(2003) 09 CAL CK 0006

Calcutta High Court

Case No: F.A. No''s. 87 and 88 of 1990

Tarak Nath Sha		APPELLANT
	Vs	
Bhutoria Brothers Private Ltd. and Manmal Bhutoria and Another		RESPONDENT

Date of Decision: Sept. 1, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 13 Rule 1, Order 13 Rule 2, Order 13 Rule 4
- Evidence Act, 1872 - Section 101, 102, 16, 45, 67
- General Clauses Act, 1897 - Section 27
- Transfer of Property Act, 1882 - Section 106, 108, 111
- West Bengal Premises Tenancy Act, 1956 - Section 25

Citation: (2004) 1 CHN 142

Hon'ble Judges: Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench: Division Bench

Advocate: Sudhis Das Gupta, Harish Tandon and Mainak Bose, for the Appellant; B.K. Bachawat, for the Respondent

Final Decision: Allowed

Judgement

D. K. Seth, J.

There two appeals F.A. No. 87 of 1988 and F.A. No, 88 of 1988 arise out of the common judgment and decree dated 6th October, 1989 passed in Title Suit No. 812 of 1984 and Title Suit No. 240 of 1984 respectively. These two appeals are heard together. The appellant had filed an application under Order 41 Rule 27 of the CPC (CPC) for additional evidence in respect of some documents being correspondences with the Postal Authorities.

2. The cases in the two suits are based on the same facts out of which two different reliefs are being sought for by the respective parties against each other. The

narration of facts-hereafter would give us a clear picture. The appellant Tarak Nath Sha (Tarak Nath) stepped into the shoes of one Ram Kewal Sha as trustee in respect of the suit property. M/s. Bhutoria Brothers Pvt. Ltd. (BBL), the defendant in the Title Suit No. 812 of 1984 obtained a lease of the suit property for the purpose of residence of its Director, Manmal Bhutoria (Manmal), for a period of 21 years outside the purview of West Bengal Premises Tenancy Act (WBPT Act) expiring on 22nd March, 1984 from Ram Kewal Sha, predecessor in title of the appellant Tarak Nath, executed on 23rd March, 1963. On the expiry of the lease, Tarak Nath filed Title Suit No. 812 of 1984 for recovery of possession with mesne profits. Manmal filed Title Suit No. 240 of 1984 against Tarak Nath and BBL for declaration that Manmal is a tenant in respect of the suit premises and for injunction.

3. The plaint case of Manmal in Title Suit No. 240 of 1984 was that originally the lease was taken by BBL for the purpose of residence of its Director Manmal, who resigned from the post of Director of the company and severed all his connections sometimes before April 1974. BBL terminated the lease with the expiry of June 1974 by its letter dated April 18, 1974 in terms of Clause (111)(iii) contained in the Deed of Lease after having paid rent till the month of June 1974. Manmal commenced negotiation with Tarak Nath for grant of tenancy in his personal capacity from July 1, 1974 at a rate of Rs. 1,100/- per month payable according to the English calendar comprising of the suit premises together with an additional piece of adjoining vacant land. Tarak Nath in spite of assurances failed and neglected to grant tenancy to Manmal in respect of the adjoining land although was agreeable to Manmal''s continuation of occupation as a monthly tenant at the rent of Rs. 1,100/- per month since paid by Manmal to Tarak Nath regularly, though, however, no rent receipt was granted by Tarak Nath. Suddenly by a letter dated 27th January, 1984, Tarak Nath demanded possession of the premises from BBL ignoring what had transpired for the last ten years. Manmal pointed out by a letter dated 9th February, 1984 to Tarak Nath that the lease was terminated with the expiry of June, 1974 and Tarak Nath was attempting to deny Manmal''s right as a tenant taking advantage of his having never granted rent receipts. On these grounds Manmal had filed the Title Suit No. 240 of 1984 for declaration of his tenancy and for injunction against Tarak Nath impleading BBL as defendant No. 2. Title Suit No. 812 of 1984 was dismissed. Title Suit No. 240 of 1984 was allowed. The appellant, therefore, had preferred these two appeals against the common judgment and decree as stated before.

4. Whereas BBL sought to defend Title Suit No. 812 of 1984 on the ground that the lease was terminated with the expiry of June 1974 and since then Manmal was accepted as tenant by Tarak Nath. On the other hand, Tarak Nath repeated his plaint case denying termination of lease or creation of tenancy in favour of Manmal as his defence in Title Suit No. 240 of 1984.

5. The parties have adduced evidences both oral and documentary and had contested the suit. The learned Counsel for the respective parties had argued the

case for days together. The questions which fall for determination before us are as follows : (1) whether the lease in favour of BBL stood terminated with effect from June 1974, (2) a tenancy in favour of Manmal was created with effect from 1st July, 1984, and (3) whether the lease continued till it expired by efflux of time on 22nd March, 1984.

