

Krishna Chandra Gupta Vs Bimal Kumar Dey

Court: Calcutta High Court

Date of Decision: Sept. 28, 2000

Acts Referred: Civil Procedure Code, 1908 (CPC) " Order 9 Rule 13
Evidence Act, 1872 " Section 44
West Bengal Premises Tenancy Act, 1956 " Section 13(1), 13(6), 17(2)

Citation: (2001) 2 ILR (Cal) 17

Hon'ble Judges: Tarun Chatterjee, J; Amit Talukdar, J

Bench: Division Bench

Advocate: S.P. Roychowdhury, Anit Rakshit and S. Chakraborty, for the Appellant; Sudhis Dasgupta and Sushil Saha, for the Respondent

Final Decision: Dismissed

Judgement

Tarun Chatterjee, J.

These two appeals have been preferred against a common judgment passed in Title Suit No. 2225/82 and Title Suit

No. 326 of 1984 which were filed by the Plaintiff-Appellant before the Chief Judge, City Civil Court at Calcutta. Title Suit No. 2225/ 82 was filed

by the Plaintiff/Appellant for declaration of his tenancy right in respect of a flat in the 7th floor of Premises No. 5B, Robinson Street, Calcutta

(hereinafter referred to as "the suit flat") and for other incidental relief. The Title Suit No. 326 of 1984 was filed by the Plaintiff/Appellant for

setting aside an ex parte decree passed against him in Ejectment Suit No. 551/83 which was filed by the Defendant No. 1/Respondent against the

Appellant for his eviction from the suit flat on the allegation that subsequent to the creation of the tenancy, the Plaintiff/Appellant having agreed in

writing with the landlord to deliver vacant possession of the suit flat to the landlord, had failed to do so.

2. Before we proceed further, we keep it on record that the facts leading to filing of the appeal being F.A. No. 257/89 which was filed against the

judgment passed in Title Suit No. 2225/82 need not be dealt with as we find that the aforesaid suit being Title Suit No. 2225/82 was so filed for a

declaration of his tenancy right in respect of the suit flat when the Defendant No. 1/ Respondent admitted the tenancy right of the Plaintiff/

Appellant in Ejectment Suit No. 551/83 which the Defendant No. 1/Respondent had filed for eviction of the Plaintiff/Appellant inter alia, on the

ground of serving notice u/s 13(1)(k) of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as "the Act"). Before us, the

Learned Counsel for the parties also had taken a stand that if the appeal being F.A. No. 258/89 was disposed of then the other appeal being F. A.

No. 257/89 need not be dealt with as the tenancy right of the Plaintiff/Appellant was duly admitted by the Defendant No. 1/Respondent and in

view of the admitted fact that the Defendant No. 1/Respondent filed the previous Ejectment Suit being No. 551/83 treating the Plaintiff/Appellant

as a premises tenant under the Act. Such being the stand taken by the Learned Counsel for the parties, we shall only consider the merits of the

appeal being F. A. No. 258/89 which has been filed against the judgment passed in the aforesaid Title Suit being No. 326/84 by the

Plaintiff/Appellant, as noted herein earlier, for setting aside the ex parte decree passed in the Ejectment Suit being No. 551/83. As noted herein

earlier, the Appellant was the Plaintiff in the suit for setting aside the ex parte decree for eviction on the ground of fraud and suppression of

summons. The only question, therefore, is whether the findings on which the Trial Court had answered that question in the negative and dismissed

the suit of the Plaintiff refusing to set aside the previous ex parte decree and reviving the original suit are sufficient in law or not. The aforesaid suit

was filed by the Plaintiff/Appellant alleging inter alia, that the claim of the Defendant No. 1/Respondent in the Ejectment Suit was false and the ex

parte decree was obtained by perjured evidence and suppression of service of summons. The Trial Court rejected the case of the

Plaintiff/Appellant and dismissed the suit, inter alia, on a finding that the summons was duly served upon the Plaintiff/Appellant and it could not be

said that the claim of the Defendant No. 1/Respondent in the Ejectment Suit was false. The propriety of this decision of the Trial Court, as noted

herein earlier, is now challenged by the Plaintiff/Appellant. It is settled law that where the fraud alleged is of such kind as to attack the suit itself and

not merely the irregularity or insufficiency of the service of summons in the proceedings, a suit by a person on whom no summons was alleged to

have been served, for setting aside the ex parte decree is maintainable. Therefore, the Plaintiff in a suit for setting aside an ex parte decree on the

ground of fraud must prove some kind of fraud which affects the suit itself and not merely the irregularity or insufficiency of the service of summons

in the proceedings in addition to non-service of summons in order to obtain a decree. Falsity of claim would amount to such fraud, though possible

mere perjured evidence, unless the claim false would not. In order, therefore, that the Plaintiff/Appellant may succeed in his suit, it is necessary to

establish that the claim for eviction was false. On this point, the Learned Trial Judge held against the Plaintiff/Appellant. Law on this point is now

well-settled. In the case of Akina Bibi v. Mohd Ali Shaha 45 C.W.N. 392 and also in the case of Satish Chandra Chatterji v. Kumar Satish

Kantha Roy 28 C.W.N. 327 the aforesaid question of law was decided and it was held in the aforesaid decisions that a suit for setting aside an ex

parte decree is maintainable if fraud is alleged to have been found by the Court. Therefore, in this appeal, we are to consider two aspects of the

matter.

1. Whether the claim in the Ejectment Suit was false ?

2. Whether there was fraudulent suppression of summons ?

3. Let us now consider whether the Plaintiff/Appellant had satisfied the Court that the aforesaid two conditions were fulfilled in the present case.

