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Court : Kolkata

Decided On : Aug-14-1963

Reported in : AIR1964Cal235

Judge : D.N. Sinha and ;A.C. Sen, JJ.

Acts : [West Bengal Premises Tenancy Act, 1956](#) - Section 2(1); ;[Transfer of Property Act, 1882](#) - Sections 53A and 107; ;[Registration Act, 1908](#) - Section 49

Appeal No. : A.F.A.D. No. 632 of 1963

Appellant : Biswabani Private Ltd.

Respondent : Santosh Kumar Dutta and ors.

Advocate for Def. : Profulla Kumar Roy, ;Bijan Behari Das Gupta, ;Ashoke Kumar Sen Gupta and ;Sudhir Das Gupta, Advs.

Advocate for Pet/Ap. : S.M. Basu, Adv. General, ;Manindra Nath Ghosh and ;Surendra Narayan Sarkar, Advs.

Disposition : Appeal dismissed

Judgement :

Sinha, J.

1. This is an appeal against a judgment and decree passed by the learned Additional District Judge, Howrah, dated 30th March, 1963 by which he allowed an appeal from the judgment and decree passed by the learned Subordinate Judge, First Court, Howrah, dated 30th September, 1961 and dismissed the original suit against the contesting defendant Nos. 1 and 2 with costs. The facts in this case are briefly as follows: There is a Cinema House situated at 61 Chintamani Dey Lane, Howrah, belonging to the respondents Nos. 1 and 2, Sri Santosh Kumar Dutta and Sri Nandalal Dutta. By a registered lease dated 9th September, 1948, the said respondents leased out the said premises to the third respondent, Kanti Bhusan Bose, for a period of five years with effect from the 1st September, 1948. This Kanti Bhusan Bose is the Managing Director of the Appellant Company, the Biswabani Private Ltd. By mutual consent the respondent Nos. 1 and 2 accepted the appellant company as their tenant and the said company was paying a rent of Rs. 2,000/- per month. In 1953, disputes and differences arose between the parties. On or about the 5th October, 1963, the respondents Nos. 1 and 2 filed a suit for ejectment against the appellant company and the respondent No. 3 in the Court of the first subordinate Judge, Howrah being T. S. No. 68 of 1953. The appellant company filed a case before the Rent Controller, Howrah, against the respondents Nos. 1 and 2, being Rent Control Case No. 114 of 1953. After a protracted litigation, the parties settled their disputes and a compromise petition was filed in the said T. S. No. 68 of 1953 on the 26th February, 1955. By the compromise petition the parties agreed that the appellant company was to remain in possession of the said cinema house for five years, beginning from the 1st day of March, 1955 at a rental of Rs. 1,000/- per month, Rs. 500/- being the rent for the cinema house and Rs. 500/- being the rent for the machinery, furniture and fixtures. Over and above the said payment, the appellant was to pay the occupier's shares of municipal taxes for the entire premises. The respondent No. 3 agreed to stand as surety and kept a deposit of Rs. 20,000/- with the respondents Nos. 1 and 2. The licence standing in the name of the respondents Nos. 1 and 2 for running the above cinema was to continue in their names, but they agreed not to surrender the same, except for default in payment of rent for six consecutive months. It was agreed between the parties that a written lease was to be executed and registered, containing all the terms embodied in the solenama. Finally, it was

one of the terms of the said compromise decree that there would be no further extension of the lease after expiry of the stipulated period, that is to say, after the expiry of the month of February, 1960; and after that date, the appellant, if it continued possession, was to be treated as a trespasser.

