(1974) 07 CAL CK 0003

Calcutta High Court

Case No: None

Gurudas Biswas		APPELLANT
	Vs	
Sibasankar Seal and Others		RESPONDENT

Date of Decision: July 17, 1974

Acts Referred:

- Transfer of Property Act, 1882 - Section 106

Citation: 81 CWN 188

Hon'ble Judges: Sankar Prasad Mitra, C.J; Murari Mohan Dutt, J; Amal Krishna De, J

Bench: Full Bench

Advocate: Susil Kumar Biswas and Biplab Kumar Mitra, for the Appellant;Satya Charan Pain, for the Respondent

Judgement

1. Charu Panna Seal started Ejectment Suit No.1832 of 1958 on 8.10.58 in the City Civil Courts for eviction of Gurudas Biswas from suite no. 1 on the first floor of premises no.1, Jatindra Mohan Avenue.

2. In the plaint she stated that she had terminated the tenancy of Gurudas by serving a "notice to quit" on him on 13.8.58 asking him to vacate the premises on the expiry of the last day of September, 1958. She further stated in the plaint that Gurudas had disentitled himself to protection from eviction having "defaulted in the payment of rents for the suit premises from December, 1954".

3. Gurudas contested the suit filing a written statement. He denied that he was a defaulter in the payment of rents. He also denied receipt of the notice to quit and stated that the notice dated 13.8.58 was illegal, insufficient and void and had not determined his tenancy under Charu Panna. Gurudas, the defendant, appeared in the suit on 12.3.59 and on the same day filed a petition praying for "leave" to deposit rents for the months of January and February, 1959 and the subsequent current rents, month by month. The learned

Judge by his order No.5 dated 12.3.59 granted it. After the issues were framed in the suit the plaintiff filed on 5.5.59 a petition u/s 17(3) of the West Bengal Premises Tenancy Act with the prayer to strike out the defendant''s "defence against delivery of possession". This petition u/s 17(3) was taken up for hearing on 22.6.59 when the learned Judge made the following order: -

Petition u/s 17(3) is taken up. Heard lawyers appearing on both sides. As the facts necessary to decide question of default which is one of the issues framed in the suit also are involved in the application u/s 17(3) of the West Bengal Premises Tenancy Act, it is desirable that both the matters should be heard on the same date and as such, the petition u/s 17(3) is left for consideration at the trial.

4. On the same date the defendant filed a petition of objection against the plaintiff''s petition u/s 17(3). On 14.3.60 the plaintiff filed a petition for her own examination on commission. The learned Judge by his order No.19 dated 14.3.60 allowed that prayer. Her evidence was taken by a Commissioner appointed by the Court. The said Commissioner submitted his report on 16.3.60. In the meantime, the learned Judge by his Order No.20 dated 15.3.60 fixed the suit for positive hearing on 16.3.60. On that date both the parties came ready and the learned Judge had recorded this order.

23. 16.3.60. Both parties ready. The plaintiff has tendered the commission evidence. The application u/s 17(1) [a mistake for section 17(3)] W. B. P. R. C. Act, 1956, put up. The defendant''s learned Advocate Shri R. L. Dutta examining after the Challans filed by the defendant submitted that the defendant did not, on the Challans filed, deposit rent on term of section 17(1), of the Act up to date and that his W.S. can''t be saved from being struck off. Then Shri Dutta took leave of the Court and retired. The W.S. of the defendant is struck off. The plaintiff''s evidence on commission submitted for judgment to 17th March, 1960, as the defendant has withdrawn from the suit.

S. Bagchi,

Judge.

5. On 17.3.60 the learned Judge decreed the suit ex parte for eviction of the defendant Gurudas by his orde No.25 dated 17.3.60. The defendant filed First Appeal No.242 of 1960 in this Court against the said judgment and ex parte decree.

6. In the first appeal the defendant-appellant appeared to have argued that the plaintiff was not entitled to a decree in the suit as no notice of suit had been given u/s 13(6) and that such notice, if any given, was invalid; that the evidence, on which the learned Judge had decreed the suit ex parte, was not sufficient to prove the validity of the notice of ejectment, meaning the notice to quit u/s 106 of the Transfer of Property Act.

