

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

CS/162/2016

Karnani Properties Limited

Vs.

Naseem Ahmed Khan

Mr. Sabhyasachi Chaudhury

Mr. Neelesh Choudhury

Ms. Anuradha Poddar

...For the plaintiff.

Mr. Rishad Medora

...For the defendant.

Heard on : 07.07.2022, 25.07.2022, 22.08.2022, 27.09.2022,
15.11.2022, 29.11.2022, 06.12.2022, 21.12.2022
& 09.01.2023.

Judgment on : 25.01.2023

Krishna Rao, J.:

The plaintiff has filed the instant suit praying for decree of eviction and recovery of possession against the defendants from the suit property,

mesne profits for Rs. 18,00,000/- from February, 2013 till January, 2016 and Rs. 3,00,000/- from February 2016 till June 2016 and further mesne profits from July 2016 till recovery of possession of the suit property.

As per the plaint case, the plaintiff is the sole and absolute owner of the premises no. 27A, Park Street, Kolkata being the part of the building known as "Karnani Mansion". The defendant is in wrongful and illegal occupation of room no. 424 at the fourth floor of the Premises No. 27A, Park Street, Kolkata. The defendant is a rank trespasser and has no right over the suit property and as such the plaintiff is entitled to get the decree as prayed for by the plaintiff. By a letter dt. 27.01.2016 the plaintiff had demanded mesne profits from the defendant at the rate of Rs. 50,000/- per month from February 2013 till January 2016 total amounting to Rs. 18,00,000/- and @ Rs. 75,000/- per month from February 2016 till June 2016 total amounting to Rs. 3,00,000/- in total Rs. 21,00,000/- and further mesne profits from July 2016 till the delivery of possession of the suit property.

The defendant entered appearance in the suit and had filed the written statement.

As per case of the defendant in the written statement, the claim of the plaintiff cannot be granted as the defendant is a member of the Karnani Mansion Residents' Association for the last more than 19 years. The suit filed by the plaintiff suffers from nonjoinder of necessary party and suppression of the material facts. It is also case of the defendant that the plaintiff has suppressed about its two clandestine Sub-Tenants/ Sub-Lessee

that the Park Street Properties Private Limited and the Central Calcutta Investment Private Limited. As per the case of the defendant, the Karnani Properties Limited had filed a suit being No. CS 8 of 2016 before this Court which is still pending and in the said suit, the plaintiff has admitted that the premises No. 21, 23, 25A, 25B, 27A, 27B, 29, 31, 33, 35, 37, 39, 43, 45, 47, 55 and 57 Park Street, Kolkata all those premises are adjacent to each other. It is the case of the defendant that the defendant paid the monthly rent and other charges to Karnani Mansion Residents' Association and thereafter to the Special Officer appointed by this Court in terms of the order dt. 18.01.2016 passed in CS 8 of 2016. The defendant says that as the defendant is paying monthly rent to the Special Officer appointed by this Court and thus the defendant is a bona fide tenant and is a lawful occupier of the suit property. The defendant shows that the defendant is enjoying the lawful possession in the flat being no. 424 at the 4th floor of the Karnani Mansion for the last more than 22 years without any break and full knowledge of Karnani Properties Limited and paying the rent to Karnani Mansion Resident Association along with other parties. The defendant further says that the plaintiff is not the landlord within the meaning of Premises Tenancy Act, 1997 and having no relationship with the plaintiff in view of the various orders passed by the Hon'ble Court in various suits, appeals and writs. The defendant prays for dismissal of the suit.

On the basis of the pleadings of the parties, the following issues were framed :

ISSUES :

- “(i) *Is the plaintiff entitled to a decree for eviction and recovery of khas possession against the defendant over and in respect of the suit premises by evicting the defendant and his men, agents and servants therefrom?*
- (ii) *Is the plaintiff entitled to a decree for mesne profit to the tune of Rs. 21,00,000/-, as indicated in Paragraph-9 of the Plaint?*
- (iii) *Is the plaintiff entitled to damages and mesne profits?*
- (iv) *To what relief or reliefs the plaintiff is otherwise entitled to?*
- (v) *Is the suit maintainable in the eye of law as well as in facts and in the present form?*
- (vi) *Does the plaintiff possess the requisite legal status to institute the instant proceeding before this Hon’ble Court as the purported landlord of the suit property?”*

EVIDENCES :

The plaintiff had adduced one witness in support of his case one witness namely Rishi Karnani.

