

(1986) 04 CAL CK 0039

Calcutta High Court

Case No: A. O. D. No. 505 of 1978

Md. Shahariyar Baig

APPELLANT

Vs

R.P. Bhal

RESPONDENT

Date of Decision: April 29, 1986

Acts Referred:

- Bengal General Clauses Act, 1899 - Section 13(6), 28
- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 20
- Evidence Act, 1872 - Section 114
- General Clauses Act, 1897 - Section 27
- Transfer of Property Act, 1882 - Section 106, 111(h)
- West Bengal Premises Tenancy Act, 1956 - Section 13(1), 13(6), 17(3), 3(6)

Citation: 91 CWN 197

Hon'ble Judges: Sukumar Chakravarty, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: B.K. Roy Chaudhury, for the Appellant; Saktinath Mukherjee and Pradipta Roy, for the Respondent

Final Decision: Dismissed

Judgement

A.M. Bhattacharjee, J.

In the suit for ejectment that has given rise to this appeal, the landlord-appellant alleged a number of grounds which, if proved, would have warranted a decree of ejectment against the tenant-respondent u/s 13(1) of the West Bengal Premises Tenancy Act, 1956. The defence of the tenant against the delivery of possession was also struck out by an order u/s 17(3) which was also upheld by this Court in Revision. The learned trial Judge also held that the various grounds alleged by the landlord, like default in payment of rent, unauthorised sub-letting etc., have been substantiated on the evidence on record. The learned Judge has, however, still dismissed the suit on the ground that the tenancy being for running a Saw Mill was

for manufacturing purpose and, therefore, required six months" notice for its termination u/s 106 of the Transfer of Property Act and was bad for want of such a notice as only one month"s notice was given u/s 106 of the Transfer of Property Act read with Section 3(6) of the West Bengal Premises Tenancy Act. When the learned Judge decided the suit and decreed its dismissal in 1978, the law as then settled was that the one month"s notice provided in Section 13(6) of the West Bengal Premises Tenancy Act was in the nature of a notice of suit and, therefore, in order to obtain a decree of ejectment against a premises-tenant, a notice terminating his tenancy u/s 106 of the Transfer of Property Act was still very much necessary over and above a notice u/s 13(6) of the West Bengal Premises Tenancy Act, though both the notices could be combined in one document. As is well-known, the Special Bench decision of this court in [Abdul Samad Bepari Vs. Manasha Charan Bakshi](#), and the various decisions preceding and following the same were clear authorities on the point. Under the law then prevailing, the learned Judge was, therefore, right in holding that a notice satisfying the requirements of Section 106 of the Transfer of Property Act was a must when the instant suit was filed and disposed of. But we are afraid that the learned Judge was not right in holding that the lease being for running a Saw Mill was one for manufacturing purpose and required six months" notice for its termination u/s 106 of the Transfer of Property Act.

2. The tests laid down in the various decisions of the Supreme Court for determination as to what is manufacturing purpose has been summarised by the Supreme Court in a rather recent decision u/s 106, Transfer of. Property Act in *Idandas v. Anant* (A.I.R. 1982 S.C. 127 at 129) thus :

1. That it must be proved that certain commodity was produced;
2. That the process of production must involve either labour or machinery.
3. That the end product which comes into existence after the manufacturing process is complete should have a different name and should be put to a different use. In other words, the commodity should be so transformed so as to loss its original character.

3. Going by these tests, as we must, we do not think that a Saw Mill, where wood is sawn or cut into different pieces and sizes, can be said to have involved any manufacturing process. At any rate, there is nothing on record to show that in the instant Saw Mill wood was so transformed so as to have different name or use and to lose their original character. We are, therefore, of the view that the learned Judge was wrong in regarding the lease to be one for manufacturing purpose within the meaning of Section 106 of the Transfer of Property Act and to require six months" notice and in holding the suit to be bad for want of such a notice.

4. But that apart, as is well-known, the Supreme Court has now in unanimous Seven-Judge Bench decision in [V. Dhanapal Chettiar Vs. Yesodai Ammal](#), categorically ruled, overruling a number of its own decisions, that in order to get a

decree or order of eviction against a tenant under any of the State Rent Acts, like the West Bengal Premises, Tenancy Act, where a tenant has been defined to include any person continuing in possession even after the termination of his tenancy until a decree or order for eviction is passed against him, no notice of termination of tenancy u/s 106 of the Transfer of Property Act is at all necessary. That being so, we would have to hold that the instant suit was not at all required to be preceded by any notice u/s 106, Transfer of Property Act and, therefore, even assuming arguendo that the tenancy for a Saw Mill is one for manufacturing purpose, the suit could not be held to be bad for want of six months' notice or, for the matter of that, any notice u/s 106, Transfer of Property Act.

