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IN THE HIGH COURT OF DELHI

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RFA 175/2008

SHRI DHARAM BIR PRASAD GUPTA Appellant.
through: Mr.Anil Grover, Adv. and
Ms.Manisha Aggarwal, Adv.

VERSUS

SHRI VED PRAKASH GUPTA Respondent
through: Mr.K.K.Malhotra, Adv. and
Mr.Tarun Aggarwal, Adv.

RESERVED ON:
03.09.2008

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DATE OF DECISION:
12.09.2008

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog
Hon'ble Ms.Justice Veena Birbal

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **PRADEEP NANDRAJOG, J.**

1. A very interesting question of law has arisen for consideration in the instant appeal : Whether the fiction in Section 106(1) of The Transfer of Property Act 1882 over-rides Section 107 thereof?

2. The factual backdrop in which the issue has arisen is that the appellant took on rent, for manufacturing purposes,

the suit property from the respondent. A rent deed was executed between the parties on 7th April 1997 creating a tenancy for a period of 3 years, but unfortunately for the parties, neither was the document drawn up on a stamp paper of adequate value nor was it registered.

3. The parties continued with their jural relationship intact, meaning thereby, the appellant continued to pay the rent each month and the respondent continued to accept the same till the month of September 2003.

4. According to the respondent, the appellant failed to pay any rent thereafter and on 10.10.2006, by a registered notice, the tenancy was determined. According to the respondent, after the tenancy was determined vide notice dated 10.10.2006, possession of the appellant qua the suit property became that of an unauthorized occupant requiring the appellant to be ejected from the suit property and liable to be directed to pay damages for unauthorized use and occupation post 10.10.2006.

5. The respondent admitted receipt of the notice determining the tenancy but found fault therewith, inter alia, on the ground that the admitted purpose for which the property could be used was a manufacturing purpose and thus required a 6 months' prior notice before tenancy could be determined.

6. There is a dispute between the parties as to the rate

of rent, whether it is Rs.7,500/- or Rs.11,500/- per month, but the same is irrelevant because in any case, the property is beyond the purview of the Delhi Rent Control Act 1958.

7. Since the lease agreement between the parties is not a registered document and relationship of tenant and landlord was not disputed, coupled with the fact that the rent admitted to be payable by the appellant was more than Rs.3,500/- per month, the respondent sought a decree on admission qua relief of ejectment prayed for in the suit.

8. The respondent had succeeded.

9. Learned Trial Judge has held that relationship of landlord and tenant is admitted. Rent payable being more than Rs.3,500/- as per the admission of the appellant meant that the property was not protected by the Delhi Rent Control Act 1958. Since the notice determining the tenancy i.e. the notice dated 10.10.2006 was admittedly received by the appellant and there was an admission to said effect in the written statement it has been held that the tenancy has to be treated as month to month. Holding that the tenancy from month to month stand validly terminated by the notice dated 10.10.2006 and suit for ejectment filed after expiry of 15 days of service of notice determining the tenancy, decree for ejectment has been passed.

10. Case of the appellant urged at the hearing was predicated only on the limited plea that the admitted purpose

for which the property was to be used was for manufacturing purposes thus the tenancy was liable to be determined by a prior notice giving 6 months' time to vacate and that the instant notice determined the tenancy by giving notice of 15 days and the suit was filed immediately thereafter, in any case prior to expiry of 6 months from the date of termination of the tenancy, the notice of determination was invalid. To put it differently, it was urged that in the absence of a valid determination of the tenancy no decree could be passed, much less a decree on admission.

11. Sections 106 and 107 of The Transfer of Property Act 1882 read as under:-

“106. Duration of certain leases in absence of written contract or local usage.—(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under than sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in

writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107. Leases how made.– A lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:

Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving an yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.”

12. The third para and the proviso to Section 107 of The Transfer of Property Act 1882 is not relevant to the issue raised between the parties and therefore suffice would it be to state that qua the first and second para of Section 107, whether the lease falls under the first para or second para thereof would depend on the duration of the lease. The purpose for which the lease is granted is wholly immaterial for Section 107 of The Transfer of Property Act 1882.

