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APDT/1/2023

With

CS/257/2018

IA NO:GA/1/2023

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction

ORIGINAL SIDE

RAJSHRI PRODUCTIONS PRIVATE LIMITED

-VS-

T. E. THOMSON AND COMPANY LIMITED

BEFORE:

The Hon'ble JUSTICE HARISH TANDON

The Hon'ble JUSTICE PRASENJIT BISWAS

Date : 3rd February, 2023.

Appearance:

Mr. Moloy Ghosh, Sr. Adv.

Mr. Rajarshi Dutta, Adv.

Mr. A. P. Agarwalla, Adv.

...for the appellant

Mr. Rupak Ghosh, Adv.

Mr. Chayan Gupta, Adv.

Mr. Rittick Chowdhury, Adv.

Mr. Dwip Raj Basu, Adv.

...for the plaintiff/respondent

The Court: An interesting point is raised in the instant appeal relating to the definition of a “rent” which has not been defined in the Act itself. The undisputed facts unfurled from the record is that a suit for recovery of possession under the Transfer of Property Act was filed after

the expiry of period provided for in the notice under Section 106 of the said Act. It is also not in dispute that at one point of time, the tenancy was protected under the West Bengal Premises Tenancy Act, 1956 as it does not make any distinction on the score of the quantum of rent but after the promulgation of West Bengal Premises Tenancy Act of 1997, the tenancy which fetches a rent above the cap mentioned therein may not come within the peripheral of the West Bengal Premises Tenancy Act, 1997. Section 3 of the Act of 1997 containing an exemption clause whereunder certain premises are excluded from the purview of the West Bengal Premises Tenancy Act, 1997. Such distinction can be seen from the aforesaid provision that if any premises is let out for non-residential purpose carrying more than Rs.10,000/- as monthly rent in respect of the premises included within the limits of the Kolkata Municipal Corporation or the Howrah Municipal Corporation, as the case may be, shall not be protected or regulated by the provisions of the Act of 1997. The dispute which hinges in the instant matter pertains to the interpretation of the provision contained in Clause 5 of Section 3 of the Act of 1997 and it would be profitable and relevant to quote the aforesaid provision which runs thus:

“3. (f) any premises let out for non-residential purpose, which carries more than –

- (i) three thousand rupees as monthly rent in the areas included within the limits of the Calcutta Municipal Corporation or the Howrah Municipal Corporation, or

- (ii) one thousand and five hundred rupees as monthly rent in other areas to which this Act extends.

Explanation. – Where any premises is let out partly for residential purpose and partly for non-residential purpose, the provisions of clause (f) shall apply to such premises in proportion to respective areas.”

It is to be borne in mind that the exemption is not in respect of the tenancy but in respect of a premises which does not come within the circumference of the Act of 1997 and, therefore, the important factor which requires consideration is whether the premises let out for non-residential purpose fetches a rent more than Rs.10,000/-, provided the said premises is situated within the Kolkata Municipal Corporation, shall come within the ambit of the said Act. There is no cavil of doubt in our mind that the non-residential premises let out by the landlord fetching more than Rs.10,000/- if situated within the limits of the Kolkata Municipal Corporation, the provisions or the protections under the said Act shall not be available to the tenant. Obviously, the moment the premises is exempted from the purview of the said Act, the recovery of possession can be sought under the Transfer of Property Act which does not contain any provisions relating to protection of the tenant. We are not unmindful of the proposition of law that the West Bengal Premises Tenancy Act, 1997 is a welfare piece of legislation and protects the tenant from being evicted by an unscrupulous landlord. The aforesaid observations can be fortified from the language employed in Section 6 of

the Act of 1997 which starts with a *non-obstante* clause that no decree or order for recovery of possession of any premises shall be made by the civil judge having jurisdiction in favour of the landlord against the tenant except on a suit being instituted by such landlord on one or more of the following grounds enumerated therein. The Transfer of Property Act is silent on such score and Section 111 of the said Act envisages the determination of a lease on the eventualities incorporated therein. The expiry of period of the statutory notice under Section 106 of the Transfer of Property Act is one of the incidences of the determination of the lease under Section 111 of the Act and there is no protection given to such precarious tenant. The instant suit was filed invoking the said provision that despite the service of the notice under Section 106 of the Transfer of Property Act, the appellant failed and neglected to hand over the possession of the demise premises and, therefore, exposed itself liable to be evicted therefrom.

