

**HIGH COURT OF TRIPURA
AGARTALA**

RSA No.8 of 2021

Shri Parimal Saha (alias Sankar Saha)

S/O- Nagendra Chandra Saha,

Melaghar, Dist.- Sepahijala, Tripura, Age-65.

---Plaintiff-Appellant

Versus

Shri Rakhal Chandra Pal

S/O- Shri Krishna Chandra Pal,

Thakur Para, Melaghar, Dist.- Sepahijala, Tripura

---Defendant-Respondent

For the Appellant(s)	:	Mr. S. M. Chakraborty, Sr. Advocate Mrs. P. Chakraborty, Advocate
For the Respondent(s)	:	Mr. Raju Datta, Advocate
Date of hearing & delivery of Judgment & Order	:	06.09.2023
Whether fit for reporting	:	Yes

HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT & ORDER (ORAL)

This is a first appeal preferred by the plaintiff/appellant under Section 100 of the Code of Civil Procedure, 1908 against the judgment and decree dated 09.02.2021 passed by the learned District Judge, Sepahijala District, Sonamura in connection with T.A. No.08 of 2019, whereby and whereunder the judgment and decree dated 05.08.2019 and 14.08.2019 respectively, passed by learned Civil Judge (Sr. Division), Sonamura, Sepahijala in T.S. No.11 of 1987 was set aside.

2. Put it shortly, the essential facts are as under:-

“The suit land measuring 0.011 acres appertaining to Khatian No.1850 of Mouja-Melaghar comprising CS plot No.2624/4277 and RS plot No.3745 was originally owned

and possessed by one Nagarbashi Chakraborty who was also running a hotel under the name and style as 'Grand Hotel' through her manager Nabadwip Bakshi in a 5(five) doors shop thereon. Subsequently she let out to those of the said shop room to one Ramesh Ch. Shil of Melaghar who was running a hair cutting salon thereon. Thereafter, she closed her total business and let out 3(three) doors portion of her hotel to one Nani Gopal Datta. But subsequently he did not continue his hotel business thereon as a result of which she let out one door of his business premises to the appellant as monthly tenant by executing a Bharatiya agreement on 5th Baishak 1385 BS who was also paying rent of Rs.20/- per month to her even after expiry of the term of tenancy. Subsequently said Nagarbashi Chakraborty gifted her land measuring 0.011 acres to her daughter Smt. Shefali Chakraborty by a registered deed dated 13.07.1984 and at that time also the appellant was still remained as a tenant under Shefali Chakraborty. Thereafter said Shefali Chakraborty also sold out 1(one) gonda 1(one) kora land to the plaintiff, the appellant herein, for a valuable consideration and also delivered possession keeping the temporary tenant thereon by registered sale deed dated 11.09.1986 and since then the plaintiff/appellant became the rightful owner of the suit land i.e. the said purchased land. Thereafter, he requested the defendant/tenant, i.e., the respondent herein, to vacate the rented premises, but, the respondent refused to deliver vacant possession. Such refusal had led the plaintiff/appellant to serve a notice upon the defendant/respondent seeking him to quit after delivery of vacant possession within 29th day of Poush corresponding to 16.12.1986 failing which the plaintiff/appellant would take shelter of law. It is stated that the defendant/tenant is a temporary tenant on monthly rent basis under the plaintiff/appellant in the suit premises. It is also alleged that the plaintiff/appellant/landlord approached the defendant/respondent/tenant on 19.09.1986

corresponding to 2nd Ashwin 1393 BS to vacate the suit land, but, the defendant/tenant denied to vacate the same. Hence, the plaintiff/landlord has filed the instant suit seeking declaration of title over the suit land along with a prayer for ejectment and mesne profit”

2.1. The defendant/respondent/tenant(here-in-after referred to as defendant/respondent) contested the suit by filing written statement. On consideration of the facts pleaded in the plaint as well as in the written statement, the learned trial judge had framed the following issues:-

“(i) Whether the suit maintainable in its present form and nature ?

