

(2013) 11 CAL CK 0014**Calcutta High Court**

Case No: G.A. No. 2445 of 2013, G.A. No. 2066 of 2013, G.A. No. 2321 of 2013, A.P.O.T. No. 321 of 2013, A.P.D.T. No. 6 of 2013 and C.S. No. 246 of 2010

Dasa and Another

APPELLANT

Vs

Ajay Kumar Singh

RESPONDENT

Date of Decision: Nov. 27, 2013**Citation:** (2014) 2 CHN 475**Hon'ble Judges:** Ashim Kumar Banerjee, Acting C.J.; Debangsu Basak, J**Bench:** Division Bench

Advocate: Arindam Mukherjee, Mr. Prasenjit Pal, Mr. Avirup Chatterjee, for the Appellant; Jishnu Chowdhury, Advocate, Mr. Rajiv Lall, Advocate and Ms. Ankita Lall, for the Respondent

Final Decision: Dismissed**Judgement**

Debangsu Basak, J.

Appeal at the instance of the defendant is directed against a decree for eviction dated March 26, 2013 passed under Chapter XIII A of the Original Side Rules. Appellant is a tenant under the respondent in respect of flat No. 9 on the 9th floor of premises No. 12 A Camac Street, Kolkata together with a car parking area for two cars. Appellant paid rent till November, 2007. The last rent paid was Rs. 40,000 per month. The appellant came into possession of the suit premises under an agreement dated May 24, 2006. The agreement describes the landlord and the tenant as the licensor and the licensee respectively. The impugned judgment returns a finding that the license for all practical purposes was treated as a tenancy. No ground was urged before us contrary to such finding. Appellant filed a suit before the 6th Bench City Civil Court at Calcutta being Title Suit No. 493 of 2008 praying, inter alia, for a declaration that the appellant was a tenant in respect of the suit premises under the respondent and for a permanent injunction restraining the respondent from creating any disturbance to the peaceful possession and enjoyment of the suit premises and not to be ousted from the suit premises without

due process of law. The respondent also filed a suit before the learned 6th Bench of the City Civil Court at Calcutta being Title Suit No. 1101 of 2008 seeking, inter alia, decree of declaration and for eviction as well as for enquiry into the damages. Such suit was filed after issuance of a termination of tenancy notice dated October 17, 2007. The respondent withdrew the suit as recorded in the order dated April 22, 2010 of the learned City Civil Court at Calcutta. In the suit of the respondent an interim application for injunction, was made by the respondent. Against the refusal to grant interim injunction, an appeal was carried at by the respondent herein which was dismissed by a judgment and order dated October 1, 2008. The respondent thereafter issued notice of the termination of tenancy dated June 16, 2010 that was sent by registered post with acknowledgement due card. Such notice came back with the endorsement "not claimed". The respondent thereafter affixed the notice at the tenanted premises. The notice dated June 16, 2010 speaks of 15 days" time to vacate. The respondent thereafter filed a suit beyond the period of 30 days from the date of the notice. Writ of summons of the suit was served on the appellant. The respondent applied under Chapter XIII A for a decree for eviction and a decree for arrear rent and mesne profit. The Chapter XIII A application was partly allowed by the impugned judgment and order by granting a decree for eviction. The claim for money decree was disallowed on the ground that a triable issue had been raised in view of the withdrawal of Title Suit No. 1101 of 2008 by the respondent also having a money claim. Mr. Arindam Mukherjee appearing for the appellant contended as follows:

- (i) The notice dated June 16, 2010 was not in terms of Clause 17 of the agreement dated May 29, 2006 and as such could not be considered to be a valid notice u/s 106(1) of the Transfer of Property Act, 1882
- (ii) The postal envelope coming back as "non-claimed" was not a good service and that the factum of affixation of the notice was required to be proved in evidence.
- (iii) Suit filed by the respondent being Title Suit No. 1101 of 2008 was a suit for eviction as well as for the mesne profit. Such suit being withdrawn unconditionally by the respondent the present suit was hit under Order XXIII Rule 1(4)
- (iv) The agreement dated May 29, 2006 being held by the learned Single Judge to be non est as the document was not registered, no decree for eviction could have been passed.

2. Mr. Arindam Mukherjee relied on 1986(II) CHN 19 to submit that the notice of eviction dated June 16, 2010 ought to have been tendered to the tenant at its residence and that in the instant case it was not done. He relied on Meghji Kanji Patel Vs. Kundanman Chamanlal Mehtani, and K. Nasir Basha and Another Vs. Turukkan Chatram Charities, in support of the proposition that the notice dated June 16, 2010 violated Section 106 of the Transfer of Property Act, 1882.

3. Mr. Jishnu Chowdhury appearing for the respondent contended that the respondent was not entitled to protection under the West Bengal Premises Tenancy Act, 1997. Due notice u/s 106 of the Transfer of Property Act, 1882 was given. The notice dated June 16, 2010 was sufficient and that the suit was filed after expiry of a period of a month from the date of the notice. He contended that the appellant had deliberately avoided accepting the notice dated June 16, 2010 and that the respondent had served the notice of eviction by affixation that was an accepted mode of service. On the question of the suit being hit by Order XXIII of the Code of Civil Procedure, 1908 Mr. Chowdhury contended that a fresh notice for eviction had been issued and that a new cause of action had arisen consequent upon the failure of the appellant to vacate the premises in terms of the notice dated June 16, 2010.

