Transport Corporation of India Ltd. Vs Pratima Bose

Court: Calcutta High Court

Date of Decision: April 2, 2003

Acts Referred: Companies Act, 1956 â€" Section 575

Citation: 108 CWN 58

Hon'ble Judges: S.K. Gupta, J; Ajoy Nath Ray, J

Bench: Division Bench

Advocate: Jyotirmoy Bhatachariya and Aniruddha Chatterjee, for the Appellant;Sudhis Dasgupta and Amitava Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

Ajoy Nath Ray, J.
This is an application from a judgment and decree allowing the relief of eviction to the plaintiff/respondent as against the

appellant/defendant. The premises in question was occupied under a lease dated January 12. 1963. The further case of the plaintiff is that the lease

was for a period of 21 years, which expired in the month of January. 1984. Thereafter the defendant had no right to occupy; the lease period being

of not less than 20 years, the West Bengal Premises Tenancy Act, i.e. the Rent Control Law of our State, had no application; the suit was,

therefore, properly decreed.

2. The appellant, on the other hand, submitted that as early as in 1971 the ground floor of the premises in question, which was part of the property

demised under the written agreement, was surrendered. The original lessee was a partnership concern of the same name, T. C. I., as the appellant,

and it continued to occupy the first floor of the premises thereafter, being the balance of the demised property.

3. In 1976, the Firm T.C.I, ceased to exist and the appellant company T.C.I. Ltd. came into existence.

4. One of the main planks of the argument of the appellant was, that in 1976 the company became a tenant under the landlord afresh; that a

monthly tenancy arose with increased rent; that earlier Rs. 500/- was paid and in 1976 the rent was increased by Rs. 100/- and service charges

were also added; that the landlord had given no consent in writing for assignment, as required under the lease, for assignment by the partnership to

the company; that the original lease being a registered instrument, a substitution of the lessee or a substitution of the rent fixed could be effected, if

at all, only by another registered instrument and in no other manner.

5. The second defence of the appellant was the written lease mentions that it is a term of 21 years, yet, in mentioning the exact dates, it describes

the term as running from 12.1.1963 to 19.1.1983 and thus, the lease was in effect for 20 years only. A notice of 1982 was served by the

respondent asking the appellant to vacate in January 1983 in accordance with the shorter described term. As such, the appellant being nonetheless

allowed to stay in the premises upto January. 1984. accompanied by acceptance of monthly rent by the landlord, there arose a fresh monthly

tenancy as between the landlord and the tenant, by reason of the year long acceptance of monthly rent. According to the appellant the second

argument of fresh tenancy should succeed even if the first argument of fresh tenancy should fail.

6. On behalf of the respondent it was submitted that by means of a registered letter written immediately after the expiry of January 1983. the earlier

mistaken notice of 1982 was retracted. Although the defendant denied the receipt of this notice, such denial should not be placed any reliance

upon, because the notice was sent under registered post and not under a mere certificate of posting; due service should be presumed unless the

contrary can be sufficiently established by the defendant

7. It was also submitted very emphatically by the respondent that by a contemporaneous letter, written in 1976. which was duly exhibited, the

existence of the lease dated 12.1.1963 was affirmed on the part of the T.C.I. Ltd. i.e. the appellant and the rate of rent was increased with

reference to the said lease and not as a result of a completely separate negotiation, for creation of a fresh monthly tenancy.

8. Several cases were cited by Mr. Bhattacharya, learned counsel appearing for the appellant, and also by Mr. Dasgupta, learned counsel

appearing for the respondent

9. Some of those we shall deal with hereafter, but not all.

10. In disposing of this case, it should be borne in mind, that landlords and tenants in this State are generally aware that creation of a monthly

tenancy brings the tenant under the protection of the Rent Control Laws; when such protection is obtained by the tenant, eviction is not possible

excepting upon certain specified grounds. The other grounds permitted by the Transfer of Property Act are not available against a protected

statutory tenant.

11. Therefore, taking common sense view of the matter, and assuming that human conduct and business life proceed in the usual manner in

accordance with the ordinary motives of human character and preservation of self interest, it is quite proper for the commercial courts to assume,

that a monthly tenancy is not lightly agreed upon by the parties, because the landlord wishes to protect his interest; but of course, it can be proved

by the tenant positively, that the parties had actually agreed upon such monthly tenancy; the most ordinary form that this proof takes, is the

production of a genuinely executed monthly rent receipt by the tenant bearing the signature of the landlord.

