

(1971) 01 CAL CK 0011
In the Calcutta High Court
Case No : A.F.A.D. No. 801 of 1956

Munshi Hossain Baksh

APPELLANT

Vs

Khudiram Mukherjee
 Khudiram Mukherjee Vs Munshi
Hossain Baksh

RESPONDENT

Date of Decision : 05-01-1971

Acts Referred:

Transfer of Property Act, 1882 — Section 116

Citation : AIR 1971 Cal 376 : 75 CWN 421

Hon'ble Judges : Salil Kumar Datta, J

Bench : Single Bench

Advocate : Shyamaprasanna Roy Choudhury, for S.C. Mitter, for the Appellant;
R.K. Banerjee and Soumendra Nath Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Salil Kumar Datta, J.—This is an appeal by the tenant defendant in a suit instituted by the plaintiff for recovery of possession on declaration of his title. The plaintiff's case is that one Krishnadhan Dey settled about 4 decimals of bastu land, being the suit land, to the defendant for a period of 7 years from Magh 1342 B.S. to Pous 1349 B.S. at a monthly rent of Rs. 3/- on the basis of a registered lease executed on Bhadra 5, 1343 B.S. The defendant had been since in possession of the said land on the basis thereof and there was an express stipulation in the lease that he would be entitled to raise only kutcha structure and never any pucca structures thereon nor he would acquire any permanent right. It was further provided therein that on the expiry of the lease he would be liable to vacate the land without any objection or pretext. By a deed of gift dated Aswin 13, 1346 B.S. the suit land was gifted to the plaintiff. After the expiry of the lease on Pous, 1349 B.S. the defendant failed and neglected to vacate the land claiming that he was entitled to possession under the provisions of the Bengal Non-agricultural Tenancy (Temporary Provisions) Act, 1940, hereinafter referred to as the 1940 Act. As under the provisions of the said Act the

defendant could not be evicted, the plaintiff could not take any steps for his eviction and was under compulsion to receive the compensation at the rate of rent sent to him, by postal money order. By such receipt the plaintiff's right was not in any way prejudiced nor the defendant was and continued to be in occupation of the land by any implied consent or by holding over. Though notice was not necessary the plaintiff gave a notice dated Ashar 10, 1359 B.S. calling upon the defendant to quit the suit land with the expiry of the month of Pous, 1359 B.S. The notice was also read over to him but as the defendant declined to give any receipt, thereafter a copy of the notice was served by hanging at his usual place of residence. It was contended that the defendant had no right to remain on the land after the repeal of the 1940 Act by the West Bengal Non-agricultural Tenancy Act, 1949, hereinafter referred to as the 1949 Act, and accordingly the plaintiff instituted the suit on February 23, 1954 (Falgun 11, 1360 B.S.) praying for recovery of possession of the suit land on eviction of the defendant therefrom. Mesne profits for preceding 3 years were also claimed from Falgun 1357 B.S. to Mash 1360 B.S. at the rate of Rs. 6/- per month for Rs. 216/-.

2. The suit was contested by the defendant who contended inter alia that notice to quit which was invalid and insufficient, was also not served on him as required under the 1949 Act, that the defendant was in occupation of the land after expiry of the lease by holding over; and his right was accordingly governed by the provisions of the said Act under which he was not liable to eviction. It was stated that the plaintiff realised rent direct from him upto 1353 B.S. and thereafter rent was sent by money order which was duly accepted by the plaintiff and such acceptance thus established that the defendant was holding over the suit land. In the circumstances the defendant contended that the suit should be dismissed.

3. The learned Munsif, on a trial on evidence, held that the notice was never served on the defendant, that as the land was held under a written lease no notice was necessary, that the defendant's claim that he was holding over the land was untenable as rent was accepted upto 1355 B.S. when the 1940 Act was in operation which stayed all proceedings for eviction during its pendency and the plaintiff was not barred by waiver or estoppel to claim the reliefs claimed. The suit was accordingly decreed for possession on declaration of the plaintiff's title while compensation was awarded at the rate of Rs. 3/- per month.

4. An appeal was preferred against the said decision and the appellate court held that the suit was not barred by limitation, that the defendant could not be said to be holding over as rent was accepted upto 1355 B.S. during which period the 1940 Act was in operation. The decision in Kartick Chandra Das and Others Vs. Gangadutta Murarka, was relied for the proposition that acceptance of rent after expiry of lease, where the tenant remained in possession on the basis of a statute, could not amount to creating a tenancy between the parties. It was further held that the defendant was not protected by Clause 4 of Section 7 of the 1949 Act from eviction being in possession of the said land for less than 12 years

in view of Section 90 of the said Act, that in absence of holding over there was no question of tacking over the period from the expiry of the lease till the institution of the suit with the earlier period of occupation so as to confer on him the benefit of the said provision. The appeal was accordingly dismissed. This second appeal is against the said decision by the tenant defendant.

