
(2018) 04 UK CK 0011
In the Uttarakhand High Court
Case No : CLR No. 105 of 2015

AMIT VAISH

APPELLANT

Vs

UTTARAKHAND JAL SANSTHAN

RESPONDENT

Date of Decision : 04-04-2018

Acts Referred:

Provincial Small Causes Court Act, 1887 — Section 25
Transfer of Property Act, 1882, — Section 111(h), 113

Citation : (2018) 04 UK CK 0011

Hon'ble Judges : MANOJ K. TIWARI, J

Bench : Single Bench

Advocate : Monika Pant, Neeti Rana, Rakesh Thapliyal

Final Decision : Partly Allowed

Judgement

Manoj K. Tiwari, J

1. This is landlord's revision, under Section 25 of Provincial Small Causes Court Act against the judgment and order dated 06.09.2014 passed by

learned Judge, Small Causes Court/District Judge, Dehradun in S.C.C. Suit No. 15 of 2010. The landlord (petitioner herein) owns a property known as

Hotel Himalayan Club, Mussoorie, in which Uttarakhand Jal Sansthan was inducted as tenant w.e.f. 08.12.2008. On 19.03.2010, landlord filed a

suit for eviction, damages and mesne profits against the tenant before Small Causes Court, which was registered as S.C.C. Suit No. 15 of 2010.

2. In the plaint, it was contended that a portion of the property was leased out for a period of 11 months w.e.f. 08.12.2008, which expired on

07.11.2009. Thereafter, on 30.11.2009 the landlord issued a notice for termination of said tenancy, however, tenant failed to vacate the premises

despite notice. In paragraph no. 6 of the plaint, it was stated that the tenant vide

letter dated 15.09.2009 sent a cheque for an amount of Rs. 69,000/-, since landlord was not willing to accept the same as rent, therefore, he replied through his counsel on 19.02.2009 that the said amount is acceptable to him towards part payment of damages, for use and occupation of the premises. Since defendant did not respond to the letter dated 19.02.2009, therefore, the said amount was adjusted by the plaintiff towards damages.

3. The defendant contested the suit and filed a written statement stating that the original rate of rent was Rs. 23,000/- per month, excluding taxes, and

rent was to be enhanced to the extent of 15% after every 22 months. It was further stated that presently rent is being paid @ Rs.23,000/- per month.

In paragraph no. 6 of the written statement, it was stated that plaintiff has accepted the rent through a cheque dated 15.09.2009 amounting to Rs.

69,000/- for the month of November, 2009 to January, 2010 from the defendant. It was, therefore, contended that the effect of the notice dated

30.11.2009 is nullified.

4. Based on these pleadings, learned court below framed following five issues for determination:

(1) Whether the property in dispute was let out to the defendant by plaintiff at a monthly rent of Rs.20,000/- vide lease deed dated 07.11.2006?

(2) Whether the disputed property was leased for 11 months only?

(3) Whether the tenancy of the defendant was terminated vide notice dated 30.11.2009.

(4) Whether the said notice stood waived after acceptance of Rs.69,000/- by the plaintiff sent vide letter no. 1560 dated 15.02.2010 by the defendant?

(5) Whether the plaintiff is entitled to any relief?

5. Learned Judge, Small Causes Court considered the evidence on record and recorded detailed findings on all five issues. Regarding issue nos. 1 & 2,

it was held that lease deed dated 07.11.2006 has not been brought on record by the parties, therefore, execution of any lease deed in the year 2006 is

not proved. Since, the lease deed dated 08.12.2008 was proved, therefore, it was held that property in question was leased out to the defendant on

monthly rent of Rs. 23,000/- for a period of 11 months, in terms of the lease deed dated 08.12.2008.

6. Regarding issue no. 3, learned court below recorded finding that tenancy of the defendant was terminated vide notice dated 30.11.2009 and it was

further observed that the lease deed had expired and no fresh lease deed was executed. Issue no. 4 was decided against the plaintiff by the learned court below, by holding that acceptance of rent of Rs.69,000/-, which was sent by the defendant to the plaintiff through cheque alongwith letter dated 15.02.2010, amounted to waiver of notice to quit and had the effect of extension of lease. Accordingly, issue no. 5 was decided against the plaintiff by holding that no relief can be granted to him.

