

(2015) 02 CAL CK 0058

In the Calcutta High Court

Case No : G.A. 3447 of 2007 and C.S. 137 of 2007

Octavius Tea and Industries Ltd.

APPELLANT

Vs

The New India Assurance Company Ltd.

RESPONDENT

Date of Decision : 24-02-2015

Acts Referred:

Transfer of Property Act, 1882 — Section 106, 106(3), 107

Citation : (2015) 02 CAL CK 0058

Hon'ble Judges : Soumen Sen, J.

Bench : Single Bench

Advocate : Surajit Nath Mitra, Senior Advocate, Dharendra Nath Sharma, Navneet Mishra and Sananda Mukhopadhyay, for the Appellant; Dhruba Ghosh and Bikash Kumar Ray, Advocates for the Respondent

Judgement

Soumen Sen, J.—The plaintiff has filed this application under Chapter XIII A of the Rules on the Original Side praying, inter alia, for a decree for eviction.

2. The plaintiff is a lessee for a term of 99 years commencing from January 1, 1962 in respect of Premises Nos. 14 and 15, Old Court House Street, Kolkata (hereinafter referred to as the "suit premises").

3. Under the lease, the plaintiff was entitled to construct a three several buildings on the leasehold property. The building constructed on the middle portion of the said property was subsequently known and numbered as 15C, Hemanta Basu Sarani, Kolkata-700001 (hereafter referred to as "the said premises").

4. Pursuant to an agreement dated 2nd June, 1986 entered into by and between the plaintiff and the defendant, the plaintiff leased out the entirety of the 5th floor to the said premises to the defendant measuring about 6933.46 sq.ft. of super built up area (hereinafter referred to as "the demised premises") on the terms and conditions and at the rents mentioned in the said agreement as also in the draft Deed of Lease annexed to the said agreement for a term of 21 years

commencing from April 1, 1986. The agreement records that a Lease Deed would be executed in terms of the said agreement for a period of 21 years with an option for renewal and such lease would commence on and with effect from 1st April, 1986. The renewal clause in the draft lease agreement stipulates that if the defendant is willing to renew the lease then in that event, the defendant would be required to give to the plaintiff at least three months' notice in writing in that behalf by registered post with acknowledgement due before the expiration of the term. In that event, the sub-lessor shall at the cost of the sub-lessee grant to the sub-lessor the lease of the demised premises for a further term at such a rent and on such terms and conditions as shall be mutually agreed upon in writing.

5. It is an admitted position that no formal deed of lease was executed by and between the parties. The defendant, however, has complied with the terms of the unregistered and unexecuted deed of lease and discharged their obligations.

6. In view of the quantum of rent payable by the defendant to the plaintiff, the defendant is not a tenant under the West Bengal Premises Tenancy Act and, accordingly, the provision of the said Act does not apply.

7. Since the lease agreement was not registered the status of the defendant becomes that of a monthly tenant and such tenancy is determinable by serving a notice under Section 106 of the Transfer of Property Act. The plaintiff treating the defendant as a monthly tenant served a notice to quit dated 11th April, 2007 under Section 106 of the Transfer of Property Act. The defendant in spite of service of notice has failed to deliver possession of the property in question.

8. Under such facts and circumstances, the plaintiff has filed a suit for eviction and mesne profits. In the said suit, the plaintiff has filed this application for eviction.

9. Mr. Surajit Nath Mitra, learned Senior Advocate appearing on behalf of the petitioner, submits that in view of the fact that it is unregistered lease, the defendant cannot rely on the renewal clause to defeat the claim of the plaintiff. The deed purportedly creating lease is inadmissible in evidence and, accordingly, all its terms are inadmissible including the one which gives a right to the lessee to exercise its option for renewal. The right to exercise of option for renewal is an essential term of the lease deed and in absence of the document being registered, no evidence could be laid on unregistered document. Even if it is assumed that the defendant has a right to exercise its option for renewal in terms of clause (e) of the draft lease agreement, the option having not been exercised within the stipulated period of three months' prior to the expiry of the original lease period, any exercise of option beyond the time period stipulated in the said clause is not binding on the plaintiff. Furthermore, renewal clause contained in the draft lease states that the lessee would be entitled for a further term at such a rent and on such terms and conditions as shall be mutually agreed upon in writing. The said terms and conditions of renewal are vague and

not enforceable.

10. The learned Senior Counsel has referred to Hindusthan Petroleum Corporation Ltd. Vs. R.P. Agarwalla and Brothers (Pvt.) Ltd., for the proposition that there cannot be an automatic renewal of lease. The provisions of renewal of a lease on expiry is not automatic but on expression of such or necessary desire to have the lease renewed, should be made duly.

