

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.381 of 2010

Against the Judgment and Decree dated 21.07.2010 passed by Addl. District Judge, Patna City in Title Appeal No.78 of 2008 dismissing the Appeal and confirming the Judgment and Decree dated 07.06.2008 passed by Sub Judge I, Patna city in Title Eviction Suit No.1 of 2004.

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Ms. Bharat Petroleum Corporation Ltd. & Anr..

.....Defendants-appellant-appellants
Versus

Sri Rajeshwar Prasad & Ors.

.....Plaintiff-respondent-Respondents
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Appearance :

For the Appellants :-

Mr. Kamal Nayan Chaubey, Sr. Advocate
Mr. Sanjay Singh, Advocate
Mr. Ajay Kumar Singh, Advocate with him.

For the Respondent :-

Mr. Dhruv Narain, Sr. Advocate.
Mr. Shailendra Kumar Jha, Advocate
Mr. Dilip Kumar Jha, Advocate
Mrs. Neelam Kumari, Advocate
Mr. Vivek Kumar, Advocate

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Dated : 16th day of February, 2017

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV JUDGMENT

1. The defendants-appellants-appellants have filed this Second Appeal against the judgment and decree dated 21.07.2010 passed by



the learned Addl. District Judge, Patna city in Title Appeal No.78 of 2008 whereby the learned ADJ dismissed the appeal and affirmed the Judgment and Decree dated 07.06.2008 passed by the learned Sub Judge I, Patna city in Title Eviction Suit No.1 of 2004 decreeing the plaintiff respondent's suit.

2. The original plaintiff filed the aforesaid suit claiming himself to be the owner and landlord of the suit premises. He leased out the suit premises to the defendants-appellants by registered lease deed dated 14.03.2000 for a period of 31 years commencing from 01.01.1999 to 31.12.2029 on monthly rent of Rs.5000/-. The rate of rent was subject to periodical revision. The plaintiffs alleged that the defendants failed to pay rent from the month of September, 2002 to 15th April, 2003, i.e., for a period of eight months. The plaintiffs issued notice under Section 106 of Transfer of Property Act on 24.4.2003 terminating the tenancy as they failed to pay rent and as such violated the terms of the lease.

3. The defendants-appellants specifically pleaded in the written statement that the suit property when leased out was a vacant piece of land and only land was leased out. Bihar Building (Lease, Rent & Eviction) Control Act, therefore, is not applicable. So far default is concerned, the defendants appellants pleaded that according to the practice prevailing between them, the defendants have remitted



the rent. As such they are not defaulter and not guilty of breaching the terms of tenancy.

4. The further case of the defendants appellants is that the plaintiff-respondent was issued a licence by the defendants appellants for dealership of the company of the petroleum product which was terminated by the company appellant. So being frustrated with the termination of license for dealership of the petroleum products, the plaintiff created the grounds and wrongly filed the eviction suit under Bihar Building (Lese Rent & Eviction Control Act, 1982. (hereinafter the same shall be referred as 'BBC Act'). Therefore, the BBC Act is not applicable. The subject matter which was let out by lease deed does not come under the definition 'building' as defined in the BBC Act. There is term incorporated in the lease deed to give notice to the defendant demanding the rent dues for six months within 15 days and if not paid within the period after receiving notice then question of default arises.

5. The learned trial Court decreed the plaintiff's suit recording a finding that the defendant have breached the term of tenancy as well as defaulted in payment of monthly rent and violated the terms of lease agreement. The trial Court also held that in view of the lease deed, the defendants were duty bound to pay Patna Municipal Corporation Taxes but intentionally breached the terms and have not



paid taxes. The sending of rent by under certificate of posting is not a valid remittance.