(ii) Whether there is any cause of action for filing of the instant suit ?

(iii) Whether the plaintiff has right, title and interest over the suit land and building i.e. the suit property?

(iv) Whether the defendant is liable to be ejected from the suit land?

(v) What other relief / reliefs the plaintiff is entitled to get?”

2.2. Evidences were let in by both the parties.

Some documents had been brought on record and duly exhibited.

2.3. Thereafter, having heard the learned counsel appearing for the parties, learned trial judge decreed the suit in favour of the plaintiff/appellant/landlord (here-in-after referred to as plaintiff/appellant) and directed the defendant/respondent to handover the vacant possession of the suit property in favour of the plaintiff/appellant. Being aggrieved by and dissatisfied with the said decree passed by the learned trial judge, the defendant-responent had preferred first appeal under Section 96 of the Code of Civil Procedure, 1908 before the court of learned District Judge as stated above. The plaintiff/appellant contested the appeal. Arguments being heard, the learned District Judge

set aside the judgment and decree passed by learned trial judge allowing the appeal in favour of the defendant/respondent holding that the learned trial judge had committed serious error in law in appreciating the legality of the issuance of notice under Section 106 of Transfer of Property Act, 1882 (for short, “TP Act”) upon the defendant/respondent for the purpose of his eviction from the suit land. Learned first appellate court further held that notice under Section 106 of the TP Act is mandatory in nature to institute a suit for eviction of a tenant who holds over the suit land under the landlord.

3. Feeling aggrieved, the plaintiff/appellant has preferred the instant second appeal under Section 100 of CPC before this court. At the time of admission of this second appeal, following substantial question of law had been formulated:-

“ Whether the fact which has been disputed in the written statement and where no documentary evidence in support of serving notice for eviction has been filed and proved in the proceeding can be held to have been admitted on the basis of a statement admitting that fact of service of notice for eviction in the cross-examination by the defendant?”

4. Firstly, this Court has to decide whether notice under Section 106 of the TP Act had properly been served upon the defendant/respondent.

Secondly, to decide the above substantial question of law, this Court will make an endeavour to find out an answer as to whether admission in cross-examination is sufficient to fulfill the ingredients mentioned in Section-17 and Section 58 of the Evidence Act.

5. Before advertng to the merits of the case, it would be apposite to reproduce Section 106 of the Transfer of Property Act, which reads as under:-

“106. Duration of certain leases in absence of written contract or local usage- (1) 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; 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.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-Section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) 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.”

6. A plain reading of the above provision crystallizes that Section 106 of TP Act provides that a lease of immovable property, as the instant suit, where a shop premise is the subject matter of the suit shall be deemed to be lease from month to month, terminable, on the part of either lessor or lessee by 15 days' notice. The period 15 days shall commence from the date of receipt of notice. If such period of notice falls short of 15 days, it will not affect the maintainability of the suit, if filed after expiry of 15 days. It further provides that the notice must be in writing, signed by or on behalf of the person giving it. It may be sent by post to the party concerned who is intended to be bound by it or be tendered or delivered personally to such party or to one of the members of his family or servants at his residence, or if such delivery is not practicable for any reason, then, such notice may be affixed to a

conspicuous part of the property, which is to be treated as deemed service.

7. There is no quarrel at the bar that notice under Section 106 of TP Act is mandatory. In a case, ***Om Prakash and Ors. Vs. Hari Ram and Anr.***, reported in 1968 SSC OnLine J&K 14 : AIR 1969 J&K 126, it is held that “*notice under the mandatory provisions of Section 106 of Transfer of Property Act was imperative and the same not having been served the tenancy had not been lawfully terminated.*” Similar ratio is reiterated in ***Satish Chand Makhan Vs. Govardhan Das Byas*** reported in (1984) 1 SCC 369.

From the aforesaid decisions, I may unhesitantly come to a conclusion that Section 106 of the TP Act casts a mandatory obligation upon a lessor/landlord to terminate a tenancy.

