

(2018) 03 GAU CK 0007
In the Gauhati High Court
Case No : CRP 331 of 2016

M/S RIKHAM CHAND BABULAL and 3 ORS	APPELLANT
Vs	
M/S KUNJALAL SUREKA and SONS HUF	RESPONDENT

Date of Decision : 08-03-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 115
Assam Urban Areas Rent Control Act, 1972 — Section 5(1), 5(4), 5(1)(f)
Transfer of Property Act, 1882 — Section 108

Citation : (2018) 03 GAU CK 0007

Hon'ble Judges : ARUP KUMAR GOSWAMI

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. Heard Mr. S. Barooah along with Mr. D. Agarwal, learned counsel appearing for the petitioners. Also heard Mr. B. K. Jain, learned counsel appearing for the respondents.

2. This Civil Revision Petition under Section 115 of the CPC was filed against the judgement and decree dated 15.03.2016, passed by the learned

Additional District Judge No. 2, Kamrup (Metro), at Guwahati, in Title Appeal No. 80/2014, dismissing the appeal and affirming the judgement and

decree dated 20.06.2014, passed by the learned Munsiff No. 1, Kamrup (Metro) at Guwahati, in Title Suit No. 463/2010, decreeing the suit of the

plaintiff/landlord for ejectment of the defendants from the suit premises, which is a flat measuring 576 Sq. ft. (24 X 24 feet) situated on the third floor

of an RCC building and for arrear rent for the period from July, 2003 till the suit premises is vacated @ Rs. 781.00 per month, which is the amount of

monthly rent, etc.

3. The suit was filed under the provisions of the Assam Urban Areas Rent Control Act, 1972 (for short, "the Act"). For better appreciation,

Section 5(1) and Section 5(4) of the Act, which are relevant for the purpose of this case, are reproduced herein below:

5. Bar against passing and execution of decree and orders for ejection.
(1) No order or decree for the recovery of possession of any house

shall be made or executed by any Court so long as the tenant pays rent to the full extent allowable under this Act and performs the conditions of the

tenancy. Provided that nothing in this sub-section shall apply in a suit or proceedings for eviction of the tenant from the house

(a) Where the tenant has done anything contrary to the provisions of clause (m), clause (o) or clause (p) of Section 108 of the Transfer of Property

Act, 1882 (Central Act 4 of 1882) or to the spirit of the aforesaid clause in areas where the said Act does not apply; or

(b) Where the tenant has been guilty of conduct which is a nuisance or an annoyance to the occupiers of the adjoining or neighbouring houses; or

(c) Where the house is bonafide required by the landlord either for purposes of repairs or rebuilding, or for his own occupation or for the occupation of

any person for whose benefit the house is held, or where the landlord can show any other cause which may be deemed satisfactory by the Court; or

(d) Where the tenant sublets the house or any part thereof or otherwise transfers his interest in the house or any part thereof without permission in

writing from the landlord; or

(e) Where the tenant has not paid the rent lawfully due from him in respect of the house within a fortnight of its falling due; or

(f) Where the tenant has built, acquired or been allowed a suitable residence.

(4) Where the landlord refuses to accept the lawful rent offered by his tenant, the tenant may within a fortnight of its becoming due, deposit in Court

the amount of such rent together with process fees for service of notice upon the landlord, and on receiving such deposit, the Court shall cause a

notice of the receipt of such deposit to be served on the landlord, and the amount of the deposit may thereafter be withdrawn by the landlord on

application made by him to the Court in that behalf. A tenant who has made such deposit shall not be treated as a defaulter under clause (e) of the

proviso to sub-section (1) of this section.

4. The plaintiff had filed the suit for ejectment of the petitioners under Clauses 5(1) (a), (c), (d), (e) and (f) of the Act. Both the courts below held that the tenants are liable to be evicted on each of the above counts.

5. The trial court records were not received and both Mr. Baruah and Mr. Jain had placed before the court copies of the evidence and exhibits. The court had received only three files, namely, A, C2 and D from the learned court below.

