

(2003) 12 CAL CK 0039

Calcutta High Court

Case No: S.A. No. 507 of 1999

Binapani Mitra and Others

APPELLANT

Vs

Bhabani Charan Nandy and
Others

RESPONDENT

Date of Decision: Dec. 18, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13, 100
- Specific Relief Act, 1963 - Section 6
- West Bengal Premises Tenancy Act, 1956 - Section 17(2), 17(2A)

Citation: (2004) 2 CALLT 99

Hon'ble Judges: Arun Kumar Mitra, J

Bench: Single Bench

Advocate: Tarapan Kr. Dutta and Debasish Roy, for the Appellant; Haradhan Banerjee and Amitava Pain, for the Respondent

Final Decision: Dismissed

Judgement

Arun Kumar Mitra, J.

This second appeal has been preferred challenging the judgment and decree dated March 16, 1998 and May 2, 1998 respectively passed in Title Appeal No. 232 of 1993 by the learned Civil Judge (Senior Division), Second Court, Howrah, affirming the judgment and decree dated June 29, 1993 and July 12, 1993 passed in Title Suit No. 232 of 1983 by the learned Munsif, 5th Court, Howrah.

2. The back drop under which this appeal has been preferred is inter alia as follows:

Said Batokrishna Mitra filed T.S. No. 232 of 1983 praying for his declaration of tenancy and injunction and also praying for setting aside the decree in case No. 51 of 1980.

3. One Bhabani Charan Nandy originally filed T.S. No. 51 of 1980 against one Batokrishna Mitra praying for his eviction from the suit property. The said Title Suit No. 51 of 1980 was decreed ex parte.

4. An application under Order 9 Rule 13 of the CPC was filed but that application was also dismissed. Thereafter, said Batokrishna Mitra filed this T.S. No. 232 of 1983.

5. Bhabani Charan Nandy being the landlord also filed a suit being T.S. No. 40 of 1984 u/s 6 of the Specific Relief Act, 1963, for recovery of khas possession of the suit property. Both the suits T.S. 232 of 1983 and T.S. 40 of 1984 were heard analogously.

6. The plaintiffs case in T.S. No. 232 of 1983 is that he is a monthly premises tenant in respect of the suit property in holding No. 1, Baba Kumar Kar Lane, P.S. Mali Pachghora, District: Howrah, at a monthly rental of Rs. 60/- according to English Calendar month, under the defendant No. 1 Bhabani Charan Nandy.

7. The plaintiff also alleged that he has been possessing the said rooms for the last 60 years by paying rent to the landlord defendant No. 1, It was further alleged that the defendant No. 1 filed T.S. No. 51 of 1980 against the plaintiff for his eviction from the tenanted premises and the plaintiff entered appearance in the said suit through his advocate Sri Arabinda Ghoshal. Said Sri Arabindo Ghoshal (advocate) has been made defendant No. 2 in the instant suit. The plaintiff filed Written Statement and application u/s 17(2) and 17(2A) of the W.B.P.T. Act in 1956. Since appearance, the plaintiff handed over rents month by month to his advocate the defendant No. 2 for depositing the same in the Court as per the instruction of the defendant No. 2 and the rent for each month was handed over to the defendant No. 2 before 15th of next month.

8. The plaintiff was assured every time by the defendant No. 2 that all his rents were being deposited in the Court and he did not have to worry about the case. The plaintiff all along relied on defendant No. 2 and he always contacted with his advocate the defendant No. 2 for knowing the result of the suit and its proceedings.

9. The plaintiff submitted that the plaintiffs application u/s 17(2) and 17(2A) of the W.B.P.T. Act, 1956 was heard on 07.01.1982 and it was allowed and the plaintiff was directed by the learned Court to deposit the sum of Rs. 780/- in thirteen equal instalments and the plaintiff deposited the aforesaid sum with the defendant No. 2 for depositing the same in the Court but the defendant No. 2 did not deposit the said sum in the Court and as a result of which the plaintiffs defence against delivery of possession in T.S. No. 51 of 1980 was struck-off and ultimately the suit was heard ex-parte. That the plaintiff had no knowledge of all these proceedings.

10. The plaintiff further submitted that on 24.8.1983 the plaintiff came to the defendant No. 2 for enquiry about his case and the defendant No. 2 told the plaintiff to sign one some written papers and told him that an application is required to be filed in the suit for setting aside the ex parte decree which has been passed against

the plaintiff as the suit was heard ex parte due to not taking steps on the date fixed for hearing and the plaintiff relying on the defendant No. 2 signed those papers at the time of leaving the Sherista of the defendant No. 2. He was told by the defendant No. 2 that the date will be communicated to him by post card.

11. The plaintiff further submitted that thereafter the plaintiff was never informed about the position of the said suit and its proceedings by the defendant No. 2 on 27th September, 1983 when the bailiff from the Court came to the suit properly to give delivery of possession of the suit property to the defendant No. 1 and he came to know about the fate of the case.

