

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

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

**F.A. No.156 of 2019
Mariam Bibi and others
Vs.
Asgari Khatoon and others**

For the appellants	:	Mr. Wasim Ahmed, Md. Saifur Rahaman
For the respondent no.1	:	Mr. Tanmoy Mukherjee, Mr. Gour Baran Sau
For the Waqf Board	:	Sk. Md. Galib, Mr. Abu Siddique Mallik
Heard on	:	19.06.2025 & 03.07.2025
Reserved on	:	03.07.2025
Judgment on	:	09.07.2025

Sabyasachi Bhattacharyya, J.:-

1. The present First Appeal has been preferred against the dismissal of the plaintiffs/appellants' suit for declaration of tenancy rights. The brief facts of the case are as follows:
2. The plaint case starts from one Noor Mohammed, the predecessor-in-interest of the plaintiffs/appellants. It is alleged in the plaint that Noor

Mohammed was the tenant of the suit premises and, on his demise on December 31, 2007, the plaintiffs/appellants became tenants in respect of the said premises. Accordingly, declaration of the plaintiffs' tenancy in respect of the suit property and consequential reliefs have been sought in the plaint.

- 3.** On the other hand, the defendant/original respondent no.1 contends that the tenancy of the suit property originally stood in the name of one Koplina Mirza and his brother Maqbool. On the demise of Maqbool, his wife Raitan became a co-tenant. On the other hand, on the death of Koplina on November 28, 1965, Noor Mohammed and the other heirs of Koplina, including the defendant/respondent no.1, Siddique Mirza, along with the daughter and widow of Koplina (respectively Ajmeran Khatoon and Zohra Bibi) became co-tenants. Thus, the prayer for declaration of the tenancy exclusively in the name of the plaintiffs/appellants was not tenable in law.
- 4.** Learned counsel for the appellants places reliance upon rent receipts which were exhibited by the appellants. Although some of the rent receipts were issued in the name of Noor Mohammed and Raitan jointly, on the death of Koplina, subsequent rent receipts are on record, which were issued solely in the name of Noor Mohammed. Thus, it is argued that Noor Mohammed became the exclusive and sole tenant of the suit property as per the said rent receipts.

- 5.** It is next contended that the defendant/original respondent no.1 Siddique Mirza approached the Wakf Board with the dispute in respect of the tenancy. The Commissioner of Wakfs, West Bengal, by an order dated January 15, 1990, observed that the Commissioner of Wakfs had nothing to interfere in the tenancy matter as the Bengal Wakf Act, 1934 does not provide for any interference in such matter, which is completely civil in nature involving title. Hence, it was held that the civil court is the best forum to take a decision in such matter and the parties may seek relief before the competent civil court, if they so desire. Thereafter, till the institution of the present suit in the year 2008, the defendant/original respondent no.1 never took steps for declaration of his tenancy right by filing any suit.
- 6.** Thus, the defendants' claim of tenancy is hopelessly time-barred. Also, in such view of the matter, it is evident that the original defendant sat over his rights and accordingly acquiesced to the sole tenancy of Noor Mohammed.
- 7.** It may be mentioned here that the original defendant/respondent no.1 Siddique died during pendency of the appeal and his heirs have been substituted as the contesting respondents herein.
- 8.** Learned counsel for the appellant next contends that although certain affidavits, purportedly sworn by Noor Mohammed, have been produced on behalf of the defendant, the signatures of Noor Mohammed on those are denied by the plaintiffs. Despite such denial, no attempt was made

on the part of the defendant to prove the validity of those signatures and, as such, those documents cannot be relied upon.

- 9.** Certain telephone bills and documents were also exhibited by the defendant to show that business was being run from the suit property by the defendant. However, it is argued by the appellants that those documents do not prove anything, since those were obtained much subsequently. For example, a telephone bill exhibited by the defendant shows that the telephone in his name was installed in the year 2004. Also, the trade licence and other documents produced were of a much later period. Thus, the claim of the defendant that he used to run business in the property for the last thirty years, cannot be lent credence to on the basis of such subsequent documents, which are of much recent origin.
- 10.** Learned counsel appearing for the appellants next contends that although the defendant admitted in his written statement that he has been dispossessed from the suit property, no eviction suit has been filed till date, nor has any counter claim to that effect been initiated, which also debars the claim of tenancy of the defendant. In any event, such plea was introduced to cover up the fact that the defendant was never in possession of the suit property at any point of time.
- 11.** Learned counsel for the substituted respondents contends that the plaintiffs have to succeed or fail on their own case. The plaint case starts from the alleged tenancy of Noor Mohammed and completely

