

(2013) 10 CAL CK 0009
In the Calcutta High Court
Case No : C.S. 208 of 2008

Sashi Prasad Goenka and Others

APPELLANT

Vs

Steelco Syndicate and Others

RESPONDENT

Date of Decision : 08-10-2013

Acts Referred:

Citation : (2014) 2 CHN 457

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Asish Chakraborty and Mr. Mohit Gupta, for the Appellant; Manju Agarwal and Mr. Bajrang Manot, for the Respondent

Judgement

Soumen Sen, J.—The plaintiff has filed the suit against the defendant for eviction and mesne profits. In this suit for recovery of possession and mesne profits, the plaintiff contends that the tenancy of the defendant No. 1 expired on efflux of time on May 31, 2008. Although, the plaintiff was not obliged to give any notice to quit, by three several letters dated May 29, 2008, July 8, 2008 and August 1, 2008 respectively, the plaintiff called upon the defendants to vacate the said flat and demanded mesne profits of Rs. 3 lacs a month. The plaintiff alleged that on and from June 1, 2008, the defendants were in wrongful and unauthorized occupation of the suit flat and had failed to pay the maintenance charges for March, April and May, 2008. The plaintiff further asserted that on and from June 1, 2008, the defendant was liable to pay Rs. 3 lacs a month as mesne profits. The details of claim of the plaintiff is particularized in Paragraph 14 of the plaint.

2. The defendant in the written statement raised amongst others the maintainability of the suit on the ground that the suit has not been arbitrarily valued. The Court has no jurisdiction to try, decide and determine the dispute. It is further alleged that the monthly tenancy created on 21st August, 2005 continued even after expiry of 33 months as mentioned in the tenancy agreement dated 21st August, 2005. In or about May, 2008, it was mutually agreed by and between the plaintiffs and the predecessor-in-interests of the

defendant No. 1 that the rent of the said premises would be enhanced at the rate of 20 per cent over and above the existing rent of Rs. 60,000/- (sixty thousand) on and from June, 2008 and, accordingly, on and from June, 2008, the defendant No. 1 became liable to pay the rent at the rate of Rs. 72,000/- per month according to English Calendar year. The defendants on the basis of such alleged mutual agreement tendered the enhanced rent in August, 2008 but the plaintiffs had refused to accept the said rent. The plaintiff has no right to dispossess the defendants on the basis of the three several notices inasmuch as the nature of tenancy of the defendant in respect of the suit premises is month by month and, accordingly, the question of expiry of tenancy by efflux of time could not and does not arise.

3. Initially, the defendants after expiry of one year three months from the date of the institution of the suit filed an application on 27th January, 2010 seeking an order for return of the plaint to be presented in the Court in which the suit according to the defendants should have been instituted on the ground that the basis of the valuation as furnished in the plaintiff for the purpose of court fees and jurisdiction was contrary to law inasmuch as the plaintiff had wrongfully purported to include the mesne profits for determination of the value of the suit for the purpose of jurisdiction. The plaintiff has wrongfully described the said defendants as trespasser and intentionally inflated the value of the suit property for the purpose of bringing the suit in a Court different from that in which it would lie if it were properly valued.

4. The learned Single Judge after considering the rival contention dismissed the said application with costs assessed at Rs. 40,000/-. An appeal was preferred against the said judgment and order. The appeal, however, was dismissed with the observation that the "assertion of the defendant that the plaintiff has deliberately undervalued the claim, should not be adjudicated as a preliminary issue and should be dealt with at time of trial". The finding of the trial Court was not interfered with.

