

(2018) 06 CAL CK 0135
In the Calcutta High Court
Case No : S.A. 461 of 2008

Shyam Sundar Kalra

APPELLANT

Vs

State Of West Bengal & Ors.

RESPONDENT

Date of Decision : 13-06-2018

Acts Referred:

West Bengal Premises Tenancy Act, 1956 — Section 13, 13(1)(i)17(4)
Code of Civil Procedure, 1908 — Section 80, Section 80(1), Order 27 Rule 5A, Order 7
Rule 11(d), Order 7 Rule 11

Citation : (2018) 06 CAL CK 0135

Hon'ble Judges : SAHIDULLAH MUNSHI, J

Bench : Single Bench

Advocate : Jishnu Chowdhury, Robin Islam, Monika Kalra, Farhan Gaffar,
Abhishek Gupta

Final Decision : Allowed

Judgement

Sahidullah Munshi, J.

This second appeal at the instance of the defendant is directed against the judgment and decree dated 21st July, 2004 passed in Title Appeal No.106

of 2002 affirming those dated 29th April, 2002, passed by the learned Civil Judge (Junior Division), 1st Court, Howrah, in Title Suit No.9 of 1999.

The instant appeal was admitted by a Division Bench of this Court by an order dated 8th June, 2005 and an order of stay of all further proceeding in

Title Execution Case No.20 of 2004 pending in the Court of the Civil Judge (Junior Division), 1st Court, Howrah, was granted on condition that the

appellants would go on depositing an amount equivalent to the rent with the Executing Court every month within fifteenth day of the month next

following and first such for the month of June, 2005 was directed to be deposited by 15th of July, 2005. The appellants were also directed to pay all

arrears of rent, if any, within 15th of July, 2005 before Executing Court. While admitting the appeal, the Division Bench formulated the question of law

on which the appeal is to be heard. The said question is as follows :

“Whether the learned Court of appeal below committed substantial error of law in holding that the present appellants got protection under Section

17(4) of the West Bengal Premises Tenancy Act in the earlier suit being Title Suit No.141 of 1988 by totally overlooking the fact that the suit was

dismissed as not maintainable for want of a valid notice under Section 80 of the Code of Civil Procedure?”

Before dealing with the question as formulated by this Court earlier, a little background is necessary to decide this second appeal. The defendant

no.1/appellant before this Court is a monthly tenant in respect of the suit premises under the plaintiff/respondent. The defendant no.1 was a habitual

defaulter in payment of rent and got protection under Section 17(4) of the West Bengal Premises Tenancy Act in a previously instituted suit being

Title Suit No.141 of 1988 filed by the plaintiff. The said suit was dismissed holding that provisions of Section 80 of the Code of Civil Procedure

(hereinafter to be referred as the “said Code”) read with Order XXVII, Rule 5A was not complied with.

After dismissal of the said suit, defendant no.1 again failed to pay rent since September, 1997. Eviction notice was served on the defendant no.1 but

he did not quit and vacate in compliance with the notice to quit. Accordingly, the present suit was filed. Defendants entered appearance and contested

the suit by filing written statement. Issues are framed and one of the issues was on the question of default “Is the defendant no.1 a defaulter in

payment of rent?” Such issue was placed in Issue No.2. Issue No.2 was decided by the trial Court holding that while deciding the proceeding under

Sections 17(4) and 17(2A) of the West Bengal Premises Tenancy Act, the defendant no.1 was adjudged a defaulter in payment of rent. Trial Court

held that the defendant/appellant was defaulter since September, 1997 to February, 1998. Therefore, on consideration of the material on record and

the evidence led by the plaintiff, Court decided Issue No.2 in favour of the plaintiff and held that the defendant was a defaulter and he was liable to be

evicted.

