IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-
The Hon'ble Justice Supratim Bhattacharya

SA 114 of 2022

SUJIT KUAMR PAUL
VS
MD KHALIL KURESHI (DSD) REP BY MD JALAL QURESHI & ORS.

For the Appellant : Mr. Sounak Bhattacharya
Mr. Apurba Kumar Ghosh
Mr. Rudranil Ghosh
Mr. Abhirup Halder

For the Respondents : Mr. Dev Kumar Sharma
Mr. Satya Prakash Shaw

Delivered On : 12.11.2026

Supratim Bhattacharya, J.:

1. The present second appeal has been preferred by the appellant being dissatisfied by the judgment dated 26th March 2018 passed by the learned First Appellate Court that is the Additional District Judge, 3rd Court, Howrah in Title Appeal No. 7 of 2017.

Through the said judgment the learned Court has allowed the said title appeal and thereby setting aside the judgment and decree dated 28th of September 2016 and 2nd of November 2016 respectively passed by the

learned Trial Court that is the learned Civil Judge,(Jr. Division) 4th Court, Howrah passed in connection with Title Suit No. 235 of 2000.

2. Factual Matrix

Before the Trial Court

The fact of the lis is that the appellant herein being the landlord in respect of the suit property that is one Pucca shoproom on the ground floor comprised in Dag No. 511 under Khatian Number 735 within Mouja Bankra, J. L. No. 55, PS Domjur, District Howrah preferred a suit for eviction being Title Suit No. 235 of 2000, against one Mr. Khalil Qureshi, the predecessor of the present respondents, on the grounds of default in payment of rent since the month of August 1991 and also on the grounds of causing damage to the suit property violating the clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act and also on the ground of reasonable requirement for his own use and occupation.

It is worth mentioning that the defendant had filed an application under section 17 (2) and section 17 (2A) of the West Bengal Premises Tenancy Act, 1956. Against the said application written objection was filed by the landlord. At the time of hearing of the said application the plaintiff namely Sujit Kumar Paul himself adduced evidence as opposite party.

The learned trial judge disposed of the said application filed by the defendant tenant under section 17 (2) and section 17 (2A) of the West Bengal Premises

Tenancy Act 1956 on 21st February, 2008 being order No. 102. Through the said order the learned trial judge had come to the conclusion that the defendant is premises tenant under the plaintiff in respect of the suit property at a monthly rental of Rs. 65 payable according to English calendar month and had also come to the finding that the defendant is a defaulter in payment of rent since August 1992 and as such had come to the conclusion that the defendant is a defaulter in payment of rent for 115 months.

The learned trial judge through the said order had calculated the area rent to be Rs. 7475/- plus statutory interest at the rate of $8\frac{1}{3}$% amounting Rs. 622.916 as such had come to the finding that the defendant should pay Rs. 8098/- in equal instalments of Rs.1000/- each out of which the first instalment shall be of Rs.1098/- and the instalments shall have to be deposited within the 15th day of each succeeding month and the current rent also to be deposited simultaneously.

Written statement was filed by the defendant on 17.07.2008.

On the basis of the pleadings the following issues were framed which are as follows: –

1 Is the suit maintainable in law ?

2. Is the suit governed by Transfer of Property Act ?

3 Whether the notice of ejectment served upon the defendant and whether it was valid notice ?

4 Has the plaintiff any cause of action to file the suit against the defendants ?

5 To what relief the plaintiff is entitled to get in law and equity ?

On behalf of the plaintiff landlord the landlord namely Sujit Kumar Paul himself adduced evidence and has proved the following documents which have been marked as exhibits :-

Exhibit No. 1 – certified copy of deed No. 2850 of 1991.

Exhibit No. 2 – khatian no. 735 and Khajna receipt (series).

Exhibit No. 3 – notice dated 23 .08.1999 with A/D card and certificate of posting (collectively).

Exhibit No. 4 – rectification letter dated 5.10.1999 with acknowledgement due card (collectively).

On behalf of the defendant /tenant Rashida Begam deposed and has proved the following documents which have been marked as exhibits.