4. As noted herein earlier, the Trial Court on consideration of the materials on record and after examining the records of the Ejectment suit filed

against the Plaintiff/Appellant came to a conclusion that the summons was duly served as it was refused by the Plaintiff/Appellant. Therefore, let us

first consider whether the finding of the Trial Court on the question of service of summons can be accepted by us or not. Before we go into this

question, let us consider the foundation of the case made out by the Plaintiff/ Appellant in the suit which runs as under:

The Plaintiff/Appellant filed Title Suit No. 2225/82 against the Defendant Nos. 1 and 2/Respondents praying for declaration that his tenancy in

respect of the suit flat was governed by the Act. The Defendant filed written statement in that suit on February 24, 1982, and an affidavit in

opposition against the prayer for injunction on February 28, 1983. But neither in the written statement nor in the affidavit in opposition, the

Defendants disclosed about any letter dated August 14, 1981, alleged to have been written by the Appellant to the Defendant No. 1/Respondent

agreeing to surrender his tenancy by the end of December 31, 1982. But at the time of hearing of the suit on September 23, 1983, the Defendant

No. 1/Respondent disclosed the alleged letter dated August 14, 1981 when the learned Chief Judge directed examination of the said letter by

appointment of a hand-writing expert. On January 31, 1984, a copy of the affidavit in opposition of the Defendants to the application for re-

framing of the issues was served upon the Learned Advocate for the Plaintiff/Appellant in Title Suit No. 2225/82 wherein it was alleged that the

Defendant No. 1/Respondent had already filed a suit for eviction and obtained a decree in Ejectment Suit No. 551/83 against the

Plaintiff/Appellant and as such tenancy in favour of the Plaintiff/Appellant was not subsisting. Only thereafter, he came to know about the institution

of the Ejectment Suit No. 551/83 and also about the ex parte decree passed therein. After searching the records of the Ejectment Suit, the suit

was filed for setting aside the ex parte Ejectment decree. The Plaintiff/Appellant alleged that the summons of the aforesaid suit was never served

upon him as the Plaintiff/Appellant along with his family left Calcutta on June, 11, 1983 in connection with the settlement and ticka ceremony of the

marriage of his daughter. After performance of ticka ceremony, he returned to Calcutta on July 4, 1983, and as such he had no occasion to be

present in Calcutta to refuse to accept the envelope containing the summons of the suit, it was further alleged in the plaint that he never surrendered

the tenancy by writing the letter dated August 14, 1981 and the ex parte decree was obtained fraudulently and by suppression of summons.

Accordingly, the Plaintiff/ Appellant had prayed for setting aside of the ex parte ejectment decree passed in Ejectment Suit No. 551/83.

5. This suit was contested by the Defendant No. 1/ Respondent by filing a written statement. The Defendant No. 2/Respondent also filed a written

statement in the suit. However, the Defendant No. 1/Respondent alleged in his written statement that by a letter dated August 14, 1981, the

Plaintiff/Appellant had agreed to increase the rent by 10% over the existing rent and further agreed to vacate the premises within December 31,

1982. The Defendant No. 1/Respondent disclosed the said letter dated August 14, 1981, in his affidavit in opposition filed in Title Suit No.

2225/82 though there was typographical mistake regarding the date of that letter. The Defendant No. 1/Respondent filed the suit for ejectment on

the basis of the aforesaid letter surrendering tenancy at a specified date that is to say u/s 13(1)(k) of the Act. According to the Defendant No.

1/Respondent, summons was duly served upon the Plaintiff/Appellant and as the Plaintiff/Appellant did not appear, the suit was decreed ex parte.

Therefore, the suit filed by the Plaintiff/ Appellant must be dismissed.

6. Let us come back to the question whether the summons of the ejectment suit was duly served or there was any fraudulent suppression of

summons. Before we proceed further, it may be placed on record that though the ex parte decree was obtained by the Defendant No.

1/Respondent during the pendency of the suit being No. 2225/82 filed by the Plaintiff/Appellant, he did not choose to file an application under

Order 9 Rule 13 of the CPC for setting aside the ex parte ejectment decree on the ground of non-service of summons.

7. It is now well-settled law that in a proceeding under Order 9 Rule 13 of the Code of Civil Procedure, sick it was open to the Plaintiff/Appellant

to file an application under Order 9 Rule 13 of the CPC and in such a proceeding it was also open to the Plaintiff/ Appellant to challenge the ex

parte decree on the ground of non-service of summons upon him. Order 9 Rule 13 of the CPC clearly provides when an ex parte decree can be

set aside by the Court. It says that the Defendant against whom an ex parte decree is passed may apply to the Court to set it aside, if he satisfies

the Court the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for

hearing. In our view, when it was open to the Plaintiff/Appellant to make an application under Order 9 Rule 13 of the CPC for setting aside the ex

parte decree passed against him on the ground of non-service of summons, it is difficult to believe why the Plaintiff/Appellant would take such

stringent step for setting aside the ex parte decree by filing the suit for setting aside the ex parte decree by alleging fraud against the Defendant No.

1/ Respondent. Be that as it may, when it is a settled law that a suit for setting aside the ex parte decree is maintainable in law if fraud is alleged by

the Plaintiff and proved by him subsequently, in that circumstances, it is open to the Court to set aside the ex parte decree. Therefore, it is clear

that without proving fraud, the question of maintaining the suit for setting aside the ex parte ejectment decree cannot arise at all. In order to prove

that there was fraudulent suppression of summons, the Plaintiff/Appellant had alleged in the plaint, as noted herein earlier, that he, at the relevant

point of time, was not in Calcutta and, therefore, the question of refusal of service of summons at the instance of the Plaintiff/Appellant could not

arise at all.

