(2002) 08 CAL CK 0029

Calcutta High Court

Case No: S.A. No. 286 of 1993

Paritosh Ghosh		APPELLANT
	Vs	
Ashim Kumar Gupta and Others		RESPONDENT

Date of Decision: Aug. 29, 2002

Acts Referred:

- Transfer of Property Act, 1882 - Section 108
- West Bengal Premises Tenancy Act, 1956 - Section 13(3)(A), 13(A), 17, 17(4)

Citation: (2002) 4 CHN 382 : 107 CWN 286

Hon'ble Judges: Malay Kumar Basu, J

Bench: Single Bench

Advocate: Jibon Ratan Chatterjee, Tapas Kr. Banerjee and G.K. Goon, for the Appellant;Gopal Ch. Ghosh and S.K. Pandey, for the Respondent

Judgement

Malay Kumar Basu, J.

This second appeal is directed against the judgment and order dated 9th July, 1991 passed by the Id. 13th Additional District Judge, Alipur in Title Appeal No. 329/89 of this court. The said Title Appeal No. 329/89 was preferred by the tenant-defendant Sri Paritosh Ghosh against the judgment and order dated 31st May, 1989 passed by the Id. Munsif. 2nd Court. Alipur in Title Suit No. 201/83 of that court. The relevant facts are as follows: The plaintiff Ashim Kr. Gupta and others filed the said title suit against the said defendant praying for a decree of eviction of the defendant-tenant from the disputed premises No. 25. Ekdalia Road. Calcutta - 700019 on the following grounds. The defendant who had been inducted as a monthly tenant in respect of the said premises at a rental of Rs. 550/- per month by Sm. Pumima Gupta, since deceased, the erstwhile owner of the house, violated the terms of the agreement by sub-letting his tenanted premises to the defendant No. 2 without obtaining any written consent from the landlord and he has been realising Rs. 3,500/- every month from that sub-tenant by way of rent. The defendant No. 1 committed certain further unlawful acts which have rendered him liable for ejectment from the suit premises

in view of the terms of the agreement. Thus he caused certain damages to the suit building in violation of the provisions of clauses (m). (o) and (p) of Section 108 of the T. P. Act. That apart, he also defaulted in payment of rent to the plaintiffs. Moreover, the plaintiffs required the suit premises for their own use and occupation as they have got no other alternative suitable accommodation. Due to non-availability of accommodation in the suit house one of the plaintiffs cannot be given in marriage. Also, the accommodation in their existing residence cannot be made available to the married sister of the plaintiffs, when she wants to come to her father''s house along with her husband and children. The plaintiff sent notice to quit upon the defendants dated 25th January, 1983 asking him to vacate the premises and deliver up the vacant possession of the same in favour of the plaintiffs by the last day of February, 1983, but even after receipt of that notice he has not vacated the suit premises. Hence the erstwhile landlady Mrs. Purnima Gupta filed the suit against the defendants praying for a decree of their eviction form the suit premises. Subsequently, during pendency of the suit, the said plaintiff. Mrs. Purnima Gupta, died and on her death the present plaintiff being her legal heirs were joined as plaintiffs in place of the deceased plaintiff. The defendant No. 1 appeared and filed a written statement in order to contest the suit. His case was one of denial of the allegations of the plaint. It is his case that he never caused any damage to the suit building, never constructed any structure, never altered the suit premises in any way and has never inducted any sub-tenant as alleged. He has also disputed the ownership of the plaintiffs in respect of the suit premises. Further, he does not admit due service of the notice to quit upon him. According to him the suit being on false grounds is liable to be dismissed with cost.

2. On the basis of the pleadings of the parties the trial court framed the following issues for consideration.

1. Is the suit maintainable?

2. Is the notice to quit legal, valid, sufficient and was it duly served ?

3. Is the defendant a defaulter?

4. Has defendant No. 1 sub-let the premises to defendant No. 2 without the consent of the landlord ?

5. Is the defendant No. 1 guilty of acts in contravention of provisions in clauses (m). (o) and (p) of Section 108 of the T. P. Act ?