12. The plaintiff also alleged in the plaint that he was astonished to see the presence of the bailiff and he was puzzled and then and there the plaintiff rushed to the Court to contact his advocate the defendant No. 2, to know about the case but the plaintiff could not meet the defendant No. 2 as he was not available at that time and the plaintiff with the help of advocate Tarun Kumar Guha got the records of Title Suit No. 51 of 1980, inspected and he came to know that not a single furthing was deposited on account of rent in the Court on his behalf and as such his defence against delivery of possession was struck off and the ex parte decree has been passed against him.

13. The plaintiff submitted in the plaint that the plaintiff has been residing in the suit premises for the last 60 years and he has got no other house to live in and he always handed over the rent to the defendant No. 2 for depositing the same in the Court. The plaintiff alleged that the defendant No. 1 managed and manipulated the defendant No. 2 and by gaining over the defendant No. 2, the defendant No. 1 got an ex parte decree in T.S. No. 51 of 1980 against the plaintiff.

14. The plaintiff alleged collusion in between the defendant No. 1 and defendant No. 2. He also alleged that the defendant No. 2 practised fraud upon the plaintiff by not conducting case properly and sincerely and by not depositing the rent in the Court helped the defendant No. 1 to obtain an ex parte decree and as such serious fraud has been practised upon plaintiff by the defendant No. 2 and the decree in T.S No. 51 of 1980 against the plaintiff is collusive and fraudulent one and is not binding upon the plaintiff and is to be set aside. Hence, the suit is filed against the defendant for declaration that the ex parte decree passed in T.S. No. 51 of 1980 against the plaintiff is collusive and fraudulent one and not binding upon the plaintiff and for the said decree to be set aside and for permanent injunction against the defendant No. 1 restraining him from dispossessing the plaintiff from the suit premises except in accordance with law.

The plaintiff submitted that he is still in possession of the suit property and the defendant No. 1 has not been able to take possession by executing the decree and if there is any report of the bailiff stating that he has handed over the possession of the suit premises to the defendant No. 1, then the report is a table work and has

been prepared according to the instructions of the defendant No. 1.

15. The defendant No. 1 to 1(b) contested the suit by filing Written Statement. In the W.S. the defendants stated that the plaintiff has no cause of action and/or right to sue against the defendants. It was further stated that the suit as framed is neither maintainable in law nor in facts. The suit is bad for misjoinder of cause of action and non-joinder of necessary or proper parties. The suit is barred u/s 34 of the Specific Relief Act. The suit is barred by principles of Estoppel, acquiescence and waiver. The suit is barred by principles of res judicata. The plaintiff is not entitled to get any decree of declaration as prayed for and the plaintiff is not also entitled to get any decree of permanent injunction as claimed in this suit. The defendants have also alleged in their W.S. that the suit is mala fide, speculative and motivated and has been falsely made on false grounds to overcome the effect of the decree passed in T.S. No. 51 of 1980 by changing his title from Moitra and Mitra. It was further alleged that though the plaintiff was a tenant sometime past in respect of holding No. 1. Naba Kumar Kar Lane at a monthly rent of Rs. 60/- payable according to English Calendar month under the defendant No. 1, he was always an habitual defaulter and could not pay rent in time.

16. In reply to the averments made in paragraph 3 of the plaint it was submitted that the plaintiff having failed to pay rent since the month of October 1976, as well as for causing damages to the suit holding, these defendants were constrained to file ejection suit against the plaintiff being T.S. No. 51 of 1980, after proper service of notice on him and the defendant of that suit, in the said suit filed two applications one u/s 17(2) and another application u/s 17(2A)(b) and during hearing the defendant of that suit submitted falsely that the rent is due from January 1980, but he had not deposited any current rent as provided u/s 17(1) of the West Bengal Premises Tenancy Act. It has been alleged by these defendants in the Written Statement in paragraph 14 that the statement regarding handing over rent month by month to his advocate, defendant No. 2 for depositing the same in the Court as per his instruction and/or the rent in each month was handed over to the defendant No. 2 before the 15th of the next month are not correct and invented for the purposes of the suit. It was submitted that it was the duty and the responsibility of the plaintiff to see the challan showing deposit of rent in the learned Court and he cannot shark his responsibility by making false statement.

17. The defendants in paragraph 15 of the Written Statement denied the allegations made in paragraph 4 of the plaint being not correct and alleged the same as invented for the purposes of the suit. The alleged statement of assurance by defendant No. 2 to the plaintiff will not save the plaintiff from being treated as defaulter. He remained without depositing a single farthing in the learned Court and almost in every date of hearing the plaintiff did not turn up in Court and filed adjournment petition on false and frivolous grounds.

