(2014) 08 CAL CK 0100

Calcutta High Court

Case No: A.P.D. No. 463 of 2012 and C.S. No. 276 of 1999

Air Construction Consultants Private Limited		APPELLANT
	Vs	
Reena Das		RESPONDENT

Date of Decision: Aug. 13, 2014

Citation: AIR 2015 Cal 9 : (2015) 1 CHN 483 : (2015) 2 WBLR 631

Hon'ble Judges: Arijit Banerjee, J; A.K. Banerjee, J

Bench: Division Bench

Advocate: Krishna Raj Thakkar, Vinay Mishra and Aniruddha Poddar, Advocate for the Appellant; Jayanta Mitra, Senior Advocate, Dhruba Ghosh, Ahana Sikdar and Kaushik Mondal, Advocate for the Respondent

Final Decision: Disposed Off

Judgement

Ashim Kumar Banerjee, J.

Respondent was the owner of the suit premises being premises No. 8 Short Street Calcutta being a two storied building and the land appurtenant there-to measuring about 23 cattahs 10 chataks and 40 square feet. The respondent wanted to develop the property as a two storied building where they would reside; the building was in dilapidated condition. The respondent was residing along with her family members whereas the ground floor was occupied by various occupants. One of the occupants was Indian Institute of Material Management. They were occupying the premises for a long time as a tenant. Through common relation, the respondent got acquainted with one Dipak Bapna a director of the appellant. Bapna was promoter by occupation. They discussed the issue of development of the property on or before September 1, 1986 that we find from the joint minutes recorded in a sheet of paper appearing at page 364. Both of them signed, the signatures appearing therein were not in dispute. On a combined reading we find, they agreed to go for joint venture where Bapna would develop the property and the parties would share the built up area equally. The parties also agreed, any money spent for detaining vacant

possession would be advanced by the developer to be repaid by the landlord at the time of handing over possession of their proportionate area. As and by way of interim arrangement, the developer would also assist the landlord to find an alternative accommodation at a reasonable rent to be paid by the developer and adjusted against "final settlement". There would be a security deposit for 15 lacs repayable on handing over of possession of the built up area. The parties entered into a formal agreement on December 23, 1987 for development, appearing at page 16-54 of the paper book. The relevant clauses that would come up for consideration would be Article V Clause (viii) and Article VII Clause xii(a) and xii(b) that are quoted below:

Article V Clause(viii) "Simultaneously with the execution of this Agreement by the parties hereto, the Developer shall keep in deposit with the owner a sum of Rs. 1,50,000/- (Rupees One Lac Fifty Thousand) only carrying no interest as Security Deposit which will be refunded on completion of the Project and further Rs. 13,50,000/- (Thirteen Lacs Fifty Thousand only) shall be paid by the Developer to the owner as interest free refundable security deposit upon the owners delivering full vacant possession of the said property. The said security deposit shall be held by the owner free of interest till three months after completion and there after the same will be refunded to the developer."

Article VII(xii)(a) "It has been agreed by and between the parties hereto that the owner will deliver the entire ground floor less one room and bathroom of the said property to the developer in part performance of the obligations with effect from 15th September, 1987 and till demand and the developer will compensate the owner @ Rs. 1500/- rent and Rs. 3500/- as maintenance charges.

(xii)(b) "Parties hereto above have also agreed specifically that in case of any default or non-performance of obligations on the part of the developer the possession of Ground Floor Flat will be returned to the owner immediately on demand and/or the developer return peaceful vacant possession of the said flat in case of no sanction being granted by the Calcutta Municipal Corporation."

2. Despite such agreement being entered into, the appellant did not construct the building and the agreement got frustrated. The respondent would contend, the appellant had no money hence, they could not proceed whereas the appellant would contend, the respondent did not hand over vacant possession although the appellant took every step to have the tenant removed from the premises to get vacant possession. Fact would remain, that we gather from the evidence-on-record. The agreement got frustrated as IIMM did not vacate the premises as a result, the parties could not proceed further. The respondent terminated the contract and filed a suit asking for possession of the flat in question that the appellant occupied while entering into the transaction for their use during the time when development would take place. The appellant contested the suit. The appellant took the plea, they were supposed to assist the landlord for the purpose of getting vacant possession. They

discharged their duty faithfully while the plaintiff did not. The relevant paragraphs of the Written Statement particularly, paragraphs 4 and 5 are quoted below:

"The defendant denies the allegations and contentions of the paragraph 7 sub paragraph (a) of the plaint. The defendant states that plaintiff never made over possession of the entire ground floor flat in the main building excepting one room and one bath room to the defendant pursuant to the terms of the said agreement and in part performance of the obligation thereunder by the plaintiff. The defendant states that the plaintiff made over the possession of the entire ground floor flat in the main building excepting one room and one bath room to the defendant before the execution of the agreement when the plaintiff accepted the defendant as a monthly tenant.

