CALCUTTA HIGH COURT

Baldeo Das Ram Narayan

Vs.

Maina Bibi

L.P.A. No. 8 of 1971

(Amaresh Chandra Roy and Salil Kumar Datta, JJ.)

21.03.1972

JUDGMENT

Amaresh Chandra Roy, J.

1. This appeal under cl. 15 of Letters Patent is against a judgment of our learned brother Chittatosh Mookerjee J. by which his Lordship has dismissed an appeal in this Court against the judgment and decree passed by a Judge of City Civil Court dismissing a suit instituted by the present Appellant.

2. That suit was for a declaration that the decree passed in favour of the present Respondent No-1 Sm. Maina Bibi against the Respondent No. 2 M/s Surajmull Nagarmull for eviction is not binding on the Plaintiff. .

3. Relevant facts are that under the Respondent M/s Surajmull Nagarmull was a tenant in respect of a portion of the second floor of premises No. 192 Jamunalal Bajaj Street under M/s Tejpal Jamunadas, the predecessors-in interest of the Respondent No. 1, who subsequently became the owner of the premises. Present Plaintiffs were inducted as sub-tenants in respect of part of that premises. The tenancy of Surajmull Nagarmull was terminated by a notice under Section 106, Transfer of Property Act, and in suit No. 937 of 1966 a decree for eviction was passed against them. Present Plaintiffs were not made parties in that suit and no notice under Section 106, Transfer of Property Act, was given to them. In execution of that decree the Respondent prayed for vacant possession of the premises by evicting the Plaintiffs also.

4. That decree was put in execution of Execution Case No. 375 of 1968. The Plaintiffs resisted delivery of possession and then present suit was instituted on the allegation that after the passing of Premises Tenancy Act of 1956 they had given notice under Section 16(2) of that Act and, therefore, the decree obtained without giving them notice to quit and without making them

parties in suit is not binding on them. The case made by the Plaintiffs was that a notice was sent to the landlord on May 2, 1956, by post, under certificate of posting and a copy of it was sent to the tenant also. Exhibit 6(b) is the copy of that notice proved in the case and Ex. 10 is the certificate of posting. That was before the Rules under the Act were framed.
5. After the Rules framed under the Act, another notice was sent to the tenants Surajmull Nagarmull by registered post as required by Rule 4 and therein they were requested to inform the superior landlord about the sub-tenancy.

6. On those assertions the Plaintiffs contended that as notice had been given under Section 16(2), the decree obtained against the tenant without making the sub-tenants parties in the suit is not binding on the sub-tenants.

7. The Defendant landlord denied the assertion that notice under Section 16(2) had been given. They contend that both the notices are fabrications and manufactured for the purpose of the suit.

8. Both the parties adduced evidence in, the trial Court. That part of the Plaintiffs' case in para. 1 of the plaint in which they claimed to have been sub-tenants under the Defendant No. 2 with the knowledge and consent of M/s Tejpal Jamunadas appears to have been abandoned at the trial. The Plaintiffs did not adduce any evidence to prove such consent of the landlord, though that was denied in the written statement.

9. The trial Court found upon evidence that the Plaintiffs had been sub-tenants under the tenants from before the commencement of the West Bengal Premises Tenancy Act, 1956. But the trial Court held that no notice of the creation of sub-tenancy under Section 16(2) of the Act was served on the superior landlord and the Plaintiffs were not entitled to protection under Sub-sections (2) and (4) of Section 13 of the West Bengal Premises Tenancy Act, 1956. As. a consequence, the decree passed in the previous suit was held to be binding on the Plaintiffs and the declaration and consequential reliefs prayed for in the suit were refused, and the suit was dismissed.

10. Against that decision of the trial Court, an appeal was preferred and it was registered as F.A. No. 696 of 1970. Value of the appeal is only Rs. 100 and under the Rules of this Court that First Appeal had been heard and decided by our learned brother Chittatosh Mookerjee J. sitting singly.

11. In the First Appeal in this Court the controversy between the contesting parties were essentially on the question of fact whether or not a notice under Section 16(2) of the West Bengal Premises Tenancy Act, 1956, had been given to the landlord. On the decision on that point of fact the result of the appeal depended because the Plaintiffs would be bound by the ejectment decree passed against the tenant Defendant No. 2 unless they had duly given notice of their sub-tenancy to the landlord Defendant No. 1 in view of the provision in Section 13(2) that only the sub-tenants who have given such notice under Section 16(2) shall be made parties in a suit for

ejectment brought-against the tenant of the first degree.

12. The learned Judge affirmed the finding that the Plaintiffs were sub-tenants under the Defendant No. 2 from before the commencement of the West Bengal Premises Tenancy Act, 1956, and before him it was conceded that the provision made in Rule 4 requiring that notice under Section 16(2) should be given by registered post with acknowledgment due did not strictly apply.

13. The notice relied on by the Plaintiffs Appellants is Ex. 6(b) which is a letter dated May 2, 1956, addressed to the landlord M/s Tejpal Jamunadas in which description of the portion of premises comprising the sub-tenancy has been mentioned and then it has been said:

> We are sub-tenants under your tenants M/s Surajmull Nagarmull of No. 8, Dalhousie Square (East), Calcutta, in respect of the above portion of the premises. No. 192, Cross Street, P.S. Burrabazar, Calcutta, since April 1955 at a monthly rent of Rs. 430 payable according to the English calendar month.
> Please recognise us your direct tenants.
> Copy:M/s. Surajmull Nagarmull, 8, Dalhousie Square East, Calcutta.
> This letter and the copy of it were said to have been "sent under certificate of posting, which is Ex. 10, which bears on its back postal seal with the date '2.5.56'.

14. Plaintiffs had also produced in evidence another letter dated September 27,1956, written on their behalf by Mr. R, P. Das, Advocate, addressed to M/s Surajmull requesting them to inform the superior landlord about the Plaintiffs' sub-tenancy. That letter is Ex. 6 and its copy Ex. 6(a) and was said to have been sent under registered post, receipt for it being Ex. 11. Even, according to the Plaintiffs, no such letter nor any copy was sent to the landlord, and for that reason the letter Ex. 6(a) was held to be ineffectual and served no purpose of the Plaintiffs.