6. At the very outset, Mr. Baruah has submitted that he will be assailing the impugned judgement in respect of Issue Nos. 5, 6, 7, 10 and 11. Out of the above issues, Issue Nos. 10 and 11 were subsequently framed as Additional Issues. At this stage, it will be appropriate to reproduce herein below the aforesaid issues:

5. Whether the defendant Nos. 1 and 2 are defaulter in payment of rent ?

6. Whether the defendant Nos. 1 and 2 made unauthorized constructions in the suit premises ?

7. Whether the suit premises is bonafide required by the plaintiff ?

10. Whether the defendant Nos. 1 and 2 have acquired suitable house for the purpose of their residence ?

11. Whether the defendant Nos. 1 and 2 have sub-let the suit premises and/or transferred their interest in the suit premises without the consent of the plaintiff to Sri Bajrang Lal Surana, defendant No. 4 ?

7. It is the case of the plaintiff that the plaintiff is a Hindu Undivided Family (HUF), represented by its Karta, Shri Ashok Sureka and the defendant

Nos. 1 and 2 are tenants under the plaintiff in respect of the suit premises, which was meant to be used for residential purpose. Tenancy stands in the

names of defendant No. 1, which is represented by defendant No. 2 and defendant No. 2. Defendant No. 3 is the son of the defendant No. 2. It is

pleaded that the tenancy was from month to month as per English calendar month and the rent was fixed at Rs. 781.00 per month payable within

seven days of every subsequent month. Whenever rent was paid, rent receipt was issued. Defendant No. 2 paid rent up to the month of June, 2003

and thereafter defaulted in making payment of rent in spite of repeated demands. It is pleaded that defendant Nos. 2 and 3 had acquired suitable

houses for the purpose of their residence and they, with their families, had already shifted to such houses in the month of June, 2003. Defendant No. 2

had shifted to one 4th Floor apartment of 'Tulsi Apartment' and the defendant No. 3 had shifted to 1st Floor of 'Jain Kunj'. Even after acquiring accommodation for residential purpose, instead of vacating the suit premises, defendant Nos. 1 and 2, without the knowledge and consent of the plaintiff, sub-let the suit premises to different persons from time to time and, lastly, in the year 2004, to one Bajrang Lal Surana, defendant No. 4. It is also pleaded that the defendant Nos. 1 and 2 made unauthorized construction of a latrine and bathroom in the year 2009 in the north-east portion of the front verandah and, subsequently, on 25.10.2010, it also came to the notice of the Karta that the defendant No. 4 had renovated the south-east portion of the suit premises by closing three doors and two windows of the existing room. Further case of the plaintiff is that the suit premises is bonafide required for its own use and occupation as the number of the family members grew over the years and that presently 16 members of the family are residing in a cramped accommodation measuring 1600 Sq. ft. It is also pleaded that the Karta, his brother Arun Surekha, wife of Arvind Surekha, another brother, who expired on 16.03.2007, and his two major children, namely, Swati Surekha and Nitin Surekha, Karta's son Vishal Surekha, his wife with three children, three major sons of Arun Surekha, namely, Pankaj Surekha with his wife and daughter, Mukul Surekha and Anshuman Surekha are all residing together under one roof and, therefore, they desperately need the suit premises for their residential accommodation, which is near to the present residence of the plaintiff and his family members. As unpaid rent from July, 2003 to 31.10.2010 accumulated to Rs. 68,728.00, the plaintiff issued a Notice of Demand dated 19.01.2010 (Ext. 1) to the defendants to vacate the suit premises and to pay up to date arrear rent with effect from July, 2003 to February, 2010 failing which it was indicated that on and from 16.02.2010, the tenancy in respect of the tenanted premises would be terminated and that the plaintiff would be entitled to claim compensation of Rs. 300.00 per day from 01.02.2010. The said notice was duly served on the defendants by Speed Post on 20.10.2010. After receipt of the said notice, the defendant No. 3 sent a letter along with a Cheque bearing number 155254, dated 05.02.2010, for Rs. 62,480.00, which was the rent for the period from 01.07.2003 to 28.02.2010. As the defendants did not vacate the tenanted premises and as payment by way of Cheque was not the mode of payment of rent, another notice dated

16.03.2010 (Ext. 8) was issued to the defendant nos. 1 and 2 expressing inability to accept the Cheque and requesting them once again to vacate the suit premises. A copy of the notice was sent to defendant no. 3 for information and all of them received the notices, which were sent by Speed Post,

on 19.03.2010. Thereafter, the suit was filed for a decree of ejectment of the defendants and for delivery of khas possession, arrear rent of Rs.

