(2011) 07 CAL CK 0049

In the Calcutta High Court

Case No : G.A No''s. 719 of 2007 and 569 of 2010 and C. S No. 16 of 2007

Numazar Dorab Mehta and Others APPELLANT

Vs

The Assam Company Ltd. RESPONDENT

Date of Decision : 22-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 4
Transfer of Property Act, 1882 — Section 106, 111, 113

Citation : (2011) 07 CAL CK 0049

Hon'ble Judges : Nadira Patherya, J

Bench : Single Bench

Advocate : Jayanta Mitra, Ranjan Bachawat and Dhruba Ghosh, for the Appellant; Anindya kumar Mitra and S.N. Mitra, Sr. Advs., for the Respondent

Judgement

Nadira Patherya, J.—This is an application filed under chapter XIII A of the Original Side Rules of this Hon''ble Court.

2. The case of the Plaintiff Petitioner is that the trustees of the Calcutta Zoroastrian Community''s Religious and Charity Fund, (Zoroastrian Trust) and Olpadvala Memorial Trust, are owners of premises 52, Chowringhee Road, Kolkata- 700 071 (premises) and the buildings thereon. As a lease deed was executed on 17 April, 1984 by the trustees for 21 years in favour of the Defendant, on expiry of the lease term the Defendant was to vacate the said premises in its possession and for not doing so a notice u/s 106 of the Transfer of Property Act was issued on 4th December 2006. The said notice was received by the Defendant. As No. reply was given to the said notice nor steps taken to vacate the said premises C.S. 16 of 2007 was filed. The said suit is maintainable under the 1997 Act as the lease rent per month is in excess of Rs. 10,000.

3. The defence taken by the Defendant is that the West Bengal Premises Tenancy Act 1956 will apply and not the 1997 Act therefore the Defendant under the 1956 Act will continue as a monthly tenant. The lease has been given by the Zoroastrian Trust while the said notice has been issued by two trusts. The

relationship of landlord tenant between the Plaintiff and the Defendant is also disputed. The issue of res judicata has been raised in view of the Suit of 2003. Each of the defence is baseless as by cheque the Municipal tax was sought to be paid under cover of letter dated 29th December, 2006. The notice dated 4th December 2006 has been issued by the Trustees of the 2 Trusts and as Landlord accepted by the Defendant. The suit of 2003 was withdrawn with leave to file a fresh suit, therefore the principle of res judicata will not apply to the facts of the case. Although the Municipal rates and taxes was sought to be paid under cover of letter dated 29th December, 2006, the said cheque was not accepted and was returned to the Defendant. As the monthly lease rent is in excess of Rs. 10,000 the Plaintiff is entitled to file the instant suit, therefore, orders be passed as sought.

4. Opposing the application Counsel for the Defendant submits that the lease deed by virtue whereof lease in respect of the said premise was granted is in the name of the Trust. The trustee Plaintiffs who have filed the instant suit were not named in the lease deed. As the Plaintiffs were not trustees therefore, the said persons cannot claim recovery of possession of the suit premises. The Plaintiffs have not been appointed as trustees as per the scheme framed by this Court. The lease deed was entered into by the Zoroastrian Trust therefore there exists No. landlord tenant relationship between the Olpadvala Memorial Trust and the Defendant. This Court lacks pecuniary jurisdiction to entertain the said suit.

5. In the notice dated 4th December, 2006 although sums on account of Municipal rates and taxes is called upon to be paid, nonpayment of the said sums is not a ground for termination. In fact by letter dated 29th December, 2006 a cheque for payment of the Municipal rates and taxes was sent to the advocates of the Zoroastrian Trust and although the same was accepted, by letter dated 17th June, 2007 was sought to be thereafter refunded. The notice issued u/s 106 of the Transfer Property Act is by two trusts and is void. Moreso as No. notice of attornment of tenancy was given by the Zoroastraian Trust in favour of the Olpadvala Memorial Trust. The lease deed of 1984 has been signed by the trustees of the Zoroastrian Trust and the rent bills have also been issued by the Zoroastrian Trust and not the Olpadvala Trust. In the Municipal records of the said premises the Zoroastrian Trust is shown as the landlord therefore, the validity of the notice is in question as it has been issued by the trustees of the Olpadvala Trust along with trustees of the Zoroastraian Trust and therefore a Triable issue has been raised. No. notice to claim Municipal Tax or forfeiture has been issued and the mesne profit has been fixed in the lease deed. Therefore, the Defendant continues as a monthly tenant on same terms as contained in the lease agreement. An enquiry has been sought into the mesne profit and the said can only be ascertained at the trial of the suit. Reliance is placed on 49 C.W.N. 246 and Kapil Deo Pandey Vs. Vasudeb Devshankar Shukla, . By the amendment made as directed the only amendment sought is in respect mesne profit without seeking to join the claim of Municipal rates and taxes. Therefore inspite of the directions by Court, No. relief can be granted at this stage. The Plaintiff No. 2 is

not a trustee as he was not duly appointed and although it has been submitted that reliance will be placed on the scheme at the hearing the same has not been produced for consideration. Therefore, as Triable issues have been raised this application merits No. order.