15. On behalf of the Defendant No. 1 a letter dated October 28, 1956, and a registered cover were produced in evidence and were marked Ex. B and Ex. B'1. Those were sought to be proved by D.W. 1 Madan Mohan Agarwalla who deposed "to the effect that Dwarka Prosad Bajaj, another employee of the Defendant No. 1, had received the letter and had made an endorsement of the date October 31, 1956, on the top of the letter,. Ex. B. That letter purported to have been written by M/s Surajmull Nagarmull informing the landlord that the sub-tenants had vacated the premises On September 29, 1956, and said:

> Please treat this as notice under West Bengal Premises Rent Control Act, 1956.
> It may be noted that the termination of the sub-tenancy does not affect you as we continue to be your tenants and shall continue to pay rent as usual.

16. The trial Court took all these documents into consideration and came to the conclusion that

the Plaintiffs did not give any notice under Section 16(2) of the Act and, therefore, were not protected by Section 13(2) of the Act. The suit was dismissed.

17. In the High Court our learned brother Chittatosh Mookerjee J. did not accept the contents of the letter Ex. B for the reason that Dwarka Prosad Bajaj was not examined as a witness to prove that the said letter was written by M/s Surajmull Nagarmull. D.W. 1 did not also state in his evidence that M/s Baldeodas Ramkumar had vacated the suit premises on September 29, 1956.He also said: I am unable to accept the contents of the letter as the evidence of the facts contained therein. In any event the said letter Ex. B is not relevant for the purpose of deciding whether the present Plaintiffs Baldeodas Ramnarayan had given any notice on May 2, 1956, under Section 16(2) of the West Bengal Premises Tenancy Act. Therefore, I do not agree with the inference drawn by the trial Court from the said letter Ex. B.
18. The learned Judge, however, took into consideration of Ex. 6(b) and Ex. 10. In -doing so he discussed several decisions on the question and nature of presumption arising from the certificate of postings and arrived at the conclusion that Plaintiffs have not satisfactorily proved that on 2nd May, 1955, they had sent the original of the letter (Ex. 6(b)) under certificate of posting (Ex. 10). He also held:

> The certificate Ex. 10 raised a very weak presumption and was sufficiently rebutted by the facts and circumstances of this case. I am also unable to accept the interested testimony of P.W. 6 regarding the writing and-the posting of the said letter " Ex. 6(b). The learned Judge of the Court below, in my view, was therefore justified in holding that' the Plaintiffs failed to satisfactorily prove that they had given any notice under Section 16(2) of the W.B. Premises Tenancy Act.

The learned Judge ultimately decided the First Appeal thus:

> But I hold that the Plaintiffs have failed to establish that in fact they had given notices to their superior landlords in accordance with the Section 16(2) of the W.B. Premises Tenancy Act. In the facts and circumstances of this case I am not prepared to accept that the Plaintiffs had in fact posted the original of the letter (Ex. 6B) on 2nd May, 1956, or that the certificate of posting Ex. 10 was really issued on the date mentioned in the postal seal affixed to it.
> In the above view the Plaintiffs who did not give notices under Section 16(2) of the W.B. Premises Tenancy Act and, accordingly, were not necessary parties in the ejectment suit brought by the Respondent No. 1 against the Respondent No. 2. The ejectment decree obtained by the Respondent No. 1 against the Respondent No. 2 is binding upon the Plaintiffs Appellants.
> I accordingly dismiss this appeal with costs.
> On the prayer of Mr. Dutt, learned Advocate for, the Appellant, in the special circumstances of this case, I grant the Appellant time at the first instance till 30th June,

1971, to vacate the ' suit premises. In case the Appellant files within the said date an undertaking to this Court that it would deliver up vacant and peaceful possession on the expiry of the further time that would be granted, it would be allowed time to vacate the suit premises till 31st December, 1972, subject to the further condition that it must go on depositing in the trial Court a sum of Rs. 80 per month within the 15th of each succeeding month and in case of default for any two months the Respondent No. 1 would be entitled to execute the decree obtained by her in Ejectment Suit No. 937 of 1956, the first of such deposit shall be made within 15th April, 1971. The Respondent will be entitled to withdraw the same, if deposited, without prejudice and without security.

Against that judgment delivered on March 11, 1971, the present appeal under Clause 15 of the Letters Patent has been preferred. It was filed on April 17, 1971. Decree has not been drawn up.

19. The Appellant had made an application for an injunction against further proceedings. A Rule was issued on that application, but interim order was not granted. Thereupon, on June 29,1971, the Appellants have filed the undertaking in terms of the judgment appealed from. By an order made in the Rule, the appeal was expedited and it was heard on July 21, 1971. At the hearing of the appeal before us, Mr. Bankim Chandra Banerjee on behalf of Appellants invited us to go into all questions of fact, findings which have been against the Appellant in the judgment appealed from and he also raised in that connection a point of law regarding the view of the learned Judge on the presumption arising from the certificate of posting by contending that on the evidence in the case it should be held that notice under Section 16(2) had been given on May 2, 1956, and the Appellants are protected under Section 13(2) of the Act.

20. Mr. P. K. Das, appearing for the Respondent, at the outset raised a question regarding scope of this appeal under Clause 15 of the Letters Patent. He raised that point as a preliminary objection to the Appellants' right to urge points of fact for assailing the findings of facts arrived at by the learned Judge of this Court who decided the First Appeal concurring with the findings of the trial Court on those questions of fact. Though the Learned Counsel for the Respondent submitted it to be a preliminary objection, his contention is not really any objection to the right of appeal given by Clause 15 of the Letters Patent, but really is an argument regarding the scope of this appeal and jurisdiction of this Bench to go into questions of fact for deciding the appeal. I shall deal with that point first.

21. It is contended that this appeal is really a Second Appeal from the appellate judgment passed in the First Appeal and should be governed by Sections 100 and 101 of the Code of Civil Procedure which provide, that no Second Appeal shall lie except on the grounds that:

(a) the decision being contrary to law or to some usage having the force of law;
(b) the decision having failed to determine some material issue of law or usage having the force of law ;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits;mentioned in Section 100, Code of Civil Procedure, Mr. Das relied on the decisions firmly laying down that in the Second Appeal the High Court shall not go into questions of fact or reverse the concurrent findings of the two Courts below. He also pointed out that several High Courts in India have taken different views on that question of scope of an appeal under cl? 15 of the Letters Patent. But there is no direct pronouncement by this High Court on that point.