The defendant denies each and every allegations and contentions of the sub paragraph (b) of the paragraph 7 of the plaint. The defendant was never obliged to remove the tenant but the tenant was not willing to shift to alternative places which was shown by the defendant to the tenants. The defendant further states that it is the plaintiff who did not co-operate at all to shift her tenant that it was mentioned in the agreement that the plaintiff will look after for her tenant a suitable place by way of alternative accommodation and handover vacant possession to the defendant. The plaintiff failed to do so. The defendant tried its level best to remove the tenant of the plaintiff within 48 months as stipulated in the agreement and even thereafter also to a suitable alternative place but the tenant refused to vacate the said premises."

3. The parties went for a trial. The combined reading of the evidence would reveal as follows:

i) The agreement dated December 23, 1987 was not in dispute. The agreement got frustrated in absence of IIMM having vacated the portion under their occupation.

ii) The developer did not deposit the security sum of Rs. 13.5 lakhs.

iii) The parties tried to shift the tenant however, that did not ultimately materialize.

iv) The developer did not have sufficient fund in his account.

v) On the tenancy of the developer there was some grey area and/or missing link. Cheques for rent at the rate of Rs. 1500 and Rs. 3500 for maintenance, were duly encashed.

vi) The respondent issued a notice to quit on December 18, 1998 being exhibit M that would show, notice was given requiring the premises in question for their own use and occupation as the respondent''s daughter was supposed to come from abroad to stay with her parents. In the notice to quit, the respondent made it clear, such notice to quit was without prejudice to her rights against the breaches that the appellant committed in respect of the agreement dated December 23, 1987.

4. The learned Judge rejected the contention of the appellants. His Lordship rejected the contention that there was an independent tenancy and the appellant was entitled to protection under the tenancy law. His Lordship dealt with breaches that the respondent alleged. His Lordship held, the case made out in paragraphs 4 and 5 could not be proved that would deal with the vacating of the premises under occupation of the tenant. His Lordship ultimately held, the suit would raise mainly two issues as to whether there was any landlord-tenant relationship and whether the appellant was obliged to hand over vacant possession. Proceeding with those two issues His Lordship considered Article VII(xii)(a) of the agreement where the plaintiff was supposed to deliver the entire ground floor, except one room and one bath room to the defendant for which the defendant would compensate the plaintiff at Rs. 1500 as rent and Rs. 3500 as maintenance charges. His Lordship held, there was no independent evidence to show, defendant was put to possession. The so-called monthly tenancy was not an independent agreement. It was nothing but an "understanding or arrangement" between the parties. The word "rent" could not be read in isolation. The cause of action of the plaintiff was based on the agreement dated December 23, 1987. Since the plaintiff discharged their onus, it was the duty of the defendant to prove their case made out in the Written Statement that the defendant "miserably failed". His Lordship held, since there was no tenancy independent of the agreement for development, the defendant would have no defence.
5. His Lordship decreed the suit in favour of the respondent/plaintiff hence, this appeal that we heard on the above mentioned dates.

6. Mr. Krishna Raj Thakkar learned Counsel appearing for the appellant would advance his argument in support of the appeal. According to Mr. Thakkar, the question of inadequacy of fund would have no relevance as there was no definite term in the contract obliging the developer to arrange for fund for the purpose of eviction of the tenant. The sheet, recording the terms on September 1, 1986 appearing at page-364, would have no effect once the parties entered into a formal agreement. The tenancy was created by the agreement hence, the appellant was entitled to seek protection in law. Furnishing of security was to secure repossession by the owner. Since the owner did not hand over possession the question would be premature. Mr. Thakkar dealt with the averments made in the Written Statement quoted above that we discussed by contending, it was an inarticulate drafting however, the clear evidence on the part of the appellant through Mr. Dipak Bapna would clinch the issue. He would refer to exhibits 18 and 19 to show, the cheques for payment of rent were duly encashed that would prove the tenancy. He would explain Article VII Clause xii(a), (b), (c) and (d) appearing at page 306 and clarify his stand, it was the obligation of the plaintiff to put the appellant in possession and there was no breach on his part. In any event, being a tenant he would be entitled to the protection as a statutory tenant and he could not be evicted without adhering to the appropriate procedure for eviction of a lawful tenant. The learned Judge could

