Nand Ram(D) Th. Lrs. . vs Jagdish Prasad(D)Th.Lrs on 19 March, 2020

Equivalent citations: AIR 2020 SUPREME COURT 1884, AIRONLINE 2020 SC 386

Author: Hemant Gupta

Bench: Hemant Gupta, L. Nageswara Rao

RE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9918 OF 2011

NAND RAM (D) THROUGH LRS. & ORS. ....

VERSUS

JAGDISH PRASAD (D) THROUGH LRS. .....RE

JUDGMENT

HEMANT GUPTA, J.

1. The challenge in the present appeal is to an order passed by the High Court of Delhi on 12 th November, 2010 whereby the appeal filed by the defendant was allowed and the suit for possession of land comprising in Khasra No. 9/19 measuring 3 Bighas 11 Biswas was dismissed.

2. The appellants-plaintiff No. 1 and plaintiff Nos. 2 to 8, as legal heirs of one Bhagwana, filed a suit for possession asserting that they were owners in possession of land measuring 3 Bighas 11 Biswas comprising in Khasra No.9/19 and land measuring 1 Bigha 16 Biswas comprising in Khasra No. 9/20/2, total measuring 5 Bighas 7 Biswas in the revenue estate of Village Tatarpur, Delhi. 12:30:17 IST Reason:

3. The land measuring 1 Bigha 19 Biswas out of Khasra No. 9/19 and 16 Biswas out of Khasra No. 9/20/2, in total measuring 2 Bighas 15 Biswas was taken on lease for 20 years commencing from 23 rd September, 1954 till 22nd September, 1974 on payment of Rs.235/- per year by Jagdish Prasad,

the defendant. It was agreed between the parties that it will not be open to the plaintiff-lessor to seek ejectment of the defendant-lessee from the leased premises, however, if the rent for one year remained in arrear, then the lessor would have the right to eject the lessee. The relevant conditions read as under:

> "7. Before the expiry of said lease it shall not be within the rights of the lessor i.e., party of the First Part to seek ejectment of party of the second part from the leased premises.
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> xx xx xx
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> 9. If rent for one year remains in arrears, then in that eventuality the lessor i.e., party of the First Part will have the right to eject the lessee i.e., party of the Second Part from the property leased and the party of the Second Part will remove all his malba from the land leased and deliver vacant possession to the party of the First Part."
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> 4. The entire leased land was acquired pursuant to the notification dated 24th August 1959 under Section 4 of the Land Acquisition Act, 18941. The Land Acquisition Collector determined a sum of Rs.28,284.85 as the market value of the land acquired including the super structure upon it. A dispute arose with regard to apportionment of compensation and the same was referred to the Reference Court. In such proceedings, three sets of claims were 1 for short, 'Act' raised, one by the appellants as owners of the land, another by Ram Chand and Jagdish Prasad, as lessee of the land and certain other persons in occupation of the hutments on the land acquired.

The defendant-respondent claimed apportionment of compensation in lieu of his lease-hold rights by raising a claim under Section 30 of the Act. The relevant paras from such claim petition filed by the defendant read as under:

> "1. That Shri Nand Ram and Shri Bhagwana sons of Lakhi Ram were the owners of land comprised in Khasra Nos.9/19 and 9/20/2 situated at Mauza Tatarpur, Delhi State.
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> 2. That the said Shri Nand Ram and Shri Bhagwana leased out land measuring 1 bigha 19 biswa out of Khasra No. 9/19 and 16 biswa out of Khasra No.9/20/2 to Shri Jagdish Prasad s/o Shri Daurilal, resident of Tatarpur the claimant herein for a period of twenty years by lease deed dated 22.9.54 and registered on 11.10.54."
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> 5. The respondent-defendant claimed share in the compensation for 2 Bighas 15 Biswas of land on the ground that they were deprived of the right to retain possession of that land for the unexpired period of 14 years of the lease in their favour, which was for 20 years in total. The Reference Court framed the following issues to determine the claim of rival claimants:

"1. Whether Jagdish and Ram Chand mentioned at Items No.27 and 28 are entitled to any share of the compensation awarded for land measuring 2 Bighas and 15 Biswas which was on lease with them and if so, to how much?

2. Whether Nand Ram and Bhagwana have any lien on Rs.2263.20 for the structure belonging to Jagdish and Ram Chand. If so, in what manner and to what extent?

3. Whether the Jhugis on the land measuring 2 Bighas and 15 Biswas leased out in favour of Jagdish were built by Dharam Chand etc. at their own expenses and they are entitled to receive the compensation in respect of their Jhuggis?

4. Relief."

6. The learned Additional District Judge, in such reference, in its award dated 21st October, 1961 (Ex.PW1/12), held that the respondent had not paid rent for more than 12 months and, thus, in accordance with clause 9 of the lease deed, the lease had come to an end. Therefore, the defendant had no right to claim a share in the compensation payable for the land leased to them. The Reference Court held as under:

"8. Jagdish Chand as R.W.4 has admitted that he did not pay any rent to Nand Ram and Bhagwan after the receipt of the notice for acquisition of the land. Nand Ram as A.W.2 has state rent has not been paid to him for two years and that he served a notice also on the lessee. Under clause 9 of the lease deed Ex.A/15, the lease is to come to an end in case rent is not paid for 12 months. From the evidence on the record it is proved that Ram Chand and Jagdish have not paid rent for more than 12 months and thus in accordance with clause 9 of the lease deed their lease had come to an end and therefore they have no right to claim a share in the compensation payable for the land leased out to them. I decide this issue against Jagdish Prasad and Ram Chand."

