

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present :
THE HON'BLE JUSTICE ARINDAM MUKHERJEE

IA GA NO.2 of 2022
In
CS 252 of 2021

KAUSICK AUDDY and Anr.
Vs.
UDAY SHAH and Anr.

For Plaintiffs	: Mr. Sourav Sen, Mr. Soumen Das,Advocates
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For the Petitioners/Defendants no.7 & 8	: Mr. Buddhadeb Ghosal, Mr. Manik Lal Poddar, Advocates
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Last Heard on	: 01.08.2023.
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Judgment on	: 20th December, 2023.
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Arindam Mukherjee, J:

1. This application for rejection of the plaint under the provisions of Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as CPC) have been filed by the defendants on the ground that the suit being one for recovery of possession has been valued in an absurd manner to attract the jurisdiction of this Court.

2. The defendants say that the plaintiffs have filed the instant suit on the basis of a Deed of Lease executed on 28th day of September, 2006 for a period of ten years commencing from 1st day of September, 2006 and ending on 31st August, 2016 to have expired by efflux of time and as such the defendants are occupying the same as trespassers. The Deed of Lease states Sreemanta Auddy as lessor inducted Sri Uday Shah, defendant no. 1 and Bhupendra Chimanlal Shah, since deceased as lessees for the first and second floor of the premises no. 2/1A, Sun Yet Sen Street, P.S. Amherst Street, Kolkata-700012 comprising of three rooms in the 1st floor and one room in the second floor of the said premises (hereinafter referred to as the suit premises).
3. The defendants further submit that for recovery of an immovable property from a tenant under the provisions of Section 7 (xii) (d) of the West Bengal Court Fees Act, 1970 which includes even a tenant by holding over after determination of a tenancy, the suit is to be valued according to the aggregate rent payable for 12 months immediately preceding to the filing of suit. The last paid of rent as mentioned in the plaint is Rs.2,310/- hence the suit value should be assessed at the rate of Rs.2,310/- per month for 12 months equivalent to Rs.27,720/- but the suit is valued at Rs.19,20,000/-. The defendants submit that the plaintiffs cannot seek any relief for mesne profit against the defendants in this suit for recovery of peaceful possession as the suit is governed by the provisions of the West Bengal Premises Tenancy Act, 1997 (hereinafter referred to as the 1997 Act) in view of the fact that the rent amount is less than Rs. 6500/- in respect of a residential property within the jurisdiction of the Kolkata Municipal Corporation (KMC).

Apart from this, the lease is for 10 years wherein the parties did not agree to opt out of the provisions of the 1997 Act. The tenancy, therefore, is a month to month tenancy under the provisions of the 1997 Act. The defendants also say that unless the tenant is held to be in unauthorized occupation, the tenant governed under the 1997 Act continues to be a statutory tenant against whom mesne profit cannot be claimed at the time of filing the suit. The defendants also say that assuming without admitting that the plaintiff is entitled to claim mesne profits and add up the arrears of rent and mesne profit under the provisions of Order II Rule 4 of CPC then also the plaintiffs at the highest can include only the mesne profit after expiry of the notice period till institution of the suit i.e. between 7th February, 2021 and 21st December, 2021 @ Rs.30,000/- per month as per plaintiffs' version which comes to about Rs.3,30,000/- for about 11 months. If the arrears of rent for 5 years i.e. between 2016 and 2021 is added up @ 2310/month without considering the limitation as to such claim it comes to Rs.1,38,600/-. Thus the 12 months rent @ 2310/month, mesne profit of Rs.3,30,000/- and arrears of rent will not take the suit value beyond Rs.5,00,000/-. The instant suit, therefore, is overvalued and this Court does not have the jurisdiction to receive, try and determine the suit. That apart and in any event Rs.30,000/- per month is an absurd sum as mesne profit taking into account the condition of the premises, its location and facilities available. Even going by the provisions of the 1997 Act a landlord is at the highest entitled 5 times increase in rent which will take the figure to Rs.11,550/- per month and not to Rs.30,000/- as claimed.

4. The defendants say that the instant suit is not maintainable on the ground of non-joinder of parties. Bhupendra Chimanlal Shah one of the lessee and his wife Bina Bhupendra Shah have died intestate leaving behind one son viz., Jatin Shah, the defendant no. 2 and one daughter viz., Smt. Amishi D. Shah who was not made a party to the instant suit.

