

(1981) 05 DEL CK 0046

In the Delhi High Court

Case No : Regular Second Appeal No. 223 of 1977

Jamila Begum and Others

APPELLANT

Vs

Jumma alias Billu Rehman and Others

RESPONDENT

Date of Decision : 07-05-1981

Acts Referred:

Citation : (1981) 20 DLT 445

Hon'ble Judges : Sultan Singh, J

Bench : Single Bench

Advocate : S.K. Paul and M.L. Kapur, for the Appellant;

Judgement

Sultan Singh, J.

(1) This second appeal by the plaintiffs u/s 100 of the CPC is directed against the judgment and decree dated July 23, 1977 of the first appellate court confirming the decree dated November 24, 1975 of the trial court dismissing their suit for declaration that they have been in occupation of the suit premises as co-tenants.

(2) The relevant facts are, in 1948 Hafiz Abdul Rehman husband of plaintiff No. 1 and father of plaintiff No. 2 and 3 took on a monthly rent of Rs. 5.00 one room, a kitchen, latrine, store, stair case and open courtyard on the first floor of property situate at Gali Shahtara, Ajmeri Gate, Delhi from Mst. Qamar-ul-Nisa widow of Hazi Abdulla. This property was sold to various persons and was lastly purchased by Jumma alias Billu Pehiwan defendant No. 1 by deed dated April 20, 1967. Hafiz Abdul Rehman became a contractual tenant under him. He died on March 11, 1968 leaving behind three sons namely, Gulam-ul-Rehman, Fazal-ul-Rehman (defendant No. 2) and Hafiz-ul-Rehman, one daughter Mst. Amtul Hafiz, besides the plaintiffs. The heirs of Hafiz Abdul Rehman including the plaintiffs inherited tenancy rights in the said premises as co-tenants. The plaintiffs plead that they tendered rent to defendant No. 1 but he avoided to accept the same. They allege that defendant No. 1 in the second week of March 1973 threatened to dispossess them from the premises. The plaintiffs on these allegations claim that they are

co-tenants in the premises. The defendant No I admits that Hafiz Abdul Rehman was tenant under him up to the time of his death. It is also now not in dispute that his heirs inherited the tenancy rights as cotenants on his death on March 11, 1958. The defendant No. I pleads that the plaintiffs, have no right that they surrendered their tenancy rights which were accepted by him on the execution of rent note on June 29, 1969 by Fazal-ul-Rehman (defendant No. 2) in his favor. Defendant No. I further pleads that the plaintiffs never offered rent to him and that the suit is barred by time. The courts as already stated dismissed the plaintiffs' suit. The following substantial questions of law arise in this appeal :

(1) Whether the plaintiffs surrendered their rights as co-tenants of the suit property to defendant No. 1, (a) by non payment of rent; (b) by plaintiff No. 1 attesting the rent note Ex. D/2 executed by defendant No. 2 in favor of defendant No. 1; or (c) by their conduct. (2) When the right to sue first accrued to the plaintiffs to obtain the declaration in question within the meaning of article 53 of the Limitation Act, and the suit is within time.

The trial court held that Hafiz Abdul Rehman died as a contractual tenant and his heirs including the plaintiffs inherited the tenancy rights that plaintiff No. 1 and her two sons impliedly surrendered tenancy rights, that there was no evidence of surrender by plaintiffs No. 2 and 3 and that the suit was barred by time. It was also observed that the plaintiffs had knowledge, that defendant No. I was receiving rent from Fazal-ul-Rehman defendant No. 2, that he was treating him alone as tenant and not the plaintiffs, that the plaintiffs had not paid any rent to defendant No. I and Therefore there was surrender of tenancy. It was also held that right to sue accrued to the plaintiffs on the date of execution of the rent note i.e. June 29, 1969. The first appellate court held that plaintiff No. 2 and 3 did not appear as witnesses to depose that they never surrendered tenancy rights and Therefore the finding of the trial court that plaintiff No. 2 and 3 had not surrendered tenancy rights was reversed. Further it was held that the plaintiffs never claimed or asserted having inherited tenancy rights for about five years, that the plaintiffs surrendered tenancy rights by accepting creation of tenancy in favor of defendant No. 2. All other points decided by the trial court were confirmed.

