
(1997) 06 CAL CK 0022
In the Calcutta High Court
Case No : S.A. No. 621 of 1993

Smt. Minati Sen alias Smt. D.P. Sen

APPELLANT

Vs

Kalipada Ganguly and others

RESPONDENT

Date of Decision : 27-06-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 22 Rule 10A, Order 22 Rule 4(4), Order 22 Rule 9, 100
Evidence Act, 1872 — Section 63
Transfer of Property Act, 1882 — Section 108
West Bengal Premises Tenancy Act, 1956 — Section 13(1)

Citation : AIR 1997 Cal 386

Hon'ble Judges : Tarun Chatterjee, J

Bench : Single Bench

Advocate : Sudhis Dasgupta and Amal Krishna Saha, for the Appellant; Ranabir Mahapatra and Santi Ranjan Das, for the Respondent

Judgement

1. This appeal is against a judgment of affirmance in a suit for eviction. The respondent, as a plaintiff, instituted the suit against the predecessor in interest of the appellants for eviction from the premises as fully described in the schedule of the plaint on the grounds of bona fide requirement, subletting and violation of Sections 108(m)(o)(p) of the Transfer or Property Act.

2. So far as the ground of bona fide requirement is concerned, it appears that during the pendency of this appeal, an application for taking into consideration of subsequent events has been filed at the instance of the appellant to which affidavit in opposition and affidavit in reply have also been filed by the Parties. When some argument was advanced by the learned counsel for the Parties on the question of bona fide requirement, an affidavit was filed by the plaintiff/respondent from which it appears that the plaintiff/respondent does not press ground of bona fide requirement. In view of the fact that an affidavit has been filed by the plaintiff/respondent in this Court saying that he is not pressing the ground of bona fide requirement for eviction of the appellant, no decree can be

passed on the ground of bona fide requirement.

3. So far as the ground of violation of Section 108(m)(o)(p) of the Transfer of Property Act is concerned, I am of the view that the Appellate court acted illegally in granting a decree for eviction on such a ground. In the plaint, a case was made out that the tenant had illegally constructed one reservoir in the bathroom of the first floor and also another reservoir on the ground floor. The fact of making such construction was however, denied by the defendant/tenant in his written statement. An issue was framed which is as follows : --

"Is the defendant guilty of damaging the suit property by way of addition or alteration?"

This was issue No. 7. Although this issue was not pressed by the plaintiff / respondent in the trial Court, the appellate Court however, granted a decree on this ground. In my view, when issue No. 7 was not pressed by the plaintiff/ respondent in the trial Court, there was no justification for the appellate Court to go into this question and decide the same in favour of the plaintiff/ respondent.

In the case of Premchand Manickchand Vs. Fort Gloster Jute Manufacturing Co. Ltd. (Oil Mill), , it has been held that when a party has raised an issue in the trial Court, and deliberately has abandoned it, he cannot be allowed to raise it again at the appellate stage. Mr. Muhapatra, appearing for the plaintiff/respondent also did not seriously argue that it was open to the appellate Court to decide the said issue in appeal although the plaintiff/ respondent did not press the same in the trial Court.

4. In view of the above, therefore, the ground for eviction relating to violation of Section 108(m)(o)(p) of the Transfer of Property Act was not available to the plaintiff/respondent. Accordingly, no decree could be passed by the appellate Court on such a ground.

5. Let me now consider the ground of subletting. In the plaint, the plaintiff asserted that the original defendant had sublet apart of the suit premises to one Dr. A. G. Roy without the consent of the plaintiff or his predecessor in interest in writing. In denying the case of subletting as made out by the plaintiff/ respondent, the original defendant categorically asserted in his written statement that he and the said Dr. A. G. Roy used to reside jointly in the suit premises and were inducted by the original plaintiff, Saroja Bala Devi (deceased) on rental basis with the understanding that the original defendant will live with Dr. A. G. Roy in the suit premises. It was also asserted in the written statement that the tenancy commenced in the year 1956 and since; then Dr. A. G. Roy was living there and that their tenancy was a joint tenancy and they paid rent jointly since inception of the tenancy. The trial Court decreed the suit on the ground of subletting on a finding that the defendant had practically admitted that the rent was paid in his name and that at the time of induction the original defendant took possession first of the suit premises and thereafter Dr. A. G. Roy started living in the ground floor exclusively in the suit premises. The trial Court,

