

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Supratim Bhattacharya

S.A. 168 of 2015

Smt. Priti De

Vs.

Sri Birendra Narayan Basak and Anr.

For the Appellant : Mr. Jahar Chakraborty

Ms. Sabita Mukherjee

Mr. Rajasree Paul

Mr. Subhojeet Mukherjee

For the Respondents : Mr. Rahul Karmakar

Mr. Saptarshi Kumar Mal

Heard On : 23.11.2022

Judgement Delivered On : 23.02.2023

The instant appeal has been filed against the Judgement passed in the Title Appeal No.2 of 2013 arising out of Ejectment suit No. 186 of 2006.

At the time of admission of this appeal the following substantial question of law was framed:

“Whether the Learned Judge in the Lower Appellate Court below, substantially, erred in law in reversing the decree for eviction without appreciating the principle of law regarding doctrine of representation and estoppels by conduct ?”

The Learned Counsel appearing on behalf of the appellant during his argument has submitted that Second Appeal only involves ‘substantial questions of law’. He has further submitted that the appellant had issued a letter dated 09.01.2006 through his Learned Advocate addressed to Birendra Narayan Basak that is the respondent No. 1 bringing to his notice that in the rent receipt the name of any other person jointly holding the said tenancy was not clarified and in reply to the said letter a letter dated 15.02.2006 was sent by the respondents through their Learned Counsel clarifying that the tenancy was in the name of Birendra Narayan Basak and Samarendra Narayan Basak and for the purpose of convenience the rent receipt was granted by mentioning “Birendra Narayan Basak

and others”. He has further submitted that the respondents never disputed the issue of relationship of landlord and tenant nor took any defence for non-joinder of Sipra Sett who is their married sister.

It has further been argued that the Learned Trial Court *vide* the Judgement and Decree dated 17.11.2012 passed in the said ejectment suit dismissed the said suit of the appellant. He has further submitted that the finding of the Learned Trial Court had been challenged by preferring the first appeal. Through the judgement dated 28.02.2014 the first appeal was dismissed on the sole ground of non-joinder of Sipra Sett. The Learned Counsel has cited a judgement published in (2000) 2 CHN 30 wherein it has been held that in a given and identical circumstance the principles relating to doctrine of representation would be squarely applicable and any action taken by the plaintiff against the defendant would be deemed to be representing the other tenants. He has further cited a judgement published in (2020) 2 RCR (Rent) 334. Wherein it has been held that the moment the entire estate of the deceased tenant is adequately represented by some of the heirs (of the deceased tenant) non-impleadment of other heirs shall not

invalidate the decree nor the suit can be said to be bad for non-joinder of necessary party. It has further been submitted by the Learned Counsel that the substantial question of law formulated by the Hon'ble High Court at the time of admission of appeal if at all is not formulated properly then it is not fatal so that the appeal could be dismissed rather the Hon'ble Court can formulate the substantial question of law at any time of hearing of the appeal. It has further been submitted that the issue of maintainability of a suit has been dismissed by both the Trial Court and the First Appellate Court but the findings of both the Courts are different, as such it cannot be said to be a concurrent finding. It has further been argued that the plea of non-joinder of Sipra Sett in the suit was beyond the pleading and no documentary *evidence* was tendered by the defendant respondent to prove that they had a sister namely Sipra Sett. It has further been submitted that the first appellate Court came to an erroneous finding that the suit is bad for defect of parties for not impleading Sipra Sett being a necessary party. He has also submitted that such finding by the First Appellate Court is not a concurrent finding rather a perverse finding.

In support of his contentions the appellant has cited the following judgements:

1) (1997) AIR (SC) 1041.

2) (2001) AIR (SC) 965.

3) (2003) AIR (SC) 1905.

4) (2006) AIR (SC) 2234.

5) (2018) 18 SCC 645.

6) (2015) 112 ALR 526.

7) (1965) AIR (SC) 1055.

8) (1965) AIR (SC) 1812.

The learned Counsel appearing on behalf of the respondents has submitted that it was the specific case of the respondents tenants that the suit is bad for non-joinder and/or mis-joinder of necessary parties. It has been submitted that the respondents/defendants had disclosed the name of the necessary parties that is Sipra Sett in their examination-in-chief on affidavit during *evidence*. He has further submitted that the Trial Court has dismissed the suit holding the suit to be defective for non joinder of necessary parties as one of the grounds and the Learned First

Appellate Court affirmed the judgement of the Trial Court on the point of defect of party.

