**Steuart and Co. Ltd. Vs. C. Mackertich**

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**SooperKanoon Citation** : sooperkanoon.com/855978

**Court** : Kolkata

**Decided On :** Mar-27-1962

**Reported in** : AIR1963Cal198

**Judge** : S.K. Sen and ;Amaresh Roy, JJ.

**Acts** : Companies Act, 1913 - Section 263; ;Evidence Act, 1872 - Section 115; ; Transfer of Property Act, 1882 - Sections 53A, 106, 107 and 108; ;Code of Civil Procedure (CPC) , 1908 - Order 6, Rule 2

**Appeal No.** : A.F.O.D. Nos. 55 and 268 of 1956

**Appellant** : Steuart and Co. Ltd.;c. Mackertich

**Respondent** : C. Mackertich;steuart and Co. Ltd.

**Advocate for Pet/Ap.** : Pramatha Nath Mitra, ;Amarendra Mohan Mitter and ;Arunendra Nath Basu, ;Bankim Chandra Banerjee, ;E. Meyer and ;N.C. Talukdar, Advs.

**Disposition** : Appeal partly allowed

**Judgement** :

**Sen, J.**

1. These two appeals are by the defendants Steuart and Company Limited against two decrees for ejectment passed by Sri J.N. Mallick, Subordinate Judge, Second Court, Alipore. The tenancy which is the subject-matter of first appeal No. 55 of 1956 (Title Suit No. 31 of 1953} is 38/1, Panditiya Road, Ballygunge corresponding to part of old premises Nos. 37 and 38 Panditiya Road; the rate of rent in respect of this tenancy is Rs. 500/- per month. The subject-matter of first appeal No. 268 of 1956 (Title Suit No. 30 of 1953) is 37 and 38 Panditiya Road, Ballygunge corresponding to old premises No. 37/1 and portion of 38 Panditiya Road; the rent of this tenancy is Rs. 200/- per month.

2. The history of the tenancies is briefly as follows: On 22nd December, 1913, M. Mackertich and Frank Ernest Bushby let out the subject-matter of Title Suit No. 31 or 1953, i.e., portion of premises Nos. 37 and 38 Panditiya Road (new No. 38/1) covering an area of approximately 7 bighas 9 cottahs 5 chattacks and 9 Sq. Ft. to 4 persons viz., Walter Bushby, Frank Earnest Bushby, Geoffrey Berridge Page and William Shenton for the purpose of their business, their business being described as partnership business as coach builders. The term of the lease was 50 years and it was to commence from the 1st of January, 1915; the lease was not to commence with the date of the execution of the lease because in the meantime the lessors undertook to build a boundary wall or fencing and fill up one of the existing tanks within the premises to the level of the surrounding land. As regards the rent it was agreed that it would be Rs. 400/- per month during the first 5 years, Rs. 425/- per month during the 2nd 5 years, Rs. 450/- per month during the 3fd 5 years, Rs. 475/- per month during the 4th 5 years and Rs. 500/-per month thereafter i.e. from 20 years after the commencement of the lease. Ext L is a certified copy ol the lease deed which was duly registered.

3. On 31st January, 1919, the lessors M. Mackentich and Frank Ernest Bushby let out the adjoining premises at old 37/1 and 38 Panditiya Road (new Nos. 37 and 38) measuring approximately 3 bighas 7 chattocks 5 Sq. Ft. to 3 persons, viz., Frank Ernest Bushby, Geoffrey Berridge Page and William Shenton, because in the meantime Walter Bushby who was one of the lessees under the earlier deed of lease had gone out of the partnership business of coach builders. This lease was to commence from tne 1st of October, 1918, i.e. the lease had already

commenced before the execution of the lease deed; and the term of the lease was fixed at 46 years 3 months from the 1st October, 1918, i.e. the lease was to empire at the same time as the earlier lease which was for a term of 50 years. The rent agreed was Rs. 125/- per month for the first 6 years 3 months, Rs. 150/- per month for the next 5 years, Rs. 175A per month for the next 5 years and Rs. 200/- per month thereafter i.e. from 16 years 3 months after the commencement of the lease. Ext. L (1) is a certified copy of the lease deed which was also duly registered.

