

(2011) 09 CAL CK 0047

In the Calcutta High Court

Case No : G.A. No. 1766 of 2011, G.A. No. 3118 of 2009, G.A. No. 3162 of 2009, A.P.O. No. 266 of 2011, A.P.O.T. No. 258 of 2011 and C.S. No. 258 of 2009

Nandlal Rathi

APPELLANT

Vs

A.T. Gooyee Enterprises

RESPONDENT

Date of Decision : 30-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10
Partnership Act, 1932 — Section 69, 69(1), 69(2)
Specific Relief Act, 1963 — Section 5
Transfer of Property Act, 1882 — Section 108
Trusts Act, 1882 — Section 34

Citation : (2012) 1 CHN 409

Hon'ble Judges : Kalyan Jyoti Sengupta, J; Joymalya Bagchi, J

Bench : Division Bench

Final Decision : Allowed

Judgement

K.J. Sengupta, J.—This appeal is directed against judgment and order dated 16th March, 2011 passed by the learned Single Judge of this Court on an application under Chapter XIII A of the Original Side Rules of this Court whereby the learned Judge had written final judgment and decree evicting the appellant. The fact relating to relationship between the parties as well as leading to preferring this appeal needs to be stated briefly.

2. Both the parties brought separate action for their desired relief. The appellant before us had filed Title Suit being No. 5305 of 2008 in the City Civil Court at Calcutta in or about December 2008 claiming for a declaratory decree "that the appellant (plaintiff in the above suit) is a monthly tenant under the respondent in respect of the entire basement situated at premises No. 157C, Lenin Sarani, Kolkata-700 013 at a monthly rent of Rs. 45,000/- and Rs. 1000/- respectively and other consequential reliefs. Immediately after filing of the said suit the appellant filed an application for interlocutory relief praying for temporary

injunction restraining the respondents and/or their men, agents and servants from disturbing plaintiffs peaceful right of his tenancy comprising of entire basement situated at the said premises. From the records it appears that appellant was successful in obtaining interlocutory relief of Status quo with regard to the said property in question.

3. The respondent thereafter filed a suit in this Hon''ble Court in its ordinary original civil jurisdiction as mentioned above claiming decree for recovery of vacant, peaceful and quiet possession of the same property, by evicting the appellant herein and a decree for Rs. 15,30,000/- towards the mesne profit calculated from 1st April, 2009 till 31st August, 2009; decree for further mesne profit at the rate of Rs. 10,000/- per diem from the date of filing of the suit till the delivery of vacant peaceful and quiet possession of the said property and other reliefs incidental thereto.

4. In the suit filed by the appellant he claims that he is a monthly tenant though he was inducted by and under a document which is described as-leave and license for a period of five years. Various grounds were taken to seek for declaration even on the :face of the aforesaid document of leave and license for five years.

5. According to the appellant before us the said document is in substance a tenancy agreement and acting upon between the parties pursuant thereto will substantiate such claim. The respondent being partnership firm admittedly on the date of institution of the suit was an unregistered one. In its suit it claimed that the appellant before us was inducted as a licensee by and, under an agreement of leave and license dated 1st April, 2004 for a period of five years at a monthly license fee of Rs. 45,000/- per month. On the date of execution of the said leave and license, the appellant/defendant in the High Court suit took possession and also deposited a sum of Rs. 2,70,000/- as interest free security. After expiry of five years by efflux of time on 31st March, 2009 the defendant has failed and neglected to hand over peaceful vacant and khas possession to the plaintiff. The, defendant/appellant also committed breach of said agreement by not paying certain other charges such as electricity and maintenance and the same is liable to be recovered. Even during currency of the said leave and license agreement the defendant had stopped paying license fee for the period from October, 2008 to March, 2009 and the said arrears of payment has been adjusted against the security deposit of Rs. 2,70,000/-. The plaintiff issued a notice dated 25th February, 2009 through its advocate u/s 108 of the Transfer of Property. Act, 1882 calling-upon the defendant to deliver vacant and peaceful possession.