5. Thereafter, on the basis of the pleadings and the disclosures made by order dated 11th September, 2011, the following issues were framed for trial:-

1. Is the suit maintainable in its present form?
2. Was there any agreement between the plaintiffs and the predecessor-in-interest of the defendant No. 1 as alleged by the defendants?
3. Was the tenancy of the defendants in respect of the suit premises for month to month?
4. Are the plaintiffs entitled to recovery of possession of the suit premises?
5. Are the plaintiffs entitled to mesne profit?
6. To what relief, if any, are the plaintiff entitled?
6. The plaintiff contended that Flat No. 2E measuring about 3975 sq. ft. situated

on the second floor of the building named Dimple Court at Premises No. 26, Shakespeare Sarani, Kolkata - 700 017 together with one Generator Room measuring about 73 sq. ft. on the ground floor of the said building (hereinafter collectively referred to as "the said flat") was given to the defendant No. 1 under an agreement of tenancy dated 21st August, 2005, for a period of 11 months commencing from 1st September, 2005, with an option for renewal for two further periods of 11 months each on the same terms and conditions as stated in the said agreement. Under the said agreement, the defendant was obliged to pay rent at the rate of Rs. 60,000/- per month on or before 5th of each month, monthly maintenance charges payable to the Association of flat owners, electricity charges as per the bills raised by the said Association and commercial surcharge payable to the Kolkata Municipal Corporation. On the expiry of the initial period of 11 months of tenancy the same was extended and/or renewed for further two periods of 11 months each and ultimately the said tenancy expired by efflux of time on May 31, 2008. The plaintiff although was not obliged by three several letters dated May 29, 2008, July 8, 2008 and August 1, 2008, called upon the defendants to vacate the said flat and demanded mesne profits at the rate of Rs. 3 lacs per month. On behalf of the plaintiffs, plaintiff No. 1 (Namely, Sashi Prasad Goenka) adduced oral evidence and on behalf of the defendants, Murari Lal Tibrewal, the manager of the defendant No. 1, the defendant No. 2, namely, Dinesh Bajaj and defendant No. 3, namely, Rishi Bajaj adduced evidence.

7. Although, there is no specific issue with regard to the jurisdiction of this Court to try and receive the suit but it is argued on behalf of the defendant that the question of jurisdiction of the Court is implicit in the said issue. It was argued that the suit on the basis of the averments made in the plaint could not have been valued at Rs. 16,56,972.00/- in accordance with the provisions of the Suit Valuation Act and Court Fees Act. The plaintiff had with mala fide intention inflated the claims and claimed mesne profits and monthly maintenance charges at an absurd rate for the purpose of bringing the suit within the jurisdiction of this Court.

8. The defendant did not lead any evidence on this issue.

9. There is no dispute that the defendant was a tenant under the plaintiff in respect of the suit premises on a monthly rental of Rs. 60,000/- and such tenancy is governed by the provisions of the Transfer of Property Act.

10. The plaintiff filed the suit for recovery of possession and mesne profits against the defendants. According to the plaintiff, the tenancy of the defendant No. 1 had expired by efflux of time on May 31, 2008. Although, the plaintiff was not obliged to give any notice to quit by three several letters dated May 29, 2008, July 8, 2008 and August 1, 2008 respectively. The plaintiff called upon the defendants to quit and vacate the said flat and demanded mesne profits of Rs. 3,00,000/- a month. The plaintiff alleged that on and from June 1, 2008, the defendants were in wrongful and unauthorized occupation of the suit flat without

paying any occupation charges. It was further asserted that from June 1, 2008, the defendant was liable to pay a sum of Rs. 3,00,000/- per month as mesne profits which appears to have been founded on the letter dated May 29, 2008 in which the plaintiffs have stated that they had received an offer of Rs. 3,00,000/- from a prospective lessee.

11. In paragraph 14 of the plaint, the plaintiff gave particulars of the valuation of the suit which is reproduced hereinbelow:-

14. For the purpose of jurisdiction the suit is valued at Rs. 16,56,972/- as per particulars set out below:

Ad-valorem court fees of Rs. 31,100/- has been paid with the plaint. The plaintiffs undertake to pay such further court fee as may be directed by this Hon"ble Court.