7. It may be stated that a part of the land acquired, comprising in Khasra No.9/19 was de-notified vide notification dated 18 th June, 1961 under Section 48(1) of the Act. Such land, measuring 1 Bigha 19 Biswas continued to be in possession of the defendant-lessee i.e. respondent herein.

8. Thereafter, the plaintiffs served a notice dated 12 th February, 1981 claiming possession of the land comprising the aforementioned Khasra No. 9/19, measuring 1 Bigha 19 Biswas, i.e. the land leased that continued in possession with the defendant post the de-

notification. The suit was filed by the plaintiffs on 13 th March, 1981. In the written statement filed by the defendant, it was asserted that the land which was in possession of the defendant did not form a part of the alleged lease deed and that the defendant was in possession of this land in his own

legal right. The defendant contended that if the plaintiffs had any right in the land in possession of the defendant, then the defendant had become the owner of the land in question by adverse possession. It was pleaded as under:

> "10. That the land in possession of defendant does not lie in the alleged khasra no. and is not covered by any alleged lease deed. Without prejudice to this plea in alternative it is submitted that the lease, if any, has already come to an end, about more than 22 years back, and defendant is owner in possession in his own rights."

> 9. The learned trial court decreed the suit after evidence was led by the parties. The certified copy of the original lease deed was produced as PW1/1 in respect of Khasra No. 9/19 and Khasra No.9/20. The notice regarding termination of lease as well as the revenue record was produced to prove the ownership of the plaintiffs-appellants. The trial court also referred to the award passed by the Reference Court (Ex.PW1/12) wherein the defendant-

respondent had claimed himself to be a tenant. The learned trial court returned the following findings:

> "Thus, the entire available record proves, conclusively that the plaintiffs are the owners of the suit land and that the suit land falls in Khasra No.9/19 Village Tatarpur, Delhi as the land in suit is no longer under acquisition, and neither is the land in possession of the D.D.A. as is indicated by Ex.PW1/13. DW2 has been unable to deny that there has been a notification for issuance of denotification of acquisition of Khasra No.9/19 Village Tatarpur, Delhi Ex.PW1/12, Ex.PW5/1, Ex.PW1/13, are all indications of admissions by the defendant that the plaintiffs are owners of the suit land and that the defendant was a lessee of the same under a registered lease deed dt.22.9.54 under Nand Ram and Bhagwana.

> Thus, issue No. 3 is decided in favour of the plaintiff and it is hereby held that the land in suit falls in Khasra No.9/19 Village Tatarpur, Delhi and that the plaintiffs are the owners of the same, as mere receipt of compensation for acquisition of land which has been denotified from acquisition does not in any manner make the plaintiff any less the owners of the land in suit. In any event the plaintiffs are certainly the landlords of the land in suit in terms of Ex.PW1/14 the lease deed, executed between Bhagwana and Nand Ram, and the defendant, and execution thereof having been admitted in the claim of the defendant in Ex.PW5/1."

> 10. In appeal against the said judgment and decree, the defendant moved an application under Order VI Rule 17 of the Civil Procedure Code, 19082 to amend his written statement and asserted that the suit was barred by limitation under Article 66 of the Schedule to the Limitation Act, 19633. The defendant asserted that the lease had come to an end when a notice for forfeiture of termination of the lease dated 23rd September, 1954 was issued by the plaintiffs which is Ex.A-3 in the proceedings

> before the Reference Court. In 2 for short, 'Code' 3 for short, 'Limitation Act' reply to such application, the stand of the plaintiffs was that the termination of tenancy is not possible vide the said notice in view of Sections 111 and 106 of the Transfer of Property Act, 18824 as the lease is said to be terminated w.e.f. 23 rd September, 1959 whereas the notice is required to be served for at least 15 days' time expiring on the last date of tenancy month. The learned First Appellate Court did not permit the defendant to amend the written statement but the question of limitation was allowed to be raised on the basis of material available on record.
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> 11. The learned First Appellate Court affirmed the findings recorded by the trial court. It did not find any merit in the argument raised by the defendant that the award passed by the Reference Court (Ex.PW1/12) produced by the appellants operated as res judicata.

The First Appellate Court found that the plea of forfeiture was totally inconsistent and contradictory to the averments made in the original statement. Further, that the plea of limitation was nothing but an ingenuity of the counsel for the defendant.

12. Thereafter, the defendant preferred a second appeal. The High Court framed the following two substantial questions of law:

> "1. Whether the judgment rendered by the Land Acquisition Court on 21st August, 1961 (Ex.PW-1/12) operates as res judicata between the parties as regards the title of the suit property?
>
> 2. If the first question is answered in the negative, whether the suit filed by the Respondent for possession is barred by time?" 4 for short, 'TP Act'

13. The High Court allowed the second appeal holding that the finding recorded in the award (Ex.PW1/12) that upon non-payment of rent for 12 months, the lease had come to an end, had attained finality. Therefore, such finding would operate as res judicata. The High Court held as under:

> "17. Ex.PW1/12 having been rendered by a court of competent jurisdiction had returned a finding that the lease between the parties stood determined as rent since the last 12 months had not been paid by the appellant/defendant. Reference to the notice dated 13.9.1960 terminating the lease had also been made.