Exhibit A – 21 Court challans**.**

Exhibit B – Will made by her father.

Exhibit C – Salishinama dated 06.01.1995.

Exhibit D – death certificate dated 31.07. 2012.

The learned trial judge after consideration of the pleadings of the parties, considering both oral and documentary evidence and also considering the submission of learned counsels came to the finding that the suit is governed by Transfer of Property Act. Notice was valid and the service of notice is deemed to be valid and thus reached the conclusion that the relationship of landlord and tenant is established and the suit is governed by Section 106 of the Transfer of Property Act and there being valid notice served upon the defendant, the learned trial judge came to the finding that the plaintiff has succeeded in part for eviction barring prayer for cost / mesne profit and has thus decreed the suit in favour of the plaintiff landlord.

3. **Before the Ld. First Appellate Court**

   Being dissatisfied by the judgment passed by the learned trial court the tenant/ defendant preferred a first appeal which being Title Appeal No. 07 of 2017. The Additional District Judge 3rd Court Howrah heard the said appeal. The learned First Appellate Court after hearing the learned counsel representing the appellant and the learned counsel representing the respondent has allowed the said title appeal thereby setting aside the judgment and decree passed by the learned trial Judge, which has given birth to the present second appeal.

4. The Ld. Counsel representing the appellant during his exhaustive argument has submitted the following;-

i) That the fact in contention is as to whether the present lis is to be guided by the Transfer of Property Act, 1882 or the West Bengal Premises Tenancy Act, 1956.

ii) He has further submitted that though the order passed by the learned trial judge while disposing of the application filed by the defendant under Section 17 (2) and (2A) of the West Bengal Premises Tenancy Act had not been assailed at that relevant point of time, it can be challenged subsequently. In this regard the learned counsel has relied upon Section 105 of the Code of Civil Procedure 1908. He has also relied upon sub-section 1 of the said Section and has submitted that no appeal shall lie from any order made by a court in the exercise of its original or Appellete jurisdiction but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

iii) Ld. Counsel has also relied upon Sections 106 (1) and Section 111 clause (h) of the Transfer of property Act. While relying upon Section 106 of the said act the learned counsel has submitted that in case of lease of immovable property for any purpose other than agricultural or manufacturing purpose, which is in this case, the lease shall be deemed to be a lease from month to month. While relying upon section 111 of the said Act the

learned counsel has submitted that as regards to determination of lease, a lease of immovable property determines on the expiration of the notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. In this case there was a notice sent to the defendant directing him to quit the suit property and the said notice was served upon the defendant as such there is no controversy as regards to the legality of the notice and seeking termination of the lease.

iv) Learned counsel has relied upon Exhibit C that is the salishinama and has submitted that the said Salishi took place before the panchayat, which signifies that the suit property is within the panchayat area, as such the lis is to abide by the Transfer of Property Act.

v) He has further submitted that in the objection to the application under Section 17 (2) and (2A) of the West Bengal Premises Tenancy Act the plaintiff has stated that the suit premises is comprised within Dag No. 511 under khatian Number 735 within Mouza Bankra, Police Station –Domjur, District Howrah. This Dag Number, khatian number and Mouja signifies that the suit property lies within panchayat area and as such is to be abided by the Transfer of Property Act.

vi) Ld. Counsel has further submitted that the defendant witness No. 1 during his cross-examination dated 03.08.2016 has admitted the fact that the shoproom is in panchayat area, as such there being admission of the fact that the suit property is within the panchayat area so it is obvious that the Transfer of Property Act will guide the present lis.

vii) The learned Counsel has further relied upon Schedule I of the Howrah Municipal Corporation Act 1980.

viii) He has also referred to section 1 of the West Bengal Premises Tenancy Act 1956. Referring to sub-section 3 of the said Section the learned counsel has submitted that the West Bengal Premises Tenancy Act 1956 extends to the whole of Calcutta and to all areas which have been or may hereafter be constituted municipalities under the provisions of the Bengal Municipal Act 1932.