The Learned Counsel also raised the point that there is defect in the formulation of the substantial question of law. He has further submitted that the substantial question of law being defective cannot be held to have been formulated at all which was raised on 31st day of July 2019. He has further submitted that the Hon'ble Court proceeded on an understanding that at the time of hearing the appellant shall formulate the grounds and then proceed. Despite such observation, the appellant thought it fit to proceed without asking the Hon'ble Court to formulate a ground. The Learned Counsel has brought to the notice of this Court Sub-section 5 of Section 100 of the Code of Civil Procedure as regards to formulation of additional substantial question of law. The Learned Counsel has further argued the fact that of no *evidence* can be led beyond pleadings. It is inapplicable in the instant case as the foundation for defect of suit for non-joinder of parties was categorically stated in the written statement. As regards to estoppel by conduct it has been argued that estoppels cannot be confused

with admission. It has been submitted that the original tenant had expired during the year 1980 and immediately thereafter the defendants along with Sipra Sett became tenants by operation of Section 2(h) of the West Bengal Premises Tenancy act 1956 as it was then operative. He has further submitted that the erstwhile landlord that is the vendor of the appellant had issued rent receipt in the name of “Birendra Narayan Basak and others” which signifies to be more than two persons. He has further submitted that a right created by inheritance and further recognized by way of issuance of rent receipt by the erstwhile landlord created a tenancy right in favour of Sipra Sett which right cannot be taken away by virtue of estoppel as there cannot be any estoppel against the law or statute. Banking upon the aforementioned submission the Learned Counsel prayed for dismissal of the instant appeal.

The Learned Counsel on behalf of the respondents relied upon the following judgements;

- 1) *AIR 1961 Cal 359.*
- 2) *(2019) 19 SCC 415.*
- 3) *(1982) 1 SCC 223.*

- 4) (2005) 11 SCC 45.
- 5) (2008) 12 SCC 675.
- 6) AIR 1966 SC 275
- 7) (2004) 2ICC 39 (AP)
- 8) 84 CWN 447.
- 9) ILR (1966) 1 CAL 252.
- 10) 78 CWN 19.
- 11) 33 CWN 46.
- 12) (2000) 2 CHN 30
- 13) (2020) 3 ICC 649
- 14) (1976) 3 SCC 660.
- 15) (2007) 5 SCC 392.
- 16) (2016) 3 SCC 78.
- 17) (2005) 10 SCC 139.
- 18) AIR 2003 SC 1905

As it is a well-settled proposition of law that Second Appeal can only be admitted where there is substantial question of law involved, so this Court first goes through the substantial question

of law which has been framed in the instant appeal at the time of admission on the 28th day of January 2015

“whether the Learned Judge in the lower Appellate Court below, substantially, erred in law in reversing the decree for eviction without appreciating the principle of law regarding doctrine of representation and estoppels by conduct ?”

On going through the aforestated substantial question of law it is felt by this Court that the substantial question of law which has been framed at the time of admission has stressed upon the two points of law firstly doctrine of representation and secondly the estoppel by conduct. It is also the view of this Court at this present juncture that the instant second appeal lies only on the aforementioned two points of law which have been included at the time of framing of the substantial question of law during admission of the instant appeal. So, there is no requirement of either adding or altering the substantial questions of law involved, only as regards to the factual aspect of the substantial question of law framed, this Court is of the view that the substantial question of law might have been framed in the following manner:

“Whether the Learned Judge in the First Appellate Court substantially erred in law while modifying

the order of dismissal passed by the Learned Trial Judge as regards to the prayer of eviction, without appreciating the principles for law regarding the doctrine of representation and estoppels by conduct ?”

Thus, this Court feels that as the fulcrum of the instant appeal lies only on the two points of law those are *doctrine of representation* and *estoppel by conduct* which have not changed, so there is no necessity of dismissing the instant appeal on the ground of wrong framing of substantial question of law. Above all neither of the parties are prejudiced by the minor alteration of the factual aspect of the question framed at the time of initial framing of the substantial question of law.

