

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Ajoy Kumar Mukherjee

S.A. 84 of 2020

Subhas Roy

Vs.

Binay Kumar Mazumdar

(Through Video Conference)

Order dated : 21st February, 2022

Ajoy Kumar Mukherjee, J.(oral): The matter was adjourned on February 16, 2022 to enable the appellant to represent and make appropriate submission. In spite of giving opportunity, today also the appellant is not represented, nor any accommodation is prayed for.

The Judgment and decree dated 28th June , 2019 passed by the Learned 3rd Court, Additional District Judge, Howrah, in Title Appeal No. 142/2012, affirming the judgment and decree dated 30th July 2012 passed by learned First Court of Civil Judge (Junior Division), Howrah, is the subject matter of the present appeal.

We have considered the judgment and decree of the trial court as well as the lower appellate court and the grounds of appeal. In the grounds of appeal two points have been urged, namely, *res judicata* and defective notice of eviction. In order to ascertain whether the said points in the facts and circumstances of the case constitute substantial questions of law in favour

of admission of the appeal, we have to consider the brief facts and the findings of both the courts below in respect of the aforesaid two issues.

Plaintiff/respondents case in a nutshell is that plaintiff's father Girish Chandra Mazumder was original owner of the suit property and during his lifetime he settled suit property in favour of his only son i.e. plaintiff by executing registered deed of settlement on 01.01.1988. Defendant was a tenant in respect of schedule mentioned shop room at a monthly rental of Rs. 50/- payable according to english calendar month. The defendant was habitual defaulter in payment of rent since February , 1999. The suit shop room is also required for plaintiffs use and occupation and for which he sent a notice of ejectment, asking the defendant to quit and vacate the suit shop room but the defendant inspite of receipt of that notice, did not vacate the suit premises. Hence the suit.

Defendant/appellant contested the suit by filing written statement. Defence case is, after the death of original owner Girish Chandra Mazumder his heirs and legal representatives became the owner and land lord in respect of the suit property but they have not been made parties in the suit. Moreover the notice as sent by the plaintiff is defective. Defendant denied that he was defaulter in payment of rent. Defendant actually use to deposit rent to the office of rent controller as plaintiff refused to accept rent. Subsequently defendant by way of amendment in written statement introduced counter claim in the suit, alleging that plaintiff has disconnected the electricity of the suit shop room, for which defendant incurred loss in his business of manufacturing iron grill as sub-contractor. After disconnection

of electricity defendant requested the plaintiff for restoration of his electric connection but plaintiff did not take any initiative for restoring the same, for which defendant made counter claim to recover damages to the tune of Rs. 20,000/- (Twenty Thousand) against the plaintiff and also prayed for dismissal of the suit for eviction. Plaintiff /respondent filed written statement against. Counter claim contending that defendant has caused damages to the suit room by keeping the same under lock and key and plaintiff never disconnected the electric connection of the defendant and defendant enjoying the electricity from a meter of other tenant and as he failed to pay the electric bill so WBSEB had disconnected his electric line sometimes in the year 1998. Accordingly plaintiff prayed for dismissal of the counter claim.

It appears that learned trial court framed 8 (eight) issues initially and after considering the counter claim and written statement against the counter claim, he re-casted 12 (Twelve) issues for the adjudication of the suit. In the said suit plaintiff had deposed as PW1 and defendant himself deposed as DW1 and he has brought 3 other witnesses in support of his case. During the course of examination, plaintiff proved certified copy of deed of settlement, entry in record of rights, government revenue receipt , tax receipt issued by Panchayet and also the copy of the notice, postal slip and A/D card ,certificate of posting (in support of service of ejectment notice), counter part of rent receipt bill, which all are marked as exhibit. On the contrary defendant filed challans in support of payment of rent and

certified copy of judgment dated 25.06.2002 passed in Title Suit No. 102/2000, which are also marked as exhibit from defence side.

