

CASE NO.:
Appeal (civil) 4392 of 1983

PETITIONER:
Spun Casting & Engg. Co.Pvt.Ltd.

RESPONDENT:
Dwijendra Lal Sinha (Dead) through Lrs. & Ors

DATE OF JUDGMENT: 08/04/2005

BENCH:
ASHOK BHAN & A.K.Mathur

JUDGMENT:
J U D G M E N T

BHAN, J.

This appeal by grant of special leave has been filed by defendant no.1, the appellant herein, against the judgment and decree passed by the High Court of Calcutta. By the impugned judgment the High Court has restored the decree for recovery of possession and mesne profits with regard to Plaint 'B' Schedule property in favour of the plaintiffs/original respondent nos.1 & 2 (since deceased and now represented by their legal representatives), setting aside the judgment of the Appellate Court in Title Appeal No.52/1976 and restoring that of the Trial Court.

Facts necessary for the disposal of this appeal are as under:
One Hangeswar alias Narendra Nath Singha on 4th February, 1936 obtained settlement/lease-hold interest for 'A' Schedule property, i.e. premises no 77, Benaras Road, Howrah admeasuring 3 Bighas including a tank from Sear Sole Raj Estate. He raised certain constructions including sheds on 'B' Schedule property, a part of 'A' Schedule property and set up an iron casting foundry under the name and style of D.L. Singha and Company, which was run by him till his death. After his death on 31st May, 1954, his legal heirs, original respondent nos. 1 and 2 settled the whole karbar (business) of iron casting foundry along with land and all fittings and fixtures in favour of one Kalipada Mondal and Bahar Bala Dassi on 27th July, 1954, for a period of five years starting with the month of Baisakha 1361 B.S. Bangabda Samvat (for short "B.S.") (Bangla year) to Chaitra 1365 B.S. at a monthly rent of Rs. 466/3 annas. By successive transfers, interest of original lessees/settlees came to be acquired by the appellant on 18th January, 1956 (A.D.). Settlement in favour of the appellant came to an end by efflux of time

in Chaitra 1365 B.S., equivalent to, 13th April, 1959. Appellant failed to vacate the 'B' Schedule property as well as to pay the rent after 1363 B.S.

Original plaintiff nos. 1 and 2 instituted suit no. 11/1959 against the appellant but the same was withdrawn due to some formal defects with liberty to file a fresh suit. After the withdrawal of said suit, appellant trespassed over 'C' Schedule property, i.e. remaining 'A' Schedule property consisting of a tank and its three banks. Appellant filled up the tank, raised certain structures thereon and extended its work over the said property.

Plaintiff respondent nos. 1 and 2, feeling aggrieved by the conduct of the appellant, instituted the present suit no. 65/1965 for recovery of possession of 'B' and 'C' Schedule properties and for mesne profits. Appellant in the written statement, inter alia denied the title of the plaintiffs to the suit property as well as existence of relationship of landlord and tenant between them. The allegation that the appellant had trespassed over 'C' Schedule property was denied.

Subordinate Court decreed the suit with respect to both 'B' and 'C' Schedule properties. It was held that 'C' Schedule property was not let out to the appellant and the appellant had taken possession of the same by committing trespass. That relationship of landlord and tenant existed between the parties with regard to 'B' Schedule property. It was held that the predecessors-in-interest of the appellant became tenant of the premises by virtue of settlement of karkhana (factory) together with the land underneath in their favour. Appellant having stepped into their shoes is estopped under Section 116 of the Indian Evidence Act from disputing the title of the plaintiffs. The settlement came to an end by efflux of time on 13th April, 1959. There was no necessity to determine the tenancy by issuing a notice under Section 106 of the Transfer of Property Act. Service of notice under Section 13 (6) of the West Bengal Premises Tenancy Act, 1956 (for short "the Act") was sufficient to put an end to the relationship of landlord and tenant between the parties. It was also held that the appellant had committed default in payment of rent of 'B' Schedule property.

