(2010) 09 DEL CK 0035

In the Delhi High Court

Case No : IA No. 12530 of 2000 in CS (OS) No. 1823 of 2000

Sh. Anil Kumar Sanghi and Another — APPELLANT

Vs

Sh. Hari Kishan Sanghi and Others — RESPONDENT

Date of Decision : 20-09-2010

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Order 14 Rule 2
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 14 Rule 2, Order 14 Rule 2(1), Order 14 Rule 2(2), Order 7 Rule 11
Companies Act, 1956 — Section 155
Delhi Rent Control Act, 1958 — Section 50
Evidence Act, 1872 — Section 92
Specific Relief Act, 1963 — Section 34

Citation : (2010) 09 DEL CK 0035

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Pravir K. Jain, for the Appellant; Arvind Kumar, Neelam Rathore for D-1 and 2, Rajat Aneja, for D-5 and Padma Priya, for D-7, for the Respondent

Judgement

Rajiv Shakdher, J.

IA No. 12530/2000 (Order 7 Rule 11 and Section 151 of CPC by Deft. No. 5)

1. By this order I propose to dispose of the captioned application, which has been filed by R.K.S. India Pvt. Ltd. erstwhile defendant No. 5 (hereinafter referred to as "RKS") under the provisions of Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 (in short, "CPC").

2. At the outset, as it is evident, this application has been pending for the last 10 years. The parties to date have not led evidence. In this context, there are two orders which I must refer to right in the beginning.

2.1 First, is the order dated 24.01.2001 wherein, it has been noticed that the applicant/RKS had filed an application under Order VII Rule 11 CPC read with Section 151 CPC for dismissal of the suit on the ground of lack of cause of action, and on the ground of jurisdiction. The court observed that this objection be taken as a preliminary objection in the written statement which would be considered as a preliminary issue. The court, further went on to observe that the said application shall be decided by way of decision on the preliminary issue arising out of the written statement. Accordingly, defendants including applicant/RKS were directed to file their respective written statements. Consequent thereto the defendants have filed their written statements. The plaintiffs in response thereto, have filed their replication.

2.2 The second order, to which reference is required is: order dated 16.12.2003. By this order, issues were cast in the suit. The total number of issues cast in suit are thirty nine. Out of these, issue Nos. 24, 31, 32 & 33 were treated as preliminary issues. For the sake of convenience, the said issues are extracted hereinafter:

Issue No. 24-Whether the suit is not maintainable in terms of Order 7 Rule 11 CPC? OPD3&4

Issue No. 31-Whether defendant No. 5 is a tenant in different portions of suit property, as mentioned in sub-paras a, b and c of para A of preliminary objections of written statement filed by defendant No. 5? OPD-5

Issue No. 32-If Issue No. 32 is answered in the affirmative, whether the suit is barred u/s 50 of Delhi Rent Control Act? OPD-5

Issue No. 33-Whether there is no cause of action against defendant No. 5 for filing the present suit, as alleged in the written statement filed by defendant No. 5? If so, its effect? OPD-5

3. With the aforesaid prefatory note, let me briefly advert to the facts, which in my view, would be relevant for the purposes of disposal of the captioned application.

4. The plaintiffs have filed the instant suit for possession, declaration, rendition of accounts and injunction. It is averred in the plaint that one Mahabir Prasad, who died in December, 1970 was blessed with three sons. These being: Mr. Hari Kishan Sanghi, Mr. Tek Chand Sanghi and Mr. Ram Kishan Sanghi. The plaintiffs, that is; Mr. Anil Kumar Sanghi, Mr. Arun Kumar Sanghi alongwith Mr. Sanjay Kumar Sanghi are progeny of Mr. Ram Kishan Sanghi and Smt. Indra Devi. Similarly, Mr. Hari Kishan Sanghi was blessed with two sons Mr. Rajender Kumar Sanghi and Mr. O.P. Sanghi. Mr. O.P. Sanghi had expired prior to the institution of the present suit. Mr. Rajender Kumar Sanghi was married to Smt. Prabha Sanghi. They were blessed with a son i.e., Mr. Ankur Sanghi. At the point in time when, the suit was first instituted, Mr. Hari Kishan Sanghi alongwith his son, daughter in law and grandson were impleaded as defendant No. 1, 2, 3 and 4 respectively, while Mr. Ram Kishan Sanghi, who was also impleaded in the suit alongwith his wife Smt. Indra Devi and his third son Mr. Sanjay Kumar were arrayed as defendant Nos. 7, 8 & 9. Therefore, the two branches of the family emerged. The