(3) The evidence on record consists of statements of plaintiff No. 1, defendant No. 1 and Hari Ram Vendor of defendant No. 1.

(4) Public Witness Public Witness 1 Hari Ram Vendor of defendant No. 1 deposes that Hafiz Abdul Rehman was his tenant in the suit premises He also proves the counter foils of the rent receipts Ex. P1 to P8 issued by him to Hafiz Abdul Rehman predecessor of the plaintiffs plaintiff No. 1 as Public Witness PW2 deposes that her husband was a contractual tenant, that at the time of his death he left behind also three sons and three daughters, that he never surrendered tenancy rights, that she has not been on speaking terms with her sons since the death of her husband, that she is illiterate and separate in mess from her sons, that she offered rent to defendant No. I, who had been promising to receive but

never accepted, that he refused to accept her as tenant of the premises. In cross-examination she states that she can not identify her own thumb impression affixed by her on any document, that defendant No. 1 has not been receiving rent from her. There is no cross-examination regarding alleged surrender of tenancy rights by the plaintiffs. DW1 Mumtaz Ali deed writer proves the rent note dated June 29, 1969 executed by defendant No. 2 in favor of defendant No. 1 in respect of the suit premises at Rs 15.00 per month. He also deposes that the rent note was written with the approval of the marginal witnesses, that there was only one woman in pardah, who was identified by defendant No 2 as Jamila Begum. Jumma defendant No. 1 appeared as DW2. He says that the rent note was written by the scribe Murntaz Ali, that he is illetrate, that the mother and brothers of Fazal-ul-Rehman defendant No. 2 were present at the time of execution of the rent note, that plaintiff No. 1, her two sons Gulam-ul-Rchman and Hafiz-ul-Rehman besides others attested the rent note. He also says that Fazal-ul-Rehman, his brothers and sisters live together having a joint mess, that the document rent note was witnessed by the brothers and mother of Fazal-ul-Rehman because they said that execution by one would suffice, that rent was being paid by Fazal-ul-Rehman within the knowledge of all, that the plaintiffs never wanted to become tenants, that Jamila Begum, plaintiff No. 1 gave him rent after the death of her husband on account and no receipt was issued to her, that Fazalul-Rehman remits rent by money order. In cross-examination .he could not -decipher the signature of thumb impression of any person on the rent note. He denies that Jarnila Begum did not put her thumb impression on the rent note. He says that she put her thumb impression in his presence, that all the heirs of Hafiz Abdul Rehman never became his tenants, that he asked them to become tenants but they said that only Fazal-ul-Rehman defendant No. 2 would be his tenant. He further says that Razaq, Abdul Aziz and some other persons were present at the time of execution of rent note, that no writing was given by the plaintiffs, that they did not want to become tenants.

(5) The learned counsel for the appellants submits that the finding of the lower courts that plaintiffs surrendered their tenancy rights is based on no evidence. He says that the plaintiffs never surrendered their rights as cotenants to defendant No. 1.

(6) A lease of immovable property is determined in one of the ways mentioned in Section 111 of the Transfer of Property Act, 1882 clause (f) of Section 111 of the said Act provides that the lease may be determined by implied surrender. Thus, in the present case it has to be seen whether there was implied surrender. Implied surrender occurs (a) by creation of new relationship (b) by relinquishment of possession. In the instant case it is admitted that the possession of the tenancy premises was never relinquished or surrendered by the plaintiffs and Therefore there would not be implied surrender of tenancy rights by relinquishment of possession The other question Therefore is whether any new relationship was created amounting to implied surrender by the plaintiffs. Defendant No. 2 as one of the heirs of the deceased Hafiz Abdul Rehman