18. These defendants in paragraph 16 of the W.S. denied the averments in paragraph 5 of the plaint. The defendants denied that the plaintiffs (defendant in that suit) application was heard on 17.01.1982 and/or the plaintiff (defendant therein) was directed by the learned Court to deposit the amount of Rs. 780/- in 13 (thirteen) equal instalments and/or the plaintiff (defendant therein) deposited the aforesaid sum with the defendant No. 2 herein for depositing the same in the Court and/or the defendant No. 2 herein did not deposit the said sum and as a result plaintiffs defence against delivery of possession was struck off in T.S. No. 51 of 1980 and/or the suit was heard ex parte and/or the plaintiff (defendant in that suit) had no knowledge of all these proceeding. The defendants submitted that on 17.01.1982 the plaintiff of this suit (defendant therein) filed a petition for adjournment in T.S. No. 51 of 1980 on the ground stated therein. Neither the plaintiff nor the learned advocate was present for moving the application and/or for hearing and the learned Court was pleased to reject the application by order No. 18 dated 17.01.1982 as the plaintiff of this suit (defendant therein) never turned up at that date of hearing and asked the parties to get ready at once. But the defendant of that suit that is the defendant of 51 of 1980 was absent on call and the learned Court waited upto 2.45 p.m. and at last the learned Court being sympathetic towards the defendant of that suit in considering his petition u/s 17(2) and 17(2A) allowed him an opportunity to liquidate the arrear by paying the same in 13 (thirteen) equal Instalment @ Rs. 60/- per month and the plaintiff was further directed to go on depositing amount equivalent to monthly rent month by month. The first instalment was payable by February 1981. But the plaintiff of this suit (defendant therein) did not care to deposit the same and at least on 16.06.1982 these defendants filed an application before the learned Court after serving copy of the said petition on the advocate of the plaintiff (defendant therein) stating that the defendant of that suit did neither care to deposit any rent month by month nor deposited any instalment in compliance with order No. 18 dated 17.01.1982 passed on an application u/s 17(2) and 17(2A) of the W.B.P.T. Act. After several adjournments the said application u/s 17(3) of the W.B.P.T. Act was heard on 14.10.1982 and the defence was struck off and the matter was set down for ex parte hearing on 13.01.1983. Defendant in T.S. No. 51 of 1980 (plaintiff herein) did not care to be present in Court on that date also and the suit was heard ex parte. These defendants on 10.08.1983 filed an application for execution of the said decree and the plaintiff (defendant in T.S. No. 51 of 1980) getting scent of the execution case, filed an application under Order 9 Rule 13 of the CPC for setting aside the ex parte decree. But knowing fully well that he has not deposited any amount in the Court and in case he prays for stay of the execution case he will be asked to deposit the entire amount as such he got the said petition under Order 9 Rule 13 CPC to go by default.

19. In paragraph 17 of the W.S. the defendant herein stated that the statements made in paragraphs 6 & 7 of the plaint are not correct, motivated and invented for the purposes of his false and harassing suit. The defendant denied that on

24.08.1983, the plaintiff (defendant therein) came to know on enquiry about his case from defendant No. 2 and/or signed written paper and/or he was told that an application was required to be filed in the suit for setting aside the ex parte decree, as the suit was heard ex parte due to not taking steps fixed for hearing and/or the plaintiff relying on the defendant No. 2 signed those papers and/or he was told that the date will be communicated to him by post card. The defendant further denied that the plaintiff (defendant therein) was not informed about the position of the said suit and it's proceedings, by defendant No. 2 his advocate, till 17.09.1983, when the bailiff from the Court went to the suit property to give delivery of possession of the suit property in favour of the defendants of this suit namely the plaintiffs of that suit (51 of 1980). The defendants further submitted that the plaintiff knew very well that he has not deposited any single farthing in this Court and not in a position to pay the same and he did not attend the Court on any date of the hearing. It was also alleged by the defendants that inspite of his knowledge that an ex parte decree for eviction has been passed against him due to not taking steps by his advocate as alleged, the story of placing reliance upon him or communicating him the date of the proceeding though changing his name from Butokrishna Moitra to Butokrishna Mitra, is far from his convincing to a man of prudence. It is further submitted by the defendants in this Written Statement that on 16.09.1983 the bailiff from the Court went there and being vehemently resisted at the time from removing the articles from suit holding police men came and with the help of local police got delivery of possession by moving all his belongings and the members of the family from the house in the presence of the local gentlemen. When the plaintiff went to several lawyers for help but with no effect and at about 10.30 p.m. on the same day the plaintiff with the help of local anti-social elements got entry into the house by forcibly removing the man of this defendant No. 1 for which Mali Pachghara, P.S. Case No. 32 dated 26.09.1983 u/s 448 IPC was started against them by the local police then Miscellaneous Case being No. 882/83 was started in the Court of SDM (Ex) against the plaintiff by the defendant No. 1. The defendants in the W.S. denied the other allegations of the plaintiff made in paragraph 10 & 11 and alleged that those allegations are false. The defendant averred that the allegations made by the plaintiff in those two paragraphs are false. The defendant also denied the story of collusion in between those defendants and the defendant No. 2 and the defendant further denied the allegations of fraud upon the plaintiff by his learned advocate Sri Arabinda Ghosal or the allegation of not depositing the rent by the defendant No. 2 in collusion with these defendants. The defendants alleged that the duty of the plaintiff was to see whether his rents were being regularly deposited or not. It was also his duty to receive the challan of deposition of rent by his learned advocate and it was also the duty of the plaintiff to attend the Court on the dates of hearing to see whether his case is being properly conducted or not. It was further alleged by the defendants that the plaintiff cannot shark his responsibility only by saying that there was a collusion between his advocate and these defendants.

