

03.03.2021.
Item No. 11

S.A.T. 319 of 2019
With
CAN 1 of 2019 (Old No. CAN 11304 of 2019)

Sri Mukul Chatterjee
Vs.
Sri Anup Kumar Dey and others.

Mr. Asit Kumar Bhattacharya.
... for the appellant.

Leave is granted to the appellant to file the certified copy of the judgment and decree of the trial court. Let the same be kept on record.

Both the courts below have decreed the suit against the defendants on the ground of default and reasonable requirement under the provisions of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as 'said Act').

The predecessor of the present defendant/appellant was the tenant under the plaintiffs/respondents and a suit for eviction was filed on the above ground upon service of the statutory notice provided under the said Act. The original defendant appeared and filed an application under Section 17(2) of the said Act raising a dispute as to the relationship of landlord and tenant and further filed the written statement with an intent to contest the said suit.

Admittedly, during pendency of the suit the original defendant died and the heirs and legal representatives were substituted in his place. Undisputedly, the substituted defendants did not participate in the proceeding and the suit was posted

at the *ex parte* board. The trial court decreed the suit *ex parte* against the substituted defendants with categorical findings that the plaintiffs have been able to establish the relationship of landlord and tenant and the substituted defendants are the defaulters in payment of rent and the plaintiffs also reasonably require the suit premises. The said *ex parte* judgment and decree is carried to a first appellate court and a plea was taken that one of the substituted defendants, namely, defendant no. 1(b), died during pendency of the suit and, therefore, the decree is a nullity.

We must record that there is no reflection of such plea having taken and considered by the first appellate court though the grounds of appeal incorporated in the Memorandum of Appeal evince such grounds to have been taken. What we perceived from the judgment of the appellate court and the submissions made by the appellant that such plea was not agitated and naturally there was no occasion on the part of the learned Judge in the court of appeal below to consider the same.

A point might have been taken in the Memorandum of Appeal but not pressed at the time of argument and the decision rendered cannot be said to be imperfect as the learned Judge is required to return its findings on each of the grounds incorporated in the Memorandum of Appeal. Furthermore, the suit was decreed *ex parte* as the substituted defendants did not participate therein. Mere statement that one of the defendants expired during pendency of the suit is not sufficient unless the same is proved by convincing evidence.

Neither the death certificate nor any other documents were produced before the court of appeal below in support of such ground that the said

defendant died during pendency of the suit. The plea of fact, which was available to the party, having not taken before both the courts below, cannot be permitted to be agitated before the second appellate court. The only exception one can see that if a point is a pure question of law not dependant upon any facts to be proved, the same can be agitated for the first time before the higher forum.

This is not a case of such nature. The first appellate court was confining the scrutiny on the basis of the evidence adduced by the plaintiffs/respondents in support of the pleading and if the court finds that such pleaded facts have been proved by convincing evidence, the appellate court has to travel over the circumference of such evidence and the pleading and is not supposed to look into the written statement filed by the defendants for the purpose of finding out the genuinity of the case pleaded therein.

There is a stark distinction between a pleading and prove. The pleading is not substitute of prove. It is an ordinary rule of evidence that the pleading has to be proved by a litigant by giving evidence unless the other side admits the claim made in the plaint for the simple reason that the admission need not be proved in law.

In absence of any evidence on the part of the substituted defendants and that no argument has been advanced before us that the material available before the trial court was not sufficient enough to justify the passing of the *ex parte* decree, we do not feel that there is any substantial questions of law involved in the instant appeal.

The appeal is dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

In view of dismissal of the appeal itself, the connected application being CAN 1 of 2019 (Old No. CAN 11304 of 2019) has become infructuous and the same is also dismissed.

There shall, however, be no order as to costs.

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(Harish Tandon, J.)

(Kausik Chanda, J.)