The defendant has adduced four witnesses in support of his case namely, (i) Naseem Ahmed Khan, the defendant himself, (ii) Murli Panjabi, (iii) Sondwip Mukherjee (Special Officer) and (iv) Rajesh Kumar Mitra (On Commission).

EXHIBITS :

During the evidence of the plaintiff’s witness, the plaintiff has exhibited all together five documents i.e. :

- “(i) ***Exhibit – ‘A’ : Certified copy of Deed of Conveyance executed between Karnani Industrial Bank and Karnani Properties Limited dt. 05.11.1966.***

- ii) **Exhibit - 'B'** : Copy of the notice sent by the plaintiff to the defendant dt. 27.01.2016 along with postal receipts and acknowledge dues.
- iii) **Exhibit - 'C'** : Schedule of property.
- iv) **Exhibit - 'D'** : Certified copy of the written statement filed by the plaintiff in TS No. 1829/2010 before the Learned 5th Judge Bench, City Civil Court at Calcutta filed by the defendant.
- v) **Exhibit - 'E'** : Certified copy of the order dt. 11.11.2018 passed by Learned 5th Judge Bench, City Civil Court to Calcutta in TS 1829 of 2010."

The defendant have exhibited altogether eight documents during the evidence of the witnesses of the defendant's which are as follows :

- "i) **Exhibit '1'** : Circular issued by the Karnani Properties Limited dt. 01.10.2007.
- ii) **Exhibit '2'** : Car parking sticker of Vehicle No. WB 02 X 8438, Sl. No. 104.
- iii) **Exhibit '3'** : Electricity Bill issued by the Karnani Mansion Residents Association dt. 22.02.2014.
- iv) **Exhibit '4'** : Receipt issued by Sondwip Mukherjee, Special Officer being No. 0024 dt. 05.04.2016.
- v) **Exhibit '5'** : Receipt issued by Sondwip Mukherjee, Special Officer being No. 0047 dt. 05.04.2016.
- vi) **Exhibit '6'** : Receipt issued by Sondwip Mukherjee, Special Officer being No. 2389 dt. 01.12.2018.

vii) **Exhibit ‘7’** : *Original photographs of car parking.*

viii) **Exhibit ‘8’** : *The notice issued by the Karnani Mansion Residents’ Association to the Special Officer dt. 04.08.2016.”*

Submissions on behalf of the plaintiff :

Mr. Choudhury, Learned Counsel representing the plaintiff submits that cause of action for filing the suit arose as the defendant is in the illegal and wrongful occupation of the suit property as a “*rank trespasser and has no right whatsoever to occupy and/or reside in the suit property*”.

Mr. Choudhury further submits that the plaintiff has received writ of summons from the Court of City Civil Court, Kolkata wherein the defendant had filed the suit against the plaintiff and accordingly the plaintiff entered into the said suit being No. TS 1829 of 2010 and filed the written statement.

Mr. Choudhury further submits that the defendant in the said suit had made out a case that the defendant is the member of Residents’ Association for more than 19 years and there have been diverse court proceedings in which Receiver has been appointed and the defendant has paid the rent to the Karnani Mansion Residents’ Association and thereafter, to the Special Officer, Mr. Sondwip Mukherjee and according to the defendant, the plaintiff and its sister concerns have no right to collect rent and other charges.

Mr. Choudhury further submits that it was also the case of the defendant, the sister concern of the plaintiff namely, “SLY Company” for and

on behalf of the plaintiff, had inducted the defendant in a very low rent with high salami.

Mr. Choudhury further submits that the foremost defense taken by the defendant that the plaintiff is not the owner of the property and to prove the said contention of the defendant, the plaintiff has exhibited two documents being "Exhibit A" wherein it is proved that the plaintiff has purchased the said property by way of Deed of Conveyance in the year 1966 and the defendant has not raised any objection with regard to the said Deed of Conveyance which is a registered document.

