CIVIL APPEAL

Present: The Hon'ble Justice K.J. Sengupta.

And

The Hon'ble Justice Kalidas Mukherjee.

F.A. 201 of 1996

Judgment on: 1st April, 2010.

Edmuond Francis Heberlet & Anr
versus
Mustt. Fatima Khatoon and Ors

POINTS:

COMMISSIONER'S REPORT, PHOTOGRAPH- The field note, cannot be the substitute of the report - Apparent inconsistency with regard to her visit and non-accessibility to the site in question renders the entire report and exercise of the commission, wholly unacceptable – Photograph is secondary evidence and the negative is the primary evidence - The person who has taken these photographs, has not come forward to say that the photographs are of the disputed structure - Defendant committed acts of waste and damage in contravention of Clauses (m), (o) and (p) of Sec. 108 of the Transfer of Property Act-The plaintiff, whether entitled to a decree of eviction and khas possession- Transfer of Property Act, 1882 S.108 cl. (m),(o),(p)

FACTS:

The defendant having lost in the ejectment suit has impugned the decree in this appeal. The plaintiff filed the suit on two grounds, namely, default in paying the monthly rent agreed and also for making wrongful, illegal and unauthorised construction of two rooms and other constructions in the tenanted premises.

HELD:

While reporting, the Commissioner has made a considerable degree of guess work. As such, she did not venture to say that the contents of the report were correct.The field note, cannot be the substitute of the report. Field note is prepared recording the situations as found in the locale. In the

field note certain statements have been recorded of both the sides and it is to be found in the field note that one day the Commissioner could reach the disputed structure. Nonetheless, the Commissioner records in her report that she could not go to the spot. This apparent inconsistency with regard to her visit and non-accessibility to the site in question renders the entire report and exercise of the commission, wholly unacceptable. Para-38

While seeing the print of photographs, the Court thinks these photographs should not have been admitted in evidence when the negatives thereof were not even produced; as it is secondary evidence and the negative is the primary evidence. Moreover, the person who has taken these photographs has not come forward to say that the photographs are of the disputed structure. These photographs also cannot help to come to the conclusion that there has been any construction of any kind. Para-40

CASES CITED:

(1) Dayanand Gupta -vs- Gobind Lall Bangur & Ors., 2007(3) C.H.N. page 665

(2) Dhanapati Dutta –vs- Gita Dutta and Ors. 1986(2) C.H.N. page 292

(3) Ratnamala Dasi & Ors.–vs- Ratan Singh Bawa, 1988(2) C.H.N. page 1

For Appellant: Mr. Sudhis Dasgupta
Mr. M. Hafizullah

For Respondents: Mr. Bidyut Banerjee,
Mr. Jiban Ratan Chatterkee,
Mr. Badal Saha,
Mr. Supratim Dhar,
Mr. Debabrata Mandal

THE COURT:

1) The defendant/tenant having lost in the ejectment suit has impugned the decree in this appeal.The plaintiff/landlord filed the suit on two grounds, namely, default in paying the monthly rent agreed and also for making wrongful, illegal and unauthorised construction of two rooms and other constructions in the tenanted premises.

2) The defendant denied all the allegations contained in the plaint. In the written statement, answering the allegation of unauthorised construction it is stated that because of refusal of the landlord to effect repair the leaking roof, the defendant was compelled to undertake some repair work in order to ensure habitable condition of the tenanted premises. It is under the law that a prudent tenant is obliged to do so.

3) After filing of the suit, an application was made for appointment of Commissioner and the learned trial Judge appointed an Engineer as Commissioner to inspect the tenanted premises whether there has been any construction or the same was unauthorised or illegal. The defendant/appellant at that time was not happy with the order of appointment of Engineer Commissioner. Hence, he approached this court in appropriate manner impugning the said order.

4) This Hon'ble Court in revisional jurisdiction modified the said order of appointment and in place of Engineer, a learned advocate was asked to be appointed as Pleader Commissioner. The learned Advocate Commissioner was appointed and she inspected the suit premises and submitted report thereafter.

5) The learned trial Judge on the face of the aforesaid pleading had framed the following issues:

1. Has the tenancy of the Defendant been terminated by due service of a legal, valid and sufficient notice to quit ?
2. Is the defendant a defaulter in payment of rent since June, 1979?
3. Has the Defendant committed acts of waste and damage in contravention of Clauses (m), (o) and (p) of Sec. 108 of the Transfer of Property Act?
4. Is the plaintiff entitled to a decree of eviction and khas possession ?

