**(2016) 11 CAL CK 0029**

**CALCUTTA HIGH COURT**

**Case No:** C.O. 3348 of 2016

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| Ashwin Desai | APPELLANT |
| Vs | |
| Bijay Kumar Manish Kumar HUF | RESPONDENT |

**Date of Decision:** Nov. 15, 2016

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11
- Transfer of Property Act, 1882 - Section 114
- West Bengal Premises Tenancy Act, 1997 - Section 6(4)

**Citation:** (2017) 1 ICC 253

**Hon'ble Judges:** Ashis Kumar Chakraborty, J.

**Bench:** Single Bench

**Advocate:** Mr. Amitava Das, Mr. Debdut Mukherjee and Mr. Meghajit Mukherjee, Advocates, for the Petitioner; Mr. Saptangshu Basu, Ms. Vijaya Bhatia and Mr. Ganesh Prasad Shaw, Advocates, for the Opposite Parties

**Final Decision:** Dismissed

**Judgement**

**Ashis Kumar Chakraborty, J.**—This revisional application is directed against the order dated August 18, 2016 passed by the learned Judge, 11th Bench, City Civil Court at Calcutta in Title Suit No. 2450 of 2007 (hereinafter referred to as "the said suit"). By the impugned order the learned Court below dismissed the application filed by the petitioner under Order 7, Rule 11 of the Code of Civil Procedure, 1908 (hereinafter called as "the Code") praying for, rejection of the plaint filed by the plaintiff opposite party in the said suit.

2. The facts giving rise to the present revisional are that in September, 2007 the plaintiff opposite party, a HUF, being represented by its karta filed the said suit before the learned Court below claiming, inter alia, a decree for eviction of the defendant petitioner from the suit property described hereinafter. In the plaint it is the case of the plaintiff opposite party that M/s. Nanjee Shamjee and Company

(hereinafter referred to as "the said company") was the owner of the Premises No. 10A, Rabindra Sarani, Kolkata-700001. By an indenture of lease dated November 20, 1992 the said company granted a lease in respect of the entire first floor measuring about 2500 square feet of the said Premises No. 10A, Rabindra Sarani, Kolkata-700001 (hereinafter referred to as "the suit property") to the defendant for a period of 99 years, commencing from November 01, 1992 at a monthly rent of Rs. 350/-, payable according to English calendar. By a deed of conveyance dated August 30, 1996 the said company transferred the entirety of the said Premises No. 10A, Rabindra Sarani, Kolkata-700001 to the plaintiff. Thus, the plaintiff became the owner of the entirety of the said premises, the defendant became a lessee in respect of the suit property under the plaintiff and said indenture of lease dated November 20, 1992 executed between the said company and the defendant became binding upon the parties to the suit. The plaintiff claimed that clause 4(a) the said indenture of lease dated November 20, 1992 provided that in default of payment of monthly lease rent for a period of three months, the lease would be terminated by giving one month notice to lessee by the lessor and if, the arrear rent is paid by the lessee with interest at the rate of 2%, per month, within one month from the date of receipt of such notice the default will be waived, but in case of non-payment of arrear rent with interest at the rate of 2%, per month the lessor is entitled to determine the lease and to re-enter and take possession of the demised premises. According to the plaintiff, since September, 2002 the defendant defaulted in payment of lease rent in respect of the suit property for more than three months; in spite of demand the defendant failed to pay the arrear rent together with interest at the rate of 2%, per month and, as such, his lease in respect of the suit property was forfeited as per Clause 4(a) of the said indenture of lease dated November 20, 1992. The plaintiff further claimed that the defendant has lost all protections under the relevant provisions of the Transfer of Property Act and is liable to be evicted.

3. The defendant petitioner has been contesting the said suit. He first filed an application under Order 7, Rule 11 of the Code praying for, rejection of the plaint filed in the said suit alleging that the suit filed by the plaintiff opposite party claiming his eviction from the suit property on the ground of forfeiture of the said lease, without serving a notice under Section 114A of the Transfer of Property Act, 1882 (hereinafter called as "the Act of 1882") is not maintainable. By an order dated February 03, 2015 the learned Court below rejected the said application. The defendant petitioner carried the said order dated February 03, 2015 before this Court in revision, being C.O. 1092 of 2015. However, by an order dated March 31, 2015 a learned Single Judge of this Court held that Section 114A of the Act of 1882 has no application relating to the forfeiture of lease in case non-payment of rent and rejected the said revisional application. The defendant petitioner filed his written statement in the said suit. He also filed an application under Section 114 of the Act of 1882 and the same is pending. It appears that the trial of the suit had begun, the karta of the plaintiff opposite party, as PW1 filed his affidavit of examination-in-chief