Mr. Choudhury further submits that during the cross examination of the plaintiff's witness, it is categorically stated that the Deed of Conveyance is for the entire Karnani Mansion including Premises No. 27A, Park Street, Kolkata.

Mr. Choudhury further submits that though the witness of the plaintiff has stated that he does not has any personal knowledge about the execution of the document i.e. Exhibit 'A' which is a registered Deed of Conveyance and the said document is more than 30 years old and thus there is a presumption that the document was duly executed between the parties.

Mr. Choudhury further submits that the Counsel for the defendant during the cross examination of the witness of the plaintiff has put several questions with respect of the Exhibit 'A' but there is no suggestion that the Exhibit A is a forged document and not executed between the parties.

Mr. Choudhury further submits that the defendant has made out a case in the written statement that the defendant is a tenant and was paying monthly rent to the Karnani Mansion Resident's Association and now he is paying the monthly rent to the Special Officer appointed by this Court but during the examination of the defendant as witness in the instant case, the defendant has made out a different case that the defendant was inducted as tenant by one Sita Devi Kapoor and he used to pay the rent to Sita Devi Kapoor and subsequently he started paying rent to the Resident's Association.

Mr. Choudhury further submits that the defendant has made out a new case during the examination of the defendant which cannot be taken into consideration. The defendant has also not brought any document on record to prove the case of the defendant that the defendant was inducted by one Sita Devi Kapoor and the defendant was paying rent to the Sita Devi Kapoor and thereafter, the defendant started paying rent to the Karnani Mansion Residents' Association.

Mr. Choudhury further submits that there is a variance between the pleading and proof, in the written statement there is no reference with regard to Sita Devi Kapoor nor the defendant has made any case of sub-tenancy obtained from Sita Devi Kapoor under Central Calcutta Investment Private Limited.

Mr. Choudhury further submits that even the defendant has not made out any case with regard to Sita Devi Kapoor and Central Calcutta

Investment Private Limited during cross examination by the Counsel for the defendant to plaintiff.

Mr. Choudhury further submits that in the written statement, it is the case of the defendant that the defendant is in occupation of the suit property with the consent of the plaintiff who had full knowledge of its occupation and had also filed a suit before the Learned City Civil Court at Calcutta against the plaintiff praying for declaration of the tenancy. In the said suit, the defendant has neither made the Sita Devi Kapoor nor the Central Calcutta Investment Private Limited as party to the said suit.

Mr. Choudhury further submits that though the plaintiff had appeared in the said suit and had filed the written statement but subsequently the suit filed by the defendant before the Learned City Civil Court is dismissed for default and till date the suit has not been restored.

Mr. Choudhury further submits that there is complete variance between the pleading and the evidence lead by the defendant and the defendant sought to bring a new case by examining the witness which is not permissible under law and accordingly the plaintiff relied upon the judgment reported in **AIR 1924 Cal 461 (Ganesh Ram & Ors. -vs- Ganpat Rai)** and submits that *"The test applied in such cases is whether if the variance was permitted in favour of the plaintiffs, the defendants would be taken by surprise and be prejudiced thereby"*.

Mr. Choudhury further relied upon the judgment reported in **(2004) 6 SCC 341 (M. Chinnaswamy -vs- K.C. Palaniswamy)** and submits that

“when the pleadings do not contain the material facts and the necessary particulars, any amount of evidence would be insufficient”.

Mr. Choudhury further submits that the defendant had cross examined the plaintiff but no suggestion was given with regard to the sub tenancy obtained by the defendant from Sita Devi Kapoor.