Suit was decreed against which an appeal was preferred and by the impugned

judgment and decree the learned Appellate Court below has affirmed the judgment and decree of the learned trial Court holding that the defendant/tenant was a defaulter. While holding that the defendant/tenant is a defaulter, both the learned Courts below have concurrently found that in a previously instituted suit being Title Suit No.141 of 1988 the defendant filed an application under Section 17(4) of the West Bengal Premises Tenancy Act and obtained a protection against eviction on the ground of default. Provisions of Section 17(4) of the West Bengal Premises Tenancy Act say that if a tenant makes deposit or payment as required by sub-section (1), sub-section (2) or sub-section (2A), no decree or order for delivery of possession of the premises to the landlord could be passed on the ground of default in payment of rent by the tenant. Provisions of Section 17 are set out hereinbelow :-

17. When a tenant can get the benefit of protection against eviction. (1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in section 13, the tenant shall, subject to the provisions of sub-section (2), within one month of the service of the writ of summons on him, or where he appears in the suit or proceeding without the writ of summons being served on him, within one month of his appearance deposit in Court or with the Controller or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of eight and one-third per cent per annum from the date when any such amount was payable up to the date of deposit, and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate.

(2) If in any suit or proceeding referred to in sub-section (1) there is any dispute as to the amount of rent payable by the tenant, the tenant shall within the time specified in sub-section (1), deposit in Court the amount admitted by him to be due from him together with an application to the Court for determination of rent payable. No such deposit shall be accepted unless it is accompanied by an application for determination of the rent payable. On receipt of such application, the Court shall â?

(a) having regard to the rate at which rent was last paid, and the period for which default may have been made, by the tenant, make, as soon as

possible within a period not exceeding one year, a preliminary order, pending final decision of the dispute, specifying the amount, if any, due from the

tenant and thereupon the tenant shall, within one month of the date of such preliminary order, deposit in Court or pay to the landlord the amount so

specified in the preliminary order; and

(b) having regard to the provisions of this Act, make, as soon after the preliminary order as possible, a final order determining the rate of rent and the

amount to be deposited in Court or paid to the landlord and either fixing the time within which the amount shall be deposited or paid or, as the case

may be, directing that the amount already deposited or paid be adjusted in such manner and within such time as may be specified in the order.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), on the application of the tenant, the Court may, by order,

(a) extend the time specified in sub-section (1) or sub-section (2) for the deposit or payment of any amount referred to therein;

(b) having regard to the circumstances of the tenant as also of the landlord and the total sum inclusive of interest required to be deposited or paid under

sub-section (1) on account of default in the payment of rent, permit the tenant to deposit or pay such sum in such instalments and by such dates as the

Court may fix; Provided that where payment is permitted by instalments, such sum shall include all amount calculated at the rate of rent for the period

of default including the period subsequent thereto up to the end of the month previous to that in which the order under this sub-section is to be made

with interest on any such amount calculated at the rate specified in sub-section (1) from the date when such amount was payable up to the date of

such order.

(2B) No application for extension of time for the deposit or payment of any amount under clause (a) of sub-section (2A) shall be entertained unless it

is made before the expiry of the time specified therefor in sub-section (1) or sub-section (2), and no application for permission to pay in instalment

under clause (b) of sub-section (2A) shall be entertained unless it is made before the expiry of the time specified in sub-section (1) for the deposit or

payment of the amount due on account of default in the payment of rent.

(3) If a tenant fails to deposit, or pay any amount referred to in sub-section (1) or sub-section (2) within the time specified therein or within such

extended time as may be allowed under clause (a) of sub-section (2A), or fails to deposit or pay any instalment permitted under clause (b) of sub-

section (2A) within the time fixed therefor, the Court shall order the defence against delivery of possession to be struck out and shall proceed with the

hearing of the suit.

(4) If a tenant makes deposit or payment as required by subsection (1), sub-section (2), or sub-section (2A) no decree or order for delivery of

possession of the premises to the landlord on the ground of default in payment of rent by the tenant shall be made by the Court but the Court may

allow such costs as it may deem fit to the landlord: Provided that a tenant shall not be entitled to any relief under this sub-section if, having obtained

such relief once in respect of the premises, he has again made default in the payment of rent for four months within a period of twelve months.â??