7. Two learned Judges of the Division Bench, hearing the first appeal, were of the view that when the defence against delivery of possession had been struck out u/s 17(3) the

defendant should not be allowed to agitate the ground as to the non-existence or invalidity of a notice u/s 13 (6), either in the Court below or in the Court of Appeal and that he should not be permitted to take the defence as to the non-existence or invalidity of a notice of ejectment for the first time in appeal as he did appear in the Court below at the final hearing. Their views, indicated above, did not agree, in their opinion, with the decision of another Division Bench of this Court in the case of Subodh Chandra Singha Vs. Santosh Kumar Srimani, , on those points. They had framed two points, quoted below, and had referred the case to the Full Bench for determination as to whether upon the two points, framed by them, the decision in the case of Subodh Chandra Singha Vs. Santosh Kumar Srimani, , has been right decided.

8. The two points, framed by them are: -

(1) In our opinion, where a defence as to delivery of possession has been struck out u/s 17(3) the defendant can no longer take the defence of the non-existence or invalidity of a notice u/s 13(6), either in the Court below or in the Court of Appeal.

(2) In our opinion, where a defendant does not appear in the Court below and take the defence as to the non-existence or invalidity of a notice of ejectment he should not be permitted to take the defence for the first time in appeal.

9. Before introduction of Section 12 in the West Bengal Premises Rent Control (Temporary Provision) Act, 1950 and subsequent introduction of section 13(1) in the West Bengal Premises Tenancy Act, 1956, on repeal of 1950 Act, a landlord was entitled to a decree for eviction of a tenant on proof that he had validly determined the tenancy of the tenant. By section 13 of the West Bengal Premises Tenancy Act, 1956, the tenants have been given special protection against eviction on grounds, enumerated in clauses (a) to (k) of sub-section (1). In section 13(6) it has further been laid down that a landlord, before filing a suit for eviction, is required to give a notice of suit in addition to, or together with, his notice to quit u/s 106 of the Transfer of Property Act to "ask for" a decree for possession considering "if the tenant has disentitled himself" to protection against eviction on any or more of the grounds introduced by section 13(1).

10. Section 17(1) of the West Bengal Premises Tenancy Act, 1956, to be hereafter called the Act, is that a tenant, against whom a suit on "any of the grounds referred to in section 13" has been instituted will b e required to pay or deposit arrear rents, if any, and to continue depositing or paying current rents, thereafter, within periods specified there. Consequence of non-compliance with section 17 (1) is in section 17(3) which is that if a tenant fails to deposit or pay any amount "referred to in sub-section (1)....." the Court shall order his defence "against delivery of possession" to be struck out and shall proceed with the hearing of the suit. When we refer to section 13, we find that the grounds on which "recovery of possession" may be had are enumerated in its sub-section (1) and not I any other sub-section. Upon a reading of sections 17(1) and 17(3), with section 13, particularly its sub-section (1) we are of opinion that the expression "defence against

delivery of possession" in section 17(3) means the defence as may be taken on any or more of the "grounds" in section 13(1). When a defence against delivery of the possession is struck out, the tenant"s defence on the grounds in section 13(1) is only struck out.

11. The decision in 68 CWN had been doubted by the Division Bench, referring to the D.R. Gellatly Vs. J.R.W. Cannon, , to observe that "sub-section (6) of the section 13 is as much protection to the tenant against as sub-section (1)" because of the "heading of section 13". A similar argument based on Gellatly"s case, was made and repelled in the case of Ajit Kumar Sen Gupta Vs. Baijnath Somani and Others, , Renupada Mukherjee, J, observing:

That decision was made under the Rent Control Act of 1950, and to some extent the Lower Appellate court has relied upon that decision has got no application to a case where a defence of the tenant against delivery of possession has been struck out u/s 17(3) of the West Bengal Premises Tenancy Act, 1956. The reason is this. Mr. Roy Chowdhury rightly pointed that the Rent Control Act of 1950 did not make any provision for service of a notice of ejectment upon a tenant prior to the institution of the suit. The notice was governed by the provisions of section 106 of the Transfer of Property Act. The West Bengal Premises Tenancy Act of 1956 makes a separate provision for service of notice upon the tenant before the filing of an ejectment suit....