inherited tenancy rights as a co-tenant. In other words he was admittedly a tenant on June 29, 1969 when he executed the rent note Ex. D. 2 in favor of defendant No. 1. By this rent note the rent of the suit premises was fixed at Rs. 15.00 per month, where in it is also recited that defendant No. 2 had been tenant of the premises since April 1, 1949. Apparently this is not a correct statement of fact. His father admittedly was a tenant and he died on March 11, 1968. He, Therefore could not be tenant under defendant No. 1 prior to March 11, 1968. In fact he became a tenant with effect from March 11, 1968 when Hafiz Abdul Rehman died. The rent note Ex. D. 2 merely recognised the existing tenancy. It seems that execution of rent note by any tenant merely recognising already existing tenancy is not a surrender of the old tenancy and the creation of a new one. It cannot be treated as implied surrender of old tenancy. Execution of the rent note is only confirmation in writing of the existing tenancy. No new relationship was created between defendant No. 2 and defendant No. 1 under the rent note. At best the difference is) that defendant No. 2 described himself as a tenant while in fact he was a co-tenant. The word "tenant" includes a cotenant. I am, Therefore, of the view that execution of the rent note Ex. D. 2 does not create new relationship between the parties and Therefore it does not amount to implied surrender of tenancy rights by defendant No. 2 or by any other co-tenant in favor of defendant No. 1.

(7) It has been held by the courts below that the plaintiffs never paid any rent to respondent No. 1 after the death of Hafiz Abdul Rehman. This may be correct. When there are many co-tenants and if one of them pays rent it must be deemed to have been paid on behalf of all the co-tenants. When defendant No. 2 had been paying rent to defendant No. 1, the other co-tenant i.e. the plaintiffs are not to pay any rent to respondent No. 1. Moreover mere non-payment of rent does not amount to determination of the tenancy. If a person has been inducted as a tenant once and he does not pay rent say for twenty years it does not mean that he has surrendered his tenancy. The remedy of the landlord in such cases is to claim rent or eviction in accordance with law. Nothing has been brought to my notice in support of the plea that non-payment of rent by a tenant or a co-tenant is implied surrender of his tenancy. It is admitted that the plaintiffs have always been in possession of the tenancy premises and if they have not paid rent it cannot be said that their tenancy stood determined by implied surrender. In *Obhova Charan Bhooia and another v. Koilash Chunder Dev and Obhova Uharan Bhooia and another v. Oopinai Dev and others*, 14 Cal. 751 it was held that mere non-payment of rent by an occupancy ryot does not extinguish or constitute an abandonment of the tenancy. Similarly in *Mazhar Raj and others v. Bangat Smghand another*, 2nd 18, All. 290 it was held that mere non payment of rent did not determine the tenancy. The learned counsel for the respondent submits that as no rent was paid by the plaintiffs it would mean that there was no tenancy. He relies upon *Kanwar A. Ahmed Khan and another v. The Union of India and another*, 1954 (56) Plr 468 wherein it was observed that non-payment of rent would negative existence of relationship of landlord and tenant. In that

case the person concerned was never a tenant but he was claiming himself to be a tenant and non-payment of rent was taken as one of the circumstances to negative the existence of the relationship of landlord and tenant. To the same fact is the judgment in *Bulhu Ram v. Than Singh and others*, 1966 (68) Plr 866. In the instant case admittedly the plaintiffs inherited the tenancy rights and became cotenants. Both authorities are not applicable to the facts of this case. 1 Therefore hold that mere non-payment of rent by the plaintiffs did not determine their tenancy and does not amount to implied surrender.

(8) Next it is argued that the plaintiffs knew that defendant No. 2 had executed a rent note Ex. D-2 in favor of defendant No. 1 and Therefore it should be presumed that the plaintiffs surrendered their tenancy rights. plaintiff No. 1, it is alleged is an attesting witness of the rent note Ex. D-2. plaintiffs No. 2 and 3 admittedly neither attested the rent note nor they were present at the time when the rent note is alleged to have been executed. It is alleged that the rent note bears the thumb impression of plaintiff No. 1 as an attesting witness. She is not in a position to identify her thumb impression. As a matter of fact, it seems, it is difficult for a person to identify his thumb impression. Identification of thumb impression is a science and to a certain extent, it is a perfect science. Defendant No. 1 ought to have produced an handwriting expert to prove the thumb Impression of the plaintiff No. 1 on the rent note. He has not produced evidence of handwriting expert. It is disputed whether plaintiff No. 1 in fact affixed her thumb impression as awitness to the rent note. Even if it is assumed that plaintiff No. 1 attested the rent note Ex. D-2 it appears attestation does not amount to surrender other tenancy rights. It is admitted that plaintiff No. 1 is an illiterate lady. There is no evidence on record to show that she had knowledge of the contents of the rent note. There is no evidence that she was consenting party to the execution of the rent note by defendant No. 2. The onus to prove that there was surrender or that plaintiff No. 1 was aware of the contents of the rent note lies upon the defendant No. 1 the landlord. He has failed to discharge the onus. The mere fact that a person attested a document does not establish that he was aware of its contents. The burden of proving that he had such knowledge and was a consenting party to the transaction embodied in it lies upon the party who relies upon this document. (See : *Siraj Ud Din v. Mt. Rahiman and others*. Air 1936 Lah 978. In *Pandwang Knshanji v. M. Tukaram and others*, Air 1922 Pg 20, it was observed:

