
(1972) 01 MP CK 0003
In the Madhya Pradesh High Court
Case No : S.A. No. 510 of 1967

Abdul Gafoor

APPELLANT

Vs

Abdeali

RESPONDENT

Date of Decision : 06-01-1972

Acts Referred:

Limitation Act, 1963 — Section 28
Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 12(1),
12(1)(a), 12(3), 13, 13(1)
Transfer of Property Act, 1882 — Section 111, 111(h), 113, 114, 13

Citation : (1973) J LJ 263 : (1973) 18 MPLJ 179

Hon'ble Judges : H.R. Krishnan, J; G.L. Oza, J

Bench : Division Bench

Advocate : S.L. Garg, for the Appellant; S.D. Sanghi, for the Respondent

Judgement

H.R. Krishnan, J.

This is a reference by a Single Bench (S.B. Sen J.) on two problems arising in this appeal which is one by the tenant-defendant in house accommodation against the landlord respondent. While the complete picture of the appeal is in the record before the Single Bench, the two questions which are the subject-matter of the reference have arisen in the following circumstances. One of the grounds of defence set up by the defendant is that the quit notice which was the basis of the suit had been waived by the landlord who issued a second notice to the same effect after the disposal of the suit and before the filing of the appeal. Accordingly the defendant-tenant contended that this suit would fail in any case, though it would be open for the plaintiff if he chooses to bring a fresh suit. The second question is the finding by the first appellate Court that the defendant-tenant had not really qualified for the benefit given to him by section 13(1) of the Accommodation Control Act as he had not tendered the entirety of the amount "calculated at the rate of rent at which it was paid for the period for which he had defaulted including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment was made". The

tenant no doubt had tendered for payment the entire sum claimed in the suit by the landlord which, as often happens, fell short of the total defaults because a number of payments had got time barred. The questions accordingly are,--first, (i) whether in the circumstances of this case--which will be set out in time--the plaintiff (respondent in second appeal) had disqualified himself from getting a decree of ejectment because he had issued a fresh notice after the dismissal of the suit and this amounts to a waiver; secondly, (ii) whether a tenant tendering or paying "the amounts in default calculated at the rate of rent" in respect of the accommodation gets the benefit of that provision by tendering or paying only the amounts legally due, that is, amounts for which a suit could be brought, or whether he has to deposit or tender the entire amount in default including such monthly payments as have got barred by lapse of time.

Effect of a subsequent notice: Question (I) :

The law applicable to the subject is contained in section 111(h) and section 113 of the Transfer of Property Act. The former provides for the issue of a notice determining the lease or to quit or of the intention to quit the property leased duly given by one party to the other. We are in the instant case concerned with a notice issued by the landlord determining the lease and asking the tenant to quit. Section 113 provides--

A notice given u/s 111(h) is waived with the express or the implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

The word "waived" is not very felicitous because once a valid notice is served the lease is terminated and an intention to create the lease as subsisting in spite of the notice has no effect unless there is a corresponding intention in the party noticed. In other words, the art of, as it were, reviving the lease has to be a bilateral act while the word "waiver" is used for what can be unilateral. Anyway, the word "waived" has come to stay and has been understood by all the Courts in the sense of a bilateral act showing mutual intention to treat the lease as subsisting notwithstanding the ostensible termination by notice earlier stated thus the effect of the second notice would depend upon the circumstances and further, firstly, whether the notice given really intends to treat the lease as subsisting and secondly, the notice for his part is agreeable to the new arrangement. Looked at that way no hard and fast rule can be laid down. Thus there is no point in the general assertions made in this class of cases on the part of the tenants that the issue of a second notice ipso facto neutralizes the effect of the first in the determination of the tenancy. The wording of section 113 is clear enough and the same principle has been neatly formulated in the English ruling quoted by the learned referring Judge--*Lawenthals v. Van Houte* (1947) 1 All. E.R. 116:

Where a notice to quit has been given, a subsequent notice to quit is of no effect unless it can be inferred from other circumstances that a new tenancy has been

created after the expiry of the first notice. If there is no agreement, express or implied, for a new tenancy the mere fact that the landlord's solicitor, to get possession gives another notice to quit is not any reason for inferring any agreement for a new tenancy, and the first notice is not waived by the subsequent notice.