There is no dispute to this factual submission which is even otherwise a part of the record. In these circumstances, it cannot be said that this finding Ex.PW1/12 was only an incidental or obiter observation made by the Land Acquisition Court/ADJ which is not binding on the parties. Ex.PW1/12 had while adverting to the notice dated 13.9.1960 categorically held that lease between the parties stood determined in terms of clause 9."

14. The High Court further held that period of limitation under Article 67 of the Limitation Act is 12 years, the period for which commences from the date when the tenancy is determined. Since the tenancy was determined on 23th September, 1960, the suit filed on 13th March, 1981 was beyond the period of limitation.

15. Mr. Vishwanathan, learned senior counsel for the appellants raised two-fold arguments. First, that Harpal Singh, one of the plaintiffs, died on 4th December, 1997 during the pendency of the appeal before the First Appellate Court. Since his legal representatives were not brought on record, the appeal stood abated. Consequently, the High Court could not have entertained the second appeal and reversed the judgment and decree passed by the First Appellate Court. Second, that clause 9 of the lease did not mean that if the rent for one year was not paid, the lease will stand terminated but only that the lessor would get a right to eject the lessee. It was further argued that the defendant had not placed on record the pleadings of the previous litigation which alone would determine whether the subsequent proceedings were barred by the principles of res judicata. It was argued that the issue before the Reference Court was restricted to the entitlement of payment of compensation on acquisition of lease hold rights. The right of the landlord to claim possession was not a subject matter of reference nor could it be a subject matter of such reference. Therefore, the decision of the Reference Court was neither res judicata nor constructive res judicata within the meaning of Explanation IV to Section 11 of the Code.

16. It was also argued that the suit was within the period of limitation as neither Article 67 nor Article 66 would be applicable but that the plaintiffs had a right to seek possession under Article 65 of the Limitation Act, which confers a right on the plaintiffs to seek possession from a person who is in possession, by virtue of his title. It is for the defendant to prove that his possession is open, continuous and uninterrupted so as to ripen the adverse possession into ownership. It was argued that the defendant had not denied the tenancy prior to the filing of the present suit for possession. Since the defendant continued to be in possession after the expiry of lease without any payment of rent, the possession of the defendant was not that of a tenant holding over but that of a tenant at sufferance. In terms of Section 116 of the TP Act, the acceptance of rent by the appellants will alone create a new tenancy or the status of the tenant as tenant holding over. It was open to the appellants to seek eviction on account of the non- payment of rent, but the possession of the respondent could not ripen into title as his possession was that of a tenant at sufferance. It was, thus, argued that the possession of the defendant was merely permissive possession under a lease deed, therefore, the plea of adverse possession was not available to the defendant.

17. The defendant-respondent contended that in the award of the Reference Court (Ex.PW1/12), there was a finding to the effect that the lease stood determined. The reliance is placed upon the findings recorded by the High Court that the tenancy stood terminated vide notice dated 13th September, 1960 (sic 23rd September, 1960). Therefore, the period of limitation commenced from the date of the notice terminating the lease or in any case from the date of the award of the Reference Court, thus, the suit filed by the plaintiffs was barred by limitation.

18. We have heard the learned counsel for the parties. The question that is required to be examined is as to which Article of the Limitation Act would be applicable in the present case i.e. Article 65, as

asserted by the appellants or Articles 66 or 67, as asserted by the respondent and that from which date the period of limitation would commence. For convenience, the Articles are reproduced hereunder:

> Description of Suit Period of Time from which limitation period begins to run
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> 65. For possession of immovable Twelve When the possession property or any interest therein years of the defendant based on title. becomes adverse to the plaintiff.
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> 66. For possession of immovable Twelve When the forfeiture is property when the plaintiff has years incurred or the become entitled to possession condition is broken.

by reason of any forfeiture or breach of condition.

67. By a landlord to recover Twelve When the tenancy is possession from a tenant. years determined.

19. Section 111 of the TP Act provides for determination of lease in the eventualities mentioned therein. Section 111 of the TP Act reads thus:

> "111. Determination of lease. - A lease of immoveable property determines-
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> (a) by efflux of the time limited thereby:
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> xx xx xx
>
> (g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;
>
> (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other."

20. In a judgment reported as Sajjadanashin Sayed Md. B.E. Edr. v.

Musa Dadabhai Ummer5 this Court held that if a matter was only "collaterally or incidentally" in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue. This Court found that the statement of law delineated by Mulla6 is the correct one, that if the issue was "necessary" to be

decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case. Such is the test for deciding into which category a case falls. One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwer Singh v. Sarwan Singh7 and Syed Mohd. Salie Labbai v. Mohd. Hanifa8). Which matters are directly in issue and which are only collaterally or incidentally in issue, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision.