6. It appears from the records that appellant herein filed an application in this Court before the learned Trial Judge for stay of proceedings and further proceedings in Civil Suit No. 258 of 2009 which is later in point of time by applying presumably the provision of section 10 of the Civil Procedure Code. The said application filed by the appellant herein was disposed of by an order dated 1st December, 2009 whereby and whereunder on agreement of the parties the

suit filed in the City Civil Court was withdrawn and transferred to this Hon''ble Court in its extraordinary civil jurisdiction and it was directed both the suits to be consolidated and tried together (see at page 117 of the paper book). While passing the said order it was observed by the learned Trial Judge that the said order would not preclude the plaintiff (in High Court suit) from taking out an application under Chapter XIII A of the Rules of this Court, if the plaintiff is otherwise entitled.

7. Thereafter it appears that the respondent/plaintiff in the High Court took out summons for writing summary judgment, the appellant herein contested the said application by filing affidavit taking the point of maintainability on various grounds specifically that the High Court suit is not maintainable as the plaintiff is an unregistered firm u/s 69 of the Partnership Act on the date of institution of the suit and further triable issue was raised as to the status of the defendant and the same is required to be tried in its suit filed earlier. Hence according to appellant very strong defence has been made out for which trial is required. In the affidavit it has reference of passing of the said order transferring the suit.

8. The learned Trial Judge after hearing the parties has written final judgment in terms of prayer (a) of the Master''s Summons dated 2nd December 2009 and thus really passed decree for eviction on the summary proceeding.

9. The learned Trial Judge in its judgment impugned recorded after considering the case made out by the defendant and further considering the Supreme Court judgment found that appellant before us has no defence at all and does not deserve any right to contest the suit.

10. Mr. Ashok Banerjee, learned Government Pleader for the appellant contends that the learned Trial Judge should have dismissed the application on the ground that plaintiff being an unregistered firm cannot file a suit nor can obtain any relief not to speak of the final relief in the summary proceedings.

11. He submits that in the affidavit strong triable issues were raised as the case filed by the plaintiff in the High Court suit based on leave and license however the act and conduct of the parties would suggest that it is a case of monthly tenancy. Separate suit taking plea of monthly tenancy has been filed before the High Court suit is filed. For this purpose his client''s suit has been brought over to this Court and both the suits have'' been consolidated for trial. The learned Trial Judge unfortunately took up the trial of the respondent''s suit in High Court ignoring the trial of his client''s suit. Hence without'' deciding the same no final judgment should have been passed. He also contends that the application under Chapter XIII A in view of the aforesaid triable issue was not maintainable.

12. Mr. Joyjit Ganguly, learned Advocate appearing for the respondent while answering to the argument of Mr. Banerjee contends that the suit filed by his client does not relate to enforcement of any contract for which section 69 sub-section (2) of the Partnership Act would be applied. He contends relying on Supreme Court decisions reported in M/s. Haldiram Bhujawala and Another Vs.

M/s. Anand Kumar Deepak Kumar and Another, that if the suit is not for enforcement of any contractual terms or for statutory provision" or for assertion of common law right the partnership firm is not required to be registered as it remains beyond the mischief of section 69 sub-sections (1) and (2) of the Partnership Act.

13. In his alternative submission he contends that, the defence made out by the appellant in its affidavit claiming monthly tenancy" is at present under the law does not get any protection as the present Rent Act having regard to the rate of rent does not admit of any protection and it is completely governed by other provision of law namely either under Transfer of Property Act or u/s 5 of the Specific Relief Act or to recover the possession of property on revocation of legal license. Even if the defendant's case is accepted it states that appellant has no defence at all. According to him the intent and purport of Rule 1 Chapter XIII A Clause (B) is intended to make applicable to examine whether the defendant has got any defence for going to trial. Hence the judgment and order of the learned Trial Judge is not flawed in any sense. The appeal should be dismissed.

14. After having narrated the aforesaid fact and reasoning of the learned Trial Judge and having considered the contention and having applied our complete mind to the contention raised by learned Counsels it appears to us though it was not specifically raised before learned Trial Judge, the primary question is as to whether the learned Trial Judge under facts and circumstances of this case did have jurisdiction to entertain the said application for recording final judgment. In our view and it is also settled law that it is duty of the Court before entertaining any lis in any form whether substantive or interlocutory the Court is obliged to examine whether it has jurisdiction or power whether it is raised or not. If the Court is reminded by the party the task become easier and even if it is not reminded still then the Court is not relieved from discharging this primary duty.