Indian case law has been cited at the bar by both sides; but it is necessary for our purposes to refer to the two Supreme Court rulings only which deal fully with this problem. In *The Calcutta Credit Corporation Ltd., and Another Vs. Happy Homes (P) Ltd.*, it has been held --

Once a notice is served determining the tenancy or showing an intention to quit on the expiry of the period of the notice, the tenancy is at an end, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be treated as subsisting. Whether the notice is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both.

In that case itself the position was factually very much different from the instant case and we need only refer to the general principle laid down by the Supreme Court. In the later case reported in *Tayabali Jaffarbai Tankiwala Vs. Asha and Co. and Another*, that Court found that the second notice clearly showed an intention of treating the lease as subsistent and as such amounted to a waiver u/s 113 Transfer of Property Act. In that case the second notice was followed by a second suit claiming damages for use and occupation for the period subsequent to the second notice. The Court found that the landlord knew the distinction between "rent" and "compensation for use and occupation" and in the circumstances of that case--waived the first notice and treated the lease as subsistent on the date of the second notice. The tenant of course was agreeable to this view.

The instant case is basically different. The respondent-landlord sued the present appellant-tenant in 1966 after the expiry of the term given by him in the first notice. He worked out the total rent payable to him as Rs. 1486-80 and deducted from it a sum of Rs. 390 (rent for 13 months) as time-barred and made an enforceable claim for Rs. 1096-80. He also asked for ejectment. The money claim was allowed by the Civil Judge while the suit for possession was dismissed by judgment and decree dated 20-3-1967. From this the landlord filed his appeal on 5-5-1967. In between, on 23-3-67, the landlord issued a fresh notice terminating the tenancy on 30-4-1967. The tenant received it a few days later and on 28-4-1967 issued a reply stating that the tenancy had been revived and accordingly tendered Rs. 30 as the rent for the month of April which the landlord refused. When the appeal was filed and came up for hearing the tenant took the position that no ejectment could at that stage be decreed because the notice terminating the tenancy had been waived u/s 113 of the Transfer of Property Act. The appellate Court did not accept this argument and allowed the appeal and decreed ejectment. The question for our purposes is whether the circumstances

show that while issuing the second termination notice the landlord intended that the lease should be treated as subsisting notwithstanding its termination by the first notice issued on 16-4-1966 before the filing of the suit. The landlord has not brought a fresh suit on the basis of the second notice which is a distinct feature of the case already noticed where it was held that the second notice showed an intention to treat the lease as subsistent. The suit being dismissed as far as ejectment was concerned, three days later the landlord issues a fresh notice. He does not follow it up with any action but follows the decision in the suit itself by filing appeal. Thus the second notice was just a superfluity and does not have either within it or in the attendant circumstances any indication of the intention mentioned in section 113, Transfer of Property Act. Thus in the instant case the issue of a second notice does not amount to waiver. It is noted at the same time that no hard and fast rule can be laid down.

Effect of default: Question (II)

Coming to the second question, section 13(1) of the Madhya Pradesh Accommodation Control Act of 1961 is broadly analogous to section 114 of the Transfer of Property Act. The main difference is that u/s 114 the Court may in lieu of decreeing ejectment pass an order relieving the lessee against the forfeiture, whereas compliance with section 13(1) unconditionally saves the tenant from an order of eviction in view of section 12(3) of the same Act:

(3) No order for the eviction of a tenant shall be made on the ground specified in Clause (a) of sub-section (1), if the tenant makes payment or deposit as required by section 13.

It would be safe to hold unless there is some positive indication to the contrary in the wording of section 13(1) that the amount to be deposited under that section would be the same as would be called for by section 114 Transfer of Property Act if the latter were the law governing the suit. We may note that the wording used in section 114 is--

...the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs....

The key words being of course "arrears of rent". In an anxiety scrupulously to avoid the word "rent", section 13(1) uses this lengthy phrase--

...an amount calculated at the rate of rent at which it was paid for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made...