13. Thus, a lease granted for any purpose, be it

residential, commercial, manufacturing purpose or agricultural purpose can be made only by a registered instrument if duration of the lease is for the period stated in the first paragraph of Section 107. But, a lease for the same purpose(s) of a lesser duration can be made, under the second paragraph, either by a registered instrument or by an oral agreement accompanied by delivery of possession.

14. If one looks to Section 106 of The Transfer of Property Act it becomes evident that the classification of leases is according to their purpose. Section 106 classifies leases of immovable property for agricultural and manufacturing purposes in one class and all other leases in a different class.

15. Sub-section 1 of Section 106 is a deeming provision as per which in the absence of a contract or a local law or a usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year. Thus, where the parties have themselves indicated the duration of the lease relatable to an agricultural or manufacturing purposes, sub-section 1 of Section 106 of The Transfer of Property Act would be redundant. This is evident from the fact that sub-section 1 of Section 106 operates only *“in the absence of a contract..... to the contrary”*.

16. Pertaining to leases, excluding leases for

agricultural or manufacturing purposes, the legal fiction created in the second para of sub-section 1 of Section 106 is to deem the leases to be from month to month. Of course, this deeming provision would also be *“in the absence of a contract to the contrary”*.

17. The problem is this. Under Section 107 of The Transfer of Property Act 1882 a lease of immovable property from year to year or a term exceeding one year can be made only by a registered instrument. If the deeming fiction of sub-section 1 of Section 106 of The Transfer of Property Act 1882 is to be given full meaning, pertaining to a lease of immovable property for agricultural or manufacturing purposes, when the same is contained in a document not registered, notwithstanding the said fact of the document not being registered the lease would be treated as from year to year, meaning thereby, a conflict would come into existence as the 2 sections would have a head-on collision. The conflict would be, because according to the first part of the fiction in Section 106, the lease would be from year to year but the first paragraph of Section 107 enjoins that leases from 'year to year' can be made only by a registered instrument. In that event, which of the two sections should prevail.

18. Existing case law shows a divergence of opinion. Some High Courts have held that Section 107 of The Transfer of Property Act 1882 does not control Section 106 thereof.

Some High Courts have held to the contrary.

19. We need not catalog all the competing views save and except to note the reasoning of the two views.

20. In the decision reported as AIR 1959 Cal. 181 Krishna Das vs. Bidhan Chandra which we find expounds the view that Section 107 of The Transfer of Property Act 1882 does not control Section 106 thereof with the best line of reasoning. The view was expounded as follows:-

'Section 107 of the Transfer of Property Act does not control Section 106 and, notwithstanding the former section, the latter will apply to a manufacturing lease, whether registered or unregistered, so as to make it a lease from year to year for purposes of that section (Section 106), terminable with a six months' notice to quit, or, in other words to control its duration and period of notice, in the absence of a contract or local law or usage to the contrary. The lease will be a lease from year to year for the limited purpose of Section 106, that is, for the limited purpose of its duration and period of notice, the duration being until the notice expires. This will not raise any conflict with Section 107. Where the lease is silent as to its duration, the omission is supplied by Section 106, according to the purpose of the lease, for applying the provisions of notice as contained therein.'

21. Noting some prior decisions, the judgment further records:-

'The section (Section 106) deals with the notice to quit, - its period and requisites, - and the implied duration under its "deeming provision" may well be for that purpose and no more and, in that view, it will be outside the mischief of Section 107. Only if Section 106, by virtue of its "deeming provision" had sought to fix the period of the lease for all purposes so as to make it a full-fledged lease of that particular character, a conflict might have arisen with Section 107, although there also the position is not very clear (vide the observation in Ram Protap's case, 54 Cal WN

58 at p. 67 : (AIR 1950 Cal 23 at p.29) which appear to give a wider scope to S.106'

