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A Study on Holding over Under the Transfer of Property Act, 1882

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A transfer of property is said to happen when there is a transfer of interest, either partial or absolute, between the living beings. In case of a lease, in favour of the lessee. A lease is also a transfer of property which is defined under Section 105 of the Transfer of Property Act, 1882. The determination of lease can also be termed as termination of the lease and the same is provided under Section 111 of the Transfer of Property Act, 1882.

The subject matter of this research paper is “holding over” under the Transfer of Property Act, 1882. The tenancy by holding over arises only after the determination of the lease, where the lessee continues to hold the possession of the property with the consent of the lessor. In the case where the continuation of possession after the determination of lease is without the assent of the lessor, such tenancy is known as tenancy-by-sufferance. Holding over gives rise to a new tenancy and therefore a lease, this tenancy will depend on the assent of the lessor and this assent will always be a question of fact. The judiciary has decided in various cases as to what will constitute an assent and what will not. This research paper will study the “Holding Over” under the Transfer of Property Act, 1882.

Keywords: *holding over, tenancy, assent.*

INTRODUCTION

In the Transfer of Property Act, 1882, Chapter V talks about the Leases of immovable property. The definition of a lease and the essentials of the lease are provided within the chapter, but the

topic of research for this paper is “holding over under the Transfer of Property Act, 1882”. This topic is a sub topic under Chapter V of the act; therefore, it is necessary to understand the basic concept of the term lease and the determination of the lease.

Section 105, Chapter V of the Transfer of Property Act, 1882 provides for the definition of the term ‘lease’ as a transfer of a right to enjoy an immovable property for a certain time, or in perpetuity against consideration of a price paid or promised to the transferor by the transferee, who accepts the transfer on such terms. Section 111 deals with the determination of lease as specified from clause (a) to (h) in the section.

Section 116 of the Transfer of Property Act, 1882 deals with the effect of holding over and says that after the determination of the lease if the lessee continues to remain in possession of the property and the lessor or his legal heirs accept the rent from the lessee or under lessee or otherwise assent to his possession then, in that case, a lease is said to be renewed from year to year or month to month according to the purpose for which the property was leased. Continuation of possession of the property after the determination of lease gives rise to two types of tenancy namely, tenant-at-sufferance and tenant-by holding over.

In this paper, the researcher will discuss the various aspects of the topic including the meaning of the term ‘holding over’ and the two scenarios as to what will happen after the determination of a lease when the lessee continues the possession of the property with or without the consent of the lessor. The effect of holding over will be discussed at large along with the various judicial decisions as to the judiciary from time to time came up with the various interpretation of the question of facts in the issue of holding over. The last part of the paper includes the judicial remarks on the holding over under the Transfer of Property Act, 1882.

LEASE AND DETERMINATION OF LEASE

Before we begin a study of holding under the Transfer of Property Act, 1882 it becomes very important to understand the basic concepts of lease and determination of lease because the topic of research evolves from the basics of the lease.

Section 105 of the Transfer of Property Act defines the 'lease', 'lessor', 'lessee', 'rent', and 'premium'. A lease is a partial transfer of certain rights in the property. It is a transfer of "right of enjoyment" of an immovable property made for a certain period, in consideration of a price paid or promised to be paid, or money, the share of crops, service, or any other thing of value to be given periodically or on specified occasions to the transferor by the transferee¹.

In this transfer, the transferee is called the lessee, the transferor is called the lessor, the paid price or promised to be paid is called the premium, and the money, share, service, or other things to be so rendered is called the rent.

The essential elements of a lease are as follows -

- The parties to lease – lessor and lessee
- The subject matter of lease – immovable property
- There must be the transfer of a right
- Duration of lease
- Consideration of lease – premium
- Acceptance of transfer by the lessee
- The lease must be made in the mode under section 107.

The principle of holding over the property comes into play only after the determination of lease thus it is important to know what constitutes the determination of the lease. Section 111 of the Transfer of Property Act deals with the determination of lease as specified from clause (a) to (h) in the section. Determination of the lease can be defined as the termination of the legal relationship between the lessor and the lessee, after the determination of the lease, a lessee is bound to revert then possession to the lessor.