Nearly every one of the States in our country has got a law on accommodation control and as can be expected every one of them has a provision corresponding to our section 13 or section 114 of the Transfer of Property Act. However, the exact wordings differ. Some of them use language of our section, in particular, the 1956 Act of West Bengal. Delhi and East Punjab have slightly different

wordings. The point for our consideration is whether the wording used in our Act involves the notion of legal recoverability or only refers to what is outstanding from the tenant to the landlord for a period from before the suit and including the month in which the tender or payment is made. The basic difference is that in one case, that is, where the wording implies legal recoverability the amounts that have got time-barred would be excluded, while on the general wording without the legal recoverability insignia the entire amount in arrears or in default would be implied. It is convenient here to set out the different alternative wordings and indicate in respect of each of them whether legal recoverability that is qualification by way of limitation, is implied.

(a) Arrears of rent: The word "arrear" is neutral is so far as limitation is concerned. It is a trite saying that the law of limitation except in the matter of immovable property does not create any right in the debtor. All that it does is that it blocks the operation of the machinery of recovery while the debt is there all the time And when we say "arrears of rent" or any other item, we mean whatever is outstanding as debt whether or not it is recoverable by process of law.

(b) Legally recoverable: This phrase is used in section 15(1) of the Delhi Rent Control Act 1958 which section is the one corresponding to our section 13 :

...., the Controller shall, after giving the parties an opportunity of being heard, make an order directing the tenant to pay to the landlord or deposit with the Controller within one month of the date of the order, an amount calculated at the rate of rent at which it was last paid for the period for which the arrears of the rent were legally recoverable from the tenant including the period subsequent thereto upto the end of the months previous to that in which the payment or deposit is made....

There is no doubt that with such a wording the tenant may not be called upon to deposit any part of the arrears which is not legally recoverable,--in other words, in respect of which a suit cannot be brought in view of the law of limitation.

(c) The wording of the corresponding provision in the East Punjab Urban Rent Restriction Act, 1949, follows that of the Transfer of Property Act--

Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have duly paid or tendered the rent within the time aforesaid.

The learned referring Judge has also discussed certain possible alternative wordings such as "owing to" or "due". Since this wording has not been used in any of the Acts we are concerned with we need not discuss at any length the legal implications of these words. Broadly speaking we are inclined to bold that the word "due" implies recoverability in a law Court and approximates in effect to

the phrase "legally recoverable". The word "owe" on the other hand implies only a debt, that is liability to pay instead of implying reliability by legal process. It is sufficient, however, to leave these two words at that.

One has only to compare with that of section 12(1) of our enactment with that of section 13(1) to see that the Legislature had meant different things. In principle, where approximately the same thing is differently worded in different provisions of the same enactment it is the Court's duty to presume that the Legislature meant some difference in material detail unless of course the content itself implies that no difference whatsoever was meant. Section 12(1)(a)--

That the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served.

No doubt is left whatsoever about the fact that the landlord can effectively demand at that stage and the tenant is liable only to pay or tender the amount that the landlord can successfully recover in a law Court, in other words, the total arrears or accumulations on default minus whatever is time-barred. As a matter of detail some difficulty seems to have been felt by the parties before the Single Bench in regard to the right to exclude from the operation of limitation the rent accruing during two months. Of that there is no doubt. Since the landlord is called upon to wait for two months he can while filing the suit upon the tenant's failure to pay or to tender the accumulated rent add to the noticed accumulation the rent accruing during the two months. But we are not immediately at that question. Section 13(1) has already been quoted. The Legislature scrupulously avoids two ideas; first, the idea of "rent" itself; this because at the stage the defendant may choose to pay or to tender certain amounts it might have lost the nature of "rent". Anyway, the word "rent" with all its possible implications is avoided. It is equally clear that the Legislature avoids any word that may imply even as an undertone the legal recover-ability. All that the section says is that in case the tenant wants to escape a decree he may pay certain amount that should be equivalent to the amount the payment of which he has defaulted, the yardstick being the rate of rent. It is a matter of common knowledge that a landlord filing a suit may not always be in a position to get a decree for the entire amount in respect of which the tenant-defendant may have defaulted. This is because, certain of these defaulted payments may have become time-barred. But section 13(1) does not in the least indicate the intention on the part of the Legislature to exclude such of the defaulted payments as might have got time-barred. Quite on the contrary it directs that the tenant should pay to the landlord the entire amount that has been the subject of the default. Certainly the tenant is not bound to pay, and the landlord cannot insist that in return for his not pressing the suit, the tenant shall pay. But if the tenant wants to escape the consequence he shall pay up all the defaulted amounts to the landlord calculated on the "rent" yardstick.

