IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

BEFORE:

The Hon'ble JUSTICE SOUMEN SEN

G.A. No.825 of 2015
C.S. No.295 of 2014

Auroshikha Vinimay Pvt. Ltd.
Vs.
Kai Commercial Pvt. Ltd.

For the petitioners	: Mr. Ahin Choudhury, Sr. Adv., Mr. Utpal Bose, Sr. Adv., Mr. Anuj Singh, Adv., Mr. S.E. Huda, Adv., Mr. A.K. Singh, Adv.
For the Defendant	: Mr. Krishnendu Gupta, Adv., Mr. C.K. Saha, Adv., Mr. Navneet Mishra,
Heard On	: 02.04.2015, 16.06.2015, 14.07.2015, 20.08.2015, 03.09.2015, 15.09.2015, 22.09.2015, 03.12.2015, 10.12.2015
Judgment On	: 14th December, 2015

Soumen Sen, J.:- This is an application filed by the plaintiff under Chapter XIIIA of the Original Side Rules of High Court praying, inter alia, for a decree for vacant and peaceful possession of Premises No.12A, Camac Street, Kolkata-700 017.

The case of the plaintiff in short is that the plaintiff is the owner of two flats being Flat No.1A and 1B on the first floor along with two servant quarters, measuring about 3216 sq.ft. situated at Premises No.12A, Camac Street, Kolkata-700 017.

The defendant was in occupation of the said property in terms of a Leave and Licence Agreement dated 26th September, 2012 since terminated on 23rd May, 2014.

In or about September 2012, the defendant approached the plaintiff for letting out the said property as the defendant represented that they require a suitable space in central Kolkata for running a restaurant. Following such request a Leave and Licence Agreement dated 26th September, 2012 was entered into between the parties in respect of the said premises. The said agreement was for a period of three years with effect from 1st November, 2012 till 31st October, 2015. In terms of the agreement, the defendant was under an obligation to pay licence fees at Rs.100/- per sq.ft. per month equivalent to Rs.3,21,600/- for a period of three years in which Rs.51,000/- was agreed to be paid for the first 16 months while the balance amount of Rs.2,70,000/- was to be adjusted against payment towards Corporation rates and taxes, electricity dues and building maintenance charges. Under the said agreement after a period of 16 months from 1st November, 2012, that is, on and from March, 2014, the defendant shall deposit a sum of Rs.19,26,000/- as interest free refundable security deposit. On the

basis of the aforesaid agreement, the defendant was put into possession. The defendant, however, has failed and neglected to pay the agreed licence fees and continued to use, occupy and exploit the said space for running a restaurant therefrom. The plaintiff claims that a sum of Rs.39,07,573/- is due and payable on account of unpaid licence fee from 1st November, 2012 to 23rd May, 2014.

The defendant defaulted in making payment of Rs.19,26,000/- towards the security deposit. The cheque issued by the said defendant in partial discharge of its liability for the aforesaid sum, bearing No.34189 dated 1st March, 2014 was dishonoured on presentation and was returned to the plaintiff with endorsement insufficient funds.

In view of the aforesaid, the plaintiff issued a notice under Section 106 of the Transfer of property Act on 23rd March, 2014 terminating the Leave and Licence Agreement dated 26th September, 2012 and consequently called upon the defendant to deliver vacant possession of the premises within 15 days from the receipt thereof. The defendant, however, has failed and neglected to make over possession. Hence the suit and the application.

The defendant has taken a preliminary point as to the maintainability of this application by citing proviso to Rule 3 of Chapter XIIIA of the Original Side Rules on the ground that the said summon was taken out beyond the time stipulated under the said Rules. It is submitted that the plaint was affirmed on 16th August, 2014 and

presented on 18th August, 2014. The writ of summons was issued on 26th August, 2015. Subsequently, the amendment of plaint was allowed on 16th September, 2014. On 16th February, 2015 an order was passed in which a direction was given for filing written statement upon payment of costs by 27th February, 2015 along with other consequential directions for inspection and discovery of documents. The suit was directed for trial fairly at the top of the list on 30th March, 2015. The defendant in terms of the order on 27th February, 2015 has filed a written statement. This application has been taken out on 10th March, 2015 which is beyond time.

The second objection appears to be that the plaintiff has suppressed the fact that secured creditors have initiated proceedings under the Secrutisation Act for taking possession of the said flats in question and in view of Section 34 of the Secrutisation Act and the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, Civil Court has no jurisdiction to decide the issues involved in this proceeding.

