

**In The High Court at Calcutta
Civil Appellate Jurisdiction
Original Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

**A.P.O.T. No.415 of 2024
Arising out of
C.S. No.257 of 2016
IA No. GA 1 of 2024**

**Sandeep Agarwal and Another
VS
Sidhartha Dealer LLP and Others**

For the appellants : Mr. Abhrajit Mitra, Sr. Adv.,
Mr. Arif Ali, Adv.,
Mr. Arnab Sardar, Adv.

For the respondents : Mr. Dhrubo Ghosh, Sr. Adv.,
Mr. Souvik Majumdar, Adv.,
Mr. Soumabho Ghosh, Adv.,
Ms. Anyapurna Banerjee, Adv.
Ms. Ajeyaa Chowdhury, Adv.

Hearing concluded on : 19.02.2025

Judgment on : 26.02.2025

Sabyasachi Bhattacharyya, J:-

1. The present intra-court appeal arises out of a suit for recovery of *khas* possession by evicting defendant nos.2 to 5, for recovery of proportional municipal rates and taxes and *mesne* profits and consequential reliefs. By the impugned judgment, an application filed by the defendant nos.2 and 4 under Order VII Rule 11 of the Code of Civil Procedure, for rejection of the plaint, was dismissed.
2. The brief facts of the case are that the defendant/respondent nos.6 to 10, in the capacity of trustees to the trust estate of Raja Rajendra

Mallick Bahadur, granted lease in favour of the defendant/respondent no.2, namely Orient Beverages Limited, by a registered deed of lease dated September 29, 1965. The lease was granted from October 1, 1965 for a period of 50 years, expiring on September 30, 2015.

3. During the pendency of the above lease, the defendant nos.6 to 10 executed a further registered lease deed in favour of the plaintiff/respondent no.1 on March 31, 2001, to be given effect from October 1, 2015, the date of expiry of the previous lease, or sooner determination of the earlier lease, whichever was earlier.
4. On the strength of the second lease deed in its favour, the plaintiff/respondent no.1 filed the suit being C.S. No.257 of 2016 on August 30, 2020.
5. Defendant nos. 2 and 4 (present appellants) filed the application for rejection of plaint claiming to be sub-lessees under defendant no.1/respondent no.2 Orient Beverages Limited, arguing that there was no privity between the plaintiff and the said sub-lessees;as such, the plaintiff cannot file a suit for eviction directly against the sub-lessees, bypassing the lessee/defendant no.1.
6. The second ground on which the application for rejection of plaint was filed was that the plaintiff's lease is invalid, in the absence of any possession being handed over coupled with the creation of the same.
7. Thirdly, it was contended that there cannot be any concurrent lease during subsistence of the previous lease in favour of the defendant no.1. As such, the lease deed on the strength of which the suit has been filed is invalid in the eye of law.

8. Learned senior counsel appearing for the appellant contends that the plaintiff/respondent no.1 sought eviction directly against the defendant nos.2 to 5/sub-lessees without seeking any eviction against the lessee (defendant no.1/respondent no.2). Learned senior counsel cites *Hiralal Vallabhram v. Kastorbhai Lalbhai and Others*, reported at *AIR 1967 SC 1853* for the proposition that a landlord cannot sue a sub-tenant alone for eviction but has to sue the tenant and only if he succeeds against the tenant, the sub-tenant would be ejected along with the tenant-in-chief unless he can take advantage of any provision of the Rent Control Act.
9. It is next argued by the appellants that concurrent lease during subsistence of the earlier lease is not permissible in law.
10. Thirdly, learned senior counsel appearing of the appellant argues that no lease could be created in favour of the plaintiff/respondent no.1 without possession being handed over to the plaintiff. It is argued that there cannot even be surrender by the principal lessee in favour of the superior lessor without actual handing over of physical possession of the property. In support of such contention, learned senior counsel cites *Tirath Ram Gupta v. Gurubachan Singh and Another*, reported at *(1987) 1 SCC 712*, *Sukumar Saha v. Shyamal Kumar Saha and others*, reported at *(2006) 1 CHN 12* and *Biswanath Paul Choudhury and Another v. Abdul Quaiyum Azad and Others*, reported at *(2014) 2 CHN (CAL) 437*, the last two of which are co-ordinate Bench judgments of this Court.

