

(1983) 11 CAL CK 0002
In the Calcutta High Court
Case No : A.O.D. No. 242 of 1982

M/s. D.S. Commercial Pvt. Ltd.

APPELLANT

Vs

Shree Shewtambar Sthakbasi Jain Sabha

RESPONDENT

Date of Decision : 10-11-1983

Acts Referred:

Registration Act, 1908 — Section 17, 17(1)(b)

Citation : 88 CWN 298

Hon'ble Judges : N.G. Chaudhuri, J;Mookerjee, J

Bench : Division Bench

Advocate : Saktinath Mukherjee and Bhaskar Ghosh, for the Appellant;Ranjit Kumar Banerjee and M.C. Surana, for the Respondent

Final Decision : Dismissed

Judgement

Mokherjee, J.—The plaintiff respondent by a registered deed dated 29th December, 1958 had granted in favour of the defendant-appellant a lease for a term of 20 years commencing from 1st September, 1958 in respect of two rooms in the ground floor of Premises No. 18D, Sukias Lane, Calcutta. The said lease deed, inter-alia stipulated monthly rent of Rs. 196/- per month and did not provide for any increase of rent during the lease period which was to end on 31st August, 1978. Undisputedly, with effect from April, 1977 the defendant lessee had been paying rent to the plaintiff at the rate of Rs. 2451- per month instead of Rs. 196/- per month. The plaintiff-respondent had instituted, in the City Civil Court at Calcutta, a suit against the defendant for recovery of possession in the aforesaid two ground floor rooms at Premises No. 18D, Sukias Lane, Calcutta and for recovery of arrear rents and mesne profits. In paragraph (2) of its plaint, the plaintiff had pleaded that the defendant was a lessee in respect of the suit rooms at a rent of Rs. 245/- per month under the aforesaid registered deed of lease dated 29th December, 1958 for a term of 20 years. The plaintiff pleaded that the lease had expired by efflux of time on the expiry of 31st August, 1978 and prayed for recovery of possession by evicting the defendant. The plaintiff further

pleaded that the defendant had failed to pay rent since June, 1978 amounting to Rs. 735/-. The plaintiff also claimed recovery of mesne profits from 1st September, 1978 at the rate of Rs. 10/- per diem.

2. The defendant in its original written statement had, inter-alia denied that the aforesaid registered deed of lease was a lease for non residential purposes and had claimed that its tenancy was governed by the West Bengal Premises Tenancy Act and was therefore, it was not liable to be ejected. On 14th August, 1981 the defendant had filed an additional written statement, inter-alia, pleading that with the consent of both parties, on 1st April, 1977 the registered lease in question was determined and it had been verbally agreed between the parties that the defendant should occupy the said premises as a monthly tenant under the plaintiff on payment of rent of Rs. 245/- per month instead of Rs. 196/- per month. Pursuant to the said alleged agreement, the defendant had paid rent to the plaintiff at the new rate since April, 1977. The defendant claimed that the said monthly tenancy which had commenced on 1st April 1977 had not yet been determined in any manner recognised by law and consequently the plaintiff's suit was bound to fail.

3. The learned Judge, 12th Bench, City Civil Court at Calcutta has decreed the suit in favour of the plaintiff. He has believed the plaintiff's evidence that the rent under the registered lease deed had been enhanced to Rs. 245/- per month because of the levy of surcharge by the Corporation of Calcutta and the learned Judge has rejected the defendant's case that by mutual agreement the registered lease had been determined and that a new tenancy had come into being with effect from April, 1977. The learned Judge disbelieved the evidence given by the defendant's witnesses on the said issue. Being aggrieved thereby, the defendant has preferred the present appeal.

