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ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APO 80 of 2023
IN
CS 142 of 2013

PODDAR PROJECTS LIMITED & ANR.
VS.
ECONOMIC TRANSPORT ORGANISATION LIMITED

BEFORE:

The Hon'ble JUSTICE JOYMALYA BAGCHI
AND

The Hon'ble JUSTICE GAURANG KANTH

Date: 10th January, 2025.

Mr. Debnath Ghosh, Sr. Advocate,
Mr. Avinash Kankani, Advocate,
Mrs. Arunima Lala Sengupta, Advocate,
Mr. Suman Majumder, Advocate,
. . . . for the appellants.

Mr. Mainak Bose, Sr. Advocate,
Mr. Anurag Bagaria, Advocate,
Mr. Amitabh Ray, Advocate,
. . . for the respondent.

Joymalya Bagchi, J.:-

1. Appellants/plaintiffs are the landlords of 9725 sq. ft. on the ground floor of premises no. 18, Rabindra Sarani, Kolkata – 700 001, (hereinafter referred to as the demised premises). The respondent/defendant is a monthly tenant at a monthly rent of Rs.12,278/-. Initially the respondent/defendant was a tenant under the first appellant and one 'M/s. *Poddar Udyog Limited*'. Pursuant to a scheme of arrangement sanctioned by

this Court vide order dated 7th April, 1998, an undivided share of tenancy comprising of 3055 sq. ft. was transferred in favour of the second appellant thereby the appellants became the joint landlords of tenancy. Though the tenancy was for a single premise, on the request of the respondent/defendant separate rent receipts were issued in favour of the respondent/defendant.

2. On 3rd October, 2012 the appellants served a notice upon the respondent/defendant terminating the monthly lease and called upon the respondent/defendant to quit, vacate and hand over peaceful possession of the demised premises under Section 106 of the Transfer of Property Act. The notice was duly received by the respondent/defendant but the latter did not vacate the said premises.

3. On 23rd April, 2013 a suit was filed before this Hon'ble Court *inter alia* praying for a decree of eviction of the respondent/defendant from the tenanted premises and for mesne profits. In the said suit, an application under Chapter XXXA of the Original Side Rules being GA 2883 of 2013 was filed for summary decree of eviction. After hearing the parties, the Hon'ble Single Judge, *inter alia*, held that:-

"The defence of the respondent/defendant was feeble, but there could be a small ray of hope flickering at the end of the tunnel."

4. Holding as aforesaid, the Hon'ble Single Judge granted conditional leave to defend to the respondent/defendant under the following terms:-

"I, therefore, grant the defendant conditional leave to defend. The defendant upon payment of occupational charges @ ₹ 4 lakh per month on and from March 2017 till the disposal of the suit shall be entitled to defend the suit. The occupational charge for the month of March 2017 shall be paid by 10th March 2017 and the future monthly occupational

charges shall be paid by 10th day of each succeeding month. Upon payment of the occupational charges for the month of March 2017, the defendant shall be entitled to file written statement within a period of four weeks from that date. In default of making payment of the monthly occupational charge for the month of March 2017 or any of the future monthly occupational charges, the decree for khas possession shall automatically follow and for which there would be no need to apply afresh.”

5. Respondent/defendant carried the matter in appeal and the Hon’ble Division Bench modified the order of Hon’ble Single Judge and granted unconditional leave in favour of the respondent/defendant to defend the suit.

6. The appellants challenged the order before the Hon’ble Apex Court. Hon’ble Supreme Court after hearing the parties, disposed of the Special Leave Petition as follows:-

“7. Having heard learned counsel for the parties and having perused the records, we are of the view that ends of justice would be met if the respondents are directed to pay Rs.2,00,000/- (Rupees two lakhs) per months as use and occupational charges/rent for the premises with effect from 01.03.2017. We order accordingly. Payments made would abide by the final outcome of the suit.

8. Learned Single Judge before whom the Civil Suit is still pending is requested to dispose of the Civil Suit expeditiously.”

7. Admittedly, the respondent/defendant has not paid occupational charges at the rate of Rs. 2 lakh per month in terms of the order of the Hon’ble Supreme Court. In this backdrop, appellants took out GA No. 6 of 2019, *inter alia*, praying for drawing up a decree for eviction.

8. By the impugned judgment and order Hon’ble Single Judge held that the direction passed by the Hon’ble Supreme Court is not a conditional

leave to defend the suit and the failure of the respondent to deposit the occupational charges as directed may be taken as an additional ground during the trial of the suit.

