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**(1964) 07 CAL CK 0021**

**In the Calcutta High Court**

**Case No :** Appeal from Appellate Decree No. 1530 of 1961

Sailesh Chandra Chakrabortti

APPELLANT

Vs

Sashi Coomar Banerjee and Others

RESPONDENT

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**Date of Decision :** 27-07-1964

**Acts Referred:**

Transfer of Property Act, 1882 — Section 116

**Citation :** 69 CWN 53

**Hon'ble Judges :** Laik, J

**Bench :** Single Bench

**Advocate :** Arun Kumar Dutta and Nanda Lal Pal, for the Appellant; Samir Kumar Mookerjee, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Laik, J.—A short question of law raised in this appeal is, whether the provisions of sections 24 and 25 of the Calcutta Thika Tenancy Act, 1949 (hereinafter referred to as the Act) read with section 31 thereof, in the light of the provisions of section 116 of the Transfer of Property Act, impose a bar on the landlord from realising the enhanced rate of rent from a thika tenant even though he agrees to pay the enhanced rate of rent. In the instant case, the tenancy commences from February 1, 1950 for a period of 5 years founded on a registered lease. The rent in the shares of the respondent landlord is Rs. 13/2/- per month (total rent being Rs. 15/-). The lease provides that on its expiry after 5 years, the appellant would be entitled to take a fresh lease for a further period of 5 years at a rental of Rs. 20/- per month. Rs. 17/8/- per month falls in the share of the plaintiffs. The suit was brought for realisation of the arrears of rent, at the said enhanced rate of Rs. 17/8/- per month from January, 1955. The said bar of enhancement was pleaded in defence, which was not accepted by both the Courts below. The result is the instant appeal.

2. Sections 24, 25 and 31 of the Thika Tenancy Act, 1949 read as follows:

24: The rent of a thika tenant shall not be enhanced except as provided in this Act.

25: (1) The rent payable by a thika tenant for his holding may be enhanced by the Controller on application made to the Controller by the landlord in the prescribed manner on either or both of the following grounds, viz.,

(a) that the value of the holding has increased;

(b) that the landlord has effected some improvement to the land at his own cost which has increased the value of the holding:

Provided that no rent shall be enhanced under this sub-section so as to exceed the rent previously payable by the thika tenant by more than twelve and a half per centum.

(2) The rent fixed under sub-section (1) shall not be further enhanced during three years next following the date on which it has been last so enhanced.

31. Nothing in any contract between a landlord and a thika tenant made after the commencement of this Act shall take away or limit the rights of such tenant as provided for by this Act, and any contract which is made in contravention of or which is inconsistent with any of the provisions of this Act shall be void and without effect to the extent of such contravention or inconsistency.

3. On the construction of the said provisions, it seems to me that they do not impose an absolute bar in all cases on the landlord to the realisation of the enhanced rate of rent. The condition precedent for the application of the said provisions of the said sections of the Act is, in my view, either the continuance of the tenancy itself which must be existing or the acquisition of the tenancy right by holding over, under the provisions of section 116 of the Transfer of Property Act. Where there is neither (as in the instant case), there can be no bar on the erstwhile landlord for realisation of the rate of rent agreed to by and between the parties though such rate of rent might be higher than the rate of rent paid during the currency of the lease. In such cases the outgoing landlord is not bound either by the proviso to sub-section (1) of section 25 or by sub-section 2 of sec. 25 of the Act. The grounds in section 25(1) of the Act, are also not binding on him in such cases.

4. Strictly speaking, there cannot be an "enhancement" of the rate of rent in a case where the old lease has expired and where section 116 of T.P. Act is not attracted. Really, there does not exist the old rate of rent. Instead, a new rate of rent on a fresh agreement, though incorporated in the old lease, has come into existence. It will be in effect a fresh lease and a new tenancy and consequently the said three sections viz., sections 24, 25 and 31 of the Thika Tenancy Act, 1949 cannot be attracted to such a case. The fresh lease, would on the same principle, be also not void u/s 31 of the Act.

5. In a Bench decision of this Court in the case of (1) Jojneswar Majumdar v.

Panchanan Porey, 67 C.W.N. 456 it has been held by S.K. Sen, J. on behalf of himself and Niyogi, J. that section 31 of the Act does not make the lease altogether void, and his Lordship continued to observe further (at p. 458) "although it might affect the terms contained therein as to the enhancement of rent in the case of renewal of tenancy". If it is meant thereby that it includes the renewal of tenancy even when the terms as to the rate of rent vary, then it goes against his Lordship's (S.K. Sen, J.'s) own decision, in the unreported case of (2) Sital Prosad v. Sashi Kumar, (S.A. 1045/1954) where it was held that the question of enhancement arises only when the same tenancy continues. Moreover, the said observation in (1) Jojneswar's case is not only very general but also obiter.

