

**(2004) 01 RAJ CK 0055**

**In the Rajasthan High Court**

**Case No : Civil Second Appeal No. 515 of 1998**

Kahtoon Begum (deceased) through her LRs

APPELLANT

Vs

Bhagwan Das and Others

RESPONDENT

**Date of Decision : 15-01-2004**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90

Rajasthan Premises (Control of Rent and Eviction) Act, 1950 — Section 13(1), 14(3)

**Citation : (2004) 1 RLW 502**

**Hon'ble Judges : A.C. Goyal, J**

**Bench : Single Bench**

**Advocate : M.M. Ranjan and N.K. Maloo, S.M. Mehta, R.R. Mathur and Punit Bapna, for the Appellant;**

**Final Decision : Dismissed**

## **Judgement**

A.C. Goyal, J.—All these three second appeals have been preferred against the judgment and decree dated 15.9.1998 whereby learned Additional District Judge No. 2, Jaipur City, Jaipur while dismissing three appeals affirmed the judgment and decree of eviction passed by learned Civil Judge (Junior Division), West, Jaipur City, Jaipur on 9.4.1997.

2. The relevant facts in brief are that the suit shop was let out on 12.8.1961 at monthly rent of Rs. 25/- to the original tenant Sh. Chhote Khan by Jaipur Cloth Retailer Association (in short the Association). The Association vide registered gift deed Ex. 5 dated 20.2.1986 gifted this shop to Pushthi Margiya Vaishanva Mandal (in short the Mandal) under intimation to Sh. Chhote Khan vide a registered notice dated 25.2.1986. The Mandal vide registered sale deed Ex.1 dated 12.9.1986 sold this shop to the plaintiff-landlord Sh. Bhagwan Das for a consideration of Rs. 75,000/- under intimation to Sh. Chhote Khan vide registered notice dated 4.10.1986, who filed the present suit on 25.2.1987 for arrears of rent and eviction on the grounds of default in payment of rent and personal reasonable and bonafide requirement as pleaded in paras 5 to 7 of the

plaint.

3. Vide written statement filed on 11.1.1987 the defendant- tenant Sh. Chhote Khan while admitting the facts of tenancy denied both the grounds of eviction with further pleas that the Association had no right to execute the gift deed and transaction of sale is sham and the Mandal also had no right to execute the sale deed in favour of the present plaintiff-landlord.

4. During the pendency of the suit, the original tenant Sh. Chhote Khan expired. Hence, his legal representatives-two sons and one daughter- all the three appellants were brought on record. Both the sons Abdul Salam and Abdul Vahid filed joint written statement with the same averments as stated in the written statement of Sh. Chhote Khan, while Smt. Khatun Begam- daughter of Sh. Chhote Khan did not appear. Hence, she was proceeded against *ex parte* on 26.7.1991.

5. Six issues were framed. Evidence was recorded. The learned Civil Judge vide judgment dated 9.4.1997 decided issues No. 1, 2 & 6 relating to reasonable and bonafide requirement, greater hardship and partial eviction in favour of the plaintiff and also decided issue No. 4 with regard to sale deed Ex.1 in favour of the plaintiff and issue No. 3 of default in payment of rent was decided against the plaintiff and decreed the suit of eviction. Three regular first appeals preferred by all the three legal heirs of Sh. Chhote Khan were dismissed vide common judgment dated 15.9.1998. Hence, these three second appeals.

6. I have heard learned counsel for the parties on the point of admission of these three second appeals.

7. Prior to coming on merits of the appeals, it would be appropriate to deal with some of the applications filed on behalf of the appellants. It is also made clear that during the pendency of these second appeals, the appellant Smt. Khatun Begum expired, hence her legal representatives were brought on record. One application under Order 6 Rule 17 C.P.C. for amendment in the memo of appeal was filed in appeal No. 515/1998 for permission to raise legal objections u/s 14(3) of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950 (in short the Act). Since such objections have already been taken in remaining two second appeals, it is unnecessary to decide this application separately. Two applications-one under Order 41 Rule 27 C.P.C. and other under Order 6 Rule 17 C.P.C. for amendment in the written statement were submitted in second appeal No. 635/1998 filed by Sh. Abdul Salam. Both the applications contain similar facts that plaintiff's father Sh. Madan Gopal was carrying on business in the name and style of Madan Gopal Gordhan Das and Sh. Gordhan Das elder brother of the plaintiff is carrying on business in the name and style of Madan Gopal Mangi Lal and thus the plaintiff's father had two shops and during the pendency of the first appeal, plaintiff's father expired in the month of June, 1997 and his both the sons-the plaintiff and his elder brother Gordhan Das have got one shop each and thus the plaintiff's need has been satisfied. It was also stated in these two

