

**IN THE HIGH COURT AT CALCUTTA
(Civil Appellate Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Supratim Bhattacharya

**S.A. 61 of 2023
with
IA No. CAN 1 of 2022**

**Smt. Sabita Das & Anr.
Versus
Sri Sumit Adhya**

For the Appellant : Mr. Arnab Roy
Mr. Satyam Mukherjee

For the respondent: Mr. Himadri Kumar Mahata
Mr. Ziaul Haque

Heard On : 24.05.2024
Judgement Delivered On : 22.08.2024

Supratim Bhattacharya, J.:

- 1.** This instant appeal has been preferred by the appellants/defendants being aggrieved by and dissatisfied with the judgment and decree passed by the Ld. Additional District Judge, 3rd Court, Barrackpore on 29.04.2022 in Title Appeal being Title Appeal No. 7 of 2017.
- 2.** The aforementioned first appeal being Title Appeal no. 7 of 2017 was preferred by the instant appellants being aggrieved by the judgment dated 23.12.2016 passed by the Ld. Civil Judge (Junior Division) Barrackpore, North-24-Parganas in Title Suit No. 326 of 2012.

3. The appellants herein were the defendants before the trial court and the appellants before the first appellate court while the respondent herein was the plaintiff before the trial court and respondent before the first appellate court.

4. Facts of the instant lis as per plaint

The entire building, mentioned in schedule 'A' of the plaint, earlier belonged to one Sankar Kumar Chanda. Within the said building one brick built room having asbestos shed, mentioned in schedule 'B' of the plaint, was let out in lieu of rent at the rate of Rs. 200/- per month by the said erstwhile owner to one of the appellants namely Sabita Das in the year 1996.

Thereafter during the year 2007 the 'A' schedule property was gifted to the present respondent /plaintiff by the said Mr. Chanda by virtue of a registered deed of gift registered in the office of the District Sub-Registrar of North-24-Parganas being No. 05681 for the year 2007. Thereafter the rent was enhanced to Rs. 260/- per month and the appellant /defendant has paid the said monthly rent till the month of May, 2012.

According to the respondent/plaintiff as the property was in bad state of affairs so the appellant/plaintiff requested the defendants to deliver possession of the suit property so that the respondent plaintiff could develop the condition of the suit property. In response to such request

of the respondent/plaintiff the appellants/defendants gave up possession of the suit property in favour of the respondent/plaintiff.

The respondent/plaintiff had entered into an agreement with Triveni Construction for developing the said property and as such the suit property was developed.

Thereafter the respondent /plaintiff asked the appellants/defendants to take the suit property for commercial purpose at fair rent.

On 27.10.2012 the appellants/defendants forcefully and illegally entered into the suit property in absence of the respondent/plaintiff, for which the respondent/plaintiff lodged a general diary before the local police station.

On 27.10.2012 itself the respondent/plaintiff sent a letter through registered post with AD to the appellant No. 1 defendant No. 1.

Ultimately as the appellants did not pay any heed to the request of the respondent /plaintiff the respondent/plaintiff was compelled to institute the instant *lis*.

5. Facts before the Trial Court:

Before the Trial court the respondent /plaintiff filed a suit for eviction of trespasser, declaration and injunction against the appellants/defendants praying for a decree of declaration that the defendants are trespassers in respect of the suit property, decree of eviction and recovery of possession after evicting the defendant from

the scheduled suit property, for a decree of injunction restraining the defendants from the illegal activities and restraining them from changing the nature and character or making any alteration or damage or repair of the suit room.

The defendants entered appearance and filed a written statement denying the contentions of the plaintiff and claiming themselves to be tenants in respect of the suit property and asserting the fact that they have never delivered possession of the suit property in favour of the plaintiff.

On the basis of the contentions of the parties the following issues were framed:

ISSUES

- 1. Is the suit maintainable in its present form and law?*
- 2. Has the plaintiff any cause of action to file the suit?*
- 3. Has the court got jurisdiction to try this suit?*
- 4. Is the suit hit by the principles of estoppels, waiver and acquiescence?*
- 5. Is the suit barred by law of limitation?*
- 6. Has the plaintiff any right, title and interest over the A schedule property?*
- 7. Are the defendants possessing the B schedule property as trespassers?*

8. Are the defendants liable to be evicted from the B schedule property as trespassers?

9. Is the plaintiff entitled to get recovery of khas possession of the B schedule property after evicting the defendants therefrom?

