

(2013) 07 CAL CK 0036

Calcutta High Court

Case No: F.M.A.T. No. 275 of 2013 and C.A.N. No's. 2401, 4143 of 2013

The India Jute and Industries
Limited

APPELLANT

Vs

Mackinnon Mackenzie and Co.
Ltd. and Others

RESPONDENT

Date of Decision: July 3, 2013

Citation: (2013) 3 CALLT 425 : (2013) 4 CHN 476 : (2013) 4 WBLR 122

Hon'ble Judges: Subhro Kamal Mukherjee, J; Asim Kumar Mondal, J

Bench: Division Bench

Advocate: Shyama Prasanna Roy Chowdhary, Mr. Debasish Roy, Mr. Paritosh Sinha, Mr. Amitava Mitra and Mr. Dolon Dasgupta, for the Appellant; S.K. Das for the Respondent No. 1, Mr. Saptangshu Basu, Mrs. Ananya Das for the Respondent No. 2, Mr. Sakti Nath Mukherji, Surojit Nath Mitra, S.S. Basu and Mr. Abhijit Sarkar for the Respondent No. 4, for the Respondent

Judgement

Subhro Kamal Mukherjee, J.

This is an appeal against order dated February 14, 2013 passed by the learned Judge, Seventh Bench, City Civil Court, Calcutta, in Title Suit No. 850 of 2007. By the order impugned, the learned judge declined to pass any ad interim order of injunction against the defendants in connection with an application for temporary injunction, which is now pending before the learned judge.

2. The plaintiff alleges in this suit that:

(a) it is a monthly tenant under the defendant No. 1, that is, Mackinnon Mackenzie and Company limited, in respect of the suit property at a consolidated monthly rent of Rs. 5370.50/- (Rupees five thousand three hundred seventy and fifty paise) only. The plaintiff is, also, paying the monthly rent and taxes, multi-storied building taxes and service charges in respect of a portion on the ground floor and a room on the roof of the said premises.

(b) On or about November 7, 1998 a major fire broke out in the said premises due to negligence of the defendants. Extensive damages were caused to the said premises. The suit house comprised of 5 (five) floors. The fire broke out on third and fourth floors of the house. However, the fire did not affect the ground floor or the roof of the said house. Because of the such fire other portions of the said premises were severely affected. Various documents, records, books of accounts, furniture etc., belonging to the plaintiff, were damaged as a result of seepage and flooding of water.

(c) On November 10, 1998 the Kolkata Municipal Corporation issued a notice intimating that all insecure portions of the building were required to be demolished and the remaining portions were required to be secured. The Kolkata Municipal Corporation, thereafter, appointed an expert committee. The said committee found that the ground floor of the said building has remained unaffected, which might not be vacated for the present, but use of the other floors of the building should not be allowed in any case. However, it was suggested that at the time of taking of remedial or protective measures in the upper floors, the ground floor would have to be vacated for safety of the users.

(d) On January 12, 1999 Kolkata Municipal Corporation issued a notice intimating that none should physically occupy any floor of the damaged building until reconstruction of the building.

(e) Immediately after the fire, the plaintiff informed to the Officer-in-Charge, Hare Street Police Station, Kolkata, by letters dated November 9, 1998 and November 10, 1998 that the portion occupied by the plaintiff was not affected by the fire and the plaintiff wanted to remove the records to avoid further damage due to water seepage by the water used by the fire brigade.

(f) On November 11, 1998 the plaintiff informed the Director of the General Post Office, Kolkata, requesting to hand over all the postal articles addressed to the plaintiff in the said premises to the authorized representative of the plaintiff.

(g) On November 14, 1998 the plaintiff sought for permission from the police authorities for removal of its damaged files, papers etc. for their restoration and for permission to clean the tenanted premises.

(h) The Executive Engineer (Building) concerned of the Kolkata Municipal Corporation, intimated the Officer-in-Charge, Hare Street Police Station, on November 23, 1998, that the plaintiff might be allowed to remove their belongings from the said premises.

(i) The plaintiff was repeatedly asking for permission to use the said premises inasmuch as the premises, which were under occupation of the plaintiff, were not damaged by the fire.

(j) However, on January 12, 1999 the Executive Engineer concerned intimidated the plaintiff that no floor of the said building, including the ground floor, would be allowed to be occupied physically until the re-construction of the building.

(k) On October 17, 2003 the plaintiff requested the defendants to permit the employee of the plaintiff to remove two air-conditioned machines and one generator from the office of the plaintiff located on the ground floor.

(l) The plaintiff is a bona fide tenant and is, therefore, entitled to occupy the tenanted premises peacefully and the plaintiff cannot be evicted except in due process of law.

(m) The owner, the developer and the Kolkata Municipal Corporation are in collusion to evict the petitioner from the suit premises without securing the requirements of law. The plaintiff, however, came to learn that one real estate developer, that is, Diamond Heritage Enterprise, has undertaken a project of developing the suit building by converting it into a commercial complex.

