
(2006) 07 AHC CK 0175
In the Allahabad High Court

Amar Zia and Others

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 28-07-2006

Acts Referred:

Provincial Small Cause Courts Act, 1887 — Section 25
Transfer of Property Act, 1882 — Section 106, 107, 111, 113, 53A

Citation : (2007) 1 AWC 199

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prakash Krishna, J.—This is plaintiff's revision u/s 25 of Provincial Small Causes Court Act against the Judgment and decree dated 12.9.1997 passed by Judge Small Causes Court (Special Judge), Muzaffarnagar in SCC Suit No. 62 of 1989.

2. The facts giving rise to the present revision, in brief, are as follows:

Ghyasuddin, the predecessor in interest of the present applicants, instituted SCC Suit No. 62 of 1999 on the pleas inter alia, that he was the owner and landlord of the disputed property described at the foot of the plaint and the same was let out to the State Bank of India, opposite party, on a monthly rent of Rs. 3,000. The tenant Bank failed to pay rent with effect from 1.9.1989. The property in question was a new construction. It was constructed in the year 1985, so the provision of U.P. Urban Buildings {Regulation of Letting, Rent and Eviction} Act, 1972 (hereinafter referred to as Act No. 13 of 1972) are not applicable. The tenancy was terminated by means of notice dated 26.9.1989 which was served on the defendant on 27.9.1989 and the tenancy stood terminated on 27.10.1989. The defendant tenant in spite of termination of tenancy failed to vacate the demised property and therefore are liable to pay damages @ 300 per day with effect from 28.10.1989. Original plaintiff Ghyasuddindied during the pendency of the suit and he left behind him a Will which was accepted by other heirs bequeathing the property in question in favour of the present applicants.

3. The stilt was contested by the defendant Bank on the pleas inter alia that the property was let out for a period of five years with effect from 25.3.1985 and the suit was premature as it was filed before expiry of the aforesaid period. It was further pleaded that a draft lease deed was prepared and signed by the parties and was handed over to the deceased Ghayasuddin for getting It registered, but he failed to do so. The plea that notice stood waived as the plaintiff accepted rent after the aforesaid notice was also raised. It was denied that as per Muslim law after the death of Ghayasuddin the applicants inherited the property in question in pursuance of a Will of the deceased as he was not competent to execute the Will for more than one third share.

4. The parties led evidence in support of their respective cases. The trial court found that the present applicants are heirs and legal representatives of the deceased Ghayasuddin and, as such competent to continue the suit. The legal heirs have consented the Will after the death of Ghayasuddin. It has also been found that the provision of U.P. Act No. 13 of 1972 are not applicable as the building in question is a new construction and the suit was filed within ten years from the date of construction. However, it dismissed the suit on the findings that the defendant tenant is entitled to protect its possession u/s 53A of Transfer of Property Act as the lease deed was unregistered. Consequently the suit was premature as it was filed before expiry of the leased period. On the question of waiver of notice the court below accepted the defence case and held that the notice terminating the tenancy stood waived. Feeling aggrieved with the aforesaid judgment and decree present revision has been preferred.

5. Heard learned Counsel for the parties and perused the record. In support of the revision learned Counsel for the applicants submitted that there was no waiver of notice by the plaintiff and, as such, the findings recorded otherwise by the court below is vitiated in law. It was further submitted that on a true and correct interpretation of Section 53A along with Section 107 of Transfer of Property Act, only this much can be urged by the transferee that his possession is lawful but it cannot enforce other terms as the term of the lease deed. In contra, learned Counsel for the Bank supported the Judgment of the court below.

6. The first question mooted in the revision is whether the findings of the court below that by acceptance of rent by the plaintiff, notice terminating the tenancy stood waived or not. It is not in dispute that the plaintiff Ghayasuddin by means of notice dated 26.9.1989 (Exhibit-1) which was served on the defendant on the next date vide (Exhibit-2) terminated the tenancy. It has come on record that the monthly rent was Rs. 3,000 out of it the Bank used to credit a sum of Rs. 2,000 per month towards loan account by crediting it and Rs. 1,000 were used to be paid to the deceased Ghayasuddin-plaintiff. The amount thus credited in the loan account after receipt of notice has been held by the court below as payment to the plaintiff and, therefore, it concluded that the notice terminating tenancy stood waived. The case of the plaintiff was that the amount thus received after notice was by way of damages as the defendant Bank failed to vacate the

