

**CIVIL APPEAL
APPEAL FROM ORIGINAL DECREE**

**Present: THE HON'BLE JUSTICE TAPAN KUMAR DUTT
AND
THE HON'BLE JUSTICE KISHORE KUMAR PRASAD**

F.A. NO. 226 OF 2004

Judgment on: 1st April, 2010

**Messers Amar Jyoti Pictures
versus
Sri Himadri Das & Ors.**

POINTS:

ANTERIOR DATE :Registered deed of lease for a period of 20 years or above is executed by giving its effect from an anterior date-Effective period of lease from the date of execution falls short of 20 years-Relationship created by such lease, whether governed by the provision contained in the West Bengal Premises Tenancy Act-Section 5 of the Transfer of Property Act, whether stands in the way of creating a relationship of lessor and lessee for more than one year from a period anterior to the date of execution of the registered deed of lease-Transfer of Property Act, 1882 S.5

FACTS:

The defendant was a tenant under a registered deed of lease dated 28th April, 1959 commencing from 1st April, 1959 at a rental of Rs.250/- per month in respect of the suit property. The lease commenced from 1st day of April, 1959 and expired on 31st March, 1980 by efflux of time but the defendant did not vacate and hence the plaintiffs were compelled to file the suit. The plaintiffs/respondents filed a suit against the defendant/appellant in the City Civil Court Calcutta praying inter alia for a decree for khas possession after evicting the appellant from the suit premises, mesne profits and damages.

HELD:

Where a lease is expressed to commence from a date anterior to the date of execution of the lease such anterior date would be material only for the purpose of computation of the period of the lease when it is one for a term of years but the interest of the lessee under the deed cannot be said to have begun from that anterior date and such interest will commence from the date of execution of the deed of lease.

Para-32

The point questioning the validity of the lease in question is a meritless point. The lease in question was a valid lease and it commenced from 28.04.1959 but for the purpose of computation of the period of lease the date of commencement should be 1st April 1959. The relationship of lessor and lessee in between the parties to the said lease commenced from 28th of April 1959.

Para-33

The other point, to let out the suit property to the appellant is also without any substance. It will appear that the appellant did not ever raise such question either at the time of being inducted as a lessee in the property or during the continuance of the lease. The appellant allowed the entire period of lease to expire and enjoyed the lease till its expiry. The appellant is estopped from challenging and questioning the said authority of the respondent to grant the lease in favour of the appellant according to good conscience and equity. The respondent is correct in his submission in this regard. In the present case the other co-owners have not disputed and/or raised any objection against the respondent's action of letting out the suit property to the appellant.

Para-34

CASES CITED:

- 1) Dipak Sen & Anr. - vs. - Smt. Lakshmi Rani Das 2000(1) CHN 365
- 2) Rita Bhattacharjee - vs. - Shanti Ranjan Bhattacharjee 2009 (1) CHN 499
- 3) Swapna Mukherjee (nee Roy) - vs. - Jyotirmoy Mukherjee 2009 (1) CHN 4994)

- 4) Ranjit Kumar Dutta - vs. - Tapan Kumar Shaw and another F.A. No.149 of 1994.
- 5) Gopika Projects Private Ltd. - vs. - State of West Bengal
with
Gopika Projects Private Ltd. - vs. - Neli Roy 2209 (4) CHN 652
- 6) P.M.C. Kunhiraman Nair - vs. - C.R. Naganatha Iyer and others (1992) 4 Supreme Court Cases 254
- 7) Makali Engg. Works Pvt. Ltd. - vs. - Dalhousie Properties Ltd 2006 (1) CHN 419 Paras 36, 37, 38 and 43
- 8) Ranjit Kumar Dutta - vs. - Tapan Kumar Shaw reported in A.I.R. 1997
Calcutta 278
- 9) Pabitra Kumar Roy and another - vs. – Alita D’souza (2006) 8 Supreme Court
Cases 344
- 10) Bazaz Construction & Mining (P) Limited - vs. - Adhish Chandra Sinha and Ors. 2001 (2)
CHN 579
with
Mervyn Murray - vs. - Adhish Chandra Sinha and Ors.
- 11) Binny Ltd. - vs. - Alliance Properties & Industries Ltd.2006 (3) CHN 322
- 12) Baneswar Pal - vs. - Smt. Nirmala Jyoti A.I.R.1979 Calcutta 396
- 13) Mahindra & Mahindra - vs. - Sm. Kohinoor Debi 1989 (1) CHN 1
- 14) Savita Dey - vs. - Nageswar Majumdar and another (1995) 6 Supreme
Court Cases 274

15) Bholanath Karmakar & Ors. - vs - Madanmohan Karmakar & Ors. 1987 (II)

CHN 418

16) Lionel Edwards Ltd. - vs. - St. of West Bengal 70 C.W.N. 452

17) Kumar Krishna Prosad Lal Singha Deo - vs. - The Baraboni Coal Concern Ltd. and ors. 41 CWN 1253

18) Smt. Kanta Goel - vs. - B. P. Pathak and others A.I.R. 1977 Supreme Court 1599

19) Pal Singh - vs. - Sunder Singh (Dead by Lrs. and others (1989) 1 Supreme Court Cases 444

Mr. P. Mullick
Mr. V. Misra,
Mr. Harish Tandon For the Appellant.