Mr. Choudhury further submits that the entire story of Sita Devi Kapoor is complete variance with the pleading which cannot be entertained. In connection with the same, Mr. Choudhury has relied upon the judgment reported in **AIR 1961 Cal 359 (A.E.G. Carapiet)** and submits that *“The defense taken by the defendant with regard to the Sita Devi Kapoor cannot be relied upon”.*

Mr. Choudhury further submits that if there can be any sub tenancy either under Sita Devi Kapoor or anywhere else, as per Section 26 of the West Bengal Premises Tenancy Act, 1997, the premises which has been sublet by the tenant without previous consent in writing of the landlord before the commencement of the Act, the manner of giving of notice is specified under Rule 12 of the West Bengal Premises Tenancy Rules, 1999 but the defendant has not exhibited any document to prove that the defendant has complied with the provisions of Section 26 of the Act.

Mr. Choudhury further submits that the plaintiff has proved the case that the plaintiff is the owner of the property and the defendant is an illegal occupier over the property and as such the defendant is liable to be evicted from the said premises.

Submissions on behalf of the Counsel for the defendant :

Mr. Medora, Learned Counsel representing the defendant submits that the defendant is in occupation of the premises for the last approximate 22 years as a tenant/ sub tenant of Sita Devi Kapoor and Sita Devi Kapoor is the tenant of Central Investment Private Limited. Sita Devi Kapoor had taken permission from Central Calcutta Private Limited for subletting the premises to the defendant.

Mr. Medora further submits that during the cross examination, the plaintiff has admitted that the said premises was let out to Central Calcutta Investment Private Limited with the right to sublet the premises and accordingly Central Calcutta Investment Private Limited had sublet the suit premises to Sita Devi Kapoor on and from 01.04.1972.

Mr. Medora further submits that the plaintiff has filed written statement in connection with the Title Suit No. 1829 of 2010 filed by the defendant before the Learned City Civil Court at Calcutta and as per the statement of P.W.1, it was admitted by the plaintiff that the defendant is a tenant in respect of the suit premises and the plaintiff had issued notice for termination of such tenancy and thus the case made out by the plaintiff that defendant is a rank trespasser cannot be taken into consideration.

Mr. Medora further submits that during the cross examination, P.W.1 admitted that the plaintiff has let out the suit premises to Central Calcutta Investment Private Limited with the power to sublet and period of tenancy

has not expired, thus the plaintiff has no right to seek eviction of the defendant.

Mr. Medora further submits that the defendant had initiated Title Suit No. 1829 of 2010 prior to filing of the instant suit of the plaintiff and the matter in issue in the instant suit is directly and substantially in issue in the previous instituted suit before the Learned City Civil Court at Calcutta and as such as per Section 10 of the Code of Civil Procedure, 1908, the present suit should not be proceeded further. He further submits that though the suit was dismissed for default but the defendant had already filed the application for restoration of the said suit and is pending for adjudication.

Mr. Medora further submits that plaintiff has no privity of contract with the defendant and as such the plaintiff has no right to seek eviction of the defendant from the said premises.

Mr. Medora further submits that inspite of having knowledge that the plaintiff has let out the suit premises to the Central Calcutta Investment Private Limited and the said company had sub-let the said property to Sita Devi Kapoor but the plaintiff has not made them as party to the instant suit. Further their presence in the said suit is necessary for proper adjudication of the present suit.

Mr. Medora further submits that the plaintiff had the knowledge that the defendant was in occupation of the premises as tenant but only to mislead this Court and belated thought has filed the instant suit praying for

an eviction on the ground that the defendant is in illegal occupation of the premises.

Mr. Medora further submits that in the written statement, the defendant has pleaded that he is a tenant in respect of the said premises and is also a member of the Karnani Mansion Residents' Association in connection with the said premises for the last more than 19 years and is paying monthly rent, maintenance and other charges regularly in connection with the suit premises either to his landlord or to the Karnani Mansion Residents' Association and now he is paying the monthly rent and other charges to the Special Officer appointed by this Court.

Mr. Medora further relied upon the provisions of Order XIV Rule 1 of the Code of Civil Procedure for the purpose of asserting the issues framed by this Court as per the pleadings and materials have been on record. Mr. Medora further submits that issues cannot be framed until and unless pleading contain the necessary foundation for raising the issues. He further relied upon Order 6 Rules 2 and 4 of the Code of Civil Procedure and submits that to establish, the defendant has stated the material facts in Written Statement and has lead evidence in order to prove such facts.

