

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE**

Present:

The Hon'ble Justice Sugato Majumdar

CS/279/2002

SMT. ANINDITA CHOWDHURY AND ORS.

VS

GOURI SHANKAR PAL & ORS.

For Plaintiffs : Mr. Purnendu Das, Adv.
Mr. Meghanil Manna, Adv.
Mrs. Gitika Mullick, Adv

For the Defendant No.11 : Mr. Debdut Mukherjee, Adv.
Mr. Gaurab Kr. Das., Adv.

Hearing concluded on : 07.02.2024

Judgment on : 27.02.2024

Sugato Majumdar, J.:

This is a suit for recovery of khas possession along with mesne-profit.

The sum and substance of the plaint case is that one Ajit Kumar Ganguly, the father and predecessor-in-interest of the original Plaintiffs was the sole owner of the piece and parcel of land measuring about 7 cottah 6 chittacks 20 sq. ft. situated at 124A, Acharya Jagadish Chandra Bose Road, Kolkata. This is the suit property. The said suit property along with structures standing thereon was

subject matter of a lease dated 17.05.1946. By a registered deed of lease, as aforesaid, dated 17.05.1946, the said Ajit Kumar Ganguly demised the suit property to the original Defendant for a period of thirty years at a monthly rent of Rs.475/-. The intention of the lessor was that the suit property would be utilized for motion picture theatre purpose and building may be constructed thereon for such purpose would form part of the land and should belong to the lessor. During subsistence of the said lease, the parties executed another registered deed of lease dated 12.11.1946 under which it was agreed upon that the original Defendant, being the lessee therein, would have option of renewal of the lease of the suit property till 14.04.1993 on payment of monthly rent of Rs.1475/-. Thus the second lease deed dated 12.11.1946 introduced option for renewal of lease. The original Defendant regularly paid rent.

The original lease expired on 17.05.1976. Thereafter, the original lessee exercised his option of renewal of lease by an agreement in respect of the land and pucca building standing thereon. The renewed period of the lease expired on 14.04.1993 and rent was accepted by the lessor last for the month of March 1993. The original lessor expired on 06.08.1981 and his legal heirs and successors stepped into his shoes. After expiry of lease the original Defendant did not vacate the suit land leading the Plaintiff to institute the instant suit praying for recovery of possession of the suit premises: decree for Rs.1,34,16,000/- for wrongful occupation of the suit property till 24.06.2002 alternatively enquiry into mesne-profit along with other prayers.

The original Defendant contested the suit by filing written statement wherein, apart from standard defenses, the original Defendant took plea that the

later took a registered lease for thirty years from 17.05.1946 with option of renewal for ten years. The lease was in respect of vacant land measuring about 7 cottah 6 chittacks 29 sq. ft. at premises no. 124/1, Acharya Jagadish Chandra Bose Road. During subsistence of this lease the lessor modified the original lease deed altering the period of lease from thirty years to forty years commencing from 17.05.1946 to 14.11.1986. There was an option to renewal of lease for another 7 years till 14.04.1993. The original Defendant executed another registered deed of lease on 29.04.1958 in respect of vacant land measuring about 2 cottah 9 chittacks, previously known as 1A, Acharya Jagadish Chandra Bose Road, with one Anadi Kumar Bose. This land was subsequently numbered as 23/2A, Dickson Lane, being a portion of the premises no. 124, Acharya Jagadish Chandra Bose Road. This lease was executed by the original Defendant for construction of a cinema building. Both the leasehold lands were amalgamated resulting in an aggregated land of 9 cottah 15 chittacks 29 sq. ft. as premises no. 124/A, Acharya Jagadish Chandra Bose Road. The name of the original Defendant was mutated in the records of the then Calcutta Municipal Corporation and assessment order was passed showing amalgamation of the two premises. Prior to 1961-1962, kutcha structure was built by the original Defendant at the premises no. 124/A, Acharya Jagadish Chandra Bose Road. In the year 1961, the said two premises were amalgamated, and numbered as 124/A, Acharya Jagadish Chandra Bose Road. On permission of the then Calcutta Municipal Corporation, the original Defendant constructed a motion picture cinema hall, being pucca structure, known as "Prachi" cinema hall. The original Defendant was the owner of the structure. In conspectus of this factual background, the original Defendant's first plea is that there is no separate

existence of any land measuring about 7 cottah 6 chittacks 9 sq. ft., the suit property herein, as such the suit is liable to be dismissed as the suit property is wrongly described.

