
(2001) 05 CAL CK 0027
In the Calcutta High Court
Case No : F.M.A.T. No. 1056 of 2000

R.S.I. Limited

APPELLANT

Vs

The Property Company Private Limited and Another

RESPONDENT

Date of Decision : 24-05-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 21 Rule 101, Order 21 Rule 102, Order 21 Rule 97, Order 21 Rule 99
Transfer of Property Act, 1882 — Section 107
West Bengal Premises Tenancy Act, 1956 — Section 13, 13(1), 13(2), 14, 16
West Bengal Premises Tenancy Rules, 1958 — Rule 4

Citation : (2001) 3 CALLT 132

Hon'ble Judges : Samarsh Banerjea, J; Gorachand De, J

Bench : Division Bench

Advocate : Sudhis Dasgupta, S.P. Roychowdhury, S.K. Mukherjee, D. Saha Roy, S. Mondal and R. Roychowdhury, for the Appellant; Shaktinath Mukherjee, Partha Sarathi Bose, Sanjib Kumar Mal and Raja Xavier, for the Respondent

Final Decision : Dismissed

Judgement

G.C. De, J.—This appeal is directed against the judgment and order dated 15th January 2000 passed by Smt. A. Roy Saraswati, Civil Judge (Senior Division) Fourth Court at Alipore, District 24 Parganas (South) in Misc. Case No. 25 of 1998. By the said judgment the trial Court dismissed the Misc. Case filed by the present appellant R.S.I. Limited under Order 21 Rules 97, 99 and 101 read with Section 151 of the Civil Procedure Code.

2. The case of the appellant-petitioner is that it is a Company registered under Companies Act 1956 having its registered office at 1, Bishop Lefroy Road. P.S. Bhawanipur, Calcutta 700 020 and it was Inducted as a tenant in respect of the eastern part of the ground floor of premises No. 1, Bishop Lefroy Road, P.S. Bhawanipur, the details of which are given in Schedule "B" to the application in the year 1977 at a monthly rental of Rs. 6000/-inclusive of service charges. The possession of the tenanted portion was given in 1978 and rent receipts were

issued in the form of licence fee and service charges. It is alleged that at the time of induction in the year 1977, the respondent No. 1/opposite party No. 1, the Property Company Private Limited, gave express consent to the Chairman, D.S. Mazda of the appellant petitioner Company, and Mr. K.R. Irani, Managing Director of the respondent No. 1/opposite party No. 1 not only gave his express consent but also gave such consent in writing to the Director of the proforma opposite party-respondent No. 2 McDonell India Ltd. for Induction of the present appellant-petitioner as monthly premises tenant.

3. The status of the present appellant-petitioner as a tenant or at least as an authorised and legal sub-tenant was never questioned. But all on a sudden the McDonell Limited refused to accept the monthly rent from the R.S.I Limited for which the rent was tendered. The rent for the month of October 1998 was tendered to the Property Company, which also refused to accept the same. Being suspicious about the situation, an inquiry was made and it was ascertained that the Property Company and McDonell Limited in collusion with each other obtained an ejectment decree in respect of the entire Premises No. 1 and 1/1, Bishop Lefroy Road from the Fourth Court of Subordinate Judge at Alipore in Title Suit No. 66 of 1977. It was also ascertained from the Court on 22.12.1998 that the Property Company put the said decree into execution in Title Execution case No. 10 of 1998 and writ of delivery of possession was Issued in respect of the entire premises including the JB" Schedule property. But the R.S.I. Limited being an authorised sub-tenant cannot be evicted in terms of the decree in Title Suit No. 56 of 1977 in respect of which he was not a party. Accordingly, an application under Order 21 Rules 97, 99 and 101 read with Section 151 of the CPC was filed praying for the following reliefs :

"(a) For an inquiry and determination of the petitioner's right, title and interest in the suit premises as described in the Schedule "B" below;

(b) For declaration that the petitioner is the bona fide and lawful subtenant in the suit premises under the proforma O.P. No. 2 and alternatively tenant under the O.P. No. 1;

(c) For permanent injunction restraining the O.P. No. 1 from eviction of the petitioner from the suit premises as described in the Schedule "B" hereunder in execution of the decree that has been passed in T.S. No. 66 of 1977 by the Learned 4th Sub-Judge (now 4th, Court of Civil Judge, Senior Division) at Alipore.

(d) Temporary/Interim Order of injunction;

(e) Cost of the suit.

(f) Any other relief or reliefs which the petitioner is entitled in law and equity."

4. The Property Limited contested the Misc. Case after filing a written objection. Their case is that the Title Suit No. 66 of 1977 was filed on 6.8.1977 against the McDonell Limited for recovery of khas possession on the ground of illegal sub-letting, structural additions and alterations and also on other grounds and

obtained a decree on 13.9.1988 after a contested hearing. The McDonell Company being aggrieved by the said decree filed First Appeal (F.A. No. 27 of 1989) before this High Court and by a judgment dated 03.10.1997 a Division Bench of this Court dismissed the appeal and the judgment and decree of the trial Court were affirmed.