68,728.00 against the defendant Nos. 1 and 2, being the rent due from 01.07.2003 to 31.10.2010 @ Rs. 781.00 per month, compensation @ Rs. 300.00 per day from the date of filing of the suit till realization, etc.

8. In the written statement filed by the defendants, it is stated that the defendant Nos. 1 and 2 were tenants under the plaintiff for the last 50 years or

so without there being any agreement of tenancy and that there was no stipulation that the rent has to be paid within first seven days of the

succeeding month. It is denied that the tenancy was on a month to month basis as per English calendar month and/or that the rent was fixed @ Rs.

781.00 only per month payable within the seven days of every succeeding month. It is stated that the plaintiff used to collect rent on a lump-sum basis

for few months or even for 1/2 years at a time. The plaintiff or his representative used to visit the premises of defendant Nos. 1 and 2 to collect rent

and only when they did not visit, they visit the plaintiff to offer rent. The plaintiff had accepted the rent till June, 2003 for three months for the months

of April, May and June, 2003 on 17.07.2003. When, thereafter, they did not come to collect rent, the defendant Nos. 2 and 3 offered rent to the

plaintiff by visiting his place. However, they were told that the plaintiff would collect rent at a time later on for several months and it was because of

such assurance given on a number of occasions that rent was not deposited in court. While denying that the defendant Nos. 2 and 3 had shifted their

families in June, 2003, it is stated that defendant No. 2 had shifted in the year 1992 with his family to the 3rd floor of Poonam Palace and

the defendant no. 3 had shifted to the 1st floor of Jain Kunj in the year 1982. The flat at 4th floor of Tulsi Apartment is in the name of

the wife of defendant No. 3 and the family members of defendant No. 3 are residing in that flat. The allegation of sub-letting is denied stating that the

grandfather of defendant No. 4 and defendant No. 2 were cousin brothers and, after death of the father of defendant No. 4 in the year 1983, he was

residing with defendant Nos. 2 and 3 as their family member and that earlier also he used to reside with them occasionally. The allegation of unauthorized construction was denied stating that only minor repairs had been undertaken. It is also pleaded that while the defendant Nos. 1 and 2 were tenants of the plaintiff for the last 50 years, the plaintiff had inducted new tenants, some of whom as late as in the year 2000 and, therefore, on the principle of "first come last go and last come first go", the plaintiff ought to have filed the suit for ejectment in respect of the tenants who came later on, and not against the defendants.

9. During trial, the plaintiff adduced evidence of one witness in the form of examination of the Karta. The defendants adduced evidence of defendant No. 3. However, defendant No. 2, being the tenant, did not examine himself.

10. Mr. Baruah, learned counsel for the petitioners has submitted that the learned courts below had committed manifest irregularity and acted beyond jurisdiction in decreeing the suit of the plaintiff. He has submitted that the plaintiff miserably failed to prove the due date for payment of rent and, in absence thereof, the findings recorded by the learned courts below that the tenants are defaulters cannot be sustained in law. There was no fixed date for payment of rent and there were instances of payment of rent up to one year at a time. As the tenancy had continued for more than 50 years and as the landlord had not repaired the premises, in order to make the premises livable, certain repairs were done by the tenants and the same cannot come within the realm of unauthorized construction and, therefore, violation of Sub-Sections (m), (o) and (p) of Section 108 of the Transfer of Property Act, 1882 does not arise. The defendant Nos. 2 and 3 had shifted their residence long time back and no objection was taken by the plaintiff earlier and, therefore, it cannot be said that because of the defendant Nos. 2 and 3 having alternative accommodation, the plaintiff is entitled to a decree for ejectment on the ground of Section 5(1)(f) of the Act. The defendant No. 4 was in the premises as a family member and therefore, the question of sub-letting did not arise. The plea of bonafide requirement is denounced by Mr. Baruah by contending that the same is mere ruse and pretext as 16 members of the family cannot be accommodated in the suit premises which measures a mere 576 Sq. ft. He submits that the plea of bonafide requirement is also not substantiated by any corroborating evidence of