6. Are the plaintiffs owners of the suit premises?

7. Do the plaintiffs reasonably require the suit premises for their own use and occupation?

8. Do not the plaintiff have any other reasonably suitable accommodation elsewhere ?

9. Are the plaintiffs entitled to the decree prayed for?

10. To what other reliefs, if any. are the plaintiffs entitled?

3. The Id. Munsif found that the notice to quit was legal, valid and sufficient and had been duly served on the defendant in due time and thus rejected the plea raised by the defendant in this regard. He also found the suit legally maintainable. As regards the issue No. 3, that is, the question whether the defendant No. 1 was a defaulter, his finding was that in view of the provisions of Section 17 of the W.B.P.T. Act, the defendant having deposited in full the rents, both arrears and current, was entitled to get the protection against eviction u/s 17(4) of the said Act and accordingly the Id. Munsif answered the issue in favour of the defendant. On the question whether the plaintiffs had established their alleged ownership in respect of the suit premises and whether they reasonably required the same, both the issue Nos. 6 and 7 have been decided by the trial court against the plaintiffs. Since it was in evidence that the suit premises were given to the plaintiffs by virtue of a deed of gift by the erstwhile owner Mrs. Purnima Gupta (Exbt. 14J on 23rd June, 1986, they were no doubt found to be the owners of the suit property, but what stood in their way in the matter of claiming an eviction decree on the ground of reasonable requirement was that under the provisions of Section 13(3)(A) of the W.B.P.T. Act, landlord having acquired interest in the premises by virtue of transfer cannot file a suit for recovery of possession on the grounds mentioned in clause (I) or clause (II) of Section 13(A) of the Act before the expiration of a period of 3 years from the date of his acquisition of such interest. According to Id. Munsif, in view of these mandatory provisions, since the acquisition of title by these plaintiffs by virtue of a deed of gift from the erstwhile owner of the house, Purnima Gupta, took place within a period of three years from the date of possession of the suit property and a period of three years in full had not expired from such date of acquisition in interest, they were not entitled to claim a decree for eviction against the defendant-tenant on (he ground of their reasonable requirement. Ld. Munsif did not accede to the contention of the ld. Counsel for the plaintiffs that in view of a decision reported in 1989 C.L.N. 256 this barrier could be overcome. In this view of the matter, the Issue No. 7 was decided against the plaintiffs and they were not found entitled to claim a decree for eviction in the suit premises on the ground of reasonable requirement. However, the Id. Munsif found the other two vital issues, namely, issue Nos. 4 and 5 in favour of the plaintiffs. According to him, the materials on record fully established the case of the plaintiffs that the defendant No. 1 had sublet the suit premises in favour of defendant No. 2 without the consent of the landlord and on that score the plaintiffs became entitled to get a decree for eviction against the defendants. Similarly so far as the issue No. 5 is concerned, the Id. Munsif came to hold that the evidence on record had clearly proved that the defendants had violated the provisions of Clauses (m). (o) and (p) of Section 108 of the Transfer of Property Act by contravening the terms of the agreement of tenancy and failed to keep the tenanted premises in the condition in which it was at the time when the defendant took the lease. Thus,

according to Id. Munsif, on that score again the defendant became liable to be evicted from the suit premises. The issue Nos. 4 and 5 being thus answered against the defendants and in favour of the plaintiffs, the latter was found entitled to get a decree for ejectment against the defendant and accordingly the Id. Munsif passed the impugned judgment under which the plaintiff got a decree of khas possession in respect of the suit premises on eviction of the defendant therefrom and the defendants were directed to vacate the same and deliver khas possession thereof to the plaintiffs within two months from the date of that order.

4. Being aggrieved thereby defendants preferred an appeal before the court of District Judge, 24-Parganas (South), Alipur being T. A. No. 329 of 89. The appeal was transferred to the court of the 13th Additional District Judge who after hearing arguments of both sides delivered the impugned judgment and order dated 9th July. 1991 dismissing the appeal on contest with cost against the respondent Nos. 1 and 2 and ex parte without cost against respondent No. 3 and affirming the judgment and decree passed by the Id. Munsif and gave a direction upon the defendant No. 1 to vacate the suit premises within 15 days of that decree of the Appellate Court.