8. Before we go into this question, an short submission of the Learned Advocate for the Plaintiff/ Appellant may be considered. According to Mr.

Roychoudhury, the Defendant No. 1/Respondent was not the only landlord of the Plaintiff/Appellant and, therefore, the claim of the Defendant No.

1/Respondent alone to evict the Plaintiff/Appellant from the suit flat was fraudulent as the ejectment suit could not be filed only by the Defendant

No. 1/Respondent or the Plaintiff/ Appellant was not liable to be evicted only at the instance of the Defendant No. 1/Respondent. In our view, this

submission of Mr. Roychoudhury is devoid of any merit. It appears from the evidence on record that at the inception of the tenancy in favour of the

Plaintiff/ Appellant, the Defendant No. 1/Respondent and the Plaintiff/Appellant executed a tenancy agreement which was marked "X"

identification. This document could not be accepted as it was an unregistered deed of lease. But, it is an admitted position that this agreement was

between the Plaintiff/Appellant and the Defendant No. 1/ Respondent alone and by virtue of this agreement, the Plaintiff/Appellant was inducted

into the suit flat as a tenant under the Act. The Plaintiff/Appellant also admitted in his evidence that on September 20, 1979, an agreement was

entered into by the Plaintiff/Appellant and the Defendant No. 1/Respondent and that agreement was marked "X" for identification in the suit. It is

well-settled that as it was an unregistered document, it could not be taken into consideration, ever, then the same can be considered for collateral

purposes which include the fact as to who were the parties to the agreement. As noted herein earlier, in evidence, the Plaintiff/Appellant himself

admitted that this agreement was executed by and between him and the Defendant No. 1/Respondent. That being the position, we are unable to

hold that there can be any controversy that the Plaintiff/Appellant was inducted in the suit flat by the Defendant No. 1/Respondent alone. Law is

well-settled now by various decisions of the Supreme Court as well as of this Court that a co-owner if he is the landlord of the tenant can get a

decree for eviction of his tenant without making the other co-sharers parties to the suit. That being the position, we are unable to agree with Mr.

Roychoudhury that the claim of the Defendant No. 1/Respondent alone to evict the Plaintiff/Appellant from the suit flat was a false one and,

therefore, the ex parte decree passed against the Plaintiff/Appellant at the instance of the Defendant No. 1/ Respondent alone was a fraudulent one

and, therefore, such decree passed against the Plaintiff/Appellant must be set aside. Let us again come back to the question whether service of

summons was duly served or not. So far as this question is concerned, we find from the records that a report was submitted by the Court bailiff on

July 15, 1983, from which the following remarks are evident:

Defendant No. 1 (Plaintiff/Appellant) absent by affixation at about 9.45 A.M. Defendant No. 2 could not be (sick) found any person of behalf of

the Defendant by affixation. Postal remarks on the envelope addressed to the Defendant No. 1 (Plaintiff/Appellant)

20. 6. 83 - Absent.

21. 6. 83 - Do.

22. 6. 83 - Do.

23. 6. 83 - Refused.

26. 7. 83 - Writ of summons in postal

cover returned with

endorsement ""refused"".

9. The order-sheet of the ejectment suit and the service return therein were not produced by either of the parties. It, however, transpires from the

statements made in the plaint of Title Suit No. 326/84 that summons sent by registered post was refused on June 23, 1983. As noted herein

earlier, the report of the bailiff dated. July 15, 1983 was that the Plaintiff/Appellant was found absent and the summons was served by affixation

after refusal. The Plaintiff/Appellant in his evidence stated that the service return was false as he was not present in Calcutta at the relevant point of

time, as noted herein earlier. However, in examination in chief, the Plaintiff/Appellant stated that on June 23, 1983 the ticka ceremony of his

daughter was solemnized at Bombay and he was staying in the hotel Sun-N-Sand at that time. He further deposed that after solemnization of the

ceremony, he came back to Calcutta on July 4, 1983, and again on July 13, 1983, he left Calcutta for Bombay for marriage ceremony of his

daughter which was solemnized on July 18, 1983, at Bombay. He further stated that the marriage ceremony took place at the same place at

Bombay. In order to prove at the relevant point of time, he was at Bombay and not at Calcutta, the Plaintiff/Appellant ought to have produced

some materials barring his own evidence. But the Plaintiff/ Appellant had failed to produce sufficient materials to prove that at the relevant point of

time he was staying at Bombay and not at Calcutta. In cross-examination, he also admitted that he could not produce any paper to show that on

June 23, 1983 the ticka ceremony of his daughter was solemnized at Bombay. He also admitted that he had no paper to show that he left Calcutta

on June 11, 1983, nor he had any paper to show that he had returned to Calcutta on July 4, 1983. He also admitted that he had no paper to show

that he had left Calcutta again on July 13, 1983, for Bombay for marriage ceremony of his daughter. He has further admitted in his evidence that

there are witnesses to prove this fact but no witness was examined on behalf of the Plaintiff/Appellant to prove this fact. Therefore, we are of the

view that the story that was made out by the Plaintiff/Appellant in his plaint as well as in his evidence was not substantiated by the