21. This Court in Sajjadanashin Sayed approved a decision by the 5 (2000) 3 SCC 350 6 15 Edn., P. 104 7 AIR 1965 SC 948 8 (1976) 4 SCC 780 Privy Council reported as Run Bahadur Singh v. Lucho Koer9 wherein claim of rent from a tenant on the basis survivorship of Joint Hindu Family property was raised by "c" brother of the deceased. Two issues were framed in such suit (1) whether the deceased alone received the whole rent of the property in his lifetime, or whether the rent was received by him jointly with his brother C; (2) whether any rent was due and if so, how much was due from B. The finding on the first issue was that the deceased alone received the whole rent in his lifetime. Subsequently, C sued the widow for declaration that he and his brother were joint, and he claimed the property by right of survivorship. The question arose whether the deceased and C were joint or separate. The earlier finding was held not res judicata inasmuch as the matter was not "directly and substantially" in issue in the earlier suit. It was in issue in the earlier suit only "collaterally or incidentally", as it did not cover the entire question of C's title but related merely to the joint or separate receipt of rent.

22. In Asgar & Ors. v. Mohan Varma and Others10, the predecessors-in-interest of the appellant relied upon the sale of land by M/S K. J. Plantations. The predecessor-in-interest of M/s. K. J. Plantation was the lessee for a period of 75 years vide lease deed dated 25th November, 1897. The lease expired by efflux of time in 1972. In the meantime, the land was transferred by the lessee to different persons. The High Court held the assignees were 9 ILR (1885) 11 Cal 301 : 12 IA 23 (PC) 10 Civil Appeal No. 1500 of 2019 decided on 05.2.2019 tenants at sufferance and were not entitled to any estate or property. Before this Court, the argument was raised that they were entitled to remain in possession until the compensation was paid for the improvements made in terms of provisions of Kerala Land Conservancy Act, 1957. Such claim was resisted by the land owners inter alia on the ground that the lease had come to an end, therefore, the assignees from the lease were tenant at sufferance and the finding in proceedings under Order XXI Rule 97 of the Code would operate as res judicata. This Court held as under:

> "40. We are not inclined to decide this question on a pri- ori consideration, for the simple reason that under the CPC, both res judicata (in the substantive part of Section
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> 11) and constructive res judicata (in Explanation IV) are embodied as statutory principles of the law governing civil procedure. The fundamental policy of the law is that there must be finality to litigation. Multiplicity of litigation en-

sures to the benefit, unfortunately for the decree holder, of those who seek to delay the fruits of a decree reaching those to whom the decree is meant. Constructive res judi- cata, in the same manner as the principles underlying res judicata, is intended to ensure that grounds of attack or defence in litigation must be taken in one of the same proceeding. A party which avoids doing so does it at its own peril. In deciding as to whether a matter might have been urged in the earlier proceedings, the court must ask itself as to whether it could have been urged. In deciding whether the matter ought to have been urged in the ear- lier proceedings, the court will have due regard to the am- bit of the earlier proceedings and the nexus which the matter bears to the nature of the controversy. In holding that a matter ought to have been taken as a ground of at- tack or defence in the earlier proceedings, the court is in- dicating that the matter is of such a nature and character and bears such a connection with the controversy in the earlier case that the failure to raise it in that proceeding would debar the party from agitating it in the future." (emphasis supplied)

23. The issue in the proceedings under Section 30 of the Act, before the Reference Court was restricted to the apportionment of compensation, consequent to the acquisition of the leased land. The argument was raised that the lessee had another 14 years of the lease period, therefore, the lessee claimed compensation in lieu of the unexpired lease period. The issue was restricted to the payment of compensation on account of the unexpired period of lease. The issue in question was not the title of the appellants or the eviction of the respondent. Still further, the finding of the Reference Court, as reproduced above, is that the respondent had no right to claim a share in the compensation. The entitlement of the appellants to claim possession from the tenant was not an issue in the previous proceedings.

24. Before the award was announced by the Reference Court, part of the land acquired was de-notified. After denotification of the land, the respondent continued to be in possession and the title of the appellants as owners stood restored. De-notification under Section 48 of the Act is possible only when possession has not been taken and the land has not been vested in the State. The effect of de- notification is that the land comprising Khasra No. 9/19 was never deemed to be acquired. Once the land was de-notified, the status of the parties as they existed prior to notification under Section 4 of the Act stood revived.

25. The High Court has relied upon the findings recorded by the Reference Court that the tenancy stood terminated so as to deny the apportionment of the compensation in respect of acquisition of land. The issue examined by the Reference Court was whether the defendant was entitled to any share of compensation awarded for the land acquired. Such issue was decided against the defendant. It is this finding that the defendant is not entitled to any share of the compensation awarded which operates as res judicata in a subsequent suit and not the reasonings recorded by the Court for arriving at such a finding. In a judgment reported as Union of India v. Nanak Singh11, it has been held that what operates as res judicata is the decision and not the reasons given by the Court in support of the decision.

26. In another judgment reported as Mathura Prasad Bajoo Jaiswal & Ors. v. Dossibai N.B. Jeejeebhoy12, a three-Judge Bench of this Court held that the previous decision on a matter in issue alone is res judicata, the reasons for such decision are not res judicata. This Court held as under:

> "5... A decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties: the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata. A matter in issue between the parties 11 AIR 1968 SC 1370 12 (1970) 1 SCC 613 is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto.

A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law."