5. The Id. Addl. District Judge as the first Appellate Court in his judgment accepted the reasoning put forward by the Id. Munsif regarding both the points which fell for determination before him, namely, (1) whether the defendant No. 1 was guilty of subletting and (2) whether the defendant No. 1 was guilty of committing the alleged waste and damage of the premises and thereby violated the terms of the agreement and the provisions of section 108, clauses (m), (o) and (p) of the Transfer of Property Act. The ld. Judge found that the initial onus of the landlords to prove sub-tenancy having been successfully discharged by them, they having proved that the defendant No. 2, a third party, was in exclusive possession of the tenanted premises, the onus shifted on to the shoulder of the defendant-tenant to rebut the presumption that the defendant No. 2 was occupying the suit premises as a sub-tenant under him, because it was within his special knowledge. Further the ld. First Appellate Judge was of the view that when an advocate had been appointed to inspect and report on this question and when it was the report of that local inspection Commissioner that the suit premises was in the occupation of a stranger, then that might leave the court to draw the conclusion that the premises had been sublet to that stranger when the tenant totally failed to adduce any evidence to the contrary. In this regard he has relied upon a decision reported in Southern Command Military Engineering Services Employees Coop. Credit Society Vs. V.K.K. Nambiar (Since Deceased) By Legal Representative Madhvi Devi, . The ld. Appellate Judge also relied upon the evidence to the effect that the defendant No. 1 had already shifted to his newly constructed house along with his telephone from the suit premises with his family and was no longer residing there and also the fact that the defendant No. '' 2 received the summons of the court at the address given on notice, namely, the address of the suit premises and the further fact that the

defendant No. 2 was admittedly not a relation of a defendant No. 1. The Id. Appellate Judge also has taken Into consideration the fact that the defendant No. 1 failed to discharge his onus by failing to adduce any evidence either documentary or oral to clarify how and in what capacity the defendant No. 2 was staying in the suit premises in his absence for such a continuously long period. In view of all this the court below came to the conclusion that the Id. Munsif had rightly held that the defendant No. 1 had sublet the suit premises in favour of the defendant No. 2 without the knowledge or consent of the landlord and on that score he had rightly decreed that suit for eviction.

6. Similarly, as regards the question whether the defendant-tenant had caused any damage or waste in respect of the suit premises as alleged and thereby whether he violated the terms of the tenancy agreement and the mandatory provisions of Section 108 clauses (m), (o) and (p) of the T. P. Act, the finding of the court below has been in the affirmative. He has relied upon the report of the local inspection Commissioner in this regard and has been satisfied that the acts of waste and damage caused to the premises had been authorised by the defendant-tenant and he did not also get such damages repaired even though the landlords requested him to do so. The First Appellate Court took into consideration the fact which had been evident from the materials on record that the defendant-tenant had set an air-cooler in the tenanted premises by cutting a portion of wall of a room without taking any prior permission of the landlord and did not also restore the wall to its original position. The Id. Judge did not find any cogent reason to differ with the views of the Id. Munsif on these points and finding no merit in the appeal dismissed the same and affirmed the judgment and order passed by the Id. Munsif.

7. Being aggrieved thereby the defendant-tenant has preferred this Second Appeal before this court challenging the judgments and orders of both the courts below as erroneous and illegal, on the grounds, inter alia, that both the courts have failed to appreciate the evidence on record in their proper perspective and the findings they have arrived at suffer from perversity and both the courts below have erred in law as well as in fact. Mr. Chatterjee, Id. Advocate for the appellant has argued that it was erroneous on the part of the courts below to treat the evidence adduced by the defendant No. 2 in his examination-in-chief as expunged on the ground that he did not appear to face the cross-examination. Secondly, according to Mr. Chatterjee, it was illegal on the part of the trial court to appoint a Commissioner for holding local inspection in the suit premises to ascertain whether any stranger was residing there, or, if so, what the name of that stranger was or in what capacity he was residing there, because such a question can be determined only by the court by taking evidence on oath and such judicial function of the court be usurped by a Commissioner for local inspection. Moreover, he contends, here the Commissioner was not called upon to give any report or findings on the question of subletting in any way and therefore it was none of his business to give any findings in his report touching such a question as to whether the defendant No. 2 was residing there as a