"A lease of the immovable property determines –

- a) by efflux of the time limited thereby;

¹ Ratanlal & Dhirajlal, *Textbook on Transfer of Property Act* (6th edn, Lexis Nexis 2019) 512

- b) where such time is limited conditionally on the happening of some event—by the happening of such event;
- c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event;
- d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;
- e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;
- f) by implied surrender;
- g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming the title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease
- h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other”.²

Thus, a lease can be determined on the occurrence of any of the events as specified under section 111 of the Transfer of Property Act, 1882.

HOLDING OVER - A STUDY

The meaning of the term “holding over” denotes retaining possession of the property by the lessee. Section 116 of the Transfer of Property Act, 1882 provides that after the determination of the lease if the lessee continues to remain in possession of the property and the lessor or his legal heirs accept the rent from the lessee or under lessee, or otherwise assent to his possession then, in that case, a lease is said to be renewed from year to year or month to month according to the

² Transfer of Property Act 1882, s 111

purpose for which the property was leased. This will give rise to a new tenancy due to holding over the property. For the purpose of new tenancy by holding over, the consent of the lessor becomes very important. In absence of this consent by the lessor for the continuing possession of the property by the lessee or under the lessee, the lessee becomes a tenant at sufferance.

The lessee who is holding possession at the will of the lessor will have protection by law but his possession cannot be said to be a lawful possession per se. In order to understand the idea behind the concept of holding over it becomes necessary to study the two possessions relevant for this section i.e., Section 116.

TENANT-AT-SUFFERANCE

“Tenant-at-Sufferance” is a word that is used under the common law. After the determination of the lease, a lessee has no right to possess the property, if he holds the possession then in that case his possession is illegal i.e., possession without any right. Such a tenant is called Tenant-at-Sufferance. The fiction of Tenant-at-Sufferance is used to avoid the continuance of possession as trespass. A tenant does not become a trespasser after the determination of tenancy until a decree of eviction is passed against him. But the position of a Tenant-at-Sufferance is not less than that of a trespasser. The lessor or the legal representative can sue the lessee who is in possession of the property without consent at any time and can also claim for the damages or the profit generated through the property during the illegal possession of it. The profit produced by a property that is in possession of a person who is not lawfully entitled to it is called mesne profit.

Thus, we can say that a Tenancy-at-Sufferance arises only by the implication of law when a person having a lawful possession continues it without the consent of the owner even after the termination of his legal right.³

TENANT BY HOLDING OVER

When after the determination of the lease, a lessee remains in the possession of the property with the consent of the lessor is known as tenant-by holding over. A tenancy by holding over is

³ R K Sinha, *The Transfer of Property Act* (17th edn, Central Law Agency 2016) 487

not created by a mere continuation of possession of the property by the lessee, the consent of the lessor or the legal representatives of the lessor, either implied or expressed, is necessary. If a lessor accepts the rent, it may be inferred that he has given his consent to the lessee to continue the possession of the property⁴, this acceptance should be preceded by an offer of renewal of the agreement⁵.

A tenant by holding over is deemed to be a tenant at will because it arises by the implication of law in cases of permissive occupation.

DIFFERENCE BETWEEN TENANT-AT-SUFFERANCE AND TENANT BY HOLDING OVER

In both the cases, there is the retention of property by the lessee even after the determination of the lease i.e., the lessee continues the possession over the property; in case of Tenancy-at-Sufferance, there is the absence of will or consent of the lessor whereas in the case of Tenancy by Holding Over the consent of the lessor is present either expressed or implied.

To summarize the differences, we can say that-

1. A tenant-at-sufferance remains in possession without the assent of the lessor or his legal representatives. Whereas a tenant-holding over remains in possession with the assent of the lessor or his legal representatives.
2. The fiction of tenant-at-sufferance is used to avoid the trespassing of the property, yet there is no privity of state between the lessor and the lessee. Whereas there is some privity of state between a tenant holding over and the lessor.
3. Tenant-at-sufferance cannot transfer his interest whereas a tenant holding over can do so.
4. A tenant-at-sufferance can be evicted without serving a notice whereas a tenant holding over will be served notice.

