

(1977) 09 CAL CK 0032**Calcutta High Court****Case No:** C.R. No. 1400 of 1977

N.C. Moitra

APPELLANT

Vs

Bhupendra Kumar Chatterjee

RESPONDENT

Date of Decision: Sept. 20, 1977**Acts Referred:**

- West Bengal Premises Tenancy Act, 1956 - Section 13(6), 17(3)

Citation: 82 CWN 248**Hon'ble Judges:** A.P. Bhattacharya, J**Bench:** Single Bench**Advocate:** A.K. Ganguly and R.K. De, for the Appellant; A.C. Roy and D. Das Gupta, for the Respondent**Judgement**

A.P. Bhattacharya, J.

This Rule was obtained on a revision petition by the petitioner against whom a suit for eviction was filed by the opposite party on the pleading that the petitioner was a monthly tenant and the suit was one to which the provisions of the West Bengal Premises Tenancy Act, 1956, apply. The uncontested position is that the petitioner's defence against delivery of possession has been struck out u/s 17(3) of the Act. A preliminary point was raised before the court below as to how far in such circumstances the petitioner (defendant) was entitled to contest the suit for ejection. The learned Court referred to the Full Bench decision of this Court reported in Gurudas Biswas Vs. Charu Panna Seal and Others, and observed that "the defendant is permitted to contend and show that the plaintiff is not entitled to the decree on the basis of plaintiff's evidence in argument. As his defence is struck out he is not permitted either to cross-examine plaintiff's witnesses or to call his own witnesses at the trial." Against this order the instant Rule has been obtained. Mr. Ganguly in support of the Rule submits that the Full Bench decision of this Court has not been properly appreciated by the trial court. The contention raised by him is that the Full Bench has decided the point that where a defence as to delivery of

possession had been struck out u/s 17(3) of the West Bengal Premises Tenancy Act, 1956, the defendant could still take the defence of non service of the notice or notices and invalidity of such notices in the trial court as well as in the court of appeal. He further adds that the Full Bench did not specifically decide the point as to whether in taking such defence the tenant defendant is permitted to cross-examine plaintiff's witnesses on the point of non-service or validity of the notice in question so that this point could be decided by this Court. He further adds that on a reading of the Full Bench decision as a whole there is no room for doubt that such cross-examination to the limited extent is permissible. It has, therefore, become necessary to refer to the Full Bench decision and appreciate the point which has been laid down therein. The Full Bench was obviously considering two points and those two points have been framed in paragraph 7 of the judgment. They are as follows:

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 the 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 suit below and take the defence as to the non-existence or invalidity of the notice of ejection he should not be permitted to take the defence for the first time in appeal.

2. The court on a consideration of several decisions of this Court has come to the following conclusion on the above two points :

1) Yes can take it means, therefore, and that is clear from the judgment itself that even when defence against delivery of possession had been struck out the defendant is entitled to take the defence of nonexistence or invalidity of a notice.

2) This will also appear from the answer to point no. 2 framed by the court which is to the effect that the defendant should be permitted to take the defence as to non-existence (whereby non service of notice is meant) or invalidity of a notice of ejection.

3. The burden of the decision as I find is that even when the defence against delivery of possession has been struck out as in this case, the defendant tenant would be entitled to take his defence in respect of non-service of the notice and invalidity of the notice both in the trial court as well as in appeal even for the first time though not raised in the trial court. That being the position of law laid down by the Full Bench the next question will arise whether a tenant defendant is entitled to cross-examine plaintiff's witnesses on the point of non service or invalidity of the notice in view of the fact that defence in this respect is permissible to the tenant defendant. There is no escape from the conclusion that he would be entitled to cross-examine plaintiff's witnesses on the point of non service of notice and invalidity of the notice and on no other point whatsoever. This appears to be the inevitable conclusion from what had been laid down by Their Lordships in the Full

Bench decision to which I have referred. Unfortunately in paragraph 26 of the said judgment there is an expression which has not been properly appreciated by the lower court. I will immediately refer to that observation. His Lordship A. K. De, J. delivering the judgment on behalf of the Full Bench has observed as follows in paragraph 26 of the said judgment :

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 in the appeal stage that the plaintiff is not entitled to the decree prayed for though he would not be permitted either to cross-examine plaintiff's witnesses when they gave evidence or to call his own witnesses at the trial if his defence is struck out.

4. The learned trial court in the impugned order has virtually quoted the last few lines of the judgment of this Court which I have just now quoted. In my judgment the above observation of the Full Bench should be construed in the following manner. It has been observed that the tenant defendant is permitted to contend and show on plaintiff's evidence and on materials as are on record that the plaintiff is not entitled to a decree as prayed for. If a tenant defendant is permitted to that extent it necessarily follows that the tenant defendant can challenge the plaintiff's testimony on the point of non service and invalidity of the notices. The plaintiff's evidence in this respect can be challenged. That includes a permission to cross-examine plaintiff's witnesses on the limited point of non service and invalidity of the notice. The observation of His Lordship is made in respect of the witnesses of the plaintiff in general who gave evidence at the trial. Such witnesses cannot be cross-examined or cannot be permitted to be cross-examined by the tenant defendant. But this observation does not preclude the tenant defendant from cross-examining only that part of plaintiff's evidence or that part of the evidence of plaintiff's witnesses which relates to the permissible defence, namely, the non service of notice and invalidity of the notice. No cross-examination on other points would be permissible. It is again significant to note that observation which has been made in the Full Bench decision was a passing observation and was not a conclusive finding. That is why it is open to this Court to interpret the judgment of the Full Bench in the manner I have done. My conclusion accordingly is that a tenant defendant whose defence against delivery of possession has been struck out u/s 17 (3) of the West Bengal premises Tenancy Act, 1956, is still permitted to contend before the court and take the defence on the point of non service or invalidity of the notice and in doing so the tenant defendant is also permitted to cross-examine plaintiff's witnesses and challenge other evidence adduced by the plaintiff confined to the points, namely, the non service or invalidity of the notices which are required to be served in accordance with law. The tenant defendant would not be entitled to take any other plea or cross-examine plaintiff's witnesses on any other point or examine his own witnesssees on any point whatsoever. Defence in any event cannot even examine a witness denying the service of notice or denying facts on the point

of invalidity of the notice. In the result, the Rule is made absolute and the impugned order is set aside and the learned Munsif is directed to hear the matter in the light of the observations made hereinbefore and in accordance with law.

I make no order as to costs.

Let the records be sent down to the court below at once.