sub-tenant or not. According to Mr. Chatterjee the report which the Id. Local Inspection commissioner submitted before the Trial Court on such aspects of the matter was simply to be overlooked in view of such reasons, particularly when there was no substantive evidence in this regard. According to Mr. Chatterjee, the oral evidence (examination in-chief) of the D. W. 2 (defendant No. 2) cannot be expunged by the court and at the most it can be disbelieved. Secondly, apart from what has b contended above. Mr. Chatterjee''s further contention is that the local inspection report will not be reliable for the further reason that as per this report the Id. Commissioner found one gentleman living with his family the suit premises who gave his name before the Id. Commissioner as Nanda Dulal, but in his evidence the plaintiff himself has given his name as Nandagopal and not Nanda Dulal. Moreover, according to Mr. Chatterjee, the plaintiff having failed to prove any transaction, that is to say, payment, of any valuable consideration by the defendant No. 2 in favour of the defendant No. 1, the most vital aspect of the allegation of sub-tenancy remains unsubstantiated and in view thereof the proof of alleged sub-tenancy remains a far cry. In support of his contention Mr. Chatterjee refers to a number of reported decisions. The first of such decisions is the one reported in 1989 (1) CHN 261 wherein it has been held that a court cannot expunge evidence for the simple reason that the same was not subjected to cross-examination. The other decisions relied upon by A.S. Sulochana Vs. C. Dharmalingam, in both of which it was held that in order to prove alleged subletting it is incumbent on the plaintiff to show that the premises was in exclusive possession of the subtenant to the total exclusion of the tenant and further that there was passing of valuable consideration between the two. According to Mr. Chatterjee, in the present case none of these two ingredients for the purpose of proof of alleged subletting are present because here it has not been proved that the defendant No. 2 was occupying the suit premises in exercise of an exclusive right of possession and such exercise of the right was in lieu of some payment of valuable consideration.

8. Giving careful consideration to what has been argued by Mr. Chatterjee, I am of the view that such contentions are not impressive or acceptable. It is an admitted position that the defendant No. 1. tenant, has constructed his own house and has shifted there from the disputed premises along with his telephone etc. and that the defendant No. 2 was residing in the suit premises at the relevant time and even he received the notice of the suit premises. In view of such facts being admitted there is not denying the position that it is for the defendant No. 1 to 42 explain as to in what capacity the defendant No. 2 was residing there. The defendant No. 1 had stated certain inconsistent facts in his cross-examination. A case has been sought to be made out by the defence that the two defendants being related to each other, the defendant No. 2 was allowed to live in the suit house for a temporary period of 3/4 months and for such occupation the latter did not have to pay anything to him. But this story appears to have been falsified by a statement of the D.W. 1 in his cross examination that he has no relationship with the defendant No. 2 and that he did