Appellant being aggrieved preferred Title Appeal no. 52/1976 challenging the judgment and decree passed by the Subordinate Court in favour of the plaintiff-respondents. Appellate Court

partly allowed the appeal, affirming the decision of the Subordinate Court that 'C' Schedule property was not covered by the settlement dated 27th July, 1954 and was trespassed upon by the appellant. Appellant had raised construction on 'C' Schedule property illegally without taking permission from the landlord. With respect to 'B' Schedule property the judgment and decree passed by the Trial Court was set aside. It was held that since the Trial Court had found tenancy to be a premises tenancy, it must be governed by the provisions of the West Bengal Premises Tenancy Act, 1956 and, therefore, neither expiry of the period of settlement nor the assignment of the interest created thereunder in favour of the appellant can be a ground for eviction of the appellant. That tenancy of 'B' Schedule property could not be determined without issuing notice under Section 106 of the Transfer of Property Act. That the settlement dated 27th July, 1954 was made by the respondents in their character as a partnership firm and therefore suit for eviction filed by them in their individual capacity was not maintainable.

Feeling aggrieved by the findings of the Appellate Court with respect to the trespasser over 'C' Schedule property, appellant preferred Second Appeal no. 646/1977 and being aggrieved by the setting aside of the decree with respect to 'B' Schedule property, plaintiff-respondents filed cross objections in the High Court. High Court heard the second appeal and cross objections together and disposed them of by passing a common judgment.

Appeal filed by the appellant with regard to 'C' Schedule property was dismissed. It was held that the evidence on record established as found concurrently by the courts below that the occupation of the appellant on the said property was illegal and by way of trespass. Cross objections filed by the plaintiff-respondents were allowed granting decree for recovery of possession of 'B' Schedule property. Contention raised by the counsel for the respondents that the settlement dated 27th July, 1954 entered into between Narendra Nath Singha and predecessors-in-interest of the appellant was not the tenancy of "premises" as had been held by the courts below but was the tenancy of the karbar (business) of iron casting foundry along with the machineries and sheds and structures wherein the foundry was set up was accepted. High Court after construing the provisions of the settlement dated 27th July, 1954 and relying upon the three decisions of this court in Uttamchand vs.

S.M. Lalwani (AIR 1965 SC 716), Dwarka Prasad vs. Dwarka Das Saraf (AIR 1975 SC 1758) and Natraj Studios (P) Ltd. vs. Navrang Studios (AIR 1981 SC 537) observed that the dominant intention of the parties while creating the lease was to lease the karbar (business) of iron casting foundry and not that of the premises within the meaning of Section 2 (f) of the West Bengal Premises Tenancy Act, 1956. Structures and sheds formed part of the settlement only because the foundry was set up therein. That the parties never intended to settle or grant lease of the structures and sheds as such and therefore, it could hardly be said to be a settlement in respect of the premises constituting a tenancy of the premises within the meaning of West Bengal Premises Tenancy Act, 1956. Finding of the First Appellate Court with regard to the requirement of issuance of notice under Section 106 of the Transfer of Property Act was set aside. It was further held that after the dissolution of the partnership firm the respondents could file the suit in their individual capacity.

Finding recorded by the courts below and affirmed by the High Court that the 'C' Schedule property had not been let out to the appellant and that the appellant had trespassed upon the same is a finding of fact based on evidence and, therefore, does not call for interference.

Finding recorded by the High Court with regard to the requirement of issuance of notice under Section 106 of the Transfer of Property Act and the maintainability of the suit by the respondents in their individual capacity after the dissolution of the partnership firm has not been challenged before us. These two findings are also affirmed.

With regard to 'B' Schedule property the High Court set aside the finding of the First Appellate Court on two counts. Firstly, that the appellant had committed a default in payment of the rent after 1363 B.S. and secondly, on the ground that what was let out to the appellant was not the premises within the meaning of Section 2 (f) of the Act but the business housed in a building along with machinery which was not covered under the provision of the Act.

Learned counsel for the appellant is right in submitting that the High Court has erred in holding that the appellant had committed a default in payment of the rent. Plaintiff-respondents in their plaint did not take the plea that the appellant had committed a default in the payment of the rent or seek his eviction on the ground of

failure to pay the rent. No issue had been framed on this point. There is no material on the record to show that the appellant did not deposit the alleged arrears of rent as required by Section 17 (i) of the West Bengal Premises Tenancy Act, 1956, and as such a decree on the ground of default in payment of rent could not be passed. In the absence of any pleadings and evidence on record that the appellant had committed a default in the payment of rent, the High Court has erred in passing a decree for eviction on that ground.

