

11 **20.06.
2023**

Ct. No. 04

Ab

**SAT 211 of 2022
IA No. CAN 1 of 2022**

Md. Alim

Vs.

Asrafa Khatun (Begum) and others.

Ms. Ameena Kabir.

... for the appellant.

An unsuccessful tenant/lessee has filed the instant second appeal assailing the judgment and decree of both the courts below primarily on the ground that the moment the plaint revealed that the recovery of possession is sought on the ground of default and reasonable requirement, the court ought not to have proceeded to decree the suit solely on the ground of expiration of period provided under Section 106 of the Transfer of Property Act (hereinafter referred to as 'said Act').

A further plea is taken that the parties have executed an agreement of tenancy, which implies that a tenancy was created and, therefore, it excludes the operation of the said Act. Another point is taken that the defendant/appellant has categorically denied the service of notice upon him and, therefore, the court ought not to have proceeded to hold that the notice has been served on the basis of an information received in official course of the business of the Postal Department unless the concerned Officer is examined as witness and an opportunity should be given to the defendant/appellant to cross-examine. Lastly, it is submitted that both the case of reasonable requirement and the default has not been proved nor there is any element in this regard and, therefore, the court ought to have dismissed the suit.

There appears to be a fallacy in the aforesaid submissions advanced before us. The defendant/appellant appeared to have beleaguered with

the nuances and applicability of the provisions contained under West Bengal Premises Tenancy Act, 1997 and the said Act. The West Bengal Premises Tenancy Act, 1997 has not been extended to the entire State but has been extended to certain areas as notified by the State Government. The moment the area within which the suit property is situated is not under the purview of the West Bengal Premises Tenancy Act, 1997, even if the word “tenancy” is used, a right is foisted upon the landlord to recover the possession of the property taking aid to the provisions contained under the said Act.

Section 105 of the said Act defines the lease, which obviously is an incident of transfer of use and enjoyment of the property or a portion thereof in lieu of the rent. The moment such right is created, it is obviously on the basis of contract having entered into between the parties and such contract has been renewed on payment of rent, be it on monthly, periodically or yearly basis. The provisions contained in said Act does not imbibe within itself any kind of protection to a tenant or a lessee, as may be called, on expiration of period provided in a notice under Section 106 of the said Act. It is one of the grounds where a lease determines as envisaged under Section 111 of the said Act.

The opening words in Section 106 of the said Act recognizes the primacy of a contract or the local law or usage, which cannot be construed to override the provisions of the said Act but is relatable to the period of notice provided under the said provisions. Section 106 of the said Act provides different period of limitation in relation to different tenancies or the lease created on mutual agreement and, therefore, the expression “in absence of contract or the local law or usage to the contrary” has to be understood in such perspective.

Hypothetically, if an agreement provides a notice for a longer period so provided under Section 106 of the said Act, the period so provided shall not be applicable, but

the period as agreed by the parties has to be adhered to before the lessor or the landlord embark its journey on the peripheral of the eviction of a tenant/lessee.

We do not find any justification on the stand of the defendant/appellant that once an agreement for tenancy has been entered into, it excludes the operation of the said Act. The legal maxim "*ubi jus ibi remedium*", meaning thereby a person cannot be rendered remediless, squarely applies in the present case.

Even for an argument sake, the contention of the defendant/appellant is accepted that the agreement excludes the applicability of the said Act, it leads to an absurdity that a person would be deprived to recover the possession from the tenant/lessee, as such area has not been brought within the extended operation of the West Bengal Premises Tenancy Act, 1997.

So far as the grounds of reasonable requirement and default, as pleaded in the plaint, are concerned, as indicated above, Section 111 of the said Act does not envisage such ground as a ground for determination of a lease. If a landlord cannot succeed on such ground in a suit under the said Act, even if the same is pleaded, it does not effect the entitlement of the landlord to seek recovery of possession, if the ground, which is recognized in the said Act, is eminently present and pleaded in the plaint.

It can at best be regarded as surplusage having no bearing and, therefore, even if the landlord has failed to prove that the premises is reasonably required by them or the defendant/appellant has committed default of payment of rent, it does not take away the right accrued under the statute to recover on a well accepted ground enumerated under Section 111 of the said Act.

As indicated above, the suit for recovery of possession under the said Act can be filed and decreed on the ground that period enshrined in a notice under Section 106 of the said Act has expired. A plea has been

taken that the moment the service of notice is denied, the suit must fail.

We have no hesitation in this regard that if the landlords/plaintiffs/respondents fail to prove the notice under Section 106 of the said Act, it may defeat the entitlement, as the suit may be regarded as incompetent.

Admittedly, a notice was sent through registered post and at one point of time it was pleaded in the plaint that the same has been duly received by the defendant/appellant by putting a signature on the acknowledgement due card. Subsequently, at the time of admission, an information sought from a Postal Department with regard to the service of the said postal article was obtained and marked exhibit. Even if we disregard the proof of service, as no acknowledgement due card or an information received from the Postal Department is not filed in the Court yet there is no fetter on the part of the Court to raise presumption of due service under Section 27 of the General Clauses Act, 1897. The said Section provides that if any document is required to be served by post, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the said document and unless the contrary is proved, it would be presumed that it has been delivered in ordinary course of post. The postal receipt was tendered and marked exhibit, which proves the dispatch of the postal article i.e. the notice under Section 106 of the said Act and in absence of any evidence on behalf of the defendant/appellant that the address put on the said envelope containing the said notice is wrong, defective or insufficient, it would be presumed that it has reached to the addressee upon payment of the proper charges leviable thereupon.

The presumption is rebuttable. The onus shift on the defendant/appellant to prove that the said notice was never served upon him. Mere statement in the written statement that it was never served in absence of any

further corroborative evidence does not rebut the presumption. There must be convincing evidence in this regard as mere denial will not be regarded as rebuttal of such presumption. We, thus, do not find any justification in the aforesaid point taken before us.

A further plea is taken that the suit is incompetent as the accrual of the cause of action has been wrongly stated in the plaint. The cause of action is not defined in any statute. The cause of action receives recognition and definition by a judicial pronouncement where it has been held that it cannot be considered as an abstract date or a place but a bundle of facts taken together entitling the plaintiffs/respondents to seek relief and invite the Court to decide upon the relief claimed therein. The cause of action cannot be squeezed to one sentence or a paragraph but the Court must ascertain the cause of action from the pleadings of the plaintiff in the plaint and to discern what constitutes the cause of action for initiation of the proceeding. Every fact may not be relevant or form the integral part of the cause of action but such facts, which raises a dispute or raises a concern requiring the Court to decide the same are the relevant facts for the purpose of cause of action.

Furthermore, the suit was filed much beyond the statutory period provided therefor. Even if the notice contained a shorter time or a lack of proper documents evincing the date of service of such notice, the presumption can be drawn from the Code of Civil Procedure that the moment a service of summons is dispatched and one month period has expired, it would be presumed that it has been duly served on the defendant. Though the aforesaid principles do not in *stricto sensu* apply to the notice yet the principles akin thereto can be extended in this regard.

Since the suit was filed beyond one month from the date of dispatch of the notice, we do not find that such suit is premature. Apart from the same, the plea of

premature suit should have been taken at the very outset by the defendant and having not taken at the nebulous stage, it is too late for the defendant to contend that the suit was premature as the cause of action did not arise because of the absence of proof of the date of service of the notice.

We, thus, do not find the involvement of substantial question of law in the instant appeal and the same is hereby dismissed under Order XLI Rule 11 of the Code. The connected application being CAN 1 of 2022 is also dismissed.

There shall, however, be no order as to costs.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)