Plaintiff/Appellant by producing any material to show that he was not in Calcutta at the time when the bailiff had gone to serve the summons or the

postal peon had gone to serve the postal envelope containing the summons of the suit. Therefore, the Trial Court was fully justified in holding that

the Plaintiff/Appellant had undoubtedly failed to prove that at the relevant point of time, he was staying at Bombay and not in Calcutta. Therefore,

in the absence of such proof, we must hold that there was no reason to disbelieve the endorsement of the postal department regarding refusal by

the Plaintiff/Appellant to receive summons. Accordingly, we hold that in view of the discussions made hereinabove, it is difficult to hold that there

was any suppression of summons so far as the Plaintiff/Appellant was concerned. Therefore, when the summons of the suit was duly served upon

the Plaintiff/Appellant as it was refused, the case of the Plaintiff/Appellant that there was fraudulent suppression of summons, cannot at all be

accepted. Mr. Roychoudhury, appearing on behalf of the Plaintiff/Appellant, however, submitted that when service was denied by the

Plaintiff/Appellant in his deposition, it was necessary for the Defendant No. 1/Respondent to satisfy the Court by producing the postal peon who

had given such endorsement containing refusal of service of summons by the Plaintiff/Appellant. In support of this contention, Mr. Roychoudhury

relied on three decisions of the Supreme Court reported in *Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana, M/s. Madan and Co.*

Vs. Wazir Jaivir Chand, In our view, the Supreme Court in the aforesaid three decisions on which Mr. Roychoudhury relied on do not lay down a

principle that in every case when a denial is made by a party that no service was effected on him, the onus would shift on the other side to examine

the postal peon to prove that the service was, infact, refused by the party saying that he had not refused to accept summons. In the case of *Anil*

Kumar Vs. Nanak Chandra Verma, the Supreme Court has clearly laid down the principle that where a notice sent by a registered post is returned

with endorsement as "refused", it is not always necessary to produce the postman who tried to effect service. Denial of service by a party may be

found to be incorrect from its own admission or conduct. In paragraph 10 of the aforesaid decision, the Supreme Court has explained the

principles laid down by the Calcutta High Court as well as other High Courts of India regarding examination of a postal peon when service was

denied by the party in his evidence. The Supreme Court observed that the Calcutta High Court in its decision applied a rebuttal presumption which

was not repealed by any evidence whereas in the *Bombay* case the Supreme Court observed that the presumption had been held to have been

rebutted by the evidence of the Defendant on earth so that it meant that the Plaintiff could not succeed without further evidence. The Supreme

Court also in this paragraph observed that the Andhra Pradesh High Court had applied the ratio decidendi of the *Bombay* case because the

Defendant-Appellant before the Supreme Court had deposed that he had not received the notice. The Supreme Court in that paragraph also

observed that it may be that on a closer examination of evidence on record, the court could have reached the conclusion that the Defendant had full

knowledge of the notice and had actually refused it knowingly. Explaining the aforesaid decisions of different High Courts of India, the Supreme

Court laid down the principle that denial of service by a party may be found to be incorrect from its own admission or conduct. In the case of

Madan & Company v. Wazir Jaivir Chand (Supra) the Supreme Court has observed if a notice is sent by registered post in the correct address

and the said notice is returned for no availability of the addressee, there was no responsibility on the sender or the post-man to prove that notice

was duly served. From this decision, it is, therefore, clear that the Supreme Court has never laid down the principle that whenever a party states in

his deposition that the summons was never served upon him, the postal peon must necessarily be examined by the person in whose favour the

postal peon had made endorsement "refusal". Each case would depend upon the facts of that case. Therefore, if it is found from the materials on

record that notice was in fact refused by the person, we do not think that the postal endorsement could only be proved by production of the postal

peon. In the case of Anil Kumar v. Nanak Chandra (Supra), the Supreme at para. 2 of the said decision observed as follows:

The question considered in both the decisions was to the statement on oath by the tenant denying the tender and refusal to accept delivery. It was

held that the bare statement of the tenant was sufficient to rebut the presumption of service. In our opinion there could be no hard and fast rule on

that aspect. Unchallenged testimony of a tenant in certain cases may be sufficient to rebut the presumption but if the testimony of the tenant itself is

inherently unreliable, the position may be different. It is always a question of fact in each case whether there was sufficient evidence from the tenant

to discharge the initial burden.

10. From the aforesaid observation of the Supreme Court, it is, therefore, clear that where summons was in fact refused by the Plaintiff-Appellant

is always a question of fact and in view of the fact that in this case materials on record would not show that the Plaintiff-Appellant at the relevant

point of time was at Bombay and not at Calcutta, and since the Plaintiff-Appellant could not prove this fact, the presumption arising out of the

service was not rebutted by the Plaintiff/Appellant. That being the position, the argument of Mr. Roychoudhury that when the Plaintiff-Appellant in

his deposition denied the fact of refusal to accept the service of summons, it was necessary for the Defendant No. 1/Respondent to prove that

summons was in fact refused by examination of postal peon who endorsed such endorsement ""refused"". Therefore, from the records and from our

discussions made hereinabove and in the absence of any proof by the Plaintiff/Appellant that the Plaintiff/Appellant was in Bombay during the

relevant point of time, we do not find any reason to disagree with the finding of the Trial Court that in the facts and circumstances of the case, the

examination of the postal peon to prove service of summons was not at all necessary. Accordingly, we are in agreement with the Learned Trial