10. Is the plaintiff entitled to get decree as prayed for in the plaint?

11. To what other relief/reliefs if any, plaintiff is entitled to get as per law and equity?

Three witnesses adduced evidence on behalf of the plaintiff and have exhibited several documents including the registered deed of gift. On the contrary the defendant No.2 adduced evidence on behalf of the defendants but did not produce any documentary evidence.

The Ld. Trial Court after adjudication decreed the suit in favour of the plaintiff and granted decree of eviction of the defendants.

6. Facts before the First Appellate Court

The defendants being aggrieved by and dissatisfied with the judgment of the trial court preferred an appeal.

The Ld. First Appellate Court after hearing the Ld. Counsels representing the appellants and the respondent, dismissed the first appeal and thus affirmed the judgment of the trial court.

- 7.** Being aggrieved by and dissatisfied with the judgement and decree passed by the Ld. First Appellate Court the appellants/defendants have filed the instant second appeal.

The instant appeal has been admitted and two substantial questions of law have been framed which are as follows:

1. *Whether the court of appeal below was justified in rejecting an application under Order XLI Rule 27 of the Code of Civil Procedure on the premise that the said application is defective and no steps were taken to amend the same when, in fact an application for amendment was filed on 8th February 2022 ?*
2. *Whether the surrender of tenancy without any written document can be regarded as valid surrender, more particularly, when the tenant all along asserted that the possession was given to renovate the suit property, which cannot be construed as a surrender of tenancy ?*

- 8.** Ld. Counsel Mr. Arnab Roy being assisted by Mr. Satyam Mukherjee appearing for the appellants has submitted exhaustively which are epitomized as follows:

- i) That the appellants were the tenants under the previous owner of the suit property.

- ii) The appellants denied that they had ever surrendered their tenancy and delivered possession of the suit property in favour of the plaintiff.
- iii) Further submitted that they used to pay rent to the plaintiff in good faith as the representative of the landlord.
- iv) They have further submitted that the defendants only shifted their business in front of the suit shop room during the period of repair and reconstruction of the suit shop room by the plaintiff.
- v) It has also been submitted that as the tenancy has never been surrendered therefore the tenancy continues unless the same is determined by a competent court of law.
- vi) It has also been submitted that both the trial court and the first appellate court erroneously concluded that not being in possession contemplates surrender of tenancy.
- vii) It has further been submitted that the defendants are tenants under the plaintiff and their tenancy is governed by the provisions of the West Bengal Premises Tenancy Act, 1997 and therefore there cannot be any implied surrender unless there is actual surrender without any written document by the defendants.
- viii) It has further been submitted that the suit itself is not maintainable because of the fact that the defendants being

tenants, no notice to quit has ever been served upon the defendants by the plaintiff and the notice dated 27.10.2012 which has been served upon the defendants is actually a notice requesting the defendant for enhancing rent thereby the admitting the defendants as tenants.

- ix) The defendants vide letter dated 05.11.2012 categorically stated that the enhancement of the rent demanded by the plaintiff is contrary to the relevant provisions of the act of 1997 and therefore it cannot be treated as fair rent and on that basis no fresh tenancy agreement can entered into.
- x) The alleged non-payment of rent by the defendants can at best make the defendants defaulters for which remedy lies on behalf of the plaintiff to file a suit for eviction on the ground of default which the plaintiff has not done.
- xi) The Ld. First Appellate Court was not justified in rejecting the application under Order XLI Rule 27 of the Code of Civil Procedure filed by the defendant on the premises that the same application was defective and no steps were taken to amend the same, when in fact an application for amendment was filed on 08.02.2022.
- xii) The Ld. Counsel has relied upon the following two authorities

- a) (2019) 6 SCC 216

b) (2016) 15 SCC 102

Relying upon the aforesaid submission the Ld. Counsel has prayed for allowing the instant appeal and setting aside the judgements of the trial court and the first appellate court.