any other family member. Mr. Baruah has asserted that there are other tenants in the building of the plaintiff who had come subsequent to the petitioners as tenants and, therefore, the suit against the defendants is misconceived. Mr. Baruah has relied on the decision of this court in the case of Upendra Chandra Deb Roy and Others vs. Smt. Subhashini Devi and Others, reported in (1989) 2 GLR 7.

11. Mr. Jain, learned counsel for the landlord/respondent has supported the impugned judgements and has contended that the scope of adjudication under Section 115 CPC being limited, the court ought not to embark upon a journey to appreciate the evidence in absence of any perversity of appreciation of evidence on record. He has submitted that the admitted position, as of today, is that the defendants did not pay any rent from July, 2003 till date as after filing of the suit also no rent was deposited in the court. Mr. Jain further submits that when there is no written contract, which is an admitted position, the tenancy is always a monthly tenancy and the rent is due at the end of the month. However, in the present case, according to understanding between the parties, rent was payable within the first seven days of the succeeding month. Admitting that the parties, by their conduct, had evolved a system of payment of rent on a lump-sum basis on some occasions, he asserts that even then there was not even a single occasion where rent was paid for more than a year at a time. Even after the Cheque was refused to be accepted by the plaintiff and in spite of the fact that the defendants were informed about the same, the defendants did not pay any rent in the court and, therefore, there is no escape from the conclusion that the defendants are rank defaulters in the eyes of law. He has submitted that in the facts and circumstances of the case and having regard to the conduct of the parties, it must be held that the rent can, at the most, be held to be payable for one year at a time and therefore, as a logical corollary, it must be held that rent will fall due after a year. With regard to the unauthorized constructions, Mr. Jain has submitted that despite elaborate evidence of PW1 regarding unauthorized construction, not even a suggestion was given to him that the defendants had not raised any unauthorized construction and, therefore, the learned courts below had rightly observed that the constructions made were unauthorized. It is submitted by him that it is the prerogative of the plaintiff to seek ejectment of tenants and the plaintiff cannot

be tied down by requiring him to file a suit for ejectment of the tenants, who had come to the suit premises subsequent to the defendants. The plaintiff is the best judge to decide whom to eject and the plaintiff had exercised his discretion to seek ejectment of the defendants for the purpose of bonafide requirement of the family members of the plaintiff, who are cramped for space in the present accommodation and about which there is no dispute. Mr. Jain has further submitted that as per the own version of the tenants, the tenants are not living in the suit property. The plea raised that a relative, that too, a very distant relative as per their own averments, i.e., defendant No. 4, is living in the suit premises goes to show that the tenants had sub-let the suit premises. In support of his submissions, Mr. Jain has placed reliance upon the following judgements:

- (i) Ram Karanji More vs. Keshar Dev Jalan, reported in 1996 (2) GLT 526.
- (ii) Satyadeo Baitha and Anr. Vs. Smti Rajkumari Devi and Ors., reported in 2001 (3) GLT 564.
- (iii) The Managing Director (MIG) Hindustan Aeronautics Ltd., Balanagar, Hyderabad and Another vs. Ajit Prasad Tarway, Manager (Purchase and Stores), Hindustan Aeronautics Ltd., Balanagar, Hyderabad, reported in AIR 1973 SC 76.
- (IV) Ragavendra Kumar vs. Firm Prem Machinery & Co., reported in (2001) 1 SCC 679.

12. I have considered the submission of the learned counsel for the parties and have perused the materials on record.

13. In The Managing Director (MIG) Hindustan Aeronautics Ltd. (supra), the Supreme Court had laid down that unless the first appellate court had exercised its jurisdiction either illegally or with material irregularity, High Court cannot invoke its jurisdiction under Section 115 of the CPC to interfere with the order of the first appellate court.