6. In reply Counsel for the Plaintiff Petitioner submits that by order dated 17th March, 2009, the existence of two causes of action has been accepted by the Defendant. This is more evident from the Order dated 9th June 2009 passed in appeal when leave was granted under Order 2 Rule 4 of the CPC and on basis thereof steps have been taken to amend the pleadings and include the claim on account of Municipal taxes. The amendment has been made and amended plaint served on the Defendant. In the notice u/s 106 of the Transfer of Property Act the claim of Municipal Taxes has been included and Section 111(g) and (h) so also Section 113 of the Transfer of Property Act 1882 be considered. In paragraph 10 of the plaint the pleadings on account of Municipal Taxes will appear and a decree sought for the said sum. Leave granted by the appeal Court remains irrespective of the defective amendment made if any. The filing of suit by the trustees has not been disputed in the letter dated filed 29th December, 2006 and the Zoroastrian Trust has been accepted as the landlord. The objection regarding trustees has not been taken in the said letter dated 29th December, 2006 whereby the Defendant sought to pay the Municipal rates and taxes. In C.S 199 of 2001 neither before the Trial Court nor before the Appeal Court was the locus of the trustees questioned. In fact by order dated 21 February, 2005, the appointment of the Plaintiff No. 2 was upheld and in appeal which was filed from the said order the same was dismissed on 20th April 2005. Therefore, the suit by the Plaintiff No. 2 is maintainable and the defence is dishonest and No. defence as held in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, and Kanasara Abudulrehman Sadruddin Vs. Trustees of the Maniar Jamat Ahmedabad, Musaji Abdulkarim and Others, .

7. Having considered the submissions of the parties the lease in respect of the said premises which was granted in 1984 specifically states that the Plaintiffs are the present Trustees of the Zoroastrian Trust so also Olpadvala Trust. Therefore filing of the suit by the trustees of both the trust cannot be faulted more so when the Defendant has not objected to the issuance of the notice dated 4th December, 2006 by the Trustees in its letter dated 29th December, 2006. C.S 199 of 2001 was also filed by the trustees and the maintainability of the suit was not challenged. The lease deed was executed by the trustees of the Zoroastrian Trust who were also trustees of the Olpadvala Trust. Therefore, the suit by the trustees is maintainable. It cannot be disputed that the trustees of the Zoroastrian Trust are the landlords but nowhere has any claim been made by the trust estate. The notice has been issued by the trustees of both the trusts and it is also mentioned in the lease deed of 1984 that the trustees who in 1984 had executed the Lease Deed on behalf of the Trust that the said term "lessors" would mean also their "successors-in-office" who admittedly are the present trustees. Therefore the present trustees will have the authority to act in terms of

the said lease deed.

8. Much is sought to be made out of the amendment made pursuant to order dated 9th June, 2009. There is No. doubt that the amendment has been carried out and by virtue of the amendment the Plaintiff has sought for a decree for recovery of possession and a decree for Rs. 17,17,424/-.

9. Leave was sought and therefore the existence of 2 causes of action has been accepted. More so, a SLP was also filed but the Order dated 9th June 2009 was not interfered with.

10. Therefore on a consideration of the facts in its proper perspective. The Defendant has not been able to raise a Triable issue and its defence is nothing but moonshine. Although it was contended by the Defendant that the Plaintiff No. 2 was not appointed as per the Scheme. This argument cannot be accepted as the appointment of the Plaintiff No. 2 was upheld not only by the Trial Court but also by the Appeal Court by Orders dated 21st February, 2005 and 28th April 2005.

11. Accordingly on the principles laid down in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , the Plaintiff will be entitled to a decree in terms of prayers (a) and (b) of the Master''s Summons.

12. For purposes of ascertaining sums payable on account of mesne profit Mr Dipak Shome Advocate Bar Library Club is appointed Special Referee, who will file his report within 6 weeks from the date of receipt of the order. The Special Referee will be entitled to an initial remuneration of 1000 gms, to be paid by the Plaintiff.

13. In view of the aforesaid this application is disposed off. The decree be drawn up expeditiously.

14. In view of the decree passed No. order need be passed in G.A. 569 of 2010.