9. Controverting the contentions of the Ld. Counsel representing the appellants Mr. Himadri Kumar Mahata being assisted by Mr. Ziaul Haque representing the respondents submitted elaborately which are as follows:

i) The Ld. Counsel has submitted that the defendant No.1 became the tenant under the plaintiff and used to run the business under the name and style Sabita Motors having pucca construction with asbestos shed room.

ii) The plaintiff have requested the defendant to deliver possession in favour of the landlord and the said shop room was in damaged condition and accordingly the defendant No.1 had surrendered possession in respect of the said shop room in favour of the landlord plaintiff and thereafter the plaintiff developed and made construction over the said property after obtaining sanctioned building plan.

iii) It has further been submitted that at the time of surrender of tenancy by the defendant No. 1, there was no agreement and/or

writing between the plaintiff and the defendants that after completion of the new construction , the plaintiff could relocate the defendants in the said new construction. Therefore, upon surrender of the tenancy, the defendants relinquished all right, title and interest in respect of the said tenancy in favour of the plaintiff. Absence of any such agreement and /or writing regarding relocation of the defendants after new construction , goes to show without any iota of doubt that the defendants had totally surrendered and given away their right, title and interest in respect of the said tenancy and did not reserve any right, title and interest in respect of the new construction.

iv) That after completion of the construction the defendant No.1 requested the plaintiff to induct the defendant No.1 as a tenant in respect of the room being the 'B' schedule property as a tenant so that the defendant can carry on business therefrom and the plaintiff agreed to such request to let out the said room being the 'B' schedule property to the defendant No.1 with a condition to make fresh new tenancy agreement at enhanced rate of rent as per fair rent to which the defendant also agreed and accordingly the plaintiff prepared a draft deed of tenancy agreement and handed over the same to the defendant No.2 to be shown to his mother being the defendant No. 1.

v) that the defendant all of a sudden on 27.10.2012 forcefully, illegally and unlawfully entered into the 'B' schedule property and after coming to know about the unlawful acts of the defendants the plaintiff on 27.10.2012 reported the said facts to the local police station.

vi) the defendants through their advocate by a letter dated 05.1.2012 replied to the said notice dated 27.10.2012 through which it has not been denied that the defendants have forcefully and illegally entered into the 'B' schedule property, therefore it is clear that the defendants also admitted that they have forcefully and unlawfully entered the 'B' schedule property.

vii) the defendants during the course of trial stated that they paid rent to the plaintiff after May, 2012 but failed to show any documentary evidence in support of such claim. The fact is that the defendant lastly paid rent to the plaintiff during the month of May 2012 and thereafter surrendered the tenancy in favour of the plaintiff and thereafter on 27.10.2012 the defendants forcefully, illegally and unlawfully without the consent of the plaintiff entered the 'B' schedule property.

viii) to improve the defence case the defendants during the course of trial stated that they went to pay rent to the plaintiff but the plaintiff refused to receive the rent and they filed an application

under Section 21 of the West Bengal Premises Tenancy Act before the rent controller Barrackpore on 20.11.2012 and the said application was dismissed on contest, against which the defendant did not challenge the said order.

ix) the DW1 during his cross-examination dated 12.04.2016 submitted that “it is a fact that when the suit room was demolished for renovation I could not have carried in my business therefrom but at that relevant point of time I used to run my business under a shed in front of the suit property” such admission clearly shows that the defendants had not been in possession of the scheduled property at the relevant point of time.

x) The Ld. Counsel has relied upon the judgment passed by the Hon’ble Apex Court reported in AIR 2003 SC 4453.

xi) The Ld. Counsel has further submitted that the defendants did not pay any rent after surrender of tenancy and on 27.10.2012 illegally and unlawfully entered into the ‘B’ scheduled property as such the status of the defendants in respect of the ‘B’ schedule property is that of a trespasser as such the defendants are liable to be evicted.

xii) he has further submitted that the defendants have failed to establish or show any document or agreement that the defendant will be relocated after surrender of tenancy in the new

construction and have not been able to produce any rent receipt after May, 2012.

Banking upon the aforesaid facts and circumstances the Ld. Counsel has prayed for dismissal of the instant appeal.

Discussion with reason:

10. As regards to the first substantial question of law which has been framed at the time of admission of the instant appeal, is as to whether the first appellate court was justified in rejecting an application under Order XLI Rule 27 of the Code of Civil Procedure, this Court deals with the discussion made by the first appellate court that is the Ld. Additional District Judge, 3rd Court, Barrackpore.