7. In the present revision, the judgment rendered by learned court below on 06.09.2014 has been challenged. It is the contention of the revisionist that finding recorded on issue no. 4 is unsustainable, as the plaintiff had replied to the defendant's letter dated 15.02.2009, whereby amount of Rs.69,000/- was offered, through his counsel on 19.02.2010. Paragraph nos. 3 & 4 of the reply dated

19.02.2010 given by landlord's counsel, are as under:

3. That your abovementioned letter with cheque of Rs. 69,000/- has been received by my client. As the amount demanded by my client towards damages for use and occupation vide abovementioned notice is Rs. 1,08,000/- (Rupees one lac & eight thousand) only, the said amount of Rs. 69,000/- is acceptable to my client towards part payment of the said damages for use and occupation.

4. That my client has retained the said cheque conditionally and shall be deposited in his account on the expiry of seven days from today. In case you have any objection, please inform by registered post within the said period.

8. Thus, it is the contention of the revisionist that respondent was duly informed by the aforesaid letter that amount of Rs. 69,000/- offered by the respondent is acceptable to him towards part payment of damages for use and occupation of the premises in question. By the said letter, respondent was asked to raise objection, if any, against accepting the said amount towards damages within seven days, failing which, revisionist will encash the cheque. Learned counsel for the revisionist further contends that since respondent did not respond to his letter dated 19.02.2010, therefore, he accepted the amount as part payment of damages and this aspect was highlighted in paragraph no. 6 of the plaint.Â Â Â

9. The only question, which falls for consideration in this revision is whether acceptance of amount of Rs. 69,000/- by the landlord, after issuance of

notice to quit, amounts to waiver or not? In the present case, intention of revisionist/landlord can be gathered from the reply given by him on

19.02.2010, through his counsel to the tenant/respondent where he has stated that Rs. 69,000/- tendered by the tenant is acceptable to him towards

part payment of damages for use and occupation. By the said letter, revisionist had enquired from the defendant/respondent if he has any objection

against acceptance of amount towards damages.

10. Since, the respondent/tenant did not reply to the said letter, therefore, he cannot now contend that revisionist/landlord accepted the said amount as

rent.

11. Even otherwise also, mere acceptance of rent after issuance of notice to quit, would not amount to waiver. Section 113 of the Transfer of

Property Act, 1882, provides that a notice given under Section 111, Clause (h), is waived, with the express or 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. Therefore to constitute waiver

under Section 113 of the Transfer of Property Act, mere tender and acceptance of rent are not sufficient. These two actions should have shown an

intention on the part of the landlord to treat the lease as subsisting. Institution of suit after acceptance of the amount of Rs.69,000/- clearly shows the

intention of the plaintiff that he is not considering the lease as subsisting.

12. Honorable Supreme Court in the case of Sarup Singh Gupta Vs S. Jagdish Singh & others reported in (2006) 4 SCC 205 has held that mere

acceptance of rent would not amount to waiver of notice to quit, unless there be any other evidence to prove or establish that the landlord so

intended. Para 8 of the said judgment is extracted below:-

8. In the instant case, as we have noticed earlier, two notices to quit were given on 10.02.1979 and 17.03.1979. The suit was filed on 02.06.1979.

The tenant offered and the landlord accepted the rent for the months of April, May and thereafter. The question is whether this by itself constitutes an

act on the part of the landlord showing an intention to treat the lease as subsisting. In our view, mere acceptance of rent did not by itself constitute an

act of the nature envisaged by Section 113, Transfer of Property Act showing an intention to treat the lease as subsisting. The fact remains that even

after accepting the rent tendered, the landlord did file a suit for eviction, and

even while prosecuting the suit accepted rent which was being paid to him by the tenant. It cannot, therefore, be said that by accepting rent, he intended to waive the notice to quit and to treat the lease as subsisting. We cannot ignore the fact that in any event, even if rent was neither tendered nor accepted, the landlord in the event of success would be entitled to the payment of the arrears of rent. To avoid any controversy, in the event of termination of lease the practice followed by courts is to permit the landlord to receive each month by way of compensation for the use and occupation of the premises, an amount equal to the monthly rent payable by the tenant. It cannot, therefore, be said that mere acceptance of rent amounts to waiver of notice to quit unless there be any other evidence to prove or establish that the landlord so intended. In the instant case, we find no other fact or circumstance to support the plea of waiver. On the contrary the filing of and prosecution of the eviction proceeding by the landlord suggests otherwise.â??