27. Thus, the finding returned in the award of the Reference Court (Ex.

PW1/12) that the lease stood determined on account of non- payment of rent was a finding made by the reference Court for a limited purpose i.e. not to accept the defendant's claim for compensation. Such finding cannot be binding on the parties in a suit for possession based on title or as a lessor against a lessee. Section 11 of the Code bars the subsequent Court to try any suit or issue which has been directly and substantially issue in a former suit. The issue before the Reference Court was apportionment of compensation and such issue having been decided against the defendant, the reference to notice for termination of tenancy does not operate as res judicata. Therefore, the finding recorded by the High Court that the order of the Reference Court operates as res judicata was clearly not sustainable. The first substantial question of law has been, thus, wrongly decided.

28. In respect of second question of law examined by the High Court that the plaintiff's suit was barred by limitation is based upon the notice dated 23rd September, 1960 produced in proceedings before the Reference Court as Ex.A-3. The reference to such notice was made in an application for amendment of the written statement under Order VI Rule 17 of the Code filed before the First Appellate Court. The First Appellate Court allowed the defendant to raise a plea of limitation without amending the written statement. Thus, the notice (Ex.A-3) in proceedings before the Reference Court was never produced in evidence in the suit for possession and such primary evidence was not before the Court. In terms of Section 62 of the Evidence Act, primary evidence

means a document itself produced for inspection by the Court. Section 64 of the Evidence Act stipulates that documents must be proved by primary evidence except in certain cases when secondary evidence can be led. The defendant has not led any evidence, including secondary evidence of the alleged notice said to be served by the plaintiffs. In the absence of primary or secondary evidence available in the suit for possession, the reference to such notice as the starting point of limitation is clearly erroneous and not sustainable.

29. The defendant was inducted as a lessee for a period of 20 years.

The lease period expired on 23 rd September, 1974. Even if the lessee had not paid rent, the status of the lessee would not change during the continuation of the period of lease. The lessor had a right to seek possession in terms of clause 9 of the lease deed. The mere fact that the lessor had not chosen to exercise that right will not foreclose the rights of the lessor as owner of the property leased. After the expiry of lease period, and in the absence of pay- ment of rent by the lessee, the status of the lessee will be that of tenant at sufferance and not a tenant holding over. Section 116 of the TP Act confers the status of a tenant holding over on a yearly or monthly basis keeping in view the purpose of the lease, only if the lessor accepts the payment of lease money. If the lessor does not accept the lease money, the status of the lessee would be that of tenant at sufferance. This Court in the judgments reported as Bhawanji Lakhamshi and Others v. Himatlal Jamnadas Dani and Others13, Badrilal v. Municipal Corpn. of Indore14 and R.V. Bhupal Prasad v. State of A.P and Others 15 and also a judgment in Sevoke Properties Ltd. v. West Bengal State Electricity Distribution Company Ltd.16 examined the scope of Section 116 of the TP Act and held that the lease would be re- newed as a tenant holding over only if the lessor accepts the pay- 13 (1972) 1 SCC 388 14 (1973) 2 SCC 388 15 (1995) 5 SCC 698 16 Civil Appeal No. 3873 of 2019 decided on 11.04.2019 ment of rent after the expiry of lease period. This Court in Bhawanji Lakhamshi held as under:

> "9. The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. A distinction should be drawn between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former is a tenant at sufferance in English Law and the latter a tenant holding over or a tenant at will. In view of the concluding words of Section 116 of the Transfer of Property Act, a lessee holding over is in a bet- ter position than a tenant at will. The assent of the land- lord to the continuance of possession after the determina- tion of the tenancy will create a new tenancy. What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise. …."
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> 30. The same view was reiterated in Badrilal v. Municipal Corpn. of Indore, as well. In R.V. Bhupal Prasad, this Court held that possession of the licencee on the expiry of the licence period was that of a tenant at sufferance and was liable to ejectment in

due course of law. His possession was not legal nor lawful. He may remain in possession until he is ejected in due course in execution of the decree in the suit filed by the respondent. His possession cannot be considered to be settled possession. The Court held as under:

"8. Tenant at sufferance is one who comes into possession of land by lawful title, but who holds it by wrong after the termination of the term or expiry of the lease by efflux of time. The tenant at sufferance is, therefore, one who wrongfully continues in possession after the extinction of a lawful title. There is little difference between him and a trespasser. In Mulla's Transfer of Property Act (7th Edn.) at page 633, the position of tenancy at sufferance has been stated thus: A tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, therefore, cannot be cre- ated by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has been de- termined, without the consent of the person entitled. A tenancy at sufferance does not create the relationship of landlord and tenant. At page 769, it is stated regarding the right of a tenant holding over thus: The act of holding over after the expiration of the term does not necessarily create a tenancy of any kind. If the lessee remains in pos- session after the determination of the term, the common law rule is that he is a tenant on sufferance. The expres- sion "holding over" is used in the sense of retaining pos- session. A distinction should be drawn between a tenant continuing in possession after the determination of the lease, without the consent of the landlord and a tenant doing so with the landlord's consent. The former is called a tenant by sufferance in the language of the English law and the latter class of tenants is called a tenant holding over or a tenant at will. The lessee holding over with the consent of the lessor is in a better position than a mere tenant at will. The tenancy on sufferance is converted into a tenancy at will by the assent of the landlord, but the re- lationship of the landlord and tenant is not established un- til the rent was paid and accepted. The assent of the land- lord to the continuance of the tenancy after the determi- nation of the tenancy would create a new tenancy. The possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the ten- ancy, his possession is juridical.