not know the name of the tetter''s father. Thus in view of such conflicting statements coming out in the evidence of the defendant No. 1, it becomes all the more necessary to see how the defendant No. 2 laces the cross-examination. But curiously enough, the defendant No. 2 did not appear on the witness box to be confronted with the cross-examination, although he came on the first date to depose and allowed himself to be examined-in-chief only. Such non-appearance of this vital witness on the date fixed for his cross-examination certainly gives rise to the drawing of an adverse presumption against the trustworthiness of his statements made in his examination-in-chief and the plaintiffs case that he was living in the suit premises as a sub-tenant under the defendant No. 1 became further strengthened. In fact, he was the best witness on this question, but his evidence having been withheld without any rhyme or reason, the defence case that he was living in the suit premises as a guest of the defendant No. 1 remains unsubstantiated. It appears that the Id. Munsif passed an order dt 19.5.1989 expunging the evidence of the defendant No. 2 Mr. Chatterjee has levelled criticism against the trial Court for passing such an order, but curiously enough the defendants did not move against this order of the Id. Munsif and allowed the same to remain in force and now it does not lie in the mouth of the defendants to contend that such an order was illegal or unworthy of reliance. Be that as it may. whether the order of expunction was legally valid or not, it goes without saying that when a particular witness after being examined-in-chief does not make himself available for being cross-examined, then the evidence led by him in his examination-in-chief loses all its credibility and is liable to be thrown aside. The Id. Munsif in his judgment appears to have analysed how the allegation of sub-letting levelled by the plaintiff had been established. He has shown that the defendant No. 1 admittedly having constructed a new house of his own at Manoharpukur Road and having the ration cards in his name and in the names of the other members of his family bearing the address of that newly constructed house, that is. the premises No. 117-B, Manoharpukur Road, having his telephone shifted from the suit premises to there and having his name and the names of his family-members being enrolled in the voters'' list as voters in respect of the locality of his newly constructed house at Manoharpukur Road (vide Exbt. 2). there cannot be any doubt that he left the suit premises lock, stock and barrel and it was the defendant No. 2 who was exclusively occupying the suit premises at the relevant point of time, as has been established from the evidence. From this the Id. Munsif appears to have been rightly driven to the conclusion that if under such circumstances the defendant No. 2 being a stranger having no relationship with the defendant No. 1-tenant and being in exclusive occupation of the suit premises does not discharge his onus of proving as to in what capacity he was staying in the suit premises, then it must be said that he had miserably failed to discharge his onus and to prove his case that he was staying there as a guest of the defendant No. 1. The Id. Munsif was fully justified while analysing the circumstances and holding that it was not expected or probable that a man like the defendant No. 2 who was a manager of a Nationalized Bank at the

relevant time would be staying in the suit premises with his family for such a long time without paying any rent and the fact that the plaintiffs could not produce any rent receipt in proof of their allegation that the defendant No. 2 was residing there as a sub-tenant would not stand in the way of his drawing the conclusion that the defendant No. 2 was staying in the suit premises as a sub-tenant under the defendant No. 1. inasmuch as, payment of rent or granting of rent receipts was out and out a matter in between the two and no third party could have any access thereto. The Id. First Appellate Judge quite rightly accepted these findings of the Id. Munsif as correct and correctly he has upheld the views that the defendant was liable for eviction having sublet the premises. Mr. Ghosh has cited in support of his argument in this connection a judgment of this court reported in Dhirendra Nath Hazari Vs. Aloke Kumar Panda and Others, wherein it was observed that in a suit for eviction on the ground of subletting direct evidence of payment of rent could seldom be found. Therefore, as regards the issue No. 4 the findings of both the courts below are found to be justified and there is no need on the part of this court of second appeal to interfere therewith.

9. The next point for determination is the question whether the lings of the courts below are correct when they have held that the defendant-tenant has been found guilty of acts done in contravention of the provisions of clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act. It is the case of the plaintiff that the defendant No. 1 during the continuance of his tenancy" unlawfully caused various damages to the suit-premises and performed various acts therein which are contrary to the provisions of the above clauses of Section 108 of the T. P. Act, 1982 and such acts of waste and damage have been described by him in the plaint as follows :

(i) He has cut big holes in the back-walls of the suit premises and fixed air-coolers in various rooms of the tenanted premises thereby damaging the main walls thereof;

(ii) Caused heavy damages to the water reservoir tank situated on the roof of the suit premises rendering the same beyond repair;

(iii) Removed 10 valuable brass water taps and replace them by plastic taps;

(iv) Has made various structural additions and alterations in the suit premises and pulled down existing walls and raised new big brick built walls in several places;