11. The decision of the Hon"ble Supreme Court in Bajaj Auto Limited Vs. Behari Lal Kohli, was cited for the proposition that since the deed of lease is unregistered, it is inadmissible in evidence and, accordingly, the clause of the lease deed giving option for renewal being an integral part of the deed of lease could not be looked into and the defendant cannot rely on the said clause to make any claim for renewal. It is submitted that clause (e) of the draft lease states that the renewal for a further term on terms and conditions and at a rent to be mutually agreed upon in writing is vague and, accordingly, not enforceable. The lessee in view of such vague terms had no enforceable right of renewal. In this connection the learned senior Counsel has referred to the decision of the Naveen Chand and Another Vs. Nagarjuna Travels and Hotels Pvt. Ltd., .

12. The defendant has filed a written statement in which the defendant has stated that the defendant has exercised its option under the lease agreement. The defendant by a letter dated 31st January, 2007 exercised its option. The plaintiff, however, has failed to execute a fresh lease for a further period of 21 years and the only thing which is to be decided is a quantum of rent. In view thereof, the plaintiff is not entitled to physical possession of the suit property. The objection also refers to a prior suit filed by the defendant before the learned 7th Bench of the City Civil Court being Title Suit No. 769 of 2007 for declaration and permanent injunction against the plaintiff. The defendant has specifically stated that the notice dated 11th April, 2007 purported to have been issued under Section 106 of the Transfer of Property Act is invalid and defective. The parties clearly have a contract to the contrary that is an agreement to renew the lease for a further period in terms of the option duly exercised by the defendant and the plaintiff having failed to act on the basis of such request inasmuch as the lease agreement does not contemplate termination by a notice to quit under Section 106 of the Transfer of Property Act. The plaintiff is not entitled to terminate the said lease by issuing the said notice.

13. Mr. Dhruva Ghosh, the learned Counsel appearing on behalf of the defendant was critical of the notice and attacked it head, body and tail. It is submitted that even if it is assumed that the tenancy is terminable by issuing a notice under Section 106 of the Transfer of Property Act, 1882, the fact remains that the said notice is a defective notice and on that ground alone, the suit must fail. The learned Counsel has referred to Section 106 of the Transfer of Property Act and submits that the said Section contemplates 15 days" notice expiring with the end of the month of the tenancy. The purported notice has used an expression "has stood terminated on and with effect from the expiry of 31st March, 2007" and

has also used the expression "or the same has been duly terminated and/or the same is hereby terminated" and thereafter the plaintiff called upon the defendant to vacate and deliver the suit premises on the expiry of 30th April, 2007. It is submitted that the tenancy is terminable only on the expiry of 15 days expiring with the end of the month of tenancy and, accordingly, the expressions used in the said notice are ambivalent and not in accordance with the provisions of Section 106 of the Transfer of Property Act. It is argued that shorn of any other details, this itself is a ground on which the defendant shall be allowed to leave to defend. The learned Counsel has referred to an unreported decision in G.A. No. 1736 of 2006 with CS No. 71 of 2006 (Pannalal Sagarmal v. Central Bank of India) decided on 15th July, 2008 to argue that the notice proceeds on the basis that the lease stood determined and requires the defendant to deliver of possession which is held to be a defective notice under Section 106 of the Transfer of Property Act. A Single Bench decision in G.A. No. 1018 of 2007 with G.A. No. 719 of 2007 with C.S. No. 16 of 2007 (Numazar Dorab Mehta and Ors. v. The Assam Company Ltd.) dated 17th March, 2009 since affirmed by the Hon"ble Division Bench in APO No. 117 of 2009 with APOT No. 114 of 2009 with C.S. No. 16 of 2007 decided on 9th June, 2009 are relied upon for the proposition that if triable issues are raised, the Court should allow leave to defend. The judgment of the Hon"ble Supreme Court in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, is referred to for the same proposition. It is argued that if it is ultimately held that the notice under Section 106 of the Transfer of Property Act is defective then the suit is bound to fail. Since the defence raised a triable issue which according to the learned Counsel is a fair and reasonable defence although may not be a positively good defence as held in M/s. Mechalec (supra) leave to defend cannot be denied to the plaintiff. It is further submitted that in terms of the order passed in this proceeding, the defendant is paying a sum of Rs. 83,201.16/- since 2007 for an area of 7000 sq.ft. (approximately) and the plaintiff as such is not being prejudiced in any manner if the defendant is allowed to contest the suit.