5. Against the said order, the McDonell Limited moved the Hon'ble Supreme Court and on 13.5.1998, the SLP was dismissed as withdrawn. Accordingly, the decree in Title Suit No. 66 of 1977 was put into execution by Title Execution Case No. 10 of 1998. It is also alleged that the R.S.I. Limited illegally was put into possession on or about 30.5.78 during the pendency of Title Suit No. 66 of 1977 in respect of 5000 sq. ft. It is also contended that the Director of the Property Company never gave any express consent as regards induction of the R.S.I Limited by the McDonell Limited in respect of the "B" Schedule property. Hence, a prayer was made for dismissal of the Misc. Case being not maintainable inasmuch as the R.S.I. Limited was an unauthorised sub-tenant. However, the McDonell Limited figured as proforma opposite party did not contest the Misc case.

6. On the basis of the respective pleadings, the trial Court framed as many as seven issues. Evidence was adduced by both the parties and arguments were made in support of the respective cases. However, the trial Court disbelieved the case made out by the R.S.I Limited and dismissed the Misc. Case on contest with costs.

7. In course of hearing of this appeal, the McDonell Limited figured as respondent No. 2 did not appear and contest. However, the R.S.I Limited and the Property Company appeared and made their respective submissions.

8. It appears that the entire dispute centres round the question as to whether the petitioner RSI Limited is a lawful sub-tenant in respect of the Schedule "B" to the application. But before entering into this question, it is necessary to indicate that the following facts are not disputed:

(a) on 18th May 1956, a registered deed of lease was executed between the opposite party decree holder, the Property Company Private Limited (Lessor) and McDonell (1948) Private Limited (Lessee) in respect of Premises No. 1, Bishop Lefroy Road, Calcutta for a period of 10 years. Thus the lease is a post West Bengal Premises Tenancy Act Lease.

(b) Clause 3 of the said Lease Deed is as follows :

"Not to assign or sublet the demised premises or any part thereof without the written consent of the Lessor first had and obtained PROVIDED HOWEVER the Lessor shall whenever called upon by the Lessee permit them to assign sublet or part with the possession of the whole or part of the demised premises in favour of any trade representation of any foreign country in India or any persons company or firm of repute."

(c) On August 6, 1977 the Property Company instituted Title Suit No. 66 of 1977 in the Fourth Court of Subordinate Judge at Alipore praying for recovery of possession on determination of the tenancy as well as on the ground of subletting to different parties and on other grounds.

(d) On August 8, 1977 the Property Company obtained an ad interim order of injunction in Title Suit No. 66 of 1977 restraining the Lessee (McDonell) from transferring and/or assigning or subletting the suit premises till the disposal of the application for temporary injunction. However on May 30, 1978 the application for temporary injunction was rejected by the Court after a contested hearing and thereby vacated the ad interim order of injunction.

(e) From May 31, 1978 the RSI Limited started functioning in the suit premises, alleging that on April 1 1977, the RSI Limited was inducted as a sub-tenant by the said lessee McDonell in respect of an area of 5000 sq. ft. in the ground floor of the suit property (Schedule "B" to the application).

(f) On September 13, 1988 the Titled Suit No. 66 of 1977 was decreed in favour of the Property Company on the ground of subletting to different parties including the RSI Limited and also on other grounds.

(g) The First Appeal being FA No. 27 of 1989 filed by McDonell was dismissed by a Division Bench of this Court on October 3, 1997 and the judgment and decree of the trial Court were affirmed.

(h) On May 13, 1998 the SLP filed by the McDonell before the Hon"ble Supreme was dismissed as withdrawn.

(i) Title Execution Case No. 10 of 1988 was started by the property Company for executing the decree passed in Title Suit No. 66 of 1977 and writ of delivery of possession was issued in respect of the entire premises including the "B" Schedule property.

(j) The RSI Limited was not a party in Title Suit No. 66 of 1977 and the instant application was filed by them challenging the execution of the decree against them.

9. The learned counsel for the appellant RSI Limited made a forceful in respect of the contention that RSI Limited is a lawful sub tenant under the Property Company Inasmuch as the tenant McDonell in terms of Clause 3 of the Lease Agreement sublet the Schedule "B" property to the RSI Limited. It is argued that the consent in writing as required u/s 14 of the West Bengal Premises Tenancy Act 1956 is contained in the deed of lease itself and such sub-letting in favour of RSI Limited by McDonell was during "the subsistence of the contract or lease was undoubtedly a valid subletting. It is also argued that the said deed of lease having been executed with the knowledge of provision of West Bengal Premises Tenancy Act 1956, the opposite party No. 1, Property Company is not competent to question the same.