22. Mr. Banerjee for the Appellants has contended that there is no words of restriction as to scope of the appeal in Clause 15 as there are in Sections 100 and 101 of the Code of Civil Procedure,

23. Before we proceed to decide on the validity of the antagonistic contentions and before we' examine the reasons that appeal in the conflicting decisions of several High Courts cited before us, it is necessary to analyze the provisions in Clause 15 of the Letters Patent as it stood originally and as it now stands after amendments in 1928.

24. Before that amendment of 1928, Clause 15 envisaged three kinds of appeal's. ;.

(1) Appeal from the judgment of one Judge of the High Court.
(2) Appeal from the judgment of one Judge of any Division Court pursuant to Section 13 of Government of India Act, 1915, and
(3) Appeal from the judgment of two or more Judges of the High Court or Division Court wherever such. Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court.

By amendment of 1928, the third category above-mentioned has been excluded from Clause 15 and has been provided for by the amendment of. Clause 36.

25. By the same amendment of 1928, Clause 15 has been recast to limit the appeal under that clause only from the judgment of one Judge of the High Court and. that has been divided into two categories:

(1) Judgment not being a judgment passed in exercise of appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a Subordinate Court; and
(2) Judgment in exercise of Appellant jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a Subordinate Court.

First of these categories does not require leave or certificate of the Single Judge but the second requires leave or certificate declaring that the case is fit one for appeal. Except that differentiation as to leave or certificate, the right of appeal under el. 15 is in absolute terms without being limited to particular grounds as in Sections 100 and 101 of the Code of Civil Procedure. It was so

before amendment and it has remained so after amendment of 1928.

26. Mr. Banerjee for the Appellants has relied on that characteristic of the provisions in Clause 15 and has contended that the scope of appeal is not limited to grounds of law only and he is entitled to argue the appeal on facts and evidence for assailing the findings arrived at.

27. On examining the decisions placed before us by Mr. Das, it appears to us that broad view of the scope of appeal has been taken in *Mulpura Venkataramayya v. Devabhakluni Kesavanarayaiia*[1], and *C.M. Sivaram v. V.S. Jayaram Mudaliar*[2], Restricted view that the scope of the appeal is limited to grounds mentioned in Section 100, Code of Civil Procedure, has been taken in *Ramsarup Singh v. Muneshwar Singh*[3], and *Nilkanth Mdhton v. Muushi Singh*[4], A middle course has been taken in: *Bhola Bhai Bhogilal v. Rattan Chand*[5], *and Bawa Singh v. Jagadish Chand*[6],

28. In our view, one aspect of the question regarding scope of an appeal under Clause 15 is clear and beyond controversy. That is the aspect that appears from the language of that clause both before and after amendment of 1928 that makes no differentiation between appears under either of the parts of the clause. Whatever the scope, it is the same irrespective of the appeal being under the first part or the second part.

[1]AIR 1963 A.P. 447 [3] A.I.R. 1901 Pat 76 [5] A.I.R. 1958 P&H. 260
[2] A.I.R. 1966 Mad. 297 [4] A.I.R. 1965 Pat. 141 [6] A.I.R. 1960 P&H. 573

29. Before amendment of 1928 it was. held in this High Court that the appeal given under this clause was not confined to the points on which the Judges of the Division Court differ; the whole appeal was open before the-Court for decision. See *Upendra Nath Bose v. Bindeshri Prasad*[7], and *Gopeswar Pyne v. Hem Chandra Bose*[8], The same view was taken by Bombay and Allahabad High Courts though it was held in the High Courts of Allahabad, Patna, Lahore and Bombay that an Appellant was not entitled in an appeal under this clause to be heard on points which had not been raised before the Judge from whose judgment the appeal was preferred. The Madras High Court held that a new point of law going to the root of the case could be raised. See Mulla's Commentary on Code of Civil Procedure ade (12th ed, p. 1471).

30. It is true that an appeal under the first part of the clause is a Second Appeal in the third Court, while the appeal under the second part is a Third Appeal in the fourth Court. Should that make any difference in the scope of appeals under the first and second parts? In a way it does because appeal under the second part is from the judgment in Second Appeal under Section 100, Code of Civil Procedure, which is limited to the grounds mentioned in that section, so much so that an appeal therefrom cannot be longer in scope than the scope was of Second Appeal. On the contrary, appeal under the first part, though it is Second Appeal, it is from a judgment in a First Appeal which was not limited to grounds of law only. Apart from that we are unable to find anything in the provision of Clause 15 of the Letters Patent to enable, far less compel to limit the scope of appeal to grounds of law only and shut out the Appellant from urging grounds of fact and assessment of evidence.

31. For that reason we are unable to read in Clause 15 of the Letters Patent the restrictive words that occur in Section 100 of the Code of Civil Procedure as appeals to have been laid down in the two decisions of the Patna High Court we have mentioned above, .viz. *Ramsarup Singh v. Muneshwar Singh* (Supra) and *Nilkanth Mahton v. Munshi Singh* (Supra). It may be noticed that in an older decision of the Patna High Court in the case of *Rajib Nath Mukherjee v. Chotonagpur Banking Association Ltd*[9]*.,* the Division Bench (Agarwalla A.C.J, and Meridith J.) did not allow a question of fact to. be raised in that appeal under Clause 15 of the Letters Patent not because of any restriction in the scope of the_ appeal but because that question of fact had not been agitated before the Court below and held that such a point could not be permitted to be raised for the first time in Letters Patent appeal.

32. As we have pointed above, though appeal under Clause 15 of the Letters Patent is not restricted in its scope, yet it being an appeal from an appellate judgment the broad principle adhered to by this Court that concurrent findings of fact arrived at by two Courts should not be interfered unless there is compelling reason. therefor is a wholesome principle that should be adhered to. In the Punjab High Court in the case of *Bhala Bhai Bhogi Lal v. Rattan Chand* (Supra) which was an appeal under Clause 10 of the Letters Patent of that High Court corresponding to Clause 15 of the Letters Patent of our High Court. There it was held:

> Although, there is not such Rule cither of procedure or practice by which a Bench hearing an Appeal under Clause 10 of the Letters Patent is debarred from examining and reversing a finding on question of fact given by the learned Single Judge, nevertheless, the Appeal Court would be reluctant to interfere with that finding unless there are very strong reasons for doing so.

