

**(2010) 06 CAL CK 0004**

**Calcutta High Court**

**Case No:** G.A No. 1347 and 1545 of 2009, EOS No. 7 of 2008

Maharshi Commerce Limited

APPELLANT

Vs

Khaitan (India) Limited

RESPONDENT

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**Date of Decision:** June 23, 2010

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 20
- Transfer of Property Act, 1882 - Section 106, 106(3)

**Citation:** 114 CWN 1009

**Hon'ble Judges:** Sanjib Banerjee, J

**Bench:** Single Bench

**Advocate:** Samit Talukdar and Hasnuhana Chakraborty, for the Appellant; Reetabroto Mitra, for the Respondent

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**Judgement**

Sanjib Banerjee, J.

The plaintiff claims eviction under Chapter XIII-A of the Rules on the Original Side of this Court in respect of a property at Poddar Court in Chitpur within jurisdiction. It is not in dispute that subsequent to a recent enhancement the monthly rent payable in respect of the premises in question takes it beyond the pale of the West Bengal Premises Tenancy Act, 1997. The notice u/s 106 of the Transfer of Property Act, 1982 was issued on August 8, 2008. The notice specified that tenancy stood terminated with effect from August 24, 2007 and required the defendant to make over possession of the premises "before 23.08.07." The suit was instituted in the City Civil Court on November 30, 2007 and has been transferred to" this Court pursuant to an order of July 28, 2008. That order noticed that the defendant had instituted a suit in this Court claiming a declaration as to its tenancy and injunction restraining the landlord from evicting it. Since it was felt that the matters in issue in the two suits would be closely connected, the order for transfer of this plaintiffs suit was made.

2. Four grounds of defence have been urged. The defendant says that the notice is bad, since the notice required the defendant to deliver possession before the expiry of 15 days from the date of the notice. It is the defendant's case that the provisions of Chapter XIII-A of the Rules on the Original Side of this Court would not apply to a transferred suit. The defendant next urges that in view of the order dated July 28, 2008 that required the two suits to be taken up one after the other, it was intended that this suit would stand to trial and not be disposed of on the basis of an application for summary judgment. The final ground urged is on merits: the defendant says that subsequent to the issuance of the notice of August 8, 2007, the plaintiff received payment of rent and deposited the relevant cheques in its bank account, thus waiving the notice u/s 106 of the Transfer of Property Act.

3. On the question of the propriety of the notice, the plaintiff has relied on a judgment reported at [Bhagabandas Agarwalla Vs. Bhagwandas Kanu and Others](#), . The case involved a notice u/s 106 of the Act that had been issued on September 29, 1962 and demanded that the noticee deliver possession of the premises in question "within the month of October, 1962". The notice further went on to say that the landlord would consider the tenant to be a trespasser as on November 1, 1962. Since Section 106 of the Transfer of Property Act, as it then stood, required a notice to be issued with effect from the end of the subsequent month of tenancy, an argument was made successfully by the tenant that the command in the notice that the tenant deliver possession "within the month of October, 1962" did not meet the requirements of that section. The Supreme Court opined that a notice u/s 106 had to be construed liberally and found the notice in question to have sufficiently complied with the provisions of Section 106 of the Act. The plaintiff says that, in any event, Sub-section (3) of Section 106 of the Act precludes the defendant from questioning the propriety of the notice. The plaintiff says that since it is not in dispute that the suit was instituted well after 15 days from the date of receipt of the notice u/s 106 of the Act by the defendant, in view of Section 106(3) of the Act the validity of the notice is beyond dispute. The plaintiff is completely justified in such assertion.

4. As to the technical ground that the substance of Chapter XIII-A of the Rules on the Original Side of this Court cannot be applied to a suit that is transferred from a subordinate Court, the plaintiff refers to a judgment reported at [Shree Shree Gopal Jew and Others Vs. Jumbo Traders Private Ltd.](#), . In view of the Division Bench judgment and principle of law recognized therein, the defendant does not urge the ground any further.

5. There is some discussion that is necessary on the aspect of waiver that has been urged by the defendant. The defendant apparently tendered cheques for the value of the rents for the months of August, September and October to the plaintiff notwithstanding the issuance and receipt of the notice dated August 8, 2007 u/s 106 of the Act. By a letter dated November 29, 2007 the plaintiff apparently returned the

cheques and reminded the defendant that since a notice u/s 106 had been issued there was no question of the plaintiff accepting rent for any subsequent period. The defendant wrote back on December 18, 2007 alleging that though the plaintiffs letter of November 29, 2007 had been received by it, the three cheques which had been apparently returned under cover of such letter had not been included in the package delivered to the defendant. The defendant claimed in such letter that a representative of the defendant had called on a representative of the plaintiff, and upon negotiations, the plaintiffs representative agreed that the rent for the three months would be received and the cheques deposited. The defendant asserted in such letter that the cheques had thereafter been encashed by the plaintiff by December 15, 2007.

