

Item No.- 5
05.12.2024
Rohan
Court No. 8

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**SA 17 OF 2024
With
CAN 1 OF 2023**

**Smt. Malabika Samanta
Versus
Sri Debashis Samanta**

**Mr. Arijit Bardhan, Advocate
Mr. Debrup Bhattacharjee, Advocate
... for the Appellant**

**Mr. Milan Ch. Bhattacharjee, Sr. Advocate
Mr. Gautam Banerjee, Advocate
Ms. Sulagna Bhattacharya, Advocate
... for the Respondent**

1. Both the Courts have concurrently held that the suit for recovery of possession on expiration of a period reserved in the lease deed by efflux of time is liable to be dismissed unless the power of attorney executed by the lessor/plaintiff in favour of the constituted attorney is produced before this Court.
2. The facts are more or less undisputed to the extent that by virtue of a registered lease of deed being No. 2297 of 2008 executed by and between the parties, the lessee/defendant was put into possession for a period of two years which expired on the last date of the month of November, 2010. Though no notice under Section 106 of the Transfer of Property Act is required in case of a recovery of possession sought on the ground of expiration of the period of lease by efflux of time, yet, the notice was sent on 01.03.2012 and thereafter, the suit was instituted. The plea was taken that the said lease is governed by the West Bengal Premises Tenancy Act, 1997

and there is also vagueness in the description of the property described in the schedule appended to the plaint which renders the suit liable to be dismissed. It is further averred in the written statement that on expiration of the period reserved in the said registered deed, the request was made to the lessor/plaintiff to extend the period thereof, and on consensus having arrived between the parties, the rent was enhanced from Rs. 660/- per month to Rs. 750/- per month it is to run from month to month. It is further averred that the enhanced rent was paid but no rent receipt was granted by the lessor/plaintiff.

3. We do not find any impediment on the part of the Court in deciding the issues upon the merit but what swayed the Courts below was that though the suit was instituted by the lessor/plaintiff, but through the constituted attorney who was undeniably the husband and in absence of any power of attorney, the suit cannot be maintained. It is undeniable that both the Courts held that there was no novation of a contract subsequent to the expiration of the period reserved therefor but proceed to dismiss a suit on the technical ground that the constituted attorney has no locus standi to file a suit for and on behalf of his wife unless the power of attorney is produced.
4. The appellant, after filing of the instant Second Appeal, further took out an application under Order XLI Rule 27 of the Code of Civil Procedure annexing the copy of the power of attorney and invited this Court to be taken on record as an additional evidence.
5. We are conscious that an application under Order XLI Rule 27 of the Code of Civil Procedure will be

required to be heard along with the hearing of the appeal which has not technically matured as yet. The reason being that the appeal has not been admitted upon formulation of the substantial question of law, but to shorten the litigation, we directed notices to be served upon the respondents and invited the attention to dispose of the appeal at the admission stage.

6. Mr. Bhattacharjee, learned Senior Advocate appearing for the respondent submits that the suit at the behest of the constituted attorney is not maintainable in absence of the same having produced before the Court. It is further submitted that the power of attorney was executed jointly by two persons and one having expired in the meantime, such power of attorney lost its force in the eye of law. He further submits that the lessor/plaintiff miserably failed to show her right, title and interest in respect of a suit premises and unless she proves her ownership, the suit for recovery of possession is not maintainable.
7. So far as the points other than the plea of non-production of the power of attorney are concerned, we do not find any semblance of a legal right available to a lessee. Admittedly, the lease was executed by the plaintiff as lessor and the defendant/respondent as lessee which was duly registered in the office of the registering authority with the duration of two years. The moment the right to enjoy the immovable property is transferred by way of a lease by a person, it is not open to the lessee to assail the title of the lessor at the time of such induction. The right to enjoy the property would be meaningless unless the possession of the property is given, or in other word, transferred by a person having possession thereof and, therefore, it

is not necessary for the lessor to prove that he had no title at the time of transferring the possession for the purpose of enjoyment of the demised premises. It would go against the spirit of Section 105 of the Transfer of Property Act defining the lease and an embargo is also created under Section 116 of the Indian Evidence Act. Even both the Courts below have not found that there is any novation of contract but the suit was dismissed on a technical ground that the constituted attorney failed to produce the power of attorney before the Court in order to prove his right to institute and proceed with the suit for and on behalf of his wife.

8. Once the technicality is pitted against a substantial justice, the later should prevail. The technical issues which are curable in nature should never be projected a front to defeat the substantive right. Non-production of the power of attorney is merely a procedural lapses and cannot be taken as a thing which is incurable in nature. Since the power of attorney is annexed to an application for taking an additional evidence, and an explanation is also offered as required under Order XLI Rule 27 of the Code of Civil Procedure, we therefore, feel that justice would be subserved if the matter is remitted to the Appellate Court to permit the appellant to produce the additional evidences and therefore, should decide the appeal on merit.
9. We find that the issue relating to the power of attorney was not framed by the Trial Court but an argument was advanced in this regard, therefore, we frame an issue to be answered by the First Appellate Court in the following:

i. Whether the suit for recovery of possession on expiration of a period

provided in a lease by efflux of time, instituted by a lessor through her constituted attorney, is liable to be dismissed?

10. The matter is remanded to the First Appellate Court to permit the appellant to adduce evidences restricted to the power of attorney and an opportunity be given to the defendant/respondent to cross-examine on the aforesaid point.
11. The Appellate Court, after recording the evidences, shall decide the appeal on the issue framed hereinbefore and we trust and hope that endeavour shall be shown to dispose the appeal within four weeks from the date of the communication of this order.
12. Liberty is granted to the parties to approach the First Appellate Court and the Appellate Court shall fix the matter within fortnight from such date.
13. The appeal being No. **SA 17 of 2024** and the connected application being No. **CAN 1 of 2023** are disposed of.
14. No order as to costs.
15. Urgent certified Photostat copy of this order, if applied for, be supplied to the parties after complying with all necessary formalities.

(HARISH TANDON, J)

(PRASENJIT BISWAS, J)