Judge that the Plaintiff/Appellant had in fact, refused to accept the service of summons, and, therefore, the presumption arising out of the postal

endorsement containing ""refused"" was not at all rebutted by the Plaintiff/Appellant. Therefore, we must hold that service of summons having been

refused by the Plaintiff/Appellant, it must be held that summons was duly served upon the Plaintiff/Appellant. From the aforesaid discussions made

hereinabove, we are therefore, of the view that the question of fraudulent suppression of summons in the present case on the materials on record

cannot arise at all as we have already held that service of summons of the ejectment suit was duly effected upon the Plaintiff/Appellant. Therefore,

we conclude that there was no fraudulent suppression of summons. Before we part with this question, we shall be failing in our duties if we do not

consider a short submission of Mr. Roychoudhury appearing for the Plaintiff/Appellant on the question of service of notice of ejectment u/s 13(6)

of the Act in respect of the ejectment suit. According to Mr. Roychoudhury, on the admitted facts of this case and in view of Section 44 of the

Evidence Act, the Learned Trial Judge ought to have held that fraud was committed by the Defendant No. 1/Respondent in respect of service of

notice of ejectment u/s 13(6) of the Act and accordingly, the Trial Court erred in not holding that the decree was a nullity. In support of this

contention, Mr. Roychoudhury relied on a decision of the Supreme Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath

(dead) by L.Rs. and others, of the aforesaid decision of the Supreme Court, Mr. Roychoudhury argued that the ex parte passed against the

Plaintiff/Appellant was a fraudulent one and, therefore, no reliance can be placed on the said decree so far as the Plaintiff/Appellant was

concerned. In support of the same contention, Mr. Roychoudhury also strongly relied on a decision of this Court in the case of Satish Chandra

Chatterjee v. Kumar Satish Kantha Roy (Supra) . In view of our discussions made hereinabove to the extent that the service of notice to quit u/s

13(6) of the Act must be considered to be a good service as the Plaintiff/Appellant had refused to accept the service of summons, the question of

applying the principles laid down in the aforesaid two decisions cannot arise at all and, therefore, the aforesaid two decisions on which Mr.

Roychoudhury strongly relied upon, cannot be put into service in the facts and circumstances of this case.

11. Let us now consider the other question viz. Whether the claim of the Plaintiff/Appellant was false. In our view, this question should also be

answered in the negative. According to the Plaintiff/Appellant, he had never written any letter dated August 14, 1981, u/s 13(1)(k) of the Act to

the Defendant No. 1/Respondent. Therefore, it was argued by the Learned Advocate for the Plaintiff/Appellant that the Defendant No.

1/Respondent had obtained an ex parte decree for eviction against the Plaintiff/Appellant relying on the aforesaid forged letter dated August 14,

1981. Before we proceed further, let us keep it on record that the alleged letter of surrender issued by the Plaintiff/Appellant u/s 13(1)(k) of the

Act was alleged to have been served on August 14, 1981. Let us, therefore, consider whether the letter dated August 14, 1981 presumably u/s

13(1)(k) of the Act was alleged to have been written by the Plaintiff/Appellant to the Defendant No. 1/Respondent by which the

Plaintiff/Appellant agreed to surrender the suit flat in favour of the Defendant No. 1/Respondent. If it is proved by the Plaintiff/Appellant that no

such letter of surrender was written by him to the Defendant No. 1/Respondent, in that case there cannot be any dispute that the suit filed by the

Plaintiff/Appellant for setting aside the ex parte decree on the ground of fraud must be decreed as in that case the Defendant No. 1/ Respondent

claimed eviction on a false claim. Let us, therefore, consider whether there was any existence of the said letter dated August 14, 1981 and whether

the Plaintiff/Appellant could be said to have written such letter to the Defendant No. 1/Respondent from the materials on record. As the signature

of the Plaintiff/ Appellant in the letter dated August 14, 1981 was disputed by him, it was thought fit by the Trial Court to appoint a hand-writing

expert to find out the authenticity of the signature of the Plaintiff/Appellant in the alleged letter dated August, 14, 1981. An order was made to this

effect by the trial Court, but no appointment was made as a direction was given by this Court to expedite the hearing of this suit. Mr.

Roychoudhury, appearing on behalf of the Plaintiff-Appellant submitted that when the Trial Court was of the view that a hand-writing expert ought

to have been appointed to find out the genuineness of the signature of the Plaintiff-Appellant appearing in the alleged letter of surrender, the suit

filed by the Plaintiff-Appellant for setting aside the ex-parte decree could not have been dismissed by the Trial Court without a report being

received from a hand-writing expert. In our view, in the facts and circumstances of the case, this submission of Mr. Roychoudhury cannot be

accepted by us. It is true that an order appointing a hand-writing expert was passed by the Trial Court, but finally no appointment was made

because of the direction given by this Court to expedite the hearing of this suit. But there is another aspect of this matter. It was the Plaintiff-

Appellant who denied the genuineness of his signature in the alleged letter dated August 14, 1981. Since he disputed such signature appearing in

the said letter, in our view, it was for him to make an application for appointment of a hand-writing expert. From the record, it appears to us that it

was the Defendant No. 1/Respondent who made that application for appointment of hand-writing expert pursuant to the observation of the

Learned Trial Judge and on the basis of such an application filed by the Defendant No. 1-Respondent an order to that effect was passed by the

Trial Court. But unfortunately, the hand-writing expert could not submit his report as there was no appointment to that effect. Be that as it may, we

may also note that a report if submitted by the hand-writing expert would only be a piece of evidence in the suit and from the other materials on

record if it can be held that the said letter was really issued by the Plaintiff/Appellant to the Defendant No. 1/Respondent, in that case it would not

be obligatory for the Court to appoint a hand-writing expert. In the case of Sri Sri Sri Kishore Chandra Singh Deo Vs. Babu Ganesh Prasad

Bhagat and Others, the Supreme Court did not lay down an inviolable rule that when a signature of a person is denied, opinion of a hand-writing

expert must be taken without looking into the other circumstances showing that the signature in the said document was of that person. Again in the

case of Ishwari Prasad Mishra Vs. Mohammad Isa, the Supreme Court observed that evidence given by hand-writing experts can never be

conclusive because it is after all opinion evidence.