disputed premises after termination of tenancy. The trial court has correctly noticed the statement of P.W. 1 Jamaluddin that the amount received was towards damages. Before the trial court certain decisions such as Smt. Sharda Sharma Vs. Smt. Gulab Devi Dhwon, New India Insurance Company v. Ghanshyam Das, 1996 (2) ARC 53 : 1997 (3) AWC 1935 and Anis Ahmad v. Special Judge/ Additional District Judge Saharanpur 1997 (2) ARC 32 : 1997 AWC 215, were cited to show that mere acceptance by a landlord of the amount tendered by the tenant after termination of tenancy during the pendency of suit for ejectment does not amount to waiver. A waiver is intentional relinquishment of known right. The tenant after termination of tenancy if fails to vacate the premises after expiry of period of tenancy and sends the amount of rent through money order, the acceptance of such money order by the landlord would not amount to waiver. Acceptance of money order treating it as damages for illegal occupation cannot constitute as waiver.

7. Learned trial court noticed and appreciated the legal position but has committed an illegality while applying it on the facts of the present case. The relevant portion of the judgment of the trial court is reproduced below:

The above cited case law clearly indicated that the waiver of notice can be taken when the landlord accepts it with a certain intention and that intention should be communicated to the tenant. In this case after the termination of the tenancy, deceased Ghayasuddin plaintiff accepted the amount for the period from 27.10.1989 to 31.10.1989 but he did not convey his intention to the defendant if it was taken as a damage or as rent while it was his duty to have conveyed it or should have conveyed his protest. Thus it cannot be said that the plaintiff Ghayasuddin deceased had not waived the notice.

The mistake in the aforesaid order is apparent on the face of record, inasmuch as there is nothing to indicate that the deceased Ghayasuddin accepted the amount intentionally as rent with a clear understanding to waive the notice. The mode of payment of rent has already been indicated above and the Bank by crediting to the loan account of Ghayasuddin cannot urge that notice stood waived at the instance of the deceased Ghayasuddin. It would not be out of place to mention here that legal position is crystal clear.

8. In a recent Judgment the Apex Court has examined the question of waiver of notice to quit where rent has been accepted by the landlord after service of notice to quit and before initiation of any eviction proceeding in Sarup Singh Gupta Vs. S. Jagdish Singh and Others, . It considered Section 113 of T.P. Act as well as decision of Calcutta High Court in Manicklal Dey Chaudhuri Vs. Kadambini Dassi, and held that there must be some act on the part of lessor evidencing the intention to treat lease as subsisting the Court while deciding the question of waiver must consider all relevant facts and circumstances of the case "and mere fact that rent has been detained and accepted cannot be determinative". In the case in hand except that the rent was accepted by the lessor after giving notice to quit there is no material on record to show that the lessor by his any action

expressed the intention to treat lease as subsisting. Relevant portion from the aforesaid decision of Apex Court is quoted below:

A mere perusal of Section 113 leaves no room for doubt that in a given case, a notice given u/s 111 clause (h) may be treated as having been waived, but the necessary condition is that there must be some act on the part of the person giving the notice evidencing an intention to treat the lease as subsisting. Of course, the express or implied consent of the person to whom such notice is given must also be established. The question as to whether the person giving the notice has by his act shown an intention to treat the lease as subsisting is essentially a question of fact. In reaching a conclusion on this aspect of the matter, the Court must consider all relevant facts and circumstances, and the mere fact that rent has been tendered and accepted, cannot be determinative.

9. In view of the above discussion the findings of the trial court on issue of waiver of notice cannot be sustained. Learned Counsel for the Bank was fair enough and he rightly did not dispute the above proposition of law seriously.

10. The next question which falls for determination is with regard to the plea of defendant-tenant that suit for eviction was pre-mature as it was filed within the period of five years, i.e., during the currency of the lease period as specified in the unregistered lease deed. It is not in dispute that there is no registered lease deed in existence between the parties. The premises in question was taken over by the defendant Bank under some draft agreement. According to the Bank late Ghyasuddin approached the Bank and offered premises in question for letting purposes. The applications given by late Ghyasuddin are Exhibits Ka-1, Ka-2 and Ka-3 on the record. Exhibit Ka-2 is an application dated 19.10.1983 signed by Ghyasuddin submitted to the Bank stating therein that he would let out the premises for a period of five years initially which can be renewed for a further period of five years. The trial court on the basis of various applications submitted by late Ghyasuddin to the Bank reached to the conclusion that although there was no written registered agreement between the parties, but the defendant Bank having come in occupation of the premises in question as tenant, therefore the plaintiff cannot ask the defendant to vacate it before completion of five years in view of terms and conditions mentioned in Exhibit Ka-4, which is an unregistered lease deed dated 25.3.1988 as the suit was filed on 1.11.1985 while the term was up to 25.3.1990. The trial court thus, concluded that the suit was premature and was not maintainable and is hit by the provisions contained u/s 53A of Transfer of Property Act.