15. It is true what the learned Trial Judge omitted to do the Appeal Court cannot afford to ignore when it has been brought to its mind by the incidental argument of Mr. Banerjee that the application was not maintainable. In the context of this plea of maintainability we, having - coextensive power of the learned Trial Judge under the provision of the CPC we look into whether the learned Trial Court had any jurisdiction to entertain the application under Chapter XIII A or not.

16. It thus requires mention of Rule 1 of Chapter XIII A of the Rules as follows:-

"Chapter XIII A

SUMMARY PROCEDURE IN SUITS TO RECOVER DEBTS OR LIQUIDATED DEMANDS OR FOR IMMOVABLE PROPERTY

Rule 1. Nature of cases in which applicable. The provisions of this Chapter shall not be applicable save to suits.

(A) in which the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant with or without interest arising-

(i) on a contract express or implied; or

(ii) on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only; or

(iv) on a trust; or

(B) for the recovery of immovable property with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit or has become liable to forfeiture for non-payment of rent or against persons claiming under such tenant."

17. We are not concerned in this matter with the nature of the suits mentioned in Clause (A) here obviously without any dispute provision of Clause (B) is sought to be invoked by the defendant.

18. From the language of the aforesaid Rule it is clear that the said provision has to be applied restrictively as it starts with the words "shall not be applicable save to suits." It is settled by the Five Judge Bench of the Supreme Court in case of *M. Pentiah and Others Vs. Muddala Veeramallappa and Others*, at page 1112 that negative words are clearly prohibitory and are ordinarily used as legislative device to make a statute imperative.

19. The intention of the framer of the Rule is very clear that this special and summary procedure is not intended to be made applicable to suits of all descriptions and it restricted to the nature of the suit mentioned herein.

20. Thus Clause (B) of the said Rule enables the landlord to take out such application against the tenant under the circumstances mentioned therein to get a decree in this summary procedure for recovery of possession of immovable properties. According to us except in case of induction of a person as a tenancy by and under an agreement by landlord against a tenant no other person can take the advantage of the said Rule.

21. Thus, consequently, follows except the landlord if any other person in other capacity wants to bring action for the recovery of possession of immovable property under the said Rule the Court is bound to refuse to entertain such an action as the Court is not empowered to do so. For example if a suit is brought by an owner against a trespasser not arising out of rank trespass provision of this Rule will not have any application for writing final judgment. Applicability of Chapter XIII A in a suit other than the suits mentioned in Clauses (A) and (B) came for consideration in case of *Kalidas Pal and Sripati M. Roychowdhury and others* reported in AIR 1979 Calcutta 14. The Division Bench of this Court in that case held that in case of a mortgage suit Chapter XIII A has no application. In this reported case a preliminary decree was obtained by mortgagee under Chapter XIII A against the official assignee as the original mortgagor was

declared insolvent during pendency of the suit and at the time of passing a decree on that application. Thereafter, the original mortgagor being the defendant was discharged from insolvency. After the said preliminary decree was passed and discharge of insolvency of the original mortgagor the original plaintiff died, and his heirs and legal representatives obtained an order of substitution and also amendment of the decree and also for leave to proceed further consequent upon passing a preliminary decree.

22. An appeal was taken by the original defendant and in that appeal a point was taken the said order of substitution and amendment was not appealable order. While deciding this question Their Lordships held amongst others the decree passed by the learned Trial Judge on earlier occasion in the mortgage suit under the summary procedure (Chapter XIII A) was nullify as the Court had no jurisdiction to entertain such application. Consequently order of substitution was modified effectively and then it was declared that the preliminary decree passed earlier in mortgage suit under Chapter XIII A is null and void. We think it fit with great respect to accept and follow the ratio decided by Their Lordships in examining the scope of Chapter XIII A vis-a-vis jurisdiction of the Court.