ix) The learned counsel has also referred to the following documents, those are the record of rights and the tax receipts and has submitted that from the record of rights and the tax receipts it transpires that the suit property lies within panchayat area.

x) The learned counsel has also submitted that the principles of *res judicata* will not apply in the present lis as because while disposing of the application the learned trial court had not

framed any issue. As no issues have been framed so the principle of *res judicata* will not apply.

xi) He has further submitted that only the relationship, rate of rent and the arrear amount of rent was decided. In this regard he has further submitted that the point of maintainability was not decided. During reply the learned counsel has further submitted that *res judicata* is applicable in cases where the court has jurisdiction but passes a wrong order but is not applicable in cases where the court does not have jurisdiction.

xii) To buttress his contention the learned counsel has relied upon the following authorities, which are: –

A judgment of a coordinate bench of this Hon'ble Court passed in a Civil Revision decided on March 21, 1995 and published in ***1995 SCC online Cal 83.*** A judgment of a coordinate bench of this Hon'ble Court passed in Civil Revision being C. O. 1943 of 2021 passed in the case between ***Soma Sarkar versus SMT. Gitika Banerjee and others*** dated 2nd of March 2022 and has also relied upon a judgment passed by this Hon'ble Court in second appeals being SA 33 of 2017 and SA 34 of 2017 in the case between ***Panchanan Pal versus Shika Roychowdhury and others.***

Relying upon the aforementioned circumstances and the authorities cited the learned counsel has prayed for allowing the

present appeal by setting aside the judgment passed in the first appeal.

5. *Per contra* the learned counsel representing the respondents has placed before the court

i. The notice for eviction and the plaint seeking eviction.

ii. The learned counsel has submitted that the plaintiff landlord both in the notice and in the plaint has time and again stated that the defendant was a monthly premises tenant under him in respect of a shop room that is the suit property at a monthly rental payable according to the English calendar month. He has further submitted that from the aforementioned facts it transpires that the appellant plaintiff landlord has stressed upon the fact of monthly premises tenancy which comes within the ambit of the West Bengal Premises Tenancy Act and not under the Transfer of Property Act.

iii. He has further submitted that the order passed by the learned trial court while disposing the application under Section 17 (2) and (2A) of the West Bengal Premises Tenancy Act had never been challenged and as it has not been challenged so the said order has attained finality and cannot be agitated subsequently.

iv. He has further submitted that throughout the entire proceeding the appellant plaintiff landlord has proceeded as per the provisions of the West Bengal Premises Tenancy Act.

v. The learned counsel has stressed upon Section 114 of the Transfer of Property Act 1882 and has submitted that where a lease of immovable property has been determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit,the lessee pays or tenders to the lessor the rent in arear, together with interest thereon and his full costs of the suit, or gives such security as the court thinks sufficient for making such payment within 15 days, the court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

vi. Relying upon the mentioned section the learned Counsel has submitted that in this present lis the tenant has complied the direction of the learned trial judge and has paid the entire amount of arrear along with interest at the rate of $8\frac{1}{3}\%$ per annum and as the same has been complied if at all the lis is guided under the Transfer of Property Act then also the respondents cannot be evicted as they have paid the entire arrear amount along with interest, so according to this angle

also the tenant is not liable to be evicted under the provisions of law.

vii. In support of his contention the learned Counsel has relied upon the following authorities.

A judgment of the Hon'ble Apex Court published at ***AIR 1987 SC 1145*** ,

He has also relied upon a judgment of the Hon'ble four Judges bench of the Hon'ble Supreme Court published at ***AIR 1966 SC1061.***

He has also relied upon a judgment published at ***AIR 1969 SC 1349*** and has also relied upon a judgment published at ***AIR 1953 Bombay 129.***

Banking upon the aforementioned authorities and the facts and circumstances the learned counsel has prayed for rejection of the present second appeal on the ground that the impugned judgment and decree passed by the learned first appellate Court does not require interference.

