PETITIONER:

KARUNA RAM MEDHI & ORS.

Vs.

RESPONDENT:

KAMAKHYA PRASAD BARUAH & ANR.

DATE OF JUDGMENT: 25/04/1997

BENCH:

K. RAMASWAMY, G.T. NANAVATI, K.VENKATASWAMI

ACT:

HEADNOTE:

JUDGMENT:

THE 2ND DAY OFAPRIL, 1997

Present:

Hon'ble Mr. Justice K. Ramaswamy

Hon'ble Mr.Justice D.P.Wadhwa

Pravir Choudhary, Adv. for the appellant

S.A. Syed and S.K. Nandy, Advs.for theRespondents ORDER

The following order of the court was delivered:

ORDER

Substitution allowed.

This appeal by special leave arises from the judgment of the Full Bench of the High Courtof Assam, made on 24.8;.1982 in S.A. No. 58 of 1976.

The admitted facts are that the respondent had entered into and agreement of lease of land with the predecessor-intitle of the appellant on January 5,1953 for a period of seven years onpayment of premium of Rs.30/- p.a. The respondent constructeda house therein within five years from the date of the lease. The housewas gutted in afire on April 4, 1958 and thereafterthe respondent reconstructed the house. Theappellant had issued a notice on December 12,1959asking the respondent to vacatethe land and deliver the possessionon January 1, 1960. The respondent has resisted the contentions raised in the suit filed by the appellant for ejectment of the respondent from the demised property. The trial Court decreed thesuit. On appeal, the Additional District Judge confirmed the same. In the second appeal, the Full Bench of the High Court reversed the decree of thetrial Court and dismissed the suit. Thus this appeal by special leave.

Chowdhury, learned counsel for the Shri Prabir appellants, with his painstaking preparation, has contended strenuously that the High Court is wrong in coming to the conclusion that the respondent had constructed the house with permission of the predecessor of the appellant. The respondent hasnot pleaded anyacquiescence inthat behalf, Unless the lease deed does contain any term forconstruction of thehouse on the non-residential premises of the land, the respondentis not entitled to the protection of Section 5 of the Act. Consequently, heis liable to ejectment under

Section11 of the AssamNon-Agricultural Urban Areas Tenancy Act, 1955, (for short, the'Act'). Thesuit notice terminating the lease is valid inlaw. The question, therefore, is whether the view of the Full Bench of theHigh Court is vitiated by anyerrorof law warranting interference? The High Court, after the elaborate consideration of the matter, has held that:

"Here the suitwas filed on 21.1.60, whereasthe notice was received by the defendant on 12.12.59. Therefore, the notice is not in accordancewith law and the notice of termination without giving onemonth's time asprovided under Section 11 of the Act is not valid.

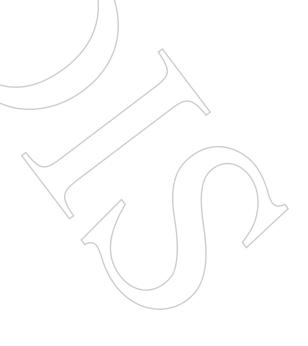
next it was heldthat "the house was constructed within five years. There is clear finding recorded by the courts below that both the structuresone constructed within five years of the lease and also the other one constructed after the earlier structure after the earlier structure was gutted by fire, were ofpermanent nature."

The notice to quit is badin law as one month's notice was notissued to the respondent. On that premise, the Court proceeded to decide on the facts whether the respondent is entitled to the protection of Section 5 of the Act. After elaborate consideration, the Full Benchhas held:

"Atenantalthough not entitled to build under the contract, has actually built permanent structure onthe land of the tenancy for residential or businesspurposes with the knowledgeand acquiescence of the landlord, shall not be ejected by the landlord except on the groundof non-payment of rent." Atpage 22, it was further held that,

"The contention raised on behalf of the landlord that unless the construction is made within five years of the current leasewhich is relied upon by a party, such a tenant is not entitled to protectionunder Section 5(1) (a) ofthe Actis not correct."

