

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

Present:

The Hon'ble Justice Sugato Majumdar

CS/244/2008

KAMALES MALLIK

VS

OCTAVIUS TEA & IND. LTD. (FOR: OCTAVIUS STEEL & CO. LTD.) & ORS

For the Plaintiff : Mr. Rupak Ghosh, Adv.
Mr. Ayan Dutta, Adv.
Ms. Labanyasree Sinha, Adv.

For Defendant No. 2, 6, 11, 12 & 13 : Mr. Mainak Bose, Adv.
Mr. Suvasish Sengupta, Adv.
Mr. Balarko Sen, Adv.
Mr. Anurag Bagaria, Adv.
Mr. Devansh Senthalia, Adv.

For Defendant No. 1 : Mr. S. N. Mitra, Sr. Adv.
Mr. S. R. Saha, Adv.
Mr. S. K. Mukherjee, Adv.
Mr. Akash Sarkar, Adv.

For Defendant No. 14 : Mr. Debasish De, Adv.
Ms. Debanjana De, Adv.

For Defendant No. 3, 4, 5 & 10 : Ms. Ishita Chakraborty, Adv.

For Defendant No. 8 : Mr. A. P. Gomes, Adv.

Hearing concluded on : 13.12.2023

Judgment on : 09.01.2024

Sugato Majumdar, J.:

The instant suit, namely, CS 244 of 2008 has been filed by the Plaintiff against the Defendant claiming for a decree for eviction against each of the Defendants praying decree for eviction and recovery of *khas* possession; decree of arrear of rent upto 31.12.2005 direction to the Defendant to pay property taxes; mesne-profit perpetual injunction along with other prayers. The Plaintiff is the Party Receiver in the present suit property, the appointment being made in CS 222 of 2001 being a partition suit among the co-owners of premises no. 15B, Hemanta Basu Sarani, Kolkata – 700001.

The nutshell of the plaint case is that the Defendant no. 1 was inducted as lessee in the back portion of the premises no. 14 and 15, Old Court House Street, now known as 15B, Hemanta Bose Sarani, Kolkata – 700001 (the suit premises), in terms of a registered deed of lease dated 5th March, 1965 for a period of 99 years commencing on and from 1st January, 1962 on payment of monthly rent of Rs.1400/- with further stipulation of enhancement by Rs.100/- on expiry of every successive nine years. Lease was determined in terms of a notice dated 23rd November, 2005 with effect from expiry of the month of December 2005, that is to the lease stood determined with effect from 1st January, 2006. In spite of determination of lease the Defendant did not vacate the suit premises compelling the Plaintiff to institute the instant suit.

The Defendants contested the suit by filing separate written statements. Defendant no.1, in the written statement denied all allegations. It is specific case of the Defendant no. 1 that it is a case of determination of lease by forfeiture but the notice dated 23.11.2005, determining the lease, is silent on the grounds of forfeiture. It is further pleaded that tenancy of the Defendant no. 1 is governed by West Bengal Premises Tenancy Act, 1997. No notice determining tenancy was served upon the Defendant no. 1 under the Act 1997. The Defendant no. 1 also refuted the plaint case on various other grounds raising the issue of maintainability of the suit.

The Defendant no. 2 also contested the suit by filing separate written statement. The Defendant no. 2 defended the suit on the grounds that the said answering Defendant being sub-lessee is not liable to be evicted; that the said answering Defendant has independent rights along with other pleas as defence.

The suit proceeded with and witness action began. After examination of plaintiff's witness, an application was filed, namely, GA 340 of 2020 by the Defendant No.2. praying for hearing of the suit on preliminary issues, namely, Issue No.1 and 6. The said application was disposed of in terms of Order dated 19th February, 2020 by a Co-ordinate Bench of this Court. It was ordered that Issue no. 1 and 6 shall be treated as preliminary issues and these issues should be taken up first. Accordingly, date was fixed for arguments of the parties on these issues.

It would be convenient to look at the said issues first.