6) In course of hearing and on considering the materials it was found by the learned trial Judge that the ground of default was not sound enough to examine the question of eviction on that ground. Hence, the learned trial Judge proceeded to hear the suit, to write the judgment on the issue of unauthorised and illegal construction, within the meaning of clause (p) of Section 108 of the Transfer of Property Act.

7) From the findings of the learned trial Judge we notice that the learned trial Judge while writing the judgment, has solely relied on the report of the Commissioner.

8) Learned trial Judge was of the view that the defendant is liable to be evicted as he is proved to have made unauthorised construction, as alleged by the plaintiff.

9) Mr. Dasgupta, learned Senior Advocate with Mr. Hafizullah, while impugning the aforesaid judgment submits that there has been no finding of the learned trial Judge that the construction is a permanent in nature, as required under section 108 clause (p) of the Transfer of Property Act. The report of the Commissioner does not lend any assistance, either to court or to the cause of the plaintiff. He has taken us through the contents of the report as well as other documentary evidence, from where he says, no one can conclude that the case of the plaintiff has been proved. Besides, the nature of the construction, as alleged by the plaintiff, is not reflected in the report of the Commissioner and it is not of permanent character at all.

10) According to him, in order to succeed in such a suit, one has to prove firstly that the construction is of permanent nature and secondly there must be evidence that no consent had been given. According to him, evidence recorded establishes that this construction had been in existence before his client came into possession as the transferee tenant. The landlord is also a transferee landlord. Therefore, this construction was always there and nothing has been done, as alleged by the plaintiff. What would be construction of permanent nature, he urges, this Court has taken consistent view in the following decisions: (1) 2007(3) C.H.N. page 665 (Dayanand Gupta -vs-

Gobind Lall Bangur & Ors.), (2) 1992(2) C.H.N. page 217, (3) 1988(2) C.H.N. page 1 and (4) 1986(2) C.H.N. page 292.

11) He submits that his client has only undertaken some repair work to plug leaking roof as the landlord refused to do so and it is within her legitimate right under Section 108(o) of the Transfer of Property Act to take care of it, as one prudent man does. Such an act cannot be said to be construction, far less a construction of permanent character.

12) Under those circumstances, he submits that the decree is not sustainable, as it has been proceeded without any evidence so to say. Hence, it is perverse.

13) Mr. Bidyut Banerjee, with Mr. Jiban Ratan Chatterjee, both learned Senior Advocates along with their learned Juniors while supporting the decree submits firstly that the learned trial Judge ought to have taken into consideration the statements and averments made in the written statement in relation to paragraph 4 of the plaint wherein it has been specifically mentioned that the defendant wrongfully and illegally made unauthorised and illegal construction of two rooms and other constructions including an asbestos shed of permanent nature causing considerable damage to the premises, in contravention of clauses (m), (o) and (p) of section 108 of the Transfer of Property Act. These statements and averments, according to Mr. Banerjee, has not been denied in the written statement specifically and the denial which has been made is nothing more than an evasive denial. He reminds us the effect of evasive denial and submits that it is worse than admission. The learned trial Judge should have taken note of this admission and should have written the judgment on that basis. He also argued that though his client has not filed any separate appeal or cross-objection on this point, still then he can argue by virtue of Order XLI Rule 33 of the Code of Civil Procedure.

14) Technically, he is right, but how far this legal principle can be made applicable in this case will be dealt with later. On merit, Mr. Banerjee submits that the learned trial Judge has come to the fact finding basing on sound evidence viz. not only the report of the Commissioner signed by him but also the accompanying document being the field note which have been exhibited. The learned trial Judge has also noted the evidence of the plaintiffs as well as the defendant. There is no rebuttal of

the evidence that there has been structure of permanent character having been made and the burden squarely rests on the defendant to prove negatively.

15) Drawing our attention to the relevant portion of the report of the Commissioner, Mr. Banerjee submits that it is proved that construction has been made in such a way that extends the extent of tenancy. The report shows that roof of the offending structure is constructed with concrete and extra rooms were also constructed. In fact, factum of this construction is not denied. It is, therefore, within the special knowledge of the defendant, under section 106 of the Evidence Act, to prove that construction was made with the permission of the landlord, P.W. 1 who has specifically denied any permission having been granted.