The Courts below have passed the decree for eviction of the defendant on the ground of default holding that since the tenant/defendant obtained relief

under Section 17(4) of the said Act, the selfsame tenant cannot get relief on the ground of default for the second time as the bar has been created

under the proviso to Section 17(4) of the said Act. Proviso to Section 17(4) says that a tenant shall not be entitled to any relief under sub-section (4) if

he has once obtained relief under the sub-section in respect of the suit premises in question and if he has made default again in the payment of rent for

a period of four months within a period of twelve months, such tenant cannot get any further protection for the second default against eviction as

provided under Section 13 of the said Act. Section 13 of the said Act lays down the grounds on which a tenant is liable to be evicted and the same is

dealt with under Section 13(1)(i) which says that if a tenant has made a default in the payment of rent for two months within a period of twelve

months or for two successive periods in cases where rent is not payable monthly. Provisions of Section 13 are set out hereinbelow :â??13. Protection

of tenant against Eviction. â??

(1) Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any

Court in favour of the landlord against a tenant except on one or more of the

following grounds, namely:

a) where the tenant or any person residing in the premises let to the tenant without the previous consent in writing of the landlord transfers, assigns or

sublets in whole or in part the premises held by him;

b) where the tenant or any person residing in the premises let to the tenant has done any act contrary to the provisions of clause (m), clause (o) or

clause (p) of section 108 of the Transfer of Property Act, 1882 (IV of 1882);

c) where the tenant has been using the premises or any part thereof for allowing the premises or any part thereof to be used for immoral or illegal

purposes;

d) where the tenant or any person residing in the premises let to the tenant is guilty of any act of waste or of any negligence or default resulting in

material deterioration of the condition of the premises;

e) where the tenant or any person residing in the premises let to the tenant has been guilty of conduct which is a nuisance or annoyance to neighbours

including the landlord;

f) subject to the provisions of sub-section (3A) and section 18A where the premises are reasonably required by the landlord for purposes of building or

re-building or for making thereto substantial additions or alterations, cannot be carried out without the premises being vacated; ff) subject to the

provisions of sub-section (3A), where the premises are reasonably required by the landlord for his own occupation if he is the owner or for the

occupation of any person for whose benefit the premises are held and the landlord or such person is not in possession of any reasonably suitable

accommodation;

g) where the premises were let to the tenant for use as residence by reason of his being in the service or employment of the landlord and the tenant

has ceased before or after coming into operation of this Act to be in such service or employment;

h) where premises let out for residential purpose have been used for any other purpose for more than four months without the consent in writing of the

landlord;

i) where the tenant has made a default in the payment of rent for two months within a period of twelve months or for two successive periods in cases

where rent is not payable monthly;

j) where the tenant has given notice to quit but has failed to deliver vacant possession of the premises to the landlord in accordance with such notice;

k) where subsequent to the creation of the tenancy, the tenant having agreed in writing with the landlord to deliver vacant possession of the premises

to the landlord has failed to do so.

l) where the landlord is a member of the Armed Forces of the Union of India and requires it for the occupation of his family and produces a certificate

of the prescribed authority referred to in section 7 of the Indian Soldiers (Litigation) Act, 1925 (4 of 1925), that he is serving under special conditions

within the meaning of section 3 of the Act or is posted in a non-family area.

Explanation. "For the purpose of this clause:

(1) The certificate of the prescribed authority shall be conclusive evidence that the landlord is service under special conditions or is posted in a non-

family area.

(2) "family" means parents and such relations of the landlord as ordinarily reside with him and are dependent on him.

(2A) The sub-tenants if any, referred to in section 16 who have given notice of their sub-tenancies to the landlord under the provisions of that section

shall be made parties to any suit or proceeding for the recovery of possession of the premises by the landlord:

Provided that except in cases covered by clause (f) or clause (g) of sub-section (1), no decree or order for ejectment shall be passed against any such

sub-tenant unless any of the grounds mentioned in clauses (b) to (e) and (h) apply to him.

(3) Save as provided in sub-section (2) and sub-section (4), a decree or order for the delivery of possession of any premises shall be binding on every

sub-tenant.

(3A) Where landlord has acquired his interest in the premises by transfer, no suit for the recovery of possession of the premises on any of the grounds

mentioned in clause (f) or clause (ff) of subsection (1) shall be instituted by the landlord before the expiration of a period of three years from the date

of his acquisition of such interest:

Provided that a suit for the recovery of the possession of the premises may be

instituted on the ground mentioned in clause (f) of sub-section (1)

before the expiration of the said period of three years if the Controller, on the application of the landlord and after giving the tenant an opportunity of

being heard, permits by order, the institution of the suit on the ground that the building or re-building or the additions or alterations, as the case may be

are necessary to make the premises safe for human habitation.