After the service of the summons, the defendant entered appearance and signified its intentions to contest the proceedings which led the plaintiff/respondent to take out an application under Chapter XIII A of the Original Side Rules framed by this Court. Rule 6 of Chapter XIII A provides that upon an application, the Judge may unless the defendant by affidavit or otherwise as may be directed has a good defence to the claim on merits or discloses such facts as may be deemed

sufficient to entitle him to defend may make an order refusing leave to defend and forthwith pronounce a judgment in favour of the plaintiff.

By the impugned order, the learned Judge in the trial Court did not found any plausible defence or a satisfactory defence having been put by the appellant in relation to the claim made against it and passed the summary judgment. There is no quarrel to the proposition that the summary judgment can be passed by the trial Court invoking the provisions contained in Chapter XIII A of the Original Side Rules provided it recorded the satisfaction that the defendant has no defence to the claim of the plaintiff and, therefore, not entitled to leave to defend.

The only point which is raised in the instant appeal is what definition can be assigned to the word “rent” which is admittedly not defined in the Act of 1997. There has been a considerable debate on the definition of the word “rent” and the various judicial pronouncements have been made defining the rent.

The earliest judgment of the Supreme Court in this regard was in respect of *Karnani Properties Limited vs. M/s. Augustin*, reported in AIR 1957 SC 309. The Apex Court was considering an issue whether any other component which is not a basic rent can be included within the definition of a “rent”. It has been held that any non-variable component paid for use and enjoyment of the facilities and the amenities attached to the tenancy shall come within the inclusive definition of a rent. Subsequent thereto a further debate was raised when the tenant was

enjoying the electricity provided by the landlord and the question arose whether the electricity charges can be brought within the circumference of the rent. It has been held that any component which is variable in nature cannot be regarded as a rent but the component which is fixed shall definitely come within the definition of a rent. Obviously, the charges for electricity depends upon the consumption of the electricity by the tenant at the demised premises which varies on every month and, therefore, cannot be regarded as the rent for the purpose of ascertaining the quantum thereof.

There was no distinction in relation to a quantum of rent under the West Bengal Premises Tenancy Act, 1956 but by virtue of Section 3 in West Bengal Premises Tenancy Act, 1997, the real and apparent distinction has been made in relation to a premises keeping the same outside the purview of the said Act.

In the instance case, the half portion of the first floor including a staff quarter comprising of 4000 sq.ft. at the premises situated within the limits of the Kolkata Municipal Corporation was let out to the appellant on the basis of an agreement of lease which admittedly expired by efflux of time. However, the appellant was allowed to continue to occupy the demised premises upon acceptance and payment of rent and, therefore, one can safely go on the premise that by virtue of holding over the said tenancy was allowed to be continued on an assent being granted by the landlord. The rent receipts would evince that there are three

components of the charges claimed by the respondent/landlord in respect of a demised premises, firstly, basic rent, secondly the Corporation tax and thirdly, the commercial surcharge. It is also not in dispute that all such components are paid on one go and not separately by the appellant. A point is raised by the appellant that the Corporation tax or the commercial surcharge cannot be an integral part of the rent for the purpose of ascertaining the quantum of rent as those are statutory dues and/or obligations foisted upon the tenant by virtue of Section 5 of the Act of 1997.

