

(2016) 05 CAL CK 0027

In the Calcutta High Court

Case No : W.P.L.R.T. No. 22 of 2015 With CAN 8929 of 2015

Shahi Enclaves Private Limited

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 02-05-2016

Acts Referred:

Citation : (2016) AIRCC 2075 : (2016) 4 CalHCN 190 : (2016) 3 CalLT 313

Hon'ble Judges : Indira Banerjee and Sahidullah Munshi, JJ.

Bench : Division Bench

Advocate : Mr. P. Chidambaram, Senior Advocate, Mr. Surajit Nath Mitra, Senior Advocate, Mr. Jaydeep Kar, Senior Advocate, Ms. Manju Agarwal, Mr. Kunal Vajani, Mr. Bajrang Manot, Mr. Abhishek Vishal, Advocates, for the Appellant; Mr. Lalit Mohan Mahata, Mr. Prasanta

Final Decision : Allowed

Judgement

Indira Banerjee, J.—The question involved in this writ petition under Article 226 of the Constitution of India is, whether the Controller, Kolkata Thika Tenancy, had jurisdiction to entertain and proceed with the returns purported to be filed by the respondent No. 2 in respect of Premises No.40/1, Mahatma Gandhi Road, Kolkata ? 700 009, where the Purabi Cinema is located, or start or proceed with Miscellaneous Case No.1 of 2013 (R/F No. 49/106) or entertain the application of the respondent Nos. 4 to 36, who claimed to be Bharatias at the said premises for being impleaded as parties to the said proceedings.

2. The writ petitioner, Shahi Enclaves Private Limited, claims to be the owner of Premises No.40/1, Mahatma Gandhi Road, Kolkata ? 700 009.

3. One Satchidananda Dutt, since deceased was, during his life time, the sole owner of Premises No.31, Mirzapur Street, Calcutta, 38, Harrison Road, Calcutta and 40, Harrison Road, Calcutta, which properties were later, on amalgamation, numbered as Premises No.40, Harrison Road, Calcutta.

4. By a registered deed of lease dated 26th April 1919, the said Satchidananda

Dutt leased out the said Premises Nos.38 and 40, Harrison Road, Calcutta and 31 Mirzapur Street, Calcutta, comprising an area of 2 bighas 4 cottahs approximately to Chimanlal Ganeriwalla and Brijlal Ganeriwalla for a term of 81 years, commencing on and from 1st May, 1919, on the terms and conditions specified in the said deed of lease.

5. The deed of lease inter alia provided that the lessees, Chimanlal Ganeriwalla and Brijlal Ganeriwalla would, at their own cost and at an outlay expense of Rs.1,60,000/- at the least, and within a space of six years from the date of the Indenture of lease, in a good, substantial and workmanlike manner erect, build and completely finish a three storied brick built house upon the demised land and would further from time to time, and at all times during the subsistence of the lease, at their own costs and charges, sufficiently and effectually repair and keep the said building in good condition and also would at the end or sooner determination of the lease, leave and yield up to the lessor, the demised land with the said building and erection.

6. The indenture of lease provided that if the lessees did not pay the agreed rent for three consecutive months after notice or if the lessees did not, at all times, keep or perform the covenants and agreements in the indenture required to be observed on their part, the lessor would be entitled to enter upon the demised premises or the structure or any part thereof and take possession thereof free from all estate interest, right or claim whatsoever of the lessees or any of them.

7. The Deed of Lease also provided that the lessees, their servants and agents would after due notice, allow the lessor, his servants and agents, during the continuance of the lease, free access to view and inspect the construction and the upkeep of the demised premises and to bring to the notice of the lessees any defect in the construction or the repair of the house and if reasonable, the lessees would rectify defects as pointed out by or on behalf of the landlord.

8. The Indenture of Lease further provided that, in the event of acquisition of the demised premises by the Government or the Calcutta Improvement Trust or any other Authority under the laws of acquisition in force, the lessor would not only be entitled to the whole of the compensation for the ground, but also to compensation for the structure that might be erected by the lessees, which would be divided between the lessor and the lessees rateably according to the expired and unexpired terms of the lease and the lessees would be entitled to compensation from the acquiring body for loss of earning, provided it did not affect the interest of the lessor in any way.

9. The terms and conditions of indenture of lease make it absolutely clear that even though the lessee would be in possession of the building, the ownership thereof would remain with the lessor. The lessee would construct the building on behalf of the lessor and the cost and outlay expenses of Rs.1,60,000/- would be in the nature of advance, adjustable against lease rent. Thus the indenture provided that the lessor would have the right of inspection and the right to

enforce construction by the lessee of the building, free from defect and also repair and upkeep thereof, failing which the lessor would be entitled to enter the demised premises and take possession thereof including the structure or part thereof.

10. Chimanlal Ganeriwalla died on 17th February, 1924, leaving him surviving his only adopted son Rameshwarlal Ganeriwalla. On or about 16th March, 1925 while the said lease was in force, Satchidananda Dutt died intestate leaving him surviving, as his heirs, his two sons Sudhangsu Ranjan Dutt and Himangshu Kumar Dutt. The properties devolved upon the said Sudhangsu Ranjan Dutt and Himangshu Kumar Dutt.

11. In 1925, Sudhangsu Ranjan Dutt being elder son of Satchidananda Dutt filed a suit for partition in this Court being Suit No.2082 of 1925 against his brother Himangshu Kumar Dutt. The said suit was decreed on 26th August, 1925 and Commissioners of Partition and Referees were appointed to partition the estate of Satchidananda Dutt into two equal shares and to allot one equal half share to Sudhangsu Ranjan Dutt and the remaining half share to Himangshu Kumar Dutt. Pursuant to the partition, Himangshu Kumar Dutt became the sole owner of the said premises No.38 and 40, Harrison Road, Calcutta.

12. By an indenture dated 22nd September, 1928 executed by and between Brijlal Ganeriwalla and Rameshwarlal Ganeriwalla as the parties of the first part, one Jiban Krishna Mitter as the party of the second part and Himangshu Kumar Dutt as the party of the third part, it was inter alia agreed that Rameshwarlal Ganeriwalla and Brijlal Ganeriwalla possessed of and occupying the portion of the properties shown in the map annexed to the indenture and marked as Plots "B", "C" and "D" and would pay to Himangshu Kumar Dutt ?th share of the rent of the said premises No.40, Harrison Road, Calcutta and the said Jiban Krishna Mitter possessed of and occupying the properties shown in the map marked as Plot "A" would pay to the said Himangshu Kumar Dutt ?th share of such monthly rent of the said premises.

13. Under the said Indenture dated 22nd September, 1928 Jiban Krishna Mitter became obliged to proportionately build on the portion of the said property allotted to him according to the covenants of the lease dated 26th April, 1919. The ownership of the construction by Jiban Krishna Mitter was, therefore, to remain with Himangshu Kumar Dutt.

14. Subsequently, the portion of the property occupied by Jiban Krishna Mitter continued with the number 40, Harrison Road, Calcutta and the portions of the said properties under the occupation of Rameshwarlal Ganeriwalla and Brijlal Ganeriwalla were mutated as premises Nos. 40/1 and 40/2, Harrison Road, Calcutta.

15. Pursuant to a deed of partition dated 16th March, 1936, Brijlal Ganeriwalla became entitled to premises No.40/1 and 40/2, Harrison Road to the exclusion of Rameshwarlal Ganeriwalla. The said Brijlal Ganeriwalla died intestate during the

subsistence of the said lease, leaving him surviving, his only son Hari Prasad Ganeriwalla, as his sole heir and legal representative.

16. By a registered Indenture dated 22th September, 1939, the said Hari Prasad Ganeriwalla sub-leased to one Kamala Prasad Pandey, land measuring 1 Bigha and 15 Cottahs situated at premises No.40/1, Harrison Road delineated in the map/plan annexed to the said indenture, along with unfinished structures and the theatre for a period of 37 years and 8 months commencing from 1st September, 1939 with an option of renewal for a further period of 10 years.

17. Under the Indenture, Kamala Prasad Pandey was to finish and complete, at his own expense, with good materials, the unfinished cinema house and structure, the plan of which had been approved by the lessor, in a workmanlike manner, within 18 months from the date of the Indenture provided that the lessee would stand a sum not less than 20,000/- in building the said cinema house or structure and would be at liberty to make alterations in the structure as may be considered necessary, but without depreciating the value of the structure and on the further consideration that the lessor, his architects and agents would be at liberty to inspect the building while the same was under construction.

18. The lease deed clearly provided that on expiry or sooner determination of the lease, the land along with the structures would have to be returned to the lessor. Furthermore, it was an express condition of the indenture that the demise would always be treated as a sub-lease or under lease of the original lease dated 26th April, 1919 between Satchidananda Dutt and Chimanlal Ganeriwalla.

19. The aforesaid covenants make it amply clear that ownership of the construction was never transferred to Kamala Prasad Pandey. If the lessees were owners of the structures, there could be no question of stipulations with regard to workmanship and materials, depreciation of the structure and the like. Furthermore, if the lessees/sub-lessees were owners of the structures, the lessees/sub-lessees would upon expiry or sooner determination of the lease, have been entitled to remove the structures or alternatively sell the structures to the landlord by agreement.

20. It was agreed that Kamala Prasad Pandey would, after finishing the cinema house, reserve one box containing at least four seats free of cost and charges exclusively for Hari Prasad Ganeriwalla and his family, friends, relations and nominees for every performance to be held in the cinema house. After execution of the Indenture of lease dated 22nd September, 1939, Kamala Prasad Pandey completed the construction of a cinema house. The cinema house was at all material times known and still known as "Purabi Cinema House".

21. By a letter dated 3rd October, 1940 Kamala Prasad Pandey agreed to let out the said cinema house "Purabi/Purabi Talkie House" to the respondent No.2, Deluxe Film Exhibitors Pvt. Ltd., on tenancy for a term of five years, except one room on the first floor, with the room thereunder and the staircase leading thereto which, it was agreed, would remain for the exclusive and sole use and

occupation of Kamala Prasad Pandey.

22. By a registered Indenture of Assignment dated 13th September, 1943, Kamala Prasad Pandey assigned to one Subhendu Sundar Trivedi, the leasehold right of Kamala Prasad Pandey in respect of 1 Bigha 15 Cottahs of land together with the brick built buildings, erections and structures known as "Purabi Cinema House".