16) Under those circumstances, he concludes that it has been proved with the standard of preponderance of probability that construction of permanent character has been made.

17) Then he argues that it is not necessary that there will be proof of the construction of permanent nature. If it is established that the construction has been made, aiming at to increase the extent of tenancy, that per se is the proof of permanent character and comes within the purview of mischief of clause (p) of section 108 of the Transfer of Property Act. In support of this legal proposition, he has relied on a decision of Supreme Court, reported in A.I.R. 1987 S.C. page 617.

18) We have heard the learned Counsels for the parties and we have perused the pleadings and evidence and also the findings of the learned trial Judge. The question involved in this case is as to whether the learned trial Judge has correctly signed the decree for eviction, on the basis of pleadings, and evidence adduced before him, or not.

19) It appears that in course of hearing, the ground for default had lost its force and indeed the plaintiff did not press such ground for eviction. The only ground for eviction is that whether the defendant caused waste and damage to the property in contravention of clauses (m), (o) and (p) of section 108 of the Transfer of Property Act (hereinafter referred to as the said Act) or not.

20) It appears that in order to prove their case, the plaintiffs have examined two witnesses, P.W. 1 and the learned Commissioner, who was appointed in terms of the order of the Court. Apart from oral evidence, documentary evidence viz. report of the Commissioner together with field note prepared while carrying out the inspection and also some print of photographs have been adduced in evidence. To rebut the case of the plaintiffs, the defendant examined one witness.

21) In paragraph 4 of the plaint, the plaintiffs have averred that the defendant, without the knowledge and consent of the plaintiffs, has most wrongfully and illegally made construction of two rooms and other constructions including asbestos shed of permanent nature, causing considerable damage to the premises, in contravention of clauses (m), (o) and (p) of section 108 of the said Act. No particulars has been given in the plaint regarding infraction of the provisions of clauses (m) and (o). Clauses (m), (o) and (p) of section 108 of the said Act which run as follows :

> "Clause (m): The lessee is bound to keep and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left ;
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> Clause (o): The lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use , or permit another to use, the property for a purpose other than that for which it was leased, or fell (or sell) timber, pull down or damage buildings (belonging to the lessor, or) work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto ;
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> Clause (p): He must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes."

22) When no particulars of infraction as required in clauses (m) and (o) has been given, it is difficult for anyone to answer the same in view of vagueness. However, the learned trial Judge just casually recorded that the defendant is guilty of committing the acts as mentioned in clauses (m), (o) and (p) of section 108 of the said Act.

23) In paragraph 7 of the written statement, the defendant has denied that she has made any structure whatsoever on the roof at the premises No. 74/B, Elliot Road, Calcutta-16 and that the said allegation is false, fabricated and cooked up to harass the defendant with the view to pressurise for wrongful gain.

24) Mr. Bidyut Banerjee, submits that the aforesaid denial is not a denial. He says that in the facts and circumstances of this case, there should have been a specific denial and in absence of the same, according to him, it is an evasive denial which results in worse than admission. The position of law is what he says, as it is provided in Order VIII Rule 4 and 5 of the Code of Civil Procedure. We quote Order VIII Rule 4 and 5.

> "Order VIII, Rule 4 : Evasive denial:
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> Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.
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> Rule 5: Specific denial:
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> (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :
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> Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.
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> (2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.
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> (3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced."

25) Reading plainly the said sub-Rule 1 of Rule 5, we view that in all cases specific denial is not necessary. If on reading of the averment, the court finds that denial has been made in totality then condition of denial by necessary implication if not specific denial is subserved. Here, the defendant has denied that any structure has been made. The word "any" is good enough to cover all situation and all description. As such, it was not necessary to state that the defendant denies that the defendant made construction of any room or other construction, asbestos shed etc.

26) We do not see substance of submission of Mr. Banerjee that it is an evasive denial for which the court should accept the same being an admission and the judgment should be written on the basis of the same. Moreover, this plea was not taken before the learned trial Judge; rather the plaintiff proceeded to prove the matter with witness action. When before the learned trial Judge this plea was not taken specifically, rather abandoned by necessary implication, at the appellate stage such plea cannot be taken in the garb of Order XLI Rule 33 of the Code of Civil Procedure. This special provision, in the appeal, can be resorted to when such a plea was taken before the learned trial Judge and argued and the learned trial Judge, either failed to decide or decided otherwise. In that situation without filing any appeal or cross objection, this plea can be taken. We, therefore, hold that the plaintiff is estopped from raising this plea at the appellate stage.