Mr. Haradhan Banerjee,
Mr. Shyamal Chakraborty,
Mr. Koushik Pradhan For the Respondent.

THE COURT:

1) This Court has heard the Learned Advocates for the respective parties.

2) The plaintiffs/respondents filed a suit against the defendant/ appellant being Title Suit No. 1740 of 1986 in the City Civil Court Calcutta praying inter alia for a decree for khass possession after evicting the appellant from the suit premises, mesne profits and damages. The case made out in the plaint was inter alia to the effect :-

(a) The defendant was a tenant under a registered deed of lease dated 28th April, 1959 commencing from 1st April, 1959 at a rental of Rs.250/- per month in respect of the suit property.

b) In the year 1959 when the defendant was inducted as a tenant, Nripendra Kumar Das, Rabindra Kumar Das and Sudhindra Kumar Das jointly had two annas(share, Smt. Juthika Das had two annas share, Smt. Charu Bala Das had four annas share which she settled in favour of the plaintiff No.1 by a registered deed of settlement with the condition that after her death her four annas share shall devolve upon the plaintiff No.1 and consequently on her death her share had devolved upon the plaintiff No.1; and Md. Rafique and others (nationals of Pakistan) had eight annas share in the premises No.12, Waterloo Street, Calcutta – 69 (hereinafter referred to as the said premises).

(c) Rabindra Kumar Das looked after the entire affairs of the said premises also on behalf of the other co-sharers and he with the consent of all other co-sharers executed the aforesaid registered deed of lease as lessor and the said Rabindra Kumar Das would collect monthly rent from the defendant/respondent and thereafter distribute the same amongst other co-sharers according to their respective shares. In 1964 Nripendra Kumar Das, Rabindra Kumar Das and Sudhindra Kumar Das by a registered deed of exchange transferred their two annas share in the said premises to Hirendra Kumar Das. Juthika Das transferred her two annas share to Hirendra Kumar Das by a registered deed of exchange. Thus Hirendra Kumar Das became owner of four annas share in the said premises.

In the year 1965 eight annas share of Md. Rafiq and others vested in the Custodian of Enemy Property for India. Hirendra Kumar Das was permitted to collect rent from the tenants and, accordingly, Hirendra Kumar Das used to collect rent from the defendant/respondent and distributed such rent amongst the co-sharers according to their respective shares.

(d) The lease period expired on 31st March, 1980 and the said Hirendra Kumar Das transferred his four annas shares to his only son Himadri Das by a registered deed of gift dated 30th December, 1981 and thus the plaintiffs became the owners of the said premises.

(e) The lease commenced from 1st day of April, 1959 and expired on 31st March, 1980 by efflux of time but the defendant did not vacate and hence the plaintiffs were compelled to file the suit.

(f) The suit property has been described in the plaint as two rooms, one bath room and one kitchen commonly described as suite No.4 on the Second floor at the said premises.

3) The defendant/respondent contested the said suit by filing a written statement denying the material allegations made in the plaint and alleged inter alia that the defendant was inducted by Rabindra Kumar Das as a monthly tenant in respect of the two rooms with attached bath, no kitchen was ever delivered to the defendant as a part of the tenancy. The defendant holds another monthly tenancy of suite No.4A on the same floor of the said premises. The defendant denied that there was any lease or that the lease expired by efflux of time on 31st March, 1980. The defendant claimed

that the defendant has all along been a monthly tenant in respect of the two rooms and attached bath room and that the suit should be dismissed.

4) The said suit came up for hearing and the Learned Trial Court by a judgment and decree dated 9th June, 2004 decreed the said suit on contest with costs directing that the plaintiffs do get a decree for delivery khas possession by evicting the defendant from the suit property and the defendant was directed to deliver khas possession of the suit premises within two months failing which the plaintiffs were given liberty to put the decree into execution. The plaintiffs were also granted a decree for mesne profits at the rate of Rs.250/- per month with effect from 01.04.1980 till recovery of khas possession.