The defendants have relied upon the judgments reported in **70 CWN 55 (Jayantilal Ojha and Co. vs. Dalhousie Properties Limited)** and **in 70 CWN 56 (Dalhousie Properties Limited vs. Jayantilal Ojha and Co.)**. By relying upon these two judgments, the defendants say that the suit in the event is governed by the provisions of Transfer of Property Act, 1882 then only a reasonable amount can be claimed as mesne profit for the period between 1st September, 2016 and till expiry of the notice period under the notice dated 20th January, 2021 and that should be equivalent to the rent last paid. That apart the claim of the plaintiffs for mesne profit during this entire period is also not tenable in law as the claim has to be restricted for a period of three years prior to institution of the suit. This is apart from the fact that the claim for mesne profit is absurd. The defendants submit that the valuation of the instant suit has been wrongfully assessed to the tune of Rs. 30,000/- per month for a period of 64 months as the suit is governed by the provisions of 1997 Act and is absolutely against the provisions of the West Bengal Court Fees Act, 1970. The defendants further submit that the plaintiffs have claimed Rs.30,000/- per month as mesne profit from 1st September, 2016 for a residential accommodation of about 1200sq.ft. where the last paid rent under the lease deed was Rs.2310/-

per month till 31st August, 2016. This figure under any stretch of imagination cannot become Rs.30,000/- per month.

The defendants have further relied upon a judgment reported in **72 CWN 404 (Pravin Chandra Ochhavlal vs. Girdharlal Govindji)** and submits that the mesne profit claimed post notice dated 20th January, 2021 is also palpably absurd apart from the fact it cannot be claimed in view of the ratio laid down in Dalhousie Properties (supra). The plaintiffs have claimed Rs.1000/- per sq.ft. for a residential accommodation which takes the monthly figures to Rs.30,000/-.

5. The suit, therefor, is not maintainable and the plaint according to the defendants should be rejected.
6. The plaintiffs on the other hand contend that the said Bina Bhupendra Shah informed the predecessor-in-interest of the plaintiffs that the said Bina Bhupendra Shah and Jatin Shah are the only legal heir/heiress and the details of the other legal heirs/heiresses of the said Bhupendra Chimanlal Shah were not intimated to the plaintiffs and as such the suit has been instituted taking them into consideration. The suit in any event cannot be dismissed on that ground alone as non-joinder of parties in the instant case cannot and does not arise. The plaint cannot be rejected on that ground as legal representative is already on record. That apart, if necessary the daughter can be made a party.
7. The plaintiffs submit that the provisions of the West Bengal Court Fees Act, 1970 are not attracted as the defendants do not come within the purview of the definition of a tenant. The plaintiffs contend that the defendants after the expiry of lease are not tenants but trespassers and

as such the suit is not for recovery of an immovable property from tenant but is for recovery of possession by evicting the trespasser. The provision of assessing suit value according to aggregate rent payable for one year preceding the filing of the suit is also not applicable in the instant case. The plaintiffs are suffering due to ex facie illegal occupation by the defendants and are losing day to day profits hence, the defendants are liable to pay the mesne profits.

8. The plaintiffs say that though the notice dated 20th January, 2021 has been alleged to be issued under the provisions of Section 106 of the Transfer of Property Act, 1882 but in effect the plaintiffs by the said notice had asked the defendants to quit and vacate the suit property as their occupancy to the suit premises are that of trespassers and did not terminate the tenancy. No termination of tenancy has been either made or was sought for in the notice as the lease had expired by an efflux of time with the expiry of 31st August, 2016 which had brought to an end to the tenancy right of the defendants and the defendants were duty bound to quit and vacate the property. The notice, according to the plaintiffs, is not for terminating the tenancy but is only for return of the vacant possession of the suit property after expiry of lease by efflux of time.
9. The plaintiffs also say that the plaintiffs are entitled to mesne profit right from 1st September, 2016 as the defendants continued to occupy the suit property despite expiry of the lease by efflux of time. Even after the plaintiffs having made known to the defendants that they are not inclined to allow the defendants to continue in occupation any further

the defendants did not quit and vacate the suit premises. The mesne profit has been, therefor, claimed in the suit under the provisions of Order II Rule 4 of the CPC. The quantum of mesne profit claimed is reasonable and fair as the defendants are required to pay that much amount to avail a tenancy of similarly situated premises and are thereby making profit for such sum. Dalhousie Properties (supra) also permits to compute the pre-suit mesne profit under Section 7 (i) of the Court Fees Act, 1970.