10. According to the plaintiff, the defendant has thus failed to keep the suit premises in its original condition in which it was let out to him and thereby he has violated the terms of the tenancy agreement as well as the provisions of clauses (m), (o) and (p) of Section 108 of the T. P. Act. The Id. Munsif has found from the terms of the agreement (Ext. 1) that the defendant-tenant agreed to keep the tenancy in good tenantable condition and preserve the articles attached to the premises in their original condition. He has also found on an analysis of the materials on record that the plaintiff has been able to prove his allegations by means of the report of the

local inspection commissioner as well as his oral evidence. The Commissioner''s report marked as Ext. 13 shows that there are apparent damages caused to the water reservoir situated on the roof and particularly there has been a hole on the upper side of one of the tanks and such damage to the reservoir was caused during the continuance of the tenancy. It has been stated by the plaintiff in his examination-in-chief that at the time of letting out of suit premises there were smokeless Sarkar''s Ovens (chullis) in (he kitchen of the house but the same has been removed by the defendant. This statement of the plaintiff appears to have been corroborated by the findings of the Id. Commissioner to the effect that no such chullis were found to exist in the kitchen at the time of his inspection, although such chullis appear to have been included in the tenancy agreement. Ld. Munsif has found that such removal of the chullis from the kitchen unaccompanied by any explanation from the side of the defendant-tenant goes to prove that the provisions of the tenancy agreement have been violated by the tenant. Then, in his evidence the P.W. 1 has stated that the iron frame of the window has been cut by the defendant-tenant and an Air-cooler has been installed there causing material deterioration to the main walls of the suit premises. The defendant-tenant has not denied such alleged act. His case is that he installed the air-coolers after taking prior permission from the-then land-lady, but the defendant having failed to furnish any proof of any such alleged written permission, the ld. Munsif has held that the defendant is taking a false plea and the plaintiffs contention is correct that the defendant installed the air-cooler without any such permission of the landlady thereby causing damage to the building. The ld. Commissioner''s report also shows that the bath room in the first floor of the suit premises was found to be in damaged condition, the plaster of the roof in several places had fallen down causing the iron rods visible and moreover, the Id. Commissioner also saw the glass of the windowpanes in broken condition. As against such report of the Id. Advocate Commissioner there has been no objection raised by the defendant and practically the report of the Commissioner appears to have been admitted. In view of such a position the ld. Munsif was justified lo hold that the allegations of the plaintiff in this regard had been fully established and he decided the issue No. 5 in favour of the plaintiff and against the defendant and on that score also, that is, violation of the terms of agreement and the provisions of clauses (m), (o) and (p) of Section 108. T. P. Act found the defendant liable to be evicted. Ld. Addl. District Judge has upheld this findings of the ld. Munsif after considering the evidence on record.

11. Mr. Chatterjee Id. Advocate for the defendant-appellant has argued that due to the causing of such damages by the tenant to the suit premises alone the plaintiff cannot be entitled to get a decree for eviction, unless it is shown that as a result of such damages or waste in the, building there was a consequential reduction in the value of the building. In support of his contention he relies upon a decision of the Apex Court reported in AIR 1996 SC 3 wherein it has been held that a suit cannot be decreed on the ground of violation of the provisions of Section 108 of the T. P. Act

unless it is proved by the landlord that as a result of such alleged unauthorised change or damage caused to the building there was a reduction in the value of the structure concerned. But our present case is to be differentiated form the case under reference so far as their facts and circumstances are concerned, inasmuch as, here there is no denying the fact that such damage or deterioration caused to the building was in clear violation of the terms of the tenancy agreement. Mr. Chatterjee further contends that cutting out of a hole in the wall or window of a house for the purpose of installation of an air-cooler cannot be termed as damage. In support of his contention he refers to a decision reported in (1988) 1 CHN 180 wherein it was held that the tenant cannot be blamed if he sets up an air-conditioner or air-cooler in the tenanted premises and subsequently restores the original condition of the building at the time of his leaving the same. According to Mr. Chatterjee, the tenant, that is the defendant No. 1, is still residing in the tenanted premises and therefore time has not yet come for him to make good the alterations which was effected to the building for installation of the air-cooler and he can be expected to perform such an act only when he will vacate the suit premises and under such circumstances he has committed no fault. But this submission also will have little significance in view of the fact that from the evidence adduced by the parties in this case as discussed above it has been found that the defendant No. 1 is not possessing the suit premises having shifted to his newly constructed house and having delivered possession thereof in favour of another person, that is, defendant No. 2 and therefore under such circumstances he was under an obligation to restore the original condition of the building by making suitable repairs and reconstruction in the places of the building where such damages had been caused. Mr. Chatterjee also contends that in the provisions of clauses (m), (o) and (p) of Section 108 of the T. P. Act it was incumbent for the plaintiff-landlords to inspect the premises during the subsistence of the tenancy and to detect any damage done by the tenant to the building and, if any damage was found to have been caused by the tenant, then they were to issue notice upon the tenant giving him an opportunity to make good the damages or deterioration allegedly caused to the building, but since in the present case no such notice was issued or no such opportunity was given to the tenant-defendant, the question of repairing the damaged portion of the building or restoring its original condition cannot arise. I am not impressed by such arguments Tor the reason that the tenancy agreement does not contain any such term or condition and it was the duty of the defendant-tenant to do such things when the notice of ejectment was served on him by the landlords. Mr. Chatterjee then argues that it is not expected that the fittings and fixtures of the suit building which were found to be attached thereto at the time of granting of the lease should remain intact after the passage of so many years and the natural wear and tear must be taken into account in such respect But no such case has been made out by the defendant or no such evidence has been forthcoming from his side. In the report of the Commissioner such damages or deterioration to the fittings and fixtures and the structure of the building have been found and that report of the Commissioner has