8. Reverting to the merits of the case, I have heard Mr. S. M. Chakraborty, learned senior counsel assisted by Mrs. P. Chakraborty, learned counsel appearing for the plaintiff/appellant and Mr. Raju Datta learned counsel appearing for the defendant/respondent.

9. At the very outset, Mr. Chakraborty, learned counsel for the plaintiff/appellant has drawn my attention to the cross-objection part of the evidence adduced by the defendant/respondent. Being confronted with the cross-examination, the defendant/respondent as DW1 stated that “*it is a fact that the plaintiff sent me a notice to vacate the suit land, but I did not vacate.*” Thereafter, he has stated “*I have filed a suit in this court bearing TS 25 of 1986 on the same suit land against the plaintiff and others for adverse possession of the land.*” It is an admitted fact that the said suit had been stayed by learned court during the pendency of the present suit under appeal.

According to Mr. Chakraborty, learned senior counsel, this is a clear admission necessary to be accepted by this court, in view of Section 17 and Section 58 of the Evidence Act, 1872. Learned senior counsel has drawn my attention to the statement made by the plaintiff-appellant in the plaint and has argued that the plaintiff had served a notice upon the defendant/respondent asking him to handover the vacant possession of the suit property. According to learned senior counsel, non-mentioning of specific provision in the notice is not to be treated as fatal. In support of his submission, learned senior counsel has pressed into service a decision of the Hon'ble Supreme Court in (2004) 2 SCC 267, **M. T. Khan & Ors. Vs. Government of Andhra Pradesh & Ors.**

10. In the light of the above submissions, it would be apposite to take note of Sections 17 and 58 of the Evidence Act, which read as under:-

“17. Admission Defined- *An admission is a statement, [oral or documentary or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.*

58. Facts admitted need not be proved.- *No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:*

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

11. On perusal of the “admission” part of the Evidence Act, it comes to fore that there are certain circumstances when admission made by a party is relevant.

12. Relying upon the aforesaid provisions, learned senior counsel for the plaintiff/appellant emphatically submitted that in view of the clear admission on the part of the defendant/respondent being the tenant that he received the notice to quit does not require further proof because such admitted fact need not to be proved by the plaintiff/appellant in line of the provision of the Section 17 and Section 58 of the Evidence Act.

13. Strongly opposing the submissions, Mr. Dutta learned counsel appearing on behalf of the defendant/respondent submits that the defendant/appellant had never received any notice as allegedly served upon him by the plaintiff/appellant, which he has categorically pleaded in his written statement. It is further argued that the defendant/respondent had adduced evidence as DW1, and in his examination-in-chief he has specifically stated that he has not received any notice asking him to quit the suit premises by the plaintiff/appellant. As regards the statement made by defendant/respondent in his cross-examination, Mr. Datta, learned counsel has emphatically contended that it is an isolated statement which is conflicting to the statement made in his written statement. Arguing further, learned counsel would contend that it is the case of the plaintiff, and burden lies upon the plaintiff to prove the fact that he had served notice upon the defendant/respondent terminating the tenancy in terms of Section 106 of the TP Act. Learned counsel has drawn my attention to the cross-examination of the plaintiff/appellant where he has admitted in reply to a specific question that “*he had not submitted any notice under TP Act*”. According to learned counsel for the defendant/respondent, alleged admission in cross-examination by the

defendant-respondent is not an admission as defined under Section 17 and 58 of the Evidence Act.

14. I have given my thoughtful consideration to the submissions advanced by learned counsel appearing for the parties.

15. Keeping in mind the substantial question of law as formulated by this Court, at the outset, I have perused the statements made in para 5 of the plaint where it is stated that *“the plaintiff thereafter served a notice upon the Defendant asking him to quit after delivering vacant possession with the expiry of 29th day of Poush, i.e., the last day of Poush 1393 B.S. corresponding to 16-12-1996 after delivery of vacant possession of the rented premises to the plaintiff and after making payment of all due arrear rents and failing which the plaintiff will have to take shelter of the Court of law for this purpose. The Defendant received the notice but has not complied with the demands made in the notice.”*

16. In the context of the case, in the opinion of this Court, Section 91 of the Evidence Act plays a vital role to interpret the essential requirements embodied under Section 106 of the TP Act, which is reproduced here-in-below:-

“91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents:-

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1- When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2- Wills [admitted to probate in [India]] may be proved by the probate.