20. The defendants in their W.S. in paragraph 20 also denied the averments made in paragraph 12 of the plaint and the defendants alleged that those averments are absolutely false.

21. The defendants further denied that the plaintiff is still in possession of the suit property and/or these defendants have not been able to take possession by executing the decree and/or if there is any report of the bailiff stating that he has delivered possession of the suit property to those defendants then that report is a desk work and has been prepared according to the instruction of these defendants, has been falsely alleged. The defendants submitted that the possession was duly delivered by removing the plaintiff and members of the family with all their belongings with the help of police in the presence of local gentleman and the defendant No. 1's son Sidhinath Nandi took delivery of possession by signing the Court papers and the plaintiff at about 10.30 p.m. in the night in the same date with the help of anti social elements got illegal access of the house by forcibly removing the man of those defendants for which false case No. 32 dated 26.09.1988 u/s 448 Indian Penal Code was started and the defendants filed application u/s 145 Code of Criminal Procedure in the criminal Court being M.P. No. 1682 of 1983 and another suit has been filed u/s 6 of the Specific Relief Act. The defendants further submitted that plaintiff having no chance of success has filed this suit on false and frivolous grounds by changing the title of himself as well as that of his father from Moitra to Mitra in order to show that the whole proceeding is not correct. The defendants prayed for dismissal of the suit with compensatory costs.

22. The plaintiff amended the plaint and against the said amended plaint, the defendants filed additional Written Statement.

23. In the additional Written Statement in paragraph 2 the defendants stated that the allegations made in para 5 of the plaint inserted by way of amendments are not correct and are denied. The defendants submitted that in collusion with the defendant No. 2 Sri Arabindo Ghoshal who was the advocate of Butokrishna Moitra the original plaintiff, since deceased, the present substituted plaintiffs have created and prepared the alleged letter and the version mentioned in that para is motivated and not acted upon. The defendants further alleged that the said defendant No. 2 has informed that he has not issued any such letter to the plaintiffs and he has no interaction with the plaintiffs from long before the ex parte decree being passed in T.S. No. 51 of 1980 on 13.01.1983. The defendants also alleged that the original plaintiff had not paid rent to said advocate upto June 1983 as alleged. It was further stated by the defendants that the original plaintiff in his deposition had not disclosed anything about the said alleged letter which was not filed in this suit during his life time. The disputed letter has been filed by the person the substituted plaintiff on the last day of his evidence on 15.05.1992 and that letter has been created for the purpose of this suit, after the death of original plaintiff and as such that letter has no documentary value in the eye of law and it cannot be taken into

evidence also. It was submitted by the defendants in their additional Written Statement that the plaintiff will not be prejudiced and will not suffer loss as alleged. But on the other hand these defendants have been seriously prejudiced and have suffered irreparable losses and injury for the said created document.

24. The defendants herein being the plaintiff has also filed T.S. No. 40 of 1984 against the plaintiffs herein making them defendants therein in that suit. In the said suit No. 40 of 1984 the defendants herein being the landlords prayed for recovery of possession u/s 6 of the Specific Relief Act.

25. On the above pleadings the learned trial Judge heard the said two Suits T.S. No. 232 of the 1983 and T.S. No. 40 of 1984 analogously and for the purpose of hearing following issues were framed:-

T.S. No. 232 of 1983

1. Has the plaintiff any cause of action or right to sue?
2. Is the suit maintainable in its present form?
3. Is the plaintiff entitled to get a decree as prayed for?
4. To what other relief or reliefs plaintiff is entitled?

T.S. No. 40 of 1984

1. Has the plaintiff any cause of action or right to sue?
2. Is the suit maintainable in its present form?
3. Is the plaintiff entitled to get a decree as prayed for?
4. To what other relief or reliefs plaintiff is entitled?

