

Present: Sri Utpal Misra (JO Code:WB00659)
Judge, Commercial Court at Alipore
Title Suit 04 of 2023
Renumbered as TS (Com) 48 of 2023
CNR No. WBSP18-000041-2023

Order No. 22

Date:06.03.2024

In the matter of:

Suit for recovery of possession and mesne profit valued at Rs. 171,80,41,276/- and for injunction at Rs. 100/-.

AND

In the matter of:

Mani Square Limited.

Vs.

Shri Subhash Kumar and 04 Ors.

Appearance:

Mr. Jaydip Kar..Ld. Sr. Advocate
Mr. Suddhasatva Banerjee..Ld. Advocate
Mr. Pranit Bag..Ld. Advocate
.....for the Plaintiff/Respondent.
Mr. Soumen Roychowdhury..Ld. Advocate
Mr. Ananya Das..Ld. Advocate
.....for the Defendants/Petitioners.

Order

Today is fixed for passing the order to an application under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC) being I.A. No. 05 of 2023 filed by the defendants no. 2 to 6 of the instant suit.

Both sides have filed their respective haziras.

I.A. No. 05/2023

The Court: The instant suit was filed by the plaintiff on 30.03.2023 against the defendants and an ad interim order was granted by this Court vide the Order dated 01.04.2023. During the course of propagation of the instant suit defendants no. 2 to 6 have filed the instant application under Order VII Rule 11 of CPC seeking rejection of the plaint.

2. Checkered history of the instant case is as follows. Jitendra Nath Ghosh, the original owner of the property in question, by virtue of a deed dated 15th December, 1973 leased out the suit property to Kumar Industries for a period of 20 years and by efflux of time said deed expired on 30th November, 1993. Mr. Jitendra Nath

Ghosh died on 15th September, 1995 leaving behind seven sons. In the meantime, the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 was promulgated and came into effect on and from 1st March, 2003 whereby Thika Tenancies were deemed to have vested with the State with retrospective effect from 18th January, 1982. The provisions of the said Act of 2001 mandates that Thika Tenancy and rights there under could be decided by a Thika Controller and Section 4, 5 and 27 of the said Act of 2001 are relevant in the present proceeding. On April 9, 2023 i.e. immediately after the said Act of 2001 was brought into effect, the properties of Kumar Industries claimed to be Thika Tenants and deposited rent with respect to the property in favour of the State of West Bengal. Then, on 10th September, 2007 the plaintiff herein purchased the said suit property from the absolute owners of the said premises being seven sons of Jitendra Nath Ghosh. On 27th January, 2010 an order passed by the Learned Controller holding that the said Kumar Industries qualified as Thika Tenants under the said Act of 2001 and being aggrieved by this Order plaintiff preferred an application before the State Govt. under Section 13 of the Act of 2001 and the Joint Secretary to the Government of West Bengal in its Department of Land and Land Revenue requested the Kolkata Thika Controller to dispose of the application filed by hearing the parties and the said application was disposed of on August 1, 2012 against the plaintiff and in favour of the Kumar Industries. Then the plaintiff again filed an application before the West Bengal Land Reforms and Tenancy Tribunal and the Ld. Tribunal rejected the said appeal on 18th November, 2013. The plaintiff challenged the said order before the Hon'ble High Court at Calcutta and the said Hon'ble High Court set aside the order of WBLRTT on March 10, 2014. Thereafter, the matter was reached before the Hon'ble Supreme Court and the Hon'ble Apex Court finally decided the matter on 27th July, 2022 declaring that the defendants were not thika tenants within the meaning of the Act of 1981 giving reasons to that effect.

3. The concerned defendants by dint of the instant application being I.A. No. 05 of 2023 pray for rejection of the plaint stemming on the grounds that, i) this is not a commercial suit, ii) the instant suit is barred by laws of limitation, iii) the plaint does not disclose any cause of action.