4. Mr. Saktinath Mukherjee, learned advocate for the defendant appellant, inter-alia, submitted that it is settled law that the term as to the amount of rent reserved in a lease is a term of the lease itself and not collateral to it. Therefore, a document which does not purport to create a lease but purports to vary the rent reserved by a previous lease requires registration if the previous lease is a registered one or if it comes within sub-clause (b) of clause (i) of section 17 of the Registration Act (vide *Lalit Mohan Ghose v. Gopali Chuck Coal Company Ltd.* ILR 39 Cal. 284=16 C.W.N. 55 (F.B.), *Parbati Charan Mukhopadhyaya and others v. Bande Ali Akon and others* 40 C.W.N. 638, *Kailash Chandra Pathak and others v. Madan Mohan Singha Chowdhury* 42 C.W.N. 107 etc). Mr. Mukherjee has accordingly submitted, that both in its plaint and at the trial, the plaintiff had admitted that since April, 1977 the rent of the tenancy was Rs. 245/ per month. Such variation of the rate of rent required to be registered and, therefore, the only way in which Rs. 245/- per month, could be taken to be the rent was if it created a new tenancy. According to Mr. Mukherjee, therefore by reason of the agreement between the parties fixing the rent at the rate of Rs. 245/- per month by operation of law, the registered lease dated 29th December, 1958 was

impliedly surrendered and a new tenancy came into existence with effect from 1st April, 1977. In this connection, Mr. Mukherjee relied upon the observations of Goff, J. in *Bable Construction Co. Ltd. v. Inland, Revenue Commissioners* 1968 (2) All Eng 968 (973).

5. Undoubtedly, the above "submissions of Mr. Mukherjee are attractive but having given our anxious consideration to the matter, we are unable to hold that the registered lease in the defendant's favour was determined by implied surrender and with effect from 1st April, 1977 the defendant appellant had become a monthly tenancy under the plaintiff at a rent of Rs. 245/- per month. In our view, the learned Judge of the trial court had correctly assessed the oral and documentary evidence adduced by the parties. We agree with the learned Trial Judge that the rent payable by the defendant lessee had been enhanced to Rs. 245/- per month with effect from 1st April, 1977 on the ground of levy of sucharge by the Corporation of Calcutta. The parties did not intend to determine the registered lease and to create a new relationship. In fact, Mr. Mukherjee, the learned advocate for the appellant, him-self did not contend that there was any express surrender of the previous lease or that both parties had formally agreed to create a new monthly tenancy in defendants favour with effect from 1st April, 1977. Mr. Mukherjee's submission is that such implied surrender of the previous registered lease ought, to be inferred from the fact of the variation and the rate of rent, because such variation of rent could not have been done by a parole agreement unless the previous lease was surrendered. Implied surrender is founded upon the ground of estoppel and the intention of the parties is immaterial. It matters not that the old lease is by deed and the new one is by parole (vide Mulla on Transfer of Property Act, 6th Edn. page 744). Mulla on Transfer of Property Act under the same heading "new relationship" at page 745 has also observed. "On the other hand, an agreement regarding a change in the rent which does not import a new demise will not operate as a surrender..... Our attention has been also drawn to the observation of Bachawat, J. in the case of *Goppulal Vs. Thakurji Shriji Shriji Dwarakadheeshji and Another*, . The learned Judge had quoted the following passage from Hill and Redman's Law of Landlord and Tenant 14th Edition :--

But a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, unless there is some special reason to infer a new tenancy, where, for instance, the parties make the change in the rent in the belief that the old tenancy is at an end.

6. We are not prepared to accept as an inflexible principle that every variation in the rate of rent payable under a registered deed of lease necessarily implies surrender of the said lease or that whenever the rate of rent is altered a new relationship between the parties would be created. A lease is not a mere contract but also is a transfer of a right to enjoy an immovable property. The rights and liabilities of the lessor and the lessee are, therefore, primarily determined by contract and also by local usage and statutory law (vide Mulla on Transfer of