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13. In view of the settled position of law, the possession of the appellant is as tenant at sufferance and is liable to ejectment in due course of law. But his possession is not legal nor lawful. In other words, his possession of the the-

atre is unlawful or litigious possession. The appellant may remain in possession until he is ejected in due course in execution of the decree in the suit filed by the respon- dent. His possession cannot be considered to be settled possession. He is akin to a trespasser, though initially he had lawful entry."

31. Sevoke Properties Ltd. was a case where the respondent contin-

ued in possession after the expiry of lease period which ended on 24th May, 1996. A suit for possession was filed without serving a notice under Section 106 of the TP Act. The stand of the defendant was that he was a tenant holding over. Such argument was not ac- cepted and it was held that after the expiry of lease period in terms of unregistered document of lease, the possession of the respon- dent was that of a tenant at sufferance. In view thereof, as owners, the appellants were entitled to possession of the land in terms of Article 65 of the Limitation Act as the possession of respondent was that of a tenant at sufferance.

32. The Division Bench of Allahabad High Court in a judgment reported as Bisheshar Nath v. Kundan & Ors.17 examined a somewhat similar question where the period of lease was three years vide a lease deed dated 19th July, 1892 but the lessee remained in possession thereafter. The suit was filed on 18 th June, 1919 i.e. 17 ILR (1922) 44 All 583 after the expiry of 12 years from the determination of the lease.

The High Court considered Article 139 of the First Schedule of the Limitation Act, 1908 which is now equivalent to Article 67 of the First Schedule of the Limitation Act. The Court held as under:

> "...It seems to me on the facts of this case that the tenancy was determined on the 19th of July, 1895. It has not been proved that any new tenancy was created. By holding over without paying rent, it seems to me that the defendants became what is known as tenants by sufferance. Their position in English law has been summed up in Addison's Law of Contract, 10th edition, page 618 in the following words:—"The difference, therefore, between a tenancy-at-will and what is called a tenancy by sufferance is that in the one case the tenant holds by right and has an estate or term in the land, precarious though it may be, and the relationship of lessor and lessee subsists between the parties; in the other, the tenant holds wrongfully and against the will and permission of the lord and has no estate at all in the occupied premises. When the tenancy at sufferance has existed for twenty (now twelve) years, the landlord's right of entry is barred by statute, and the tenant becomes the absolute and complete owner of the property." So far as the question of limitation is concerned, the law in India is not different, in my opinion, although it may not be good law to hold that a tenant holding over is in adverse possession to his landlord. In my opinion this view is supported by Chandri v. Daji Bhau [(1900) I.L.R., 24 Bom.,
>
> 504.], where the facts were similar, and which case was followed in Farman Bibi v. Tasha Haddal Hossein [(1908) C.L.J., 648.]. In my opinion the suit was clearly barred under article 139 of the Limitation Act. I would, therefore, dismiss this appeal with costs."

33. In a separate but concurring opinion by Justice Stuart, it was held that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not restored possession by surrender to his landlord. It was

held that the plaintiff is the landholder and the defendants are tenants by sufferance. It was held so:

"...Their Lordships of the Privy Council say: "A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has act openly restored possession by surrender to his landlord." That clearly is the law, but does it in any way affect the present case? I think it does not. The defendants cannot be permitted to deny the plaintiff's title. They have foolishly denied it but they cannot be permitted to do so. The plaintiff is undoubtedly the land- holder and the defendants are tenants by sufferance, but once having recognized that the tenants are so estopped, the fact still remains that the suit has been instituted beyond the period of limitation allowed by the law. In these circumstances I accept the view of my learned brother and would dismiss this appeal."

34. The Division Bench of Allahabad High Court in a judgment reported as Sheo Dulare Lal Sah v. Anant Ram & Anr.18 examined an appeal arising out of a suit for possession against the defendants who were inducted as tenants for a period of one year. However, the tenants did not make any payment of rent. In a suit for possession, a plea was taken that the suit is barred by limitation.

The plaintiffs filed a suit on the basis of title without any averment that defendants were indicted as tenants except to the effect that the vendor of the plaintiff has executed a rent note and that the defendants have denied the title of the plaintiff, therefore, they are liable for ejectment. The Court held that in terms of Section 108(q) of the TP Act, the lessee had a duty to put the lessor into possession of the property. If he did not do so, he was merely a tenant whose lease had expired and who had continued to remain in wrongful possession of the property on the expiry of the lease. It 18 AIR 1954 All. 475 was open to the landlord to regularise the position by giving his assent to the continuance of possession and in that situation, provisions of Section 116 of the TP Act would apply. The Court held as under:

"10. Taking up the third point first, on the expiry of a lease for a period, Section 108(q) of the Transfer of Property Act imposes a duty on the lessee to put the lessor into possession of the property. Sahib Dayal, therefore, on the expiry of the period of one year fixed under the lease was bound to put Sri Krishna Das in possession of the property in accordance with the provisions of Section 108(q) of the Transfer of Property Act. If he did not do so, he was merely a tenant whose lease had expired and who had continued to remain in wrongful possession of the property on the expiry of the lease. It was open in such a case to the landlord to regularise the position by giving his assent to the continuance of possession and in that case the provision of Section 116 of the Transfer of Property Act would apply and the lessee would, in accordance with the provisions of that section, become a month to month tenant."