before the learned Court below and his cross-examination had commenced. At this stage, the defendant petitioner filed the second application under Order 7, Rule 11 , read with Section 151 of the Code praying for rejection of the plaint filed in the said suit. According to the defendant petitioner, he filed the said second application for rejection of the plaint as he was advised by a new set of counsel engaged by him in the beginning of the year 2016. In the said application the defendant petitioner alleged that from the averments made in the plaint it is evident that the plaintiff opposite party filed the said suit, claiming him to be a lessee in respect of the suit property under the Act of 1882, at a monthly lease rental of Rs. 350/-, but in view of the enactment of the West Bengal Premises Tenancy Act, 1997 (hereinafter called as "the Act of 1997") which came into force on July 10, 2001 when the said indenture of lease was registered before July 10, 2001 and the monthly rent in respect of the suit property is Rs. 350/- only, the defendant petitioner is a monthly tenant in respect of the suit property under the provisions of the said Act of 1997 and, as such, in the absence of any notice under Section 6(4) of the said Act of 1997 the plaint filed in the said suit is liable to be rejected. In the said application the defendant petitioner pressed both the grounds under Order 7, Rule 11 (a) and (d) of the Code.

4. The plaintiff opposite party contested the said application of the defendant petitioner. By the impugned order dated August 18, 2016 the learned Court below rejected the said application filed by the defendant petitioner and fixed the suit on September 07, 2016 for further cross-examination of the PW-1. The learned Court below held that after rejection of the first application under Order 7, Rule 11 , no such second application lies after filing of the written statement, framing of issues and evidence being led by the parties at the fag end of the trial. The learned Court further held that the defendant petitioner filed the said application so as to misuse and abuse the judicial process. According to the learned below, the said order dated March 31, 2015 passed by this Court in C.O. 1093 of 2015 not having been challenged by the defendant petitioner is binding on it and the said second application under Order 7, Rule 11 of the Code is not maintainable.

5. On September 05, 2016 the defendant petitioner moved the present revisional application, when this Court passed an interim order directing stay of all further proceedings in the said suit before the learned below. The said interim order was extended subsequently and the same is still subsisting.

6. Mr. Debdut Mukherjee, led by Mr. Amitava Das, learned counsel appearing on behalf of the defendant petitioner contended that it is well settled law that an application under Order 7, Rule 11 of the Code can be filed at any stage of the suit, before the conclusion of the trial but the learned Court below fell into an error of law in dismissing the application of the defendant on the ground that the same was filed after the trial of the suit had commenced. In this regard, he relied on the decision of the Supreme Court in the case of **Saleem Bhai and Ors. v. State of Maharashtra and Ors. reported in (2003) 1 SCC 557.**

7. Although, in his application the defendant petitioner mentioned both the grounds of rejection of plaint under Order 7, Rule 11 (a) and (d), but during the hearing of this application the learned counsel for the defendant petitioner pressed the ground that the plaint filed by the plaintiff opposite party does not disclose any cause of action.

8. It was contended on behalf of the defendant petitioner that although in the plaint filed in the said suit it is the case of the plaintiff opposite party that the defendant petitioner was inducted as a lessee in respect of the suit property under the said registered indenture of lease dated November 20, 1992, but in view of the amended provisions of Section 3(c) of the said Act of 1997, which came into effect from July 10, 2001, any tenancy under a lease agreement registered before commencement of the said Act shall be governed by the said Act of 1997 only. It was, therefore, urged that in the instant case the tenancy of the defendant petitioner on the basis of the said indenture of lease dated November 20, 1992 registered before July 10, 2001 is governed by the said Act of 1997 and in the absence of any notice under Section 6(4) of the said Act of 1997, the plaint filed by the plaintiff opposite party in the suit on the basis of the Act of 1882 discloses no cause of action against the defendant petitioner. It was further contended that it is the case of the plaintiff opposite party in the plaint filed in the suit that the monthly rent payable by the defendant petitioner in respect of the suit property is Rs. 350/- and the said indenture of lease was registered before July 10, 2001 and as per Section 3(e) and Section 3(f) of the Act of 1997 whether the tenancy of the defendant petitioner is for residential or non-residential purpose, the same is governed by the Act of 1997. Therefore, according to Mr. Mukherjee, once again in the absence of any notice under 6(4) of the said Act of 1997 the plaint filed by the plaintiff does not disclose any cause of action against the defendant petitioner.