negated the case of the defendant of joint tenancy. The trial Court came to a finding that not a single scrap of paper was filed by the original defendant to establish the case of joint tenancy. The contention of the original defendant before the trial Court on the question of waiver with regard to subletting was also negated on the ground that the question of waiver of right to evict on any ground under the West Bengal Premises Tenancy Act could not be taken even though the plaintiff or the original landlady had the knowledge that Dr. A. G. Roy was living with the original defendant for a long time. On an admission of the defendant, the trial Court found that the original defendant had surrendered part of his tenancy in favour of Dr. A. G. Roy who used to possess the same since a long time back. The trial Court also found that the original defendant by his admission that such surrender was coupled with the delivery of exclusive possession of a part of the tenancy over which the defendant lost all his control and as the defendant made out a case of joint tenancy, there was some sort of monetary transaction between the original defendant and the said Dr. A. G. Roy. On the aforesaid findings, the trial Court decreed the suit on the ground of subletting. In appeal, the finding of the trial Court was affirmed. The appellate court relied on Exhibits 1 and 1/a and came to a conclusion that the tenancy was not a joint tenancy, but the tenancy was solely in the name of D. P. Sen (original defendant). Apart from that finding, the appellate Court also took into consideration the admission of the original defendant made in paragraphs 4, 8 and 10 of the written statement and on the basis of such admission, came to a conclusion that it was the original defendant who was inducted in the suit property by the predecessor in interest of the plaintiff and Dr. A. G. Roy was in exclusive possession of the ground floor of the suit premises. The appellate Court also came to a conclusion that the original defendant and Dr. A. G. Roy were paying rent to the landlady simply by making mutual adjustment regarding payment of rent. On the basis of the aforesaid findings, the appellate court came to a conclusion that the original defendant D. P. Sen had not only parted with possession of a part of the suit premises to Dr. A. G. Roy, but also realised rent from him. Accordingly, the appellate Court affirmed the decree of the trial Court on the ground of subletting.

6. Before me, the findings on the question of subletting have been challenged by Mr. Dasgupta, appearing on behalf of the defendant/appellant by making the following submissions :

Firstly, he argued that since the counter-foils of the rent receipts did not bear the signature of the original defendant as would be evident from Exhibits 1 and 1/a, no reliance could be placed by the Courts below on such Exhibits 1 and 1/A to hold that the original defendant was the sole tenant of the suit premises, nor it could be held that the plea of joint tenancy was not proved. In support of this contention, Mr. Dasgupta relied on a Supreme Court decision in the case of *Idandas v. Anant Ramchandra* AIR 1982 SC 127.

Secondly, Mr. Dasgupta argued that in view of the fact that the tenancy was

created in the year 1957 and Dr. A. G. Roy came into possession of a part of the suit property in 1958 and the mother of the original landlady was alive till 1981 and as no step was taken by the mother during her lifetime against the original defendant and as the original defendant and Dr. A.G.Roy were residing in the suit premises for along time, the Courts below ought to have held that the tenancy in question was a joint one and, therefore, the case of subletting was not proved. In support of this contention. Mr. Dasgupta relied on a decision of the Supreme Court in the case of A. 5. A.S. Sulochana Vs. C. Dharmalingam, Mr. Dasgupta also relied on two other decisions, one of which is the Privy Council decision reported in (1915) 42 Ind APP 103 : (AIR 1915 PC 2) (Motabhooy Mulla Essabboy v. Mulji Haridas) and the other reported in Fateh Chand Murlidhar Vs. Juggilal Kamalapat, and on reliance of the aforesaid two decisions Mr. Dasgupta contended that the admission contained in paragraphs 4, 8 and 10 of the written statement must be said to have been explained in view of the fact that no step was taken by the mother of the plaintiff during her life time against the original defendant.

Mr. Dasgupta thereafter contended that in the present case the Courts below on the evidence and facts pleaded ought to have held that the tenancy was taken in the benami of the original defendant, although Dr. A. G. Roy was residing with the original defendant jointly in the suit premises. In support of the case of plea of benami. a Division Bench decision of this Court reported in Anadi Mohon Ghose and Others Vs. Rabindra Nath Dutta and Others, and also a decision of the Supreme Court in the case of R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives), were cited. Mr. Dasgupta lastly argued that as Dr. A. G. Roy had resided with the original defendant during the lifetime of the original owner and thereafter with the knowledge of the present plaintiff, the defendant/appellant cannot be evicted on the ground of subletting as the plaintiff/respondent had waived his right to evict the defendant/appellant on such a ground.

