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Ct. No. 04

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S.A.T. 311 of 2016
CAN 1 of 2016 (Old No. CAN 10796 of 2016)
CAN 3 of 2022
CAN 4 of 2022
CAN 5 of 2022

Rampada Senapati & Anr.

Vs.

Amit Dutta & Anr.

Mr. Bhudeb Bhattacharyya,

Mr. Abhijit Ray,

Mr. Santu Nandy.

... for the appellants.

Re: CAN 3 of 2022

This is an application seeking condonation of delay in taking out an application for substitution upon setting aside abatement.

After hearing the learned Counsel appearing for the appellants and on perusal of the averments made in the instant application, we are satisfied that the defendants/appellants were prevented by sufficient cause in not filing the application for substitution within the time limited therefor.

The delay in filing the application for substitution upon setting aside abatement is condoned. The instant application is thus allowed.

Re: CAN 5 of 2022

This is an application for substitution upon setting aside abatement.

After hearing the learned Counsel for the appellants and on perusal of the averments made in the instant application, we find that the right to sue survives upon the heir and legal representatives of the deceased plaintiff, as mentioned therein, to pursue the cause of the instant appeal.

Hence, the instant application is allowed. Let the persons named in the said application be substituted instead and place of the deceased plaintiff/appellant no. 1.

Office is directed to amend the cause title of the instant application as well as the Memorandum of Appeal.

The applications being CAN 4 of 2022 and CAN 5 of 2022 are disposed of accordingly.

Re: S.A.T. 311 of 2016

The permissive occupants have taken all sorts of pleas to thwart the decree passed by the Trial Court and affirmed by the First Appellate Court on the grounds, which had been conclusively decided by both the Courts below.

Obviously the moment the decree for recovery of possession is passed by the Court, the defendants took all sorts of pleas to defeat and delay the enjoyment of the fruits of the decree in the hands of the decree-holder and in this case even approached the Executing Court by filing an application under Section 47 of the Code of Civil Procedure stating that the plaintiff no. 2 being a person of unsound mind cannot be represented by the plaintiff no. 1, his brother, unless the Court appoints a guardian. We have given to understand that the said proceeding under Section 47 of the Code is still pending which raises a serious concern.

The facts revealed in course of hearing as well as from the record of the instant appeal that the defendants/appellants were inducted as tenant in respect of one room on the first floor with a common user of privy, which subsequently gutted in fire. It is a specific case of the plaintiffs that the said room was destroyed completely when the fire broke out and the

same is also admitted by the first witness of the defendants as reflected in the judgement rendered by the Trial Court. It is a specific case of the plaintiffs/respondents that while in possession of one room on the first floor at the suit premises the defendants/appellants were permitted to occupy one room on the ground floor for the purpose of keeping potatoes, as they were engaged in the avocation of dealing the potatoes. It is further stated that after the first floor room was gutted in fire, out of sheer relation the defendants/appellants were permitted to use another room on the ground floor.

The plaintiffs have categorically stated in the plaint that permission to use the aforesaid two rooms on the ground floor can never be construed as a tenancy and, therefore, the defendants/appellants remained in permissive occupation thereof. It is further stated in the plaint that the defendants/appellants subsequently created pressure on the plaintiffs/respondents to issue rent receipt in respect of the aforesaid two rooms on the ground floor and being denied took extraneous resorts beyond the purview of law.

Such being the narratives, which led the institution of the suit for recovery of possession, the defendants/appellants took a stand that the aforesaid rooms on the ground floor was given in tenancy as the tenanted room in the first floor gutted in fire and, therefore, the possession thereof cannot be regarded as licensee or trespasser, but as a tenant and, therefore, the suit is not maintainable. A further plea was taken that the rent was paid in respect of the said rooms on the ground floor which would be evident from the entry made in the Register (Exhibit – 1) and the moment such tenancy is governed under the West Bengal Premises

Tenancy Act, 1956 the suit for recovery of possession against the tenant is not maintainable unless the grounds enshrined in Section 13(1) of the Act is proved by the landlord and a statutory notice under Section 13(6) of the said Act is issued upon the defendants/appellants.

Both the Courts disbelieved such statement and decreed the suit in favour of the plaintiffs/respondents. We also find from the record that the said Register (Exhibit – 1) reveals the payment of rent till 1995 when actually the fire broken out in the year 1997 and, therefore, we do not find any infirmity or perversity in the findings of both the Courts below that such payment of rent cannot be construed to have been made in respect of the rooms situated in the ground floor of the suit premises. There is no iota of evidence adduced by the defendants/appellants evincing payment of rent after the tenanted room in the first floor is gutted in fire and, therefore, in absence of any rent receipt or any corroborative documents relatable to creation of tenancy in respect of two rooms in the ground floor, the occupation cannot be regarded as tenancy.

Tenancy is a creature of contract. Rent receipt is one of the important pieces of evidence in relation to creation of tenancy. The moment the defendants/appellants have failed to prove that the tenancy was created in respect of two rooms in the ground floor, we do not find any justification in their stand that such tenancy was created in exchange of the tenancy held by the defendants/appellants in respect of one room in the first floor, which is admittedly gutted in fire completely.

The moment the Court found that the defendants/appellants are the permissive occupants in

respect of two rooms in the ground floor, there is no law which mandates the service of notice before institution of the suit. The institution of suit is itself a notice in relation to recovery of possession against a licensee and, therefore, we do not find that the suit would fail for want of notice.