10. It is argued that the above-mentioned facts practically distinguished the judgment of the apex Court reported in *Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others*, It is also pointed out that the principles laid down in the case of *Shantilal Rampuria and Others Vs. Vega Trading Corporation and Others*, is also not applicable in the present facts and circumstances of the case inasmuch as subletting in the cited decision was done after the expiry of contract of lease. It is also argued that none of these judgments had decided upon nor had made any observation in respect of consent in writing contained in the deed of lease itself and subletting and/or parting with possession during the tenure of contract of lease. It is further argued that Section 14 of the West Bengal Premises Tenancy Act 1956 does not enjoin the consent in writing should be obtained by the tenant from the landlord subsequent to creation of tenancy as envisaged u/s 13(1) (k) of the Act. It is pointed out that there is nothing in Section 14 warranting taking of consent in writing subsequent to the creation of tenancy or subsequent to the contract of tenancy between the landlord and the tenant.

11. The learned counsel for the appellant further argued that the West Bengal Premises Tenancy Act 1956 does not totally prohibit subletting. But it restricts the right of subletting by the tenant. Since the landlord in this case with clear knowledge of the provisions of the Act gave the consent in writing in the contract of tenancy itself, that is, in the deed of lease and when the tenant, subsequent to the written contract of tenancy inducted a sub-tenant, it is to be construed as a valid subletting with previous consent in writing of landlord as envisaged in the provision of Section 14 of the West Bengal Premises Tenancy Act 1956. It is added that since the previous consent in writing is contained in the deed of lease itself, a second consent in writing is not required during the subsistence of contract of tenancy.

12. The learned counsel also urged that West Bengal Premises Tenancy Act 1956 is for protection of the tenants and hence, Section 14 of the Act should not be construed in a manner to further restrict the right of subletting of a tenant. A tenant/lessee enjoys the right of subletting under Transfer of Property Act and repeal of Transfer of Property Act by the West Bengal Premises Tenancy Act 1956 has not destroyed the right of the tenant of subletting unless the provision of 1956 Act clearly superimposes or is in direct conflict with the rights enjoyed by the tenant under Transfer of Property Act. On this score, reliance was placed on a decision of this Court reported in *Luxmi Spinning and Weaving Mills Ltd. Vs. Md. Ibrahim, Mutwalli*, . It is also argued on behalf of the appellant that since the subletting in favour of RSI Limited was done with the previous consent in writing of the landlord within the meaning of Section 14 of the West Bengal Premises Tenancy Act, 1956 that lawful sub-letting does not become unlawful merely because the contractual tenancy of the tenant comes to an end. On this score, reliance was placed on *Mahabir Prasad Verma Vs. Dr. Surinder Kaur*, . It is argued that the said judgment was referred to in AIR 1988 Supreme Court 1754 (*Silverline Forum Pvt. Ltd. v. Rajiv Trust and Anr.*) for the proposition that the

sub-tenancy created with the consent of the landlord during the subsistence of the tenancy would continue to be lawful even after expiry of the period of lease and three Judges Bench of the apex Court in the later judgment have not expressed any dissent. Similar view was also taken in Arvind Narhar Wagh Vs. Chintaman G. Khire and Others, . Learned counsel for the appellant argued that the judgment of the High Court in the Ejectment Suit is not binding upon the RSI Limited as it was not a party to the Ejectment Suit, Moreover, in the present case the consent in writing to sublet was given by the landlord subsequent to the West Bengal Premises Tenancy Act of 1956..It was urged that the question of contract out of the Rent Control. Statute had not been considered in the High Court's Judgment in the Ejectment Suit. On the other hand, it has been held by the apex Court in Smt. Juthika Muliek and another Vs. Dr. Mahendra Yashwant Bal and others, that the landlord and the tenant may contract out of the tenancy Act. In the instant case, there is nothing in the lease deed to indicate that for each and every subletting, separate consent in writing will be required.

13. Finally analysing the factual aspects, the learned counsel for the appellant argued that in fact the landlord gave consent/approval of subletting. It is pointed out that the lessor and the lessee were closely associate Companies having common Directors and both the Companies were controlled by same families, namely, Mazda and Irani. The letter dated 12th December 1977 (Ext. 6) and another letter dated 23rd March, 1977 marked as "X" for identification are sufficient to indicate that Mr. K.R. Irani, one of the Directors of the Property Company informed Mr. D.S. Mazda of the McDonell Private Limited (opposite party No. 2) that they had no objection to induct RSI Limited as a sub tenant in a portion of the suit premises namely 1, Bishop Lefroy Road.

14. It is also argued that the lower Court was pre-determined and passed the order in haste. It failed to adjudicate an Independent suit and was Influenced by consistent submission by the Property Company that the matter was dismissed by Hon"ble Supreme Court. The trial Court failed to take into notice the fact that Mr. K.R. Irani in Title suit No. 66 of 1977 admitted in his affidavit annexed to the application under Order 39 Rules 1 and 2 of the CPC that he found a sign board of RSI Limited before filing of the suit. So, it is argued that such a sign board on a premises could not be affixed without any meaning. It is also argued that Mr. D.S. Mazda in his Affidavit-in-Reply in connexion with the revisional case in respect of injunction before in this Court clearly stated that RSI Limited was not allowed to take possession till 30.5.1978 which means that the tenancy was created "earlier.