The first appellate court in its judgment has mentioned that the defendant appellant had filed an application under Order XLI Rule 27 of the Code of Civil Procedure praying for adducing additional evidence. It has been mentioned that the said application was devoid of any nomenclature of the documents intended to be adduced as evidence by the appellant and subsequently after completion of hearing of the first appeal and on the date of passing judgment the appellant filed one application for amendment of the said petition and through the said amendment petition had prayed for incorporating the nomenclature of those documents but the copy of the said

application for amendment was not served upon the respondent. At the time of hearing of the appeal the appellant had not stated that they intended to amend the petition under Order XLI Rule 27 of Code of Civil Procedure. It has been mentioned that after conclusion of hearing of the appeal including the petition there was no scope left to the appellant for filing any amendment petition seeking amendment of the original petition filed under Order XLI Rule 27 of the Code of Civil Procedure as such the said application for amendment was not entertained and thus rejected.

From the record it transpires that the first appeal was preferred during the year 2017 bearing the number Title Appeal 07 of 2017, while the said appeal was disposed of on 29.04.2022 as such disposal of the said first appeal took place after five years of the same being instituted and in spite of the fact that the Ld. Counsel representing the respondent during the hearing of the appeal had brought to the notice as regards to non-mentioning of the nomenclature of the documents the appellants did not seek any amendment during the entire period of hearing and came up with a petition praying for amendment of the application filed under Order XLI Rule 27 of the Code of Civil Procedure on the date of passing of the judgment. This lacklustre attitude of the appellant has no reason to be supported as such this Court is of the same view as that of the first appellate Court that the intention of the appellants was only to drag the proceedings

and nothing more than that. When the parties to a proceeding in spite of being aware of the drawback, in this instant case the appellants did not take any step for more than four years, then it is not the duty of the court to have the things done by the appellants or on their behalf. As such the rejection of the petition praying for amendment and ultimately the rejection of the application of the Order XLI Rule 27 of the Code of Civil Procedure is not incorrect step adopted by the first appellate court.

It will not be out of context to mention that through the application under order XLI Rule 27 of the Code of Civil Procedure the appellants herein intended to produce i) rent bills ii) trade licence issued by the local municipality iii) shop establishment notice iv) commercial tax receipts and v) electricity bills in the name of the appellants. For the sake of argument if it is considered that if the petition under Order VI Rule 17 of the Code of Civil Procedure seeking amendment and the application under Order XLI Rule 27 of the said Code would have been allowed then also it would not have improved the status or position of the appellants. Through the said applications the appellants intended to show/prove that they are tenants in respect of the suit property. As regards to the appellants being tenants in respect of the suit property till the month of May 2012 there is no dispute on the contrary it is admitted fact but the question is as

regard to the status of the appellants during the period after May 2012.

- 11.** Now this Court enters into the moot point involved in the lis that is as to whether surrender of tenancy without any written document can be regarded as valid surrender.

In this context it is to be mentioned that the cause of action of the instant lis arose on 27.10.2012 so the instant lis is governed by the West Bengal Premises Tenancy Act, 1997 (hereinafter to be referred to as the 1997 Act).

Section 12(2) of the 1997 Act states as follows:

“Notwithstanding anything in any other law for the time being in force, a tenant may give up possession of the premises on giving such notice as is required under the contract creating the tenancy. In the absence of any provision in the contract relating to notice or when there is no contract, the tenant may give up possession of the premises on giving not less than one month's notice expiring with a month of the tenancy.”

This section commences with non-obstante clause and the word ‘may’ signifies that the tenant may surrender his possession either expressly or impliedly.

