

21.06.2021
2 & 3
PG Ct.04

S.A.T. No. 301 of 2018
With
I.A. no. C.A.N. 1 of 2021
with
I.A. no. C.A.N. 2 of 2021

Smt. Bharati Koley.
Vs.
Pratik Das & Anr.

With
S.A.T. No. 302 of 2018
With
I.A. no. C.A.N. 3 of 2021
with
I.A. no. C.A.N. 4 of 2021

Smt. Bharati Koley.
Vs.
Pratik Das & Anr.

Mr. Rabindranath Mahato,
Mr. Animesh Das ... for appellant.

Mr. Debjit Mukherjee,
Ms. Susmita Chatterjee,
Mr. Kaustav Bhattacharya for respondent no.1.

Re: C.A.N. 2 of 2021 (S.A.T. No. 301 of 2018)
C.A.N. 4 of 2021 (S.A.T. No. 302 of 2018)

Mr. Mahato, learned advocate appears on behalf of applicant/appellant. He submits, prayer made in the applications be allowed. The prayer is for recording fact of death of respondent no.2, who died on 15th May, 2021. He submits further, respondent no.1 is the legal representative of deceased respondent. Mr. Mukherjee, learned advocate appears on behalf of respondent no.1.

Let there be amendment to the cause titles in the memos striking out name of respondent no.2 as prayed in the applications. The amendments be carried out within two weeks. The applications are disposed of.

Appellant will correct name of respondent no.1 appearing in the memos, discrepancy having been pointed out by Additional Stamp Reporter. On requirement to file certified copies of judgments and decrees in both the appeals, dispensation was directed by order dated 12th April, 2021. As such, we take up the appeals for admission.

Mr. Mahato wants four question to be formulated as substantial questions of law, for hearing of the appeals. The questions suggested are set out below:-

- I. *Whether the learned Judges in the Courts below substantially erred in law in taking into consideration the provision of Section 25 of the West Bengal Premises Tenancy Act, 1956 for adjudication as to whether the appellant is a tenant under the respondents, when the suit property having been situated under the panchayat area, the provision of Transfer of Property Act, 1882 is applicable instead of West Bengal Premises Tenancy Act, 1956.*
- II. *Whether the learned Judges in the Courts below substantially erred in law in not considering the Exhibit-1 as admission on the part of the respondents to the effect that the appellant is a tenant, when submission of such document being*

objection to electric supply connection to the appellant, has been proved by the authority concerned and the finding that the appellant is not entitled to get any benefit from Exhibit-1, as she has not proved the signature of respondent no.1 over there by handwriting expert, is perverse finding.

- III. *Whether the learned Judges in the Courts below substantially erred in law in not considering the admissible evidence of PW-2, who being summoned by Court, adduced even in cross examination to the effect that the appellant was a tenant under Bimal Dey, the vendor of the defendants/respondents and Bimal Dey used to make entry after receipt of rent from the appellant.*
- IV. *Whether the learned Judges in the Courts below substantially erred in law in decreeing the counter claim filed by the respondents without considering the admission of DW-1 that the counter claim has been filed without serving any notice to quit, the prerequisite condition for institution of proceeding for recovery of possession according to Section 106 of the Transfer of Property Act, 1882 and the finding regarding Exhibit-D, a notice of revocation of alleged license is perverse finding.*

On the first question we had required production of copies of the plaint, written statement and counter claim and written statement dealing with the

counter claim. Those were produced and we have perused them. Plaintiff case was, inter alia, declaration that plaintiff is bona fide tenant on pleading of defendant no.1 claiming to be land lady in respect of the demise, bearing rental of Rs.125/- per month payable according to English calendar, situate at the place, where Mr. Mahato submits, West Bengal Premises Tenancy Act, 1956 is not applicable. In the written statement and counter claim, pleading is allegation of licence. Plaintiff's written statement to the counter claim is denial of it.

Section 107 in Transfer of Property Act, 1882 provides for a lease, as is contended to have been given to Mr. Mahato's client being from month to month, to be made either by a registered instrument or by oral agreement accompanied by delivery of possession. This case is not there in the plaint. Neither is any case made in the written statement to the counter claim, of omission to serve notice under sub-section (1) in section 106. The trial Court noticed that claimed landlord of plaintiff was not called by her as a witness and she had been unable to produce rent receipt or an agreement or any document of tenancy. Nowhere in the plaint or in the written statement to the counter claim was the word 'lease' mentioned. In the circumstances, we find no substantial question of law arises on dismissal of the suit by the trial Court, as confirmed in appeal.

On the second question, Mr. Mahato submits, exhibit 1 was a document produced by plaintiff's witness as additional evidence in appeal. Exhibit 1 was a letter, plaintiff contended, written by defendant no.1 to the authority supplying electricity. We have ascertained from Mr. Mahato that the letter was tendered by a person of the authority. Mr. Mahato's submission is that the appeal Court, in dealing with the exhibit, wrongly shifted the onus on his client to prove contents of the letter merely because defendant no.1 had denied writing it.