"In the present case the permanent structure which was built earlier within the periodfive years and thereby acquiring the protection under Section 5(1) (a) of the Act, itcould not be said to have been whittled down by the mere fact that the said permanent structure has been gutted out byfire. The act of fire in getting out the permanent within structurewas not control of the appellant, it was accidental withoutany violation on the part of the appellant. This was an event whichcouldnot



reasonably anticipated.A loss occasionedby the act of God or Vis major or by any event beyond the control of a person, it cannot be said that such loss willfall on him."

onthat $\mbox{premise}$, the Full Benchconcluded in para 10 thus:

"We are firmly of opinion that on the destruction of the permanent structure by accident beyond the control of the tenant or by any act ofGod, the protection available to a tenant under the provisions of Section 5, byconstructing permanent structure, do not evaporate. Oncethe protection ensure to the tenant by virtue of his having built the permanent structure, within five years of the lease forthe purpose of residence and business, the destruction of the structures by some event beyond the control of thetenant would not deprive the tenant of the said protection providedhe is continuingin thetenancy for the purpose of his residence business."

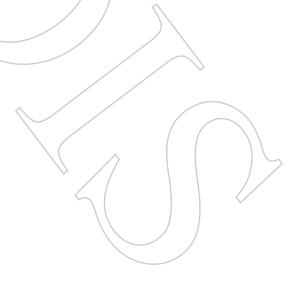
Onthat finding, the decree of the trial Court as confirmed by the appellate Court came to be reversed.

Itis true, as contended by Mr, Prabir Chowdhury, that the tenant is required to establish three essential facts as postulated under Section 5(1)(a) of the Act. It postulates thus:

"5(1)(a) "Where under theterms of a contract entered into between a landlord and his tenant whether before or after the commencement of this Act, a tenant whether before orafter the commencement of the Act, a tenant is entitled to build, and has in pursuance of such terms actually built within the period five years from the dateof such contract, a permanent structure on the land of the tenancy residential or business purposes, orwhere a tenant not being so entitled to build, hasactually built anysuch structure on the land of the tenancy for residential orbusiness purposes, orwhere a tenant not beingso entitled to build, has actually builtany such structureon the land of the tenancy for any of thepurposes aforesaid with the knowledge and acquiescence of the landlord. the tenant shall not be ejected by the landlord from the tenancy except on the groundof non-payment of rent."

The following conditions must be satisfied for application of section 5(1)(a):-

"(1) The terms of the contract of



tenancy, the tenant is entitled to build on the land of tenancy a permanent structure.

- (2) That pursuantto that liberty, he had actually constructed the building.
- (3) It must be constructed within five years from the date of the contract of tenancy, a permanent structure on the land of tenancy.
- (4) That the permanent structure is for residential orbusiness purpose.
- (5) The construction was with the knowledge and acquiescence of the landlord.

If the aforesaid conditions are satisfied, the tenant shall not be ejected by the land lord from the tenancy except on the ground of non-payment of rent. This view was laid by this court inRafiquennessa vs. Lal Bahadur Chetri (dead) by Lrs.& Ors. [(1964) 6 SCR 876] and Biswambhar Roy (dead) by Lrs.vs. Girindra Kumar Paul (dead) by Lrs.[AIR 1966 SC1908].

This was construed by this Court in Dhananjoy Singh V. Usha Ranjan Bhadra & Ors [1970 ILR Vot.22 at 82]. Thisview was reiterated buy this Court in Bishwambar Roy's case(supra).

Itis seen that the High Court after considering the question of law, following the earlier Full Bench judgment of that Court in Bireswar Banerjee v. Sudhir RanjanBose [A.L.R 1973, A&N 15]held that the tenant constructed the permanent structure onthe land takenon lease withinfive years from thedate of the lease. He is entitled to the protection of tenancy. The mere fact that the said building was destroyed by firesubsequently does notdestroy the tenancyrights acquiredby the tenant and thereby the tenant is notliable to ejectment from the demised premises. Thus, he is entitled to the protection of Section 5(1)(a) of the Act.

