M/S Park Street Properties (Pvt) Ltd vs Dipak Kumar Singh And Anr on 29 August, 2016

Equivalent citations: AIR 2016 SUPREME COURT 4038, 2016 (9) SCC 268, 2017 (1) AJR 729, AIR 2016 SC (CIVIL) 2630, (2016) 2 CLR 658 (SC), (2016) 4 KER LJ 47, (2016) 2 WLC(SC)CVL 566, (2016) 4 CIVLJ 549, (2016) 4 RECCIVR 243, (2016) 3 ALL RENTCAS 684, (2016) 3 CURCC 430, (2016) 4 CIVILCOURTC 289, (2017) 1 MPLJ 550, (2016) 5 ANDHLD 179, (2016) 4 ICC 385, (2016) 2 RENTLR 434, (2017) 2 MAH LJ 32, (2016) 2 ORISSA LR 633, (2017) 134 REVDEC 127, (2016) 8 SCALE 327, (2016) 166 ALLINDCAS 84 (SC), (2016) 119 ALL LR 447, (2016) 2 RENCR 297, 2016 (4) KCCR SN 556 (SC), 2016 (4) KLT SN 6.1 (KER)

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Bench: Adarsh Kumar Goel, V.Gopala Gowda

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8361 OF 2016

(Arising out of SLP (C) No.24486 of 2014)

M/S PARK STREET PROPERTIES (PVT) LTD. .....APPELLANT

Vs.

DIPAK KUMAR SINGH & ANR. .....RESPONDENTS

J U D G M E N T

V. GOPALA GOWDA, J.

Leave granted.

The present appeal arises out of the impugned judgment and order dated 15.05.2014 passed by the High Court of Calcutta in F.A. No. 151 of 2012, whereby the High Court has set aside the order of the Trial Court and remanded the matter to it for reconsideration from the stage of examining the question of validity of the notice dated 30.10.2008.

The relevant facts of the case required to appreciate the rival legal contentions advanced on behalf of the parties are stated in brief hereunder:

> One Karnani Properties Limited, a company incorporated under the Companies Act, 1956 was the owner of the suit premises. It had let out the suit premises in favour of the appellant herein with the right to sublet the same or portions thereof. The appellant herein entered into an agreement dated 15.10.2004 with the respondents subletting the suit premises for the purpose of carrying out business from the 'Blue Fox Restaurant'. Subsequently, the respondents requested the appellant to allow them to run franchise or business dealing with McDonald's family restaurant from the suit premises. In pursuance of the same, the agreement dated 15.10.2004 was terminated, and a tenancy of the suit premises was created in favour of the respondents on the basis of an unregistered agreement dated 07.08.2006 at a rent and on the terms and conditions agreed therein. In terms of the said agreement, the tenancy commenced from 01.08.2006, at a rent of Rs. 20,000/- per month, payable by the tenants-respondents by the 7th day of every succeeding month according to the English calendar. Further, as per the terms of the agreement, in case of breach of the agreement, the landlord- appellant was entitled to terminate the tenancy after serving a notice of period of thirty days. On 30.10.2008, the appellant issued a notice under Section 106 of the Transfer of Property Act, 1882 (hereinafter referred to as the "Act") terminating the monthly tenancy of the respondents in respect of the tenanted premises upon the expiry of 15 days from the date of receipt of the said notice. Upon the expiry of the period of 15 days, the respondents did not vacate the suit premises. The appellant thus, filed suit for recovery of khas possession and mesne profits of the suit premises before the City Civil Court at Calcutta. The respondents contested the suit inter alia contending that by necessary implication the parties had agreed to not terminate the lease of the premises before 30 years, and that it was for this reason, a clause was incorporated for enhancement of monthly rent at the rate of 15% after expiry of every 3 years. The respondents further urged that the appellant had permitted them to invest a substantial sum of money for further repair and renovation of the tenanted premises suitably for their business. Thus, the appellant, by its declaration, acts and omissions had intentionally caused and permitted the respondents to believe that they will not terminate the lease of the respondents in respect of the tenanted premises before the expiry of the franchise agreement for running the McDonald's Family Restaurant from the tenanted premises. It was thus, urged by the respondents that the notice of termination of lease is bad and not in accordance with law. The Trial Court, after examining the evidence on record, decreed the suit in favour of the appellant. "It appears that clause 6 of the unregistered Memorandum of Agreement dated 7th August, 2006, is an important clause which deals with determination or termination of the tenancy only in case of non-payment of rent for three consecutive months and the tenant in spite of notice to remedy such breach fails to make such payment. When the document is inadmissible in evidence, none of its terms can be admitted in evidence for the purpose of proving an important clause contained therein including the clause 6. Reliance on clause 6 of