As regards to the substantial questions of law, first of all the *doctrine of representation* is taken into consideration. In the instant case it has been revealed that the original tenant namely Nihar Bala Basak expired during the year 1980 as such, as per the Section 2(h) of the then existing West Bengal Premises Tenancy Act, 1956 all her legal heirs were required to be impleaded as tenants as they had stepped into the shoes of their predecessor on her death. As it revealed that the said Nihar Bala Basak expired leaving behind two sons and one daughter so all the three had stepped into the shoes

of their mother. A rent receipt, being Exhibit-12 which has been exhibited bears the following:

‘বীরেন্দ্র নারায়ণ বসাক এবং অন্যান্য’

Which means

‘Birendra Narayan Basak and others.’

In the instant case there is neither any surrender of tenancy by anybody nor it has been proved that the remaining tenants had authorized any one tenant or two tenants to use the tenanted portion or to pay rent on behalf of all or to obtain receipt on behalf of all. If that had been so then it would have been construed that there was surrender or authorization by any of the tenants.

In the instant case the doctrine of representation in respect of service of notice cannot be taken into consideration as because the said doctrine of representation only comes into effect where there is either surrender of tenancy right or constructive surrender of tenancy right or there has been authorization by one or some of the tenants authorizing the other tenants or the remaining tenants to use the tenanted portion and to pay rent and to receive rent receipt solely in the name/names of the authorized person/persons. In this regard I would like to cite the judgement of this Court passed in

Biswadev Mukherjee and others vs. Gour Mohan Das De & Another published in (1998) 1 *Calcutta Law Journal* 327 which has been cited in SA 240 of 1990 where it has been observed that the Doctrine of Representation or implied surrender does not arise when it is established that after the death of the original tenant, the landlord received rent from all the heirs of the tenant which resembles this instant case. In the said case the notice of ejectment was served only upon the widow and two sons of the original defendant, but there were other sons and daughters on whom the notice of ejectment was not served nor in the suit for ejectment they were impleaded. The fact of the aforementioned case resembles this instant case.

From the exhibited Rent Receipt (Exhibit-12) it reveals that there is mention of “বীরেন্দ্র নারায়ণ বসাক এবং অন্যান্য” which means “Birendra Narayan Basak and others” so there ought to have been at least more than two tenants. There is no case to the effect that anybody had surrendered the tenancy right or anybody had authorized any other tenant to pay rent and receive rent receipt on his or their behalf.

In this context it is required to be mentioned that the appellant/landlord was well aware about the presence of several tenants which has been disclosed during the *evidence* of the landlord.

In view of the above facts this Court does not wish to draw the Doctrine of Representation in favour of the landlord after the death of the original tenant. So, the notice to quit was held to be defective and as a consequence the ejectment suit was also held to be not maintainable. Following the Calcutta High Court decision passed in the aforestated SA 240 of 1990, in the absence of the other heirs (of the deceased tenant) the suit is not maintainable and no effective decree can be passed in such a suit.

So, the Doctrine of Representation which has been sought to be applied or urged to be relied does not hold good.

As regards to estoppel by conduct it cannot be said that the respondents/tenants have not stated the name of all the tenants when asked for by the appellant/landlord, as such the tenants are not estopped from raising the issue of non-joinder of necessary parties. The fact of having the knowledge of all the tenants in

respect of the property purchased by the purchaser lies upon the person/landlord who by virtue of purchase of the said property has become the landlord subsequently. To mitigate this problem which may arise the provision of letter of attornment has been made.

In this instant case the rent receipt also reflects the word 'others' along with the name of one tenant which signifies that there were/are more than two tenants as because if there had been only two tenants then the word "others" would not have been used, instead the word another would have been mentioned. Above all it is the duty of the purchaser/subsequent landlord to have the knowledge about his tenants.

During the cross-examination of Smt. Priti Dey (PW1) she has stated that "My vendor at the time of purchase had informed me that the name of the tenants was Birendra Narayana Basak and others". As such it is evident that the appellant/landlord had the knowledge that there were more than two tenants in respect of the suit property. So the principle of estoppel by conduct does not arise in this case and cannot be enforced.

As such both the substantial questions of law do not go in favour of the appellant/landlord. So, the instant second appeal cannot be allowed.

Hence, the second appeal being No. **S.A. 168 of 2015** stands **dismissed**.

Department is directed to send back the records after complying all the formalities.

Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.

Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)