14. The learned Counsel has referred to the decision of the Hon"ble Supreme Court in Raj Duggal vs. Ramesh Kumar Bansal, AIR 1990 SC 2218, for the proposition that where the defence raises a triable issue leave should not be declined merely because of inherent implausibility or inconsistency of the defence. It is submitted that in the said judgment it was held that summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. Since the challenge to the notice to quit raises a triable issue, the defendant may be allowed to contest the suit by filing written statement.

15. In response to the argument of the plaintiff that the renewal clause cannot be looked into, it is submitted that the plaintiff has relied upon the said unregistered lease deed in the notice to quit and the said unregistered lease deed having formed the basis of the present suit, the plaintiff at this stage cannot turn around and contend that the defendant cannot rely upon the said

renewal clause.

16. In an application for summary proceeding it has to be seen whether in the opposition the defendant has been able to raise a triable issue which cannot be conveniently decided in a summary manner. The defence should not be moonshine. In the petition, the plaintiff has referred to a letter dated 31st January, 2007. The said letter was issued by and/or on behalf of the defendant in which the defendant purported to have exercised option for continuation of tenancy in terms of the renewal clause of the lease deed which is to expire on 31st March, 2007. The plaintiff would contend that the said exercise of option is not in terms of clause (e) of the draft lease.

17. To appreciate such argument, it is necessary to refer clause (e) of the draft lease which states:--

"(e). If the Sub-Lessee shall be desirous of renewing the term hereby created on the expiration thereof and of its such desire shall give to the Sub-Lessor at least 3 months" notice in writing, in that behalf by registered post with AD before the expiration of the term hereby created then the Sub-Lessor shall at the cost of the Sub-Lessee grant to the Sub-Lessor the Lease of the Demised Premises for a further term at such a rent and on such terms and conditions as shall be mutually agreed upon in writing." 18. Under the said clause, the lessee would be required to exercise such option of renewal by giving at least 3 months" notice in writing in that behalf by registered post with acknowledgement due before the expiration of the term created by the lease. The lease was to expire on 31st March, 2007, accordingly, the option would be exercisable on or before 31st December, 2006. The option appears to have been exercised almost after a month. The plaintiff, however, in reply to such notice on 2nd February, 2007, informed the plaintiff that in terms of the agreement, the lease would expire on 31st March, 2007 and, therefore, the defendant was requested to vacate possession of the property in question. The defendant, however, renewed its prayer for renewal in its letter dated 19th March, 2007 which, however, was not accepted by the plaintiff primarily on the ground that the rent offered by the defendant was grossly inadequate. Where a lessee has an option to ask for renewal but does not exercise such option before the expiry of the term and merely continues in possession he becomes merely a tenant from year to year after the termination of the original tenancy. In fact, on the expiry of the period mentioned under Section 106, the lessee becomes a trespasser and liable to be evicted. Although it is argued by the plaintiff that the draft lease agreement is inadmissible in evidence but the fact remains that the plaintiff has relied upon the said draft lease agreement and the parties have acted upon such terms.

19. It appears that the option was exercised beyond the period mentioned in the draft lease. There was a delay of about one month. It is well-established that renewal of an agreement of lease requires execution of a document in accordance with law evidencing such renewal. The grant of renewal is also a fresh grant.

20. In *Bhikaji Vishnu Karmarkar Vs. Ramchandra Krishna Phatak*, it was held that if the option to renew is not exercised by tenant before expiry of tenancy, the tenancy stands annulled after expiry of period of lease.

21. Where a lease is for a period exceeding one year its renewal without registered instrument is invalid. It shall be treated as monthly lease terminable by notice under Section 106. There can be no automatic renewal in absence of compliance with Section 107. However, a notice to quit must have a clear and unambiguous intention to determine the lease. The intention of the party giving the notice must be clearly spelt out, that is to say, that the lease is to terminate at a certain time. No particular form is necessary but there must be no uncertainty or ambiguity in the notice. The object of giving notice to communicate the intention of the landlord that he wants premises back and for that he gives 15 days time to the tenant to vacate. Such notice is to be liberally construed as the tenant's only right is to get notice of 15 days to vacate. A tenant is under a statutory obligation to vacate the property on expiry of 15 days' notice.

22. In *Jaswant Raj Soni and Jabar Lal Vs. Prakash Mal and Kan Mal*, it has been held that even if inadequate time (in accordance with the provisions of Section 106 of the Transfer of Property Act) is given to a tenant by a notice, it would not invalidate the notice altogether or render useless the plaintiff's subsequent acts founded on the notice if the action is initiated beyond the period that Section 106 permits a noticee tenant to enjoy. This is also clear from Section 106(3) of the relevant Section.

