

(1986) 10 PAT CK 0007
In the Patna High Court
Case No : S.A. No. 109 of 1980

Maksudan Prasad Kesarwani alias Maksudan Prasad	APPELLANT
Vs	
Abid Ahmad and Others	RESPONDENT

Date of Decision : 16-10-1986

Acts Referred:

Contract Act, 1872 — Section 60

Citation : (1987) 35 BLJR 407

Hon'ble Judges : B.N. Agrawal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.N. Agarwal, J.—This appeal is by the plaintiff against the judgment of affirmance passed in a suit for eviction and arrear of rent in which the plaintiff claimed eviction on three grounds, namely, personal necessity, material deterioration in the condition of building and default in making payment of rent from May to November, 1973.

2. The case of the defendant, in short is that the plaintiff has no personal necessity for the house in question and the defendant has not caused any deterioration in the condition of building muchless the material one so as to entitle plaintiff to seek execution decree. According to him, there was no default as he has partly paid the rental hand to hand and with regard to the payment of the balance rent there was an understanding between the parties that the plaintiff shall be making purchases of medicines from the shop of the defendant who shall be entitled to adjust the price of the medicines supplied to the plaintiff towards future rental.

3. The trial Court after considering documentary evidence dismissed the suit for as having recorded a finding against the plaintiff on all the three grounds for eviction. Being aggrieved by the aforesaid judgment and decree of the trial Court, the plaintiff preferred an appeal and the lower appellate Court dismissed

the appeal and confirmed the finding of the trial Court on the question of personal necessity and material deterioration in the condition of building. So far the eviction on the ground of default is concerned, the appellate Court has recorded a finding in paragraph 9 of its judgment to the following effect:

On the other hand the defendant has proved payment of rent by way of cash payment and by supplying medicine to the plaintiff upto December, 1973.

Even after recording this finding, the appellate Court has dismissed the suit holding that the defendant was not a defaulter. The plaintiff has preferred this appeal challenging the aforesaid judgment and decree.

4. Sri Sukumar Sinha, learned Counsel in support of the appeal contended that the plaintiff was entitled to a decree for eviction on the ground of default on the basis of the aforesaid finding recorded by the final court of fact us according to the learned Counsel the defendant became a defaulter in law. learned Counsel in support of his contention has placed reliance upon a decision of this Court in M.N. Roy Choudhary Vs. Nand Kishore Kakkar, , wherein a learned single Judge of this Court in somewhat similar circumstances has held that the tenant was a defaulter. In that case the tenant came with a defence that there was an agreement between him and the landlord to make construction and/or repair of the suit premises and adjust cost of repair towards future rental and the final court of fact recorded a finding that the expenses were incurred over the repair of the suit premises with the consent of the landlord who also agreed to adjust the cost of repair towards future rental. In view of the aforesaid facts of the reported case ray learned Brother Mr. Justice Nagendra Prasad Singh after considering the effect of Section 60 of the Indian Contract Act and the provisions of Section 11(1)(d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act 1947 (hereinafter referred to as "the Act") and after placing reliance on a Bench decision of this Court in Madholal and Others Vs. Madan Mohan Agrawalla and Others, , has succinctly laid down the law in paragraphs 7 and 8 of the judgment, relevant portions whereof are quoted below;-

7.... In my view, even if any construction is made by the tenant with the consent of the landlord, it cannot be inferred as a necessary corollary that the cost thereof has to be adjusted towards the rent..... As such, whatever may be said under the general law, so far as the Act is concerned, it has made no provision authorising a tenant to make constructions in the building which is in his possession and then to claim adjustment in respect of the cost incurred over the same towards the rent payable.

8. Section 60 of the Indian Contract Act is as follows:

Whereof the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

The aforesaid Section authorises the creditor to appropriate any amount towards his debt at his direction. But Section 11 (1)(d) of the Act is as follows:

Whereas the amount of two months' rent lawfully payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract or, in the absence of such contract, by the last day of the month next following that for which the rent is payable or by not having been validly remitted or deposited in accordance with Section 13.

In view of the aforesaid Clause (d) of Sub-section (1) of Section 11, once two months' rent lawfully payable by the tenant is due as not having been paid within the time fixed by the contract, or in absence of such contract, by the last day of the month next following that for which the rent is payable, or for not having been validly remitted or deposited in accordance with Section 13, makes the tenant defaulter. The scope of this clause has been construed in different Bench decisions of this Court and reference in this connection may be made to the case of Madholal and Others Vs. Madan Mohan Agrawalla and Others, , where it was pointed out that once rent for two months has not been paid or deposited, default taken place. Clause (d) aforesaid speaks of payment within the time fixed by contract. It was pleaded by the defendant that with the consent of the plaintiff he had constructed the cowshed and fencing wall. That will not amount to fixing a time by contract regarding payment of the rent so as to absolve him from the consequences provided by Clause (d) of Sub-section (1) of Section 11 of the Act. The result will be that in the instant case even if it is assumed that the defendant had spent the amount with the consent of the plaintiff, this will not be a case where any particular time has been fixed by the contract regarding payment of two months' rent lawfully payable...Sub-section (1) of Section 11 has a non-obstante clause. It says, notwithstanding anything contained in any contract or law to the contrary, where a tenant is in possession of any building, he shall not be liable for eviction therefrom except in execution of a decree passed by the Court on one or more of the grounds mentioned in Section 11 (1). As much, any tenant cannot adjust any amount unless it is consistent with the scheme of the Act in question.

5. From the reported judgment referred to above, it becomes clear that it had been laid down by this Court that a contract envisages between the parties u/s 11 (1)(d) of the Act can be only with regard to the time of payment and no other type of contract muchless the type alleged in the case in hand is postulated and the tenant cannot absolve himself from the liability of eviction even if there was a contract between the parties for adjustment of a particular payment made by the tenant to the landlord towards future rental. I am in respectful agreement with the law laid down in the aforesaid reported decision particularly the judgment of the learned single Judge, the principle of law enunciated wherein applies on all fours to the facts of the present case as in this case the defendant comes with to case that there was an understanding between the parties that the plaintiff shall be making purchases of medicines from the shop of the defendant

who shall be entitled to adjust the price of the medicines towards future rental may be in part, may be in whole. Thus, I hold that even according to the finding of the court of appeal below the defendant become a defaulter within the meaning of Section 11 (1)(d) of the Act for a period of more than two months as it neither amounted to making payment of rental to the landlord nor validly remitting the same or depositing in accordance with the provisions of Section 13 of the Act. In view of the aforesaid facts, I have no option but to hold that the defendant was defaulter in law and is liable to be evicted on this ground alone. Since I am decreeing the suit for eviction on the ground of default, it is not necessary for me to examine the finding of the two courts below on the other two grounds for eviction.

6. In the result, the appeal is allowed with cost throughout, the judgments and decrees passed by the courts below are set aside and the suit for eviction is decreed. learned Counsel for the appellant states that his client does not press for granting decree for arrear of rent. In view of this it is not necessary for me to examine the legality or otherwise of the plaintiff's claim regarding arrear of rent.