7-8. On behalf of the plaintiff/respondent, Mr. Ranabir Mahapatra contested the submissions so made by Mr. Dasgupta. Mr. Mahapatra contended that the question of waiver could not arise, even if rent was accepted by the landlord from the tenant with the knowledge that a subtenant was inducted by the plaintiff/respondent against the original tenant for a long time. Mr. Mahapatra further contended that since, for induction of a sub-tenant, consent in writing was mandatory and not directory and as consent in writing was not taken by the original defendant to induct Dr. A. G. Roy, the Courts below were justified in decreeing the suit on the ground of subletting. So far as the admissibility of exhibits 1 and 1/A in evidence was concerned, Mr. Mahapatra submitted that in view of the admission made by the defendant in paragraphs 4, 8 and 10 of the written statement the question of admissibility of the exhibits 1 and 1/A would not be fatal. So far as the question of long stay by the sub-tenant in the suit premises with the knowledge of the landlord was concerned. Mr. Mahapatra submitted that long stay in the suit premises with the knowledge of the landlady

cannot take away the right of the landlady to evict the tenant on the ground of subletting, as the statute itself prohibited subletting without the permission of the landlord in writing,

9. Having heard Mr. Dasgupta for the appellant and Mr. Mahapatra for the respondent and after giving my anxious considerations to the submissions made on behalf of the parties and taking into consideration the entire materials on record including the evidence and the findings arrived at by the Courts below on the question of subletting. I am of the view that there is no ground to interfere with the concurrent findings of fact arrived at by the Courts below on the question of subletting.

10. So far as the submissions of Mr. Dasgupta with regard to long-stay of Mr. A. G. Roy and no step was taken after such induction for a long time are concerned. I am in full agreement with the submission of Mr. Mahapatra that only because no step was taken against the tenant for inducing the sub-tenant for a long time, the right to evict the tenant cannot be said to have been waived. In my view, the question of waiver in this case does not arise at all. In *Duli Chand (Dead) by Lrs. Vs. Jagmender Das*, the Supreme Court has observed as follows ;

"It was held that it was necessary for the tenant to obtain the consent in writing to subletting the premises. The mere permission or acquiescence will not do. The consent shall also be to the specific subletting or parting with possession. This Court, further observed that the requirement of consent to be in writing was to serve a public purpose, i.e. to avoid dispute as to whether there was consent or not, and that, therefore, mere permission or acquiescence will not do. While nothing that everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his individual capacity in the context of the statutory provision of the Delhi Rent Control Act, this Court further held that the requirement as to the consent being in writing was in the public interest and that, therefore, there cannot be any question of waiver of a right dealing with the rights of the tenant or landlord. The words used in the Section are "without obtaining the consent in writing of the landlord". If the words were "without consent of the landlord" it might mean without consent express or implied and in that sense question of waiver may arise. The question of implied consent will not arise, if the consent is to be in writing."

11. From the aforesaid observations of the Supreme Court, it is, therefore, clear that the question of waiver of right to evict on the ground of subletting shall not arise although Dr. A. S. Roy was allowed to stay in the suit premises with the knowledge of the plaintiff/respondent, when no consent was obtained in writing from the landlord. In this connection reliance can also be placed on the Supreme Court decision in the case of *Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others*, In paragraph "18" of the Said decision of the Supreme Court, the Apex Court of our country has observed as follows:--

"He contended that in the light of the aforesaid authorities in this case, there was no parting of legal possession in favour of the sublessee. We are unable to accept this position. In the instant case, exclusive possession was given to the sublessee and the tenant had transferred the right to possess in that portion. It is clear that subletting was done without the consent in writing of the landlord. If that is so there was inevitably breach of the covenant."

12. From the above observation of the Supreme Court and in view of the findings arrived at by the Courts below which were not challenged on behalf of the appellant, excepting the submissions made by Mr. Dasgupta as noted earlier it must be held that the case of subletting as found by the Courts below must be accepted. Again in a recent decision of the Supreme Court in the case of Ram Saran Vs. Pyare Lal and another, the Supreme Court has observed that mere knowledge of the landlord about occupation of the tenanted premises by a sub-tenant and acceptance of rent for the tenanted premises tendered by the tenanted in the name of sub-tenant will not create subtenancy unless induction of such tenant is made with the written consent of the landlord. In view of the aforesaid decisions of the Supreme Court as noted above, it is no longer *res integra* that mere knowledge of the landlord about the occupation of tenanted premises by the subtenant and acceptance of rent for the tenanted premises shall not create a valid sub-tenancy, an less induction of sub-tenancy is made with the written consent of the landlord.

13. For the reasons aforesaid, the Courts below were fully justified in holding that the acceptance of rent shall not constitute legal and valid sub-tenancy and the landlord shall not be estopped from claiming eviction of unauthorised sub-tenant along without lawful authority. It cannot therefore, be held that the right of the landlord to evict the tenant can be said to have been waived only because the sub-tenant with the knowledge of the plaintiff/respondent or of his predecessor was in possession of the suit premises for a long time. In the case of Ram Saran Vs. Pyare Lal and another, the decision cited by Mr. Dasgupta that is A.S. Sulochana Vs. C. Dharmalingam, was also considered. Apart from that the decision of the Supreme Court in the case of A.S. Sulochana Vs. C. Dharmalingam, which was cited on behalf of the appellant was based on a completely different fact. In that decision the facts were like this :--

"1. The father of the landlord had granted lease in favour of the father of the tenant prior to 1952.

