

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

Present:

The Hon'ble Justice Krishna Rao

**IA No: GA 6 of 2019
(Old No: GA 2770 of 2019)
In CS 142 of 2013**

Poddar Projects Limited & Anr.

Versus

Economic Transport Organization Ltd.

Mr. Debnath Ghosh
Mr. Avinash Kankani
Mr. Suman Majumder

... for the plaintiffs.

Mr. Mainak Bose
Mr. Anurag Bagaria
Mr. Ratul Das
Mr. A. Agarwalla
Ms. D. Mukherjee
Ms. P. Gargain

... for the defendant.

Heard on : 10.01.2023, 17.01.2023, 20.01.2023 & 31.01.2023

Judgment on : 09.02.2023

Krishna Rao, J.:

The plaintiffs have filed the instant application for a direction to draw and complete the decree for eviction against the defendant as per the claim made by the plaintiff.

The plaintiffs have filed the suit against the defendant praying for following reliefs :

- a) Decree of eviction and peaceful possession of the tenanted premises more fully described in Annexure "A" hereof;*
- b) Decree for mesne profits of Rs. 50/- per sq.ft. per day from 21st October, 2012 till the date of institution of the suit as pleaded in paragraph 24 above;*
- c) Decree for further mesne profits @ Rs. 50/- per sq. ft. per day from the date of institution of the suit till recovery of possession as pleaded in paragraph 24 above;*
- d) Receiver;*
- e) Injunction;*
- f) Costs;*
- g) Further and other reliefs."*

After filing of the suit, the plaintiffs have filed an application being G.A. No. 2883 of 2013 under Chapter XIII A of the Original Side Rule of this Court seeking summary eviction of the defendant upon expiry of the notice period. The application filed by the plaintiffs was duly contested by the defendant and this court had disposed of G.A. No. 2883 of 2013 by an order dt. 28th February, 2017 by passing the following order :

"The defendant is in possession of a very valuable property in the commercial hub of the city and is paying an mesne occupational charge at ₹ 1/- per sft. per month which is extremely low compared to the occupational charges that the property is expected to earn. Since

establishment of separate tenancies at the trial would make the notice under Section 106 of the Transfer of Property Act invalid, on the basis of the discussions made above, the defendant is entitled to conditional leave to defend. 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.

GA No. 2883 of 2013 and GA No. 2905 of 2013 accordingly stand disposed of.”

Being aggrieved with the order dt. 28th February, 2017, the defendant had preferred an appeal being APD No. 86 of 2017 and in the said appeal, the plaintiffs have preferred a cross objection against the said order. The appellate court had disposed of the appeal and cross objection by judgment dt. 22nd August, 2017. In the said appeal the appellate court held that the cross objection preferred by the plaintiffs is not maintainable and the allow the appeal preferred by the defendant by passing the following Judgment :

“In conclusion, we find and hold that there is a good defence of the appellant/defendant for contesting the suit in trial and to use such defence, the appellant/defendant need not be burdened to pay a lumpsum of Rs. 4,00,000/- at monthly intervals. The impugned judgement is required to be modified and we do modify it upon granting unconditional leave in favour of appellant/ defendant to defend the suit. Accordingly, the appeal is allowed and cross-objection is dismissed as not maintainable in the light of our observations made in this judgement.”

The plaintiffs being aggrieved with the Judgment dt. 22nd August, 2017 had preferred a Special Leave Petition and the Hon’ble Supreme Court

had disposed of the said SLP on 18th October, 2019 by passing the following order :

“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 month 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.”

After the order passed by the Hon’ble Supreme Court, the counsel for the plaintiffs had mentioned the matter before this Court and upon mentioning the matter was taken up for hearing on 19th November, 2019 and by considering the order passed by the Hon’ble Supreme Court this Court has passed the following order :

“On enquiry it appears that the suit is not ready for hearing and only the plaint and written statement has been filed. The plaintiffs in the circumstances are directed to take necessary steps to make the suit ready by filing affidavit of documents within seven days from date. The defendant is directed to file their affidavit of documents also within such time. The documents be disclosed by the parties within seven days thereafter. Parties should take inspection of documents within seven days thereafter. The admission and denial of documents be completed within seven days thereafter. Parties are at liberty to mention the suit once these procedures are complete.”

Mr. Debnath Ghosh, Learned counsel representing the plaintiffs submits that Hon’ble Supreme Court had directed the defendant to pay Rs. 2,00,000/ (Rupees Two Lakhs) per month as use and occupational charges/rent for the premises with effect from 1st March, 2017 but the defendant has not paid any amount as directed by the Hon’ble Supreme

Court and thus the plaintiffs are entitle to get decree for eviction of the defendant from the suit premises.