35. It was further held that in order to create a tenancy at sufferance the tenant should have lawfully entered into possession in recognition of the landlord's superior

title and should have continued to remain in possession in the same right after the termination of the tenancy without asserting any title hostile to that of the landlord. The Court held as under:

"12. In order to create a tenancy at sufferance the tenant should have lawfully entered into possession in recognition of the landlord's superior title and should have continued to remain in possession in the same right after the termination of the tenancy without asserting any title hostile to that of the landlord and without his assent or dissent. The continuance in possession should be due to the laches of the owner in not asking for payment of the rent or vacation of the premises or taking over possession of the property. In Corpus Juris Secundum, Vol. 51, p. 780, 175, it is pointed out that:

"The holding of a tenant at sufferance is the most shadowy estate recognized at common law, and practically the only distinction between such a tenant's holding and the possession of a trespasser is that the land-owner may, by his acquiescence, at any time base on the tenancy at sufferance the relation of landlord and tenant, which he cannot establish at law against a mere trespasser, and that the tenant cannot be subjected to an action in trespass before entry or demand for possession." The law thus enunciated is in line with the provisions of Section 116 of the Transfer of Property Act (No. 4 of 1882) which pointed out that:

"If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased as specified in S. 106."

36. The Full Bench of Bombay High Court in a judgment reported as Sidram Lachmaya, heir and legal representative of deceased Lachmaya Shivram Madur, heir of Original Plaintiff v. Mallaya Lingaya Chilaka19 rightly held that 'it is a well recognised construction of the Limitation Act that when there is a specific article dealing with a specific subject, that article is to be applied in preference to a general and residuary article'. The Full Bench was examining the question as to whether the possession of the tenant is adverse to the landlord upon the expiration of the

19 ILR 1949 Bom 135 (FB) : 1948 SCC OnLine Bom 4 tenancy period merely because the tenant has not paid rent. The second question examined was whether in a suit based upon title by a landlord against his ex-tenant, whether Article 139 or Article 144 is applicable. In such suit filed by the tenant, the claim was that the title of his landlord had extinguished under Section 28 of the Limitation Act, 1908. The Court held as under:

"Now, there can be no doubt that on the determination of the tenancy on June 11, 1925, the plaintiff became a tenant at sufferance, if we might make use of an English expression, or a trespasser. Although his possession was originally lawful, and he entered by lawful demise, at the termination of the tenancy his possession became wrongful and he became a trespasser. Therefore on the determination of the tenancy the right would arise in the landlord to recover possession from him of the property and the period of limitation would be governed by article 139 of the Indian Limitation Act.

xx xx xx Our Court almost consistently has taken the view that in a case by a landlord against a tenant it is art. 139 that applies, the first case which might be looked at is Kantheppa v. Sheshnppa, [(1897) 22 Bom. 893.] a decision of Sir Charles Farran, Chief Justice, and Mr. Justice Candy. There at p. 897 Sir Charles Farran says:

"We are inclined to think that the termination of the period of a fixed lease where nothing further occurs, is the time from which limitation begins to run against the landlord within the meaning of article 139 of the limitation Act." The expression "where nothing further occurs" is obviously with reference to s. 116 of the Transfer of Property Act, because it is open to the landlord on the expiration of the tenancy of accept rent from the tenant or otherwise assent to his continuing in possession and thereby create a fresh lease under the provisions of that section. But if the landlord neither accepts rent nor otherwise assents to the continuing of the possession of the tenant, then it is clear that the tenancy expires, limitation begins to run against the landlord under art.

139 and his right to obtain possession from his tenant would be barred after the period of 12 years.

xx xx xx As we have taken the view that a suit by a landlord against his ex-tenant is always governed by art. 139 and as we have indicated earlier in the judgment that the question whether his possession is adverse or not does not arise, we answer question No. 2 submitted to us as follows: art. 139. And with regard to question No. 1 our answer, with respect to the learned Judges who have referred this question to us, is that on the view we have now taken the question does not arise."

37. In another judgment by a Single Bench of the Delhi High Court reported as MEC India Pvt. Ltd. v. Lt. Col. Inder Maira & Ors.20, it has been held that in terms of Section 108(q) of the TP Act, a lessee continues to be liable to the lessor till possession has been actually restored to the lessor. The continuing in possession of the lessee is expressive of his continuing stand that the tenancy, in whatever form, continues. It was held as under:

"40. Section 108(q) thus ensures that a lessee continues to be liable to the lessor till possession has been actually restored to the lessor and a semblance of relationship

subsists till that contingency takes place. His continuing in possession is expressive of his continuing stand that the tenancy, in whatever form, continues. It is said that he does not hold it adversely to the landlord only till he has unequivocally renounced his status as a tenant and asserted hostile title, but even that appears to be doubtful, for in law his possession remains permissive till it has been actually restored to the landlord.