Learned Trial Court after considering the pleading and evidence as adduced by the parties, came to the conclusion that admittedly plaintiff is the land lord in respect of the suit property. Learned Trial Court held that defendant is defaulter in payment of rent since February 1999 to February 2002. Citing the judgment in ***Prasanta Ghosh & Anr., v. Pushkar Kumar Ash & Ors.***, reported at **2006(2) CHN 277**, the learned Trial Court held that in a case where tenancy is governed by the Transfer of Property Act , all that land lord is required to prove is that notice in terms of section 106 of the Transfer of the Property Act has been duly served upon the tenant defendant. Once it is established that prior institution of the suit a valid notice in terms of section 106 of the Act was duly served upon the tenant defendant, there was no necessity for the learned court below to consider whether the grounds mentioned in the plaint had really exists. In the present case the notice to quit has been duly served upon the defendant, which reflects from exhibit 5 series. Regarding legality and validity of the notice to quit ,Trial court also relied upon the judgment in ***Dharam Pal v. Harbans Singh***, reported at **2006(9) SCC 216** and came to the conclusion that in a notice under section 106 of the Transfer of Property Act two requirement must be fulfilled **i)** it should give 15 days notice **ii)** expiring with the end of the month of the tenancy. In the instant suit the notice was sent on 19.07.2002 and it also expired in the end of the month of tenancy i.e. last day of August , 2002. Though defendant tried to agitate before the trial

court that defendant's business comes within the purview of business relating to "manufacturing process" and for which 6 months notice is required but Trial Court did not accept such contention as from the evidence of DWs, it was clear that the defendant use to run a business of welding at suit premises, which by no stretch of imagination can be categorized as "manufacturing process". In this context learned trial Court relied upon the judgment in ***Samir Mukherjee v. Davinder K Bajaj & Ors.***, reported in **AIR 2001 SC 1969**.

Regarding legality of notice to quit defendant also agitated before the trial court that exhibit "C" i.e. certified copy of judgment passed in T.S. 102 of 2000, makes it clear that in that suit the same plaintiff send a notice to the quit to the defendant on 19th March, 2000 and on the basis of the said notice said T.S. 102 of 2000 was filed and during pendency of said suit same plaintiff served another notice to quit upon same defendant tenant on 26th December, 2000 in view of above present notice to quit marked as exhibit 5, is not valid because the relationship of landlord and tenant had already been determined in that previous suit being T.S. 102 of 2000. The learned Trial Court however did not rely upon such contention regarding the question of legality or validity of notice, on the ground that even if it is presumed that the relationship between plaintiff and defendant was determined by that second notice, then also defendant would have no better position than that of a "tenant at sufferance" which means that a possession rightful in its inception but wrongful in its continuance and mere continuance in possession after determination of the terms of the lease does

not create a tenancy by holding over, as lessee does not have any proof that lesser accepted rent assented to the lessee's continuance in possession. Accordingly if defendant becomes a "tenant at sufferance" then plaintiff was not required to serve any notice before filing the present suit, so, trial court held that in both cases that is "tenant at sufferance" or "waiver of notice", the notice marked as exhibit 5 is valid and legal. In view of such observations learned trial court decreed the suit in favour of plaintiff and dismissed defendants counter claim, as defendant failed to prove that plaintiff has disconnected his electric connection .

Feeling aggrieved by that judgment Defendant /Appellant preferred first appeal which came up for disposal before the Additional District Judge, 3rd Court, Howrah, being Title Appeal No. 142 of 2012. Learned First Appellate Court by its judgment dated 28th June, 2019, affirmed the judgment passed by learned trial court in Title suit No. 104 of 2012. The specific observation of First Appellate Court on the point of legality of the notice is that disposal of suit does not imply that tenant got a non evictable right against his land lord. He clearly observed the suit is not hit by the principle of *res-judicata* or estoppel waiver or acquiescence. During the hearing of the appeal, the Appellant did not press the argument that the suit is barred for non-joinder of necessary parties. Learned First Appellate Court also of the view that admittedly tenancy is governed by the Transfer of Property Act and in such case what land lord is required to prove that notice in terms of section 106 of Transfer of Property Act has been duly served upon the defendant. Here in the present case learned First Appellate Court found that the notice is

Legal valid and duly served upon the tenant and learned First Appellate Court did not find any substance in the defence contention that six months notice is required in the present context.

In the grounds for admission of second appeal two principal points have been mentioned, firstly, that in view of the dismissal of the earlier ejectment suit present suit for ejectment is barred by *res-judicata* and First Appellate Court wrongly held that dismissal of earlier suit does not imply that tenant had got non-evictable right against his land lord.

Secondly, on the ground of defectiveness of the notice as the second notice was issued during pendency of previously instituted suit.