4. The partners were carrying on business as coach builders under the name and style Steuart and Company. In December, 1919, the partners decided to form a limited Company and register the Company under the Companies Act, 1913. For such registration a minimum membership of 7 being necessary, 4 more members were brought into the Company and the Company was registered in the office of the Registrar of Companies, on 4th December, 1919, under the name and style Steuart and Company Limited. Ext. W is a copy of the Memorandum and Articles of Association of Steuart and Company Limited. On. 17th December, 1919 an agreement was made and signed between the partners of the partnership firm (Frank Ernest Bushby, Geoffrey Barridge Page and William Shanton) and Steuart and Company Limited represented by two of the directors viz., Frank Earnest Bushby and J.H. Patterson, wherein it was stated that the partners of the partnership firm would sell the business and transfer all the assets of the firm with effect from the 31st day ot December, 1919, to the incorporated company viz., Steuart and Company Limited. It was stipulated that the partners would sell and tne incorporated company would purchase with effect from the 31st day of December, 1919, the goodwill of the business, the leasehold properties of the firm including the lease-hold properties with which we are concerned in the two appeal, the plant, machinery, office furniture etc. of the firm, and generally all the assets of the firm. It was also mentioned that one of the leaseholds being assignable only with the consent of the landlords, the partners would try their best to obtain the necessary consent for the assignment of the lease-hold, and that if such consent could not be obtained, the partners would at the option of the Company execute a declaration of trust of the premises in favour of the Company.

5. This agreement, proved and marked Ext. H, was filed at the office of the Registrar of Joint Stock Companies, Bengal. Under this agreement the incorporated company Steuart and Company Limited entered into possession of the lease-hold premises of the partnership firm and also took charge of the business of the partnership firm and began to carry on the business itself; but no separate deed of transfer in respect of the lease-hold properties or other property like the goodwill of the firm appears to have been executed. The two major partners of the partnership firm viz., F. E. Bushby who had 9 annas share and Geoffrey Berridge Page who had 4 annas share, became two of the 3 directors of the newly formed incorporated company, and so, broadly speaking, the old partnership firm by taking on some new members and being registered under the Companies Act, 1913, became an incorporated company, and carried on business as before, but in law there was a change of ownership because the ownership became vested in the new incorporated company from the old partnership-firm.

6. It appears that for many years, even though no registered deed of transfer in respect of the lease-hold premises was executed by the old partnership firm In favour of the new incorporated company, the owners viz., M. Mackertich and Frank Earnest Bushby, treated the incorporated company as the lessees and accepted rent from them. Frank Earnest Bushby ultimately sold his Interest as owner of the property to M. Mackerticn. The Plaintiff C. Mackertich is the son of M. Mackertich and has Inherited all his Interests and is therefore the sole landlord of two premises In suit. He claimed that the tenancies were governed by the West Bengal Premises Rent Control Act 1950, and on the ground that there had been default of payment of rent from May, 1952, to March, 1953, the plaintiff claimed that the defendant company had forfeited the protection against eviction. Notice determining the tenancy was issued on 12th March, 1953, by reglstered post and served on the delendant company on 13th March, 1953, calling upon the defendant company to vacate the premises on the expiry of the 3lst day of March, 1953. As the defendant company did not give up possession of the premises, the plaintiff instituted tne two suits on 26th May, 1953, seeking decrees for ejectment against the defendant company, and a decree tor Rs. 5,500/- for arrears of rent for 11 months from May, 1952, to March, 1953 in Title Suit No. 31/53 and a decree for arrears of Rs. 2,200/- lor the 11 months from May, 1952 to March, 1953, in Title

Suit No. 30/53, and decrees for damages or mesne-profits from the 1st day of April, 1953, such mesne-profits being claimed at Rs. 25 per day In respect of the bigger tenancy which Is the subject-matter of Title Suit No. 31/53 and at the rate of Rs. 10/- per day in respect of the smaller tenancy which is the subject-matter of Title Suit No. 30/53.

7. The defendant contested the suits, contending that the tenancies were governed by the terms of the lease deeds of 22nd December, 1913 and 3lst January, 1919, i.e. the lease deeds Ex L and L(1), and that in the circumstances, the tenancies were not governed by the West Bengal Premises Rent Control Act 1950 and could not be determined by service of 15 days' notice. The defendant denied that there was any arrear of rent, and contended that for repairs of the premises which had become dilapidated the defendant company had to incur a good deal of expenditure since 1948, the expenditure on account of such repairs being Rs. 22,000/-; that the plaintiff was liable to carry out the repairs or pay the cost of the repairs, but had done as in spite of a long correspondence, and that therefore the defendant was entitled to sue for recovery of the said amount from tne plaintiff; and it was contended that until adjustment ot account between the parties or liquidation of the claim of the defendant on account of repairs, it could not be said that there was any arrear of rent due by the defendant company.