22. The decision concludes by reasoning finally as under:-

'That Section 106 was not intended to be controlled by S.107 would also be clear if we study the implications of Section 116. That section deals with the effect of holding over and enacts that, "in the absence of an agreement to the contrary", the tenancy by "holding over" would be a renewal of the old or the original tenancy which has determined by efflux of time and the renewal would be "from year to year or from month to month according to the purpose for which the property is leased as specified in Section 106". The period of the original lease having expired, ex hypothesi there would be no period of the tenancy by "holding over", where there is no fresh agreement between the parties, and this omission is supplied by the statutory application of Section 106 which fixes the period of the renewed tenancy, - to wit, its duration and period of notice, - in terms of the section (Section 106) according to the purpose of the lease, that is, according to the purpose of the expired or the original lease. Thus, if the purpose of the original lease was manufacturing, the renewal would be from year to year and the renewed lease or the tenancy by "holding over" would be one from year to year, terminable by six months' notice, expiring with the end of a year of the tenancy, in terms of S.106. This will be so whether the original lease was registered or not as S.116 contains no contrary indication and no other 'provision in this respect, and the statute certainly did not intend to leave the period of the tenancy by "holding over" unprovided for in any case. In Section 116, therefore, the statute itself indicates by necessary implication, that Section 106 will apply to all leases, covered by the statute, whether under registered instruments or not, to supply the omission as to duration and period of notice. To this aspect of the matter we drew the attention of the learned Advocate General during the course of arguments but we did not get any satisfactory answer'.

23. The opposite view stands best expressed on the reasoning adopted in the decision reported as AIR 1952 All.

634 Kishan Lal Vs. Lal Ram Chander as under:-

'In this connection, reference may be made to Section 107, Transfer of Property Act, which provides that a lease from year to year must be by registered document. If the holding over, in this case, were to be treated as one from year to year, it will mean that the parties will successfully, be able to evade the provisions of Section 107, Transfer of Property Act which requires that leases from year to year must be by 'registered instruments'. It seems to me, therefore, that when a person holds over after an unregistered lease of this kind for one year, which fixes only monthly rent, the holding over cannot be from year to year as that would amount to negating the provisions of Section 107. Further considering that the rent, in this case, was reserved from month to month and became payable after the holding over from month to month, the proper construction to be put on the nature of this holding over must be that it was a monthly tenancy which came into existence after the year was over. It would have been a different matter if the document of 24-5-1938 had been a registered document. In that case the provisions of Section 107 would have been complied with and the holding over could only be from year to year considering the nature of the document itself. But when the document is not registered, it would in my opinion, be going against the provisions of Section 107, Transfer of Property Act to hold that the holding over was from year to year and, therefore, six months notice was necessary."

24. Unfortunately, not much assistance was rendered by the counsel for the parties to us on the issue at hand. Our research reveals that the 2 conflicting views afore-noted have not been the subject matter of a direct decision on the issue by the Hon'ble Supreme Court. However, a decision of the Hon'ble Supreme Court reported as AIR 1952 SC 23 Ram Kumar Das vs. Jagdish Chandra Deo & Anr. comes nearest to the issue at hand and in our opinion concludes the issue in

favour of the view expressed by the Allahabad High Court in Kishan Lal's case (supra).

25. In Ram Kumar's case (supra) the Hon'ble Supreme Court explained the interplay of Section 106 and Section 107 of The Transfer of Property Act 1882 as under:-

“13. The section lays down a rule of construction which is to be applied when there is no period agreed upon between the parties. In such cases the duration has to be determined by reference to the object or purpose for which the tenancy is created. The rule of construction embodied in this section applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from the possession and acceptance of rent and other circumstances. It is conceded that in the case before us the tenancy was not for manufacturing or agricultural purposes. The object was to establish the lease to build structures upon the land. In these circumstances, it could be regarded as a tenancy from month to month, unless there was a contract to the contrary. The question now is, whether there was a contract to the contrary in the present case? Mr. Setalvad relies very strongly upon the fact that the rent paid-here was an annual rent and he argues that from this fact it can fairly be inferred that the agreement between the parties was certainly not to create a monthly tenancy. It is not disputed that the contract to the contrary, as contemplated by S.106, T.P. Act, need not be an express contract; it may be implied, but it certainly should be a valid contract. If it is no contract in law, the section will be operative and regulate the duration of the lease. It has no doubt been recognised in several cases that the mode in which a rent is expressed to be payable affords a presumption that the tenancy is of a character corresponding thereto. Consequently, when the rent reserved is an annual rent, the presumption would arise that the tenancy was an annual tenancy unless there is something to rebut the presumption. But the difficulty in applying this rule to the present case arises from the fact that a tenancy from year to year or reserving a yearly rent can be made only by registered instrument, as laid down in S.107, T.P. Act. The Kabuliyat in the case before us is undoubtedly a

registered instrument, but *ex concessis* it is not an operative document at all and cannot consequently fulfill the requirements of S.107, T.P. Act.”