Whether the lease stood terminated :

6. Tarak Nath had denied receipt of the alleged letter of termination (Ext. C) by BBL. This was sought to be proved by a Postal Acknowledgment Card (Ext. B) admitted into evidence with objection. Tarak Nath had denied his signature. No expert was sought to be appointed by either of the parties. However, the learned Court having compared the signatures of Tarak Nath came to a finding that the signature appearing in Ext. B was that of Tarak Nath. On the other hand, Tarak Nath had produced some correspondences with the Postal Authority being Exts. 6 and 7 and those annexed with the application under Order 41 Rule 27, C.P.C. Ext. 2 is a letter dated 9th August, 1989 addressed to the Director of Postal Services enquiring about the dates in which Princep Street Post Office started functioning as a delivery post office. In reply, the Director of Postal Services informed Tarak Nath through its letter dated 11th August, 1989 (Ext. 7) that the Princep Street Post Office started function as delivery post office from 11th June, 1975 using Pin Code No. 700072. In fact, the Ext. B contained a postal seal of Princep Street Post Office with Pin Code number. P.W.-2, Kedar Nath Chatterjee, an employee attached to the Postal Department as Investigation Inspector Planning, was examined on behalf of the plaintiff. He identified Exts. 6 and 7 and proved the signature of the Director of Postal Services, A. Biswas, on Ext. 7 and the contents of the said letter. He pointed out that every delivery office under the Postal Rules must have a Pin Code. The Princep Street Post Office became a delivery office with effect from 11th June, 1975 on allotment of a Pin Code. He was also cross-examined. In cross-examination, he pointed out that he has no personal knowledge with regard to the contents of Ext. 7, but his knowledge was based on official records. In order to counter this evidence, Mr. Bachawat had relied on some documents relating to allotment of Pin Code by the Postal Department, but the same are not part of the records. Be that as it may, the contents of Ext. 7 cannot be denied when proved by a competent officer of the Postal Department as having deposed on the basis of his knowledge based on records. It is the Postal Department, which can enlighten as to when a particular post office started functioning together with Pin Code as a delivery office. Thus, it appears that the genu ness of Ext. B was proved to be doubtful by Tarak Nath. On the other hand, Manmal or BBL never attempted to prove this acknowledgment card (Ext, B) by examining any witness from the Postal Department that this was delivered to Tarak Nath or that Tarak Nath had signed Ext. B in the presence of the delivery peon.

7. It is contended by Mr. Bachawat that this Ext. B was admitted into evidence without objection. He relied on the decisions in P.C. Purushothama Reddiar Vs. S.

Perumal, . This view was reiterated in Tarak Nath Sha Vs. Bhutoria Bros. Pvt. Ltd. and Others, . In these decisions, it was held that it is not open to a party to object to the admissibility of documents, which are marked as exhibits without any objection (AIR 1929 110 (Privy Council)). Once a document is properly admitted the contents of that document are also admitted in evidence though those contents may not be conclusive evidence. But this principle has no manner of application in the present case in view of the fact that Ext. B was admitted into evidence with objection (page 31 Part-II PB 87/90).

8. Now this question could be proved by proving the signature of Tarak Nath on this document. When on a particular document is required to be proved, the burden lies upon him, who would suffer, if the document is not a mitted into evidence. Therefore, the burden of proving Ext. B lay heavily on BBL. If the production of Ext. B is taken as discharge of the burden by BBL, then the onus shifts on Tarak Nath. As soon Tarak Nath attempts to prove that there was no delivery office bearing Pin Code in the Princep Street Post Office until 1975 coupled with his denial of the signature thereon, the onus that lay on him stood discharged and shifted on BBL. This could be discharged by BBL only by proving the signature of Tarak Nath on Ext. B. This could have been done by seeking for an appointment of handwriting expert by BBL. But it had not done so. Since the initial burden lay on BBL and they would succeed only if this was proved, it was for them to get this signature of Tarak Nath on Ext. B proved through expert evidence by comparing the same with the admitted signature of Tarak Nath. However, in this case, the Court had taken over the responsibility of comparison and had proceeded on the basis that the Court is the expert of experts. Admittedly, the Court was not a handwriting expert. The Court does it only through its visual experience. The comparison of signatures by expert is a piece of evidence. The opinion of the expert is not binding on the Court. The Court examines the expert evidence and the opinion and applies its mind and compares the signatures and comes to the conclusion as to whether there expert evidence would be accepted or not.

9. Ordinarily, the Court should not take upon itself the responsibility of comparing signatures when disputed. Those are matters of intrinsic technicalities requiring some amount of technical expertise. A signature apparently may look alike but when examined by experts, various flaws may be detected. But without such expert examination, the Court cannot for sure accept the signature of the author denying it. When it was open to BBL to seek appointment of expert for examining the signature of Tarak Nath on Ext. B and the proof of this signature was the basic foundation of its case, its omission to take the steps speaks against it. Why was BBL shy of getting the same examined through expert is neither explained nor answered anywhere by BBL or by the learned Trial Court. This non-examination coupled with the evidence that the Princep Street Post Office was not a delivery post office till 1975 might lead the Court to draw an inference adverse to the BBL. There is nothing on record to discard the evidence of P.W. 2 and Exts. 6 and 7 so proved by this

witness. Thus, we cannot definitely and conclusively conclude on the basis of the materials on record that Ext. B was proved or that the signature of Tarak Nath on Ext. B was proved. It still remains doubtful.

