(2010) 11 CAL CK 0053

Calcutta High Court

Case No: S.A. No. 71 of 1996

Milan Kanti Dutta		APPELLANT
	Vs	
Md. Aminul Iqbal and Others		RESPONDENT

Date of Decision: Nov. 30, 2010

Acts Referred:

- Transfer of Property Act, 1882 - Section 106, 111, 113

Hon'ble Judges: Tarun Kumar Gupta, J

Bench: Single Bench

Advocate: S.P. Roy Chowdhury and Anit Rakshit, for the Appellant;Shyamal Kr. Chakraborty and Md. Mahmed Anwar, for the Respondent

Final Decision: Dismissed

Judgement

Tarun Kumar Gupta, J.
This second appeal is directed against judgment and decree dated 30.09.1994 passed by learned Assistant District Judge, Additional Court, Hooghly in Title Appeal No. 66 of 1990 affirming the judgment and decree of eviction dated 28.11.89 passed by learned Munsif, 2nd Court, Hooghly in Title Suit No. 183 of 1986.

2. It is the case of the Plaintiffs that they being the owner of entire property (A-Schedule) let out the suit property i.e. (B-Schedule) to Sri Jogendranath Dutta, the predecessor in interest of the Defendants for running a shop by his son Milan Kanti Dutta (Defendant No. 4) at a rental of Rs. 30/- per month payable according to Bengali calendar month. It was later on enhanced to Rs. 40/- per month. Defendant No. 4 Milan Kanti Dutta solely runs a grocery shop in the suit shop room. The Plaintiffs earlier filed an ejectment suit against the present Defendant No. 4, Milan Kanti Dutta being Title Suit No. 17 of 1986. In that case Defendant No. 4 rook the plea that his father Jogendranath Dutta since deceased was original tenant and on his demise all his legal heirs were necessary parties for said suit of ejectment. Learned Trial Court dismissed said suit observing that other legal heirs

of Jogendranath Dutta, since deceased, were necessary parties. The Defendant/tenants were habitual defaulter and did not pay rent since Magh, 1392 B.S. and Defendant No. 4 being in occupation of the suit shop room caused damage to the property and Plaintiffs reasonably required the suit shop room for running a business. The Plaintiffs sent notice of ejectment u/s 106 of Transfer of Property Act upon all the heirs of Jogendranath Dutta, since deceased, under registered post with A/D terminating tenancy with a direction to quit and vacate the suit premises on the expiry of the month of Ashin, 1393 B.S. Some of the Defendants received said notice and some of the Defendants refused to accept the notice. The present Defendant No. 4 also did not accept said notice. Plaintiffs also claimed arrears of rent since Magh, 1392 B.S. to Kartick, 1393 B.S. and also claimed mesne profit at the rate of Rs. 2 per day till recovery of possession.

3. Only present Appellant /Defendant No. 4 contested the suit by filing written statement. Denying material allegations of the plaint he contended inter alia that his father Jogendranath Dutta since deceased was a tenant of the suit shop room and he used to run a grocery shop and that after his death all his legal heirs became tenants of said grocery shop but present Defendant alone was running said grocery shop. Plaintiffs/landlords asked for enhancement of rent and when present Defendant refused, this false case was filed. No notice was ever tendered upon this Defendant.

4. On the basis of the pleadings of the parties learned Trial Court framed several issues. Learned Trial Court on consideration of evidence on record decreed the suit for eviction on the ground of default.

5. Learned Lower Appellate Court also dismissed the appeal preferred by present Appellant Defendant No. 4/tenant by confirming the judgment and decree of eviction passed by learned Trial Court.

6. At the time of admission of this second appeal the Division Bench accepted ground No. 9 and 19 in the memo of appeal as grounds of substantial question of law. Those grounds are enumerated below.

(IX) For that the learned Additional Assistant District Judge failed to appreciate that the Plaintiff stated in his plaint that the Defendant No. 4 is the only tenant and the rest are not the tenants and if that be so, what compelled the Plaintiff to serve the notice to the other Defendants which had falsified the case of the Plaintiff that the notice was duly tendered to the Defendant No. 4 and he did not claim the service of notice.

(X) For that the Courts below should have held that the tenancy of Defendant No. 4 still exists and was not terminated with the expiry of month of Aswin, 1393 B.S. in view of the fact that the Plaintiff had claimed rent for the month of Kartick, 1393 B.S. in their plaint.

7. Mr. Roy Chowdhury, learned senior Counsel for the Appellant/Respondent No. 4/tenant, has submitted that as per averments in the plaint vide part- 4 present Appellant/Defendant No. 4 Milan Kanti Dutta was claimed to be the only tenant of the suit

shop room but alleged notice of ejectment was sent to all legal heirs of Jogendranath Dutta since deceased, predecessor in interest of the present Defendant.