application that this question was raised before the First Appellate Court but the same was not considered by the First Appellate Court and these are subsequent events which should be taken into consideration either in this second appeal or permission may be granted to amend the written statement. The plaintiff-respondent filed separate reply of both the applications denying all these averments with a specific plea that plaintiff's father was having only one shop in which plaintiff's brother was and is still carrying on his business during the lifetime of their father and thus this fact is wrong that the plaintiff and his brother each have got one shop after the death of their father which took place in October, 1997 and thus this is not a case of any subsequent event. It is also significant to say here that in para 11 of the memo of appeal No. 515/1998 it is pleaded that after the death of Sh. Madan Gopal, the shop which was in possession of Madan Gopal came to the plaintiff and initially Sh. Madan Gopal had two shops. In one shop Sh. Madan Gopal was carrying on business in the name and style of Madan Gopal Gordhan Das while in second shop he was doing business in the name and style of Madan Gopal Bhagwan Das and now the plaintiff has started his business in the said shop and thus the plaintiff's need stands satisfied. Similar pleas were raised in para 8 of remaining two second appeals with a marked difference that in second shop the plaintiff's father was carrying on business in the name and style of Madan Gopal Mangi Lal. Learned counsel for the appellants submitted that these are subsequent events which should be taken into consideration by this Court or permission for amending the written statement should be granted and the case may be remanded to the trial Court for fresh consideration. Learned senior counsel Sh. Mehta appearing for the plaintiff-respondent No. 1 opposed these applications.

8. A bare perusal of para 11 of second appeal No. 515/1998, para 8 of remaining two second appeals and the contents of both the applications filed under Order 41 and under Order 6 C.P.C. goes to show that the appellants have taken contradictory pleas in this regard. On the one hand it is pleaded that the plaintiff's father was carrying on business in these two shops respectively in the name and style of Madan Gopal Gordhan Das and in the name and style of Madan Gopal Bhagwan Das and on the other hand it is pleaded that the plaintiff's father was doing business in the second shop in the name and style of Madan Gopal Bhagwan Das and the third contradictory plea taken is that the plaintiff's father was carrying on business in the second shop in the name and style of Madan Gopal Mangi Lal. Hence, even prima facie the pleas raised on behalf of the appellants appear to be not reliable at all. Secondly, the plaintiff nowhere pleaded that his father was carrying on business in two shops in different name and styles as has been stated in second appeal by the appellants and it is also significant to say here that neither Sh. Chhote Khan nor his two legal heirs pleaded in their statement that the plaintiff's father was carrying on business in two shops in different names. Therefore, both the applications being devoid of merit, are hereby dismissed.

9. I have heard learned counsel for the parties on merits. Section 100 of CPC

provides that second appeal shall lie to the High Court only when the High Court is satisfied that the case involves a substantial question of law and if the High Court is satisfied that a substantial question of law is involved, it shall formulate such questions and then the appeal shall be heard on the questions so formulated by the Court.

10. The first submission made by learned counsel for the appellants is that the trial Court did not offer any opportunity to the defendant-appellants to adduce their evidence, hence the case should be remanded to the trial Court for recording the evidence of the defendant-appellants. Reliance is placed upon *Sangram Singh v. Election Tribunal, Kotah and Anr.* (1), wherein it was held that if at an adjourned hearing the defendant appears and shows good cause for his previous non-appearance, he can be heard in answer to the suit as if he had appeared on the day fixed for his appearance. This cannot be read to mean that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared. If a party does appear on the day to which the hearing of suit is adjourned, he cannot be stopped from participating in, further proceedings simply because he did not appear on the first or some other day of hearing. Similar view was taken by this Court in *Nashim Alam v. Shri Mukund Singh and Ors.* (2). Learned senior counsel Sh. Mehta while referring the order-sheets of the trial Court submitted that proper opportunity was given to the defendants.

