

(2003) 11 CAL CK 0004

Calcutta High Court

Case No: F.A. No. 230 of 2002

Shyamali Mitra and Others

APPELLANT

Vs

Manindra Nath Chatterjee

RESPONDENT

Date of Decision: Nov. 19, 2003**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- West Bengal Premises Tenancy Act, 1956 - Section 3(2)

Citation: (2004) 1 CHN 138 : 108 CWN 351**Hon'ble Judges:** Joytosh Banerjee, J; Ajoy Nath Ray, J**Bench:** Division Bench**Advocate:** Tapas Kumar Mukherjee and Snehasis Jana, for the Appellant; Nirmal Mitra, Sankar Kumar Bose, Chandramala Mukherjee and Sudipta Kumar Bose, for the Respondent**Final Decision:** Dismissed

Judgement

Ajoy Nath Ray, J.

This is an appeal by the erstwhile tenant from a decree of eviction. The premises in suit is a single shop room on Girish Avenue, Calcutta.

2. It was held under a lease for 21 years covering 1.11.1965 to 31.10.1986.
3. The suit for eviction was filed in 1987 after the term expired.
4. Although 16 years have expired since, the landlord is still fighting the litigation.
5. In the impugned judgment there is nothing which needs any correction by us. None of the points urged in the Court below was even touched upon by the appellant before us.

The appellant went on a completely different track.

6. It was argued that the West Bengal Rent Laws controlling the lease did not apply to leases for durations above 20 years. But if the lease contained provisions allowing either the landlord or the tenant to terminate it at his option before the expiry of the term, then the Rent Laws would apply.

7. For showing this the proviso to Section 3 Sub-section (2) of the West Bengal Premises Tenancy Act, 1956 was relied upon. The said proviso is set out below;-

Section 3. (1).....

(a).....

(b).....

(2) Notwithstanding anything to the contrary contained in Sub-section (1) but subject to Sub-section (3) of Section 1, this Act shall apply to all premises held under a lease which has been entered into after the commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1956:

Provided that if any such lease is for a period of not less than 20 years and the period limited by such lease is not expressed to be terminable before its expiration at the option either of the landlord or of the tenant, nothing in this Act, other than the provisions relating to rent and the provisions of sections 31 and 36, shall apply to any premises held under such lease.

8. The said Act has also been repealed and a new Act of 1997 has come into force. The matter is very old. The rent of the room was only Rs. 80/- per month with a provision of annual increase at the rate of Rs. 5/-.

9. It might be felt that so many years after the expiry of the fixed written term, the landlord deserves injustice to get back the room. Even if he cannot, as he is dead, at least his daughter should get it.

10. However, the point of law has been urged in all earnest.

11. High authorities were relied upon to show that a new point can be urged in appeal provided two conditions are satisfied:-

(i) The urging of the point does require any new proof of materials and the admitted documents and facts, or evidence already given and accepted are enough for urging the point of law.

(ii) If the point is successful no two views are possible and the appeal must succeed.

12. The case of Ram Kissen is relied upon; it is a decision given by Sir Ashutosh when His Lordship adorning a Bench of this Court. The case is reported at AIR 1920 Cal 239. The case of Gurucharan Singh, reported at AIR 1997 SC 5, was also relied upon. There is a reference in that case to the decision given in the case is given Connecticut Fire, reported at 1892 A. C. 473. A quotation of Lord Watson is also

extracted with approval by the Supreme Court.

13. In our respectful opinion the authorities basically state the above two points; it is also emphasized that justice according to law requires that the new point be considered by the Court if the above two conditions are satisfied and be now simply brushed aside.

14. Since the applicability of the Rent Laws would prevent the passing of a decree of eviction, and since the admitted lease is the only document required for urging that point, we are bound by authorities to deal with the new point even at this stage.