6. The appellants then filed Title Appeal. After hearing the parties, the lower appellate Court came to the conclusion that though the plaintiff had directly not pleaded in the plaint about non-payment of municipal taxes but in evidence, both the P.Ws. have well supported that the defendant appellant have not paid the P.M.C. taxes to them. Thus, non-payment of P.M.C. is also breach of condition of tenancy and on this account also, the defendant appellants are liable to be evicted vide paragraph 16. The appellate Court also held that the defendants-appellants had got information as per Section 106 of Transfer of Property Act about the termination of their tenancy on the ground of breach of terms of lease deed due to non-payment of rent including P.M.C.s taxes. Hence, the plaintiffs have well proved the notice and accordingly, the defendants have breached the terms of tenancy as such must vacate the premises. The learned lower appellate Court also held at paragraph 22 that the Bihar Building (Lease Rent & Eviction Control Act, 1982 is applicable as the defendant have taken the land containing some structures thereon as per definition of Section 2(b) of the BBC Act. Therefore, the defendants-appellants are liable to be evicted. Accordingly, the Appeal was dismissed.



7. On 19.09.2014, the Second Appeal was admitted for hearing. and the following two substantial questions of law were formulated :-

(I) “Whether in view of non compliance of term incorporated in the lease deed for service of notice by the Lessor(Plaintiff) upon the Lessees(defendants) indicating arrears of rent for the period of consecutive six calendar months and on failure of lessee to pay the same within a fortnight from the date of service of notice, the defendants, appellants could have been held defaulter?

(II) Whether the plaintiffs can be held liable for eviction, for breaching the terms of tenancy by way of not paying the P.M.C. Taxes, although Ext. A the very basis of tenancy between the parties clearly mandates that in case of any breach of any of the covenants or condition herein contained, the lessor is required to serve notice and lessees were supposed to fulfill within fortnight, having not been complied by the lessor plaintiff?”

8. At the time of hearing of the Second Appeal on 09.12.2016, additional substantial question was formulated as follows :-

(III)“Whether the suit could have been decided under the B.B.C. Act although it was filed under T.P. Act and further the defendant could have been held to be defaulter for failure to show that the cheques were encashed and credited to the account of the plaintiff particularly when sending of rent per month by a/c payee cheque was the accepted mode of payment of rent regularly per month as such the finding of default is vitiated?”

9. The learned senior counsel, Mr. Kamal Nayan Chaubey firstly submitted that in view of the fact that only vacant piece of land was leased out to the defendants-appellants, BBC Act is not



applicable at all. Both the Courts below have decided the suit as if they are deciding the eviction suit under the BBC Act and moreover, the appellate Court specifically held that BBC Act is applicable. Therefore, so far the substantial question of law formulated on 09.12.2016 is most important substantial question of law. According to the learned senior counsel, if it is held that BBC Act will apply then the procedure will be different and it is to be decided under the BBC Act but if it is held that BBC Act will not apply then it is to be decided under the Transfer of Property Act.

10. So far substantial question of law No.(I) is concerned, the learned senior counsel submitted that there is specific term in the lease deed to the effect that if for consecutive six calendar months, rent is not paid, the plaintiff was required to serve a notice on the defendant to pay the rent for the aforesaid six months within 15 days and if within the said period, the due rent for six months is not paid then only the defendant can be held to be defaulter as BBC Act is not applicable. If BBC Act is applicable then also the plaintiff must comply the agreed terms. However, the Courts below have wrongly held that the defendants is defaulter, firstly, applying the BBC Act and secondly without considering the terms of demanding rent by giving notice to the defendants as aforesaid.

11. Thirdly, the learned senior counsel submitted that for non-



payment of municipal taxes, no eviction decree can be passed either under the Transfer of Property Act or under the BBC Act. At best it will be an amount which should have been paid by the defendant and if it was paid by the plaintiff, the plaintiff would have prayed for recovery of the amount but that cannot be a ground for eviction.

12. The learned senior counsel, Mr. K. N. Chaubey, further submitted that there is specific recital in the registered lease deed that only vacant piece of land is leased out and right was given to the defendant-appellant to demolish the structure which was in existence and to reconstruct structure by the defendant according to his business need but the Courts below have wrongly misconstrued that the building was leased out. According to the learned senior counsel, the lower appellate Court has misunderstood and misinterpreted the decisions referred to in the Judgment, i.e., **2007 (3) PLJR 582** and has wrongly come to the conclusion that the leased out premises is a building within the meaning of the definition of building under Section 2(b) of the BBC Act. On these grounds, the learned senior counsel submitted that the impugned Judgment and decrees passed by both the Courts below be set aside and the plaintiff's suit be dismissed.