10. We may also look into another aspect of this question with regard to the proof of Ext. B. To support this acknowledgment card, no registration receipt was produced. Unless this acknowledgment is connected with the registration receipt, which bears a number, with the number endorsed on the acknowledgment card, it is very difficult to establish the nexus. The other point that is also very important for the purpose of accepting Ext. B having proved is that this acknowledgment card was not disclosed in the affidavit of documents filed on behalf of BBL (page 25 PB 87/90). This affidavit was affirmed on 17th June, 1985 after the issues were settled on 16th January, 1985. This is further aggravated by the production of this AD Card (Ext. B) on 18th July, 1989 after the examination-in-chief of Tarak Nath was closed and on the last day of his cross-examination. The learned Trial Court proceeded with the view that even though Tarak Nath had denied the signature on Ext. B, but he should have taken the help of some handwriting expert overlooking the question that there was no scope for Tarak Nath to take help of handwriting expert when this Ext. B was produced on the last day of his cross-examination. This delayed production itself leads us to draw an adverse presumption. The trump card was not disclosed in the affidavit of documents and was only produced on the last day of cross-examination. This is otherwise impermissible in view of the provisions contained in Order 13 Rules 1 and 2 of the C.P.C. read with Section 102 of the Evidence Act. At the same time, the registration receipt having not been produced, no presumption u/s 27 of the General Clauses Act could be drawn.

11. Order 13 Rule 1, C.P.C. requires the parties to produce all documentary evidence of every description in their possession or power on which they intended to rely on or before the settlement of issues. Admittedly, the affidavit as to document was filed after the settlement of issues and that too did not disclose Ext. B. Under Rule 2, no document in the possession or power of a party, which should have been produced but has not been produced in accordance with the requirement of Rule 1, would be received in the proceedings at a subsequent stage unless good cause for non-production thereof is shown for the satisfaction of the Court. The Court receiving such evidence has to record the reasons for doing so. In this case, no cause has been shown. There is nothing on record to show that the Court was satisfied with regard to the reasons for its non-production neither our attention has been drawn to any order recording the reasons for receiving this Ext. B in the proceedings. This was sought to be justified by Mr. Bachawat that under Sub-rule (2) of Rule 2 of Order 13, C.P.C. Ext. B having been produced in the cross-examination, the provisions of Rule 1 or Rule 2 Sub-rule (1) would not be affected. It is permissible for a party to produce a document for the purpose of cross-examination of the witness. But Mr. Bachawat has overlooked that this document was a document non-production whereof would disentitle the BBL to defend its cause and the

burden lay upon BBL to prove the same. There is nothing on record to show as to why this document was not disclosed in terms of Rule 1. This document being a primary document to prove the defence of BBL and being in his possession and power, he ought to have disclosed it and it could not have been withheld for the purpose of cross-examination. This document was not used for the purpose of cross-examination, but was used to establish the termination and for proving the service of Ext. C in the absence whereof the defence of BBL would fail. Then again this having been produced at the last day of cross-examination of Tarak Nath, there was no scope left for Tarak Nath to get this document examined through handwriting expert A.E.G. Carapiet Vs. A.Y. Derderian, , deals with the question of cross-examination. In this case, it was held that this is a rule of essential justice not merely a technical rule of evidence. Unless it serves to prevent surprise at trial and miscarriage of justice, because it gives to the other side of the actual case that is going to be made when in turn the party on whose behalf cross-examination has been made comes to give and lead evidence by producing witnesses. In the present case, the cross-examination was made with regard to Ext. B at the last stage without giving any opportunity to Tarak Nath to meet the same, which had really sprung surprise to him. That apart, this document having not been used as a piece of evidence to establish Ext. C and having been used only for the purpose of cross-examination of Tarak Nath, the same cannot be relied upon when Tarak Nath denied the same, and when his signature was not proved in terms of Section 67 of the Evidence Act. No benefit could be derived after the signature was denied in cross-examination by Tarak Nath from this Ext. B by BBL without getting the signature on Ext. B examined by handwriting expert.

12. Section 67 of the Evidence Act requires that if a document is alleged to be signed by any person, the signature must be proved to be in his handwriting, and it is to be done in the manner provided in sections 45 56 and 47, by obtaining opinions of expert. u/s 47, the signature has to be proved by a person who knows his signature or had seen the person signing the document. We may refer to H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . The ordinary mode of proving is of calling someone who sees the executant to write or knows his handwriting or by a comparison by his signature with his signature on other documents written by him. The proving of Ext. B in terms of Section 102 of the Evidence Act lay on BBL. If this is not proved the defence of BBL would fail.