8. According to him, alleged service of notice, if any, on other Defendants being other legal heirs of late Jogendranath Dutta cannot be said to be service of notice upon present Appellant /Defendant No. 4 Milan Kanti Dutta, as according to the plaint case Milan Dutta was the sole tenant in the suit premises.

9. He has further submitted that the alleged notice sent to present Appellant /Defendant No. 4 returned with postal remark "not claimed" and that in view of specific denial on the part of Appellant/Defendant No,.4 that said notice was never tendered, said alleged "not claimed" cannot be treated as good service.

10. In this connection he has referred a case law reported in Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana, In said case law it was held by the Hon"ble Apex that the endorsement "refused" of the postal peon on a registered notice sent in correct address will carry a presumption of refusal which tantamounts to service but said presumption is rebuttable.

11. In this connection he has further submitted that as Appellant/Defendant No. 4 has categorically deposed that no notice of ejectment was ever tendered to him by the postal peon, the presumption of service no longer stands and that the case should have been dismissed for want of service of notice u/s 106 of Transfer of Property Act.

12. Mr. Shyamal Kumar Chakraborty, learned advocate for the Respondent, has submitted that in the earlier suit for ejectment filed by the present Plaintiffs against present Defendant No. 4, he took the plea that other legal heirs of his father were also co-tenants and that said suit of ejectment was dismissed with the observation that other legal heirs of the father of Defendant No. 4 were necessary parties. According to him, on that ground all the legal heirs of the father of present Appellant/Defendant No. 4 were made parties in this suit for ejectment and notices of ejectment were sent to all of them to be in safe side.

13. In this connection he has further submitted that notices of ejectment were duly served upon Defendant No. 2, 8, 9 and 10 and that Defendant No. 1 and 11 refused to accept the same and that the notice meant for present Defendant No. 4 returned with post endorsement "not claimed". He further submits that said postal peon was examined in this case as a witness wherein he categorically deposed that he went to the residence of the Appellant / Defendant No. 4 on several occasions and gave intimation and that in spite of that the registered notice was not claimed and accordingly he returned the same. It is thus apparent that the presumption of the service of notice on account of aforesaid endorsement of postal peon "not claimed" was tried to be rebutted by Defendant by denial of having any intimation, but it was amply proved by the Plaintiffs/landlords by tendering the postal peon. There is nothing to show that the present

Respondents/Plaintiffs/landlords had any intimacy with the postal peon or that postal peon had any enmity and / or quarrel with the Defendant No. 4. In view of the above evidence on record I find much substance in the finding of learned Lower Courts that notice of ejectment was deemed to be served upon Defendant No. 4.

14. In this connection it is interesting to note that though Appellant /Plaintiff stated in their plaint that only Defendant No. 4 was a tenant in the suit shop room by way of running grocery shop and that other legal heirs of his father were not tenants, Appellant Defendant took the stand in his W.S. vide para 9 that his father Jogendranath Dutta since deceased was the original tenant and that after his demise all his legal heirs became joint tenants though Defendant No. 4 alone used to run the grocery shop in the suit premises. There are catena of decisions wherein it was held that service of notice on some of the joint tenants and / or tenants in common amounts to service of notice upon all the joint tenants / tenants-in- common. As notices are found to be duly served upon some of the legal heirs of the father of the Defendant No. 4 namely Defendant No. 2, 8, 9 and 10, it has to be presumed said service on those Defendants amounted to service of notice upon the present Appellant Defendant No. 4 who himself claimed that his father was original tenant and that on his death all his legal heirs including Defendant No. 4 became tenants of the suit property jointly. So, from whatever angle it can be seen, it is clear that notice of ejectment u/s 106 of Transfer of Property Act was duly served upon the present sole contesting Appellant/Defendant No. 4.

15. Mr. Roy Chowdhury, learned advocate for the Appellant/Defendant No. 4 /tenant has submitted that as per alleged notice of ejectment dated 25.09.1986 corresponding to 8th Aswin, 1393 B.S. the tenancy was tried to be terminated on the expiry of the month of Aswin, 1393 B.S. but in the plaint the Respondent/Plaintiff/landlord claimed arrear of rent since Magh, 1392 B.S. till Kartick, 1393 B.S. According to him said claim of rent for the month of Kartick, 1393 B.S. in the plaint amounted to waiver of notice of ejectment dated 25.09.1986, as after determination of tenancy landlord has no right to claim any rent. He further submits that said claim of rent for the month of Kartick, 1393 B.S. automatically waived the notice of ejectment terminating tenancy on the expiry of the month of Aswin, 1393 B.S. In this connection he has referred a case law reported in 2009 (2) CHN 910 Binoy Kumar Majumder and Anr. v. Gopi Chand Pal and Ors..

16. In said case the transferee landlords while pursuing the suit of ejectment already instituted on the basis of a notice of ejectment issued by earlier landlord, issued a fresh notice of ejectment incorporating some grounds. Though later on they issued further notice recalling their fresh notice but this Court held that issuance of fresh notice by the transferee landlords during pendency of the suit, amounted to waiver of earlier notice. According to him the same principle is applicable in the facts of the present case also.