suppresses the previous devolution of tenancy from Koplina Mirza onwards. It has been admitted by the plaintiffs that Noor Mohammed carried on STD/ISD/PCO and Pan Shop business on the suit property till his death on May 11, 2007. However, during the lifetime of Noor Mohammed, neither any suit was filed nor any claim of exclusive tenancy of Noor Mohammed was made. Only upon the demise of the said Noor Mohammed, his heirs, the present plaintiffs/appellants, have come up with the claim of his exclusive tenancy. This suppression, it is argued, ought to be construed against the appellants.

- 12.** Learned counsel appearing for the contesting respondents next argues that Koplina was a co-tenant with Maqbool, which is evident from the rent receipts produced by the plaintiffs themselves, some of which were issued jointly in the name of Koplina and Maqbool and others jointly in the name of Noor Mohammed and Raitan, the widow of Maqbool. Thus, in any event, the plaintiffs cannot claim exclusive tenancy through Noor Mohammed, as Maqbool and thereafter his heir Raitan were admittedly tenants of the suit property, as borne out by the plaintiffs' exhibited rent receipts.
- 13.** Learned counsel next contends that the defendant exhibited a letter issued by Noor Mohammed to the Official Mutawalli as well affidavits sworn before the Presidency Magistrate at Calcutta, where he categorically admitted the tenancy to stand jointly in his name and in the name of the other heirs of Koplina, including the defendant and the

daughter and widow of Koplina. Such original affidavits were exhibited in the suit and, as such, the case of exclusive tenancy of Noor Mohammed and, through him, of the plaintiffs/appellants is demolished.

14. Learned counsel for the contesting respondents cites a Division Bench judgment in the matter of *Amar Nath Pramanick v. Sanjib Das Gupta & Ors.*, reported at (2008) 3 CHN 962, where the Court observed that in the plaint of the said case, there was no allegation that prior to one Salil, his father was the tenant or that other heirs of the said father had surrendered the tenancy. The moment the court found that the father of Salil was the original tenant and there was no plea of surrender taken by the plaintiff, it necessarily followed that the old tenancy was continuing. It was held that the question of surrender, whether express or implied, being essentially one of fact, must be pleaded specifically in the plaint; otherwise, such plea cannot be permitted to be taken.
15. In the matter of *Buddhadeb Halder v. Chandra Nath Chandra* in *SLP (Civil) diary No. 21426/2022*, the Supreme Court held, in a matter arising out of a Division Bench of this Court, that the other inheritors of the respondent, who were co-tenants, had to be impleaded as parties to the civil suit and although the plea and contention of surrender of tenancy by co-tenants was raised, evidence and material in that regard was scanty and not established.

- 16.** By drawing a parallel between the said judgments and the present case, it is argued that since the plaintiffs suppressed altogether the original tenancy in the name of Koplina and Maqbool and even failed to plead surrender at any point of time by the other co-tenants, Noor Mohammed never became the sole and exclusive tenant of the property, as the said case was never established or pleaded.
- 17.** Upon consideration of the arguments of both parties and the materials on record as well as the governing legal position, this Court comes to the following findings on the questions raised in the appeal:

(I) Legal effect of Rent receipts and Affidavits exhibited in the suit

- 18.** The plaintiffs themselves have exhibited a number of rent receipts in respect of the suit property. Some of the rent receipts stood in the name of Koplina and Maqbool jointly. Subsequent rent receipts have been produced which go on to show that Noor Mohammed, one of the sons of Koplina, was shown to be a joint tenant along with Raitan, the wife of Maqbool. Such rent receipts find place from pages 96 to 105 of the Paper Book in the present appeal.
- 19.** Only three receipts stand in the name of Noor Mohammed alone, which are annexed at page 108 to 110 of the Paper Book. Those three rent receipts in the name of Noor Mohammed were for the periods March to June, 2007, as well as May and June to August, 1999.