- 11.** It is further argued that the contention of the plaintiff/respondent no. 1 that Section 107 of the Transfer of Property Act, 1882 is applicable is not germane, since the same is a mere procedural provision and cannot govern the substantive rights of the parties.
- 12.** Learned senior counsel for the plaintiff/respondent no.1, the only contesting respondent, argues that under Section 107 of the Transfer of Property Act, two types of creation of lease are contemplated – by a registered deed and orally. In the event a lease of immovable property is made by a registered instrument, handing over of possession is not necessary. Only in the event of creation of lease by oral agreement, the same has to be accompanied by delivery of possession.
- 13.** Thus, the judgments cited by the appellants, it is argued, are not applicable to the present case.
- 14.** Learned senior counsel for the plaintiff/respondent no.1 takes the court through paragraph nos.7, 18, 19, 20 and 29 of the plaint to impress upon the court that the plaintiff, in its plaint pleadings, never admitted the defendant nos.2 to 5 to be sub-tenants but claimed that they are trespassers occupying the property unlawfully. Hence, the proposition, that no suit can be filed against them without seeking eviction of the principal lessee/defendant no.1, is not attracted in the present case.
- 15.** Thirdly, it is contended that by a previous order dated July19, 2019 passed in connection with the present suit, a learned Single Judge had granted injunction in favour of the plaintiff/respondent no1. While passing the said order, similar issues as raised in the present

application under Order VII Rule 11 of the Code of Civil Procedure were raised by the defendant no.2 and 4 but were turned down. Hence, by operation of the principle of *res judicata*, the same issues could not reopened by the court under Order VII Rule 11 of the Code.

- 16.** Upon hearing learned counsel for the parties, we find that the learned Single Judge, while passing the impugned order, primarily relied on surrender by the defendant no.1/lessee of a portion of the property demised to the said lessee in favour of the superior lessor as a ground for dismissal of the application under Order VII Rule 11. However, both parties agree before this Court that the said surrender was in respect of a different portion than the suit property, the latter being occupied by the defendant nos.2 to 5 whereas the surrendered portion being under actual physical occupation of the defendant no.1/lessee. As such, the said surrender might not be a germane consideration in the present context.
- 17.** However, we are to independently assess whether the conclusion of the impugned judgment was correct, even if for reasons other than those attributed by the learned Single Judge, before parting with the matter.
- 18.** The first issue which crops up for consideration is whether a concurrent lease could be created during subsistence of the earlier lease in favour of defendant no.1/respondent no.2. We are at one with the arguments of the appellants that Indian Law does not recognize the creation of concurrent dual leases. However, it would be evident from the registered lease deed dated March 31, 2001, created in

favour of the plaintiff/respondent no.1, that the said lease was to operate on and from October 1, 2015 or on sooner determination of the original lease, whichever is earlier. As such, the lease granted in favour of the plaintiff commenced only upon the expiry/determination of the earlier lease. Hence, there arises no question of any overlapping period between the two and, as such, the concept of concurrent lease is not attracted at all in the instant case.

- 19.** There is no bar in creation of a lease from a future date. In fact, the previous lease deed was executed in favour of the lessee/defendant no.1 on September 29, 1965, whereas it was to commence from October 1, 1965, that is, on a future date. Hence, the argument of the appellants fails on such count.
- 20.** The next question which arises here is whether the principle laid down in *Hiralal Vallabhram (supra)* is applicable to the present case.
- 21.** In the said judgment, the Supreme Court held that the landlord cannot sue a sub-tenant alone for eviction but has to first sue the tenant and only if he succeeds there, the sub-tenant would automatically be ejected along with the tenant-in-chief. Hence, the said case was in the context of a three-tier hierarchy of jural relationships – superior lessor, intermediate lessee and sub-lessee. In view of the jural relationship between the superior lessor and the lessee, the said judgment lays down a trite proposition of law that the lessee cannot be bypassed by the lessor and a suit for eviction filed directly against the sub-lessee.

- 22.** The said proposition, however, does not hold good in the factual matrix of the present case. Unlike the cited judgment, in the case at hand, the hierarchy is not three-dimensional but the plaintiff has stepped into the shoes of the erstwhile lessee upon the expiry of the previous lease by efflux of time and hence, even if the defendant nos.2 to 5 are taken to be sub-lessees, the jural relationship between the current lessee, that is, the plaintiff and the sub-lessees would be a first-degree relationship without any intermediary between the two. Since it is the present lessee which filed the present suit and not the superior lessor, the ratio laid down in *Hiralal Vallabhram (supra)* is not applicable in the case at hand.
- 23.** That apart, as evident from paragraph nos.7, 18 to 20 and 29 of the plaint, the plaintiff/respondent no.1 does not admit the defendant nos.2 to 5 to be sub-lessees but claims that they are trespassers/unlawful occupants of the property. Thus, the jural relationship of lessor-lessee between the plaintiff no. 1 and the defendant nos. 2 to 5 is not apparent from the face of the plaint whereas, in an application under Order VII Rule 11 of the Code, it is only the averments made in the plaint which are to be looked into.
- 24.** The next question which arises is whether a clear right to sue has been disclosed in favour of the plaintiff in the plaint inasmuch as the defendant nos.2 and 4/appellants argue that in the absence of handing over of possession of the suit property, which is admittedly in occupation of defendant nos.2 to 5, no lease could be created at all in favour of the plaintiff.

