

(2009) 04 CAL CK 0010
In the Calcutta High Court
Case No : C.O. No. 582 of 2009

Prime Retail India Pvt. Ltd.

APPELLANT

Vs

Y.D. Properties and Investment Pvt. Ltd.

RESPONDENT

Date of Decision : 09-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 3(a), Order 39 Rule 3(b)
Companies Act, 1956 — Section 394

Citation : (2009) 3 CALLT 201

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : S.P. Roy Chowdhury, Ms. Chaitali Chatterjee and Mr. Javed K. Sanwarwala, for the Appellant; Bhaskar Sen and Mr. K.N. Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Jyotirmay Bhattacharya, J.—Admittedly Prime Clocks Pvt. Ltd. (Admitted Tenant) was inducted as a tenant by the defendant (Landlord) in the suit shop room. The agreement of tenancy provides that the said tenant will have the right to sublet the suit room to any other person with prior notice in writing to the defendant for which the defendant will consent and shall have no objection. The said agreement also provides that the tenant will not be entitled to sublet or sublease the said tenancy which will go against any of the above provisions contained in the said agreement. The tenancy agreement also provides that electricity will be supplied to the tenant at the rate charged by the Calcutta Electric Supply Corporation plus 5 (Five) paise per unit according to reading of the meter to be supplied by the tenant at its cost and approved by the defendant. The other terms of the said agreement are not mentioned here as this Court is not presently concerned with those terms of the tenancy agreement.

2. Since certain disputes and differences subsequently cropped up between the said tenant and its landlord, the said tenant apprehended that the supply of

electricity to the tenant may be disconnected by the defendant opposite party and under such circumstances, for protecting the tenant's right of user and enjoyment of the said tenancy, the said tenant filed a suit being Title Suit No.939 of 2002 before the learned trial Judge inter alia praying for a decree for permanent injunction for restraining the opposite party and his men and agents from disconnecting the supply of electricity to the schedule shop of the plaintiff {Admitted Tenant} from the HTC line of the defendant (Landlord) from its HT meter installed in a part of "B" schedule property mentioned in the plaint.

3. On an application for temporary injunction filed by the plaintiff in the said suit, an ad interim order of injunction was passed by the learned trial Judge whereby the defendant (Landlord) and/or his men and agents were restrained from disconnecting the supply of electricity to the schedule shop of the plaintiff (Admitted Tenant) from the HT line supplied by the defendant from its meter installed in a part of "B" schedule property mentioned in the plaint till 19th July, 2002. The defendant (Landlord) was intimated about the said ad interim order of injunction by the plaintiff (Admitted Tenant) in compliance of the provision contained in Order 39 Rule 3(a) and 3(b) of the Code of Civil Procedure. On receipt of the said notice the defendant appeared in the said suit through its learned Advocate but ultimately did not come forward either to contest the said suit or to contest the plaintiffs application for temporary injunction. As a result, the plaintiffs application for temporary injunction was disposed of by the learned trial Judge on 14th January, 2005 vide Order No.35 whereby the ad interim order of injunction which was passed earlier, was made absolute.

4. Subsequently the plaintiff company (Admitted Tenant) was amalgamated with Prime Retail India Pvt. Ltd. (the Petitioner herein) as per the amalgamation scheme approved by this Hon'ble Court u/s 394 of the Companies" Act, with effect from 18th June, 2008. By virtue of such amalgamation all the properties, right and interest of the transferor company namely the admitted tenant including those specified in the first, second and third part of schedule "B" in the proposed scheme of amalgamation stood transferred and/or vested with the transferee company (the Petitioner herein) with effect from 18th June, 2008 as per section 394(2) of the Companies" Act, 1956. It was also provided in the said order that all proceedings and suits and/or appeals then pending by or against the said transferor company (Admitted Tenant) will be continued by or against the said transferee company (the Petitioner herein).

5. Immediately after such amalgamation was effected, the present petitioner (transferee company) intimated the order of such amalgamation to the defendant (Landlord) herein. It is also an admitted fact that though no notice was given to the defendant (Landlord) intimating the defendant about such proposal for amalgamation prior to the approval granted by this Hon'ble Court to the scheme for such amalgamation but such amalgamation was intimated to the defendant (Landlord) immediately after such amalgamation was affected pursuant to the order passed by this Court and electricity bill was also paid by

the transferee company (the Petitioner herein) to the defendant/opposite party (Landlord) who accepted such payment without protest, with the knowledge of such amalgamation.

6. In spite of acceptance of the electricity bill amount from the transferee company namely the petitioner herein, by the defendant/ opposite party with the knowledge of such amalgamation, supply of electricity to the suit shop room was disconnected by the defendant/opposite party herein.

