a trespasser since 29th June, 2007 as alleged.

(Emphasis supplied by us).

h) Apart from the aforesaid defence, the Defendant also asserted that the valuation of the suit has been mala fide enhanced to bring it within the purview of the Original Side of this Court although on the basis of contractual rate of rent, the suit should be valued less than Rs. 10 lac and as such, this Court had no pecuniary jurisdiction to entertain the suit.

I) The learned Single Judge by the order impugned herein has turned down all the defences taken in the affidavit and according to His Lordship, no arguable case had been made out by the Defendant against the claim of eviction to be sent to trial and consequently, decree for eviction followed.

4. Mr. Surojit Nath Mitra, the learned senior advocate appearing on behalf of the Appellant, has laboriously contended before us that having regard to the cause shown by his client in the affidavit in support of its defence, it was not a fit case for passing a summary judgment in terms of Chapter XIII A of the Original Side Rules. According to Mr. Mitra, his client made a specific statement that no notice under registered post, as alleged in the plaint, was ever received by his client but in spite of such specific averment, the learned Single Judge was of the view that his client was required to further deny that apart from notice by registered post, no other notice u/s 106 of the Transfer of Property Act was received. Mr. Mitra submits that when the Plaintiff has, in the plaint, averred service of notice only by registered post, and his client has denied such service, there was no justification of denying defence in such a suit for eviction on the ground that the denial was not sufficient.

5. Mr. Mitra points out that the copy of the acknowledgement card that has been annexed to the plaint discloses that only a short illegible initial is appearing from the said card without any indication that the same was received on behalf of the Defendant. Mr. Mitra further contends that even in the alleged date of service, namely, 29th May, 2007, there is interpolation in the figure "29". According to Mr. Mitra, when his client has specifically denied such service, it was a fit case for trial on evidence and there was no justification of passing a decree for eviction by way of summary judgment.

6. Mr. Mitra next contends that even his client had taken alternative defence that after the alleged service of notice, the Plaintiff raised bills for payment of rent for two subsequent months of July and August, 2007 and the Defendant had

accepted such bills. According to Mr. Mitra, the issue of those two bills claiming rent for the months of July, 2007 and August, 2007 amounted to waiver of the earlier notice dated May 22, 2007, even if it is assumed for the sake of argument that the notice was received by his client.

7. As regards the admission of his client by the letter dated January 3, 2008, Mr. Mitra submits that the Plaintiff himself having relied upon such letter and coupled with the fact that after the issue of the alleged notice dated May 22, 2007, the rents for two months were claimed, it was apparent that the Plaintiff had no intention to terminate the lease and the negotiation was all along continuing regarding the arrears of rent payable by his client. According to Mr. Mitra, the aforesaid letter dated January 3, 2008, nowhere admitted receipt of any earlier notice to quit and it only indicated that there was a settlement of payment of rent, as his client was not in a position to pay the entire arrears of rent at a time. Mr. Mitra contends that such fact would not enable the Plaintiff to get a decree for eviction unless the tenancy is determined in accordance with the provisions contained in Section 106 of the Transfer of Property Act, which the Plaintiff had failed to prove. Mr. Mitra further points out that even in the said letter, his client expressed his readiness and willingness to pay current rent and municipal tax indicating his client's intention to keep the relationship subsisting.

8. Mr. Anindya Kumar Mitra, the learned senior advocate appearing on behalf of the Plaintiff-Respondent, has, on the other hand, opposed the aforesaid contention of Mr. Surojit Nath Mitra, and has contended that in the facts of the present case, the learned Single Judge rightly exercised His Lordship's discretion by not permitting the Defendant to take defence as the defence disclosed in the affidavit was an apparently mala fide and false defence. Mr. Mitra contends that mere claim of rent for two months subsequent to service of eviction notice would not automatically amount to waiver of earlier notice and in support of such contention, Mr. Mitra strongly relied upon the decision of the Supreme Court in the case of Sarup Singh Gupta Vs. S. Jagdish Singh and Others, . Mr. Mitra further contends that it would appear from the acknowledgement card itself that the notice of eviction was received and there is no defence taken in the affidavit by the Defendant that the endorsement of the acknowledgement card was not made on behalf of the Defendant.

9. Mr. Mitra, therefore, prays for dismissal of the appeal.

10. Therefore, the only question that arises for determination in this appeal is whether in view of the assertion made by the Defendant in the affidavit to the notice of show cause, the learned Single Judge was justified in signing the judgment against eviction without permitting the Defendant to take defence.

11. Chapter XIII A of the Original Side Rules which are applicable to some special type of suits as mentioned in Rule 1 thereof permits a Court to pronounce judgment forthwith after making an order refusing leave to defend if the learned Judge is satisfied from the affidavit that the Defendant has no good defence to

claim on merit or the Defendant is unable to disclose such fact as may be deemed sufficient to entitle him to defend.