12. Mr. Malay Ghosh, the learned Counsel appearing with Mrs. Manju Agarwal appearing on behalf of the defendants strenuously contended that the monthly rent payable by the defendant being Rs. 60,000/-, the suit should have been valued and can only be valued on the basis of easily rental that is Rs. 7,20,000/- for the purpose of relief for eviction. It was contended that even if it is accepted that the defendant did not pay any rent for the months of June, July and August, 2008, a further sum of Rs. 1,80,000/- being the rents for the said three months could be added and, accordingly, the suit is required to be valued or could be properly valued at Rs. 9,00,000/- on the date of filing of the suit that is on September 24, 2008.

13. Mr. Asish Chakraborty, the learned Counsel appearing on behalf of the plaintiffs submitted that even if the argument of the plaintiff is accepted, the claim of the plaintiff could not be less than Rs. 10,00,000/- since mesne profits at the rate of Rs. 3,00,000/- a month for 23 days would be more than Rs. 2,00,000/- and, accordingly, the valuation would exceed Rs. 10,00,000/-.

14. For the purpose of eviction and recovery of arrears of rent up to the month of August, 2008 even at the contractual rate at which the rent was last paid the valuation would be Rs. 2,00,000/-. The first notice of May 29, 2008 although evinced an intention to terminate the lease but it falls short of 15 days and could have been treated as an invalid notice. The suit immediately filed before the expiry of 15 days expiring with the end of the month of the tenancy would stand in the way of the plaintiff and such a suit would have to wait till the expiry of such period or after a fresh notice is issued in compliance with the requirement of Section 106 of the Transfer of Property Act.

15. The second notice of 8th July, 2008 was followed by the final notice of termination dated August, 2008. The plaintiff although stated in the plaint that the cause of action for the suit arose on June 1, 2008 and is continuing from day to day but from the evidence and the documents disclosed, it appears that the final determination of the tenancy, in fact, had taken place with the notice dated

1st August, 2008. It involves construction of the three notices and the intention of the parties gathered from such notices. The correctness and ultimate success of such claim would not be a determining factor for the purpose of deciding the jurisdiction of this Court. The suit property situated within the jurisdiction of this Court. The basis of the valuation does not appear to be arbitrary. In fact, this issue has been elaborately gone into and discussed in an earlier proceeding initiated by the defendant for return of the plaint on the ground that this Court does not have the pecuniary jurisdiction on the basis of the averments made in the plaint. The learned Single Judge dismissed the said application. The defendants preferred an appeal. The Appellate Court by a judgment and order dated March 1, 2011 also dismissed the appeal. Under the provisions of Order 2 Rule 4A of the Code of Civil Procedure, the plaintiffs indeed are entitled to claim mesne profits or the rent in arrears in respect of the property or any part thereof. The mesne profits if any was to be computed up to the date of institution of the suit and not on the basis of hypothesis. In the instant case, the claim on account of mesne profits even if it is for 23 days in respect of the property situated in Calcutta does not appear to be fanciful having regard to the prevailing situation. The success or failure on account of mesne profits or damages or arrears of rent or maintenance charges at the trial would not denude this Court of the jurisdiction. The suit is required to be valued under the provisions of the West Bengal Court Fees Act read with the Suit Valuation Act. The suit has been valued in accordance with such statutes. It cannot be said that the plaintiff had dishonestly or intentionally inflated the value of the suit property in order to attract the jurisdiction of this Court which has no jurisdiction otherwise.

16. The valuation of the suit can be made by the plaintiff according to his own estimation and such valuation has to be accepted ordinarily is a settled proposition of law and well-fortified by various decisions, namely, Smt. Nandita Bose Vs. Ratanlal Nahata, ; Ratan Lal Nahata Vs. Nandita Bose reported in 1997 (1) CHN 392 Bharat Petroleum Corporation Ltd. Vs. Prafulla Kumar Roychowdhury and Another, Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., ; J. Thomas and Company Pvt. Ltd. Vs. Pawan Kumar Tebriwalia,

