

(2012) 10 CAL CK 0073

In the Calcutta High Court

Case No : SAT 431 of 2010 with C.A.N. 9177 of 2010

R.S. Iron Industries Pvt. Ltd.

APPELLANT

Vs

Calcutta Pinjrapole Society

RESPONDENT

Date of Decision : 17-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11
Criminal Procedure Code, 1973 (CrPC) — Section 144
Transfer of Property Act, 1882 — Section 106, 111, 116

Citation : AIR 2013 Cal 97 : AIR 2013 Cal 94

Hon'ble Judges : Subhro Kamal Mukherjee, J; Harish Tandon, J

Bench : Division Bench

Advocate : Sakti Nath Mukherjee, Mr. Saptangshu Basu, Ms. Suchitra Saha and Mr. Ranabir Roy Chowdhury, for the Appellant; Sudhis Dasgupta, Mr. Aniruddha Chatterjee, J.M. Pugalia, N.L. Singhania, Sumit Singhania and Mr. O.P. Tiwari for the caveator, for the Respondent

Final Decision : Dismissed

Judgement

Harish Tandon, J.—Assailing the judgment and order dated June 30, 2010 passed by Additional District Judge, 5th Court, Howrah in Title Appeal No. 78 of 2005, affirming the judgment and decree dated May 21, 2005 passed by Civil Judge (Senior Division), 1st Court, Howrah in Title Suit No. 101 of 2004, the defendant/appellant has filed the instant appeal. This appeal was posted under Order 41 Rule 11 of the Code under Chapter V Rule 17 Of Appellate Side Rules of High Court at Calcutta.

2. Admittedly, the defendant/appellant was inducted in respect of a suit premises on the basis of the registered deed of lease dated January 9, 1958 commencing from first day of January, 1958 for a period of 21 years at lease rent of Rs. 675/- per month according to English calendar. The said lease contained a clause for renewal for a period of 5 years on the terms and conditions to be mutually agreed upon provided a request is made by the lessee for such renewal. It is an admitted position that the lessee did not exercise the option of renewal. The

tenure of the lease as stipulated in the lease deed expired on December 31, 1978. Admittedly, the rent for the months of January to September 1979 was paid by the defendant/appellant. The plaintiff/respondent subsequently filed a suit for recovery of possession on the ground of expiration of the period reserved in the said lease dated January 19, 1958 by efflux of time which was registered as Title Suit No. 12 of 1982 in the Court of 2nd Sub Judge, Howrah. The said suit was subsequently renumbered as Title Suit No. 101 of 2004. The bare perusal of the averments made in the plaint reveals that the plaintiff/respondent founded its claim on the basis of the expiration of the lease by efflux of time with the categorical statement that the rent for the period from January to October 1979 was accepted in ignorance and the plaintiff/respondent never assented for continuance in possession of the defendant/appellant. There was further prayer for a decree for mesne profit for wrongful and illegal possession/occupation of the defendant/appellant.

3. Although, several defence were taken by the defendant/appellant in the written statement, but the principle defence which could be deciphered therefrom is that the plaintiff/respondent after expiration of the period reserved in the said lease deed assented for continuance in possession not only on acceptance of the rent for the period from January 1979 to October 1979. But such assent could be deciphered from the act and conduct of the plaintiff/respondent reflected in the notice dated February 23, 1980.

4. The Trial Court held that mere acceptance of a rent after expiration of the period reserved in the deed of lease does not create any right in defendant/appellant u/s 116 of the Transfer of Property Act in absence of an assent of the plaintiff/respondent which is found absent in the present case.

5. The appellate Court concurred with the said finding and dismissed the appeal which has been challenged before this court in this appeal.

6. Mr. Sakti Nath Mukherjee, the learned Senior Advocate appearing for the defendant/appellant strenuously submits that although, mere acceptance of rent after expiration of the period limited in the lease deed does not result into a creation of new right u/s 116 of the Transfer of Property Act, unless an assent of the lesser exist in express words or by necessary implication. He succinctly argues that the intention of the plaintiff/respondent, so far as it relates to grant of an assent is inferred from the notice dated February 23, 1980 issued by the learned lawyer of the plaintiff/respondent permitting the defendant/appellant to remain in possession till 31 August, 1980. He further placed reliance upon the examination-in-chief of P.W. 1 who categorically stated that the content of the said notice is true and correct. He put much emphasis on the point that the mistake of law may render the agreement void or voidable but the ignorance does not.

7. Lastly he submits that both the Courts below heavily relied upon a judgment of this Court in case of Kartick Chandra Das and Others Vs. Gangadutta Murarka,

to arrive at the conclusion that there was no assent but the said judgment is not pointer to such an issue and, therefore, the concurrent findings of both the courts below are perverse and, therefore, there exist a substantial question of law involved in the instant appeal.

8. We have given our anxious consideration on the submissions made by the appellant as well as on perusal of the judgments of both the Courts below to satisfy our conscience as to whether an assent could be inferred by an act and conduct of the plaintiff/respondent as envisaged u/s 116 of the Transfer of Property Act.