23. Even after Kamala Prasad Pandey assigned his leasehold interest in the premises in question to S.S. Trivedi, by execution of the said Indenture of assignment dated 13th September, 1943, the respondent no.2, Deluxe Film Exhibitors Pvt. Ltd., continued to occupy Purabi Cinema house, excluding 1 Cottah 4 Chittacks and 9 sq. ft. and excepting one room which was later converted into three rooms, lavatory and tea room together with the corridor on the first floor and servants quarter in the ground floor and the staircase in the western portion thereof.

24. Even after expiry of the term of 5 years and the renewal period of 2 years as mentioned in the letter dated 3rd October, 1940, the respondent No. 2 continued to occupy Premises No. 40/1, Harrison Road, Calcutta excluding the portion referred to above.

25. By an indenture dated 24th March, 1961, S.S. Trivedi sub-leased to the respondent No. 2 the land and hereditaments in Premises No. 40/1, Harrison Road including the cinema house built and erected thereon known as Purabi Cinema House, but excluding 1 cottah, 4 chittaks and 9 sq. ft. of land thereof included in the premises for Aruna Cinema and further excluding 3 rooms, one tea room and one lavatory together with the corridor in the 1st floor and servant's quarters in the ground floor and staircase in the western portion thereof from 15th September, 1960, for the unexpired residue term of 37 years and 8 months i.e. upto 29th April, 1977 with option to renew the same. The said Indenture was duly registered.

26. The said lease inter alia provided that the lessees would not commit any act against the express stipulations of the terms and conditions of the lease dated 22nd September, 1939 between Hari Prosad Ganeriwalla and Kamala Prasad Pandey and also all leases, agreements prior thereto executed by and between the predecessors-in-title of the lessor and the superior landlords of the said premises from time to time and would keep the lessor indemnified against any damages arising out of any breach of the covenants or stipulations contained in the said head lease and other leases.

27. The said lease also provided that, at the expiration or sooner determination of the demise, the lessee would deliver up and make over quiet, peaceful and vacant possession of the premises with all furniture, fixtures and fittings and all other appurtenances as were contained in the said premises at the time of execution of the indenture including all gas, electric connections and gas and electric lines in the same condition as they existed at the time of execution of the

lease deed, subject to reasonable wear and tear.

28. By the said Indenture of lease dated 24th March 1961, what was let out was not just the structure or just the land but all the land, hereditaments and messuages in the premises known as "Purabi Cinema", together with the land there unto contained excluding three rooms, one tea room, one lavatory together with the corridor on the first floor in the "Purabi Cinema" building and servant's quarter and stair case on the ground floor thereof. The lease of furniture and fittings included those specified in Part II to the Schedule of the said agreement.

29. In 1976 S.S. Trivedi filed a suit against the respondent No. 2 in the Original Side of this Court for recovery of khas possession, upon forfeiture of the lease, on the alleged ground of default in payment of lease rent. The said suit was registered as Suit No. 657 of 1976 (Subhendu Sundar Trivedi v. Deluxe Film Exhibitors Pvt. Ltd.). The said S.S. Trivedi filed an application in the said suit under Chapter XIII A of the Original Side Rules of this Court for final judgment and decree. The said Suit No. 657 of 1976 was decreed by consent according to the terms of settlement filed by the parties in this Court, in terms whereof the Respondent No. 2 continued in possession of the premises in question, inter alia upon payment of arrears of rent.

30. The lease granted by Satchidananda Dutt in favour of Chimanlal Ganeriwalla and Brijlal Ganeriwalla expired on 26th April, 1990, by efflux of time. On 30th April, 2000, the Duttis filed Title Suit No. 1293 of 2005 in the City Civil Court at Calcutta, claiming recovery of khas possession inter alia of the suit premises from the ex-lessee. The said suit was decreed in favour of the Duttis on 17th May, 2006.

31. The decree was thereafter put into execution by the Decree-holders by filing Title Execution Case No. 15 of 2010. On 23rd April, 2010, while the execution case was pending, the decree-holders sold and transferred the said premises, together with the benefit of the said decree, to the petitioner for consideration.

32. The respondent No. 2, along with one Shri Dilip Chand Kankaria, claiming himself to be one of the Directors of the respondent No. 2, filed an application under Order 21 Rules 99 to 101 of the Code of Civil Procedure being Misc. Case No. 392 of 2011, for a declaration that the applicants were the lawful tenants of the suit property.

33. In Paragraph 26 of the said application there is a categorical assertion that "Premises No. 40/1, Mahatma Gandhi Road, P.S. Muchipara, Calcutta ? 700009, is a thika land and the title of the said land is vested on the Government of West Bengal under the provisions of the West Bengal Thika Tenancy (Acquisition & Regulation) Act, 2001 in view of the facts that the son of original Lessee, one Hari Prasad Ganeriwala, prior to 22nd September 1939 constructed an incomplete katcha structure on the suit premises and thereafter his Transferee namely Kamal Prasad Pandey duly completed such katcha construction in September 1939 and upon making such construction, by and/or under a Deed of

Assignment of Lease dated 30th September 1943, the said Kamal Prasad Pandey transferred and assigned all his interest in the said land in favour of Subhendu Sunder Trivedi till 1st May 1977 and thereupon the said Subhendu Sunder Trivedi, by and/or under a Deed of Assignment of Lease dated 24th March 1961, duly transferred and assigned all his right, title and interest in the said leasehold Premises No. 40/1, Mahatma Gandhi Road, Calcutta with the said katcha structure in favour of the Petitioner No. 1 herein till 1st May 1977 and thereupon the Petitioner No. 1 is still in possession of the same and carrying on business therefrom. In view of aforesaid, your Petitioner has inherited the right of thika tenancy over the said premises and is taking necessary step to file a Return in Form No. A with the Ld. Controller of Thika Tenancy in accordance with law????.."

34. In the writ petition, it is incorrectly stated that even in the said application under Order 21 Rules 99 to 101 of the Code of Civil Procedure filed by the respondent No. 2 along with its Director, the respondent No. 2 had not claimed any "thika" tenancy interest in the suit premises. The petitioner did claim thika tenancy rights in the premises in question in its aforesaid application. Whether, on the basis of the pleadings, it could be said that the land in question was thika land or not, is a different issue.

35. It is stated that upon execution of the decree dated 17th May, 2006, possession of entire Premises No. 40/2, Mahatma Gandhi Road has been obtained by the petitioner along with possession of two rooms in Premises No. 40, Mahatma Gandhi Road. The petitioner claims to be in possession of a major portion of Premises No. 40, Mahatma Gandhi Road and the entire Premises No. 40/2, Mahatma Gandhi Road, Kolkata.

36. In or about November, 2011, the respondent No. 2 filed a return before the Controller, Kolkata Thika Tenancy, hereinafter referred to as the Controller, claiming a declaration of thika tenancy in respect of a portion of Premises No. 40/1, Mahatma Gandhi Road, Kolkata. The Controller condoned the delay in filing the return in Form A and registered the return as File No. 49/106. Thereafter, the Controller initiated proceedings to dispose of the claim of the respondent No. 2, which were registered as Misc. Case No. 1/2013. The respondent No. 2 filed its written submissions along with documents in support of its claim.

37. Some occupants of the said premises, being the respondent Nos. 4 to 35, also applied to the Controller, under Section 11(4) of the West Bengal Thika Tenancy (Acquisition and Regulation) Act 2001, hereinafter referred to as the 2001 Thika Tenancy Act, read with Order 1, Rule 10 (2) of the Code of Civil Procedure, for being added as parties, inter alia contending that they were "bharatias".

38. An application filed by the petitioner in this Court under Article 227 of the Constitution of India, being C.O. No. 2341/2013, was disposed of by an Order dated 11th July, 2013, directing the Controller to complete the proceedings within 3 months from 17th July, 2013. By an Order dated 25th September, 2013

impugned in this writ petition, the Controller held he had jurisdiction to make an enquiry under Section 5(3) of the 2001 Thika Tenancy Act and also allowed all the applications for addition of parties.

39. Being aggrieved by the Order dated 25th September, 2013, the writ petitioner filed an appeal being O.A. No. 3708/2013 in the West Bengal Land Reforms and Tenancy Tribunal, along with an application being Misc. Application No. 882/2013, for condonation of the delay of 59 days in filing the appeal.

40. By an Order dated 18th November, 2014, the learned Tribunal gave directions for affidavits in Misc. Application No. 882/2013 and directed the application to appear under the heading "motion" on 9th September, 2015. The delay in filing the appeal not having yet been condoned, there is no pending appeal in the eye of law.

41. In the meanwhile, by a letter dated 21st January 2013, Lalit Kumar Ganeriwalla and two others informed the Controller that they had received legal advice to the effect that they were bound by the decree of eviction in the aforesaid Title Suit and also bound by the orders in Title Execution Case No. 15 of 2012 arising out of the said decree for eviction and they therefore found no reason to spend money to appear or contest the proceedings before the learned Controller, Kolkata Thika Tenancy.

42. This writ petition has been filed, challenging the jurisdiction of the Controller to entertain or proceed with Misc. Case No. 1 of 2013 as also his jurisdiction to pass the impugned order dated 25th September, 2013.

43. The Calcutta Thika Tenancy Act, 1949, hereinafter referred to as the 1949 Thika Tenancy Act, was enacted to regulate the law of landlord and tenant in respect of thika tenancies in Calcutta, and to make better provisions relating to the law.

44. The said 1949 Thika Tenancy Act was repealed by the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981, hereinafter referred to as the 1981 Thika Tenancy Act. The said 1981 Thika Tenancy Act has been repealed and replaced by the 2001 Thika Tenancy Act (West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001).

45. The 1949 Thika Tenancy Act defined "thika tenant" to mean a person who held land, whether under a written lease or otherwise, under another person, and was, or but for a special contract, would be liable to pay rent at a monthly or at any other periodical rate, for that land to that other person, and had erected or acquired by purchase or gift any structure on such land for residential, manufacturing or business purpose and included successors in interest of such person.

46. The definition of "thika tenant" under the 1949 Thika Tenancy Act, expressly excluded a person who held land under another person in perpetuity or a person who held land under another person, under a registered lease, for a period of not

less than 12 years, or a person who held land under another person and used or occupied such land as a "khatal".

47. Section 2(1) of the 1949 Thika Tenancy Act defined "bharatia" to mean any person by whom or on whose behalf, rent was payable for any structure or part of a structure erected by a "thika" tenant in his holding.