12. Bearing the above in mind, we proceed to discuss the rest of the case.

13. Mr. B. Bhattacharya argued on the basis of the case reported at Sunil Kumar Roy Vs. Bhowra Kankanee Collieries Ltd. and Others, , that if a

rate of rent is fixed in a registered instrument of lease, it can be altered only by another registered instrument. In this case, as against an assignee of

the term, the lessor was unable to recover the enhanced rate of rent, because the enhancement was not made by way of a registered agreement in

variation.

14. Mr. Dasgupta submitted in this regard that it is the standard law that ordinarily variation of rent only does not mean that the lease itself is

altered. Amongst other authorities, he cited 27(1) Halsbury 529. The said paragraph is set out hereinabove:

529. Variation of terms of leases. Where the terms of the relationship between the landlord and the tenant are altered by agreement, it is

necessary to decide whether the alteration amounts to the creation of a new tenancy upon the altered terms, and thus of necessity the surrender by

operation of law of the previous tenancy, or whether the alteration merely continues the previous tenancy in a varied form. Certain agreed

alterations necessarily involve the surrender of the previous tenancy and its replacement by a new tenancy. The only way in which new land may be

added to the demised premises is by the process of surrender by operation of law of the old lease and the grant of a new lease to include both the

old and the new premises. Equally the duration of a lease can be extended only by the surrender of the existing lease and its replacement by a new

lease for the longer term. As matter of law the parties can achieve this intention only by the fiction of a surrender and re-grant.

Other agreed alterations do not necessarily involve a surrender and re-grant. If the ""parties wish, they may increase the rent payable under a

tenancy without creating a new tenancy and the old tenancy continues at the increased rent. The rent may be reduced in the same way. Other

minor variations may be effected without a surrender and re-grant. Where the agreement between the parties does not affect the terms of an

existing tenancy, there is no reason to imply a surrender and re-grant. Where, however, the parties intend that their altered relationship is to amount

to a new tenancy, there will be a surrender of the previous tenancy.

15. Mr. Dasgupta also gave the case of Goppulal Vs. Thakurji Shriji Shriji Dwarakadheeshji and Another, and placed paragraph 5 from that

judgement. A part of the said paragraph is set out hereinbelow:

A mere increase or reduction of rent does not necessarily import. the surrender of the existing lease and the grant of a new tenancy. As stated in

Hill and Redman''s Law of Landlord and Tenant, 14th Edn. Article 385 p-493 :

''But a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, unless there is some special

reason to infer a new tenancy, where, for instance, the parties made the change in the rent in the belief that the old tenancy is at an end.''****

16. In our opinion, the rate of rent is an essential term of a lease; without such a term finally fixed, a lease cannot come into existence. The above

case given by Mr. Bhattacharya is an authority for this proposition. A variation of the rate of rent fixed by a registered instrument, so as to bind

even an unknowing succeeding third party assignee, must also be made by another registered instrument. But if a landlord and a tenant operating

under a registered lease change the rate of rent by an unregistered instrument or even by oral agreement, such change does not bring about an

alteration or a surrender of the lease. The term of years agreed is not touched by the change of rent or its amount. Even an oral change of rent is

enforceable against the tenant himself who has agreed to such change, because he is bound under the later parole contract, which binds him just as

much as the registered instrument. The case of a third party assignee is different.

17. Thus, in our opinion, the change or enhancement of rent, or the addition of service charges, does not alter the lease or cause its surrender to be

made, or bring about a fresh tenancy by payment by the appellant and acceptance of the enhanced amount of rent by the respondent.

18. Mr. Bhattacharya also argued that the name of the T.C.I. Limited i.e. the appellant, was never substituted for the name of the partnership in the

registered Indenture of Lease dated the 12th January. 1963. According to him. this meant that the appellant was not holding the first-floor of the

premises under the lease. If the appellant was not the lessee it could not be holding under that lease. The logical next step would be that the

appellant was possessing the premises on payment of the monthly charge as monthly rent and this was being accepted by the respondent month by

month and year after year. Mr. Bhattacharya''s case was that ""a registered instrument can be varied by another registered instrument only, and

what he said in regard to the above Supreme Court case about change of rent is applicable, with even greater strength, to this part of his case,

which concerns the name of the very lessee itself.

19. Mr. Dasgupta, replying to this part of the argument relied heavily upon a letter written on behalf of the appellant dated the 1st of December,

1976.