4. Mr. Roychowdhury, Ld. Counsel appearing for the defendants firstly refers to Section 2(1) defining to "Commercial disputes" and Section 2(1)(c)(vii) stipulating to "agreement relating to immovable property used exclusively in trade or commerce". He further refers to the case of the *Ambalal Sarabhai Enterprises Ltd. v. K.S. Infra*

Space LLP. As such, he states that there is no averment made in the plaint that the property is being used exclusively for trade or commerce. Therefore, there is no question of Section 2(1)(c)(vii) of the Commercial Courts Act applying in the instant case. In facts, the purported agreement dated 10.09.2007 by which the plaintiff is claiming its right over the subject property does not in any manner indicate that the subject property is being used exclusively in trade or commerce. It only records “...the vendors shall sell and the purchasers shall purchase the said premises containing a land area of two Bighas ten Cottahs and three Chittacks more or less with the existing construction dwelling houses sheds etc. and being present Municipal Premises No. 195 Picnic Garden Road, P.S. Tiljala...” and further it also records the occupation of the predecessor-in-interest of the defendants as would appear from internal page 5 of the said agreement. Therefore, this Court has no jurisdiction to try and/or entertain this Suit as it is not a Commercial Suit. There exists no commercial dispute between the plaintiff and the defendants. This plaint filed in the instant suit is to be returned to the appropriate court having jurisdiction over the matter. Ld. Counsel further urges that in order to be a commercial dispute in relation to an immovable property there has to be an agreement, as regards, he referred to the case of *Jaspal Singh Chandok & Ors. vs. Sandeep Poddar & Anr²*.and the case of *Deepak Polymers Pvt. Ltd. v. Anchor Investments Pvt. Ltd³*.

5. The next contention of the defendants’ Ld. Counsel is that as per Article 65 of the Limitation Act, 1963 the possession of immovable property or any interest therein based on title, period of limitation is twelve years, after which the possession of the defendant become adverse to the plaintiff. In this present case as would appear from paragraph no. 7 of the plaint, the plaintiff purchased the suit property in the year 10.09.2007 and the plaintiff not having initiated any recovery of possession proceedings within 10.09.2019 i.e. twelve years from 10.09.2007 has lost its right to sue for possession in terms of Section 27 of the Limitation Act read with Article 65 of the said Act. Therefore, the instant suit is clearly barred by the laws of limitation and is hit by Order VII Rule 11(d) of CPC.

6. Mr. Roychowdhury further states that the cause of action as alleged in the plaint is illusory, as the entire cause of action for initiation of the instant suit is based on the Judgment and Order dated 27.07.2022, therefore, it is essential to place certain averments of the said judgment and order dated 27.07.2022 in order to understand

¹Reported in (2020) 15 SCC 585.

²Reported in 2023 SCC Online Cal 361.

³Arising out of C.O. No. 759 of 2021.

what was actually decided by the said judgment and order and whether the said judgment and order gives any cause of action to the plaintiff to institute the instant suit outside the purview of laws of limitation. In the said judgment and order dated 27.07.2022 the Hon'ble Supreme Court had only decided the issue of thika tenancy of the defendants with respect to the subject property. It had no occasion to adjudicate upon the title of plaintiff. Liberty was given to the plaintiff to take recourse to any other claim relief. No special privilege was given to the plaintiff by way of the said order. Law of limitation does not permit filing of suit for possession after 12 years. The defendants have perfected its title in the year 2005 itself by way of adverse possession i.e. two years before the plaintiff purchased the property. The Hon'ble Supreme Court of India had only decided the issues of Thika Tenancy of the defendant with respect to the subject property. It had no occasion to adjudicate upon the title of the plaintiff. Liberty was given to the plaintiff to take recourse to appropriate remedies "strictly" in accordance with law, in relation to any other claim relief. No special privilege was given to the plaintiff by way of the said order. Law of Limitation does not permit filing of the suit for possession after 12 years. The defendant has perfected its title by way of adverse possession. In fact, even before the plaintiff had purchased the suit property, the defendant had perfected its title. In terms of the Hon'ble Supreme Court's order that the defendants were not Thika Tenants with effect from 1993. The lease of the defendants expired in 1993. The defendants remained in open, hostile, continuous possession from 1993 to 2005. No recovery of possession proceeding was initiated by the lessee (i.e. the seller in 2007 agreement) during that period (i.e. 1993 to 2005). Therefore, the defendants have perfected its title in the year 2005 itself by way of Adverse Possession i.e. two years before the plaintiff purchased the property. As regards, Mr. Roychowdhury referred to the case of Ravinder *Kaur Grewal vs. Manjit Kaur*⁴.