15. At the close, the learned counsel for the appellant pointed out that the Title Suit No. 66 of 1977 was the outcome of a collusion between the landlord and the tenant and the lessor, namely the McDonell withdrew the SLP before the apex-Court as a part of such collusion. It is pointed out that the opposite party No. 2 (McDonell) is still in collusion with the opposite party No. 1 and it has opted not to contest this case and in fact, tried to remain silent during the continuance of

Title Suit No. 66 of 1977. On law point the learned counsel for the appellant also urged that notice u/s 16(1) is a protection for a subtenant even if he is unlawful subtenant but has served a notice. Any subtenant who has served a notice u/s 16(1) has to be impleaded and if not, such a decree will not be binding on such subtenant and this gives a protection to a subtenant. Moreover, for failure to give notice u/s 16(1) there is a penal provision u/s 30(5) of the West Bengal Premises Tenancy Act. Even Section 13(2) of the Act has two distinctive separate parts, firstly, It gives protection to a subtenant but has served a notice u/s 16(1) and secondly, excepting the case of reasonable requirement, a lawful subtenant will have its protection. It is argued that no judgment so far has taken away the protection u/s 13(1) and Section 14 of the Act because the subtenant failed to serve notice u/s 16(1). It is added that there is no logic behind Section 16(1) when a subtenant has been lawfully inducted with the knowledge of landlord and again to inform such landlord of creation of sub-tenancy by such subtenant. The only meaning of Section 16(1) is that any unlawful subtenant who has served notice u/s 16(1) of the Act is to be impleaded as the party in the suit for eviction and not for otherwise. Accordingly the learned counsel prayed for rejection of the order passed by the trial Court and for allowing the prayer of the present applicant namely, the RSI Limited.

16. Having regard to the scope of the instant proceeding and the questions to be determined therein, the vital point is the date, month and the year of induction of the appellant RSI Limited in the "B" Schedule property. In the application, the RSI claimed that they were inducted in April 1977, but no specific date was given. In course of evidence, attempt was made to indicate that RSI Limited was inducted from April 1, 1977. It is also claimed that actual possession of the "B" Schedule property was taken on May 31, 1978 that is immediately after rejection of the application for temporary Injunction and withdrawal of ad interim order of injunction by an order dated 30.5.1978 passed by trial Court in Title Suit No. 66 of 1977. An attempt was made to explain that though the tenancy created by McDonell on 1st April 1977, the actual possession could not be taken before 31st May 1978 as the "B" Schedule property required extensive repair and thereafter, the order of injunction was in force from 8th August 1977 till 30th May 1978. But surprisingly no material has been produced by the appellant RSI to indicate that on 1st April 1977, they took possession of the "B" Schedule property and thereafter any act of possession was carried on. On the other hand, it is evidenced on their behalf that the registered office of RSI Limited was shifted to the "B" Schedule property on 31st May 1978 from another premises. Argument is also made that for shifting a being establishment like the RSI from the existing office to the "B" Schedule property took a considerable time. But again it is to be noted that no rent receipt or any other document has been produced by the RSI in support of continuance of the tenancy from 1st April 1977 to 31st May 1978.

17. The learned counsel appearing on behalf of the opposite party No. 1-decree holder drawing our attention to Ext. 1 argued that the first rent receipt in favour of RSI Limited is for the month of April 1985. Since no rent receipt is produced

from April 1977 to May 1978 payment of rent and its acceptance having not been proved, the creation of tenancy is also not proved. It is also argued that the tenancy was created during the pendency of Title Suit No. 66 of 1977 and as such, the application filed by RSI Limited is not maintainable in view of the provisions of Order 21 Rule 102 of the Civil Procedure Code.

18. u/s 107 of the Transfer of Property Act all other leases of Immovable property may be made either by registered Instrument or by oral agreement accompanied by delivery of possession. In the instant case the physical possession in respect of "B" Schedule property was taken only on 31.5.1978 indicating that oral agreement dated 1st April 1977 was not accompanied by delivery of possession. So u/s 107 of the Transfer of Property Act there was no valid sub-tenancy.

19. The appellant RSI has not claimed that they obtained any written consent of their induction as sub-tenant from the opposite party No. 1, Property Company. The Ext. 6 is rightly argued to be a "doctored, copy of letter from RSI Limited to the Corporation of Calcutta and in fact, it cannot help the RSI Limited to prove the consent of K.R. Irani, Director of the Property Company Private Limited. The letter dated 23rd March 1977 is also not marked as an Exhibit in the suit and it was simply marked as "X" for Identification and hence, no reliance is to be placed on it. It is needless to mention that an office copy cannot be kept in the manner as is claimed in respect of the said letter without any Initial or signature of the person issuing it. The word "Sd/-" is sufficient to indicate that an attempt was made to show it as a letter of K.R. Irani. Be that as it may, the letter has not been proved and no reliance was rightly placed on it by the trial Court. It is also to be noted that in Ext. 6 the date of the letter is also mutilated and cannot be read indicating that an attempt was made to make it 23rd March 1977 after stating out some other dates. So there is nothing on the record to show or indicate that sub-tenancy was created on and from 1st April 1977. In fact, the date of creation of the sub-tenancy is also not Indicated in the original application. An attempt was made by RSI Limited before the institution of the Title Suit to show the existence of the business at 1, Bishop Lefroy by putting one sign board. But it is sufficiently clarified that to avoid any such sub-tenancy, an injunction petition was filed in Title Suit No. 66 of 1977 for restraining the McDonell from creating any sub-tenancy. The evidence on record is also sufficient to indicate that as soon as the order of injunction was vacated on 30th May 1978, the RSI Limited took the possession on the following day, that is on 31st May 1978. So the sub-tenancy was undoubtedly created during the pendency of the title suit and hence, it is rightly argued that such tenancy is hit by the provision of section 52 of the Transfer of Property Act and also by the provision of Order 21 Rule 102 of the Civil Procedure Code. It is also rightly argued placing reliance on the decision of Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and another, that a transferee pendente lite is not entitled to raise any entertainable plea at the execution stage.

