Wellman Wacoma Ltd. Vs Tivoli Park Apartments (P.) Ltd.

Court: Calcutta High Court

Date of Decision: Sept. 4, 2012

Acts Referred: Companies Act, 1956 â€" Section 441, 446, 447, 456, 457
Transfer of Property Act, 1882 â€" Section 116
West Bengal Premises Tenancy Act, 1997 â€" Section 14, 5(6)

Citation: (2013) 1 CALLT 471 : (2012) 4 CHN 645 : (2012) 116 SCL 46

Hon'ble Judges: Shukla Kabir Sinha, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: P.C. Sen, Utpal Bose, Rajratna Sen, Ms. Soma Chakraborty and Kaushik Chakraborty, for the Appellant; S.B. Mookherjee, Tilak Bose, Sabyasachi Chowdhury, D. Dutta and Ms. V. Bhatia for the Respondent and Susanta Datta for the Official Liquidator, for the Respondent

Judgement

Ashim Kumar Banerjee, J.
Tivoli Park, the respondent No. 1 was the owner of a bungalow situated at No. 225 Acharya Jagadish

Chandra Bose Road, Calcutta-700 020. Wellman Incandescent Ltd. (hereinafter referred to as Incandescent'') was a company incorporated

under the provisions of the Companies Act, 1956. In the year 1970 Incandescent became a tenant in respect of bungalow No. 5 measuring about

fifteen hundred square feet under Tivoli Park Apartments (P) Ltd. The financial condition of Incandescent became precarious resulting in a BIFR

proceeding where it was declared as a ""Sick industrial company"". By an order dated July 25,2002 BIFR recommended winding up of

Incandescent and this Court ultimately passed an order of winding up vide order dated September 24, 2002. Since then the Official Liquidator

would be in deemed possession of all the assets of the company in liquidation including the bungalow in question. According to Tivoli Park, they

did not have any information about the BIFR proceeding or the subsequent order of winding up. They were getting rent month by month. They

came to know of the order of winding up from an advertisement published by the Official Liquidator in Media inviting offer for sale of the assets of

the company in liquidation. They wrote letter to the Official Liquidator on August 22,2005, asking the Official Liquidator to deliver vacant

possession of the premises in question as according to them tenancy stood terminated in view of the order of winding up. The Official Liquidator

subsequently contended, he did not take possession of the bungalow. In fact, Official Liquidator did not know of such tenancy as we find from the

record. On April 28,2006 Tivoli Park made an application inter alia praying for disclaimer of the said tenancy u/s 535 of the said Act of 1956.

Official Liquidator subsequently decided to take possession of the said bungalow in question and visited the premises on May 5,2006 when he

was resisted by one Suman Basu, claiming to be an Executive of Wellman Wacoma Ltd. (hereinafter referred to as "Wacoma"), a company

claiming to be a tenant of the self-same bungalow. Suman however could not produce any agreement for tenancy or any rent receipt. He

supported his act by production of telephone bill, electric bill and Municipal Trade Licence. Wacoma approached the learned Company Judge on

May 10, 2006 inter alia praying for an order of restraint on the Official Liquidator from interfering with their possession. Wacoma subsequently

filed a suit in the Alipore Court inter alia praying for a declaration that Tivoli Park had no right to obstruct ingress and egress of Wacoma to and

from the said premises coupled with prayer for permanent injunction and other reliefs. The learned Judge dismissed both the applications. On an

appeal by Tivoli Park, the Division Bench set aside the judgment and order dated September 19, 2007 passed on the disclaimer application and

directed the said application to be tried on evidence. The Alipore Court suit was also transferred to this Court. Wacoma subsequently withdrew

the said suit and did not proceed further in respect of their prayer made in their application u/s 446. Hence, the only application being the

application for disclaimer was heard by the learned Judge by trial on evidence. One Kalyan Banerjee adduced evidence on behalf of Wacoma.

The matter reached up the Apex Court level on the question of framing of additional issues when the Apex Court directed expeditious disposal of

the disclaimer application. His Lordship allowed the application for disclaimer that gave rise to the present appeal.