not been challenged by the defendants and if under such circumstances the defendant does not make out any such case in his pleadings on evidence to the effect that such damage or deterioration was the result of natural wear and tear and was not contributed by the tenant, he cannot raise such a point a new at the time of argument This is more so, because here the defendant-tenant never during the continuance of their tenancy gave any intimation to the plaintiff-landlords to the effect that such fittings and fixtures were being broken or destroyed due to natural wear and tear as argued. Mr. Ghosh. Id. Advocate for the respondents-landlords has relied upon a decision reported in Merwanji Nanabhoy Merchant (Dead) through his L.R. Vs. Union of India (UOI) and Others, wherein it has been held that the tenant had definitely an obligation to effect such repairs as found necessary to keep the tenancy in good condition, particularly when the terms or conditions of the deed of agreement cast a duty upon the tenant to maintain repairs and to replace any article in case of its damage. Mr. Ghosh further argues quite rightly that the tenant might have had right to set up an air-cooler machine in the suit premises and for that purpose to cut the open window but he had a corresponding duty to set the same right by replacing the rods of the window and removing the air-cooler machine at the time when he was delivering possession of the suit premises in favour of the defendant No. 2.

12. In view of the above discussion. I am to hold that the courts below have correctly found the issue Nos. 4 and 5 in favour of the plaintiffs-landlords in view of the entire materials on record considered by them and I do not find any perversity in such concurrent findings of both the courts below and in that view of the matter there is absolutely no reason for me to interfere with the same in this Second Appeal.

13. In the result. I do not find any merit in this Second Appeal preferred by the defendant-tenants and the trial court rightly decreed the suit for eviction on the ground of sub-letting by the defendant-tenant and also violation by him of the terms of the tenancy agreement and of the provisions of clauses (m), (o) and (p) of Section 108 of the T. P. Act and the court of First Appeal rightly upheld that decision of the trial Court. The impugned order is therefore affirmed and the Second Appeal be dismissed, in the circumstances, with costs. The appellant is hereby directed to deliver vacant, peaceful possession of the suit-premises in favour of the respondents within 60 (sixty) days from this date, in default, they will be at liberty to put the decree into execution.

14. The L.C.R. be sent down to the Court below forthwith.

Later :

15. Mr. Tapas Banerjee, Id. Advocate for the appellant, verbally prays for an order of stay of operation of this judgment and order on the ground that he will prefer appeal against the same. But after considering the prayer I reject the same.

16. Mr. Ghosh, Id. Advocate for the respondents submits that in view of urgency he will deposit the Special Messenger costs so that the L.C.R. may be sent as per Special Messenger without the slightest delay. Accordingly, Mr. Ghosh is directed to deposit the costs of Special Messenger in course of this day whereupon the office shall send the L.C.R. by Special Messenger forthwith. Let urgent xerox certified copy of this order, if applied for, be given to the Id. Advocates for both the parties within seven days from the date of such application.