Mr. Medora further submits that the plaintiff does not possess the requisite legal status to institute the instant proceeding before this Court as landlord of the suit property as there is no privity of contract between the plaintiff and the defendant. He submits that the plaintiff is in occupation of the suit premises as tenant other than the plaintiff and is paying monthly rent regularly with respect of the suit premises.

Mr. Medora further submits that the Division Bench of this Court has passed an order dt. 27.08.2002 in APOT No. 582 of 2002 and order dt. 18.01.2016 passed by this Court in CS No. 8 of 2016 wherein this Court has appointed Mr. Sondwip Mukherjee, Learned Advocate as Special Officer for the purpose of collecting rent and maintenance charges from the tenants/occupiers who are the members of the Karnani Mansion Residents' Association of this suit premises and accordingly the Learned Special Officer has open a separate account to keep the rent separately. Mr. Medora further submits that Karnani Mansion Residents' Association is also the necessary party but the plaintiff has not made them as party to the instant suit.

Mr. Medora further submits that the plaintiff had issued sticker to the defendant in pursuant to the circular notice being Exhibit '1' and Exhibit '2' as tenant and the plaintiff had also issued notice being Exhibit 7 to the defendant as a tenant and as such the plaintiff has admitted that the defendant is a tenant of the plaintiff in respect of the suit premises.

Mr. Medora further submits that the defendant has exhibited documents during the evidence wherein it is proved that the defendant is paying electrical charges, monthly maintenance and other charges to the Special Officer and the said Special Officer has accepted the same without any objection.

Mr. Medora further submits that the defendant is also the President of Karnani Mansion Residents' Association and as such it cannot be said that the defendant is a rank trespasser of the suit premises.

Mr. Medora further submits that as regard to Section 26 of the West Bengal Premises Tenancy Act, 1997 is not applicable in the instant suit as the plaintiff had the knowledge that the defendant is in occupation of the premises and the plaintiff has never contended either in pleading or in evidence that the plaintiff did not have a notice of the defendant's occupation of the suit premises as tenant.

Mr. Medora further submits that the Judgments relied by the plaintiff are not applicable in the instant suit.

Mr. Medora further submits that the plaintiff failed to prove the case and as such the plaintiff is not entitled to get any relief as prayed for and prayed for dismissal of the suit filed by the plaintiff.

Decision with Reason :

To decide the suit, this Court finds that before deciding the other issues at first this Court has to see whether plaintiff is able to prove the issue No. vi.

Issue No. vi reads as follows :

Does the plaintiff possess the requisite legal status to institute the instant proceeding before this Court as the purported landlord of the suit property?

Plaintiff has examined one witness namely Rishi Karnani as P.W.1. During this evidence, the plaintiff has produced the document i.e. the Deed of Conveyance dt. 05.11.1966 through the P.W.1, the said document was

exhibited as Exhibit 'A' without any objection. As per Exhibit 'A', Karnani Industrial Bank Limited had transferred the property in favour of Karnani Properties Limited. The Counsel for the defendant during the cross examination of the plaintiff has put the specific question to P.W.1 : Vide question no. 154 wherein the P.W.1 has categorically stated as *"This is for entire building. Building No. is 27A. Each and every flat number is not mentioned in the Deed of Conveyance"*. In question no. 159, the P.W.1 has answered that *"There are lot of premises which were later renumbered and amalgamated and charged to current holding numbers. One of them is 27A Park Street"*. In question no. 160, the P.W.1 has further answered that *"That was done prior to the execution of this deed. So that 53, Park Street will not be there in the records now. It has already been renumbered as 27A Park Street, Calcutta 16"*. In question no. 168, the P.W.1 has also answered that *"This is the conveyance between the Vendor Bank and the plaintiff company which is Karnani Properties Limited, which is the buyer. This will not show how Vendor Bank acquired the property"*.

From Exhibit 'D', it is proved that the defendant has filed a Title Suit No. 1829 of 2010 before the Learned 5th Judge Bench, City Civil Court at Calcutta against the plaintiff declaration of tenancy which itself proves that the defendant has admitted that the plaintiff is the owner of the premises in question. Only defense taken by the defendant in the present suit that the defendant has taken the said premises from Sita Devi Kapoor as Sita Devi Kapoor had sub-let the said premises to the defendant.