The decision cited by Mr. Prabir Chowdhury, Viz., Venkatlal G. Pittie &Anr. v. Bright Bros.(pvt.)Ltd. [(1987)3 SCR 593 AT 601] on the nature of the permanent structure as defined in Section 3(d) of Act aslaid down in some of the decisions of the Calcutta High Court referred to by this court in the above judgment is of no relevance for the purpose of this case. It is true that Section 3(d) of the Act defined " permanent structure". The permanent structure mustbe construed as defined in Section 3(d), Since the permanent structure is built as per the permission expressly contained in the contract of lease orby necessary acquiescence of the landlord the tenant constructed it to the knowledge of the landlord, What will bea permanent structure for the purpose of the protection ofsection5 of the Actis a question of fact. The question of nature of the structure, i.e., whether it is a permanent within the meaningof Section 3(d) of the Act, was notput in issue before the High Court. Therefore, wecannot go intothat question for the first time in deciding the nature of the construction made by the respondent before the fire had broken out. Under these circumstances, the above judgment renderslittleassistance to the appellant.

Hethen contendedthat it is for the tenant to prove that the landlord hadpermitted the construction. In the light of the recitals in the lease deed, no such permission was given in writing; so it isnot valid in law. Therefore, the High Courtwas not rightin concluding that he has constructed the permanent structure. Therefore, landlord cannot be deprived of his statutory right to eviction on the ground of acquiescence without any pleading or proof inthis behalf. We find noforce in the contention. He had constructed the house within five years obviously to the Knowledge of the landlord and he acquiesced toit as it was not objected to.

Itis rather unfortunate that the question was not raised by the appellantin the High Court and we do notfind the same issuein thepleadings. ThisCourt in Karam Singh Sobti & Anr. vs. Shri Pratap Chand & Anr. [(1964) 4 SCR 647 AT 649] merely consideredthe questionwhether the construction made by the tenant should be regarded as a permanent structure in relation to the legality of the plot? It wasfound that he has no evidence to showwhen exactly the said housewas constructed. In other words, the ratio thereinis with reference to the period during which the construction was made and this Courtdid notfind that it was not a permanent structure. The decision therein if of little assistance to the appellant.

InCanaraBank v. Canara SalesCorporation &Ors. [(1987)2 SCC 666], the question was whether the customer-accountholderto whom the monthly pass-sheets of account are communicated is deprived of his right to file a suit for account. It was contended that since in the regular course, pass-sheets of the account were being communicated and he had acquiescedto the same, the suit was not maintainable. In this context, this Courthad that thequestion of acquiescence does not arise so long as he is entitled to the settlement ofaccount. The ratio also isnot of any assistance to the appellant. InShiromani & Ors. v. em Kumar & Ors.[(1968)3 SCR 639 at 644], thequestion therein was under the Mitakshara Law of theBenaresSchool of HinduLaw, viz., whether a wife is entitled to an equalshare in the property alongwith the sons. There was a prior partition betweenthe sons evidenced by Ex. D-4 to whichtheir mother was a signatory. It was contended in the suitfiled by the mother that she had acquiesced to the division of the property and thereby when she claimed her sharewas declared disentitled. In this context, it was held that the plea of acquiescence must be specifically pleaded and proved. In that case, it was not done. The ratio thereof has no application to the present case for the reason that the appellant has not disputed the construction of the house and that it was not his case thathis predecessor-in-title had acquiesced to the construction of the permanentstructure in the land leasedout to the respondent.

Hehas also placed rellance on an unreported judgment of this Court in Pramila Rani Nag v. rohd. Mir Hussain & Ors. [C.A. Mp/1209/74]decidedon 17.1.1995 which is on the nature of the construction. That also has norelevance to this case.

Thus we hold that the view takenby the High Court is not vitiated by any error oflaw warranting interference. The appellant is entitled to withdraw the amounts under deposit.

The appealis accordingly dismissed. No costs.