2. From the evidence and the judgment and order of the learned Single Judge it would appear that Wacoma based their claim on a surrender by

Incandescent and a fresh tenancy being created in their favour since March 2002. Pertinent to note, the order of winding up was passed in

September 2002. In March 2002 admittedly the BIFR proceeding was pending that ultimately culminated in the order of recommendation of

winding up. Wacoma relied on receipts for few months to show that Tivoli Park accepted rent from them. The contents of the receipt are extracted

below :

Received from M/s Wellman Wacoma Ltd. cheque No. xxx dated xxx for Rs. 825.00 drawn on Bank of Baroda, Hazra Road Branch as rent for

the month of xxx being bungalow No. 5 Tivoli Park, 225 B A.J.C. Bose Road Kolkata-700 020.

3. The receipt was signed by someone whose initial was illegible. The receipt would not contain any seal of the company. Needless to say, Tivoli

Park denied such receipt being issued. According to them, those payments, although made by Wacoma, were credited towards Incandescent.

Tivoli Park also disclosed receipt issued in favour of Incandescent who issued the cheque even in August 2002 that would demolish the claim of

fresh tenancy being created in March 2002.

His Lordship considered the evidence and observed, ""since "I" do not find any evidence which can even remotely suggest the termination of

Incandescent"s tenancy and formation of a new tenancy in favour of Wacoma as asserted by Wacoma before the order of winding up at any point

of time "I" should and do accept that the tenancy of Incandescent whether the said tenancy had commenced in the year 1970 or thereafter

continued to exist on the date of the order of winding up.

4. Mr. P.C. Sen., learned Senior Counsel appearing for Wacoma contended that the Division Bench directed the application to be tried on

evidence. Hence, Tivoli Park as the petitioner, should prove their case through oral and documentary evidence which they failed to do. Mr. Sen.

contended, even after the order of winding up the Official Liquidator never took possession of the bungalow. The Official Liquidator found

Wacoma occupying the said bungalow, hence, by the process of summary trial Wacoma could not be divested of possession. Section 535 could

not operate as a mechanism to evict Wacoma who was a lawful tenant discharging their obligation month by month by payment of rent.

One Dalveer Singhee deposed on behalf of Tivoli Park who did not have any personal knowledge about the state of affairs in 2002. He deposed,

he looked after the company"s affairs since 2004 at the request of one Manish Poddar who became a Director of Tivoli Park in 2003.

5. Mr. Sen. further contended, Tivoli Park must prove, they had interest in the property and Incandescent was tenant in respect of the premises as

on the date of winding up. They did not make any attempt to prove such case before His Lordship. Hence, His Lordship could not have allowed

their application for disclaimer. Mr. Sen. lastly contended, the property admittedly did not belong to the company in liquidation. Hence, Section

535 could not have any role to play.

6. He referred to the evidence to show that the rents were paid by Wacoma, receipts of which were appearing at page 40 onwards in Volume "I"

of the paper book, the text of which we have quoted above.

7. He further contended, Wacoma was enjoying the tenancy upon payment of Rs. 75,000/- (Rupees seventy-five thousand) per month as per the

order of Court of Appeal. They did not have any objection to continue with the same on the same term or on such terms and conditions, as this

Court might think fit and proper. They would be agreeable to pay any reasonable rent that could be found to be payable in respect of such

tenancy. He contended, Wacoma was not made a party in the disclaimer application. On their intervention, they were added as party and

subsequently heard by His Lordship. He referred to the following decisions to support his contention :

1. Ram Kumar Das Vs. Jagadish Chandra Deb Dhabal Deb and Another,

2. United Bank of India v. Official Liquidator[1994] 79 Comp. Cas. 262 (SC)

3. Asoka Ghose and Others Vs. The Official Liquidator of Remington Rand of India Limited (In Liquidation),

8. Mr. S.B. Mookherjee, learned Senior Counsel contended, Tivoli park was admittedly the owner of the bungalow in question that was not in

dispute. Wacoma admitted Tivoli Park as their landlord. They filed a suit, claiming declaration as to the tenancy. They filed application u/s 446 to

decide on the controversy. Both proceedings were withdrawn. They did not prove the tenancy allegedly created in their favour in March 2002 or

at any point of time. Hence, Tivoli Park was entitled to an order of disclaimer that was rightly passed by His Lordship. Commenting on the receipts