It is submitted that the plaintiff as owners have mortgaged the said property on 15th July, 2011. Thereafter a tenancy agreement was entered into on 17th September, 2012 suppressing that the property is encumbered. The secured creditor appears to have issued a notice under Section 13(2) of the SARFAESI Act on 7th March, 2013 and subsequently on 24th June, 2013 possession notice and notice under Section 13(4) of

the SARFAESI Act was issued by the secured creditor. On 16th September, 2013, the secured creditor has filed an application under Section 19 of the DRT Act, 1993. On 4th December, 2013, the Debt Recovery Tribunal issued a summon under Section 19(3) of the DRT Act, 1993. The auction notice was initially issued on 19th September, 2014 and subsequently another auction notice was issued on 1st March, 2015. In view of such proceedings the suit in respect of the suit property is not maintainable. The learned Counsel has relied upon the decisions of the Hon'ble Supreme Court in ***Jagdish Singh Vs. Heeralal & Ors.*** reported at ***(2014) 1 SCC 479*** and ***Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited & Ors.*** reported at ***(2014) 6 SCC 1*** and submitted that in view of the clear pronouncement of law on this point the suit is liable to be dismissed.

The learned Counsel has relied upon ***T.K. Lathika Vs. Seth Karsandas Jamnadas*** reported at ***(1999) 6 SCC 632***, and argued that before the defendant could be asked to argue on the other point the maintainability is to be decided first.

Under such circumstances, it is argued that the present application is not maintainable.

Without prejudice to the aforesaid rights and contentions Mr. Krishnendu Gupta, the learned Counsel appearing for the defendant submitted that even otherwise the plaintiff is not entitled to a decree. It is submitted that the defendant was looking for a vacant space for

running its business during negotiation the plaintiff not only expressed its desire to let out the said premises but also showed interest to sell the said flats to the plaintiff. Pending finalization of the terms of conditions of the sale the parties have entered into an agreement dated 17th September, 2012 by and under which the plaintiff agreed to let out and the defendant agreed to take on rent the said premises for a monthly rent of Rs.25,000/-. The tenancy was to commence from 1st November, 2012 and was for a term of six years. Subsequently, on 22nd September, 2012, the plaintiff expressed its willingness to sell the said premises to one of the directors of the defendant at and for a sum of Rs.2 crores less the amount owed by the plaintiff to Usha Kiran Welfare Society being the body which maintains the common areas and amenities at the multistoried building as also unpaid municipal rates and taxes owed by the plaintiff to Kolkata Municipal Corporation in respect of the said premises. The plaintiff represented that the said property is unencumbered and the plaintiff is in a position to sell the said property free from all encumbrances. It is submitted that an agreement reached by and between the parties subsequently thereto by which the parties proposed that out of the payments to be made by the defendant if the defendant wanted to purchase the said premises a sum of Rs.25,000/- would be treated as rent paid in advance in terms of the tenancy agreement dated 17th September, 2012 and any amount in excess thereof would be treated as part of the consideration money for the said

premises. Since the defendant was agreeable to purchase the said property, the defendant since 25th September, 2012 till February, 2014 have paid the said sale consideration amount along with agreed rent of Rs.25,000/-. It is contended that by reason of the payment of the aforesaid sums there is a concluded contract for sale and the plaintiff is bound by the said contract.

Mr. Gupta has referred to the schedule of payments referred to in Paragraph 3 sub-paragraph 11 and submitted that these payments are not being disputed by the defendant and in view thereof the plaintiff cannot succeed in this action. It is submitted that the defendant does not admit any agreement subsequent to the agreement dated 17th September, 2012. The defendant has paid all sums that are required to be paid in terms of the licence agreement. Moreover, the said agreement was for a period of six years from 1st November, 2012 and the said period has not expired.

Mr. Ahin Choudhury, learned senior Counsel appearing on behalf of the plaintiff submits that initially the parties executed a document dated 17th September, 2012 whereby the respondent agreed to monthly rent of Rs.25,000/-. The said agreement, however, did not refer to other obligations, namely, payment of dues towards rates and taxes, electricity charges and building maintenance charges. In such circumstances, the agreement dated 17th September, 2012 was superceded and replaced by a more comprehensive agreement dated 26th September, 2012 recording

all the terms and conditions. It is submitted that the defendant has accepted the said agreement as the defendant paid a sum of Rs.51,000/- towards rent initially for few months. In fact, the defendant for the month of May, 2014 has paid a sum of Rs.3.21 lakhs being the monthly occupational charges payable in terms of the subsequent agreement. It is submitted that it is absurd to suggest that for rent of two flats at Camac Street having an area of 3216 sq.ft. which are to be used as a restaurant would be let out at a paltry of sum of Rs.25,000/- without any other obligations to be discharged. It was for that reason, subsequently, a comprehensive agreement was entered into.