5. But even though in [V. Dhanapal Chettiar Vs. Yesodai Ammal](#), the Supreme Court has ruled out the necessity of a notice of termination of tenancy u/s 106, Transfer of Property Act in a suit for ejectment governed by the State Rent Acts whereunder a tenant continues to be a tenant until a decree or order of ejectment is passed notwithstanding termination of his tenancy, the Supreme Court has sufficiently indicated that if any State Act itself requires any notice as a condition precedent to a suit for ejectment, such notice would still be necessary as before. In the instant suit, therefore, a notice u/s 13(6) of the West Bengal Premises Tenancy Act was very much necessary as the subsection provides that "notwithstanding anything in any other law for the time being in force, no suit or proceeding for the recovery of possession of any premises on any of the grounds mentioned in sub-section (1) shall be filed by the landlord unless he has given to the tenant one month's notice expiring with a month of the tenancy". And Mr. Mukherjee, the learned counsel appearing for the tenant-respondent has very strongly urged that as no such notice has been proved to have been duly served upon the tenant-respondent, the decree of dismissal must and can not but be upheld.

6. The notice u/s 13(6) of the West Bengal Premises Tenancy Act in this case, being Ext. 2, was sought to be served in almost all the modes permissible under the second paragraph of Section 106 of the Transfer of Property Act, namely, 1) by registered post, 2) by personal tender or delivery and 3) by affixing to the demised property. Section 13(6) of the West Bengal Premises Tenancy Act, however, as quoted hereinabove, does not provide for any mode of service of a notice thereunder. Are the modes prescribed for service of a notice u/s 106 of the Transfer of Property Act of 1882 also available in law for service of notice u/s 13(6) of the West Bengal Act? Can the second paragraph of Section 106 of the Transfer of Property Act providing different modes for service of notice under that section stand transposed and super-added to the provisions of Section 13(6) of the West Bengal Premises Tenancy Act without any legislative incorporation or reference and make those modes of service applicable to a notice u/s 13(6)? We are inclined to think that the various modes of service provided u/s 106 of the Transfer of Property Act, can not proprio vigore apply to a notice u/s 13(6) of the West Bengal Premises Tenancy Act in the absence of a clear legislative indication to that effect. We think it to be too

obvious a proposition that procedural provisions in one statute can not apply to matters covered by another statute in the absence of statutory indication to that effect, whether by legislative incorporation or referential legislation or the like. We are afraid that as there is no such indication in either the Transfer of Property Act or the West Bengal Premises Tenancy Act, it would be too much of judicial legislation to rule that the provisions of the second paragraph of Section 106, Transfer of Property Act prescribing various modes of service of a notice under that Section would also apply proprio vigore to a notice u/s 13(6), West Bengal Premises Tenancy Act. But how then the notice u/s 13(6) is to be served?

7. Section 13(6), West Bengal Premises Tenancy Act, as already extracted, provides for "giving of a notice by the landlord to a tenant. As the modes of "giving" such notice are not prescribed, such ""giving" must be in accordance with such mode or modes as would amount to "giving" under the general principles of law. Such "giving" of notice by personal tender or delivery or through post would amount to "giving" as required u/s 13(6) of the West Bengal Premises Tenancy Act, not because Section 106 of the Transfer of Property Act prescribed those modes, but because under the general principles of law, such "giving" by personal tender, whether effected by the landlord himself or by or through his agent or by or through post, would amount to giving of notice. But service by affixation is rather an extra-ordinary and a technical procedure and as it can not and does not amount to a service under the ordinary and general principles of law, specific statutory provisions had to be made in Section 106 of the Transfer of Property Act as in, for example, Order 5 Rule 20 of the Code of Civil Procedure, to provide that service by such mode also would amount to service. As we have very recently pointed out in *Sarashibala v. Monorama* (1986 - 1 Calcutta High Court Notes 253 at 258-259), relying on a number of decisions of the Supreme Court, and also of this court the West Bengal Premises Tenancy Act being a legislation enacted for the benefit and protection of the tenant, if two or more interpretations are possible of its provisions, the interpretation which is protective or more protective of the interest of the tenants must be preferred. There can be no manner of doubt that Section 13(6) of the West Bengal Premises Tenancy Act disentitling a landlord from suing a tenant for ejectment unless the landlord has given to the tenant one month's notice under that Section is obviously a provision for the protection of tenants and, therefore, if two views are possible in respect of modes of service of notice thereunder, the one being that such notice may be served according to all the modes permissible u/s 106 of the Transfer of Property Act including the technical mode of service by affixation and the other being that such notice can be served only in accordance with such ordinary modes which under the general principles of law would amount to service, the latter view being more protective of the interest of the tenants is to be accepted.