(4) Where the landlord requires the premises on any of the grounds mentioned in clause (f) or clause (ff) of sub-section (1), and the Court is of opinion

that such requirement may be substantially satisfied by ejecting the tenant or a sub-tenant from a part only of the premises and allowing the tenant or

the sub-tenant to continue in occupation of the rest, then, if the tenant or sub-tenant agrees to such occupation, the Court shall pass a decree

accordingly and fix the proportionate rent for the portion remaining in the occupation of the tenant or the sub-tenant. The rent so fixed shall be deemed

to be the fair rent for purposes of this Act. If the tenant does not agree but a sub-tenant agrees to such occupation, no decree or order for ejectment

shall be passed against such sub-tenant and such subtenant shall become, with effect from the date of the decree or order, a tenant directly holding

under the landlord.

(5) Where under sub-section (2) a decree or order for ejectment is passed against a tenant but not against, a sub-tenant, the sub-tenant shall become

with effect from the date of the decree against the tenant, a tenant directly holding under the landlord in respect of the premises in his occupation and

he shall pay such rent as may be fixed by the Court. The rent so fixed shall be deemed to be the fair rent for purposes of this Act.

(6) Notwithstanding anything in any other law for the time being in force, no suit or proceeding for the recovery of possession of any premises on any

of the grounds mentioned in sub-section (1) except the grounds mentioned in clauses (j) and (k) of that subsection shall be filed by the landlord unless

he has given to the tenant one month's notice expiring with a month of the tenancy.

While passing the decree for eviction on the ground of default it has been held by the learned Courts below that having regard to the tenant's

obtaining relief under Section 17(4) of the said Act, such tenant is not entitled to any further remissions and/or relief under Section 17(4) of the said

Act on the question of default for the second time in the second suit and, therefore, the plaintiff was entitled to get a decree for eviction of such tenant on the ground of default. The learned Courts below, while passing the decree for eviction, held that proviso to Section 17(4) is a bar for the defendant to avail any benefit under Section 17(4) of the said Act in the second suit meaning thereby that once the tenant has availed the opportunity to make payment of the defaulted rent within the meaning of Section 17(4) of the said Act in the first suit, the said tenant is not entitled to any such benefit to make payment of the defaulted amount in favour of the landlord to avoid the risk of being a defaulter within the meaning of Section 13(1)(i) of the said Act. The question which was formulated at the time of admission is only to decide in the second appeal as to whether the learned Court of Appeal below committed substantial error of law in holding that the present appellants got protection under Section 17(4) of the West Bengal Premise Tenancy Act in the earlier suit being Title Suit No.141 of 1988 by totally overlooking the fact that the said suit was dismissed as not maintainable for want of valid notice under Section 80 of the Code of Civil Procedure. Fact as we have discussed earlier that issues were framed in the earlier suit being Title Suit No.141 of 1988. Out of those issues one of the issues was â??whether the defendant/appellant was a defaulter?â? Out of six issues framed by the Court, the first issue was â??whether the suit was maintainable?â? and second issue was â??whether the defendant/appellant was defaulter?â? Learned trial Court answered all the issues, although, in answering to issue no.1 it had held that the suit was not maintainable for want of notice under Section 80 of the Code of Civil Procedure. Although, in the said suit being Title Suit No.141 of 1988 it was held by the learned trial Court that the suit was not maintainable for want of notice but at the interlocutory stage some order was passed on the defendantâ??s application under Section 17(4) of the said Act whereby the tenant was allowed to deposit the defaulted rent and the default was thereby condoned. Learned trial Court held that since the tenant got benefit of Section 17(4) of the said Act and deposited the amount of default, there could not be any decree for eviction against such tenant in view of the provisions of Section 17(4) of the said Act which says that no decree or order for delivery of possession of the premises could be made by the Court.