"THEattestation of a deed by itself estops a man from denying nothing whatsoever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects."

In *Banga Bhendra Dhur bids was and another v. Jagat Kishore Achariya Chowdhuri and others*, Air 1916 Pg 1 it was observed :

"ATTESTATIONproves no more than that the signature of an executing party has

been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. It could, at the best, be used for the purpose of cross-examination, in order to extract from the witness evidence to show that he was in fact, aware of the character of the transaction effected by the document to which his attestation was affixed."

In the instant case, as already observed, not a single question was asked in cross examination from plaintiff No. 1 about the contents of the rent note or about her knowledge of the execution of the rent note by defendant No. 2. Under these circumstances it must not be held that by attesting the rent note, plaintiff No. 1 became aware of the contents of the rent note or gave her consent to the creation of tenancy in favor of defendant No. 2 or that she agreed to the surrender of her rights as co-tenant in the premises.

(9) The courts below observed that plaintiffs had knowledge that defendant No. 1 was receiving rent from Fazal Ul Rehman and that defendant No. 1 was treating defendant No. 2 alone as his tenant and that he did not treat them as tenants and Therefore there was surrender of tenancy. It is, wrong approaching by the courts below. plaintiffs may be knowing that defendant No. 2 was paying rent to defendant No. 1 or that defendant No. 1 was receiving rent from defendant No. 2 but it does not mean that the plaintiffs surrendered their tenancy rights. The first appellate court observed that plaintiffs No. 2 and 3 did not appear as witness to depose that they did not surrender tenancy and Therefore it must be assumed that they surrendered tenancy. I do not appreciate the approach of the court. plaintiffs No. 2 and 3 have been in possession of the premises. It is not necessary for them to appear as a witness. The onus is upon defendant No. 1 to prove that there was surrender of tenancy. If a tenant is in possession of the tenancy premises, heavy onus lies on the landlord to prove that the tenant ceased to have any right to continue in occupation of the tenancy premises. If there was no evidence led by the landlord, non appearance of plaintiff No. 2 and 3 would not affect their rights. Further it was observed by the first appellate court that the plaintiffs never claimed or asserted having inherited tenancy rights for five years. What is the question of claiming or asserting their rights by the plaintiffs when they have been in possession. It is for defendant No. 1 to claim or assert that they were not his tenants. I am, Therefore of the view that the first appellate court was in error in holding that as plaintiffs did not assert their tenancy rights after the death of Haliz Abdul Rehman, there was surrender of their rights. There is nothing on record to support the finding of surrender of tenancy by the plaintiffs. In other words I would say that the finding of the lower courts is based on no evidence. The finding at best is based upon conjectures, and it is a well known provision of law that conjectures can never take place of judicial proof. If defendant No. 1 got a rent note executed from defendant No. 2 the rights of the plaintiffs cannot be affected. In other words the plaintiffs cannot be debarred from claiming that they are co-tenants, by any rule of estoppel or otherwise. The deed writer Dw 1 while in the witness box went to the extent to

say that the rent note Ex. D2 was executed with the approval of other attesting witnesses. No such question was put in cross examination to plaintiff No. I and there is no plea in the written statement. It appears to be an after thought. The rent note was written in 1969 and the statement of the deed writer was recorded on April 4, 1975. It appears to be an interested statement. Further no such statement was made even by the landlord defendant No. 1. The learned counsel for the respondent submits that the essence of an implied surrender of tenancy is not change of possession but the doing of an act which is in consistent with the continuance of the tenancy and relies upon Dayal Singh v. Shanti Swaroop, 1919 Rlr 197. The question of implied surrender is to be determined on the particular facts of a case. In the facts and circumstances of that case this court held that there was implied surrender. The learned counsel for the respondent further relies upon Bhuremal Nundkishore v. Faqir Chand, 1971 Rlr 58, wherein the tenant did not object for a long time, direct dealing between the owner and the sub-tenant, and it was held that there was implied surrender of the tenant. The facts of that case are also not applicable to the instant case before me. Thus, I am of the view that the courts below were in error in holding that the plaintiffs surrendered their rights as co-tenants in the suit property to defendant No. I. The finding as already observed is based on no evidence and is Therefore liable to be set aside. I accordingly set aside the same.

