
(1995) 01 CAL CK 0021
In the Calcutta High Court
Case No : Suit No. 239 of 1994

Punalur Paper Mills Limited

APPELLANT

Vs

Central Bank of India

RESPONDENT

Date of Decision : 11-01-1995

Acts Referred:

Registration Act, 1908 — Section 17(1)
Transfer of Property Act, 1882 — Section 107, 110, 111
West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 — Section 5
West Bengal Premises Tenancy Act, 1956 — Section 13(1), 2, 3, 3(1), 3(2)

Citation : AIR 1995 Cal 154 : (1995) 1 CALLT 241 : (1995) 1 CHN 468 : 99 CWN 729

Hon'ble Judges : Shyamlal Kumar Sen, J

Bench : Single Bench

Advocate : S. Talukdar and S.R. Karati, for the Appellant; A. Chatterjee and S. Chattarjee, for the Respondent

Judgement

1. This is an application under Chapter XIII A of the Original Side Rules of this Court for final judgment against the defendant for recovery of vacant possession as also for mesne profits. The facts inter alia involved in the suit are set out hereinafter:

(a) The plaintiff is the owner and landlord of the premises.

(b) An Indenture of Lease was executed by and between the plaintiffs predecessor in title and the defendant on December 1, 1969. The said Indenture of Lease has also been duly registered. The Lease is for a period of 21 years commencing from the first day of November, 1969.

(c) In terms of the said Indenture, the Lease has expired on 31st October, 1990. Though it is not required under the law yet out of abundant caution, the plaintiff by a letter dated 25th September, 1990 (Annexures "A" to the A/R) duly informed the defendant of the imminent expiry of the Lease on 31st October, 1990 and intimated that the plaintiff's authorised representative will call upon

the defendant to receive vacant possession of the demised premises.

(d) A writ application was filed, inter alia, claiming possession of the demised premises. The same was rejected principally on the ground that such a relief cannot be granted in a writ petition. While dismissing the application, it has, however, made clear that there was no adjudication of the merits of the controversy raised in the writ petition and it could be open to the writ petitioner to seek appropriate remedy in accordance with law.

2. It is the case of the applicant/plaintiff that since duration of the lease was for a period of 21 years and the lease expired on 31st October, 1990, the defendant has no defence whatsoever and a decree for eviction should follow as a matter of course. It has also been submitted by Mr. A. K. Sen learned Advocate for the plaintiff that the defendant is not entitled to protection under the West Bengal Premises Tenancy Act inasmuch as the term reserved under the lease is for a period of 21 years and the provisions of the West Bengal Premises Tenancy Act did not and do not apply.

3. The learned Advocate for the defendant however has argued that there is a bonafide defence which should entitle the defendant to have the suit tried on evidence. It has further been submitted on behalf of the defendant that the tenancy strictly construed as per the deed of lease in question created monthly tenancy in favour of the defendant. Mr. Ajoy Chatterjee learned Advocate referred to Clause 4(ii) and Clause 4(xi) of the lease respectively. It has been submitted on behalf of the defendant that "Sooner determination" in all the said clauses really mean that the lease strictly speaking should not be taken to be a lease for a period of 21 years. The learned Advocate referred to proviso to Section 3 of the West Bengal Premises Tenancy Act. In reply to the contention raised by the learned Advocate for the defendant, it has been argued on behalf of the plaintiff that the said argument is ex facie not sustainable and can be termed as in aid of a moonshine defence. It has further been submitted on behalf of the plaintiff that in order to relieve the landlord of the rigours of the provisions regarding eviction of tenants under the West Bengal Premises Tenancy Act, the legislature has thought it fit to confer a right of the landlord in respect of a tenancy, the tenant whereof would have an unrestricted right to enjoy the tenancy for a period of 21 years. The intention appears to be clear that by giving unrestricted right of enjoyment for 21 years, on the other hand the landlord cannot reserve to himself the right to terminate the same at his option at any time before the expiry of the period. The language of the proviso it has been submitted also makes it clear that the lease is not expressed to terminable at the option of the landlord or tenant.