5) The Learned Trial Court found that the defendant failed to produce any agreement of tenancy to prove that he was a premises tenant under the West Bengal Premises Tenancy Act and that the partners of the defendant company did not come before the court to deny the existence of the lease deed. The Learned Trial Court also found that there is no iota of evidence on behalf of the defendant to show that the defendant was a premises tenant under West Bengal Premises Tenancy Act and the plaintiffs, by production of the certified copy of the lease deed, has been able to establish that the defendant was a lessee in respect of the suit property. Considering the materials on record the Learned Trial Court came to the conclusion that it has no hesitation to hold that the defendant came to the suit premises as a lessee for a period of 21 years at a rent of Rs.250/- per month. The Learned Trial Court further found that the defendant paid rent to Rabindra Kumar Das and subsequently to Hirendra Kumar Das and during the continuance of the lease the defendant never challenged the authority either of Rabindra Kumar Das or of Hirendra Kumar Das. The

Learned Trial Court took into consideration the provisions of Section 116 of the Evidence Act and deserved that a tenant is not permitted the question of title of the landlord during the continuance of the tenancy and as such the defendant was estopped from challenging the title of the lessor. The Learned Trial Court, however, found that there is no illegality in the filing of the suit by all the co-owners for eviction of the lessee. The Learned Trial Court found that the deed of lease was executed on 28.04.1959 commencing from 1st April, 1959 for 21 years and by efflux of time the lease has expired and the lessee is bound to deliver the peaceful and vacant possession of the leasehold property to the lessor. It appears that even though a dispute was raised with regard to the description of the suit property, the Learned Trial Court found that no local inspection was prayed for by either of the parties to show that whether the suite No.4 contains any kitchen. The Learned Trial Court found that suite No.4A is not the subject matter of the suit and that the plaintiffs are entitled to get a decree for khas possession after eviction of the defendant from the suite No.4. The Learned Trial Court also found that the plaintiffs did not receive any rent from the defendant after the expiry of the lease-period.

6) The Learned Advocate for the appellant submitted that the lease was executed on 28.04.1959 with effect from 01.04.1959. The said Learned Advocate further submitted that according to the lease the rent was payable by the 7th of each month for which it became due and the rent for the month of April, 1959 was paid within 7th April, 1959 but the lease was executed on 28.04.1959. The said Learned Advocate submitted that such lease was an invalid one and is hit by the provisions of Section 5 of the Transfer of Property Act. The said Learned Advocate further submitted that since there was no lease deed in existence before 28.04.1959 the right created in favour of the appellant on payment of rent by the appellant within 07.04.1959 is a right of monthly

tenancy particularly when possession of the property in dispute was delivered to the appellant prior to the execution of the deed of lease.

7) The next point raised by the Learned Advocate for the appellant was that the person who executed the deed of lease was not the absolute owner of the suit property and such lease was not a valid one since all the owners were not parties to the said deed of lease.

8) According to the said Learned Advocate, Rabindra Kumar Das (described as a lessor in the said lease) had only 1/24th share and therefore he did not have the authority to transfer more than his share. There is no dispute that the lease was for a period of 21 years. Section 5 of the Transfer of Property Act stipulates that the expression “transfer of property” in the said Act means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and “to transfer property” is to perform such act. The said Learned Advocate submitted that since the conveyance of the property has to be in present or in future in terms of the said Section 5 of the Transfer of Property Act, 1882 (hereinafter referred to as T.P. Act) the lease deed which purported to give effect to the lease from a date anterior to the date of execution of the lease deed was an invalid one as it violated the provision of Section 5 of the T.P. Act. It may be recorded here that in the said lease deed dated 28th April, 1959 (Ext. 4) it was stipulated inter alia that the lessor grants to the lessee the suit property to hold the same from 1st April, 1959 for 21 years on certain conditions laid down in the said deed of lease.

9) The said Learned Advocate also referred to Section 107 of the T.P. Act and submitted that even though the said Ext. 4 was a registered document being a lease for 21 years, the said lease

agreement was hit by the provision of Section 5 of the T.P. Act since the conveyance of the property was neither in present nor in future. From Section 7 of the T.P. Act it appears that the transferee must be competent to contract and should have title to the property, or authority to transfer if it is not his own.