[7](1915) 22 C.L.J. 452 [9] A.I.R. 1948 Pat. 443
[8](1920) 31 C.L.J. 447

The same view has been adhered to by a Division Bench of Punjab High Court in the case of *Bawa Singh v. Jagadish Chand* (Supra). In that judgment, which was delivered by Dua J., it has been held:

> It is true that as a matter of practice the. finding on a question of "fact given by a learned Single Judge of this Court is usually treated with respect and is not lightly interfered with, but there is no legal impediment in the way of the Letters Patent Bench reversing the finding on question of fact by the learned Single Judge, if the same is considered to be erroneous. It is not open to us to read into Clause 10 of the Letters Patent any limitation on the right of appeal, which is not included in it by the Legislature.

33. We respectfully agree with that view and hold that while there is no impediment to examine question of fact or to reverse finding thereon in an appeal under Clause 15 of the Letters Patent, this appeal Court will not ordinarily reverse concurrent findings, of fact or a finding arrived at by

the Single Judge unless there appears very strong reason for holding that such finding has been erroneous by reason either by admission of illegal evidence or omission to consider material evidence for arriving at such findings.

34. Mr. Banerjee has contended before us that for arriving at his finding that the Plaintiffs had failed to establish that in fact they had given notice to their superior landlord in accordance with Section 16(2) of the West Bengal Premises Tenancy Act, our learned brother Chitta-Mukerjee J. has neglected to give proper value of the presumption arising from the certificate of posting, Ex. 10, and also has left out of consideration the material evidence provided by "the letter Ex. D and for that reason Mr. Banerjee contended that the finding of fact against the Plaintiffs has been erroneous. It appears that while dealing with first part of Mr. Banerjee's argument regarding the presumption arising from the certificate, Ex. 10, our learned brother Chittatosh Mookerjee J. referred to and in fact quoted a passage from the Division Bench judgment in *Chhaya Debi v. Lahoriram Prashar*[10], He also referred to another Division Bench decision in *Ramasankar v. Sindri Iron Foundry*[11], and quoted a passage from that judgment also. Our learned brother Chittatosh Mookerjee J. appears to have held that by effect of those two Division Bench judgments the presumption that attaches to the certificate of posting-is 'a very weak presumption'. That view does not appear to be correct. In the case *Chhaya Debi v. Lahoriram Prashar*[12], a Division Bench of this Court held that presumption arising from a certificate of posting goes to the extent that the letter described in that certificate was posted and reached the hand of the addressee in due course. The presumption does not, however, attach to what was contained in the cover, it was the oral testimony of a witness only and there was nothing else in support of that testimony. That testimony was held to be unreliable and the presumption was held to be rebutted by the denial that the cover contained any letter as was testified.

[10](1963) 67 C.W.N. 819 [12](1963) 67 C.W.N. 819

[11] A.I.R. 1966 Cal. 512

35. It is true that in the latter Division Bench decision in Ramasankar v. Sindri Iro*n Foundry*[13], in the judgment delivered by the two members of the Bench there are broad principles of fact postulated in general terms. In that reported case G.K. Mitter J. observed that certificate of posting can be got hold of without actually putting letters in the post.

> "Nothing, I imagine, is easier for an unscrupulous person than to use a certificate of this sort as a bluff."

36. This latter Division Bench had not even referred to the earlier Division Bench decision in *Chhaya Debi v. Lohariram Prashar* (supra). If by the observations quoted above the latter Division Bench was intending to take a view different from the view laid down by the earlier Division Bench decision by the Rules of this Court they could only refer the point to a larger Bench. As postulate of fact appearing from those observations it appears to us to be too spacious even for matters to be taken, judicial notice of as notorious facts under Section 57 of the Evidence Act, we are Unable to follow that dictum. But we hold that the view that prevailed in the decision in Chhaya Debi's case (10) that certificate of posting raises a presumption that a

letter was posted as described in the certificate, but the presumption, does not go to the extent of the contents of the cover arid the presumption is rebuttable by denial of the receipt of the contents when evidence about the contents is unreliable. That is not the same thing to say that the presumption is a 'weak presumption'. In a proper case, if the evidence regarding contents of the letter posted under certificate of posting is reliable, the presumption may be strong presumption indeed.

37. However, in the present case, Chittatosh Mookerjee J. upon consideration of the evidence in the case has not accepted the interested testimony of P.W. 6 regarding the writing and posting of the said letter Ex. 6(b) and has accepted the finding of the trial Judge, that the Plaintiff failed to satisfactorily prove that he had given any notice under Section 16(2) of the West Bengal Premises Tenancy Act. That concurrent finding of fact cannot be assailed in this appeal under the Letters Patent because there is no good reason appearing for holding that the said finding is erroneous.

38. Regarding other piece of evidence, viz. letter dated October 28,1956, and a registered cover which were marked as Exs. B and B-l our learned brother Chittatosh Mookerjee J. pointed out' that those were produced by the Respondent No. 1 and, according to the testimony of D.W. 1, Madan Mohan Agarwal, the said letter was received by Dwarka Prosad Bajaj who had made an endorsement of the date October 31, 1956, on the top of the letter Ex. B. The said Dwarka Prosad Bajaj was not examined as a witness. For those reasons the learned Judge held that he was unable to accept the contents of the letter as the evidence of the fact contained therein and that the letter Ex. B is not relevant for the purpose of deciding whether the present Plaintiff Baldco Das Ram Narayan had given any notice on May 2, 1956, under Section 16(2) of the West Bengal Premises Tenancy Act. Our learned brother Chittatosh Mookerjee J., therefore, did not agree with the inference drawn by the trial Court from the said letter Ex. B.

39. Mr. Banerjee's submissions with regard to this part of the judgment on appeal is that

[13] A.I.R. 1966 Cal. 512

the material evidence Ex. B has been erroneously left out of consideration. It appears to us that there is some force in Mr. Banerjee's submission. The witness D.W. 1 only deposed to the fact that the registered cover containing the letter Ex. B dated October 28, 1956, was received in the office of M/s Surajmull Nagarmull. He was a witness only to that transaction of the letter being sent and received. Our learned brother Chittatosh Mookerjee J. rightly held that by that manner of proof the truth of the facts stated in the letter were not proved at all. It is profitable to refer to the observation of Sir Asuthosh Mookerjee J. in the case of *Lakshan Chandra Mandal v. Takim Dhali*[14] which is in these words:

> The distinction between the admissibility of a document as evidence of a transaction and the admissibility of a document in proof of a statement contained therein is of a refind but of a fundamental character and is yet frequently overlooked.