In this context this Court relies upon the view adopted by a coordinate bench of this Court while dealing a matter under the West Bengal Premises Tenancy Act, 1956 in the case between Anjali Saha Vs. Ajit Kumar Datta reported in 2005 SccOnline Cal 436. In the

Paragraphs No. 44 and 45 of the said judgment following has been stated:

“44. No doubt the provision contained in sub-s. (2) of S. 19 of the said Act starts with non obstante clause but still then the expression of word "may" in the said provision clearly indicates that the mode as prescribed in the said provision is not the only mode by which tenant may give up possession. If that be so, then the tenant's right to surrender the tenancy either by express or by implied surrender, as provided in Cls. (e) and (f) of S. 111 of the Transfer of Property Act has not been abrogated by non-obstante clause contained in S. 19(2) of the said Act. Though the express surrender requires surrender of tenancy by mutual agreement but implied surrender may occur either by relinquishment of possession or by creation of new relationship of landlord and tenant between the parties.

45. The concept of implied surrender under the West Bengal Premises Tenancy Act is not unknown to this Court, as this Court finds recognition of the said concept in the Division Bench decision of this Court in the case of Martin Harris (P) Ltd. v. E. Properties, reported in 86 CWN 588.”

Section 12(2) of the 1997 Act is a verbatim of the Section 19 (2) of the West Bengal Premises Tenancy Act, 1956.

The expression ‘may’ used in sub-section (2) clearly indicates that the provisions of sub-section (2) of Section 12 are enabling one. It has been held that the provisions of the Act do not abrogate the tenant’s right to surrender the tenancy by express or implied surrender as provided in clauses (e) and (f) of Section 111 of the Transfer of Property Act. The surrender or relinquishment may be either express or implied. In case of express surrender notice under Section 12(2) is necessary,

but in case of implied surrender notice is not required to be given by the tenant to the landlord. The surrender may be implied when there is relinquishment of possession or when there is creation of a new relationship of landlord and tenant between the parties.

The witness for the defendant that is the son of the tenant during his cross examination has deposed that “It is a fact that when the suit room was demolished for renovation I could not have carried in my business therefrom but at that relevant point of time I used to run my business under a shed in front of the suit property ...”

This signifies the fact that there was giving up of possession of the suit property by the tenant. In this regard it is to be mentioned that none of the parties have produced any document revealing that there was an agreement between the contending parties that there was temporary delivery of possession of the suit property by the tenant solely for the purpose of addition, alteration or renovation. On the contrary exhibit-7 and exhibit-8 those are the notice dated 27.10.2012 issued by the Ld. Counsel representing the landlord and the reply to the said notice dated 05.11.2012 issued by the Ld. Counsel representing the tenant can give light in this regard.

From the exhibit -7 it transpires that the Ld. Counsel representing the landlord has mentioned in the Paragraph No.1 of the said letter “That you were the monthly tenant at will ...” and in the Paragraph No.3

it has been stated "That my client has required to reconstruction the said shop room accordingly you left and /or vacated the said room at the request of my client ...". In response to the aforesaid letter the Ld. Counsel representing the tenant has not denied the fact mentioned in the notice dated 27.10.2012.

From the aforementioned factual matrix it transpires that there was implied giving up of possession of the suit property by the tenant.

As the tenant had given up possession of the suit property and there being no fresh agreement as regards to tenancy so the defendant cannot be termed as a tenant, instead from the date of once again obtaining possession of the suit property by the appellants that is 27.10.2012 these appellants are not better than trespassers in respect of the suit property.

The respondent being the owner of the suit property though not admitted by the appellants as landlords is entitled to obtain an order of eviction against the appellants.

The appellants have relied upon a judgment of the Hon'ble Apex court reported in (2019) 6 SCC 216. The said judgment deals with the issue of *statutory tenant*. In this instant case question of statutory tenant does not arise as because the tenant has surrendered the tenancy. So the instant authority is not applicable in this case.

Another judgment of the Hon'ble Apex court reported in (2016) 15 SCC 102 has also been relied upon. In the cited authority the issue of *protected tenancy* as per the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act 1950 has been dealt with. In the instant case as the tenant has surrendered and there being no provision of protected tenant under the West Bengal Premises Tenancy Act, 1997 so this authority is also not applicable in this instant lis.

Thus, this Court is of the view that there was giving up of possession of the suit property by the tenant which has also been the view of the first appellate court which has been expressed through the impugned judgment.

In such premises this Court feels that the impugned judgment is not required to be interfered with.

- 12.** Thus the instant appeal being **S.A. 61 of 2023** with **IA No. CAN 1 of 2022** stand **dismissed**.
- 13.** 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.
- 14.** Urgent certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)