Issue no. 1 : "Whether the instant suit is barred by law and particularly by the provisions of the Transfer of Property Act, 1882 as alleged in the paragraphs 1 (a) – (c) of the written statement of the Defendant?"

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Issue no. 6 : "Whether the lease agreement dated 5th March, 1965 stands terminated? If so, from what date?"

Mr. Bose, the Learned Counsel appearing for the Defendant no. 2, 6, 11, 12 and 13 argued that admittedly rent is payable at a rate of Rs.1900/- per month. The original rent was Rs.1400/-. Although there is a registered deed of lease, the said lease has been determined earlier. Had the lease been allowed to run its full life, it would have been governed by Transfer of Property Act, 1882. Sooner or earlier determination of lease coupled with rate of rent being Rs. 1900/- per month, in view of ratio of **Prakashwati Chopra Vs. Shibaji Mitra, [(2007) (1) CLJ (Cal) 47]** bring the tenancy within ambit of the West Bengal Premises Tenancy Act, 1997. It is contention of Mr. Bose that suit should be filed in

appropriate forum under appropriate law. The present suit under the Transfer of Property Act is not maintainable.

Mr. Ghosh, the Learned Counsel appearing for the Plaintiff refuted the contention on several grounds. The first point raised by Mr. Ghosh is that the rent includes payable municipal rates and taxes. In the present case, for ascertaining the rent, municipal rates and taxes should be clubbed together. This clubbed figure is higher than the ceiling limit prescribed in Section 3(c) of West Bengal Premises Tenancy Act, 1997 which is the reason why an action under the West Bengal Premises Tenancy Act, 1997 is not tenable, according to Mr. Ghosh.

The second limb of argument of Mr. Ghosh is that a lease of twenty years or more would only come within the domain of West Bengal Premises Tenancy Act, 1997 if there is a sooner determination clause in the lease deed. There is no such clause in the lease deed. It is argued that in the event, this Court comes to the finding that there is sooner determination clause in the lease, the Plaintiff states that the same having been terminated under Clause 4(d) of the deed of lease. The alleged sooner determination clause was not invoked in order to terminate the concerned lease. As such, it keeps the concerned lease beyond the purview of the Act of 1956 and secondly beyond the Act of 1997. According to Mr. Ghosh in order to bring a pre-1997 Act registered lease within the ambit of the Act one must show that the lease was in fact terminated prematurely. Mr. Ghosh also referred to the findings of **Prakashwati Chopra's** case (supra).

The next limb of argument of Mr. Ghosh is that even though the Co-ordinate Bench directed that Issue No. 1 and 6 should be heard as a preliminary one, under Order 14 this Court can postpone the hearing of this point along with the other issues. Mr. Ghosh relied upon **[(2016) SCC OnLine Cal 431]**; **[(2022) SCC OnLine SC 947]**; **[(2007) 1 SCC 202]**.

In reply Mr. Bose, the Learned Counsel appearing for the Defendants refuted the contention that monthly rent includes payable municipal rates and taxes. According to Mr.

Bose if both the parties, namely the landlord and the tenant agree then only rent becomes inclusive of municipal taxes and rates. Intention emanates from the conducts of the parties; unless it is so, rent does not include municipal rates and taxes. Mr. Bose relied upon **The Municipal Corporation of the City of Ahmedabad Vs. Canara Bank, Ahmedabad [(1992) SCC OnLine Guj 48]; Canara Bank and Another Vs. Municipal Corporation of Ahmedabad [(1996) 7 SCC 298]; Raval & Co. Vs. KG Ramachandran & Ors. [(1996) 79 LW 580]; Rajshri Productions Private Limited Vs. T.E. Thomson and Co. Limited [(2023) SCC OnLine Cal 899]; Eih Limited Vs. Nadia A Virji [(2022) SCC OnLine SC 947].**

I have heard rival submissions.

Both the issues are taken up together for consideration.