48. There could only be a "thika" tenancy under the 1949 Act, when the land belonged to one person and the structures thereon to another person. In other words, there would be a superior landlord, who was the owner of the land and a subservient holder being the lessee and/or tenant under the superior landlord and the owner of the structures, that is, the "thika tenant", with the right to use, occupy or let out the structures. The "bharatia" was the person to whom a structure so constructed and/or acquired by a "thika tenant" had been let out. A "bharatia" paid rent to the "thika tenant" only for the structure, of which he was "bharatia".

49. In this case, Satchidananda Dutt leased out the premises to the Ganeriwallas in 1919, long before the enactment of the 1949 Thika Tenancy Act. The Indentures/Deeds dated 22nd September 1928, 22nd September 1939 and 13th September 1943 were all executed long before any law relating to "Thika Tenancy" was conceived of. The concepts of "thika tenant" and "bharatia" were introduced with the promulgation of the Calcutta Thika Tenancy Ordinance 1948, which was repealed by the 1949 Thika Tenancy Act. The Respondent No. 2 was inducted by Kamala Prasad Pandey in 1940, long before the enactment of the 1949 Thika Tenancy Act, or for that matter promulgation of the Calcutta Thika Tenancy Ordinance. The respondent No. 2 could not possibly have been inducted as a bharatia.

50. Furthermore, what was leased out under the Deed of Lease of 26th April, 1919 and/or subleased under the Indentures dated 22nd September, 1928, 22nd September 1939 and 13th September, 1943, was land hereditament and structures except to the extent expressly excluded. In any event, neither the Ganeriwallas who were lessees for a term of 81 years under a registered lease, nor Kamala Prasad Pandey, who was sub-lessee for a period of 37 years and 8 months also under a registered deed, could be thika tenants under the 1949 Thika Tenancy Act in view of clause (b) of the exclusions in Section 2(5) of the 1949 Act. Similarly S.S. Trivedi to whom Kamala Prasad Pandey assigned his own leasehold rights could also not be a thika tenant. His term under the registered Indenture of Assignment exceeded 12 years. The respondent No. 2, initially inducted by Kamala Prasad Pandey, and later tenant under S.S. Trivedi could never be a "Bharatia" under the 1949 Act since he was neither inducted by any "thika tenant" nor ever was liable to pay rent to any "thika tenant". Moreover under the deed of sub-lease dated 24th March 1961, the respondent No. 2 occupied both land and building and not just the structure for a term exceeding 12 years.

51. The respondent No. 2 could not also be "thika tenant" under the 1949 Thika Tenancy Act, since the respondent No. 2 neither erected the structures at the premises in question, nor acquired the same by gift or purchase. In any case, under the deed of sub-lease dated 24th March 1961, which was duly registered, land along with the buildings and structures thereon were demised to the respondent No. 2, for a period exceeding 12 years (residue of the lease of 37 years and 8 months with effect from 1st September, 1939).

52. The expression "structure" in the Thika Tenancy Act of 1949, had all along been judicially interpreted to mean a "kuccha" and/or temporary structure. However, a different view has been taken by the Hon"ble Supreme Court, by its judgment and order dated 24th February, 2015, in Civil Appeal No. 2402 of 2015 arising out of SLP (C) 8297/2014 (Nemai Chandra Kumar & Ors. v. Mani Square Ltd. & Anr.).

53. In 1969 the Thika Tenancy Act of 1949 was amended to include the definition of "pucca structure" which was defined to mean any structure constructed mainly of brick, stone or concrete or any combination of these materials.

54. By amendment in 1969, Section 10A was incorporated in the 1949 Thika Tenancy Act. Section 10A provided that notwithstanding anything contained in any other law for the time being in force, or any contract, but subject to the provisions of Sub-section (2) and (3), a thika tenant using the land comprised in his holding for a residential purpose, might erect a pucca structure on such land, for such purpose, with the previous permission of the Controller.

55. Sub-section 2 of Section 10A provided that the Controller might grant permission to erect a pucca structure, if the Controller was satisfied that the thika tenant had been using the structure on the land comprised in his holding for a residential purpose, intended to use the pucca structure to be erected on such land for a similar purpose and had obtained sanction of a building plan to erect the pucca structure from the municipal authorities of the area.

56. Section 10A incorporated in 1969 makes it patently clear that a thika tenant using a structure for residential purpose, might erect a pucca structure in place of the existing "kuccha" structure, with permission of the Controller and for similar purpose, that is, residential purpose, subject to sanction of the municipal authorities. Thus, under the 1949 Thika Tenancy Act, no pucca structure for business or manufacturing purpose would come within the purview of thika tenancy.

57. The 1949 Thika Tenancy Act was repealed and replaced by the 1981 Thika Tenancy Act, under which the interests of landlords in lands comprised in thika tenancies, and certain other lands in Calcutta and Howrah, vested in the State.

58. Section 3(8) of the 1981 Thika Tenancy Act defined "thika tenant" to mean any person who occupied, whether under a written lease or otherwise, land under another person, and was, or but for a special contract, would be liable to

pay rent at a monthly or at any other periodical rate, for that land to that another person and had erected or acquired by purchase or gift, any structure on such land for residential, manufacturing or business purpose and included successors in interest of such person.

59. The definition of "thika tenant" in the 1981 Act was almost identical to the definition of "thika tenant" in the 1949 Act, except that, persons holding land in perpetuity, persons holding land under registered lease for a period of not less than 12 years and persons using land for the purpose of khatahs were no longer excluded from the definition of "thika tenant".

60. Section 5 as it stood at the time of enactment of the 1981 Thika Tenancy Act provided as follows :-

"5. Lands comprised in thika tenancies and other lands, etc. and right, title and interest of landlords in such lands to vest in the State.- With effect from the date of commencement of this Act, lands comprised in thika tenancies and other lands held under any person in perpetuity or under registered lease for a period of not less than twelve years or held in monthly and periodical tenancies for being used or occupied as khatahs along with easements, customary rights, common facilities and such other things in such thika tenancies and khatahs attached to or used in connection with such thika tenancies, and khatahs and the right, title and interest of landlords in such lands shall vest in the State free from all encumbrances :

Provided that the easements, rights, common facilities or benefits enjoyed by a thika tenant or an occupier of any land under any person in perpetuity or any land under any person under registered lease for a period of not less than twelve years or a khatal in khas lands of the landlords shall not be affected in any way by such vesting."

61. Under Section 5 of the 1981 Act, lands comprised in "thika" tenancies and other lands held under any person in perpetuity, or under registered lease for a period of not less than 12 years or held in monthly and periodical tenancies for being used and occupied as khatahs, along with easements, customary rights, common facilities and such other things in such "thika" tenancies and khatahs, attached to or used in connection with such "thika" tenancies and khatahs, and the right, title and interest of landlords in such lands were to vest in the State free from all encumbrances, with effect from the date of commencement of the 1981 Act.

62. The proviso to Section 5 of the 1981 Act clearly provided that easements, rights, common facilities or benefits enjoyed by a "thika tenant" or an occupier of any land under any person in perpetuity or any land under any person under a registered lease for a period of not less than 12 years or a khatal in khas lands of the landlords, were not to be affected in any way by such vesting.

63. After the enactment of the 1981 Thika Tenancy Act, every thika tenant and

other tenant occupying land directly under the State, became liable to pay to the State an amount of revenue determined in accordance with the provisions of the West Bengal Land Holding Revenue Act, 1979 and for this purpose, such tenant was to be deemed to be a "raiyat" under that Act. The revenue payable by the tenant was not to be less than what he was paying to the landlord, before the coming into force of the said Act.

64. Sub-section 3 of Section 6 of the provided that the rights of a thika tenant and other tenants occupying land directly under the State, subject to the provisions of the said Act, would be heritable but not transferrable. The 1981 Act and particularly Sub-section 3 of Section 6 thereof clearly provided that no tenant was to construct a pucca structure without submitting a comprehensive development plan or improvement scheme for the holding. Any such scheme was to provide for alternative accommodation for bharatias in accordance with Sub-section 2 of Section 11. An exception was made by the proviso to Section 6 enabling a thika tenant or a tenant of lands which vested under Section 5 to construct a pucca structure for essential common facilities like common pathway, common bath, toilet, water supply, drainage, sewerage, lighting and other similar purposes.

65. Mr. P. Chidambaram, Senior Advocate appearing on behalf of the writ petitioner rightly submitted that only thika tenancies as defined by the 1949 Thika Tenancy Act, vested in the State under the 1981 Thika Tenancy Act, apart from Khataals.

66. In *Lakshmimoni Das and Ors. v. State Of West Bengal and Ors.* reported in AIR 1987 Calcutta 326, where the vires of the 1981 Thika Tenancy Act was under challenge, a Full Bench of this Court held:-

"56. For the reasons aforesaid we hold as follows:-

(a) The impugned Act is not protected under Article 31C of the Constitution as it is found on scrutiny of different provisions of the impugned Act that the impugned Act has not been enacted to give effect to provisions of Articles 39(b) and (c) of the Constitution and the impugned Act is open to challenge on the score of violations of Part III of the Constitution.

(b) Within the scope and ambit of Section 5 of the impugned Act only lands comprised in thika tenancies within the meaning of the Calcutta Thika Tenancy Act, 1949 comprising a kutcha structure and/or a pucca structure constructed for residential purpose with the permission of the Controller under the Calcutta Thika Tenancy Act, 1949 and khatal lands held under a lease shall vest and save as aforesaid no other land and structure vest under the impugned Act.

.....

(e) Section 19 of the impugned Act in so far as it purports to abate any pending appeal preferred by a thika tenant against a decree for eviction of thika tenant under the Calcutta Thika Tenancy Act, 1949 and any execution proceeding for

eviction of a thika tenant against whom a decree for eviction had been passed under the Calcutta Thika Tenancy Act, 1949 before the enforcement of the impugned Act is illegal and ultra vires."

67. Being aggrieved by the judgment of the Full Bench in *Lakshmimoni Das and Ors. v. State Of West Bengal and Ors.* (supra), the State of West Bengal filed a special leave petition in the Hon'ble Supreme Court. While the special leave petition was pending, the legislature passed the Calcutta Thika Tenancy (Acquisition and Regulation) (Amendment) Act, 1993, hereinafter referred to as the 1993 Amendment Act, making certain amendments in the Thika Tenancy Act of 1981.