9. Before dealing to decide the point as enumerated above, it would be profitable to quote Section 116 of the Transfer of Property Act which reads thus:

116. Effect of holding over.- If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

10. The determination of lease is provided u/s 111 of the said Act and one of the ground provided therein is the expiration of the period of lease by efflux of time. Section 116 of the said Act carved an exception to such determination provided the lesser assents for continuance of possession of the lessee. The assent has not been defined under the said Act. The ordinary grammatical meaning of the word assent defined in the Concise Oxford English Dictionary is "expression of approval or agreement". The Law Lexicon defines the "assent" as:

The act of the mind in admitting or agreeing to the truth of a proposition proposed for acceptance; consent, agreeing to; to admit, yield, or concede; to express an agreement of the mind to what is alleged or proposed, (as) Royal assent or Viceroy's assent to an enactment passed in the Legislative Assembly; Executor's assent to a legacy; assent of a corporation to bye-laws.

Mutual Assent is the meeting of the minds of both or all the parties to a contract.

11. The Corpus Juris Secundum also defines the word "assent" in these words:

A passive act of concurrence; the act of the mind in admitting or agreeing to anything; the act of agreeing or consenting to accept some proposition; and, by context, "acceptance." It also has been defined as agreement or approval; compliance, approval of something done, or a declaration of willingness to do something in compliance with a request; concurrence in, or with; consent; silent acquiescence. "Assent" implies knowledge of some kind in the party assenting to that to which he assents; also permission on the part of the party assenting; but ordinarily it does not imply contribution or express concurrence. As used in some statutes, however, the term has been held to require affirmative, positive action

on the part of the party assenting. It has been said that the term indicates the meeting of the minds of the contracting parties, and that the word is applicable only to conduct before or at the time of the doing of an act and hence does not include an approval after the commission of an act. "Assent" has been distinguished from: "consent," "estoppel", "mere neglect to ascertain facts," and "ratification."

12. Mere payment of a rent does not amount to an assent as contemplated u/s 116 of the said Act unless it is demonstrated that such payment has been made with clear stipulation and/or understanding or agreement of allowing the lessee to continue in possession.

13. The Apex Court in case of Bhawanji Lakhamshi and Others Vs. Himatlal Jamnadas Dani and Others, held that mere continuance in possession in absence of any assent of the lessor does not bring out a new tenancy.

14. To constitute the assent, there must be an offer of taking a new lease by the lessee remaining in possession of the demise premises after the expiration of the term and the lesser has consented in definite terms for such continuance of possession.

15. The holding over, if inferred by the conduct of parties, will bring out a new tenancy even though many of the terms thereof the expired lease deed exist. Therefore, to constitute a valid assent u/s 116 of the said Act, bilateral contract must exist between the lessor and the lessee.

16. In case of Daya Ram v. Gurcharan Das reported in AIR 1974 266, the Single Bench was considering the matter relating to an assent on the basis of the word "tenant" used in the plaint as it was contended that the said word signifies the clear intention of the lesser of granting assent to create a new agreement which is protected under the Rent Restrictions Act. The reliance was placed in the said report upon a judgment of the Federal Court AIR 1949 124 (Federal Court) which reads thus:

15. "The tenancy which is created by the "holding over" of a lessee or under-lessee is new tenancy in law even though many of the terms of the old lease might be continued in it, by implication; and it cannot be disputed that to bring new tenancy into existence, there must be a bilateral act. What Section 116 contemplates is that on one side there should be an offer of taking a renewed or fresh demise evidenced by the lessee's or sub-lessee's continuing in occupation of the property after his interest has ceased and on the other side there must be a definite assent to this continuance of possession by the landlord expressed by acceptance of rent or otherwise. The assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it."

16. On an analysis of the various authorities, it is quite evident that in order to attract the provision of Section 116 of the Transfer of Property Act, there must be

a bilateral agreement between the landlord and a tenant, that is, there must be an offer on the one side and acceptance on the other. It is further clear by the various authorities that the question whether the acceptance of rent was in token of a fresh contract of tenancy between the parties will be a question depending upon the facts and circumstances of each case. In this view of the legal position, it has to be examined whether the landlord had accepted the rent after the termination of the lease in token of accepting the defendant as a tenant.

17. In another judgment, the Apex Court in case of Murlidhar Jalan vs. State of Meghalaya & Ors. reported in (1997) 7 SCC 480, in categorical terms, held that mere acceptance of a rent on mistaken impression does not defeat the right of the lessor so as to constitute an assent u/s 116 of the Transfer of Property Act.

18. One of us (Subhro Kamal Mukherjee, J.), while presiding the division bench, had an occasion to consider the similar point in case of Shila Roy Choudhury and Others Vs. Nimai Charan Rakshit, and it is held:

16. The basis of section 116 of the Transfer of Property Act is a bilateral contract between the erstwhile lessor and erstwhile lessee. Therefore, to create a new tenancy, there must be a bilateral act. There must be an offer of accepting a renewed or fresh demise and there must be a definite assent expressed by the lessor. Mere acceptance of an amount equivalent to rent by the erstwhile lessor cannot be regarded as evidence of new tenancy. The expression "holding over" means that relationship of landlord and tenant was allowed to continue with the consent of both the parties. It is for the lessee to prove the overt acts by which the relationship was allowed to continue.