2. The appellant, company continued in possession but it so happened that no lease was executed nor registered by the parties as contemplated by the compromise decree. Even after the expiry of the said term, the appellant company refused to vacate the premises. On the 14th March, 1960 the appellant company filed a suit in the Court of the Subordinate Judge, First Court at Howrah, against the respondents, being title suit No. 10 of 1960, for a declaration of its tenancy right in the said premises, for a permanent injunction restraining the respondent Nos. 1 and 2 from interfering with its tenancy right; and a mandatory injunction directing the said defendants to remove the locks which the said defendants had put at different parts of the disputed property, and for other reliefs. It was stated in the plaint that inasmuch as no written lease was executed and registered in accordance with the terms of the solenama, the plaintiff had be-come a tenant from month to month and as this monthly tenancy had not been determined by a proper notice to quit the defendants were not entitled to take khas possession. It was contended that all the provisions of the [West Bengal Premises Tenancy Act, 1956](#), and the Rent Control Act, 1950, were applicable to the said monthly tenancy. It was then alleged that sometime on the night of the 29th February, 1960, the defendant No. 1 illegally entered into the disputed premises and threatened by force to drive out the agents and employees of the plaintiff company and having failed to do so, forcibly locked the doors of the office room and the operating room and the main entrance of the disputed premises, as a result of which it was impossible for the plaintiff company to run its cinema business in the said premises. The suit was contested by the defendants 1 and 2 who are the respondents 1 and 2 in this appeal. Their case was, that in accordance with the terms of the solenama, the plaintiff company would become a trespasser after the expiry of the month of February, 1960. It was denied that the plaintiff company had ever become a monthly tenant or that it was entitled to any notice under Section 106 of the Transfer of Property Act or protection under the Rent Control Act, 1950 and the [West Bengal Premises Tenancy Act, 1956](#). Their further case was that

upon the expiry of February, 1960, there was an amicable arrangement and the defendant No. 1 went to the cinema house and got amicable khas possession as per arrangement. In other words, their case was that the plaintiff company had made over vacant possession in terms of the solenama. Thereafter, there were certain proceedings in the suit namely, proceedings regarding injunction and receiver and for a time Joint Receivers actually took possession. We are, however, not concerned with such details for the purpose of this appeal. It would be sufficient to state that on the 30th September, 1961 the suit was decreed by the learned Subordinate Judge, First Court, Howrah. The learned Subordinate Judge held that inasmuch as there was no written document of lease executed or registered, there was a lease between the parties from month to month, and it did not expire on the expiry of February, 1960 as the monthly tenancy was not determined in accordance with law. Nothing was said about the [West Bengal Premises Tenancy Act, 1956](#) or the Rent Control Act of 1950. The learned Subordinate Judge held that as the plaintiff company was entitled to continue in possession and its possession was disturbed, the suit should be decreed and the plaintiff's tenancy right from month to month declared and a permanent injunction issued restraining the defendants Nos. 1 and 2 from interfering with the possession of the plaintiff in the disputed property. There was also a mandatory injunction directing the defendants to remove the locks put by them in different parts of the cinema house. There was also a mandatory injunction restraining the defendants 1 and 2 from surrendering the cinema licence until determination of the lease in favour of the plaintiff company in accordance with law. Against this judgment and decree the defendants preferred an appeal before the learned District Judge, Howrah. The learned District Judge, by his judgment and decree dated 30th March, 1963 allowed the appeal, setting aside the judgment of the trial Court and dismissing the suit as against the contesting defendants 1 and 2 with costs. Briefly speaking the learned District Judge did not agree with the trial Court that as a result of the non-execution and non-registration of the lease, there arose a monthly tenancy right in the plaintiff company. On the other hand, the learned District Judge held that upon the expiry of the term mentioned in the solenama, the plaintiff company's possession became that of a trespasser and that it was not entitled to any of the reliefs claimed in suit. The learned District Judge held that

upon the expiry of the term mentioned in the solenama the respondents Nos. 1 and 2 acquired the right to re-enter the suit property and that nothing had been done by them in violation of law. It is against this judgment that the second appeal has been preferred.

3. Before us, the learned Advocate General propounded his case very simply and it was this: He admitted that there was a compromise decree and under the terms of that decree it was stipulated that there would be a tenancy for five years and that upon the expiry of February, 1960 there would be no further renewal and the plaintiff company would thereafter become a trespasser. He argued, however, that no agreement was drawn up, executed or registered in terms of the said solenama and the result was that there was no valid lease for five years and the tenancy could at best be one from month to month. Such a tenancy could not be determined except by notice to quit under Section 106 of the Transfer of Property Act, and indeed, by virtue of the [West Bengal Premises Tenancy Act, 1956](#), even such determination would be of no effect, because the plaintiff company would, in that case, become a statutory tenant and be entitled to continue in possession. According to him, the question of Section 53-A of the Transfer of Property Act did not enter into the picture at all and even if it did, the position remained the same. It may be that under Section 53-A of the Transfer of Property Act, the defendants could not evict the plaintiff company for a period of five years, but after the expiry of the said five years the plaintiff company is protected from eviction by the provisions of the [West Bengal Premises Tenancy Act, 1956](#). In other words, as a result of such protection it cannot be evicted at all except in conformity with the provisions of that Act.