8. The learned Subordinate Judge held that tlie defendant company, being a separate legal entity from the partnership firm the members of wtiich had been granted the two leases, the lease-holds could not be transferred to the defendant company without registered documents, ana in the absence of such registered documents, the defendant company could not claim to be lessees governed by the registered lease deed Exts. L and L(l). The learned Subordinate Judge noted that the plaintiff had accepteo rent for many years from the defendant company and treated the company as the tenant. In the circumstances, he held that the defendant company had become the tenant on Implied surrender of the lease by the old tenants, the partners of the firm; and that there being no registered lease deed governing the existing tenancies held by the defendant company, they must be deemed to be tenancies from month by month terminable by 15 days' notice under Section 106 of the Transfer of Property Act. me learned Subordinate Judge

rejected the claim of the defendant company that the purpose of the tenancies was manufacturing and that therefore 6 months' notice ending with a year of the tenancy was necessary. The learned Subordinate Judge held that 15 days' notice determining the tenancies as served by the plaintiff was quite sufficient and legal. As regards the claim of the defendant company for adjustment of the cost of repairs against the arrears of rent, the learned Subordinate Judge observed that the defendant company was not entitled to avail of any condition contained in the old registered lease deeds Exts. L and L(1), and that as between the defendant company and the plaintiff there was no evidence of any agreement that the plaintiff would ever undertake repairs of the premises. In the circumstances, the learned subordinate Judge held that the plaintiff was not bound to carry out the repairs and that therefore the defendant-company could not claim a set off for the cost of repairs against the arrears of rant.

9. In the circumstances, the learned Subordinate Judge held that the plaintiff was entitled to decrees for ejectment as well as for arrears of rent as claimed and mesne profits. The learned Subordinate Judge granted mesne-profits not at the rate claimed but at the rate of rent viz. Rs. 200/- per month in Title Suit No. 30/53 and Rs. 500/- per month in Title Suit No. 31/53. The suits were decreed accordingly.

10. Against that decision, the dcisndant company has filed these appeals. Mr. Mitra appearing for the appellant has raised several points. He has conceded that the defendant company cannot avail of the provisions of Sec, 263 of the Indian Companies Act, 1913, because that Section applies only when an existing partnership firm is registered as a Company under the provisions of the Companies Act i.e. without any change in its constitution; and it does not apply when the constitution of a partnership firm is substantially changed for forming the incorporated company registered under the Companies Act. It is not the case of the defendant company that before the registration under the Companies Act the partnership firm was expanded by taking new partners; on the other hand, it is clear that a new company was tormed of which Frank Earnest Bushby, Geoffrey Berridge Page and William Shenton were members and 4 other persons were members also; and after the registration of such new company in the office of the

Registrar of Companies, there was the agreement Ext. H executed between the partners of the old partnership firm and two of the directors of the new company for transfer of the business ana assets of the partnership firm to the company. In the circumstances, Section 263 cannot avail the defendant company in its claim that the lease-hold premises became transferred to the company without the execution of any registered transfer deed by the partners of the old partnership firm.

11. Mr. Mitra has, however, raised a new defence, which was not taken in the Court below viz., that by the terms of the agreement Ext. H, the partners of the firm virtually became trustees for the incorporated company in respect of the lease-held property and other assets; and therefore, if there was no valid transfer by the partners, the partners continued to be real tenants under the lease deeds, and there could not be any surrender by them of the leases, because such surrender would amount to breach of trust by them. For this argument Mr. Mitra has relied on the terms of clauses 7 and 8 in the agreement Ext. H. Paragraph 7 provides that one of the lease-holds is assignable with the consent or the landlord and that the partners shall use their best endeavours to obtain the requisite consent, and in case the consent cannot be obtained the partners will at the option of the company execute a declaration of trust of the premises in favour of the company. Clauseause 8 provides that on and from the thirty-first day of December, 1919, the partners shall be deemed to be carrying on the business for and on behalf of the company.

12. Now it does not appear that any declaration of trust was executed by the partners in favour of the company in respect of any of the demised premises. There is nothing to show that the old tenancy in favour of the 3 partners of the partnership firm was deemed to be continuing; on the other hand, it appears that on and from the first of January 1920, when the new company started functioning, the new company was all along treated as the tenant and the landlord realised rent from the company. There was a suit previously filed by the landlord C. Mackertich against the defendant company for ejectment and arrears of rent and mesne-protits, being Title Suit No. 330/49 in the Second Court of Subordinate Judge Alipore Ext. C is the plaint of that suit and Ext. 6 is the written statement. In the