4. Having heard the learned Counsel for the parties and having considered the pleadings on record we find that the instant suit was filed on the basis of the failure of the appellant to vacate the suit premises consequent to the notice dated June 16, 2010. The suit was filed after the expiry of 30 days from the date of the notice. Such fact is not disputed by the appellant. The suit was filed sometime in September 2010. Section 106 of the Transfer of Property Act, 1882 specifies that in absence of a contract or local law or usage to the contrary a tenancy of immovable property which is not for agricultural or manufacturing purpose can be terminated by 15 days" notice. Such tenancy is to be from month to month. The notice to quit was dated June 16, 2010 and the suit was filed in September 2010 provisions of the notice u/s 106 of the Transfer of Property Act, 1882 was compiled in the instant case. Moreover, the learned Single Judge held that the agreement dated May 29, 2006 was non est. The agreement dated May 29, 2006 in Clause 17 required a months" notice. No challenge was made against the finding of the learned Single Judge that the agreement dated May 29, 2006 was wrong. Therefore, the contention of the appellant that the notice dated June 16, 2010 did not comply with Section 106(1) of the Transfer of Property Act, 1882 cannot be sustained.

5. The next ground of the appellant that the notice dated June 16, 2010 violates Section 106(4) of the Transfer of Property Act, 1882 cannot be sustained also. Section 106(4) of the Transfer of Property Act, 1882 required the notice of eviction to be tendered or delivered personally to the appellant at the appellant's residence. In the instant case, the appellant is a partnership firm and is carrying on business at the suit premises. Since it is a partnership firm one of the citus of the partnership firm would be the suit premises from where it is carrying on business. That being the position the respondent tendered the notice dated June 16, 2010 at the suit premises by registered post that was returned unclaimed. The respondent thereafter affixed the notice dated June 16, 2010 to a conspicuous part of the suit property and filed an affidavit in support thereof. The requirements of Section 106(4) of the Transfer of Property Act, 1882 was complied with by the respondent.

6. The case reported at 1986(II) CHN 19 relates to an eviction suit filed under the West Bengal Premises Tenancy Act, 1956. On appraisal of the evidence of that case the division Bench was of the view that the plaintiff therein had failed to comply with the provisions of Section 106 of the Transfer of Property Act, 1882. Such is not the case here.

7. In Meghji Kanji Patel Vs. Kundanmal Chamanlal Mehtani, the Court was concerned with an application for setting aside an ex parte decree. Question arose as to the sufficiency of service of the writ of summons on the defendant in such proceedings. In such context, the Bombay High court held that since the plaintiff did not summon the postman and since the summons was sought to be served by registered post, the statement on oath of the defendant that the defendant was not served with the writ of summons remained uncontroverted and that the same was sufficient ground for setting aside of the ex parte decree. Again the facts of the instant case are different. It is not a case of setting aside of a decree passed ex parte. The respondent herein has, in any event, proved service of the notice dated June 16, 2010 to the satisfaction of the learned single Judge. We find no perversity in the satisfaction of service of notice recorded by the learned Single Judge. Merely because the appellant sought to make comments on the postal acknowledgement cards and the manner of affixation of the notice a triable issue was not raised warranting the Court to relegate the parties to a protracted hearing.

8. The case reported a K. Nasir Basha and Another Vs. Turukkan Chatram Charities, relates to the sufficiency of the duration of the notice for eviction. Nothing was shown to us that the notice dated June 16, 2010 was insufficient and the manner and mode of breach of section 106(4) of the Transfer of Property Act, 1882.

9. The contention, that the present suit is barred under Order XXIII Rule 1(4) in view of the prayers contained in the Title Suit No. 1101 of 2008 and its unconditional withdrawal does not appeal to us. The instant suit was filed subsequent to a fresh notice for eviction dated June 16, 2010 that remained non-complied with by the appellant giving the respondent a fresh cause of action.

10. It has been pointed out by the appellant that the agreement dated May 29, 2006 has been held to be non est. However, the appellant admits the tenancy. The appellant has filed Title Suit No. 493 of 2008 seeking, inter alia, declaration of tenancy. The relationship of landlord and tenant being established the declaration of the agreement dated May 29, 2006 being non est is not fatal to the respondent.

11. In the circumstances we find no reason to interfere with the impugned judgment and decree.

12. The appeal being A.P.D.T No. 6 of 2013 is at the behest of the plaintiff limited to the relegation of the claim of mesne profit to trial.

13. Triable issues have been raised by the defendant with regard to the claim for mesne profit. Furthermore, in view of the findings recorded by us in the other Appeal No. A.P.O.T No. 321 of 2013 we find no reason to interfere. The appeals are thus dismissed. There would however be no order as to costs.

Ashim Kumar Banerjee, Actg. C.J.

I agree.