6. The present second appeal has been admitted on the following two substantial questions of law, which are as follows:

"I. *whether the learned judge in the lower appellate court, substantially, erred in law in not considering the Exhibit 2 which shows that the property in suit governs under the Transfer of Property Act?*

II. *whether the learned judge in the lower appellate court, substantially, erred in law in relying upon the order passed in the application filed under sections 17 (2) and subsection (2A) of the West Bengal Premises Tenancy Act holding, inter alia, that the defendants are the premises tenant under the plaintiff disregarding the fact that during the evidence it was established that the property in suit is in the panchayat area?"*

7. From the contention of the learned counsels and the substantial questions of law framed it transpires that the moot point for consideration is whether the decision arrived at the time of disposal of the application filed by the defendant tenant under Section 17 (2) and (2A) of the West Bengal Premises Tenancy Act will prevail, having not been challenged has attained finality, over the evidence which have been adduced at the time of adjudication of the suit.

8. From the materials on record it transpires that a notice dated 23 .08.1999 for eviction of the tenant was issued by a learned counsel on behalf of the plaintiff landlord. In the said notice it has mentioned that Md. Khalil Kureshi is a *'monthly premises tenant'* under Sujit Kumar Paul that is the appellant plaintiff in respect of one Pucca shoproom comprised in Dag No. 511, under khatian Number 735 within Mouja Bankra JL No. 55 Police Station Domjur, District Howrah, at a monthly rental of Rs. 200/- payable according to English calendar month and demand of tenancy is from first day to the last day of English calendar month. So there is mention of *"monthly premises tenancy* " and there is

also mention of " *the month of tenancy is from first day to last day of English calendar month* ".

9. In addition it has also been mentioned that through the said notice the defendant was requested to quit vacate and deliver Khas possession to the plaintiff with the expiry of the month of September, 1999 and all *relationship between landlord and tenant shall be absolutely seized on and from 01.10.1999*. So through the notice for eviction of the tenancy which has been proved on behalf of the plaintiff appellant and has been marked Exhibit 3 (collectively) along with the acknowledgement due card there has been specifically mention of *" relationship as landlord and tenant "* between the plaintiff and the defendant.

10. In the plaint through which the lis has been initiated it has been mentioned that the plaintiff is the absolute owner of the landed property comprising in Dag No. 511 under Khatian No. 735 Mouja Bankra by purchase through a registered sale deed and the defendant was a monthly premises tenant in respect of a shop room at the aforesaid premises comprising within the Dag No. 511 under Khatian No. 735 within Mouja Bankra, PS Domjur, District Howrah. It is also fact that an application under Section 17 (2) and (2 A) of the West Bengal Premises Tenancy Act had been filed by the defendant. The plaintiff had contested the said application by filing written objection and has deposed at the time of hearing of the said application. The said application has been disposed of by the learned trial judge holding that the defendant is

premises tenant under the plaintiff at a monthly rental of Rs. 65 payable according to English calendar month. It has also been held through the said order that the defendant has not paid rent during the period of August 1992 and February 2002, that is for 115 months and as such the defendant was directed to pay Rs. 7475 plus statutory interest at the rate of $8\frac{1}{3}\%$ per annum amounting Rs. 622.9166. The total amount payable was Rs. 8098 /-. The defendant was also directed to pay the said amount in equal instalments of Rs. 1000/- each of which the first instalment was of Rs.1098/-. The plaintiff did not assail the said order on the contrary has accepted the compliance of the said order by the defendant. As the said order has not been set aside so the order passed by the learned trial judge declaring the relationship between the plaintiff and defendant as premises tenant stands. It is also fact that the learned trial judge while finally adjudicating the suit has reached the finding that the lis is to abide by the Transfer of Property Act and has thus reached the inference that the notice is legal and has been served upon the defendant as such the defendant is liable to be evicted. As the appellant herein had not assailed the order passed by the learned trial judge while disposing of the application under Section 17 (2) and subsection (2 A) of the West Bengal Premises Tenancy Act so the decision of the trial court stands that the respondent defendant is premises tenant under the plaintiff appellant.