not have decreed the suit. He would dispute the plaintiff''s contention, he had no money. He would submit, it was not necessary for the developer being a businessman to block his capital in the bank, the question would only come when he would start making construction. Situation did not come as the plaintiff failed to handover vacant possession. He took us to the exhibits being exhibits 1, 4, 5, 12, 13, 15, 18, 19 and exhibit M to support his contention, he would not be liable for eviction. He would rely upon questions 13 to 42 appearing at page 149 as also question 181 appearing at page 107 and question 28 onwards appearing at page 72 in this regard.

7. Mr. Jayanta Kumar Mitra learned senior Counsel, while opposing the appeal, would put emphasis on paragraph 5 of the Written Statement quoted supra and would contend, the appellant/defendant miserably failed to prove his case. According to Mr. Mitra, it was a mere license and not a tenancy. In any event, the defence of the appellant/defendant was totally inconsistent with each other. They would run three alternative cases, one contrary to the other. According to him, the appellant once contended, there was an independent tenancy followed by an agreement for development. Sometime they would say, it was a case of development whereas they would also run a case of independent tenancy and holding over. Mr. Mitra would draw our attention to the answer given by the witness in reply to question No. 32 to 37 appearing at page 153 and question No. 187 to 198 at page 190 to contend, rent was paid in December 1987 and those cheques, that the appellant would mention, were issued in furtherance of the agreement for development dated December 23, 1987. He would rely upon Article VII Clause (xii)(a) and (b) that in default on the part of the appellant, possession was to be restored meaning thereby, the so-called tenancy was in furtherance of the agreement for development and had no independent character. At best, it could be termed as a license within the meaning of Section 52, 60 and 62 of the Easement Act 1882. To support his case on license, he would rely upon three Apex Court decisions and one Calcutta decision that are as follows:

1. Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (Smt) and Others,

2. Delta International Limited Vs. Shyam Sundar Ganeriwalla and Another,

3. ICICI Vs. State of Maharashtra and Others,

4. Gobinda Chandra Ghose Biswas and others Vs. Nanda Dulal Sut reported in 1918 Volume-XXVII Calcutta Law Journal Page-523.

8. Resuming his argument on the next day, Mr. Mitra dealt with the issue of IIMM. He would rely upon paragraphs 5, 7 and 13 of the Written Statement and contend, the appellant miserably failed to prove their case that would be contrary to the evidence that they led before His Lordship.

9. On the issue of building rules, he would refer to Rule 16 and contend, such ground was not available to the appellant.

10. On the issue of finance, he would refer to the answer given by the witness in reply to question 229 to 254 appearing at pages 201-205 of the paper book.

11. Resuming his argument on the next day, Mr. Mitra would rely upon the decision in the case of Muhammad Ziaul Haque Vs. Standard Vacuum Oil Company, and contend, even if a license was revoked wrongly the aggrieved party would be entitled to damage only. The license could be revoked at any time on demand in the instant case. As soon as it was demanded the appellant was supposed to hand over possession back that they failed to do.

12. Citing the decision in the case of Smt. Sayambari Dassi Vs. Dwijapada Naskar, Mr. Mitra would contend, no formal notice was necessary in case of revocation of license. He would further contend, mere payment of rent through cheque ipso facto would not create any tenancy. He would rely upon our judgment and order admitting the appeal particularly, our observation appearing at page 728-730 of the paper book where we were prima facie satisfied, the appellant did not have any right to claim tenancy.

13. Mr. Thakkar learned Counsel, while replying to what Mr. Mitra would contend, reiterated what he had submitted while arguing the appeal. According to him, it was the consistent case of the appellant, he was a tenant and not a license. In any event, even if this Court would hold it as a license the same could not be terminated in absence of alleged breach alleged to have been committed by the appellant, being proved. He would draw our attention to issue No. 2, 4 and 7 and contend, the evidence would not support the respondent/plaintiff. Since there was no proof for the breach the termination was wrongful.

14. On merits, Mr. Thakkar would contend, there was enough fund in the bank account as would appear from exhibits 7, 9 and 10 hence, the observation of His Lordship, the appellant did not have fund, would be without any basis. On the sanctioned plan, Mr. Thakkar would submit, the law would not support such contention. In this regard, he would refer to pages 368, 369 and 371 of the paper book.