- 20.** Section 109 of the Indian Evidence Act, which was applicable during the relevant period, provides that when the question is whether persons are landlords and tenants and it has been shown that they have been acting as such, the burden of proving that they do not stand or they have ceased to stand to each other in such relationship is on the person who affirms it.
- 21.** In the present case, the conduct of the plaintiffs/appellants is suspect and it is apparent that they are guilty of suppression of material facts. Nowhere in the plaint has any averment been made as to the devolution of the tenancy on Noor Mohammed, the predecessor-in-interest of the plaintiffs/appellants. The plaint, in fact, starts the narrative from Noor Mohammed already being a tenant in respect of the property.
- 22.** Such falsity of such storyline is, however, called out by the rent receipts exhibited by the plaintiffs themselves inasmuch as, in consonance with the defence case, the initial rent receipts were seen to have been issued jointly in the name of Koplina and Maqbool.
- 23.** Even the subsequent rent receipts, at least up to May, 1997, were issued by the Board of Wakfs (Landlord) jointly in the names of Noor Mohammed and Raitan Bibi, the latter being the widow of Koplina. Hence, as per the exhibits of the plaintiffs/appellants themselves, rent receipts were issued jointly in the name of Koplina and Maqbool and thereafter in the name of Noor Mohammed and Raitan, the widow of Maqbool. This clearly shows that the tenancy was joint from the

inception between Koplina and Maqbool and thereafter devolved on their respective heirs, in the absence of any pleading or proof of surrender by any of the co-tenants or cessation of their tenancy. On the count of the joint tenancy with the heir of Maqbool alone, the plaintiff case of exclusive tenancy of Noor Mohammed is defeated. There is even no pleading of surrender of the tenancy at any point of time by Maqbool or his widow Raitan, let alone any evidence being led on such count. Hence, the case of exclusive tenancy made out by the plaintiffs cannot be accepted on such score alone.

- 24.** On a careful reading of Section 109 of the Evidence Act, coupled with the absence of any pleading or proof of cessation or surrender of their joint-tenancy by Maqbool or his heir Raitan, the plaintiff case of sole tenancy of Noor Mohammed and thereafter his heirs, the plaintiffs, was never established.
- 25.** Three rent receipts have been produced in the name of Noor Mohammed exclusively. However, such issuance has been clearly explained by the documents exhibited by the defendant Siddque Mirza. By a letter issued to the Official Mutawalli, Board of Wakfs, West Bengal, Noor Mohammed categorically stated that on the demise of Koplina Mirza, who was joint tenant along with Maqbool Mirza, on November 28, 1965, by operation of Mohammedan Law, the tenancy devolved upon the said Noor Mohammed and his younger brother, Siddique, along with his sister Ajmeran Khatoon and mother Zohra

Bibi. It was further declared in the said letter that, for the purpose of convenience, the other co-tenants had decided that in place of their father Koplina, the tenancy should now stand in the name of Noor Mohammed. In such circumstances, it was requested that the records be mutated in the name of Noor Moahammed in place of Koplina along with the continuing joint tenant Maqbool Mirza, the cousin of Noor Mohammed.

- 26.** The defendant also exhibited an affidavit affirmed before the Presidency Magistrate, Calcutta where the same stand was reiterated, adding that for convenience of business, the defendant Siddique, Noor's sister Ajmeran and mother Zohra had agreed to substitute Noor Mohammed's name in the *Sherista* of the landlord in exclusion of the other co-tenants. The letter issued to the Official Mutawalli, referred to above, was made a part of the affidavit and marked as Exhibit-A thereto. It was reiterated in the affidavit that the said brother (Siddique, the original defendant), sister and mother of Noor Mohammed would remain as "co-sharers" along with Noor in respect of the tenanted rooms, Noor shall "legally" remain co-tenant along with his cousin Maqbool in respect of the tenancies under the original Mutawalli.
- 27.** Another affidavit, dated May 24, 1965 was marked in the suit as Exhibit-E, which also carried a Magisterial Notarization, whereby Koplina Mirza, the original co-tenant, declared that he constituted and appointed his sons Noor Mohammed and Mohammed Siddique Mirza as

his lawful attorney to exercise any of the provisions embodied in the agreement dated October 14, 1963 between himself and Maqbool Mirza. The said agreement referred to a partnership entered into between Koplina and Maqbool.