Explanation 1- This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2- Where there are more originals than one, one original only need be proved.

Explanation 3.- The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.”

Sub-section (4) of the Section 106 of TP Act mandates that every notice under sub-section (1) must be in writing. The word “**must**” employed in the said provision carries enough significance which mandates that a notice under sub-section (1) of Section 106 of TP Act to be served upon a lessee/tenant requires to be reduced into writing. Again, the language used in Section 91 of the evidence Act “**Any matter is required by law to be reduced to the form of a document**”, means and connotes that when in regard to any given matter, the law requires that the evidence of the transaction should be embodied in a document, the transaction can be established only by proof of the document; no proof can be substituted for that, so long as the writing exist and as the power of the party.

17. Section 91 of the Evidence Act, 1872 clearly forbids proving of the contents of writing otherwise than by writing itself, it is covered by the ordinary rule of law of evidence. It is in reality declaring

a doctrine of the substantive law. Further, this rule is in no sense a rule of evidence, but a rule of substantive law. [*Roop Kumar Vs. Mohan Thedani*, (2003) 6 SCC 595: AIR 2003 SC 2418]. The best evidence about the contents of a document is the document itself and it is the production of the document, i.e. required by Section 91 in proof of its contents. [*Meva Devi Vs. Omprakash Jagannath Agarwal* AIR 2008 Chh. 13 (20)]. Further, even if they do not have the copy of the notice, then also, they could send a notice through the Court asking the defendant/respondent to produce the copy of the original notice which they did not, for the reasons best known to them. This conduct of the plaintiff/appellant raised the serious doubt in the mind of this Court as to whether the notice under Section 106 had really been served upon the defendant/respondent. It is a cardinal rule of evidence, not one of technicalities, but of substance, which it is dangerous to depart from, where written documents exist, they shall be produced as being the best evidence of their own contents. The cases under the rule require the contents of a document to be proved by the document itself, if its production be possible, may be arranged in three classes, the first class relating to those instrument which requires the law to be in writing, the second, to those contracts which parties have put in writing; and third the other writings, the existence or contents of which are disputed, and which are material to the issue. In other words, oral evidence cannot be substituted for any instrument which the law requires to be in writing. Further, oral evidence cannot be substituted for in writing the subjects and contents of which as disputed, and which is material to the issue between the parties.

18. Now, to analyse the legal consequence of admission of a fact in cross-examination, in my opinion, when an admission is found in cross-examination, it must be clear and explicit and it must not be read isolately. The plaintiff, who claims that he has served a notice, it is his burden to prove the contents since the said notice itself is the best evidence. His evidence must show that he has fulfilled all the pre-conditions or ingredients embodied in Section 106 of the TP Act. In the case at hand, the plaintiff appellant neither in his pleading in the plaint nor in his evidence has stated that he had served the notice under Section 106 of the TP Act in writing upon the defendant/respondent mentioning that he had to handover the vacant possession of the suit premises within 15 days. The contents of the notice must be proved by the plaintiff himself. He has not stated even about the mode of service of notice upon the defendant/respondent. To re-iterate, all the pre-conditions embodied in Section 106 of the TP Act are mandatorily to be observed, which, in the instant case, the plaintiff has failed.

19. I have considered the principle laid down in ***M. T. Khan (supra)*** where the Hon'ble Supreme Court has reiterated the settled principle of law that non-mentioning or wrong quotation of a provision of law does not invalidate an order in the event it is found that the power therefore, exists. According to me, this principle will apply to an order passed by any person authorized by law or in case of any application where provision of law is not mentioned or wrongly mentioned. This is not the question to be decided here. To reiterate, the substantial question of law whether the admission on the part of the defendant/respondent as regards the receipt of notice is sufficient to prove that notice under Section 106 of the TP Act had been served upon him.