26. As the above two suits were heard analogously, the issue of both the suits being same were taken up together and argued accordingly by the learned counsel for the parties. The learned trial Judge dismissed T.S. No. 232 of 1983 on contest with cost and decreed T.S. No. 40 of 1984 on contest with cost against the defendant of that suit. Learned trial Judge found the defendant T.S. No. 40 of 1984 in wrongful possession of the suit property and granted plaintiff of T.S. No. 40 of 1984 decree for recovery of khas possession of the suit property. The defendants of T.S. No. 40 of 1984 that is the plaintiffs of T.S. No. 232 of 1983 were directed by the learned trial Judge to quit and vacate and deliver khas possession of the suit property within 60 days from the date of the order and in default, the plaintiffs were given liberty to execute the proper justice the formulation of additional question is necessary. The learned counsel in this regard rely on a decision reported in (1999)1 CHN 1 (Rekha Mukherjee v. Ashis Kumar Das and Ors.). According to the learned counsel for the appellant in this judgment the Hon'ble Division Bench formulated additional substantial question of law in exercise of power u/s 100 of the Code of Civil

Procedure.

27. In so far as this proposition of law is concerned I agree with the submission of the learned counsel for the appellant. After perusal of all the records and both the judgments and decree I feel that another substantial question of law need be formulated which is as follows :

"whether in the instant cases the judgment and decree passed by the learned trial Judge was scrutinised by the Appellate Court below, in view of the statutory provision or the learned Appellate Court below delivered the judgment on surmise and conjecture and/or whether the judgment and order passed by the Appellate Court below is perverse or not."

28. Learned counsel for the appellant submitted that the finding of the Appellate Court below is perverse. The learned counsel drew attention of this Court regarding the observation made by the Appellate Court below which is "So, from the above application it is clear that the tenant applicant did not deposit the rent with his lawyer at least upto 25.8.1983 (the date of filing of the Miscellaneous Case). The learned counsel also submitted that the finding regarding tender of rent to learned advocate is not relevant for the purpose of determination of the issue in question. The learned counsel for the appellant further submitted that scrutiny of evidence as required under the statute was not done by the Appellate Court below in as much as it appears from the judgment and order passed by the Appellate Court below that no discussion of evidence is there. The learned counsel accordingly, submitted that the judgment and order passed by the Appellate Court below is based on surmise and conjectures.

29. The learned counsel also submitted that the plaintiff has filed a separate suit being T.S. No. 56 of 2000 which is still pending before the learned trial Judge. In the suit the parties herein are the parties there. In the said suit that is 56 of 2000 the plaintiff has prayed for a decree for declaration that the judgment and decree dated 29th June, 1993 and 12th September 1993 respectively passed in connection with T.S. No. 40 of 1984 of the learned Civil Judge (Junior Division) 5th Court at Howrah is a nullity, void, illegal, inoperative without jurisdiction and not binding upon the plaintiff. The learned counsel submitted that because of pendency of the said suit this appeal should not be decided finally, because any observation in this appeal if made against the plaintiff/appellant herein will make the said suit infructuous without hearing. The learned counsel submitted that it is the duty of the Appellate Court below to scrutinise the judgment of the trial Court and this second Appellate Court can interfere or should interfere in the judgment and decree passed by the Court below, if the said judgment appears to be based on surmise and conjecture. Perverse finding not based on legally acceptable evidence and which are patently contrary to law declared by the Hon"ble Supreme Court, that judgment cannot have any immunity from interference in the hands of the Appellate Authority and according to the learned counsel for the appellant that is the ratio of the judgment

of the Hon"ble Apex Court in State of Rajasthan Vs. Harphool Singh (Dead) Through His L.Rs.,. The learned counsel also submitted that in this judgment the Hon"ble Apex Court also observed that the first Appellate Court is duty bound to make a critical analysis of the matter before it and it cannot mechanically affirm findings of trial Court without due and proper application of mind. The learned counsel submitted that in the instant case the Appellate Court below proceeded purely on surmise and conjectures as it would appear on the lace of the judgment of the Appellate Court below. In this context the learned counsel for the appellant also relied on a decision of the Hon"ble Apex Court reported in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., In this decision the Hon"ble Apex Court observed that where a view of trial Court has uphold, the first Appellate Court, need not go into detail, but an expression of gentleman agreement should not become a way to avoid the duty based on such Court to apply its law conscientiously when giving judgment. The Hon"ble Apex Court in this case also observed that the first Appellate Court while reversing a finding of fact must assign it's own reason for the different findings. The Hon"ble Apex Court further observed that apart from being the final Court of fact, the first Appellate Court is also a final Court of law, in that it's decision on a question of law is no longer assailable before the High Court, unless such question is substantial question of law. The learned counsel for the appellant submitted that the judgment and decree passed by the Courts below in dismissing T.S. No. 232 of 1983 should be set aside. The learned counsel for the appellant also submitted that the impugned judgment and decree should be set aside.