branch of Mr. Hari Kishan Sanghi comprised of himself; his son, Mr. Rajender Kumar Sanghi; his daughter-in-law, Ms. Prabha Sanghi; and grandson, Mr. Ankur Sanghi. The other branch comprised of the plaintiffs i.e. Mr. Anil Kumar Sanghi and Mr. Arun Kumar Sanghi alongwith their father Mr. Ram Kishan Sanghi, their mother, Smt. Indra Devi and their brother Mr. Sanjay Kumar Sanghi. For the sake of convenience, the two branches are compendiously referred to hereinafter by me as: Hari Kishan and family; and Ram Kishan and family. As noticed above, the two branches traced their root to Mahabir Prasad Sanghi.

5. It is the case of the plaintiffs that Mr. Hari Kishan Sanghi alongwith Mr. Ram Kishan Sanghi and their brother Mr. Tek Chand Sanghi (who are the uncles of the plaintiffs) and Sh. Mahabir Parsad Sanghi (who was the plaintiffs'' grand father) constituted a Joint Hindu Family. It is also the case of the plaintiffs that the said Mahabir Prasad Sanghi alongwith his two sons, referred to above, lived as members of a Joint Hindu Family, and in the process acquired various properties and businesses. The said joint family, it is averred, resided in a tenanted property situated at 61, Darya Ganj, Delhi. The above members of the Joint Family it is averred, were joint in estate, mess and worship.

6. What is pertinent for the purposes of the captioned application is that the joint family, it appears acquired, amongst various other properties, four (4) plots in Delhi, which were, numbered as plots Nos. 1, 2, 3 & 4 Kilokari Village, Ring Road, New Delhi-110 014 (hereinafter, referred to as Property No. 1, 2 and 3 respectively). These plots, it is averred, were acquired in 1957 by the joint family in the name of Mr. Mahabir Prasad Sanghi, who was the karta of the joint family. I am, not for the moment, referring to other properties and agricultural lands which, the plaintiffs claim the joint family owns and possesses.

6.1 It is also the case of the plaintiffs that in 1960-1962, super-structures were raised on property Nos. 1, 2 & 3 out of the funds owned by the joint family.

6.2 It is averred that in 1964, a partial partition took place between the members of the joint family, and consequent thereto, property No. 3, with the superstructure then obtaining , fell to the share of the branch of the family headed by Mr. Ram Kishan i.e. the father of the plaintiffs herein. In-so-far-as property No. 2 was concerned, by virtue of the very same partition, fell to the share of Mr. Tek Chand Sanghi, while property No. 1 came to the share of the family of Mr. Hari Kishan Sanghi.

7. It is the case of the plaintiffs that Mr. Hari Kishan Sanghi being the eldest son of Mr. Mahabir Prasad Sanghi, had in sum and substance taken over the reins of the family, and thereby exerted great amount of influence on the other members of the family. The plaintiffs allege that the affairs of the family, which also included management of the property which fell to the share of Ram Kishan Sanghi and family i.e. Property No. 3 was within the domain of Mr. Hari Kishan Sanghi. The averments to that effect have been made in paragraph 14 of the plaint. There are also averments to the effect that the ground floor of property

No. 3 was let out on rent to Ranbaxy, W.H.O., GM (Postage & Telegraph), etc., and the rents which were realized by Mr. Hari Kishan Sanghi were deposited, in joint account of Ram Kishan Sanghi and family. It is further averred that out of the rental income of the ground floor of the property No. 3, further construction was carried out whereby, the first floor and the barsati floor alongwith the annexe was raised on property No. 3. It is alleged that between 1964-1980, the ground floor was let out by Mr. Hari Kishan Sanghi to various tenants on behalf of Ram Kishan Sanghi and family. For this purpose, it is averred, Mr. Hari Kishan Sanghi obtained a power of attorney in favour of his son Mr. Rajender Kumar Sanghi from the plaintiffs (i.e. Anil Kumar Sanghi and Arun Kumar Sanghi) and Defendant Nos. 7 and 8 (i.e. Mr. Ram Kishan Sanghi and Smt. Indra Devi). There is also an averment to the effect that by a registered deed dated 29.03.1980, a partition, in respect of property No. 3, took place in the family of Mr. Ram Kishan Sanghi whereby, the two plaintiffs and Mr. Ram Kishan Sanghi, Smt. Indra Devi and Mr. Sanjay Kumar acquired 1/5th undivided share in property No. 3. It is specifically averred that this partnership deed was witnesseth by Mr. Hari Kishan Sanghi. There are further averments to the effect that in 1989, the first floor of property No. 3 was let out to an entity by the name of Indian Renewable Energy Development Agency (i.e. M/s. IREDA) vide lease agreement dated 30.06.1989 at a rent of Rs. 45,000/- p.m.