The second plea of the original Defendant is that on coming into force of the Calcutta Thika Tenancy (Acquisition and Requisition) Act 1981 and the West Bengal Thika Tenancy (Acquisition and Requisition) Act 2001, the suit property got vested in the State of West Bengal. The original Defendant deposited rent with the Thika Controller and also filed application for mutation of name as a thika tenant. In this context the original Defendant took another plea that in view of vesting of the suit property with the State of West Bengal, the Thika Controller of Calcutta is a necessary party, but is not impleaded in the suit. Therefore, the suit is bad for non-joinder of necessary party and misjoinder of party. A further plea of the original Defendant, in the same context, is that erection of cinema house is included in the word “any structure”, as defined in Section 2 (13) of the West Bengal Thika Tenancy (Acquisition and Requisition) Act 2001. Consequential defence of the original Defendant is that the suit is not maintainable and is liable to be dismissed.

The third plea is that the original Plaintiffs filed Title Suit No. 516 of 1999 in the City Civil Court at Calcutta and the said suit was valued at Rs.17,700/- on the basis of twelve month's rent. The said suit was contested by the original Defendant. But the said suit was withdrawn by the original Plaintiffs with liberty to institute a fresh suit. The instant suit is filed by overvaluing the same to bring the suit within ambit of this Court.

A fourth plea is that the suit is not maintainable as hit by the provisions of the West Bengal Premises Tenancy Act 1997. Since the tenancy is governed by the provisions of the West Bengal Premises Tenancy Act, 1997, Rent Controller only has jurisdiction to adjudicate upon the dispute. As such, Civil Court has no jurisdiction to entertain the suit.

Fifthly, it is averred that the original Defendant, by a letter dated 07.06.1976 requested the original lessor to renewed the lease together with building and structures for a further period of seventeen years – ten years from 17.11.1976 and seven years thereafter ending on 14.04.1993, at a rent of Rs.1475/-. Both the parties agreed upon for such renewal though no deed was executed in terms of such agreement. By accepting rent by the lessors as agreed upon, monthly tenancy was created under Sections 106 and 107 of the Transfer of Property Act. Since no eviction notice was issued by the landlord/lessor, the suit fails to disclose any cause of action and is not maintainable.

In the context of the facts so pleaded, the original Defendant also took the plea that the suit does not disclose any cause of action in as much as the right, title and interest of the original Plaintiffs vested in the state. It is further pleaded that the suit is barred under provision of Section 34 of the Specific Relief Act since no declaration of title is prayed for.

On death of the original Plaintiffs and the Defendant their respective legal heirs were substituted. Defendant No. 11 filed additional written statement. Contention of the Defendant No. 11, relevant for adjudication of the present dispute is that the original Defendant was the brother of the grandfather of the Defendant No. 11. She purchased the cinematography business of the name and

style of “Prachi Cinema” situated on the suit property from the original Defendant and became sole proprietress of the business. The Defendant No. 11 adopted the written statement filed by the original Defendant. It is contended that the instant suit does not disclose any cause of action against the answering Defendant No. 11 and that the suit property is a *thika* property vested in the state of West Bengal. In nutshell, it is pleaded that the instant suit is not maintainable and is liable to be dismissed.

On the basis of the pleadings of the parties issues were framed and then recast as follow:

1. Whether the suit is maintainable?
2. Whether the suit discloses any cause of action?
3. Whether the suit is bad for non-joinder or misjoinder of parties?
4. Whether the suit property is vested with the State under provisions of the Calcutta Thika Tenancy (Acquisition & Regulation) Act, 1981?
5. Whether the tenancy of the Defendant and the Plaintiff is governed by West Bengal Premises Tenancy Act or Transfer of Property Act?
6. Whether the suit is filed praying or partial eviction? If so, is the Plaintiff, in view of that, entitled to the any relief prayed for?
7. Whether the Plaintiff is entitled to decree of eviction and other relief or reliefs as prayed for?