7. Under such circumstances, the petitioner filed two applications before the learned trial Judge. In one of such applications, the petitioner prayed for amendment of the Cause Title of the plaint so that the transferee company namely the petitioner herein is brought on record by way of substitution in the place and stead of the original plaintiff namely the admitted tenant. In the other application the transferee company namely the petitioner herein prayed for immediate restoration of the supply of electricity which was disconnected by the defendant (landlord) during the subsistence of the injunction order.

8. Since none of the aforesaid applications of the petitioner, were taken up for hearing by the learned Trial Judge immediately after their filing and further since the hearing of the said applications was deferred till 20th April, 2009, the petitioner filed the instant application under Article 227 of the Constitution of India before this Court seeking immediate relief by way of restoration of the supply of electricity to the suit shop room.

9. Heard, Mr. Roy Chowdhury, learned senior counsel appearing for the petitioner and Mr. Sen, learned senior counsel appearing for the opposite parties. Considered the materials on record including the relevant orders passed in connection with the said suit.

10. Mr. Roy Chowdhury submitted that by virtue of the sanction given by this Hon"ble Court to the proposal for amalgamation as aforesaid, all the assets of the plaintiff company namely the admitted tenant stood vested with the transferee company namely the petitioner herein and as a result, the transferee company (the Petitioner herein) stepped into the shoes of the transferor company and thus, became a tenant in respect of the suit premises with effect from the date of such amalgamation. Mr. Roy Chowdhury further contended that by virtue of such amalgamation, the transferee company namely the petitioner herein is entitled to enjoy the benefit of the injunction order which was passed in the said suit in favour of the plaintiff namely the admitted tenant. Mr. Roy Chowdhury further submitted that creation of sub tenancy was not prohibited under the terms of the tenancy agreement. By referring to the said agreement. Roy Chowdhury pointed out that the transferor company namely the admitted tenant was permitted to create such sub-tenancy upon notice to the landlord and in case of creation of such sub tenancy, the landlord has no other option but to accept such sub-tenant. However, in case of creation of such sub-tenancy, the plaintiff (Admitted Tenant) is required to intimate about its intention to create

such sub-tenancy to the landlord before creation of such sub-tenancy.

11. Mr. Roy Chowdhury further submitted that even though such notice was not given by the transferor company namely the admitted tenant to its landlord prior to passing of the order of amalgamation but facts remain that the landlord was intimated about the order of amalgamation passed by this Hon''ble Court immediately after the said order was passed by this Hon''ble Court. Mr. Roy Chowdhury further contended that undisputedly the electricity charges at least for one month was accepted by the defendant (Landlord) from the transferee company (the Petitioner herein) and since such acceptance was made with knowledge of such amalgamation, the defendant deemed to have consented to the creation of such sub-tenancy in the suit property.

12. By referring to the provision contained in section 4(3) of the West Bengal Premises Tenancy Act, 1997 Mr. Roy Chowdhury contended that the landlord has the obligation to supply electricity to the said tenancy. Mr. Roy Chowdhury further submitted that even assuming that the legality of the possession of the transferee company namely the petitioner herein is not accepted by the defendant but, still then, the defendant cannot disconnect supply of electricity so long as the admitted tenant and/or the petitioner herein are not evicted in due process of law.

13. By relying upon a Division Bench decision of this Hon''ble Court in the case of Phani Bhusan Dey v. Sudhamoyee Roy & Anr., reported in (1987)2 CHN 49, Mr. Roy Chowdhury submitted that the defendant would not suffer any injury if during the pendency of the suit the plaintiff and/or the petitioner herein enjoys electricity in the said tenancy. Mr. Roy Chowdhury, thus, submitted that in the event the defendant ultimately succeeds in the suit, the supply of electricity in the suit shop room would not adversely affect the interest of the defendant (Landlord) in the suit but if the plaintiff succeeds in the suit then the plaintiff and/or the petitioner will be deprived of enjoying electricity in the said premises so long as the suit is not finally decided. Thus, the inconvenience which will be caused to the plaintiff and/or the petitioner herein would remain irremediable.