> the memorandum of Agreement dated 7th August, 2006 cannot be termed as using the document for a collateral purpose, in as much as proving and/ or reliance on clause 6 is an important term of the agreement which cannot be proved by admission of an unregistered lease deed into evidence.
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> So the notice appears to be legal and valid." (emphasis laid by this Court) The respondents were accordingly, directed to vacate the suit premises within three months from the date of the order. Aggrieved of the judgment and order of the Trial Court, the respondents challenged the correctness of the same by way of filing appeal before the High Court. The High Court observed as under:
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> "It is the general proposition of law in view of the provisions of Section 49 of the Indian Registration Act that when a document is required to be registered under a provision of law, it cannot be accepted in evidence of any transaction affecting an immovable property in absence of registration of that document. It is also true that in accordance with the provisions of Section 107 of the Transfer of Property Act, 1882, a lease of immoveable 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.

But the above observation does not exhaust the scope of determination of a question as regards admissibility of an instrument which has been improperly admitted in evidence. The decision of Javer Chand & Ors v. Pukhraj Surana reported in AIR 1961 SC 1655 is an authority for the proposition that once document has been marked as an exhibit in a case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross examination of their witnesses, it is not open either to the trial court itself or to a court of appeal or revision to go behind that order. The learned Court below committed an error in passing the decree in favour of the respondent. The impugned judgment is, therefore, required to be interfered with and the validity of the notice dated October 30,2008 is required to be reconsidered by the learned Court below looking into the "Exhibit-4" The High Court accordingly, allowed the appeal and remanded the suit back to the Trial Court for reconsideration from the stage of examining the question of validity of notice dated 30.10.2008. Hence, the present appeal filed by the appellant.

Mr. C.A. Sundaram, learned senior counsel appearing on behalf of the appellant contends that the agreement dated 07.08.2006 creates a monthly tenancy. It is submitted that in terms of Section 17(1)(d) of the Registration Act and Section 107 of the Act, the said document would require registration only if it leases the immoveable suit property from year to year or for any term exceeding one year or receiving yearly rent. Therefore, the agreement dated 07.08.2006 was not required to be registered. It is further contended that it is not even the case of the appellant that the agreement intended to grant lease of year to year. The learned senior counsel further contends that a monthly tenancy is terminable at will. In the instant case, the monthly tenancy was terminable only in the manner stipulated under Clause 6 of the agreement dated 07.08.2006. The learned senior counsel further contends that it is the case of the appellant that in terms of the lease, the same could not be terminated unless there was a breach of its provisions. It is contended that this argument

cannot be accepted, as that goes against the very spirit of Section 106 of the Act. It is contended that the term 'contract to contrary' in Section 106 of the Act only envisages a valid contract, and that Section 106 of the Act cannot be subverted by way of a contract which is contrary to the provisions of law. It is contended that parties are free to contract out of Section 106 of the Act only by way of a registered instrument and not otherwise. The learned senior counsel places reliance on the decision of this Court in the case of Samir Mukherjee v. Davinder K. Bajaj[1], the relevant potion of which is extracted as hereunder:

> "Section 107 prescribes the procedure for execution of a lease between the parties. Under the first paragraph of this section a lease of immovable property from year to year or for any term exceeding one year or reserving yearly rent can be made only by registered instrument and remaining classes of leases are governed by the second paragraph that is to say all other leases of immovable property can be made either by registered instrument or by oral agreement accompanied by delivery of possession. In the case in hand we are concerned with an oral lease which is hit by the first paragraph of Section 107 of the Transfer of Property Act. Under Section 107 parties have an option to enter into a lease in respect of an immovable property either for a term less than a year or from year to year, for any term exceeding one year or reserving a yearly rent. If they decide upon having a lease in respect of any immovable property from year to year or for any term exceeding one year, or reserving yearly rent, such a lease has to be only by a registered instrument. In absence of a registered instrument no valid lease from year to year or for a term exceeding one year or reserving a yearly rent can be created. If the lease is not a valid lease within the meaning of the opening words of Section 106 the rule of construction embodied therein would not be attracted. The above is the legal position on a harmonious reading of both the sections.
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> In Ram Kumar Das (supra), Section 106 was considered by a bench of four judges of this court. This court held that this section 106 lays down the rule of construction which is to be applied when there is no period agreed upon between the parties and in such cases duration has to be determined by the reference to the object for purpose for which tenancy is created. It was also held that rule of construction embodied in this section applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession and acceptance of rent and other circumstances. It was further held that it is not disputed that a contract to the contrary as contemplated by Section 106 of the Transfer of Property Act need not be an express contract; it may be implied, but it certainly should be a valid contract. On the fact of that case, the court held that 'the difficulty in applying this rule to the present case arises from the fact that tenancy from year to year or reserving an yearly rent can be made only by registered instrument as lays down in Section 107 of the Transfer of Property Act.'" (emphasis laid by this Court) The learned senior counsel further places reliance on the decision of this Court in the case of K.B. Saha & Sons Pvt. Ltd v. Development Consultant Ltd.[2], wherein it was held as under:

"34. From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that :-

1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immoveable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.

35. In our view, the particular clause in the lease agreement in question cannot be called a collateral purpose. As noted earlier, it is the case of the appellant that the suit premises was let out only for the particular named officer of the respondent and accordingly, after the same was vacated by the said officer, the respondent was not entitled to allot it to any other employee and was therefore, liable to be evicted which, in our view, was an important term forming part of the lease agreement. Therefore, such a Clause, namely, Clause 9 of the Lease Agreement in this case, cannot be looked into even for collateral purposes to come to a conclusion that the respondent was liable to be evicted because of violation of Clause 9 of the Lease Agreement. That being the position, we are unable to hold that Clause 9 of the Lease Agreement, which is admittedly unregistered, can be looked into for the purpose of evicting the respondent from the suit premises only because the respondent was not entitled to induct any other person other than the named officer in the same." The learned senior counsel submits that there is no infirmity with the judgment and order of the Trial Court and that the High Court was not justified in interfering with the same and remanding the matter back to the Trial Court on the ground that the terms of the agreement dated 07.08.2006 were not taken into consideration in a proper perspective.

On the other hand, Mr. Anindya Mitra and Mr. Gopal Subramanium, learned senior counsel appearing on behalf of the respondents contends that termination of lease is by its definition meant to disrupt the contract between the parties. Sections 106 and 107 of the Act provides for duration of leases and how they are to be made. It is submitted that Section 106 of the Act cannot be departed from and that the operation of Section 107 of the Act can be excluded by virtue of Section 106 of the

Act only in cases where there is a valid contract to the said effect. The learned senior counsel places reliance on the decision of this Court in the case of Ram Kumar Das v. Jagadish Chandra Deb Dhabal[3], wherein it was held as under:

> "The section lays down a rule of construction which is to be applied when there is no period agreed upon between the parties. In such cases the duration has to be determined by reference to the object or purpose for which the tenancy is created. The rule of construction embodied in this section applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession and acceptance of rent and other circum- stances. It is conceded that in the case before us the tenancy was not for manufacturing or agricultural purposes. The object was to enable the lessee to build structures upon the land. In these circumstances, it could be regarded as a tenancy from month to month unless there was a contract to the contrary. The question now is, whether there was a contract to the contrary in the present case? Mr. Setalvad relies very strongly upon the fact that the rent paid here was an annual rent and he argues that from this fact it can fairly be inferred that the agreement between the parties was certainly not to create a monthly tenancy. It is not disputed that the contract to the contrary, as contemplated by section 106 of the Transfer of Property Act, need not be an express contract; it may be implied, but it certainly should be a valid contract. If it is no contract in law, the section will be operative and regulate the duration of the lease. It has no doubt been recognised in several cases that the mode in which a rent is expressed to be payable affords a presumption that the tenancy is of a character corresponding there to. Consequently, when the rent reserved is an annual rent, the presumption would arise that the tenancy was an annual tenancy unless there is something to rebut the presumption." The learned senior counsel submits that in the instant case, the requirements under Section 106 of the Act need to be adhered to, as clause 6 of the agreement operates as a contract to the contrary.

We have heard the learned senior counsel appearing on behalf of the parties and have perused the evidence on record. The essential question which arises for our consideration in the instant case is whether the agreement dated 07.08.2006 can be read in evidence, and whether it is a contract to contrary in terms of Section 106 of the Act.

