

Kanak Projects Limited Vs. Reckitt and Colman of India Limited

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Court : Kolkata

Decided On : Mar-30-2010

Judge : Patherya, J.

Acts : West Bengal Premises Tenancy Act; ;[Transfer of Property Act, 1882](#) - Section 106; ;Code of Civil Procedure (CPC) - Order 14, Rule 2

Appeal No. : G.A. No. 2789 of 2006 and C.S. No. 206 of 2003

Appellant : Kanak Projects Limited

Respondent : Reckitt and Colman of India Limited

Advocate for Def. : P.C. Sen, Sr. Adv.,; Maloy Ghosh,; R.R. Sen,;

Advocate for Pet/Ap. : Ranjan Deb, Sr. Adv.,; Surojit Nath Mitra and; Ashis Kum

Judgement :

Patherya, J.

1. This is an application filed under Chapter XIII A of the Original Side Rules for a decree of eviction.
2. The case of the petitioner is that it is the owner of premises No. 41, Chowringhee Road, Calcutta (said premises). By a lease deed dated 16th September, 1985 23000 Sq. ft. on the first floor of the said premises was let out to

the defendant No. 1 for 30 years. The lease deed barred subletting or assignment. The defendant No. 1 let out the said portion to third parties and subsequently the third party was added as defendant No. 2. The plaint was amended and additional grounds by amendment were included. Although the defendant No. 1 has entered appearance no written statement has been filed. There are two reports filed, one set has been filed by Joint Special Officers and the other set by engineers. The defendant No. 2 has taken exception to the report of the engineers but has accepted the report of the Joint Special Officers. Clauses 2, 4 and 11 of the lease deed are relevant as the said clauses have been breached and notice given. In spite of receipt of notice no reply was forthcoming and therefore suit filed. The plaint has been amended twice. Once when the induction of third parties came to the knowledge of the petitioner and second when works endangering the tenancy was undertaken. Therefore, as the plaint stands today there are two grounds for eviction of the defendant namely (i) parting with possession and (ii) damage by cutting, both of which have been proved and therefore a decree is called for.

3. Initially cheques were sent by the defendant No. 1, later it was sent by the defendant No. 2 although TDS was issued by the defendant No. 1. In view of the aforesaid by Order dated 8th October 2004, the defendants were directed to make payment directly. Pursuant thereto the defendant No. 2 has issued cheques and the TDS certificates, though payments are now made by demand drafts.

4. In opposing the said application Counsel for the defendants submits that two notices to quit were issued. Initially the notice dated 27th August, 2001 was issued under the West Bengal Premises Tenancy Act on account of assignment of business. The second notice dated 29th January, 2003 was issued under Section 106 of the [Transfer of Property Act, 1882](#). The applicability of either of the two Acts cannot be decided in summary proceedings. Chapter XIII A Rule 3 requires the parties to 'swear positively'. The same has not been done in the instant proceedings. By Order dated 8th August, 2006 the question of maintainability is to be decided as a preliminary issue. Exceptions have been taken with regard to the engineers' report and the same is pending adjudication. The author of the said report will have to be cross-examined. The second report cannot be treated as evidence in the suit and the issue whether the conditions have been breached will

have to be proved. Reliance is placed on AIR 1949 Calcutta 79; AIR 1958 SC 321 and AIR 1977 SC 577. Reliance is also placed on Order 14 Rule 2 of the CPC and in view of no affidavit-in-reply filed the averment made in the opposition must be accepted. The application filed is not in compliance with the conditions set out in Chapter XIII A proceedings.

5. In reply Counsel for the petitioner submits that the question raised is with regard to the maintainability of the application filed under Chapter XIII A viz. absence of pleadings and suppression of the first notice to quit, both of which raises no triable issue. With regard to the first objection raised paragraph 1 of the affidavit in support of the Summons has provided the answer.

6. Having considered the submissions of the parties Rule 3 of Chapter XIII A of the Original Side Rules postulates verification of an affidavit by the defendant or any other person who can swear positively. The deponent in paragraph 1 of the affidavit in support of the Masters Summons has sworn positively to the facts verifying the cause of action. In paragraph 32 of the said affidavit also the deponent has sworn positively to the facts. Therefore, there is compliance with Rule 3 of the Original Side Rules.

7. The grounds on which eviction of the defendant is sought are -

(i) transfer to defendant No. 2 ;

(ii) addition and alteration without landlord's consent, causing damage by cutting.

8. From a reading of the Lease Deed it will appear that the respondent No. 1 was to use the said premises for a commercial purpose and office and not to allow user without the written consent of the petitioner. The interior of the office space was to be kept in good condition without causing it any injury or damage by cutting. From the Joint Special Officers' Report it will appear that one S. B. Pigments Pvt. Ltd. was found in possession of a small room in the said premises. This Report of the Joint Special Officers has not been challenged. Such report has been filed after the Engineers' Report was filed, which report alone is under challenge. Therefore, letting out of the said premises remains uncontroverted.

9. The defendant No. 1 was entitled to undertake amalgamation and a natural consequence of such amalgamation would be user of the said premises by the defendant No. 2, but for Clause 11 of the Lease Deed which bars assignment or parting with possession of the said premises without the consent of the petitioner. The defendant No. 2 is neither a subsidiary nor associated body of the defendant No. 1. This is evident from the letter dated 15-01-2001 by which the defendant No. 2 sought attornment of the tenancy. Therefore, parting with possession is evidenced and in doing so without the consent of the petitioner, the defendant No. 1 acted in breach of the Lease Deed.

10. The defendant No. 2 was added at the instant of the defendant No. 1. The defence that by order dated 8-8-2006, the question of maintainability of the suit against the defendant No. 1 was to be tried as a preliminary issue, does not raise a triable issue as the Lease Agreement was between the petitioner and the defendant No. 1 and the terms thereof were applicable to the said parties, breach whereof has been committed by the defendant No. 1 and would affect not only the defendant No. 1 but all claiming under it. As both the defendants are on record and no appeal filed from the order dated 8-8-2006 the question of deciding the said as a preliminary issue does not arise. It is the defendant No. 1 who brought the defendant No. 2 on record, who has submitted to the jurisdiction of this Hon'ble Court and the issues in the suit.

11. Certain works of repair have also been undertaken by the defendant which resulted in cracks occurring in the ceiling closest to the works undertaken. These cracks can be seen in the photographs annexed to the affidavit filed in support of the Master's Summons. Such cracks have damaged the space let-out. No letter of Blue Star has been annexed to the defendant's affidavit evidencing that similar works was undertaken by it. Even if it is assumed that no damage has been caused to the said office space by the defendant, parting with possession without the prior consent of the plaintiff and the defence taken with regard thereto by the defendants does not raise a triable issue and entitles the plaintiff to a decree in terms of prayer (a) of the Master's Summons.

12. As the notice issued under Section 106 of the Transfer of Property Act, is valid and in view of the decree passed, for purposes of calculating the mesne profits, Ms Chandrika Joshi, Advocate, 1st Floor, Bar Library Club, is appointed Special Referee at an initial remuneration of 1000 Gms. The Special Referee will file her report within 6 months. For the balance claim the plaintiff is relegated to suit.

13. Let the decree be drawn up expeditiously.

14. In view of the aforesaid, this application is disposed off.

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