20. In this connexion it is pertinent to mention that the P.W 1 failed to produce any rent receipt for the month of April or May 1977. The P.W 1 further stated that they were Inducted in the portion vacated by the USSR Trade Representation. The D.W 1 in his evidence stated that in the beginning of June 1977, the USSR Trade Representation vacated the suit premises. This statement was not controverted in the cross-examination. So it was not possible for RSI Limited to be inducted in the same portion which was under the occupation of USSR Trade Representation upto June 1977. So judging from this standpoint also the plea of creation of the sub-tenancy with effect from 1st April 1977 or May 1977 cannot be believed.

21. Clause 3 of the Lease Deed authorised the McDonell (Lessee) to assign, sublet or part with the possession of the whole or part of the demised premises in favour of any trade representation or firm. But before such induction, the lessee was to call upon the lessor for the permission. There is nothing on the record to show that the McDonell ever called upon the Property Company to permit them to sublet the "B" Schedule property to RSI Limited. So, at the risk of repetition we come to a conclusion that sublease was created during the pendency of the suit without the prior consent in writing of the landlord.

22. In view of the discussion hereinabove made, we come to a conclusion that before subletting it was incumbent upon the McDonell to take consent of the lessor, the Property Company under Clause 3. This act was also discussed in details in the judgment of the Division Bench of this Court in McDonell's Appeal No. F.A. 27 of 1989 disposed of on 3.10.1997. Relying upon the different pronouncement of the apex Court the Division Bench held that notwithstanding alleged general consent in indenture dated 18.5.1956 specific consent to a particular subletting is required to enable the subtenant to claim special protection of the 1956 Act.

23. No doubt the judgment of the Hon"ble Division Bench in McDonell's appeal will not operate as res judicata since RSI was not a party therein. But it is rightly argued by the learned counsel for the respondent No. 1 that it held the filed as a precedence. On this score reliance was rightly placed in the decision reported in Sm. Bibhabati Debi and Another Vs. Mahendra Chandra Lahiri and Others, and Sahu Madho Das and Others Vs. Mukand Ram and Another, . In both these decisions, the view was taken that when a document construed by the apex Court, though the decision is not binding on a person not a party to that litigation, yet the decision operates as a judicial precedent.

24. In this connexion, it is to be mentioned that D.W1 Irani during his cross-examination stated that he had personal knowledge that RSI was inducted on 30.5.78 by the opposite party No. 2 without the written consent of O.P. No. 1. But there was no further cross-examination of Irani touching--this point The Ext. "B" is a verified petition filed by the McDonell in Title Suit No. 66 of 1977 in which there is a specific averment that the "B" Schedule property was sublet immediately, after the order of vacating the ad interim order of injunction was

passed on 30.5.1978, The said Ext. "B" has been admitted upon the evidence of the Mr. Irani and it does not appear to be objected to. It is rightly contended by the learned counsel for the O.P. No. 1 placing reliance on the decision of the apex Court in P.C. Purushothama Reddiar Vs. S. Perumal, that once a document is properly admitted the contents of that document are also admitted in evidence though those contents may not be conclusive evidence. In the said decision, the apex Court also observed that it is not open to a party to object to the admissibility of documents which are marked as Exhibits without any objection from such party. It is already stated above that D.W 1 proved the said document and it was marked as an Exhibit without any objection from the present appellant. In a similar circumstance the apex Court in Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import, also took the similar view that unless objected to by a party, the documents admitted in evidence are to be construed to have been satisfactorily proved.

25. The Ext. "B" was lawfully admitted in a evidence and once it is not objected its contents are required to be assumed to be true. It is well-settled that when admissibility is not questioned, then the contents are also admitted to be part of the evidence. The contents of the Ext. "B" when examined in the light of the pleadings and deposition of the O.P. No. 1 appear to be undisputed and true. So Judging from the legal as well as factual point of view, we come to a conclusion that the sub-tenancy was created during the pendency of the suit for which the application filed by the present petitioner is not maintainable and it was rightly rejected by the trial Court.

