

13.12.2023
Item No.23
Court No.652.
S. De

C.O. 958 of 2019

**M/s. Dutta Optics.
Vs
Mr. Debyendu Sekhar Saha & Anr.**

Mr. Soumalya Ganguli,
...for the petitioner.

Mr. Amritam Mondal,
Ms. Ananya Chakraborty,
Ms. Shipra Naskar,
...for the respondents.

Challenging the order dated February 28, 2019, passed by the learned Civil Judge (Jr. Division), 1st Court, Malda in Title Suit No. 37 of 2016, the present application under Article 227 of the Constitution of India has been preferred.

By the impugned order the learned Court below was pleased to reject the plaintiff's application under Order VI Rule 17 for amendment of plaint.

The petitioner contended in the present application that she is a tenant under the opposite party no.2 herein in respect of the suit premises and his previous landlord Dibyendu Sekhar Saha who is the opposite party no.1 herein defrauding the petitioner sold the suit premises to opposite party no.2 by a registered deed of sale dated September 8, 2015, with a view to evicting the petitioner without due process of law. The previous landlord i.e. opposite

party no.1 did not file any eviction suit against the petitioner. The petitioner in the present suit was constrained to approach before the learned Trial Court, where petitioner's prayer for temporary injunction was allowed and the opposite parties were directed not to disturb the possession of the petitioner or to change the nature and character of the suit property.

The petitioner further submits that according to the lease deed entered by and between the plaintiff/lessee and opposite party no.1/lessor on July 26, 2012, the defendant no.1 has certain duties and responsibilities but the defendant no.1 has committed breach of all those obligations and suppressing the terms and conditions of the lease deed, he has transferred the same in favour of defendant no.2. He further submits that the defendant no.1/opposite party no.1 had special knowledge and complete control and possession in respect of documents which the petitioner seeks to disclose and bring on record but in this regard the opposite party no.1 deliberately avoided and refused to disclose about the lease deed and for which the plaintiff preferred an application for amendment with a view to incorporating the fact that the lease deed executed by the plaintiff and the defendant no.1 may not have been registered and for which he sought for a prayer for direction upon

defendant no.1 to forthwith register the deed of lease executed on July 26, 2012 by and between the plaintiff and the defendant no.1 and which is lying in the custody of defendant no.1, at the cost of the plaintiff. He also wants to incorporate the fact by that amendment, since transfer was made in favour of the defendant no.2 by the defendant no.1 violating the terms of the lease deed, the said deed executed by defendant no.1 in favour of defendant no.2 should be declared as null and void, being the out come of fraud.

Learned Court below while dealt with the said application for amendment observed that the suit has been filed on the strength of notarized lease deed and the plaintiff only prayed for declaration of his status as leasee. But now he intends to declare the deed in favour of the defendant no.2 as void. Since the plaintiff cannot restrict defendant no.1 who is absolute owner of the property from transferring the said property and a leasee cannot seek for declaration of a deed as void in respect of the property in which he has no title and since the Court cannot compel the defendant no.1 to execute registered sale deed in favour of plaintiff, so the Court below came to the conclusion that the proposed amendment if allowed will change the nature and character of the suit.

Learned counsel, Mr. Amritam Mondal, appearing on behalf of the opposite party during

hearing raised strong objection and contended that proposed amendment is not at all required for adjudication of the real controversy between the parties and that if the proposed amendment is allowed it will change the nature and character of the suit and serious injustice will be caused to the defendants and not only that proposed amendment as sought for, if allowed, will change the cause of action of the suit. Accordingly, the Court below was justified in rejecting the plaintiff's prayer for amendment which does not call for interference.

I have considered the submissions made by both the parties.

On perusal of the plaint it appears that the plaintiff/petitioner herein by filing the aforesaid suit has sought for a declaration that the plaintiff is lawful lessee in respect of the schedule mentioned suit property and for injunction. The plaintiff claimed himself as lessee on the basis of a lease deed dated July 26, 2012 executed by the plaintiff/petitioner herein and the defendant no.1/opposite party no.1. Though it has been stated in the said lease deed that the lease was executed for a period of fifteen years but the said lease deed was simply notarized and was not a registered lease deed. Needless to say that under Section 107 of the Transfer of Property Act, a lease of immovable property from year to year or for any term

exceeding one year can be made only by a registered instrument. Similarly, Section 17(1)(d) of the Registration Act 1908 also postulates that the lease of immovable property from year to year or for any term exceeding one year, registration is compulsory. Section 49 of the Registration Act, 1908 deals with the effect of non-registration of documents which are required to be registered. In the present case, since the lease deed has not been registered, though in the deed it has been contended that the lease has been for fifteen years, the plaintiff has come up with the said prayer for amendment wherein he has sought to incorporate a plea that since the transfer has been made by the defendant no.1 in favour of the defendant no.2, he apprehends that the lease deed might not have been registered till now.

From the schedule of amendment, let me reproduce summary of schedule of amendment as sought for by the plaintiff

- 1) *By incorporating a new paragraph i.e. para 2(a) plaintiff want to incorporate that at the time of formation of lease deed it was notarized but thereafter he reminded defendant no. 1 on several occasions to complete the registration of the lease deed but since no confirmation of registration has been given by defendant no.1, plaintiff apprehends that lease deed might not have registered.*
- 2) *By inserting paragraph 7(a), plaintiff wants to insert that defendant no.1 committed breach of obligations mentioned in lease deed and suppressing lease deed he has transferred the property to defendant no.2 so said deed of sale dated 8th September, 2015 be declared as null and void.*

- 3) *By inserting paragraph 7(b) plaintiff sought to amend the plaint by stating that original lease deed dated 26th July, 2012, in the custody of defendant no.1 is necessary and germane for the purpose of complete adjudication of the dispute involved in the instant proceeding.*
- 4) *By way of amendment, plaintiff wants to incorporate an additional prayer in the plaint for passing a direction upon defendant no.1 to forthwith register the deed of lease, which is lying in the custody of defendant no.1.*

The plaintiff filed one application for injunction before the Court below in the said Title Suit No. 37 of 2016. While disposing said application for injunction the Court below has clearly held on 20.09.2016 that the concerned lease deed is not registered as per Section 107 of the Transfer of Property Act and as such the plaintiff is not lessee in the suit property from year to year but his tenancy comes under the purview of lease from month to month.