9. Chapter 13A of the Original Side Rules, *inter alia*, provides the procedure in which the Judge shall deal with a prayer for summary decree. If the Judge is of the view that the defendant has no defence or the defence is illusory or sham, he shall refuse the prayer of the defendant for leave to defend and forthwith pronounce judgment in favour of the plaintiff. In the alternative, if the Judge is of the view that the defendant has made out a good defence or has raised a triable issue, he shall be granted unconditional leave to defend. Even in cases where the defence is practically moonshine, this Court in *Kiranmayi Dasi vs. J. Chatterji*¹ held as follows:-

“8. *** **

(a) *** **

(b) *** **

(c) *** **

(d) *** **

(e) *If the defendant has no defence or the defence is illusory or sham or practically moonshine then, although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may allow the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on condition and thereby show mercy to the defendant by enabling him to try to prove a defence.”*

10. Respondent/defendant admits the tenancy as well as the receipt of notice to quit under Section 106 of the Transfer of Property Act. The sole defence raised by him is that there are two tenancies and not a composite one. Hon’ble Single Judge referred to the nature of the demised premises

¹ 1945 SCC OnLine Cal 114

which is a single godown, manner of its creation and the circumstances in which the separate rent receipts were issued at the request of the respondent/defendant to come to the conclusion that the tenancy is a composite one and the defence of the respondent was extremely feeble. Notwithstanding such finding, Hon'ble Judge was of the view the last hope of the tenant ought not to be extinguished and extended the concession of leave to defend on payment of occupational charges at the rate of Rs.4 lakh per month on and from March, 2017 till disposal of the suit.

11. In appeal, the Hon'ble Division Bench referring to a judgment (*W. Newman & Company Limited vs. Apollo Zipper India Limited & Anr.* ²) held the defence was not illusory or moonshine and granted unconditional leave to defend. It may be apposite to note the said judgment has since been overruled.³

12. Hon'ble Supreme Court modified the aforesaid order and directed that for ends of justice, the respondent-tenant shall pay Rs.2 lakh per month as use and occupational charges w.e.f. 01.03.2017. The payment shall abide by the final outcome of the suit.

13. Mr. Ghosh contends as terms of conditional leave to appeal had not been complied with, a decree for eviction ought to be automatically passed. Per contra, Mr. Bose would argue the order passed by the Division Bench granting unconditional leave had been disturbed. Hon'ble Apex Court merely added an additional requirement, namely, deposit of occupational charges at the rate of Rs.2 lakh per month. Non-compliance of this direction cannot lead to an automatic decree for eviction.

² 2017 SCC OnLine Cal 7242

³ *Apollo Zipper India Ltd. vs. W. Newman & Co. Ltd.*, (2018) 6 SCC 744

14. The issue raised before us calls for interpretation of the directions of the Hon'ble Supreme Court in the order dated 18th October, 2019. By the said order, the Hon'ble Supreme Court had called upon the respondent-tenant to deposit a sum of Rs.2 lakh per month as occupational charges for the premises w.e.f. 01.03.2017. It was further directed that payments shall abide by the final outcome of the suit. Directions were also given for expeditious disposal of the suit. These directions should be read in isolation. As rightly argued by Mr. Ghosh the directions must be appreciated in the backdrop of the facts of the case particularly the nature of proceeding from which the appeal before the Hon'ble Apex Court had arisen.⁴

15. Appellants had taken out an application under Chapter 13A for a summary decree. Hon'ble Single Judge holding the defendant's case is a feeble one granted conditional leave to defend subject to payment of occupational charges at the rate of Rs.4 lakhs per month w.e.f. 01.03.2017. Hon'ble Division Bench of this Court modified the order and permitted unconditional leave to defend. This order came to be challenged before the Hon'ble Supreme Court and the Court directed the defendant to deposit Rs.2 lakh per month as occupational charges instead of Rs.4 lakh per month as directed by the Hon'ble Single Judge.

16. The direction for deposit of Rs.2 lakhs per month as occupational charges cannot be construed independently but must be contextually understood as a condition for leave to defend. If construed otherwise, the order would be rendered nugatory as no punitive consequence of non-payment would befall the defendant.

⁴ Goan Real Estate And Construction Ltd. Vs. Union of India, (2010) 5 SCC 288 (para 31)

17. Hon'ble Single Judge failed to appreciate the direction of the Hon'ble Supreme Court in its right perspective and incorrectly held that the direction was not a conditional leave to defend the suit.

18. It has also been argued that the appellants have blown hot and cold.

19. Referring to order dated 19th November, 2019, Mr. Bose contends the appellants had acceded to the suit being tried out as an ordinary suit and thereafter altered course and taken out the instant prayer for drawing up summary decree on default. We find little substance in this submission too. Hon'ble Supreme Court had imposed the condition to pay Rs.2 lakhs per month as occupational charges w.e.f. 1st March, 2017 on 18th October, 2019. Barely a month thereafter when the suit had come up for hearing, it was not in the farthest contemplation of the appellants that the respondent/defendant could not comply with the aforesaid direction. Accordingly, they agreed to the suit being tried as contested one. Soon thereafter, their hopes were belied and the appellants took out an application for drawing up of decree due to breach of the conditions for leave to defend.

20. In light of the aforesaid discussion, we are of the view the condition imposed by the Hon'ble Supreme Court requiring the respondent to deposit occupational charges at the rate of Rs.2 lakhs per month w.e.f. 1st March, 2017 was a condition to grant leave to defend the suit. As the respondent has failed to comply with the aforesaid condition, leave to defend stands forfeited and the defense of the respondent/defendant is liable to be struck off.

21. Needless to mention that the respondent/defendant shall have a right to cross-examine the plaintiff's witnesses and address arguments only during the hearing of the suit.

22. Order passed by Hon'ble Single Judge is set aside.

23. APO No.80 of 2023 is allowed.

I agree

(GAURANG KANTH, J.)

(JOYMALYA BAGCHI, J.)

pa/akg