30. The learned counsel for the respondent submitted that in the meantime the respondent herein moved an application u/s 115 of the CPC being C.O. No. 1032 of 1998 and in the said revisional application the respondent herein being the petitioner challenged the judgment and decree passed by the Court of learned second Civil Judge (Senior Division) at Howrah in Title Appeal No. 233 of 1993 on 10.3.1998 referring the judgment and decree passed in T.S. No. 40 of 1984 by the Court of learned 5th Munsif at Howrah on June 29, 1993. The said revisional application was taken up for hearing on 24.09.1998 by one Hon"ble single Judge of this High Court and the said revisional application was allowed and the judgment and order passed in Title Appeal No. 233 of 1993 was set aside. In the said revisional application the Hon"ble single Judge of this High Court also observed that as a result of setting aside the Appellate Court's decree and order, the decree of the trial Court passed in T.S. No. 40 of 1984 stands good.

31. The learned counsel for the respondent also submitted that thereafter on behalf of the appellant recalling application was filed in C.O. No. 1032 of 1998 for recalling the order dated 18.11.1999 passed by the Hon"ble single Judge setting aside the judgment and decree passed in T.A. No. 433 of 1993 and affirming the judgment and decree passed by the learned Munsif, 5th Court at Howrah in T.S. No. 40 of 1984 and the said recalling application was also rejected by order dated 18.11.1999 passed by another Hon"ble single Judge of this High Court. The learned counsel for

the respondent, Mr. Banerjee submitted that such being the position the judgment and decree passed by the learned Court below granting decree for recovery of possession in T.S. No. 40 of 1984 stands. The learned counsel for the respondent submitted that in the above facts and circumstances the instant suit filed by the appellant/plaintiff is barred by res judicata. The learned counsel for the respondent in this context relied on a decision reported in Ram Prakash Vs. Smt. Charan Kaur and Another,. The learned counsel submitted that in this judgment the Hon'ble Apex Court observed that when two connected suits are filed and one is dismissed and ultimately the judgment and decree passed in which is not set aside, the other connected suit standing thereon becomes barred by res judicata. The learned counsel then submitted that the allegations of fraud as raised by the plaintiff/appellant in the Court below is a special type of allegation in the instant case and under Order 6 Rule 4 of the CPC the detailed particulars (with dates and times, if necessary) shall be stated in the pleading but in the instant case the plaintiff did not give any such detailed particular regarding the collusion of defendant No. 1 and 2 in T.S. No. 232 of 1983 and as such in view of the provision of Order 6 Rule 4 the said allegation cannot be made sustainable. The learned counsel in this context relied on the decision reported in AIR 1915 P C 7 (Bal Gangadhar Tilak and Ors. v. Shrinivas Pandit and Ors.). The learned counsel submitted that allegation of fraud by the defendant No. 2 in T.S. No. 232 of 1983 is not specific. The learned counsel also relied in this context on the decision reported in 1998(6) S CT 414 (Smt. Satya Gupta @ Madhu Gupta v. Brijesh Kumar). The learned counsel for the respondent submitted that High Court in a second appeal u/s 100 of the CPC cannot reappreciate the evidence. The learned counsel submitted that in the judgment reported in Tirumala Tirupati Devasthanams Vs. K.M. Krishnaiah,. The Hon'ble Apex Court has taken the view of the judgment referred to earlier. The learned counsel for the respondent relied on another decision of the Hon'ble Division Bench of this High Court reported in Sm. Swarna Lata Devi Vs. Krishna Iron Foundry and Metal Works (P) Ltd.,, and relied also on a decision of the Hon'ble Apex Court, reported in Lakhami Chand Khemani Vs. Smt. Kauran Devi,.

32. The learned counsel for the respondent submitted that by virtue of the judgment and order passed by the Hon'ble single Judge in C.O. No. 1032 of 1998 judgment and decree passed in T.S. 40 of 1984 stands. The learned counsel further submitted that even if the application for recalling the order dated 24.09.1998 passed in C.O. No. 1032 of 1998 filed by the plaintiff/appellant herein was also rejected. The learned counsel for the respondent submitted that the suit filed by the predecessor-in-interest of this respondent being T.S. No. 51 of 1980 was decreed against the plaintiff/appellant whose predecessor-in-interest Botokrishna Moitra was the defendant here. The appellant being the defendant there filed an application under Order 9 Rule 13 of the CPC and that also ended in dismissal. Then the appellant being, plaintiff filed T.S. No. 232 of 1983 making an allegations of fraud against their learned advocate Sri Arabindo Ghoshal and making Sri Arabindo

