

(1979) 08 CAL CK 0019
In the Calcutta High Court

Case No : Full Bench Reference No. 1 of 1978 in A.F.O.D. No. 334 of 1975

Bhagaban Biswas

APPELLANT

Vs

Bejoy Singh Nahar
 Bejoy Singh Nahar Vs Bhagaban
Biswas

RESPONDENT

Date of Decision : 22-08-1979

Acts Referred:

Transfer of Property Act, 1882 — Section 108, 114A
West Bengal Premises Tenancy Act, 1956 — Section 13(1)

Citation : AIR 1980 Cal 70

Hon'ble Judges : Sankar Prasad Mitra, C.J;S.K. Datta, J;S.C. Deb, J

Bench : Full Bench

Advocate : Rabindra Nath Mitra, Purnendu Narayan Dutta, Paresh Nath
Bhattacharjee, Nihar Ranjan Chatterjee and Kasi Nath De, for the Appellant;

Judgement

Sankar Prasad Mitra, C.J.—This Full Bench Reference have been made by a Bench consisting of Pradyot Banerjee and B. N. Maitra, JJ. under Chapter VII, Rule 3 of the Appellate Side Rules. Two questions have been referred to the Full Bench. These questions are:

(1) Whether a notice u/s 114-A of the Transfer of Property Act is to be given if the ground on which the ejectment is prayed for is u/s 13 (1) (b) of the West Bengal Premises Tenancy Act, 1956, that is, if a tenant or a person residing in the premises has done any act contrary to the provisions of clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act, 1882?

(2) Whether the decision of the Division Bench reported in Mahasukrai Ramrichpal Vs. Kishori Charan Law, was correctly decided?

2. The appellant was a tenant under the plaintiff in respect of the upper western flat on the first floor of premises No. 3/B, European Asylum Lane, now named as Abdul Halia Lane. A decree for eviction was passed against the appellant on the ground of unauthorised and permanent construction contrary to the provisions of

Section 108 (m), (o) and (p) of the Transfer of Property Act. Before the Division Bench of Banerjee and B. N. Maitra, JJ. Mr. Mitra appearing for the appellant contended that in view of the finding of an unauthorised construction of a permanent nature it was difficult for him to argue that the case did not come within the mischief of Section 108 (m), (o) and (p) of the Transfer of Property Act, in particular, clause (p). Mr. Mitra submitted before the Division Bench that he was agreeable to remove the offending structure and the decree should be set aside. Learned Counsel relied on the judgment of the Supreme Court in *Brij Kishore v. Vishwa Mitter Kapur* AIR 1965 SC 1574.

3. In *Brij Kishore*'s case the Supreme Court was considering certain provisions of Delhi Rent Control Act, 1958, and Delhi and Ajmer Rent Control Act, 1952. The relevant provisions of Section 13(1) of the 1952 Act were as follows:

"13 (1) Notwithstanding anything to the contrary contained in any other law or any contract, no decree or order for the recovery of possession of any premises shall be passed by the Court in favour of the landlord against any tenant (including a tenant) whose tenancy is terminated.

Provided that nothing in this Sub-section shall apply to any suit or other proceeding for such recovery of possession if the court is satisfied.

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(k) that the tenant has, whether before or after the commencement of this "Caused or permitted to be caused substantial damage to the premises, or notwithstanding previous notice has used or dealt with the premises in a manner contrary to any condition imposed on the landlord by the Government or the Delhi Improvement Trust while giving him a lease of this land on which the premises are situated".

4. The Supreme Court in construing the above provisions and similar provisions in the 1958 Act has observed in paragraph 7 at page 1577 of the judgment that:

"It will be seen that Section 114-A gives power to Court to give relief to the tenant against forfeiture where it holds that the landlord did not give reasonable time to the tenant to remedy the breach. In such case it can dismiss the suit as not maintainable. It is true that Section 114-A would not in specific terms apply to cases like the present; but ejectment on the ground specified in Clause (k) to the proviso to Section 13(1) of the 1952-Act was somewhat analogous to forfeiture on breach of an express condition of a lease for it also required previous notice to the tenant before the suit is filed.

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We do not think that it can be said that the 1952-Act forbade the Court from granting relief where the offending structures were removed by the tenant even during the pendency of the suit for ejectment. What is reasonable time within which the breach should be remedied is always a question of fact and we think it

could have been possible for the Court in a suit based on Clause (k) of the proviso to Section 13(1) to give relief against forfeiture in proper case where the tenant had removed the offending structure before the suit was filed or even during the pendency of the suit if reasonable time was not allowed in the notice contemplated by Clause (k) of the proviso to Section 13(1)."

5. It is clear that by reason of specific provisions of the said 1952 and 1958 Acts the Supreme Court was treating those provisions as analogous to Section 114-A of the Transfer of Property Act, 1882. We may state at once that there are not such specific provisions in the West Bengal Premises Tenancy Act, 1956. The Supreme Court itself has stated that Section 114-A would not in specific terms apply to the cases that Court was dealing with.

6. Before the Division Bench of Banerjee and B. N. Maitra, JJ reliance was placed on behalf of the respondent on the Division Bench decision of this Court in *Mahasukrai Ramrichpal Vs. Kishori Charan Law*, . In this case the Division Bench has said that in case of monthly tenancies the provisions of the West Bengal Premises Tenancy Act apply and the landlord if not required to serve a notice u/s 114-A of the Transfer of Property Act before filing a suit for ejectment on the ground of breach of clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act.

