

(1973) 11 MP CK 0001
In the Madhya Pradesh High Court
Case No : Second Appeal No. 439 of 1965

M.P. Wakf Board

APPELLANT

Vs

Mst. Siraj Bi, and others

RESPONDENT

Date of Decision : 05-11-1973

Acts Referred:

Contract Act, 1872 — Section 70

Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 12

Citation : (1979) ILR (MP) 63 : (1975) JLJ 225 : (1974) MPLJ 807

Hon'ble Judges : R.J. Bhawe, J

Bench : Single Bench

Advocate : P.S. Khirwadkar, for the Appellant; U.C. Issrani and K.L. Issrani, for the Respondent

Final Decision : Allowed

Judgement

R.J. Bhawe, J.

This appeal is by the plaintiff, M.P. Wakf Board, Bhopal.

It appears that the suit house originally belonged to Hafiz Abdul Hafiz who created a wakf of the same in the year 1943 and its ownership and management vested in the Awkaf Department of the erstwhile State of Bhopal and now the management is vested in the M.P. Wakf Board, Bhopal. The plaintiff's case was that on 1st August 1947 the defendant No. 1 Sk. Mahtab Hussain, who is now represented by his legal representatives, had entered into an oral contract of tenancy with the Awakf Department of Bhopal in respect of the house in suit. The Awakf Department had not granted any express permission for sub-letting of the whole or any part of the accommodation. The defendant, however, sub-let a portion of the leased property to defendants 2 to 5. Apart from this, the defendant No. 1 removed his possession from rest of the portion of the building and handed over the same to one Zakaullah. It was also the case of the plaintiff that the defendant No. 1 failed to pay rent in respect of the demised premises for several years and also failed to pay the arrears in spite of demand. Finally, a

demand was made on the defendant No. 1 for payment of rent through a notice dated 18-11-1961 which was served on the defendant on 20-11-1961. That notice had also terminated the tenancy of the defendant No. 1. The plaintiff, thereafter, filed the present suit on 5-1-1962 for ejectment of the defendants and for arrears of rent. The grounds for ejectment were: (i) arrears of rent, (ii) sub-letting, and (iii) removing possession over a portion of the demised premises. It appears that after the portion of the demised premises was allowed to be occupied by Zakaullah, he entered into a contract of tenancy with the Awakf Department and hence the arrears were claimed at the rate of Rs 22/8/- per month, representing the proportionate rent of the premises remaining with the defendant No. 1.

The defence was that Zakaullah was allowed to occupy part of the premises only temporarily. The plaintiff by entering into a contract of tenancy with Zakaullah wrongfully deprived the defendant No. 1 of possession of the demised premises. So long as the possession was not restored to the defendant, he was not liable to pay any rent. It could not, therefore, be said that the defendant was in arrears of rent. It was also urged that the defendant No. 1 had let out the premises to the defendants 2 to 5 with the permission of the original landlord; and when in 1947 he entered into fresh agreement with the Awakf Department, the premises were already sub-let and as such there was implied, if not express, permission for sub-letting. It could not, therefore, be said that the sub-letting was without permission of the landlord. As there was no permanent abandonment of the premises by the defendant, the third ground was also not available to the plaintiff. It was admitted that the notice issued by the plaintiff was served on the defendant No. 1. It was, however, urged that the notice was not valid inasmuch as the tenancy of the portion of the demised premises could not have been validly terminated.

The lower appellate Court found that the sub-letting by the defendant No. 1 was with the implied consent of the landlord. It was held that the defendant No. 1 had not paid any rent as admitted by him. However, inasmuch as the defendant was deprived of the part of the premises demised, it was held that the doctrine of "suspension of rent" was applicable and that the defendant was not liable to pay any rent till he was restored to possession. It was also held that in recognising Zakaullah as a tenant there was dispossession by the landlord of the defendant No. 1 of the premises let out to Zakaullah. In this view of the matter, it was held that the defendant had not committed any of the defaults pleaded by the plaintiff and that the plaintiff was neither entitled to a decree for ejectment nor a decree for arrears of rent. In the result, the plaintiff's suit was dismissed in toto with costs.

At this stage, it must also be noted that the lower appellate Court had come to the conclusion that though the plaintiff had determined the tenancy of the entire house by a quit notice dated 18-11-1961, the notice was ineffective inasmuch as the plaintiff had already taken possession of a portion of the house leased out to

the defendant No. 1 and had not claimed ejectment in respect of the same. It could not, therefore, be said that the entire tenancy was legally determined. This finding of the lower appellate Court is obviously wrong. What is required by law is that the entire tenancy should be terminated. Once that is done, it is immaterial whether the defendant is in a position to hand over possession of the entire land or not. What he has to do is to vacate that portion which is already in his possession. Learned counsel for the defendants also conceded that this point was not rightly decided by the lower appellate Court. I need not, therefore, dilate on it any further.