(10) The next question is whether the plaintiffs' suit was barred by time. Hafiz Abdul Rehman died on March 11, 1969. FazalulRehman respondent No. 2 executed the rent note on June 29, 1969 in favor of defendant No. 1. The present suit for declaration was filed on April 3, 1973. It is not disputed that article 58 of the Limitation Act 1963 is applicable to the present suit. This article provides a limitation period of three years to obtain any declaration. Tills period commences from the date when the right to sue first accrues. There can be "no right to sue" until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted (See Mst. Rukhmabai Vs. Lala Laxminarayan and Others,). In the present case this is to be determined when the right to sue first accrued to the plaintiffs. The plaintiffs have been in possession. There is nothing on the record to show that the plaintiffs were ever threatened to be dispossessed by defendant No. 1. The plaintiffs plead that the defendant threatened them in the second week of March 1973 to dispossess them. The courts below held that the plaintiffs have not led any evidence about this threat of dispossession in March 1973. I may mention that there is no evidence on behalf of defendant No. I to show if defendant No. I ever threatened to dispossess the plaintiffs. In para 9 of the written statement the defendant No. I alleges that there was no question of any threat to the plaintiffs. Thus, it would seem that the present suit was premature on April 3, 1973. The right to sue would not accrue to plaintiffs unless there was threat of dispossession. Thus the suit may be pre mature. In the present case however the defendant No. I for the first time in his written statement dated May 26, 1975 pleaded that the plaintiffs

had no right to remain in possession of the premises. He pleaded that the plaintiffs were not co-tenants and did not inherit the tenancy rights. Both the courts held that after the death of Hafiz Abdul Rehman the plaintiffs and other heirs inherited the tenancy rights and became co-tenants in the suit property. Thus, it seems that right to sue accrued to the plaintiffs on the date when they filed the suit for declaration.

(11) It has also been brought to my notice that defendant No. 1 filed a suit for eviction against defendant No. 2 in May 1972 which was dismissed by title Rent Controller but was subsequently decreed by the Rent Control Tribunal. The courts below have treated that the right to sue accrued on the date when the rent note Ex. D-2 was executed i.e. June 29, 1969 and as such suit filed on April 3, 1973, was barred by time. It is a wrong approach. If defendant No. 1 got a rent note executed from defendant No. 2 it does not affect the rights of the plaintiffs, because the execution of the rent note is nothing but recognition of the existing tenancy rights of defendant No. 2. Execution of rent note does not furnish any cause of action to the plaintiffs. The courts below were Therefore not correct in holding that the plaintiffs' suit was barred by time.

(12) The decree and judgment of the lower courts is Therefore set aside and the plaintiffs are granted a decree for declaration that after the death of Hafiz Abdul Rehman they inherited the tenancy rights as co-tenants in the suit premises i.e. part of property later and the first floor was let out at Rs. 300.00 annually for residential purpose. This means that I do not accept the case of the tenant that the property was let out for residential cum commercial purpose as there is no writing to suggest this probably the lower rate of rent was being charged because the property was let only for residence.

(13) In view of this discussion, I would come to the conclusion that the property was let out for residence and the landlord did make out a case for eviction on the ground of bona fide personal requirement. It also appears to me that the tenant did not seriously try to show that the property No. 152 was lying vacant and nor was it shown that there were in fact three rooms or four rooms available in that property. Rather, the local commissioner's report with the plan attached shows that there is only one room. I do not know how the Additional Rent Controller found that the two additional rooms had fallen down due to rains as there is no material on the record in this respect. However, it is possible that the parties might have accepted this position during arguments. In any event, I dismiss the revision petition, leaving the parties to bear their own costs.