Ghoshal defendant No. 2 therein. It has been also submitted by the learned counsel for the respondent that Sri Ghoshal adduced evidence as DW 6 and he also admitted that the defendant in T.S. No. 51 of 1980 Boto Krishna Moitra (presently deceased) told him that he has been dispossessed and in that view of the matter the learned trial Judge rightly dismissed T.S. No. 232 of 1983 and decreed the suit for recovery of possession filed by the respondent herein and rightly directed eviction of the tenant and rightly observed that the said tenant Boto Krishna Moitra was a trespasser after the decree passed in T.S. 40 of 1984 was executed. The learned counsel for the respondent submits that the instant appeal should be dismissed with costs. The learned counsel for the appellant in reply submitted that the Appellate Court below has not discussed the evidence and the principle of res judicata is not applicable here inasmuch as causes of action in two suits are different. The learned counsel for the appellant submits that the Appellate Court below accepted the appellant as not a trespasser and in that view the respondent is not entitled to relief u/s 6 of the Specific Relief Act. The learned counsel also submitted that the judgment and decree of the Appellate Court below as well as the trial Court suffers from perversity and that apart the learned Appellate Court below did not also scrutinise the evidence and/or the judgment and decree passed by the learned trial Judge and as such both the substantial question of law are in favour of the appellant and the appeal should be allowed with imposition of costs on the respondent.

33. Heard the learned counsel for the respective parties. Considered their submissions in respect of the substantial questions of law formulated, considered the judgment and decree passed by the Courts below in the light of the evidence on record.

34. Let me first have a look into the back ground of this instant second appeal inasmuch as the case herein has got a chequered history.

35. One Bhabani Charan Nandi being the Karta of Hindu undivided family along with others filed a suit for eviction in respect of the said property against one Boto Krishna Moitra a tenant there being T.S. No. 51 of 1980. The tenant defendant appears in the said suit through one learned advocate Sri Arobindo Ghoshal. The application u/s 17(1) and 17(2A)(b) of the W.B.P.T. Act were filed and on the said application order passed for payment of arrear rent in 13 (thirteen) equal instalments to be paid along with current rent. But the tenant defendants neither deposited the arrear nor current rent, and his defence against delivery of possession was struck off u/s 17(3) of the W.B.P.T. Act. Ultimately the said suit was decreed ex parte. In T.S. 51 of 1980 execution case was started. Thereafter, the tenant defendant filed application under Order 9 Rule 13 of the CPC for setting aside, the ex parte decree and that application also ended in dismissal. Thereafter, the tenant filed Title Suit No. 232 of 1983 praying for a declaration that the decree passed in T.S. 51 of 1980 is not binding upon the tenant and also with prayer for restraining the landlord from taking possession of the suit property. The plaint was

amendment subsequently and the defendant landlord submitted Written Statement as well as additional W.S. In T.S, No. 232 of 1983. The landlord filed T.S. No. 40 of 1984 u/s 6 of the Specific Relief Act praying for recovery of possession of the suit premises.

36. At this juncture two facts need be recorded, original tenant Boto Krishna Moitra and subsequently Bhabani Charan Nandi both expired during the course of proceedings and their heirs were substituted under orders of the Courts.

37. The point of dispute which arise was on the basis of the claim and rival claim made by the landlords and the tenants. The landlord's alleged that after the decree has been passed in T.S. No. 51 of 1980 they have taken possession by way of execution proceeding and evicted the tenants and put their man in possession of the suit premises but the tenants on the same night at 10.30 p.m. with the help of anti social re-entered the suit premises and as such they are trespassers and accordingly prayer for recovery of possession u/s 6 of the Specific Relief Act has been made through T.S. No. 40 of 1984. The tenant alleged that their learned advocate Mr. Arobinda Ghoshal committed fraud on them, acted in collusion with the landlord and as such the decree was made ex parte in T.S. No. 51 of 1980 and the tenants are still in possession and as such they have filed T.S. No. 232 of 1983.

38. Now, it is to be decided as to whether the Appellate Court was right in coming to the conclusion that the tenants were not trespassers or the decree has been passed in T.S. No. 51 of 1980 was not executed or the learned trial Judge came to a wrong conclusion in so far as the possession of the tenants is concerned. It is admitted position that T.S. No. 51 of 1980 was decreed ex parte and it is not that the allegations of defendant in that case that the defendant did not receive any summons. The defendants received summons, appeared in the matter through Sri Arobindo Ghoshal, advocate, but did not comply with the order passed by the trial Court in T.S. No. 51 of 1980 deciding the applications u/s 17(1) and 17(2)(1) of the West Bengal Premises Tenancy Act. The learned trial Judge fixed the arrear of rent and directed payment in the said order through instalment, but the order was not complied with. No deposit was made the defence was struck off and ultimately the suit was heard ex parte. The tenant/ defendants in that suit made application under Order 9 Rule 13 of the CPC for setting aside ex parte decree and that was dismissed. An application for review of the order passed in the Miscellaneous Case which was instituted for setting aside ex parte decree, that also ended in dismissal and thereafter T.S. No. 232 of 1983 was filed by the tenant and that suit was also dismissed by the learned trial Judge on merit. It is also admitted that an execution case was started for execution of the decree passed in T.S. 51 of 1980 and now comes the point whether the decree was executed or not and whether the tenant has been dispossessed in pursuance of the decree or not. The bailiff gave his evidence, and in cross-examination he said that first date was fixed on 26.08.1983 for delivery of possession and in his examination in chief he said "I have gone to