In the present fact scenario, we have a case where a tenant defaulted monthly rent and suit for eviction was filed against him but taking advantage under the Statute he availed the benefit provided under Section 17(4) of the said Act and deposited the defaulted rent without knowing anything that the said suit would, ultimately, be dismissed by the Court on the question of maintainability for want of notice under Section 80 of the Code of Civil Procedure. Therefore, question arises whether the orders which were passed at the interlocutory stage irrespective of Section 17(4) of the said Act are at all orders within the meaning of those Sections or whether it could be said that the tenant/appellant got the benefit of the said Section, or could it be said that the subsequent default for which the present suit has been filed is a second default within the meaning of proviso to Section 17(4) of the said Act. When the Court requires that if a suit to be instituted against Government or State Authorities, Section 80 notice is a must and when Court holds that in absence of such notice the suit is absolutely barred and non-est, meaning thereby that the suit was not maintainable in law, question would arise what would be the fate of the orders, if any, passed at any stage of the suit by the Court? The orders so passed during the pendency of the suit may have some meaning during the lifetime of the suit but in my opinion, those will be meaningless once Court holds that the suit was not maintainable in law.

This observation and/or finding arrived at by the Court goes to the very root of the suit where it hits the Court's jurisdiction as also the cause of action. Cause of action is a bundle of fact. For every cause of action a suit may not be filed. Suit can be filed provided there is a cause of action but at the same time, the Court entertaining a suit on the basis of a declaration, cause of action must have jurisdiction to entertain such suit. Therefore, cause of action and/or jurisdiction of the Court are interrelated. When there is a cause of action but the Court does not have jurisdiction, the suit must fail.

When the Court has initial jurisdiction but there is no cause of action, there also the suit will fail. The difference between the two situations can be analysed in a way that when the Court has jurisdiction but no cause of action, the suit requires adjudication, but in a case where Court has got no jurisdiction but the suit is alive with the cause of action, then the suit should be dismissed in limine for want of jurisdiction. The second situation is

prevalent in the present case. Although, Court has decided the matter on issues including the issue of jurisdiction and default with the intention of

finally adjudicating the lis between the parties, but the same would not be done having regard to the jurisdictional issue. It is also important to discuss in

this case as to the nature of the relief under Section 17(4) of the said Act passed by an appropriate Court in an eviction proceeding whether this relief

provided under Section 17(4) is of permanent nature or all are interim in nature.

The learned Advocate appearing for the appellant submitted that the relief by use of Section 17(4) of the said Act becomes non-est the moment Court

holds that it is without jurisdiction and the suit is not maintainable meaning thereby suit was not to be filed. To substantiate his such argument learned

Advocate relied on the following judgments :

â?¢ The State of Andhra Pradesh â?¢ Vs. â?¢ Gundugola Venkata Suryanarayana Garu, reported in AIR 1965 SC 11;

â?¢ M/s. Premier Enterprises & Ors. â?¢ Vs. â?¢ The State of Meghalaya & Ors., reported in AIR 1992 GAUHATI 98;

â?¢ Kavita Trehan (Mrs.) & Anr. â?¢ Vs. â?¢ Balsara Hygiene Products Ltd., reported in (1994) 5 SCC 380;

â?¢ Pawan Kumar Gupta â?¢ Vs. â?¢ Rochiram Nagdeo, reported in (1999) 4 SCC 243 and

â?¢ Jeevraj Munshi Shah â?¢ Vs. â?¢ Collector, Thane, reported in 1995 SCC Online Bom 5.

The decision in the case of State of Andhra Pradesh (supra) has been placed by Mr. Chowdhury to show that for want of notice under Section 80,

Civil Procedure Code, a suit is liable to be dismissed and this is a question of jurisdiction of the Court. The position of law with regard to the mandatory

requirement under Section 80 of the Civil Procedure Code, before filing a suit against Government, is admitted by the respondent inasmuch as the

respondent never challenged the order of dismissal of the suit on the ground of absence of notice under Section 80 of the Civil Procedure Code. In the

said decision it has been held by the Honâ??ble Apex Court that object of the notice under Section 80 is to give the Government or the public servant

concerned, an opportunity to reconsider its legal position and if that course is justified to make amendment or to settle the claim out of Court.