7. *Per contra*, Mr. Kar Ld. Sr. Counsel appearing for the plaintiff/respondent vehemently assailed the instant application being cited it as misconceived and as such prays for rejection of it.

8. The contention of the Mr. Kar, Ld. Sr. Counsel for the plaintiff is that by the Order dated 27th July, 2022 the Hon'ble Apex Court of India held that the plaintiff could take recourse to appropriate remedies available in law. It is this order that crystallized the rights of the plaintiff and the cause of action for the present proceeding starts from such date being July 27, 2022. As such it cannot be

⁴Reported in 2019 (8) SCC 729.

contended under any circumstances that the suit is barred by limitation. The order by which the Hon'ble Supreme Court affirmed the order of the High Court starts from page 208 of the plaint and the concluding paragraphs at pages 272 to 274 of the plaintiff could not file the present suit before July 22, 2022. The possession of the defendants did not adverse to the plaintiff and Section 27 read with Articles 65 and 67 of the Limitation Act, 1963 would not non-suit the plaintiff as the cause of action for the instant suit arose only on July 22, 2022. The defendants could not have perfected its title in the year 2005 under any circumstances. The rights of the defendant, if any, as a Thika Tenant was nullified by the Supreme Court's decision on July 27, 2022. Regarding that, Mr. Kar referred to the case of *Liverpool & London SP & I Association Ltd. v. M.V. Sea Success I & Anr*⁵.

9. Mr. Kar further stated that the point raised in the supplementary affidavit filed by the defendants is that the present suit is not a commercial suit in terms of Section 2(1)(c) of the Commercial Court Act. The said issue cannot be raised in an application under Order VII Rule 11 of the CPC. The point could have been raised if the defendants seek to treat the petition as an application under Order VII Rule 10 of CPC which is not the case in the instant proceeding. More so, he contends that there are ample instances in the various clauses of the lease deed as well as the order of the Division Bench of High Court at Calcutta and the application under Right to Information Act which if read together, would reveal that the property has always been used for commercial purpose as has been admitted by the defendants in various proceeding. The lease deed is annexed at page 24 of the plaint. Clauses 1, 2, 9, 14, 17 and 18 of the said lease deed would reveal that the property in issue was always intended to be used for commercial purpose. Moreover, a perusal of the order passed by the Division Bench of High Court at Calcutta as delivered on March 10, 2014 reveals that it has been recorded that the property was to be used for running factory activities and as such, was intended to and put for commercial use and could not be otherwise contended by the defendants. The RTI application dated 12th September, 2022 and the reply thereto dated 15th September, 2022 would reveal that the landlord and tenant relationship, was terminated on and from 30th June, 2022 and a perusal of the said deed of lease annexed at page 284 onwards of the plaint would evince that the premises was let out and put to use for commercial purposes by Kumar industries.

⁵Reported in (2004) 9 SCC 512.

10. Mr. Kar further contended that the submission of defendants i.e. there is no “agreement” between the parties and as such, the dispute cannot be a “commercial dispute”, cannot be within the ambit of a petition under Order VII Rule 11 of CPC. In any event, the statement is factually incorrect as the plaintiff is the owner of the premises through deeds of conveyance and the Apex Court has held that the defendants are not Thika Tenants. The dispute arises from the original lease deed and the plaintiff is the successor in interest of the original lessor. The defendants have all through claimed to be a thika tenant in the suit premises and as such, the dispute of the plaintiff was with the State and a contrary stand cannot be taken by the defendants in the instant proceeding. It is trite law that a party cannot approbate and reprobate. In this regard, Ld. Counsel referred the case of *Union of India v. N. Murgesan & Ors.*⁶ wherein the Hon’ble Court held that the principle, as borrowed from Scots Law, would mean that no party can be allowed to accept and reject the same thing and thus one cannot blow hot and cold.