Needless to repeat that there is nothing to say that plaintiff is not the land lord in connection with suit property and admittedly the suit is governed by the Transfer of Property Act. In such a situation to determine the lease, what the plaintiff is expected to do is well-settled and as rightly pointed out by both the courts below that land lord is required to prove that notice in terms of section 106 of the Transfer of Property Act has been duly served upon the defendant. In the present context, defendant/appellant has failed to controvert the presumption which has arisen in view of the exhibit 5 series that notice to quit was duly served upon the defendant. In this context, we need to look into the grounds of appeal namely:-

- i)** Whether the suit is barred by *res-judicata* and
- ii)** Whether the notice is legal valid or not.

Both these issues have arisen due to the fact that before the filing of the present suit for ejectment, plaintiff filed another suit for ejectment against the self same defendant in respect of the self same suit property being Title Suit No. 102/2000 and certified copy of said judgment goes to show that the said suit was dismissed on notice point, because the suit was filed by the same plaintiff on the basis of notice to quit dated 19th March, 2000 but during pendency of the said T.S. 102 of 2000, another notice dated 26th December, 2000 was given by the plaintiff to the defendant. While deciding issue No. 1 and 2, learned court observed in that suit:

“By the second notice the language determined defendant’s tenancy with expiry of the last day of January, 2001. So, unless the plaintiff treats the tenancy subsisting even after service of first notice on 27.03.2000 expiring with the month of April, 2000 how he could determine tenancy by the second notice. So, the second notice clearly waived the first notice and as such the instant suit was filed without any notice as per section 106 of the Transfer of Property Act and hence it is not maintainable.”

On perusal of aforesaid observation it is clearly understandable that the observation of the court in the said suit was that in view of the second notice, the first notice was waived and as such said title suit was filed without any notice under section 106 of the Transfer of the Property Act. Admittedly such observation has not been challenged by either of parties and as such it attains its finality. There is no dispute that notice under section 106 of the Transfer of the Property Act is to be given for termination of the lease of immovable property and in view of the aforesaid unchallenged observation, that no notice was given in that suit, it clearly implies that no termination of lease of immovable property had taken place by dint of that

second notice and in view of the illustration (b) to section 113 of the Transfer of the Property Act, first notice given in that suit was also waived. Now if the first notice is waived and if second notice does not have any bearing in connection with the said T.S. 102 of 2000, then in terms of section 106 of the Transfer of Property Act at least it can be said that, said suit was filed without terminating lesser and lessee relationship and as such said suit was dismissed. Now in order to attract section 11 of the Code of Civil Procedure the matter directly and substantially in issue in earlier suit must be directly and substantially in issue in the present suit, between the same parties litigating under the same title and such issue must have been heard and finally decided by such court. In the present context the issue namely whether there was any termination of the lease by dint of exhibit 5, has not been heard and finally decided in the earlier suit and as such Defendant /Appellant's plea that the suit is barred under section 11 of the Code of Civil Procedure does not found any leg to stand and we do not found any substance to interfere with the observation made by the trial court that dismissal of the said earlier suit does not imply that tenant has got non-evictable right against his land lord.

For the self same reason we do not found any illegality in the eviction served in the present suit (Ex-5) as it was observed in the earlier suit that in view of the second notice, for filing said earlier suit no notice to be quit was given upon the defendant, as second notice was served prior to the institution of the suit and second notice amounts to waiver of first notice

which leads to the conclusion that as there was no notice for filing the said earlier suit, so there was no termination of relationship in that suit.

The arguments that six month notice is required for filing the present suit as defendant is running “manufacturing process” in the suit shop room, we do not find any substance to such contention as from the evidence of DWs it is clear that defendant uses to run a business of welding in the suit premises which by no stretch of imagination can be categorized as “manufacturing process”. The law on this point is well-settled long back which says:-

“The expression “manufacturing purposes” in Section 106 thus means purposes for making or fabricating articles or materials by physical labour or skill or by mechanical power, vendible and useful as such. Such making or fabricating does not merely mean a change in an already existing article or material but transforming it into a different article or material having a distinct name, character or use of fabricating a previously known article by a novel process.” In **Allenbury Engineers Pvt. Ltd v. Ramkrishna Dalmia & Ors.**, reported in **1973(1) SCC 7**.

Said observation also finds support in subsequent Hon’ble Apex Court judgment in **Idandas v. Anant Ramchandra Phadke** reported at **1982(1) SCC 27**.

Defendant/Appellant has also miserably failed his case of counter claim either by oral or by documentary evidence.

In view of above we are not inclined to admit the second appeal in view of the fact that no question of law far from substantial question of law involved in the present context.

Accordingly the prayer for admission of second appeal is dismissed.

I agree

(Soumen Sen, J.)

(Ajoy Kumar Mukherjee, J.)