PETITIONER:
SAVITA DEY

Vs.

RESPONDENT:
NAGESWAR MAJUMDAR AND ANR.

DATE OF JUDGMENT26/09/1995

BENCH:
PUNCHHI, M.M.
BENCH:
PUNCHHI, M.M.
AGRAWAL, S.C. (J)
JEEVAN REDDY, B.P. (J)

CITATION:
1996 AIR 272 1995 SCC (6) 274
JT 1995 (7) 63 1995 SCALE (5)546

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Punchhi, J.

In furtherance to our Order dated May 11, 1994, allowing this appeal, setting aside the judgment and order of the Division Bench of the Calcutta High Court, restoring that of the Trial Court, we hereby release our deferred reasons to complete the judgment.

The landlord-appellant herein was the plaintiff. The defendants-respondents were the tenants. The appellant filed a suit for recovery of possession of the demised premises and for mense profits in the City Civil Court at Calcutta against the tenants-respondents. The suit was based on the premise that by a registered deed of lease dated 6-7-1964, the demised premises were leased out to the respondents for a period of 21 years commencing from July 1, 1964 and ending on June 30, 1985 at the agreed upon rate of Rs.475/- per month which subsequently was increased to Rs.501/- per month, consequent to the increase in municipal tax. Since the lease was expiring on June 30, 1985, the appellant sent a quit notice on 26-5-1985 requiring the respondents to vacate the premises, on the efflux of time on June 30, 1985. Since the respondents did not vacate the demised premises despite notice, a suit for possession was filed against the respondents claiming Rs.100/- per diem for wrongful use and occupation after the expiry of the period of lease.

The respondents even though contesting the suit had not much to offer in defence. They pleaded that they had wrongly been made to pay Rs.5,000/- as Salami at the time of the execution of the lease deed and that rent was enhanced to Rs.501/- per month contrary to the terms of the lease. And this act of enhancement had the effect of tenancy becoming from month to month, in substitution of the lease, attracting provisions of the West Bengal Premises Tenancy Act, 1956.

Before the Trial Court, the only question raised was whether on the terms of the registered lease deed the appellant was entitled to a decree for possession as also for mense profits from the date of the expiry of the lease. The Trial Court in its well-reasoned judgment came to the conclusion that the stipulated rent of Rs.475/- per month was rightly increased to Rs.501/- per month with effect from January 1969 because of increase in municipal tax and therefore on this factum, there could be no implied surrender under Section 111(f) of the Transfer of Property Act, there being no novation of the lease, or any change in the terms thereof. The Trial Court further viewed that Since enhancement in rent on account of the enhancement of municipal tax was itself stipulated in the lease of deed, there was in fact no enhancement of rent by the appellant. On that premise, the Trial Court decreed the suit for possession and for payment of mense profits at the rate and from the date claimed by the appellant, The High Court on appeal by the tenants-respondents reversed the judgment and decree of the Trial Court without demolishing the grounds on which the judgment of the Trial Court was based, but on grounds totally different.

Section 3 of the West Bengal Premises Tenancy Act, 1956, prior to its amendment, effective from 24-8-1965, rendered the provisions of the Act inapplicable to any premises held under a lease for more than 20 years, whether the purpose of the lease was residential or non-residential. By the amendment of 1965, this provision was retained and re-numbered as Sub-section (1) of Section 3 while adding there to Sub-section (2). The provision as it stands reads as follows:

> "3. CERTAIN PROVISIONS OF THE ACT NOT TO APPLY TO CERTAIN LEASES-
>
> (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 is for a period of 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 contained 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.

A bare reading of the provision makes it obvious that Sub-section (2) does not touch those leases which were entered into before 24-8-1965 which remained to be governed by

Section 3, as it stood and Section 3(1), as it now stands, whereunder the Act is not applicable to any premises under a lease for more than 20 years. Since the lease in hand was executed on 6-7-1964 for a period commencing from July 1, 1964 and expiring on June 30, 1985, sub-section (2) of Section 3 obviously has no applicability to it.

The learned Judge authoring the judgment of the Division Bench under appeal had at an earlier occasion authored and delivered another Division Bench judgment of the High Court in Mahindra & Mahindra vs. Sm. Kohinoor Debi [Calcutta High Court Notes 1989(1) Reports, Second Appeal No.142 of 1987 decided on December 1, 1988]. There the High Court Prominently drew the distinction between the pre-amendment and post-amendment leases. In para 13 of the Report it observed as follows:

> "13..... 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 not given an option to terminate it earlier. If a lease for a fixed term with the right or option for renewal 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 the period fixed, as the option in each case creates, enlarges, limits or extinguishes no right, title or interest, until exercised." (emphasis supplied)

The High Court seemingly having talked for the lessee then went on to conclude in paragraph 18 of the Report affirmingly as follows:

> "18. ..... But if, while deliberately engrafting such a Proviso to s.3(2) while amending s.3 in 1965 to provide only for leases executed after 24.8.65, the Legislature has conspicuously refrained from incorporating any such provisions in s.3(1) governing leases entered into before that date, we do not think that it would be open to us to project the provisions of that Proviso in s.3(1) also and to hold that a lease for a fixed term would cease to be so, if it is determinable before its expiration even at the option of the tenant only. We would accordingly overrule both the contentions made by Mr. Dutt and would dismiss the second appeal."