Exhibit 'A' is a registered document and more than 30 years old and as such in terms of Section 90 of the Evidence Act of 1872, this Court can presume that the document was duly executed and attested by the person. During the cross-examination, the defendant has not put any question with regard to execution of the said Deed or the defendant has not adduced any evidence to disprove Exhibit 'A' on the other hand from the evidence and record, it appears that the defendant has admitted with regard to the ownership of the premises in question but only the defendant has denied that he is not the tenant under the plaintiff.

Exhibit 'A' being 30 years old document gives rise to presumption as to its genuineness. Section 90 of Evidence Act enables the Court to draw presumption about the genuineness of the document which is 30 years old, Section 90 raises presumption as to the authority of the document.

In view of the above, this Court finds that the plaintiff is able to prove that the plaintiff is the owner of the suit premises and thus issue no. vi answered in favour of the plaintiff.

Issue no. v reads as follow :

Is the suit maintainable in the eye of law as well as in facts and in the present form?

In the written statement, the defendant has made out a case that the defendant is the member of Karnani Mansion Residents' Association and use to pay the rent to the Karnani Mansion Residents' Association but the Karnani Mansion Residents' Association is not made party to the instant

suit. The defendant has also mentioned that “Sly Company” is also not made party to the instant suit and as such without making them as party to the suit, the instant suit cannot be decided properly. In the written statement, the defendant has taken the stand that he was paying rent to the Karnani Mansion Residents’ Association and subsequently is paying the rent to the Special Officer but during the evidence, the defendant had made out a new case that the Sita Devi Kapoor has taken a flat on rent from Central Calcutta Investments Private Limited and she had obtained permission from Central Calcutta Investments Private Limited and rented out the said flat to the defendant and the agreement was between defendant, Sita Devi Kapoor and Central Calcutta Investments Private Limited. Though the defendant has stated the same in the evidence during the examination-in-chief but has not produced any document either agreement or rent receipts to prove that the defendant was inducted by Sita Devi Kapoor and the defendant had paid rent to the Sita Devi Kapoor. The reference of “Sly Company” in the written statement is vague as the defendant has not adduced any evidence or exhibited any document of alleged deeds of induction of the defendant as tenant either by “Sly Company” or anyone else.

The Judgment relied by Mr. Choudhury in the case of **Ganesh Ram & Ors. (*supra*)**, the Hon’ble Division Bench of this Court categorically held that *“The test applied in such cases is whether if the variance was permitted in favour of the plaintiffs, the defendants would be taken by surprise and be prejudiced thereby”*. In the instant case also the defendant has not taken the stand with regard to Sita Devi Kapoor and the defendant at first time has

taken the stand of Sita Devi Kapoor in the examination in chief of the defendant even the defendant has not cross examined the plaintiff on the point that the defendant has taken the said premises on rent from Sita Devi Kapoor.

In the instant case of ***M. Chinnaswamy vs. K.C. Palaniswamy (supra)***, the Hon'ble Supreme Court has held that when the pleadings do not contain the material facts and the necessary particulars, any amount of evidence would be is sufficient. In the instant case, the defendant has not taken the said stand in the written statement or during cross examination of plaintiff and has also not proved with regard to the Deed of Conveyance taken during his examination.

The defendant has relied upon Order XIV, Rule 1 of CPC as well as Order 6 Rule 2 and 4 of the CPC. Admittedly this Court has framed issue on the basis of the pleadings of respective parties. This Court has framed issue No. V by taking into consideration of paragraphs 5 of the written statement which reads as follows :