Mr. Choudhury, learned Senior Counsel submitted that it would appear from the said affidavit that the respondent never made any payment of Rs.25,000/- on account of rent. The respondent all throughout issued TDS certificate to the tune of Rs.51,000/- only as agreed in the agreement dated 26th September, 2012. The cheque dated 22nd September, 2012 was also issued for a sum of Rs.51,000/-. The respondent has failed to establish that there was any oral agreement inasmuch as it is unbelievable even to suggest that payment of Rs.26,000/- out of Rs.51,000/- was a part payment agreed to be received towards part payment for sale of the said property for an aggregate sum of Rs.2 crores. It is submitted that in the event the argument of the defendant is accepted then the defendant would be required to pay the

entire consideration of Rs.2 crores over a period of 60 years which is clearly absurd.

Mr. Choudhury submits that this application has been filed within a period of 10 days from the date of service of the written statement since the defendant did not enter appearance in the suit and no such notice was ever served upon the Advocate-on-record of the plaintiff. Accordingly, it is submitted that this application is made within the prescribed period.

In dealing with the other issues regarding the applicability of the provisions of SARFAESI Act it is submitted that the Debt Recovery Tribunal has no jurisdiction to determine the issues involved in this proceeding and give the reliefs as claimed in the suit. Accordingly, the pendency of any proceeding under the said Act cannot be a ground to deny the reliefs claimed in this application for summary judgment.

Let me first consider the question of maintainability raised by the defendant.

Chapter XIIIA Rule 3 deals with when an application to be made in terms of Rule 1. The proviso to the said Rule says that such application cannot be proceeded as against the defendant who has filed written statement unless the written statement is filed within 10 days after receipt of notice of entering appearance under Chapter VIII Rule 18. In the instant case, it is an admitted position that no notice was served upon the Advocate-on-record of the plaintiff of entering appearance in

terms of Rule 18. The plaintiff was served with a written statement on 2nd of March, 2015 and this application is filed within a period of 10 days. If one takes the service of the written statement as a notice under Rule 18, this application is filed on the 8th day and, thus, in my view, it is within the period prescribed under proviso to Rule 3 of Chapter XIIIA.

The second defence was with regard to the pendency of proceeding before the Debt Recovery Tribunal. The learned Counsel has referred to Section 34 of the SARFAESI Act which reads:-

> *"**34**. Civil court not to have jurisdiction. – No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)."*

The Tribunal is a creature of a statute. Unlike the Civil Court which has a plenary jurisdiction, the power and jurisdiction of the Tribunal are circumscribed by the statute. In order to find out whether the subject matter of the suit could form the subject matter of a dispute before the Tribunal, it has to be ascertained what kind of matters the Tribunal is entitled to receive, determine and adjudicate. The SARFAESI Act was enacted to safeguard the security interest of the secured

creditors. There are special provisions in the said statute which gives sweeping power to the Tribunal. The secured creditor approaches the Tribunal under the SARFAESI Act for enforcement of its security interest. In the instant case, it is an undisputed position that the secured creditor has enforced its right over and in respect of securities created and proceedings are pending before the Debt Recovery Tribunal both under the provisions of the SARFAESI Act and as well as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The success or failure of this proceeding would hardly affect the proceeding pending before the Debt Recovery Tribunal. Even if the plaintiff in this proceeding gets a decree for khas possession, it would not affect any order passed by the Tribunal in the SARFAESI proceeding. In this proceeding this Court is deciding any dispute between the secured creditors and the plaintiff vis-à-vis the property in question. The Debt Recovery Tribunal is not competent to adjudicate the rights and liabilities of parties arising out of the Leave and Licence Agreement. A mortgagor has a right of redemption even at the stage of proclamation of sale of mortgaged properties as a court of law would not ordinarily dispossess a mortgagor from his property so long as the sale is not concluded and mortgagor is willing to redeem. It may so happen that if a decree is passed in this proceeding, the mortgagor may not be entitled to enforce the said decree on the basis of any order that may be passed under the SARFAESI Act or the RDB Act. That by itself would not be a bar for the

plaintiff to proceed for recovery of the suit premises as owner of the said property. Moreover, the respondent as tenant is clearly estopped from questioning the title of the plaintiff.

In view of the aforesaid reason the judgments cited by Mr. Gupta cannot apply to the facts and circumstances of this case. I make it clear that I am not adjudicating in this proceeding any right of any secured creditor against the plaintiff vis-à-vis the property.