13. The principle of ascertaining the genuineness of a signature when denied by the author though appears to be settled, but the position remains a little blurred. Inasmuch, as it is dependent on the materials produced on records and the other evidences to support. The comparison of signatures by expert is a technical job requiring some scientific investigation with regard to the nature and the characteristic of the comparable signatures. But an expert cannot conclusively and definitely determine the genuineness of the signature in comparison with the other. It is not a substantial evidence. It is only an opinion evidence. The Court is not

bound to accept this evidence. Court has to examine the evidence and consider the same all by himself applying his own vision and expertise in the examination of the comparison between the two signatures having regard to the other evidences available on record to support one way or the other. It cannot be decided with the exclusion of the other evidences. The totality of the evidence has to be looked into. At the same time, the Court cannot, in law, relying on its own examination of the signature, supply the evidence. However, there is nothing in principle or authority, which prevents the judge of facts from using his own eyes and looking at the admitted signature along with the disputed one in detail whether the evidence that has been given as regards the genuineness of the document should be believed or not. At the same time, the Court must bear in its mind the caution that such comparison is almost always by its nature inconclusive and hazardous. That is why apart from such comparison the Court has to consider other cogent and compelling circumstances and factors in coming to the conclusion about the genuineness of the disputed signature. The Court cannot be disallowed to use his faculty of vision without first receiving light from the evidence of the handwriting expert, unless it is suggested that the Court has a duty first to be misguided by the handwriting expert in order to enable him to come to the right decision on the disputed signature. The opinion evidence of the handwriting expert can rarely take the place of substantive evidence. But before acting on such evidence, it is to be seen if it is corroborated either by clear direct evidence or by circumstantial evidence. The opinion of the expert cannot override the positive evidence where there are no suspicious circumstances. It may not be safe for a Court to record a finding about the persons writing merely on the basis of comparison. But a Court can itself compare the writing in order to appreciate properly the other evidence produced before it in that regard. The opinion of a hand-writing expert, though relevant in view of Section 45 of the Evidence Act, but that is not conclusive. It is not essential that the handwriting expert must be examined in a case to prove or disprove the disputed writing.

14. For the above proposition, we may fall back on the decisions in Fazaladdin Mandal Vs. Panchanan Das, ; Bisseswar Poddar Vs. Nabadwip Chandra Poddar and Another, ; Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, ; State of Gujarat v. Vinaya Chandra Chhota Lal Pathi, AIR 1967 SC 778 and Fakhruddin v. State of Madhya Pradesh AIR 1967 SC 1326.

15. Having regard to the facts and circumstances of the present case, the acceptance of the signature on Ext. B as genuine by the learned Court below is to be examined on the principle enunciated above. We are now to find out as to whether there are other substantive evidences to support the service. The primary condition is the posting of the letter sufficiently stamped and correctly addressed. The registration receipt has not been produced. Therefore, there is nothing to indicate that this Ext. B related to the notice Ext. C, if posted, it is alleged that this was sent by registered post. But the very posting of the letter has not been proved. The letter

was not posted by an individual person. It was posted by a company, which is owning no responsibility for the occupation of the premises. It ought to have been a little more careful to preserve the registration receipt or produce some other proof from its Despatch Register that this notice was despatched. The evidence of DW-1 (pages 74-75 Part-I PB 87/90) does not support posting of Ext. C. No one from the Postal Department has been examined. Therefore, the posting of the alleged letter has not been proved. Therefore, the alleged presumption of service could not be drawn. Such presumption u/s 16 of the Evidence Act would be available when there is proof to show that this was posted with correct postal address and sufficiently stamped. Unless the issuance of the notice is established, the recipient is not called upon to deny. Unless it is proved that the letter was posted, then applying the principle of Section 16 of the Evidence Act, a presumption of service could have been drawn. This was so held in Jugal Kishore Jodhalal Vs. Bombay Revenue Tribunal, Nagpur and Others, ; Jagannath Upadhyay Vs. Amarendra Nath Banerjee and Others, and Mobarik Ali Ahmed Vs. The State of Bombay, . In Mobarik Ali Ahmed (supra), the Apex Court had held that proof of genuineness of a document is proof of the authorship. Such proof is a proof of fact like any other fact. The evidence relating thereto may be direct or circumstantial. This can be proved by person, who saw the document being written or signed or by the opinion of the handwriting expert, a mode provided in sections 45 and 47 of the Evidence Act. It can also be proved by internal evidence. When the signature is disputed, link in a chain of correspondences are to be looked into. Illustration (b) to Section 16 only means that each of the facts, namely, posting of a letter and the return of the acknowledgment card are relevant facts. However, without such combination the presumption can still be drawn but the Court has to examine the relevance and it cannot overlook the same. Mere assertion by one party would not be sufficient to accept the proof. In the later case, it was proved that the letter was posted and that the denial of the signature on the acknowledgment card was not accepted by three Courts. Such presumption can be drawn only when there are other collateral proofs with regard to the posting of the letter.

16. In Tarak Nath Sha Vs. Bhutoria Brothers Pvt. Ltd., , it was held that the Court should be slow to undertake comparison of signature upon itself. It should take aid of handwriting expert. But this decision had since merged with that of the Apex Court reversing this decision.

17. How far the Court can go into the merits of a decision by the Court, which had the advantage of having the witnesses before it and observing the manner in which they gave their testimony, has been laid down in The Provincial Transport Service Vs. State Industrial Court, , following the principle laid down in Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh and Others, . Now in this case the learned Trial Court has not recorded the demeanour of Tarak Nath in denying the signature on Ext. B, but that would be irrelevant in the present case since there was no proof of posting the notice and there was nothing to connect this Ext. B with Ext. C. We also

do not find any number endorsed on the acknowledgment card with regard to the registration slip, which bears a number. The very posting having been doubtful, when the signature on Ext. B is denied by Tarak Nath the Court ought to have exercised a little more caution which it did not. The finding by the learned Trial Court with regard to the genuineness of the signature of Tarak Nath on Ext. B is cryptic. He purported to compare the signature of the rent receipt with that of the AD slip but does not describe the characteristic of the two signatures. In the absence of any other evidence or factor to prove service, the simple comparison would not be sufficient to rely upon.