According to the Honâ??ble Apex Court, this Section is imperative and must

undoubtedly be strictly construed. The Honâ??ble Apex Court further held that failure to serve a notice complying with the requirements of the Statute would entail dismissal of the suit which has exactly happened in the present case and Mr. Chowdhury appearing for the appellant seeks benefit from this decision to the effect that the suit was dismissed as not maintainable and, therefore, passing of any order under Section 17(4) of the said Act has no relevance in the matter. If the plaintiff/respondent did not challenge the default made by the defendant/appellant/tenant, thereby, allowing the appellantâ??s prayer under Section 17(4) of the said Act, is inconsequential in nature, in a suit which has, ultimately, been held to be not maintainable for want of notice under Section 80 of the Code of Civil Procedure.

The next decision in the case of M/s. Premier Enterprises (supra) relied on by Mr. Chowdhury, is also on the same line to show the difference

between the scope of an application under Order VII, Rule 11(d) and Section 80 of the Code of Civil Procedure. The decision makes a distinction

between the two situations while Order VII, Rule 11(1)(d) attracts rejection of plaint where the suit appears from the statement in the plaint to have

been barred by any law, but if the provisions of subsection (1) of Section 80, Civil Procedure Code is considered, there is no chance to file a suit

against the Government or its public officer before expiry of the statutory period of notice. Therefore, the suit becomes non-est in the eye of law.

Court does not assume jurisdiction, at all, even to consider whether or not the plaint is liable to be rejected. In this decision, the Court, however, has

held that the word â??dismissedâ?? includes the rejection of the plaint where the dismissal is without final judgment on the controversy with regard to

the rights of the parties. Therefore, the Court held that the dismissal of the suit as not maintainable itself implies the rejection of the plaint.

The decision in Kavita (supra) has been placed to rely on the proposition that when an interlocutory order passed in a suit, although, in order to give

benefit to the defendant but upon dismissal of the suit the interlocutory order stood set aside. In this case, since benefit was given to the tenant under

Section 17(4) of the said Act, it has been contended by the plaintiff/respondent/landlord that once benefit has been taken under the said provision he is

not entitled to get any benefit against delivery of possession in view of the

proviso added to Section 17(4) of the said Act by way of amendment. This decision is pat on the point of the present case with regard to advantages and disadvantages obtained by a party in a suit by way of interlocutory order and the fate of it in the event of dismissal of the suit on the ground of maintainability. The decision of Pawan Kumar Gupta (supra) has been cited by Mr. Chowdhury on the issue of res judicata. He has relied on paragraph 19 of the said judgment which is quoted below :

19. Thus the sound legal position is this: if dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as res judicata in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of res judicata in the subsequent suit.

However, the question of res judicata is not applicable in the present case. Therefore, this decision has no application in the facts and circumstances of this case. The last decision in the case of Jeevraj Munshi Shah (supra) cited by Mr. Chowdhury is also on the question of dismissal of a suit for want of notice under Section 80 of the Code of Civil Procedure vis-a-vis rejection of plaint under Order VII, Rule 11, Code of Civil Procedure. These issues have already been discussed earlier.

Ms. Monika Kalra, learned Counsel appearing for the respondent/landlord submitted that the decision which was taken by the Court in the earlier suit is binding upon the parties including the tenant. According to her, even if Court holds that the suit was not maintainable but Court was allowed to decide the matter and a decision has been taken by the Court wherein the Court made a finding that the defendant was a defaulter and in view of the earlier order passed under Section 17(4) of the said Act Court did not exercise the jurisdiction to pass a decree on the ground of default.

According to the learned Advocate for the respondent, the concurrent finding on fact is that the tenant is not entitled to get benefit for the second default, is absolutely all right and she supports the decree for eviction passed by

the Courts below on the ground of default cannot be interfered with in the second appeal. She further submitted that since the tenant has committed a default for the second time in respect of the selfsame tenanted premises, he is not entitled to make any further application under Section 17(4) of the said Act having regard to the restriction imposed by the proviso appended to Section 17(4) of the said Act. Learned Advocate appearing for the respondent relied on the following judgments in support of the fact that even if a decision is an erroneous decision, it operates as a *res judicata* in between the selfsame parties. In support of her argument, learned Counsel appearing for the respondent has submitted the following judgments :

â?¢ Tarini Charan Bhattacharjee & Ors. â?¢ Vs. â?¢ Kedar Nath Haldar, reported in AIR 1928 Cal 777;