4. The argument advanced by the learned Advocate General seems to be plausible at first sight. In fact, he confessed that there is very little merit in his client's case, but claimed that if the law protects his client, the Court must find in his favour, as indeed it must. If the appellant succeeds, it will be a most unhappy state of affairs. Here is a party, who has solemnly entered into an agreement, has enjoyed the benefit of it, has committed a flagrant breach, of it, and now wishes the law to come to his aid and protect him from the evil consequences. Of course, if the law does allow him protection, there is nothing more to be said. I am glad

however, to be able to hold, that such is not the case and the appellant is not protected. The position seems to be as follows: Under the Solenama the parties agreed that the old tenancy would be wiped out and a new tenancy would be created for a period of five years expiring in February, 1960. It was further stipulated that after the expiry of that term, the lease would not be renewed and the appellant, if it refuses to give vacant possession, would be treated as a trespasser. It was contemplated by the Solenama that a formal agreement in writing should be executed by the parties and registered. But no such document was executed by the parties or registered. Since it was a lease of immoveable property for a term exceeding one year Section 107 of the Transfer of Property Act applied. Under that provision, such a lease can only be made by a registered instrument. That being so, it cannot be said that there was any contract of lease at all. What then is the position Since the terms of the lease are in writing and the appellant is in possession, the provisions of Section 53-A of the Transfer of Property Act applies. That provision lays down that where any person contracts to transfer for consideration any immovable property, which includes an interest in immovable property like a lease; from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or being already in possession, continues in possession and has done some act in furtherance of the contract, and is willing to perform his part of the contract then, notwithstanding that the contract, though required to be registered, has not been registered, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him, any right in respect of the property, of which the transferee has taken or continued in possession. Section 49 of the Registration Act has been amended and provides that the written document mentioned above, although not registered, would be admissible as evidence for establishing a right under Section 53-A of the Transfer of Property Act. There can be no doubt that the provisions of Section 53-A are applicable in the instant case. The principle embodied in Section 53-A is founded on the English rule of equity which provided that, although a contract required by the Statute of Frauds to be in writing, has not been reduced in writing, the Court of Equity would nevertheless direct specific performance of the contract where it has

been acted upon or part performed, on the principle that unless this was done the other party would be permitted to perpetrate a fraud. After the passing of the Judicature Act, this doctrine was given further extension in the case of *Walsh v. Lonsdale*, (1882) 21 Ch D 9. In that case, a party had entered upon the premises under an agreement for a lease but the lease had not been executed. The Court treated the parties on the same footing as if the lease had been executed and gave effect to one of the terms of the contemplated lease, which provided for an advance payment of rent. Section 53-A has an important proviso to the effect that nothing in the paid section shall affect the rights of a transferee for consideration without notice of the contract or of the part performance thereof. This proviso has been explained to mean that the right of the transferee to hold the transferor to the terms of the transfer is not a title or a right in rem. It is a personal and equitable right and is available against the transferor and all those who claim under him, except a transferee for consideration without notice. In other words, the position is this; A lease of more than five years requires registration under Section 107 of the Transfer of Property Act. Without such registration there can be no lease. Where, however, the conditions of Section 53-A of the Transfer of Property Act are satisfied, then the transferee, in this case the lessee, is entitled to continue in possession. In such a case however, what exactly is the title of the transferee? To say that he is a lessee would be erroneous because a lease for five years can only be made by a registered instrument. Where there is no registered instrument there cannot be any such lease at all and a transferee who is continuing in possession and claims the protection of Section 53-A cannot be said to be a lessee. His position is that of a person who has no contractual right, but by virtue of the fact that in equity the transferor is estopped from disturbing his possession in any manner contrary to the terms of the agreement between the parties, his possession is protected by law. This position has been elucidated by a decision of a Division Bench of this Court--*Ram Pratap Kayan y. National Petroleum Co. Ltd.*, : AIR1950 Cal23 . The facts in that case were as follows: The National Petroleum Co., Ltd., filed a suit against the appellant Ram Pratap Kayan for ejectment of the latter from a corrugated iron sheet shed and godown forming a part of premises No. P-2, Paharpur Siding Road, belonging to the Port Commissioners of Calcutta and being a part of King George's Dock. The respondent's case was that there