4. In the instant case it has been argued on behalf of the plaintiff that no option has at all been reserved unto the landlord or for that matter to the tenant to determine the lease at any point of time before the expiry of 21 years. It has further been submitted on behalf of the plaintiff that the aforesaid position is also clear from the conduct of the parties that having such a valuable property the

landlord at no point of time called upon the tenant to vacate the premises or to determine the lease prior to the expiry of 21 years indeed since no such right has been provided for in the lease the landlord could not have exercised such right. In support of his contention Mr. Sen relied upon the judgment and decision in the case of Nageswar Majumder and Another Vs. Srimati Savita Dey., and also the decision in the case of Mahindra and Mahindra v. Smt. Kohinoor Devi reported in 1988 (1) CHN 1. It has been argued that in order to attract the provisions of the Transfer of Property Act, and for the purpose of excluding tenancies governed by West Bengal Premises Tenancy Act the language of the proviso to Section 3 stipulates conditions in cases of leases which are not less than 20 years or 15 years as the case may be. It has further been submitted that for the aforesaid purpose lease must be for a period not less than 20 years or 15 years as the case may be and the same is not expressed to be terminable before its expiration at the option either of the landlord or of the tenant. It has also been submitted by the learned Advocate for the plaintiff that the proviso does not contemplate lease exceeding 20 years being covered by the Bengal Premises Tenancy Act when the period of the lease comes to an end by operation of law such as u/s 111 of the Transfer of Property Act or by other laws where leases may be extinguished like the Thika Tenancy Act or the West Bengal Estate Acquisition Act and the Lease Hold properties are made to vest in the Government. In such cases the leases terminate by operation of law and not at the unilateral option of the landlord and the termination of the tenancy or a lease is not by the unilateral option of the landlord or of the tenant. The unilateral part of landlord or tenant arises only in the case of implied surrender u/s 111 of the Transfer of Property Act. By there the right of the lessees to hold the lease-hold exceeding 20 years remains as a right of the tenant according to paragraph 8 of the above decision. It is not made to depend upon the option of the landlord. The learned Advocate accordingly submitted that the particular Clauses referred to in the Deed of Lease providing for sooner determination of the lease does not really contemplate the termination at the option of the landlord but the determination accordingly by operation of law.

5. Mr. Ajoy Chatterjee, learned Advocate for the defendant, has however, submitted that the tenancy created in favour of the defendant No. 1 under the lease in question dated 1st December, 1969 is a monthly tenancy and governed under provisions of West Bengal Premises Tenancy Act 1956 and the provisions of Transfer of Property Act do not apply for the undernoted reasons.

"(a) The lease expressly provides option for sooner determination of the term reserved thereunder. Such term would appear, inter alia, at internal pages (4) and (6) of the lease annexed to the Chapter XIIIIA application.

(b) In paragraph (3) of the plaint the plaintiff also acknowledged existence of the option for sooner determination term expressly provided in the lease and pleaded as follows:--

"By and under the term of the said lease it was expressly stipulated and/or

agreed upon by and between the parties thereto, inter alia, that at the expiration or sooner determination therein stated the defendant No. 1 would peaceably and quietly yield and deliver up possession to the pro forma defendant No. 1 (including his heirs, executors, administrators or assigns) of the said premises."

(c) Option for such sooner determination of the lease before the term reserved is available to both the lessor and the lessee. The said term does not expressly exclude either the lessor or the lessee from exercising the said option.

(d) Section 3 of the West Bengal Premises Tenancy Act, 1956 provides as to when and in what nature of lease the said Act would be applicable and not applicable. Proviso Clause in the said Section 3(2) of the Act makes it abundantly clear that even if there is a lease not less than 20 years but if the period limited by such lease is determinable before its expiration at the option either of the landlord or of the tenant, the West Bengal Premises Tenancy Act would apply and govern such a tenancy.

(e) Therefore, in view of the existence of option for sooner determination clause term expressly provided in the lease in question the said lease is governed under the provisions of West Bengal Premises Tenancy Act, 1956 and tenancy created thereunder in favour of the defendant No. 1 is a monthly tenancy.