â?¢ S. Nagaraj (dead) by LRs. & Ors. â?¢ Vs. â?¢ B.R. Vasudeva Murthy & Ors. etc. etc., reported in (2010) 3 SCC 353;

â?¢ Satyendra Kumar & Ors. â?¢ Vs. Raj Nath Dubey & Ors., reported in (2016) 14 SCC 49;

â?¢ Ishwar Dutt â?¢ Vs. â?¢ Land Acquisition Collector & Anr., reported in AIR 1005 SC 3165;

â?¢ Supreme Court Employees Welfare Association â?¢ Vs. â?¢ Union of India & Ors., reported in AIR 1990 SC 334; and

â?¢ Gangappa Gurupadappa Gugwad â?¢ Vs. â?¢ Rachawwa & Ors., reported in AIR 1971 SC 442.

Citing the abovementioned judgments the respondent urged that the appellant herein being the tenant, defaulted in payment of monthly rent with effect from 1st October, 1982 and hence the respondent/landlord instituted the suit being Title Suit No.141 of 1988 before the learned Civil Judge (Junior Division), 1st Court, Howrah on the ground of â?¢defaultâ?¢ and prayed for reliefs mentioned therein. Landlord/plaintiff/respondent, before institution of the suit, issued notice to quit to the tenant/appellant but, however, did not issue notice under Section 80 of the Code of Civil Procedure. The appellant/tenant entered appearance in the said suit against the same by filing written statement and vide order no.113 dated 23rd June, 1993, deposited arrear rent along with statutory interest. According to the respondent, the tenant/defendant/appellant availed the benefit as provided under Sections 17(1), 17(2) and 17(2A) of the West Bengal Premises Tenancy Act,

1956.

The learned Counsel appearing for the respondent further submitted that suggested issues were submitted before the Court; Court framed issues;

parties argued at length; Court dealt with issues but, ultimately, the suit was dismissed holding, inter alia, that for want of notice the suit was not

maintainable at all. According to the respondent, since other issues were also considered by the Court, although, the suit was dismissed for want of

notice under Section 80, the findings arrived at by the Court on other issues are also binding upon the defendant/tenant/appellant. It has been further

submitted that the defendant/appellant, having not filed any application under Order VII, Rule 11 of the Code of Civil Procedure for rejection of the

plaint of Title Suit No.141 of 1988, Court has rightly held in the subsequent suit (which is now under challenge) that the

defendant/tenant took benefit under Section 17(4) of the West Bengal Premises Tenancy Act, 1956 and, therefore, he is not entitled to take further

benefit under Section 17(4) of the West Bengal Premises Tenancy Act, 1956 in the subsequent suit being Title Suit No.9 of 1999 (under consideration

in this appeal). Learned Counsel submitted that protection once availed in the earlier suit further protection is not available to the tenant in respect of

the suit premises. Therefore, she justifies that trial Court has rightly passed the decree and there is no illegality on the part of the first Appellate Court

in affirming the said decree. Respondent has further submitted that appellant had availed the benefit of default in the former suit and it has waived the

rigours of Section 80 notice by contesting the former suit. Learned Counsel has further submitted that if the Court decides various issues raised on the

pleading it is difficult to see why the adjudication of the rights of the parties apart from the question of applicability of Section 80 of the Code and

absence of notice thereunder should not operate as res judicata in a subsequent suit where identical questions arose for determination between the

selfsame parties.

Learned Counsel has placed the abovementioned decisions to show that the decision arrived at by the trial Court in Title Suit No.141 of 1988 operates

as res judicata in between the parties in the subsequent suit irrespective of the dismissal of the suit for want of notice under Section 80 of the Code of

Civil Procedure and the respondent has submitted that the decision in that

previous suit has attained its finality. Simple question arises if that decision operates as res judicata and is binding on the defendant what was the necessity for the respondent to file a fresh suit for eviction of the tenant again on the ground of default? Conduct of the respondent itself shows that he has accepted the order of dismissal of Title Suit No.141 of 1988 and it cannot be argued that the decision is final decision between the parties so far as default is concerned or that such decision has any binding effect upon the tenant/appellant.