Mr. Ghosh submits that initially this Court has passed an order dt. 28.02.2017 by granting conditional leave to the defendant to defend the suit upon payment of occupational charges of Rs. 4,00,000/- per month on and from March, 2017 though the said order was modify by the Hon'ble Division Bench in an appeal by granting unconditional leave but the Hon'ble Supreme Court had reduced the quantum of amount from Rs. 4,00,000/- to Rs. 2,00,000/- which implied that Hon'ble Supreme Court has granted conditional leave but the defendant had not complied with the order and thus plaintiffs are entitle to get a decree in terms of their prayer.

Mr. Ghosh has relied upon Chapter XIII A (B), Rule 6 and Rule 9 of the Original Side Rules of this Court as well as Order 37 of the Code of Civil Procedure, 1908. In support of his contention, Mr. Ghosh relied upon the judgment of Kiranmayi Dasi -versus- J. Chatterji reported in (1945) SCC Online Cal 114 and IDBI Trusteeship Services Limited -versus- Hubtown Limited reported in (2017) 1 SCC 568.

Per Contra, Mr. Mainak Bose, Learned Senior Advocate, representing the defendant submits that the application filed by the plaintiffs is not maintainable under law as there is no order in favour of the plaintiffs for eviction of the defendant and thus how the decree can be drawn as per the prayer made by the plaintiffs in the instant application.

Mr. Bose submits that after the order passed by the Hon'ble Supreme Court the plaintiffs have mentioned the matter before this Court and this Court vide order dt. 19th November, 2019 directed the parties to make the suit ready by filing affidavit of documents, inspection and admission and denial of the documents and liberty was given to the parties to mention the suit once procedure are completed but inspite of completing the procedure, the plaintiffs have filed the instant application.

Mr. Bose submits that order passed by this Court wherein conditional leave was granted to the defendant to defend the suit was set aside by the Hon'ble Appellate Court and there is no order of conditional leave to defend the suit.

Mr. Bose submits that the Hon'ble Supreme Court while disposing of the SLP preferred by the plaintiffs held that numbers of issues and contentions have been raised by the appellants and the respondent which the Hon'ble Supreme Court has not decided as a civil suit is still pending. Mr. Bose has further submits that the Hon'ble Supreme Court had only directed the defendant to pay Rs. 2,00,000/- per month as occupational charges/ rent for the premises with effect from 1.03.2017 and the said payments made would abide by the final outcome of the suit and thus if the defendant has not paid the said amount, this court will take into consideration at the time of deciding the suit on merit.

Mr. Bose submits that Order 37 of the Code of Civil Procedure is not applicable in the instant suit. Mr. Bose has drawn the attention of this Court to the Clause (B) of Chapter XIII A of the Original Side Rules of this

Court and submits that clause (B) is for the recovery of immovable property with or without a claim or mesne profits by the landlord against the tenant whose term has expired or has been duly determined by notice to quit or has become liable to forfeiture for non-payment of rent or against persons claiming under such tenant but under Order 37 of the Code of Civil Procedure the Courts and classes of the suits to which the Order is to apply is mentioned. In the said Order classes of the suits are described in Clause (2) which reads as follows :

“(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely : -

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising,-

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.]

[(iv) suit for recover of receivables instituted by any assignee of a receivable.]”

Heard the learned counsels for the respective parties, perused the materials on record and the Judgment relied by the Counsel for the plaintiff.

The issue in the instant application whether the order passed by the Hon’ble Supreme Court by directing the defendant to pay Rs. 2,00,000/- (Rupees Two Lakhs) per month as use and occupational charges/rent for the premises with effect from 01.03.2017 is a conditional one or not?

Chapter XIII A (B), Rule 6, 7 and 9 of the Original Side Rule of this Court reads as follows :

“(B). for the recovery of immoveable property with or without a claim for rent or mesne profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit or has become liable to forfeiture for non-payment of rent or against persons claiming under such tenant.

6. Judgment unless good defence.- *Upon such application the Judge may, unless the defendant by affidavit or otherwise as the Judge may direct shall satisfy him he has a good defence to the claim on its merits or disclose such facts as may be deemed sufficient to entitle him to defend, make an order refusing leave to defend and forthwith pronounce judgment, in favour of the plaintiff.*

7. Where one defendant has good defence but other not.- *If it appears to the Judge that any defendant has a good defence to or ought to be permitted to defend the claim and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend and the plaintiff shall be entitled to judgment against the latter; and may issue execution upon a decree to be drawn up pursuant to such judgment without prejudice to his right to proceed with his claim against the former.*

