

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Soumen Sen
&
The Hon'ble Justice Ajoy Kumar Mukherjee

SA 41 of 2021
With
CAN 1 of 2021
Md. Takbir Ali
Vs.
Md. Moyazzem Hossain

(Via Video Conference)

Order dated: 07th March, 2022

Ajoy Kumar Mukherjee, J. (oral):

1. None appears on behalf of the appellant.
2. On the last occasion, a prayer was made by Ms. Mobashshara Alam, Advocate on behalf of Mr. Mazhar Hossain Chowdhury, Advocate representing the appellant for adjournment which was granted. Even on the earlier occasion, we adjourned this matter on the ground of non-availability of Mr. Mazhar Hossain Chowdhury, Advocate. In our order dated 23rd February, 2022, we made it clear that in the event the appellant fails to appear, we shall dispose of the matter on the basis of the available record. The said order was passed in presence of by Ms. Mobashshara Alam, Advocate who represented the

appellant on the earlier occasion. It seems that the appellant is deliberately avoiding to appear and argue the matter.

3. Accordingly, we consider the merits of the matter on the basis of the available record.

4. Being aggrieved by and dissatisfied with the judgment and decree dated January 15, 2020 passed by learned District Judge, Malda in OC appeal No. 2 of 2018, affirming the judgment and decree dated November 30, 2017 passed by learned Civil Judge, (Junior Division), 2nd Court, Malda In OC No. 52 of 2014, Appellant preferred this second appeal before this court.

5. Opposite party/plaintiff's case in brief is that defendant is a tenant in the suit premises at monthly rent of Rs. 501/- according to English calendar month since 20.08.2004 and had been running a cloth selling business but the defendant has kept the suit premises under lock and key for last seven years, resulting in damage to the suit premises. Defendant is irregular in payment of rent and has failed to make payment of rent for the last 5 years. Moreover the said premises is required for plaintiff's personal use. Plaintiff sent notice to quit upon Defendant on 19.04.2013 under section 106 of the Transfer of Property Act but inspite of service of notice, defendant failed to quit and vacate the suit premises. Hence the suit, Defendant contested the suit by filing written statement denying all material allegations made in the plaint. Defendant's contention is that he is a tenant under the plaintiff at a rental of Rs. 501/- per month, which is created by dint of un-registered agreement

dated 20.08.2004 . The plaintiff due to close acquaintance with the defendant did not issue rent receipt regularly. On 07.03.2013 when defendant visited the plaintiff to pay rent for the month of February 2013 and demanded rent receipts, plaintiff refused to accept rent and instituted the present suit. Plaintiff has another 4 storied building in the vicinity of suit shop room, besides other properties. Accordingly he prayed for dismissal of the suit.

6. On the basis of the pleading learned Trial Court has framed as many as 7 issues. Plaintiff himself deposed as PW1 in support of his case and proved eviction notice, A/D card, which are marked as exhibit 1 series plaintiff's purchase deed dated 20.06.1988 marked exhibit 2 and LRROR marked as exhibit 3, tax & revenue receipts marked as exhibit 4 and 5 series. On the contrary defendant deposed as DW1 and one Md. Rahim Biswas as DW2. Defendant proved agreement dated 20.08.2004 which are marked as exhibit "A".

7. Learned trial court after considering the documentary as well as oral evidence decreed the suit in favour of plaintiff with the observation that the notice under section 106 of Transfer of the Property Act was duly served upon the plaintiff and learned trial court did not find any substance in the defendant's contention that the suit is not maintainable or that suit is barred by limitation.