9. It was vehemently urged that from the impugned order it is evident that no argument was advanced on behalf of the plaintiff opposite party before the learned Court below to dispute the contention raised by the defendant petitioner that his tenancy in respect of the suit property is governed by the said Act of 1997 and in the absence of any notice under Section 6(4) of the said Act of 1997, the plaint filed by the plaintiff opposite party does not disclose any cause of action against the defendant petitioner for his eviction from the suit property. According to Mr. Mukherjee, when the ground urged by the defendant petitioner in his second application under Order 7, Rule 11 of the Code was totally different from that urged in the first application for rejection of the plaint, the learned Court below fell into an error of law in holding that once the earlier application filed under Order 7, Rule 11 of the Code is rejected the second application under the same provision is not maintainable. He strenuously urged that by the impugned order the learned Court below has not at all decided the contention raised by the defendant petitioner with regard to the maintainability of the suit, nor any direction has been passed that the defendant petitioner''s contention will be decided at the trial of the suit.

10. However, Mr. Saptangshu Basu, learned senior counsel appearing for the plaintiff opposite party submitted that the impugned order passed by the learned Court below suffers from no infirmity. He urged that in view of the dismissal of the first application under Order 7, Rule 11 of the Code, the second application under the same provision of law is not maintainable. It was contended that in any event, in the present case, when the trial of the suit has commenced the application filed by the defendant petitioner under Order 7, Rule 11 of the Code was not maintainable. Mr. Basu relied on the decision of the Supreme Court in the case of **Ram Prakash Gupta v. Rajiv Kumar Gupta & Ors. reported in (2007) 10 SCC 59.** It was argued that whether the defendant petitioner is a lessee in respect of the suit property under the Act of 1882 or he is a monthly tenant under the said Act of 1997 can be established only at the trial of the suit and not on the basis of the averments made by the plaintiff opposite party in the plaint filed in the said suit. Mr. Basu submitted that this Court should dispose of this revisional application by directing the learned Court below to decide the question raised by the defendant petitioner in the said application under Order 7, Rule 11 of the Code, as an issue in the eviction suit. However, no submission was advanced on behalf of the plaintiff opposite party disputing the above contentions raised by the defendant petitioner claiming himself to be a tenant, in respect of the suit property under the Act of 1997.

11. I have considered the material records and the agreements advanced by learned counsel, appearing for the respective parties. It is the settled law that for deciding an application for rejection of plaint under Order 7, Rule 11 (a) or (d) of the Code, only the averments made in the pliant are germane, which are to be treated as correct. For the decision in an application under Order 7, Rule 11 (a) of the Code for rejection of plaint on the ground that the same does not disclose any cause of action, the test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed by the Court. This view is fortified by the decision of the Supreme Court in the case of **Liverpool & London S.P. & I. Association Ltd. v. M.V. Sea Success & I & Ors. reported in (2004) 9 SCC 512** (para-139).

12. In the present case, in the year 2007 the plaintiff opposite party filed the said suit claiming, eviction of the defendant petitioner from the suit property on the ground of forfeiture of the lease, with the express averments made in the plaint that the lease was governed by the terms provided in the said indenture of lease dated November 20, 1992 and the lease rent payable by the defendant petitioner was Rs. 350/- per month. In the plaint the plaintiff opposite party has claimed that the defendant was a lessee in respect of the suit property under the Act of 1882. It further claimed that the defendant has lost all protections under the relevant provisions of the Act of 1882 and he is liable to be evicted. Now the test is, whether by treating the averments made in the plaint to be true, in view of the provisions contained in clauses (c), (e) and (f) Section 3 of the Act of 1997 which came into force with effect from July 10, 2001 a decree would be passed in the suit in favour of the

plaintiff opposite party. As per Section 3(c) of the Act of 1997, any tenancy where the lease has been registered under the Registration Act, 1908, after commencement of the said Act with due consent of the tenant recorded in the registered instrument, the tenancy shall not be governed by the said Act. Therefore, in this case when the said suit was filed in 2007 on the basis of said indenture of lease dated November 20, 1992 which was registered before July 10, 2001 the tenancy of the defendant petitioner comes within the purview of the said Act of 1997 and in the absence of any notice under Section 6(4) of the said Act of 1997, no decree can be passed in favour of the plaintiff opposite party in the suit based on the Act of 1882.