Mr. Mookherjee contended, mere receipt of any sum on account of rent or otherwise would not ipso facto create any tenancy. In any event, their

claim for alleged surrender of tenancy and creation of new tenancy in favour of Wacoma in March 2002 stood demolished by production of rent

receipt issued to Incandescent who paid rent for the month of August 2002 vide Account Payee cheque that was encashed through its banker. He

referred to the letter of the State Bank of India appearing at pages 488, 489 and 490 Volume II of the paper book in this regard. He contended,

Section 535 would empower the learned Company Judge to disclaim any onerous property. The tenancy was onerous, as it would attract

expenses month by month whereas it would have no worth to support beneficial winding up. Mr. Mookherjee also referred to the evidence to

show that Khosla being the Director of both the companies admitted that the possession had been illegally transferred to Wacoma without the

consent of Tivoli Park.

9. Resuming his argument on the next day Mr. Mookherjee took us to the said Act of 1996, particularly Sections 446, 456 and 535 to contend

that on a combined reading of the said provisions, the Court''s power to have a summary adjudication on the issue of like-nature was permissible.

He contended, such extraordinary power was vested upon the Company Court to smooth the beneficial winding up and have a speedy dissolution

of the company after its winding up.

10. He relied on two decisions of our Court in the case of In Re: Sakow Industries P. Ltd. (In Liquidation), and Vidyadhar Upadhyay Vs. Sree

Sree Madan Gopal Jew and Others, , to support his proposition, the summary adjudication to be done by the Company Court, was the due

process of law to evict an unauthorised occupant, occupying company''s property or a property having onerous covenant and burdensome on the

company in liquidation. He also relied on three decisions of our Court in the case of Smt. Pushpa Devi Jhunjhunwalla v. Official Liquidator [1993]

1 Cal. LJ 447 in the case of The Hongkong and Shanghai Banking Corporation Limited Vs. The Official Liquidator, and in the case of Dhirendra

Nath Nrogi Vs. Pronab Kumar Nrogi and Others, He also referred to the decision of the Apex Court in the case of General Radio and Appliances

Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., to support his contention that a tenancy being non-salable and nontransferable could not

be transferred. Any transfer of tenancy without the consent of the landlord was illegal under the provisions of West Bengal Premises Tenancy Act,

1956, since repealed and West Bengal Premises Tenancy Act, 1997. He referred to Section 14 of the old law and Section 5(6) of the new law in

this regard. He cited the decision in the case of Amar Kumar Sen. v. Gita Rani Das [2005] 13 SCC 83 to say that unless there was any break in

relationship between the landlord and tenant, there could not be any new relationship established on the self-same property. He relied upon the

decision in the case of Prudential Capital Market Ltd. (In liquidation), In Re: Prudential Capital Markets Ltd. (In Liquidation), . The Division

Bench of our Court held that Sections 441, 446, 447, 456, 457, 535, 536 and 537 would have combined application in a case of the like-nature.

Our Division Bench considered the monthly tenancy in favour of the company in liquidation and held that such summary adjudication was the due

process of law as established by the judicial pronouncement in the case of Vidyadhar Upadhyay (supra).

11. To counteract the submissions of Mr. Sen. that acceptance of rent would operate as an estoppel as against Tivoli, Mr. Mookherjee relied on

the Apex Court decision in the case of Shanti Prasad Devi and Another Vs. Shankar Mahto and Others, were relied upon, wherein the Apex

Court held that acceptance of rent after expiry of the lease, would not ipso facto operate as renewal. The lessee could not claim that he was

''holding over'' as a lessee within the meaning of Section 116 of the Transfer of Property Act, 1882 (hereinafter referred to as ''the said Act of