8. Being aggrieved and dissatisfied with the aforesaid judgment passed by the learned trial Court, defendant /appellant preferred first appeal, being OC

appeal No. 2/2018 which came up for hearing before the learned District Judge, Malda and learned District Judge Malda was pleased to dismiss the appeal and affirmed the judgment passed by the Trial court. It is specifically observed by the first Appellate Court that in paragraph 6 of written statement appellant /defendant categorically admitted that he is tenant under the plaintiff at a rental of Rs. 501/- per month and in his evidence-in-chief on oath the appellant /defendant has stated that he has taken the suit property as a tenant from the plaintiff on 20.08.2004 by an agreement of tenancy executed between him and the plaintiff for running cloth business therein. Said tenancy agreement dated 20.08.2004 is marked as exhibit "A" and both in the oral and documentary evidence, Defendant/Appellant admitted plaintiff/respondent as his land lord in respect of the suit property. Learned First Appellate Court did not place reliance upon defendant's contention that before execution of sale deed in favour of plaintiff which is marked as exhibit 2, vendor of the plaintiff previously executed three more deeds being No. 4454, 4456 & 4457. Said deeds even if presumed to have been executed, but still it was never been acted upon, as possession was never delivered to the alleged donee. In this context he observed that in order to constitute a valid gift pivotal requirement is acceptance which has not been proved Moreover from the four corners of the written statement, there is nothing to suggest that defendant has questioned plaintiff's title over the suit property. Exhibit 1 series also go to show that the notice was duly served upon the defendant and learned First Appellate Court also turned down the defendant's contention regarding validity

of the notice. In this context it is to be mentioned that at paragraph 8 of the plaint , plaintiff stated that on 19.04.2013 the plaintiff sent his notice to quit under section 106 of the Transfer of Property Act but on perusal of the notice i.e. exhibit 1, it is found that the notice is actually dated 29.04.2013 and as such defendant /appellant pressed upon such discrepancy but it has got no basis at all, as the aim of interpretation of notice should be confined only to ascertain whether the person receiving the notice has understood the meaning of the same and notice to quit notwithstanding the erroneous particulars is still good and effective so long as recipient is not misled. In the present case the notice was sent on 29.04.2013 and in the said notice it was directed to hand over the vacant possession by June, 2013. The notice , postal receipt marked as exhibit 1, 1/1 and 1/2 respectively shows that the notice was consigned for service on the same day and from exhibit 1/3 it reveals that the notice was duly received by the appellant /defendant on 03.05.2013 by putting signature on the A/D card and signature on the A/D card has not been challenged by the defendant /appellant. From the exhibit 1 it is also clear that the description of the premises, name of the landlord, the name of the tenant and the month of expiry of the notice has been duly mentioned and accordingly learned First Appellate Court held that discrepancy in the date of the notice as pressed by Appellant/Defendant cannot be construed that there was no legal termination of tenancy. Section 106 of the Transfer of Property Act only provides that lease is terminable by 15 days notice expiring on the end of a tenancy month and in the present case it appears from the exhibit 1 series that lease was terminated

on the expiry of the month of June, 2013 and it was received by the defendant on 03.05.2013.

9. In a case where tenancy is governed by the Transfer of Property Act, a notice under section 106 of the said Act would suffice to determine the tenancy. In the instant case, admittedly plaintiff is the land lord and defendant is the tenant and tenancy is from month by month. In such a situation, what the plaintiff is required to prove is the service of 15 days' notice under section 106 of the Transfer of Property Act in order to terminate the relationship. In the present case from the exhibit 1 series, it has been clearly established that the notice has been duly served upon the defendant /appellant and further more exhibit 6 shows that the defendant's advocate had given reply to that notice on 21.08.2013. There is also nothing to held that the notice is not legal or invalid and as such we find nothing to interfere with the ultimate observation as made by both the courts below. Moreover, the appeal does not involve any substantial question of law. Accordingly defendant /appellant's prayer for admission of second appeal is dismissed with cost of Rs.5,000/- which the defendant/appellant will pay to the plaintiff/respondent.

10. S.A. 41 of 2021 is, accordingly, dismissed with a cost of Rs.5,000/- .

In view of dismissal of the second appeal, the application being CAN 1 of 2021 also stand dismissed.

All parties shall act on the server copies of this order duly downloaded from the official website of this Court.

I agree

(Soumen Sen, J.)

(Ajoy Kumar Mukherjee, J.)