⁴ *K Anjanakumari v Bhavani* AIR 2007 (NOC) 138 (Mad); *Ambar All v Anjab* AIR 1949 Assam 87; *Bijay Chandra v Howrah Amta Rly* AIR 1923 Cal 524; *Har Nath v Mohar Singh* AIR 1931 Lah 675; *Sutti Devi v Seth Banarse Das* (1949) ILR All 840

⁵ *Municipal Committee Kaithal v Pyare Lal Rikhiram* AIR 1974 P&H 239

EFFECT OF HOLDING OVER

Section 116 of the Transfer of Property Act provides for the effect of Holding Over, it provides that if a lessor continues to hold the possession after the determination of the lease and the lessor accepts the rent or otherwise assents to the possession then, in the absence of any contrary agreement the lease will be deemed a year to year or month to month lease. This will amount to a new tenancy but the terms of the new lease would be the same as of the expired one. Therefore, the new lease would be a year to year or month to month whatever the case may be and the eviction of the lessee is possible only after serving him a notice to quit. He cannot be ejected without a notice to quit.

Thus, for the application of Section 116, two conditions are important-

- The tenant or the lessee must be in possession of the property after the determination of the lease.
- The lessor or his legal representative must accept rent from the lessee or under lessee or otherwise assent to his possession.⁶

This section does not apply where the lease was for the life of the lessee, it is only applicable where the original lease was fixed for the year to year or month to month.

Tenancy created by the virtue of Section 116 is a question of fact, this will depend upon the assent of the lessor, express or implied. As stated earlier the acceptance of rent by the lessor implies his acceptance to the holding over of the property by the tenant/ lessee.

Illustrations-

(a) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

⁶ *Manathanath Kunhahammed v Kizhakke Theruvathakath Cherammal Thodiyil Unnimoideenkutty* AIR 2009 Ker 143

(b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.⁷

In the case of *Bhuneshwar Prasad v. United Commercial Bank*⁸, the bank was the tenant through a registered deed and the term of the lease got expired but the bank continued to hold the possession. The bank paid the increased rent which was accepted by the lessor. The owner of the premises filed a suit for eviction on the grounds of expiration of the lease upon which the Hon'ble Supreme Court held that it can be easily inferred that the owner accepted the rent from the bank. This created a month-to-month tenancy and the bank has protection against eviction before the expiry of the stipulated period of the lease.

In the case of *Padmanabh Pillai v. Sankaran Vishwambharam*,⁹ it was held that a new tenancy is not created under this section if the landlord receives rent from the tenant and is protected by the Rent Acts. In such cases, mere acceptance of the rent will not amount to the assent of the landlord about the new tenancy. There must be independent evidence of assent by the landlord.

AGREEMENT TO THE CONTRARY

The presumption of holding over under section 116 of the Transfer of Property Act, 1882 may be excluded by an agreement to the contrary. In order to exclude it is necessary that the agreement must be express and should not be implied, it must also specify the terms of the holding over as well as the duration of the new lease.

RIGHTS OF TENANT BY HOLDING OVER

A tenant has the same set of rights which he used to have before the determination of the lease. A tenant can also sublet the property he is holding over and can also mortgage the same even after the expiration of the original lease.

⁷ Property Act (n 2), s 116

⁸ *Bhuneshwar Prasad v United Commercial Bank* (2000) 7 SCC 232

⁹ *Padmanabh Pillai v Sankaran Vishwambharam* AIR 1987 Ker 98

He becomes entitled not to be evicted without a due process approved by the law. A tenancy by Holding Over does not change the purpose for which the property was leased.

In the case of *Dinesh Chand v. State of Utrakhand*,¹⁰ it was held that the Grant of official accommodation cannot be termed as a lease in favour of the employee. After retirement, an employee cannot claim accommodation on the principle of Holding Over. The authorities in the case could evict him from the allotted house.

JUDICIAL APPROACH ON HOLDING OVER

Over the years the judiciary has played a vital role in affirming the concept of holding over and doing away with the ambiguity of the various aspects of the law. Since the assent of the lessor is a question of fact, the courts from time to time have clarified as to what will constitute an assent and what not?

In the case of *N.K. Rajendra Mohan v. Thrivamadi Rubber Co. Ltd.*¹¹ there was a renewal of lease year to year on lessee's remaining in possession after the determination of lease by efflux of time, the Supreme Court held that such renewal is essential qua purpose for which land was originally leased. No unilateral alteration or modification of purpose is possible unless both the parties agree upon. In the instant case the Supreme Court held that when the original lease was not for the purpose of the plantation, that purpose cannot, with efflux of time, enter into renewed lease merely because plantation had been grown on lease hold subsequently by the lessee, who had been given discretion under original lease to do so.¹²

Thus it can be inferred from this case that a lease can be renewed only for the purpose it was leased upon in the original lease.