27) Now the task is as to whether on the basis of materials available, the case of the plaintiff has been proved or for that matter, the learned trial judge passed a decree on the basis of acceptable material or not. Before we dilate this question, we feel it expedient to examine what is the requirement for passing a decree under clause (p) of section 108 of the said Act. We think that in order to pass a decree under the aforesaid provision of the Act, the Court must see that the plaintiff pleads first that without the lessor's consent (here land-lady's consent), the defendant erected any structure of permanent character. We notice that in paragraph 4 of the plaint, such averment is there. When there is a denial followed by framing of issues, it has to be proved. The plaintiff has to

prove with cogent evidence that there has been an erection of any structure of permanent nature, on the property. Whether it is lawful or wrongful, is immaterial. Construction of any description or any structure cannot be a ground for eviction, and judicial pronouncement of this Court in this respect is very consistent.

28) In the case of Dhanapati Dutta –vs- Gita Dutta and Ors., reported in 1986(2) C.H.N. page 292 no specific legal proposition is laid down about permanent structure. In paragraph 5 of the report Their Lordships basically, while noting decision of Special Bench in Surya Properties (AIR 1964 S.C.1) came to the conclusion that in order to decide whether a structure was permanent or not within the meaning of section 108(p) of the Transfer of Property Act, the nature of the construction and the intention with which it has been constructed are of primary and prime importance and while the former is to be ascertained from the structure, its situs and its mode annexation, the latter is to be derived from an investigation of the surrounding circumstances.

29) In the case of Ratnamala Dasi & Ors. –vs- Ratan Singh Bawa, reported in 1988(2) C.H.N. page 1, relying on Dhanapati's case (supra) the Division Bench illustratively formulated some test to be applicable for holding construction of permanent character and nature. Some of the tests laid down therein amongst other, are (i) if the structure cannot be removed without doing irreparable damage to the demised premises (ii) its removability had to be taken into consideration (iii) the nature of the material used. Similar observation has been made in two other decisions reported in 1992(2) C.H.N. page 217 and 2007 (3) C.H.N. page 665.

30) It is thus clear from above pronouncements of this Court, in order to hold structure being permanent one , it must be of such a character that cannot be removed without damaging and/or impairing substantially any portion of demised premises. Unless these conditions are satisfied, it cannot be said to be a structure of permanent nature. Mere raising a wall, adjacent to the demised premises, either mud or bricks which can be removed without any difficulty at any point of time, cannot be said to be a structure of permanent nature and character. Even if any roof is constructed either with asbestos or corrugated tin shed or even with concrete slab, cannot be said to be permanent since it can be removed easily, unless such concrete roof is cast on a brick built

massionary wall, which cannot be removed easily and need to be demolished with substantially or structural damage to the building.

31) In the Supreme Court decision in the case of Om Prakash –vs- Amar Sing and Anr., cited by Mr. Banerjee, this aspect has been dealt with. In paragraph 9 of the said judgment it has been stated that nature of construction, whether they are permanent or temporary, is a relevant consideration in determining the question of material alteration. A permanent construction tends to make changes in the accommodation on a permanent basis while a temporary construction is on temporary basis which do not ordinarily affect the form or structure of the building as it can easily be removed without causing any damage to the building. The Full Bench referred to the observation of this Court made in Babu Manmohan Das Shah's case (AIR 1967 SC 643) that the alteration in a given case might not cause damage to the premises or its value or might not amount to an unreasonable use of leased premises, yet construction may fall within the expression "material alterations".

32) The Supreme Court judgment was rendered on the question of material alteration. This judgment does not lend any support to the case of the plaintiff, but it is very helpful to understand what does it mean by 'permanent construction'. Hence, our observation gets full support from the observation of the Supreme Court.

33) Given this legal position, we now to examine whether the plaintiffs have been able to prove their case or not. We think when the case of construction of permanent nature has been established with the standard of preponderance of probability, the next question comes, whether this has been done without the consent of the landlord or not.