This Court in *Uttam Chand v. S.M. Lalwani*, AIR 1965 SC 716 drawing a distinction between the lease of a building and the lease of a business held that what was protected under the Act was the lease of the building and not the lease of the business. The question before the Court was as to whether the lease created of Dal Mill building with fixed machinery in sound working condition was an 'accommodation' within the meaning of Section 3A of the Madhya Pradesh Accommodation Control Act, 1955. For determining the nature of lease created the Court laid the test of 'dominant intention' of the parties while creating the lease which is to be gathered in each case by construing the terms of the lease deed. Construing the terms of the lease in the said case this Court came to the conclusion that the dominant intention of the parties was to create the lease of the business and not that of the building. It was held that since the lease created was of running the business, the same was not protected under the Act. It was observed in para 12 as under:-

"12. What then was the dominant intention of the parties when they entered into the present transaction? We have already set out the material terms of the lease and it seems to us plain that the dominant intention of the appellant in accepting the lease from the respondent was to use the building as a Dal Mill. It is true that the document purports to be a lease in respect of the Dal Mill building; but the said description is not decisive of the matter because even if the intention of the parties was to let out the Mill to the appellant, the building would still have to be described as the Dal Mill building. It is not a case where the subject matter of the lease is the building and along with the leased building incidentally

passes the fixtures of the machinery in regard to the Mill; in truth, it is the Mill which is the subject matter of the lease, and it was because the Mill was intended to be let out that the building had inevitably to be let out along with the Mill. "

It was further observed in the same paragraph:-

"The fixtures described in the schedule to the lease are in no sense intended for the more beneficial enjoyment of the building. The fixtures are the primary object which the lease was intended to cover and the building in which the fixtures are located comes in incidentally. That is why we think the High Court was right in coming to the conclusion that the rent which the appellant had agreed to pay to the respondent under the document in question cannot be said to be rent payable for any accommodation to which the Act applies."

Following the aforesaid judgment in Dwarka Prasad vs. Dwarka Das Saraf, AIR 1975 SC 1758 this Court held that where a cinema theatre equipped with projector and other fittings is let out it would not be a lease of 'accommodation' as defined in Section 2 (1) (d) of the U.P. (Temporary) Control of Rent and Eviction Act, 1947. It was observed that, legislature intended to cover within the meaning of word 'accommodation,' premises simpliciter either for residential, commercial or industrial purposes but did not include the business accommodated in a building. Where the business itself was let out, the same would not fall within the meaning of the word 'accommodation' enjoying the protection of the Rent Act. That the leasing of a lucrative cinema business could not be reduced to a mere tenancy of building covered within the scope of the definition of 'accommodation'.

In the present case according to the plaintiff-respondents what was settled was the business of iron casting foundry along with building and the machinery therein and not the premises within the meaning of West Bengal Premises Tenancy Act, 1956. In order to determine the true character of the settlement, it would be necessary to

refer to the deed itself and construe the terms thereof.

The deed has not been described as a lease but as "an agreement for five years." In the first paragraph of the deed, the settlers recite how the first party having taken settlement of the land at premises no.77, Benaras Road along with a tank had set up an iron casting foundry valued approximately at Rs.75,000/-. It then goes on to recite that it is the said karkhana or in other words the business which is being settled with the second party i.e. the appellants on terms and conditions set out therein. Clause (i) of the terms provides that the second party is taking settlement of the business along with all its fixtures and appliances and the interest of the settlers in the land on an annual rent of Rs.5,594.4 annas payable on a monthly instalment of Rs.466.3 annas. The relevant portion of Clause (i) reads:

"The Second party is taking the said karbar (business) together with all rights on the aforesaid land and all fittings and fixtures of the Iron Foundry styled D.L. Singha & Co. from the first party with the promise to pay a sum of Rs.5594-4 as five thousand five hundred ninety four and four annas per annum on account of rent."