8. In so far as applicant / RKS is concerned, there are averments made in para 22 of the plaint. The said averments basically advert to the fact that in 1975, the joint family comprising of Mr. Hari Kishan Sanghi, Mr. Ram Kishan Sanghi and Mr. Tek Chand Sanghi acquired an industrial plot bearing No. 10, DLF Industrial Estate, Faridabad by acquiring share holding rights in the company by the name of M/s. Optical Instrument Company Pvt. Ltd., which at that point of time evidently owned the said property. Subsequently, it is averred, the name was changed to the present name of applicant i.e. R.K.S. India Pvt. Ltd. It is alleged that the management and control of the said company was, however, entrusted to Mr. Hari Kishan Sanghi.

9. What is important is that the plaintiffs have specifically adverted to the fact that Mr. Hari Kishan Sanghi had got signatures of Mr. Ram Kishan Sanghi, Smt. Indra Devi and Mr. Sanjay Kumar on blank papers and documents which included stamp papers by representing to them that the said documentation was required for taxation purposes. There is also a reference to the fact that in early 1991, the ground floor of property No. 3 was let out to one French company at a rent of Rs. 1,30,000/- p.m., out of which only Rs. 30,000/- was shown as the rent, while the balance sum was shown as "liaison charges" only to avoid tax liability. The fact that the signatures on documents were appended by Mr. Hari Kishan Sanghi, in good faith, is also adverted in para 24 and 28 of the plaint.

10. The plaintiffs have filed a site plan to show that while the annexe to the super structure built on property No. 3 is in their possession, including the drive way and all other portions marked therein in yellow colour, the first floor and the

barsati, which is marked in red colour, is in possession of Hari Kishan Sanghi and family. It is averred that the first floor and the barsati floor is occupied by M/s. Pulse Impulse Health Club Fitness Centre, which is an entity controlled by Hari Kishan Sanghi and family. At the relevant point in time, the ground floor which is marked green, in the site plan, was occupied by defendant No. 10 i.e. National Highway Authority of India (in short ''NHAI'').

10.1 To be noted during the pendency of the proceedings, NHAI has vacated the premises. Reference in this regard may be made to order dated 23.09.2002 passed by this Court.

11. In the background of these broad averments, the plaintiffs have sought reliefs of declaration that they are owners of property No. 3, more specifically comprising of the main building, annexe, servant quarters and garages shown in colour yellow, red, green and brown in the site plan appended to the plaint. The plaintiffs also sought possession of entire first and barsati floor of property No. 3 alongwith servant quarters and garages shown in colour red in the site plan appended to the plaint. A mandatory injunction was also sought at the relevant point in time qua NHAI India as also the injunction against Hari Kishan Sanghi and family against creating any third party rights in property No. 3 or any part thereof. There are other reliefs also sought for, such as rendition of accounts with regard to other properties, I am not detailing the same out, as presently one is not concerned with them.

12. The applicant/ RKS in both in the written statement as well as in the captioned application has raised preliminary objections with regard to lack of cause of action qua itself, as also raised objection as to the jurisdiction of the court to entertain and try the instant suit in the background of the following averments. Briefly, these are as follows:

(i) Vide lease deed dated 22.05.1985 executed in its favour by Ram Kishan Sanghi and family, it acquired leasehold rights in the second floor of property No. 3 alongwith three floors in the annexe block. The rent as per the lease deed is a sum of Rs. 1,000/- p.m. More importantly, as per the said lease deed, applicant/ RKS could use the demised premises not only for commercial and residential purposes but could also sub-let the demised premises or any part thereof.