68. The definitions of "Bharatia", "bustee", "holding", "hut", "khatal", "landlord, other lands", "pucca structure", "slum area", "tenant of other lands" and "thika tenant" as amended and/or incorporated in Section 3 of the 1981 Thika Tenancy Act by the 1993 Amendment Act, are set out herein below for convenience :

"(1) "Bharatia" means any person by whom, or on whose account, rent is payable for any structure or part thereof, owned by a thika tenant or tenant of other lands in his holding or by a landlord in a bustee on his khas land;

(1A) "bustee" means an area containing land with a collection of huts used or intended to be used for human habitation or for any business purpose, and includes any tank in or appurtenant to and in common use of the occupiers of such bustee, whether or not the same person is the owner or the landlord in respect of such tank;

(3) "holding" means a parcel or parcel of land occupied by a thika tenant or tenant of other lands under one set of conditions, and includes a bustee owned by a landlord on his khas land along with any tank included in such bustee;

(3A) "hut" means any building or structure, the roof or the floor of which, excluding the floor at the plinth level, is not constructed of masonry or reinforced concrete;

(3B) "khatal" means a place where cattle are kept or maintained for the purpose of trade or business including business in milk derived from such cattle;

(7) "pucca structure" means any structure constructed mainly of brick, stone or concrete or any combination of these materials, or any other material of a durable nature;

(7A) "slum area" means the area declared as such by the State Government under Section 3 of the West Bengal Slum Areas (Improvement and Clearance) Act, 1972 (West Ben. Act X of 1972), or Section 4 of the Calcutta Slum Clearance and Rehabilitation of Slumdwellers Act, 1958 (West Ben. Act XX of 1958);

(7B) "tenant of other lands" means any person who occupies other lands under another person, whether under a written lease or otherwise, and is or but for a special contract would be liable to pay rent at a monthly or periodical rate for

occupation of such other lands, and includes the successors-in-interest of such person;

(8) "thika tenant" means any person who occupies, whether under a written lease or otherwise, land under another person, and is or but for a special contract would be liable to pay rent, at a monthly or at any other periodical rate, for that land to that another person and has erected or acquired by purchase or gift any structure on such land for residential, manufacturing or business purpose, and includes successors-in-interest of such person."

69. Section 5 of the 1981 Thika Tenancy Act as amended by the 1993 Amendment Act provided as follows :-

"5. Lands comprised in thika tenancies, khas lands, etc. to vest in the State. ? With effect from the date of commencement of this Act, the following lands along with the interest of landlords therein shall vest in the State, free from all incumbrances, namely :-

(a) lands comprised in and appurtenant to tenancies of thika tenants including open areas, roads, passages, tanks, pools and drains;

(b) lands comprised in and appurtenant to bustees on khas lands of landlords and lands in slum areas including open areas, roads, passages, tanks, pools and drains;

(c) other lands not covered by clauses (a) and (b) held under a written lease or otherwise, including open areas, roads, passages, tanks, pools and drains;

(d) lands held in monthly or other periodical tenancies, whether under a written lease or otherwise, for being used or occupied as khatal :

Provided that such vesting shall not affect in any way the easements, customary rights or other facilities enjoyed by thika tenants, Bharatias and occupiers of land coming within the purview of clauses (c) and (d).

70. The 1981 Thika Tenancy Act has been repealed and replaced by the 2001 Thika Tenancy Act. Some of the provisions of the 2001 Thika Tenancy Act were amended with effect from 5th October, 2010, by the West Bengal Thika Tenancy (Acquisition and Regulation) (Amendment) Act, 2010, hereinafter referred to as the Amendment Act of 2010.

71. Some of the relevant provisions of the 2001 Thika Tenancy Act, prior to its amendment by the Amendment Act of 2010 are set out herein below:

"2. Definitions. ? In this Act, unless there is anything repugnant in the subject or context, -

(1) "Bharatia" means any person by whom or on whose account, rent is payable to "for any structure or part thereof," owned by a thika tenant, but excludes any person paying rent to a Bharatia and any "resident of a structure" forfeited by the State Government under sub-section (2) of section 6, irrespective of the

status, the said person may have enjoyed earlier;

(2)

(3) "holding" means a parcel or parcels of land occupied by a thika tenant under one set of conditions along with any tank included in such land.

(4) "hut" means any building or structure, the roof or the floor of which, excluding the floor at the plinth level, is not constructed of masonry or reinforced concrete.

(5)

(6) "land appurtenant" includes any easement, right, or any common benefits or facilities, or access, passage, drains, tanks and pools which were owned by the landlord and were enjoyed by the thika tenant and the Bharatia, if any, before the date of vesting.

(7) "landlord" means any corporation, charitable or religious institution or person who, for the time being, is entitled to receive or, but for a special contract, would be entitled to receive the rent for any land comprised in the tenancy of a thika tenant or in a khatal, tank or hut owned by him, and includes any corporation, institution or person having superior interest in such thika tenancy;

.....

(13) "pucca structure" means any structure constructed mainly of brick, stone or concrete or any combination of these materials, or any other material of a durable nature.

(14) "thika tenant" means any person who occupies, whether under a written lease or otherwise, land under another person, and is, or but for a special contract, would be, liable to pay rent at a monthly or any other periodical rate for that land to that another person, and has erected or acquired "by purchase or gift any structure on such land" for residential, manufacturing or business purpose, and includes the successors-in-interest of such persons but excludes any resident of a structure forfeited to the State under sub-section (2) of section 6 of this Act irrespective of the status, he may have enjoyed earlier.

3. Act to override other laws.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith in any other law for the time being in force or in any custom, usage or agreement or in any decree or order of a court, tribunal or other authority.

4. Lands comprised in thika tenancies and other lands, etc. to vest in the State. - With effect from the 18th day of January, 1982, the following lands along with the interest of landlords therein shall be deemed to have vested in the State, free from all encumbrances:-

(a) Lands comprised in and appurtenant to tenancies of thika tenants including open areas, roads and

(b) Lands held in monthly or other periodical tenancies, whether under a written lease or otherwise, for being used or occupied as khatal:

Provided that any land comprised in, and appurtenant to, tenancies of thika tenants created after the 18th day of January, 1982, shall also be deemed to be vested in the State, free from all encumbrances with effect from the date of creation of tenancies of thika tenants:

Provided further that such vesting shall not be deemed to have affected in any way the easements, customary rights or other facilities enjoyed by thika tenants, Bharatias or occupiers of land coming within the purview of this section:

Provided also that nothing contained in this section shall prevent the State Government or the local authority from taking up any development work on the land appurtenant to tenancies of thika tenants for public purpose.

5(1)

5(2)

5(3) If any question arises as to whether a person is a thika tenant or not, the matter shall be decided by the controller.

5(5) The thika tenants holding directly under the State under sub-section (1) shall be entitled to construct pucca structures in accordance with the building plans sanctioned under the Kolkata Municipal Corporation Act, 1980, (West Ben. Act LIX of 1980), and the rules made thereunder, or the Howrah Municipal Corporation Act, 1980 (West Ben. Act LVIII of 1980), and the rules made thereunder, according as the land may be situated within Kolkata as defined in clause (9) of section 2 of the Kolkata Municipal Corporation Act, 1980 (West Ben. Act LIX of 1980), or Howrah as defined in clause (15) of section 2 of the Howrah Municipal Corporation Act, 1980, (West Ben. Act LVIII of 1980), for ?

(a) residential and business purposes for themselves and the Bharatias under them; and

(b) essential common facilities like common pathway, common bath, toilet, water supply, drainage, sewerage, lighting and similar other purposes:

Provided that the thika tenants holding directly under the State under sub-section (1), shall obtain a no objection certificate from the Controller before making any pucca construction or changing the nature, character and dimension of an existing structure on the land, irrespective of the area of the land.

16. Restriction or exclusion of the Act by agreement. ? Nothing in any contract between a thika tenant and a Bharatia made after the commencement of this Act shall take away, or limit, the rights of such tenant or Bharatia as provided for in 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, as the case may be.

72. The definition of "Thika tenant" as amended by the 2010 Amendment Act is as follows :-

"2 (14) "Thika tenant" means any person who occupies, whether under a written lease or otherwise, land under another person, and is, or but for a special contract, would be, liable to pay rent at a monthly or any other periodical rate for that land to that another person, and has erected or acquired [by purchase or gift any structure including pucca structure, if any, on such land] for residential, manufacturing or business purpose, and includes the successors-in-interest of such persons but excludes any resident of a structure forfeited to the State under subsection (2) of section 6 of this Act irrespective of the status, he may have enjoyed earlier;"

73. The 2010 Amendment Act has incorporated sub-section (15) of Section 2 of the 2001 Thika Tenancy Act, which defines "thika land" as follows :-

"2(15) "thika land" means any land comprised in and appurtenant to, tenancies of thika tenant irrespective of the fact whether there is any claim of such tenancy or not an includes open areas and roads on such land."

74. Section 5(3) and 5(5) of the 2001 Thika Tenancy Act as amended by the 2010 Amendment Act are set out herein below for convenience :-

"5(3) If any question arises as to whether a person is a thika tenant or not or whether the land in question is thika land or not, the Controller, either on his own motion or upon receiving any information, may, after giving the persons interested an opportunity of being heard and after examining all such documents and particulars as may be considered necessary, enquire upon and decide such question.

.....

5(5) The thika tenants holding directly under the State under sub-section (1) shall be entitled [to construct pucca structures or to change the nature, character and dimension of an existing structure on the land] in accordance with the building plans sanctioned under the Kolkata Municipal Corporation Act, 1980, (West Ben. Act LIX of 1980), and the rules made thereunder, or the Howrah Municipal Corporation Act, 1980 (West Ben. Act LVIII of 1980), and the rules made thereunder, according as the land may be situated within Kolkata as defined in clause (9) of section 2 of the Kolkata Municipal Corporation Act, 1980 (West Ben. Act LIX of 1980), or Howrah as defined in clause (15) of section 2 of the Howrah Municipal Corporation Act, 1980, (West Ben. Act LVIII of 1980), for ?

(a) residential and business purposes for themselves and the Bharatias under them; and

(b) essential common facilities like common pathway, common bath, toilet, water supply, drainage, sewerage, lighting and similar other purposes:

Provided that the thika tenants holding directly under the State under sub-

section (1), shall obtain a no objection certificate from the Controller before making any pucca construction or changing the nature, character and dimension of an existing structure on the land, irrespective of the area of the land."

75. Section 21 of the 2001 Thika Tenancy Act provides as follows:-

"Bar to jurisdiction - No civil court shall have jurisdiction to decide, or to deal with, any question, or to determine any matter, which, by or under this Act, is required to be, or has been, decided or dealt with, or which is to be, or has been, determined, by the Controller or the appellate or other authority specified in the provisions of this Act, and no order or judgment passed, or proceedings including execution proceedings commenced, under the provisions of this Act shall be called in question in any civil Court."