18. Unless Ext. B (page 31 PB 87/90) is proved, the termination of the lease by BBL through Ext.-C cannot accepted. Though the learned Trial Court had found that Ext. C was received by Tarak Nath and the lease was terminated, yet on examination of materials on record, as discussed above, we do not find that such a conclusion can be arrived at on the basis of Ext. B that Ext. C was received by Tarak Nath.

19. Now let us examine whether the lease could have been terminated by Ext. C coupled with the pleading pleaded in the plaint and the written statement in the two respective suits. Ext. C as it appears from page 33 Part-II of the PB F.A. 87/90, purports to inform Tarak Nath that Manmal had resigned as Director of the company with effect from 17th April, 1974. Therefore, the company was no more interested in the leasehold property. Accordingly, in terms of Clause (III)(iii) of the Deed of Lease, called upon Tarak Nath to treat the lease as cancelled. It also called upon Tarak Nath to take possession of the premises on the expiry of June 1974 and to appropriate the sum of Rs. 1,400/- being two months rent lying in deposit as advance with Tarak Nath towards rent in lieu of notice. It had also warned Tarak Nath that in case Tarak Nath fails to take possession, BBL would not be liable and responsible towards any of the terms and conditions under the Deed of Lease. At the same time, this notice did not notify or appoint any date, time and place for delivery of possession. A copy of this document was also sent to Manmal for information and complying with the requisite contained in the above notice and for negotiating with the landlord, if required, directly. Whereas Manmal claims creation of tenancy with effect from 1st July, 1974. Admittedly, there was no delivery of vacant possession or giving of possession to Manmal by Tarak Nath. It is also not the case either of BBL or of Manmal that vacant possession was given to or taken by Tarak Nath or delivery of possession to Manmal by Tarak Nath. On the other hand, it is pleaded by Manmal that despite assurances, Tarak Nath failed and neglected to grant tenancy to Manmal of the adjoining vacant land, although Tarak Nath was agreeable to Manmal''s continuing occupation as a monthly tenant (page 23 Part-I PB 88/90). It is also never pleaded either by BBL or by Manmal that even symbolic possession was taken by Tarak Nath and delivered to Manmal. The question of cessation of tenancy and creation of a new tenancy is dependent on facts. Admittedly, Manmal was occupying the suit premises as a Director of BBL allegedly till June 1974 as the case has been made out both by BBL and Manmal and he

continued to occupy the premises from 1st July, 1974 on the alleged creation of tenancy in his favour. Therefore, there was no cessation of occupation by Manmal.

20. Thus, on these facts whether there could be a termination of the lease as alleged Mr. Das Gupta had relied on Section 111(h), Section 108(q) and Section 106 of the Transfer of Property. Act (TP Act) to contend that there was no termination of the lease by virtue of this letter.

21. Now let us examine-presuming (not accepting) that Ext. C was received by Tarak Nath. If it is presume to be received then whether there could be a presumption of termination of the lease by BBL. In order to find out as to whether there was a termination on the basis of Ext. C, we may refer to Section 106 of the TP Act, which provided for termination through notice. u/s 108, the lessee has certain rights and liabilities. Clause (q) provides that on the termination of the lease, the lessee is bound to put the lessor to possession of the property. u/s 111(h), a lease of immovable property determines on the expiration of the notice to determine the lease or to quit or of intention to quit the property lease duly given by one party to the other. A notice to determine a lease u/s 111(h) takes effect even though the party receiving it may not accept the determination.

22. In Pandit Kishan Lal Vs. Ganpat Ram Khosla and Another, , the Apex Court had held that a tenant does not absolve himself from the obligations of his tenancy by intimating, that as from a particular date, he will cease to be in occupation under the landlord and that some one else whom the landlord is not willing to accept will be the tenant. It is one of the obligations of the contract of tenancy that the tenant will, on determination of the tenancy, put the landlord in possession of the property demised. Unless possession is delivered to the landlord before the expiry of the period of the requisite notice, the tenant continues to hold the premises during the period as tenant. Mere assignment'' of right the tenancy of the lessee would not cease.

23. Mr. Bachawat, however, distinguished between termination and surrender. In this case Mr. Bachawat contended that the lease was determined. He has not espoused the case of surrender by BBL. In the present case, BBL purported to terminate the tenancy pointing out that Tarak Nath should take possession thereof and in default the tenancy shall deem to have been terminated. But the fact remains that the premises was taken on lease by BBL for the residence of Manmal, one of its Directors, While terminating the tenancy on the ground that Manmal has resigned as Director, BBL informed Manmal that he may negotiate with the landlord if required directly. The said notice did not specify any date, time and place for delivery of possession to Tarak Nath. Ext. G never asked Manmal to vacate or deliver possession to Tarak Nath. On the other hand, it had asked Manmal to negotiate with Tarak Nath. The advice to Manmal to negotiate indicates that BBL endorsed continued possession of Manmal for creation of tenancy in the latter''s favour. Therefore, the said letter does not make out an intention on the part of the BBL to

terminate the tenancy with an intention to deliver the possession. In fact, it had purported to assign the tenancy in favour of Manmal. Therefore, if we construe this notice then we may feel that it is not really a notice of termination but a notice intended to create a tenancy in favour of Manmal. This is further supported by the fact that BBL took the tenancy for the residence of Manmal and intended Manmal to continue. Thus, in our view, it does not satisfy the test of a notice terminating the tenancy when BBL was obliged to deliver vacant possession not only u/s 111(h) but also by reason of the terms contained in the Deed of Lease itself. Therefore, by reason of the said notice, the lease cannot be presumed to be determined.