11. I have considered the above submissions. These objections were raised before the First Appellate Court also but the same were dismissed and rightly so. The plaintiff's evidence was completed on 27.4.1995 and the first date for recording the evidence of the defendants was 13.7.1995. The case was adjourned to 21.8.1995 as prayed on behalf of the defendants and again on 21.8.1995 the case stood adjourned for evidence of the defendants on their prayer and the next date 28.9.1995 was fixed. On that day also prayer for adjournment was made by the defendants and further an application under Order 9 Rule 7 C.P.C. was also moved on behalf of the third legal heir Smt. Kahtoon Begum. On the next date 11.10.1995 learned counsel for the defendants appeared in the trial Court at about 4 p.m., hence only examination-in-chief of the defendant-appellant Sh. Abdul Salam could be recorded and the case was adjourned for cross-examination of this witness on 16.10.1995. On 16.10.1995, D.W. 1 Sh. Abdul Salam did not appear in the court and the trial court making detailed observations as recorded in the order-sheet declined to grant any further adjournment and the application of Smt. Kahtoon Begum filed under Order 9 Rule 7 C.P.C. was also dismissed vide order dated 27.10.1995, but she was allowed to participate in further proceedings of the case. One application on behalf of remaining defendants was moved for reopening of their evidence but the trial Court having heard learned counsel for the parties vide a separate order dated 21.11.1995 dismissed that application being devoid of merit. It is also made clear that misc. appeal No. 7/1996 filed by Sh. Kahtoon Begum against the order dated 27.10.1995 dismissing her application was also dismissed by learned

Additional District Judge No. 3, Jaipur City, Jaipur vide order dated 4.4.1997. In view of the entire discussion made hereinabove, I find no merit in the submissions made by learned counsel for the appellants that the appellant Smt. Khatun Begum was not allowed the three appellants were not given any opportunity to lead their evidence. The submission made by learned counsel Sh. Rajan that all the three appellants should have been given separate opportunities for their evidence, appears to be without any force. Otherwise also, no substantial question of law in this regard is made out as the First Appellate Court having considered these objections dismissed the same.

12. The second submission made by learned counsel for the appellants is that both the courts below failed to consider the issue No. 4 that transaction of sale of suit shop was a sham transaction and the tenant had a right to challenge this sale in favour of the plaintiff-landlord. Reliance is placed upon *Devi Das v. Mohan Lal* (3), wherein it was held that the tenant had a right to challenge the validity of the sale deed executed in favour of the purchaser-landlord to show that the sale of the suit premises was not bonafide transaction and the same had been made with the ulterior motive of evicting the tenant. In view of this judgment of the Hon'ble Supreme Court the tenant has a right to raise such an objection. Learned counsel Sh. Ranjan submitted that the original landlord i.e. the Association filed the suit for eviction against the original tenant Sh. Chhote Khan on the ground of default in payment of rent and the suit was decreed by the trial Court as well as by the First Appellate Court but S.B. Civil Second Appeal No. 472/1972 filed by Sh. Chhote Khan was allowed by this Court vide judgment dated 24.3.1973 and when the Association could not succeed, the suit shop was gifted to the Mandal and the Mandal sold it out to the plaintiff which is after seven months and both the transactions were made only for the purpose of eviction of the tenant, but both the courts below failed to consider this aspect in a proper manner.