14. Mr. Roy Chowdhury, thus, ultimately concluded by submitting that the defendant should be directed to restore the supply of electricity forthwith but such restoration may ultimately be subject to the result of the pending applications filed by the plaintiff in the said suit,

15. Mr. Sen, learned counsel appearing for the defendant/opposite party refuted such submission of Mr. Roy Chowdhury by submitting that though it is true that the transferor company/plaintiff was the admitted tenant of the defendant but the said transferor company ceased to exist for all practical purposes due to its amalgamation with the transferee company (the Petitioner herein) with effect from 18th June, 2008. Mr. Sen further contended that his client was not made a party in the amalgamation proceeding and his client never consented to the creation of any interest in favour of the petitioner herein by the plaintiff

(Admitted Tenant) in respect of the suit property. By relying upon the following decisions of the Hon'ble Supreme Court Mr. Sen, submitted that, in fact, a sub-tenancy was created in favour of the transferee company namely the petitioner herein by the transferor company/ petitioner namely the admitted tenant without the consent of the defendant landlord and as such the possession of such transferee company (the Petitioner herein in the suit shop room is nothing but unauthorised and/or illegal:

1. In the case of General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., .

2. In the case of Cox and Kings Ltd. and Another Vs. Chander Malhotra (Smt), .

3. In the case of Singer India Ltd. Vs. Chander Mohan Chadha and Others,

16. According to Mr. Sen, such an unauthorised occupant cannot claim any benefit of the order of injunction which was granted in favour of the original tenant namely the transferor company/plaintiff. Mr. Sen further contended that since there was no privity of contract between his client and the transferee company (the Petitioner herein), his client has no obligation to supply electricity to the suit premises in question in terms of the tenancy agreement entered into between the plaintiff and the defendant herein.

17. In short, Mr. Sen submitted that the transferee company (the petitioner herein) being a trespasser in the suit premises, the said petitioner cannot demand supply of electricity in the suit shop room from the defendant herein.

18. Mr. Sen further contended that the petitioner has not yet been impleaded as party in the suit and as such, its prayer for restoration of supply of electricity is a premature one. According to Mr. Sen so long as the petitioner is not added as a party in the suit, the petitioner has no *locos standi* to claim any interim relief in the said suit.

19. Mr. Sen, thus, submitted that in the facts of the instant case no relief by way of restoration of the supply of electricity to the suit shop room can be granted to the petitioner in the instant case.

20. Mr. Sen, further submitted that in the present set of facts the learned trial Judge may at best be directed to consider the petitioner's application for amendment of plaint as expeditiously as possible and if occasions so arises after the disposal of the petitioner's application for amendment, the learned Trial Judge may be directed to dispose of the petitioner's application for restoration of the supply of electricity on its own merit as expeditiously as possible.

21. Let me now consider the submission of the learned counsel of the respective parties in the facts of the instant case.

22. Admittedly the plaintiff was inducted as a tenant by the defendant in respect of the suit shop room. It is also an undisputed fact that the scheme for amalgamation of the plaintiff company (Admitted Tenant) with the transferee

company (the Petitioner herein) was approved by this Hon''ble Court under sections 391 and 394 of the Companies Act with effect from 18th June, 2008. The order by which the proposal for amalgamation of the plaintiff company (Admitted Tenant) with the transferee company (the Petitioner herein) was sanctioned by this Hon''ble Court, demonstrates that all assets including the tenancy right of the plaintiff company (Admitted Tenant) vested with the transferee company (the Petitioner herein). It is also an admitted fact that the defendant (Landlord) was not a party in the amalgamation proceeding and the said defendant never consented to the proposal for such amalgamation. At the same time undisputedly the defendant was intimated about such amalgamation immediately after the scheme of amalgamation was approved by this Hon''ble Court on 18th June, 2008 and the electricity bill amount was received by the defendant from the transferee company (the Petitioner herein) at least for a month with knowledge of such amalgamation without any protest.

23. Of course, the effect of amalgamation of the said two companies and the consequences of such amalgamation with regard to the tenancy of the plaintiffs company in respect of the suit shop room and the legality of the possession of the transferee company (the Petitioner herein) is a matter for consideration in the suit itself which is required to be resolved after trial on evidence.

24. But if the principles which has been laid down by the Hon''ble Supreme Court in the decisions which were cited by Mr. Sen are taken into consideration, then this Court is of the prima facie view that a sub-tenancy was created by the plaintiff company (Admitted Tenant) in favour of the transferee company (the petitioner herein) by virtue of such amalgamation.

25. Now this Court will have to ascertain as to whether such sub-tenancy is legal and/or unlawful. Creation of sub-tenancy as such is not prohibited under the concerned rent legislation but if such sub-tenancy is created without the consent of the landlord; then creation of such sub-tenancy will be a ground for eviction of such tenant from its tenancy.

26. Though in the instant case such sub-tenancy was not created with the consent of the landlord but I have mentioned above that amalgamation was duly intimated to the defendant (Landlord) who with the notice of such amalgamation accepted electricity charges from the transferee company (the Petitioner herein) at least for a month. Such acceptance, no doubt, creates a prima facie impression in the minds of the Court that the defendant has impliedly accepted the creation of such sub-tenancy in favour of the transferee company (the petitioner herein).