The position in the Transfer of Property Act is similar. Section 111 sets out the

circumstances in which a lease of immovable property is determined. We are concerned with sub-sections (g) and (h):

(g) by forfeiture in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter

The condition we are concerned with is that the lessee should pay the stipulated rent regularly. A landlord may demand the rent and on non-payment may issue a notice determining the lease. He can bring a suit to enforce the forfeiture of the lease. Till this point the amount to which the landlord would be entitled is not all the arrears of rent but only such of the arrears as have not become time-barred.

After the suit is brought it is open to the tenant to seek to take advantage of section 114 and the Court may in its discretion give him the benefit:

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

The tenant-defendant can invoke this section when the lease is determined by forfeiture for non-payment of rent and a suit for ejectment against him is actually pending. At that stage he can make or tender certain payments on the basis of the rent in arrears plus interest and costs whereupon the Court may consider whether in the circumstances of the case it can relieve the lessee against forfeiture, that is to say, dismiss the suit for ejectment. At that stage the tenant is liable to pay the arrears of rent which as we have pointed out in the foregoing has precisely the same connotation as the rather lengthy description in section 13(1) of our enactment.

The learned Single Judge is disturbed because such an interpretation might make the tenant liable to pay the arrears accrued during fifty years if the landlord waits for that period. With all respect, the obvious answer is there is absolutely nothing wrong in the law providing that a tenant should make good all the defaults for whatever period because they are all his defaults. u/s 114 if the arrears had accrued for fifty years or one century and the tenant has enjoyed the use of the property during this period he will have to pay up the whole lot if he wants to escape the consequences of the suit. It is entirely his choice and if he does not want to pay up he can take consequences of the decree being passed against him. The fact that the tenant might have defaulted for one year or fifty years should make absolutely no difference, to the intendment of the law that after the suit is filed a tenant-defendant who wants to be relieved from the consequences should make good all the defaulted amounts which is the same thing as arrears of rent accrued.

Case law has been cited and the learned Single Judge has given particular attention to certain rulings of the Calcutta High Court. Actually there are three rulings representing, as it were, the three different versions of the law in that State which had been amended more than once. The ruling reported in T.S.R. Sarma Vs. Nagendra Bala Debi, deals with section 14 (4) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 17 of 1950. There the crucial problem was whether this provision applied to suits that were pending at its commencement. It was held that it being a special provision it did not apply to a suit that was pending at the commencement of that Act. To such suits the earlier Act, namely, the one of 1948 would be applicable. Accordingly it is not possible to get any light on our present problem from this ruling. The ruling reported in Krishna Chandra Bose Vs. Radharani Ghose and Others, deals with a case that was filed after the commencement of the 1950 Act. Dealing with section 14 of that Act the Court held that the words "arrears of rent" used in two of the sub-sections of section 14, namely (1) and (4) should be interpreted alike in both the provisions as the context did not show any other intention. Since the Court was satisfied that the words "arrears of rent" in sub-section (1) that is the provision relating to the demand by the landlord referred only to what was legally recoverable the same words in sub-section (4) should be interpreted alike, that is,--

...all rent legally payable and if the tenants cannot be compelled in law to pay any portion of such rent because it is barred by limitation, then the Court cannot make an order for deposit of the same.

The point to note is that the amount realizable or payable, as the case may be, has been defined in different language in section 12(1) and in section 13(1) respectively of our Act. It may not therefore be proper to import in our Act the principle laid down in this ruling in regard to another Act involving a different scheme and substantially different wordings.