was a written agreement whereby the National Petroleum Co., Ltd., agreed to provide for the appellant a suitable shed and godown of which he would remain in occupation for a period of five years and would return vacant possession at the end of the period. It was alleged that in pursuance of the said agreement the company let out the shed and godown to the appellant and the appellant went into possession from the 1st of April, 1939. The period of five years expired on the expiry of the 1st April, 1939 but the appellant refused to vacate the premises and the company brought a suit against the appellant for ejectment of the latter from the shed and godown. The defence taken by the appellant was that the agreement which was unregistered did not and could not create a lease for a term of five years and that as the letting to him was for manufacturing purposes, he had in law a tenancy from year to year terminable by six month's notice to quit ending with the year of the tenancy. As no such notice had been served, he continued to be a tenant and could not be regarded as a trespasser. The learned Subordinate Judge held that after the expiry of five years the defendant was bound to vacate the premises in terms of the agreement. From this the defendant appealed to this Court. Mitra, J., said as follows:-

'The argument of the appellant with regard to the nature of the tenancy was put in this way. The agreement, Ext. 2, being unregistered, no lease for a term of five years was created, as under Section 107 of the Transfer of Property Act a lease for a term exceeding one year can be created only by a registered instrument. But there was a letting to the appellant followed up by payment and acceptance of rent, and the letting was for manufacturing purpose. Therefore, under Section 106 of that Act the lease must be deemed to be a lease from year to year terminable by six months' notice to quit ending with the year of the tenancy, there being no contract to the contrary. The only modification that was made by the operation of Section 53-A of the Act in the legal relationship of the parties was that during the continuance of the term of five years the respondent could not eject the appellant from the demised premises by service of six months' notice to quit. But this was really an additional protection afforded to the appellant, which did not fundamentally alter the character of the tenancy as a tenancy from year to year. With the withdrawal of the protection on the expiry of the term of five years the tenancy again became terminable by service of a six months' notice to quit.'

This argument was not accepted by the Court but was repelled. It was held that Section 53-A imposes a bar on the transferor when the conditions mentioned in the section have been fulfilled. It debars him from enforcing against the transferee any right in respect of the property other than a right expressly provided by the terms of the contract. He is not allowed to take advantage of the fact that the contract though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed by law. In order to obviate any difficulty about the proof of the contract in such a case, supplementary legislation was enacted amending Section 49 of the Registration Act. Mitra, J., proceeds to say as follows: -

'So far as the transferee is concerned, the section confers a right on him to the extent that it imposes a bar on the transferor. But this is only a right to protect his possession against any challenge to it by the latter contrary to the tenor of the contract or the instrument of contract; *Probodh Kumar Das v. Dantamara Tea Co. Ltd.* 0043/1939 . As Lord Atkin observed in *S. N. Banerjee v. Kuchwar Lime and Stone Co., Ltd.* : '.....the words of the section make it quite plain that the section does not operate to create a form of transfer of property which is exempt from registration. It creates no real right : it merely creates right of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons.'...

We agree with the learned Subordinate Judge that the appellant was bound to vacate on the expiry of the period of five years and Ms position became wrongful thereafter.'

5. Virtually the same position arises in the instant case. The parties agreed under the solenama that there will be a lease for five years and the appellant continued in possession. As no document was executed and registered, as contemplated by the solenama, no lease was created. This, however, did not mean that the appellant, by virtue of Section 53-A or any other provision of law began to hold the premises as a tenant from month to month. Such a tenancy was neither created by the agreement of parties nor by operation of law. All that happened was that the appellant's possession was protected and the respondents were estopped from