This brings me to the consideration of the question as to whether any of the grounds required under the Madhya Pradesh Accommodation Control Act has been made out by the plaintiff or not. That question is now settled by the decision of the Supreme Court. The tenancy of the defendant No. 1 was validly terminated by the notice dated 18-11-1961. Thereafter, the defendant No. 1 became only a "statutory tenant". He died during the pendency of the appeal and his legal representatives were brought on record. In Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another, it was held by their Lordships of the Supreme Court :

On the death of a statutory tenant pending eviction suit or appeal his heirs and legal representatives brought on record cannot claim the status of tenant within section 3 (vii) of the Act (Rajasthan Premises (Control of Rent and Eviction) Act, No. 17 of 1950) as no rent is payable by them. If the rent was paid by them during the course of the proceedings it was not because they were recognised as tenants by the landlord but because the amount was received by him without prejudice to the rights under the orders of the Court. Therefore, the only contentions that they could put forward in the second appeal by the landlord were the contentions appropriate to their representative character and not one which was personal to the deceased. The defence of want of bona fide requirement by the landlord was personal to the statutory tenant and on his death the same is not open to his legal representatives.

In that case it was held that a person remaining in occupation of the premises let to him after the determination of or expiry of the period of the tenancy is commonly, though in law not accurately, called a "statutory tenant". Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permissible increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute." The provisions of the Rajasthan Act and that of the M.P. Accommodation Control Act are similar. It must, therefore, be held that the grounds of protection provided u/s 12 of the M.P. Accommodation Control Act are not available to the legal representatives of the defendant No. 1.

In this view of the matter, it is not necessary to decide the question as to whether there was any sub-letting, abandoning the premises or there were any arrears of rent warranting the ejectment of /the defendant No. 1.

Shri Issrani, learned counsel for the respondents, however, urged that the definition of "tenant" in the M.P. Accommodation Control Act includes the heirs of the deceased statutory tenant as well and hence the decision of their Lordships of the Supreme Court is not attracted in this case. According to this Act, "tenant" means "a person by whom or on whose account or behalf the rent of any accommodation is, or, but for a contract, express or implied, would be payable for any accommodation and includes any person occupying the accommodation as a sub-tenant and also any person continuing in possession after the termination of his tenancy whether before or after the commencement of this Act;...". Shri Issrani laid emphasis on the words "any person continuing in possession". He says that "any person" includes the heirs of the tenant as well. This interpretation cannot be accepted because "any person" mentioned in this clause refers to "the person whose tenancy has been terminated." It thus necessarily refers to the statutory tenant himself who continues in possession after the tenancy is terminated and not to his heirs. In this view of the matter, it must be held that the plaintiff is entitled to the ejectment of the legal representatives of the defendant No. 1 as well as the defendants 2 to 5 who were inducted on the premises as sub-tenants.

The only question that remains for my consideration is as to whether there was any remission of rent and that the plaintiff was not entitled to recover any rent from the defendant No. 1. In AIR 1925 97 (Privy Council) it was held by their Lordships of the Privy Council that the doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, applies where the rent is a lumpsum rent for the whole land leased treated as an indivisible subject and that it has no application to a case where the stipulated rent is so much per acre or bigha. From this decision it would appear that where lumpsum rent is fixed for the entire land of building there is remission of rent if the tenant is not put in possession of the whole of the demised premises. This decision was followed in India also. Similar view was taken in *Jatindra Kumar v. Raimohan Rai* AIR 1961 Ass 52 . *Nilkantha Pati Vs. Kshitish Chandra Satpati and Others*, ; *Hajira Bibi Vs. Abrar Hussain*, and *Hakim Sardar Bahadur Vs. Tej Parkash Singh*, . In all these cases the decision of the Privy Council referred to above, was followed. Their Lordships of the Privy Council had occasion to consider this question again in AIR 1943 24 (Privy Council) . In that case which arose from Bengal it was held :

In Bengal the doctrine of suspension of rent should not be applied to cases where the lessor fails to give possession to the lessee of part of the agricultural land demised.

In that case their Lordships, after referring to the decision of the Privy Council in *Smt. Katyayani Debi v. Uday Kumar Das* (supra), observed :

The applicability of the English rules was strongly challenged in the Tagore lectures of 1895.... and at the present time decisions in Bengal disclose a state of considerable perplexity and difference of opinion as to the application of these doctrines; some distinguishing between cases of eviction and cases of failure to deliver possession; some expressing the view that though it must work injustice in some cases the refusal to permit apportionment of rent helps to protect tenants and should be maintained as a dependable rule; others holding with Bartley J. in the present case that no such rigid rule can be applied as justice, equity and good conscience in the conditions of Bengal... The observations of the Board in *Smt. Katyayani Debi v. Udoy Kumar Das* have only added to the perplexity since they have in some cases been wrongly taken to lay down that if the rent is a lumpsum rent then in all cases of failure to give possession of any part there must be a suspension of the entire rent. They were intended only as showing that on its facts that case raised on question of suspension even if the course of discussions in Bengal be taken as correct, a question upon which there was no need to embark.(p. 27)

Their Lordships further observed :

As a matter of broad general principle, the law of India no longer proceeds upon the notion that where a contract is for an entire sum there is a necessity of reason which prevents a party from recovering anything where his full obligations under a special contract have not been discharged. Since 1872, u/s 70, Contract Act, the mere fact that the party has done work which has been accepted, or supplied goods which have been taken, entitles him to compensation subject if need be to any claim for damages. It is not supposed that a contrary rule is needed to encourage people to keep their bargains. No one objects that the work done or goods supplied cannot of themselves raise an equity in favour of one who has broken his contract.