(ii) It is averred that by virtue of yet another lease deed dated 09.07.1990, applicant/RKS surrendered possession of the annexe block in favour of Ram Kishan Sanghi and family, however, it retained tenancy rights with respect to the second floor of the main building of property No. 3. The rent, however, remained fixed at Rs. 1,000/- p.m. In so far as the ground floor of the main building of property No. 3 was concerned, it was let out to the applicant/RKS for commercial and residential purposes at a rent of Rs. 2500/- with a further right to further sub-let.

(iii)By virtue of a lease deed dated 04.01.1995, Shri Hari Kishan Sanghi acting as the attorney of Ram Kishan Sanghi and family, leased out the first floor of the main building of Property No. 3 to the applicant/RKS @ Rs. 2,000/- p.m. In this lease deed as well the applicant/RKS was given the right to sub-let the demised premises.

(iv) The applicant/RKS has averred that it is an independent entity which has acquired tenancy right in the ground floor, first floor and the second / barsati floor of the main building of property No. 3. It is thus submitted by applicant/ RKS that neither does it have anything to do with the joint family nor has any cause of action arisen against it. It is, therefore pleaded, that since there is no cause of action in so far as applicant / RKS is concerned, it should be deleted from the array of parties by taking recourse to provisions of Order 1 Rule 10(2) of the CPC.

(v) In addition, it is also pleaded that the suit is not maintainable in view of the provisions of Section 50 of Delhi Rent Control Act, 1958 (in short, D.R.C. Act). The stance being that: since the rent of the various portions of the main building of property No. 3 (referred to above) is less than Rs. 3500/-p.m., it is a matter over which only the Rent Controller would have jurisdiction, and therefore, by virtue of Section 50 of the D.R.C. Act, the jurisdiction of this Court is ousted. In this connection, it is specifically averred that the plaintiffs while, referring to the fact that Mr. Hari Kishan Sanghi had let out various portions of property No. 3 from time to time to various tenants; had concealed the material fact pertaining to execution of the three lease deeds referred to in the written statement, and the captioned application.

13. At this juncture, it may perhaps be pertinent to refer to order dated 06.04.2005 passed in IA No. 3191/02 whereby, NHAI which was erstwhile defendant No. 10 was deleted from the array of parties based on the application filed by NHAI. The application was pivoted on the circumstance that since NHAI was inducted as a sub-tenant in a portion of property No. 3, and the fact that, it had vacated the premises on 30.09.2009; it ought to be deleted from the array of parties as, no relief was sought against it. The court based on the application of NHAI directed its deletion from the array of parties. NHAI was, however, directed to file copy of the lease deed, by which, it had been inducted as a tenant.

13.1 By the very same order, directions were passed in IA 12531/2000, whereby Mr. Ram Kishan Sanghi, erstwhile defendant No. 7, Smt. Indra Devi, erstwhile defendant No. 8 and Mr. Sanjay Kumar, erstwhile defendant No. 9 were transposed as plaintiffs. In these circumstances, plaintiffs were directed to file an amended memo of parties. These orders are referred to for the purposes of bringing to fore the fact that the original memo of parties stood amended; therefore, as noticed above, the defendants are largely referred to by name.

14. Mr. Aneja, who appeared for the applicant/RKS has argued before me that in view of the lease deeds referred to hereinabove, the execution of which according to him being not in dispute, the plaint ought to be rejected in so far as the applicant/RKS is concerned as mandated by the provisions of Order VII Rule

11 (a) & (d) of the CPC. Mr. Aneja has also argued that the plaintiffs have not as a matter of fact impugned the said lease deeds. It is submitted that the plaintiffs ought to have, in terms of Section 34 of the Specific Relief Act, 1963 sought a declaratory relief with respect to the said lease deeds. The suit in these circumstances according to Mr. Aneja is not maintainable. It is also urged by Mr. Aneja that provisions of Section 92 of the Indian Evidence Act, 1872 would prevent the plaintiffs from leading any evidence contrary to the contents of the said lease deeds.

