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**(1975) 07 CAL CK 0022**

**Calcutta High Court**

**Case No:** Appeal from Original Decree No. 897 of 1968

Tarapada Das

APPELLANT

Vs

Satindra Nath Nandy

RESPONDENT

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**Date of Decision:** July 15, 1975

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 111

**Citation:** (1976) 2 ILR (Cal) 154

**Hon'ble Judges:** Sharma, J; M.M. Dutt, J

**Bench:** Division Bench

**Advocate:** Manindra Nath Ghose and Jamini Kumar Banerjee, for the Appellant; Pramatha Nath Mitter, Barun Kumar Roy Choudhury and Samar Kumar Rudra, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

M.M. Dutt, J.

This appeal is at the instance of the Defendant and it arises out of a suit for declaration, eviction of the Defendant, recovery of mesne profits, in the alternative, for arrears of rent.

2. The facts which are involved in this case are more or less admitted and they may be stated as follows:

One Baruneswar Banerjee and his brother Kasiswar Banerjee, since deceased, were the owners of the municipal holdings Nos. 13, 13/1, 15, 16, 17, 18 and 19, Izzatulla Lane, usually known as premises No. 1, Izzatulla Lane, Tollygunge, Calcutta, consisting of buildings, shop-rooms and a cinema house known as Pradip Talkies. Baruneswar and Kasiswar let out the said Pradip Talkies to the Defendant at a monthly rent of Rs. 450 which was subsequently reduced to Rs. 270. Baruneswar died sometime in the month of February 1950. In or about 1953, his heirs instituted a suit being T.S. No. 66 of 1953 in the Court of the Third Subordinate Judge, Alipore, for partition of the said premises. During the pendency of the said suit Kasiswar

granted a lease of his undivided half share in the said premises No. 1, Izzatulla Lane including the half share of the cinema house to the Defendant at a monthly rent of Rs. 208 by a registered deed of lease dated February 10, 1954, for a term of 30 years with effect from February 1, 1954, with an option of renewal for a further term of 10 years. Ultimately, final decree was passed in the said partition suit on May 7, 1956. The western portion of the said premises consisting of the said cinema building, shop-rooms etc. was allotted to Kasiswar in respect of his half share in the premises. It may be stated here that, till before the final decree in the partition suit, Kasiswar was realising rent at the rate of Rs. 208 per month under the said registered lease in respect of his undivided half share and he was also realising a sum of Rs. 135 which was payable to Baiuneswar or his heirs in respect of the said monthly tenancy. Kasiswar died on March 11, 1959 and his interest in the property was inherited by his widow Sm. Abirbala as his sole heiress. By three deeds of transfer, two executed on May 15, 1961 and the third one on July 4, 1962, Abirbala assigned her interest in the suit premises, that is, in the portion allotted to Kasiswar under the partition decree, which is the subject-matter of the registered lease dated February 10, 1954, to the Plaintiff. She also assigned to the purchaser, namely the Plaintiff, the arrears of rents due from the Defendant from October 1960.

3. In the instant suit, which has been filed by the Plaintiff, his case is that the registered lease dated February 10, 1954, executed by Kasiswar in favour of the Defendant is void; that the said monthly tenancy created by Baruneswar and Kasiswar has been existing; and that he is entitled to realise arrears of rents from the Defendant at the rate of Rs. 270 per month with effect from October 1960. Alternatively, it is his case that if the said registered lease is found to be valid and binding upon the Plaintiff, then by virtue of the allotment of the entire 16 annas share in the said Pradip Talkies to Kasiswar, he became entitled to payment of the sum of Rs. 135 which was payable by the Defendant to the heirs of Baruneswar in respect of their half share in the said Pradip Talkies besides the stipulated sum of Rs. 208 per month to which Kasiswar was entitled. Accordingly, as an alternative case he has prayed for recovery of the arrears of rent at the rate of Rs. 343 per month with effect from October 1960 to October 1962. It has been alleged by him that he has terminated the lease of the Defendant by the service of a notice to quit and he has claimed eviction of the Defendant from the suit premises on the ground that he is a defaulter in payment of rent. He has also claimed mesne profits at the rate of Rs. 270 per month with effect from September 1962 till recovery of khas possession.