15. Dealing with the argument of Mr. Mitra on Easement Act, Mr. Thakkar would contend, it had no application in the State of West Bengal in absence of appropriate notification issued therefor. The parties agreed to go for arbitration as would appear from the Arbitration Clause. Since the parties did not venture for arbitration the Court must go into the question of alleged invocation and decide accordingly.

16. Distinguishing the decision in the case of Muhammad Ziaul Haque Vs. Standered Vacuum Oil Company (supra) he would contend, the revocation would only arise on the happening of contingency Clause xii (a) and (b) of Article VII read together, were

of no consequence as admitted by the plaintiff''s witness in reply to question No. 163 and 164 appearing at page 103. On the contrary, the witness raised the issue of fair rent that would demolish the case of license. According to Mr. Thakkar, three Supreme Court cases cited by Mr. Mitra would have a clear distinction as there was no specific provision for license in the subject agreement. The appellant was not supposed to complete the construction for 48 months that would depend upon handing over possession by the landlord that eventuality never happened. On the notice of eviction, he would contend, acceptance of rent subsequent to the notice, would make the notice not applicable. The tenancy that the appellant took, would have no relation to the development. It was nothing but a case of arrangement of residential accommodation that the appellant obtained to accommodate another occupant during performance of another development agreement. He would pray for setting aside of the judgment and order impugned and dismissal of the suit.

17. We have carefully read the relevant clauses quoted supra and considered respective interpretations that the learned Counsel appearing for the parties would give before us. Our understanding of the said three Clauses is as follows:

i) Deposit of Rs. 1.5 lacs at the initial stage and Rs. 13.5 simultaneously on handing over of possession was a security for return of possession to the owner after completion. It would have no nexus with the eviction of the tenants.

ii) Owner was supposed to hand over possession to the developer, the entire ground floor, less one room and bath room, in part performance of the obligation, with effect from September 15, 1987 in lieu of compensation of Rs. 1500 shown as rent and Rs. 3500 shown as maintenance charges.

iii) In default of any non-performance of the obligation of the developer, the developer would be bound to return possession to the owner. Similarly, he would also return possession in case corporation would not sanction the building plan.

18. On a combined reading of our understanding as stated above, we can safely infer, the deposit of Rs. 15 lacs had nothing to do with eviction of IIMM. It was the duty of the owner to give vacant possession and the developer was to assist the owner. Even if any money transaction would require in the process the same was not clearly spelt out. At least we do not find any such definite Clause in the agreement. From the Written Statement we find, developer took it upon themselves the onerous task of assistance and contended, they tried their best to assist the owner however, fact would remain, IIMM did not vacate.

19. It is very difficult to put the blame either on the owner or the developer. One thing is clear to us, the agreement got frustrated. It was frustrated mainly because the parties could not shift IIMM. Once the agreement got frustrated it would be difficult for us to give direction for specific performance of the same that too, at this belated stage when about two decades have passed in between.

20. Question would thus remain what would happen to the possession of the rooms that the appellant was enjoying. The moment the agreement got frustrated the parties must get their status back. If any money is paid by the appellant to the respondent that must be refunded along with interest at the rate of 9% per annum on and from the date of payment until realization. Similarly, the owner was also entitled to the possession back. The appellant would strenuously claim tenancy independent of the agreement. They miserably failed to prove so. The appellant came in possession in view of the Clause quoted supra that would talk about part performance of the contract for development and the payment of rent and maintenance charges was in the nature of compensation as the owner would be out of possession. Once the agreement got frustrated the owner must get back possession.

21. On the question of mesne profits we feel, once we could not specifically lay the blame on one party or the other it would not be proper for this Court to impose additional financial burden on the appellant. The appellant already paid enhanced amount of occupation charges as per the direction of the Court. We do not feel inclined to pass any further direction save and except, confirming the interim arrangement that the Division Bench made at the time of admission of the appeal. The appellant would continue to make payment of the occupation charges at the said rate till they hand over possession back to the respondent. It is further made clear, in case there is any arrear amount due and payable by the appellant to the respondent the appellant would be entitled to get credit of the said sum or any part thereof as against deposit, if any, lying with them and/or the interest payable thereon in terms of the foregoing order.

22. Save what modification we have made, the decree passed by the learned Single Judge would stand affirmed.

23. Appeal is disposed of without any order as to costs.