8. Mr. Roy Chowdhury appearing for the landlord-appellant has, however, drawn our attention to a Division Bench decision of this Court in *Radharani v. Angur Bala* (65 C W N 1119) and has urged that the same is a clear authority for the view that all

the modes provided for service of notice u/s 106 of the Transfer of Property Act are also equally available for the service of notice u/s 13(6) of the West Bengal Premises Tenancy Act. The question before the Division Bench in that case was, however, something very much different. Section 106, Transfer of Property Act expressly provides for a notice to be given not only by the landlord but also on his behalf, that is, by his duly authorised agent also. But Section 13(6) only speaks of a notice to be given by the landlord only and, unlike Section 106 of the Transfer of Property Act, does not make any reference to a notice given by some one on behalf of the landlord. As already noted hereinbefore, those were the days when the law was that to sue a premises-tenant for ejectment, both a notice u/s 106, Transfer of Property Act and a notice u/s 13(6), West Bengal Premises Tenancy Act were necessary though both could be combined into one. And the question which fell for determination by the Division Bench was whether such a combined notice given by a lawyer or some other agent on behalf of the landlord would be good notice u/s 13(6) of the West Bengal Premises Tenancy Act also, the provisions whereof, at least in express terms, provide only for a notice by the landlord and not for a notice on his behalf as is provided in Section 106 of the Transfer of Property Act. The Division Bench, speaking through P.N. Mookerjee, J., answered the question in the affirmative pointing out that "ordinarily, an act which can be done by a party can also be done by his authorised agent" and that "the express provisions in the Transfer of Property Act about giving of notice on behalf of the landlord, i.e. by his duly authorised agent, appears to have been redundant from that point of view or a provision inserted ex abundante cautela and, accordingly the non-repetition of the same in Section 13(6) of the West Bengal Premises Tenancy Act, 1956 does not really have any effect of changing the law".

9. But even though the relevant question was thus fully and sufficiently disposed of, his Lordship nevertheless chose to proceed further and observed as hereunder:

It may also be quite reasonably contended that the phrase "unless he (the landlord) has given to the tenant one month's notice expiring with a month of the tenancy" refers to the giving of notice (including the service) in the then recognised manner, namely, as under or as prescribed in Section 106 of the Transfer of Property Act. This is more or less patent as it is nobody's case that the mode of service of notice to quit would be otherwise than under the said Section 106, even though there is no express mention or reference of it in the aforesaid new Section 13(6) and, if so, the phrase quoted would include the whole of the second part of Section 106.

10. We have considered both the earlier and the later observations, quoted hereinabove, of that eminent Judge with all the respect that they deserve and we have felt that even though the earlier observations were sufficient to dispose of the relevant question, in the later observations his Lordship was furnishing further grounds and additional reasons to substantiate the conclusions already arrived at by him that the notice u/s 13(6) of the West Bengal Premises Tenancy Act may be

given not only by the landlord but on his behalf also. The later observations, therefore, can not be considered to be more obiter, even though the relevant point for consideration could be and was disposed of by the earlier observations. It is true that the expression "as it is nobody's case" in the later observations, quoted hereabove, would indicate that in that case it was accepted by all concerned that mode of service of a notice u/s 13(6) of the West Bengal Premises Tenancy Act would be in accordance with and not otherwise than what are prescribed u/s 106 of the Transfer of Property Act. It is, therefore, apparent that the question as to the availability of the modes of service prescribed u/s 106 of the Transfer of Property Act to a notice u/s 13(6) of the West Bengal Premises Tenancy Act was not raised or posed in Radharani (supra) in the form and the manner in which the same has been considered by us in the preceding paragraphs. But even then, there is probably no escape from the conclusion that in Radharani (supra) the Division Bench has clearly ruled that the modes of service prescribed for a notice u/s 106 of the Transfer of Property Act are available for the service of notice u/s 13(6) of the West Bengal Premises Tenancy Act. That this is so would also clearly appear from a later Division Bench decision in [Satya Chorone Roquittee Vs. Suresh Chandra Pal and Others](#), where the same learned Judge speaking for the Bench has held (at 1243) that for a combined notice u/s 106 of the Transfer of Property Act and Section 13(6) of the West Bengal Premises Tenancy Act, "service of affixing of the notice to quit on the door of the disputed premises... was good service".

