

(2006) 07 CAL CK 0035
In the Calcutta High Court
Case No : F.A. No. 5 of 2002

Shila Roy Choudhury and Others

APPELLANT

Vs

Nimai Charan Rakshit

RESPONDENT

Date of Decision : 14-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Transfer of Property Act, 1882 — Section 106, 116

Citation : (2006) 4 CHN 7 : 110 CWN 839

Hon'ble Judges : Subhro Kamal Mukherjee, J; Rudrendra Nath Banerjee, J

Bench : Division Bench

Advocate : Prabal Kumar Mukherjee and Rajat Dutta, for the Appellant; Harish Tandan, for the Respondent

Final Decision : Dismissed

Judgement

Subhro Kamal Mukherjee, J.—This appeal is arising out of a suit, inter alia, for recovery of khas possession on the expiry of lease and for recovery of mesne profits.

2. The predecessor-in-interest of the defendants, namely, Ranen Roychowdhury, was inducted as a lessee by Gunindra Mohan Bose, under a registered deed of lease dated October 1, 1964 for a period of 21 years commencing from August 1, 1964. On the death of Gunindra Mohan Bose, the property devolved upon his son, Amal Kumar Bose, who by executing a registered deed of conveyance dated August 13, 1984 conveyed the property in favour of the plaintiff. By such purchase the plaintiff stepped into the shoes of the lessor. The lessee accepted the plaintiff as his landlord and paid the rents to the plaintiff.

3. The lease expired on August 1, 1985 by efflux of time. The plaintiff, under mistaken impression, received rent from the lessee for the month of August, 1985 and granted receipt therefor. However, when such mistake was detected, the plaintiff sent back the rent for the month of August 1985 to the lessee by money order, by the lessee refused to accept the said money order.

4. The plaintiff instituted this suit for recovery of possession and recovery of mesne profits against the defendants, who were the successors-in-interest of the original lessee.

5. The defendants contested the suit by filing a written statement. The defendants, inter alia, contended in the written statement that the deed of lease was never acted upon and the defendants were monthly joint tenants entitled to all protections of the West Bengal Premises Tenancy Act, 1956. Alternatively, it was contended that the defendants were holding over the property on the same terms and conditions as the plaintiffs intended to continue the lease by acceptance of rent after the expiry of the lease.

6. The learned Trial Judge by the impugned judgment and decree dated May 30, 2001 decreed the suit on contest, but without any order as to costs. The learned Judge granted decree for recovery of khas possession in favour of the plaintiff. The plaintiff, also, got a decree for mesne profits from June, 1990 till the date of recovery of possession to be ascertained under a separate proceeding under Order 20 Rule 12 of the Code of Civil Procedure. The learned Judge, inter alia, found that the defendants were lessees as per the lease agreement and as such, they are not entitled to protections under the West Bengal Premises Tenancy Act, 1956. The learned Judge, further, found that the plaintiff accepted the rent for the month of August, 1985 by mistake and when he came to realize the mistake, he rectified his mistake by sending back the rent to the lessee by money order.

7. Mr. Prabal Kumar Mukherjee, learned Advocate, appearing in support of the appeal, submits that admittedly the plaintiff accepted the rent for the month of August, 1985, that is, after the expiry of the lease and as such assented to the continuance of the lease in favour of the lessee on the same terms and conditions. Therefore, the lessee became a monthly premises tenant.

8. Mr. Harish Tandan, learned Advocate, appearing on behalf of the plaintiff/respondent, submits that the rent for the month of August, 1985 was accepted by the plaintiff under a mistaken impression inasmuch as although the lease commenced from August 1, 1964, but the document was registered on October 1, 1964; the transferee landlord/plaintiff was, therefore, misled. However, Mr. Tandan draws our attention to the rent receipt granted by the plaintiff for the month of August, 1985 and submits that even in the said rent receipt it was clearly mentioned that the rent was accepted in terms of the lease deed dated October 1, 1964. Mr. Tandan, finally, submits that the landlord has never assented to the continuance of the lease and as such neither the original lessee nor his successors-in-interest became monthly premise tenants.