40. In the present case the transaction of writing the letter may be viewed as a piece of evidence which was admissible under Section 11 of the Evidence Act, because that transaction either by itself or in connection with other facts might make the existence or non-existence of fact in issue, viz. whether a notice under Section 16(2) was given by the Plaintiffs probable. Viewed as such, the transaction evidenced by the letter Ex. B was relevant and admissible evidence. The manner of proof afforded by D.W. 1 was of that transaction though not evidence of the truth of the contents of the letter. That subtle and fundamental distinction appears to have, been missed. We, therefore, hold that the letter Ex. B was a piece of evidence relevant and admissible. But, we are agreeing in the finding of the learned Judge, even upon consideration of that evidence, that the Plaintiff has failed to prove that they had given notice under Section 16(2): of the West Bengal Premises Tenancy Act to the superior landlord. We hold so because we consider improbable that instead of sending a proper notice under Section 16(2) the Plaintiff would take a circuitous way of writing to the intermediate tenant M/s Surajmull Nagarmull, and it is more so because it is directly in conflict with the other piece of evidence showing that earlier M/s Surajmull Nagarmull had written to the landlord that sub-tenant under them, i.e. M/s Surajmull Nagarmull had vacated their portion of the premises.

41. We, therefore, hold that the decision arrived at by our learned brother Chittatosh Mookerjee J. is correct decision upon the evidence in case. The appeal, therefore, fails and is dismissed without costs.

Salil K. Datta J.

42. I agree with my Lord that the appeal should be dismissed as proposed. I would also like to give my reasons in support in view of the interesting points of law argued in the appeal. This appeal under Clause 15 of the Letters Patent is by the Plaintiff against the decree passed by Chittatosh Mookerjee J. affirming the decree of the Judge, Tenth Bench of the City Civil Court, dismissing the suit.

43. The facts, according to the plaint, in short are as follows:

[14](1923) 39 C.L.J. 90 (94)

44. The Plaintiff which is a registered partnership firm became the sub-tenant of the suit premises under the Defendant No. 2 with knowledge and consent of the superior landlord M/s Tejpal Jamunadas with effect from April 1, 1955. The suit premises comprised of southern portion of the hall with two kotharies and one inside room on the second floor of premises No. 192 Jamunalal Bajaj Street, Calcutta. The Plaintiff's tenancy was, according to English calendar month, the monthly rent being Rs. 44. The Defendant No. 2 was a tenant in respect of the suit premises under the said Tejpal Jamuna-das who transferred its right, title and interest to the Plaintiff in respect of the premises No. 192 Jamunalal Bajaj Street, Calcutta. On the commencement of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as the

said Act), the Plaintiff duly served a notice dated May 2, 1956, under Section 16(2) of the said Act to the then superior landlord Tejpal Jamunadas informing its aforesaid sub tenancy and its requisite particulars.

45. On August 30, 1968, a Bailiff of the City Civil Court with Police went to the suit premises to execute a decree and on enquiry the Plaintiff came to know of Ejectment Execution Case No. 375 of 1968 arising out of Ejectment Suit No. 937 of 1966 which was decreed on April 15, 1968. On further enquiry the Plaintiff came to know that the Defendant No. 1 instituted the above suit for recovery of possession of the suit premises on eviction of the Defendant No. 2 therefrom only on ground of default in payment of rent and obtained ana parte decree which decree was put in execution as stated above. The Plaintiff was not made party to the said proceeding as required under Section 13(2) of the said Act nor had knowledge thereof till when in execution of the decree, possession of the suit premises was sought to be recovered by the decree-holder, the Defendant No. 1 herein. The Plaintiff averred that the decree was not executable and it had become a direct tenant under the Defendant No. 1 in respect of the suit premises. As the Plaintiff was likely to be dispossessed from the suit premises, the present suit was instituted by it against the Defendant No. 1 on September 10, 1968, for declaration that the Plaintiff had become a direct tenant under the, Defendant No. 1, with same incidents of its tenancy in respect of the suit premises, for further declaration that the decree was not executable against it and for permanent injunction restraining the Defendant No. 1 from executing the decree or disturbing the Plaintiff's possession of the suit premises.

46. The suit was contested by the Defendant No. 1 who filed a written statement denying all material allegations. It was denied that the Plaintiff ever became a sub-tenant and with consent of M/s Tejpal Jamunadas as alleged. The Defendant No. 2 was himself not a tenant of the entire suit premises. It was specifically denied that any notice under Section 16(2) of the said Act was served on the then superior landlord, and it was alleged that the notice and postal certificate, as produced in support of the case by the Plaintiff, were fabricated for the purpose. The Plaintiff was not a necessary party to the ejectment suit, and not being a lawful sub-tenant it was not entitled to be a direct tenant and to the reliefs claimed in the suit. The Defendant No. 2, who entered appearance in the suit, did not however file any written statement.

47. The suit was tried on evidence before the learned Judge, Tenth Bench, City Civil Court, when the Plaintiff and the contesting Defendant No. 1 adduced evidence, oral and documentary. The Judge on a consideration of the materials on record arrived at the following findings:

(a) The predecessor of the Plaintiff had its office located in the disputed premises for a very long time, and On amicable partition in April 1955 the Plaintiff succeeded in the said office and had been in possession thereof paying rent to the Defendant No. 2.

(b) There was no evidence adduced on the part of the Plaintiff that to establish that the Plaintiff became a sub-tenant with the knowledge and consent of the then superior landlord.

(c) No notice under Section 16(2) of the said Act was served on the superior landlord and, accordingly, the Plaintiff was not entitled to any protection under Section 13, Sub-sections (2) and (4).The suit on the above findings was dismissed.

An appeal was taken by the Plaintiff to this Court and was heard by Chittatosh Mookerjee J. who dismissed the appeal affirming the findings-of the learned Judge. The present appeal is against this decision.