10. The plaintiffs have relied on judgments reported in **1981 (2) SCC 199 (Shanti Devi vs. Amal Kumar Banerjee)** and **2022 SCC OnLine SC 1161 (Indian Oil Corporation Ltd. vs. Sudera Realty Private Limited)** to contend that where a lease is for a definite term and it expires by efflux of time by reason of Section 111(a) of the Transfer of Property Act, 1882 there is no requirement of service of notice under the provisions of Section 106 of the Transfer of Property Act, 1882 for determination of lease.
11. After hearing the parties and considering the materials on record the core issue is whether the suit has been over-valued to attract the pecuniary jurisdiction of this Court.
12. In deciding this issue, several issues to be dealt with on merit get interlinked which should not be considered at the stage of rejection of plaint under the provision of Order VII Rule 11 of the CPC.
13. The original lease being a registered document was for 10 years which had expired on 31st August, 2016 after having continued for the full tenure. The last paid lease rent is Rs.2310/- which is less than

Rs.6500/- being the ceiling limit which brings a tenancy out of the ambit of 1997 Act. In the instant case the tenancy came into operation by way of a registered document. In order to bring the tenancy out of the 1997 Act the consent of the parties to treat the tenancy outside the jurisdiction of 1997 Act has to be specifically recorded in view of the provisions of Section 3 (c) of the 1997 Act. Although, the plaintiff relies upon a clause in the deed to contend that such recording is there but on a holistic reading of the deed no such specific reading is there without which it can be said that the lease operates under Section 3 (c) of the 1997 Act. Even otherwise the lease had come to an end in 2016 while the suit is filed in 2021. Assuming without admitting if the rent quantum i.e. rent being less than Rs.6500/- for residential premises within Kolkata Municipal Corporation (KMC) area which was fixed by the 2002 amendment being prior to the execution of the lease deed then also it cannot be said that provisions of 1997 Act is not applicable. The defendants including the defendant No.1 being the original lessee continued to occupy the premises. The plaintiffs did not take any step for their eviction till the issuance of notice under Section 106 of the Transfer of Property Act, 1882 on 20th January, 2021. Even if the defendants did not pay the rent for this period, the defendants can at the highest be defaulters and alleged to be in unauthorized occupation under the provisions of 1997 Act and not a tenant at sufferance under the provisions of 1882 Act which is akin to a trespasser. Unless there is a declaration that the defendants are in unauthorized occupation no mesne profit can be claimed against them for the period between 1st September, 2016 and 7th February, 2021.

14. The defendants, if on the other hand can show that they have paid the rent then a fresh tenancy by holding over may arise. In that event the notice ought to have terminated the new tenancy coming into operation by holding over. In a situation where the registered lease expires by efflux of time and the lessee continues to be in possession, it is treated to be a month to month tenancy on the same terms and conditions as recorded in the lease deed subject to payment and acceptance of rent. It is to be also noted that the original lessor died on 29th August, 2015 before expiry of the lease term. The adjudication of these issues cannot be entered into at this stage of the suit.
15. If the provisions of Section 7 (xii) of the West Bengal Court Fees Act, 1970 are construed in its plain language along with the provisions of Order II Rule 4 of the CPC then in a suit for recovery of possession from the tenant for the purpose of valuation, the plaintiffs can include apart from the 12 months' rent immediately preceding the date of institution of the suit, the mesne profit, arrears of rent.
16. The defendants are correct when they allege that the defendants cannot be termed as a trespasser unless there is a declaration to that effect from the Court. Considering the continuance for about five years after the tenure of the lease coupled with the quantum of rent, there is prima facie a clear indication that the tenancy is governed by the provisions of 1997 Act. The tenant after termination of tenancy under the 1997 Act remains to be a statutory tenant. The arrears of rent between 2016 and 2021 are for 5 years and as such a limitation issue also comes into operation. Even if we ignore that, the suit for the

purpose of valuation cannot exceed more than Rs.5,00,000/- even taking into account the facts and figures available from the plaintiffs. At the same time mesne profit cannot be allowed from 2016 when the plaintiffs did not take any step seeking vacant possession within a reasonable period from the expiry of the lease when the plaintiffs found that the defendants did not voluntarily lease the premises.

17. The contention of the plaintiffs that the defendants are not tenant and the suit does not fall as one for recovery of possession from the tenants but is a suit for recovery of possession from the trespasser is also not acceptable as the plaintiffs have valued the suit under the provisions of Section 7 (xii) of the West Bengal Court Fees Act, 1970 and not under section 7(vi)(a) of the said Act as required in case of suit against trespassers. The plaintiffs, therefore, cannot argue that the suit is for recovery of possession from the trespasser. That apart in any event one of the original lessee is alive and the entry of the said defendant No.1 to the premises is legal by virtue of lease deed. It may have turned into an unauthorized occupancy due to subsequent event but that does not permit the original lessee to be called as a trespasser particularly when the application of the Transfer of Property Act, 1882 to this case is in dispute and there is a strong possibility of the provisions of 1997 Act being attracted. The valuation and its methodology as pleaded in paragraphs 12, 13 and 18 also clearly shows that the suit is for recovery of possession by evicting the tenants /lessee. The argument advanced on behalf of the plaintiffs that the notice dated 20th January, 2021 is only for the purpose of calling upon the defendants to vacate and is not a termination notice also goes against the plaintiffs. The very

basis of an eviction suit is termination of tenancy. Although, there are line of cases where no notice of termination is required where lease terminates due to efflux of time. In that case the money claim of the plaintiffs gets barred beyond three years prior to institution of the suit. Even if it is assumed that the suit for recovery of possession and can be filed within 12 years from termination. The suit is not framed in such a manner.