5. Mr. Syama Prasanna Roy Choudhury, the learned Advocate for the tenant appellant, has contended that the landlord having accepted rent after the termination of tenancy by efflux of time, a fresh tenancy was created by holding over. Accordingly a notice determining the tenancy was necessary as required under the 1949 Act before the suit could be instituted. He also contended that the defendant being in possession of the land for over 12 years acquired a non-eject- able right and was not liable to eviction, A new point was taken, with reference to the West Bengal Estates Acquisition Act, 1953, to the effect that whatever interest the plaintiff had in the suit land had vested in the State and the plaintiff not being in actual possession of the land was not entitled to institute the suit for recovery of possession of such land.

6. Mr. Ranjit Kumar Banerjee, the learned Advocate for the plaintiff-respondent, has contended that by mere acceptance of rent after expiry of the lease no tenancy was or could be created by holding over. After the coming in operation of the 1940 Act, it was not open to the landlord to institute a suit for eviction of the tenant during the pendency of the said Act. Accordingly in the said circumstances acceptance of rent by the landlord for use and occupation of the land could not amount to creation of fresh tenancy by holding over by the tenant. It was also contended that as there was a written lease which expired there was no necessity for any notice which was given by way of abundant caution. The defendant's claim of acquisition of a non-ejectable right by over 12 years' occupation was disputed as the defendant was not in possession for over the said period, as correctly found by the appellate court. As to the landlord's right to institute a suit for recovery of possession it was stated that this point was not raised in the courts below and there was no evidence in support of such case. The certified copy of the entry in the record of right did not establish that the plaintiff landlord was an intermediary whose interest vested in the state. It may be mentioned here that the question as to the right of an intermediary to institute a suit for recovery of possession of land not in his khas possession is the subject-matter of a Full Bench reference in this court which is pending.

7. Mr. Roy Choudhury's rejoinder is that that the appellant tenant was holding over the land with the consent of the plaintiff landlord would be evidenced by his receipt of rent throughout from the expiry of the lease till some months of 1353 B.S. while rent for 1353 (portion), 1354 and 1355 B.S. was sent to him by rent money order with interest which was duly received by him. The relevant provisions of the 1940 Act provided no bar for institution of suits but only the proceedings for passing of decrees or order for possession was stayed during the pendency of the said Act. For suits for recovery of possession for non-payment of

rent there was no prohibition even under the 1940 Act.

8. It is common knowledge that in legislation since and during the second World War dealing with the landlord/ lessors and tenants/lessees, protection was afforded to tenants/lessees against their eviction from premises or lands under tenancy or settlement within certain limits. In the Bengal House Rent Control Order, 1942, issued under the Defence of India Rules, by a subsequent notification it was provided that a decree or order for recovery of possession of any house not executed till July 6, 1944 would be stayed unless the landlord produced an order of the Controller permitting him to execute the decree or order on the ground of his bona fide requirement for own use and occupation. The same restriction was extended even to institution of suits for recovery of possession of any house and expiry of the period of lease was not considered as sufficient cause of action provided a tenant was ready and willing to pay all due rent. Similar provisions were incorporated in the Calcutta House Rent Control Order, 1943. Similar provisions were also incorporated in the Calcutta House Rent Ordinance, 1946 which came in operation on October 1, 1946 in Calcutta and notified municipalities on the said orders ceasing to be in operation. There again the definition of tenant included a person continuing in possession after the termination of his tenancy. The West Bengal Premises Rent Control (Temporary Provisions) Act, 1948 repealed the said Ordinance and there again tenant included a person continuing in possession after termination of tenancy in his favour and no order of ejectment could be made against a tenant if rent was paid at the allowable rate unless the tenant was guilty of specified acts or the premises were bona fide required by the landlord for own occupation or rebuilding. Similar provisions have been incorporated in the West Bengal Premises Tenancy Act, 1956.

9. The law on the question as to whether a tenant, continuing in possession after the determination of lease by efflux of time, acquires a status by holding over fell to be considered in the case of AIR 1949 124 (Federal Court) in which case B.K. Mukherjea J. (as his Lordship then was) speaking for the Court made the following observations:

".....in cases of tenancies relating to dwelling houses to which the Rent Restriction Acts apply, the tenant may enjoy a statutory immunity from eviction even after the lease has expired. The landlord cannot eject him except on specified grounds mentioned in the Acts themselves. In such circumstances, acceptance of rent by the landlord from a statutory tenant whose lease had already expired, could not be regarded as evidence of a new agreement of tenancy and it would not be open to such a tenant to urge, by way of defence, in a suit for ejectment brought against him, under the provisions of Rent Restriction Act that by acceptance of rent a fresh tenancy was created which had to be determined by a fresh notice to quit."