10) The Learned Advocate for the appellant referred to a decision reported at **2000(1) CHN 365** (Dipak Sen & Anr. - vs. - Smt. Lakshmi Rani Das). In the said reported case the lease was for a period of 20 years commencing from 1st March, 1966. In the said reported case the Learned Counsel for the appellants did not dispute the finding of fact arrived at by the Learned Trial Judge as regards the defence of the appellants that they paid rent but no receipt was granted by the landlord. The Learned Counsel for the appellant in the said reports raised a pure question of law to the effect that the lease deed having been admittedly executed on 10th March, 1966 but the lease having been given effect from 1st March, 1966 for a period of 20 years from that day, the lease should be treated to be really a lease for less than 20 years because according to the said Learned Counsel the lease was effective from the date of execution and it ended on February 28, 1986; thus the said lease was limited for a period of 19 years and 355 days. According to the said Learned Counsel in the said reports in view of the proviso to Section 3(2) of the West Bengal Premises Tenancy Act, 1956, the tenancy should have been governed by the said Act of 1956 and thus in absence of any notice under Section 13(6) or in the absence of any ground mentioned in Section 13(1) of the said Act of 1956, the respondent in the said reports was not entitled to evict the said appellants. In paragraph 11 of the said reports it was observed by the Hon'ble Court that the tenant became a monthly tenant from March 1, 1966 under the said Act of 1956 and rent for March, 1966 was paid on March 7, 1966 but thereafter a registered lease deed was executed on 10th March, 1966.

The Hon'ble Court was pleased to observe that if the duration of the said lease was for a period of 20 years from 10th March, 1966, the Learned Counsel for the respondent in the said reports could successfully argue that by virtue of such new tenancy the provision of the said Act of 1956 except Sections 31 and 36 thereof would not be applicable but the registered lease executed on 10th March, 1966 will be of no avail to the said respondents because it was due to expire on 28th February, 1986 thus falling short of 20 years. The Hon'ble Court was pleased to hold that the new tenancy which started from March 10, 1966 is also governed by the provisions contained in the said Act of 1956. The Hon'ble Division Bench, in paragraph 12 of the said reports, was pleased to hold that in view of Section 5 of the T.P. Act a lease can be effective either from the date of execution or from a date specified in the body of lease provided such date is a future date. But if in a lease deed an anterior date is given, for all practical purposes, the relationship will commence from the date of execution thereof and the anterior date can be taken into consideration only for the purpose of calculating the date of termination of the lease. The Hon'ble Division Bench in the said reports was pleased to note that it should be presumed in the said case that the lease started from 10th March, 1966 and came to an end on 28th February, 1986 because 20 years time should be calculated from 1st March, 1966 and the said lease in question in the said reports should be held to be one for less than 20 years and as such in view of the proviso to Section 3(2) of the West Bengal Premises Tenancy Act, the tenancy should be governed by the provisions contained in the said Act of 1956. Their Lordships were pleased to observe that Their Lordships were unable to accept the contention of the Learned Advocate for the respondent in the said reports and also the view taken by the Division Bench in the case of *Ranjit Kumar Dutta - vs. - Tapan Kumar Shaw* and another in F.A. No. 149 of 1994. Their Lordships were, however, were pleased to refer the matter to the then Hon'ble

Acting Chief Justice for constituting a Larger Bench for the purpose of deciding the following points of disagreement :

(A) If a registered deed of lease for a period of 20 years or above is executed by giving its effect from an anterior date thereby the effective period of lease from the date of execution falls short of 20 years, whether relationship created by such lease is governed by the provision contained in the West Bengal Premises Tenancy Act?

(B) Whether section 5 of the Transfer of Property Act stands in the way of creating a relationship of lessor and lessee for more than one year from a period anterior to the date of execution of the registered deed of lease?

11) The Learned Advocate for the appellant had initially submitted that since the said reference, as indicated above, was pending consideration before a Larger Bench the hearing of the present appeal should be adjourned till the said Larger Bench decides the aforesaid reference. Even though such submission was made at the initial stage, subsequently the Learned Counsel for the appellant argued the appeal on its merits.

12) The Learned Advocate for the appellant cited a decision reported at **2009(1) CHN 499** (Rita Bhattacharjee - vs. - Shanti Ranjan Bhattacharjee and Swapna Mukherjee (nee Roy) - vs. - Jyotirmoy Mukherjee) in support of his contention that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction on a question of law, it is appropriate that the matter should be referred to a Larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate and create confusion.

13) The Learned Advocate for the appellant cited another decision reported at **2009(4) CHN 652** (Gopika Projects Private Ltd. - vs. - State of West Bengal with Gopika Projects Private Ltd. - vs. - Neli Roy) in support of his contention that when a decision of a coordinate Bench of the same High Court was brought to the notice of the Bench, it is to be respected and is binding, subject of course, to the right to take a different view or to doubt the correctness of the decision and the permissible course then open is to refer the question or the case to a Larger Bench.