[underlining emphasized]

26. It may be noted that the Hon'ble Supreme Court was seized of an issue where the lease was by way of a registered document but the lessee had continued in possession beyond the stipulated period of the lease without there being a registered documents extending the lease on yearly basis.

27. The Hon'ble Supreme Court has held that no *contract to the contrary* could be implied which would infringe Section 107. The Hon'ble Supreme Court never said as the cases which adopt the second view, that the deeming part of Section 106 would operate notwithstanding anything contained in Section 107. The Hon'ble Supreme Court has unequivocally held that a 'contract to the contrary' could not be implied in contravention of Section 107.

28. It would be interesting to note that Justice Woodroffe, in the decision reported as Debendra Nath vs. Syama Prosanna (1907) 11 Cal. WN 1124 summarised the conflict between the 2 sections and resolved the same as under:-

“Then assuming that this case is governed by the Transfer of Property Act I should like to notice the argument that because an annual rent was mentioned the tenancy must be taken to be a yearly one. The lease was not for agricultural or manufacturing

purposes and therefore must, in the absence of a contract to the contrary, be deemed to be a tenancy from month to month. It is said here that there was such a contract, for a yearly tenancy is to be implied from the mention of an annual rent. But when S.106 speaks of a contract I think it means a valid contract. But in the present case there is no such contract and under S.107 a lease such as is argued for in this appeal can only be created by a registered instrument and there is none here. The notice was therefore sufficient so far as the tenancy is concerned."

29. In the decision reported as AIR 1980 Delhi 7 Jagat Taran Berry vs. Sardar Sant Singh, a learned Single Judge of this Court has resolved the conflict in the following words:-

"18. Under S.107 the parties have an option. They can negotiate a lease of a duration mentioned in the first paragraph. If they decide upon such a lease, they must execute a registered instrument. Alternatively, they can decide to have a lease for a shorter period. In that event they can create the lease with or without executing a registered instrument. Whenever, a lease is created without a registered instrument the inevitable conclusion must be that the parties have, so to speak, opted out of the first paragraph. They have negatived any intention of creating a lease of the duration therein mentioned. Or, to put it in positive form, they have agreed upon a lease of a duration coming within the second paragraph. This is, or must be deemed to be a conscious decision on their part. It is, therefore, indicative of a contract between them. That contract is that the lease will not be of a duration mentioned in the first paragraph of S.107. Such a contract will always be a 'contract to the contrary' envisaged by the opening words of S.106. The Supreme Court has said that a 'contract to the contrary' can be implied, and need not be express. So, from the single fact that a registered instrument is not executed, one can, and should, immediately deduce a contract to create a lease of the kind that can be created without such an instrument. Thus, if the lease is for 'agricultural or manufacturing purposes' and there is no registered instrument, that fact itself is conclusive to establish a 'contract to the contrary'. Considering that it was always open to the parties to execute a registered

instrument but they chose not to do so, this inference accords with their intention, whether actual or ascribed.

19. On this line of reasoning there never can be a conflict between S.106 and S.107. For, whenever according to S.106 a lease is deemed to exist which could only be created by registered instrument according to S.107, the non-existence of a registered instrument will of itself invoke the opening words of S.106 by implying a contract to the contrary. Thus, the two sections become fully reconciled.”

30. It has to be additionally noted in the instant case that the rent was admittedly being paid on monthly basis and not on yearly basis.

31. Thus, there being no registered lease deed between the parties, the inevitable conclusion has to be that the tenancy was from month to month and notwithstanding the purpose of the lease being a manufacturing purpose, the tenancy has to be treated as a monthly tenancy and hence was determinable with a notice of 15 days.

32. We find no infirmity in the view taken by the learned Trial Judge.

33. The appeal is dismissed.

34. No costs.

PRADEEP NANDRAJOG, J.

VEENA BIRBAL, J.

September 12, 2008
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