plaint Ext. C, paragraph 6, it was stated by the plaintiff that the defendant company, was the successor in interest of Walter Bushby and other partners of the Firm Steuart and CD. In the written statement Ext. 6 the defendant company also claimed to be holding as tenants under the plaintiff under the registered lease deeds which are Exts. L and L(1). It was suggested that the defendant company was not the real tenant, but that the tenancy continued to be vested in the partners of the other partnership firm. There was another suit viz., Money Suit No. 6/50 renumbered as Money Suit No. 11/51 of the 4th Court, Additional Subordinate Judge, Alipore, where the plaintiff sued for recovery of municipal taxes payable by the defendant company under tne terms of the old registered lease deeds. Ext. 8 is a certified copy of the decree in that suit, showing that the suit ended In a compromise, by which the defendant company agreed to pay the entire occupier's share of taxes for the premises No. 38 Panditia Road and also to pay the enhanced portion of the owner's share of the municipal taxes of premises Nos. 37 and 38/1. There was another suit viz., Money Suit No. 20/52 filed by the plaintiff against the defendant company for arrears of owner's and occupier's share of the municipal taxes for the 2 premises. Ext. 1 is a ceritfied copy of the Judgment passed in that suit. From the judgment it is clear that the position was accepted by both parties that the detendant company viz., Steuart and Co. Ltd., is the tenant in respect of both the premises under the plaintiff U. Mackertich. There is also evidence that for many years, rent was paid amicably by the defendant company and the same was accepted by the plaintiff. In the circumstances, it is not possible to accept the argument that the partners of the old partnership firm viz., Frank Earnest Bushby, Geoffrey Berridge Page and William Shenton continued to be the tenants in respect of the two premises and that they were trustees in respect of the premises on account of defendant company.

13. Mr. Mitra has referred to Section 56 of the Trusts Act, 1882 which provides that trustees may transfer property which they held on account of beneticiaries, to sucn beneficiaries, and he has urged that under that provision, the trustees may transfer possession to the incorporated company without any registered deed. But it is not possible to accept the position that the partners were at any time trusees on account of the defendant company, Section 53 of the Trusts Act can have no application to the facts of the present case.

14. Mr. Mitra has urged that the requisites of an implied surrender or surrender by operation of law are (1) that the lessor should grant a new lease (2) and that the old lessee should assent and give possession in favour of the new lessee. It has been urged that there is no such grant of a new lease by the lessor, and therefore the theory of implied surrender or surrender by operation of law cannot be availed of in order to explain the tenancy of the defendant company. But where a lessee puts in a new tenant in the premises and the landlord accepts such new tenant as his tenant, clearly there is a new relationship as landlord and tenant between such landlord and new tenant. In the present case, the relationship as landlord and tenant between the plaintiff and the defendant company is established not only by the possession of the defendant company in tne premises and the acceptance of rent by the plaintiff, but also by constructive res judicata by the judgments and decrees of the suits already referred to. It may be true that there was no implied surrender in the sense that the old tenants never intended to surrender their lease-hold rights, but to transter their leasehold rights under the registered lease Deeds to the defendant company which was registered under tne Companies Act. For a long time the plaintiff recognised the defendant company as being governed by the registered lease deeds. The admission in Ext. C, the plaint of Title Suit No. 330/49 has been already referred to, where in paragraph 6 the plaintiff stated that the defendant company is the successor in interest of Walter Bushby and other partners of Steuart and Co. in respect of the demised premises. In paragraphs 1 and 2 of the same plaint, the plaintiff expressly referred to the two lease deeds Exts. L and L{1) and the defendant company was acknowledged as the successor in interest of the lessees of the two lease deeds. In several letters by the plaintiff or the plaintiff's solicitors there is also such recognition. Reference may be made among others to Ext. A (12), a letter dated 9th December, 1942, by Fowler and Co. Solicitors of the plaintiff to the First Land Acquisition Collector, Calcutta, regarding requisition of the premises No. 38/1 Panditia Road, which is the subjectmatter of first appeal No. 55/56; therein it was stated that premises are let under long lease and that the liquidators of Steuart and Co. Ltd. are the parties at present entitled to the lease-hold interest. It may be mentioned in this connection that liquidation proceedings in respect of the Steuart and Co. Ltd. were started in 1941 and liquidators were put incharge of ths business and the premises, but in

1947, by an order of the High Court dated 17th November, 1947 Ext. P, the company was reconstructed and the liquidators were directed to make over all the assets and properties of the Stuart and Co. Ltd. to the reconstructed company, the reconstructed company being also known as Sieuart and Co. Ltd. it must be held that the reconstructed company was not a new legal entity and therefore it is entitled to the same rights as the incorporated company which was registered in December, 1919, but the defendant company cannot get over the hard fact that though there was an agreement that the leasehold properiies would be legally transferred to the incorporated company, there was no registered deed of transfer executed in respect of the two leasehold properties, and therefore it cannot be said that the leasehold properties created by the two registered deeds Exts. L and L(l) stood transferred to the defendant company. But the defendant company remained in possession and paid rent and was acknowledged as the tenant not only by the plaintiff by receiving rent, but also by necessary implication by several decrees of Courts. In the circumstances, it must be held that the defendant company cannot claim to be governed by the registered lease deeds Exts. L and L(l), but they are tenants of the premises in suit and their tenancy is from month to month or year to year according as the purpose of the tenancy is not or is for a manufacturing purpose. In this connection it is unnecessary to consider whether there was any implied surrender of the old leases by the partners of the partnership firm.