27. That apart, the tenancy agreement also shows that the landlord was authorised to create a sub-tenancy, of course, with notice to the landlord and if such sub-tenancy is created the landlord has no option but to accept such sub-tenancy as per the terms of the said tenancy agreement.

28. Considering the said part of the agreement coupled with the acceptance of

electricity charges by the defendant from the transferee company (the Petitioner herein), without any protest with the knowledge of such amalgamation, this Court is of the prima facie view that the transferee company (the petitioner herein) stepped into the shoes of the plaintiff company namely the original tenant because of vesting of the tenancy right of the transferor company/plaintiff with the transferee company (the Petitioner herein). In my view, such vesting is akin to the concept of assignment rather than creation of sub-tenancy. But even if it accepted that a sub-tenancy was created by virtue of such amalgamation but still then such sub-tenant cannot be deprived of enjoying the essential services in the said tenancy so long as the tenant and the sub-tenant, are not evicted from the said tenancy in due process of law. As such, the transferee company (the petitioner herein) is entitled to get the benefit of the order of injunction passed in the said suit in favour of the plaintiff herein during the pendency of the said suit.

29. This Court, thus, has no hesitation to hold that the transferee company (the Petitioner herein) is the legal representative of the plaintiff company (Admitted Tenant) and thus, the petitioner company is entitled to maintain the application for restoration of the supply of electricity to its said tenancy, in the pending application under Article 227 of the Constitution of India before this Hon''ble Court, by virtue of the provision contained in section 146 of the Civil Procedure Code.

30. Though Mr. Sen submitted that the transferor company/plaintiff (Admitted Tenant) became extinct with the sanction of amalgamation scheme by this Hon''ble High Court with effect from 18th June, 2008, but this Court is unable to accept the said submission of Mr. Sen without ascertaining as to whether the transferee company (the petitioner herein) has applied for dissolution without winding up the transferor company as per the leave granted by the Hon''ble High Court at the time of sanctioning the amalgamation scheme and/or the fate of such application.

31. This Court holds that since supply of electricity in the said tenancy was disconnected by the defendant during the pendency of the suit in violation of the order of injunction, the transferee company (the petitioner herein) is entitled to get restoration of such supply of electricity in its tenancy. This Court, thus, directs the defendant to restore the supply of electricity to the transferee company (the petitioner herein) in its tenancy within two days from date, as the right to enjoy such supply of electricity by the transferee company (the Petitioner herein) from the defendant cannot be denied so long as the plaintiff company (Admitted Tenant) and the transferee company (the petitioner herein), are not evicted from the suit premises in due process of law.

32. Such direction is given by this Court by following the principles laid down by the Division Bench of this Hon''ble Court in the decision of Phani Bhusan Dey v. Sudhamoyee Roy & Anr. (supra) cited by Mr. Roy Chowdhury as aforesaid.

33. It is, however, made clear that such restoration will, however, be subject to the ultimate decision to be taken by the learned trial Judge on the pending application u/s 151 of the CPC filed by the transferee company (the petitioner herein) which is fixed for hearing before the learned trial Judge on 20th April, 2009.

34. The learned trial Judge is, thus, directed to consider the petitioner's application for amendment of plaint on its own merit and thereafter to dispose of the petitioner's application for restoration for supply of electricity on its own merit, if occasion so arises after the disposal of the plaintiffs application for amendment, positively on the date which is fixed for hearing of the said application before the learned trial Judge without granting any adjournment to any of the party.

35. It is further made clear that while considering the petitioner's said applications, the learned trial Judge will take its own decision independently on the merit of these two applications without being influenced by any of the observations made by the Court hereinabove or by the ad hoc arrangement for restoration of supply of electricity to the petitioner's tenancy which was made by this Court in this order on the basis of the tentative findings arrived at, by this Court only for the purpose for disposal of this application under Article 227 of the Constitution of India.

36. Leave is granted to the defendant/opposite party herein to file objection against the petitioner's application within a week from date if not already filed, reply if any thereto may be filed by the petitioner, within a week thereafter. The time limit which is fixed above either for filing of affidavits by the respective parties or for disposal of the aforesaid applications by the learned trial Judge is peremptory.

37. The revisional application, thus, stands allowed.

38. Let a plain copy of the operative part of the order be given to the learned advocates for the parties on usual undertakings for obtaining the certified copy of the said order.

Urgent xerox certified copy of this order, if applied for, be given to the parties, as expeditiously as possible.