Section 3 of the West Bengal Premises Tenancy Act, 1956 exempts operation of the Act to certain leases. Section 3 of the Act reads as follow:-

“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 (XVI of 1908), where-

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

If a lease is for twenty years or more and there is no express stipulation that the lease is terminable before its expiration at the option either of the landlord or tenant, then nothing in the Act other than the provisions relating to rent and provisions of Section 31 and 36 shall apply to any premises under such lease. Presence of express stipulation that lease will be terminable before its expiration at the option of either landlord or the tenant is important. This is explained by the Supreme Court of India in **Pabitra Kumar Roy Vs. Alita D'souza, [(2006) 8 SCC 344]** in the context of the West Bengal Premises Tenancy Act, 1956. It was elucidated in Para.15 of the judgment:

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

This observation amply clarifies what is the importance of “sooner determination” clause. This observation also elucidates why a lease which is otherwise not within the ambit of West Bengal Premises Tenancy Act 1956, brings the tenancy within sweep of the Act.

Subsequently, Division Bench of this Court considered the issue of “sooner determination” of lease in the context of the West Bengal Premises Tenancy Act, 1997 in **Prakashwati Chopra v. Sibaji Mitra, [(2006) SCC OnLine Cal 441]**. It was observed:

“25. It would thus appear that great emphasis was given by the earlier Act on the terminability of the lease. If a long lease for more than 20 years was terminable before expiration of its term it would be covered under the Act and all the provisions thereof would apply as indicated hereinabove irrespective of whether such a lease was in fact terminated before expiry of its term. We are of the considered opinion that this situation was sought to be remedied by the new Act when it provided that a person continuing in possession after termination of his tenancy shall be within the definition of a tenant. Mere terminability of the lease is no longer the *criteria*. In order to bring a pre Act registered lease within the fold of the tenancy Act of 1997 one has to show that the lease has in fact been terminated prematurely only then it would come within the mischief of the Act but it would not come within the mischief of the Act after the lease has been allowed to have a run of its normal life, in other words a lease will not come within the purview of the Act of 1997, if it expires by efflux of time. It is also worth noticing that under Section 3 of the Act a registered lease executed after the Act came into operation is specifically excluded from the purview of the Act of 1997. Therefore the legislature has rationalised the old Act in that mere terminability is no longer material. It is actual termination before expiry of lease is what is material.”

According to the Division Bench it is actual termination before expiry of lease what is material.

In the instant case, Clause 2(xi) of the deed of lease provides a “sooner determination” clause. The lease was, in fact, determined earlier. In view of the ratio of **Prakashwati Chopra’s** case and the prevailing facts of the case in hand, the differentiation made by Mr. Ghosh holds no leg to stand.

It is strenuously argued by Mr. Ghosh that rent includes municipal taxes. Therefore, the rent of the premises is much higher than ceiling limit provided in Section 3(f) of the West Bengal Premises Tenancy Act, 1997. The issue is no longer *res integra*. The issue came up for consideration before Three Judges’ Bench of the Supreme Court of India in **Karnani Properties Limited Vs. Miss Augustine & Others, [(1957) SCR 20: AIR 1957 SC 309]**. In respect of West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 where the Court concluded that rent must be taken to have been used in its ordinary meaning. The term rent is comprehensive enough to include all payments agreed by the tenant to be paid to his landlord for use an occupation not only of the building and its appurtenances but also of electronic installations and other amenities agreed to be provided by and at the cost of landlord. Ratio of this case was reiterated in number of other decisions. In **Calcutta Gujarati Education Society and Another Vs. Calcutta Municipal Corporation and Others, [(2003) 10 SCC 533]** the Supreme Court of India considered the liability of the tenant to pay proportionate share of municipal tax of the premises. In the context of West Bengal Premises Tenancy Act, 1997 and Section 231 of Kolkata Municipal Corporation Act it is observed by the Supreme Court of India:

“45....The legislature has taken note of the fact that a large number of properties in the metropolitan city of Calcutta are in occupation of tenants, sub-tenants or occupants on a comparatively small amount of rent or lease money. In such a situation, to impose entire burden of tax on the owner or lessor, would be inequitable, more so when the tenancy law does not allow

increase in rent beyond a particular limit and the right of eviction of the landlord is restricted to the grounds under the Tenancy Act. By the impugned provisions of the Act, therefore, the legislature has thought of apportioning the tax burden between owner or the *lessor* as one party and the tenant, sub-tenant or occupier as the other parties. The whole amount of tax is recoverable from the lessor and may also be recovered from the tenant or sub-tenant through attachment of the rent. In case where the lessor or landlord has paid the whole tax including the portion of tax payable by the tenant or sub-tenant, the landlord has to be equipped with the power to get himself reimbursed by recovery of the portion of tax paid by him on behalf of the tenant. Section 231 of the Act, therefore, creates a fiction that the “tax” apportioned on the tenant would be treated as “rent” and would be recoverable as such. The word “rent” has not been defined in the tenancy law and this Court has taken note of this legal position in the case of *Puspa Sen Gupta v. Susma Ghose* [(1990) 2 SCC 651] which arose out of the provisions of the Tenancy Act applicable to West Bengal. Rent is a compendious expression which may include lease money with service charges for water, electricity and other taxes leviable on the tenanted premises.”

In **Eih Limited vs. Nadia A Virji [(2022) SCC OnLine SC 947]** the Supreme Court of India, referring to **Calcutta Gujarati Education Society’s** case (supra), **Popat and Kotecha Property Vs. Ashim Kumar Dey, [(2018) SCC 149]** concluded that **Calcutta Gujarati Education Society’s** case cannot be read holding that tax apportioned on tenant be treated as part of rent. It was elucidated in Para.26:

“Merely because the obligation to pay half of the property tax and surcharge would be upon the tenant as per section 230 of the Act 1980 and the tenant is obliged to pay his share of municipal tax as an occupier of the premises under Section 5(8) of the Act 1997 and merely because for the purpose of

recovery of the tax due from the tenant, such tax apportioned can be recovered as rent, such tax apportioned (half of the amount of the property tax and surcharge) cannot become part of the rent of the premises which is tenanted. For that purpose, the terms and conditions mentioned in the tenancy agreement/lease agreement are required to be considered. For example, if in the tenancy agreement it is provided that the tenant shall pay 'X' amount which shall include the taxes, the tax component can be said to be 'part of the rent'. However, if under the agreement and/or even under Section 230 of the Act 1980 r/w Section 5(8) of the Act 1997, the tenant is liable to pay tax separately or half of the amount of tax now statutorily liable to be paid, the same can be recovered as arrears of rent because such 'tax' is to be treated as 'rent' for the purpose of recovery. However, the same cannot be said to be 'part of the rent'."

Coming to the case in hand, nowhere in the tenancy agreement it is stated that rent includes municipal tax. It is made clear in the agreement that apart from rent, municipal rates and taxes shall be payable without any whisper that rent is inclusive of municipal tax and rates. It is stipulated that the tenant shall pay the municipal taxes. A plain reading of the deed of lease leaves no option than to conclude that municipal tax is not part of the rent. The premises used are for commercial purpose and the rent is Rs.1900/- per month. Argument of Mr. Ghosh fails here also.

It is argued by Mr. Ghosh that this Court can dispensed with hearing the suit on preliminary point if necessary, even though a Co-ordinate Bench has ordered that the suit should be heard on preliminary issues, namely, Issue No. 1 and 6. This Court is of considered opinion that there is no cogent or good reason to set at naught the order passed by the Co-ordinate Bench and to embark on and continue the protracted trial whereas present materials on record are sufficient enough to decide on the preliminary issue.

For reasons discussed above, it is clear that the instant suit under the Transfer of Property Act, 1872 is not maintainable. Issue No. 1 and 6 are decided against the Plaintiff. In result, the suit is dismissed as not maintainable.

The instant suit is disposed of accordingly along with pending applications, if any.

(Sugato Majumdar, J.)