Section 17(3) of the Act does not say that the whole defence of the defendant will be struck out if he incurs the penalty of non-payment of arrears of rent or of current rent. It says that the defence against delivery of possession will be struck out. The expression "defence against delivery of possession" is a relative expression, because the word "defence" is a counterpart of the word "offence" which in this particular context means the case of the plaintiff. In an ejectment suit u/s 17 of the Act, the plaintiff claims recovery of possession of some particular premises on a ground or grounds referred to in section 13. Where such a suit is contested, the tenant puts forth a defence against the ground or grounds alleged in the plaint. Sub-section (3) of section 17 lays down that a tenant who incurs the penalty contained in that sub-section shall not be permitted to press his defence against delivery of possession which should be struck out. This has no reference to the service of notice or to its validity. It may be that the service of a notice to quit is a condition precedent to the institution of a suit for ejectment u/s 17 of the Act, but it cannot be said by any stretch of imagination that the notice has any connection, direct or remote, with the several grounds of ejectment enumerated in clauses (a) to (k) of sub-section (1) of section 13 of the Act. That being the position, it will be permissible for a tenant whose defence against delivery of possession has been struck out to contest the suit of the plaintiff landlord on the ground that the notice to quit has not been served upon him, or that the notice is legal or sufficient.

12. In D.R. Gellatly Vs. J.R.W. Cannon, , the suit was filed on the ground that the tenant, being a defaulter in payment of rents, was not entitled to any protection u/s 12(1)(i) as his

defence against "ejectment" had been struck out u/s 14(4) of 1950 Act. It was held that for non-compliance with the provision of section 14(1) his defence against ejectment i.e. his defence so far as the "special protection" in section 12 (1)(i) conferred on the tenant, would be unavailable to him. That case did not consider the question that has arisen in the instant case. There was no corresponding provision like section 13(6) in section 12. Whether a defence as to the entertainability of a suit on the ground of absence of notice, enjoined under the 1950 Act, was also a "special protection" conferred to a tenant by that Act, was not considered or decided. That case is of no aid in determination of the question before us.

13. The conclusion, that we have reached above, is what two Division Bench decisions of this Court, namely in Subodh Chandra Singha Vs. Santosh Kumar Srimani, have made on the same question. P. N. Mukherjee, J, speaking for the Court in Subodh Chandra Singha Vs. Santosh Kumar Srimani, observed as follows rejecting Mr. Sen"s contention :

Mr. Sen, appearing on behalf of the plaintiff respondent, while realising that the impugned notice might be invalid or insufficient for purposes of Section 13 (6) of the West Bengal Premises Tenancy Act, 1956, and this invalidity or insufficiency may lead to the dismissal of his client"s suit, as aforesaid, sought to argue that the above objection is no longer open to the defendant-appellant in this court... Mr. Sen urged that in the instant case, the tenant"s defence against delivery of possession was struck out u/s 17(3) of the West Bengal Premises Tenancy Act, 1956... Mr. Sen argues that the objection to the notice u/s 13 (6) of the West Bengal Premises Tenancy Act, 1956, which, according to him, is only part of the special defence, provided under the aforesaid Act, must be deemed to have been taken away from the defendant and it is no longer open to him to urge this point in support of this appeal...

The mere striking out of the tenant"s defence - be it the general defence under the law or only the special defence, if any, under the above Act, - would not, therefore, affect this position and improve the plaintiff"s lot and its only effect will be that the tenant, whose defence has been struck out, will be placed merely in the position of one, who has not defended the suit and the suit would proceed ex parte. In other words, the result will be that the suit will be heard ex parte. Even at this ex parte hearing, however, the plaintiff will have to prove that he has complied with all the requirements, which would entitle him to maintain the suit. The position, in regard to the notice u/s 13 (6) in this respect, is in no way, different from the position in regard to a notice to quit and it is, certainly, well and firmly established that, even in an appeal from an ex parte decree for ejectment, the tenant is entitled to challenge the validity and sufficiency of the notice to quit.

14. R. N. Dutt, J, in the other case, speaking for the Court, observed as follows: -

We would rather hold that what is struck out is the defence against delivery of possession u/s 13 (1) of the Act. The special protection conferred on the tenant under the Premises Tenancy Act, 1956, is contained in section 13 (1) of the Act. What is struck out u/s 17(3)

of the Act is the defence against delivery of possession provided for under the Act, that is the special protection contained in section 13(1) of the Act. The effect of this conclusion is that even apart from the question of jurisdiction the landlord will have to prove the service of notice of suit u/s 13(6) of the Act of 1956.