15. In order to avail of the provisions of the registered lease deeds Exts. L and L(l), Mr. Mitra has finally urged that the defendant company can avail of the provisions of Section 53A of the Transfer of Property Act, because one of the lessors, Frank Ernest Bushby, who executed the agreement Ext. H, was also one of the landlords. Now Frank Ernest Bushby was originally one of the owners of the premises along with M. Mackertich, he was also a member of the partnership firm, and thus in the two registered deeds Exts. L and L(l) he figured as one of the two lessors and also one of the 3 or 4 lessees; he was one of the owners when the agreement Ext. H was executed (17th Dec. 1919). It appears from Ext. U that Frank Ernest Bushby transferred his share of the property to M. Mackertich on 17th February, 1920. Thus he was still one of the owners when the agreement Ex. H was executed. But the agreement Ext. H was between the partners of the firm

who were the lessees under the lease deed Exts. L and L(l) and the new registered company; the partners who were lessees agreed to transter their leasehold right to the registered company. Though Frank Ernest Bushby executed the agreement, he did so as one of the partners of the partnership firm, and did not sign the agreement as an owner of the land or the premises. Section 53A of the Transfer of Property Act applies only when a person has contracted to transfer for consideration any immoveable property by a writing signed by him or on his behalf. The partners contracted to transfer by the agreement Ext. H their lease-hold interest to the Company. Thus the registered company might under Section 53A of the Transfer of Property Act claim to remain in possession of the leasehold premises as against the partners of the firm, Frank Ernest Bushby, Geottery Berridge Page and William Shenton, who had agreed to transfer their lease-hold interest to the registered com pany, but this agreement could not bind Frank Ernest Bushby in his capacity as an owner of the property; it could not also bind M. Mackertich who was not a party to the agreement at all. In the circumstances, Section 53A of the Transfer of Property Act cannot avail the defendant company in its claim to he governed by the terms of the registered lease deeds, Exts. L and L(l). The jposition must be accepted that the defendant company has become lessee of both the premises by virtue of their possession and acceptance of rent by the plaintiff as landlord, and such relationship was recognised by the Court in several suits, but the defendant company cannot claim advantage of the registered lease deeds Exts. L and Ml).

16. The plea of estoppel was raised in the Court below viz., that the plaintiff, in view of his admission even in December, 1949, when the plaint Ext. C was tiled, that the defendant company is successor in interest of Walter Bushby and others of the leasehold interest created by Exts. L and L(l), is now estopped from denying that the defendant company can avail of the terms or the lease deeds Exts. L and L(l). The learned Subordinate Judge negatived this plea of estoppel by referring to the proposition that there can be no estoppel against the statute. Mr. Mitra has not challenged the decision of the learned Subordinate Judge on this point. It is in fact clear that both the parties acted under the misapprehension that the tenancies are governed by the original lease deeds, Exts. L and L(l), until the present dispute arose between the parties over the liability of the plaintiff to reimburse the

defendant for the cost of repairs which had to be carried out to the premises. When this dispute arose, the plaintiff apparently obtained legal advice and came to understand that the defendant company could not plain to avail of the terms of the original registered lease deeds Exts. L and L(l). Since the parties were acting under a common misapprehension, until the position was cleared up, there cannot be any esioppel against the plaintiff. It is true that the terms of the lease deeds were acted upon and the provision as to graduated increase in rent as contained in the lease deeds Exts. L and L(l) was given effect to without demur by either party. It cannot however be said that the plaintiff gained an undue advantage, because in the absence of such provision as to enhancement of rent, the plaintiff could have obtained enhancement of rent by agreement or by suit. It is clear therefore that, the defendant company cannot successfully raise the plea of estoppel against the plaintiff.