15. Mr. Jain, who appeared for the plaintiffs, submitted that this Court is presently called upon only to deal with the application filed under Order VII Rule 11 (a) & (d) of the CPC, therefore, the court would only be required to examine the averments made in the plaint. It was contended by him that from the averments made in the plaint, it would be quite clear that cause of action, as against the applicant, does arise. In so far as the case set up by the applicant/ RKS with regard to ouster of jurisdiction is concerned, Mr. Jain relied upon those averments made in the plaint, wherein it has been stated by the plaintiffs that from time to time signatures had been obtained of the members of Ram Kishan Sanghi and family by Shri Hari Kishan Sanghi on blank papers which included stamp papers, on the pretext that they were required for tax purposes. Mr. Jain also refers to the averments made in the replication to the written statement filed by the applicant/RKS to contend and demonstrate that the veracity of the said lease deeds is squarely challenged. Mr. Jain specifically adverted to the fact that there is no denial of the averments made in the plaint to the effect that the portions of the property No. 3 were let out from time to time on rents which were far in excess of Rs. 3,500/-. In this context, one such lease deed dated 30.06.1999, amongst others, was referred to. Mr. Jain also sought to contend that, the affairs of property No. 3 were managed by Shri Hari Kishan Sanghi as the attorney of Ram Kishan Sanghi and family. He drew my attention to various documents appended at pages 166, 173 & 186 of the documents filed by the plaintiffs to demonstrate that Shri Hari Kishan Sanghi was acting for and on behalf of Ram Kishan Sanghi and family in respect of property No. 3 before the Municipal Corporation of Delhi for the purposes of assessment of property tax.

16. I have heard learned Counsel for the parties. In my view, there are two aspects to the matter: first, whether the issue Nos. 24, 31, 32 and 33 can be tried as preliminary issues. It is pertinent to note that parties have been stuck; at this stage, and consequently, have not led evidence since December, 2003, only for this reason. The second aspect is whether captioned application is maintainable. Let me deal with the second aspect, first, since one is required to tread a known path. It is trite law that while dealing with an application under Order VII Rule 11 CPC, the court is only required to look at the averments made in the plaint. The averments made in the written statement are wholly irrelevant in order to ascertain as to whether or not, there arises a cause of action or, even with respect to bar of maintainability of the suit. If an authority is required for this purpose, I would rely upon the judgment of the Supreme Court in the case

Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others, at pages 650-652 paragraphs No. 14 & 15. In this case, a company petition filed u/s 155 (of the then prevailing provisions of the Companies Act, 1956) was dismissed on the ground of limitation by relying upon averments made in affidavit-in-reply. The Supreme Court in this context made the following observations:

14. The plea raised by the contesting respondents is in fact a plea of demurrer. Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings Constituting a legal reason why the opposite party should not be allowed to proceed further. In O.N. Bhatnagar v. Rukibai Narsindas (SCC Para 9) it was held that the appellant having raised a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by Respondent u/s 91(1) of the Act and those allegations must be taken to be true. In Roop Lal Sathi v. Nachhattar Singh Gill (SCC Para 24) it was observed that a preliminary objection that the election petition is not in conformity with Section 83(1)(a) of the Act i.e. it does not contain the concise statement of the material facts on which the petitioner relies, is but a plea in the nature of demurrer and in deciding the question the Court has to assume for this purpose that the averments contained in the election petition are true. Reiterating the same principle in Abdulla Bin Ali v. Galappa it was said that there is no denying the fact that the allegations made in the plaint decide the forum and the jurisdiction does not depend upon the defence taken by the defendants in the written statement. In Exphar SA v. Eupharma Laboratories Ltd. (SCC Para 9) it was ruled that where an objection to the jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have the jurisdiction as a matter of law. In this case the decision of the High Court on the point of the jurisdiction was set aside as the High Court had examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of the Delhi High Court and also that Respondent No. 2 did not carry out business within the jurisdiction of the said High Court. Following the same principle in Indian Mineral & Chemicals Co. v. Deutsche Bank (SCC paras 10 and 11), it was observed that the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on the point of demurrer.

15. The principle underlying Clause (d) of Order 7 Rule 11 is no different. We will refer here to a recent decision of this Court rendered in Popat and Kotecha Property v. State Bank of India Staff Assn. where it was held as under in para 10 of the report: (SCC p.515).

10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in

the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.

16. It was emphasized in para 25 of the reports that the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by Sub-rule (d) of Order VII Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the said principle, the plea raised by the contesting respondents that the Company Petition was barred by limitation has to be examined by looking into the averments made in the Company Petition alone and any affidavit filed in reply to the Company Petition or the contents of the affidavit filed in support of Company Application No. 113 of 1995 filed by the respondents seeking dismissal of the Company Petition cannot at all be looked into.