2. The father of the landlord as also the father of the tenant both have died.

3. The tenant was accepted as a tenant upon the death of his father in 1968.

4. The suit for eviction giving rise to the appeal was instituted for eviction on the ground of unlawful subletting in 1970 by the landlord who had inherited the property from her father.

5. Admittedly, neither the landlord, nor the tenant has any personal knowledge

about the terms and conditions of the lease originally granted by the father of the landlord in favour of the father of the tenant.

6. Neither the landlord, nor the tenant has any personal knowledge as to whether or not subtenancy was created with a written consent of landlord 18 years back in 1952."

14. On the aforesaid facts, the Supreme Court held that the prayer for eviction on the ground of subletting must be denied. Apart from that in that decision, there was nothing on record to show that the subletting in question which was made in 1952, 18 years before the institution of the suit, was in violation of the relevant provisions of law. There was no evidence direct or circumstantial on the basis of which it can be said that the lease did not confer on the father of the tenant the right to create the sub-tenancy and that it was done without the written consent of the landlord that is to say the father of the landlord. Under that circumstance, the Supreme Court held that the appellant could not successfully evict the tenant on the ground of having created unlawful subtenancy within the meaning of Section 1(2)(ii)(a) of the Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960). In the background of these facts, the Supreme Court held that by this long stay of the sub-tenant with the knowledge of the landlord for more than 18 years, the case of sub-tenancy could not be proved.

15. For the reasons aforesaid, the decision of the Supreme Court in the case of A.S. Sulochana Vs. C. Dharmalingam, as relied on by Mr. Dasgupta cannot be relied. He it noted herein in Ram Saran Vs. Pyare Lal and another, . this decision of the Supreme Court was noted and after noting, the Supreme Court has held that mere acceptance of rent by the landlord and long stay of the sub-tenant with the knowledge of the landlord shall not create any lawful subtenancy until and unless it was shown that such sub-tenancy was created with the consent of the landlord. In view of the aforesaid decisions of the Supreme Court and in view of my discussions made hereinabove. I am of the view that the tenant is liable to be evicted on the ground of subletting and the findings arrived at by the courts below in Second Appeal cannot be upset.

16. Let me now deal with the submission of Mr. Dasgupta on the question of Benami. Before. I proceed further, it may be stated here and now that no case was made out by either of the parties with regard to benami. No issue was raised with regard to the case of Benami. Before the Courts below no argument was advanced on the question of benami. That being the position. I am unable to permit Mr. Dasgupta to argue the case of Benami for the first time in Second Appeal. Assuming in Second Appeal for the first time the case of Benami can be urged, even then, I am of the view that such a case of Benami was not pleaded in the written statement by the defendant. In paragraph "8" of the written statement the defendant has alleged the following facts which are as follows :--

"The statements made in paragraph "4" of the plaint may be substantially

correct. This defendant and Dr. A. Gopal Roy both used to reside jointly in Chittagong. Both decided to come to Calcutta. This defendant came first and rented the suit premises from Sm. Soroja Bala, Devi with this understanding that this defendant would live in the suit premises with Dr.A.G. Roy to which Sm. Soroja Bala Devi agreed with, the above understanding the settlement of the suit premises was taken though in the name of this defendant. Dr. A.G. Roy has been living in the suit premises with the knowledge and consent of Sm. Soroja Rala Devi and her sons including the plaintiff who used to reside in another portion of the same premises. Sm. Soroja Bala Devi so long she was alive, she used to love both this defendant and Dr. A. G. Roy. the killer was her physician. Whenever she became ill. she would call Dr. Roy to treat her and Dr. Roy would treat her. She used to love both of them and their family members and this defendant and Dr. Roy both would respect her as mother."

17. Mr. Dasgupta however, submitted that in view of the statements made in paragraph "8" of the written statement that the settlement of the suit premises was taken in the name of the original defendant, but, it was agreed between the original defendant and Soroja Bala Devi that Dr. A. G, Roy shall be staying with the original defendant. it would be clear that a case of benami in the form of joint tenancy at best was pleaded by the original defendant. In my view, no case was made out by the defendant that the settlement of the suit properly was taken in the Benami of the defendant. So far as joint tenancy is concerned, both the Courts below concurrently found that the case of joint tenancy was not proved by the defendant. Apart from the admission of the defendant in paragraph "8" of the written statement, from the cross-examination of the P.W. 1 Kalipada Ganguly, it would be clear that P.W. 1 has calegorically slated that the defendant first came to the suit premises on 15th May, 1957. D.W. 1 Gopal Ch. Sen in cross-examination categorically stated that tenancy agreement was executed between D. P. Sen and. Saraju. Bala.