15. The next point for consideration is whether sub-section (6) of section 13 is also a special "protection" conferred by 1956 Act to the tenant. Sub-section (6) is part of section 13. The heading of section is "protection of tenant against eviction". Heading prefixed to a section cannot restrict the meaning of the section, and, is only useful aid in cases of doubt. If the language of section is clear, heading is not to be taken into consideration. The heading cannot be used to cut down the clear words of the section. Lord Macnaghten speaking for Privy Council in the case of Thakurain Balraj Kunwar and another v. Rae Jagatpal Singh reported in 31 IA 132 (P.C.) observed at page 142 "It is well settled that marginal notes to the section of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and it has been exploded long ago. There seems to be no reason for giving that marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament". Sub-section (6) has prescribed a step to be taken before filing the suit. "Protection against eviction" relates to a step after the suit is decided against the tenant for his eviction. When a tenant is held evicted in law, the Court further considers whether he can seek or get protection against "eviction" on any grounds in sub-section (1). Sub-section (6) is not any protection against eviction.

16. In Commissioner of Income Tax, Bombay Vs. Ahmedbhai Umarbhai and Co., Bombay, at page 141, para 19 (middle) Supreme Court quoted with approval the observation in 31 IA 132 (PC).

Lord Thankerton in the case of AIR 1940 105 (Privy Council) and Lord Summer in the case of Abdul Rahim Mohammed v. Municipal Commissioner for City of Bombay reported in ILR 42 Bom, 462 made similar observations.

Maxwel on Interpretation of Statutes - 11th Edition at page 48-quoting Lord Goddard in Rex. V. Surrey Assessment Commissioner reported in (1948) 1 K.B. 29 at page 32 writes:

While the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such headings to give a different effect to clear words in this section, where there cannot be doubt as to the ordinary meaning.

17. P. N. Mukherjee, J, has held in Subodh Chandra Singha Vs. Santosh Kumar Srimani, at page 187, col. 2 that it refers to "Jurisdiction" observing as follows: -

It is, in essence, a point of jurisdiction or, in other words, the court has no jurisdiction to entertain the suit in the absence of such a notice. It is not strictly a part of the tenant"s defence. It is a part of the requirement of the plaintiff to entitle him to maintain the suit.

18. If we accept the contention that the heading controls the whole of section 13 in all its sub-sections, consequence that will follow will be that the defence of a tenant, sued for eviction on the ground u/s 13 (1)(f), pleading the bar laid down in sub-section (3A), will also be unavailable to him on his "defence against delivery of possession" being struck out. That is a defence unconnected with "special protection". Imposing restriction upon the landlord in the matter of commencement of his suit for eviction before a "certain period". "Special protection", conferred by the 1956 Act, is only in section 13(1). Any other defence under any other sub-section of section 13 or in any other Act is not "against delivery of possession". The words of Section 13 are clear. Meaning of any of its sub-sections, is not to be ascertained with reference to the heading of the section.

19. By the notice u/s 106, Transfer of Property Act the landlord gets the right to possess. He has to enforce that right by a suit for recovery of possession. An embargo on his such right by a suit to recover possession is that he has to give a notice of suit u/s 13 (6) of 1956 Act. It has been argued that by putting that "embargo" another protection against eviction was given to the tenant. This contention does not appear to us to be sound. This restriction has no connection with "eviction of the tenant". It is but a restriction on the "filing" of the suit. That means that the court is to consider, on such objection when taken, as to whether it can hear the suit or go into questions relating to special protection "and not to consider as to whether" "special protection" is available will be given or not.

20. The decision in Sugan Chand Suraogi Vs. The Commissioner of Income Tax, Calcutta and Another, cannot be said to have been reached incorrectly on this ground. Question (1) will be answered in the affirmative.