17. Learned advocate for the Appellant /Plaintiff /landlords has submitted that above referred case law has no application in this case as no second notice was issued in this case. He further submits that once notice was issued in this case terminating tenancy of

the tenant it stands as it is. Inclusion of rent for the month of Kartick, 1393 B.S. in the claim of arrear rent since Magh, 1392 B.S. in the plaint cannot be treated as a waiver u/s 111(h) of Transfer of Property Act. According to him, if a wrong claim is made in the plaint the Court has every right to reject the same and that said wrong inclusion of demand of rent for the month of Kartick, 1393 B.S. cannot be taken as waiver of the valid notice already terminating tenancy of the tenant in the suit premises on the expiry of the month of Aswin, 1393 B.S.

18. Waiver of notice to quit under T.P. Act is dealt with u/s 113 of said Act which runs as follows:

A notice given u/s 111, Clause (h) is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

19. Now the only question is whether the inclusion of rent for the month of Kartick, 1393 B.S. in the plaint amounts to waiver u/s 113 of said T.P. Act. Admittedly, the case law referred by Sri Roy Chowdhury has no application in this case. In the referred case a second notice was issued during pendency of the suit already initiated on the basis of an earlier notice and accordingly Hon''ble Court held that said second notice even if it was recalled later on, already waived the first notice on the basis of which the ejectment suit was initiated and that landlord has to file a fresh suit. In the case in hand there was no waiver of the notice by issuing second notice. On the basis of notice to quit, the ejectment suit was filed and was being persuaded by the landlords. There are catena of decisions wherein it was held that after filing of suit of ejectment on determination of tenancy by serving a notice u/s 106 of T.P. Act, even if the landlord accepts rents for subsequent period that did not amount to waiver. Khumani Vs. Saktey Lal, , Smt. Sharda Sharma Vs. Smt. Gulab Devi Dhwon,

20. According to the Hon''ble High Court of Andra Pradesh, where a person has instituted a suit seeking eviction, it is difficult to accept the contention that he will intend to treat the lease as subsisting even if he accepts rents after such institution. Purohit Lakshmanchandji Vs. Vetcha Venkata Sree Ramachandra Murty, .

21. According to the Bombay High Court, acceptance of rents during the continuation of suit of eviction cannot amount to waiver. Termination of tenancy which has been made a cause of action for filing a suit cannot be done away with on the grounds of alleged waiver by the acceptance of a certain amount. : AIR 1979 Bom 95 H.H. Sindhi v. T. L. Mohota.

22. In the case in hand, no amount of rent for the period subsequent to determination of tenancy was even accepted. Only rent for one month after period of termination of tenancy was included in the calculation of arrear rent in the plaint.

23. From the above discussions it is palpable that said inclusion of rent for the month Kartick 1393 B.S. cannot be treated, by any stretch of imagination, as a waiver of notice to quit u/s 113 of the T.P. Act.

24. It came out that in the earlier suit for eviction against present Appellant/Defendant No. 4, he took the plea that on the death of his father all his legal heirs were tenants-in-common in the suit premises. On that ground the earlier suit was dismissed wherein it was held by the Trial Court that all the legal heirs of the father of the present Appellant/Defendant No. 4 were necessary parties. Accordingly, Plaintiff /landlords have made all the legal heirs of the father of the present Appellant/Defendant No. 4 party Defendants in the suit of ejectment. Though he claimed that Appellant Defendant No. 4 was running a business solely and was the sole tenant but sent the notice of ejectment to all the legal heirs of the father of the Appellant Defendant No. 4 terminating tenancy in the suit premises. As said notice of ejectment was amply proved to be served on some of the legal heirs of the father of the Appellant Defendant No. 4, it has to be accepted that there is proper service of notice upon Defendant No. 4 also being joint tenants. However, if it is taken as per plaint case that Appellant /Defendant No. 4 was the sole tenant even then the notice to quit sent to him under registered post with A/D has to be deemed to be served upon him in view of the evidence of postal peon and the endorsement "not claimed" on the envelope of notice. So from whatever angle it can be seen it is found that notice to quit was duly served upon all the legal heirs of original tenant including the Appellant Defendant No. 4/tenant.

25. I do not find any infirmity in the impugned judgment of the Lower Appellate Court wherefrom it can be said that it was perverse and/or not based on evidence.

26. As a result, the second appeal fails.

27. The impugned judgment and decree dated 30.09.94 passed by learned Assistant District Judge, Additional 3rd Court, Hooghly in Title Appeal No. 66 of 1990 affirming the judgment and decree of eviction dated 28.11.1989 passed by learned Munsif, 2nd Court, Hooghly in Title Suit No. 183 of 1986 is hereby affirmed.

28. Send down L.C.R. along with a copy of this judgment to the Lower Court expeditiously.

29. Urgent xerox certified copy of this judgment be supplied to the learned Counsels of the party / parties, if applied for.