
(1961) 07 CAL CK 0001

Calcutta High Court

Case No: Civil Revision 2658 of 1960

Sailendra Kumar Roy
Choudhuri

APPELLANT

Vs

Abdul Latif Khan

RESPONDENT

Date of Decision: July 3, 1961

Acts Referred:

- Transfer of Property Act, 1882 - Section 10, 108, 111, 6
- West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 - Section 13(1)
- West Bengal Premises Tenancy Act, 1956 - Section 10(1), 16(1), 16(2), 16(3)

Citation: 65 CWN 1050 : (1962) 2 ILR (Cal) 206

Hon'ble Judges: Chatterjee, J; Bachawat, J

Bench: Division Bench

Advocate: Manindra Nath Ghosh and Dhruva Kumar Mukherjee, for the Appellant; Sudhansu Kumar Sen and Gaganendra Krishna Deb, for the Respondent

Judgement

Bachawat, J.

This revision petition arises out of an application made under Sub-section (3) of Section 16 of the West Bengal Premises Tenancy Act, 1956. Opposite party No. 1 Abdul Latif Khan is the landlord of the premises No. 3, Sambhu Chatterjee Street, Calcutta, opposite party No. 2, Harsha Nath Roy is the tenant of the first degree in respect of a portion of the said premises and since June, 1954 the Petitioner Sailendra Kumar Boy Choudhury is the tenant of the second degree in respect of the said portion of the premises. Following the judgment of N.K. Sen, J. in the case of Prafulla Chandra Mukherjee v. Akshoy Kumar Bose Unreported decision, dated March 21, 1958, in Civil Revision Case No 1738 of 1957 (1) the Tribunals below have refused to grant relief to the Petitioner under Sub-section (3) of Section 16 on the ground that the rent note (et. C) on the basis of which Harsha Nath Roy was inducted as a tenant contains an express prohibition against subletting. In our opinion the Sub-section (2) of Section 16 applies to the sub-letting and the Tribunals below ought to have granted the relief prayed for by the Petitioner.

2. By ext. C Harsh Nath Roy entered into the following covenant in favour of Abdul Latif:

I will use the premises for my residence only and will not sub-let either the whole or any portion thereof during the period of my tenancy.

3. The sub-lease in favour of the Petitioner though made in breach of this covenant is valid and operative. It is to be noticed that ext. C does not provide that on breach of the covenant the landlord Abdul Latif Khan would be entitled to re-enter the premises. Now by Section 6 of the Transfer of Property Act save as provided by that Act or by any other law for the time being in force property of any kind may be transferred and therefore save as so provided the lessee may transfer his interest in the property by way of sub-lease. Section 108 of the Transfer of Property Act shows that in the absence of a contract or local usage to the contrary the lessee has as against the lessor the right to assign or sub-lease his interest in the property. But the lessee may by express contract with the lessor bind himself not to sub-lease the property. The contract is valid and the lessor may enforce the contract by claiming damages for the breach and by injunction restraining a threatened breach of it. The express contract may also be read as a condition limiting the power of disposal by the lessee of his interest in the property. By Section 10 of the Transfer of Property Act such a condition is valid where it is for the benefit of the lessor. Now the condition restraining the alienation cannot be said to be for the benefit of the lessor where the lessor cannot terminate the lease upon breach of the condition. Section 111(g) of the Transfer of Property Act shows that a lease cannot be forfeited on breach of a condition unless the condition expressly provides that on such breach the lessor may re-enter. A stipulation in a lease restraining the alienation unaccompanied by a proviso for re-entry on its breach is not therefore an effective restraint or bridle on lessee's interest in the property and is not really a condition for the benefit of the lessor. Such a stipulation is ineffective as a condition or restraint against alienation. The lease remains operative, notwithstanding the breach of the stipulation. Consequently the sub-lease made in breach of the stipulation also is valid and operative. It may be observed that even before the amendment of Section 111(g) of the Transfer of Property Act by Act XX of 1929 it was held that where there is a stipulation in a lease restraining its assignment without a proviso for re-entry on its breach and the lessee assigns the lease in breach of the stipulation, the assignment is operative and the assignee obtains a valid title to the leasehold as against the landlord, see *Basarat Ali Khan v. Manirulla* I.L.R.(1909) 36 Cal. 745.

4. The sub-tenancy of the Petitioner came into existence while the West Bengal Rent Control (Temporary Provisions) Act, 1950, was in force. Since the sub-letting was by the tenant of the first degree, nothing in Sub-section (1) of Section 13 of that Act invalidates this sub-lease.

5. We find nothing in the general law or in the special Acts which invalidates the sub-lease. It may therefore be well said that the tenant of the first degree had sub-let the premises let to him by the landlord and that the Petitioner is the sub-tenant to whom the

premises have been so sub-let.

6. Mr. Sen, however, contends that a sub-letting in breach of an express condition which prohibits it is not a sub-letting "with or without the consent of the landlord" within the purview of Sub-section (2) of Section 16 of the West Bengal Premises Tenancy Act, 1956. We are unable to accept this contention. Sub-section (2) of Section 16 applies to all sub-lettings whether made before the commencement of the Act "with or without the consent of the "landlord." A sub-letting made in breach of an express condition prohibiting it is a sub-letting without the consent of the landlord.

7. Sub-section (1) of Section 10 of the West Bengal Premises Tenancy Act, 1956, deals with sub-lettings made "with the previous consent in writing of the landlord" after the commencement of the Act. Sub-section (2) of Section 16 deals with and applies to sub-lettings made before the commencement of that Act. In view of the fact that Sub-section (1) of Section 16 is limited in its application to post-Act sub-letting made with the previous consent in-writing of the landlord, the Legislature used the expression "with and without "the consent of the landlord in Sub-section (2) of Section 16 to indicate that the Sub-section (2) applies to all pre-Act sub-lettings. Every sub-letting by the lessee is either with the consent of the landlord or without his consent. In Civil Rule No. 1738 of 1957 our learned brother, N.K. Sen, J. appears to have held that the subtenant cannot get the benefit of Section 16 where the sub-letting is in breach of an express contract prohibiting it. His Lordships made a distinction between bilateral and unilateral acts and thought that prohibition is a bilateral act whereas consent and absence of consent are unilateral acts.

8. With respect we are unable to agree with that judgment or with its reasoning"s. A prohibition is an express negation of consent. A sub-letting made in breach of an express condition prohibiting it is an a fortiori case of sub-letting made without the consent of the landlord. The point in issue is whether the sub-letting is without the consent of the landlord and not whether the absence of a consent is a bilateral act. If a prohibition is a bilateral act, the negation of consent by the prohibition is also such an act.

We pass the following order.

9. We decide and adjudge that the Petitioner is entitled to the declaration prayed for in his application under Sub-section (3) of Section 16 of the West Bengal Premises Tenancy Act, 1956. The application under Sub-section (3) of Section 16 is remitted to the Controller in order that he may decide and dispose of the application. In accordance with law and in accordance with the observations made above.

10. We direct that each party will pay and bear his own costs up-to-date both in this Court and in the Tribunals below.

Chatteejee, J.

11. I agree.