13. On the other hand, the learned senior counsel, Mr. Dhruv Narain appearing on behalf of the plaintiff-respondent submitted that



there is no illegality in the impugned judgment and decree. From perusal of the lease deed itself, it will appear that at the time of lease in fact there were structures constructed by the plaintiff-respondents. This suit premises was leased out, therefore, the suit premises is a building as defined under Section 2(b) of the BBC Act. Accordingly, the plaintiff-respondent has filed the suit for eviction under the BBC Act. The lower appellate Court has rightly proceeded to decide the appeal and has rightly held that BBC Act is applied and the suit is not under Transfer of Property Act. Moreover, even if suit for eviction is filed under the Transfer of Property Act then also notice under Section 106 of Transfer of Property Act has been issued. As soon as the notice was received, the tenancy terminated and the defendant was liable to vacate the suit premises.

14. The learned senior counsel further submitted that in the decision relied upon by the learned lower appellate Court, it has clearly been held that in some portion of the vacant land if there is any construction made by the plaintiff and the suit premises is leased out then BBC Act is applicable. According to the learned counsel, since BBC Act is applicable, the defendant will be a defaulter for non-payment of two months rent and any agreement between the parties contrary to this provision of BBC Act as contained in Section 11 (1) (d) will be illegal contract. Here, the plaintiff filed the suit on the



ground of default and breach of terms of tenancy. So far default is concerned, six months rent was not paid, therefore, the defendant is a defaulter. So far breach of terms of tenancy is concerned, municipal taxes were not paid by the defendant-appellant which amount to breach of terms of the lease as such is liable to be evicted.

15. The learned senior counsel further submitted that pursuant to the direction to this Court for compromise, the plaintiff respondent proposed the monthly rent to the appellant but the appellant did not respond to the proposal of the plaintiff respondent.

16. At the time of hearing of the Appeal, the terms of compromise was produced before this Court claiming Rs.50/- per sq. feet for 5088 sq. feet = Rs.2,54,400/- per month because now the State Bank is paying the said rate, therefore, there cannot be compromise if the said amount of rent is not paid by the appellant. If the appellant will keep the four shop premises then the rate of rent for four shop premises will be Rs.50,000/- per month liable to be paid by the appellant. These are the terms of compromise. To this proposal, the learned senior counsel for the appellant on instruction submitted that the appellant is running a petrol pump and it is not possible and it is not feasible to pay Rs.300000/- (three lakh) per month as rent particularly, when the structures on the vacant land have been constructed by the appellant for running the business of petrol.



Accordingly, the negotiation to compromise failed and the appeal was heard on merit.

17. The learned senior counsel, Mr. Dhruv Narain submitted that none of the substantial question of law is involved in this Appeal for decision. The appellant never raised the ground of non-applicability of BBC Act before the trial Court. Although no issue was framed before the trial Court, the said point was raised before the appellate Court. The appellate Court relied on the decision of this Court and held that BBC Act will apply. Now, when BBC Act is applicable, the plaintiff respondent is required to prove default for two months only. In the judgment, the Courts below have held that the appellant did not pay the rent for six months and the remittance of rent by under certificate of posting is in valid in the eye of law, therefore, the appellant failed to prove that rent was paid. As such on this ground alone, the appellant is liable to be evicted. There is no illegality in the judgments of the Courts below and, therefore, the Second Appeal be dismissed.

18. The learned senior counsel, Mr. Dhruv Narain further submitted that in these days, the rent is very high in the locality. The petitioner is in possession of 5088 sq. feet land and structure thereon and is operating petrol pump, therefore, the plaintiff respondent agreed to compromise with the appellant if at all the demand rent per



month is paid by the appellant. However, the intention of the appellant is not fair and the appellant is litigating only for the purpose of harassing the plaintiff respondent.