20. He showed us from that letter that the company had stated as follows:

Be it noted that we shall remain responsible for payment of rent and other liabilities as provided in the Deed of Lease.

21. He argued that the company itself affirmed its position as a lessee under the said lease. As regard the necessity of a registered instrument, he

submitted on the authority of the case of Vali Pathabhi, reported at 60 Comp Cases 568 . alternatively at Vali Pattabhirama Rao and Another Vs.

Sri Ramanuja Ginning and Rice Factory P. Ltd. and Others, , (a Division Bench judgment of the Andhra Pradesh High Court) that in case of

reconstitution of a firm as a company, the taking over of assets and liabilities under a registered deed to which the partnership was a party, by the

company itself, takes place by operation of law without the necessity of the preparation of a fresh deed.

22. The Kerala High Court relied in this regard upon Section 263 of the Indian Companies Act, 1913, corresponding to Section 575 of the

Companies Act, 1956 and opined as above. Mr. Bhattacharya sought to distinguish this case by showing that in the Andhra Pradesh case, there

was no clause requiring the consent of the landlord prior to assignment, as is provided for here, in our case. Thus, according to him, if the consent

of the landlord in writing is not there, and a writing is here required by the lease deed itself, no operation of any law can cause a valid assignment of

the unexpired term to be made in favour of the appellant from the original partnership.

23. Mr. Dasgupta also submitted, on the authority of Madras Bangalore case, reported at AIR 1986 Supreme Court, page 1564. that the

Company here is an alter ego of the partnership itself, which was converted into a Company. Such a conversion does not. according to the cited

case, constitute an authorized assignment or sub-letting contrary to the rent laws. Similarly, although the picture is slightly different, he submitted,

the reconstitution of the firm substitutes for itself the Company in the registered deed of lease, and no fresh deed is needed.

24. Mr. Dasgupta also submitted that, for a fresh lease or a fresh tenancy, a fresh agreement between the parties is necessary, that fresh agreement

is nowhere to be seen in the instant case. Never did the appellant surrender the old lease or say that it is deriving no rights from the old lease.

Never was another term of years or any other periodic tenancy agreed upon. There is no specific agreement to create, a monthly tenancy (here

please recall what we cited at the beginning of the judgment about a monthly tenancy being usually an anathema to the landlord). For the necessity

of fresh agreement, before a fresh lease can be said to have come into existence, he. gave us two cases of our High: Court, both Division Bench

decisions, being the case of Bhabatosh Ghattak Vs. Sm. Joy Kumari Devi and Others, and the case of J. Thomas, reported at 1998 (2) CHN

502.

25. As regards this part of the case we are in full agreement with Mr. Dasgupta that a fresh tenancy must be preceded by a fresh agreement. Once

this is conceded, the arguments made on behalf of the appellant on this score becomes of no importance. If there was a necessity of a registered

instrument for substituting the Company as the lessee, and even if the landlord gave no consent to such substitution, the result would merely be, that

the appellant would be left not even with the lease of 12th January, 1963 for validating and legalizing its continued possession. The appellant can

only succeed by showing that the parties have agreed to a fresh lease or a fresh relationship by way of entering into a new monthly tenancy. Short

of showing such agreement and consensus, the appellant''s arguments are of no avail; those merely become self-defeating by destroying even the

lease itself which the appellant had for protecting its possession upto 1983/1984.

26. It is our opinion that an agreement of tenancy cannot and does not arise as a matter of technicality. The ordinary rules which apply for

determining whether the parties have agreed and entered into a contract, equally apply in these circumstances. Unless parties can be demonstrated

to have been ad idem on the essential features of the agreement, there cannot be a new term, or a new tenancy. The essential features of a new

agreement in our case would include the following:

1. Whether the parties were surrendering or cancelling the unexpired term of the existing lease for the period subsequent to 1976,

2. Whether the parties were agreeing upon a fresh long term, or to have the rent control laws, or not.

3. Whether -the parties were entering into a monthly tenancy and thus coming under the West Bengal Premises Tenancy Act by shifting themselves

from the pure region of the Transfer of Property Act.

27. From the facts of this case a consensus of opinion or none of these three above points can be seen, let alone all three

28. Thus, there was no agreement for a fresh tenancy in 1976 consequent upon reconstitution of the firm. Even at the cost of repetition we say, that

though the protection of statutory tenancy might arise on a mere technicality, like the grant of a single simple rent receipt for one month only, yet the

agreement of tenancy, as far as the Transfer of Property Act is concerned, has to be adjudged on the broad aspects of the consensus of the

parties. The reason jar this is, that the transfer of property as per the Transfer of Property Act usually follows an agreement, but the raising of a

statutory tenancy follows certain events to which importance has been lent by the statute, irrespective of what parties might think according to their

ordinary common sense. The Transfer of Property Act proceeds on agreements, but the Rent Control Laws proceed on policy decisions.