21. When a suit is decreed ex parte, because of the defendant not appearing or not participating in the trial after appearance, law has given him the right to file an appeal against that ex parte judgment and decree and to show in that appeal that the judgment, on the materials on record, could, and should not have been passed. He cannot, therefore be debarred from urging at the hearing of such an appeal his objections to the decree. The question is whether because of his appearance on the day of trial and "voluntary retirement" thereafter from the case he waived his "right" to object to the entertainability of the suit on the ground of absence or invalidity of the notice of ejectment. Whether he has waived his "right" by voluntary retirement?

22. N. H. Bhagwati, J, in the case of Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, in para 53 while dealing with the connotation of "waiver" observed:

It has been said that "waiver" is a troublesome term in law. The generally accepted connotation is that a constitute waiver there must be an international relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege. Waiver differs from estoppel in the sense that it is contractual and is an

agreement to release or not to assert a right, Estoppel is a rule on evidence. "See AIR 1935 79 (Privy Council)]...

and it would I, think, be going too far to hold that every unsuspecting submission to a law, subsequently declared to be invalid, must give rise to a plea of waiver; this would make constitutional rights depend for their vitality on the accident of a timely challenge and render them illusory to a very large extent.

In the case the The Indian Link Chain Manufacturers Ltd. Vs. Their Workmen, it has been held that "there cannot be any waiver by conduct or by implication of the requirement of a written notice" Voluntary retirement of the lawyer is only a "conduct" of the defendant, if any.

23. P. N. Mukherjee, J, in Subodh Chandra Singha Vs. Santosh Kumar Srimani, at page 186 col. 2 observed:

Assuming however, that the point was not raised earlier as aforesaid, even then we are of the view that the plea of waiver is utterly inappropriate in a case of this kind. Waiver, as it is well known, is intentional relinquishment of a known right. It is true, that such intention may be inferred from circumstances, but the right in question must be a known right. This, indeed is well established in this Court [vide Dhanukdhari Singh and Another Vs. Nathima Sahu and others] and it has only recently been re-affirmed by the Supreme Court in Manak Lal Vs. Dr. Prem Chand, . Their Lordships of the Supreme Court have in the case, just cited, categorically laid down that the party, against whom waiver is pleaded, must have known about the relevant facts and of his right, which was said to have been waived. Judged by this test, the plea of waiver in the instant case would be unavailing. The law on the point of the notice u/s 13 (6) of the West Bengal Premises Tenancy Act, 1956, and particularly, whether it will be a notice to quit or a notice of suit or a combined notice to answer both the above descriptions, was unsettled and was in a state of confusion or in a fluid state until the recent Special Bench decision in F.A. 444 of 1961 (See also F.S"s Nos. 101 and 102 of 1961), above cited. If the law was unsettled and the position was not clear as to the nature of this particular notice, it will normally, at least, and generally speaking, - that is, in the absence of very strong circumstances to the contrary - be utterly inappropriate to uphold a plea of waiver in respect of such a notice. It is significant to note, in this connection, that the plaint, in the instant case, refers to the notice in question only as a notice to quit. There is no reference, in the plaint to this notice as a notice of suit. It is difficult, in the above context, in the circumstances of this case, to sustain a plea of waiver of the disputed notice or of any defect thereof as a notice of suit even assuming that no specific objection was taken on the ground that it is not a proper notice of suit u/s 13 (6) of the West Bengal Premises Tenancy Act, 1956.

24. Waiver is "intentional withdrawal of a known existing right". The judicial pronouncement laying down that a notice is a necessary antecedent step before a trial for eviction was made only on 19.6.63 when this Court in its Full Bench decision in Abdul

Samad Bepari Vs. Manasha Charan Bakshi, so ruled. The tenant when his lawyer retired on 16.3.60 had not any knowledge of any such right to object to the filing of ejectment suit for absence of notice u/s 13(6). So his retirement on 16.3.60 was not waiver of a known right. The referring Judges when they felt unable to agree with P. N. Mukherjee, J., do not appear to have adverted to his Lordship''s observations and had not given any reasons for their disagreement with him.

25. There was no statement in the plaint that two notices, one to quit and the other notice of suit, or one notice, combining both, was given. If the Statements in paras 3 and 4 of the plaint are taken as referring to the two notices, separate or combined, then the defence in paras 4 and 5 of the written statement is a denial of the same, as to the existence and validity of both. No specific issue was raised as to the notice of suit. There was no waiver of the objection as to absence or invalidity or notice of suit. Objection as to that, in our opinion, was taken in paragraphs 4 and 5 of the written statement. The question is whether the tenant, not waiving his objection as to the notice, in his written statement, can be said to have waived it by "retirement" from the suit.