19. Now, let us consider the substantial question of law formulated one by one. So far the two substantial questions of law formulated on 19.09.2014 at the stage of admission are dependent on the question of applicability of BBC Act which is the third substantial question of law formulated on 9.12.2016. Therefore, I propose to consider this third substantial question of law first.

20. Substantial question No.(iii):- The main contention of the appellant is that BBC Act is not applicable but both the Courts below proceeded to decide the suit treating the same as eviction suit under the BBC Act. Both the Courts below have not decided the suit under the Transfer of Property Act nor the procedure for deciding the suit under T.P. Act is followed. Here, the lease deed was with respect to vacant land for a period of 31 years and there are terms and conditions mentioned in the lease deed ext. 'A'. Admittedly, the appellate Court has held that BBC Act will apply. Now, let us see the evidences and materials. Ext 'A' is the registered lease deed. In this lease deed, the plaintiff claiming himself to be the owner of a piece or parcel of land measuring 5088 sq. feet leased the same to the appellant vide page 3 of the lease deed. At page 4 also, in the second paragraph it has been



mentioned that the lessor has offered to let out the said piece or parcel of land to the leasee. At page 4 itself from the last line of the page it has been mentioned that 'all that piece or parcel of land situated in M/s Plot No.1260 appertaining to seat No.194 ward No.19 at Mohalla – Gulgarbagh, Khalasi Tola under P.S.-Alamganj, in the district Patna containing by measurement an area of 5088 sq. feet more fully described in the schedule and shown on the plan annexed herewith'. In the schedule of the lease deed, the description of the leased property has been mentioned that piece or parcel of land at measuring 5088 sq. feet. At page 6 in the second paragraph, the leasee was given full and free liberty to remove the existing structures of the lessor. In the next paragraph at page 6 again the leasee was given full and free liberty to erect and maintain the demise premises in all manners and at page 7 right to construct over demised premises was also given to the leasee. The rent per month was fixed at Rs.5000/- 1.1.1999 to 31.12.2004, Rs.6250/- per month from 1.1.2005 to 31.12.2009 and likewise the description of increased rent per month has been mentioned at page 9.

21. It further appears that at page 13 paragraph 3 again liberty was given to the leasee to remove all tanks, plants, buildings or structure and may construct according to his need. At page 17 paragraph 8 the leasor agreed to pay to the superior landlord and also



the taxes assessment etc. except municipality tax.

22. An important clause is there at page 18 (iii) (1) wherein it is mentioned that if the rent or part thereof shall be in arrear for a period of consecutive six calendar month and the leasee failed to pay the same within a fortnight from the date of service of notice by the lessor demanding payment in cash of any breach of any of the covenants or conditions herein contained and on the part of the leasee to be observed and performed or if the leasee is wound up except for the purpose of amalgamation or reconstruction then and in each of such cases it shall be lawful for the lessor or any person or persons duly authorized by it in that behalf at any time thereafter to re-enter possession and enjoy the demise land or any part thereof.

23. In view of this lease deed which is registered now it becomes clear that only piece of land was leased out to the appellant by the plaintiff respondent. Even if there was construction on the land right was given to the leasee appellant to demolish the same and reconstruct according to its need. Therefore, the rent was not fixed taking into consideration the existing structure on the land because it was to be demolished by the leasee. In other words, the rent was fixed for the vacant land only measuring 5088 sq. feet. The terms and conditions quoted above mentioned in at page 18 clause III (1) of the lease deed provides that if rent is in arrear for six consecutive month



then a notice is required to be served by the lessor to the leasee demanding payment or in case of any breach of any of the covenants or conditions then only the lessor will have to re-enter the suit land.

24. Section 2 (b) of the BBC Act defines 'building'. It means any building, or hut or a part of the building or hut, let or to be let, separately for residential or non-residential purposes and includes (i) the garden, grounds and out houses, if any, appurtenant to such building or hut or part of such building or hut, and (ii) any furniture supplied by the landlord for use in such building or hut or part of building or hut.