11. He further argued that the defendants/petitioners have made additional submissions in the written notes which are beyond the submissions made in the Court or the pleadings in the petition. The submission in paragraph III at page 6 of the notes with regard to the plaint being barred in law as it fails to disclose a cause of action is baseless. The plaintiff herein could not have instituted the present plaint before the crystallization of rights through the Supreme Court decision. Also, there is a clear bar as stated above in the Thika Tenancy Act which bars the plaintiff from approaching the Court and such impediment was lifted only after the Judgment of the Hon’ble Court on July 27, 2022. The present plaint has been filed “strictly” in accordance with law. To buttress his submission Mr. Kar stated that the judgment and decision referred to by the defendants in *Ambalal Sarabhai Enterprise Limited vs. KS Infraspace LLP*⁷ is in favour of the plaintiff. the Hon’ble Supreme Court has explained therein that the work “used” denotes “actual used” and not “ready for use” or “likely to be used” or “to be used”. The premises in issue was “put to use” when Kumar Industries were put in possession of the suit premises and as such, the principle laid down in the judgment fortifies the cause of plaintiff.

12. To counter the submission as made by the defendants Mr. Kar further submitted that the judgment referred to by the defendants in *Vasu Healthcare Private Limited Vs. Gujrat Akroti TCG Biotech Limited*⁸ which has been affirmed in the judgment of

⁶Reported in (2022) 2 SCC 25.

⁷Reported in (2020) 15 SCC 585.

⁸Reported in AIR 2017 Guj. 153.

Ambalal Sarabhai Enterprise Limited (supra) is clear distinguishable from facts since in the instant case as the property has admittedly been used for trade or commerce and has been put to such use when Kumar Industries was given possession of the property, as stated hereinabove and as such, the explanation given in paragraph no. 33 of the said judgment would not apply to the instant facts and circumstances. The judgment referred to by the defendants in *Mrs. Soni Dave vs. M/s. Trans Asian Industries Expositions Pvt. Ltd.* is also distinguishable on facts since paragraph nos. 15 and 16 as referred to by the defendants in the said judgment would not be applicable to the instant facts and circumstances, since in the instant proceeding, the plaintiff has pleaded how the dispute relates to a commercial dispute and how the property has exclusively been used for trade and commerce. This Court has jurisdiction to decide the issues raised in the suit as raised by the plaintiff.

13. In respect of the decision of the Hon'ble High Court at Calcutta in the case of *Dipak Polymers Pvt. Ltd. vs. Ankur Investments Pvt. Ltd. (supra)* Mr. Kar submitted that the ratio of the said judgment would also not apply to the facts and circumstances of the instant case since the said decision was based on a notice issued under Section 106 of the Transfer of Property Act, 1882 (in short TPA Act) and in the present case there was no notice which was issued under Section 106 of the said TPA Act. Moreover, a conjoint reading of Section 108(q) and 111 of the said TPA Act would evince that in the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, would possess the rights and are subject to the liabilities mentioned in the rules or such of them as are applicable to the property leased and the lessee is bound to put the lessor into possession of the property. Moreover, a lease of the immovable property determines when the conditions stated in Section 111 of TPA Act are satisfied. In the instant case, it is an admitted position that the lease has expired and as such, the judgments sought to be relied on by the defendants are not applicable in the instant facts and circumstances.

14. In respect of the case being *Ravinder Kaur Grewal vs. Manjit Kaur (supra)* as referred by Mr. Roychowdhury, Ld. Counsel for the defendants/petitioners, Mr. Kar submitted that defendants raised the above case to contend and argue "adverse possession" under Section 27 read with Article 65 and 67 of the Limitation Act, 1963, the said argument is faulty since the so called "title" has not been "perfected"

⁹Reported in AIR 2016 Delhi 186.

as has been finally decided by the Supreme Court on July 27, 2022. As such the judgment referred to by the defendants is clearly distinguishable on facts.