13. A perusal of the impugned judgments goes to show that no such objection was raised before the courts below that the Association filed the suit for eviction and decree of eviction passed by learned trial court as well as First Appellate Court was set-aside in second appeal by this Court and thereafter only with a view to evict the tenant these two transactions took place. Although these objections were taken in the written statement that the Association had no authority to execute the gift deed in favour of the Mandal and the Mandal also had no authority to execute the sale deed in favour of the plaintiff. The burden of proving the issue in this regard was upon the defendants but as stated hereinabove, no evidence was produced on behalf of the defendants and since D.W. 1 Sh. Abdul Salam did not appear for cross-examination, his statement in examination-in-chief was rightly not considered by the courts below and thus in absence of any evidence on the part of the defendant-appellants, both the courts below rightly decided this issue against them. Legally this Court is not required to appreciate the evidence in second appeal. Even though a bare perusal of the evidence of the plaintiff goes to show that PW.1 Sh. Bhagwan Das-plaintiff and

PW.2 his brother Sh. Gordhan Das were not cross-examined at all on this point that transaction of gift as well as sale were not genuine transactions. PW.4 Gopal Das executed the sale deed Ex.1 but no question was put to him in cross-examination that transaction of sale was a sham one with a view to evict the tenant. Similarly PW.5 Sh. Rameshwar Lal executed a gift deed on behalf of the Association in favour of the Mandal, but he was also not cross-examined with a view to challenge the said gift deed. Only on the ground that PW.2 Sh. Gordhan Das is an attesting witness to these documents and he is brother of the plaintiff is no ground to say that these documents were executed only with a view to evict the tenant from the suit shop. It is also significant to say here that according to the averements made in the memo of this second appeal, this Court dismissed the suit of eviction filed by the Association in March, 1973 and the gift deed as well as sale deed were executed in the month of February, 1986 and in the month of September, 1986, after about a period of 13 years. Therefore, it cannot be said that these transactions were carried out only with a view to evict the tenant.

14. Third point raised by learned counsel for the appellants is that the suit for eviction was not maintainable in view of the provisions of Sub-section (3) of Section 14 of the Act. Section 14(3) of the Act, reads as under :-

14 (3). Restriction on eviction :- Notwithstanding anything contained in any law or contract, no suit for eviction from the premises let out for commercial or business purposes shall lie against a tenant on the ground set forth in Clause (h) of Sub-section (1) of Section 13 before the expiry of five years from the date the premises were let out to the tenant.

15. It is not in dispute that suit shop was let out for business purposes in the year 1961 by the original landlord i.e. the Association. The plaintiff-respondent No. 1 became the landlord with regard to suit shop in accordance with the sale deed executed in his favour on 12.9.1986. The plaintiff informed this fact to the original tenant Sh. Chhote Khan vide registered letter dated 4.10.1986. It is also not in dispute that Sh. Chhote Khan started paying the rent to the plaintiff-landlord. According to learned counsel for the appellants, a fresh tenancy came into existence between the plaintiff and the defendant Sh. Chhote Khan on 12.9.1986 and thus the plaintiff was barred in filing the suit before the expiry of five years from 12.9.1986 on the ground set forth in Clause (h) of Sub-section (1) of Section 13 of the Act. It was also submitted that principle of waiver is not applicable in the instant case. Reliance is placed upon *Martin & Harris Limited v. Vith Additional Distt. Judge and Ors.* (4), *Govind Narain v. Mohan Singh* (5), *T.K. Lathika v. Seth Karsandas Jamnadas* (6), *P.M.C. Kunhiraman Nair v. C.R. Naganatha Iyer and Ors.* (7), *Mohammad Ibrahim v. Bani Madhab Mullick and others* (8), *Konijeti Venkayya and Anr. v. Thammana Peda Venkata Subbarao and Anr.* (9), *Noratmai v. Mohanlal* (10), *N.K. Kame v. Bihari Lal* (11), *Smt. Sudha Mukherjee v. Sankar Chatterjee* (12) and *Anandilal Bhanwarlal and Anr. v. Smt. Kasturi Devi Generiwala and Anr.* (13). It was also submitted that objections in

this regard were taken in the written statement and even in absence of such a specific objection, it can be raised in second appeal being a pure question of law.

16. Per contra, learned senior counsel appearing for the plaintiff-respondent No. 1 submitted that the parties are to be governed by the original tenancy dated 12.8.1961 and there is no question of any fresh tenancy as no fresh rent note was executed, neither rent was enhanced nor any fresh terms and conditions of tenancy were agreed upon and the tenant continued to pay the rent to the plaintiff-landlord in accordance with the original tenancy dated 12.8.1961 and thus the provisions of Section 14(3) of the Act are not applicable. He placed reliance upon *Babu Ram v. Narayan Dass* (14), *Munavar Basha and Anr. v. Narayanan and Anr.* (15) and *P. Ratnam Yeshwantraj Mudliyar v. Vimalchandra Shiv Datta Grovar and Ors.* (16).