26. Even if the sub-tenancy was created in April 1977 that is before the filing of the suit, it is to be construed as illegal sub-tenancy as no notice u/s 16 was ever given to the landlord by the lessee or by the sub-lessee.

27. Section 16(1) of the Act enjoins upon the post Act subtenant as also the inducting tenant to give notice to the landlord in the prescribed manner within one month from the date of such subletting. Rule 4 of the West Bengal Premises Tenancy Rules 1956 requires the notice u/s 16 to be given by Registered post with Acknowledgement Due and such notice is to contain the particulars specified in the said rule. Giving of such a notice u/s 16 is mandatory even when the post Act sub-tenancy is created under the written consent of the landlord. Such a view was taken by the apex Court in Pulin Behari Lal Vs. Mahadeb Dutta and Others, . In Hiranmoyee Debi and Ors. v. M.K. Somendra Nandy and Ors. (1982 (1) CLJ 229), a Division Bench of this Court also examined such a situation and took the view that the legislature had made it incumbent upon the subtenant to give notice of their sub-tenancy in order to be entitled to claim protection there under. Therefore, no Court can dispense with the fulfilment of such a statutory requirement by taking the view that since the landlord was aware of the sub-tenancy, it is immaterial whether any notice u/s 16(2) of the Act had been given or not. It is a settled principle of law that the object of Section 16, on the whole, is to provide a scheme and a machinery to render it as to who are the sub

tenants that would be entitled to relief under the other provisions of the Act, namely, Section 13(2) of the West Bengal Premises Tenancy Act. In the absence of any such notice the sub tenants are not entitled to the protection u/s 13(2) of the Act. Similar view was also expressed by another Division Bench of this Court in Lakshmi Rani Das and Ors. v. Hari Sankar Dutta reported in 1982(1) CLJ 350 and in J.C. Chakraborty & Co. and Ors. v. Shantilal Rampuria and Ors. reported in 1997 (1) CLT 360. The question was further raised in J.C. Chakraborty & Co. v. Shantilal Rampuria and Ors. reported in 1998 (II) CHN 530, where the Division Bench of this Court after analysing the pre Act and post Act sub- tenancy, took the view "in view of our discussion made hereinabove and relying on Section 16(2) read with Section 13 of the Act, we are of the opinion that the requirement of Section 16(2) of the Act is mandatory." The Court took further view that only subtenants who have given notice of their sub- tenancies to their landlords u/s 16 would be protected under the Act and non else. So the argument made by the learned counsel for the appellant on this score that no notice was necessary is not tenable in law and we hold and conclude that for getting protection under the Act the service of notice u/s 16 to the landlord is mandatory.

28. The learned counsel for the opposite party No. 1 pointed out that D.S. Mazda was a Director in respect of McDonell and he tried to become an illegal Director of the Property Company. Scanning the evidence of D.W 1 it has been pointed out that from the beginning of 1977 Mr. K.R. Irani, Rustamji and the D.W 1 are the Directors of the Property Company, and in the annual return of the Company the names of Directors are given (Ext. "C"). So it is not correct to say that Mr. D.S. Mazda had any connexion with the respondent No. 1. It is proved by the respondent No. 1 that after the prolonged legal battle the Iranis succeeded in removing D.S. Mazda from the alleged directorship of the Property Company pursuant to the order of the Company Law Board in Company petition No. 481/186/CLP/75 (Ext. 5). It appears that the trial Court discussed this aspect in its Judgment in details. So the plea that the sub- tenancy was created with the consent of the parties is not at all tenable in facts as well as in law. On the other hand, it is proved beyond any reasonable doubt that there was no consent in writing as regards the creation of the sub-tenancy. It is also discussed above that the consent of the landlord was not taken following the terms contained in Clause 3 of the Deed of Lease.

29. Much was argued about the collusion between the Property Company and the McDonell Limited. But it is to be noted that the Title Suit No. 66 of 1977 was fought for two decades and ultimately it was withdrawn at SLP stage when D.S. Mazda was no longer in this living world. It is proved that D.S. Mazda expired on 4th April 1987 that is long before the Judgment before the trial Court. So it is absurd to allege that the decree in the trial Court was obtained as a result of collusion between the Property Company Limited and the McDonell.

30. In this connexion, the claim of RSI that Title Suit No. 66 of 1977 was filed behind their back, as taken in the grounds of appeal, is not tenable in law

inasmuch as on their own showing they were inducted in the portion of the suit premises on May 1978. In fact, the Title Suit was filed on 6th August 1977 that is long before the induction of RSI in "B" Schedule property. It is also to be noted that the Mazdas and the Sukias were the common Directors of the McDonell and RSI Limited and since McDonell was the defendant in Title Suit No. 66 of 1977, the RSI Limited has ample knowledge about the title suit. It further Indicates that being unsuccessful in the title suit upto the apex Court the RSI has been set up by McDonell to delay the execution proceeding.