In this regard this Court relies upon a judgment of the Hon'ble three Judges bench of the Hon'ble Apex Court passed in the case between

SATYADHYAN GHOSAL AND OTHERS versus DEORAJIN DEBI(SMT) and another reported at ***1960 SCC online SC 15.*** In Paragraphs 8 to 16 of the said judgment the following has been laid down :

> *"8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again?*
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> *9. Dealing with this question almost a century ago the Privy Council in Maharaja Moheshur Singh v. Bengal Government[3] held that it is open to the appellate court which had not earlier considered the matter to investigate in an appeal from the final decision grievances of a party in respect of an interlocutory order. That case referred to the question of assessment of revenue on lands. On 6-12-1841, judgment was pronounced by the Special Commissioner to the effect that 3,513 beeghas of land alone were assessable, and that the collections made by the Government on the other lands should be restored to the possessors. This judgment was affirmed by another Special Commissioner on 8-3-1842. On 21-9-1847, a petition for review on behalf of the Government of Bengal was presented to another Special Commissioner. That petition for review was granted. After due hearing the judgment of 8-3-1842, was reversed. The question arose before the Privy Council whether the review had been granted in conformity*

with the Regulations existing at that time with respect to the granting a review. It was urged however on behalf of the Government of Bengal that it was then too late to impugn the regularity of the proceeding to grant the review and that if the appellant deemed himself aggrieved by it, he ought to have appealed at the time, and that it was too late to do so after a decision had been pronounced against him.

10. Dealing with this objection the Privy Council observed:

"We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication."

11. This view was re-affirmed by the Privy Council in Forbes v. Ameeroonissa Begum[4]. A decree for possession with mesne profits having been made against the defendant by the Civil Judge, Purneeha on 18-12-1834, the defendant appealed to the Sadar Diwani Adalat. That Court by its order dated 22-1-

1857, held that the Civil Judge had been wrong in decreeing the mesne profits and further that the plaintiff was bound before he was entitled to have his conditional sale made absolute to render certain accounts. Accordingly the Sadar Diwani Adalat remanded the case in order that the judge might call upon the plaintiff for his accounts and then decide the case in the light of the remarks made by the Adalat. After the case went back the plaintiff produced accounts but the judge held that they were insufficient and dismissed the suit. An appeal was taken against that decree of dismissal to the Sadar Diwani Adalat but the appeal was unsuccessful; a later prayer for review was also rejected. On behalf of the appellant it was contended before the Privy Council that the Sadar Diwani Adalat was wrong in requiring the appellant to produce his accounts. In order however that this question could be raised, it was necessary to decide, whether if the Sadar Diwani Adalat was wrong in remanding the case for re-trial, the appellant was bound by that decree he not having appealed therefrom. Their Lordships of the Privy Council pointed out that the order of remand was an interlocutory order and that it did not purport to dispose of the case and consequently upon the principle laid down by the Privy Council in Maharaja Moheshur Singh v. Government of Bengal (Supra), the appellant was not precluded from insisting that the remand for the production of the accounts was erroneous or that the cause should have been decided in his favour, notwithstanding the non-production of the accounts. Their Lordships also mentioned the fact that the learned Judges of the Sadar Court also treated the latter point as still open to the appellant, when considering his appeal against the decree of dismissal passed after remand.

12. The principle laid down in Moheshur Singh case[3] was also acted upon by the Privy Council in Sheonath v. Ramnath[5]. That litigation was commenced Ramnath by a suit in the Court of the Civil Judge, Lucknow, seeking a general account and partition. The plaint mentioned the execution of some releases described as (Farighkuttees) but alleged that there had been no partition as between the parties as stated in them, that the partition was intended to take effect after the settlement of accounts when the Farighkuttees were to have been registered and that in the meantime they had remained with the appellant as incomplete instruments. The trial Judge held however that the Farighkuttees had been executed on the footing of actual partition and division of the joint property, that these had been executed without taint of fraud and dismissed the suit. An appeal was taken to the Judicial Commissioner; he affirmed the Civil Judge's decision on all points adding however that "there was one account between the parties still unadjusted viz. the division of the outstandings which was left open at the time of the division of the assets". In this view he remanded the case to the Judge to decide what sum should be awarded to the plaintiff in satisfaction of all claims on this account and directed that if possible a decision should be obtained from the arbitrators previously appointed by the parties. After remand the Civil Judge referred the question involved to certain arbitrators but the defendant did not acquiesce in this order and petitioned the Judicial Commissioner against it, stating that he objected to the arbitrators to whom the Civil Judge had referred the case, and requesting that other arbitrators might be appointed. This objection was overruled by the Judicial Commissioner, and the request was rejected. Ultimately two separate decrees