17. Mr. Mitra has next urged that if there is a new relationship as landlord and tenant between the plaintiff and the defendant company, the plaintiff should have stated the date of commencement of the tenancy, because the validity of the notice determining the tenancy is connected with that question; without pleading or proving the date of commencement of the tenancy, the plaintiff cannot plead that the notice determining the tenancy under the provision of Section 106 of the Transfer of Property Act was a good and valid notice. The date of commencement of the new tenancy between the plaintiff and the defendant Company was not expressly stated in the plaints ef the two suits filed by the plaintiff. The recitals in the plaint however contain the implication that the new tenancies are according to the English Calendar month, that is, tenancies beginning from the first of each English Calendar month and ending on the last day of each English Calendar month. In paragraph 1 of each of the plaints, it is mentioned that the defendant company is a monthly tenant with rent paid according to the English Calendar month. In the written statement, this statement is nowhere denied, and though the validity of the notice was challenged in the written statement it was not stated that the notice was bad as the month of the tenancy did not end with the last day of an English Calendar month. The registered lease deeds created tenancies for long terms, but according to the English Calendar month beginning from the first day of January, 1915, in one case, and first day of October, 1918, in the other case.

Although there is no express evidence on the point, because the point was not specifically raised in the Court below, it may reasonably be inferred from the agreement Ext. H that the registered company took over the assets and the business of the partnership firm on the 31st day of December, 1919, and commenced business from first of January, 1920. In the circumstances, it would be reasonable to hold that the tenancies of the registered company commenced from the first of January, 1920, and therefore, the tenancies are terminable by 15 days' notice ending with the last day of a calendar month. Hence the notice as given by the plaintiff was sufficient to determine the tenancy, provided the tenancies were for a purpose other than manufacturing.

18. The next point raised by Mr. Mitra is that the purpose of the lease was a manufacturing purpose and therefore 15 days' notice was not sufficient; but 6 months notice ending with a year of the tenancy was necessary. The learned Subordinate Judge referred to the contents of Ext. W, the Memorandum and Articles of Association of Steuart and Co. Ltd., where in the objects for which the company was established are recited in paragraph 3. He pointed out that along with the purpose of manufacture of carriages and vehicles, manufacturing of and dealing in lamps, whips, rugs, leather goods are also mentioned, and business of electrical engineers is also referred to. The learned Subordinate Judge held that unless the lease was solely for manufacturing purpose, the tenant could not claim 6 months' notice. The learned Subordinate Judge held therefore, that in the present case since the business of tbe defendant company was composite business, partly of manufacturing and partly of trade in lamps, whips, leather goods etc. The defendant company could not claim that the purpose of the lease was a manufacturing purpose or that 6 months' notice was necessary. The learned Subordinate Judge also relied on the fact that in the written statement it was not definitely pleaded that the leasa was for a manufacturing purpose.

19. The point, however, whether the lease was for manufacturing purposes was permitted to be raised as an issue in the Court below, as included in the issue, 'whether the notice served was valid and sufficient.' In the written statement also it was pleaded that the notice served was not valid and sufficient. I do not think therefore that merely because the defendant did not definitely plead in the written

statement that the purpose of the lease was a manufacturing purpose, the defendant company would be estopped from raising that point as a de fence. As regards the purpose ot the tenancy Mr. Mitter has urged that the learned Subordinate Judge was wrong in referring to the objects as recited in the Memorandum and Articles of Association Ext. W. because in the Memorandum and Articles of Association many objects may be mentioned, but a company may actually be doing a limited business covered by one only of the objects mentioned. This contention must be accepted, and the actual business which was being done by the defendant company must be looked into. Mr. J.N. Ghosh, the Managing Director of the defendant company, was examined on commission. He stated (questions 27 and 30) that the leases were granted originally for the purpose of business (in the lease deeds the business of the lessees was described as coach builders) and that the Steuart and Co. Ltd. was holding the leasehold properties as successor in interest of the old partnership firm Steuart and Co. In reply to question 235, the witness described the business of Steuart and Co. Ltd. in more detail, stating that they were working as Automobile engineers, coach builders, refrigerators, motor and mechanical engineers, body-builders and the like. Since the defendant company cannot claim to be holding under the registered lease deeds Exts. L and L(1), the purpose mentioned in the lease deeds cannot be taken into consideration. The purpose has to be otherwise ascertained, and the reply to question 235 may be considered as correctly describing the purpose of which the defendant company was using the leasehold property. Now if the lessee to the knowledge of the lessor requires on uses the land for manufacturing purpose, then in the absence of a contract to the contrary, he is entitled to 6 months' notice, vide W. Jacks and Co. v. Joosab Mahomed, ILR 48 Bom 38: (AIR 1924 Bom 115). In the present case the plaintiff must be deemed to have had Knowledge of the purpose for which the defendant company was using the land, and if the use as recited in reply to question 235 put to Sri J.N. Ghosh is a manufacturing purpose then it may reasonably be held that the lease was for a manufacturing purpose and so 6 months' notice was necessary.