24. In The Calcutta Credit Corporation Ltd., and Another Vs. Happy Homes (P) Ltd., , it was held that a tenancy is determined by service of the notice in the manner prescribed by Section 111(h) read with Section 106 of the TP Act. If the notice is duly given, the tenancy stands terminated on the expiry of the period of tenancy. Even if the party served with the notice does not assent thereto, the notice takes effect. In order to determine tenancy at the instance of the tenant, there need not be actual delivery of possession before tenancy is effectively determined. But this case is distinguishable on facts in the present case since there the tenant itself had continued in possession. Whereas, in the present case, some one else was attempted to be brought into the shoes of the tenant. There is nothing to show such a consequence was accepted by Tarak Nath. We will, however, discuss about the question of payment of rent by BBL at a later stage in order to appreciate the extent of creation of tenancy in favour of Manmal.

25. The decision in Gandavalla Munuswamy Vs. Marugu Muniramiah, , does not help us. Inasmuch as it dealt with the case of surrender not with determination of lease. Mr. Bachawat never pleaded surrender. He struck to his case of determination of the lease.

26. At the same time, we may examine the evidence of DW 1 with regard to the termination of the lease. Tarak Nath denied the receipt of Ext. C and his signature on Ext. B the acknowledgment card. DW 1, however, identified Tarak Nath''s signature on the AD slip, Ext. B and says this was also prepared in his office in his presence, With regard to the termination of the lease, it is stated by DW 2 that the factum of taking lease can be found in the minute book of the company meetings, hut there may not he any note regarding termination of the lease. He also admitted that "we do not maintain registers of letters received and letter issued by the company. Nor do we keep any note of the letters received by the company or that had been issued by the company except that we had retained the copy of the letter Ext. C in our office We have no other document to show that such a letter dated 18th April, 1974 had at all been sent by the company to the plaintiff. I did not myself post the registered letter in the post office. Nor did we maintain any note in the company register that such a letter had been posted to the person concerned. We have not filed the postal receipt in the suit to show that letter Ext. C had really been sent by

registered post. I was not present when the registered letter was delivered to the plaintiff and on receipt of which he had signed the AD slip Ext. B. We did not record anything in writing in our office document that the lease had duly been surrendered and possession had been delivered. Excepting that our account book show cessation of payment of rent regarding the suit property (leasehold), we, have nothing to show that really the lease had been surrendered and possession had been delivered. Regarding the termination of the lease, no separate registered document came into existence. We did not receive anything in writing from the plaintiff that there had been termination of the lease. Although I had not personally seen possession being handed over to Mr. Tarak Nath Sha, I assert that he had obtained possession. It is not a fact that the company Bhutoria Brothers Pvt. Ltd. continued to possess the suit property till the lease had been terminated by efflux of time. I have no personal knowledge if any electric meter stands in the name of M/s. Bhutoria Brothers Pvt. Ltd. in respect of the suit premises. I did not check up any official record if any electric bill was still being paid by M/s. Bhutoria Brothers Pvt. Ltd. for the suit premises" (pages 74-76 Part-I PB 87/90).

27. The covenant between the parties contained in the deed in relation to determination of lease provided in Clause 5 at page 29 Part-I PB 87/90 runs as follows :

"(5) And will at the expiration or sooner determination of the said term peaceably and quietly yield and delivered up vacant possession of the said demised premises together with all fixtures and fittings to the lessor in as good a condition as the same now save reasonable wear and tear, damage by fire (not caused by the lessee its agents or workmen) earthquake tempest mobviolence Act of God or other irreparable force beyond the control of the lessee only excepted;"

and in Clause (III)(iii) at page 36 Part-I PB 87/90 runs thus :

"(iii) Notwithstanding the term hereby reserved the lessee may terminate the lease at any time after the expiry of one year from the commencement hereof by first giving to the lessor two calendar months'' notice in writing according to English calendar and the lessor shall accept such notice or two months'' rent in lieu of such notice for the determination of the lease provided always that the lessee shall have paid, fulfilled, observed and performed the covenants and conditions hereinbefore reserved and on the part of lessee to be paid, fulfilled, observed and performed provided the lessee will not be entitled to exercise such option unless the lessee surrenders the demise in respect of the said demised premises. It is mutually agreed by and between the parties that the surrender of the demise to be operative must be in respect of the demised premises."