13. Similar view was expressed by Honâ??ble Supreme Court in the case of C. Albert Morris v. K. Chandrasekaran and others reported in (2006) 1

SCC 228, while considering similar question where the landlord had informed the tenant that the amount, if any, sent by him will be adjusted towards

the compensation payable him. In that backdrop, Honâ??ble Supreme Court held that mere acceptance of rent by the landlord from the tenant in

possession after the lease has been determined would not create a tenancy so as to confer the erstwhile tenant the status of tenant or a right to be in

possession. Paragraph nos. 26 and 32 of the aforesaid judgment are relevant, which are extracted below:

â??26. Though the arguments of the learned senior counsel appearing for the appellant are attractive on the first blush yet on a careful

reconsideration of the same, it has no merits. The judgments cited by the learned senior counsel appearing for the appellant are not only distinguishable

on facts but also on law. Much argument was advanced on the receipt of the rent by the landlord after the cancellation of the lease. The consensus of

judicial opinion in this country is that a mere continuance in occupation of the demised premises after the expiry of the lease, notwithstanding the

receipt of an amount by the quondam landlord would not create a tenancy so as to confer on the erstwhile tenant the status of tenant or a right to be in

possession. In this context, we may refer to judgment of this Court in Raptakos

Brett & Co. Ltd. Vs. Ganesh Property, (1998) 7 SCC 184. In

paragraph 13 of the said judgment, this Court held as under:

13. In view of the aforesaid settled legal position, it must be held that on the expiry of the period of lease, the erstwhile lessee continues in possession

because of the law of the land, namely that the original landlord cannot physically throw out such an erstwhile tenant by force. He must get his claim

for possession adjudicated by a competent Court as per the relevant provisions of law. The status of an erstwhile tenant has to be treated as a tenant

at sufferance akin to a trespasser having no independent right to continue in possession.

Â??32. It is also seen from Annexure R-6 (page 33 of the paper book Vol.II) which is a notice sent by the landlord's advocate to the tenant, the

appellant herein on 21.2.1997 wherein it has been clearly stated in paras 2,3 & 4 which read as under:

You were a tenant under my client in the property described in the schedule hereunder. My client states that as the period of lease expired on

30.9.1996 by agreement, my client had issued a notice dated 24.8.1996 determining the lease and directing you to vacate and handover possession of

the schedule mentioned property. My client states that after the determination of lease your possession amounts to that of a trespasser and you are

liable to pay compensation which is to be determined after your vacating the premises.

My client states that subsequent to the notice dated 24.8.1996, you have chosen to send three Banker's cheques dated 30.11.1996, 24.12.1996 and

29.1.1997, each for Rs. 4500/-. My client states that he had not consented to your continued possession of the schedule mentioned property in any

manner. Hence my client apprehends that the banker's cheques being sent are a ruse to create the appearance of continuation of tenancy.

Hence take notice that my client will encash the banker's cheques already sent by you and any that might be sent in future under protest and that the

payments made by way of such cheques will be adjusted towards the compensation payable by you and take notice that encashments of any cheques

already issued and that might be issued in future should not be treated or considered as consent from my client for your occupying the schedule-

mentioned property.

We are, therefore, of the opinion that mere acceptance of rent by the landlord, the first respondent herein, from the tenant in possession after the lease has been determined either by efflux of time or by notice to quit would not create a tenancy so as to confer the erstwhile tenant the status of a tenant or a right to be in possession. We answer this issue accordingly.â??

14. Undisputedly, revisionist/landlord did file a suit for eviction after acceptance of amount offered by the respondent/tenant, therefore, it cannot be said that by accepting rent, he intended to waive the notice to quit and treat the lease as subsisting. There is no material on record to prove and establish that the landlord signified his assent to continuance of tenancy even after its termination. There is no other fact and material to support the plea of waiver, therefore, the finding recorded by learned court below on issue no. 4 is unsustainable.

15. In such view of matter, the judgment and order dated 06.09.2014 is set aside. Revision Petition is partly allowed. Matter is remanded back to learned trial court for decision afresh, in accordance with law. It is hoped and expected that learned court below shall hear and decide the matter, as expeditiously as possible, preferably within six months from the date of production of certified copy of this order.

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