- 25.** In support of such proposition, the appellants rely on three judgments, one of the Supreme Court and two others of co-ordinate Benches of this Court. Such judgments require a closer scrutiny.
- 26.** The first judgment is of *Tirath Ram Gupta (supra)*. In the said judgment, the factual premise was that the tenant had surrendered his entire tenancy in favour of the superior landlord despite there being sub-tenants in occupation of a part of the property. In such context, it was held by the Supreme Court that a lease can be determined only by restoring possession in respect of the entire property which was taken on lease. It was also observed that a sub-lessee who has obtained a part of the interest of the head tenant will be entitled to claim the benefit of the contract vis-à-vis the lessor, as the lessee (head tenant) cannot surrender the lease in part. In the said factual premise, the Supreme Court referred to Section 111(e) as well as Section 108(m) of the Transfer of Property Act.
- 27.** However, in the present case, the lessee (defendant no.1) has surrendered only the portion of his tenancy which was in actual physical occupation of the lessee and not the suit property, which is admittedly in possession of defendant nos.2 to 5.
- 28.** Section 111(e) contemplates express surrender, in which context it was held by the Supreme Court that there cannot be surrender without handing over possession. In such light, Section 108(m) was interpreted to cast a duty on the lessee to restore the physical possession of the property to the lessor on the termination of the lease.

- 29.** As opposed to the said case, here there is no question of surrender of the suit property by the lessee. The plaintiff does not claim on the strength of such surrender, but on the basis an independent lease deed executed in its favour which operates only after the expiry of the previous lease by efflux of time.
- 30.** In *Sukumar Saha (supra)*, which was followed in the subsequent judgment of *Biswanath Paul Choudhury (supra)*, the Division Bench of this Court held that lawful tenancy can be created in favour of a third person by a lessor only if the lessor is capable of handing over *khas* possession of the tenanted portion in favour of the lessee. It was further held that if a particular property is in occupation of a trespasser, without evicting such trespasser, the lessor cannot create a lease over the portion so occupied. The moment a lessor creates a lease, the title remains with him but the right to enjoy the property is transferred to the lessee. The same principle was adopted in *Biswanath Paul Choudhury (supra)*. However, with utmost respect, the ratio laid down in the said judgments cannot be applicable to the present case, since those judgments were delivered in the context of leases which it was not clarified in either of the judgments to be registered leases.
- 31.** That apart, the learned Division Benches in both the cases did not take into consideration the effect of Sections 5, 20, 105 and 107 of the Transfer of Property Act, nor was such legal effect argued before the said Benches.

- 32.** Section 107 of the Transfer of Property Act, contrary to the contention of the appellants herein, is not a mere procedural provision but creates substantive rights in favour of the lessee. The said Section clearly distinguishes between a lease created by registered deed and oral leases.
- 33.** In the case of the former, that is, if a lease is made by a registered instrument, by specific exclusion, the provision does not prescribe any further requirement of delivery of possession. As opposed thereto, if the lease is created by an oral agreement, the same, as per Section 107, has to be accompanied by delivery of possession.
- 34.** It is not clear from the cited judgments as to whether any registered lease deed was executed in those cases. Be that as it may, since in the present case a registered deed of lease was executed in favour of the plaintiff/respondent no.1, the further requirement of delivery of possession is redundant and not required. Thus, the proposition laid down in the said two Division Bench judgments of this Court does not have any application in the present case insofar as delivery of possession being mandatory is concerned.
- 35.** Insofar as the creation of a lease from a prospective date is concerned, Section 5 of the Transfer of Property Act defines a transfer of property to include conveyance of an immovable property in present or in future.
- 36.** Again, Section 19 of the said Act provides that a vested interest can be created in favour of a person without specifying the time when it is to

take effect or on terms specifying that it is to take effect forthwith *or on the happening of an event which must happen.*