14) The Learned Advocate for the respondents submitted that for deciding the present case it is not necessary for this court to wait for the answer to the reference made in Dipak Sen's case (supra) in as much as it was found in the Dipak Sen's case (supra) that the lease concerned was limited for a period of 19 years 355 days and thus it fell short of 20 years by 10 days. The said Learned Advocate submitted that the reference made in Dipak Sen's case (supra) was not with regard to the voidness of the lease agreement but it was with regard to the relationship created by such lease and whether or not such relationship is governed by the provisions contained in the said Act of 1956. From point B of the reference in the said Dipak Sen's case (supra) it will appear that the point of reference was as to whether or not Section 5 of the T.P. Act stands in the way of creating a relationship of lessor and lessee for more than one year from a period anterior to the date of execution of the registered deed of lease — thus the point of reference was essentially with regard to the date of commencement of the relationship of lessor and lessee in a case where a registered lease deed is executed on a particular day and it is stipulated in such lease deed that the lease will be effective from a date anterior to such day. The said Learned Advocate submitted that in a case where the lease concerned turns out to be less than 20 years necessary consequences would follow

and such fact of the lease becoming less than 20 years would be a differentiating factor i.e. with regard to the applicability of the West Bengal Premises Tenancy Act, 1956. According to the said Learned Advocate in the present case even if the lease concerned is treated to have commenced from 28th April, 1959 it would be definitely more than 20 years — in fact just a few days short of 21 years. According to the said Learned Advocate, in any event the lease concerned in the present case would be governed by the T.P. Act and not the said Act of 1956.

15) According to the said Learned Advocate for the respondent even if it is assumed for the sake of argument that the alleged monthly tenancy of the appellant started from 01.04.1959 then in that event there was an implied surrender on 28.04.1959 when the lease deed was executed. He referred to Section 111(f) of the T.P. Act. In this connection he referred to paragraph 10 of the decision reported at **(1992) 4 Supreme Court Cases 254** (P.M.C. Kunhiraman Nair - vs. - C.R. Naganatha Iyer and others). He also referred to paragraphs 198 and 199 of the Law Relating to Estoppel by Representation, by George Spencer Bower. The said paragraphs 198 and 199 are quoted below:-

“198. The principles regulating the surrender of leases by operation of law are substantially the same as those which govern estoppels between landlord and tenant in general, of which such surrender is only one amongst several examples. But, inasmuch as there are certain peculiar features and incidents to be noticed in the application of the general principles to this particular subject-matter, it has been thought desirable to reserve the topic for special and separate examination.

The tenant may surrender his lease or interest to his landlord either by express agreement, or by acts and conduct from which the law infers a surrender, whether there was any surrender in fact, or not, and whatever the tenant's intention may have been; and for that reason the surrender in the latter case is said to be “by act and operation of law”. Surrenders by express agreement are by the provisions of the Law of Property Act 1925

required to be by deed; but s. 52 (2) (c) of that statute expressly excepts “surrenders by operation of law”. Such surrenders may arise from the relinquishment of possession by the tenant, or from the grant and acceptance of a new interest, irreconcilable with the supposition that the old interest is still subsisting. The principles which underlie this doctrine can be found expressed in a judgment of PARKE B. in which it was said:

“This term (surrender by act and operation of law) is applied to cases where the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on to the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is estopped from disputing the seisin in fee of the remainderman, and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is estopped from disputing his lessor’s right to grant the rent, and as this could not be done during the term, therefore he is deemed in law to have surrendered his term to the lessor.”

199. It is clear from the above, and other judicial statements, that the rule of surrender by operation of law rests ultimately on the theory that the surrenderor is estopped by his acts from disputing the grant to him of a new interest inconsistent with the continuance of his former interest, and, consequently, from disputing the surrender of such former interest, though there may have been no surrender in fact. Whether the term “estoppel” be actually used, as it is in many of the authorities, or not, the basis of the doctrine is unquestionably estoppel by representation.”

16) He also referred to paragraph 43 of the decision reported at **2006(1) CHN 419** (Makali Engg. Works Pvt. Ltd. - vs. - Dalhousie Properties Ltd.). He also referred to paragraphs 36, 37 and 38 of the said reports [Makali Engg. Works' (supra)] while submitting that in the case of Ranjit Kumar Dutta - vs. - Tapan Kumar Shaw reported in A.I.R. 1997 Calcutta 278 the Hon'ble Judges of the Division Bench were unanimous on the point that the deed of lease concerned in the said case did not fall short of 15 years and as such the Hon'ble Judges did not accept the contention of the defendant/appellant in the said case that it fell short of 15 years. The said Learned Advocate however submitted that in the facts and circumstances of the present case the appellant did not at all plead any agreement of monthly tenancy nor could it prove that there was any such agreement of monthly tenancy in between the parties.

17) The said Learned Advocate referred to Ext. 7 and submitted that it will appear from the said Ext. 7 that the appellant was granted rent receipts. He also referred to Ext. A wherefrom it appears that Prafulla Kumar Das for Hirendra Kumar Das issued rent receipt to the appellant i.e. to say that the appellant paid rent to Hirendra Kumar Das.