In the case of Ganga Dutt Murarka Vs. Kartik Chandra Das and Others, the Supreme Court was considering the West Bengal Premises Rent Control

(Temporary Provisions) Act, 1948 on appeal from the case cited above and it was observed:

"It is, however, well settled that where a contractual tenancy to which the rent control legislation applies has expired by efflux of time or by determination by notice to quit and the tenant continues in possession of the premises, acceptance of rent from, the tenant by the landlord after expiration or determination of the contractual tenancy will not afford ground for holding that the landlord has assented to a new contractual tenancy. Failure to take action which was consequent upon a statutory prohibition imposed upon the courts and not the result of any voluntary conduct on the part of the appellant (Landlord) did not also amount to "otherwise assenting to the lessee continuing in possession". Of course, there is no prohibition against a landlord entering into a fresh contract of tenancy with a tenant whose right of occupation is determined and who remains in occupation by virtue of statutory immunity. Apart from an express contract, conduct of the parties may undoubtedly justify an inference that after determination of contractual tenancy, the landlord had entered into a fresh contract with the tenant, but whether the conduct justifies such an inference must always depend upon the facts of each case. Occupation of premises by a tenant whose tenancy is determined is by virtue of the protection granted by the statute and not because of any right arising from the contract which is determined. The statute protects his possession so long as the conditions which justify a lessor in obtaining an order of eviction against him do not exist. Once the prohibition against the exercise of jurisdiction by Court is removed, the right to obtain possession by the lessor under the ordinary law springs into action and the exercise of the lessor's right to evict the tenant will not unless the statute provides otherwise, be conditioned."

10. The Bengal Non-agricultural Tenancy (Temporary Provisions) Act, 1940, with which we are concerned here, stayed the continuation of any suit or proceedings for recovery of possession of land held by non-agricultural tenant. This prohibition did not extend to suits for eviction on the ground of non-payment of rent as pointed out by Mr. Roy Choudhury. Now in the "hatchita" exhibit B which is a book retained by the tenant, there are entries of payments at places signed by or on behalf of the landlord. The same book is continued in the same manner even after the termination of tenancy. Further, rent, it appears, was not paid every month but by instalments and two or three months' rent or more was paid at a time. The last entry is of rent for Baisakh to Aswin, 1353. It further appears that rent for 1353 B.S. (portion) for Rs. 18/- for 1354 and 1355 B.S. in full for Rs. 36/- for each year totalling Rs. 90/- and interest Rs. 5-14-6 p in all Rs. 95-14-6 p was remitted by the tenant by post as rent money order on August 5, 1949 and the same was personally received by the plaintiff on August 11, 1949 (exhibit A). As we have seen, the institution of suit for recovery of possession was never barred by the 1940 Act, only the proceedings in the suit were stayed. No steps were taken by the landlord during the period, Mr. Banerjee's contention being that it was useless to do so in view of the general stay of all suits, though

suits for recovery of possession on the ground of non-payment of rent were excepted. It could be fairly contended that in view of the expiry of the lease by efflux of time the landlord also could not institute a suit for eviction as there could be no default since after expiry of lease there was no tenancy held by the tenant.

11. Accepting the contention of Mr. Banerjee, on the basis of law which is now settled, that acceptance of rent during the pendency of the 1940 Act,, which ceased to have operation from May 15, 1949, could not create a holding over by the tenant, the plaintiff even is faced with a formidable difficulty. As has been held in *Ganga Dutt Murarka Vs. Kartik Chandra Das and Others*, referred to above, once the prohibition against exercise of jurisdiction by court is removed, the right to obtain possession by the lessor under the ordinary law springs into action. Accordingly on and from May 15, 1949 the landlord became at once entitled to institute a suit for recovery of possession on the ground of expiry of lease with Pous, 1349 B.S. or in or about January 15, 1943 and the suit was in fact filed on February 23, 1954. The landlord however accepted rent, as we have seen, on August 11, 1949 for 1353 (portion), 1354 and 1355 B.S. There is no explanation about the cause which compelled the landlord to accept the amount tendered as rent and it is no answer that rent related to a period before the coming into force of the 1949 Act, as the 1940 Act did not bar institution of suits for recovery of possession nor destroyed any right accruing to the landlord during its pendency.