(n) The plaintiff claims to be a bona fide monthly tenant and, therefore, claims that it is entitled to peacefully use, enjoyment of the said tenanted premises. As the defendants are not handing over the tenanted premises to the plaintiff, the plaintiff institutes the instant suit, inter alia, for declaration of tenancy right, recovery of possession and permanent injunction.

3. The plaintiff, after filing of the suit, moved an application for injunction and the learned trial judge, by order dated April 9, 2007, passed an ad interim order of maintenance of status quo.

4. Initially, the Diamond Heritage Enterprise was not a party. Subsequently, on the prayer of the plaintiff, the said Diamond Heritage Enterprise was added as a party defendant in the suit.

5. After such addition, the plaintiff moved yet another application for injunction restraining the defendants including the added defendants from transferring, alienating or creating third party interest in respect of the tenanted premises during the pendency of the suit.

6. The learned trial judge, as we have already noted hereinabove, declined to pass an ex parte ad interim order of injunction.

7. Mr. Sakti Nath Mukherji, learned senior Advocate appearing for the respondents, strenuously, argues that the learned Trial Judge rightly exercised his discretion in refusing to pass an ex parte order in connection with the pending application for temporary injunction. He submits, further, that the plaintiff has no privity of contract with the owner or with the developer of the building. Thus, the plaintiff is not entitled to any order of injunction against the rightful owners. The present owner of the premises, that is, Diamond Heritage Enterprise, acquired the property for

valuable consideration from the erstwhile owners. Mr. Mukherji submits that Mackinnon Mackenzie and Company limited was a lessee under the erstwhile owner and they had surrendered their lease. The plaintiff was at the best could claim itself to be a sub-lessee, but after the surrender of lease by Mackinnon Mackenzie and Company limited, the plaintiff has no locus standi to occupy the property-in-suit.

8. Mr. Mukherji, also, submits that as the plaintiff fails to make out any cause of action against the present owner of the premises, the plaintiff is not entitled to any order of injunction. He submits that the plaintiff is not paying anything towards occupational charges since 2001 and the plaintiff does not possess any document to show that the plaintiff was ever a tenant in the property-in-suit.

9. Mr. Mukherji submits that the description of the suit premises in the schedule to the plaint was vague. Similarly, the description of the suit property in the application for injunction is, also, vague. Therefore, the trial court declined to exercise his discretion to pass an ad interim order of injunction in relation to a vague subject matter. He draws our attention to the schedule to the plaint and submits that there is no description of the suit property by boundaries.

10. He finally submits that when the property has been destructed by an act of God, the purported tenancy of the plaintiffs becomes void. He submits that on the destruction of the suit premises, the purported right of the plaintiff stood extinguished in relation to subject matter and there was an end of the alleged tenancy.

11. Mr. Mukherji in support of his contentions relied a decision in the case of [Chutahru Bhagat and Others Vs. Hialal Sah and Others](#), . The Patna High Court held that in a suit for declaration of title and recovery of possession, the plaintiff must indicate the identity of the portion claimed by him either by means of boundaries or by means of a map.

12. The plaintiff describes the suit property in the schedule to the plaint "All that an area measuring about 4500 sft. approximately in the Ground Floor at the Southern side of premises No. 2, Fairlie Place, 16 to 18 Stand Road, Calcutta- 700 001."

13. It is true that the suit property was not described either by boundaries or by a map. We must not forget that the existing building was destroyed partially by fire and it has been re-constructed. Therefore, we cannot reject the prayer for ad interim injunction of the plaintiff merely because the property was not described either by the boundaries or by means of a map. It is clear that the plaintiff was in possession of a portion of the suit building. He suggests that he was in possession of about 4500 Square feet approximately in the ground floor at the Southern side of the said building. For the purpose of consideration of the prayer for interim order, the description, we think is sufficient.

14. Mr. Mukherji placed strong reliance in the case of [Vannattankandy Ibrayi Vs. Kunhabdulla Hajee](#), . In Vannattankandy Ibrayi (supra) the tenancy was destructed by natural calamity. It was held that the tenant of such premises, therefore, could not claim on the strength of section 108(e) of the Transfer of Property Act that the tenancy continued to subsist and he had the right to construct a new building on the same spot or occupy one constructed by the landlord.

15. The case is distinguishable. Firstly, the tenancy was destroyed in full by natural calamity. Negligence on the part of the landlord was not established. Moreover, after destruction, the tenant, without obtaining any permission from the landlord, reconstructed a shop room and continued to occupy the same. The landlord, in such a situation, instituted a suit for eviction. The Supreme Court of India, in such a situation, held that the landlord was entitled to recover possession of the land.

16. Mr. Mukherji, also, cited a bench judgment of this Court in the case of West Bengal Khadi and Village Industries Board v. Sagore Banerjee & Ors, reported in (2003) 1 ICC 991. It was held that on destruction of subject-matter of tenancy, the doctrine of suspension of rent has no application. Section 108(e) of the Transfer of Property Act was applicable where, the tenancy was not completely destroyed.