- 28.** We find from the record that another affidavit dated October 18, 1966 was also marked as Exhibit, whereby Noor Mohammed reiterated that his father Koplina was the owner of an eating house being run from the tenanted premises, upon the death of whom Noor, his mother Zohra, sister Ajmeran and brother Siddique became the heirs of all the properties including the eating house at the suit premises and that the heirs of his late father had no objection if ration permit was issued in his name. It was stated therein that other licenses such as corporation, Police licence to run the eating house, etc., had been granted in Noor Mohammed's name and that his mother, sister and brother had given their consent to that effect.
- 29.** An agreement dated October 14, 1963, which is in the nature of a registered partnership deed, was marked as Exhibit-F in the suit, whereby Koplina and Maqbool entered into a partnership to run business from the suit property. Significantly, the description of the parties in the said partnership deed included the heirs, assigns, etc., of the parties as well.
- 30.** Thus, the context of issuance of rent receipts in the name of Noor Mohammed exclusively has been categorically established through

evidence by the defendants. It is crystal-clear from the abovementioned documents that Noor Mohammed admitted at all points of time that he was a co-tenant with the other heirs of Koplina, including the original defendant Siddique, his mother Zohra Bibi and sister Ajmeran, along with Maqbool and, thereafter, the heir of Maqbool. Hence, there cannot be any manner of doubt that the evidence on record, taken in conjunction with the rent receipts produced by the plaintiffs themselves, unerringly indicate that the tenancy continued jointly in the name of Noor Mohammed along with the other heirs of Koplina and Maqbool and his heirs. In the absence of any document to show the cessation or surrender of such joint tenancy, the case of exclusive tenancy of Noor Mohammed cannot but be disbelieved.

- 31.** In tune with the proposition laid down by the Division Bench of this Court in *Amar Nath Pramanick (supra)*¹ and the Supreme Court in *Buddhadeb Halder (supra)*², in the absence of any pleading or proof regarding surrender of the tenancy by the other joint tenants, the plaint case of exclusive tenancy of Noor Mohammed cannot be accepted. In fact, the plaintiffs altogether suppressed the devolution of such tenancy prior to Noor Mohammed and started with the story that Noor Mohammed was the exclusive tenant, thus, rendering the

¹ *Amar Nath Pramanick v. Sanjib Das Gupta & Ors., reported at (2008) 3 CHN 962.*

² *Buddhadeb Halder v. Chandra Nath Chandra in SLP (Civil) diary No. 21426/2022.*

plaintiffs/appellants guilty of gross suppression of material facts, for which adverse inference ought to be drawn against them.

(II) Whether the affidavits produced by the defendant were authentic

- 32.** Despite having ample opportunity to amend the plaint as the written statement categorically declared the devolution of tenancy at length, no attempt was made by the plaintiffs to amend their plaint to incorporate any pleading as to the original joint tenancy, initially standing in the name of Koplone and Maqbool and thereafter in the names of their respective heirs, having ever been terminated or surrendered.
- 33.** Insofar as the affidavits are concerned, those were exhibited by the defendants in original. The affidavits were notarised and executed before the Presidency Magistrate at Calcutta and carry a presumption of correctness available to official and judicial acts. Such correctness and the validity of the documents were never rebutted by any cogent evidence by the plaintiffs/appellants at any point of time. In the plaint pleadings, there is not a single averment regarding the signature of Noor Mohammed on such affidavits being fraudulently obtained, let alone any particulars of such alleged fraud, as required to be pleaded under Order VI Rule 4 of the Code of Civil Procedure, nor was any evidence led by the plaintiffs to that effect. Since the plaintiffs/appellants now allege (beyond their plaint pleadings) that the

affidavits were fraudulently obtained, it was the burden of the plaintiffs/appellants to call for a comparison of the signatures of Noor Mohammed on the said affidavits with his other admitted signatures by experts, which was never done at any point of time by the plaintiffs/appellants.

- 34.** In fact, Noor Mohammed himself was alive long after the execution of the letter to the Official Mutawalli and his affidavits, but never challenged the validity of those documents. Immediately after his demise on December 31, 2007, his heirs, the plaintiffs, instituted the suit in 2008. Such tell-tale conduct of the plaintiffs also betrays the baselessness of the allegations of the signatures on the affidavits being false. In fact, no such case was ever made out by the plaintiffs, either in their pleadings or in evidence, in the court below.
- 35.** Thus, the authenticity of the said affidavits stands vindicated and unchallenged by the plaintiffs/appellants.

(III) Effect of the order of the Commissioner of the Wakf Board, West Bengal dated January 16, 1990

- 36.** The appellants have argued that the order of the Commissioner of Waqfs relegating the parties to the civil court has never been challenged by the defendants and, as such, the claim of joint tenancy/co-tenancy of the defendant is time-barred.