20. As I said earlier, admission must be clear and explicit. Here, I find that the defendant/respondent has clearly stated in his written statement as well as in his examination-in-chief denying the receipt of notice served upon him under Section 106 of the TP Act by the plaintiff/appellant.

21. In the case of **Chikkam Koreswara Rao Vs. Chikkam Subba Rao and Ors.** reported in **AIR 1971 SC 1542**, the Supreme Court had observed thus:-

“7. This admission must be read along with the evidence given by him in his chief-examination

8. If we read this statement along with other evidence and in a harmonious manner, it is clear that what the appellant admitted was that the acquisition in was made by his father on his behalf and the consideration for the same was paid by his father from out of the appellant's private funds”

Thus, the Supreme Court has pointed out that *“before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive and there should not be any doubt or ambiguity about the alleged admission and to examine whether there is ambiguity in the admission, it would be necessary for the court to read the other parts of the evidence and the stand taken by him in the pleadings. Considering in that way, as pointed out above, it becomes obvious that the so called admission is not admission at all. It is a statement made out of knowledge. Hence, it does not help the case of the the respondent. Thus, we are satisfied, looking into the stand taken by the respondent in the proceeding and the manner in which he has disposed, having least regard for the truth, that the so called admission and suggestions put by the counsel for the petitioner would not render the*

marriage invalid. The evidences on record are neither clear nor ambiguous nor reliable. Hence, the initial presumption arising from the facts of the case is not at all rebutted by the respondent. Hence, we are constrained to hold that the marriage is legal and valid and that the petitioner has the status of wife of the respondent.”

In furtherance thereof, the evidence of plaintiff/appellant does not reflect that the alleged notice had given an opportunity to the tenant to handover the vacant possession of the suit property within 15 days. It is also not clear whether the plaintiff/appellant has instituted the present suit after expiry of 15 days. That part, the plaintiff/appellant has reasonably failed to establish that he has served a notice upon the respondent. Had the notice been served upon the defendant/respondent in writing, then, this court is at a loss to understand why the plaintiff/respondent has not produced a copy of the said notice before this Court. This has cast a serious doubt as regards the service of notice upon the defendant/respondent.

22. For the aforesaid reasons, in my opinion, the admission on the part of the defendant/respondent in cross-examination that he has received a notice requesting him to vacate the suit premises is an isolated statement and such isolated statement cannot have any bearing for deciding any suit. This is an established principle of law that oral evidence also must be proved in accordance with law, which the plaintiff in the instant case has failed to discharge.

In my opinion, it should not be a sound rule of appreciation of evidence to pick up an answer from the cross-examination of a witness and draw inference on the basis of such evidence. The court must see the consistency of the entire statements/testimony of a witness and only after

that the court is to evaluate the true picture of the circumstances of making such statement.

23. In the opinion of this Court, to make the statement a perfect and genuine admission, the plaintiff would have clarified the contents of the notice by putting more questions upon him which the plaintiff had not done. In the case on hand, the plaintiff has stated that he served notice upon the defendant/respondent. If that be so, he must have the copy of the notice he served along with proof serving the notice, i.e., registered slip and receipt memo. In this circumstance, plaintiff could have easily placed these materials before the Court as a matter of proof serving the notice.

24. Moreso, the plaintiff could not come out with a reasonable or plausible explanation.

25. In the light of aforesaid discussions on facts and law, in my opinion, the substantial question of law has been answered in an appropriate manner and ultimately, it is held that statement made in cross-examination cannot be a decision maker of a suit unless and until such admission is clear, explicit, unambiguous and appears to be a conclusive to the court.

26. In the light of above observations and discussions, I do not find any merit in the instant second appeal. Accordingly, it is dismissed. However, there shall be no order as to cost.

Send down the LCRs.

JUDGE