

CASE NO.:
Appeal (crl.) 960 of 2002.
PETITIONER:
Sri S.K. Sarma
Vs.

RESPONDENT:
Mahesh Kumar Verma
DATE OF JUDGMENT: 17, 201902BENCH:
M. B. SHAH & D. M. DHARMADHIKARI
JUDGMENT:
J U D G M E N T

Shah, J.

Leave granted.

Short question involved in this appeal is whether the provisions of Section 138 of the Indian Railways Act, 1890 (hereinafter referred to as "the Railways Act") can be invoked for taking back possession of the premises which was given to its employee, upon his retirement on failure of railway administration to prove lease document in its favour?

The High Court of Calcutta by judgment and order dated 10.10.2001 arrived at the conclusion that railway administration ought to have proved that the premises belonged to it, before invoking Section 138 of the Railways Act and as the lease agreement of the premises between railway administration and its owner is not proved, Section 138 of the Railways Act could not be invoked for evicting the respondent. That judgment is challenged by filing this appeal.

Short facts of the case are undisputedly, respondent Mahesh Kumar Verma was a railway employee, posted as Chief Public Relations Officer (CPRO), and as he was entitled to official accommodation, on 17.1.1967, he was allotted premises at 85-B, Sarat Bose Road, Calcutta, which is about 2800 sq. ft. with a lawn of 2500 sq. ft. in front apart from a garage. The lessor of the property to the Railway Department is one Mr. N.B. Ganguly. Despite his retirement on 30th June, 1984, he has not vacated the premises in question.

Railway administration filed a complaint under Section 138 of the Railways Act bearing Crl. Misc. Case No.36 of 1985 before Chief Judicial Magistrate, South 24-Parganas, Alipore (West Bengal) seeking police help for recovery of possession. On 22nd November, 1986, the learned CJM allowed the application and directed the police to enter the premises and evict the respondent in case respondent fails to deliver its possession to the railway administration within two weeks from the date of order. He arrived at the conclusion that in view of the evidence of PW1 and PW2, the premises in question was allotted to the respondent on 17.1.1967 as official residence while he was holding the post of CPRO and this fact was not disputed by the respondent. Learned CJM further held that under Section 116 of the Indian Evidence Act, 1872 the respondent was estopped from questioning the right, title or interest of the railway administration as landlord/licensor.

Aforesaid judgment and order was challenged by the respondent by filing Criminal Revision No.1722 of 1986 before the

High Court of Calcutta. The High Court allowed the petition by holding that railway administration has failed to establish that the property 'belonged to it'. The Court emphasized the phrase "belonging to the railway administration" used in Section 138 of the Railways Act and arrived at the conclusion that railway administration has failed to prove lease document in its favour.

At the time of hearing of this matter, learned ASG appearing for the appellant submitted that the High Court materially erred in over-looking Section 116 of the Evidence Act. For this purpose various decisions are relied upon. It was further submitted that use of phrase "belonging to the railway administration" in Section 138 of the Act does not mean absolute ownership. It may include lessor's interest including that of a lessee. But that is not required to be proved in a case where property is handed over to its employee as a licensee under the service conditions.

As against this, Mr. Dholakia, learned senior counsel for the respondent submitted that the appellant has failed to prove that the property belonged to it and, therefore, the High Court has rightly dismissed the application filed under Section 138 of the Act. It is contended that the railway administration has no proof that the property belonged to them and, therefore, they seek to rely upon Section 116 of the Evidence Act. It is also contended that the railway administration must establish subsisting tenancy and as no attempt has been made by the railway administration to prove the same, the application was rightly dismissed. It is additionally sought to be contended in written submission, even though not argued at the time of hearing, that Section 138 of the Act does not include the expression 'retirement' and, therefore, also the power under Section 138 to summarily evict cannot be exercised.