17. The ratio of the aforesaid decisions would show that in case of a tenancy governed by the provisions of Transfer of Property Act, once the tenancy comes to an end by determination of lease, the right of the tenant to continue in possession of the premises comes to an end and for any period thereof for which he continued to occupy the premises, he becomes liable to pay damages for use and occupation at the rate at which the landlord could have let out the premises on being vacated by the tenant. The suit might have been over-estimated or over-valued but not arbitrarily valued. A Court is normally bound to accept the valuation put forth by the plaintiff. It can interfere only when it is abnormally low or inflated. This arbitrary and fanciful valuation can be questioned and interfered with if raised. In view of the discussions alluded above, this Court finds no reason to hold that suit has been arbitrarily valued. The valuation does not seem to be absurd.

18. In view thereof, the said issue is answered in favour of the plaintiffs and against the defendants.

19. With regard to the other issues, in my view, it has to be examined whether the tenancy has been duly determined which necessarily would involve an enquiry as to whether any agreement was reached between the plaintiffs and the predecessor-in-interest of the defendant No. 1 for continuation of the said tenancy upon expiry of 33 months, that is to say, from June, 2008.

20. The plaintiff No. 1, Sri Sashi Prasad Goenka was examined on behalf of the plaintiffs.

21. The plaintiff No. 1 in his evidence has stated that the tenancy agreement was entered into on 1st September, 2005. He has referred to the tenancy agreement dated 21st August, 2005 and submitted that the said tenancy commenced on and from 1st September, 2005 for a period of 11 months with an option to the defendants to ask for renewal of the tenancy for two further periods of 11 months each on the same terms and conditions.

22. The said witness has duly identified the documents disclosed on behalf of the plaintiffs and stated that on August 21, 2005, an agreement was entered into between the Trust and the M/s. Steelco Syndicate by which the Steelco was inducted initially as a tenant for 11 months with further option to renew the tenancy for two further periods of 11 months each on the same terms and conditions mentioned in the said agreement. The rent for the said flat was agreed at Rs. 60,000/-. In addition to payment of monthly rent, the defendant No. 1 was required and obliged to pay the monthly maintenance charges payable to Association of Flat Owners and charges for electricity consumed according to the bills raised by the Association of Flat Owners. In addition to the aforesaid, commercial surcharge would be payable by the said defendant No. 1.

23. He has stated that on May 29, 2008, the defendant was duly informed that the last renewal period under the tenancy agreement is due to expiry on May 31, 2008, and the defendant was requested to vacate the tenanted property and make over vacant possession immediately upon expiry of the said period since the plaintiff had received offers from prospective tenants to hire the said flats at the rate of Rs. 3 lakhs approximately per month. The witness has also referred to the two notices, namely, the notices dated 8th July, 2008 and 1st August, 2008 by which further demand was made to vacate the said flat and the demand for mesne profits at the rate of Rs. 3 lakhs per month.

24. The said witness stated that legal notices were issued to the defendant No. 1 determining the said tenancy. The letter of termination was issued by Mr. A.P. Agarwalla on the basis of the instructions issued by the plaintiffs as trustees. The plaintiff was signed by all the trustees. The trustees had never entered into any agreement after May, 2008 with late Satya Narayan Bajaj extending the period of the tenancy beyond May, 2008 or had agreed to accept enhanced monthly rent of Rs. 72,000/- per month on the basis of such oral agreement as alleged by the

defendants in the written statement. He has further stated that the suit property is situated at Shakespeare Sarani which is part of Central Business District and the rental in that area would be Rs. 1400/- per sq. ft.

25. The witness had referred to and relied upon two certified copies of registered deed of lease both dated 12th January, 2004 between M/s. Subir Udyog Ltd. & ICICI Bank Ltd. being Exhibit "F" to demonstrate that the claim for mesne profit at the rate of Rs. 3 lakhs in 2008 for such wrongful occupation was justified. The witness has stated that the property described in the said Exhibit is situated within one kilometre from the suit premises comprising of an area of 3100 sq. ft.. The rent during the period from January 12, 2007 to January 11, 2012 was Rs. 2,44,202/-. The bank was further liable to pay service charge of Rs. 1,66,990/-. The payment towards Municipal rates and taxes was Rs. 1,42,947.50/- for the period between January, 2007 and January, 2010. The said three components, in fact, constituted the rent which ICICI Bank Ltd. had to pay for using the said premises.