18) The said Learned Advocate referred to the decision reported at **(2006) 8 Supreme Court Cases 344** (Pabitra Kumar Roy and another - vs. – Alita D'souza) and reference was made to paragraph 22 of the said reports. Paragraph 22 of the said reports is quoted as follows:-

“22. The law is clear that lease deeds for periods of twenty years or more would stand excluded from the operation of the 1956 Act except in matters relating to Sections 31 and 36 thereof, unless the same were terminable before their expiration at the option either of the landlord or of the tenant. In other words, if such a lease is terminated before its fixed

period expired, the proviso to Section 3(2) would be attracted as a defence against eviction. If, however, the lease was allowed to run its full course, both the lease and the conditions contained therein would come to an end and would cease to be operative and the clause for prior determination would no longer be available as a defence against eviction.”

19) The Learned Advocate for the respondent submitted that the mere existence of the clause for termination of lease before its expiration will not be sufficient and a defence against eviction cannot be taken unless at the appropriate time such right is exercised as would appear from paragraph 22 of the said reports and once the lease is allowed to run its full course the clause for prior determination would no longer be available as a defence against eviction.

20) The Learned Advocate for the respondents referred to the decision reported at **2001(2) CHN 579** (Bazaz Construction & Mining (P) Limited - vs. - Adhish Chandra Sinha and Ors. with Mervyn Murray - vs. - Adhish Chandra Sinha and Ors.). It appears that the Hon’ble Judge who delivered the judgment in the said reports was also a member of the Bench which delivered the judgment in Dipak Sen’s (supra) case. In Bazaz Construction & Mining’s case (supra) the Hon’ble Court was pleased to observe that if a registered deed of lease is executed and is given effect from a date anterior to the date of execution, in view of the provision contained in Section 5 of the T.P. Act the same should be treated to be valid from the date of the execution thereof but there is no reason why the entire transaction should be held to be void merely because the law does not permit creation of a lease from a date prior to the date of transaction. The Hon’ble Court was pleased to observe that that part of the deed by which relationship is created from a date anterior to the date of execution should be ignored. In the said reported case the deed of lease was executed and registered on July 12, 1958 and the same was for a period of 21 years with effect from February 1, 1958 and, thus, the period of lease came to an end on January 31, 1979. His Lordship was pleased

to hold in the said reported case that there is no impediment in giving effect to the terms of the agreement from the date of execution thereof till 21 years from February 1, 1958 i.e. till January 31, 1979. His Lordship was pleased to hold that the lease deed in question for all practical purposes should be held to be valid from the date of execution till January 31, 1979 although the same is void in so far as it sought to create a relationship of lessor and lessee from February 1, 1958 to July 11, 1958. It will appear that the order passed in Dipak Sen's case (supra) was on October 13, 1999 and the judgment delivered in Bazaz Construction and Mining case (supra) was on June 22, 2001.

21) The Learned Advocate for the respondent cited a decision reported at **2006(3) CHN 322** (Binny Ltd. - vs. - Alliance Properties & Industries Ltd.) and submitted that the observations made in clause C at page 326 of the said reports has been impliedly overruled by Pabitra Kumar Roy's case (supra) which was decided by the Hon'ble Supreme Court since according to the said Learned Advocate the mere existence of the clause for earlier termination of the lease will not be sufficient unless such right is exercised at the appropriate time.

22) The said Learned Advocate submitted that the decision reported at **A.I.R. 1979 Calcutta 396** (Baneswar Pal - vs. - Smt. Nirmala Jyoti) is essentially in support of the proposition that where a lease is expressed to commence from a date anterior to the date of execution of the lease such anterior date would be material only for the purpose of computation of the period of the lease when it is one for a term of years but the interest of the lessee under the deed cannot be said to have begun from that anterior date. Such interest will commence from the date of the execution of the deed of lease and not from the anterior date from which the lease is expressed to commence.

23) The learned Advocate for the respondents cited a decision reported at **1989 (1) CHN 1** (Mahindra & Mahindra - vs. - Sm. Kohinoor Debi). In the said reported case the Hon'ble Court held that a lease for an immovable property for any term exceeding one year can only be made by a registered instrument and the same would nevertheless remain one for such period fixed, even though the lessee has a right of option to put an end to it at any time before the expiry of that period. The Hon'ble Court was also pleased to observe that a lease for 21 years would not cease to be, but would remain, such a lease in the eye of law even if the lessee has been given an option to terminate it earlier. The Hon'ble Court was also pleased to observe that if a lease for a fixed term with the right or option for renewal in favour of the lessee remains a lease for that fixed term only, until the option is exercised, a lease for a fixed term with the right or option in favour of the lessee of earlier termination should also remain a lease for the period fixed, as the option in each case creates, enlarges, limits or extinguishes no right, title or interest, until exercised.