For appreciating the contentions raised by the learned counsel for the parties, we would refer to Section 138 of the Railways Act which reads thus: -

"138. Procedure for summary delivery to railway administration of property detained by a railway servant If a railway servant is discharged or suspended from his office, or dies, absconds or absents himself, and he or his wife or widow or, any of his family or representatives, refuses or neglects, after notice in writing for that purpose, to deliver up to the railway administration, or to a person appointed by the railway administration in this behalf, any station, dwelling-house, office or other building with its appurtenances, or any books, papers or other matters, belonging to the railway administration and in the possession or custody of such railway servant at the occurrence of any such event as aforesaid, any Presidency Magistrate or Magistrate of the first class may, on application made by or on behalf of the railway administration, order any police officer, with proper assistance, to enter upon the building and remove any person found therein and take possession thereof, or to take possession of the books, papers or other matters, and to deliver the same to the railway administration or a person appointed by the railway administration in that behalf."

From the aforesaid section, following ingredients can be culled out: -

- (1) It prescribes summary procedure for delivery to railway administration of property detained by railway servant.
- (2) a railway servant is discharged or suspended from his

office, dies, absconds or absents himself; and

(3) he or his wife or widow or, any of his family representing him refuses or neglects;

(4) after notice in writing for that purpose;

(5) to deliver up to the railway administration;

(6) any station dwelling-house, office or other building with its appurtenances;

(7) or any books, papers or any other matters;

(8) belonging to the railway administration and in the possession or custody of such railway servant at the occurrence of such event as aforesaid;

(9) the Magistrate on application may by and on behalf of railway department order any police officer with proper assistance to enter upon the building and remove any person from therein and take possession thereof and to deliver the same to the railway administration.

The object of the aforesaid Section is to provide speedy summary procedure for taking back the railway property detained by the railway servant or his legal representative. Properties include not only dwelling house, office or other building but also books, papers and any other matters. This would mean that the Section embraces in its sphere all unlawful detention of any railway property by the railway servant. Further, from the aforequoted second ingredient, it is clear that a railway servant who is discharged or suspended from his office, dies, absconds or absents himself would include a railway employee who is removed, retires or dismissed from service. In context, the words 'discharge, dies, absconds or abstains himself' would certainly include employees who retire at the age of superannuation. The word 'discharge' used in context is of widest amplitude and would include cessation of relationship of employer and employee, may be by retirement, resignation, dismissal or removal. This Court in *Union of India and another v. B.N. Prasad* [(1978) 2 SCC 462] considered Section 138 and held that a close perusal of the section clearly reveals that the provision has widest amplitude and takes within its fold not only a railway servant but even a contractor who is engaged for performing services to the railway, and the termination of his contract by the Railway amounts to his discharge, as mentioned in Section 138. The Court also observed that the said provision is in public interest and must be construed liberally, broadly and meaningfully so as to advance the object sought to be achieved by the Railway Act. The Court also referred to the decision of the Lahore High Court in *S.L. Kapoor v. Emperor* [AIR 1937 Lahore 547] which was earlier approved by this Court wherein the Court has made the following observations: -

"The termination of his service by the railway under Clause 21 of the agreement amounts to his discharge within the meaning of Section 138 of the Act, and he is therefore liable to dispossession of the premises which he was occupying as a servant of the railway."

The High Court of Calcutta in *Divisional Superintendent, Eastern Railway, Asansole, v. Suresh Chandra Chakravarty* [AIR 1957 Cal. 97] in context of Section 138 has rightly held that the word 'discharge' is general enough to include employee who is retired at the age of superannuation. Similarly, the Bombay High Court in

Arjun Babloo Tukaral v. G.V. Javalkar (AIR 1981 Bom. 72) after elaborate discussion arrived at the conclusion that considering the intention of the Legislature and in the light of the general purpose of the Act, the word 'discharge' embraces all types of termination of contract of employment and the word 'discharge' used in section 138 would include retirement at the age of superannuation.

Further, the contention of the learned senior counsel for the respondent that the railway administration has to prove that the property in question was belonging to it before invoking Section 138 is totally misconceived because once it is admitted that respondent was given possession of the premises in question by order dated 17.1.1967 as he was entitled for the same while working as CPRO of the Department, he could not be permitted to deny the title of the railway administration. Admittedly, respondent was inducted because he was in railway service. Now, he is estopped from challenging the title of the appellant over the premises in question. For this purpose, we would refer to Section 116 of the Evidence Act which reads thus "116. Estoppel of tenant; and of licensee of person in possession. No tenant of immovable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given."