19. Let us now consider whether the notice dated February 23, 1980 issued by the respondent through its learned Advocate, would constitute the assent so as to create a new tenancy u/s 116 of the Transfer of Property Act. It would be relevant to quote the full text of the said notice which reads thus:

To

M/S. R.S. Iron Industries Private Ltd., 30, Goshala Road, P.S. Bally, Dist. Howrah.

Dear Sir,

Clients: Calcutta Pinjrapole Society, 34 Armenian Street, Calcutta.

By an under an Indenture of Lease dated 9th January, 1958 my client let out to you all that 2-storied brick built house and other constructions together with land thereunto belonging and part whereof the same are erected and built containing an area of 14 Bighas and 1 Kotta more or less situate lying at and being holding No. 30, Goshala Road in Mouza Lillua, Thana- Bally, Sub-registrar Howrah in the District of Howrah and comprising in Dag No. 3168, 3169 and 3170 of Khatian No. 491 Dag Nos. 3165, 3166 and 3167 of Khatian No. 858, Dag No. 3164 of Khatian No. 1095 and 1096 and Dag No. 3171 of Khatian No. 1320 and enclosed

all sides by brick walls and butted and bounded on the North by M/s Metal Products and Engineering Company, No. 6, Nutanpara Road, on the East by M/s Baldeo Ram Sallgram Private Limited, on the South by Goshala Road and on the East by Nutanpara Road at a monthly rent of Rs. 675/- payable according to English Calendar month by on or before 7th of each and every month for the month immediately preceding clear of all such deductions and the first of such monthly payment of rent was to be made on or before 7th February, 1958. The said lease was for a term of 21 years commencing from 1st January, 1958. The said lease expired on 31st December, 1978. The said lease provided that on your observing and performing the several covenants and stipulations contained in the said lease, on the expiry of the terms of the said lease and at your request and cost, my client shall grant to you a new lease of the said demised premises for a further term of five years on the terms and conditions to be mutually agreed upon. No request for new lease was made and you are wrongfully occupying the premises as a trespasser.

You should appreciate that you were under obligation to deliver vacant possession of the premises let out to you under the said lease dated 9th January, 1958 at the expiration of the said term that is on 31st December, 1978 but you failed and neglected to deliver the vacant possession in terms thereof and is still in wrongful occupation of the said premises, and causing damages to the same.

You are wrongfully making additions and alterations to the premises belonging to my client without any permission of my client and without lawful authority. The construction by way of additions and alterations to the premises of my client are wrongful and illegal. Since you failed to stop the said wrongful and illegal constructions inspite of my clients protests and warnings, my client took steps and failed a complaint in the court of the Sub-Divisional Magistrate (Executive) Sadar Howrah for an order u/s 144 of the Code of Criminal Procedure and the said complaint has since been entertained as Miscellaneous Petition No. 1773 of 1979 before the said Court and is pending.

My client states that you are wrongfully occupying the premises and you have no right to stay therein. You are also liable to pay damages and mesne profits for the wrongful use and occupation of the said premises on and from 1st September, 1980 at the rate of Rs. 500/- per diem until delivery of vacancy possession thereof unto my client.

In the circumstances aforesaid my client hereby calls upon you that you should quit, vacate and deliver up Khas possession of the said premises morefully described hereinabove to my client on or before 31st August, 1980. In default of compliance herewith my instructions are to take steps for your eviction. My client will file a suit after the expiration period hereinbefore mentioned that is on the expiration of 31st August, 1980 and shall hold you liable for all costs and consequences therefor.

Yours Faithfully,

Sd/-

20. The meaningful reading of the said notice does not infer that there was any express consent given by the plaintiff/respondent as to the continuance of possession of the appellant upon expiration of the term reserved in the lease. The intention is manifest that the plaintiff/respondent never assented and/or consented for novation of a contract or creation of a new tenancy. There is no document produced by the defendant/appellant relating to the acceptance of a new tenancy either on the existing terms and conditions as embodied in the original lease or modified terms and conditions. There is no element of bilateral agreement between the parties which is one of the basic element for grant of an assent. The defendant/appellant could not satisfy the elementary test relating to an offer for creation of a new tenancy and the acceptance thereof by the plaintiff/respondent. We do not think that the said notice has any bearing on the plea of an assent as required u/s 116 of the Transfer of Property Act.

21. We, therefore, do not find any substantial question of law involved in the instant appeal.

22. The appeal is summarily dismissed under Order 41 Rule 11 of the Code of Civil Procedure.

23. In view of dismissal of the appeal itself, the connected application filed in the instant appeal is, accordingly, dismissed.

24. However, in the facts and circumstances, there shall be no order as to costs.

25. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

Subhro Kamal Mukherjee, J.

I agree