The plaintiff and the defendant have relied upon two agreements in support of their respective claim. There is a gap of about 9 days between the said two agreements. While the first agreement says that the monthly rental would be Rs.25,000/- then the second agreement says that the monthly rent would be Rs.51,000/-. In order to appreciate the submissions made by the respective parties with regard to their liability and obligation to make payment under the agreement if it is necessary to refer to Clause C (1), (3) (7) and Clause D (1) which are:-

> *"**Clause C (1**).To use and occupy the license premises for the said license period, the Licensee shall pay to the Licensor the monthly License fees of @ Rs.100/- per sq.ft. equivalent to Rs.3,21,600/- (Rupees Three Lac Twenty one Thousand Six hundred only) for a period of 3 years beginning from 01.11.2012 to 31.10.2015 in which Rs.51,000/- will be paid for the first 16 months and rest amount of Rs.2,70,000/- shall be adjusted against payment towards corporation liabilities, electricity dues and building maintenance.*

3. *It is pertinent to mention herein that the license fee shall increased by 15% if the licensed period shall be extended for further period of 3 years i.e. from 01.10.2015 to 30.09.2018.*

7. *There is a liability of corporation tax which shall be adjusted by the licensor and Licensee in terms of rent.*

Clause D (1).*For due performance and observation of payment terms and conditions of this agreement for use and occupy the said license premises, the Licensee in assurance of its due performance shall also deposit with the licensor after a period of 16 months from 1st November, 2012 a sum of Rs.19,26,000/- (Rupees Nineteen Lacs Twenty Six Thousand) only as an interest fee refundable security deposit."*

The mode of payment was cheque and by and large a sum of Rs.51,000/- was paid by the defendant. In fact, under the second agreement dated 26th September, 2012, the defendant was required and obliged to pay monthly lease fees at the rate of Rs.100/- per sq.ft. equivalent to Rs.3,21,600/- for a period of 3 years beginning from 1st November, 2012 to 31st October, 2015. The said amount contains two components. Rs.51,000/- would be the rent component to be paid for the first 16 months and the rest amount of Rs.2,70,000/- would be adjusted against payment towards corporation rates and taxes, electricity dues and building maintenance. Curiously, the defendant has paid the said sum by a single cheque for Rs.51,000/-without any forwarding letter contemporaneously asserting that Rs.25,000/- was towards rent

and the balance amount as part consideration for sale. It appears from the schedule of payment referred to in Paragraph 3 (xi) of the affidavit-in-opposition that from September, 2012 till July, 2013, the plaintiff has paid a sum of Rs.51,000/- and thereafter the payment has varied between Rs.50,000/- and Rs.1,00,000/-. On 10th March, 2014, there was a payment for Rs.25,000/- and significantly on 1st May, 2014 the defendant has paid a sum of Rs.3,21,000/- which is the amount (short by Rs.600) payable by the defendant under the second agreement dated 26th September, 2012. The defendant has failed to establish that a sum of Rs.19,26,000/- has been deposited in terms of the agreement. The cheques issued by the defendant were dishonoured on payment. The defendant has failed to establish that the defendant has paid any amount towards municipal rates and taxes. In Paragraph 3 (xvi) it is contended on behalf of the defendant that between 25th September, 2012 to 26th February, 2014 paid a sum of Rs.33,15,000/- out of which an aggregate sum of Rs.6,75,000/- was on account of monthly rent at the rate of Rs.25,000/- per month and the balance sum of Rs.26,40,000/- was on account of part consideration money which included payments made to Usha Kiran Welfare Society and Kolkata Municipal Corporation as per agreed terms for sale of the said premises between the parties. The petitioner, however, had failed to disclose any documents to show that the monthly rent was fixed at Rs.25,000/- and the balance amount was towards part consideration for sale or any amount was paid towards

monthly rates and taxes. The argument sought to be made on behalf of the defendant that the defendant is only obliged to pay municipal rates and taxes provided a demand is raised is unacceptable. It is argued that the claim on account of service tax is not recoverable since the plaintiff has failed to pay the said amount to the appropriate authorities. The said argument, in my view, must fail as the defendant is not concerned with the payment of service tax by the plaintiffs to the authorities concerned. It is for the authorities to initiate penal action against the plaintiff for non-payment of service tax if any. Moreover, the second agreement refers to a consolidated sum which includes the monthly rent as well as corporation and other charges.

The plaintiff has filed a written statement in which the defendant said that the defendant is entitled to specific performance of sale as against the plaintiff with regard to the suit property but for the plaintiff having lost its right due to the space taken by the bank to enforce their security interest the plaintiffs have not claimed by way of counter-claim any such relief and reserves its right under Order 2 Rule 2 of the Code of Civil Procedure. The court is not aware of whether any leave under Order 2 Rule 2 was granted to the respondent.