24) The said Learned Advocate cited another decision reported at **(1995) 6 Supreme Court Cases 274** (Savita Dey - vs. - Nageswar Majumdar and another) and referred to paragraph 5 of the said reports while submitting that since in the present case the lease was for more than 20 years the West Bengal Premises Tenancy Act was not applicable to the present case. Paragraph 5 of the said reports is quoted below :-

“5. Section 3 of the West Bengal Premises Tenancy Act, 1956, prior to its amendment, effective from 24-8-1965, rendered the provisions of the Act inapplicable to any premises held under a lease for more than 20 years, whether the purpose of the lease was residential or non-residential. By the amendment of 1965, this provision was retained and re-

numbered as sub-section (1) of Section 3 while adding thereto sub-section (2). The provision as it stands reads as follows:

“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, where –

(a) 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 sub-section (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.”

A bare reading of the provision makes it obvious that sub- section (2) does not touch those leases which were entered into before 24-8-1965 which remained to be governed by Section 3, as it stood and Section 3(1), as it now stands, whereunder the Act is not applicable to any premises under a lease for more than 20 years. Since the lease in hand was executed on 6-7-1964 for a period commencing from 1-7-1964 and expiring on 30-6-1985, sub-section (2) of Section 3 obviously has no applicability to it.”

25) The said Learned Advocate cited another decision reported at **1987(II) CHN 418** (Bholanath Karmakar & Ors. - vs. - Madanmohan Karmakar & Ors.) while submitting that when contrary decisions of coordinate benches cannot be reconciled or explained a court may follow the one which, in its view, is better in point of law.

26) The Learned Advocate for the respondent submitted that no case was made out by the appellant in the written statement that for any period in April 1959 any monthly tenancy was created. He further submitted that even if for the sake of argument it is assumed that there was such monthly tenancy, in that event such monthly tenancy ended with the execution of the deed of lease on 28.04.1959.

27) The said Learned Advocate further submitted that the deed of lease was marked Exhibit on formal proof being dispensed with and he cited a decision reported **70 C.W.N. 452** (Lionel Edwards Ltd. - vs. - St. of West Bengal) and referred to paragraph 10 of the said reports where the Hon'ble Court was pleased to observe "*Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted the result being, the contents cannot be challenged either by way of cross-examination or otherwise. In respect of the documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents and is free to challenge the contents by way of cross-examination or otherwise.*"

28) The Learned Advocate for the respondents submitted that the appellant is estopped from challenging the said Rabindra Kumar Das's authority to grant the lease in favour of the appellant. He submitted that at the time of induction as a lessee the appellant did not raise any objection and allowed the entire period of lease to expire and, according to good conscience and equity the appellant is estopped from questioning the authority of the said Rabindra Kumar Das to induct the appellant as a lessee in the suit property. In this regard, he refers to a decision reported at **41 CWN 1253** (Kumar Krishna Prosad Lal Singha Deo - vs. - The Baraboni Coal Concern Ltd. and ors.).

29) He cited another decision reported at **A.I.R. 1977 Supreme Court 1599** (Smt. Kanta Goel - vs. - B. P. Pathak and others) and also a decision reported at **(1989) 1 Supreme Court Cases 444** (Pal Singh - vs. - Sunder Singh (Dead by Lrs. and others) in support of his contention that a co-owner is as much an owner of the entire property as any sole owner of the property is and such co-owner owns every part of the composite property along with others and it may not be said he is only a part-owner or a fractional owner of the property. It was submitted by the said Learned Advocate that in the present case the co-owners have not disputed and/or raised any objection against the said Rabindra Kumar Das's action of letting out of the suit property to the appellant and on the other hand the co-owners have accepted such fact of letting out. It was submitted that the question of the extent of title of the said Rabindra Kumar Das in the instant case is irrelevant, as there is no dispute that he was one of the co-owners of the suit property.

30) The argument made by the Learned Advocate for the appellant that the decision of the present appeal should be deferred till the Larger Bench decides the reference, as indicated above, is not of any substance in view of the fact that in the present case there is no dispute that the lease was for a period of more than 20 years even if the relationship between the parties as lessor and lessee

commenced from 28.04.1959. In any event, the lease in question is governed by the Transfer of Property Act and not by the said Act of 1956. Thus, even if the lease in question has been effective from 28.04.1959, and not 01.04.1959, it would still remain to be a lease governed by the Transfer of Property Act. The facts and circumstances in Dipak Sen's case (*supra*) are not similar to the facts and circumstances of the instant case as the discussion above with regard to the Dipak Sen's case (*supra*) would reveal.