20. In this connection some decisions have been referred to before us. In Sati Prasanna Mukherji v. Ma. Fazal : AIR1952 Cal320 it was held that printing does not necessarily amount to manufacture, and where the lease is for dwelling

purpose, for the purpose of setting up a printing press and for business purpose, it could not be said that the lease is for a manufacturing purpose. In Brahmananda Das v. Nagendra Chandra Sarkar : AIR1954 Cal224 it was held that where a shoproom and a kitchen had been let out for the purpose of opening and running a sweetmeat shop and preparation of sweetmeats in tne kitchen, the primary purpose of the lease is shop Keeping and not manufacture.

21. Manufacture must be understood in the popular sense of making articles of trade and commerce by means of machinery. From that point of view, it is clear that preparation of sweetmeats for sale done in a kitchen does not amount to manufacture. Similarly, printing with a small press set up In a room of a dwelling house cannot lso be treated as manufacturing, although the printing and making of magazines and books in rotary press macmnes may be regarded as manufacturing. In Krishnadas Nandi v. B.C. Roy : AIR1959 Cal181 where the purpose of the tenancy was setting up of a workshop for repair of motor-cars but for the purpose af repairs, some small parts were made for replacing broken parts not readily available as spare parts, it was held that the primary purpose of the lease was business and not manufacture. In the present case, the purpose as described in reply to question 235 put to Sri J. N. Ghosh Is not merely repair of motor-cars and vehicles, but also I coach building and body building, that is, of cars and buses. Coach building and building of bodies cf cars and buses may be considered as making of articles of trade and commerce by means of machinery. It is the dominant purpose of the lease that should be considered to govern the lease for deciding the kind of notice required under Section 106 of the Transfer of Property Act; and where coaches and cars are both built and repaired the building or manufacture should be taken as the dominant purpose. That being so, the leases in suit must be regarded as manufacturing leases, and so 15 days' notice ending with ja month of each tenancy must be held to be insufficient; it was necessary to serve 6 months' notice ending with a year of the tenancy i.e. ending with the 31st of December of an English Calendar year.

22. Mr. Banerjee appearing for the plaintiff respondent has referred to some observations by P.B. Mukherji J. in : AIR1952 Cal320 viz., that a lease which under Section 106 of the Transfer of Property Act is deemed to be a lease from

year to year is nevertheless a lease from year to year and must satisfy the requirement of registration contained in Section 107 of the Transfer of Property Act; and in the absence of registration, it cannot be held that tha lease is for a manufacturing purpose; but this view of P. B. Mukharji J. was dissented from in a later Division Bench decision viz., : AIR1959 Cal181 , already referred to above in another connection; it was observed that notwithstanding the provisions of Section 107 of the Transfer of Property Act, a lease for a manufacturing purpose must for the purpose of notice be deemed to be a lease from year to year, we respectfully agree with this decision viz., that where the lease is in fact for a manufacturing purpose, even though there is no registered lease deed by which the lease was created, it must be deemed to be a lease from year to year for the purpose of the notice under Section 106 of the; Transfer of Property Act, and 6 months' notice ending with the year of tenancy is necessary.

23. In that view it must be held that the notices determining the tenancies were not sufficient in the present case, for determining the tenancies and that therefore the pfaintiff respondent cannot obtain decrees for ejectment.

24. As regards the arrears of rent decreed, Mr. Mitra has urged that the defendant company is entitled to set off Rs. 22,000/- spent by it on repairs after notice to the plaintiff. The defendant company produced a number of letters in this connection to show that the defendant company was calling upon the plaintiff to effect the necessary repairs. In the letter Ext. A(25) dated 15th April, 1952, by the defendant company to the plaintiff it is mentioned as follows:

'We invite your attention that the buildings (dwelling house and others) situated at 38 Panditia Road are absolutely unfit for habitation so much so that they stand almost in a collapsible condition.

Although necessary and thorough repairs should have been taken by you every five years but it Is to be regrettea that any sort of repairs to the buildings have neither been taken up nor done by your goodself during the period between 1938-52 and consequently the buildings are reduced to their present condition. We may mention here that at a joint inspection held at the premises very recently by the respective representatives of the Government of India Land Acquisition Collector,

p. W. D. and ourselves it was found that neither any one can live in the nouses without the risk of his life nor any repair is possible if any occupant remains in the buildings as any portion of the building may collapse any time, specially while certain portion which requires to be dismantled and rebuilt. Consequently the Government has vacated the buildings since 31st March, 1952 to facilitate repairs and asked us to effect thorough repairs at once. We may further mention here that the P. W. D. has made out an estimate of about Rs. 22,000/- for such repairs.