17A. That being the position. I am unable to agree with Mr. Dasgupta on the question of Benami. In view of my discussions made hereinabove the decisions cited by Mr. Dasgupta on the question of Benami need not be dealt with. No other point was advanced by Mr. Dasgupta on the question of subletting. In view of the above. I am, therefore, of the view that both the courts below were fully justified in decreeing the suit for eviction on the ground of subletting. Let me now deal with two Division Bench decisions of this Court as cited by Mr Dasgupta which are reported in Fateh Chand Murlidhar Vs. Juggilal Kamlapat, and (1915) 42 Ind App. 103 : (AIR. 1915 PC 2). (Motabhoy Mulla Essabhoy v. Mulji Haridas). So far as the above two decisions are concerned. I am of the view that reliance cannol be placed on the above two decisions. In Fateh Chand Murlidhar Vs. Juggilal Kamlapat, it has been held by this Court that while a Court of law was entitled to accept a part of the evidence of a witness am to reject another part, a pleading could not be dissected, but must be taken either as a whole or left alone altogether. If a written staiement contains an admission of certain fuels, which were favourable to him or an assertion of other facts, which are unfayppurable,

the plaintiff must, if he wants to avail himself of the admission, take not only the first, set of facts as truly stated, but also the second set of facts. Relying on this decision, Mr. Dasgupta sought to contend that the courts below ought not to have relied on the admissions made in the written statement. There is no quarrel about this proposition of law. But, I find from the pleadings as well as from the evidence adduced by the parties, the case of benami was not pleaded by the original defendant in the written statement and it was admitted in the written statement that the original defendant first came to the suit premises and the said A. G. Roy joined them later. Both the Courts below relied on this admission and relying on Mr. Dasgupta's admission and after taking into consideration the other evidence on record, came to a conclusion that the original defendant was the sole tenant, the case of joint tenancy pleaded by the original defendant was not proved. In view of the reasons given by me in respect of (1955) 59 Cal 223 ; (AIR 1955 Cal 465) (Fatechand Murlidhar v. Juggilal) the position is similar in respect of the other decision reported in (1915) 42 Ind App 103 : (AIR 1915 PC 2) (Motabhoj Mulla Essabhoj v. Muli Haridas), At the risk of repetition, I may mention that the Privy Council in that decision held that though it was permissible to accept part and reject part of witness's testimony and an admission in pleading could not be so dissected, and if it was made subject to condition it must either be accepted subject to the condition or not accepted at all,

Before I conclude on the question of subletting, it would be necessary for me to deal with the first submission of Mr. Dasgupta that the Courts below had acted illegally in relying on the counterfoils of the rent receipts being Exhibits "A" and "A" for the purpose of holding that the original defendant was the sole tenant of the suit premises as the counter-foils of the rent receipts were not admissible against the tenant. Reliance was also placed in support of his contention by Mr. Dasgupta on a Supreme Court decision in the case of *Idanda.s v. Anant Ram Chandra Phadke* AIR 1982 SC 127. In my view, the aforesaid decision of the Supreme Court is clearly distinguishable on facts. In that decision, the admitted facts were as under:--

1. That do begin with the lease was given to the tenant in respect of an open piece of land;
2. That on the open piece of land the tenant installed a flour mill and that the tenant was not using the land for any other purpose except running a flour mill.
3. That the receipts filed by the tenant clearly showed that the lease was a yearly one.

18. Considering the above admitted facts, the Supreme Court in that decision held that the entry in the counter-foils of the rent receipts being an admission in favour of the landlord was not against the tenant. Paragraph "6" of the said decision however runs as follows :--

"Reliance was placed by the District Judge on the counterfoil where the plaintiff-landlord tried to make out a case of monthly tenancy but the entry in the

counterfoil being an admission in his own favour was not admissible against the appellant. On the other hand, the trial Court has pointed out at page (?) of its judgment that the receipts produced by the tenant clearly show that the rent used to be paid from year to year.

Exhibits 24 to 26 pertained to the rent paid on an early basis right from 1959 to May 31, 1961. On point of fact, therefore, we are satisfied that in the instant case the lease was from year to year and, therefore, a month's notice was not legal if the lease was for a manufacturing purpose."