23. Mr. Ghosh, learned Counsel appearing on behalf of the defendant has relied upon *Yerrabhothula Krishna Murthy and Others Vs. Addepalli Subba Rao*, to argue that on fair construction of the notice to quit, the Court should come to a conclusion for the purpose of this application that it calls for a deeper look since according to the learned Counsel the determination of the lease is in accordance with Section 106.

24. It is now well-settled that a notice to quit must be construed broadly and not in a pedantic manner. The notice has to be construed as a whole and not by reading one word in isolation. However, the Court is required to see whether the basic requirement of the law has been complied with in giving notice, the notice could not be construed too strictly. The validity of a notice to quit ought not to turn on the split up a straw or in a hypercritical manner or pedagogic pedanticism or over-refined subtlety. (*Yerrabhothula Krishna Murthy (supra)*). It must be construed in a common sense way *Bengal Electric Lamp Works Ltd. Vs. Sukdev Chandra Sinha*, , *P. Honnamma Shetty Vs. B. Jagannath and K. Krishnappa Poojary*, .

25. In *Karthikeya Press, Printers and Book Binders, Karthikeya Traders, Erode, M.P. Palaniappan, Chinnaswami and Nachimuthu Vs. Madarsa Dawoodiya Arabic College Trust*, cited by Mr. Mitra it was held that merely because the word

"hereby" is used in the notice, it cannot be construed that the tenancy was terminated in praesenti or terminated forthwith, but it should be understood that the tenancy is terminated by the notice in question. The view expressed by the learned Judge of the Andhra Pradesh High Court was dissented.

26. In *General Auto Agencies Vs. Hazari Singh*, a decision relied upon on behalf of the plaintiff, it was held that the expression "hereby terminates" cannot be read to mean "terminated forthwith" the word hereby means that the tenancy was terminated by that notice. It was submitted that the sentence when read as a whole could make it abundantly clear that the plaintiff wanted to synchronize the act of termination of tenancy with the act of delivering vacant possession.

27. In *Harihar Banerji and Others vs. Ramsashi Roy and Others*²³ CWN 77 (Privy Council) in which their Lordships of the Privy Council laid down the following as the principles deducible from English authorities on the subject:--

"Notice to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law. The test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances, touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances. Further, notices to quit are to be construed not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat, quam pereat* (that an act may avail rather than perish)." 28. The same principle has been reiterated by the Hon'ble Supreme Court in *Bhagabandas Agarwalla Vs. Bhagwandas Kanu and Others*, in which in Paragraph 3, the Supreme Court observed:--

"3. Now, it is settled law that a notice to quit must be construed not with a desire to find faults in it, which would render it defective, but it must be construed *ut res magis valeat quam pereat*. "The validity of a notice to quit", as pointed out by Lord Justice Lindley, L. J. in *Sidebotham v. Holland* (1895) 1 QB 378 "ought not to turn on the splitting of a straw". It must not be read in a hyper-critical manner, nor must its interpretation be affected by pedagogic pendantism or over refined subtlety, but it must be construed in a common sense way. The notice to quit in the present case must be judged for its validity in the light of this well recognized principle of interpretation." 29. The expression in the notice to quit although has used phraseology "has stood determined and/or the same has been duly terminated and/or the same is hereby terminated" but the fact remains that the defendant was called upon to deliver possession upon the expiry of the 15 days. I am unable to accept this submission that the notice proceeds on the basis that the lease stood determined and requires the defendant to deliver up possession immediately. The said expression only means that such termination is done through the notice and when the notice is read as a whole, it conveys that the termination is intended to take effect at the end of 15 days. The same is clear from the notice, relevant portions whereof on which the argument is based in defence are reproduced hereinbelow:--

"We without prejudice state that your lease/tenancy in respect of the above office space has stood terminated and/or the same has duly been terminated and/or the same is hereby terminated and we call upon you to please vacate and deliver the vacant and peaceful possession of the above office space being the entire Fifth floor of the building in the Middle portion at 15C, Hemanta Basu Sarani, Kolkata-700 001 in our favour, positively on the expiry of April 30, 2007.

Please also note that should you fail to comply with our aforesaid requisitions and to vacate and to deliver the vacant and peaceful possession of the above office space being the entire 5th floor of the building at 15C, Hemanta Basu Sarani, Kolkata on the expiry of April 30, 2007 as aforesaid, we shall have no alternative but to institute appropriate suit or other legal proceedings against you for recovery of possession of the above office space and further to hold you liable for the costs and consequences. Please also treat that as a Notice under Section 106 of the Transfer of Property Act, 1882."