11. Mr. Saktinath Mukherjee, the learned counsel appearing for the tenant-respondent has, however, very strongly urged that as both in Radharani (supra) and Satya (supra), the Division Benches were considering the case of service of a combined notice both u/s 106 of the Transfer of Property Act and Section 13(6) of the West Bengal Premises Tenancy Act, the Division Benches could and did rule that the modes of service prescribed under the former Section were available to a notice under the latter Section. But now that in view of the Seven-Judge Bench decision of the Supreme Court in [V. Dhanapal Chettiar Vs. Yesodai Ammal](#), the notice u/s 106 of the Transfer of Property Act is no longer necessary, the ratio of the aforesaid two Bench decisions would not apply where, as here, a notice u/s 13(6), West Bengal Premises Tenancy Act only was required to be served. We are not impressed with this argument, if the modes prescribed for service of notice u/s 106 of Transfer of Property Act are not otherwise available for service of notice u/s 13(6). West Bengal Premises Tenancy Act, those would have been still unavailable for a combined notice under both the Sections so far the same purports to be a notice u/s 13(6) of the West Bengal Premises Tenancy Act also. Mr. Mukherjee has also urged that when the cases of Radharani (supra) - and Satya (supra) were decided the notice u/s 13(6) was treated as a notice to quit of the nature of one u/s 106, Transfer of Property Act, though the period of notice was different and that enabled the Division Benches to hold that the modes permissible u/s 106 of Transfer of Property Act were also available to a notice u/s 13(6) of the West Bengal Premises Tenancy

Act. But now that in the Special Bench decision in *Suraya Properties* (supra, 1964 Calcutta I) has been ruled that the notice under; Section 13(6) of the West Bengal Premises Tenancy Act is not a notice to quit as u/s 106 read with Section 111(h) of the Transfer of Property Act, but is a notice of suit, the ratio of the Bench decisions in *Radharani* (supra) and *Satya* (supra) would no longer apply. This argument also does not impress us. If, as held in those Bench decisions, even in the absence of any legislative indication to that effect, modes prescribed for service of notice in Section 106, Transfer of Property Act are available to a notice u/s 13(6), West Bengal Premises Tenancy Act, those would continue to be available whether the notice u/s 13(6) is classed as a notice to quit or as a notice of suit.

12. We have already indicated that we are inclined to think that the provisions of the second paragraph of Section 106 of the Transfer of Property Act providing for various modes of service cannot *Proprio vigore* apply to the service of a notice u/s 13(6) of the West Bengal Premises Tenancy Act and Section 13(6) having prescribed no. mode of service, a notice thereunder has got to be served in such manner which under the general principles of law would amount to service, like personal tender or delivery or delivery by post. But even though we are inclined to hold a different view, we cannot but govern ourselves by the two Bench decisions in *Radharani* (supra) and *Satya* (supra), unless we decide to take steps for having the question referred to a larger Bench. But we have, however, felt that such a course would not be necessary as in the case at hand we are satisfied that the notice u/s 13(6) cannot be taken to have been duly served, even if we proceed on the view laid down in the aforesaid two Bench decisions in *Radharani* (supra) and *Satya* (supra) to the effect that the notice u/s 13(6) of the West Bengal Premises Tenancy Act can be served in accordance with the modes prescribed in Section 106 of the Transfer of Property Act.

13. The notice u/s 13(6) in this case, Ext. 2, was sought to be served by - (1) registered post, (2) by personal tender or delivery and also (3) by affixation on the demised premises. As to the sending by registered post, the evidence is that one copy of the notice was sent to the demised premises while another copy was sent to the residential address of the tenant. The notice sent by registered post to the demised premises while another copy was sent to the residential address of the tenant. The notice sent by registered post to the demised premises came back with postal endorsement "left" on the cover. Obviously this can not amount to service for, as pointed out in the Division Bench decision of this Court in *Hare Krishna v. Hahneman* (70 C.W.N. 262 at 264-265), when the record contains only the registered notice with the endorsement "left", that on the face of it rebuts presumption of due service. As observed in another later Bench decision in *Surajmull v. Samadarshan* (I.L.R. 1969, 1 Cal. 379), the endorsement "left" itself shows that there was no tender and unless there was a tender to the addressee, service of the notice can not be presumed on any conceivable principle.