16.1 As noticed hereinabove, the plaintiffs who are a part of Ram Kishan Sanghi and family, have averred in the plaint that by virtue of partition carried out in 1964, property No. 3 fell to their share. It was also their case that the affairs with respect to the said property No. 3 were looked after by Shri Hari Kishan Sanghi. In the plaint, there are specific averments to the effect that Shri Hari Kishan Sanghi had obtained signatures of Shri Ram Kishan Sanghi and other members of his family on blank documents, papers and stamp papers on the pretext that they were required for income tax purposes. Whether these documents included the lease deeds in issue, is a matter which can only be ascertained after evidence is led by the parties. It is well settled execution of documents by itself does not establish the veracity of contents of documents. (See AIR 1945 174 (Privy Council) and Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import, . The relevant observations being:

16. ...Undoubtedly, mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document. If the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence, i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue....

17. In the instant case as is evident from the reply filed to the captioned application while signatures on the first and second lease deeds dated 22.05.1985 and 09.07.1990 are accepted the truth of the contents of the said lease deeds is disputed. In so far as the third lease deed dated 04.01.1995 is

concerned what is evident on the bare perusal, is that, while Hari Kishan Sanghi has acted on behalf of the landlord, as the attorney for Ramkishan and family; on behalf of the applicant RKS i.e., the lessee, the lease is signed by one Neeta Khanna. Evidence will have to be led to vouch safe the truth of the contents of the said lease deeds. Furthermore, notwithstanding the submissions of Mr. Aneja that by virtue of Section 92 of Indian Evidence Act, 1872, the plaintiffs cannot lead evidence contrary to the contents of documents, it is well settled that evidence can be led to explain the circumstances in which the documents were executed, or even to show that an agreement was executed to create evidence with regard to another matter. In other words, as in the instant case there was no lease created, the document was created only for tax purposes. See Raj Satyendra Nath Ray Chaudhury Bahadur v. Pramananda Haldar and Ors. 164 Ind Cas 437. The observations made in paragraph 4, 5 & 6 being relevant are extracted below:

4. ...But under proviso 1 to Section 92, oral evidence is admissible to prove the circumstances which would invalidate any such document. The circumstances enumerated in the said proviso, e.g., fraud, etc., are illustrative and not exhaustive. In my opinion the fact that an instrument, registered or unregistered, was not intended to be acted upon from the very beginning is a fact which comes within proviso 1 and can be proved either by direct oral evidence or by indirect or circumstantial evidence furnished by the conduct of the parties. If the cases are examined in this light there is no conflict whatsoever....

5. ...In the case Bini Madhub Gorani v. Labnoii Dassi 6 CWN 242, where the defence in a suit for rent based upon a registered kabuliyat, was that the kabuliyat was never intended to be acted upon; Rampini, J., sitting singly held that oral evidence adduced to sustain the defence was not admissible but on Letters Patent Appeal he was overruled by Maclean, C.J., and Macpherson, J. Maclean, C.J., observed, firstly, that:

Evidence would be admissible to show that, as between the landlord and the tenant, the document was never intended to be acted upon.

6. The learned Chief Justice further observed (in which observation Macpherson, J. also concurred) that evidence would also be admissible "to show that there has been, as between the parties to this document, a waiver of some of its terms." As I shall show later on the last mentioned observation only has been taken exception to it later cases and must be held to be not good law in view of the decision of the Full Bench in the case of Lalit Mohan Ghosh Vs. Gopali Chuck Coal Company Ld., , but I am not aware of any case of this Court which has either dissented from or even cast doubt upon the first mentioned observation of the learned Chief Justice. In the same case Macpherson, J. made the following observations:

The defendant in this case does not attempt to give any evidence of an oral agreement rescinding or contradicting the contract as to amount of the rent payable, but as both the lower Courts have found, he did prove that since the time the agreement was entered into he had always paid rent at a lower rate than that stated in the agreement. The evidence was, in my opinion, distinctly admissible, not for the purpose of contradicting the terms of the agreement, but for the purpose of showing, as the learned Chief Justice has pointed out, that the intention of the parties was, that the agreement was from the first not intended to be acted upon.

17.1 In any event, onus with regard to the lease deeds in issue would rest on the applicant / RKS. As to what would be the effect of not seeking a declaration of Section 34 of the Specific Relief Act, 1963 will be seen at the stage of final adjudication. These are submissions made at the bar; there is no reference to them either in the written statement or in the captioned application.

