

A TECHNICIANS STUDIO PRIVATE LTD.

v.

LILA GHOSH & ANR.

September 19, 1977

[A. C. GUPTA AND S. MURTAZA FAZAL ALI, JJ.]

B *Transfer of Property Act (Act IV) 1882, sec. 53A—Doctrine of Part Performance—Scope of.*

West Bengal Premises Tenancy Act 1956—Appellant coming into possession of the premises as a result of a compromise decree in the court—Terms of compromise decree not registered and no lease deed executed subsequently—Whether payment and acceptance of rent creates a monthly tenancy entitling protection available under West Bengal Premises Tenancy Act 1956.

C In terms of the compromise petition filed in the High Court in an earlier ejectment suit, it was agreed by the predecessors-in-title of the respondent that the appellant would become "a direct tenant under the first respondent's husband and his brother who were then the owners of the property at a monthly rent of Rs. 1000/- and that the lease would be for a period of 16 years from May 19, 1954 with option to the appellant to terminate the lease earlier on giving 60 days' notice on the lessors." No deed of lease was ever executed nor the petition of compromise containing the terms of settlement was registered and the appellant's possession from May 19, 1954 was on the basis of the compromise. Respondent No. 1 after the expiry of the said period of lease served a notice on the appellant to quit and vacate the premises and thereafter filed a title suit No. 59 of 1970 on May 22, 1970 in the Third Court of the Subordinate Judge at Alipore for recovery of possession and mesne profits. The defence of the appellant was that by payment and acceptance of rent a monthly tenancy has been created in their favour which was continuing even after the expiry of the said period. The trial court found that to be effective as a lease for 16 years the petition of compromise required registration and this not having been done it could not create any interest in favour of the appellant in the premises though they were entitled to protect their possession for a period of 16 years under s. 53A of the Transfer of Property Act. It also held that payment and acceptance of rent made in terms of the unregistered compromise petition did not give rise to a right of tenancy and on the expiry of the said period, they had no protection against eviction and thus decreed the suit. Both the first appellate court and the High Court in second appeal affirmed the findings of the trial court.

F Dismissing the appeal by special leave, the Court,

G HELD : (1) Section 53A confers no active title on the transferee in possession. It only imposes statutory bar on the transferor. A person who is let into possession on the strength of a void lease does not acquire any interest in the property but gets under s. 53A only a right to defend his possession. In the instant case under the petition of compromise the appellant had to pay a monthly sum of Rs. 1000/- as rent during the period of intended lease which the appellant did. These monthly payments brought the appellant under the coverage of section 53A but from this fact alone that the appellant had performed his part of the contract it is not possible to conclude that a tenancy was brought into existence. Acceptance of the payments tendered as rent is not decisive of a tenancy. [520 A-C]

Prabodh Kumar Das and Ors. v. Dantmara Tea Co. Ltd. and Ors. 66 I.A. 293 and *State of Punjab v. British India Corporation Ltd.* [1964] (2) SCR 114(123), referred to.

H (2) Whether the relationship of landlord and tenant exists between the parties depends on whether the parties intended to create a tenancy and the intention has to be gathered from the facts and circumstances of the case. It is possible to find on the facts of a given case that payment made by a trans-

feree in possession were really not in terms of the contract but independent of it and this might justify an inference of tenancy in his favour. In the instant case the payment of a monthly sum as rent by the appellant to the plaintiff-respondent who accepted the same did not create any tenancy. The question is ultimately one of fact. [520 E-F]

Ram Kumar Das v. Jagadish Chandra Deb & Anr. [1952] SCR 269, held not applicable.

(3) Part performance in this country does not give rise to an equity as in England but to a statutory right which is comparatively a restricted right in that it is available only as a defence. Section 53A of the Transfer of Property Act is only a partial importation in the statute law of India of the English doctrine of part performance. [519 H, 520 A]

Sherth Maneklal Mansukhbhai v. M/s. Hormusji Jamshedji Ginwalla and sons. [1950] SCR 75, reiterated.

(4) The petition of compromise seeking to create a lease for 16 years was required to be registered and not being registered it did not affect the immovable property to which it relates and could not be received as evidence of any transaction affecting the property though it was admissible as evidence of part performance of a contract for the purpose of s. 53A of the Transfer of Property Act or as evidence of any collateral transaction not required to be effected by registered instrument. [519 A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 352 of 1977.