28. The covenants contained in those two clauses oblige the lessee to deliver vacant possession on expiry or sooner determination of the lease. The right to determine the lease is subject to the fulfillment of the conditions contained in the covenants

pre-supposing yielding of vacant possession. The proof with regard to the delivery of possession does not seem to indicate that any Court could come to a conclusion on the basis thereof to hold that BBL had delivered possession to Tarak Nath. Having regard to sections 111(h) and 108(q) of the TP Act read with the covenants referred to above, in the facts and circumstances of this case would not support determination of lease as sought to be contended by BBL.

29. We, therefore, are of the opinion that the lease of BBL was not terminated by the alleged Ext. C, which is shrouded by doubts as discussed above. Creation of tenancy in favour of Manmal:

30. Unless there is a determination of this lease, there is no scope for creation of any tenancy. Now even on the basis of this Ext. C, it is very difficult to presume termination since the service of the notice has not been proved, the signature on the acknowledgment card has not been admitted. There is nothing to establish nexus between the Ext. B and Ext. C. That apart, Tarak Nath had produced Ext. 3 series, which are copies of rent receipts for the month of December, 1963 continuously till December, 1983. The Court had come to a finding that these copies are same as with the admitted rent receipts produced by BBL being Ext. A and Ext. A(1). The Court has disbelieved the genuineness of these receipts alleged to have been prepared in one sitting for genuineness of these receipts alleged to have been prepared in one sitting for the purpose of the suit. BBL produced only two receipts and when the question was put in the cross-examination, it has contended that it had destroyed the receipts. It did neither produce its accounts to show that rent was never paid. There was nothing to prevent BBL to produce the accounts to show that the rent was not paid after June, 1974. We have also examined the Ext. 3 series, which do not differ from Exts. A(1) and A(2), as rightly found by the Court below. These are all carbon copies, which resemble that of Exts. A(1) and A(2). We do not find any reason to support the finding of the learned Trial Court that these receipts were prepared in one sitting. The learned Court had found creation of tenancy on the basis of Exts. 2(h) and 2(e) (240/84) in favour of BBL. Exts. 2(h) and 2(e) are letters requesting Tarak Nath to effect repairs. Since Manmal was occupying under BBL, therefore, his possession may not be in dispute and he can very well ask for repairs directly. But then this letter would not be a clear proof of creation of tenancy in favour of Manmal. Manmal is attempting to claim creation of tenancy. Unless he is able to establish creation of a tenancy, he cannot succeed in his suit Title Suit No. 240 of 1984. Unless a creation of tenancy is established, the determination of the lease cannot be presumed. In the absence of any material that a new tenancy is created in favour of Manmal, the determination of lease cannot be presumed.

31. In order to establish creation of a tenancy as contended on behalf of Manmal, we are to examine the materials on record. The tenancy claimed to be one under the WBPT Act. Manmal has alleged creation of tenancy in respect of the suit premises along with the adjoining vacant land. But this vacant land was never given

possession to him. At the same time, he claimed to have paid @ Rs. 1,100/- per month by cash. It is his further case that no receipt was ever granted in his favour. Unless a receipt is produced, the creation of tenancy under WBPT Act cannot be presumed. The continuation of possession can at best be treated to be that of a licence and nothing more than that.

32. Section 25 of the WBPT Act entitles a tenant to obtain from the landlord or his authorized agent a written receipt for the amount paid as rent by him. If the landlord or his authorized agent refuses or neglects to deliver the receipt to the tenant for any rent paid, then the tenant has a right to apply to the Controller within two months from the date of payment for a certificate in respect of the rent paid. Upon such an application, the Controller after hearing landlord or his authorized agent by order shall direct the landlord or his authorized agent to pay the tenant by way of damages such sum not exceeding double the amount of rent paid by the tenant and the costs of the application. The Controller shall also grant a certificate to the tenant in respect of the rent paid. Section 25 casts an imperative obligation on the landlord to grant rent receipt whenever rent is paid by the tenant. Refusal or negligence to grant such receipt obliges the landlord to pay to the tenant damages not exceeding double the amount of rent paid by the tenant. It also makes the tenant entitled to a certificate from the Controller in respect of the rent paid. However, this is to be done on the basis of an application and after giving hearing to the landlord and such application is to be made within the period limited. However, if receipt is not granted when rent is sent by money-order, this Section 25 may not apply as was held in Jamnadas Srinivas Co. v. Mathuradas Jadavji Gudgud, 65 Cal WN 1025.

33. Thus, if upon payment of rent the receipt is not granted, two options were open to the tenant. One for seeking aid of Section 25, WBPT Act and the other to send the rent by postal money-order. Manmal in this case has not resorted to either of it. On the other hand, Ext. 2 (page 4 Part-II PB 88/90) dated 2nd July, 1974 issued by Manmal proceeds to record that as per discussion held with Tarak Nath pursuant to the notice served by BBL, Tarak Nath had agreed to allow Manmal to occupy the suit premises along with the adjoining vacant land at a rent of Rs. 1,100A as a monthly tenant with effect from 1st July, 1974, and requested to acknowledge receipt and confirm the same at the earliest. Admittedly, there was no confirmation from the end of Tarak Nath. Ext. 2(a) (page 6 Part-II PB 88/90) a letter dated 30th July, 1981 from Manmal to Tarak Nath records that Tarak Nath had neither confirmed Manmal''s letter dated July 2, 1974 or of the tenancy nor issued rent receipt for the rent paid upto that date. He had said nothing else in the said letter with regard to payment of rent, however, he made once again in request to issue the rent receipts immediately. At the same time, it may be noted that Manmal had never attempted to assert the dates when such payments were made nor the period for which rents were paid. There is nothing on record to support Manmal''s assertion of payment of rent except his oral testimony and these two exhibits. Ext. 2(b) (page 8 Part-II PB