Property Act, 6th Edition page 786). Implied surrender is one of the modes by which a lease of immovable property may be determined. Mulla on Transfer of Property Act at page 744 has pointed out that implied surrender or surrender by operation of law occurs : (1) by creation of a new relationship, or (2) by relinquishment of possession. Thus, "if a lessee accepts a new lease that in itself is a surrender of the old lease, for the new lease could not be granted unless the old one was surrendered". Thus, the legal position is that when the lessor and the lessee agree to create a new relationship between them, the previous lease is impliedly surrendered because such new relationship could not have been created if the previous lease had continued to exist. We have already noted that Mr. Mukherjee himself has pointed out that implied surrender is put on the ground of estoppel and the intention of the parties is immaterial. No doubt, by varying the rate of rent payable, the parties may manifest their intention to create a new relationship. In other words, that intention to create a new relationship, the rent previously payable may be altered. But in a given case the lessor and the lessee might purport only to alter the amount of rent payable under a registered deed of lease without further intending to create a fresh lease. In such a case there being no intention on the part of the lessor and the lessee to create a new relationship, there would be no implied surrender of the previous lease merely because the rate of rent had been altered. When on the basis of such an oral agreement only for varying the rate of rent payable under a registered deed of lease, the lessor seeks to recover rent at the enhanced rate, section 17(1) (b) of the Registration Act which has been made supplemental to the Transfer of Property Act would stand as a bar and the ratio of the Full Bench decision in the case of Lalit Mohan Ghose's case (supra) and the other reported decisions taking the same view-would apply. A parole agreement to vary the rate of rent would not be of any avail because by such agreement the law cannot be overridden. On the other hand, where the parties intend to create a new relationship and in pursuance thereof altered the rate of rent previously payable, by operation of law the previous lease is determined. Thus, when the rate of rent is altered, the cardinal question would be whether thereby the parties had intended to create a new relationship between them or merely had agreed to alter the rate of rent.

7. The learned Judge of the Chancery Division who had decided the case of Cable Construction Co. Ltd. v. Inland Revenue Commissioners (supra), did not lay down as a general proposition that whenever by parole agreement rent reserved under a deed is varied there would be surrender of the old tenancy. On the other hand, the learned Judge at page 973 of the reports had rejected the submission of the counsel of the Crown that a deed varying rent reserved by an earlier lease deed operated as a surrender and grant of new lease. The learned Judge had observed, inter-alia, "..... as it appears to me on the authority..... that the deed of variation would operate to increase the rent and yet leave the original lease subsisting.....". On the other hand, in order to decide whether there was implied surrender, the learned Judge had considered whether the

parties had intended to create a new tenancy. In Cable Construction Co. Ltd.'s case (supra), however, the learned Judge construed the document in question as a bond or covenant chargeable with the amount of duty claimed by the Revenue Authorities.

8. In the instant case, we have affirmed the finding of the learned Trial Judge that while agreeing to enhance the rent to Rs. 245/- per month, the parties did not intend to create a new relationship with effect from April, 1977. On the other hand, the said rent by mutual consent was purported to be increased because of the alleged additional levy of surcharge by the Corporation of Calcutta. In the absence of any registered deed varying the said essential term of the registered lease deed dated 29th December, 1958, the plaintiff lessor would be unable to get a decree for recovery of rent at the rate of Rs. 245/- per month. But the registered lease in defendant's favour having expired by efflux of time, there could be no bar in passing a decree for recovery of possession. The defendant had also failed to prove that it was holding over by reason of the plaintiff in any manner had assented to continuance of the defendant's possession after expiry of the term. For the foregoing reasons, we propose to uphold the decree for recovery of possession passed by the court below but to modify the decree for recovery of arrears of rent and mesne profits. For the reasons already given, the plaintiff cannot recover such mesne profits at the rate exceeding Rs. 196/- per month. We, accordingly, dismiss the appeal and affirm the judgment and decree of the court below subject to the modification that the plaintiff would be entitled to recover arrears of rent and mesne profits claimed in the plaint at the rate of Rs. 196/- per month. In the circumstances of the case, there will be no order as to costs in the appeal. We grant the appellant time till 30th of June 1984 subject to the appellant filing within one month an undertaking to this court to quit and deliver up vacant possession on the expiry of 30th June, 1984. The appellant would be also liable to go on depositing in the trial court current damages at the rate of Rs. 196/- per month within 15th day of each succeeding month. In case, the above amount be deposited, the respondent will be entitled to withdraw the same without prejudice and without security.