6. To avail of the provisions of sections 24, 25 and 31 of the Act, Mr. Dutta, on behalf of the appellant, further contended, that the definition of a Thika Tenant u/s 2(5) of the Act would include a tenant, whose lease has expired and therefore his client is still a thika tenant and as such he can take advantage of the bar of enhancement provided for in the said sections. To hold the same, in my view, is to overlook the provisions of section 3(vi) of the Act, where the expiry of the registered lease has been made a ground for ejectment of a thika tenant. If, even after the expiry of the lease, the thika tenant continues as a thika tenant, the expiry could not be a ground for ejectment.

7. Mr. Dutta next contended that though the lease had expired, the appellant had acquired the status of a tenant by holding over under the provisions of section 116 of the Transfer of Property Act. Section 116 has been considered by the Federal Court in the case of (3) AIR 1949 124 (Federal Court) (judgment of the majority delivered by Mukherjea, J., [Fazl Ali, J. agreeing with him]). There the plaintiffs appropriated the moneys paid by the defendant "as and by way of rents and rents only", for which fact the plaintiffs were held by their Lordships to "assent" to the tenant's continuance of possession. In the case before me, there is neither such evidence which can constitute assent of the plaintiff nor there is any such payment, which might be treated as importing such assent. In a judgment of the Supreme Court delivered by Fazl Ali, J. in the case of (4) Karnani Industrial Bank Limited Vs. The Province of Bengal and Others, (in which Mukherjea, J. was also a party), the said Federal Court decision was considered; and Fazl Ali, J. observed at p. 565 (of S.C. Reports): "It was held" (in Capadia's case) "that where rent was accepted by the landlord after the expiry of the tenancy by efflux of time, section 116 (would) apply, even though the landlord accepted the amount remitted to him as a part deposit towards his claim for compensation for illegal use and occupation, and without prejudice to his rights". Though it is pointed out that in Capadia's case, payment was not for compensation for illegal use and occupation but by way of rent only and both Mahajan and Mukherjea, JJ. were parties in the said two decisions, but in Karnani's case (supra) it should be remembered, that the Supreme Court affirmed the concurrent findings of the High Court as well as of the Court subordinate to it, viz., that the consent of the landlord to the tenant's continuing

in possession cannot be inferred. Secondly, the payment of rent in the said case was before the expiry of the lease, which was neither the fact in Capadia's case nor in the case before me.

8. Mr. Samir Kumar Mukherjee who ably argued the case on behalf of the respondent, can as well rely on a later decision of the Supreme Court in the case of (5) Ganga Dutt Murarka Vs. Kartik Chandra Das and Others, , where though the tenant was described as "a monthly tenant", but Shah, J., speaking for the Court, after considering the said Federal Court decision in Capadia's case, held at page 1070 (of A.I.R.) that "The High Court was, in our judgment, right in holding that by merely accepting the rent from the appellant and by failing to take action against him, the appellant did not acquire the rights of a tenant, holding over." Mere acceptance of rent thus did not give the power, or status of a tenant by holding over. Though the earlier Supreme Court decision in the case of Karnani Industrial Bank (supra) was not considered in the later Supreme Court decision, it is also an answer to the contention in the instant case that the plaintiffs themselves admitted in paragraph 4 of the plaint, that the defendant has been "holding over".

9. The Bench decision of this Court in the case of (6) Annapurna v. Tincowrie, 66 C.W.N. 338 does not help either party so far as the instant case is concerned. Moreover it is really not a Bench decision on the point, because P. B. Mukharji, J. thought it "unnecessary", "to decide whether there was renewal or holding over u/s 116 of the Transfer of Property Act", (see page 353) whereas Bachawat, J. held (at page 363) that "the lessees did not hold over a monthly tenancy u/s 116 of the Transfer of Property Act". Rather the later Bench decision of the Court in the case of Jojneswar Majumdar (supra) relying on the said Federal Court decision went into the question viz., in which cases, section 116 of the Transfer of Property Act would apply. Lastly, the evidence of the appellant in the instant case is, that the landlord refused to accept the rent at the old rate after the expiry of the lease. He further deposed that he agreed to pay the rent at the enhanced rate if instalment was granted. On the evidence there appears to me to be no assent of the landlord. Rather there is express agreement to the contrary. The appellant, therefore, has not acquired the status of a tenant by holding over u/s 116 of the Transfer of Property Act. This contention of Mr. Dutt also fails.

10. My opinion, therefore, is that where the lease has expired and the tenant is not holding over under the provisions of section 116 of the Transfer of Property Act, there is no bar on the landlord under the provisions of sections 24, and 25 of the Calcutta Thika Tenancy Act, 1949 read with section 31 thereof, to realise the rate of rent, agreed to, which is higher than the old rate of rent, fixed in the expired lease. Nor also the fresh lease with the new terms, would be void u/s 31 of the Thika Tenancy Act. The result is that the appeal fails and is dismissed but in the circumstances of the case without any order as to costs.