12. Therefore, from the principles laid down by the Supreme Court in the aforesaid two decisions, we are of the view that it cannot be straightway

held that when there was an order appointing a hand-writing expert to find out the genuineness of the signature of the Plaintiff/ Appellant appearing

in the alleged letter dated August 14, 1981, such letter could not be found to be a genuine one without any report received from a hand-writing

expert as we find from the other materials on record that the aforesaid alleged letter dated August 14, 1981 was duly written by the

Plaintiff/Appellant to the Defendant No. 1/Respondent. Let us, consider the materials on record including the oral evidence adduced by the parties

in order to decide whether the signature of the Plaintiff/Appellant was a genuine or whether such a letter could at all be written by the

Plaintiff/Appellant to the Defendant No. 1/Respondent. In order to come to a positive finding on the aforesaid question let us first consider Exhibit

"C which is the alleged letter issued by the Plaintiff-Appellant on August 14, 1981, to the Defendant No. 1/Respondent. We have carefully

examined the contents of this letter. From this letter, it appears to us that a request was made by the Plaintiff/ Appellant to the Defendant No.

1/Respondent to extend the validity of the contract up to December 31, 1982, and by that time he would find another residential accommodation

and then within that time i.e. December 31, 1982, he would shift from the suit flat. It also appears from a reading of this letter that the Plaintiff/

Appellant from August 1, 1981, shall pay the Defendant No. 1/Respondent at a monthly rate increased by 10% flat of the existing rate. It is this

letter which is challenged by the Plaintiff/Appellant on the ground that the question of surrendering the suit flat or to increase the monthly rate by

10% flat of the existing rate could not arise at all. Exhibit "D" is a letter received by the Plaintiff/Appellant from the Defendant No. 1/Respondent

which was dated April 27, 1982. It is not in dispute that this Exhibit "D" was written by the Defendant No. 1/ Respondent to the Secretary of

Kanchanjongha Cooperative Housing Society (in short ""KCHS""). Calcutta copy of which was served on the Plaintiff/Appellant. We have carefully

perused the contents of this letter also. From this letter, it appears that the Plaintiff/Appellant had made a proposal for extension of the existing

contract up to December 31, 1982, with a promise to vacate the suit flat on or before December 31, 1982 allowing an increase in his payment at

the rate of 10; over Rs. 1,800.00 per month that is at the new rate of Rs. 1,980.00 per month from August 1, 1981. From this letter it also

appears that the Plaintiff/Appellant was paying the Secretary of KCHS Rs. 1,000.00 per month and Rs. 48.00 towards part of the charges of the

Authorities of KCHS and as such the difference of Rs. 800.00 from February 17, 1981, to July 31, 1981, or Rs. 9,80.00 per month was

accumulated and will be payable by the Plaintiff/Appellant ever and above his usual payment. The entire work out for the whole of the contract

period was made in the said letter and finally it was found that a sum of Rs. 16,003.00 was payable by the Plaintiff/Appellant in 8 monthly

installments which would commence from the month of May, 1982 at the rate of Rs. 2,000.37 per month. It was also made clear in the said letter

that if the Plaintiff/Appellant wanted to leave or propose to leave the suit flat before December 31, 1982, in that case, the Defendant No.

1/Respondent should be accordingly intimated. From this letter, it appears to us that a copy of the same was duly sent to the Plaintiff/Appellant

directing him to pay the above Society a sum of Rs. 3,048.37 per month as worked out above from the month of May, 1982 within 5th of each

month apart from the other dues payable to the Society. It was also pointed out in the said letter that if the Plaintiff/Appellant wanted to leave the

flat before December 31, 1982, intimation must be given to the Defendant No. 1/Respondent in advance. Exhibit "E" is a postal receipt of the

registered letter dated April 27, 1982. From Exhibit "E", it appears to us that the letter with acknowledgement due was duly received by K. C.

Gupta, the Plaintiff/Appellant. In order to prove that the said letter being Exhibit "D" was duly received by the Plaintiff/Appellant, the Defendant

No. 1/Respondent wrote a letter to the Superintendent of Post Office North Calcutta Division for making an enquiry whether the aforesaid letter

Exhibit "D" was duly received by the Plaintiff/Appellant. In reply to that letter, the Authorised Officer of the Senior Superintendent of the Post

Office of North Calcutta Division informed the Defendant No. 1/ Respondent that the said letter was found on enquiry to have been delivered to

the addressee on April 20, 1982. From the aforesaid facts, it is, therefore, clear that at least Exhibit "D" was duly received by the Plaintiff/

Appellant. From this letter, it also appears that the Defendant No. 1/Respondent requested the Plaintiff/ Appellant to pay in 8 monthly installments

a sum of Rs. 16,003.00 which was due from him for the period from May 1982 and it also appears from the said letter that the Defendant No.