13. Further, as per Section 3(e) of the Act of 1997, as amended with effect from July 10, 2001 any premises, within the limits of Kolkata Municipal Corporation area, let out for residential purpose, not being a premises within the purview of clause (c) mentioned above, which carries monthly rent more than Rs. 6,500/- (Rupees Six Thousand Five Hundred only) is excluded from the purview of the said Act. Section 3(f) of the Act of 1997, as amended with effect from July 10, 2001 provides that any premises situated within the limits of the Kolkata Municipal Corporation area, let out for non residential purpose and carrying monthly rent more than Rs. 10,000/- (Rupees Ten Thousand only) is excluded from the purview of the said Act. In the present case, the suit property is situated within the limits of the Kolkata Municipal Corporation. In the plaint, the plaintiff opposite party has admitted the rent in respect of the suit property, under the said indenture of lease dated November 20, 1992 registered before July 10, 2001 is Rs. 350/- per month. In these facts, irrespective of the fact whether the suit property is used for residential or non residential purpose, the inescapable conclusion is that the defendant petitioner is a monthly tenant in respect of the suit property under the said Act of 1997 and in the absence of any notice under Section 6(4) of the said Act, on the basis of the averments made in the plaint already discussed, no decree can be passed in the said suit filed by the plaintiff opposite party on the ground of forfeiture of lease under the Act of 1882. Even no argument was advanced on behalf of the plaintiff opposite party to dispute the applicability of the said Act of 1997 in respect of the suit property as contended by the defendant petitioner.

14. For all the foregoing reasons, I find substance in the contention raised by the defendant petitioner that the plaint filed by the plaintiff opposite party in the said suit does not disclose any cause of action against the defendant and I accept such contention.

15. From the impugned order it is evident that the learned Court below did not at all consider the contentions raised by the defendant petitioner in his said application for rejection of the plaint, nor any direction was passed that the contentions raised by the defendant petitioner will be decided at a subsequent stage of the suit. The learned Court below simply rejected the application filed by the defendant petitioner holding that on rejection of an application under Order 7, Rule 11 of the Code no

such second application lies and after filing of the written statement, framing of issues, evidence being led by the parties just at the fag end of the trial. I am, however, unable to persuade myself to agree with the said findings of the learned Court below. The trial of a suit commences at the stage of the plaintiff''s first witness adducing evidence and concludes with the argument of the parties. In the case of **Samar Singh v. Kedar Nath & Ors. reported in AIR 1987 SC 1926** the Supreme Court held that Order 7, Rule 11 of the Code does not, either expressly or by necessary implication, provide that the power under the said provision should be exercised at a particular stage only and in the absence of any restriction placed by the statutory provision, it is open to the Court to exercise that power at any stage. Even in the subsequent decision in the case of Saleem Bhai and Ors. (supra), relied upon by the defendant petitioner the Supreme Court held that the trial Court can exercise power under Order 7, Rule 11 of the Code, at any stage of the suit and at any time before the conclusion of the trial.

16. It is settled law that the decision of a Court has to be considered in the context in which it was rendered and not to be read as Euclid''s theorem. In the case of Ram Prakash Gupta (supra) cited on behalf of the plaintiff opposite party, the plaintiff had filed the suit for cancellation/setting aside a decree obtained against his father by the defendant. As per Article 59 of the Limitation Act, 1963 a suit for cancellation of a decree has to be filed by the plaintiff within three years from the date of his knowledge of the facts entitling him to have the decree cancelled/set aside. It is a fact that, in the said case after conclusion of the evidence, the application under Order 7, Rule 11 (d) was filed by the defendant alleging that on the basis of the averments made in the plaint itself, the plaintiff''s suit was barred by Article 59 of the Limitation Act and both the trial Court and the High Court, in appeal accepted the said contention of the defendant and allowed the application of the defendant. The Supreme Court, however, after considering the averments made by the plaintiff in his plaint held that the knowledge mentioned in the plaint cannot be termed as inadequate and incomplete as observed by the High Court. In the background of such finding in paragraphs 22 and 23 of the said decision the Supreme Court held as follows :

"22. It is also relevant to mention that after filing of the written statement, framing of the issues including on limitation, evidence was led, the plaintiff was cross-examined, thereafter before conclusion of the trial, the application under Order 7, Rule 11 was filed for rejection of the plaint. It is also pertinent to mention that there was not even a suggestion to the appellant-plaintiff to the effect that the suit filed by him is barred by limitation.