1882"). Mr. Mookherjee distinguished the decision in the case of United Bank of India (supra) by contending that there was substantial difference

considering the factual controversy involved in the said matter. He contended that the Apex Court in the case of United Bank of India (supra)

considered sub-Section (a) of Section 535 and not sub-Section (c), which would be relevant for consideration in the present case. He

distinguished the decision in the case of Ram Kumar Das (supra) by contending that there was substantial difference in factual matrix. In the said

case the defendant was a monthly tenant and the tenancy was determined by a notice to quit. The Apex Court considered ''holding over'' u/s 116

of the said Act of 1882. In the present case, Wacoma was not a tenant. Hence, question of ''holding over'' would not arise. Distinguishing the

decision in the case of Asoka Ghose (supra), Mr. Mookherjee contended that the view of the learned Single Judge was contrary to the Division

Bench view as expressed in the case of Sakow Industries (supra), Vidyadhar Upadhyay (supra) and Prudential Capital (supra). He lastly took us

to the said decision to show inconsistency. He relied on the Division Bench decision (unreported) in the said case. He also referred to the receipts

relied upon by Wacoma to show that payments were made in respect of the tenancy that Incandescent had been holding. He referred to the finding

of the learned Judge on the affidavits of Khosla, particularly at page-725 of the paper book wherein we find, learned Judge recorded, Khosla gave

possession to Wacoma as admitted by him. In his evidence, learned Judge observed, Khosla was not the landlord, hence, he did not have the

authority to hand over possession to Wacoma.

12. Mr. Mukherjee also relied upon the decision in the case of Tata Steel Ltd. Vs. Official Liquidator, .

13. Mr. Mookherjee prayed for dismissal of the appeal.

14. Mr. Susanta Datta, learned Counsel appearing for the Official Liquidator contended, Official Liquidator did not know about the tenancy at the

initial stage. Hence, they could not make any attempt to take possession. After receipt of the notice for disclaimer, the Official Liquidator

attempted to take possession. Such attempt failed, as Wacoma resisted such attempt. Mr. Datta contended, this Court should consider the records

and pleadings and pass appropriate order as would be just and proper in the instant case. In short, he left the issue at our discretion.

15. While giving reply, Mr. P.C. Sen., learned Senior Counsel appearing for the Wacoma contended, the fact that Wacoma was in possession

since March, 2002, was not in dispute, as it would appear from the evidence of Dalveer Singhee, particularly his reply to question No. 1059

appearing at page-186 of the paper book (Volume-II). Hence, Tivoli was not entitled to ask for summary eviction against Wacoma without

availing due process of law. Mr. Sen. relied on Section 535(6) and contended that both equity and law being in favour of Wacoma, the Company

Court should not have passed an order of eviction that too, by availing the summary power, that would render workers of a running company

jobless. On the additional issue, Mr. Sen. contended that the Apex Court left it to the discretion of the learned Single Judge. Learned Single Judge

declined to settle any additional issue at a stage when the suit as well as the application u/s 446 had been pending. Hence, His Lordship should

have reconsidered the issue in view of withdrawal of the said two proceedings by Wacoma. The learned Single Judge earlier held, Tivoli would

have to prove that Incandescent was a tenant on the date of winding up. Such initial onus on the part of Tivoli was not discharged at all that would

be apparent from the evidence that was led on its behalf. He referred to the judgment and order impugned appearing at pages 697-728,

particularly page 721 to say that the same contained incorrect facts. Mr. Sen. made such comment on the observation of His Lordship to the

extent that the tenancy in question was not at all terminated. According to Mr. Sen., such observation was contrary to the evidence that was led on

behalf of the parties. Mr. Sen. then contended, in 2002 Tivoli did not have any title on the property at all. The situation remained the same in 2003-

2004, until the issue was resolved with the landlord and a fresh lease was executed after a protracted litigation up to the Apex Court level between

Tivoli and its landlord. Hence, on the relevant date Tivoli did not have any interest in the property at all. So question of Tivoli"s consent would not

arise at all. Referring to Section 535, Mr. Sen. contended, to get an order for disclaimer the applicant would have to prove his interest over the

property that Tivoli miserably failed. Hence, the learned Judge could not have allowed the said application. Dealing with the cases cited by Mr.

Mookherjee, Mr. Sen. contended that the decision in the case of Vidyadhar Upadhyay (supra) and Sakow Industries (P.) Ltd. (supra) would not

represent the correct proposition of law. In any event factual matrix involved therein would make the proposition not applicable in the present case.