34) Clause (p) of section 108 of the said Act nowhere says that consent should be taken before making any construction. It may be taken aftrwards because the word "prior" has not been used by the legislature. According to us, even after construction, if no action is taken then consent can be inferred. But such fact of not giving consent has to be established by the landlord and the landlord alone and not by any other person for fact of giving consent, is within the special knowledge of the

landlord under section 106 of the Evidence Act. If someone on behalf of the landlord comes and says that no consent was given, it would be a hear-say evidence, as he or she must have heard it from the landlord. Needless to say that hear-say evidence is not accepted by the Court except in cases as provided in section 32.

35) Admittedly, in this case the landlady has not come forward to depose on the aspect of consent. On behalf of the landlady, P.W. 1 attempted to prove that no consent was given. We think his evidence cannot be accepted as being a hear-say evidence, as we have already observed. The learned trial Judge has unfortunately not taken note of this aspect of the matter. It appears that the learned trial Judge did not rely on the evidence of either parties on this issue. He has relied primarily on the report of the learned Commissioner and his testimony.

36) We need to read the evidence of the Commissioner to find justification of the findings of the learned trial Judge. Exhibit-11 is the report of the Commissioner and Exhibits 11/1 and 11/2 are the field notes. When a document is exhibited, it is admitted for examination by the Court to assess its worth. However, relevancy of a document is one thing and admissibility is another thing. Relevancy is judged examining the nexus and relation of the document with the fact in issue. No doubt, the report of the Commissioner is having tremendous nexus and relation with the fact in issue. But then, before the contents of the report is accepted there must be proof of correctness of the content.

37) In this regard, we have read oral evidence of the Commissioner. In the examination-in-chief, we do not find, the Commissioner has said that the contents of the report are true and correct though a suggestion in the cross-examination was given that the report was not true. When the Commissioner has not said that the contents of the report are correct, Court cannot accept the correctness just because it was prepared in terms of the Court's order. Even while reading of the report minutely, we find that the Commissioner reported that the defendant's occupation is under lock and key and she had seen suit premises from outside and, as she could not enter into the suit premises. She relied on the statement and instruction of the learned Advocate of the plaintiff who is alleged to have showed her the allegedly newly constructed rooms from outside. From the report, it

appears that she did not have the occasion to go to the spot nor she did ascertain which was the exact disputed spot. From outside, as per description of the learned Advocate of the plaintiff, she thought that this could be the disputed structure. In our view, while reporting, the Commissioner has made a considerable degree of guess work. As such, she did not venture to say that the contents of the report were correct.

38) Mr. Bidyut Banerjee showed us the field note. The field note, in our view cannot be the substitute of the report. Field note is prepared recording the situations as found in the locale. In the field note certain statements have been recorded of both the sides and it is to be found in the field note that one day the Commissioner could reach the disputed structure. Nonetheless, the Commissioner records in her report that she could not go to the spot. This apparent inconsistency with regard to her visit and non-accessibility to the site in question renders the entire report and exercise of the commission, wholly unacceptable.

39) Over and above, we find that the learned trial Judge has nowhere come to the fact finding that there has been a structure of permanent nature. Even in the evidence of P.W. 1 or the Commissioner, nowhere it is said that structure is of permanent character. Even the description and particulars of the disputed structure do not appear to hold that the same is a permanent structure. Whether wall has been erected or not or if it is done, then what material has been used for erecting the wall, are not to be found in evidence, either oral or documentary. The learned trial Judge unfortunately did not go into details in this respect of the matter and he has simply recorded that the defendant is guilty of clauses (m), (o) and (p) of section 108 of the said Act. The learned trial Judge failed to note that the case of contravention of clauses (m) and (o) has not been made out by the plaintiff in details. Simply it was not possible under any circumstance to for anyone to come to said findings, as no attempt has been made to prove this case.

40) While seeing the print of photographs, we think these photographs should not have been admitted in evidence when the negatives thereof were not even produced; as it is secondary evidence and the negative is the primary evidence. Moreover, the person who has taken these photographs, has not come forward to say that the photographs are of the disputed structure. These

photographs also cannot help to come to the conclusion that there has been any construction of any kind.

41) In view of the aforesaid discussions, we are unable to uphold the findings of the learned trial Judge and to sustain the decree. Hence, the appeal is allowed. The judgment and decree of the learned trial Judge is set aside. Obviously, the suit fails and the same is dismissed. There will be no order as to costs.

42) Lower court records, brought over to this Court, be sent down forthwith.

(K.J. SENGUPTA,J.)

I agree.

(KALIDAS MUKHERJEE,J.)