(f) Plaintiff's submissions (vide paragraph (4c) of the Notes of Submission) that no option had at all been reserved unto the landlord or for that matter to the tenant to determine the lease before expiry should therefore, be rejected.

(g) The plaintiff submits (vide para (4c) of the Notes of Submission) that from the conduct of the parties, it would be evident that having such a valuable property, the landlord at no time called upon the tenant to vacate the premises or to determine the lease prior to the expiry because no such right is provided in the lease and also be rejected on the above grounds. Further more, in terms of Section 3(2) proviso of the Act, 1956, the very existence of the option of early determination of the lease exceeding 20 years takes the lease out of the proviso of Transfer of Property. Act and brings the same within the purview of West Bengal Premises Tenancy Act, 1956 irrespective of the fact whether such option for early determination was exercised or not by the parties.

6. The main question that arises for consideration, therefore, is whether proviso to Section 3 of the West Bengal Premises Tenancy Act can be attracted in the instant case. It has further been submitted on behalf of the defendant that the observation of the Division Bench in *Nageswar Majumdar v. Smt. Savitri Dey* (supra) is an obiter. It has further been submitted that the principles decided in the said decision really support the case of the defendant. The learned Advocate has sought to distinguish other decisions also relied upon by the petitioner namely that of *Mahindra and Mahindra v. Smt. Kohinoor Devi* (supra), and it has been submitted that the said decision supports the submissions of the defendant since it has been held that under proviso to Section 3(2) of the West Bengal Premises Tenancy Act a lease even for a period of more than 20 years but

determinable before expiry of the term reserved at the option of the tenant only is governed by the provisions of West Bengal Premises Tenancy Act (vide paragraphs 17 and 18) and the Division Bench was pleased to dismiss the appeal as the disputed lease was dated 11-4-1960 for a period of 21 years and was entered into long before 1965 when the sub-section (2) in Section 3 of the West Bengal Premises Tenancy Act was introduced and as such terms of the lease were varied subsequently on 5-2-1971 and 7-9-77, still the benefit of Section 3(2) of the said Act could not be extended to such a lease. Accordingly, it has been submitted that the leave should be granted to the defendant.

7. In the case of Mahindra and Mahindra v. Smt. Kohinoor Debi (supra), the Division Bench of our Court observed in paragraphs 13 and 14 of the said Judgment at page 9 as follows:--

"We do not think that a premises held under a lease for a fixed term ceases to be so held for the purpose of the Transfer of Property Act or the Registration Act or Section 3(1) of the West Bengal Premises Tenancy Act solely because the lessee has been given the right or option to quit the demised property at any earlier stage. A lease for immovable property for any term exceeding one year, can, u/s 107 of the Transfer of Property Act and Section 17(1)(d) of the Registration Act, only be made by a registered instrument and the same would nevertheless remain one for such period fixed, even though the lessee has a right or option to put an end to it at any time before the expiry of that period, a lease, for, say, 21 years would not cease to be, but would remain such a lease in the eye of law even the lessee has been given an option to terminate it earlier. If a lease for a fixed term with the right or option in favour of the lessee of earlier termination should also remain a lease for the period fixed, as the option in each case, creates, enlarges limits or extinguishes no right, title or interest until exercised.

"A premises in order to be excluded from the operation of the West Bengal Premises Tenancy Act, must, u/s 3(1) thereof, be a "premises held under a lease for a period of not less than" 15, years or 20 years as the case may be. A house or a building becomes a premises, as defined in Section 2(f) of the West Bengal Premises Tenancy Act, only when the same is let out. A let out house becomes a premises only vis-a-vis the tenant and not vis-a-vis the landlord for whom it is still a house or a building. Therefore, the expression "premises held" in Section 3(1) would obviously mean a premises held by the tenant or the lessee. As already noted, if premises are held by a tenant under a lease or a tease for a fixed period or more than 15 or 20 years, the premises must be deemed to be held under a lease for such fixed period, notwithstanding the fact that the tenant has also the right or option, which he may or may not exercise to terminate it earlier, at least unless and until that right is exercised. If under the lease the tenant has an unfettered right to hold the premises for the period fixed, he must be deemed to be holding the same under a lease for fixed period for the purpose of Section 3(1) of the West Bengal Premises Tenancy Act, whereunder the provisions of the Act would cease to apply if the period fixed is for more than 15