17. This case has no application in the facts and circumstances of this case. Firstly, the premises under occupation of the plaintiff were not destroyed by fire. Whether it is an act of God or the fire broke out due to negligence is an issue before the Trial Court. Therefore, we express no opinion. Nevertheless, we observe that even God was kind enough not to destroy the premises under occupation of the plaintiff.

18. Mr. Mukherjee, finally, relies upon a decision of the Supreme Court of India in [Best Sellers Retail \(India\) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. and Others](#), . The Supreme Court of India reiterated conditions for granting injunction. He submits that as the plaintiff has no prima fade case, he is not entitled to any order of temporary injunction far less to say any ad interim order of injunction.

19. Mr. Saptangshu Basu, learned senior Advocate appears for respondent No. 2 and submits that although the suit was filed sometime in the year 2007 and the new construction commenced on January 25, 2010, the application for injunction was filed after long lapse of time. Mr. Basu, therefore, submits that this is a speculative suit and the conduct of the plaintiff shows that he has abandoned his right.

20. We must record that at the time of hearing of this appeal the parties proceeded on the basis of the uncontroverted averments made in the plaint and in the application for temporary injunction.

21. Thus, we proceed to decide this appeal on the basis that the statements made in the pleadings taking that the averments made in the plaint and the application for temporary injunction as correct for the present.

22. We are of the opinion when so taken, the allegations, in our view, make out a case for ad interim injunction. It is true that the property was partially damaged by fire. In the plaint it was not admitted that it was an act of the God. In any event the premises under occupation of the plaintiff was not destroyed. It is very clear from the materials on record that the plaintiff was in possession. The statutory authorities issued notices asking the plaintiff not to occupy the suit premises for re-construction of the new building for the safety of the users during the period of re-construction.

23. We refrain from discussing the materials any further and recording our conclusions because matter is, still, pending before the trial court and the contentions and disputes have to be examined in depth upon exchange of affidavits in course of hearing of the application for temporary injunction. Any expression of our opinion may prejudice one or either party in having a fair hearing and uninhibited decision.

24. Having given our anxious considerations, we are satisfied that the plaintiff has made out a prima facie case to go to trial and to get at least an ad interim order of injunction during the pendency of the application for temporary injunction.

25. We are of the opinion on the facts pleaded in the plaint and the application for temporary injunction, the averments are yet to be controverted, the learned Trial judge erroneously refused, to pass an ad interim order of injunction.

26. Initially, we entertained the appeal on March 12, 2013 and restrain the parties from transferring, alienating or encumbering the property in suit. We feel that unless such interim protection continues during the pendency of the application for injunction in the Trial Court, the situation may become irreversible by the time the application for injunction is decided by the trial court and would preclude fair and just decision of the application for temporary injunction.

27. The appeal is, therefore, allowed.

28. The order impugned refusing to pass ad interim order of injunction is set aside. The parties are restrained by order of injunction from transferring, alienating and encumbering the property in suit during the pendency of this application for temporary injunction.

29. We are not unmindful of the fact that the plaintiff is not paying anything towards occupational charges from 2001. We, therefore, direct the plaintiff to deposit Rs. 5,00,000/- (Rupees five lakh) only, without prejudice to its rights and contention in the application for injunction, in the trial court. If such deposit is not made within fortnight, the interim order of injunction shall stand vacated. If, however, Rs. 5,00,000/- (Rupees five lakh) only, as aforesaid, is deposited with the trial court, the interim order of injunction, as above, shall continue till the disposal of the application for temporary injunction.

30. The learned Trial judge shall invest Rs. 5,00,000/- (Rupees five lakh) only, in a short-term interest bearing deposit in any nationalized bank of his choice. The deposit shall abide by the result of the application for temporary injunction.

31. By way of abundant caution, we clarify that we have not finally gone into the merits of the claim and the counter-claim of the parties involved in the suit and in the application for temporary injunction.

32. The learned Trial judge would, obviously, consider the show cause of the defendants and all the materials as would then be available to him and would come to his own finding as to whether a case for temporary injunction till the disposal of the suit has or has not been made out. He should do so being wholly uninfluenced by any observation made by us as to the merits as is well known that the findings arrived at in dealing with prayer for ad interim injunction, pending the disposal of the application for temporary injunction, even if they relate to any material question involved in the application for temporary injunction in the suit cannot take the place of findings in the final decision of the Trial Court in connection with the application for injunction. In view of disposal of the appeal, the connected applications are, also, disposed of.

The defendants are directed to file their written objections to the application for injunction by three weeks; reply if any, by two weeks thereafter. The learned Trial Judge would make all endeavors to see that the application for temporary injunction is disposed of as expeditiously as possible preferably within three months from the date of filing of the reply by the plaintiff.

We, however, direct the parties to bear their respective costs in this appeal.

Ashim Kumar Mondal, J.

I agree.