30. In Numazar Dorab Mehta (supra), the learned single Judge while considering an application under Chapter XIII A of rejection of plaint held that in view of absence of leave under Order 2 Rule 4, the plaint cannot be sustained in this Hon"ble Court and, accordingly, direction was given to return with the plaintiff to present the plaint at the appropriate Court.

31. Mr. Ghosh would urge that having regard to the quality of the defence that the Court is required to consider at the stage of leave to defend has been stated succinctly in M/s. Mechalec (supra) and the defence as disclosed in the affidavit falls under Clause (b) of Paragraph 8. It is submitted that even if affidavit does not positively and immediately make out a clear case of defence yet the Court in an appropriate situation in exercising its discretion imposed conditions as to the time or mode of trial but not as to payment of the Court or furnish security.

32. The oft. quoted observations in M/s. Mechalec (supra) laying down the guidelines the Court is required to follow in such a situation are:--

"(a). If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b). If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c). If the defendant discloses such facts as may be deemed sufficient to entitle him to defend that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may

in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

33. One of the factors, the Court would be required to take into consideration if the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.

34. In the instant case, I am of the view that the challenge to notice to quit is unacceptable.

35. The main dispute between the parties appears to be with regard to the quantum of rent to be paid by the defendant to the plaintiff. In the letter exercising option on 31st January, 2007, the defendant does not appear to have given any specific terms for renewal. The defendant purportedly exercised such option for renewal belatedly, that is to say, there is a delay of one month and the defendant admits such delay. In the said letter, the defendant did not indicate the terms and conditions and more particularly the rent the defendant is willing to pay. However, it appears that the parties were negotiating on the terms and the subsequent letters issued by the plaintiff would show that the plaintiff had declined to renew the lease on the ground that the rent offered by the defendant was inadequate. The defendant is depositing a sum of Rs. 83,201.16/- since 2007 in terms of the order passed by this Court. There cannot be any doubt that the defendant is occupying an area of 7000 sq.ft. in a prime locality at Kolkata and is paying a meager rent of Rs. 83,201.16/-. Even if it is assumed that the defendant has properly exercised the option and the plaintiff would have responded to such option and agree to a reasonable amount of rent, it cannot be disputed that Rs. 83,201.16/- could not be a realistic sum that the property is capable of fetching. During the pendency of this application, documents have been produced by the learned Counsels for the parties wherefrom it appears that the defendant on 1st April, 2011 gave an offer to pay enhanced rent at the rate of Rs. 28.40 per sq.ft. with effect from 1st April, 2007 with a condition that a lease deed should have executed which must contain a renewal clause identical

to Clause (e) of the lease agreement dated 22nd June, 1986. However, surprisingly in an subsequent communication dated 17th November, 2014, the defendant offered to pay lesser rent at the rate of Rs. 24.14 per sq.ft. from 1st April, 2007 till 30th March, 2013 and thereafter at the rate of Rs. 32.13 per sq.ft. with provisions for automatic escalation at the rate of 10% after completion of three years for a lease period of 6 years w.e.f. 1st April, 2013. The said amount appears to be unrealistic and contrary to the offer given earlier. Both the parties have relied upon lease agreement as the basis of their claim in the suit. The plaintiff, however, has contended that since the lease deed is unregistered, the terms and conditions of the lease deed cannot be looked into. However, having regard to the fact that there are correspondences which suggest that the parties were discussing and/or negotiating on the terms and conditions on which a lease agreement could be executed, I think an opportunity should be given to the defendant to contest the suit. However, such leave to defend should be conditional. The defendant upon payment of occupation charges at the rate of Rs. 28/- per sq.ft. w.e.f. 1st April, 2007 till 30th March, 2012 and thereafter on and from 1st April, 2012 at the rate of Rs. 35/- per sq.ft. till the disposal of the suit shall be entitled to file a written statement and defend the suit. The occupation charges for the month of March, 2015 shall be paid by 15th March, 2015 and the defendant shall continue to pay such occupation charges month by month on or before 7th of each succeeding month. The arrear occupation charges shall be paid after adjustment of the amount already paid within a period of four weeks from date. In default of either depositing the arrear amount or to pay the occupation charges as determined, the plaintiff shall be entitled to sign judgment and a decree shall be passed for eviction. The payment of such occupation charges and acceptance of such amount shall be without prejudice to the rights and contentions of the parties.

36. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

Later:--

37. At this stage an oral prayer is made on behalf of the defendant for leave to file the written statement. The defendant is given leave to file written statement within one week from the date of payment of the occupation charges in terms of this order.