6. By a letter of January 10, 2008, the plaintiff dealt with the defendant's letter of December 18, 2007. The plaintiff asserted that there was no meeting between the representatives of the parties as alleged in the defendant's letter of December 18, 2007 and the plaintiff had not agreed to either accept or deposit the rent that had been tendered by the defendant. There is a sentence at page 35 of the papers (which is the third page of the letter dated January 10, 2008) to the effect that the cheques had, indeed, been returned by the plaintiff under cover of its letter dated November 29, 2007. The plaintiff says since previous rents were directly deposited by the defendant in the plaintiffs bank account, the defendant mischievously put in the three returned cheques in the plaintiffs account to try and set up a defence.

7. The next letter issued by the defendant on such aspect was on January 11, 2008 when the defendant informed the plaintiff that since it had already instituted a suit in respect of the disputes between the parties, it did not wish to enter into further discussion on the matter with the plaintiff.

8. It does not appear on the basis of the documents that have been presented that the cheques tendered on account of rent for the months of August, September and October, 2007 were encashed by the plaintiff on or prior to December 15, 2007. There is an assertion in the letter of November 29, 2007 that the cheques were returned. It is the undisputed position that the suit was instituted on November 30, 2007. It is difficult to accept on the basis of the material that has now been brought that a plaintiff who had instituted a suit for eviction of a tenant on the basis of a notice u/s 106 of the Transfer of Property Act, would, within 15 days of the institution of the suit, accept the rent that had been tendered for a period subsequent to the date of the notice and render the eviction suit nugatory. It was open for the defendant to establish that such was the position and that this landlord had acted so foolishly. But in the absence of any amplification on such aspect by the defendant in its response of January 11, 2008 to the plaintiffs letter of January 10, 2008, the defendant has failed to discharge the onus.

9. A further point has been taken on behalf of the defendant which needs to be noticed. In one of the letters following the issuance of the notice u/s 106 of the

Transfer of Property Act, the defendant contended that since it was in occupation of the premises in question for a period in excess of three decades without the terms and conditions, except as to the quantum of rent, having been changed, the defendant was a tenant in perpetuity in respect of the premises in question. The defendant also seeks to demonstrate that there was no immediate denial of such assertion in the subsequent letters issued by the plaintiff.

10. The point has been repeated by the defendant in its affidavit-in-opposition to the affidavit in support of the summons. The plaintiff has denied such assertion. It is the ordinary rule that when a tenancy in perpetuity is sought to be asserted, the person asserting the same has a duty to affirmatively establish it. There is no document or any other material that has been produced by the defendant to establish or even attempt to establish that there was any tenancy in perpetuity in favour of the defendant in respect of the premises in question.

11. There remains the final aspect of the defendant's contention that in view of the order dated July 28, 2008 and direction therein that the two suits would have to be heard one after the other, the plaintiff herein was precluded from applying under Chapter XIII-A of the Rules on the Original Side of this Court if it was otherwise entitled to do so. The order cannot be so strictly read so as to convey the sense that notwithstanding the transfer of the suit, the plaintiff was precluded from taking any steps other than waiting for the trial thereof. Once it is accepted that the provisions of Chapter XIII-A of the Rules on the Original Side of this Court would apply to a transferred suit, as the Division Bench judgment holds, there was nothing in the order dated July 28, 2008 that can be said to have prohibited the plaintiff herein to take advantage of such provision.

12. It also would matter little that a decision on this suit, or the decree that is about to be made now, would render the other suit meaningless. If a suitor founds a suit on a cause of action which is unmeritorious and if a previous decision of a Court has the effect of rendering the claim in another suit nugatory, that would not deter the Court dealing with the previous matter from adjudicating upon or disposing of the same. Further, at the very highest, it can be the defendant's case that if the plaintiff were to attempt to put this decree into execution, the plaintiff would have to await the trial of the other suit. In Order XXI Rule 20 of the Code, the principle in support thereof is recognized. But that has to be left to the discretion of the executing Court as to whether the principle would be applied or as to whether conditions, if any, would be imposed to allow or restrain the execution of the decree.

13. There is no merit in any of the grounds urged by the defendant to resist the prayer for summary judgment brought by the plaintiff. There will be final judgment and decree in terms of prayer (a) of the master's summons of June 8, 2009. As for the quantum of mesne profits, the plaintiff will be detained till the trial.

14. The defendant will also pay costs of the present application assessed at 500 GM. Urgent certified photocopies of this order, if applied for, be given to the parties subject to compliance with all requisite formalities.