

CO 2319 of 2021

Bharat Sanchar Nigam Ltd. Calcutta Telephones
Vs.
Emami Limited

Mr. Rajib Mukherjee
Ms. Shreyasi Bhaduri
... For the petitioner

Mr. Shuvasish Sengupta
Ms. Pushpika Sahoo
... For the respondent/opposite party

This is an application under Article 227 of the Constitution of India against the order dated 7th October, 2021 passed by the learned Civil Judge (Senior Division), 3rd Court at Barasat in Title Suit No.498 of 2020. By the impugned order, the learned Trial Court rejected the defendant's challenge about maintainability of the suit with cost of Rs.500/-.

The petitioner's case is that the plaintiff/respondent filed the instant suit, being Title Suit No.498 of 2020, for a decree of eviction and recovery of Khas possession of the two properties mentioned in Schedule-A and Schedule-B to the plaint against self-same defendant. The defendant/petitioner appeared in the suit and filed an application challenging the maintainability of the subject matter of the suit, where plaintiff filed written objection. The defendant also filed written statement subsequently. Learned Trial Court had taken up the application for maintainability

filed by the defendant/petitioner on 7th October, 2021 and was pleased to reject the contention of the defendant/petitioner as above.

Mr. Rajib Mukherjee, learned counsel appearing on behalf of the petitioner submits that it is settled law that if any agreement contained arbitration clause, then upon an application of either party of the suit, the matter should be referred to an Arbitrator. Learned Court below failed to appreciate such proposition of law since there is an arbitration clause in the agreement for tenancy, the Court below should have referred the dispute to an Arbitrator for settlement. He further submits that defendant is occupying two different tenancies arose from two different contracts and clubbing together two different tenancies in a single suit is not legally permissible and hit by misjoinder of cause of action. He further submits that the notices given under Section 80 of the Code of Civil Procedure and Section 106 of the Transfer of Property Act are defective and invalid for which also the suit is not maintainable.

Mr. Shuvasish Sengupta, learned counsel appearing on behalf of the opposite party submits that in the matter of ejectment of the same tenant jointly from two or more tenaments in one suit by the landlord is legally permissible and the same cannot be dismissed for misjoinder of causes of action. In this connection, he relied upon the judgment of this Court delivered in CO

818 of 2013 (M/s. Klar Sehen (P) Ltd. v. Runtu Dutta). He further submits that even if there is any arbitration clause, the defendant as on this date has not made any prayer for referring the matter before the Arbitrator and furthermore he contended that the question of legality and validity of the notice under Section 80 of Code of Civil Procedure or under Section 106 of the Transfer of Property Act is always a mixed question of law and fact which can only be determined at the time of final hearing of the suit and the suit cannot be dismissed at its threshold merely on those grounds.

I have heard learned counsel for both sides at length and also perused the materials on record. It appears that the defendant/plaintiff had made the aforesaid prayer contending that the suit is not maintainable without mentioning any specific provision of law. Be that as it may, his contention is based mainly on three grounds. Firstly that the plaintiff has clubbed two separate causes of action in respect of two different tenements which is not permissible. Secondly, the Court below has overlooked that there is an arbitration clause in the tenancy agreement and without referring the dispute before the Arbitrator, he has rejected defendant's petition for maintainability and thirdly, notice under Section 80 of Code of Civil Procedure or under Section 106 of the Transfer of Property Act is defective.

It is admitted that in the agreement between the parties, there is an arbitration clause. It further appears that neither party as on this date has prayed for referring the matter before the Arbitrator, on the contrary, the defendant has already filed written statement in the said suit.

In this context, Section 8 of the Arbitration and Conciliation Act is very clear which stipulates that if a party wants to refer the matter before the Arbitrator in terms of agreement clause, then he will have to do the same not later than the date of submitting his first statement. Section 4 stipulates that when a party who knows that a requirement under the arbitration agreement has not been complied with, then he deemed to have been waived his right in terms of the agreement. In this context, reliance has also been placed in a judgment reported in 2020 SCC OnLine Cal 1658 (Lindsay International Private Limited & Ors. v. Laxmi Niwas Mittal & Ors.) wherein it was held that once a suit is filed by a party to an arbitration agreement the other party must at the earliest stage in the proceedings or at the time when the first statement of defence to the plaintiffs claims, file an application under Section 8, it is only then, that the Court may refer the parties to arbitration after applying the tests in the Booz Allen case (2011) 5 SCC 532.

So far as the plaintiff's prayer for clubbing two causes of action is concerned, the defendant/petitioner has relied upon AIR 1953 Calcutta 185 (Sm. Nagendra Bala Debi & Ors. v. Provash Chandra & Ors.). In the said judgment, it has been clearly stipulated that for the for an application under Order I Rule 3 Code of Civil Procedure, there must be some common question of law or fact and also the same act or transaction or the same series of acts or transactions in respect of which or out of which the alleged right to relief arises. It was further held that some common link or nexus must be found in order that the requisite as to there being the same act or transaction or the same series of acts or transactions may be satisfied.

On perusal of the Schedule of the plaint, it appears that two tenements described as Schedule-A and Schedule-B are the part and parcel of the same building, one is on the ground floor (South Eastern Side) and the other is the on the first floor (North Western Side) in connection with Premises No.584, M.B. Road, PS – Nimta, PO – Birati, Kolkata – 700051 and the tenants are the same.

The object of order I, rule 3 is to avoid multiplicity of suits and needless expenses to the parties if it could be avoided without embarrassment to the litigants concerned and the Court. Rule 3 of order I stipulates two factors must co-exist

(i) could the right to relief against the defendants be said to be in respect of or arising out of the same act or transactions or series of acts or transactions

(ii) would any common question of law or fact arise if separate suits were brought against the same/different defendants.

Here in the present case right to relief against same defendant is in respect of same series of acts/transactions and common question of fact/law involved in question of eviction and khas possession from both the tenements.

So far as the issue relating to the defectiveness of notice as pointed out by the defendant/petitioner is concerned, it appears that in paragraph 8 of the plaint, the plaintiff has categorically stated that the plaintiff/respondent sent notice under Section 106 of the Transfer of Property Act on 14th January, 2020 to the defendant terminating tenancies and prior to that notice under Section 80 of the Code also sent on 14th January, 2019. In the written statement, the defendant failed to deal with the said paragraph of the plaint and has made an evasive denial and has not made out any case that it has not received such notice. Their only contention is that two causes of action cannot be adjudicated in one suit and, as such, the notice is defective.

In view of the facts and circumstances of the case and that the issue regarding defectiveness of notice herein is not a pure question of law which can be dealt with or decided as preliminary issue but a mixed question of law and fact which can always be dealt with during trial and, as such, simply on that allegation the suit cannot be thrown away at its threshold.

In view of the said discussion, I find no merit in the revisional application and, therefore, CO 2319 of 2021 is dismissed.

Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Ajoy Kumar Mukherjee, J.)