4. The Defendant entered appearance in the suit and contested the same. He has denied the Plaintiff's claim for recovery of arrears of rent either at the rate of Rs. 270 per month or at the rate of Rs. 343 per month. He has also denied that the lease dated February 10, 1954, is a void lease, but it has been asserted by him that it is quite legal and valid. According to him, the Plaintiff is only entitled to realise rent from him at the rate of Rs. 208 per month, as stipulated in the registered lease,

which is the only existing lease.

5. The learned Subordinate Judge came to the finding that the lease dated February 10, 1954, was a valid lease. He took the view that the said lease was in respect of the reversion of one half share of Kasiswar in the suit premises and that the monthly tenancy was neither extinguished nor was it surrendered. He held that even after the allotment of the suit premises to Kasiswar in respect of his half share in the suit premises, the position remained unchanged and he became entitled to realise rent at the rate of Rs. 208 per month on account of the registered lease dated February 10, 1954, which was a lease of his reversion and Rs. 135 per month as the share of rent of the monthly tenancy to which he became entitled after the said allotment in his favour in the partition suit. He, however, overruled the claim of the Plaintiff for eviction of the Defendant from the suit premises on the ground that the lease was for at term and that mere non-payment of rent did not entitle the landlord to determine the lease by service of a notice to quit. In that view of the matter, he disallowed the claim of the Plaintiff for mesne profits but, instead, he allowed the prayer of the Plaintiff for recover) of arrears of rent for the period after the suit. Upon the said findings he decreed the suit in part for recover) of arrears of rent from October 1960 till August 1962 at the rate of Rs. 208 per month and also for arrears of rent at the rate of Rs. 135 per month from July 4, 1962, till August 1962. Further, he decreed the suit for arrears of rent in lieu of mesne profits from September 1962 till December 1962 at the rate of Rs. 208 plus Rs. 135 per month. Hence this appeal by the Defendant.

6. On behalf of the Defendant Appellant it has been contended before us that after the final decree and the allotment of a specific portion of the said premises including the cinema building, shop-rooms etc. to Kasiswar in lieu of his half share in the said premises, the monthly tenancy came to an end and that, accordingly, the plain-till is not entitled to realise rent either at the rate of Rs. 270 per month or claim half the said amount on account of the share of Baruneswar. It is argued that after the partition decree the right of Baruneswar or his heirs to the half share of rent payable in respect of the monthly tenancy did not vest in Kasiswar but, as contended, the monthly tenancy itself terminated. On the other hand, Mr. Mitter, the learned Advocate appearing on behalf of the Plaintiff Respondent, has urged that the monthly tenancy never came to an end. It is contended by him that the lease, which was granted by Kasiswar in favour of the Defendant, was a lease of his reversion. According to him, it is a concurrent lease which Kasiswar was entitled to rant and that Such concurrent lease did not have the effect of extinguishing the monthly tenancy which was created before. In support of his contention he has placed strong reliance on a Bench decision of this Court consisting of Sir Asutosh Mookerjee and Buckland JJ. in Johar Mull Bhutra and Ors. v. Jatindra Nath Bose and Ors. 34 C.L.J. 79. Sir Asutosh Mookerjee, who delivered the judgment of the Bench, laid down the following principles of law after considering the previous decisions on the point:

Indeed, it is now settled law that if, after a lease has been granted, another lease of the same premises is granted, the term being concurrent with that of the existing lease, the concurrent lease, provided it is made by deed, operates as a grant of the reversion upon the existing term. If the concurrent term is equal to or exceeds the residue of the existing term, the concurrent lessee is entitled to the rent for the whole of such residue and afterwards to possession for the remainder, if any, of his own term; if the concurrent term is less than the existing term, the concurrent lessee is entitled to the rent during his own term; *Neale v. Mackenzie* (1836) 1 M. and W. 747. The principles thus expounded and applied justify the inference that a landlord who has created a tenancy is still competent to carve out another tenancy from the interest he has reserved and interpose the same between himself and his first tenant, subject to the qualification that he cannot thereby prejudice the position of the first tenant, take away or destroy the value or effect of the prior interest transferred, or, limit its extent or restrain its operation for the maxim applies that no man can derogate from his own grant, which has sometimes been regarded as in essence a formulation of a principle of estoppel.