On the strength of the above observations, the High Court did the opposite in the instant case on the superficial distinction drawn in the case of a tenant who had been conferred the option to terminate the lease within the duration of the term of the lease, which in no way was affected by any action of the landlord, because the tenant had otherwise the right to continue undeterred in the premises for the period fixed. Negatively the case of the landlord was put at a different footing. The High Court completely overlooked that the requirements of sub-section (2) of Section 3 could never be imported wholly or partially, for the tenant or against the tenant, in sub-

section (1) of Section 3. It could not have gone on to hold that if in a lease of the pre-1965 period a term exists entitling the landlord to terminate the lease, the lease ceases to be the one governed by Section 3(1). The High Court, rather should have appreciated that both the landlord and tenant were at par under sub-section (2) of Section 3 of the Act. It was unfortunate for the High Court to have observed that in Mahindra & Mahindra's case, the question about the landlord having reserved to himself the right to terminate the lease at his option, at any time before the expiry of the lease period, so as to make the tenure of the tenant precarious, was not finally decided as not being necessary for the disposal of the matter at their end. The High Court should have kept in mind that for a pre-amendment lease the right of termination even if kept reserved by the landlord, to which Section 3(1) applied, could not have the consequence of the lease being governed under Section 3(2) of the Act. The High Court should have borne in mind the distinction drawn by the legislature. Had it thought otherwise, it could have made provision for the same. The High Court could not have imported the requirements of Section 3(2) into Section 3(1) and in so doing has committed a gross error.

Additionally, in the lease in hand, neither the landlord nor the tenant had reserved to himself the unfettered right of termination of the lease during the period of 21 years. In the first place, as are the facts pleaded, neither of them has ever asserted the said right of premature termination. Perhaps no occasion arose. Secondly, the question of the suggested precariousness of the tenure did not arise in the circumstances of the case because the lessee/tenant had fully enjoyed the period of lease of 21 years. The heart of the matter is that the tenancy was never terminated either by the landlord or by the tenant during the period of the lease.

Adverting now to the lease deed, we find that Rs.5000/- had been paid by the lessee as advance rent which was adjustable in 50 instalments at the rate of Rs.100/- per month from the monthly rent of Rs.475/- payable during the period July 1964 to August 1968. In this period, the lessee was to pay Rs.375/- per mensem because of the adjustment of Rs.100/- per mensem, till the advance got exhausted. Thereafter from September 1968 to June 1985, the lessee was to pay Rs.475/- per mensem. Under Clause, 16 both the lessee and the lessor agreed not to terminate the lease thereby created before the expiry of four years and two months, from the commencement of the term of the lease, i.e., from July 1, 1964 to August 31, 1968, (That period being in which rent would be adjusted) subject to the proviso that if rent is not paid and goes in arrears, the lessor shall have a right of re-entry. Subject to the afore-conditions, the lease also provided that a notice of an English calendar month shall be necessary for the termination of the lease by either the lessor or the lessee in accordance with the statute law of the country. No where in these terms can anything be spelled out that the lessor had reserved to herself the unfettered right to terminate the tenancy at her whim and caprice. The High Court has not adverted to this fact situation. It erroneously proceeded on the assumption that the lessor herein had an unfettered right of bringing to an end the tenure of the tenant termed precarious. Thus neither on law, nor on fact does the judgment of the High Court deserve sustaining; all the more, when it has not demolished the case of the landlord, as succeeding in the Trial Court, and on projecting one which was never canvassed before the Trial

Court.

Now on the trial scene, we find that the argument of the tenant-respondents about the increase of rent and novation of contract was rightly rejected by the Trial Court. There is no inflexible principle that every variation at the rate of rent payable under a registered deed of lease necessarily implies surrender of the said lease and creation of a new tenancy, or that whenever rate of rent is altered a new relationship between the parties gets created. By mere increase or reduction of rent, surrender of the existing lease and the grant of a new one, cannot be inferred in each case. It is a question of fact to be determined. See in this regard Gappulal vs. Shriji Dwarkadheeshji and another [AIR 1969 SC 1291 (at 1293)]. Instantly in the deed itself, provision had been made whereby the lessee had undertaken to pay a proportionate increase in the share of municipal taxes if in future the rate and taxes get increased by the Calcutta Corporation in respect of the demised premises. The increase of Rs.26/- per month in the agreed upon rent has rightly been found to be because of increase in taxes. And since they were conceived of and stipulated in the deed itself, no question of novation of contract could ever arise or on that event creation of new tenancy, so as to lift the protection to the landlord available under Section 3(1) of the Act.

For all these reasons, the judgment and decree of the High Court stands set aside, which reasons be supplemented to our Order dated May 11, 1994.