

**IN THE HIGH COURT AT CALCUTTA**  
**(CIVIL APPELLATE JURISDICTION)**

PRESENT:

**THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY**

**S.A. 12 of 2019**

***ASHOK KUMAR SETT***  
**VS.**  
***GITA DAS MAHAPATRA***

|                      |                                                                                                    |
|----------------------|----------------------------------------------------------------------------------------------------|
| For the Appellant    | : Mr. Kartick Kumar Bhattacharyya, Adv.<br>Mr. Asit Kumar Rout, Adv.<br>Ms. Soumashree Dutta, Adv. |
| For the Respondent   | : Mr. Gopal Ch. Ghosh, Adv.<br>Mr. Balai Lal Sahoo, Adv.<br>Mr. S.P. Roy, Adv.                     |
| Hearing concluded on | : 5 <sup>th</sup> July, 2023                                                                       |
| Judgement on         | : 18 <sup>th</sup> July, 2023                                                                      |

**Siddhartha Roy Chowdhury, J.:**

1. This Second Appeal challenges judgement and decree passed by learned Civil Judge, Senior Division, 1<sup>st</sup> Court, Howrah in Title Appeal No. 138 of 2015 on 29<sup>th</sup> March and 5<sup>th</sup> April, 2018 respectively affirming thereby the judgement and decree passed by learned Civil Judge, Junior Division, Howrah in Title Suit No. 219 of 1998.
2. Briefly stated, one Fatik Chandra Sett, since deceased, was a tenant under Prafulla Chandra Mukherjee, the predecessor-in-interest of the plaintiffs/respondents. The plaintiff acquired the property from her father by dint of deed of settlement dated 13<sup>th</sup> February, 1987 and the father of the defendant became tenant in respect of the suit property

under the plaintiff. Since after the death of said Fatik Chandra Sett in 1993, the defendant has been carrying on the business with the consent of all other legal heirs of Fatik Chandra Sett as a tenant at a monthly rental of Rs. 70/- per month excluding the electric charges under the plaintiff, in respect of the suit property. The defendant paid rent for the last time for the month of July, 1998 which was acknowledged vide receipt no. 737 dated 19<sup>th</sup> September, 1998. It is contended by the plaintiff that the suit premises is required for her own use and occupation and also for the purpose of building and re-building. During pendency of the suit the plaintiff constructed building over the suit property as per plan duly sanctioned by Howrah Municipal Corporation, keeping the existing possession of the tenant. It is further contended that the defendant caused waste and damage to the suit property and acted in violation of provision under clause (m), (o) and (p) of Section 108 of the Transfer of Property Act. The tenancy was determined by a notice to quit dated 19<sup>th</sup> September, 1998 which was duly served upon the defendant. Though he was called upon to quit and vacate the suit property after the expiry of the month of October, 1998, the defendant did not comply with the terms of the said notice. Hence the suit.

3. The defendant contested the suit by filing written statement denying all material allegations made in the plaint. It is the specific case of the defendant that the suit is bad for non-joinder of the necessary parties. The original tenant Fatik Chandra Sett was survived by his three sons namely Prosanta Sett, Feluram Sett and Ashoke Kumar Sett and four daughters namely Sunita Sett, Malina Dhang, Monju Srimani and Anuradha Patra. All of them have inherited the tenancy. Defendant

Ashok Kumar Sett has been paying the rent on behalf of all of them. It is the specific case of the defendant that during pendency of the suit the parties to the suit arrived at a settlement and it was agreed that the plaintiff would construct a building over the property in suit. The defendant would vacate the tenanted property and the plaintiff would deliver the possession of a room on reconstruction and/or development of the suit property. Accordingly, after construction, the possession of a room measuring about 225 square feet was given to the defendant in place of 323 square feet let out to his father. The defendant denied the claim of reasonable requirement or violation of clause (m), (o) & (p) of Section 108 of the Transfer of Property Act or that he was defaulter in payment of rent. Learned Trial Court after considering the evidence on record was pleased to pass a decree on the ground of reasonable requirement. The defendant assailed the said judgement and decree of learned Trial Court in Title Appeal No. 138 of 2015 but the appeal was not accepted by the learned First Appellate Court.

4. Being aggrieved by and dissatisfied with the judgement of learned First Appellate Court passed in Title Appeal No. 138 of 2015 the defendant has preferred the appeal under consideration which was admitted on 17<sup>th</sup> December, 2018 and following substantial questions of law were formulated :-

1. Whether the Court of Appeal below was justified in rejecting an application for additional evidence solely on the ground that it does not believe the statements of the defendant because of his inconsistent stand in course of the suit?