76. On perusal of the definition of "thika tenant" in the 2001 Act, as amended, it is patently clear that there is no difference between the definition of "thika tenant" in the Thika Tenancy Act of 2001, with the definition of "thika tenant" in the 1981 Thika Tenancy Act as amended in 1993 and the 1949 Thika Tenancy Act, except that persons residing in a structure forfeited to the State under Sub-section 2 of Section 6, irrespective of the status that they might have enjoyed earlier, have been excluded from the definition of "thika tenant". The definition of "thika land" incorporated with effect from 1st November, 2010 defines "thika land" to mean any land comprised in and appurtenant to tenancies of thika tenants, irrespective of whether there is any claim of such tenancy or not and includes open areas and roads on such land.

77. The essential ingredient of a thika tenancy is that the land should be owned by the superior landlord, but the structure thereon should be owned by another person in occupation of land, ordinarily on payment of rent, who may have erected the structure on the land held by him as occupier and/or holder of the land, or acquired the structure by gift or purchase.

78. After 1st November, 2010, the definition of "thika tenant" includes the owner of a pucca structure, whether the pucca structure has been acquired by gift or purchase, or erected by him from his own funds. The thika tenant must, however, be the owner of the structure, but not the land on which the structure is erected.

79. The respondent No. 2 has in its affidavit-in-opposition to the writ petition claimed that it is a "Bharatia", even though it apparently submitted its return before the Controller, for recording its name as "Thika tenant", in respect of the premises in question. Having regard to the definition "bharatia", read with the definition of "thika tenant" in the 1949 Thika Tenancy Act, the 1981 Thika Tenancy Act and the 2001 Thika Tenancy Act as amended from time to time, the respondent No.2 could never have been a "Bharatia", or a thika tenant since:-

(i) The respondent No.2 was inducted long before promulgation of Calcutta Thika Tenancy Ordinance, 1948 and/or enactment of the 1949 Thika Tenancy Act.

- (ii) The ownership of the structures remained with the superior landlord Satchidananda Dutt and his successor-in-interest;
- (iii) Neither the Ganeriwallas nor Kamala Prasad Pandey nor Subhendu Sundar Trivedi owned the structures. None of them were thika tenants.
- (iv) Neither the Ganeriwallas nor Kamala Prasad Pandey nor Subhendu Sundar Trivedi could be thika tenants under the 1949 Act, since they all held land for a term exceeding 12 years under registered deeds/ indentures.
- (v) The respondent No.2 could never be a "Thika tenant" within the definition of "Thika tenant" under Section 2(5) of the 1949 Thika Tenancy Act, as the respondent No. 2 held the premises for over twelve years, under a registered deed. Moreover, admittedly, the respondent No. 2 did not erect the structures or acquire the same by gift or purchase.
- (vi) The respondent No.2 could never be a "Bharatia" as defined under the 1949 Thika Tenancy Act, the 1981 Thika Tenancy Act, or the Thika Tenancy Act of 2001 as respondent No.2 was never liable to pay rent for any structure owned by a "thika tenant" or part thereof.
- (vii) What was demised to the respondent No.2 by Subhendu Sundar Trivedi by the indenture dated 24th March, 1961 was the land comprised in Premises No. 40/1, Harrison Road, Calcutta, including the buildings and structures thereon, as described in Part I of the Schedule, except the areas specifically excluded hereunder, the respondent No.2 held that cinema house along with the land and not just the building/structure.

80. Section 12 of the 2001 Thika Tenancy Act provides:-

12. Appeal. ? (1) Any person aggrieved by an order of a Controller may, within 30 days from the date of the order, prefer an appeal in writing before the Land Reforms and Tenancy Tribunal established under the West Bengal Land Reforms and Tenancy Tribunal Act, 1997 (West Ben. Act XXV of 1997).

(2) Subject to provisions of this Act and rules made thereunder, any order passed by the Land Reforms and Tenancy Tribunal may, in the manner prescribed, be reviewed by the said Tribunal on account of some mistake or error apparent on the face of the record or for any other sufficient cause of like nature.

81. The West Bengal Land Reforms and Tenancy Tribunal, hereinafter referred to as the Tribunal has been established under the West Bengal Land Reforms and Tenancy Tribunal Act, 1997, hereinafter referred to as the Tenancy Tribunal Act to exercise jurisdiction, power and authority conferred by Section 6 and Section 7 of the Tenancy Tribunal Act.

82. Section 6 of the Tenancy Tribunal Act confers jurisdiction on the Tribunal inter alia in relation to an order made by an authority under a specified Act; inaction or culpable negligence of an authority under a specified Act, applications relating to matters under any provision of a specified Act, matters relating to

constitutional validity of any action under the provisions of a specified Act and adjudication of matters, proceedings, cases and appeals which stand transferred from the High Court and other authorities to the Tribunal in accordance with the provisions of the Tenancy Tribunal Act. The 2001 Thika Tenancy Act is a specified Act.

83. Sections 7 and 8 of the Tenancy Tribunal Act provides as follows :-

"7. Exercise by Tribunal of jurisdiction, power and authority exercisable by court.- Save as otherwise expressly provided in this Act, the Tribunal shall, with effect from the date appointed by the State Government under section 6, exercise all the jurisdiction power and authority exercisable immediately before that day by any court including the High Court, except the writ jurisdiction under Articles 226 and 227 of the Constitution exercised by a Division Bench of the High Court, but excluding the Supreme Court, for adjudication or trial of disputes and applications relating to land reforms and matters connected therewith or incidental thereto and other matters arising out of any provisions of a specified Act.

8. Exclusion of jurisdiction of courts.-On and from the date from which jurisdiction, power and authority become exercisable under this Act by the Tribunal, the High Court, except where that Court exercises writ jurisdiction under Articles 226 and 227 of the Constitution by a Division Bench, or any civil court, except the Supreme Court, shall not entertain any proceeding or application or exercise any jurisdiction, power or authority in relation to adjudication or trial of disputes or applications relating to land reforms or any matter connected therewith or incidental thereto or any other matter under any provision of a specified Act."

84. Under Section 7 of the Tenancy Tribunal Act, the Tribunal is empowered to exercise jurisdiction that was exercisable by all Courts including the High Court, at the time of establishment of the Tribunal, but except the Supreme Court and except the High Court in exercise of its extra ordinary writ jurisdiction under Articles 226 and 227 of the Constitution, when such jurisdiction is exercised by a Division Bench of the High Court, for adjudication or trial of disputes and applications relating to land reforms and matters connected therewith or incidental thereto and other matters arising out of any provision of a specified Act.

85. Section 8 of the Tenancy Tribunal Act excludes the jurisdiction of all Civil Courts, except the Supreme Court and the Division Bench of the High Court, exercising its writ jurisdiction under Articles 226 and 227 of the Constitution of India, from entertaining any proceeding or application or from exercising jurisdiction, power or authority in relation to adjudication or trial of disputes or applications relating to land reforms or any matter connected therewith or incidental thereto or any other matter under any provision of a specified Act.

86. Similarly Section 9 of the Tenancy Tribunal Act provides for transfer to the

Tribunal of all proceedings and appeals relating to land reforms and matters connected therewith and incidental thereto and other matters arising out of a specified Act pending in the High Court except where a Division Bench of the High Court exercises writ jurisdiction under Articles 226 and 227 of the Constitution of India.

87. Mr. Chidambaram argued, and rightly that the Controller had no jurisdiction to proceed with the enquiry under Section 5(3) of the 2001 Thika Tenancy Act on the basis of the return filed by the respondent No. 2.

88. Under Rule 3 of the West Bengal Thika Tenancy (Acquisition and Regulation) Rules 2001 every "thika tenant", occupying land under a landlord on 18th January, 1982, or on any subsequent day is required to furnish a return in Form "A". There could be no question of initiating or proceeding with an enquiry under Section 5(3) of the 2001 Thika Tenancy Act on the basis of a return if it was apparent from the return that the returnee was not a "thika tenant".

89. Sri Rajiv Karkaria, a director of the respondent No.2, filed written submissions before the Thika Tenancy Controller, Kolkata, in support of the return of the respondent No.2, praying for declaration of the respondent No.2 as "thika tenant".

90. In paragraph 3 read with paragraph 2 of the said written submission it is alleged that the lessee under the Indenture of Lease dated 26th April, 1919, that is, the Ganeriwallas constructed a structure at the premises in question.

In paragraph 5 of the said petition it is alleged:-

"5. That thereafter by a Indenture dated 22nd September 1939 the said Hariprasad Ganeriwalla being the lessor on One part, transferred the thika tenancy interest in respect of the land by way of lease to Sri Kamal Prasad Pandey being the lessee, for a period of 37 years and 8 months commencing on and from 1st September, 1939 with an option to extent the same for further period of 10 years at a monthly rental of Rs. 700/-.

Xerox copy of the said deed of lease dated 22.09.1939 is annexed herewith and marked with the latter "B".

91. There could be no question of any "thika" tenancy interest in the year 1939, almost ten years before promulgation of the Calcutta Thika Tenancy Ordinance.

92. In any case the sub-lease was for a period of 37 years. Paragraphs 8 to 11 of the written submissions are extracted herein below for convenience:-

"8. That by an Indenture dated 13th September, 1943 the said Kamal Prasad Pandey being the assignor of one part and Sri S.S. Trivedi, described therein as assignee of the other part. Sri Kamal Prasad Pandey absolutely conveyed and assigned unto the said assignee leasehold hereditaments and premises and the cinema hall as Purabi cinema together with the thika tenancy interest as per particularly described in the said lease and/or assignment for the residue within

the unexpired of said terms of the indenture of lease dated 22nd September, 1939.

9. That the said S.S. Trivedi by virtue of the said deed of assignment dated 13th September, 1943 became the sole thika tenant and was occupying the said premises No.40/1, Harrison Road, Calcutta containing the said purabi Cinema Hall.

10. That subsequently the said S.S. Trivedi by a deed of lease dated 24th March, 1961 transferred his thika tenancy interest in respect of the land measuring about 10,200 sq. ft. together with the structure lying and situated at premises No.40/1, Harrison Road in favour of M/s. Deluxe Film Exhibitors Pvt. Ltd. for a period of unexpired residue of 37 years 8 months from 15th September 1960 with the option of further renewal and/or extension for 10 years. Xerox copy of the deed of indenture dated 24.3.1961 is annexed herewith and marked with the letter "C".

11. That the present returnee is still occupying the said property in question and was paying ground rent to the then Zamindar and thereafter to the Joint Receivers appointed by the Hon"ble High Court in the partition suit till 1986."