14. As to the service of notice by attempted personal tender and then by affixing it to a conspicuous part of the demised property, we have also no doubt that the same also failed as the mandatory provisions of Section 106 in respect thereof were not complied with. It is apparent from the evidence on record that before affixing the notice to the demised property, it was tendered to an alleged employee of the tenant in the demised premises at 62, Bipin Behari Ganguly Street, where the tenant used to run his Saw Mill business, while the tenant was residing at some other place being 5/2, Commissariat Road. Assuming that the notice was tendered to a servant of the tenant, under the express terms of the second paragraph of Section 106, Transfer of Property Act, such tender must be "at his (landlord's) residence". This is irresistably clear from the terms of the relevant provisions that tender or delivery to "one of his family or servants" of the tenant must be "at his residence". To quote from the well-known authority of the Privy Council in Harihar Banerjee vs. Ramshashi Roy (A.I.R. 1918 P C 102 at 110), while the personal tender or delivery to the tenant may take place anywhere, "the vicarious tender or delivery must take place at the residence of the person intended to be bound by the notice". But as it appears from the deposition of the plaintiff, PW - 2, and the pleader's clerk, PW-3. the tender or delivery to the alleged employee of the tenant preceeding the affixation of the notice to the demised premises was also made at the demised premises where the tenant carried on his business, but not at his residence. We have no doubt that the vicarious tender or delivery in this case not having been made at the residence of the tenant, the tender and the following affixation of the notice to the demised premises were of no avail.

15. As to the other registered notice sent to the residential address of the tenant which has not come back, we would like to point out that though u/s 27 of the General Clauses Act, 1897, there is an obligatory presumption in favour of due service of a document sent by registered post, such a presumption would operate only when the conditions laid down in that Section are satisfied and the conditions are - (1) a Central Act or Regulation must authorise or require a document to be served by post and 2) the letter containing the document is properly addressed, pre-paid and sent by registered post. To the same effect are the provisions of Section 28 of the Bengal General Clauses Act, 1899 whereunder also the obligatory presumption of due service in respect of an un-retuned registered notice would arise, as the opening words of the Section would show, only "where any Bengal Act or West Bengal Act made after the commencement of this Act authorise or requires any document to be served by post". In Radharani (supra), the Division Bench by its judicial dicta has only made the modes of service prescribed u/s 106, Tansfer of Property Act available to a notice u/s 13(6) of the West Bengal Premises Tenancy Act and one such mode permissible u/s 106, Transfer of Property Act is sending by post. But since such judicial dicta can not amount to legislation making statutory incorporation of the second paragraph of Section 106 of the Transfer of Property Act in Section 13(6) of the West bengal Premises Tenancy Act, the latter Section on can

not be said to authorise or require service by post within the meaning of Section 28 of the Bengal General Clauses Act, 1899. Since neither Section 13(6) of the West Bengal Premises Tenancy Act, nor any other provision of that Act authorises or requires a notice under the General Clauses Act of due service in respect of unreturned notice sent by registered, post can not operate. It is true that an optional presumption of due service may still be available under the provisions of Section 114, Evidence Act in respect of notices sent by post in view of Illustrations (e) and (f) of that Section. But the presumption being optional, the court may not in a given Case raise any such presumption at all. As we have already noted, the registered notice has come back with an endorsement "left" indicating thereby that it was not a case where the post man did not just find the addressee when he went to serve the notice, but was a case of the addressee having left the place altogether. We also find from the evidence of the pleader's clerk PW-3, who went to effect personal delivery of the notice, that he also could not find the addressee there. The registered notice was posted on 20/21.9.66 while a copy of the notice was affixed on the demised premises on 23.9.66. This undue haste in attempting to get the notice served by affixation without waiting for a reasonable period to ascertain the result of registration also gives rise to the suspicion that the plaintiff also knew that the tenant was not there and would not be available for service by personal tender or through post. In the context of all these, we are afraid that the instant case is hardly a case where the optional presumption arising out of service by post u/s 114 of the Evidence Act should be given effect to. We have noted that under similar circumstances the Division Bench in *Surajmull* (supra, ILR 1969 1 Cal 379 at 1382) also refused to draw a presumption of service u/s 114 of the Evidence Act in the case of a notice sent under certificate of posting. We would like to make it clear that the matter would have been different if the obligatory presumption of due service of registered notice operating u/s 28 of the Bengal General Clauses Act was available in this case. But, as already pointed out, the West Bengal Premises Tenancy Act not having authorised or required service of a notice u/s 13(6) by post, no such presumption is available. A presumption u/s 114 is also very often out-weighted by a counter-presumption under that Section and, as is well-known, one of the presumptions operating under that Section. Illustration(g), is that evidence which could be and is not produced, would, if produced, be unfavourable to the person who could produce it. We are satisfied that in view of the fact that the obligatory presumption u/s 28 of the Bengal General Clauses Act was not available, and the other registered notice has come back with the endorsement "left", and the attempted personal delivery has also failed as the tenant could not be found, the plaintiff could have adduced much better evidence by summoning the postal department to approve as to what happened to the unreturned registered notice. This, we may repeat, would not have been necessary if the obligatory presumption of due service of registered notice available u/s 28, Bengal General Clauses Act could apply in this case. A notice u/s 13(6) has very serious consequences and as already pointed out, the provisions were designedly enacted for the protection of the tenant. In the