disturbing the possession of the appellant for a period of five years as agreed upon by the solenama. During that period, the appellant could put forward the incomplete agreement as a shield to protect him from eviction by the respondents. There was, however, no tenancy created either from month to month or at all. In other words, the right of the appellant to remain in possession did not confer upon it the status of a tenant, but an equitable right was created by Section 53-A of the T. P. Act to protect its possession. This right came to an end upon the expiry of five years. The estoppel only continued as long as the solenama allowed it to continue. After that the appellant was defenceless. Coming now to the provisions of the [West Bengal Premises Tenancy Act, 1956](#) we find that a 'tenant' has been defined to be a person by whom or on whose account or behalf, the rent of any premises is payable and also any person continuing in possession after the termination of his tenancy. In other words, where there is a contract of tenancy, and after the termination of the tenancy the tenant continues in possession, he acquires the status of a statutory tenant and is protected by the provisions of the said Act. But the continuation of possession after the expiry of the tenancy must be a continuous process. In other words, between the expiry of the tenancy and the continuance of possession, there must be no hiatus, there should be no period during which the tenant lost his possession or was holding possession not as a tenant but under some other right. It must obviously be so, because if there is a hiatus between the point of time when the contractual tenancy terminated and the statutory tenancy commenced, during which the tenant did not occupy the position of a tenant, then he cannot be said to be 'continuing in possession after the termination or his tenancy' as a tenant, in terms of Section 2(h) of the [West Bengal Premises Tenancy Act, 1956](#). To put it in another way, a contractual tenant upon the termination of his tenancy becomes a statutory tenant if he continues in possession. But between the contractual tenancy and the statutory tenancy there cannot be a blank period during which he is either not in possession or holds possession in some other right but not as a tenant. Where his right springs from Section 53-A of the T. P. Act, as has been explained above, it is not a tenancy right at all, and even the fact that he has paid rent during the period, does not matter. It does not make him a tenant. His right is merely an equitable right based on estoppel, which prevents the landlord from evicting him. According to the

Bench decision cited above, the appellant in this case did not become a tenant from month to month because the agreement contemplated under the solenama was not executed or registered. During the five years contemplated by the solenama, the appellant was in possession neither as a contractual tenant nor as a statutory tenant, but as a person entitled to be protected by the provisions of Section 53-A of the T. P. Act as long as the solenama permitted it. That being so, it must be held that the appellant is not protected by the provisions of the [West Bengal Premises Tenancy Act, 1956](#). After the expiry of the said term, the position of the appellant was merely that of a trespasser and a trespasser cannot maintain a suit for a declaration of a tenancy right or for an injunction. Reference has been made before us to a Supreme Court decision *Ram Kumar Das v. Jagdish Chandra Deo*, : [1952]1SCR269 . In that case, the facts were as follows: The property in suit was a plot of land in village Jugselai in the district Singhbhum. In 1913 the father of the defendant by a registered Patta took lease of about 31 bighas of land from the Prodhan for purposes of cultivation. Later on, suits were filed claiming title to the estate, in which the land in dispute was situated, and in such proceedings a Receiver was appointed by the High Court at Patna. In December 24, the defendant executed a registered kabuliyat in favour of the Receiver by which he purported to take settlement of the land in suit for a period of ten years at a rental of Rs. 46/- per annum and a selami of Rs. 250/-. The defendant made two payments of the annual rent but made no other payments. The plaintiff's title to the entire estate was declared in 1927 and in April 1937, the plaintiff brought a suit for ejectment after serving a notice to quit. This suit ended in 1942 when the High Court declared that the notice to quit was defective and the suit should be dismissed. On 18th July, 1942, the plaintiff again served a notice to quit on the defendant asking him to vacate the land on the 7th August following. As the defendant refused to give up possession a suit was brought in July, 1943. No question of Section 53-A of the T. P. Act was involved. The only point discussed was as to whether on the facts the tenancy of the plaintiff was one from month to month or from year to year, upon an interpretation of Section 106 of the T. P. Act. Mukherjea, J., proceeded on the assumption that although the parties might have attempted to create a lease for ten years no operative lease came into existence. It was admitted that the defendant remained in possession of the land belonging to

the plaintiff with the permission of the Receiver who represented the plaintiff's estate, and paid rent to the latter. It was further admitted that the plaintiff accepted these payments as rent. The learned Judge held that from these facts a tenancy could be fairly presumed. The only point for determination was as to what was the duration of the tenancy. It is one thing to say that a contract of tenancy having become invalid by reason of Section 107 of the T. P. Act, the tenant was continuing in possession and maintaining his rights by virtue of Section 53-A and it is quite another thing to say that the parties entered into a fresh contract of tenancy. If the parties entered into a fresh contract of tenancy, there is no scope for the operation of Section 53-A. It was held in the Supreme Court decision that from the admitted facts, the inference was that the parties had entered into a fresh agreement of tenancy. The only question was whether that contractual tenancy was to be deemed as one from month to month or from year to year. It was held that it was a tenancy from month to month. Therefore, this decision does not affect the problem that arises in the present case, or throw any light thereon.

6. For the reasons aforesaid we must come to the conclusion that the decision of the learned District Judge was right and the appeal fails and must be dismissed with costs.

A.C. Sen, J.

7. I agree.

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