93. On the face of the averments in the written submissions, neither the Ganeriwallas, nor K.P. Pandey nor S.S. Trivedi could be "Thika Tenants" for the reasons already discussed and as such there could be no transfer of any "Thika Tenancy" interest to the respondent No.2. Moreover there is a clear admission that what was transferred to the respondent No.2 was land with structure and not just the structure for a period of over twelve years by a registered indenture. Furthermore the respondent No.2 neither erected the Purabi Cinema building nor acquired the same by gift or purchase. Significantly in the affidavit-in-opposition to this writ petition, the respondent No.2 has changed its stand and claimed that it is a "bharatia".

94. In *Nemai Chandra Kumar & Ors. v. Mani Square Ltd. & Anr.* (supra) which is perhaps the latest judgment of the Supreme Court relating to the Thika Tenancy laws in the State, the Supreme Court held:-

"22.To claim rights of a "Thika Tenant" a person should be a "Thika Tenant" under Section 2(5) of the 1949 Act for which he should satisfy the following conditions:

"(i) The person shall be holding land under another person;

(ii) he shall be liable to pay rent, at a monthly or any other periodical rate, for that land to that another person; and

(iii) he should have erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose. It includes the successors in interest of such person."

The said definition does not include a person- (a) who holds such land under that

another person in perpetuity; or (b) under a registered lease, in which the duration of the lease is expressly stated to be for a period of not less than twelve years; or (c) uses or occupies such land as Khatal.

23. The word "any structure" relates to structure erected or acquired by purchase or gift on such land for a residential, manufacturing or business purpose??"

95. Mr. Chidambaram argued that the proceedings before the Controller being without jurisdiction, this Court should in exercise of its extraordinary power of judicial review under Article 226 of the Constitution of India, quash the impugned order dated 25th September, 2013 of the Controller, and issue a writ of prohibition restraining the Controller from proceeding and/or further proceeding with the return purported to be filed by the respondent No.2.

96. Mr. Lalit Mohan Mahata, appearing on behalf of the State of West Bengal (Respondent No.1), Mr. Ashok Kr. Banerjee appearing on behalf of the respondent No.2, Mr. Satya Narayan Shaw appearing on behalf of the respondent Nos. 4, 5 and 6, Mr. Jiban Ratan Chatterjee appearing on behalf of the respondent Nos. 7 to 13 and 23 to 34, Mr. Pratik Prokash Banerjee appearing on behalf of respondent Nos. 14 to 22 and 35 made extensive arguments and also submitted their respective written notes of arguments. Since there has been overlapping of arguments the submissions are briefly summarised together herein below to avoid prolixity and unnecessary repetition.

97. Mr. Ashok Kumar Banerjee, Senior Advocate appearing on behalf of the respondent No. 2 briefly enumerated the facts of the case, referred to the Indentures of Lease dated 26th April 1919, 22nd September 1939, 13th September 1943 and 24th March, 1961 and submitted that Satchidananda Dutt had let out vacant land comprising an area of 2 bighas, 7 cottahs to the Ganeriwalla brothers with the right to construct thereon.

98. Mr. Banerjee argued that the premises vested in the State with the enforcement of the 1981 Thika Tenancy Act with effect from 18th January, 1982. The interest of the superior landlord, that is, the successors-in-interest of Satchidananda Dutt vested in the State and the thika tenants under him became thika tenants under the State.

99. Mr. Banerjee submitted that the definition of "thika tenant" in Section 2(5) of the 1949 Thika Tenancy Act may have excluded persons, who held land under another person, under a registered lease of duration of not less than 12 years. However, the exclusions in the definition of "thika tenant" in the 1949 Thika Tenancy Act having been removed in Section 3(8) of the 1981 Act, persons who held vacant land with right to construct structures thereon for a period of more than 12 years could be a thika tenant under the 1981 Act.

100. Mr. Banerjee argued that a person who was not a thika tenant under the 1949 Thika Tenancy Act could, therefore, be a thika tenant under the provisions

of the 1981 Thika Tenancy Act and the 2001 Thika Tenancy Act.

101. Mr. Banerjee argued that after enactment of the 1981 Act, with effect from 18th January, 1982, the interest of the superior landlord vested in the State and the thika tenant became thika tenant under the State of West Bengal.

102. However, as discussed earlier, there were no "thika tenants" under Satchidanda Dutt or his heirs and successors in interest, at the premises in question. Significantly, even after the 1981 Act came into force with effect from 18th January, 1982, no one claimed any thika tenancy. It was only in 2011 that the respondent No. 2 all of a sudden submitted return in Form A with relevant documents, with the Thika Tenancy Controller along with an application for condonation of delay.

103. However, in *Lakshmimoni Das and Ors. v. State of West Bengal and Ors.* (supra) cited by Mr. P. Chidambaram, the Full Bench of this Court held:-

"43. Looking into the history of the legislation and purpose of the legislation, it appears to us that the impugned legislation is plainly to abolish the rights of the landlord over the lands held by thika tenants which were so long governed by the provisions of Calcutta Thika Tenancy Act, 1949. ??????. Applying these legal maxims, it appears to us that "other land" appearing in Section 5 of the impugned Act must mean land falling under the category of thika tenancy land. This general word following a specific word must apply not to different objects of a widely differing character, but something which can be called a class or kind of objects. In this case, from the title, preamble of the Act, the intention of the legislature as also on consideration of the mischief sought to be remedied by the impugned Act it must be held that "other land" must be land coming within the category of thika tenancy land. If however appears that besides the lands comprising thika tenancies lands used as khatahs and the right, title and interest of landlord in such khatahs are intended to be vested under Section 5??"

104. The judgment of the Full Bench is binding on the Division Bench. We are, thus, constrained to hold that land not falling within the category of thika tenancy land under 1949 Thika Tenancy Act would not vest in the state under the 1981 Thika Tenancy Act.

105. The Full Bench decision of this Court in *Lakshmimoni Das and Ors. v. State of West Bengal and Ors.* (supra) was considered by the Supreme Court in *Nemai Chandra Kumar v. Mani Square Ltd.* (supra). The Supreme Court approved the view of the Full Bench that only land held by thika tenants within the meaning of the 1949 Thika Tenancy Act vested. The issue is no longer open, at least not before this Court.

106. In *Ramdas Bansal v. Kharag Singh Baid & Ors.* reported in (2007) 3 CHN 851 cited by Mr. Chidambaram, a Division Bench of this Court held that a person who did not acquire title to the structure but only had a right of enjoyment of the structure was not a thika tenant. The Division Bench held:-

"19. As regards the application under Order 41, Rule 27 of the Code of Civil Procedure filed before us, we find that by those additional documents, the appellant wanted to impress upon us that the lessor of the plaintiff was really a thika tenant because their predecessor constructed the building on vacant land taken on lease. It appears that those constructions were done prior to the coming into operation of the Calcutta Thika Tenancy Act, 1949. Moreover, in order to bring the plaintiffs within the definition of thika tenant, it must be established that the plaintiffs or their predecessors-in-interest were thika tenants. The lessor the plaintiffs cannot be said to be their predecessor-in-interest. It is now well-settled that lease is a doctrine of separation of possession from ownership. By virtue of execution of a lease-deed, the title remains with the lessor while right of enjoyment passes to the lessee. Therefore, by execution of a lease-deed in favour of the plaintiffs' father, the lessor remained the owner of the property whereas the plaintiffs' father merely got right of enjoyment of the property. Once, we hold that the plaintiffs or then father did not make any construction of the property nor did they or their father acquire any title to the structure but merely got right enjoyment of the same from the owners, they cannot be said to be the thika tenant within the meaning of the definition given in the subsequent legislations. We are unable to accept the contention of Mr. Bachawat that the lessor of the plaintiffs is the predecessor-in-interest of the plaintiffs so as to bring them within the definition of thika tenant."

107. In *Ramdas Bansal v. Kharag Singh Baid & Ors.* reported in (2012) 2 SCC 548 cited by Mr. P. Chidambaram the Supreme Court affirmed the judgment of the Division Bench of this Court referred to above and held:-

"44. The point relating to a portion of the demised premises being a Thika Tenancy and thus covered by the provisions of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981, was raised before the Division Bench of the High Court, which, however, negated such contention upon holding that the Respondents were not Thika Tenants since the building had been constructed on the land in question before the Calcutta Thika Tenancy Act, 1949, came into operation. Placing reliance on the doctrine of separation of possession from ownership, the Division Bench further held that the Appellant had failed to establish that the Respondents or their predecessors-in-interest were Thika Tenants of the suit property.

45. The Division Bench also held that even after execution of the lease deed in favour of the Respondents, the lessor remained the owner of the property, whereas the Respondents' father merely got the right to enjoyment of the property and could not, therefore, be said to be the Thika Tenant within the meaning of the definition given in the subsequent legislations. On such reasoning, the Division Bench rejected the application filed on behalf of the Appellant under Order 41, Rule 27 CPC to bring on record subsequent facts to prove his status as a tenant of a portion of the structure in relation to which the Appellant had acquired the status of a Bharatia after the acquisition of Thika

Tenancies under the 1981 Act.

46. The law relating to Thika Tenancies in relation to Calcutta and Howrah, as it existed prior to the Acquisition Act of 1981, was the Calcutta Thika Tenancy Act, 1949, which excluded leases of land exceeding 12 years' duration. The instant lease being one for 20 years, the same stood excluded from the operation of the 1949 Act, when it was executed. In any event, having been granted a lease for a period of twenty one years in respect of the building standing on the suit premises, comprising premises No.91-A, Mahatma Gandhi Road and 6-A, Sambhu Chatterjee Street, Kolkata, in which the Grace Cinema was located, the Appellant could never claim to be a Thika Tenant in respect of the suit premises as defined either under the Calcutta Thika Tenancy Act, the Calcutta Thika and other Tenancies and Lands (Acquisition and Regulation) Act, 1981, as well as The West Bengal (Acquisition and Regulation) Act, 2001.

47. As has been indicated hereinbefore, a "Thika Tenant" under the Calcutta Thika Tenancy Act, 1949, was defined to mean any person who, inter alia, held, whether under a written lease or otherwise, land under another person and has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose and includes the successors-in-interest of such person, except for the exceptions indicated in Sub- Section (5) of Section 2 of the said Act. As also indicated hereinbefore, the aforesaid Act stood repealed by the Calcutta Thika Tenancy and Other Tenancies and Lands (Acquisition and Regulation) Act, 1981, which provided for the acquisition of interest of landlords in respect of lands comprised in Thika Tenancies and certain other tenancies and other lands in Kolkata and Howrah for development and equitable utilisation of such lands.