1/Respondent duly intimated the Plaintiff/Appellant that if he wanted to leave the suit flat before December 31, 1982, in that case prior intimation

must be given to him. It also appears from the said letter (Exhibit "D") that the Plaintiff/Appellant must pay at the rate of Rs. 3,048.37 per month to

the KCHS on account of the amount payable to the Defendant No. 1/Respondent. From this fact, it is clear that from the letter (Exhibit "D") which

was received by the Plaintiff/ Appellant, the Plaintiff/Appellant had knowledge of the fact that he was to leave the suit flat on December 31, 1982,

and he was to pay Rs. 3,048.37 per month on account of his tenancy under the Defendant No. 1/ Respondent. Exhibit "A" is an account payee

cheque for a sum of Rs. 3,048.37 of the Punjab National Bank, Chittaranjan Avenue Branch issued by M/s. S Gupta, Biri Manufacturers (P) Ltd.

in favour of the said KCHS. In evidence, the Plaintiff/Appellant duly admitted that the aforesaid cheque of Rs. 3,048.37 dated July 15, 1982, was

issued by him in favour of KCHS drawn on Punjab National Bank, Chittaranjan Avenue Branch. But he stated in his evidence that he stopped

payment of the said account payee cheque (Exhibit "A") by sending a telegraphic message to the Manager of the said Bank. He also admitted in

his evidence that a cheque of Rs. 5,000.00 dated July 30, 1982, was issued by him in favour of KCHS which was drawn on Canara Bank (Exhibit

A/1). The cheque being "A/1" was dishonoured. From his evidence, it also appears that although the Plaintiff/Appellant sent an account payee

cheque of Rs. 3,048.37 which is exactly the amount asked to be paid by him which would be apparent from Exhibit "D", even then he stated in his

evidence that he did not send anything in writing to the Defendant No. 2 intimating that he was agreeing to the proposal for payment of rent at an

enhanced rate. In cross-examination, the Plaintiff/ Appellant stated "I cannot remember if I received any copy of the letter dated April 27, 1982,

written by the Defendant No. 1/Respondent to the Defendant No. 2". We have" carefully seen the evidence of the Plaintiff/ Appellant that he

categorically stated in his deposition that he had no enmity with the Postal Authority. Such being the state of affairs and in view of the admitted

facts that the letters were sent to the addressee which was not disputed by the Plaintiff/Appellant, it must be held that the above registered letter

reached the Plaintiff/Appellant in due time and he refused to accept the same. In the facts and circumstances of the case and on the materials on

record and in view of the discussions made hereinbefore, we are unable to hold that the alleged letter dated August 14, 1981, was never written by

the Plaintiff/Appellant to the Defendant No. 1/ Respondent. The copy of the ex parte decree obtained by the Defendant No. 1/Respondent in

Ejectment Suit No. 551/83 was not exhibited in this case. But in the plaint of Title Suit No. 326/84, the ex parte decree passed in the Ejectment

Suit was produced. From this ejectment decree passed on August 4, 1983, it appears to us that the eviction was granted on the ground that the

Defendant No. 1/Respondent served a notice upon the Plaintiff/Appellant informing him to quit and vacate the suit flat by December 31, 1982, but

the Plaintiff/Appellant had failed to comply with the same. This letter to terminate the tenancy of the Plaintiff/Appellant has been exhibited as Exhibit

"C in the present case as noted herein earlier. The Defendant No. 1/Respondent had admittedly proved that this letter bare the signature of the

Plaintiff/Appellant himself but the Plaintiff/ Appellant had denied the signature in this document. The evidence of the Defendant No. 1/Respondent

in this respect was that this letter dated August 14, 1981, was sent to him by the Plaintiff/Appellant and it bare the signature of the

Plaintiff/Appellant which the Defendant No. 1/Respondent knew. There were some contradictions as noted herein earlier in the evidence of the

Defendant No. 1/Respondent and his son. Accordingly an order was passed by the Trial Court to take steps for appointment of a hand-writing

expert for comparison of the signature in the said letter with the admitted signature of the Plaintiff/Appellant. Mr. Roychoudhury, appearing on

behalf of the Plaintiff/Appellant had drawn our attention to the fact that when the suit for declaration of tenancy right filed by the Plaintiff/Appellant

was pending, the ejectment suit was filed and subsequently an ex parte decree was obtained at the instance of the Defendant No. 1/Respondent. It

is true that the Defendant No. 1/ Respondent had not mentioned the above fact in his written statement or in the written objection filed to the

application for injunction in the aforesaid declaratory suit that is to say this fact of filing an ejectment suit and subsequent to the filing of the

ejectment suit the fact of obtaining an ejectment decree were not disclosed by the Defendant No. 1/Respondent. But in our view, there was no

necessity for the Defendant No. 1/Respondent to bring to the notice of the Court in the aforesaid declaratory suit filed by the Plaintiff/Appellant

about the filing of the ejectment suit and subsequent obtaining of the ejectment decree in that suit as the issues in the suit filed by the

Plaintiff/Appellant and issues in the ejectment suit were absolutely different and, therefore, nothing wrong had been committed by the Defendant

No. 1/Respondent to bring to the notice of the Plaintiff/ Appellant about the existence of the ex parte ejectment decree passed in the aforesaid

ejectment suit filed by the Defendant No. 1/Respondent against the Plaintiff/ Appellant. From the aforesaid discussions made hereinabove, we are,

therefore, of the opinion that under no stretch of imagination it can be held that the claim of the Defendant No. 1/Respondent for obtaining an

ejectment decree to evict the Plaintiff/Appellant from the suit flat was a false one. Mr. Roychowdhury also contended that the fact alleged in the

plaint of this suit was apparent from the fact that an ex parte decree for ejectment was obtained by the Defendant No. 1/Respondent at a time the

Plaintiff/Appellant was proceeding with the declaratory suit filed against the Defendant No. 1/Respondent claiming tenancy right under the

provisions of the Act. According to Mr. Roychowdhury, a person who is contesting an earlier suit to establish his tenancy right would not allow an

ex parte decree to be passed against him without contesting the same inspite of the knowledge of institution of the same. In our view, Mr.