19. From the aforesaid finding of the Supreme Court, it is clear that the counter foils of the rent receipts were found to be not admissible against the tenant in view of the fact that in that case the tenant also produced rent receipts in support of his case of tenancy that the tenancy was from year to year and the said tenancy was not a monthly tenancy. In the background of this fact, the Supreme Court held that the counter-foils of the rent-receipts produced by the landlord was not admissible against the tenant as the entry in the counter-foil was an admission in favour of the landlord. That being the position. I am unable to rely on this decision as cited by Mr. Dasgupta on behalf of the appellant. That apart in view of the admission of the original defendant in the written statement that he was inducted in the suit premises as sole tenant by Saraju Bala Devi, the predecessor in interest of the plaintiff and Dr. A. G. Roy came to the suit premises later, I am unable to hold that even assuming that the counter foils of the rent receipts were not admissible against the tenant the findings of the Courts below could not be set aside in view of the admission by the original defendant in his written statement. That being the position. I am unable to accept this submission of Mr. Dasgupta. Before I part, another technical objection raised by Mr. Dasgupta on the question of abatement needs to be dealt with. According to Mr. Dasgupta, since on the death of the original defendant during the pendency of the suit, no application for substitution after setting aside abatement was filed by the plaintiff/respondent. the suit had abated. To appreciate this argument, let me deal with some facts, which would be relevant to decide this question. An application for substitution was filed by the plaintiff/respondent in the suit on the death of the original defendant. Sri D. P. Sen. This application, for substitution was filed on 1st of April, 1987. By an order being order No.37 dated 1st of April, 1987, the trial Court directed the application to be put upon 11th June, 1987 by making an observation to the effect that such an application could not be allowed for want of date of death of the original defendant in the said application. Subsequently, by an order being order No. 40 dated 14th August, 1987. the trial Court allowed the application for substitution on a finding that subsequently, the date of death of the original defendant had been disclosed in [the application for substitution. From order No. 40 dated 14th of August, 1987, it appears that the same was allowed in the absence of the heirs and legal representatives of the deceased defendant for not taking any step. Mr. Dasgupta, appearing for the appellant however. contended that when order No. 40 dated 14th August, 1987 was passed or when the date of death of

the original defendant was disclosed by the plaintiff/respondent, the suit had already abated as there was no prayer for substitution after setting aside abatement. In support of this contention, Mr. Dasgupta has relied on two Division Bench decisions of this Court in the case of Mani Gopal v. Panchanan 59 CWIN 304 and the case of Kanailal Manna and Others Vs. Bhabataran Santra and Others, Mr. Mahapatra. appearing for the plaintiff/respondent however, submitted that the appellate Court had rightly held that in the facts and circumstances of this case, the application for substitution on the death of the original defendant was rightly allowed. Mr. Mahapata contended that since the date of death of the original defendant was subsequently disclosed, the question of abatement shall not arise. He submitted that assuming that the question of abatement had arisen, then also it cannot be held that the appellate Court had acted illegally in allowing such application for substitution on the death of the original defendant. In this connection, Mr. Mahapatra relied on a decision of the Allahabad High Court in the case of Smt. Shakuntala Devi Vs. Banwari Lal and Others, and also on the two decisions of the Supreme Court in the case of Union of India (UOI) Vs. Ram Charan and Others, and in the case of Gangadhar and Another Vs. Raj Kumar, After considering the rival submissions made on behalf of the parties on the question of abatement and after going through the materials on record including the application for substitution and the orders passed by the trial Court allowing the application for substitution, I am of the view that in the facts and circumstances of this case and in view of the law on the question of abatement decided by different Courts of our country and also by the Supreme Court, it would not be possible for me to hold that the order passed by the appellate Court on the question of abatement on the death of original defendant was illegal and without jurisdiction. It is true that the application for substitution was filed, but, in such application, there was no prayer for substitution after setting aside abatement. It is not in dispute that at the time of the application for substitution was filed, the date of death was not supplied by the learned Counsel for the defendant in the suit. A letter was written by the learned lawyer of the plaintiff/respondent to the learned lawyer for the defendant asking for the names of the heirs and legal representatives of the deceased defendant and also his date of death. It appears from record that subsequently the date of death was disclosed by an affidavit and after the date of death was, recorded or brought into record, the application for substitution was allowed by the Court. From the record, it is evident that the plaintiff/ respondent acted upon the information furnished by the learned advocate for the defendant on 1st of April, 1987. From the said information given by the learned advocate for the defendant/ appellant, it appears that there was no disclosure about the date of death of the original defendant, In the said information only the names of the heirs and legal representatives of the deceased defendant were disclosed. I have carefully perused the application for substitution. After carefully examining the application for substitution, it appears to me that the plaintiff/respondent had given certain reasons for not giving the date of death of the defendant/appellant in it. The reason was that the date of death was not disclosed by the learned advocate of