were made by the Civil Judge, one on the 4th September as regards part of the claim and the other on 22nd December as regards another part. On appeal both these decrees were affirmed by the Judicial Commissioner. It was against this decision of the Judicial Commissioner that the defendant appealed to the Privy Council. Two points were raised before the Privy Council. The first was that it was not competent to the Judicial Commissioner except with the consent of both parties, to vary, as he did vary, by his order of May 15, 1862, the rights of the parties under the Farighkuttees and to impose on the defendant an obligation of purchasing the plaintiff's interests in the outstandings on a rough estimate of its value; the other point raised was that the nomination of the particular arbitrator by the Judge without the consent and against the repeated protests of the appellant was altogether irregular, and that the award was therefore not binding upon him. It has to be noticed that the defendant had not appealed against the Judicial Commissioner's order of May 15, 1862, nor had he appealed against the Judicial Commissioner's later order rejecting the defendant's petition that he objected to the arbitrators to whom the Civil Judge had referred the case and that other arbitrators might be selected by the parties. In spite of these facts the Privy Council held that both these points were open to the appellant observing:

"That both points are open to the appellant, although he has in terms appealed only against the final decision of the Civil Judge and the confirmation of it by the Judicial Commissioner, is, we think, established by the case of Moheshur Singh v. Government of Bengal[3]. The appeal is, in effect, to set aside an award which the appellant contends is not binding upon him. And in order to do this he was not bound to appeal against

every interlocutory order which was a step in the procedure that led up to the award."

13. There can be little doubt about the salutary effect of the rule as laid down in the above cases on the administration of justice. The very fact that in future litigation it will not be open to either of the parties to challenge the correctness of the decision on a matter finally decided in a past litigation makes it important that in the earlier litigation the decision must be final in the strict sense of the term. When a court has decided the matter it is certainly final as regards that court. Should it always be treated as final in later stages of the proceeding in a higher court which had not considered it at all merely on the ground that no appeal lay or no appeal was preferred? As was pointed out by the Privy Council in Moheshur Singhs Case[3] the effect of the rule that at every stage of the litigation a decision not appealed from must be held to be finally decided even in respect of the superior courts, will put on every litigant against whom an interlocutory order is decided, the burden of running to the higher courts for redress of the grievances, even though it may very well be that though the interlocutory order is against him, the final order will be in his favour and so it may not be necessary for him to go to the appeal court at all. Apart from the inevitable delay in the progress of the litigation that such a rule would cause, the interests of the other party to the litigation would also generally suffer by such repeated recourse to the higher courts in respect of every interlocutory order alleged to have been wrongly made. It is in recognition of the importance of preventing this mischief that the legislature included in the Code of Civil Procedure from the very beginning a provision that in an appeal from a decree it will be open to a party to

challenge the correctness of any interlocutory order which had not been appealed from but which has affected the decision of the case.

14. In the Code of 1859 Section 363 after laying down that no appeal shall lie from any order passed in the course of a suit and relating thereto prior to a decree provided "but if the decree be appealed against, any error, defect or irregularity in any such order affecting the merits of the case or the jurisdiction of the court may be set forth as a ground of objection in the memorandum of appeal".