17. I have considered the rival submissions made by learned counsel for the parties in the light of the judgments relied upon. In *Martin & Harris's* case (supra), the respondent No. 3 had purchased the premises on 30.6.1985 and sent notice to the tenant on 20.9.1985 and filed an application for eviction in January, 1986. The case was taken up for hearing by the court after a period of three years from the date of purchase of the premises by the landlord. The point for consideration was whether the landlord's application for eviction filed u/s 21(1)(a) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act was not maintainable in view of the proviso to the said section as it was filed before the expiry of three years from the date of purchase. The Hon'ble Supreme Court held that this proviso bars entertainment of the application, therefore, the stage at which the Court has to consider whether grounds mentioned in Clause (a) are made out or not will be reached when the Court takes up the application for consideration on merits. In the instant case, Section 14(3) of the Act provides that no suit for eviction on the grounds set forth in Clause (h) of Sub-section (1) of Section 13 shall lie before the expiry of five years. Thus, the contention of learned counsel for the appellants appears to be justified that the provisions of both the Acts in this regard are quite distinct as the proviso to Section 21(1) of the U.P. Act bars "entertainment" of the application for eviction while Section 14(3) of the Act bars even the institution of the suit for eviction. Yet there is another very important distinction between the provisions of these two Acts. Proviso to Section 21 of the U.P. Act makes a specific provision that where the building was in the occupation of a tenant before its purchase by the landlord, such purchase being made after the commencement of this Act, no application shall be entertained on the grounds mentioned in Clause (a) unless a period of three years has elapsed since the date of such purchase and this proviso further provided that the landlord has given a notice in that behalf to the tenant not less than six months before such application. There is no similar provision in Sub-section (3) of Section 14 of the Act putting an embargo on a purchaser-landlord for filing the suit for eviction before the expiry of five years. Rather Sub-section (3) of Section 14 of the Act makes a provision that no suit for eviction shall lie against a tenant on the

ground of reasonable and bonafide requirement of the landlord before the expiry of five years from the date the premises were let out to the tenant. In the instant case, admittedly, the suit shop was let out to the tenant on 12.8.1961 by the original landlord i.e. the Association and this fact as stated hereinabove has been admitted in the written statement firstly by the original tenant Sh. Chhote Khan and then by his two legal heirs in their joint written statement. It is significant to say here that they did not plead any change in the terms and conditions of the original tenancy and therefore, on the basis of this judgment in Martin & Harris's case (supra) the contention of learned counsel for the appellants cannot be accepted that merely on the ground that the plaintiff being new landlord on the basis of the purchase of the suit shop was barred for filing the present suit after a period of five years from the date of the purchase of the suit shop. Similarly the judgment of this Court delivered in Govind Narain's case (supra) does not extend any help to the appellants. In Govind Narain's case (supra) the terms of the tenancy were changed and new tenancy agreement was entered into or a new lease was executed by the tenant and thus the existing tenancy was deemed to have been surrendered and it was held that the tenant continued to remain in possession will be of no consequence and Section 14(3) of the Act would apply meaning thereby the premises will be deemed to have been let out to the tenant from the date of commencement of new tenancy and not from the date of original tenancy. But in the instant case, there was no change in the terms of the tenancy, no new tenancy agreement was executed and the rent was also not enhanced and the tenant on receiving information of the sale in favour of the plaintiff- landlord continued to pay the rent to the plaintiff-landlord and thus no fresh or new tenancy came into existence. In T.K. Lathika's case (supra) the original landlord gifted rented premises to his daughter-transferee landlord. The proviso (3) to Section 11 (3) of Kerala Buildings (Lease and Rent Control) Act provided that no landlord whose right to recover the possession arises under an instrument of transfer inter-vivos shall be entitled to apply to be put in possession until the expiry of one year from the date of the instrument. The transferee-landlord without waiting for the moratorium period of one year from the date of the gift to expire filed eviction petition. Having found two differences in the terms of the old and new lease that (i) the name of the landlord was changed and (ii) rent payable was enhanced from Rs. 65 per month to Rs. 150 per month, it was held by the Hon'ble Supreme Court that moratorium period would apply from the date of fresh lease deed. But this judgment is also not applicable in the instant case, as there is no such provision u/s 14(3) of the Act putting any embargo on the rights of the transferee landlord and secondly as already observed there is no change in the terms of the tenancy between the plaintiff- landlord and the tenant in this case. On the similar reasonings as stated hereinabove, the judgments delivered in P.M.C. Kunhiraman Nair, Mohammed Ibrahim, Konijeti Venkaya and another, Norat Mal, N.K. Kame, Smt. Sudha Mukherjee and Anandilal Bhanwarlal's case (all supra) are not applicable in the instant case as no terms and conditions of the old tenancy of 1961 were altered between the parties and the tenant continued to pay the rent to the plaintiff-