26. During cross-examination, it was stated that for extending the lease period, no formal document was executed and the said agreement for tenancy was not registered. Although, there is no necessity to terminate the said agreement and demand possession upon expiry of the lease period but three several notices were issued demanding possession. The witness denied that there was no discussion for continuation of the tenancy agreement beyond 33 months nor there was any agreement between the parties for extending the period of lease upon enhancement of rent at the rate of 20 per cent of the last rent paid.

27. During Cross-examination, the witness said that for the extended period of 11 months each, there was no formal agreement. The tenancy agreement was not registered. The plaintiffs used to raise bill of the maintenance charges on the defendant and the association was used to raise a bill on the plaintiffs as landlords. He further stated that the lease expired on May 31, 2008 and the defendant was supposed to vacate on 31st May, 2008. However, on a legal advice, a notice of termination was issued on 1st August, 2008. The defendant was in wrongful and illegal possession on and from June 1, 2008 and had remained in wrongful possession even after the notice was issued on 1st August, 2008. It was stated that Mr. Satya Narayan Bajaj who was the original proprietor of the defendant No. 1 died sometimes on June 4, 2008. On the aspect of mesne profits, it was stated as per the agreement the lease expired on May 31, 2008 and, accordingly, mesne profits have been claimed from June, 2008. The witness denied that there was any agreement for continuation of the tenancy beyond May, 2008 and he had denied the contents of the letter dated July 1, 2008 issued on behalf of the defendants by one Murarilal Tibrewal claiming himself to be the Manager of the said defendant No. 1 in which it was recorded that there was a mutual agreement to continue tenancy subject to enhancement of rent by 20 per cent on the last rent paid. The witness stated that in spite of raising of bills for the month of March to May, 2008 towards maintenance charges, the defendants

had failed, neglected and refused to pay the said amount. However, by reason of an order passed by this Court on May 6, 2009 Dimple Court Apartment Owners Association raised bills on account of electricity and maintenance charges upon the defendant in respect of the said flat month my month but he could not say whether the defendants are paying such amounts.

28. The defendant examined three witnesses and have exhibited ten documents. The summary of the evidence of the three witnesses are that it has been incorrectly mentioned in the notice dated 29th May, 2008 that the said flat was let out to the defendants for 11 months. In fact, the tenancy was subject to enhancement of rent and the witness had already mutually agreed to enhance the rent by 20 per cent on the last paid rent. In view thereof, the question of vacating tenanted portion could not and does not arise. On 12th August, 2008, the defendant forwarded a cheque of Rs. 1,44,000/- on account of rent for the period of June, 2008 and July, 2008 on the basis of enhanced rent as agreed upon between the parties. The allegations made in the several letters that the witnesses are trespassers without any basis. The return of cheque by the plaintiffs under agreement of a letter dated 1st September, 2008, was wrongful and the allegations made in the said letter that the defendants are trespassers is without any basis. The rent was tendered by the defendant for the subsequent months and the plaintiffs have wrongfully refused to accept the said rent. The defendant is a bona fide tenant in respect of the said flat and continued to be the tenant thereof at a monthly rental of Rs. 72,000/- per month.