Under Clause (ii) the settlers undertake to pay the rent to the landlord as also to the municipality. Clause (iii) provides for forfeiture of the settlement for non-payment of rent for four consecutive months. Clause (iv) provides that on the expiry of the agreement the "fittings and fixtures of the said karbar (business) which the second party is now receiving from the first party (the second party) shall return the same on the expiry of the period of agreement. If there be any loss or damage to the same the same shall be made good by the second party." Clause (v) provides that if necessary, second party can bring in new fixtures and appliances with prior notice to the settlers and on the expiry of the agreement the second party shall be entitled to remove the fixtures and appliances brought by them. Clause (vi) provides that settlers will be entitled to carry on the business in their own firm's name but they shall have to bear all the expenses for electricity and telephone. Clause (vii) provides that after the expiry of first term if the second party desires to carry on the said karkhana (business) the first party shall enter into a separate agreement for a stipulated period. Clause (ix)

expressly excludes the tank and its three banks from the settlement so made.

The High Court after referring to the above quoted terms of the settlement came to the conclusion that the dominant intention of the parties who entered into the settlement was to effect a settlement in respect of the business of iron casting factory. The structures and sheds formed a part of the settlement only because the foundry was set up therein. The parties had never intended to settle or grant lease of the structure and the sheds as such. The High Court concluded that what was let out to the appellant was the business of running a iron casting foundry along with the building and the machinery and not a premises constituting a 'premises tenancy' within the meaning of Section 2 (f) of the West Bengal Premises Tenancy Act, 1956.

We have no hesitation in accepting the findings recorded by the High Court. Premises have been defined under Section 2(f) of the Act to mean:-

"Section 2 (f) : "premises" means any building or part of a building or any hut or part of a hut let separately and includes-

- (i) the gardens, grounds, and out-houses, if any, appertaining thereto,
- (ii) any furniture supplied or any fittings or fixtures affixed for the use of the tenant in such building or part of a building or hut or part of a hut; but does not include a room in hotel or a lodging house."

Reading the terms of the settlement as aforesaid and construing the same we are of the view that the dominant intention of the settlers was to effect the

settlement in respect of the karbar (business) of iron casting foundry set up by them along with machinery housed in a building. 'Premises' in the Act are defined to mean a building or a part of a building which includes gardens, grounds and out-houses, if any, appertaining to the building. It also include the furniture supplied or any fittings or fixtures in a building or a part of the building but would not include a room in a hotel or a lodging house. It does not include the lease of a business along with machinery in a building. The intention of the parties was not to settle or grant lease of the

structures and sheds as such. Structures and sheds did not constitute the dominant part of the settlement in favour of the appellant. It is evident from the terms of the settlement that the dominant intention of the parties was to create a lease for running the business of an iron casting foundry. It cannot be said that the settlement was in respect of the premises constituting 'premises tenancy' within the meaning of the Act. Tenancy was not being created of the premises to run a business it was to the contrary.

In *Natraj Studios (P) Ltd. v. Navrang Studios and another*, AIR 1981 SC 537 though this Court took the same view but keeping in view the peculiar provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, it was held the principle laid down in the earlier two judgements would not be applicable to the case. Referring to the amended provisions of the said Act it was held that the tenancy created was of the premises within the meaning of Section 5 (8) and 5 (8A) to which Part 11 of the Act has been made applicable by Section 6 (1) notwithstanding the fact that the building was not let out as such. We do not agree with the learned counsel for the appellant that this Court in *Natraj Studios (P) Ltd. (supra)* had revised its earlier view. The provisions of West Bengal Premises Tenancy Act, 1956 are altogether different from the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The West Bengal Premises Tenancy Act, 1956 can have application only if what is settled by way of lease is a premises and in order to decide whether the settlement is such or not, we are governed by the well settled principle laid down by three-Judge Bench of this Court in *Uttamchand vs. S.M. Lalwani*, AIR 1965 SC 716 followed by a later Bench of four hon'ble Judges in *Dwarka Prasad vs. Dwarka Das Saraf*, AIR 1975 SC 1758. In our view, what was settled in the present case was not the premises for carrying on a particular business but the businesses itself and therefore, it cannot come within the purview of West Bengal Premises Tenancy Act, 1956

No other view was urged before us. For the reasons stated above we do not find any infirmity in the judgment and decree passed by the High Court and the same is affirmed. Accordingly, the appeal is dismissed with no orders as to costs.