31. The law is well settled that a decree in a suit in which the sub-lessee is not a party would bind the sub-lessee. On this score reliance may be placed on a decision of the apex Court in *Rup Chand Gupta Vs. Raghuvanshi Private Limited and Another*, . The general principle of law that a decree for eviction of the tenants binds the subtenants also gets support from *Jagadguru Gurushiddaswami Vs. Dakshina Maharashtra Digambar Jain Sabha*, and *Burmah Shell Oil Distributing now known as Bharat Petroleum Corporation Ltd. Vs. Khaja Midhat Noor and Others*, . In *K. Sanjeeva Rao and Ors. v. Thangam Vergeese and Anr.* (1997)7 Supreme Court Cases 585) such a view was reiterated.

32. In view of the discussion hereinabove made, we come to a conclusion that the present petitioner has no right, title or interest in the property described in the schedule "B" to the application, that the petitioner is not a bona fide and lawful subtenant or a tenant under the opposite party No. 1 and hence. It is not entitled to get injunction in any form. We do not find any reason to interfere with the judgment and order passed by the trial Court.

33. In this connexion, it is to be noted that an interim order was passed on 12.4.2000 directing the parties to maintain status quo as on date in respect of the portion of the premises in question which is in occupation of the appellant on condition that within two weeks from the date, the appellant shall deposit a sum of Rs. 4,00,000/- with the Registrar General of this Court without prejudice to the rights and contentions of both the parties and subject to further orders to be passed by the Court. In the said order it was also made clear that the question of stay and/or extension thereof shall be finally decided after considering the question whether the appellant shall be depositing amount at the market rent of the property after fixing the appropriate market rent. In course of hearing of this appeal, the interim order was extended from time to time and by an order dated 28.7.2000 the interim order was extended till 31.8.2000, but subsequently thereafter no further argument was made on the market rent, and the said application for stay was not finally disposed of. Hence we deem it proper to dispose of the said application for stay at the time of passing of the final order in this appeal.

34. On the basis of an affidavit, it is claimed by the respondents that the market rent of the premises under wrongful occupation of the appellant is to be assessed at the rate of Rs. 45/- per sq. ft. A report of the valuer was also annexed with the affidavit in support of the contention. It is also claimed by the respondents

that out of the total electricity charges per month in respect of the entire premises the appellant agreed to pay 16%, that is, about one-sixth of the total amount of the monthly bill. Subsequently another affidavit was filed to show that out of the total amount paid on account of the electricity charges from December 1998 till April 2001, an amount of Rs. 9,90,894/- being the 10% of the total amount may be claimed from the appellant. The appellant, on the other hand, filed an Affidavit-in-Opposition alleging that the electricity charges from February 1999 upto February 2000, that was due towards the share of the appellant was duly paid to the respondents for which no receipt was granted.

35. Mr. Mukherjee appearing on behalf of the respondents pointing out the figures at page 36 of the supplementary affidavit contended that even if it presumed that the electricity charges upto February 2000 was paid by the appellant, the balance electricity charges from March 2000 to April 2001 is to be paid by the appellant at the admitted rate of one-sixth of the total amount of the bills. By a modest calculation the said amount payable by the appellant comes to Rs. 7,00,000/- and odd. On this score Mr. Mukherjee drew our attention to the evidence adduced on behalf of the appellant before the Executing Court where it is admitted that the appellant was to pay one-sixth of the total amount of the bill on account of the monthly electricity charges. Actually this fact is not denied in the Affidavit-in-Opposition filed on behalf of the appellant. Thus it appears that more than a sum of Rs. 7,00,000/- and odd is due on account of electricity charges consumed by the appellant and the exact amount can only be fixed at the appropriate forum after trial on evidence.

36. As regards the occupation charges for the 500sq. ft. In occupation of the appellant, materials have been produced by the respondents to show that the fair market rent may be fixed at an amount ranging from Rs. 31/-and odd to Rs. 45/- per sq. ft. on the other hand, it is simply contended by the appellant that excepting the amount of monthly rent payable, the appellant is not responsible to pay any other occupation charges. After careful scrutiny of the materials on record and after a modest calculation, we are of the view that the market rent of the premises in question may not be less than Rs. 30/- per sq. ft., that is Rs. 1,50,000/- per month. But the actual market rent can only be fixed at the appropriate forum after trial on evidence.

37. It is already discussed above that the decree is executable from the date of dismissal of the suit before the Hon'ble Supreme Court, that is from May 13, 1998. But as the appellant filed his objection under Order 21 Rule 97 of the CPC the decree could not be executed. The respondents are thus deprived of getting occupation of the premises and consequently the income derived therefrom. In view of the interim order passed by this Court at the Instance of the appellant, the decree holder respondent could not execute the decree. However, as an interim measure a sum of Rs. 4,00,000/- was directed to be deposited till the final disposal of the application for stay. Mr. Roychowdhury appearing on behalf of the appellant argued that this Court at the time of final disposal of the appeal

is not competent to pass any order as regards the current market rent or the amount due and payable to the decree holder respondent, specially when no prayer was made in the plaint itself for mesne profits or damages. True it is that the respondent in the original title suit did not pray for mesne profits for which there is no scope for issuing any direction of an inquiry under Order 20 Rule 12 of the Civil Procedure Code. But the fact remains that the present appellant has been proved to be in unauthorised occupation of the disputed premises and it is also held that the original decree binds him. It is also stated above that the decree holder respondent is deprived of the income of the disputed premises in view of the interim order passed by this Court. We are convinced that the appellant on the basis of an application for stay has been able to stop the execution of the decree and at the same time, deprived the respondent decree holder from the lawful income of the premises. We are not unmindful of the legal position that a party should not suffer unnecessary loss due to the intervention of the Court and hence at the time of passing the interim order a sum of Rs. 4,00,000/- (rupees four lakh only) was directed to be deposited.