29. The principal witness on behalf of the defendant was Mr. Murarilal Tibrewal. The witness claimed that he was working as an accountant in the defendant No. 1, although, he admitted that he signed the letter dated July 1, 2008 (Exhibit I) in the capacity as Manager of M/s. Steelco Syndicate. The witness stated that the defendant No. 1 was inducted as tenant under the Trust on and from September 1, 2005 at a monthly rent of Rs. 60,000/- under an agreement dated August 21, 2005. He, however, stated that the lease was extended after May, 2008 till May, 2010 on the basis of a mutually agreed terms to enhance the rent by 20 per cent on the last paid rent. He had stated that the letter of the plaintiff dated May 29, 2008 (Exhibit B) could not be replied earlier to July 1, 2008 due to unforeseen circumstances in the family. It was stated that the said agreement dated August 21, 2005 was signed by Satya Narayan Bajaj on behalf of the defendant No. 1 as proprietor thereof Sashi Prasad Goenka as trustees of Ginni Devi Goenka Charitable Trust. The renewal beyond May, 2008, however, was not made in writing. It was stated that the defendant No. 1 negotiated with Sashi Prasad Goenka in presence of Mr. Satya Narayan Bajaj and Mr. Dinesh Bajaj. The witness said that the defendant No. 1 had paid monthly charges for the months of March to May, 2008 but he could not produce any evidence of such payment. During Cross-examination, he stated that after the death of Satya Narayan Bajaj his wife Rajkumari Devi became the sole proprietor of the said firm. The reply to the letter dated May 29, 2008 was issued on the basis of the instructions of Mr. Dinesh Bajaj who was looking after the day to day affair of the business on

behalf of his mother. The delay in replying the letter was due to the death of Satya Narayan Bajaj on June 4, 2008. The witness received the said letter but was unable to respond to such letter immediately. He, thereafter, contacted Mr. Dinesh Bajaj and on his instruction he replied to the said letter on July 1, 2008.

30. The witness, however, could not explain as to why he had signed the letter dated July 1, 2008 in the capacity as Manager. He accepted during cross-examination that he was not working as Manager of the defendant No. 1. He was an accountant only. The witness also could not recollect when Satya Narayan Bajaj had gone out of his residence for official purpose. It was stated that after the death of Satya Narayan Bajaj due to shock and sorrow prevailing at the point of time, the rent for the month of June could not be tendered. He, however, admitted that the business of the defendant No. 1 continued notwithstanding the death of Satya Narayan Bajaj.

31. Sri Rishi Bajaj, the defendant No. 3, stated that the plaintiff did not accept the rent for the month of June, 2008 since it was represented by the said landlord that they would raise the bill and, thereafter, the defendant should send the rent. The rent was paid in cheque and hand delivered to the landlord or its representative. According to the said witness, there was a clause in the agreement that rent would be enhanced immediately and on that basis a meeting took place in the month of May, 2008 when late Satya Narayan Bajaj had a discussion with the plaintiffs. During such meeting, it was agreed that the rent would be enhanced at the rate of 20 per cent. In the meeting, the witness along with his late father and elder brother were present. The accountant was also present. However, he admitted that the agreement reached in such meeting was not recorded immediately after the said meeting and there is no document evidencing such agreement. He also admitted that there is no contemporaneous evidence or document to show that such discussion was duly recorded and confirmed by the parties. Mr. Dinesh Bajaj, the other witness on behalf of the defendant stated that on receipt of this notice dated 29th May, 2008, he had spoken to Mr. Goenka over telephone and informed him that his father had suffered a brain stroke, and in view thereof, it would not be possible to give reply to the said letter immediately. Mr. Goenka on hearing the same told the deponent that the matter would be discussed after his father recovered from the illness. The witness during cross-examination was confronted with a suit filed by the said defendants in the City Civil Court being Title Suit No. 3030 of 2008 and was asked to find out if there was any reference or mention of any such alleged telephonic conversation in the pleading as the witness had referred to during his cross-examination to which the witness answered in the negative. According to him the renewal took place in a meeting which was held at Mr. Goenka's residence in Southern Avenue in presence of the said witness, his father and his brother along with Mr. Tibrewal. Such discussion according to him took place sometimes in May, 2008. He, however, was unable to recollect when late Satya Narayan Bajaj walked out of his residence for official work.