8. Whether the Plaintiff is entitled to any mesne-profit? The date from which the possession of the Defendants is unauthorized, if any?
9. Which of the Defendant/Defendants is/are liable to pay mesne-profit, if any, and from which date?

Both the parties adduced oral and documentary evidences.

Since interrelated, Issue No. 1, 2, 4 & 5 are considered together to avoid prolixity and logorrhea.

Maintainability of the suit is challenged on multiple grounds.

Firstly, it is averred in the written statement as well as argued by the Learned Counsel for the Defendant that with coming into force the Calcutta Thika Tenancy (Acquisition & Requisition) Act 1981, in terms of Section 3 (8) of the Act, the right, title and interests of the Plaintiffs in respect of the suit properties vested in the State of West Bengal. Referring to Section 3 (8) of the Act, the Learned Counsel for the Defendant No. 11 argued that the original Defendant occupied the land of another under a written lease dated 17.05.1946 and also had been paying rent of Rs. 1475/-. The original Defendant also erected structure for business purpose, namely for running a cinema hall. So, according to the Learned Counsel for the Defendant No. 11 the original Defendant was a *thika* tenant. The Calcutta Thika Tenancy (Acquisition & Requisition) Amendment Act came into force on 15.03.1994 giving retrospective effect to the said Act, without changing the definition of '*thika* tenant'. The Learned Counsel also referred to Section 2 (13) of the West Bengal Thika Tenancy (Acquisition & Requisition) Act, 2001, defining

‘*pucca* structure’. Section 2 (14) of the Act of 2001 is also referred to, defining ‘*thika* tenant’. It is argued that the term “any structure” as used in the Act of 2001 includes both *pucca* and *kutch*a structure. This apart there are *thika* challans issued in favour of the original Defendant by the Thika Controller (Ext.9). In perspective of the factual array, according to the Learned Counsel for the Defendant No. 11, the suit property had been vested with the State of West Bengal prior to the institution of the suit. Therefore, the suit is not maintainable, according to him.

Per contra, the Learned Counsel for the Plaintiff argued that even after promulgation of the Act of 1981, the original Defendant continued to pay rent to the Plaintiffs till the date of expiry of lease accepting the Plaintiffs as the owners of the suit premises. The defense of vesting is ill-founded and baseless, according to him. It is further argued that neither there is any declaration by the Thika Controller that the suit property vested in the State nor is there any compliance with the provisions of Section 6 (3) of the Act. There is no evidence to demonstrate compliance by the original Defendant as well as by the Defendant No. 11 that there is a substantial compliance with Rule 3 (a) of the Thika Tenancy (Acquisition & Requisition) Rules 1982. Thus, according to the Learned Counsel for the Plaintiff the suit property never vested in the State and on this score, at least, the suit cannot be said to be not maintainable.

I have heard rival submissions.

It is the case of the original Defendant that under the original lease deed vacant land was handed over on which *pucca* structure was constructed for

running motion picture theatre. The purpose is clearly commercial, and there is no denial of this by the original Defendant, as well as the Defendant No. 11.

The Calcutta Thika Tenancy Act, 1949 was introduced to protect the interests of *thika* tenant. Section 2 (5) of the Act of 1949 defined *thika* tenant as a person who holds, whether under a written lease or otherwise, land under another person, and is or but for special contract would be liable to pay rent at a monthly or any other periodical rate, for that land to that another person and has erected or acquired by purchase or gift any structure on such land for a residential manufacturing or business purpose and includes the successes in interest of such person. Thika tenants did not include a person under Section 2 (5) of the Act of 1949:

- (a) who holds such land under that another person in perpetuity; or
- (b) who holds such land under a registered lease for a period not less than 12 years; or
- (c) who occupies such lands as Khatal.