The significant difference between the provisions contained in 1956 Act and 1997 Act as noticed is that the earlier Act did not contain such provisions, more particularly, the obligation of the tenant. By virtue of Section 5 of the Act of 1997, it is a statutory liability and/or duty of the tenant to pay the share of municipal tax as an occupier of the premises in accordance with the provisions of the Kolkata Municipal Corporation Act, 1980. It is sought to be contended by the appellant that such being a statutory liability or the obligation imposed upon the tenant even if the agreement or otherwise does not provide the payment of the said tax, it becomes a statutory liability and, therefore, cannot be kept within the purview of the word “rent”. In fact, the reliance is placed upon a recent judgment of the Supreme Court rendered in the case of *Eih Limited vs. Nadia A Virji* reported in 2022 SCC OnLine SC 947. An argument was advanced in the said report that by virtue of Section 230

of the Kolkata Municipal Corporation Act, 1980, the property tax imposed on the premises is a primary liability of a person that is the owner who, in turn, can recover the property tax by apportioning the same from the occupier as a rent. It was, thus, contended that by virtue of the aforesaid provision, the property tax was included within the ambit of the rent and, therefore, there is no ambiguity on the part of the Court in passing a summary judgment if the rent is covered under the exempted provision. The Apex Court held that the aforesaid provision creates a fiction that the tax apportioned on the tenant shall be treated as a rent and would be recoverable as such and did not accept the contention of the landlord in the following:

“26. Thus, as observed and held by this Court in the case of *Calcutta Gujarati Education Society* (supra), the amount of tax due and payable by the tenant under Section 230 of the Act 1980 r/w Section 5(8) of the Act 1997 can be recovered as arrears of rent (Section 231 of the Act 1980) and for that purpose, namely, for the purpose of recovery the tax apportioned on the tenant would be treated as ‘rent’ and would be recoverable as such. The aforesaid judgment cannot be read holding that the tax apportioned on the tenant be treated as ‘part of the rent’, as contended by Shri Rana Mukherjee, learned Senior Advocate appearing on behalf of the landlord. Merely because the obligation to pay half of the property tax and surcharge would be upon the tenant as per section 230 of the Act 1980 and the tenant is obliged to pay his share of municipal tax as an occupier of the premises under Section 5(8) of the Act 1997 and merely

because for the purpose of recovery of the tax due from the tenant, such tax apportioned can be recovered as rent, such tax apportioned (half of the amount of the property tax and surcharge) cannot become part of the rent of the premises which is tenanted. For that purpose, the terms and conditions mentioned in the tenancy agreement/lease agreement are required to be considered. For example, if in the tenancy agreement if it is provided that the tenant shall pay 'X' amount which shall include the taxes, the tax component can be said to be 'part of the rent'. However, if under the agreement and/or even under Section 230 of the Act 1980 r/w Section 5(8) of the Act 1997, the tenant is liable to pay tax separately or half of the amount of tax now statutorily liable to be paid, the same can be recovered as arrears of rent because such 'tax' is to be treated as 'rent' for the purpose of recovery. However, the same cannot be said to be 'part of the rent'. Therefore, reliance placed upon the decision of this Court in the case of *Calcutta Gujarati Education Society* (supra) by learned counsel appearing on behalf of the landlord is on a misreading of the said decision. As observed hereinabove, the said decision cannot be read to mean that the tax apportioned can be said to be part of the rent as sought to be contended by Shri Rana Mukherjee, learned Senior Advocate appearing on behalf of the landlord."

(emphasis supplied)

The proposition of law as enunciated in the aforesaid report exposes that the property tax cannot *ipso facto* come within the purview of the rent but depends upon the intentions and the conduct of the parties in relation thereto. It can be safely said that there is no uniform

principle that the property tax shall be outside the purview of the rent but it depends upon the facts of the each case which can be conceptualised from the examples quoted in the aforesaid passage. It has been held that if the parties have agreed that the amount shall include the tax then in that event the tax component will become a part of the rent. There is no scintilla of doubts in our mind that every component in respect of the enjoyment of the premises payable to the landlord may not come within the definition of a rent as it depends upon the intentions and the conduct of the parties in relation to the tenancy having created. Any amount or a component which is variable in nature cannot be regarded as a component of the rent even if it is paid along with the basic rent.