- 37.** The Explanation to the said Section provides that an intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed.
- 38.** That apart, Section 105 of the Transfer of Property Act defines lease of immovable property as a transfer of a right to enjoy such property, without qualifying whether such enjoyment has to be *in praesenti* or may be postponed till a future date.
- 39.** The expiry of the previous lease on September 30, 2015 was a certain event and as such, the creation of the lease in 2001 of commencing from October 1, 2015 is well within the contemplation of Transfer of Property Act.
- 40.** Another aspect of the matter cannot be lost sight of. In the judgment of *Tirath Ram Gupta (supra)*, the Supreme Court was considering a scenario where even the portion which was in occupation of the sub-tenant was surrendered by the principal lessee in favour of the superior lessor. In such context, the Supreme Court applied Section 111(e) and held that for express surrender, there has to be a handing over of possession. Section 108(m) was read in such context, which binds the lessee to restore the property to the lessor on termination of the lease.
- 41.** However, Section 108 speaks about the rights and liabilities of the lessor and lessee. The erstwhile lessee (defendant no.1) lost its character as a lessee on the expiry of its lease on September 30, 2015

by efflux of time. Hence, the provisions of Section 108, which speak of present lessors and lessees and not ex-lessors or ex-lessees, is not attracted to the present case at all. Since the erstwhile lease came to an end by efflux of time, the termination of lease was automatic and did not require a restoration of possession to the superior lessor for conclusive termination of the lease.

- 42.** Section 111 of the Transfer of Property Act contemplates several modes of determination of lease, one of which is by express surrender under Clause (e) thereof. The present case, however, is governed by Section 111, Clause (a), which is by efflux of the time limited by the lease, for which no handing over of possession is required and the previous lease automatically comes to a terminus. Seen in such context, the judgments relied on by the appellant are not germane precedents for deciding the present case.
- 43.** We also have to take into consideration the fact that the erstwhile lessee/defendant no.1 has not come up with any application for rejection of plaint, nor has, till date, opposed the filing of the suit directly against the sub-lessees. It would be the lessee who should be affected the most if his rights were bypassed and an eviction decree was obtained directly against the sub-lessees. Thus, it is doubtful whether the defendant nos. 2 to 5/occupants have the *locus standi* to throw such a challenge to the effect that the lessee cannot be bypassed by filing an eviction suit directly against the sub-lessees. It does not lie in the mouth of the alleged sub-lessees/trespassers to espouse the cause of the lessee as such.

- 44.** All said and done, however, we are unable to accept the contention of the plaintiff/respondent no.1 that the previous order of injunction passed in the suit operates as *res judicata* in respect of the subsequent application under Order VII Rule 11 of the Code. The scope of consideration of the *prima facie* case in an injunction application is tentative and limited and does not operate as *res judicata* at further stages of the suit. In contrast thereto, the consequence of rejection of plaint is that the suit itself comes to a terminus, thus requiring the court to enter into the merits of the contention of the parties, which would attain finality on a different and more serious level than the consideration of the court in an injunction application, which is confined only to ascertaining a *prima facie* triable issue.
- 45.** Moreover, the injunction order passed in the suit did not take into consideration all aspects of the challenge now thrown in the application for rejection of the plaint but primarily revolved around the interpretation of Section 107 of the Transfer of Property Act. The points taken here were not argued in their entirety or adjudicated by the said court and as such, the injunction order does not operate as *res judicata* in respect of the subsequent application for rejection of plaint.
- 46.** One last factor cannot also be overlooked. The lease deed dated March 31, 2001 executed in favour of the plaintiff/respondent no.1, in paragraph 3 thereof, *inter alia* empowers the lessee/plaintiff to sue for obtaining vacant and/or peaceful possession on its own accord and

not only on behalf of the superior lessors. Secondly, it is provided therein that such eviction suit can be maintained against the existing occupiers or even the sub-lessees or other occupants. The disjunctive conjunction “and/or” has been used to segregate the different persons against whom such suit could be filed. Hence, the present suit filed by the plaintiff on its own accord against occupiers/sub-lessees is very much maintainable even within the contemplation of the second lease deed.

- 47.** In view of the above, we find that a plain reading of the plaint, which can be the only consideration in an application under Order VII Rule 11 of the Code of Civil Procedure, does not disclose any bar of law or non-disclosure of cause of action to justify the rejection of the plaint at the threshold.
- 48.** Undoubtedly, upon the pleadings of both parties being considered and evidence being led upon a full-fledged trial, it will be open to the suit court to decide all issues involved and framed in accordance with law. However, it would be premature to reject the plaint at this stage on the face of the allegations made in the plaint. Thus, no case for rejection of plaint has been made out by the appellants.
- 49.** The learned Single Judge, thus, was justified in dismissing the application under Order VII Rule 11 of the Code of Civil Procedure.
- 50.** We accordingly affirm the said conclusion, albeit on different grounds (as discussed above) than those attributed by the learned Single Judge.

- 51.** Accordingly, A.P.O.T. No.415 of 2024 along with GA No.1 of 2024 are dismissed on contest, thereby affirming the impugned judgment and order dated November 13, 2024 passed in C.S. No. 257 of 2016.
- 52.** There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)