48. The essential question at issue, therefore, is whether any notice under Section 16(2) was served on the then landlord. The alleged notice dated May 2, 1956, under Section 16(2), Ex. 6(b) was not served by registered post 'as required under the rules. It was dispatched by ordinary post and as evidence of posting the Plaintiff produced the certificate of posting dated May 2, 1956, Ex. 10. Mookerjee J. held in agreement with the trial Court that there was no satisfactory proof that the original of the letter, Ex. 6(b), was sent under certificate of posting (Ex. 10). The conclusion was arrived at also by internal evidence of the alleged notice which contained all the requisite particulars in the same order as in Rule 4 even though the rules were published in the Gazette long after, that is, on June 26, 1956. No evidence was adduced as to the person who drafted the notice, as he must have been one versed in law. Further, the notice was not followed by any proceeding under Section 16(3). A subsequent letter dated September 27, 1956, was written by Sri R. P. Das, Advocate, to the Defendant No. 2 and sent by registered post (Ex. 6(a)) in which the notice of May 2, 1956, had been referred to. But, curiously enough no copy of this letter admittedly was sent to the then superior landlord, while it was unbelievable it was held that such an important letter like notice under Section 16(2) could be sent by the Plaintiff, whose partners are all businessmen, by ordinary post. It was held on authorities that the despatch of the notice by certificate of posting raised a very weak presumption which was sufficiently rebutted by the facts and circumstances of the case, and further the certificate of posting was not genuine. Accordingly, in agreement with the findings of the trial Court, Mookerjee J. held that the Plaintiff failed to prove that it had given any notice to the Defendant No. 1 under Section 16(2) of the Act.

49. Mr. Bankim Chandra Banerjee, the Learned Counsel for the Appellant, has assailed the findings both of law and fact arrived at by the trial Court as also by this Court in appeal. His contention is that the Courts erred in arriving at the finding upon materials on record that the original of the notice, Ex. 6(b), was not sent under certificate of posting, Ex. 10. He further disputed the finding that the certificate of posting raised a weak presumption of service or that the presumption was sufficiently rebutted.

50. Before we examine the contentions in detail, it is necessary to deal with an objection raised by Mr. P. K. Das, the Learned Counsel for the Respondent No. 1, about the scope of the appeal before us. According to Mr. Das, the findings of fact arrived at by a single Judge of this Court in hearing a First Appeal are binding on the Division Bench sitting on appeal against his decision. In support of his contention he referred to a decision in *Ramsarup Singh v. Muneshxuar Singh*

(Supra) in which it was observed by Mahapatra J. that the scope of the Letters Patent appeal did not yield to a challenge to clear findings of fact. It was observed in dealing with Clause 10 of the Letters Patent for the High Court of Patna which is in similar terms with Clause 15 of the Letters Patent of this Court:

> (a) No doubt Clause 10 of the Letters Patent of High Court provides for an appeal against a judgment in a First Appeal passed by a single Judge, but its ambit cannot be more extensive than that of as against the appellate judgment and decree of a Court subordinate to High Court. Long before the Letters Patent was created (February 9, 1916), the Code of Civil Procedure was in the file and the scope of Second Appeals to the High Court was well defined under Section 100 of that Code. Clause 10 of the Letters Patent will be taken to have been provided in that context, otherwise an absurd situation will arise, such as the limit of interference by a High Court in a Second Appeal from ' a decree of a subordinate Court will be much less while that scope against a decree of a single Judge of the High Court will be wide and circumspective like that in an appeal from an original decree. Viewed in this light, the finding of fact arrived at by the learned Judge of this Court cannot be assailed in the Letters Patent appeal unless it is shown to be based on no evidence or inconsistent with any .particular position in law ... e salutary canons about the scope of interference in different appellate jurisdictions of the High Court as provided in the Code of Civil Procedure or otherwise accepted cannot be ignored while dealing with an appeal under the Letters Patent.

51. Tarakeswar Nath J. concurred with the above observations with regard to the scope of a Letters Patent appeal and further observed:

> finding of fact arrived at by a learned Judge while deciding a First Appeal should not be interfered with unless there is a gross error in the judgment.

In *Nilkanth Mahton v. Munshi Singh* (Supra) Mahapatra J. again following the above decision and speaking for the Court observed:

> The scope of a Letters Patent appeal against the judgment and decree passed by a learned Judge of the High Court in Court in a First Appeal (appeal from an original decree) does not permit any challenge to be raised against any clear and specific findings of fact.

52. On these authorities Mr. Das has contended that the finding of Mookerjee J. that the notice under Section 16(2) of the said Act was never issued or served on the superior landlord cannot be assailed in this appeal.

53. Mr. Banerjee, on the other hand, contended that an appeal under Clause 15 of the Letters Patent against the judgment in a First Appeal is one both on fact and law and there is no factor on

the appellate Court to examine the findings of fact under appeal and to arrive at its own conclusion. He referred to the decision in *Mulpura Venkataramayya v. Devabhakluni Kesavanarayana* (Supra) in which it was observed:

> There is also no force in the contention that a finding of fact arrived at by a single Judge of the High Court is not open to attack. Clause 15 of the Letters Patent is differently worded from Section 100 of the Code of Civil Procedure. While Section 100, Code of Civil Procedure, enacts that the High Court ought not to interfere in Second Appeal on question of fact, there is no such inhibition in Clause 15 of the Letters Patent. There is no rule of law that any finding of fact arrived at by a single Judge of the High Court in a First Appeal is not open to be challenged under Clause 15 of the Letters Patent. The Letters Patent appeal under Clause 15 of the Letters Patent is in the nature of a rehearing of, the appeal.

In *Ms. Bhola Bhai Bhogilal v. Rattan Chand* (Supra) it was observed by Grover J. for the Court as follows:

> Although there is not such rule either of procedure or of practice by which a Bench hearing an appeal under Clause 10 of the Letters Patent is debarred from examining and reversing a finding on a question of fact given by the learned single Judge. Nevertheless, the appeal Court would be reluctant to interfere with that finding unless there are very strong reasons for doing so.