landlord in accordance with the terms and conditions of the old tenancy and thus no new fresh tenancy came into existence between the parties. In Dr. Harumal's case (supra), this Court dealing with the notice of terminating the tenancy held that the date of commencement of the tenancy of the tenants will be considered to be the original date of tenancy on which the appellants were admitted as tenants. Similar view was taken in Babu Ram's case (supra). In Munvar Basha and another's case (supra) the Madras High Court held that the premises were sold during the pendency of eviction proceedings, no new tenancy is created. In P. Ratnam's case (supra) the Bombay High Court held that true date of the commencement of the tenancy month is the date of the tenancy which was in force between the tenants and the previous owner in absence of any evidence to suggest that the date was altered. Thus, the provisions of Section 14(3) of the Act are not attracted in the instant case.

18. Now second submission made by learned senior counsel for the plaintiff-landlord that the appellants waived their right even if available to them is taken up. It is not in dispute that no such objection was raised in the written statement, during the trial and even before the First Appellate Court. This objection has been raised for the first time in memo of second appeal. As per learned counsel for the appellants, Section 14(3) of the Act puts a complete embargo on filing of the suit for eviction on the ground set forth in Clause (h) of Section 13 of the Act, hence such question can be raised at any stage. In Sardar Singh v. Prakash Singh (17), such an objection was taken in the written statement but that objection was not pressed into before the First Appellate Court. In view of these facts, this Court held that such an objection can be allowed to be raised in the second appeal, but there is material distinction between the facts of two cases as in Sardar Singh's case such objection was raised in the written statement itself and thus this court allowed such objection to be raised in second appeal, although that objection was not pressed into before the First Appellate Court. But in the instant case, such objection was not raised prior to filing the second appeal in this Court. Learned counsel for the appellants submitted that since Section 14(3) of the Act puts a complete restriction on filing the suit itself for eviction on the ground of personal requirement before the expiry of five years, no such waiver can be pleaded and the judgment of the Hon'ble Supreme Court delivered in Martin & Harris's case (supra) is not applicable as the principle of waiver was held to be applicable not with regard to filing the suit before the prescribed period but for filing the suit before the expiry of six months period of notice/Learned senior counsel for the plaintiff-respondent No. 1 contended that right in favour of the tenant u/s 14(3) of the Act is a right for the tenants and the tenant may waive such right and he placed reliance upon Martin & Harris's case (supra).

19. I have considered the rival submissions. Assuming that such an objection can be raised in this second appeal, the point for consideration is as to whether the appellants waived this right? Two points in this regard were raised for consideration by the Hon'ble Supreme Court in Martin & Harris's case (supra).