25. In view of this definition, a vacant piece of land is not included in the definition of building. The lower appellate Court relied on a decision reported in **2007 (3) PLJR 582** and held that even if originally the premises was a vacant land and subsequently the tenant make construction and paid rent for the entire premises the said premises cannot be legally call a vacant land, therefore, it will be within the definition of building defined under Section 2 (b) of the BBC Act. The lower appellate Court also relied upon the decision of the Hon'ble Supreme Court reported in **AIR 2001 SC 1387** which is relied by the High Court in **2007 (3) PLJR 582**. On the basis of these two decisions came to the conclusion that BBC Act will apply.

26. From perusal of the decision reported in **2007 (3) PLJR 582**



Hindustan Petroleum Vs. Rajeshwar Prasad, it appears that in that case in the schedule of the plaint, only 2 katha land was mentioned. Objection was raised by the defendant that BBC Act is not applicable. This Court found that at para 7 of the plaint and in the lease agreement ext. 2 and the schedule attach thereto, it was apparent that there were several construction on the land in question which was admitted by the defendant in the said agreement and, therefore, it was held that BBC Act is applicable.

27. It appears that the Supreme Court decision, i.e., ***AIR 2001 SC 1387 M/s Shawwallace & Company Ltd. Vs. Govind Das Pursuttom Das*** which has been referred to in the above decision by this Court. The Supreme Court was dealing with the Tamil Nadu Building (Lease, Rent & Eviction) Control Act. It appears that in the decision the landlord filed application before the Rent Controller for fixation of fair rent of the premises under Section 4 of Tamil Nadu Act. The controversy in the proceeding relates to exclusion of area of 1752 sq. feet which was described as platform and henpen as a part of the building. The rent controller and the appellate authority excluded the said area and assessed the fair rent on the basis of plinth area. The Supreme Court held that the expression 'building' includes any building with the garden, grounds and out house appertaining to such building or such part of building let or to be let along with such



building. The excess portion of vacant land was treated as amenity. Therefore, this decision is also not applicable in the present case.

28. In view of the above facts and circumstances, in my opinion, both these decisions are not applicable in the present case.

29. A Division Bench of this Court in the case of *M/s Ashok Chitra Pvt. Ltd. Vs., State of Bihar 1993 (1) PLJR 524* has held that ‘the term ‘building’ as defined under the BBC Act does not include within its ambit any vacant piece of land as such the provisions of BBC Act are not applicable to lease for a vacant piece of land. In this case, it appears that 1 bigha 7 katha vacant land was leased out for the purpose of construction of cinema hall. The lease was for a period of 25 years. Application was filed by the lessor for enhancement of rent. Objection was raised that only vacant land was leased out and not the structures. The High Court found that no construction was made by the lessor. However, Rent Controller fixed the rent for entire construction portion also. In Appeal, it was upheld. The Division Bench relying on the decision of *Dr. Sudhir Kumar Mukherjee Vs. Narsin Dhobin AIR 1961 Patna 321* and *Smt. Jugal Kishor Devi Vs. Ashok Mill AIR 1961 Patna 330* held that ‘it is repeatedly laid down that a lease of vacant land for erecting building or industrial use is not a building within the meaning of the Act and allowed the writ application setting aside the orders of controller and the appellate



Court.’ This Division Bench has not been considered in the judgment reported in **2007 (3) PLJR 582**.

30. The Another Division Bench of this Court reported in **1979 BBCJ page 105 Braj Kishore Sah Vs. Commissioner of Bhagalpur Division** wherein it has been held that ‘if the premises is not covered by the definition of building the provision of the Act would have no application to it and fixation of fair rent proceeding were not maintainable. Parti land is not intended to be covered by the definition. It appears that in that case originally parti piece of land was leased out to the father of the petitioner before the High Court. Subsequently, the leasee made construction. The Commissioner held that construction has been made by the leasee and then fixed the fair rent. The High Court held that the construction, if any, put by the leaseee could not change the character of the land as wrongly held by the commissioner and ultimately the Division Bench held that the BBC Act is not applicable and accordingly, the writ application was allowed.’ In this Division Bench decision also, 1961 Patna decision 321 Full Bench has been referred to. It may be mentioned here that this decision is Full Bench decision **Dr. Sudhir Kr. Mukherejee Vs. Nirsin Dhobin**. It has clearly been held that Bihar Building (Lease, Rent & Eviction control) Act does not apply to a case in which a building is not but a piece of land is let out.