In *Girdharilal v. Krishan Dutt*[15], Dua J. also speaking for the Court observed:

> It is true that as a matter of practice the finding on a question of fact given by a learned single Judge of this Court is usually treated with respect and is not to be lightly interfered with, but there is no legal impediment in the way of the Letters Patent Bench reversing the funding on the question of fact by the learned single Judge if the same is considered erroneous. It is, not open to us to read into Clause 10 of the Letters Patent any limitation on the right of appeal which is not included in it by the Legislature.

54. The relevant provisions of Clause 15 of the Letters Patent for the High Court of Calcutta dated December 28, 1965, (as amended in 1928) are as follows:

> ...an appeal that lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appeal- late jurisdiction by a Court subject to the superintendence of the said High Court...) of one Judge of the said High Court and that notwithstanding anything hereinbefore provided an appeal shall lie to the High Court from a judgment of one Judge of the said High Court made on or after the first day of February 1929 in the exercise of appellate jurisdiction in respect of a decree

> Or order made in the exercise of appellate jurisdiction by a Court subject to superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal.

55. There is an unqualified right of appeal from the judgment of a single Judge on the Original Side under this clause. Apart from such provision, two clauses of decrees or orders are contemplated under this clause. One class of such decrees or orders are the

[15] A.I.R. 1960 P&H. 575

ones passed by one Judge of this Court in exercise of its appellate jurisdiction against an original decree or order passed by any subordinate Court under its superintendence.. The other class of decrees or orders are those passed by one Judge of this Court in exercise of appellate jurisdiction against an appellate decree or order passed by any subordinate Court under its superintendence. The latter class of decrees or orders passed are thus appeals from appeal late decrees or orders and in common parlance known as Second Appeals in respect of decrees and second miscellaneous appeals in respect of orders. The scope of such appeals is circumscribed by Section 100 of the Code of Civil Procedure which provides for grounds on which a Second Appeal will lie. The grounds preclude interference by this Court in such appeals of findings of fact arrived at by the subordinate appellate Court on materials before it and Section 101 provides that a Second Appeal will not lie on any other ground except as provided in Section 100.

56. The scope of such appeals from appellate decrees or orders before a single Judge is thus circumscribed, to the question of law by Sections 100 and 101 of the Code of Civil Procedure and an appellate Court sitting on appeal against the decision of the single Judge in such appeal will not have any larger powers of interference -than those of the single Judge whose decision is under appeal before it. This proposition, also finds support in the said Clause 15 of the Letters Patent providing that any appeal from the decision of a single Judge against the appellate decree or orders will lie only if a certificate of fitness for appeals is granted by the single Judge passing the judgment and it is the uniform and consistent practice that such certificate is granted in case in which any point of law is involved in such appeal.

57. Under Section 8(1) of the City Civil Court Act, 1953, it is provided that an appeal shall lie to the High Court from every decree passed by such Court as also against some orders passed by the said Court. There is no provision in the Code of Civil Procedure circumscribing such appeal to questions of law only. These appeals are regular appeals on both questions of fact as also of law and the single Judge under the extant Rules of the appellate side of this Court has been given jurisdiction to hear appeals valued at or exceeding Rs. 5,000 from every decree of the City Civil Court of Calcutta under the City Civil Court Act of 1953. There is also no provision in the Letters Patent restricting the powers of the single Judge in respect of appeals before him from such original decrees. It is, therefore, obvious that the single Judge can examine the decision of the original decrees under appeals before him from the City Civil Court as in the parent case on both questions of facts and law. As to appeals from the decrees of the single Judge in such

appeals again there is no provision for any certificate of fitness for appeal to the Division Bench. The appellate Court in such appeals from the decrees of the single Judge of this. Court will, therefore, have all the powers as the single Judge-had in deciding the appeal from him and there is no provision in the Code or in the Letters Patent circumscribing the appeal before the. Division Bench to question of law only. There can, therefore, be no doubt that the appellate Court being a Division Bench itself under Clause 15 of the Letters Patent will be competent to enter into and decide both questions of fact and law as may be involved in the appeal. I am, accordingly, unable to agree with the view taken by the Patna High Court that the findings of fact arrived at by a single Judge of this Court in hearing a First Appeal are binding on the Division Bench sitting on appeals against his decision. It is, however, the settled practice that the findings of fact arrived at by a single Judge is treated with high respect and is not to be lightly interfered, but there is no legal impediment on the way either by any provision of the Letters Patent or the Code of Civil Procedure as held by the Punjab and Andhra Pradesh High Courts under their respective Letters Patent which are in similar terms of the Letters Patent of this Court.

58. I shall now examine as to whether the findings on the fact of non-service of notice under Section 16(2) of the West Bengal Premises Tenancy Act as found by Mookerjee J. is warranted by the facts established and the presumption arising therefrom. It appears from Ex. 10 (certificate of posting) that two letters are addressed to the predecessor-in-interest of the Defendant No. 1 and the other to the Defendant No. 2 were posted on May 2,1956. The P.W. 6 is Ramnarayan Kandui, a partner of the Plaintiff who looked after the case. From his evidence it appears that he caused the notice of the sub tenancy to be issued and served on M/s Tejpal Jamunadas under certificate of posting. This notice was typed according to his instruction and signed by him arid he himself posted the letter and obtained the certificate of posting. The suggestion on behalf of the Defendant No. 1 that Ex. 10 was manufactured, was denied. It was also stated that the letter was drawn according to his discretion and not according to lawyer's instruction. Mookerjee J. has held that there was no satisfactory proof that the original of the letter, Ex. 6(b), was sent under certificate of posting, as. this witness did not specifically say that the original letter was enclosed within the cover for which the alleged certificate of posting was granted. It also appears that all the requisite particulars of the sub-tenancy was mentioned in the said notice even in the same order as in Rule 4 of the West Bengal Premises Tenancy Rules, 1966, even though the same became, known to public after the publication of the rules long after, that is, on June 26, 1956. There is no evidence as to the person who drafted the notice which, it is obvious, could only be done by a person. versed in law. By the internal evidence also in respect of the letter itself as stated above it is highly improbable that such notice was issued on the date mentioned in the letter that is May 2, 1956. There is also another improbability relating to the despatch of letter itself by ordinary post. As a prudent person it could only be reasonably expected for the Plaintiff to send the letter by registered post as was done subsequently by his lawyer, Mr. Das, who wrote a letter on September 27,1956, to the Defendant No. 2. Even here again no copy of the letter was sent by registered post to the superior landlord as could be expected of the Plaintiff as a prudent man of business affording the superior landlord an opportunity to have a say about the notice

under Section 16(2). It may be noted also, no further proceedings was initiated by the Plaintiff under Section 16(3) for declaration of its sub-tenancy as direct tenancy which could be done by filing an application within two months of receipt of such notice.