12. Therefore, at this stage, we are called upon to decide whether by the affidavit, the Defendant has made out a fair or bona fide or reasonable defence so that Plaintiff should not be entitled to get a judgment under Chapter XIII A. The case before us is one of claiming relief for eviction of a tenant over which the Chapter XIII A of the Rules has application. Since the tenancy in question is admittedly governed by the provisions of the Transfer of Property Act, the Defendant should by affidavit disclose that he has bona fide ground of defence that his tenancy has not been properly determined and is still continuing either for non-service of such notice or because the notice is otherwise illegal even if the same is served or that even after the service of a valid notice, the same has been waived by the subsequent conduct of the parties.

13. In the case before us, the first defence of the Defendant is that there has been no service of notice, as alleged in the plaint.

14. The learned Single Judge has dealt with the aforesaid question in the following way:

Nowhere in paragraph 13 or 14 of the Defendant's affidavit has the Defendant claimed that it did not receive the notice u/s 106 of the Transfer of Property Act. In the first sentence of paragraph 13, the Defendant has denied that by any notice dated May 22, 2007 its tenancy has or could have been terminated. In the second sentence the legality, validity, correctness and existence of the notice have been questioned. In the third sentence the Defendant has said that the said notice was not "duly or otherwise" served on the Defendant "by registered post" on May 22, 2007 or on any other date. The denial amounts to a denial of service by registered post and not a denial of receipt of the notice. In the fourth sentence the Defendant claims that the Plaintiff has not been able to demonstrate the receipt of the notice by the Defendant, but there is still no denial that the Defendant received the notice. In the fifth sentence the correctness of the acknowledgement due card has been challenged. Later in paragraph 13, the Defendant says that "after issuance of the purported notice ... the Plaintiff has raised bills ... for the monthly rent for the months of July and August, 2007 ..." Though such statement is without prejudice to the earlier statements in the paragraph, since the actual issuance of the notice by the Plaintiff and the receipt thereof by the Defendant have not been denied, it implies that the Defendant had received the subsequent rent bills after the receipt of the notice u/s 106 of the Transfer of Property Act. This sentence may have a bearing on the defence of waiver urged by the Defendant. In paragraph 14 of its affidavit, the Defendant has denied receipt of the notice on May 29, 2007, but has not denied receipt of the notice altogether.

(Emphasis supplied by us).

15. We have already pointed out that there is specific denial that the notice

alleged in the plaint has not been served and the learned Single Judge appeared to have accepted such position but according to His Lordship, the Defendant has not denied the receipt of the notice altogether.

16. We would have accepted the said reasoning as sound if there was further averment in the plaint that apart from the mode of service by registered post, the said notice was sent by any other mode and in that event, it would have been the duty of the Defendant to disclose that even notices sent by other modes have not been received by him. If no such assertion has been made by the Plaintiff in the plaint, the Defendant is not required to further prove that apart from the notice alleged in the plaint, he had also not received any other notice not averred in the plaint.

17. Therefore, the finding of the learned Judge that the Defendant had no good defence is passed on faulty interpretation of law relating to denial of averment made in the plaint.

18. Apart from the aforesaid fact there being specific assertion made by Defendant that the rents for the months of July and August, 2007 were claimed by the Plaintiff by sending bills which he had received, whether issue of such bills for two months amounts to waiver of the earlier notice even if the same was served, depends upon the intention of the parties. But such question cannot be decided unless parties are permitted to lead evidence in support of their respective claims. If in a proceeding under Chapter XIII A of the Original Side Rules, it is established before the Court that after the service of alleged notice pleaded in the plaint, the Plaintiff demanded rent for two subsequent months in writing and such fact is suppressed by the Plaintiff in the plaint, the question whether such act amounted to waiver should be decided on the basis of evidence on regular trial for the purpose of ascertaining the intention of the parties.

19. In the case of Swarup Singh Gupta (*supra*), relied upon by Mr. Anindya Mitra, the Supreme Court while interpreting the provisions contained in Section 113 of the Transfer of Property Act laid down the following principles as a proposition of law:

A mere perusal of Section 113 leaves no room for doubt that in a given case, a notice given u/s 111, Clause (h), may be treated as having been waived, but the necessary condition is that there must be some act on the part of the person giving the notice evincing an intention to treat the lease as subsisting. Of course, the express or implied consent of the person to whom such notice is given must also be established. The question as to whether the person giving the notice has by his act shown an intention to treat the lease as subsisting is essentially a question of fact. In reaching a conclusion on this aspect of the matter, the Court must consider all relevant facts and circumstances, and the mere fact that rent has been tendered and accepted, cannot be determinative.

20. Therefore, in the case before us the question of waiver of notice should be decided on the basis of regular trial for the purpose of ascertaining the intention

of the parties on consideration of all the facts and circumstances.

21. We, therefore, find that the learned Single Judge although in His Lordship's judgment correctly disclosed the scope of a proceeding under Chapter XIII A of the Original Side Rules, while applying those principles deviated from the same.

22. We, therefore, hold that in the facts of the present case, the Defendant has disclosed good defence against eviction so as to enable it to defend the suit unconditionally.

23. We, accordingly, set aside the judgment and decree, passed by the learned Single Judge and ask the Defendant to file written statement against the claim of the Plaintiff, if not already filed.

24. The appeal is, thus, allowed.

25. In the facts and circumstances, there will be, however, no order as to costs.