or 20 years. The legislature in enacting Section 3 in 1956, which is now renumbered as Section 3(1) thought it fit that once a landlord has granted such a long lease entitling the tenant to hold the premises for such a long period without any right reserved to the landlord to determine it earlier, the landlord should be relieved or the rigours of the provisions of the Act permitting ejectment only on the ground specified in Section 13(1) and should be allowed to recover possession on the expiration of such period."

8. The Division Bench while discussing the provision for option to determine the lease before it is determinable noted that if a landlord while purporting to grant a lease for more than 20 years reserves to himself the unconditional right to determine the same at any time before the term fixed the premises may not be regarded to be held under lease for the term fixed within the meaning of Section 3(1) in order to go out of the provisions of the West Bengal Premises Tenancy Act. The fixation of the period of the lease in that case may only be a camouflage and a manoeuvre to evade the provisions of the West Bengal Premises Tenancy Act, not to be countervailed by any Court. It has also been made clear in the Division Bench decision that in the said case since the lease was determinable at the option of the tenant and not at the option of the landlord, it was not necessary to decide the said question. It has been specifically made clear in the said judgment that under proviso of Section 3(2), a lease even for a period of more than 20 years, but determinable at the option of the tenant only also goes out of the Proviso and is governed by the provisions of West Bengal Premises Tenancy Act. In the instant case, the lease in question does not provide for option either by the tenant or by the landlord. It only provides for sooner determination of the lease which may taken place because of the various provisions mentioned in the Transfer of Property Act itself. It, therefore, cannot be said that the landlord has been given the option to terminate the lease in question at his will and as such, the lease although is for 21 years is in effect less than the same and should be governed by the provisions of the West Bengal Premises Tenancy Act. The other decision in the case of *Nageswar Majumdar v. Srimati Savita Dey* (supra) relied upon by Mr. Sen the learned Advocate for the petitioner may be taken note of. It has been held in the said decision that the West Bengal legislation like other allied legislations in other States, has thought it fit to preserve the contractual rights of the landlord unaffected by the statute, if a lease for considerably long period has been granted to the tenant. Section 3(1) of the West Bengal Premises Tenancy Act has accordingly provided that nothing in the said Act shall apply to any premises held under a lease for a period of more than 20 years. The legislature obviously thought that once a tenant's tenancy is secured for the considerable, long period of more than 20 years, or more than 15 years, as the case may be, the landlord may reasonably be exempted from the rigours of the Act disentitling him to evict tenant except on grounds specified in Section 13 and thus empower him to recover possession on the ground of expiration of lease or other contractual grounds.

9. Construing the aforesaid decision as also the provision contained in proviso to

Section 3, it appears to me that there must be clear provision or right to exercise option to terminate the lease either by the landlord or the tenant as the case may be and in that event, the lease will not be deemed to be a lease of 21 years because express right has been reserved upon either by the parties to terminate the lease. In the instant case, however, as noted there is no such right to exercise option granted either to the landlord or the tenant but lease Deed only provides for sooner determination which is, in fact, available to the parties even without mention of the same in the lease Deed under the provisions of the Transfer of Property Act itself. Accordingly, the contention of the defendant that the proviso to Section 3 of the West Bengal Premises Tenancy Act is applicable in the instant case and as such, the tenant is entitled to protection under the West Bengal Premises Tenancy Act, does not appear to be of much substance.