There is no requirement of law that an agreement or contract of sale of immovable property should only be in writing. However, in a case where the plaintiffs come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an

oral agreement alone, heavy burden lies on the plaintiffs to prove that there was consensus ad idem between the parties for a concluded oral agreement for sale of immovable property. The party would be required to establish even at this interlocutory stage prima facie that there is a concluded contract between the parties with regard to the vital and fundamental terms for sale of immovable property and were concluded between the parties orally and a written agreement if any to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement. The stipulations and the terms of contract are to be certain and the parties must have been consensus ad idem. In the instant case, one would have expected the defendant to disclose some materials to show that an oral agreement for sale has been concluded between the parties. The defendant did not even raise such an issue in any of its communications to the plaintiff. The notice to quit has remained unanswered. Instead the defendant has disclosed a document dated 28th April, 2014 which would show that the said defendant has expressed its inability to pay the licence fee as agreed by and between the parties. Subsequently on 4th June, 2014 while denying the claim of the plaintiff on account of unpaid lease rentals there was no assertioin that there is an agreement for sale. In the said reply it was alleged that a sum of Rs.26.40 lakhs have been over paid and receivable by the defendant. Curiously in the written statement filed in this proceeding the defendant

did not ask for a decree for a sum of Rs.26.40 lakhs. Irrespective of the nomenclature given to the said agreement, there cannot be any doubt that the quantum of rent fixed under the agreement excludes the provisions of the West Bengal Premises Tenancy Act, 1997. There cannot be any doubt that the defendant has committed default in making payment of rent as well as the security deposit. In fact, the plaintiff would be entitled to a sum of Rs.38,48,562/- on account of unpaid licence fee from 1st November, 2012 to 23rd May, 2014.

Mr. Gupta submits that on the basis of the defence disclosed in the affidavit the claim must fail and the parties must be relegated to suit. It is submitted that issues raised in this proceeding are such which cannot be conveniently decided in the summary procedure.

There cannot be any doubt that if a triable issue is raised, the summary procedure must give way to the suit being tried as an ordinary suit. However, if it appears to the Court that the issues raised can be decided without any further evidence and on the basis of the materials on record the Court can dispose of the said matter without requiring the parties to wait for a trial which would involve oral and documentary evidence. The important thing to my mind which the Court must consider in deciding an application of this nature is whether the defendant is able to make out plausible defence and such defence is likely to succeed at the trial. Even a faint chance of success at the trial might at times persuade the Court to exercise its discretion against

passing a decree in favour of the plaintiff. However, where the Court finds that the defence is patently absurd and moonshine the Court would not hesitate to pronounce the decree. In this age of docket explosion, in my view, it is the duty of the Court to dispose of suits in a summary way where the Court finds that there is no possibility of the defence to succeed even if it is tried as a suit. A matter can be decided on the basis of affidavit of evidence without calling for an oral testimony. The Court has to find out whether the issue raised can by decided on the basis of affidavit of evidence. The case of an oral agreement for sale is so patently absurd that it is very difficult to accept the contention of the defendant that the part of the amount paid for occupation of a very valuable property at Camac Street was towards sale consideration. It is also unbelievable and unacceptable that a company would enter into an oral agreement for sale without any correspondence recording that such an agreement was entered into between the parties. The material on record does not even suggest that any such agreement for sale was ever entered into between the parties. The defendant has also failed to explain the payment of Rs.3.21 lakhs on 1st March, 2014 which almost corresponds to the amount liable to be paid by the defendant for use and occupation of the said premises. Similarly was the case in respect of payment of Rs.51,000/-. The agreement relied upon by the respondent does not say that the defendant would be required to pay Rs.51,000/- as monthly occupation charges whereas the second agreement clearly stipulates that

the defendant would be required to pay Rs.51,000/- as monthly rent. The schedule to the agreement dated 26th September, 2012 refers to three cheques which exactly corresponds to the sums required to be paid by the defendant under the agreement. This has remained unexplained. Moreover, the cheques towards security deposit was dishonoured on presentation. Under such circumstances, I am of the opinion that the defendant has failed to disclose any defence for which the defendant may be allowed to defend the suit. Accordingly, there shall be an order in terms of Prayer "A" of the Master Summons. There shall be a decree for a sum of Rs.38,48,000/-. The other claims are relegated to suit. The department is directed to draw up the decree as expeditiously as possible.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

(Soumen Sen, J.)