deliver possession on 26.09.1983. The suit property was identified by Siddhi Nandi, son of decree-holder." Sri Arobindo Ghoshal, the learned advocate of the defendant also adduced evidence as DW 6 and in cross-examination he said "I have heard only about the taking possession from Boto Krishna Babu. There was no other advocate except me and Boto Krishna Babu"s son cannot say whether the landlord has taken possession or not, but Boto Krishna Babu himself told me that he was dispossessed.

39. The Appellate Court below without consulting the record, however, held that he was not a trespasser in as much as the plaintiff in suit No. T.S. 51 of 1980 could not take possession by executing the decree. It also appeared from the evidence of the process server that when judgment-debtor obstructed the process-server, then the decree holder, process-server with Malipachghora Police Station and police party came there and in presence of the police party peaceful possession was delivered and writ was duly executed Kashinath Banerjee, the driver of the landlord/plaintiff in T.S. No. 51 of 1980 adduced evidence and said that the defendant in that case with the help of some anti-social elements forcibly entered into the suit property and removed him from the house.

40. On such evidence the learned trial Judge arrived at a conclusion that the landlord took possession and thereafter the tenants re-entered and as such the tenants are trespassers. But the Appellate Court below without going into the evidence or without scanning the evidence only on surmise decided that the plaintiff herein are not trespassers and in execution of the decree the landlords/ defendants herein could not take possession. The Appellate Court below only discussed the procedure as to what the bailiff could have done and to take police help what is the procedure etc. The learned Appellate Court below also did not consider in this regard that a diary was lodged before the Police Station after the tenants re-entered the premises with the help of anti-socials and the police started a criminal case. The Appellate Court below therefore proceeded on surmise and conjecture and not on evidence insofar as the delivery of possession part is concerned. The trial Court in my view was therefore right in coming to the conclusion that the tenant was evicted, possession was taken by the landlord and thereafter the tenant with the help of anti-socials re-entered the premises.

41. So, the first subsequent question of law goes in favour of the landlords inasmuch as basic finding of the Appellate Court below that the tenants were not dispossessed and as such not trespassers is not correct. It is also to be kept in mind that T.S. No. 40 of 1984 filed by the landlord ultimately was confirmed by the High Court that means the High Court decided that recovery of possession by the landlords in a suit u/s 6 of the Specific Relief Act is established. Relevantly it should be noted also that on scanning the evidence of Sri Arobindo Ghoshal, learned advocate, and the original tenant"s son the learned trial Judge rightly came to the conclusion that the alleged fraud could not be proved. Section 17 of the Contract Act came to the help in this context where it is clear that only allegation of fraud is not

going to help if there is any allegation of fraud that is to be proved by giving detailed particulars of the fraud. That apart Order 6 and Rule 4 of the CPC also comes in aid.

42. In my view, therefore, the learned Appellate Court below was wrong in holding that delivery of possession could not be proved and the plaintiffs herein are not trespassers.

43. In so far as second substantial question of law is concerned that is whether the judgment and order passed by the Appellate Court below is perverse or not need not be discussed in details inasmuch as the above discussion clearly proves that the Appellate Court below went beyond the recorded evidence and went in contradiction with the evidence on record and as such the judgment of the Appellate Court below in so far as delivery of possession part or in so far as trespasser part is concerned is also perverse.

44. In view of the above discussions both the substantial questions of law go in favour of landlords/respondents herein and the second part of the judgment of the Appellate Court below dismissing the suit of the landlord being T.S. No. 40 of 1984 is set aside and the judgment and decree passed by the learned trial Judge is affirmed. In so far as the pendency of the T.S. No. 56 of 2000 is concerned the tenants/appellants herein being the plaintiff of that suit prayed for stay of the judgment and decree passed in T.S. No. 232 of 1983 and 40 of 1984 which was rejected and the injunction prayer in this suit was rejected upto the High Court, lastly by Hon"ble Mr. Justice Bhaskar Bhattacharya.

45. The instant appeal, therefore, fails and is dismissed. The judgment and decree passed by the learned trial Judge in T.S. 232 of 1983 and 40 of 1984 are affirmed. However, considering the circumstances of the case the appellants/tenants are given three months time to vacate the suit premises, in default the landlords/respondents herein will be entitled to put the decree in execution. The parties are to bear their own costs.

Let the decree be drawn up accordingly. The L.C.R. be sent down to the Courts below forthwith.

Urgent xerox certified copy, if applied for will be supplied to the parties expeditiously.