10. The judgment and decision of the Division Bench of this Court in the case of *Ila Basi v. Narayani Bazaz* reported in 59 CWN 102 may be taken note of. The said decision though not cited by either of the parties, in my view appears to be relevant. In the aforesaid decision, the words "terminable..... at the option of the landlord" occurring in Section 5 of the West Bengal Premises Rent Control Act, 1950, was considered. The proviso to Section 3(1) of the West Bengal Premises Tenancy Act mentions the words as terminable before its expiration at the option either of the landlord or of the tenant. In the aforesaid decision, the Division Bench considered a clause in a lease for 30 years which given a right of re-entry to the landlord on certain events happening, namely, the rent reserved remaining unpaid for three months after the due date and in case of non-performance or non-observance of the covenants, conditions and agreement in the lease. It was held that such a lease cannot be said to be terminable within the period of thirty years at the option of the landlord. Accordingly the West Bengal Premises Rent Control Act, 1950 not applicable to such a lease. The Division Bench further held that it is only where the lease provision whether or not the tenant does something or whether or not something happens, merely on the strength of the provision's of the lease the landlord can cut off a part of the term that the lease can be said to be "terminable at the option of the landlord". In this connection, Division Bench referred to Section 110 of the Transfer of Property Act, the third clause of which is in these words "Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee and not the lessor, shall have such option."

On the basis of the said Section, it was argued on behalf of the defendant / petitioner before the Division Bench that the Legislature in enacting Section 5 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, had in mind the provisions of Section 110 of the Transfer of Property Act as regards the expression of terminability before the expiration of the period apart from anything else.

11. The Division Bench accepted the contention of the defendant/petitioner and

held, inter alia, as follows :--

"The words "Terminable at the option of the landlord" cannot in our judgment, be reasonably applied to a case where in view of something happening the lease is forfeited. It is true that even in such a case the landlord may not choose to enforce the forfeiture, but it will be inappropriate to speak of such a lease as terminable at the option of the landlord. These words are properly applicable to a case where there is provisions for cutting off a part of the term wholly and solely because the landlord so chooses. Where the will of the landlord is not supreme and can be exercised only if the tenant acts or omits to act in a particular way it can no longer be properly said that the landlord is free to cut off the term. It is only where the lease provides that whether or not the tenants does something happens, merely on the strength of the provisions of the lease the landlord can cut off a part of the term that the lease can be said to be "terminable at the option of the landlord."

"We have therefore come to the conclusion that the present lease was not terminable within the period of 30 years for which the lease was executed at the option of the landlord and consequently the provisions of the West Bengal Premises Rent Control Act, 1950 are not applicable. We therefore set aside the order passed by the learned Court below.

The rule is made absolute. The petitioner will get her costs in both the Courts."

12. The words referred to in the lease in question in the instant case is that "at the expiration or sooner determination therein stated the defendant No. 1 would peaceably and quietly yield and deliver u"p possession to the proforma defendant No. 1 (including his heirs, executors, administrators or assigns) of the said Premises."

13. It was argued on behalf of the defendant that option for such sooner determination of the lease before the term reserved is available to both the lessor and the lessee. The" said term does not expressly exclude either the lessor or the lessee from exercising the said option, according to the learned Advocate for the defendant.

14. I am however, unable to accept the said contention. The question of determination before the expiry of the term contained in the lease has been provided u/s 111 of the Transfer of Property Act. The word "Sooner determination before the expiry contained in the lease" in my view provides for the right to determine the tease under the law that is to say, under the Transfer of Property Act itself. The said words in the lease under the instant case providing for sooner determination cannot be equated with the option, to terminate the lease at the instance of the landlord. The contention of the defendant therefore, fails. In my view there is no defence in the suit and the plaintiff accordingly, succeeds in the instant case.

15. Accordingly in my view, the plaintiff succeeds in this application. There will

be an order for final judgment and decree for recovery of possession of the premises in question.

16. The plaintiff is also entitled to mesne profit from the date of expiry of the said lease. Since however, the assessment of mesne profit cannot be ascertained, Mr. D. P. Mukherjee, a member of the bar is appointed Special Referee to assess the same. The Special Referee is directed to submit the report within 31st March, 1995.

17. The application is, thus disposed of.

18. The plaintiff is entitled to costs of this application.

19. Stay prayed for is refused. The Special Referee will not take up the matter for a period of three weeks from date.

20. All parties are to act on the signed copy of the operative part of the judgment on the usual undertaking.

21. Order accordingly.