Appeal by Special Leave from the Judgment and order dated 6-5-1976 of the Calcutta High Court in Appeal from Appellate Decree No. 1557 of 1973.

A. K. Sen, Sankar Ghosh and Rathin Das for the Appellant.

Lal Narain Sinha, Tapash Chandra Ray, S. C. Agarwal, V. J. Francis, Sunil Kumar Bhattacharyya and Umma Prasad Mukherjee for the Respondent No. 1.

The Judgment of the Court was delivered by

GUPTA, J. This is an appeal by special leave from a judgment of the Calcutta High Court disposing of a second appeal which arose out of a suit for recovery of possession instituted against the appellant by the first respondent. The property in dispute consists of land measuring 11 bighas 17 kathas and 17 sq. ft. with structures thereon, being premises No. 1, Babu Ram Ghosh Road, Calcutta, previously numbered as premises Nos. 2, 3 and 4, Babu Ram Ghosh Road. Earlier, in 1952 the predecessors-in-interest of the first respondent had brought a suit for ejectment of the lessees of the property impleading the appellant, a private limited company who were the sub-lessees, also as a defendant. That suit was decreed against all the defendants some time in 1954. The appellant applied for review of the judgment decreeing the suit. The review petition having been dismissed, the appellant moved the High Court in revision. The revision case was ultimately disposed of in terms of a petition of compromise. The relevant terms of the compromise were—

- (i) the appellant would become a direct tenant under the first respondent's husband and his brother, who were

A then the owners of the property, at a monthly rent of Rs. 1000/-;

- (ii) the lease would be for a period of sixteen years from May 19, 1954 with option to the appellant to terminate the lease earlier on giving sixty days' notice on the lessors.

B No deed of lease was however executed, nor the petition of compromise containing the terms of settlement was registered. There is some dispute as to whether the appellant had been dispossessed in execution of the ejectment decree or continued in possession, but it is clear that their possession on and from May 19, 1954 was on the basis of the compromise.

C The property ultimately devolved on the first respondent as sole owner who on the expiry of the period of the lease mentioned in the compromise petition served a notice on the appellant to quit and vacate the premises. As the appellant did not comply with the notice, the first respondent instituted title suit No. 59 of 1970 on May 22, 1970 in the Third Court of the Subordinate Judge at Alipore for recovery of possession and mesne profits on a declaration that the appellant were trespassers and in wrongful occupation of the premises after the period mentioned in the petition of compromise had expired. The appellant's case in their written statement was that by payment and acceptance of rent a monthly tenancy had been created in their favour which was continuing even after the expiry of the said period. The trial court found that to be effective as a lease for sixteen years the petition of compromise required registration, and this not having been done it could not create any interest in favour of the appellant in the premises though they were entitled to protect their possession for a period of sixteen years under section 53A of the Transfer of Property Act. It was further held that payment and acceptance of rent made in terms of the unregistered compromise petition did not give rise to a right of tenancy and on the expiry of the said period they had no protection against eviction. The trial court accordingly decreed the suit. The first appellate court having dismissed the appeal preferred against this decision, the appellant took a second appeal to the High Court. The High Court dismissed the second appeal affirming the findings of the courts below.

F
G The contention of the appellant in this Court also is that as the first respondent and her predecessors-in-interest before her had accepted the rent paid month by month duly granting receipts, a monthly tenancy had been created in favour of the appellant independent of the protection they had under section 53A of the Transfer of Property Act. It is claimed that this was a tenancy governed by the West Bengal Premises Tenancy Act, 1956 which protected them against eviction. Was the High Court wrong on the facts found by the courts below in rejecting this contention?

H Admittedly there was an ejectment decree against the appellant before the petition of compromise was filed in the High Court. By the compromise the decree was not set aside but a lease for sixteen