- 37.** However, there are several reasons why such contention cannot be accepted.
- 38.** First, the appellants failed to produce any copy of the pleadings filed by the parties or to show the disputes raised before the Commissioner of Wakf, which led to the said order. Thus, no contextual reference-frame of the order can be derived from the materials on record. As such, there is precious nothing before the court to indicate the nature of the disputes which were raised before the Commissioner of Wakf and whether those pertained to any claim regarding the jointness of the tenancy at all. There can be several shades of disputes regarding a tenancy, on a much lesser footing than a declaration regarding the joint tenancy itself. Hence, in the first place, we are not aware of the nature of dispute which was relegated to the civil court by the said order of the Wakf Board. This takes away the very premise of the plaintiffs' argument that in the absence of any challenge thereto or a suit being filed by the defendants before the civil court, the joint tenancy now claimed by the defendants could not be claimed.
- 39.** Secondly, even if we assume for the sake of completion that a dispute as to the existence of the joint tenancy itself was raised before the Wakf Commissioner, it is a settled proposition of law that the law of limitation does not take away the substantive rights of a person but merely precludes the filing of a legal action by the affected persons.

- 40.** There is no bar to a person claiming such substantive rights, even if otherwise barred by limitation from filing a suit on the strength of such rights, in defence to a legal action filed by another party. Hence, the argument of the appellants based on the order of the Commissioner of Wakf, to the effect that the respondents are now restrained from claiming joint tenancy, is hereby turned down.

(IV) In view of admission of dispossession, whether the defendant ought to have filed an eviction suit / counter claim

- 41.** It has been rightly argued by the contesting respondents that the physical possession of one of the co-tenants of a property is deemed to be legal possession on behalf of all the other co-tenants. Hence, even if the original defendant had alleged that he was dispossessed from the suit property, no eviction suit against the plaintiffs need to have been filed by the defendant to stake a claim to co-tenancy in respect of the said property. As such, the said argument of the appellants is also negated.

(V) Whether the suit property is included under “premises” as defined in the West Bengal Premises Tenancy Acts of 1956 and 1997

- 42.** The contesting respondents have cursorily raised an issue that the suit property, having been admitted to be an “eating house”, comes within

the purview of 'hotel', which is excluded from the purview of both the 1956 and 1997 Acts. However, although a 'hotel' is sometimes colloquially equated with a restaurant in layman's parlance in India, the two are not the same. A hotel is obviously a boarding or lodging house whereas the suit property is admittedly used as an eating house only, meaning thereby that it is a mere restaurant where people come and go for their meals. Also, the suit property is being used not only as an eating house but for other purposes, such as STD/ISD/PCO as well as 'pan' shop business. Thus, such argument does not have any strength.

- 43.** In any event, the said question is a non-issue in the suit as, irrespective of whether the suit property is covered by any of the Rent Control Acts of West Bengal, it would in any event be governed by the provisions of the parent statute, that is, the Transfer of Property Act. The declaration sought in the suit is that the plaintiffs/appellants are exclusive tenants in respect of the property, without any reference to whether such tenancy is under the Rent Control Laws or the Transfer of Property Act. Hence, such issue need not be gone into further, having no germane bearing on the present adjudication.

CONCLUSION

- 44.** Accordingly, upon a comprehensive assessment of the materials on record, we find that the plaint case of exclusive tenancy of Noor Mohammed, and thereafter his heirs, the plaintiffs/appellants, has not been established at all. Rather, the evidence on record goes on to establish that the suit tenancy stood initially in the name of Koplina Mirza and his cousin Maqbool Mirza and, upon their demise, devolved upon the heirs of Koplina and Maqbool respectively. Hence, not only the original defendant and, thereafter, his heirs (the present contesting respondents) but also the heirs of Maqbool are co-tenants in respect of the suit property. Thus, the learned Trial Judge was perfectly justified in passing the impugned judgment, dismissing the suit of the plaintiffs/appellants claiming their exclusive tenancy.
- 45.** Even otherwise, it is trite law that the appellate court does not substitute its own views for that of the court of first instance unless errors of law and/or fact are made out. In the present case, we do not find any such error at all and the learned Trial Judge, on the test of preponderance of probability, has rightly arrived at conclusions which are in consonance with the law governing the field as well as the evidence on record and facts of the case.
- 46.** Thus, F.A. No.156 of 2019 is dismissed on contest, thereby affirming the impugned judgment and decree dated August 17, 2017 passed by

the learned Judge, Fourth Bench, City Civil Court at Calcutta, in Title Suit No.1130 of 2008.

- 47.** There will be no orders as costs.
- 48.** Interim orders, if any, stand vacated.
- 49.** A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)