"5. The suit being C.S. No. 162 of 2016 is not maintainable in the eye of law, because of suppressing of materials facts by the plaintiff (referred to as 'KPL') filed the instant Suit being C.S. No. 162 of 2016 before the Original Side of the Hon'ble High Court, Calcutta since on same context and cause of action of Title Suit No. 1829 of 2010 is/was filed by this defendant and still pending before the Learned Judge V. Bench, City Civil Court Calcutta. The defendant craves kind leave of this Hon'ble court to refer and to submit the Copy of the plaint of the said Suit T.S. No. 1829 of 2010 at the hearing of this suit. In the year 2010 the defendant filed a suit being Title Suit No. 1829 of 2010 for Declaration and Permanent Injunction against the Karnani Properties Limited and others before the Learned Judge, Vth Bench in the City Civil Court at Calcutta, on the same context and issue which is still pending for adjudication wherein this plaintiff had appeared filed the written statement and contesting. The particular fact is not disclosed by

the plaintiff in the plaint being C.S. No. 162 of 2016. As such the Suit is liable to be dismissed and barred by the Principles of Section 10 of the Code of Civil Procedure. That apart the plaintiff is also guilty of suppression of material facts that its sub-lessee or a Sub-Tenant a clandestine Sly Company as sister concern was/is handed over the flat for granting further sub-tenancy or tenancy of the same flat. In both the Court, the plaintiff had suppressed the facts as to who was the tenant/sub-tenant in possession of the same flat prior to this defendant.”

As regard to the Provision of Section 10 of the Code of Civil Procedure, the plaintiff has exhibited Exhibit “D” and Exhibit “E” i.e. written statement filed in the Title Suit No. 1829 of 2010 (Naseem Ahmed Khan –vs- Karnani Properties Limited & Ors.) and Order dt. 11.12.2018 passed in T.S. No. 1829 of 2010 wherein it is proved that the suit filed by the defendant is dismissed for default. The defendant has not denied with regard to the dismissal of suit for default but had filed an application for restoration of suit, admittedly in the eye of law at present there is no suit being T.S. No. 1829 of 2010 in existence and thus Section 10 of the CPC is not applicable in the present suit.

As regard sub lease or sub tenant of the sister concern company namely “Sly Company” the defendant has not proved by way of sufficient evidence that the defendant was inducted as tenant and the defendant has paid rent to Sly Company or someone else.

In view of the above, this Court finds that the suit filed by the plaintiff is maintainable and the issue no. v is decided in favour of plaintiff.

Issue no. i :

Is the plaintiff entitled to a decree for eviction and recovery of khas possession against the defendant in respect of the suit premises by evicting the defendant and his men, agents and servants therefrom?

The plaintiff has filed the instant suit against the defendant for eviction on the ground that the defendant is illegal occupier of the suit property.

Per contra, the defendant has taken the plea that the defendant is no way connected with the plaintiff and the plaintiff cannot pray for eviction against the defendant. To prove the case, the plaintiff has exhibited a document being Exhibit A that the plaintiff is the owner of the property. The defendant failed to prove that he was inducted by Sita Devi Kapoor and he used to pay monthly rent to Sita Devi Kapoor subsequently to the Karnani Mansion Residents' Association.

The defendant has not filed any document to prove that at any point of time, the defendant has paid rent to Sita Devi Kapoor or to Karnani Mansion Residents' Association. In the first time, the defendant has taken the plea of Sita Devi Kapoor during his examination as D.W.1, but the defendant has not exhibited any document to prove the contention of the defendant that defendant had paid rent to Sita Devi Kapoor. On the other hand, before filing of the instant suit, the defendant had initiated a previous suit before the Learned Court of City Civil Court being T.S. No. 1829 of 2010 against the plaintiff for declaration of tenancy but in the said suit, the defendant has neither made Sita Devi Kapoor nor Central Calcutta Investments Private Limited as party to the said suit. The suit filed by the

defendant before the City Civil Court is dismissed for default. Though the Counsel for the defendant has argued but the defendant has taken steps for restoration of the suit but admittedly till date, the suit is not restored. Accordingly, this Court finds that there is variance between the pleading and proof. The case made out by the defendant in the written statement as well as during his cross examination-in-chief as DW-1 failed to prove the case but on the other hand, the plaintiff has proved the case that the plaintiff is the owner of the property and the defendant is an illegal occupier of the said premises.

