

CASE NO.:  
Appeal (civil) 2380 of 2001

PETITIONER:  
PABITRA KUMAR ROY & ANR.

RESPONDENT:  
ALITA D' SOUZA

DATE OF JUDGMENT: 27/09/2006

BENCH:  
A.K. Mathur & Altamas Kabir

JUDGMENT:  
J U D G M E N T

ALTAMAS KABIR, J.,

The appeal raises an interesting question of law relating to the interpretation of Sub-section (2) of Section 3 of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as 'the 1956 Act') which does not appear to have been considered earlier for its full scope and effect. The question relates to the applicability of Sub-section (2) of Section 3 of the 1956 Act to leases which were executed for periods of over twenty years but containing a clause allowing prior determination at the instance of either the lessor or the lessee. Prior to 1965, the said Section was comprised only of one Section which is now numbered as Sub-section (1). Sub-section (2) was added by Amending Act XXIX of 1965. Since we shall be considering the provisions of Section 3 in this appeal, at some length, the same as it stands, after amendment, is reproduced hereinbelow for reference:-

"3. Certain provisions of the Act not to apply to certain leases.\027(1) The provisions relating to rent and the provisions of sections 31 and 36 shall apply to any premises held under a lease for residential purpose of the lessee himself and registered under the Indian Registration Act, 1908, where--

(a) such lease has been entered into on or after the 1st December 1948, and

(b) such lease is for a period not more than 20 years, and save as aforesaid nothing in this Act shall apply to any premises held under a lease for a period of not less than 15 years.

(2) Notwithstanding anything to the contrary in sub-section (1) but subject to sub-section (3) of section 1, this Act shall apply to all premises held under a lease which has been entered into after the commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1965:

Provided that if any such lease is for a period of not less than 20 years and the period limited by such lease is not expressed to be terminable before its expiration at the option either of the landlord or of the tenant, nothing in this Act, other than the provisions relating to rent and the provisions of sections 31 and 36, shall apply to any premises held under such lease."

As will appear from the facts involved in this appeal, by a registered deed of lease dated 13th January, 1969, the predecessor-in-interest of the appellants let out the ground floor flat with one garage, measuring 1200 sq.ft., in premises No.29/1, Bondel Road, Calcutta \026700019, to the respondent on a rental of Rs.450/-per month. The lease commenced with effect from 1st January, 1969, and was for a period of 21 years. The lease deed contained a clause which permitted the parties to terminate the lease prior to its expiry with notice from either side.

On 29th September, 1972, when the lease was subsisting, the lessor served a notice determining the lease under Section 111 (g) of the Transfer of Property Act, 1882. The lessee was asked to quit and vacate and deliver possession to the lessor on the expiry of the notice period. Inasmuch as, the lessee did not vacate the premises, the lessor filed a suit, being Title Suit No.3/1973, for eviction of the lessee from the suit premises and for recovery of arrear rents and damages. The said suit was decreed by the 2nd Subordinate Judge at Alipore under Section 111 of the Transfer of Property Act, 1882, on the ground of default. However the lessee made an application for protection under Section 114 of the Transfer of Property Act, 1882, and on payment of the arrear rents, he was entitled to retain his possession of the suit premises.

Subsequently, on completion of the period of 21 years reserved in the lease deed, in 1990, the lessor, who is represented by the appellants herein, called upon the lessee (the respondent herein) to hand over peaceful and vacant possession of the suit premises. On the failure of the respondent to do so, the lessor filed another suit, being Title Suit No.71/1990, in the court of the Second Munsif, Alipore, for ejectment. In his written statement the respondent took a stand that the suit was not maintainable since the respondent was a tenant protected under the provisions of the 1956 Act. The Trial Court by its judgment and decree dated 29th June, 1996, negated the defence taken by the respondent herein that she had been inducted as a monthly tenant and decreed the suit upon holding that the respondent had failed to establish her claim of monthly tenancy.

Apart from the above, the trial court also took note of the fact that the earlier suit had been filed under the provisions of the Transfer of Property Act, 1882, and at no point of time had the respondent taken the plea that her tenancy was governed by the provisions of the 1956 Act. The trial court took note of the fact that, on the other hand, the respondent had herself obtained relief against eviction under Section 114 of the Transfer of Property Act, 1882.