38. Mr. Roychowdhury however submitted that this Court was competent to pass an order of stay after directing the appellant to put in appropriate security under Order 41 Rule 5 of the Code. But at the time of disposal of the appeal this Court is not competent to pass any further order for giving security. Mr. Roy Chowdhury also referring to the provisions of Section 95 of the Code contended that the Court at best can award an amount not exceeding Rs. 1,000/- if it is satisfied that there was no reasonable or probable ground for instituting the application under Order 21 Rule 97 of the Code.

39. Mr. Mukherjee, on the other hand, contended that the application for stay having not been disposed of finally, this Court is competent to pass further order as regards giving of security under Order 41 Rule 5 of the Code. As regards the provisions of Section 95 of the Code, the contention of Mr. Mukherjee is that the Court is the competent to pass an award for an amount not exceeding Rs. 1000/- as reasonable compensation if it appears to the Court that there was no reasonable or probable ground for instituting the instant application by the appellant. He further argued that since the respondent decree holder is deprived of the possession of the disputed premises and consequently the income therefrom, the appellate Court is competent to pass necessary order protecting the interest of the decree holder.

40. Admittedly, at the time of passing interim order on the stay petition filed by the appellant a sum of Rs. 4,00,000/- (four lakh only) was directed to be deposited with a rider that question of stay and/or extension thereof shall be finally decided after fixing the current market rent. The stay petition having not been disposed of finally, it is within the competence of this Court to pass further order as regards deposit of money to save the decree holder from unnecessary monetary loss. In a case of this nature where it has been found that the appellant is in unlawful occupation of a premises, the Court in its inherent power

can direct the appellant to deposit certain amount on account of such occupation charges. This inherent power of the Court as well as the power conferred under order 41 Rule 5 of the Code is not curtailed or derogated by the provision of section 95 of the Code. In fact, the respondent No. 1 has not yet prayed for any compensation against the appellant for unnecessarily bringing the proceeding under Order 21 Rule 97 of the Code and hence, there is no scope at this stage to pass any order u/s 95 of the Code. But at the time of final disposal of the stay petition, it is within the competence of this Court to make further order as regards deposit of money for the use and occupation of the disputed premises so that the decree holder is not forced to suffer financial loss due to the act of the Court. So we deem it proper, at the time of disposal of the application for stay, to direct the appellant to deposit a further amount towards the share of the electricity charges and for the use and occupation of the premises in question.

41. It is already discussed above that a substantial amount on account of occupation charges for the last three years is due from the appellant along with an amount more than Rs. 7,00,000/- (rupees seven lakh only) towards the electricity charges payable upto April 2001. It is also discussed above that the actual amount on account of current market rent and the amount payable towards the share of the appellant on account of the electricity charges is to be decided in the appropriate forum as we have not gone into that question and decided it finally. But from the materials on record, we come to a conclusion that it would be just and proper to direct the appellant to make a further deposit of Rs. 11,00,000/- (rupees eleven lakh only) out of the total amount to be finally fixed and decided at the appropriate forum.

42. The appeal is accordingly dismissed with a cost of 500 Cms. to be paid by the appellant to the opposite party respondent No. 1. The judgment and decree of the Court below are hereby affirmed.

43. In disposing of the application for stay it is further ordered that the judgment and decree shall not be executable till the end of July 2001 if the appellant deposits a further sum of Rs. 11,00,000/- (rupees eleven lakh only) on account of the occupation charges and electricity charges with the Registrar General of this Court by 15th of June 2001. The decree holder respondent No. 1 shall be at liberty to withdraw the said amount of Rs. 11,00,000/- (rupees eleven lakh only), if so deposited, and also a sum of Rs. 4,00,000/- (rupees four lakh only) already deposited in terms of the order dated 12.4.2000 without furnishing any security. If the said amount of Rs. 11,00,000/- (rupees eleven lakh only) is not deposited by 15th June 2001, the decree shall stand executable thereafter.

44. We make it clear that we have not gone into the merits of the question of actual occupation charges of the premises or what would be its actual current market rent, nor we have decided the total amount due and payable on account of occupation charges and the electricity charges, and it shall be lawful for the appropriate authority to decide the said questions without being influenced by the comments made by us in this respect.

45. Urged xerox certified, copies of this order, if applied for, be supplied to the parties within three days on usual terms.

S. Banerjea, J.

I agree.

46. Appeal dismissed