We quote below a passage from the appellate judgment.

"During cross-examination, the PW-2 had not been able to make confirm that original Prantik Das i.e. the present respondent no.1 submitted such letter or not. The Appellant did not take any step for examination of handwriting and signature of respondent no.1 Prantik Das to verify and ascertain whether the handwriting and signature of Exbt.1 is of original Prantik Das or not. In view of such dispute regarding handwriting and signature of Prantik Das in the Exbt.1 raised by the Defendants and non-taking any appropriate step by the Appellant to clear the doubt, I am of the opinion that the Exbt.1 in connection with Title Appeal 69 of 2004 has failed to gain evidential value and thus the Appellant/Plaintiff is not entitled to get any support or benefit from Exbt.1 in respect of

her claim of tenancy right over the suit property.”

Section 47 in Indian Evidence Act, 1872 is regarding opinion to any handwriting, when relevant. The explanation provides that a person is said to be acquainted with the handwriting of another person when he has seen that person write or when he has received documents purported to be written by that person in answer to documents written by himself or under his authority and addressed to that person or when, in the ordinary course of business, documents purported to be written by that person have been habitually submitted to him. We have ascertained from Mr. Mahato that reference to PW-2 in the appellate judgment is reference to the witness, who had tendered exhibit 1. It appears, the appeal Court did not find any evidence, regarding dispute on the signature of defendant no.1, given by or on behalf of plaintiff in terms of section 47 for plaintiff's onus being discharged. The letter was correctly found by the appeal Court to be unreliable in the circumstances of its tender.

Mr. Mahato submits on third suggested question, PW-2 at trial was his client's neighbour. This neighbour had seen his client tender rents and acceptance by the erstwhile owner, predecessor-in-interest of defendants. Evidence or testimony of this witness ought to have been relied upon. A question of law arises regarding

appreciation of direct evidence tendered, tested by cross-examination.

We find from the judgment of the trial Court, inter alia, following was said.

“In this aspect, plaintiff could not filed any rent receipt. She claim that Bimal did not issued her receipt. She examined her witness. On the panoramic perusal of the evidence of PW-2. I hardly believe that, the evidences of plaintiffs PW-2 is believable because the plaintiff’s claim that Bimal did not issued receipt but enter the same in khata. In this aspect, Bimal Dey was not called as witness by plaintiff and PW-2’s evidence is hard to believe, as he is not a neutral witness but a close friend of plaintiff’s husband, Prabhat. More over, there is no exact time or place where the Court will come to conclusion that Bimal Dey refused to issue rent receipt and surprisingly the plaintiff never agitate when Bimal Dey did not issue rent receipt.”

Above appears to be appreciation of the trial Court on a question of fact, upon having had the benefit of the witnesses deposing before it. The appeal Court said the following in this connection:-

“On perusal of the evidence of the PW-1, it is surfaced that she in unequivocal language admitted that she had no rent receipt to prove that she was a tenant in respect of the suit property and she

would not examine Bimal Kumar Dey as her witness and also that she would not furnish any document to show that she paid rent to Bimal Dey till May 1998. It is seen that she in unequivocal language admitted that although she paid rent but Bimal Dey did not grant rent receipt to her and she did not make complain before the Rent Controller or Court about non-issuance of rent receipt by Bimal Dey. Although she deposed that she had documents in support of her tenancy for 23 years but unfortunately she did not produce and prove such document before the Court either during trial of the original suit or by filing petition u/o 41 rule 27 CPC before this Appellate forum.”

Best evidence must be tendered by a party. Undoubtedly, Bimal Dey was the person who should have been called to the box to give evidence in this regard. Plaintiff did not venture to call the person. At the time of suit and thereafter at trial, plaintiff could have reasonably expected Bimal Dey to be disinterested and give evidence truthfully because said person had sold and gone away. Mr. Mukherjee submits, plaintiff deposed in cross-examination on 5th February, 2004 that she would not call Bimal Dey as witness. There was, therefore, above concurrent finding of failure to prove fact of tenancy by payment of rent. No substantial question of law arises on this concurrent finding.

We come to the last question. There cannot arise a substantial question of law on a contention, which does not have its basis in the pleadings, but is contrary to them. As aforesaid, there is no averment in plaintiff's pleadings, particularly in response to the counter claim, that defendants were required to serve notice under subsection (1) in section 106, Transfer of Property Act. It is clear to us that plaintiff had made out a case of tenancy under the rent Act but here in second appeal would want it to be admitted on purported error committed by the Courts below in dealing with plaintiff's contentions in light of monthly tenancy as opposed to a lease.

In view of the above, we do not find the second appeals deserve admission on any question of law. The same are dismissed. Accordingly, the other connected applications are also dismissed.

(Arindam Sinha, J.)

(Biswajit Basu, J.)