Dasgupta was right in his submission in saying that the Plaintiff/Appellant intentionally avoided appearance in that suit to avoid compliance of

Section 17(2) of the Act. Undoubtedly, If the Plaintiff/Appellant would have contested the suit by entering appearance, then he had to comply with

the provisions of Section 17(2) of the Act by depositing all arrears of rent and also to continue to deposit arrears of rent subsequently payable by

him. It is also an admitted position that even after the Plaintiff/ Appellant came to know about the ex parte decree, he did not choose to file a

petition under Order 9 Rule 13 of the CPC for restoration of the suit in which, we are of the view, law is well settled that the Plaintiff/Appellant had

to satisfy the Court that either summons of the suit was not served upon him or there was sufficient cause for his nonappearance when the suit was

decreed ex parte. But in his suit for setting aside the ex parte decree, the Plaintiff/Appellant has to prove that there was a falsity of claim and at the

same time, there was fraudulent suppression of summons. Therefore, we are of the view that by not filing an application under Order 9 Rule 13 of

the Code of Civil Procedure, the Plaintiff/Appellant wanted to avoid payment of rents in respect of the suit flat. Therefore, in our view, the Trial

Court was fully justified in holding that in order to abide the effect of the provision of Section 17(2) of the Act, recourse was taken by the Plaintiff/

Appellant to challenge the ex parte decree by filing a regular suit. It may be kept on record that even after the filing of this suit, the

Plaintiff/Appellant had not deposited any arrear rent in favour of the Defendant No. 1/ Respondent even in the office of the Rent Controller.

Therefore, all these facts, in our view, lead to support the submission made by Mr. Dasgupta for the Defendant No. 1/Respondent by which Mr.

Dasgupta had sought to explain the reason as to why the Plaintiff/Appellant allowed the ex parte decree to be passed against him inspite of his

knowledge of the same. There is yet another aspect of this matter. In our view, the filing of the suit by the Plaintiff/Appellant for declaration of his

tenancy right and injunction indicated that the Plaintiff/ Appellant himself executed the letter of surrender (Exhibit "C"). No dispute was raised by

the Defendant No. 1/Respondent in the declaratory suit filed by the Plaintiff/Appellant that the tenancy of the Plaintiff/ Appellant was not governed

by the Act. But inspite of that, the Plaintiff/Appellant filed that suit claiming that his tenancy was governed by the Act and also for an order of

injunction from the Court. In view of the above discussions made hereinabove, we are, therefore, of the view that the Plaintiff-Appellant had failed

to prove that either the claim of the Defendant No. 1/respondent in the ejectment suit was a false one or there was any fraudulent suppression of

summons by the Defendant No. 1/Respondent to obtain an ex parte decree against the Plaintiff/Appellant.

13. Mr. Roychoudhury, appearing on behalf of the Plaintiff-Appellant submitted in view of the fact that although the Plaintiff/Appellant had signed

the letter of surrender and the same was, however, not signed by the landlord-Defendant No. 1-Respondent, it must be held that an agreement of

the nature contemplated by Section 13(1)(k) of the Act cannot be construed to be an agreement within the meaning of Section 13(1)(k) of the Act.

In our view, this contention of Mr. Roychoudhury is also devoid of any merit. It is true that in the instant case there is no dispute that the letter was

only signed by the Plaintiff-Appellant but in order to fit such a letter as an agreement of the nature of contemplated Section 13(1)(k) of the Act, the

same is not required to be signed by the landlord in token acceptance if there is any overt act indicating the acceptance thereof. Such being the

position in law now, we are unable to agree with the submission of Mr. Roychoudhury that in the absence of any acceptance of letter of surrender

by the Defendant No. 1/Respondent, the agreement entered into by the parties in the nature of Section 13(1)(k) of the Act cannot be said to have

any force in law. In this connection a Single Bench decision of this Court with which we fully agree, may be relied on. This is the decision of S. K.

Datta, J. (as His Lordship then was) in the case of Gosto Behari Roy Vs. Ramesh Chandra Das, A similar view was also expressed by another

Single Bench of this Court in the case of Mira Sen v. Dipak Kumar Ghosh 82 C.W.N. 177. In the aforesaid decision, the brother of the Defendant

(tenant) expressed the intention to vacate the suit premises within 6/8 months while sending the rents for November and December 1968 by

Money order. The Plaintiff (landlord) subsequently wrote a registered letter to the Defendant in order to ascertain on what date the Defendant

would vacate the suit premises. The Defendant did not give any reply to that letter. In the fact stated above, the learned Judge of this Court held

that the statements made in the Money order taken amounted to a valid notice and, therefore, it could determine the tenancy. It is also kept on

record that Mr. Roychoudhury appearing on behalf of the Plaintiff-Appellant also did not dispute before us that Exbt. "C" i.e. a letter of surrender

dated August 14, 1981, was not a letter of surrender from the side of the Plaintiff-Appellant to vacate the suit flat by December 31, 1982. That

being the position, we do not find any substance in this appeal. No other point was raised by the Learned Counsel for the parties before us in this

appeal. According, the appeal is dismissed. There will be no order as to costs.

14. In view of the judgment passed in the appeal being F.A. No. 258 of 1989, the appeal being F.A. No. 257 of 1989, therefore, becomes

infructuous and accordingly, it is also dismissed.

15. There will be no order as to costs.

Amit Talukdar, J.

16. I agree.