The Calcutta ruling reported in Nashiben Bibi v. Parul Bala Dutta 62 C.W.N. 778, is a decision of a Single Judge in revision. By the time this case came up the law in that State had been further amended and the Act 12 of 1956 had come into force. Section 17(1) of that Act corresponds to section 13(1) of our Act and it uses the wording used in our Act as description of the amount by tendering or paying which the tenant may save the consequences of an ejectment decree. That Court has interpreted this in the following terms:

The payment or deposit referred to above is in respect of all arrears of rent legally recoverable in payment of which the tenant may have made a default. The legislature did not intend to discriminate between the arrears of rent which accrued due after the date when the West Bengal Premises Tenancy Act, 1956 came into operation and the arrears due before that date.

With all respect it is difficult to agree with this interpretation. Probably it has been coloured by the effect of the wording of the corresponding provisions of the

earlier Acts of that State.

A similar provision in the East Punjab legislation has also been interpreted by the Courts in that State. There the wording of section 13(2) which corresponds to our section 13(1) is--

Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application....

It has been held in *Rullia Ram v. Sham Sher Singh* AIR 1962 P&H. 258 (F.B.),--

A tenant who is sought to be ejected because he is in arrears of rent can avoid ejectment u/s 13(2)(1), proviso, tendering all the arrears of rent whether they are within or outside the period of limitation, and interest at six per cent per annum on such arrears together with the costs of the application assessed by the Controller. . . . The object of the proviso is not that the landlord is to be deprived of the rent. The object is to give an opportunity to the tenant to stay in the premises irrespective of his default if the tenant on the first hearing pays the rent due....or tenders the arrears of rent....

A debt does not cease to be a debt because its recovery is barred by the statute of limitation. Limitation extinguishes the remedy but except in the case covered by section 28, Limitation Act does not destroy the right.

All things considered, we are inclined to hold in agreement with the Punjab High Court and in disagreement with the Calcutta High Court judgment in *Nashiben Bibi v. Parul Bala Dutta* (supra) that the concession given to the tenant by section 13(1) can be availed of by him only by his paying or tendering the entire amount of "rent" that had been the subject-matter of his default whether or not any part of it had got time-barred and impossible of recovery in the suit.

The learned Single Judge feels that by this interpretation we would be nullifying the statute of limitation in its application to arrears of rent and that in his view is not reasonable. With all respect these doubts are cleared by the patent fact that for one thing, there is no nullification properly so called and the nullification that can be read into this is one left to the choice of the debtor; that is to say, if the debtor-tenant wants a concession by the arrest of the process of law against him he has in his turn to give the creditor-landlord a balancing concession. But if he does not want to avail of it, he can certainly by avail of the law of limitation and letting the suit proceed insist on his liability to payment of nothing more than what is saved from the operation of the limitation. Even if in one sense a statute does in a very limited manner save the operation of limitation there is nothing to be said against it on the ground of reasonableness or fairplay. After all if the tenant is business-like and prompt in his payment he can pay within two months of the receipt of notice u/s 12(1) and take the fullest advantage of limitation. If having failed he still wants the movement of law to be arrested he should do a good turn from his side as well and pay up all arrears or all defaulted amounts

irrespective of whether any part of it is barred by limitation.

To summarise we answer the two questions thus:

(1) (a) To save himself from a decree for ejectment the tenant has to pay or tender all the arrears including those beyond limitation and which the landlord for his part cannot recover by process in Court.

(b) We do not agree that the landlord has given up any claim of arrears. What he has done in the plaint is to mention separately the total arrears and those arrears which are barred by limitation and claimed the balance. This is not a voluntary giving up but only a statement of the factual position involving limitation.

(2) Whether a fresh quit notice by the landlord on the tenant does amount to a waiver as mentioned in section 113, Transfer of Property Act is a question of fact depending upon the circumstances of each case. In the instant case there is no intention to treat the lease as subsisting on the date of the fresh notice and accordingly the issue of the fresh notice does not disentitle the landlord to a decree for ejectment.

The records of the case are returned to the Single Bench for further steps. On this reference the parties shall bear their own costs.