In the case of Vidyadhar Upadhyay (supra), Civil Court dealt with all the issues. No evidence was led despite opportunity being given. In such

backdrop, the order was passed. In the instant case, Wacoma was not a party at all. In the application u/s 535, no allegation of wrongful

possession or trespass was ever made by Tivoli as against Wacoma. Hence, the said application was not at all maintainable. According to Mr.

Sen., when a statutory provision was invoked, it should be followed in all respect and any partial compliance would not suffice. In case of Sakow

Industries (P.) Ltd. (supra), the Court dealt with a long lease and the tenant did not have any protection under the tenancy law. In any event, such

decision was contrary to the settled proposition of law. In any event, the ratio decided, would not be applicable as Wacoma was entitled to the

protection of tenancy law, that was absent in Sakow Industries (P.) Ltd. (supra). Distinguishing the decision of the Apex Court in the case of Amar

Kumar Sen. (supra), Mr. Sen. contended that the said decision would relate to a civil proceeding that would have no bearing in the instant case.

Commenting on the decision of General Radio & Appliances Co. Ltd. (supra) Mr. Sen. contended that the said decision was had considering a

scheme of amalgamation that would have no relevance in the present case. Relying on paragraph-27 of the decision in the case of Smt. Pushpa

Devi Jhunjhunwalla (supra), Mr. Sen. contended that the said decision would be of no assistance to Tivoli as the decision would suggest that the

special law should prevail. The decision in the case of Prudential Capital Market Ltd. (supra) would relate to Letter for Direction filed by the

Official Liquidator and not a regular adversarial proceeding. Hence, it would have no relevance in the instant case.

16. The decision cited at the Bar would predominantly suggest, for beneficial winding up any question that would arise in the course of winding up,

pertaining to company in liquidation, could be decided summarily by the Company Court u/s 446. Such power is also extended to a question

where the company would have an onerous contract and/or interest that would cause hindrance in the smooth process of beneficial winding up, to

be decided summarily in terms of Section 535. It is true that the decision in the case of Sakow Industries (supra) and Vidyadhar Upadhyay (supra)

may not have resemblance of facts. We would have to agree with the proposition to the extent that a proceeding either u/s 446 or Section 535

relating to a question pertaining to the company in liquidation, would be the due process of law. Our view is strengthened on a combined reading of

Sections 446 and 535 wherein any person, claiming interest over such property is given liberty to approach the learned Judge for appropriate

adjudication of right. The purpose underlying this provision is to streamline the process of winding up through speedy avenue.

Due process of law"" is not specifically defined in any statute. On a combined reading of the relevant provisions we feel, it would mean, in the

present context, adjudication on documentary evidence and pleadings, if not possible, through oral evidence deciding respective rights and

privileges, the applicant would be having on the property, in respect of which the company in liquidation had an interest. It does not necessarily

follow, the properly must be owned by the company in liquidation. With due respect to Mr. Sen., we would join issue on that score. Any property

held by the company in liquidation with onerous covenant would definitely come within the scope of Section 535 and the learned Company Judge

through summary process could decide such question, of course, upon giving best of opportunities to the party, placing rival claim on the same

resisting the applicant who was claiming for disclaimer. At the end of the day, it might be a lis between X and Y, having a rival claim on the self-

same property, that would come within the scope of Section 535. Once it is proved, as on the date of liquidation, the company in liquidation had

interest over it, the learned Company Judge should consider whether to disclaim the said property or not. If the learned Judge is satisfied, he would

disclaim it as a consequence. Question would further remain, in whose favour it is to be disclaimed. The answer would be obviously in favour of

the applicant, if there was no rival claim. If there was a rival claim, the learned Judge also would have to decide such issue.

17. The above, is our understanding of the law on the subject. Let us now apply the same in the present factual matrix.

Incandescent was a tenant in respect of the property under Tivoli, since 1970. Admittedly, there was no evidence that the tenancy was terminated

at any point of time.