We think it will not be out of place to mention that on your failure to effect any repairs as stipulated in respect of the premises 38/1 Panditia Road we had to do the same at a heavy cost through contractors and ourselves and we will now submit our bill for the same to your goodselves either for payment or adjustement in usual course.'

25. But Sri J. N. Ghosh in his evidence has admitted that in spite of such letters, the plaintiff never accepted the liability to execute the repairs.

26. Although the terms of the leases Exts. L and L(1) do not govern the relationship between the parties, it would be relevant to refer to the provisions as to repairs contained therein. In Ext. L, in paragraph 3 of the conditions governing the lessees, it was provided that the lessees would keep the demised premises and all buildings which the lessees might build, in good and tenantable condition, and at their own cost perform ail petty repairs to the premises except to the boundary wall or the entrance gate and existing godown which would be maintained in repair by the lessors. In paragraph 2 of the conditions governing the lessors, it was mentioned that the lessors would at their own cost construct and keep in repairs the boundary wall and fencing and a gate in the northest corner of the premises. In paragraph 4 of those conditions, it was provided that the lessors would at their own cost maintain the godown at the northwest corner of the demised land in wind and water tight condition and would thoroughly repair the same once every 5 years. In txt. L(l), in paragraph 3 of the conditions governing the lessees, it was provided that the lessees would keep all buildings which the lessees would thereafter build and erect, ingood and tenantable condition, and would at their own costs from time to time perform all petty repairs required to be

done thereto. In paragraph 2 of the conditions governing the lessors, it was provided that the lessors would at their own costs maintain the buildings then standing upon the premises demised, so long as the same were not pulled down by the lessees, in wind and water tight condition, and once every five years would thoroughly repair the same in good workman-like manner.

27. Even if the terms of the lease deed Exts. L and L[l) were to apply, it is clear that the plaintiff would not have the liability to effect thorough repairs once in every five years to all the buildings standing within the demised premises; the tenant had the right to pull down existing buildings and to construct new buildings for the purpose of the business after taking the consent of the landlord, and many such new constructions were admitted!y made. Though the defendant company may have spent a good deal of money in effecting repairs since 1948, after the defendant company was reconstructed by the order of the High Court, there is no clear evidence to show whether in respect of the leases created by Ext. L(i) the buildings in existence at the time of the demise were still in existence in 1948, and as regards the premises covered by Ext. L there is no evidence to show whether the godown at the northwest corner and the entrance gate were still in existence. As regards the other buildings and structures which had been put by lessees themselves, it was the duty of the lessees to keep them in repairs.

28. Further the terms of Exts; L and L(1) as to repairs do not apply, as it has been found that Exts. L and L(1) do not govern the existing tenancies. Therefore, the defendant company could only avail of the protection 0f S. 108 of the Transfer of Property Act. Under S. 108(f) on the Transfer of Property Act if the lessor neglects to make within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself and deduct the expense of such repairs from the rent or otherwise recover the same from the lessor; but the lessor would be bound to make any repair only if there is such a contract between we parties. In the absence of such a contract the lessor is not bound to effect any repairs whatever. It has been held that the words in cl. (f) of sec. 108 of the Transfer of Property Act 'any repairs which he is bound to make to the property' refer to an express covenant to repair, . and the onus of proving such express covenant is on the lessee. In the present case, the defendant's witness Sri

J.N. Ghosh had to admit that the plaintiff never agreed to execute any repairs himself at his own cost and there is also no evidence of any agreement or covenant under which the plaintiff undertook to bear the cost of repairs. In the circumstances the defendant company was wrong in thinking that it had the right to deduct the cost of repairs from the rent. Apparently, the defendant company was relying on the terms of Exts. L and L(l) already been referred to, under which the landlord would have liability to effect repairs to some of the buildings including the godown which were in existence at the time of the demise, as well as the boundary wall and the entrance gate at the northeast corner; but the terms of the registered lease deed Exts. L and L(l) do not help the defendant company, and therefore the defendant company is not entitled to a set off, and therefore the plaintiff is entitled to the decree for arrears of rent as passed by the Court below.

29. It is, therefore, ordered that the appeals be allowed in part and the decrees passed by the learned Subordinate Judge be modified; the suits be decreed in part with proportionate costs for the arrears of rent claimed, but dismissed so far as the claim for ejectment and damages or mesne profits is concerned.

30. in these appeals the parties will bear their own costs.

**Amaresh Roy, J.**

31. I agree.