7. There can be no doubt that a landlord can create an intermediate estate between himself and the existing lessee in respect of the identical subject-matter by granting a lease of his reversion to another. The interposition of another lessee in between himself and the existing lessee does not terminate the original lease nor does the same prejudice in any manner whatever the rights of the original lessee. The above principles of law which have been laid down by Sir Asutosh Mookerjee J. are well-settled. But, in our view, the same are inapplicable to the facts and circumstances of the instant case. It cannot be conceived that a concurrent lease may be granted to the existing lessee in respect of the identical subject-matter. No authority has been cited before us on behalf of the Respondent to show that any such lease can be granted to the existing lessee or that when such a lease is granted, it will be a case of interposition of an intermediate estate between the landlord and the existing lessee. In our opinion, a concurrent lease which is a lease of the reversion of the landlord can be granted in favour of a person other than the existing lessee. If the proposition of law as advanced by Mr. Mitter is accepted, in that case the theory of implied surrender of lease, as embodied in Clause (f) of Section 111 of the Transfer of Property Act, will have to be given a go-by. It is now well-settled that when a landlord grants a lease of the same property to the same lessee, the original lease will, by operation of law, be deemed to have been surrendered by the lessee and he will become the lessee under the landlord by virtue of the new lease. The doctrine of implied surrender, when a new lease is granted to the same lessee, is based on the doctrine of estoppel. During the continuance of a lease the landlord is not entitled to grant a fresh lease to the same person and in such a case he must be taken to have accepted the surrender of the lease. He cannot deny the fact of surrender, for he is the grantor of the fresh lease nor can the tenant deny the same as he is a party to the grant of the new lease. The

lease which was granted by Kasiswar on February 10, 1954, to the Defendant is not, in our opinion, a lease of the reversion of Kasiswar, but it is a case of surrender of the monthly tenancy in respect of the half share of Kasiswar in the said tenancy. It is however, contended that the implied surrender, in order to be effective, must be of the entire lease and cannot be of a part of it. Our attention has been drawn to the illustration under Clause (f) of Section 111 of the Transfer of Property Act, which is as follows:

A lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the existing lease. This is an implied surrender of the former lease and such lease determines thereupon.

The illustration does not refer to the surrender of a part of the leasehold interest. On the contrary, it shows the surrender of the whole. We do not think that the view which we have taken militates against the law embodied in Clause (f) of Section 111 or as illustrated in the illustration quoted above. The lease dated February 10, 1954, was in respect of the entire share of Kasiswar in the said premises and by the granting of such a lease the entire share which Kasiswar had in the monthly tenancy was surrendered impliedly. It is also well-known that there can be a lease of a share and consequently, there can be the termination of such a lease according to the modes prescribed by Section 111 of the Transfer of Property Act. One of the modes is implied surrender and in our view, the interest of the Defendant in the monthly tenancy, so far as the share of Kasiswar concerned, was surrendered. One of the principles of implied surrender in such cases is that the two relationships are so incompatible that they cannot co-exist. Kasiswar's interest in the monthly tenancy and the new lease which he created by the registered lease dated February 10, 1954, were so incompatible and repugnant to each other that both could not co-exist. Accordingly, we are unable to accept the contention of the Respondent that in spite of the grant of a fresh lease on February 10, 1954, the monthly tenancy in respect of the share of Kasiswar in the cinema building continued.

8. The position before the passing of the final decree in the partition suit was different from the position after the final decree. Before the final decree the monthly tenancy in respect of the half share of Kasiswar in the cinema building was determined by implied surrender by the new lease. The same, however, continued in respect of the share of Baruneswar. It is in evidence that the lessee paid the sum of Rs. 208 on account of the new lease and also the half share of the rent of the monthly tenancy, that is, the sum of Rs. 135 payable to Baruneswar or his heirs. But, after the final decree the position changed. The undivided half share of Kasiswar in the whole of the said premises No. 1, Izzatulla Lane was specified and demarcated into a specific portion by metes and bounds consisting of the cinema building, shop-rooms etc., as allotted in the partition decree on the basis of the report of the Commissioner for Partition and as delineated in the Commissioner's plan, which is a part of the decree. The Defendant, however, did not get anything more than the

said half share of Kasiswar in respect of which he was already a lessee under him under the said lease dated February 10, 1954. All that was done was that instead of the undivided half share in the whole of the premises, he got a specific portion in lieu thereof as the subject-matter of his lease. He was, however, deprived of the half share of Baruneswar in the cinema building. The said half share was shifted to and fixed, on a specific portion of the eastern part of the said premises. He lost his title to the portion which was allotted to Kasiswar. We are unable to accept the contention of Mr. Mitter that Baruneswar's interest in the half portion of the cinema building vested in Kasiswar as he was allotted the whole of it. This contention, in our opinion, has no foundation whatsoever, for, as stated already, Baruneswar was allotted the property on the eastern part of the premises in lieu of his half share. As a result of such allotment, there was cesser of his title and the lease of the Defendant in respect of Baruneswar's half share in the cinema building terminated in view of Clause (c) of Section 111 of the Transfer of Property Act which provided that a lease of immovable property determines where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event--by the happening of such event. As the interest of Baruneswar in the half portion of the cinema building ceased, the lease in respect of that portion consequently terminated. Therefore, the only lease which remained to be effective and operative is the lease dated February 10, 1954, reserving a monthly rent of Rs. 208 and payable to Kasiswar.