Second part of the aforesaid section clearly provides that no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny the title to such person to such possession of the property. He cannot deny the same during the pendency of such license or sub-lease. Such estoppel continues to operate so long as licensee or sub-tenant has not openly restored possession by surrender to such person. This rule of estoppel would cease to operate only after such licensee or sub-tenant has been evicted. This position does not require reference to many judgments. However, we would refer to the decision in *S. Thangappan v. P. Padmavathy* [(1999) 7 SCC 474] in which the appellant tenant who was running an automobile workshop since 1962 disputed the title of respondent-landlady on the ground that certain Devasthanam was the actual landlord. This Court held that Section 116 of the Evidence Act, 1872 puts an embargo on a tenant of an immovable property, during the continuance of his tenancy to deny the title of his landlord at the beginning of his tenancy. The significant words under it are 'at the beginning the tenancy'. So a tenant once inducted as a tenant by a landlord, later cannot deny his landlord's title. However defective the title of such landlord may be, such tenant cannot deny his title.

Further in *Vashu Deo v. Balkishan* [(2002) 2 SCC 50] the question that came up for consideration before the Court was whether a sub-tenant could have directly attorned to the owner Trust bypassing the tenant? The Court while rejecting such plea of sub-tenant considered the provision of Section 116 of the Evidence Act and held thus:

"..Section 116 of the Evidence Act, which codifies the common law rule of estoppel between landlord and tenant, provides that no tenant of immovable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property. The rule of estoppel so enacted has three main

features: (i) the tenant is estopped from disputing the title of his landlord over the tenancy premises at the beginning of the tenancy; (ii) such estoppel continues to operate so long as the tenancy continues and unless the tenant has surrendered possession to the landlord; and (iii) Section 116 of the Evidence Act is not the whole law of estoppel between the landlord and tenant. The principles emerging from Section 116 can be extended in their application and also suitably adapted to suit the requirement of an individual case. Rule of estoppel which governs an owner of an immovable property and his tenant would also mutatis mutandis govern a tenant and his sub-tenant in their relationship inter se. As held by the Privy Council in *Currimbhoy & Co. Ltd. v. L.A. Creet* [AIR 1933 PC 29] and *Bilas Kunwar v. Desraj Ranjit Singh* [AIR 1915 PC 96] the estoppel continues to operate so long as the tenant has not openly restored possession by surrender to his landlord. It follows that the rule of estoppel ceases to have applicability once the tenant has been evicted. His obligation to restore possession to his landlord is fulfilled either by actually fulfilling the obligation or by proving his landlord's title having been extinguished by his landlord's eviction by a paramount title-holder..."

In this view of the matter, respondent cannot be permitted to contend that property was not belonging to the railway administration. Whether the railway administration is owner, mortgagee, lessee or licensee is not required to be decided in such proceedings at the instances of sub-lessee or licensee of railway administration.

Lastly, the learned ASG appearing for the appellant submitted that on one or other ground, respondent - ex-employee after his retirement had unauthorisedly retained the possession of the property belonging to the railway administration and, therefore, he should be directed to pay mesne profit from the date of his retirement till possession of the suit property is handed over to the railway administration. In our view, this question cannot be decided in these proceedings because Section 138 does not empower the Court to pass such order nor such question was raised before the trial court. It is open to the appellant to resort to other alternative remedy available to it under the law.

In the result, the appeal is allowed and the judgment and order passed by the High Court is quashed and set aside. The order passed by the learned CJM dated 22.11.1986 directing the respondent to hand over vacant possession of the premises in question is restored. The respondent is given 15 days time from today to hand over possession to the railway administration. On his failure, the O/C Bhowanipore, P.S. shall, with proper assistance of the police force, enter upon the premises in question and remove the respondent and other persons from there and take possession thereof and shall deliver the same to the railway administration or a person duly appointed by the railway administration in this behalf.