18. This brings me to the first aspect. As noticed hereinabove, the court by order dated 24.01.2001 had directed that objections contained in the application under Order VII Rule 11 CPC should be incorporated in the written statement. It was only on 16.12.2003 that the court held issue No. 24, 31, 32 and 33 be tried as preliminary issues. A bare reading of the provisions of Order XIV Rule 2(2) would show that preliminary issues are those issues which can be tried as pure question of law, and pertain to jurisdiction or to bar to the suit created by law in force. Sub-rule (2) of Rule 2 of Order XIV is an exception to Sub-rule (1) of rule (2) Order XIV which requires the court to try all issues. Therefore, before a Court comes to a conclusion that an issue should be tried as a preliminary issue, it ordinarily would assess, as to whether it is a question of law, fact or a mixed question of law and fact. Though, B.N. Kirpal, J. (as he then was) in the case of Mohammad Yasin Vs. Abdul Kalam and Another, has observed that even "if some evidence" is required to be led an issue can be tried as a preliminary issue. The observations of court being relevant are extracted hereinbelow:

I am unable to agree with the contention of the learned Counsel for the petitioner that the issue of law pertaining to jurisdiction or to the maintainability of the suit must be such in which no evidence at all is to be recorded. The expression "issue of law" occurring in Sub-rule (2) of Order 14 Rule 2 is in contra-distinction to the expression "issue of fact". Whether the court has the jurisdiction to try the suit or may not solely be a question of fact. It may be a question of law or a mixed question of fact and law. In my opinion, even a mixed issue of fact and law, but which pertains to the jurisdiction of the court to try the suit, would be covered by Order 14 Rule 2 (2). The reason for this is obvious. If the court has no jurisdiction to try the suit then its decision on other issues arising in the case would be of no avail. If no suit is maintainable then the court would have no jurisdiction to give any decision on any other issue arising in the suit. Order 14 Rule 2 has been amended with a view to expedite the trial of the suit. Previously, all legal issues on which the suit could be disposed of could be tried as preliminary issues. Now a restriction has been placed by the amendment and the restriction is that it is only that preliminary issue pertaining to the jurisdiction of the court or the maintainability of the suit which can be tried as a preliminary issue. If in deciding the jurisdiction of the court or the maintainability of the suit some evidence has to be recorded, that does not mean that the court would have no jurisdiction to direct such an issue to be treated as a preliminary issue. The trial court, therefore, in my opinion, was right in coming to the conclusion that the issue with regard to jurisdiction would be tried as a preliminary issue.

(Emphasis is mine)

18.1 However, if an issue is completely a question of fact, it cannot be tried as a preliminary issue. [See paragraph 13 at page 650 of Ramesh B. Desai (supra)]. The relevant observations made in para 13 is extracted hereinbelow:

13. ...Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the abovequoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

19. Whether an issue ought to be tried as preliminary issue is completely in the discretion of the trial court. Furthermore, where the court is of the view, in respect of even an issue of jurisdiction; that evidence would be required to be led, it ordinarily would not be tried as a preliminary issue: Shyama Sundar Mohapatra Vs. Janaki Ballav Patnaik and Others, ; Mithlesh Kumari and Ors. v. Gaon Sabha Kishanpur and Ors. AIR 1999 All. 304 ; Sidh Nath and Others Vs. District Judge and Others, ; Canbank Financial Services Ltd. Vs. M/S. V.B. Desai and Another, and Shoib Ullah and Others Vs. Bhartesh Chandra Jain and Another, .

20. From a conspectus of the facts obtaining in this case, as brought out in the plaint, in my view, evidence would be required to be led by parties. Whether after evidence is adduced by parties, the court is in a position to dispose of the suit on the bases of issues No. 24, 31, 32 and 33 is a matter, which a court could revisit, at that stage. Given the time which has lapsed, in the fitness of things, I deem it fit to direct parties to lead evidence on all issues. Accordingly, the captioned application is dismissed with observation made hereinabove.

21. In view of the above, the captioned application is dismissed. Needless to say any observations made herein will not impact the merits of the case.

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22. List on 19.10.2010 before the Joint Registrar. The plaintiffs shall file their list of witnesses, if not already filed, within two weeks from today alongwith affidavit by way of evidence. The plaintiffs shall ensure the presence of their witnesses for the purposes of their examination on the date fixed above.