9. Of the three deeds by which Sm. Abirbala assigned her interest in the suit premises to the Plaintiff, Ex. 5 is relevant for our purpose. It provides, inter alia, that the assignor doth hereby grant transfer convey and assign upto the assignee all and singular the assignor's rights title interest benefit claim and demands whatsoever under the said lease dated February 10, 1954, including all arrears of rent due from the said lessee, Tarapada; Das, from October 1960. Nothing more has been assigned to the Plaintiff nor the assignor could grant him anything to which she was not entitled. On the date the deeds of assignments were executed, Abirbala, as the sole heiress of Kasiswar, had already inherited his interest in the portion allotted to him by the partition decree which, as discussed above, is the subject-matter of only one lease, namely, the said registered lease dated February 10, 1954, in favour of the Defendant. The monthly tenancy having been long extinguished before the assignment, it had no existence and could not form the subject-matter of such assignment nor was any such assignment with regard to the rent of the said monthly tenancy made.

10. After considering the facts and circumstances of the case and the legal position referred to above, we are of the view that the Plaintiff was entitled to realise rent as reserved in the lease dated February 10, 1954, at the rate of Rs. 208 per month and not at any other rate. He is not entitled to claim the half share of the amount of rent in respect of the said monthly tenancy which stands extinguished after the final decree for partition.

11. It may be noticed at this stage that the finding of the learned Subordinate Judge that the registered lease dated February 10, 1954, is quite legal and valid, has not been challenged on behalf of the Respondent. The Respondent has not also challenged the decree disallowing the prayer for eviction of the Defendant from the suit premises.

12. Now, we may pass on to consider the contention of the Appellant that the Plaintiff was not entitled to recover future rents. There can be no doubt that the Plaintiff is entitled to recover arrears of rent from October 1960 till August 1962 which, admittedly, are due by the Defendant. The learned Subordinate Judge, however, granted a decree to the Plaintiff entitling him to recover arrears of rent which fell due during the pendency of the suit, in lieu of mesue profits, from September 1962 till December 1962 at the rate of Rs. 208 per month plus Rs. 135 per month. It has been already found that the Plaintiff cannot claim anything on account of the said monthly tenancy. But the question is whether he is entitled to recover future rents from September 1962 till December 1962 at the rate of Rs. 208 per month, as reserved in the lease dated February 10, 1954. Mr. Mitter has not been able to place before us any provision of law which entitles a landlord to recover future rents. It may be that the learned Subordinate Judge granted the said decree for recovery of future rents on equitable principles. But such principles, in our opinion, have no manner of application when the law does not permit one to recover future rents for the simple reason that on the date of the suit the same did not fall due and that, accordingly, no cause-of-action arose to the Plaintiff for recovery of future rents. Mr. Ghose, the learned Advocate appearing on behalf of the Defendant Appellant, has however assured us on instruction from his client that his client will pay the arrears of future rents, as decreed by the learned Subordinate Judge. But on a matter of principle he has urged that it was not proper for the learned Subordinate Judge to grant a decree which is invalid in law. In our opinion, there is considerable force in the said contention. The Plaintiff Respondent is not entitled to recover the arrears of future rents that fell due during the pendency of the suit and the decree granted by the learned Subordinate Judge in that regard must be set aside. No other point has been argued on behalf of the parties.

13. In the result, in lieu of the decree passed by the learned Subordinate Judge, the following decree is passed : The Plaintiff's suit is decreed in part. He will be entitled to recover arrears of rent at the rate of Rs. 208 per month from October 1960 upto August 1962. The other claims of the Plaintiff are disallowed.

14. The appeal is allowed to the extent indicated above. But, in view of the facts and circumstances of the case, we direct each party to bear his own costs both in this Court and in the Court below.

Sharma J.

15. I agree.