59. As to the presumption of service of a notice sent under certificate of posting Mr. Banerjee has referred to the decision in *Harihar Banerjee v. Ramsasi Roy*[16], in which the Privy Council quoted the following observation, the decision in *Gresham House Estate Company v. Rossa Grandi Gold and Mining Company*[17], It was observed in that case:

> If a letter properly directed, containing notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to regular course of business of post office and was received by the person to whom it was addressed.

[16](1918) 23 C.W.N. 77 (P.C.)
[17](1870) W.N. 119

60. It was held in Harihar Banerjee's case (14) that presumption would apply with greater force to letters which the sender had taken the precaution to register and was not rebutted but strengthened by the fact that a receipt of the letter was produced signed on behalf of the addressee by some person other than the addressee himself.

61. In *Chhaya Devi v. Lahoriram*(Supra), in which my learned brother was a party, after a review of the relevant cases the Court made the following observations:

> The 'normal presumption under Section 114, illustration (f) of the Evidence Act will also be that the covers were delivered to the Petitioner. The presumption is not, however, proof and may be rebutted. In the instant case, the Petitioner denies the receipt of the two letters in her affidavit-in-reply. The question for our consideration is whether the denial is sufficient to rebut the presumption that the letters were delivered to the Petitioner. The opposite party did not act like a man of ordinary prudence when he chose to send the above-mentioned two letters of the importance that they appear to be, by ordinary post under certificate of posting. He took the .peril of such letters being mislaid or mis-delivered, a risk not unknown in postal communication by ordinary post.

62. In *Ramasankar v. Sindri Iron Foundry* (Supra), a decision by a Division Bench of this Court, it was observed by G.K. Mitter J. as follows:

> It is only too well-known that certificates of posting can be got hold of without actual putting the letters in the post and the Respondent must have adopted that course so far as the Board Meeting of January 22, 1963, or the extra-ordinary general meeting of February 21,1963, was concerned.

In *Kanak Lata v. Amal Kumar*[18], *A*a decision of a Division Bench of this Court, it was observed

by A.C. Sen J.:

> The certificate of posting having been given by the postal authorities in the ordinary course of business must be presumed to be genuine unless the presumption is rebutted by cogent proof. The contents of the certificates must, be presumed to be true unless they are proved to be false: No evidence has been adduced by the husband (the addressed) that the certificates are forged or spurious. Therefore, it must be taken that the three letters....were duly posted according to the tenor of the certificates. Under Section 114, illustration (f) of the Evidence Act it must further be presumed the three letters....were received by the husband in due course.

63.It may be noted that in the above case no importance was attached by the Court to the denial of receipt of letters by the husband. It will appear that while the above observations of G.K. Mitter J. is in relation to the facts of the case, the other decisions of this Court indicate that there is a presumption of service of letters posted under certificate of posting, unless the certificates are found to be spurious. Such presumption again is a rebuttable presumption.

[18].I.R. 1970 Cal. 328, (332)

64. In the present case, we do not have the evidence from the Defendant No. 2 as to the receipt of the other copy of notice by him even though he entered appearance in the suit but did not file any written statement, nor gave any evidence about the notice. D.W. 1, an employee of the Defendant No. 1 and formerly of the superior landlord at the material time, denied receipt of any notice under Section 16(2) by the former employers and there was no specific cross-examination on the question. On the fact of such denial it was incumbent on the Plaintiffs in order to claim protection under Section 13(2) of the Act to establish by positive evidence in rebuttal that this notice was duly served on the Defendant No. 2 as also on the superior landlord at the time who is not a party to the present proceeding or the ejectment suit against the tenant. It is also curious that the copy of the notice of September 27, 1956, sent under registered post was not given to the superior landlord as already noticed even though at that point of time a notice under Section 16(2) could be validly served on the superior landlord.

65. Taking in consideration all attending facts, I am in agreement with Mookerjee J, that there is no evidence that the original of the notice was put inside the cover for which the certificate of posting was alleged to have been issued, even if genuine. I also think it -improbable that such an important notice should be sent by ordinary post or that such notice could be drafted by P.W. 6 without legal assistance. In the background of the hazards of letters being mislaid or misdelivered, if sent by ordinary post, there is evidence of D.W. 1 who denied receipt of such notice by the superior landlord his erstwhile master who is not a party to the suit. There is also absence of evidence about the service of such notice on the part of the Plaintiff apart from the certificate of posting either on the superior landlord or on the tenant. In the circumstances, I am of opinion that the presumption of service of the notice under Section 16(2) under certificate of posting even assuming that the notice was put inside the cover was amply rebutted by the

Defendant No. 1.

66. There is another aspect of the question which was overlooked by the trial Court as also by the appellate Court. Notice of sub-tenancy under Section 16(2) was to be given, under the unamended West Bengal Premises Tenancy Act,. Act XII of 1956, within a period of three months from its commencement which is March 31, 1956. By the West Bengal Premises Tenancy (Amendment) Act, 1956 (XVIII of 1956), the period of three months in Section 16(2) was substituted by six months with effect from retrospective effect with consequential changes in the main Act. This amending Act came into force on July 27, 1956, and was necessitated for the reason that the rules under the Act were published in the Gazette on June 28, 1956. Under its Rule 3, the notice under Section 16(2) was to be given by registered post with acknowledgment due. When Mr. Das, Advocate for the Plaintiff sub-tenant, was issuing a registered letter on September 27, 1956, to the original tenant about the sub-tenancy under consideration, there was no impediment on him or his client to serve the notice under Section 16(2) by registered post with acknowledgment due, as under the provisions of the said Sub-section the required notice is to be given in prescribed manner as in the rules subsequently published. Viewed on this aspect, there was no notice under Section 16(2) of the Act legally served as required by law on the superior landlord, which could afford a protection to the sub-tenant under Section 13(2), particularly in absence of any positive proof of such service.

I agree that the appeal, in the circumstances, fails and is dismissed without costs as proposed.

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