At the outset, it would be useful to refer to the statutory provisions at play in the instant case, which are Sections 106 and 107 of the Act, which read as under:

> "106. Duration of certain leases in absence of written contract or local usage:
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> 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 expiring with the end of a year of the tenancy; 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 expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107. Leases how made:

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.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:

PROVIDED that the State Government from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession." (emphasis laid by this Court) A perusal of Section 106 of the Act makes it clear that it creates a deemed monthly tenancy in those cases where there is no express contract to the contrary, which is terminable at a notice period of 15 days. The section also lays down the requirements of a valid notice to terminate the tenancy, such as that it must be in writing, signed by the person sending it and be duly delivered. Admittedly, the validity of the notice itself is not under challenge. The main contention advanced on behalf of the respondents is that the impugned judgment and order is valid in light of the second part of Section 107 of the Act, which requires that lease for a term exceeding one year can only be made by way of a registered instrument.

At this stage, it will also be useful to examine Clause 6 of the agreement dated 07.08.2006, which reads as under:

"6. Default In the event of any default on the part of the Tenants in making payment of the rent for 3 consecutive months or in the event of any breach of any the terms and conditions herein contained and on the part of the tenants to be performed and observed and the landlord shall be entitled to serve a notice on call upon the tenants to make payment of the rent and to remedy for the breach of any of the remaining terms and conditions herein contained and if within a period of 30 days, the Tenants

> shall fail to remedy the breach the landlord shall be entitled to determine or terminate the tenancy." (emphasis laid by this Court) Thus, in terms of clause 6 of the agreement, the landlord was entitled to terminate the tenancy in case there was a breach of the terms of the agreement or in case of non-payment of rent for three consecutive months and the tenants failed to remedy the same within a period of thirty days of the receipt of the notice. The above said clause of the agreement is clearly contrary to the provisions of Section 106 of the Act. While Section 106 of the Act does contain the phrase 'in the absence of a contract to the contrary', it is a well settled position of law, as pointed out by the learned senior counsel appearing on behalf of the appellant that the same must be a valid contract.

It is also a well settled position of law that in the absence of a registered instrument, the courts are not precluded from determining the factum of tenancy from the other evidence on record as well as the conduct of the parties. A three Judge bench of this Court in the case of Anthony v. KC Ittoop & Sons[4], held as under:

> "A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created. What is mentioned in the three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created. The first paragraph has been extracted above and it deals with the mode of creating the particular kinds of leases mentioned therein. The third paragraph can be read along with the above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein. All other leases, if created, necessarily fall within the ambit of the second paragraph. Thus, dehors the instrument parties can create a lease as envisaged in the second paragraph of Section 107 which reads thus..... When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than through such deed.
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> ..... 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 un-rebutted." (emphasis laid by this Court) Thus, in the absence of registration of a document, what is deemed to be created is a month to month

tenancy, the termination of which is governed by Section 106 of the Act.

Thus, the question of remanding the matter back to the Trial Court to consider it afresh in view of the fact that the same has been admitted in evidence, as the High Court has done in the impugned judgment and order, does not arise at all. While the agreement dated 07.08.2006 can be admitted in evidence and even relied upon by the parties to prove the factum of the tenancy, the terms of the same cannot be used to derogate from the statutory provision of Section 106 of the Act, which creates a fiction of tenancy in absence of a registered instrument creating the same. If the argument advanced on behalf of the respondents is taken to its logical conclusion, this lease can never be terminated, save in cases of breach by the tenant. Accepting this argument would mean that in a situation where the tenant does not default on rent payment for three consecutive months, or does not commit a breach of the terms of the lease, it is not open to the lessor to terminate the lease even after giving a notice. This interpretation of the clause 6 of the agreement cannot be permitted as the same is wholly contrary to the express provisions of the law. The phrase 'contract to the contrary' in Section 106 of the Act cannot be read to mean that the parties are free to contract out of the express provisions of the law, thereby defeating its very intent. As is evident from the cases relied upon by the learned senior counsel appearing on behalf of the appellant, the relevant portions of which have been extracted supra, the contract between the parties must be in relation to a valid contract for the statutory right under Section 106 of the Act available to a lessor to terminate the tenancy at a notice of 15 days to not be applicable.

In view of the above reasoning and conclusions recorded by us, the impugned judgment and order passed by the High Court is set aside. The judgment and order passed by the Trial Court is restored. The Appeal is accordingly allowed. No costs.

… J. [V.GOPALA GOWDA] ………………………………………………………J. [ADARSH KUMAR GOEL] New Delhi, August 29, 2016

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[2] (2001) 5 SCC 259 [4] (2008) 8 SCC 564 [6] 1952 (3) SCR 269 [8] (2000) 6 SCC 394