11. I have given careful consideration to the judgment of the trial court and respectful submissions of the learned Counsel for the parties and am of the opinion that the court below committed illegality in dismissing the suit as premature.

12. Section 106 of the Transfer of Property Act provides the mode under which contract of tenancy can be entered into. A lease for fixed term or for more than

a year or year to year or reserving yearly rent can be made only by a registered instrument while all other leases of immovable property can be made either by a registered instrument or by oral agreement coupled with delivery of possession. Section 53A of the T.P. Act is in the nature of a shield to protect a person who has performed his part of contract and has come in possession of the property by way of transfer of property and who is always willing to perform his part of contract. Such a person is entitled to shield of protective umbrella of Section 53A of Transfer of Property Act. This matter has been examined in detail in the case of Punjab National Bank v. Ganga Narain Kapoor 1993 (1) LCD 972, wherein it has been held as follows:

59. Thus considered if Section 53A can be applied to the case of a person of entering in to possession in pursuance of agreement to lease but the same has either not been registered or executed in accordance with law, the benefit that the tenant will be entitled to avail, will be that his possession or occupation or enjoyment of the property shall not be deemed to be illegal or unauthorised under law. It will be deemed to be lawful and permissive but as regards duration of the tenancy, the presumption u/s 106 of the T.P. Act will apply, i.e., if tenancy is for a purpose other than agricultural or manufacturing the tenancy shall be deemed to be month to month. Lease of accommodation for the running of Bank cannot be said to be one for manufacturing purposes in view of the principles of law Laid down in Allenbury Engineers Pvt. Ltd. Vs. Ramkrishna Dalmia and Others, in this regard u/s 106 of the Transfer of Property Act. The tenancy can be deemed to be only one from month to month.

60. The cases of Sheth Maneklal Mansukhbhai Vs. Hormusji Jamshedji Ginwalla and Sons, ; in Nathulal Vs. Phoolchand, and B.P. Sinha Vs. Som Nath, , are not the authorities for the proposition that by virtue of application of doctrine of part performance in the matter of an agreement to lease or an unregistered lease or lease entered in to in breach of requirement of Section 107 of Transfer of Property Act, the transferee of right to enjoy the immovable property not only acquires an umbrella to protect his possession and user of immovable property u/s 53A of the Transfer of Property Act but he further acquires the status of a fixed term tenant or tenant with the term of more than a year. These are simply the authorities for proposition that possession of such lessee or transferee of such a property remain that of tenant not one of a trespasser and the defendant is entitled to retain his possession in spite of an absence of the registered deed in an action to eject such person or lessee on the ground that his possession is not backed by a registered deed of lease as such these cases do not help the revisionist tenant.

61. Thus considered the lease in the present case is monthly lease in absence of registration of the deed and the deed in the present case was rightly held to have not been admissible on account of non-registration to determine the tenure or its nature. The lease being month to month in view of the provisions of Section 106 of the Transfer of Property Act could validly be terminated by a notice of 30 days

on either side in view of amended Section 106 of the T.P. Act amended in the sense of amendment made therein by the State of Uttar Pradesh.

13. Learned Counsel for the tenant Bank could not place anything to contradict or distinguish the above legal position.

14. in this view of the matter tenancy in question was month to month tenancy. It has come to an end after 30 days of receipt of notice dated 26.9.1989 which was served on 27.9.1989. The view of the court below to the contrary cannot be sustained.

15. There is another reason not to uphold the order of the trial court as period of five years even if taken as lease period as pleaded by the defendant, had come to an end during the pendency of the suit. Indisputably, the premises in question is not governed by Rent Control Act namely U.P. Act No. 13 of 1972 and the lease is governed under Transfer of Property Act. No illegality was pointed out or pleaded in the notice u/s 106 T.P. Act terminating the tenancy. in this view of the matter the trial court committed manifest error of law in not taking in to account the above facts. Even otherwise the defendant was liable for eviction.

16. The damages at the rate of Rs. 300 per day is claimed in the suit, for the period after determination of tenancy but the trial court has failed to address itself on this issue presumably it was going to dismiss the suit. Now the said decree is being reversed by this Court, as held above, the question of grant of damages needs adjudication on the basis of material on record. For this limited purpose the matter is restored back to the file of the trial court, who shall decide it preferably within a period of four months from the date of receipt of the judgment.

17. In the result the Judgment and decree of the court below cannot be sustained and is in defensible and the same is hereby set aside. The revision is allowed. The suit for recovery of arrears of rent, damages and ejectment of the defendant applicant stands decreed with costs throughout.