The argument advanced by the respondent appears to have adverse effect against him. The sole question is whether the learned Court below is justified in holding that the appellant is not entitled to get any benefit under Section 17(4) in the present suit having regard to the proviso thereof or whether such proviso has got any manner of application in the subsequent suit having regard to the fact that the earlier suit stood dismissed for want of notice under Section 80 of Code of Civil Procedure and particularly when the trial Court held that the suit was not maintainable, question necessarily arises when the Court holds that the suit is not maintainable before it any decision arrived at by the same Court on other issues whether has got any impact on the rights of the parties.

According to the purport of Section 80 in absence of notice, no suit can be brought against the Government and its public officer before expiry of the period of notice. If that be so, when the Court holds that the suit was not maintainable in absence of notice, decision, if any, arrived at by the Court in such a dismissed suit, cannot be binding upon the parties. Law is settled by the Honâ??ble Apex Court in the case of Pawan Kumar Gupta (supra) which decided that if dismissal of the prior suit was on a ground questioning the maintainability of the suit, any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause, a decision made in the suit on a vital issue involved therein would operate as res judicata in a subsequent suit between the same parties and it would be for the defendant in such a suit to choose whether the judgment should be appealed against or not. If such defendant does not choose to file the appeal he cannot thereby aver the bar of res judicata in the subsequent suit.

I have considered the judgments of the learned Courts below and their concurrent finding on the issue that the tenant is not entitled to any protection against eviction on the ground of default inasmuch as in the previously instituted suit he obtained the benefit of Section 17(4) whereby he was allowed to pay the defaulted rent but I am not convinced by the submission made by the learned Counsel appearing for the respondent that proviso to Section 17(4) of the said Act is applicable in this case so that the ground of default taken in the second suit can be termed to be a "second default" within the meaning of the proviso to Section 17(4) of the said Act. It is my considered opinion that when the Court passes an order dismissing the suit holding it to be not maintainable for want of notice under Section 80, I respectfully disagree with the learned Courts below and hold that there could not be any occasion for the Courts to come to any finding that the tenant was liable to be evicted on the ground of default. I also hold that it was absolutely without jurisdiction for the Court to hold that the tenant made any default in respect of the period alleged in the plaint of the previously instituted suit of 1988. The suit should be considered to be non-est in between the parties. If a suit is considered to be non-est it is to be considered that there was no cause of action against the defendant also for the said suit and, therefore, the order which was passed on the application of the appellant/tenant under Section 17(4) of the said Act, cannot stand in the way of the tenant taking a defence in the subsequently instituted suit on the ground of default, nor can it be held that defence of protection against delivery of possession could be struck off. Since the first suit was held to be not maintainable it should be construed that the ground of default raised by the landlord/respondent in the first suit, had been waived.

The submission by the learned Counsel for the respondent that even an erroneous decision will operate as a res judicata, has no leg to stand inasmuch as the decision arrived at by the Court in the previously instituted suit was a decision without jurisdiction and is a nullity and the order which runs in nullity cannot operate as a res judicata in between the parties. More so, in this case, the respondent has accepted the finding of the Court below in Title Suit No.141 of 1988 and accepting such decision he has filed a second suit on the ground of default. Hypothetically, if the submission of learned Advocate for the respondent is accepted that the decision operates as res judicata then filing of the second suit itself would have been barred. While

the respondent himself filed the second suit it goes without saying that he has accepted the position that Court was devoid of any jurisdiction to decide

any issue. Therefore, it is immaterial whether the Court at the first instance refused to pass any decree for eviction on the ground of default on the

issue that defendant/appellant was granted relief under Section 17(4) of the said Act. Therefore, in my considered view, both the learned Courts

below have committed grave error in holding that the tenant/appellant is liable to be evicted on the ground of default since he has committed such

default for the second time.

I do not find any substance in the argument advanced on behalf of the respondent and, therefore, the appeal is allowed on contest. There will be,

however, no order as to costs save and except what has already been awarded in favour of the respondent in his application being C.A.N. 2184 of

2018. Appeal is allowed and judgments and decree passed by the learned Courts below are set aside. Urgent Photostat certified copy of this judgment,

if applied for, be given to the learned advocates for the respective parties upon compliance of all formalities.