31) The submission of the Learned Advocate for the appellant that the lease in question was an invalid one as it was hit by the provisions of the Section 5 of the Transfer of Property Act is also bereft of any merit. Assuming for the sake of argument that before 28.04.1959 the lease did not come into existence and there was a monthly tenancy created from 1st April, 1959 by way of payment and acceptance of rent for the month of April, 1959 on or before the 7th of April 1959, such monthly tenancy was impliedly surrendered by the execution of the deed of lease on 28.04.1959. The Learned Advocate for the respondent referred to Section 111(f) of the Transfer of Property Act and also to paragraph 10 of P.M.C. Kunihiraman Nair's case (*supra*) wherein the Hon'ble Supreme Court was pleased to observe that under the illustration to clause (f) of Section 111 of the T.P. Act, there would be an implied surrender of the former lease if a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the existing lease. The discussions in the Law Relating to Estoppel by Representation, by George Spencer Bower, may also be referred to as noted above in this regard. It will appear from the materials on record that the appellant could not prove that there was any agreement of any monthly tenancy governed by the provisions of West Bengal Premises Tenancy Act in between the parties.

32) There is no dispute that the lease was for a period of 21 years and there is also no dispute that under Section 5 of the T.P. Act transfer of property means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons. It is true that the conveyance of the property has to be in present or in future in terms of the said Section 5 of the T.P. Act. In Bazaz Construction & Mining's case (supra) the Hon'ble Court was pleased to observe that if a registered deed of lease is executed and is given effect from a date anterior to the date of execution, in view of the provisions contained in Section 5 of the T.P. Act the same should be treated to be valid from the date of execution thereof but there is no reason why the entire transaction should be held to be void merely because the law does not permit creation of a lease from a date prior to the date of transaction. The Hon'ble Court was pleased to observe that that part of the deed by which relationship is created from a date anterior to the date of execution should be ignored. Thus, in the instant case the period 1st April, 1959 till 27th April, 1959 may at the most be ignored, the lease from 28.04.1959 upto its expiry has to be treated as a valid one. With regard to the clause whereby the lessee was given a liberty to determine the lease before its expiry, the reported decisions cited at the bar have already been discussed above and it will appear that mere existence of such clause for earlier termination of the lease will not be sufficient unless such right is exercised at the appropriate time. In the present case the lease was allowed to expire in its natural course without the lessee exercising the purported right under the clause for earlier determination and as such the existence of such clause in the lease agreement does not really matter as already submitted by the Learned Advocate for the respondent by citing Banerwar Pal's case (supra) that the said Banerwar Pal's case (supra) indicates that where a lease is expressed to commence from a date anterior to the date of execution of the lease such anterior date would be material only for the purpose of computation of the period of the lease when

it is one for a term of years but the interest of the lessee under the deed cannot be said to have begun from that anterior date and such interest will commence from the date of execution of the deed of lease.

33) In view of the discussions made above and taking into consideration the facts and circumstances of the case and keeping in mind the decisions cited at the Bar, this court is of the view that the point raised by the Learned Advocate for the appellant questioning the validity of the lease in question is a meritless point. This court is of the view that the lease in question was a valid lease and it commenced from 28.04.1959 but for the purpose of computation of the period of lease the date of commencement should be 1st April 1959. The relationship of lessor and lessee in between the parties to the said lease commenced from 28th of April 1959.

34) The other point raised by the Learned Advocate for the appellant questioning the authority of the said Rabindra Kumar Das to let out the suit property to the appellant is also without any substance. It will appear that the appellant did not ever raise such question either at the time of being inducted as a lessee in the property or during the continuance of the lease. The appellant allowed the entire period of lease to expire and enjoyed the lease till its expiry. The Learned Advocate for the respondent is right in his submission that the appellant is estopped from challenging the said Rabindra Kumar Das's authority to grant the lease in favour of the appellant. The said Learned Advocate is correct in submitting that according to good conscience and equity the appellant is estopped from questioning the authority of the said Rabindra Kumar Das to induct the appellant as a lessee in the property. Reference was made to Kanta Goel's case (supra) and Pal Singh's case (supra) by the Learned Advocate for the respondent while making his submissions on the position of a co-owner in respect of a property, as already noted above. This court finds that the

said Learned Advocate for the respondent is correct in his submission in this regard. In the present case the other co-owners have not disputed and/or raised any objection against the said Rabindra Kumar Das's action of letting out the suit property to the appellant.

35) In view of the discussions made above, this court finds that there is no merit in the instant appeal and, accordingly, the present appeal is dismissed. There shall, however, be no order as to costs.

36) The Lower Court records, if any, along with copy of this judgment be sent down to the Learned Court below concerned.

37) Urgent Xerox certified copy of this judgement, if applied for, be supplied to the parties upon compliance of requisite formalities.

(TAPAN KUMAR DUTT, J.)

38) I agree.

(KISHORE KUMAR PRASAD, J.)