2. Whether the Court of Appeal below was justified in rejecting the contention of the defendant that the suit is bad for non-joinder for necessary party solely on the basis of the deposition of D.W. 1 when the fact remains that upon the death of the original tenant there are other heirs also than the defendant/appellant?
3. Whether the Court of Appeal below was justified in dismissing the appeal solely on the premise that the advocate commissioner appointed for inspection did not inspect the suit shop room and thereby ignored the commissioner's report, which clearly suggests that the suit shop room is inspected and measured by him?
4. Whether the Court of Appeal below was justified in affirming the judgement and decree of the Trial Court as he has meticulously dealt with all the issues and correctly applied law?
5. Assailing the judgement Mr. Asit Kumar Rout, learned Counsel for the appellant submits that the suit property admittedly used to be occupied by Fatik Chandra Sett and after his demise the tenancy right devolved upon his three sons and four daughters. The notice terminating the tenancy was not served upon all the legal heirs of Fatik Chandra Sett. Therefore, the notice to quit the suit premises given under Section 13(6) of the West Bengal Premises Tenancy Act cannot be said to be valid one. That apart, the suit cannot be said to be maintainable due to non-joinder of necessary parties as the plaintiff-

landlord did not implead all the legal heirs of the original tenant in the suit.

6. Drawing my attention to the agreement Exhibit-B, Mr. Rout, learned Counsel for the appellant submits that during pendency of the suit Smt. Gita Das Mahapatra, the respondent herein and Ashok Kumar Sett, the appellant on 2<sup>nd</sup> April, 2001 entered into an agreement. It was decided by and between the parties to the suit that Smt. Gita Das Mahapatra would undertake work of reconstruction of the suit premises wherein the defendant was occupying a shop room measuring about 323 square feet. After reconstruction the tenant would be given possession of a room measuring about 225 square feet and the rate of rent would be enhanced to Rs. 200/- from Rs. 70/- and the plaintiff shall take steps to withdraw the Title Suit No. 219 of 1998 described in 'Ga' schedule property in the agreement. According to Mr. Rout by the dint of this agreement, which was duly acted upon, a new tenancy was created. Therefore, the suit ought to have been dismissed by the Courts below.
7. It is further adverted that on 18<sup>th</sup> April, 2002, another agreement was executed by and between the land lady and Ashok Kumar Sett, the appellant and the rate of rent agreed to be enhanced to Rs. 700/- per month. The defendant prayed before the learned First Appellate Court to admit the said agreement as additional evidence which would establish that the plaintiff/respondent has inducted the defendant/appellant as tenant in respect of a shop room different from that of the shop room which is subject matter of the suit. It is contended by Mr. Rout that the schedule of the property which was subject matter of the suit has undergone a sea-change and that makes the proceeding invalid in the

eye of law, even the plaintiff expressed her intention to withdraw the suit while entering into the agreement dated 2<sup>nd</sup> April, 2001.

8. Per contra Mr. Gopal Ch. Ghosh, learned Counsel for the respondent submits that, the defendant failed to give any cogent reason before the learned First Appellate Court as to why he could not produce the agreement dated 18<sup>th</sup> April, 2001 which was in his possession.
9. That apart, according to Mr. Ghosh, the agreement executed on 2<sup>nd</sup> April, 2001 was not acted upon. The defendant did not tender any rent in terms of the agreement, rather he kept on depositing Rs. 70/- as rent before the Court.
10. According to Mr. Ghosh, learned Counsel, the defendant got the possession of the suit room after the construction was complete. Such action on the part of the plaintiff/respondent demonstrates the discharge of obligation as laid down under Section 18 of the West Bengal Premises Tenancy Act, 1956. Tenancy, that was determined by statutory notice, was never revived.
11. According to Mr. Ghosh, concurrent finding of learned Courts below do not warrant any interference in Second Appeal. Appeal may be dismissed.
12. From the facts of the case it is admitted that the suit property was originally occupied by father of the appellant Fatik Chandra Sett. Fatik Chandra Sett, the original tenant died intestate and survived by his sons and daughters. Tenant has been defined under Section 2 (h) of the West Bengal Premises Tenancy Act, 1956 in the following manner :-

*“2(h) "tenant" [means] any person by whom or on whose account or behalf, the rent of any premises is, or but for a special*

*contract would be, payable and [includes any person continuing in possession after the termination of his tenancy or in the event of such person's death, such of his heirs as were ordinarily residing with him at the time of his death] but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction.”*