Their Lordships further on observed:

Where the failure to give possession of a part is due to defect in the lessor's title it seems almost absurd that the rule should be any different from that which applies to eviction by title paramount. Nor do their Lordships think that the rule of suspension should be retained for cases in which the lessor does not show that he was unable to give possession of the part withheld. The purely accidental or aleatory character of the penalty with which the lessor is visited prevents it from being the medium or the object of a judicial discretion in such cases; which afford no reason why a scientific and careful attempt to adjust the rights of the parties should discard the ordinary forms of relief-damages, apportionment, specific performance, the right to avoid the lease, as the case may require-for a method which proceeds by giving one party to the transaction a windfall, or a right to retain and use another party's property without making payment therefor. Moreover, the right of a tenant to obtain possession of all that has been demised arises at the commencement of the lease and any legal theory which permits such claim to be raised after 50 years as a claim to pay no rent at all,

stands condemned.(p. 28.)

From these observations it would appear that their Lordships of the Privy Council did not confirm their decision in *Smt. Katyayani Debi v. Uday Kumar Das* (supra) but explained that in every case, depending on the circumstances, the equities are to be adjusted between the parties.

This question also came for consideration before the Supreme Court in *Surendra Nath Bhabra Vs. Stephen Court Ltd.*, . Their Lordships held :

The doctrine of suspension of rent should not be regarded as a rule of justice, equity and good conscience in India in all circumstances. The doctrine cannot be justified as a dependable rule to be adhered to notwithstanding hard cases. On the one hand it does not seem equitable that when a tenant enjoys a substantial portion of the property of the landlord, leased to him, without much inconvenience, he should not pay any compensation for the use of the property; in other words he should enjoy a windfall. On the other hand it is unfair that if a tenant is not given possession of a substantial portion of the property, he should be asked to pay any compensation for the use of the property while he is taking appropriate measures for specific performance of the contract. It will depend on the circumstances of each case whether a tenant would be entitled to suspend payment of the rent or whether he should be held liable to pay proportionate part of the rent. Where, therefore, the landlord has failed to give possession of one out of the three bed-rooms of the demised premises, the tenant is not entitled to suspend the payment of rent but he must pay a proportionate part of the rent.

The further question whether the doctrine of suspension of rent should or should not be applied at all to cases of eviction of the lessee by the lessor from a part of the land was, however, left open; but it is clear from the decision of their Lordships of the Supreme Court that the rule enunciated by their Lordships of the Privy Council in *Smt. Katyayani Debi v. Uday Kumar Das* (supra) was not a rigid rule to be applied as a matter of course. Now, in the present case we find that the first default was committed by the defendant No. 1 in handing over possession of part of the premises to Zakaullah. On his own showing he came to know that Zakaullah was accepted as a tenant directly by the plaintiff in 1953, but no steps were taken by the defendant to secure possession of the said property from the plaintiff. There is thus acquiescence on his part. Again, it is found that the defendant is not in possession of any parcel of the property and has sub-let the rest of it. On the top of it he is earning a rent of about Rs. 80/- per month from his sub-tenants which is more than what he is liable to pay towards the plaintiff's claim. There is thus no equity in his favour and no principle of equity, good conscience and justice requires that the defendant No. 1 should be permitted to enjoy the premises without payment of any rent.

I have already noted that the plaintiff has claimed rent only at the rate of Rs. 22 /8 /- per month for the portion which is in occupation of the defendant No. 1

through his sub-tenants. The rent claimed by the plaintiff comes to about 1/3rd of the original rent fixed. From the plan attached to the plaint which is not disputed by the defendant, it appears that his subtenants are in occupation of more than 1/3rd of the premises. Again, half of the portion which is abutting on the main road is in occupation of the subtenants of the defendant No. 1. Under the circumstances, it cannot be said that the demand for Rs. 22/8/- per month as rent of the premises in occupation of the defendant No. 1 through his sub-tenants is either excessive or unreasonable. In my opinion, the plaintiff is entitled to the rent at the above-said rate.

In the result, the appeal is allowed. The decree of the lower appellate Court is set aside and the decree of the trial Court is restored. The plaintiff shall get costs of this Court as well as that of the lower appellate Court.