23. In paragraph 15 at page 18 of the report Their Lordships observed as follows:-

"The plaintiff in a mortgage suit does not have any right to make any application for final judgment or decree under the provisions of Chapter XIII A in a mortgage suit. Unless the provisions of Chapter XIII A apply the Court does not acquire any jurisdiction or power to entertain the application and to pass any decree and any decree which the Court may pass will certainly be without jurisdiction. Merely because Rule 5 of Chapter VII provides that a mortgage suit may be marked as a liquidated claim for the purpose of classification of suits, it does not follow that it becomes a suit to which the provisions of Chapter XIII A are applicable".

24. Their Lordships while deciding the said ratio was pleased to take note of an old decision of this Court namely the judgment reported in AIR 1926 Calcutta 713 wherein Justice Rankin pronounced for the Bench as follows:

"It seems to me that the order of the learned Judge (a part of which as regards the sale of these properties is entirely without jurisdiction under Chapter XIII A) should be altogether set aside and that the proper order to make is that the plaintiff on this application should have judgment for Rs. 13,000 but that this judgment is not to be executed pending the final determination of the other matters in the suit."

25. In the Full Bench decision of this Court reported in AIR 1921 Calcutta 34 Sir Asutosh Mookerjee the then Acting Chief Justice on behalf of the Bench observed as follows:

"The authority to decide a case at all and not the decision rendered therein is what makes up jurisdiction".

26. In the case of Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another, has been pleased to observe in the context of the power of the Code u/s 34 of the Indian Trust Act as follows:-

In paragraph 16 Their Lordships have been pleased to observe as follows:-

"The jurisdiction of the Court is circumscribed by the provisions of section 34 of the Trusts Act. The Court had no jurisdiction to pronounce on the pleas put forward by the settlor. From the facts stated in the petition and from the relief asked for, it was obvious that the case did not come within the scope of section 34 of, the Trusts Act. Therefore, when the learned Judge granted relief asked for, he did something which he was not competent to do u/s 34 of the Trusts Act."

27. Before that in paragraph 15 Their Lordships as principle of law held as follows:-

"From the above discussion it is clear that before a Court can be held to have jurisdiction to decide a particular matter it must not only have Jurisdiction to try the suit brought but also have the authority to (emphasis supplied) pass the orders sought for. It is not sufficient that it has some Jurisdiction in relation to the subject matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that has arisen between the parties."

28. In the content of the aforesaid proposition of law we now need to examine the case made out by the respondent/plaintiff before learned Trial Judge for obtaining final judgment. It is a case of the plaintiff that the suit based on revocation of leave and license by efflux of time and it is not a suit based on recovery of possession from a tenant. It seems to us that learned Trial Judge had taken note of the case made out by the defendant and did not taken note of the case made in the context of the aforesaid provision of law.

29. When the legislature whether supreme; or subordinate has envisaged its certain provision, either in negative form or in affirmative it has-to be construed that the case has to be brought in that form as mentioned in the statute not otherwise.

30. Moreover we have already noted the language suggest in the restricted way and no other idea or thought can be brought in to help the suitor by the Court. We in this case held that learned Trial Judge did not have any authority to entertain the application going by the statement and averment made by the affidavit in support of summons and accompanied by document. While entertaining the application the case of the defence comes later and it cannot be seen unless the Court gets an authority to examine the defence. If the Court lacks jurisdiction it cannot examine the matter in any respect thereafter.

31. According to us this application should have been dismissed in limine as the Court did not have jurisdiction to entertain the same.

32. In view of the discussion above we think that the other discussions rendered by the learned Trial Judge is without jurisdiction.

33. Even if we presume that by necessary implication that the learned Trial Judge did have power in relation to the suit those issues raised therein are triable ones, and the learned Trial Judge has decided the matter involved in the High Court suit and did not follow His Lordship's earlier order. These suits have been decided in a consolidated manner, taking the appellant's suit for hearing also. Accordingly on that ground also this order is not sustainable and the same is set aside However having regard to the facts and circumstances of this case the interim

[order passed by this Division bench should continue thus the appeal succeeds with the aforesaid order.

there will be no order as to costs]

J. Bagchi, J.

I agree.