On the said two grounds, the trial court decreed the suit for eviction against the respondent herein. The respondent preferred an appeal against the said judgment and decree of the trial court, being Title Appeal No. 246/1996. The first appellate court also rejected the

respondent's claim of having been inducted as a monthly tenant and affirmed the judgment of the trial court by holding that the decision in Title Suit No.3/1973 attracted the provisions of Section 11 of the Civil Procedure Code, 1908, relating to the applicability of the Transfer of Property Act to the leasehold premises and held further that the said question could not be reopened. It was also held by the 1st appellate court that the tenancy created by the deed of lease dated 13th January, 1969 would not be governed by the 1956 Act in view of the provisions of Section 3 (2) thereof. In arriving at such conclusion, the 1st appellate court referred to and relied upon the decision of this Court in Savita Dey vs. Nageswar Majumdar and Anr., reported in AIR 1996 SC 272. Aggrieved by the said order, the respondent preferred a second appeal before the Calcutta High Court which was numbered as Second Appeal No. 595/1997. By judgment and order dated 10th September, 1999, the High Court allowed the second appeal upon reversing the finding of the courts below regarding the applicability of the 1956 Act to the deed of lease executed by the lessor on 13th January, 1969. The High Court also disagreed with the finding that the decision in the earlier suit (T.S. No.3/1973) operated as res judicata as far as the plea of protection under the 1956 Act is concerned.

This appeal has been preferred against the said judgment of reversal of the Calcutta High Court. Appearing in support of the appeal, Mr. P.S. Mishra, Senior Advocate, reiterated the stand of the appellant before the courts below and submitted that the defendant-respondent was precluded by the principle of res judicata from contending that her tenancy was protected under the provisions of the 1956 Act. He urged that since the respondent had obtained the benefit of Section 114 of the Transfer of Property Act in the earlier suit, she was estopped from raising a defence in the later suit that her tenancy was protected under the proviso to Sub-section (2) of Section 3 of the 1956 Act.

It was also contended that apart from the question of res judicata, the High Court had erroneously reversed the findings of the courts below regarding the applicability of the 1956 Act to the tenancy created by the lessee having regard to the clause which entitled both the lessor and the lessee to terminate the lease during its subsistence. It was submitted that since the lease was for a fixed period of twenty one years and was allowed to run for the full length of its term and the respondent remained in possession of the demised premises throughout the period of lease, the High Court had erred in holding that such clause brought the lease within the protection of the 1956 Act.

Mr. Mishra submitted that the decision of this Court in Savita Dey vs. Nageswar Majumdar and Anr.(supra), fully supported the case of the appellant and the High Court had erroneously reversed the judgments of the courts below. The application of the principles of res judicata and estoppel was denied by Mr. Rana Mukherjee, learned advocate, appearing for the respondent. According to him, the respondent was not precluded from claiming that the lease granted in her favour was protected under Section 3 (2) of the 1956 Act, merely because the provisions of Section 114 of the Transfer of Property Act had been invoked in the earlier suit. It was contended that the object of Section 114 of the Transfer of Property Act, 1882, was similar to the object of Section 17 (4) of the 1956 Act and it was immaterial which of the two provisions was invoked in a given case and, in any event, the question was a pure question of law to which the rule of res judicata would not apply as was held by this Court in

Mathura Prasad Bajoo Jaiswal and Ors. vs. Dossibai N.B.

Jeejeebhoy, (1970) 1 SCC 613.

Mr. Mukherjee submitted that the language of Section 3(2) of the 1956 Act made it clear that on account of the prior determination clause the lessee enjoyed the protection of the 1956 Act. It was urged that the lease had, in fact, been determined during its subsistence by a notice issued by the appellants on 29th September, 1972, followed by a suit for eviction on the basis thereof. The exercise of the option of prior determination brought the lease within the ambit and protection of the 1956 Act. It was not, therefore, a case of uninterrupted continuance of the lease for a fixed period of 21 years on account of the break that had been effected by the determination of the lease within three years from the date of its execution. There was, therefore, no error in the High Court's finding that on account of the clause relating to prior determination, the lease would be governed by the provisions of the 1956 Act notwithstanding the fact that the earlier suit had been filed and conducted under the provisions of the Transfer of Property Act.