18. A similar question came up for consideration in the case of ***Nandita Bose v. Ratanlal Nahata***, reported in ***(1987) 3 SCC 705 : AIR 1987 SC 1947***. The Court held that the claim for mesne profit/damages was neither palpably absurd nor imaginary. The Court went on to observe that the acceptance of the view put forward by the tenant may lead to encourage him who has forfeited his right to tenancy to carry on a dilatory litigation without compensating a landlord suitably for the loss suffered by him on account of the unreasonable deprivation of the possession of his premises over a long period until he is able to get possession of the premises through Court. The fact of forfeiture is, however, not available in the instant case.
19. The facts in the case of ***J. Thomas & Co. Pvt. Ltd. vs. Pawan Kumar Tebriwalia*** ***(1998 (2) CHN 502)*** relied upon by defendants, have a good degree of resemblance with the facts involved in this case. The tenant in that case came into possession under a registered indenture of lease for a period of 21 years with an option to renew for a further period of five years given to the lessee. The initial period of 21 years ended in the year

1986. Rent at the rate of Rs. 950/- per month was thereafter paid and accepted for five years.

20. In appeal therefrom two points were taken by the appellant of which we are here concerned with only the first one for our present purpose, i.e., fraudulent pecuniary valuation of suit seeking to wrongfully invoke the pecuniary jurisdiction of the Court. It has been held that if the Court is of an opinion that the claim of the plaintiff is absurd and has been made absurdly high to deprive the proper lower court of its jurisdiction then and in that event the suit can be dismissed on that ground. To express succinctly, the valuation has to be established patently to be arbitrary and unreasonable.
21. Reference may also be made to the judgments reported in **2012 (3) CHN 225 (Punjab & Sind Bank vs. Technoshop Private Limited)** and (**In re: Smt. Dalia Ghosh**) reported in **1991 (2) CLJ 226** wherein a Division Bench of this Court relying on the case of *Nandita Bose* (Supra) and a few others had held that the valuation put in by the plaintiff to be demonstratively arbitrary and unreasonable the same has to be established patently to be arbitrary and unreasonable. In the present case there is no sufficient material placed before us to satisfy the above test and as such we hold that the contentions of the appellant must fail.
22. In the instant case Rs.30,000/- as a figure of mesne profit may not be arbitrary or palpably absurd but where the provisions of 1997 Act is found to be applicable, the suit for the purpose of Court fees and jurisdiction cannot be over ten lakhs even on the basis of the facts and figures supplied by the plaintiffs in view of the fact that the suit is not

framed in such manner and the valuation proposed by the plaintiff is impermissible in law. The defendants are found to have an arguable case when the defendants contend that the aggregate of one year rent immediately preceding the institution of suit, mesne profits even at the rate computed by the plaintiffs for the period between 7th February, 2021 and 21st December, 2020 along with the arrears of rent for five years between 2016 and 2021 takes the aggregate sum to about Rs.5,00,000/- which is much less than Rs.10,00,000/- to enter the pecuniary jurisdiction of this Court.

23. In the aforesaid facts and circumstances, the suit is over-valued and this Court does not have the pecuniary jurisdiction to receive, try and determine this suit.
24. Although, Order XLIX Rule 3(1) of the CPC makes the provisions contained in Order VII Rule 10 inapplicable to Chartered High Courts, however this Court by an amendment dated 14th May, 1974 to the High Court Rules applicable in the Original Side of this Court, published in the Calcutta Gazette part (1) dated 1st August, 1974, the provisions of Order VII Rule 10 of CPC has been made applicable to suits filed in this Court. Therefore, since 1st August, 1974 the provisions contained in Order VII Rule 10 of the Code are applicable to suits filed in the Original Side of this Court.
25. The plaint is, therefore, directed to be returned along with the Court fees for being presented before the appropriate Court subject to other applicable provisions of law.

GA 2 of 2022 is accordingly disposed of.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(ARINDAM MUKHERJEE, J.)