13. Therefore, all the legal heirs and successors of the original tenant cannot be said to have acquired the status of tenant as a matter of course unless it is shown that they were ordinarily residing with the original tenant Fatik Chandra Sett at the time of his death.
14. Since the appellant as defendant has taken this plea that all his brothers and sisters became joint tenants upon the death of their father, onus was upon the defendant to prove the same and I feel no hesitation to hold that the defendant failed to discharge such onus.
15. Therefore, the suit cannot be said to be bad for non-joinder of necessary parties. The suit for eviction has been filed on the ground of reasonable requirement along with the ground for building, re-building and also on the ground that the tenant acted in contrary to the provision of clause (m), (o) and (p) of Section 108 of the Transfer of Property Act.
16. Section 13 (1) (ff) of West Bengal Premises Tenancy Act, 1956 says:-
 

*“(1)Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against a tenant except on one or more of the following ground namely:-*

  - a. xxxx*
  - b. xxxx*
  - c. xxxx*
  - d. xxxx*

*e. xxxx*

*f. xxxx*

*ff. Subject to the provision of Sub-Section 3A, where the premises are reasonably required by the landlord for his own occupation if he is the owner or for the occupation of any person for whose benefit the premises are held and the landlord or such person is not in possession of any reasonably suitable accommodation.”*

17. Therefore, the plaintiff/respondent had the obligation to prove that he had no reasonably suitable accommodation elsewhere. From the attending facts of the case it is admitted that the plaintiff/ landlady acquired the suit premises as well as a portion of premises no. 3/2 Buxarah Road by dint of deed of settlement executed by the her father who was the original owner. An Advocate Commissioner was appointed to hold local inspection by the learned Trial Court but the report was not taken into consideration by the learned Trial Court on the ground that the learned Commissioner did not take into consideration the measurement of the room occupied by the defendant/appellant as tenant.

18. It is pertinent to mention here that during pendency of the suit the original suit premises was dismantled and a concrete structure was erected by the plaintiff/respondent herein. Therefore, there is every reason to hold that the suit premises has undergone a sea-change during pendency of the suit. Therefore, it was incumbent upon the plaintiff/respondent to hold a local inspection of both the suit house as well as the other premises to show that she really does not have reasonably suitable accommodation for herself and for her family and

for that reason the appellant/tenant should be evicted. Learned Trial Court therefore, had no reason to pass the decree on the ground of reasonable requirement, ignoring the statutory mandate as laid down under Section clause (ff) of Sub-Section 1 of Section 13 of the West Bengal Premises Tenancy Act and learned Appellate Court below committed grave error in ignoring the said point.

19. This suit was filed for eviction of the tenant on the ground of building or re-building as well. Plaintiff herself did not adduce evidence. Her son Gitesh Das Mahapatra adduced evidence as P.W. 1 and from his testimony we find that the building was constructed according to sanction plan and the plan was sanctioned in the year 2002 but he refused to produce the sanction plan and he further stated that the suit property is no more required for the purpose of building and re-building. In his pleading as well as in his testimony the defendant/appellant Ashok Kumar Sett stated that during pendency of the suit, being approached by landlady/plaintiff he agreed to surrender the suit room to facilitate the construction of building, the plaintiff/landlord wanted to build after getting the plan sanctioned by the Municipal Authority, and there was an agreement executed between the landlady and the tenant on 2<sup>nd</sup> April, 2001, the agreement was admitted as Exhibit-B. From the said agreement I find that the defendant/tenant agreed to have a shop room described in the schedule 'Ga' of the agreement measuring about 225 square feet in place of 323 square feet at a monthly rental of Rs. 200/- per month. In clause 11 of the said agreement it was stated that the landlady being the first party to the agreement shall take steps to withdraw Title Suit No. 219 of 1998 after the construction of 'Ga'

schedule property. From Exhibit-A the certified copy of Misc. Appeal No. 81 of 2002 it appears that Gita Das Mahapatra admitting the factum of agreement executed on 2<sup>nd</sup> April, 2001 containing certain terms and conditions filed a suit being Title Suit No. 33 of 2002 seeking declaration that said agreement was not binding upon her. The same is void and illegal on the grounds stated in the plaint of the said suit.

20. This document Exhibit-A supports the fact that an agreement was entered into during pendency of the suit by and between the plaintiff/landlady and the defendant/tenant. A promise was made in the said agreement that after completion of the construction the suit shall be withdrawn. Without making any comment on the intention of the plaintiff/landlady behind institution of Title Suit No. 33 of 2002 or proceeding under Section 144 of Cr.P.C. by filing application Exhibit-D against her tenant-the appellant herein, it can be said that the defendant/appellant surrendered the suit room for the purpose of building, re-building and he was given possession of 225 square feet area in the form of a shop room by the landlady at a subsequent point of time, as agreed upon.