7. Banerjee and B. N. Maitra, JJ. were unable to agree with the view expressed in *Mahasukrai Ramrichpal*'s case and that is why the present Full Bench Reference has been made.

8. Before us, Mr. Mitra appearing for the appellant has relied only on Section 108(p) of the Transfer of Property Act. Let us, therefore, at the outset set out the provisions of the Transfer of Property Act and those of the West Bengal Premises Tenancy Act, 1956, with which we are directly concerned in this reference. We will first take the Transfer of Property Act, 1882. Section 108 of the Transfer of Property Act runs thus:

"108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of Immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:--

(A) Rights and liabilities of the lessor

XXX XXX XXX XXX X (B) Rights and liabilities of the lessee

XXX XXX XXX XXX X (p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes:"

"114-A. Where a lease of Immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing-

(a) specifying the particular breach complained of: and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach: and the lessee fails, within a reasonable time from the date of service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting: parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent."

9. We now go to the West Bengal Premises Tenancy Act, 1956. Chapter III of this Act is the Chapter on "Suit and Proceedings for Eviction".

Section 13 is in this Chapter. It lays down:

"13. Protection of tenant against eviction-

(1) Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premise shall be made by any Court in favour of the landlord against a tenant except on one or more of the following grounds, namely:--

XXXX XXXX XXXX (b) where the tenant or any person residing in the premises let to the tenant has done any act contrary to the provisions of clause (m). clause (o) or clause (p) of the Section 108 of the Transfer of Property Act, 1882 (IV of 1882);

XXXX XXXX XXXX "

10. Mr. Mitra for the appellant does not dispute that in the Transfer of Property Act the provisions of Section 108(p) is an implied term of a lease. But his contention is that that implied term in Section 108(p) has now become an express term of the lease by virtue of being incorporated in Section 13 (1) (b) of the West Bengal Premises Tenancy Act, 1956. That being the case according to him, the remedy given to a tenant u/s 114-A has not been taken away by the said Act of 1956 and is still available to a tenant.

11. Various decisions of this Court as well as of the Supreme Court have been cited before us, but for the purpose of answering the questions referred to us, we shall restrict ourselves to the construction of the relevant provisions of the two statutes.

12. We have seen that Section 108 of the Transfer of Property Act opens with the words "In the absence of a contractto the contrary". The rules therefore incorporated in Section 108 are the rules applicable to a lease in the absence of a contract to the contrary. In other words, these are implied rules or implied terms of a lease.

13. Section 114-A of the Transfer of Property Act speaks of an express condition which provides that on breach thereof the lessor may re-enter. Section 114-A is a provision relating to an express agreement between the lessor and the lessee as

to one of the conditions of the lease.

14. Now, contracts may be either express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination. There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term. Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Vide Chitty on "Contracts" 24th Edition Article 12 at pages 9 and 10.

15. The observations of Lord Wright in *Luxer (East Bourne). Ltd. v. Cooper*, 1941 AC 108, at page 137 on this subject are also helpful. Lord Wright has said:

"The expression "implied term" is used in different senses. Sometimes it denotes some term which does not depend on the actual intention of the parties but on a rule of law, such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as for instance under the Sale of Goods Act and the Marine Insurance Act. The law also in some circumstances holds that a contract is dissolved if there is a vital change of conditions.....

.....The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. But it is well recognized that there may be cases where obviously some terms must be implied of the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying", some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties."

16. We find therefore that a fundamental difference between an express term and an implied term is that when a term of a contract is stated in words or manifested in words by the parties themselves it is an express term but when a term is not stated in words or manifested in words by the parties themselves but is either assumed to be one of the terms of the contract or is provided by a statute to be one of the terms, it would be an Implied term. We find such implied terms even in our Sale of Goods Act, 1893 in Sections 14 to 17 thereof.

17. In the present case it seems to us that, Section 108(p) of the Transfer of

Property Act is an implied term, whereas Section 114-A provides for relief against forfeiture in respect of express terms or conditions between the lessor and the lessee.

18. We are unable to accept Mr. Mitra's argument that by reason of the incorporation of the provisions of Section 108(p) of the Transfer of Property Act into Section 13 (1) (b) of the West Bengal Premises Tenancy Act, 1956 what was an implied term has become an express term. It is well known that where a single section of an Act is introduced into another statute, it must be read in the sense which it bore in the original Act from which it is taken, and consequently it is legitimate to refer to all the rest of that Act to ascertain what the section means, although one section only is incorporated in the new Act. Vide Maxwell on "The Interpretation of Statutes", Eleventh Edition, page 33. In any event there has not been an incorporation in the full sense. Section 13 (1) (b) of the 1956 Act is wider in its amplitude. It includes "any person residing in the premises let to the tenant" which is not to be found in Section 108(p).

19. In view of the conclusion we have reached, namely, that Section 114-A of the Transfer of Property Act can be in-voked only when there is an express condition which provides that on the breach thereof the lessor may re-enter we proceed to answer the questions referred to us as follows:

(1) No:

(2) This is correct in so far as it is in conformity with our judgment.

20. We now refer the case back to the Division Bench for disposal of the appeal in accordance with law.

21. The costs of this reference will abide by the result of the appeal.

Deb, J.

I agree.

S.K. Datta, J.

I agree.

Reference answered accordingly.