48. In the said Act, a "Thika Tenant" has been defined to mean any person who occupies, whether under a written lease or otherwise land under another person and is or but for a special contract liable to pay rent, at a monthly or periodical rate, for the land to the said person and has erected or acquired by purchase or gift any structure on such land for residential, manufacturing or business purpose and includes the successors-in-interest of such person. What is significant in the definition of Thika Tenant under the 1981 Act is the persons who had been excluded from the definition in the 1949 Act, were also brought within the ambit of the 1981 Act. Consequently, certain lands which were earlier excluded from the definition of "Thika Tenancy", were now brought within its ambit.

49. The circumstances were further altered with the enactment of the West Bengal Thika Tenancy (Acquisition & Regulation) Act, 2001, to provide for the acquisition of interests of landlords in respect of lands comprised in Thika Tenancies and certain other tenancies in Kolkata and Howrah and other Municipalities of West Bengal for development and equitable utilisation of such lands with a view to sub-serve the common good. It is clear that the main object of the 2001 Act was to extend the acquisition of lands beyond Kolkata and Howrah, in other Municipalities of West Bengal, for development and proper

utilisation of such lands.

50. The Appellant does not come within the ambit of any of the definitions under the aforesaid three Acts having been granted a lease of the structures which had already been erected on the lands long before the coming into operation of either the 1949 Act or the 1981 Act or even the 2001 Act??.."

108. Mr. Banerjee's argument that a person who was not a "thika tenant" under the 1949 Thika Tenancy Act, could be a "thika tenant" under the 1981 Thika Tenancy Act cannot, therefore, be sustained.

109. Mr. Banerjee argued that the Controller, Kolkata Thika Tenancy is competent under Section 5(3) of the 2001 Thika Tenancy Act to decide whether the land in question is thika land and whether the person claiming thika tenancy is a thika tenant or not.

110. There can be no doubt, as argued by Mr. Banerjee, that the Controller has power under Section 5(3) of the 2001 Thika Tenancy Act to decide whether any particular land is thika land and whether any person claiming "thika tenancy" is a "thika tenant" or not. However, the Controller, on preliminary examination of the return/claim would have to be prima facie satisfied of the existence of a thika tenancy. Where a return and/or the documents appended thereto and/or any pleadings filed in support thereof ex facie reveal that the land in question is not a "thika" land, the Controller cannot exercise jurisdiction/further jurisdiction to proceed with an enquiry under Section 5(3) of the 2001 Thika Tenancy Act.

111. It is reiterated that the written submissions filed in support of the return clearly show that the land in question is not "thika" land and the respondent No. 2 is neither "thika tenant" nor "bharatia". The essential ingredients of a "thika" tenancy do not exist in this case. Admittedly the respondent No.2 had neither erected the structures at the premises in question, nor acquired those structures by gift or purchase.

112. By the Deed of Lease dated 24th March, 1961 executed between S.S. Trivedi and the respondent No. 2, all the messuages, land, hereditament, including the Cinema House were sub-leased to Deluxe Film Exhibitors for the unexpired residue of 37 years 8 months commencing from 15th September, 1960 with an option of further renewal for 10 years. The term exceeding twelve years, the respondent No. 2 could not possibly be a "thika tenant" within the meaning of the 1949 Thika Tenancy Act.

113. It would, perhaps also not be out of context to note that in its written submission before the Controller, the respondent No. 2 claimed declaration of thika tenancy, but in its affidavit-in-opposition the respondent No. 2 claimed that the respondent No. 2 was a "bharatia".

114. Mr. Banerjee argued that respondent No.2 remained in occupation of Purabi Cinema as "bharatia". However, in 1943, there could be no question of Deluxe Film Exhibitors continuing in possession as "bharatia", since the concept of

"bharatia" under a thika tenant was for the first time introduced by the Calcutta Thika Tenancy Ordinance which was promulgated long after the independence of India.

115. As per the definition of "bharatia" in the 2001 Thika Tenancy Act, "bharatia" is one by whom or on whose account rent is payable for any structure including pucca structure if any, or any part thereof, owned by a thika tenant, but excludes any person paying rent to a "bharatia".

116. As discussed above, none of the lessees/sub-lessees were owners of the structure and incidentally, in the written submission, the respondent No. 2 has not claimed ownership of the structure. Nor has the respondent No. 2 claimed that any of the lessees were owners of the structure. Moreover, what was let out to the respondent No. 2 was both land and structure and not just the structure.

117. Mr. Banerjee argued that in this case, the Tribunal has been constituted under the West Bengal Land Reforms and Tenancy Tribunal Act, enacted pursuant to the enabling provisions of Article 323B(1) read with Article 323B(2) and Article 323B(3) of the Constitution of India. Article 323B(3) of the Constitution provides that a law made under Article 323B(1) may exclude the jurisdiction of all Courts except the jurisdiction of the Supreme Court under Article 136 of the Constitution, with respect to all or any of the matters falling within the jurisdiction of the said Tribunal.

118. The Tenancy Tribunal Act has not, however, excluded the jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India exercised by a Division Bench. Rather the jurisdiction of the High Court under Article 226 of the Constitution has expressly been saved, subject to the condition that the jurisdiction is exercised by a Division Bench.

119. Mr. Banerjee submitted that in this case, vacant land had been let out to the Ganeriwallas for a period of 81 years which ended in 2000 with the right to construct structure thereon. Admittedly the land was let out for 81 years. The Ganeriwallas could never have been "thika tenants" under the 1949 Thika Tenancy Act.

120. Mr. Banerjee submitted that the respondent No. 2, a transferee by way of sub-lease from the erstwhile lessee, for the unexpired period of the sub-lease executed in 1939, was occupying the premises by paying rent. The structures had been constructed by the erstwhile lessees. The adjudication proceeding being Misc. Case No. 1/2013 was still pending before the Controller for final adjudication. The learned Controller had only directed all the parties to file affidavits and fixed 23rd October, 2013 for hearing.

121. Mr. Banerjee argued that the Controller had not decided if the premises in question attracted the provisions of the 2001 Thika Tenancy Act or the 1981 Thika Tenancy Act. Final adjudication was pending. The writ application was, therefore, liable to be dismissed.

122. However, by the Order dated 25th September 2013, the Controller held that he had jurisdiction to proceed with the enquiry, without at all considering the pleadings and documents filed by the respondent No.2, in support of its return, but proceeded on the basis that the object of addition of parties was to prevent multiplicity of proceedings, and conflict of decisions. The learned Controller in effect held that addition of parties would facilitate comprehensive adjudication.

123. There could, however, be no question of any adjudication under Section 5(3) of the 2001 Thika Tenancy Act, if the return read with the pleadings and the admitted documents in support thereof, did not make out any case for adjudication under the said section. Addition as party cannot be claimed as of right, to support a return, which is, on its face, unsustainable in law.

124. Mr. Banerjee argued that the Order dated 18th November, 2014 passed by the learned 1st Bench, West Bengal Land Reforms and Thika Tenancy Tribunal was not a conclusive order, but a mere direction upon the parties to appear on 9th September, 2015 after exchange of affidavits. The writ application is therefore misconceived and not maintainable. Mr. Banerjee argued that the writ petitioner has not exhausted its remedies. The Tribunal was yet to go into the merits.

125. The power of the High Court under Article 226 of the Constitution of India is unfettered. The existence of an alternative remedy of appeal does not debar the Writ Court from entertaining an application. However, the Courts as a self imposed measure of discipline, decline to exercise jurisdiction when there is an equally efficacious alternative remedy.

There are, however, at least four well-known exceptions to the rule of alternative remedy. The Writ Court may interfere notwithstanding the existence of an alternative remedy, where proceedings, are without jurisdiction, where the proceedings are conducted under the provisions of an ultra vires law, where the proceedings are in violation of the principles of natural justice and where the action is in breach of fundamental rights conferred by Article 14 of the Constitution of India. It would, perhaps, also be pertinent to note, that the delay of 59 days in filing the appeal not having yet been condoned, there is no appeal in the eye of law.

126. Mr. Banerjee also argued that while the application of the writ petitioner challenging the maintainability of the application before the Controller was pending, the writ petitioner filed a revisional application in this Court for orders on the Controller for expeditious disposal of the application. It is not open to the writ petitioner to take a sudden somersault and contend that the Tribunal had no jurisdiction to quash the order of the Thika Controller and the directions issued by the learned Tribunal. Mr. Banerjee's argument cannot be sustained since the revisional application was filed before the impugned order dated 25th September 2013 was passed by the learned Controller, holding that he had jurisdiction to make an enquiry under Section 5(3) of the 2001 Thika Tenancy Act in respect of

the return filed by the respondent No. 2.

127. Mr. Banerjee argued that writ petitioner had purchased the property by a Deed of Conveyance dated 25th April, 2010. The property is described as land with structure, but in fact, the predecessors of the present vendor transferred only vacant land to the Ganeriwallas in 1919. The writ petitioners had not come to Court with clean hands.

128. The Deed of Conveyance speaks for itself. Moreover, as observed above, the ownership of the structures remained with the Dutts in terms of the lease deeds. It cannot, therefore be said that the writ petitioner has come to this Court with unclean hands.

129. Citing the Constitution Bench judgment of the Supreme Court in *L. Chandra Kumar v. Union of India and Ors.* reported in AIR 1997 SC 1125, Mr. Banerjee argued that an order of the Controller was appealable to the Tribunal under Section 12 of the 2001 Thika Tenancy Act.

130. Mr. Banerjee submitted that in view of the judgment of the Constitution Bench of the Supreme Court in *L. Chandra Kumar v. Union of India and Ors.* (supra), a person aggrieved by an act of any authority under a specified Act was first required to approach the Tribunal. A decision of the Tribunal was subject to judicial review by the Division Bench of the High Court, exercising power under Articles 226 and 227 of the Constitution of India. In the instant case, there being no decision but only routine directions for affidavits, the writ petition was not maintainable. Mr. Lalit Mohan Mahata, Mr. Satya Narayan Shaw, Mr. Jiban Ratan Chatterjee, Mr. Protik Prokash Banerjee elaborated on the arguments made by Mr. Banerjee and also filed their written notes of arguments which have been taken on record. The arguments in substance, being the same, the arguments are not separately recorded to avoid repetition and prolixity.