29. In our opinion no fresh tenancy arose in 1976. As regards the second case of fresh tenancy arising after January 1983, Mr. Dasgupta

submitted that the respondent cannot be held to her mistake, which she made in the notice to quit served in 1982. We quite sgree. If the lease, on a

true construction, did not create after a term of 20 years, a letter by a party could not vary or alter the term of the registered lease, even if the letter

is written against one''s own interest.

30. To substantiate that the lease, on a true interpretation, created the larger term of 20, years, Mr. Dasgupta referred to the rule, commonly called

contra proferentum. The following short entry in Earl Jowitt''s Dictionary of English Law at page 447, might be read in this context:

Contra proferentem (against the party putting forward) interpreta, lion of a document in case of ambiguity against the party who drafted it or

whose document it is.

31. Mr. Dasgupta also gave up the Supreme Court case of Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and

Others, , for proposition that a grantor''s document is interpreted against him and in favour of the grantee. Paragraph 13 of the said judgment is set

out below:

But even here the rule has to be borne in mind that the document being the grantor''s document it has to be interpreted strictly against him and in

favour of the grantee.

32. It is an odd feature of this case that the lessee wished for a construction of a shorter term in favour of the lessee. If that construction is made,

the lessee has the balance year for showing that 12 monthly rents were accepted, thus raising a monthly tenancy. The respondent lessor also takes

upon herself the unusual job of showing that the lessor granted a larger term as per the true interpretation of the deed. If that larger term is

construed, then the lessor is relieved of the task of explaining the taking of any monthly payments beyond the fixed term.

33. This is an odd and reverse situation. The normal situation for which the above rules were formulated, were for the term or to make endeavour

for carving out a larger term for himself: and for the owner of the fee, usually the fee simple, to submit, that a lesser term has been carved out of his

fee.

34. But in our opinion the oddity of the case does not pervert the normal operation of these rules of construction, since Mr. Dasgupta''s client is the

grantor and since Mr. Dasgupta''s client seeks for eviction on the basis of the deed of lease which she ""prefers"" to the court as evidence of her

present right of re-entry. The deed must be construed against the lessor and be held to be a term for the larger period of 21 years.

35. The above rules of construction cannot get perverted and cannot be used by the lessee for the purpose of saying that the deed must be

construed'' in my favour, that in the present case it would help me if the deed is construed for a shorter term and therefore construe the deed in that

manner, and construe it against the grantor, and contra proferentem. That would not be a right application of these rules. In regard to fixed terms

these rules were always intended to help the lessee by increasing the term; and if in this case such increment of term happens to help the lessor,

then these rules, although oddly, will help the lessor in this case.

36. We are thus of the opinion that the deed of lease had a fixed term of 21 years. We would also add, purely as a matter of common sense, that it

is much more difficult for a party, by mistake to type out twenty one (in words), then to type out 1983 (in figures) where he had intended to type

1984 (in figures).

37. We are also not convinced, that in any event, during the year 1983 January / 1984 January, the respondent had ever intended to create a fresh

monthly tenancy in favour of the appellant by taking monthly rents de hors the lease dated 12th January, 1963. What we have said previously in

regard to the consensus of the parties for the purposes of creating of a new tenancy, applies with equal force in this context also. Thus, even if the

term was to be construed as a term of 20 years, the appellant would not be in the least helped by that. The appellant would fail to prove that the

respondent was asserting and was aware that the term was for 20 years, and further that she consciously agreed to raise a fresh monthly tenancy

by accepting monthly rents. Such intention on the part of the respondent being absolutely ruled out by the facts and circumstances of this case, a

case of holding over cannot be made or urged by on behalf of the appellant.

38. Thus, on all counts. Mr. Dasgupta''s client succeeds. The appeal is accordingly dismissed with costs. The lower court records be transmitted to

the lower court immediately. Such transmission by a Special Messenger. Cost be put in by Mr. Dasgupta''s client within a week from date. Decree

be drawn up expeditiously. Execution by the lower court on an expeditious basis is encouraged.

S.K. Gupta, J.

I agree.