the defendant/appellant. As the date of death was not disclosed by the learned advocate of the defendant/appellant and as on the application for substitution was filed on the basis of such information given by the learned advocate for the defendant/appellant, it must be held that the plaintiff/respondent had no information about the date of death of the original defendant and, therefore, on the date of filing the application for substitution the date of death could not be disclosed by the plaintiff/respondent. As soon as the date of death was disclosed, the plaintiff/ respondent brought the date of death of the original defendant into record by filing an application to that effect. Such being the position. I am in agreement with the views expressed by the Courts by (sic) below that even if the date of death was not disclosed in the original application and in view of the subsequent disclosure of the same by the learned advocate for the defendant/appellant, there cannot be any illegality in the matter of allowing the said application for substitution filed on the death of the original defendant. In Union of India (UOI) Vs. Ram Charan and Others, the Apex Court of our country has observed as follows :--

"The provisions of the Code are with a view to advance the cause of justice. Of course, the Court in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within the time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established. both because the question does not relate to the merit of the dispute between the parties and because if the abatement is set aside the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement."

20. Relying on the aforesaid observations of the Supreme Court, it must be held that when the information on the death of the defendant was given by the lawyer for the defendant, it was the duty of the learned lawyer for the defendant to supply the date of death of the original defendant with the names of the heirs and legal representatives of the deceased. Admittedly, in this case, such an information was not given and only the names of the heirs and legal representatives were initially supplied to the plaintiff/respondent. On the basis of such information, initially, the application for substitution was filed without stating the date of death of the original defendant. On the date of filing the application, therefore, the plaintiff/respondent had no knowledge of the date of death of the defendant/appellant. Subsequently, the learned lawyer for the defendant supplied the date of death and immediately (hereafter another application was filed giving the date of death as supplied by the learned lawyer

for the original defendant. That being the position, the application for substitution ought to have been regarded as an application for substitution after setting aside abatement. In my view, the Courts below have not acted illegally and without jurisdiction in allowing the application for substitution, after accepting the explanations given by the plaintiff/respondent. That apart. Order 22, Rule 10A of the Code of Civil Procedure, which has been added in Order 22 of the CPC by the Amendment Act, 1976 provides that when a pleader, appearing for a party to the suit, comes to know about the death of the party, he shall inform the Court about it and the Court thereafter shall issue notice to the other party. This provision was introduced by the aforesaid amendment specially to mitigate the hardship arising from the fact that the party may not come to know about the death of the other party during the pendency of any civil proceeding. By this amendment, a duty has been cast upon the learned advocate, appearing for the party who is dead to intimate the Court about the date of death of the party represented by him. For this purpose, this deeming fiction is introduced by the amendment to the effect that the contract between the dead client and the lawyer subsists to the limited extent after the death of the party. In the present case, the date of death was brought on record, as soon as the date of death was supplied by the learned lawyer for the deceased to the learned lawyer for the plaintiff/respondent. Therefore, it must be held that it is satisfactorily explained that the plaintiff/respondent was prevented by sufficient cause in making the application for substitution within the prescribed period of limitation and delay, if there be any. deserved to be condoned. In *Gangadhar and Another Vs. Raj Kumar*, it has been held that refusal to set aside abatement without considering Order 22, Rule 10A of the CPC must be held to be bad in law. In the said decision, it was observed that in view of Order 22, Rule 10A of the CPC a duty is cast upon the pleader of the deceased to inform the Court or to the learned Counsel for the plaintiff about the date of death and also to supply the names of the heirs and legal representatives of the deceased. Therefore following this decision also, it must be held that the order allowing the application for substitution was rightly allowed by the Courts below as appears from the record that as soon as the date of death of the original defendant was supplied by the lawyer of the deceased defendant, the plaintiff/respondent took steps immediately thereafter by making an application and also subsequently by disclosing the date of death of the original defendant. In a single Bench decision of the Allahabad High Court in the case of *Smt. Shakuntala Devi Vs. Banwari Lal and Others*, it has been held that although an appeal had abated due to the death of the person concerned earlier the application for substitution on the death of the said deceased could be treated as an application for setting aside abatement and for bringing on record the names of the heirs and legal representatives of the deceased. For the reasons aforesaid. I am of the view that both the Courts below had not acted illegally and without jurisdiction in allowing the application for substitution on the death of the deceased defendant. Before I part with this question, the decisions cited by Mr. Dasgupta should be dealt with. The first decision on which Mr. Dasgupta has relied is a decision of the Division