On the conspectus of the aforesaid proposition of law, let us see whether the defence of the appellant justifies that the portion of the municipal tax or the surcharge is not a component of the rent nor can be regarded as an integral part of the rent for the purpose of determining the quantum of the rent so that it can fall outside the purview of the exempted clause. As already discussed three components constitute the payment per month at the instance of the appellant, our attention is drawn to the rent receipts issued by the respondent for the months of January and February, 2017 which indicates that a sum of Rs.6,900/- was basic rent and a sum of Rs.1,380/- was the occupier's shares of municipal tax totalling Rs.8,280/-, which is admittedly below the cap of

Rs.10,000/- as indicated in clause (f) of Section 3 of the Act of 1997. It is apparent from the record that the tenancy was created many years before and the occupation of the appellant in respect thereof is more than decades. The rent which was initially fixed might have been enhanced from the time to time either by virtue of the terms and conditions incorporated in the agreement or by mutual agreement between the parties. The rent which was fixed at the time of creation of the tenancy may not be the same by passage of time. After the month of January and February, 2017, we cannot ignore the correspondences exchanged between the appellant and the respondent in the month of June and subsequent thereto. By virtue of a letter dated June 2, 2017 issued by the appellant, there is a clear stipulation that they are enclosing the rent and the arrears which became due from September, 2015 to be accepted by the landlord. It is clearly indicated in the said letter that the rent at the rate of Rs.10,080/- for the months of April, 2015 and May, 2017 are also enclosed by virtue of cheques being issued in this regard. The subsequent letter dated July 20, 2017 would reveal that since the rent for the month of February, 2017 which was paid by cheque was not encashed and the period of validity of the cheque has expired, a fresh cheque for the rent of the said month is further enclosed which indicates a sum of Rs.9,660/-. However, by a subsequent letter dated July 25, 2017, the appellant in categorical terms indicated that the rent for the month of June, at the rate of Rs.10,800/- is paid by a cheque

and asked the landlord/respondent to issue the rent receipts therefor. The landlord responded to the aforesaid payment on 1st December, 2017 issuing rent receipts for the aforesaid months and there is no ambiguity that the rent from the months of April to July, 2017 was accepted and agreed at the rate of Rs.10,080/-. Even in the month of March, the appellant caused a letter dated 12th March, 2018 enclosing the cheques towards the rent for the months of December, 2017 and January, 2018 at the rate of Rs.10,080/-.

From the aforesaid facts deduced from the record, it may be that at one point of time, the rent was below Rs.10,000/-but at the time of determining the tenancy, the appellant unequivocally, clearly and explicitly admitted that the rent is at the rate of Rs.10,080/- per month. In view of the principles laid down in *Eih Limited (Supra)*, the moment the appellant has accepted the components of the municipal tax as well as the occupier's shares to be an integral part of the rent, in such event, it leads to an inescapable conclusion that the municipal tax partakes a character of a rent and for the purpose of invoking the provisions of the exempted clause, the premises is kept outside the purview of the Act of 1997. The intention and the conduct of the appellant are explicit and patent that the rent last paid was at the rate of Rs.10,080/- per month in respect of the demised premises and, therefore, exceeds the limit set out in Section 3(f) of the Act of 1997. The aforesaid discussion leads to an inescapable conclusion that the premises is not governed by the West

Bengal Premises Tenancy Act, 1997 but under the Transfer of Property Act, as it fetches rent beyond the permissible cap. It leads us to another question whether any defence is put on the validity and the legality of a notice under Section 106 of the Transfer of Property Act. The service of the notice has not been disputed for the simple reason that the said notice was duly responded to by the appellant. The only contention which appears from the reply to the said notice is that the identical defence was taken that the tenancy does not come within the purview of the Transfer of Property Act but protected under the West Bengal Premises Tenancy Act, 1997. It is, thus, apparent that the legality and the validity of the notice has not been disputed nor the service thereof and, therefore, the moment the period enshrined in the said notice has expired, there is no protection which is extended to the appellant to resist the claim of the plaintiff/respondent. We, thus, do not find any grounds warranting interference with the impugned order.

The appeal is dismissed.

There will be no order as to costs.

(HARISH TANDON, J.)

(PRASENJIT BISWAS, J.)