14. Coming to the issue of bonafide requirement of the suit premises for the own use and occupation of the plaintiff and his family, it is to be noted that

PW1, in tune with the pleadings, had stated that he, his son's family with son, Arun Sureka (brother of PW1) with his three major sons, one of

whom is married and has a daughter, PW1's pre-deceased brother's wife and their two major children (Swati and Nitin), comprising of 16

(sixteen) family members, are residing together under one roof in a house

comprising of 1600 Sq. ft. Except for a suggestion that the suit premises are not required bonafide, plaintiff's assertion that 16 (sixteen) members of the HUF, as noticed above, are residing together under one roof in a house measuring 1600 Sq. ft., which is totally inadequate, is not even contested. In his evidence, PW1 has stated that the suit premises is sought to be used for accommodating the family of one of his brothers. The learned trial court had rightly held that PW1 was not even cross-examined on the issue of bonafide requirement. Thus, the plea of bonafide requirement of the suit premises stands established. The principle of 'last come first go and first come last go', a concept which is associated with service jurisprudence, as sought to be canvassed by the tenants, cannot be applied in a dispute of present nature. The plaintiff, in the instant case, has overwhelmingly established less than adequate space in his present accommodation and if he has alternative choices to seek ejectment of a tenant out of many, a tenant who was earlier inducted, cannot dictate terms to the landlord that the landlord ought to file the suit for ejectment against the tenant who had been inducted last as, in such matters, as held in *Ragavendra Kumar (supra)*, the landlord is the best judge of his own requirement for residential or business purpose and has complete freedom in the matter. It is a discretion exercised by the landlord guided by his convenience and host of other considerations which may also include non-payment of rent, making of unauthorized constructions, etc. by a tenant.

15. The tenants had, admittedly, shifted their residence and are no longer residing in the suit premises. The relationship of defendant No. 4 with defendant No. 2, i.e. the tenant, is that grandfather of defendant No. 4 and 2 were cousin brothers. To say the least, the defendant No. 4 is a very distant relative and cannot be considered to be a family member of defendant No. 2 for the purpose of tenancy. After the tenant had left the tenanted premises, defendant no. 4 independently does not have any right to continue to occupy the suit premises. In such circumstances, the plaintiff will be entitled to maintain an action for ejectment of the tenants on the ground of Section 5(1) (f).

16. Coming to the issue of default, it is to be noted that proviso (e) of Section 5(1) of the Act provides that where the tenant has not paid the rent lawfully due from him in respect of the house within a fortnight of its falling due,

the bar of grant of decree for recovery of possession of tenanted premises under Section 5(1) will not be attracted. Section 5(4) of the Act provides, amongst other, that when the landlord refuses to accept the lawful rent offered by the tenant, the tenant may within a fortnight of its becoming due, deposit in court the amount of such rent together with process fee for service of notice upon the landlord.

17. For the purpose of securing a decree for ejectment, the burden lies on the plaintiff to prove when the rent falls due as a tenant can be held to be defaulter only when he had not paid rent lawfully due within a fortnight of its falling due.

18. In *Karanji More* (supra), this court had held that when there is no written contract, the tenancy is always a monthly tenancy and the rent is due and payable at the end of every month. Though the defendants had taken the plea that the tenancy is not a monthly tenancy, DW1 in his cross-

examination had admitted that the tenancy was as per English calendar month. However, in the instant case the rent was payable within the first

seven days of every succeeding month as per understanding of the parties. The learned trial court noted that there was really no fixed date as such for

payment of rent and it is also recorded, on the basis of Ext. E and Ext. I, that rent for the months of April 1998 to March 1999 (one year) and from

April, 2000 to March, 2001 (one year) were paid at a time. In *Karanji More* (supra), it was further held as follows:

“9. Now it is to be seen what was the mode of payment, as would be evident from records. The question of default has to be decided from the

facts available before the Court. Even in a case of monthly payment, landlord may agree to accept the rent at the convenience of the tenant but this

indulgence cannot change the nature of monthly tenancy even to accommodate the tenant in some given circumstances. The landlord may accept rent

beyond the stipulated period of tenancy in certain occasion, but this cannot be a deviation from the payment of rent at the stipulated date. In that case

for ascertaining the mode of payment and default therefore, court requires to determine it according to conduct of the parties on the basis of the

evidence and the circumstances appearing in evidence. In this case the lower appellate Court to ascertain mode of payment relied on the rent receipts

issued to the defendant petitioner by the landlord regularly.”