On a construction of the provisions of Sub-section (2) of Section 3 of the 1956 Act, we are unable to subscribe to the view expressed by the High Court. The intention of the Legislature in amending Section 3 appears to have been to prevent landlords from using long term leases as a camouflage for excluding them from the protection of the 1956 Act and yet retaining the right of prior determination. Sub-section (2) appears to have been enacted to prevent such abuse, inasmuch as, once the lease was determined before the fixed period, it attracted the proviso thereof.

This aspect of the matter was noticed by a Division Bench of the Calcutta High Court in Mahindra & Mahindra Ltd. vs. Kohinoor Debi, 93 C.W.N. Page 773, while considering the applicability of Sub-section (2) of Section 3 of the 1956 Act to a lease governed by Sub-section (1) thereof and it was observed therein as follows :-

"A lease for, say, 21 years would not cease to be, but would remain, such a lease in the eye of law even if the lessee has been given an option to terminate it earlier. If a lease for a fixed term with the right or option for removal in favour of the lessee remains a lease for that fixed term only, until the option is exercised, a lease for a fixed term with the right or option in favour of the lessee of earlier termination should also remain a lease for a period fixed, as the option in each case creates, enlarges, limits or extinguishes no right, title or interest, until exercised."

Although, ultimately the matter was decided on other considerations, the aforesaid exposition appears to us to be a correct appreciation of the law.

A somewhat similar question came up for consideration before this Court in Savita Dey vs. Nageswar Majumdar and Anr. (supra) which had been cited before the High Court. While considering the said decision the High Court merely observed that in the said case what had been decided was that the lease for a fixed period of twenty one years was not governed by Section 3(2) of the 1956 Act having been entered into prior to the enforcement of the amendment made to the provision. The High Court did not take into consideration the decision relating to the precariousness of a tenure which was

terminable prior to its full duration and the observation that such suggested precariousness of the tenure did not arise in the facts of the case because the lessee/tenant had fully enjoyed the period of lease of twenty years, which is also the case in the instant appeal. Although, in the instant case, the tenancy was terminated by notice during the fixed period of lease, the lessee continued to occupy the demised premises without interruption for the full period of twenty one years. The decision in Savita Dey's case makes the position clear that the mere inclusion of a clause for prior determination of a lease, which is otherwise for a fixed period of more than twenty years, will not ipso facto bring it within the exception contemplated in the proviso to Sub-section (2) of Section 3 of the 1956 Act. The inclusion of such a clause may be taken by the tenant as a defence in the event the option under the said clause is exercised. Such a defence was not set up by the lessee in the earlier suit when it was available to her and the same is not available to her after the lapse of the fixed period of the lease.

As was indicated by the Calcutta High Court in the Mahindra and Mahindra case (supra) a lease for a fixed period does not cease to be so by the inclusion of a clause entitling either the lessor or the lessee to determine the lease prior to its expiry, unless such option is actually exercised.

In the impugned judgment under appeal, the High Court went wrong in holding that it had been found that the lease in question was governed by Section 3(2) of the 1956 Act. To the contrary, both the trial Court and the 1st Appellate Court held that the deed of lease was not governed by the provisions of the 1956 Act under Section 3(2) and such finding was reversed by the High Court on a misapplication of the decision in Savita Dey's case.

The law is clear that lease deeds for periods of twenty years or more would stand excluded from the operation of the 1956 Act except in matters relating to Sections 31 and 36 thereof, unless the same were terminable before their expiration at the option either of the landlord or of the tenant.

In other words, if such a lease is terminated before its fixed period expired, the proviso to Section 3(2) would be attracted as a defence against eviction. If, however, the lease was allowed to run its full course, both the lease and the conditions contained therein would come to an end and would cease to be operative and the clause for prior determination would no longer be available as a defence against eviction.

The appeal must also be allowed on the question of estoppel. Having submitted to the jurisdiction of the Court under the Transfer of Property Act and having obtained relief thereunder, the respondent cannot in the present suit claim protection under the provisions of the West Bengal Premises Tenancy Act, 1956 to which she is not, in any event, entitled, in terms of the lease deed dated 13th January, 1969.

The appeal is accordingly allowed. The judgment and decree of the High Court is set aside and that of the trial Court is restored. The respondent is granted time till 31st December, 2006, to vacate the premises and make over peaceful possession thereof to the appellants subject to filing of the usual affidavit within fifteen days.