context of the facts and circumstances as noted hereinabove, we do not think that it would be proper to find service of notice in this case on such a mere optional presumption available u/s 114. In this view, we hold that even this service also of the notice u/s 13(6) has not been proved. We accordingly hold that the suit was bad as the service of the notice u/s 13(6) of the West Bengal Premises Tenancy Act, which is a condition precedent to such, has not been proved.

16. There is yet another aspect of the matter to which we would advert before we part with this case. The defendant was originally sued as the sole tenant. But subsequently an application was filed purporting, to be signed by his brothers and sister alleging that they also were to be joined as tenant-defendants on the plea that their father was the original tenant and they all have succeeded to the tenancy on the death of their father. They were also added as party-defendants, being defendant Nos. 2 to 5 and a separate issue, being No. 10. was framed which was tried separately and it was held that they were rightly made parties as co-tenants. If the matters stood at that then a monthly tenancy being undisputably heritable by all the heirs of the deceased tenant, we would have accepted the contention of Mr. Mukherjee that the suit was also bad on the ground that no notice u/s 13(6) was served on those co-tenants who also inherited the tenancy. It is true that, relying inter alia on the Privy Council decision in Harihar Banerjee (supra, AIR 1918 PC 102) and the decision of the Supreme Court in Kanji Manji (A.I.R. 1963 SC 496), this Court has laid it down as settled law that a notice to quit to one of the joint-tenants would be a good notice to the other joint-tenants also, provided however, the notice is addressed to all the co-tenants. The notice in this case, Ext. 2 not having been addressed to all the co-tenants, but to the original defendant only, could not amount to a sufficient notice to the other co-tenants who were later joined as defendants Nos. 2 to 5. But these subsequently added defendants, being Nos. 2 to 5 are no longer on record and their names were later struck out as it was found by the Court on an application made by the plaintiff and after giving these added defendants due notice thereof that these defendants Nos. 2 to 5 never put their signatures on the application for being added as defendants and the order striking out their names was never challenged at any stage. It is also in evidence that after the death of the original tenant, the father of the defendant, the rent-receipts have all along been issued to and rents have all along been realised from the present defendant only. It is also in evidence that after the death of the father, this defendant in writing represented to the landlord by Ext. 3(a) that his father having died, the tenancy was to be changed in his name alone. It is true that notwithstanding such representation by the present defendant, the other heirs could have claimed their shares in the tenancy and their right to be added as parties and could have resisted the suit for want of notice to them u/s 13(6) of the West Bengal Tenancy Act. But they are no longer on record to plead such a case and the original defendant, by his acts and representations as aforesaid, may very well be estopped from pleading that he was not the sole tenant of the plaintiff. We are

inclined to think that all these might have let Sudhamoy Basu, J. to observe in Civil Rule No. 71 of 1977 decided on 30.1.78 against the order passed in this case against the defendant u/s 17(3) of the West Bengal Premises Tenancy Act, that the facts and circumstances "militate against any assumption that there was more than one heir". But since we have held that the suit is bad as the service of the notice u/s 13(6) of West Bengal Premises Tenancy Act has not been satisfactory proved and we are going to dismiss the appeal and affirm the dismissal of the suit on that ground, we do not think that we need finally decide this question and pursue the same any further.

The appeal accordingly fails and is hereby dismissed, but without any order as to cost.

Sukumar Chakravarty, J.

I agree.