In the case of *C. Albert Morris v. K. Chandrasekaran*,¹³ the contention of the appellant in the Supreme Court was that the conduct of the landlord, who had filed a suit for ejectment but did

¹⁰ *Dinesh Chand v State of Uttrakhand* AIR 2017 NOC 594 Uttr

¹¹ *K Rajendra Mohan v Thrivamadi Rubber Co Ltd* (2015) 9 SCC 326

¹² *Ibid*

¹³ *C Albert Morris v K Chandrasekaran* (2006) 1 SCC 228

not pursue the same, should be considered as the assent of the landlord. The Supreme Court rejected the contention and held that the conduct will not equate to assent, as the suit was withdrawn for liberty to file a fresh suit on the same cause of action.

In the case of *Badrilal v. Municipal Corpn. of Indore*¹⁴, the Municipal Corporation increased the rent but the plaintiff used to pay the old rent and the old rent was accepted by the Municipal Commissioner. The Supreme Court held that the acceptance of rent by the Commissioner does not make the lessee a tenant holding over. Thus, a notice under section 106 of the Transfer of Property Act, 1882 was not necessary in the case.

In *Ramratan Pannalal Jaiswal v. Rohit Raghunathdas Udasi*¹⁵, the issue was whether a compromise recorded in the court created a new tenancy in favour of the sub-tenant? The court held that section 116 does not necessarily amount to the creation of a fresh tenancy agreement. The whole basis of section 116 is that a landlord is entitled to file a suit for ejection and obtain a decree for possession and, therefore, his acceptance of rent after the expiry of the lease is an unequivocal act referable to his desire to assent to the tenant continuing possession. Therefore, no new contract can be said to have taken place between the sub-tenant and the landlord by virtue of compromise between the tenant and the landlord.¹⁶

In the case of *Tara Properties Pvt Ltd v. Shalimar Paints Ltd*¹⁷, the defendant remained in possession and the plaintiff accepted rent. The court held that these two things could affirm the fact of holding over and its effect could be the renewal of the lease. But there was no proof of acceptance of rent, nor of any mutual agreement. The Court also held that the payment made by the tenant to the ITO on account of the landlord did not amount to acceptance of rent by the landlord.¹⁸

¹⁴ *Badrilal v Municipal Corporation of Indore* (1973) 2 SCC 388

¹⁵ *Ramratan Pannalal Jaiswal v Rohit Raghunathdas Udasi* Second Appeal No 197 of 2015, decided on 20 April 2015, High Court of Bombay

¹⁶ *Ibid*

¹⁷ *Tara Properties Pvt Ltd v Shalimar Paints Ltd* AIR 2009 Cal 47

¹⁸ *Ratanlal & Dhirajlal* (n 1) 601

CONCLUSION

When a lease is registered in name of a lessee by the lessor, there is the transfer of interest for some consideration and the lease is valid for a time period as specified in the instrument. A lease can be determined by various events, all such circumstances are specified under Section 111 of the Transfer of Property Act, 1882.

The study of holding over begins only after the determination of the lease, a tenant who continues the possession over the property after the determination of lease with the consent of the lessor is said to be a tenant-holding over. Thus, the lessee is holding over the property i.e. continuing possession even after the determination of the lease. Whereas if the tenant does continue the possession after the determination of lease without the assent of the lessor, he will be regarded as tenant-by-sufferance. He will not be deemed as a trespasser but his position is not better than that of a trespasser, he can be evicted without notice. But a tenant by holding over needs to be served a notice and can be evicted by following a due process of law.

Whether a lessor has given his assent to the lessee for continuing the possession even after the determination of the lease is a question of fact, though if a lessor or the legal representative of the lessor accept the rent from the lessee holding over or assent to him otherwise, it will be deemed that the lessor has given his assent. Here the assent can be expressed or implied. But in some cases situation can be different, where giving rent will not equate to the assent of the lessor.

If it is conclusive that the lessee has the assent of the lessor then, the new lease would be a year to year or month to month whatever the case may be and the eviction of the lessee is possible only after serving him a notice to quit. A new lease created by the virtue of Section 116 cannot be used for some other purpose i.e. the purpose of the lease should be the same as it was in the original lease before the determination.

With the holding over of the property, there are some rights of the tenant holding over. He enjoys the same set of rights which he used to before the determination of the lease. He can sublet the property holding over but the purpose of the property for which it was leased does not change.