32. On the basis of the evidence on record, it appears that the existence of the said agreement is not in dispute. The tenancy created by implication of law in favour of the defendant should be held to be from month to month since its inception in July, 1991. The said tenancy has to be regarded as a tenancy from month to month u/s 106.

33. Even though it is not specifically mentioned in the notice dated May 29, 2008 that the tenancy was determined, it is, however, evident that the plaintiffs wanted to determine the tenancy by giving notice. It is also apparent from the subsequent two notices that more than 15 clear days' notice had been given. Non-mentioning specifically that the tenancy would be determined in the first notice dated May 29, 2008 would not be of much consequence as subsequent notices are in conformity with Section 106 of the Transfer of Property Act. All the three notices are required to be taken into consideration. In any event, with the expiry of the month of August, 2008, the tenancy stood determined and the said defendant becomes a tenant-at-will governed by the provisions of Transfer of Property Act. In a lease month by month with the expiry of each month, a new relationship is created and/or renewed with the tender of rent and acceptance thereof. It may be that some other obligations are also required to be discharged by both the parties. This continued act of acceptance of rent coupled with discharge of other obligations attached to the incidence of such tenancy each month would constitute creation and continuation of such tenancy month by month until determination. However, in such a situation, it is implicit that such monthly tenancy may not be renewed either by lessor or by the lessee unless there are terms which prohibit each of the parties from doing so. The question of continuing the relationship between lessor and lessee in a case of lease from month to month on the face of determination of the lease by the lessor by giving clear notice of 15 days it has to be established by the lessor that the parties have mutually agreed to continue with the lease which may be inferred and/or implied from the conduct of the parties or on the basis of some worthy clinching acceptable evidence. In the instant case, admittedly the lease was created for a period of 11 months only and the lessee was given right to exercise option for further period of 11 months each aggregating to 33 months in totality to continue in occupation of the suit premises. The said lease is an unregistered document. In fact, the period of lease is less than one year and, accordingly, does not require any registration in terms of second proviso of Section 107 of the Transfer of Property Act read with Section 18(c) of the Registration Act. That the defendant becomes a monthly tenant and the said lease does not require registration is not in dispute.

34. Non-registration of the document had caused only two consequences. One is that no lease exceeding one year was created. Second is that the instrument became useless so far as creation of the lease is concerned. Nonetheless the presumption that a lease not exceeding one year stood created by conduct of parties remains unrebutted.

35. In *Anthony Vs. K.C. Ittoop and Sons and Others*, , the Hon"ble Supreme Court dealing with Sections 105 and 107 of the Transfer of Property Act stated that a lease of immovable property is defined in Section 105 of the Transfer of Property Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created. What is mentioned in the three paragraphs of the first part of Section 107 of the Transfer of Property Act are only the different modes of how leases are created. The first paragraph deals with the mode of creating the particular kinds of leases mentioned therein. All other leases, if created, necessarily fall within the ambit of the second para. Thus, dehors the instrument, parties can create a lease as envisaged in the second para of Section 107.

36. When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than through such deed.

37. Since the original defendant was inducted into the possession of the suit premises by the plaintiffs owners thereof and was paying monthly rent or had agreed to pay rent in respect of the tenanted portions, the legal character of the defendants' possession has to be attributed to a jural relationship between the parties. Such a jural relationship, on the fact-situation of this case, cannot be placed anything different from that of lessor and lessee falling within the purview of the second para of Section 107 of the Transfer of Property Act.