A further plea is taken that the plaintiff no. 2 being a person of unsound mind cannot be represented by the plaintiff no. 1 unless a guardian is appointed by the Court to represent him.

We do not find any fetter being put in the law in representing a person of unsound mind by a next friend or a person competent to represent the said person. Order XXXII Rule 4 of the Code of Civil Procedure postulates that any person who is of sound mind and attains majority may act as the next friend of the minor or as his guardian in the suit provided the interest of such person is not adverse to that of the minor. If a person is represented by a next friend or a person, who is capable to protect the interest of the person of unsound mind, we do not find any legal infirmity in instituting a suit and proceeding therewith.

Though the provision contained under Order XXXII Rule 4 of the Code relates to a minor, but the said provision is also applicable in case of a person of unsound mind in view of the provisions contained under Order XXXII Rule 15 of the Code of Civil Procedure which provides that the Rules 1 to 14 (except rule 2A) shall as far as may be applied to a person adjudged, before or during the pendency of the suit, to be of unsound mind. We thus do not find that the aforesaid point involves any substantial question of law nor we find that the suit would be defeated in absence of a guardian to be appointed by a Court when admittedly the brother of the plaintiff no. 2 can

sufficiently protect the interest in representing the said person, as he does not have any adverse interest to that of the plaintiff no. 2 in relation to the reliefs claimed in the said suit.

A plea is taken at the Bar that the defendants/appellants are in occupation and possession of the tenanted room on the first floor after making a substantial repair. We do not find the aforesaid case having made out in the pleading nor in the evidence of the defendants. An argument cannot be made at the Bar by making out a new case, which is neither pleaded nor any evidence adduced in this regard by the defendants/appellants. It is wholly impermissible in law to proceed on the basis of the argument made at the Bar beyond the pleading and the evidence on record and pass an order thereupon.

Furthermore Section 108 (e) of the Transfer of Property Act, 1882 provides that in the event the lease property is destroyed by fire, tempest or flood or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered it substantially and permanently unfit for which it was let, the lease shall be declared as void subject to the option of the lessee. The proviso attached thereto indicates that if any inquiry is made on the wrongful act or default of the lessee, he shall not be entitled to avail such benefit under the aforesaid clause. Precisely for such reason the plaintiffs/respondents asserted in the plaint that it was due to negligence or the act of the defendants/appellants the first floor room was completely destroyed by devastating fire.

The aforesaid issue came up for consideration before the Apex Court in case of *Vannattankandy Ibrayi vs. Kunhabdulla Hajee* reported in (2001) 1 SCC 564;

wherein the Apex Court held that the moment the demise premises is destroyed by fire, it extinguishes the tenancy in the following:

“20. From the aforesaid decisions there is no doubt that if a building is governed by the State Rent Act the tenant cannot claim benefit of the provisions of Sections 106, 108 and 114 of the Act. Let us test the arguments of learned counsel for the appellant that on the destruction of the shop the tenant can resist his dispossession on the strength of Section 108(B)(e). In this case what was let out to the tenant was a shop for occupation to carry on business. On the destruction of the shop the tenant has ceased to occupy the shop and he was no longer carrying on business therein. A perusal of Section 108(B)(e) shows that where a premises has fallen down under the circumstances mentioned therein, the destruction of the shop itself does not amount to determination of tenancy under Section 111 of the Act. In other words there is no automatic determination of tenancy and it continues to exist. If the tenancy continues, the tenant can only squat on the vacant land but cannot use the shop for carrying on business as it is destroyed and further he cannot construct any shop on the vacant land. Under such circumstances it is the tenant who is to suffer as he is unable to enjoy the fruits of the tenancy but he is saddled with the liability to pay monthly rent to the landlord. It is for such a situation the tenant has been given an option under Section 108(B)(e) of the Transfer of Property Act to render the lease of the premises as void and avoid the liability to pay monthly rent to the landlord. Section 108(B)(e) cannot be interpreted to

mean that the tenant is entitled to squat on the open land in the hope that in future if any shop is constructed on the site where the old shop existed he would have right to occupy the newly-constructed premises on the strength of original contract of tenancy. The lease of a shop is the transfer of the property for its enjoyment. On destruction of the shop the tenancy cannot be said to be continuing since the tenancy of a shop presupposes a property in existence and there cannot be subsisting tenancy where the property is not in existence. Thus when the tenanted shop has been completely destroyed, the tenancy right stands extinguished as the demise must have a subject-matter and if the same is no longer in existence, there is an end of the tenancy and therefore Section 108(B)(e) of the Act has no application in case of premises governed by the State Rent Act when it is completely destroyed by natural calamities. (emphasis supplied)

In view of the law enunciated in the above Report there is no infirmity or illegality in the finding returned by both the Courts below that the moment the rooms on the first floor is gutted by devastating fire completely, such tenancy got extinguished and, therefore, the suit for recovery of possession without serving notice cannot be held to be bad in law.

However, we do not intend to go into the aforesaid aspect as it is completely foreign and alien in the pleadings and evidence and, therefore, the argument so advanced by the learned Advocate for the defendants/appellants is not acceptable to us.

Both the Courts have concurrently held that the plaintiffs/respondents have proved the case by cogent evidence and discarded the stand of the

defendants/appellants.

We do not find that the aforesaid findings are perverse and contrary to the record.

The instant appeal does not involve any substantial question of law.

The appeal is thus dismissed. Consequently the connected applications, if there be any, are also dismissed.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)