131. Counsel appearing on behalf of the respective respondents also emphasised that the Controller had not actually arrived at any decision. He only allowed an application for addition of parties. At the material time when the application for addition of parties was allowed by the impugned order dated 25th September, 2013, there was no demurer application challenging the jurisdiction of the Controller. The petitioner had been hopping from one forum to the other. By the order dated 18th November, 2014 impugned in the writ petition the Tribunal had only allowed the respondents to file their Affidavit-in- Opposition to the application of the writ petitioner for condonation of delay being MA No.882 of 2013. On 29th January, 2015 the petitioner approached this Court. On 13th February, 2015 the petitioner filed a petition before the Controller, praying that the petition dated 13th January, 2013 questioning the maintainability of the proceedings before the controller be disposed of.

132. Mr. Satya Narayan Shaw argued that the issue of whether the learned controller had jurisdiction to entertain the return or not, was a mixed question of law and facts. This Court being an appellate forum, it could not act as a Court of

first instance and adjudicate facts. The argument seems to be confused. It is nobody's case that this Court is the appellate forum in respect of the orders of the learned Controller. Judicial review is not the same as an appeal.

133. It is well-settled that a judgment is a precedent for the issue of law which is raised and decided. The judgment of the Constitutional Bench of the Supreme Court in *L. Chandra Kumar* (supra) was rendered in relation to the Administrative Tribunals Act, 1985 which excluded the jurisdiction of all Courts including the High Court exercising its writ jurisdiction in relation to service matters under the Central or the State Government. Sentences in a judgment are not to be read out of context, in the same manner as statutory provisions.

134. Section 28 of the Administrative Tribunals Act provided as follows:-

"28. Exclusion of jurisdiction of courts. ? On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, no court except-

(a) the Supreme Court; or

(b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force,

Shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters."

135. In the context of Section 28 of the Administrative Tribunals Act which excluded the jurisdiction of the High Court under Article 226 of the Constitution of India, the Supreme Court framed the following questions:-

"(1) Whether power conferred upon Parliament or the State Legislatures, as the case may be, by sub-clause (d) of clause (2) of Article 323A or by sub-clause (d) of clause (3) of Article 323B of the Constitution, to totally exclude the jurisdiction of "all courts", except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in clause (1) of article 323A or with regard to all or any of the matters specified in clause (2) of Article 323B, runs counter to the power of judicial review conferred on the High Courts under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?

(2) Whether Tribunals, constituted either under Article 323A or under Article 323B of the Constitution, possess the competence to test the constitutional validity of a statutory provision/rule?

(3) Whether these Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review? If not, what are the changes required to make them conform to their

founding objectives?"

136. In the context of the aforesaid questions formulated in *L. Chandra Kumar v. Union of India and Ors.* (supra) the Supreme Court held:-

"90. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Article 226/227 cannot wholly be excluded. ???.. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

91. Having regard to both the afore-stated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

92. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.

93. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their

parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

.....

99. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

137. It is well-settled that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact, this Court can, in exercise of its writ jurisdiction, examine whether the findings on jurisdictional facts were correct or not. This proposition find support from the judgment of the Supreme Court in *State of Madhya Pradesh & Ors. v. D.K. Yadav* reported in AIR 1968 SC 1186.

138. In *M/s. Raza Textiles Ltd., Rampur v. The Income Tax Officer, Rampur* reported in AIR 1973 SC 1362, the Supreme Court held that no authority, much less a quasi-judicial authority, could confer jurisdiction on itself by deciding the jurisdictional facts wrongly. The question of whether the jurisdictional fact had rightly been decided or not was a question open to examination by the High Court in an application under Article 226 of the Constitution of India.

139. In *Shrisht Dhawan v. Shaw Brother* reported in (1992) 1 SCC 534 the Supreme Court followed its earlier judgment in *M/s. Raza Textiles Ltd. (supra)* and reiterated the proposition that a Court or Tribunal cannot confer jurisdiction to itself by deciding a jurisdictional fact wrongly.

140. In *Calcutta Discount Company Ltd. v. Income Tax Officer, Companies District I, Calcutta & Anr.* reported in AIR 1961 SC 372, a Constitution Bench of the Supreme Court held that the Court in exercise of power under Article 226 of the Constitution of India could examine jurisdictional facts. The Constitution Bench further held:

"It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences."

141. The power of the High Court under Article 226 of the Constitution of India includes the power to issue High Prerogative writs of Habeas Corpus, Quo Warranto, Mandamus, Certiorari and Prohibition. The purpose of issuing writs is to restrict all authorities to the limits of their power, and jurisdiction and to ensure performance of their duties and obligations.

142. The Tenancy Tribunal Act does not affect the power of the High Court under Article 226, provided the power is exercised by a Division Bench. Nor does the judgement of the Supreme Court in *L. Chandra Kumar v. Union of India and Ors.* (supra). While mandamus is a command to do an act, prohibition restrains the doing of an act, and a writ of Certiorari quashes an act done.

143. The object of the writ of Prohibition is to confine Courts and Tribunals within the limits of their jurisdiction. A writ of prohibition prohibits an inferior Court Tribunal or quasi judicial authority from exceeding the limits of its jurisdiction.

144. When an inferior Court, Tribunal or Authority lacks inherent jurisdiction to entertain or proceed with an action, the High Court is obliged to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India and to issue a writ of Prohibition restraining the inferior Court, Tribunal or Authority, as the case may be from exercising jurisdiction.

145. In *Calcutta Discount Company Ltd. v. Income Tax Officer (supra)* the Supreme Court held that the existence of an alternative remedy is not generally a bar to issuance of the writ of prohibition.

146. Where action is sought to be taken which is ultra vires and/or in excess of jurisdiction, it is open to the aggrieved party to move the Court for issue of an order of prohibition, without his being obliged to wait until those proceedings run their full course as held by the Supreme Court in *Carl Still G.M.B.H. & Another v.*

The State Of Bihar And Others reported in AIR 1961 SC 1615.

147. In principle, there is not much difference between certiorari and prohibition except that certiorari is invoked at an earlier stage. A writ of prohibition is issued only when patent lack of jurisdiction is made out. A charge sheet can be set aside if on the charges framed no misconduct or other irregularities alleged can be said to have been made out or the charges framed are contrary to any law.

148. A prohibition order may be made if the inferior Tribunal proceeds to apply a wrong principle of law when deciding a fact on which the jurisdiction depends. To quote from the book "Working of the Constitution ? Checks and Balances" written by Mr. V. Sudhish Pai, "Prohibition is preventive, certiorari is curative. As C.K. Allen puts it, certiorari applies to a decision which is fait accompli, prohibition seeks to prevent the fait from becoming accompli".

149. The Tenancy Tribunal Act does not exclude the jurisdiction of the Division Bench of the High Court under Articles 226 and 227 of the Constitution of India. On the other hand the writ jurisdiction of this Court is, as observed above expressly saved. The jurisdiction has to be exercised by a Division Bench and not the Single Bench. An order may, therefore, be challenged, by filing a writ petition in the High Court. The writ petition would, however, have to be heard by a Division Bench.

150. In Calcutta Discount Co. Ltd. v. Income Tax Officer (supra) the Constitution Bench held that in proceedings under Article 226 of the Constitution, the High Court can investigate jurisdictional facts and if the conditions precedent for exercise of jurisdiction do not exist, the High Court is to issue high prerogative writs to prohibit action in excess of jurisdiction. Though the writ of prohibition or certiorari does not ordinarily issue against an executive authority, the High Courts have power to issue in a fit case, an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts are to issue appropriate orders or directions to prevent such consequences.

151. It is well-settled that acquiescence or waiver does not affect the right of a party to challenge the jurisdiction of an authority. An issue as to lack of subject matter jurisdiction can be raised at any stage of the proceeding. Reference may be made to the judgment of the Supreme Court in Jagmittar Sain Bhagat and Ors. v. Director, Health Services, Haryana and Ors. reported in (2013) 10 SCC 136.

152. In East India Commercial Co. Ltd. Calcutta and Anr. v. The Collector of Customs, Calcutta reported in AIR 1962 SC 1893 the Supreme Court held that if it is manifest that on the basis of the allegations made, none of the conditions laid down in the specified sections of the Act in question were contravened, the Customs Authorities would have no jurisdiction to initiate proceedings. A writ of prohibition would lie forbidding the inferior authority from continuing with the

proceeding on the ground that the proceeding was without or in excess of or contrary to the law of the land, statutory or otherwise.

153. In this case, it is manifest on the basis of the allegations in the written submissions in support of the return and the submissions made on behalf of the respondent No.2 that the ingredients of a thika tenancy were not there. Of course, it is well-settled that the prohibition will not lie only because of insufficiency of the statement of the cause of action in the pleading or because of insufficient proof of action. Prohibition will lie if the disclosed facts reveal lack of jurisdiction.

154. In *Raja Srinivas Prasad Singh v. S.D.O. Mirzapur and Anr.* reported in AIR 1962 Allahabad 590 a Division Bench of Allahabad High Court held that in cases of patent lack of jurisdiction the writ of prohibition can be claimed as of right and a writ cannot be refused on the ground of delay or omission to raise the point before the inferior Tribunal. We are in full agreement with the view of the Division Bench of the Allahabad High Court.

155. When there is defect of jurisdiction or usurpation of jurisdiction, this Court is duty bound to interfere, in exercise of its extraordinary power of judicial review under Article 226 of the Constitution. If Courts were to refuse relief under Article 226 and refuse a writ of prohibition in an appropriate case of patent want of jurisdiction, as in this case, where there cannot possibly be any thika tenancy on the face of the averments in the pleadings in support of the return filed by the respondent No.2, the Courts would, to quote Mr. Sudhish Pai from his book "Working of the Constitution ? Checks and Balances" "be guilty of abdication of their jurisdiction and powers".

156. For the reasons discussed above, the writ petition is allowed. The impugned order dated 25th September, 2013 of Controller, Kolkata Thika Tenancy, is set aside and quashed. There will be a writ of prohibition restraining the Controller, Thika Tenancy, Calcutta from proceeding and/or further proceeding with Misc. Case No. 1 of 2013.

157. Photostat certified copy of this judgment, if applied for, be supplied to the parties expeditiously, subject to compliance with the requisite formalities.

158. Sahidullah Munshi, J.—I Agree

159. Later

160. Mr. Kaushik Bhatta, learned Counsel, appearing for the respondent Nos. 7 to 13 and 23 to 34 and Mr. Chhandak Dutta, learned Counsel, appearing for the respondent Nos. 14 to 22 and 35 pray for stay of operation of this judgment and order. The prayer is considered and refused.