9. Mr. Tandan in support of his contentions cites the decisions in the cases of Ganga Dutt Murarka Vs. Kartik Chandra Das and Others, and Bhuneshwar Prasad and Another Vs. United Commercial Bank and Others, .

10. Section 116 of the Transfer of Property Act, 1882, runs as under:

116. Effect of holding over.?If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.

11. In the case of *Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden and Anr.* reported in 1949 FCR 262, the Federal Court of India observes that on the determination of a lease, it is the duty of the lessee to deliver up possession of the demised premises to the lessor. If the lessee or a sublessee under him continues in possession even after the determination of the lease, the landlord undoubtedly has the right to eject him forthwith; but if he does not, and there is neither assent nor dissent on his part to the continuance of occupation of such person, the latter becomes in the language of English law a tenant on sufferance, who has no lawful title to the land, but holds it merely through the laches of the landlord. If now the landlord accepts rent from such person or otherwise expresses assent to the continuance of his possession, a new tenancy comes into existence as is contemplated by Section 116 of the Transfer of Property Act, and unless there is an agreement to the contrary, such tenancy would be regarded as one from year to year or from month to month in accordance with the provisions of Section 116 of the said Act.

12. In the cases of *Ganga Butt Murarka* (supra) the Supreme Court of India observes that of course, there is no prohibition against a landlord entering into a fresh contract of tenancy with a tenant, whose right of occupation is determined and who remains in occupation by virtue of the statutory immunity. Apart from an express contract, conduct of the parties may undoubtedly justify an inference that after determination of the contractual tenancy, the landlord had entered into a fresh contract with the tenant, but whether the conduct justifies such an inference must always depend upon the facts of each case.

13. In the case of *Bhawanji Lakhamshi and Others Vs. Himatlal Jamnadas Dani and Others*, , the Supreme Court of India while explaining the scope of Section 116 of the Transfer of Property Act observes that what the Section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise. It was, further, held that the decision in *Ganga Dutt Murarka* (supra), which followed the principles laid down by the Federal Court in *Kai Khushroo Bezonjee* was correct and did not require reconsideration.

14. In this case, the lease expired on August 1, 1985. The rent for the month of August, 1985 was accepted by the landlord from the lessee. In the receipt it was, however, mentioned that such rent was accepted as per the deed of lease. The

landlord is a transferee landlord. He accepted the rent under misconception as he was misled by the date of execution of the deed of lease. The moment he noticed such mistake, he immediately returned the rent to the lessee by money order.

15. In the light of these established facts it is difficult to hold in law that a monthly tenancy as contemplated by Section 116 of the Transfer of Property Act, 1882 came into existence. In the facts and circumstances of the case, it cannot be said the landlord has assented to lessee continuing in possession as a tenant.

16. The basis of Section 116 of the Transfer of Property Act is a bilateral contract between the erstwhile lessor and erstwhile lessee. Therefore, to create a new tenancy, there must be a bilateral act. There must be an offer of accepting a renewed or fresh demise and there must be a definite assent expressed by the lessor. Mere acceptance of an amount equivalent to rent by the erstwhile lessor cannot be regarded as evidence of new tenancy. The expression "holding over" means that relationship of landlord and tenant was allowed to continue with the consent of both the parties. It is for the lessee to prove the overt acts by which the relationship was allowed to continue.

17. In the facts of case, it cannot be said the landlord has ever assented to the continuance of the tenancy. The acceptance of the rent for the month of August, 1985 has been sufficiently explained. There was no intention to create a new tenancy. We hold that there was no holding over by the lessee.

18. We, therefore, do not find any merit in this appeal.

19. The appeal is dismissed.

20. We make no order as to costs.

21. Xerox certified copy of this judgment and decree, if applied for, is to be supplied expeditiously.

Rudrendra Nath Banerjee, J.

22. I agree.