38. Both the parties have referred to the decisions reported in 1997 (1) CHN 392 (*Ratan Lal Nahata Vs. Nandita Bose Turner Morrison Ltd. Vs. Calcutta Stock Exchange Association Ltd., Pannalal Sagarmal Vs. Central Bank of India*,

39. In view of the discussions made aforesaid, it is not required to deal separately with the aforesaid three decisions. In *Pannalal (supra)* His Lordship was deciding an application under Chapter XIII A of the Original Side Rules of the High Court at Calcutta in which objection was raised with regard to valid determination of the lease. The defendant in the suit was able to demonstrate the notice to quit was not in conformity with Section 106 of the Transfer of Property Act. The Court being satisfied that an arguable case has been made out and the defence is not sham or moonshine allowed the defendant to contest the suit. In the instant case the plaintiff has been able to establish at trial that such lease was validly determined. Similarly in *Turner Morrison (supra)* the defendant was able to make out an arguable case for trial as the Court would be required to determine if such tenancy would be governed by the Transfer of Property Act or the Rent Control Statute.

40. The validity of the lease is not in dispute. The notice to quit fulfils the

requirements of Section 106 of the Transfer of Property Act. The party pleading oral agreement has to establish by cogent evidence that there is an existence of such an oral agreement between the parties. The defendant is required to prove that there was consensus ad litem between the parties. When the defendants alleged oral agreement for continuation of such tenancy, heavy burden lies on him to plead and prove such facts by cogent and reliable evidence. Since a tenancy month by month is determinable at the end of each month, the defendant is required to establish that there has been a consensus ad idem between the parties for continuation of the said relationship beyond the period when faced with a notice to quit. On the face of such resistance and denial, heavy burden lies upon the party who pleads such oral agreement to establish its existence as well as the conditions thereof with the support of clinching and admissible evidence.

41. There is a complete hiatus between the letters of May 29, 2008 and July 1, 2008. There was no evidence on record to show that on the basis of the alleged mutual oral agreement to extend the period of tenancy, the defendants had tendered such enhanced rate in June or July, 2008. Instead it is only on 12th August, 2008, a cheque for a sum of Rs. 1,44,000/- on account of rent for the period of June, 2008 and July, 2008 was forwarded under cover of a letter dated August 12, 2008. There are also inconsistencies in the evidence of the three witnesses who deposed on behalf of the defendants. There is no reliable evidence on record from which it can be inferred that an oral agreement was reached between the parties for continuation of the tenancy beyond May, 2008. None of the witnesses could precisely say as to when such meeting took place. It is surprising that while the business continued notwithstanding the demise of Satya Narayan Bajaj, the defendants did not feel it necessary to tender the rent at the enhanced rate for the month of June, 2008 or record such meeting immediately. If a letter could have been written on July 1, 2008, there could be no reason for the defendant not to tender such enhanced rent along with the said letter instead of waiting till August 12, 2008. The defendants sung into action only after they received the letter dated May 29, 2008, in which the plaintiff demanded vacant possession immediately on expiry of the month of May, 2008. There is no evidence to show that the lessor had assented to the continuation in possession of the lessee.

42. However, what is argued is that the parties have mutually agreed to extend the period of the lease at an enhanced monthly lease rent. The burden of proof in this regard heavily lies upon the lessee. On the basis of the evidence both oral and documentary, in my view, the defendant has failed to discharge this burden and such oral agreement on renewal of lease beyond 33 months have not been established.

43. In view of the aforesaid, the issue No. 2 is answered against the defendant and in favour of the plaintiff. The issue Nos. 3 and 4 also, accordingly, answered in favour of the plaintiff.

44. On the basis of the evidence on record, in my view, the plaintiff would be entitled to mesne profits on and from September, 2008 till recovery of possession at the rate of Rs. 2,44,000/- after giving adjustment of all payments made by the defendant in terms of the orders passed by this Court.

45. Accordingly, the plaintiff is entitled to a decree for vacant and peaceful possession of the flat being No. 2E, on the Second floor of the building named Dimple Court at premises No. 26 Shakespeare Sarani, Kolkata ? 700 017 together with one generator room on the Ground floor of the said premises. The plaintiff shall also be entitled to recover a sum of 9,36,972/- towards monthly maintenance charges for the months of March to May, 2008 since there is no evidence on record to show that these amounts have already been paid by the defendant to the plaintiff.

46. The suit is accordingly decreed. The department is directed to draw the decree as expeditiously as possible. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.