9. Leave to defend. – *Leave to defend may be given unconditionally or subject to such terms as to giving security, or time, or mode of trial or otherwise as the Judge may think fit.”*

In the order passed by this Court in GA No. 2883 of 2013 dt. 28.02.2017 leave was granted to the defendant to defend the suit upon payment of Rs. 4,00,000/- per month as occupational charges for the month of March, 2017 and further succeeding months. In the order, it was also made clear that in case of default, decree for khas possession shall automatically follow and for which there would be no need to apply a fresh. The order passed by this Court was modified by the Hon’ble Appellate Court and granted unconditional leave to the defendant to defend the suit. The Hon’ble Supreme Court directed the defendant to pay Rs. 2,00,000/- per

month as occupational charges/rent for the premises with effect from 1.03.2017 and the payment made would abide by the final outcome of the suit.

In the judgment of Kiranmayi Dasi (Supra) this Court held that :

“From the above authorities the following propositions may be laid down with regard to an application under O. XIV:—

- (a) If the defendant satisfied the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.*
- (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.*
- (c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence yet shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend, but in such the Court may in its discretion impose condition as to the time or mode of trial but not as to payment into Court or furnishing security.*
- (d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine, there ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.*
- (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.”*

In the order dt. 28.02.2017, this Court held that defendant appears to have raised some defence which although is a weak and may or may not succeed at the trial, be given an opportunity to fight out the rest of the battle. The said defence falls short of moonshine but little probable and granted conditional leave to defence.

The Division Bench while deciding the appeal held that :

“The respondents/plaintiffs intended to use two letters of 1969 as vital pieces of evidence in support of the plaint case, which documents have been challenged by the appellant/defendant upon affirming an affidavit with contention that the same are forged and fabricated. Such a defence also cannot be treated as weak/flimsy/evasive defence for which a stringent condition should be imposed upon the appellant/defendant to place such a defence for trial. From the affidavits of the parties it can be said at this stage that there was/is a relationship of landlord and tenant between the respondents / plaintiffs and appellant / defendant in respect of tenancy/tenancies authorizing appellant/defendant’s occupation of 9725 square feet suit property/properties at a contractual monthly rent of Rs. 12,278/-. There is no claim of the respondents/plaintiffs that before the alleged determination of tenancy, any step was taken by respondents/plaintiffs to enhance the rent. As such, when obviously it cannot be said that appellant/defendant has no defence, it is not proper for the Court to fix an exorbitant under Chapter XIII A to take his defence in the suit.”

The Hon’ble Supreme Court while deciding the SLP filed by the plaintiff held that a number of issues and contentions have been raised by the plaintiff and the defendant which the Hon’ble Supreme Court do not proposes to discuss and decide, as a civil suit is still pending and has not been decided and the payment made would abide by the final outcome of the suit.

As per Rule 9 of Chapter XIII A of the Original Side Rule of this Court, leave to defend may be given unconditionally or subject to such terms as to giving security, or time, or mode of trial or otherwise as this court may think fit.

In the case of Kiranmayi Dasi (Supra), this Court held that if there is 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.

In the instant case, this Court while granting conditional leave to the defendant opined that the defence raised by the defendant is weak and may not succeed but the Hon'ble Division Bench held that there is good defence of the defendant for contesting the suit in trial. The Hon'ble Supreme Court for the ends of justice directed the defendant to pay Rs. 2,00,000/- per month as use and occupational charges with effect from 01.03.2017.

In paragraphs 7 and 8 of the of the affidavit in opposition of the instant application, the defendant has taken a specific defence that the petitioners are the landlords in respect of 9,725 sq. ft. in the ground floor of the property and there are two separate tenancies and each tenancy is governed by West Bengal Premises Tenancy Act, 1997 and the monthly rent is less than Rs. 10,000/- and the notice to quit purportedly issued under Section 106 of the Transfer of Property Act, 1882 is bad in law.

Initial order passed by this Court dt. 28.02.2017, it was specifically stated that “In default of making payment of the monthly occupational charges, 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.” But the Hon’ble Supreme Court while disposing of the SLP preferred by the plaintiff has only directed the defendant to pay Rs. 2,00,000/- per month with effect from 01.03.2017 and has not imposed any penalty made conditions. In the order passed by the Hon’ble Supreme Court it was also clarified that the payment made would abide by the final outcome of the suit.

In view of the above, this Court is of the view that the order passed by the Hon’ble Supreme Court is not a conditional leave to defend the suit. The Hon’ble Supreme Court has passed the order for the ends of justice, if, the defendant has chosen not to deposit the said amount, the same would be an additional ground for the plaintiff during the trial of the suit.

G.A. 6 of 2019 is thus **dismissed**.

(Krishna Rao, J.)