19. In Upendra Chandra Deb Roy (supra), this court had held that when a landlord continues to receive the rent at varying intervals from the tenant

without any objection for several years, he cannot be permitted to suddenly turn back and say that the arrangement between him and his tenant was

otherwise and seek eviction of a tenant on the ground that he was a defaulter. In such cases, the court may infer that there was no arrangement

between the parties to pay the rent from month to month within a specified time or if there was such an arrangement, the same stood impliedly

modified by the conduct of the parties.

20. The defendants had not brought on record any rent receipt issued beyond June, 2003 or Challans evidencing deposit of rent in the court after the

rent receipt was issued in the month of June, 2003. It is the burden of the defendants to demonstrate payment of rent and the position that has

emerged is that the defendants had not paid any rent beyond July, 2003 till today, i.e., for the last nearly 14/15 years.

21. In a case where there was an arrangement for making payment or taking of rent for a couple of months or for a year at a time, a pragmatic view,

without causing any prejudice to the tenant, for whose benefit the Act was enacted, with regard to the due date of rent has to be taken based on the

surrounding circumstances and conduct of the parties as it cannot be countenanced that in such a scenario a landlord cannot seek ejectment of a

tenant on the ground of default although the tenant had simply stopped making payment of rent for years together.

22. Apart from anything else, when the plaintiff had refused to accept the Cheque for Rs. 62,480.00 on account of rent and had intimated the

defendant Nos. 1, 2 and 3 about the non-acceptance of the Cheque vide Ext. 8, in order to avail protection under the Act, in terms of Section 5(4), it

was obligatory on the part of the tenants to have deposited rent in court, which, evidently, was not deposited by the defendants. Even in a case where

due date of rent is not firmly established, it cannot be understood that the tenant would have no obligation to pay rent. In such a situation, tenant would

be obliged to deposit rent in court within a fortnight of refusal of the landlord to accept rent comes to his notice. There is also a continuous obligation

on the part of the tenant to pay rent during the pendency of the suit. In Satyadeo Baitha (supra), this court had laid down that liability of the tenant to

pay rent subsists all throughout the proceedings even when the matter is pending in the highest court and that once the tenant fails to discharge his duties, he is liable to eviction at any stage during the pendency of any proceeding. Therefore, on the admitted facts that the rent was not deposited in court, there can be no conclusion other than the one that the defendants are defaulters.

23. That the original tenants had left the suit premises and had started residing elsewhere is not in dispute. But the contention advanced by the

defendant Nos. 1, 2 and 3 is that the defendant No. 4 is their relative and he had been staying with them for many years and, therefore, he is residing

in the suit premises. The plaintiff has not brought on record any evidence to indicate that the defendant No. 4 was paying any rent to defendant Nos.

1, 2 or 3 and, therefore, I am of the considered opinion that the findings recorded by the learned courts below that the defendant No. 4 is a sub-tenant

cannot be accepted and, therefore, finding of the learned courts below on this issue, i.e., Issue No. 10, is set aside.

24. In the evidence of PW1, it was categorically stated by him that the defendants had unauthorizedly constructed latrine and bathroom as well as

blocked doors and windows of the suit premises. As rightly held by the learned courts below, there was no cross-examination of the PW1 on this

point. Construction of latrine and bathroom and blocking of doors and windows do not come within the meaning of normal routine repairs.

25. Notwithstanding setting aside of Issue No. 10, having regard to the above discussions, the decree passed by the learned courts below cannot be

faulted with and, therefore, the revision petition is dismissed.

26. Registry will send back the records.