Said observation was made by the Trial Court long back on 20.09.2016 and neither party challenged the said observation made by the Trial Court while disposing injunction application and as such, what plaintiff wants to incorporate by way of amendment in first paragraph that he now apprehends that the lease deed might not have registered by defendant no.1 does not find any substance.

On perusal of the averments made in the plaint it further appears that the plaintiff in the said suit in paragraphs 2 and 3 categorically averred that the lease was created with the mutual consent of both the

parties at a monthly rent and he further stated that the plaintiff paid the rent in each month without any iota of default to the defendant no.1 and defendant no.1 had also accepted the said rent by issuing the rent receipts.

So it is plaintiff's own case in the plaint that by the alleged deed dated 26th July, 2012 parties agreed to pay settled amount on monthly basis and as such it was never the intention of the parties to create lease on the basis of annual rent.

It has been categorically held in ***Anthony Vs. K.C. ITTOOP & Sons & Ors.*** Reported in **(2000) 6 Supreme Court Cases 394** in paragraph 16 that non-registration of the document had caused only two consequences. One is that no lease exceeding one year was created and the second is that the instrument became useless so far as creation of the lease is concerned. Here also the presumption that the lease not exceeding one year was created has been clearly reflected by conduct of the parties as also reflected from the averment in the plaint and the observation of court below that plaintiff was a lessee in the suit property under defendant no.1 but his tenancy comes under the purview of lease from month to month, which has been accepted by both the parties.

In another judgment reported in **(1980) 1 Supreme Court Cases 185 (Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta & Ors.)**, the Apex Court has categorically dealt with such issue from paragraph 11 onwards and it has been clearly observed that doctrine of part performance can be used only as shield and not as sword and as such cannot be availed of by tenant filing a declaratory suit. Their Lordship further observed that if an indenture of lease is compulsorily registrable under Section 107 of the Transfer of Property Act, such a lease can only be made by a registered instrument and if not so made, is void altogether. However, if such a person is in possession under a void lease, the landlord accepts rent, an inference of tenancy would follow.

Their lordships' observation in paragraph 11 on a similar context may be reproduced below

“11. Even if it is assumed that the appellant was put in possession for the first time under a lease which turns out to be void, the appellant came into possession of the premises with the consent of the landlords and paid rent from month to month. As the lease was to be for a period of 5 years, for want of registration no operative lease came into existence. In almost identical circumstances in Ram Kamar Das v. Jagdish Chandra Deb Dhabal Deb [1951 SCC 1111 : AIR 1952 SC 23 : 1952 SCR 269, 280 : 1951 SCJ 813] an inference of tenancy was made and the duration of the tenancy in such circumstances was held to be from month to month.”

In view of the aforesaid facts and circumstances of the case what is reflected is that by the conduct of the parties coupled with the averments made by the plaintiff in plaint and in view of unchallenged

observation made by the Trial Court, the deed executed by the parties was not a lease deed exceeding one year nor it was a lease from year to year. Now the plaintiffs by way of amendment sought to convert the suit which was filed in connection with a lease not exceeding one year having not been registered, to a suit claiming lease exceeding one year. Such amendment if allowed will cause serious prejudice and injustice to the defendants.

The Apex Court in ***Revajeetu Builders and Developers Vs. Narayanaswamy & Sons & Ors.*** has laid down the factors to be taken into consideration while dealing with applications for amendment and in paragraph 37 it has been clearly stated that the amendment shall not be allowed where the proposed amendment constitutionally and fundamentally changes the nature and character of the case. Since the proposed amendment if allowed will definitely change the suit filed on the basis of payment of monthly premium through unregistered deed to a suit claiming lease exceeding one year, taking aid from Section 53A of transfer of property Act, so if such amendment is allowed will constitutionally or fundamentally change the nature and character of the case and will attract paragraph 37(5) of the said judgment. Moreover it is settled principle of law as laid down by Privy Council in ***Ma Shwe Mya Vs.***

Maung Mo Hnaung reported in **(AIR 1922 PC 249)** and which has been consistently followed by subsequent Judgements that power to deal with amendment applications always be liberally exercised but nonetheless no power has been given to enable one distinct cause of action to be substituted for another nor to change by means of amendment the subject matter of the suit. (In this context case law laid down in **State of A.P. & Ors. Vs. Pioneer Builders, (A.P. (2006) 12 Supreme Court Cases 119** followed).

In view of the aforesaid discussions and the facts and circumstances of the case, I find that the proposed amendment is not at all required for the purpose of adjudication of the suit and such amendment, if allowed, will change the nature and character of the suit and also change the cause of action and not only that such amendment, if allowed, will cause serious prejudice to the defendants, since it has been clearly established from the conduct of the parties and as per law that the lease deed in question is not intended to be created exceeding one year and as such I find nothing to interfere with the ultimate finding made by the Court below.

Accordingly, C.O.958 of 2019 is dismissed.

Urgent certified photostat copy of this order, if applied for, shall be given to the parties as

expeditiously as possible on compliance with all the necessary formalities.

(Ajoy Kumar Mukherjee, J.)