In 1969, Section 10A was inserted by way of amendment. The newly introduced Section 10A authorized a *thika* tenant to erect a *pucca* structure on such land for residential purpose with previous permission of the Controller. Now this newly added Section 10A authorized a *thika* tenant to make *pucca* structure for residential purpose subject to permission of the Thika Controller. *Bharatias* who were persons paying rent in respect of structures erected by *thika* tenant were also given protection against whimsical eviction by the *thika* tenant on the pretext

of erecting pucca structure. Accordingly, the Calcutta Thika Tenancy Stay of Proceedings (Temporary Provisions) Act 1978 was enacted whose life was extended up to 18.07.1981. The expression “any structure” in Section 2(5) of the Act 1949 meant only temporary or *katcha* structure and not permanent or *pucca* structure as decided in **Jatadhari Daw & Grandsons Vs. Smt. Radha Debi [(1986) 1 CHN 21]**, which was also approved in the Full Bench decision of the High Court in the case of **Lakshmimoni Das Vs. State of West Bengal (AIR 1987 CAL 326)**. Subsequently replacing the Calcutta Thika Tenancy Act 1949, Calcutta Thika Tenancy (Acquisition & Regulation) Act, 1981 was enacted. This Act of 1981 provided for acquisition of interests of landlords in respect of lands comprised in *thika* tenancies and certain other tenancies and other lands in Kolkata and Howrah for development and equitable utilization of such lands.

In the said 1981 Act, a “*thika* tenant” was defined to mean any person who occupied, whether under a written lease or otherwise land under another person and was or but for a special contract liable to pay rent, at a monthly or periodical rate, for the land to the said person and had erected or acquired by purchase or gift, any structure on such land for residential, manufacturing or business purpose including the successors-in-interest of such person. What is significant in the definition of *thika* tenant under the 1981 Act is the persons who had been excluded from the definition in the 1949 Act, were also brought within the ambit of the 1981 Act. Consequently, certain lands which had been earlier excluded from the definition of “*thika* tenancy”, were brought within its ambit.

The circumstances were further altered with the enactment of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001, to provide for the

acquisition of interests of landlords in respect of lands comprised in *thika* tenancies and certain other tenancies in Kolkata and Howrah and other municipalities of West Bengal for development and equitable utilization of such lands with a view to subserve the common good. It is clear that the main object of the 2001 Act was to extend the acquisition of lands beyond Kolkata and Howrah, in other municipalities of West Bengal, for development and proper utilization of such lands.

Two main parameters in the Act of 1949, determining *thika* tenancy were the nature of structure and length of lease. The Act of 2001, namely, West Bengal Thika Tenancy (Acquisition and Requisition) Act, 2001 defined *pucca* structure. Section 2 (14) of the Act defined *thika* tenant. In 2010, an amendment was made in the Act of 1981 w.e.f 01.11.2010. After amendment definition stands as follow:

(14) “*thika* tenant” means any person who occupies, whether under a written lease or otherwise, land under another person, and is, or but for a special contract, would be, liable to pay rent at a monthly or any other periodical rate for that land to that another person, and has erected or acquired [by purchase or gift any structure including *pucca* structure, if any, on such land]* for residential, manufacturing or business purpose, and includes the successors-in-interest of such persons but excludes any resident of a structure forfeited to the State under sub-section (2) of section 6 of this Act irrespective of the status, he may have enjoyed earlier.”

(* substituted by W.B Act XXV of 2010 w.e.f 01/11/2010)

The subsequent introduction, reintroduction, repealing and amendments of the Acts were considered by the Supreme Court of India in **Nemai Chandra Kumar (D) Thr. Lrs. And Ors. Vs. Mani Square Ltd. and Ors. [(2022) SCC OnLine SC 920]**. The Supreme Court of India affirmed the full bench decision of the Calcutta High Court in **Lakshmimoni Das's** case. It was further observed:

“114. There are several indications which unfailingly lead to the conclusion that “any structure” which was employed in the Act of 1949 and was further employed in the Act of 1981 and also in the Act of 2001 for the purpose of creation of *thika* tenancy referred only to *kutchha* structure until the year 2010. The first and foremost indication comes from the amendment of the Act of 1949 by Act of XXIX of 1969 whereby clause (4a) was inserted to Section 2 and then Section 10A was inserted to the enactment which, in effect, invested a right in the *thika* tenant to erect a *pucca* structure when using the land in question for a residential purpose but only with permission of the Controller. If *pucca* structure was a part of the definition of *thika* tenant in clause (5) of Section 2, Section 10A was never required to be inserted to the Act of 1949. Then, in the Act of 1981, even when the legislature provided for acquisition of land comprised in *thika* tenancy and other lands, the principal part of the definition of *thika* tenant remained the same; only the other three exclusion conditions, as occurring in clause (5) of Section 2 of the Act of 1949 were removed. However, the Act of 1981, as originally enacted, never provided for creation of *thika* tenancy by the event of tenant erecting or acquiring by purchase or gift, any *pucca* structure.”

The above mentioned ruling set at rest the dispute that until the advent of the Amendment Act of 2010, w.e.f 01.11.2010 erection of pucca structure on the lease land did not bring the tenant within definition of *thika* tenant. Therefore, at the time of institution of the suit, there was no *thika* tenancy and thus there could not have been any vesting in this state under Section 5 of the Act of 1981, whether originally enacted or amended or under Section 4 of the Act of 2001 as originally enacted. Therefore, in view of admission of the Defendant that pucca structure was constructed for running cinematography business and in view of the observation and ruling of the Supreme Court of India as above, the suit property cannot be said to be vested in the State as on the date of institution of the suit. Therefore, challenge to maintainability of the suit on this ground should be viewed negation.

Issue no. 1 & 4 are decided in favour of the Plaintiff.

Secondly, it is argued on behalf of the Defendant that the suit does not disclose any cause of action. The sum and substance of the argument of Mr. Mukherjee, the Learned Counsel for the answering Defendant is that the original lease dated 17th May, 1946 expired on 17th May 1976 and an option for renewal was created in terms of a registered instrument dated 12.11.1964. After expiry of lease no registered deed was executed, creating a new lease. There is no lease of a fix tenure which expired on 14.04.1993. It is further canvassed that Defendant No. 11 is a tenant by holding over and the tenancy runs month to month. Since the tenancy is not determined under Section 106, the tenancy is in continuity. Therefore, in absence of determination or termination of tenancy there is no cause of action. The Learned Counsel referred to **Burmah Shell Distributing**

Vs. Khaja Midhat Noor and Ors. [(1988) 3 SCC 44]; State of U.P. and Others Vs. Lalji Tandon (dead) through LRS [(2004) 1 SCC 1]; Hardesh Ores Pvt. Ltd. Vs. Hede & Company [(2007) 5 SCC 614].

According to Mr. Mukherjee, there is no renewal of lease for fixed tenure and therefore, there is no question of expiry of lease by efflux of time.

Per contra, the Learned Counsel for the Plaintiff reiterated that original lease was renewed for ten years from 1976 and then for seven years from 1986. Thus, the original lease, as renewed came to an end on April 14, 1993. Therefore, according to the Learned Counsel, Mr. Das the suit discloses cause of action and is maintainable.

I have heard rival submissions.

The original lease was for a period of thirty years which expired on 17th May, 1976. By a registered instrument dated 12th November, 1964, the parties agreed for renewal of the term of the existing lease dated 17th May, 1946. The registered instrument dated 12th November, 1964, in effect introduced the option for renewal of the original lease on expiry of the same. On expiry of the original lease, the parties agreed to extend the same by executing a registered deed. After expiry of the original lease, the parties agreed to renew the lease in terms of the letter in question, however, subject to execution of a registered deed of lease. Rent was tendered and accepted. Nothing is there in the record to show that a registered lease deed was executed. Obviously, when rent was tendered and accepted a fresh tenancy was created. But there was no registered deed of lease. In such case, in absence of registered instrument three inhibitions operates - one under Section 107 of the Transfer of Property Act, 1882, the other is under