18. Unless the tenancy is terminated, it would continue to remain. If a tenant defaults in making payment of rent, the tenancy does not automatically

come to an end. It would depend upon a positive consequential act of the parties. The landlord may give notice to quit. The tenant may accept

such notice and quit the tenancy. If he does not do so, the landlord has to approach a Civil Court for a decree of eviction and recovery of

possession. If someone commits any breach of the contract of tenancy either by defaulting payment of rent or otherwise, the landlord does not get

automatic power to evict him. He would have to approach the Court for a definite order of eviction. In the instant case, Incandescent was paying

rent. At one point of time Wacoma was its subsidiary. Subsequently the companies became independent of each other. It might have been correct,

Wacoma paid rent for few months for the self-same tenancy. We carefully examined the receipts appearing at page-40 onwards in the paper

book. Those were receipts for acceptance of rent by cheque. The receipts did not acknowledge Wacoma as a tenant. Learned Judge rightly

framed the issue, whether the tenancy of Incandescent was surrendered, if so, how Wacoma was inducted. Incandescent had gone in liquidation in

September 2002. There was evidence on record to show that Incandescent paid rent even in August 2002. Wacoma claimed tenancy since April

2002, on the strength of the receipts referred to above. There could not be two tenancies in respect of one self-same premises. Incandescent paid

rent even in August 2002 that would automatically demolish the case of Wacoma, having entered into agreement for tenancy in March, 2002.

Pertinent to note, Wacoma could not produce any document except the receipts to prove their tenancy.

19. Coming to the oral evidence, lot was said by Mr. Sen. on question No. 1059. We are not sure whether the answer was correctly typed out in

the paper book. However, if we read the answer in question Nos. 1058-1059 together, we would have a different meaning than what was

suggested by Mr. Sen. We have examined the evidence of Khosla, the common man between Incandescent and Wacoma. His evidence would

clearly show, he simply handed over possession to Wacoma with the help of one Sutodia whose authority was in dispute. Even if we give full

credence to the argument that Sutodia consented to creation of tenancy on behalf of Tivoli, in absence of a surrender of tenancy by Incandescent

there could not be any new tenancy created in favour of Wacoma. Even if we give full credence to the case made out by Wacoma, we would still

be in difficulty to get a plausible answer as to why Incandescent paid rent in August 2002 if it had already surrendered the tenancy and caused

Wacoma to step in its shoes in March, 2002.

20. The learned Judge meticulously scanned the evidence. We need not deliberate in detail. We view the controversy from a close angle and in a

narrow campus.

21. We would find Incandescent, a tenant since 1970 under Tivoli. It is well-settled principle of law, a tenant cannot question the owner''s right

over the property in which he is a tenant. In short, a tenant cannot dispute the title of his landlord. We do not know what litigation Tivoli was facing

from its landlord. As on date landlord did not come to contest the claim of Tivoli. Wacoma also claimed tenancy under Tivoli. Hence, they cannot

dispute its title.

22. Incandescent paid rent up to August 2002. It went in liquidation in September 2002. Hence, the case made out by Wacoma that they got the

tenancy under Tivoli through Sutodia in March, 2002, falls to the ground.

23. Mr. Sen. lastly contended, the Division Bench while admitting the appeal put Wacoma on terms. Wacoma is now paying occupation charges at

the rate of Rs. 75,000/- (Rupees seventy-five thousand) per month as per the order of the Division Bench. They would continue to do so if this

Court would permit the same. Mr. Sen. contended, any other term this Court may feel fit and proper, would be acceptable to Wacoma to continue

in possession.

24. The company in liquidation admittedly does not own the property. We cannot force Tivoli either to sell or let it out to Wacoma. Interim

arrangement was made at the stage of admission of appeal considering the balance of convenience and inconvenience. Such interim arrangement

could not be made permanent. Court cannot create tenancy without the consent of the landlord. In short, tenancy is a contract between landlord

and tenant. Court is not competent to direct the parties to enter into contract of tenancy. Hence, the request made by Mr. Sen. on that score is

turned down.

25. The appeal fails and is hereby dismissed.

26. There will be no order as to costs.

27. There would be stay of operation of this judgment and order for a period of two months from date. The appellant would however, continue to

adhere to the existing arrangement during this period. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual

undertaking.

Shukla Kabir Sinha, J.

I agree.