The Judgment referred by the Counsel for the plaintiff, in the case of **A.E.G. Carapiet (supra)** is squarely applicable in the instant suit as the defendant failed to put any question to the plaintiff at the time of cross examination of the plaintiff with regard to the story of Sita Devi Kapoor. The case of the defendant is that Sita Devi Kapoor has taken a flat on rent from Central Calcutta Investments Private Limited and Sita Devi Kapoor has let out the said premises to the defendant but the defendant failed to prove with regard to the provisions as specified under Section 20 of West Bengal Premises Tenancy Act, 1997 and Rule 12 of the said Act of 1997.

Section 26 of West Bengal Premises Tenancy Act, 1996 reads as follows :

“26. Creation and termination of sub-tenancy to be notified.- (1) Where after the commencement of this Act, any premises is sublet, either in whole or in part, by the tenant with the previous consent in writing of the landlord, the tenant and every sub-tenant to whom the premises is sublet, shall give notice to the landlord in the prescribed manner of the creation of the sub-tenancy within one month from the date of such subletting and shall, in the pre-scribed manner, notify the termination of such sub-tenancy within one month of such termination.

(2) Where before the commencement of this Act, the tenant has, with or without the consent of the landlord, sublet any premises either in whole or in part, the tenant and every sub-tenant to whom the premises has been sublet, shall give notice to the landlord of such subletting in the prescribed manner [within two years of the commencement of this Act] and shall, in the prescribed manner, notify the termination of such sub-tenancy within one month of such termination.

(3) Where in any case referred to in sub-section (2), there is no consent in writing of the landlord, and the landlord denies that he gave any oral consent, the Controller shall, on an application made to him in this behalf either by the landlord or by the sub-tenant within two months of the date of receipt of the notice of subletting by the landlord or the issue of the notice by the sub-tenant, as the case may be, by order, declare that the interest of the tenant in so much of the premises as has been sublet shall cease and that the sub-tenant shall become a tenant directly under the landlord from the date of the order. The Controller shall also fix the rents payable by the tenant and the sub-tenant to the landlord from the date of the order. Rent so fixed shall be deemed to be the fair rent for the purposes of this Act.”

As per Section 26 (2) of the Act of 1997, a notice in writing is to be given within two years from the date of commencement of the Act but in the instant case, the defendant failed to prove said provision.

From Exhibits 4, 5 & 6 i.e. receipts issued by the Special Officer which the defendant has relied upon as rent of the premises in question. In the said receipt, it is categorically mentioned that this payment does not confer any right to claim tenancy or any other right. The defendant has relied upon the said document with the said Clause and as such from the said receipt, the defendant cannot say that he being a tenant is paying the rent to the Special Officer in respect of the suit premises. As regard Exhibits 1 and 2, i.e. the car parking sticker cannot give any right to the defendant to treat him as tenant of the premises.

In view of the above, this Court decides the Issue No. (i) in favour of the plaintiff.

Issues No. ii, iii & iv :

Plaintiff has claimed mesne profit at the rate of 50,000/- per month of the suit premises for a period of 36 months commencing from February 2013 till January 2013 and at the rate of Rs. 75,000/- per month from February 2013 till June 2016 and further from July 2016 till recovery of possession.

In view of the claim made by the plaintiff with regard to mesne profit, this Court is of the view that an enquiry is to be conducted by appointing a Special Officer and on receipt of report from the Special Officer the claim of the plaintiff with respect of mesne profit can be decided. Accordingly, issues no. ii, iii & iv are kept pending till filing of report by Special Officer.

Conclusion :

In view of the above, the plaintiff is entitled to get decree in terms of prayer (a) of the plaint with respect of Suit Schedule Property as properly described in Exhibit "C". Decree be drawn accordingly.

As regard to mesne profit, Shri Deb Nath Ghosh, Learned Advocate is appointed as Special Officer to inquire and determine the mesne profit and to submit report before this Court. The remuneration of the Special Officer is fixed Rs. 6,00,000/-. At the first instance, the remuneration of Special

Officer shall be paid by plaintiff and subsequently shall recover from the defendant.

(Krishna Rao, J.)