Bench of this Court reported in 59 CWN 304 (Nani Gopal v. Panchanan). In my view, this decision cannot be applied in the facts and circumstances of this case. In that decision, a Division Bench of this Court was considering the question of exemption to substitute the heirs and legal representatives under the provisions of sub-rule (4) Rule 4 of Order 22 after the suit had abated. In other words, the Court cannot exercise the power to exempt under Order 22. Rule 4 sub-rule (4) of the Code after abatement had taken place. I am not concerned with this question in this case in view of the discussions made hereinabove. In the present case, an application for substitution was filed and subsequently by another application or by an affidavit the date of death was disclosed. Such disclosure could be made only after the date of death was supplied by the learned advocate of the deceased defendant. Therefore in the facts and circumstances of this case. I am unable to rely on the decision of the Division Bench which dealt with the power of the Court to exempt under sub-rule (4) Rule 4 of Order 22. The next decision is a decision of this Court in the case of Kanailal Manna and Others Vs. Bhabataran Santra and Others, In my view, this decision cannot also be applied to the facts and circumstances of this case. In that decision a joint decree was passed against the defendants. An appeal was taken by them to the appellate Court. During the pendency of the appeal one of the plaintiffs died. The death of one of the plaintiffs was not brought to the notice of the Court, The appeal was dismissed and the joint decree was passed in ignorance of such death. In this background a Division Bench of this Court held that the appeal had abated. In the present case, the facts are not alike the decision referred to above. In this connection, some other facts also need to be kept in mind. It appears from the record that after the application for substitution was allowed, the heirs and legal representatives of the deceased original defendant had entered appearance in the suit and took all other steps in the suit. As noted earlier, the application for substitution was allowed in the year 1987 and the suit was pending, till 1991. During this period of about four years, the present defendants took no step for recall of the order allowing the application for substitution. Be it mentioned herein that it cannot be disputed by the present defendants that such action was available to be taken by the present defendants as the application for substitution was allowed in their absence. Since against the order allowing the application for substitution no step was taken by the present defendants, in my view, the discretion used by the appellate Court in favour of the plaintiff/respondent cannot be disturbed in Second Appeal. Apart from that in view of my discussions made hereinabove that in the facts and circumstances of this case, the Court could treat the application for substitution as an application for substitution for setting aside abatement, no infirmity in the judgment of the appellate Court can be found in respect of the question of abatement.

21. Before I part on this question, another Division Bench decision as cited by Mr. Dasgupta be dealt with which is reported in Janakinath Singha Ray Vs. Nirodbaran Ray and Others, In my view, this decision is also distinguishable on facts. In that decision, an application for substitution was filed, but no date of

death was given, but subsequently the plaintiff came to know of it, it was held that in the background of that fact the said application for substitution could not be treated as an application for setting aside the abatement under Order 22, Rule 9 of the Code of Civil Procedure. From the facts discussed earlier, it must be held that the aforesaid decision of the Court is clearly distinguishable on facts. Lastly, Mr. Dasgupta, appearing on behalf of the appellant had relied on Rule 21 of Civil Rules and Orders and submitted that as the application for substitution was not served on the heirs and legal representatives of the deceased defendant, the order passed by the trial Court allowing the said application for substitution must be set aside. It is true that Rule 21 of Civil Rules and Orders makes an obligation to a party to serve on the pleader or other party with the application that may be filed in Court. But, in the facts and circumstances of this case, I do not find that even if the service of a copy of the application was not made by the learned Counsel for the deceased defendant, in Second Appeal such question would be permitted to be agitated. The order allowing the application for substitution was made in the year 1987, I do not find from the records that after the heirs and legal representatives of the deceased defendant were brought on record, any application was filed by them to recall the order which was passed in the year 1987. On the other hand, the heirs and legal representatives of the deceased on the ground of non-service of the copy of the application for substitution. That being the position, I am unable to agree with Mr. Dasgupta that in view of the provisions in Rule 21 of Civil Rules and Orders, non-service of the application for substitution was fatal for which the contested judgments of the Courts below can be set aside.

22. Accordingly, this part of the submission of Mr. Dasgupta cannot at all be accepted. No other point was raised by Mr. Dasgupta in support of this appeal excepting the submissions referred to above.

23. Accordingly the (sic)

24. The judgments and decrees of the Courts below are hereby affirmed. In view of the fact that the appeal is being disposed of by this judgment, the application for taking into consideration of subsequent events is also disposed of.

25. There will be no order as to costs.

26. Considering the facts and circumstances of this case, I am of the view that the tenant shall vacate the suit premises by the end of December, 1997 if the appellant files an undertaking within two months from this date that he shall vacate and deliver peaceful possession of the suit premises to the landlord/respondent on the expiry of the time fixed by this judgment and subject to the further condition that the appellant shall go on depositing the rent at the rate last paid in the executing Court and also shall deposit arrears of rent, if there be any, within two months from this date.

27. Let lower Court records be set down as early as possible preferably within two months from this date.

28. Appeal dismissed.