15. In support of the proposition that if the proviso applies then the lease is no better than an ordinary short lease covered by the Rent Laws, reliance was placed upon the case of Mahindra & Mahindra, reported at 1989(1) CHN 1,

16. On behalf of the respondent it was submitted that under the general law being the Transfer of Property Act a lessee must vacate upon expiry of the term. The applicability of such general law cannot be overlooked. In support thereof the case of Screen Corporation was placed. It is reported at 1994(1) CLT 427.

17. In the written lease the entitlement of the lessor to terminate is contained in the following terms:

Clause--(i) Notwithstanding anything herein contained to the contrary if the monthly rents hereby reserved shall remain in arrears for two months after the same shall become due or if the lessees fail or neglect to observe and perform the covenants and conditions herein contained and on the part of the lessees to be observed and performed, the lessor shall at his option be entitled to terminate this demise and to re-enter and repossess the demised shop and upon such termination or re-entry, the lessees shall deliver vacant and peaceful possession to the lessees of the demised ship together with all appurtenances, reasonable wear and tear and effects of irresistible forces of nature excepted.

18. The entitlement of the lessee to terminate is differently worded and runs as follows:

(b) Notwithstanding anything contained herein regarding the term hereby created the lessee will be at liberty after expiry of one year from the commencement hereof to determine or surrender this demise by giving two months notice in writing to the lessor at his said address at No. 43, Ram Kanto Bose Street under registered post and thereupon the lessees will deliver vacant peaceful possession of the demised shop to the lessor in the same condition in which the same has been demised reasonable wear and tear and effects of irresistible forces of nature excepted.

19. Although it was no so argued at the Bar, nor the materials placed, the West Bengal amendment has a long history at common law. There was a very old me which provided that if in a lease only one party i.e. the lessor or the lessee had the

option to terminate at will, the law implied a similar option to the other party.

20. Thus, a lessor's option to terminate would imply a lessee's option and vice versa.

21. This rule is mentioned in Coke upon Littleton. It is followed in a 1/2 page judgment in an old Madras case, if we remember rightly, reported in ILR 44 Madras. Since the Rent Laws are for the benefit of the lessee, the lessee can always give up the benefit; and these days landlords will happily accept the lessee's surrender; rarely does the case arise that the landlord does not allow the lessee to go because he is under a contract to pay a very large rent.

22. Since the lessee's option implies the lessor's option, the proviso came to be inserted, giving both options equally high status.

23. But the essence of the proviso is, that the terminability must be at the mere option of the party. It cannot be hedged in by this condition or that. So far as the landlord's option to terminate is concerned, it is clearly not a real option. Only the word option is used. Various pre-conditions have to be satisfied.

24. So far as the lessee's option is concerned, the problem is more difficult. The lessee can terminate at will after expiry of one year.

25. But that is where the hitch lies. The statutory proviso says, terminable before the expiry of the term; but the lessee's option does not allow him to terminate at any time before the expiry of the term; he can terminate only after one year of commencement.

26. Does that make any difference ? In our opinion it does. Consider a lease of 30 years and consider an option given to the lessee to terminate after 25 years. If the option to terminate need not freely be exercisable at any time before the expiry of the term, then even this lease would attract the Rent Laws. But that is completely contrary to common sense. Because leases about 20 years are intended to be exempted.

27. Accordingly, the phrase in the proviso has to be applicable in exact terms. In other words, the lease must express itself to be terminable before its expiration at the option either of the landlord or of the tenant, If the case is not this, but something else, then this super technical conversion of an agreed long lease into a shorter term by the operation of the statute cannot take place.

28. Thus, the proviso is not applicable. We are very happy that we do not have to send away the plaintiff respondents away from court on the basis of a peculiar legal decision which they have no hopes of understanding, (unless any of them happen to be Advocates themselves), and which, after so many years, would be bound to give rise in them a justifiable sense of discontent and a sense of injustice.

29. The appeal is, therefore, dismissed.

30. All applications connected with the appeal are dismissed. Stay of execution is lifted with immediate effect.

31. The lower court's records be sent back forthwith.

Joytosh Banerjee, J.

32. I agree.