21. Learned Appellate Court below failed to appreciate the legal consequences of such development during pendency of the suit. On the contrary learned Appellate Court below endorsed the view of learned Trial Court that the agreement Exhibit-B cannot be looked into as the defendant failed to prove the execution of the document. In fact the incident that took place during pendency of the suit, pursuant to the agreement Exhibit-B, unerringly indicates that there was surrender of tenancy on the ground of building, re-building. Though the entire

arrangement was made out of Court, but when the said development is considered in the in the light of the provision of clause (f) of Section 13 (1) of the West Bengal Premises Tenancy Act, there should have been no hesitation to hold that with the surrender of possession of the property, on the basis of settlement out of Court, cause of action for the suit extinguished. Admittedly, after completion of building the defendant/tenant was given possession of a room in terms of agreement and this factum demonstrates the advent of new contractual relationship between the parties and an end to the old tenancy which was terminated by a notice under Section 13 (6) of the West Bengal Premises Tenancy Act.

22. Mr. Gopal Ch. Ghosh, learned Counsel for the respondent submits that the tenant/appellant continued to pay a sum of Rs. 70/- and never tendered a sum of Rs. 200/- hence it should be presumed that the old tenancy is continuing, and restoration of possession should be looked into in the light of Section 18 of the Premises Tenancy Act. Non-payment of contractual rent may give birth to new cause of action to file a suit but does not blow life to the suit, which has been decreed. In order of invoke the provision of Section 18 of the West Bengal Premises Tenancy Act there has to have a decree for delivery of possession of any premises from the tenant under clause (f) or clause (ff) of Sub-Section 1 of Section 13 and on the happening of re-letting of the said premises to any person other than the tenant without permission of the Controller, the Controller may on the application of tenant without giving an opportunity to the landlord of being heard, direct the landlord to put such tenant into possession.

23. Even if we consider the admitted events in the light of Section 18 of the West Bengal Premises Tenancy Act, 1956 such an act indicates surrender of the tenancy; pursuant to which after construction possession was delivered to the tenant and it heralds the creation of a new tenancy as a consequence thereof in respect of an altogether new room, different in nature and size. Learned Lower Appellate Court should have considered this aspect as well. Copy of another agreement dated 18<sup>th</sup> April, 2001 was tendered by the appellant before the learned Lower Appellate Court to treat the same additional evidence. Without discussing the provision of Order 41 Rule 27 of the Code of Civil Procedure learned Lower Appellate Court had no reason to reject the application under Order 41 Rule 27 of the Code of Civil Procedure on the ground that “the Court does not believe the statement of the defendant for his inconsistent stand”. This cannot be a valid reason to reject the application under Order 41 Rule 27 of the Code of Civil Procedure.
24. In fact learned Lower Appellate Court ought to have held that the plaintiff/respondent being the landlady was estopped from proceeding with the suit for eviction of the defendant/appellant on the principle of promissory estoppel. It was clearly spelt out in the agreement that landlady not only would restore the possession, but also shall take step to withdraw the suit. By filing a suit, seeking declaration that agreement dated 2<sup>nd</sup> April, 2002 is vitiated by fraud, in the backdrop of the admitted fact that the construction was completed during pendency of the suit, plaintiff/respondent cannot avoid the consequence of such promise.

25. Section 115 of the Evidence Act is being extracted hereinbelow :-

*“115. Estoppel.-When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.*

*Illustration*

*A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.*

*The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.”*

*It needs to be understood that the rule of estoppel is a doctrine based on fairness. It postulates the exclusion of the truth of the matter. All for the sake of fairness. A perusal of the above provision reveals four salient preconditions before invoking the rule of estoppel.*

*(i) Firstly, one party should make a factual representation to the other party.*

*(ii) Secondly, the other party should accept and rely upon the aforesaid factual representation.*

*(iii) Thirdly, having relied on the aforesaid factual representation, the second party should alter his position.*

*(iv) Fourthly, the instant altering of position, should be such, that it would be second party iniquitous to require him to revert back to the original position. Therefore, the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position, in such manner, that it would be unfair to restore the initial position.”*

26. Had there been no such promise the tenant could not have entered into agreement and could not have affirmed an affidavit Exhibit-C

expressing his no objection in constructing the building within the tenanted holding i.e. premises no. 84 Buxarah Road.

27. Thus in my humble opinion the impugned judgement passed by learned Lower Appellate Court in Title Appeal No. 138 of 2015 suffers from incurable infirmity and should not be allowed to remain in force, which I accordingly do. Consequently the appeal is accepted. The judgement passed by learned Civil Judge, Senior Division, 1<sup>st</sup> Court, Howrah in Title Appeal No. 138 of 2015 is set aside.
28. Let a copy of this judgement and lower court records be sent down to the learned Trial Court for information.
29. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance of the requisite formalities.

***(SIDDHARTHA ROY CHOWDHURY, J.)***