12. There is no doubt that the question whether a new tenancy has been created by holding over is a question of fact and the court has to come to a finding that the facts relied on by the tenant is sufficient to raise an inference of tenancy. We find that rent was remitted by rent money order therein and the particulars of payment, as being rent for 1353 (portion), 1354 and 1355 B.S. with interest, were mentioned. It was tendered as rent and received as such by the landlord. There was no contemporaneous protest or reservation that it was not received as rent and subsequent conduct of the landlord could not alter its legal consequences and in the instant case it was stated in the plaint filed 41/2 years later as being received under compulsion of statute. It has been observed in AIR 1949 FC 124 (*supra*) by B.K. Mukherjea J. (as his Lordship then was), speaking for the court as follows:

"In the first place, the facts clearly show that when the cheques were cashed, it was done without any reservation or condition whatsoever. The protest was not a contemporaneous but a much subsequent event and if the agreement was already complete by acceptance of rent on 23rd November 1942, the subsequent conduct of one of the parties cannot alter its legal consequences. In the second place, it seems to me that when money was paid as rent, it did not lie in the mouth of the plaintiff to say that he would receive the money but not as rent. It is now settled principle of law that when money is paid by a debtor with an express intimation that it is to be applied to the discharge of a particular debt,

the creditor may not accept the money at all, but if he receives and appropriates it, he cannot be allowed to say that he took it wrongfully on some other account. The ordinary legal consequence of accepting payment as indicated by the debtor would follow in such cases, however much the creditor might attempt to repudiate them. This being the position it must be held on the facts of this case that money was not only paid by the defendants 2 and 3 but was received as rent by the plaintiff and consequently a monthly tenancy under the provision of Section 116 of the Transfer of Property Act, did come into existence. So long as this monthly tenancy is not determined in a manner recognised by law, the plaintiff's suit must fail."

On the basis of the above rulings, it is now settled law that if after determination of tenancy or its expiry money is tendered by the tenant as rent, and not as statutory rent in discharge of his obligations, and is accepted as such, a fresh tenancy by holding over is created unless there is prohibition against the exercise of jurisdiction by courts in respect of the lessor's right to obtain possession.

13. The observations made in the above cases apply with full force to the facts of the present case and on the authority of the above rulings it must be held that a new tenancy in respect of the suit land did come into existence on the tender of money by the tenant and its acceptance as such by the landlord without any protest or reservation when there was no prohibition against exercise of jurisdiction by courts for decreeing suits for recovery of possession. As the tenancy so created being a lease without writing, it could be terminated by notice u/s 9 (1) of the 1949 Act and the plaintiff's suit in absence of such notice must fail.

14. I am not unmindful of the decisions in *Panchanan Ghose Vs. Haridas Banerjee*, where this court held that mere acceptance of rent did not operate as waiver of notice to quit and it was held that an agreement to treat the lease as continuing must be proved in addition. Again in *Bhabatosh Ghattak Vs. Sm. Joy Kumari Devi and Others*, a stricter test whether "quo animo the rent was received and what the real intention of the parties was" was applied, and it was observed that in such cases "ad idem" between the parties has to be established as basis of tender and acceptance of rent. This test even appears to be contrary to the express provision of Section 116 of the Transfer of Property Act and also to the decisions cited above. On the high authority of the Federal Court in *Kai Khushroo's case*, AIR 1949 FC 124 cited above, in effect approved in *Karnani Industrial Bank Limited Vs. The Province of Bengal and Others*, the real test is whether rent is tendered as rent by the tenant in possession after termination or expiry of tenancy, and not as statutory tenant in discharge of his obligations, and is accepted by the landlord as such rent, and if so a fresh tenancy by holding over is thereby created unless there is prohibition against the exercise of jurisdiction by court regarding landlord's right to possession.

15. As to the contention that the tenant had acquired a non-ejectable right in the suit land by 12 years' possession, it appears that u/s 90 of the 1949 Act, the

period during the pendency of the 1940 Act (April 15, 1940 to May 14, 1949) is to be excluded for the purposes of computation under provisions of Section 7 of the later Act. The appellate court held that the period available for calculation in favour of the tenant was less than 12 years and no material has been placed before me to upset the said finding.

16. In the view I have taken, it is not necessary to explore the question as to whether the plaintiff's interest in the suit land was that of intermediary and that such interest had vested in State, so that the plaintiff was not entitled to institute a suit for recovery of possession of tenanted lands.

17. In the premises, there being a tenancy between the parties in respect of the suit land, the plaintiff's claim for mesne profits also has no basis.

18. In the result the appeal succeeds and is allowed. The judgments and decrees of the courts below are set aside and the plaintiff's suit is dismissed. There will however be no order for costs in this court.