88/90) is a letter dated 28th April, 1983 requesting Tarak Nath to look into the leakage of the roof of the said premises. Ext. 2(c) (page 9 Part II PB 88/90) dated 7th June, 1983 records thanks for bringing the masson (mistry) for repairing the roof and requesting him to complete the job before monsoon and had also expresses sorrow due to delay in payment of rent. But no reply is alleged by Manmal to have been given by Tarak Nath to him. Tarak Nath also did not give any reply. Even if it is shown that these letters were received by Tarak Nath that will not improve the case of Manmal with regard to establishment of creation of tenancy in his favour. Ext. 2(d) is a letter dated 23rd June, 1983 requesting the Post Master General to confirm the delivery of Ext. 2(c). Ext, 2(e) is a letter from Post Master General confirming delivery of Ext. 2(c), however, regretting loss of AD Card in transit. Ext. 2(f) (page 13 Part-II PB 88/90) dated October 20, 1983 conveyed Vijaya Greetings and informed the damaged condition of the bathroom. In the said letter a request was made to accept the rent by cheque instead of cash. Ext. 2(g) (page 14 Part-11 PB 88/90) is a letter addressed to the Post Master, Hastings Post Office for confirmation of delivery of Ext. (f). Ext. 2(h) (page 15 Part-II PB 88/ 90) from the Post Master confirmed delivery of Ext. (f) while regretting loss of AD Card in transit. Ext. 2(i) (page 16 Part-II PB 88/90) is a letter by Manmal to Tarak Nath issued on 9th February, 1984 expressing his surprise about the notice to quit issued by Tarak Nath to BBL and proposed to narrate the facts that the lease granted on 23rd March, 1963 stood terminated by a notice dated 18th April, 1974 with the expiry of June 1974 and that Manmal had entered into a negotiation to Tarak Nath and continued occupation at a rent of Rs. 1,100/- per month that for the last ten years Tarak Nath did not grant receipt for rent paid and he conceded to the same since this was also the practice with BBL and, therefore, omission to grant receipt was not made an issue. In fact, this letter contradicts the stand taken by BBL, which admits grant of receipt and had also produced two receipts Exts. A and A(1) (page 29-30 Part-II PB 87/90). At the same time, DW 1 in T.S. 812 of 1984 had admitted that so long the lease continued, Tarak Nath used to come to office of BBL with typed rent receipt and on acceptance of rent from cashier used to grant the rent receipt to the cashier after putting his signature thereon. The last rent receipt was granted for the month of March 1974. That the rent receipts Exts. A and A(1) correspond to the Ext. 3 series for the month of February, 1974 and March, 1974. He did not deny that the other rent receipts in Ext. 3 series were copies of the rent receipts granted to BBL. He only pleaded ignorance with the expression "can''t say if these are really copies of rent receipt granted" to BBL. He further stated that the rent receipts received by the company along with payment voucher are destroyed after expiry of eight years and as such the earlier rent receipts could not be produced. Tarak Nath''s going to the office and collecting rent by signing receipt is corroborated by Tarak Nath in his cross-examination. However, Exts. A and A(1) were preserved since those were considered important. Exts. A and A(1) will not show termination of the lease. Therefore, it is not possible to place reliance on these documents that Manmal would not take any steps for omission to grant rent receipt despite payment for this

long ten years and even after 1981 [Ext. 2(a)].

34. From these evidences on record, it is not possible to hold that there was a creation of tenancy in favour of Manmal. The finding of the learned Trial Court on the basis of Exts. 2(e) and 2(h) about the creation of tenancy appears to be wholly perverse. Receipt of Ext. 2(c) or Ext. 2(f) would not prove creation of tenancy in view of Section 25 of the WBPT Act without which no tenancy could be established. Having regard to the facts and circumstances of the present case, the creation of tenancy in favour of Manmal could not be established. It appears that the DW-1 (TS 812/84) had avoided answering many questions which could have clinched the issue. Continuation of the lease :

35. In view of the foregoing reason, it is clear that the lease continued till it expired by efflux of time.

36. In these circumstances, both these appeals succeed. The judgment and decree in Title Suit No. 812 of 1984 and Title Suit No, 240 of 1984 dated 6th October, 1989 passed by the learned Chief Judge, City Civil Court, Calcutta appealed against are hereby set aside. Title Suit No. 812 of 1984 is hereby decreed. The Title Suit No. 240 of 1984 is hereby dismissed. The Title Suit No. 812 of 1984 is hereby decreed. The plaintiff/appellant in F.A. No. 87 of 1990 shall be entitled to a decree in terms of prayers (a), (b) and (c) of the plaint in Title Suit No. 812 of 1984.

37. These appeals are, thus, allowed. There will, however, be no order as to costs.

R. N. Sinha, J.

38. I agree.