Section 17 (1) of the Registration Act, 1908 and the third one is under Section 49 of the Registration Act. It is apposite to refer to the observations made in **Burmah Shell Distributing V Khaja Midhat Noor and Ors. [(1988) 3 SCC 44]**:

“5. In view of the para 1 of Section 107 of the Act, since the lease was for a period exceeding one year, it could only have been extended by a registered instrument executed by both the lessor and the lessee. In the absence of registered instrument, the lease shall be deemed to be “lease from month to month”. It is clear from the very language of Section 107 of the Act which postulates that 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. In the absence of registered instrument, it must be a monthly lease. The lessee and the sub-lessee in the facts of this case continued to remain in possession of the property on payment of rent as a tenant from month to month. The High Court so found. We are of the opinion that the High Court was right.”

The following observations made in **State of U.P. v. Lalji Tandon [(2004) 1 SCC 1]** are also apposite:

“13. In India, a lease may be in perpetuity. Neither the Transfer of Property Act nor the general law abhors a lease in perpetuity. (*Mulla on the Transfer of Property Act*, 9th Edn., 1999, p. 1011.) Where a covenant for renewal exists, its exercise is, of course, a unilateral act of the lessee, and the consent of the lessor is unnecessary. (*Baker v. Merckel* [(1960) 1 All ER 668 : (1960) 1 QB 657 : (1960) 2 WLR 492 (CA)] , also Mulla, *ibid.*, p. 1204.) Where the principal lease

executed between the parties containing a covenant for renewal, is renewed in accordance with the said covenant, whether the renewed lease shall also contain similar clause for renewal depends on the facts and circumstances of each case, regard being had to the intention of the parties as displayed in the original covenant for renewal and the surrounding circumstances. There is a difference between an *extension of lease* in accordance with the covenant in that regard contained in the principal lease and *renewal of lease*, again in accordance with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed, as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month, as the case may be.”

In **Anthony Vs. K.C. Ittoop & Sons and Ors. [(2000) 6 SCC 394]** Three Judges Bench of the Supreme Court of India observed:

“**16.** Taking a different view would be contrary to the reality when parties clearly intended to create a lease though the document which they executed had not gone into the processes of registration. That lacuna had affected the validity of the document, but what had happened between the parties in respect of the property became a

reality. Non-registration of the document had caused only two consequences. One is that no lease exceeding one year was created. Second is that the instrument became useless so far as creation of the lease is concerned. Nonetheless the presumption that a lease not exceeding one year stood created by conduct of parties remains unrebutted.”

The registered deed of 1964 introduced the option of renewal of lease without varying the terms. Ext. – F is the letter signed by Ajit Kumar Ganguly and Jitendra Nath Bose dated 7th June, 1976 where both the parties agreed to “renew the lease together with building and structure on the demised land for a further period of seventeen (17) years, - ten (10) years from November 17, 1976 and seven (7) years thereafter ending on April 14, 1993..” It was further contemplated that formal deed of lease would be executed later on. But that was not done. It is manifest from Ext.-F that the parties contemplated, intended and were in consensus *ad idem* that there would be a renewal of lease and that a fresh deed of lease would be executed which did not materialized.

Section 106 of the Transfer of Property Act, 1882 states:

“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."

No written contract is there; no registered lease deed is there. The original Defendant was thus tenant by holding over and the tenancy was month to month. Therefore, such tenancy continues unless determined under Section 106 of the Transfer of Property Act, 1882. There is no termination of tenancy or determination of the same. Therefore, it is correct submission of Mr. Mukherjee, that there is no cause of action for filing a suit for eviction and recovery of possession since the tenancy is not determined or terminated and is continuing one. In view of this position the suit cannot be said to be maintainable or discloses any cause of action and is liable to be dismissed.

Issue No.1, 2, 4 and 5 are decided accordingly. Consideration of other issues becomes redundant in view of discussions made above.

In nutshell the instant suit fails. It is ordered that the instant suit is dismissed on merit without cost along with pending application, if any.

Parties shall bear their respective costs.

(Sugato Majumdar, J.)