years was sought to be created in favour of the appellant. Thus whatever interest the appellant may have had in the property was extinguished after the passing of the decree and even if they continued in possession after the decree was passed the subsequent possession in order to be valid must be referable to the compromise. Clearly, the petition of compromise seeking to create a lease for sixteen years was required to be registered and not being registered it did not affect the immovable property to which it relates and could not be received as evidence of any transaction affecting the property though it was admissible as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act or as evidence of any collateral transaction not required to be effected by registered instrument. In order to be entitled to the protection of section 53A, the transferee must perform or must be willing to perform his part of the contract. In this case one of the terms in the petition of compromise was that the appellant would pay a monthly rent of Rs. 1000/- and there is no dispute that this sum was paid every month for the period of sixteen years. It has not been found or even claimed that any such sum was paid and accepted after the expiry of that period. Mr. A. K. Sen appearing for the appellant contends that as a result of these monthly payments not only the protection under section 53A was available to the appellant, but a monthly tenancy also came into existence which subsisted after the period of sixteen years mentioned in the petition of compromise had expired. In support of his contention Mr. Sen relies mainly on the decision of this Court in *Ram Kumar Das v. Jagadish Chandra Deb Dhabal Deb and another.*⁽¹⁾ We do not think that *Ram Kumar's* case is an authority for the proposition Mr. Sen was contending for that in every case where a person enters into possession on the strength of an invalid lease and the landlord accepts 'rent' in terms of that invalid lease, a monthly tenancy is created by implication of law. In *Ram Kumar's* case it was admitted that in the beginning there was a relationship of landlord and tenant between the parties, and the only question that arose for decision was whether the defendant was in fact a monthly tenant under the plaintiff at the date when the notice to quit was served upon him. The Court speaking through Mukherjea J. came to the conclusion that "on the facts of this case it would be quite proper to hold that the tenancy of the defendant was one from month to month since its inception in 1924". It is not necessary to refer to the other cases cited by Mr. Sen; these are the decisions of several High Courts which are either based on an incorrect reading of *Ram Kumar's* case or in which the contention Mr. Sen has raised here did not arise for consideration. If Mr. Sen's contention were correct, then it was unnecessary to enact section 53A.

Mr. Sen has also referred to the law in England according to which a tenancy at will is implied when a person enters into possession under a void lease. But part performance in this country does not give rise to an equity as in England but to a statutory right which is comparatively a restricted right in that it is available only as a defence. It has been held that section 53A is only a partial importation in the

(1) [1952] S.C.R. 269.

A statute law of India of the English doctrine of part performance. see *Sheth Maneklal Mansukhbhai v. Messrs Hormusji Jamshedji Ginwalla and sons*⁽¹⁾. It is well settled that section 53A confers no active title on the transferee in possession, it only imposes a statutory bar on the transferor. (see *Probodh Kumar Das and others v. Dantmara Tea Company Limited and others* ⁽²⁾). Thus a person who is let into possession on the strength of a void lease does not acquire any interest in the property but gets under section 53A only a right to defend his possession. As the section says, this right is subject to the condition that the transferee has performed or is willing to perform his part of the contract. In this case under the petition of compromise the appellant had to pay a monthly sum of Rs. 1000/- as rent during the period of the intended lease which the appellant did. These monthly payments brought the appellant under the coverage of section 53A, but from this fact alone that the appellant had performed his part of the contract, it is not possible to conclude that a tenancy was brought into existence. Even the acceptance of these payments tendered as rent is not decisive of a tenancy. "In its wider sense rent means any payment made for the use of land or buildings. In its narrower sense it means payment made by tenant to landlord for property demised to him." (*State of Punjab v. British India Corporation Ltd.*) ⁽³⁾. Here the payments can be explained, as the courts have done, as evidence of the appellant's willingness to perform their part of the contract. This does not mean however that there cannot be a relationship of landlord and tenant in any case where the transferee has taken possession of the property under a void lease or in part performance of a contract and is entitled to protection under section 53A of the Transfer of Property Act. Such a view would be incorrect and encourage attempts to circumvent the protection of the Rent Acts given to the tenants. Whether the relationship of landlord and tenant exists between the parties depends on whether the parties intended to create a tenancy, and the intention has to be gathered from the facts and circumstances of the case. It is possible to find on the facts of a given case that payments made by a transferee in possession were really not in terms of the contract but independent of it, and this might justify an inference of tenancy in his favour. The question is ultimately one of fact. In the present case the High Court has found in agreement with the courts below that the "payment of rent by the appellant to the plaintiff respondent who accepted the same did not create any tenancy in favour of the appellant inasmuch as the said payments were made in part performance of the said contract of lease contained in the compromise petition". We cannot go behind this finding of fact on which the appeal turns. The appellant's plea of tenancy cannot therefore be accepted.

The appeal is dismissed with costs.

S.R.

Appeal dismissed

(1) [1950] S.C.R. 75.

(2) 66 I.A. 293.

(3) [1964] 2 S.C.R. 114, 123.