23. On going through the entire plaint averments, we are of the view that the trial court has committed an error in rejecting the same at the belated stage that too without adverting to all the materials which are available in the plaint. The High Court has also committed the same error in affirming the order of the trial Court."

17. From the above findings in the case of Ram Prakash Gupta (supra) it is clear that in the said case the Supreme Court did not lay down any law that after filing of written statement, framing of issues or after the conclusion of the evidence of the plaintiff''s witness the defendant cannot maintain an application under Order 7, Rule 11 of the Code. Therefore, in the facts of the present case the said decision of the Supreme Court in the case of Ram Prakash Gupta (supra) does not come to any assistance of the plaintiff opposite party.

18. The learned Court below the rejected second application of the defendant petitioner for rejection of the plaint filed in the suit on the ground that on rejection of the earlier application under Order 7, Rule 11 of the Code no such second application lies under the same provision. The learned Court below held that the aforementioned order dated March 31, 2015 passed by this Court in C.O. 1093 of 2015 not having been assailed by the defendant anywhere is binding on it. It was contended on behalf of the plaintiff opposite party that the said finding of the learned Court below is the correct exposition of law. However, no decision or authority was cited before me to support the said finding of the learned Court below. However, it is to be noted that the reasoned decision by which this Court held the earlier application of the defendant petitioner under Order 7, Rule 11 to be not maintainable was passed in C.O. 1092 of 2015 and not in C.O. 1093 of 2015 as recorded in the impugned order. In the facts of the present case already discussed above, it is evident that the grounds urged by the defendant petitioner in the second application for rejection of plaint and the ground urged in his said earlier application decided by this Court in the aforementioned earlier revisional application are completely different. Therefore, the dismissal of the earlier application of the defendant petitioner for rejection of the plaint could not render the second application of the defendant petitioner under Order 7, Rule 11 of the Code to be not maintainable. For all these reasons, I am unable to convince myself to sustain the finding of the learned Court below that in view of the rejection of the earlier application of the defendant petitioner under Order 7, Rule 11 of the Code, his said second application for rejection of the plaint was not maintainable. In the facts of the instant case, as I have already discussed, the finding of the learned Court below that the defendant filed the said second application to misuse and abuse the judicial process cannot be sustained.

19. For all the foregoing reasons, the impugned order dated August 11, 2016 passed by the learned Court below in Title Suit No. 2450 of 2007 stands set aside.

20. In this case, not only by the averments made in the plaint the plaintiff has claimed the suit to be based on the Act of 1882, even in the affidavit-in-opposition filed against the application of the defendant, it asserted that the suit has been rightly filed under the Act of 1882 and the said Act of 1997 has no application. However, as discussed above, when from the averments in the plaint it is evident that no decree can be passed in the suit and in view of the assertion of the plaintiff

opposite party in its said affidavit-in-opposition that the suit is based on the Act of 1882, it makes no sense to direct the learned Court below to further decide the contention raised by the defendant petitioner in this revisional application. Accordingly, the application filed by the defendant petitioner for rejection of the plaint filed in Title Suit No. 2450 of 2007, pending before the learned Judge 11th Bench City Civil Court at Calcutta stands allowed and the plaint filed in the said suit stands rejected. However, since there was delay on the part of the defendant petitioner to file the application, he shall pay costs assessed at Rs. 20,000/- (Rupees Twenty Thousand) only to the plaintiff opposite party within December 03, 2016.

With the above directions the revisional application, being C.O. 3348 of 2016 stands disposed of.

Let urgent certified server copies of this judgement, if applied for, be supplied to the parties subject to compliance with all requisite formalities. (Ashis Kumar Chakraborty, J.) Later

A prayer was made on behalf of the plaintiff opposite party for stay of operation of the above order. Such prayer is considered and rejected.