15. When the Code of 1877 made provisions in Chapter 43 for appeal against certain orders, Section 591 thereof provided "Except as provided in this chapter, no appeal shall lie from any order passed by any court on the exercise of its original or appellate jurisdiction" and went on to say "but if any decree be appealed against any error, defect or irregularity in any such order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal". The position remained the same in the Code of 1882. The present Code in its 105th section uses practically the same phraseology except that the word "any such order" has been substituted by "any order" and an additional provision has been made in the second sub-section in respect of orders of remand. The expression "such order" in Section 591 gave rise to a contention in some cases before the Privy Council that Section 591 applied to non-appealable orders only. This contention was overruled by the Privy Council and that view was adopted by the legislature by changing the words "any such order" to "any order". As regards the orders of remand it had been held that under Section 591 of the Code a party aggrieved by an order of remand could object to its validity in

an appeal against the final decree, though he might have appealed against the order under s. 588 and had not done so. The second sub-section of Section 105 precludes an appellant from taking, on an appeal from the final decree, any objection that might have been urged by way of appeal from an order of remand.

16. It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision. If however an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final decision as in the cases of other interlocutory orders. ..."

....

11. From the aforementioned judgment, specifically Paragraph 16 it transpires that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not preferred could be challenged in an appeal from the final decree or order.

In the present lis the defendant preferred the first appeal but the plaintiff did not prefer any counter appeal / cross appeal and did not take any step in this regard and has eventually preferred the present second appeal after the first appellate Court having set aside the judgment and decree of the trial court.

12. At this stage the issue as to whether the lis is to be abided by the Transfer of property Act or by the West Bengal Premises Tenancy Act cannot be re-agitated by the appellant when the appellant has enjoyed the fruits of both the order passed while disposing the application under Section 17 (2) and (2A) of the West Bengal Premises Tenancy Act and also the judgment and decree passed by the trial judge at the time of final disposal of the suit.

13. As it has been mentioned earlier during discussion that the appellant herein throughout the entire lis has mentioned the defendant to be a monthly premises tenant and has sought for determination of all relationship of landlord and tenant, cannot at this stage seek for abiding the provisions of the Transfer of Property Act and also cannot seek eviction of the defendant as per the provisions of the Transfer of Property Act, 1882. When the appellant plaintiff himself has mentioned the defendant to be a monthly premises tenant and has sought for determination of all relationship of landlord and tenant cannot seek for applicability of the judgments which have been relied upon on behalf of the appellant. The question of issue not been framed during the hearing of the application filed under Section 17 (2) and (2 A) of the West Bengal Premises Tenancy Act does not have any bearing in the present lis. As regards to the issue of *res judicata* the authority published at ***1995 SCC online Calcutta 83***, is applicable, but where the appellant plaintiff himself has termed the defendant to be a monthly premises tenant and

has sought for determination of the relationship of landlord and tenant the aforementioned judgment does not come to the aid of the appellant. As regards to the judgment passed in CO 1943 of 2021, the said issue of non-applicability of Section 7 of the West Bengal Premises Tenancy Act also does not come into play in the present lis and is not at all helpful to the appellant.

As regards to the applicability of the judgment passed in SA 33 of 2017 and SA 34 of 2017 which has been referred on behalf of the appellant, also does not have a bearing on the present lis when the plaintiff himself has mentioned the defendant to be a monthly premises tenant and has sought for determination of all relationship of landlord and tenant. So when the plaintiff himself has prayed for being dealt by the provisions of the West Bengal Premises Tenancy Act cannot now seek for being dealt under the provisions of the Transfer of Property Act. As such all the authorities relied upon on behalf of the appellant are of no help to the appellant plaintiff.

14. <u>Conclusion</u>:-

From the aforementioned discussion it is apparently clear that the plaintiff himself has mentioned the defendant to be a monthly premises tenant and has sought for determination of the relationship of the landlord and tenant. In such situation this Court is of the view that the impugned judgment passed by the learned first appellate court does not require interference .

15. Hence the impugned judgment passed by the Ld. First Appellate Court is not interfered with.

16. The present second appeal being **SA 114 of 2022** is **dismissed** without any cost.

17. 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.

18. Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)