The first point was whether the landlord's application for eviction was not maintainable in view of the proviso to Section 21(1)(a) as it was filed before the expiry of three years from the date of the purchase of the suit premises and the second point was whether such application was not maintainable on the ground that it was filed prior to the expiry of six months from the date on which notice was given by the respondent to the appellant as required by same proviso. The relevant provisions of the proviso of Section 21 have already been referred hereinabove and the Hon"ble Supreme Court on the basis of the terminology "entertain" provided in the proviso came to this conclusion that filing of the suit itself was not barred. On the second point, it was held in view of the clear language of the proviso to Section 21(1) of the Act that application for possession had to be filed by the landlord concerned not earlier than the expiry of six months from the date of the issuance of the notice by the landlord and on the facts of the present case it cannot be disputed that the application was filed before the expiry of a period of six months. It was held that this provision was mandatory and thus to that extent it can be said that the application was premature. Further on the question of the wavier, the Hon"ble Supreme Court held that on the facts of the case, the answer must be in the affirmative as in the written statement the appellant amongst others did take up the contention that the application as filed by the respondent-landlord was not maintainable and was premature as six months period had not expired since the service of notice. But curiously enough thereafter, the said contention raised by the appellant in written statement was given a go-by for the reasons best known to the appellant. It is easy to visualise that if at that stage the appellant had pressed for rejection of the application on the ground of Section 21 (1)(a) as not showing completed cause of action due to non-expiry of six months from the date of service of notice invoking Order VII Rule 11(a) and (d) C.P.C., alleging that the plaint did not disclose a cause of action or it appears to be barred by law, the respondent-plaintiff could have withdrawn the suit on that ground under Order XXIII Rule 1 Sub-rule (3) C.P.C. as the suit based on grounds u/s 21(1)(a) of the Act would have been shown to have suffered from a formal defect and he would have been entitled to claim liberty to file a fresh suit on the same cause of action after the expiry of six months period-from the date of service of notice. That opportunity was lost to the respondent-landlord as the appellant did not pursue this contention any further. On the contrary appellant joined issues on merits and when the decree was passed against the appellant, even while challenging the said decree in appeal no such ground was taken in the memo of appeal nor was it argued before the First Appellate Court. Under these circumstances, the High Court rightly held that the contention, regarding the suit being premature must be treated to have been waived by the appellant. It was further held in para 17 of this judgment that if the prohibition imposed by the statute is with a view to affording protection to a party, such protection can be waived by the party. He may avail of it or he may not avail of it as he may choose. The decision of the Hon"ble Supreme Court is fully applicable to the instant case. As in the instant case, no such objection was raised in the written statement, during trial and

even during the first appeal. Section 11(3) of the Act obviously was enacted for the benefit and protection of the tenants and it is for the tenant to insist on it or to waive it. On the facts of the present case there is no escape from the conclusion that the said benefit of protection was waived by the appellants. In view of the observations made by the Hon"ble Supreme Court in para 18 of the judgment, it is easy to visualise that proceedings u/s 13(1)(h) of the Act would be between the landlord on the one hand and the tenant on the other. These proceedings are not of any public nature nor any public interest is involved therein. Only personal interest of landlord on the one hand and the tenant on the other hand get chashed and call for adjudication by the courts. In other judgment delivered in *Dhirendra Nath Gorai v. Sudhin Chandra Ghosh and Ors.* (18), the Hon"ble Supreme Court held that even the mandatory provision of law can be waived. According to the facts of this case, the judgment-debtor received the notice of the proclamation of sale, did not attend at the drawing up of the proclamation or did not object to the non-compliance of Section 35 of the Bengal Money Lenders Act, which provide that the Court should specify in the sale proclamation the property to be sold. It was held that noncompliance with Section 35 is a defect within the meaning of the second proviso to Order 21 Rule 90 C.P.C., and such mandatory provision can be waived only if it is not conceived in the public interest but in the interest of the party that waives it. Thus in view of the entire discussion made hereinabove, it must be held that the provisions of Section 14(3) of the Act, though are mandatory, confers protection to the tenant concerned and such protection can be waived by the tenant and thus it is held that the appellants had waived this right available to them u/s 14(3) of the Act.

20. Lastly, it was also submitted by learned counsel Sh. Hanjan that both the courts below did not consider issues relating to reasonable and bonafide requirement, comparative hardship and partial eviction in a proper manner. Having considered this submission in the light of the judgments of the courts below, i find no merit in the same as both the courts below having considered the material evidence available on the record arrived at concurrent findings on these issues and I find no perversity in the same.

21. Thus, no substantial question of law arises in these second appeals, hence all the three second appeals arc hereby dismissed.