15. As per the proposition of the Hon'ble Supreme Court of India laid down in various decisions it is clarified that the Court, while dealing with such an application seeking rejection of a plaint, ought to determine whether the plaint discloses a cause of action by scrutinizing the averments in the plaint, read in conjunction with the documents relied upon. In this regard, it is also clarified that while making such a determination, Courts will have to disregard the pleas taken by the Defendant(s) in the Written Statement and application for rejection of the plaint on merit. Hence, the Hon'ble Apex Court has clarified that while determining any application filed under Order VII Rule 11 of CPC, the Courts should restrict itself to the plaint and should not go into the delineated facts as provided under the Written Statement or even the application filed under Order VII Rule 11. In the cases of *Liverpool and London S.P. and I Association Ltd. vs. M.V. Sea Success*, which, inter alia, provides that whether the plaint discloses a cause of action or not is essentially a question of fact, however, whether it does or does not must be found from the reading of the plaint itself during which the averments made in the plaint in their entirety must be held to be correct. In other words, the plaint must be construed as it stands, without addition or subtraction of words. Therefore, it is very clear that when a Court goes to adjudicate an Order VII Rule 11 application, the Plaint annexed with the documents will be the sacrosanct and if the Plaint does not disclose a cause of action {as per clause (a) of the said Order}, or that the suit is barred by any law {as per clause (d) of the said Order}, the Court has no option, but to reject the Plaint (*Dahiben vs. Arvindhai Kalyanji Bhanusali (Gajra)*)¹⁰

16. Upon perusal of the present application as well as hearing of the parties to this present proceeding, it is conspicuous to this Court that Defendant filed this present

¹⁰Reported in AIR 2020 SC 3310

interlocutory application mainly resorting to clause (a) and clause (d) of the Order VII Rule 11 and all other residual clauses as enumerated in the said Order are otiose in term of the factual aspects of the instant application.

17. It is reiterated that it is well settled golden proposition in law that at the time of the considering an application for rejection of plaint, Court has to confine itself only to averments made therein. Whether the Plaintiff will succeed or not, is a matter of trial and not the subject matter of enquiry under Order VII Rule 11.

18. It is also settled proposition of law that the plea of limitation is essentially a mixed question of facts and law unless it is apparent from the averments made in the plaint and the documents annexed thereto. The moment the Court finds that such pleading of limitation is required to be proved by evidence, oral and documentary, the provision under Order VII Rule 11(d) of the Code does not contemplate the rejection of the plaint.

19. So, from the discussions made in the foregoing paragraphs, this Court is of the view that the manner in which the case has been made out and upon meaningful reading of the pleadings made in the plaint, the issues relating to limitations, cause of action etc. assume character of mixed question of fact and law, therefore, I have no other option but to reject the application under Order VII Rule 11 read with Section 151 of the CPC filed by the defendants being I.A. No. 05 of 2023 on contest without any order as to cost.

20. The I.A.No.05 of 2023 is thus accordingly disposed of.

21. One application has been filed by the plaintiff for extending the *ad interim* order of injunction dated 1st April, 2023. It appears from the record that by an order dated 09.02.2024 the said interim order dated 1st April, 2023 has already been extended till 15.03.2024, therefore, there is no need to call for any order in respect of the instant application and as such, the same deserves to be dismissed and accordingly disposed of *albeit* no order as to costs.

To date i.e. 15.03.2024 at 10:30 a.m. to 11:00 a.m. for hearing of I.A. No. 13/2023.

Parties to act on the basis of the downloaded copy of the order sheet from the website/E-court App.

Dictated and corrected by me,

Sd/-

Judge, Commercial Court at Alipore,
for South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram

Sd/-

Judge, Commercial Court at Alipore,
for South 24 Parganas, Purba Midnapore,
Paschim Midnapore & Jhargram