41. In law there is presumption in favour of the continuity of the tenancy and against the possession of the tenant becoming adverse. Furthermore, the doctrine of tenant estoppel, which continues to operate even after the 20 80 (1999) Delhi Law Times 679 termination of the tenancy, debars a tenant who had been let into possession by a landlord, from disputing the latter's title or pleading adverse possession, without first openly and actually surrendering possession of the tenanted premises and restoring them to the landlord.

42. A tenant who upon determination of the tenancy does not deliver up possession to the landlord as required by Section 108(q), cannot be heard to say that he is not a tenant—be he one at sufferance or be he one from month-to-month. Therefore, unless the landlord is actually put into possession, the premises remain under a tenancy, which unless assented to by the landlord, has the character of one at sufferance.

43. Thus, a tenant at sufferance is one who wrongfully continues in possession after the extinction of a lawful title and that a tenancy at sufferance is merely a legal fiction or device to avoid continuance in possession from operating as a trespass. A tenant remaining in possession of the property after determination of the lease does not become a trespasser, but continues as a tenant at sufferance till possession is restored to the landlord. The possession of an erstwhile tenant is juridical and he is a protected from dispossession otherwise than in due course of law. Although, he is a tenant, but being one at sufferance as aforesaid, no rent can be paid since, if rent is accepted by the landlord he will be deemed to have consented and a tenancy from month-to-month will come into existence. Instead of rent, the tenant at sufferance and by his mere continuance in possession is deemed to acknowledge both the landlord's title and his (tenant's) liability to pay mesne profits for the use and occupation of the property.

44. To sum up the legal position or status of a lessee whose lease has expired and whose continuance is not assented to by the landlord, is that of a tenant at sufferance. If, however, the holding over has been assented to in any manner, then it becomes that of a tenant from month-to-month. Similar, i.e. from month-to-

month, is the status of a lessee who comes into possession tinder a lease for a period exceeding one year but unregistered. He holds it not as a lessee for a fixed term, but as one from month-to-month or year-to-year depending on the purpose of the lease. If upon a tenant from month-to-month (or

year-to-year) and in either of the aforesaid two contingencies, a notice to quit is served, then on the expiry of the period, his status becomes of a tenant at sufferance. Waiver of that notice, or assent in any form to continuation restores to him his status as a tenant from month-to-month, but capable, of once again being terminated with the expiry of any ensuing tenancy month."

38. Thus, the suit of the plaintiffs filed within 12 years of the determination of the tenancy by efflux of time is within the period of limitation. The defendant has not proved forfeiture of tenancy prior to the expiry of lease period. Mere non-payment of rent does not amount to forfeiture of tenancy. It only confers a right on the landlord to seek possession. The plaintiffs have filed a suit for possession against the defendant on the basis of determination of tenancy, such suit is governed by Article 67 alone.

39. In view of the above, the suit for possession would not be covered by Article 65 since there is a specific article i.e. Article 67 dealing with right of the lessor to claim possession after determination of tenancy. The appellants-plaintiffs have claimed possession from the defendant alleging him to be the tenant and that he had not handed over the leased property after determination of the lease. Therefore, such suit would fall within Article 67 of the Limitation Act. Such suit having been filed on 13th March, 1981 within 12 years of the determination of lease by efflux of time on 23 rd September, 1974, the same is within the period of limitation. Thus, the findings recorded by the High Court are clearly erroneous in law and the same cannot be sustained and are, thus, set aside.

40. Though, Mr. Vishwanathan has argued that the first appeal stood abated as the legal representatives of one of the deceased respondents was not impleaded but we find that it is not necessary to decide such question as on merits, we have found the claim of the plaintiffs to be meritorious.

41. The respondent continued to be in possession of the land leased vide registered lease deed dated 22nd September, 1954. The respondent has admitted the ownership of the appellants before the Reference Court. Such plea operates as estoppel against the respondent in respect of the title of the appellants. However, the claim of compensation put forward by the respondent was declined for the reason that non-payment of rent disentitles the respondent from compensation. In the present proceedings, the respondent has denied his status as that of a tenant but claimed title in himself. The respondent claimed adverse possession and claimed possession as owner against a person, who has inducted him as tenant. The respondent was to prove his continuous, open and hostile possession to the knowledge of true owner for a continuous period of 12 years. The respondent has not led any evidence of hostile possession to the knowledge of true owner at any time before or after the award of the reference Court nor he has surrendered possession before asserting hostile, continuous and open title to the knowledge of the true owner. The question of adverse possession without admitting the title of the real owner is not tenable. Such question has been examined by this Court in Uttam Chand (D) through LRs. v. Nathu Ram (D) through LRs & Ors.21.

42. In view of the said fact, we find that the High Court erred in law in holding that the suit is barred by limitation in terms of Article 66 of the Limitation Act, therefore, the order passed by the High Court is clearly erroneous and is not sustainable in law. The same is set aside and the suit is decreed

by restoring the decree of the First Appellate Court. Accordingly, the appeal is allowed.

.....J. (L. NAGESWARA RAO) .....J. (HEMANT GUPTA) NEW DELHI;

MARCH 19, 2020.

21 Civil Appeal No. 190 of 2020 decided on 15th January, 2020 : 2020 SCC OnLine SC 37