31. Another Division Bench decision of the Patna High Court is reported in *AIR 1961 Patna page 330 Smt. Jugal Kishori Devi Vs. Ashok Mills & Foundaries*. In this case, in lease, certain lands along with the buildings standing thereon was demised in favour of the defendant for a period of 30 years in consideration of monthly rent and the object of the lease was to enable the leasee to erect upon the vacant land, factory and other houses, boundaries walls, drains, garage etc. The Division Bench held that the subject matter of the lease in the true nature and character was not a 'building'.

32. In view of the decisions of this Court by Division Bench and also Full Bench, it becomes clear that if the vacant piece of land is leased out for the purpose of business by the leasee then the BBC Act will not be applicable. In the present case, we have seen the various terms and conditions of the lease deed ext. 'A' wherein it is clearly mentioned that vacant land was leased out for the purpose of petroleum business. The leasee was granted liberty to demolish the standing structure and to erect structure according to his need. It means that the leasee was not paying the rent for the structure which was standing and in fact he was given the liberty to demolish the same. It is, therefore decisive terms and conditions that only vacant piece of land was given in lease for 31 years and, therefore, the rent was fixed for the vacant piece of land only.



33. According to the submission of the learned senior counsel, Mr. Dhruv Narain for the respondent that at the time of lease, there were construction on the land. So far this submission is concerned, no doubt there were construction which is evident from the lease itself but the rent for this structure was not fixed rather the right to demolish was given to the leasee. The leasee constructed according to his need and is carrying his business.

34. In view of my above discussion and the settled principle of law laid down by this Court in aforesaid Division Bench and Full Bench decision, I find that BBC Act in this present suit is not applicable. Moreover, in *AIR 1979 Sc 1745*, it has already been held that notice under Section 106 of Transfer of Property Act is not required to be given by the landlord to the tenant in cases of eviction under BBC Act. In the present case, the plaintiff-respondent issued notice under Section 106 of T.P. Act, but then the lower appellate Court held that BBC Act will be applied on the basis of the single Bench decision and the Supreme Court decision referred to in the Judgment.

35. So far other two substantial question of law formulated at the time of admission are concerned, those are the questions for consideration if the suit is decided under the Transfer of Property Act. Admittedly, so far substantial question No.(I) is concerned, the lower



appellate Court has not considered at all about the service of notice stipulated in the lease deed regarding arrears of rent for consecutive six calendar months. Likewise, so far substantial question No.(II) is concerned, whether the breach of terms of tenancy for non-payment of Patna Municipal Corporation taxes was committed by the defendant under BBC Act to T.P. Act entitling the plaintiff to re-enter the suit premises has also not been decided. It is said Patna municipal taxes is not being paid, therefore, it is breach of terms of tenancy. This fact was not pleaded in the plaint as has been held by appellate Court.

36. In view of the above position, since I have already held that BBC Act is not applicable in the present case, the substantial question No.(III) is answered in favour of the appellant. So far the two substantial question of law formulated at the time of admission are concerned, it requires decision by the appellate Court in the light of the answer to substantial question No.(III).

37. In the result, this Second Appeal is allowed. The impugned judgment and Decree of the lower appellate Court is hereby set aside and the matter is remanded back to lower appellate Court for deciding the Title appeal No.78 of 2008 on its merit applying the Transfer of Property Act after hearing both the parties. Any observation on merit regarding breach of terms of tenancy or arrears of rent, i.e., default made in this judgment



shall not prejudice the parties or the Court. The lower appellate Court shall pass a fresh judgment after hearing the parties according to law.

38. It is made clear that by this judgment, it is only held that BBC Act is not applicable. Interim order if any passed by this Court either on stay matter or monthly rent is concerned, the same stands vacated.

(Mungeshwar Sahoo, J)

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