26. It was contended that there was "voluntary retirement" from the suit by the defendant when his lawyer, upon his reading of the defendant''s challans, submitted "the defendant did not, on the challan filed, deposit rent on term of Section 17(1) of the Act up to date and his written statement cannot be saved from being struck off". His retirement, with Court''s leave, could not have been from the suit. The Court could not have given such "leave" for his retirement from the suit wholly. For, even after his defence against delivery of possession was struck out, he could show that the notice to quit was not served at all. The allegation in plaintiff''s petition u/s 17(3) was that "rents from December, 1954 to date of suit" had not been deposited in "Court". It was not his allegation that he had not deposited those in Rent Controller''s Office. The point for determination in the application u/s 17(3) was whether the deposit of rents, allegedly in arrears, by the defendant''s in Rent Controller''s office, as stated in his objection, filed on 20.6.1959 would be "good deposit" for the purpose of section 17(1) where not deposited in Court. Defendant''s learned Advocate on his view that those were not "good deposit" u/s 17(1) asked for Court''s leave to retire from the suit. In spite of defendant''s clear case in his petition of objection dated 206.59 to plaintiff''s petition u/s 17(3) the court did not decide whether or not those deposits in Rent Controller''s office were "good deposits" u/s 17(1). The entire trial was vitiated by lawyer''s mistaken admission on a point of law. In the case of Secretary of State v. Shibaprasad Jana reported in AIR 1919 Cal. 972 the decision is that "an erroneous admission by a lawyer on a point of law is of no effect and does not preclude a party from claiming his legal rights in the appellate Court. Voluntary retirement following an erroneous admission of the lawyer is no "waiver" by the defendant. Even if it were so, it would not be waiver as this "right to object" was not known.

27. To pass an ex parte decree in a suit for ejectment on one of the grounds in section 13(1), the court is required to decide, whether the suit is defended or not (if the relationship of landlord and tenant is not disputed as here) (a) whether the tenancy has

been validly determined by a notice u/s 106 Transfer of Property Act, (b) whether a valid notice of suit was given before filing the suit (c) whether the ground alleged in the plaint to take away the tenant''s special protection conferred by section 13(1), has been established on the evidence. This is the requirement of Or. 20 R. 4 Civil Procedure Code, whether the suit is contested or not. The Court cannot relieve itself of the necessity of complying with Or. 20 R. 4 even if it strikes out the tenant''s defence against delivery of possession or the written statement. That being the position in law, it would be wrong not to permit the tenant to contend and show, if possible, on plaintiff''s evidence and materials as are on record, both at the trial and also at the appeal stage, that the plaintiff''s is not entitled to the decree prayed for, though he would not be permitted either to cross-examine plaintiff''s witnesses, when they given evidence, or to call his own witnesses at the trial, if his defence is truck out.

28. There is no finding in the ex parte judgment by the trial Judge that the defendant is a "defaulter". As it had not made any such finding, the court could not pass a decree for eviction. This is the view taken by the Supreme Court in the case of Bahadur Singh and Another Vs. Muni Subrat Dass and Another, where it has been held that the decree for delivery of possession to the landlord is a nullity if not made in a suit by the landlord for recovery of possession from the tenant on any of the grounds stated in section 13(1) of Delhi and Ajmir Rent Control Act, 1952 and unless the court was satisfied that such a ground of eviction exists. Reference may also be made to the case of Kaushalya Devi and Others Vs. Shri K.L. Bansal, and Ferozi Lal Jain Vs. Man Mal and Another, and K.K. Chari Vs. R.M. Seshadri, . The defendant cannot therefore, be debarred from showing in the appeal Court absence of such finding.

29. The case of Subodh Chandra Singha Vs. Santosh Kumar Srimani, has been rightly decided on both the points, framed by the referring appeal court.

We answer the points raised as follows: -

(1) Yes, can take

(2) Should be permitted.

Sankar Prasad Mitra, C.J.: I agree.

M. M. Dutt, J.: I agree.