

(1971) 12 KL CK 0023

In the High Court Of Kerala

Case No : Civil Revision Petition No. 440 of 1971

P. Kochukrishna Pillai

APPELLANT

Vs

Achi Ammal Ammalu Ammal

RESPONDENT

Date of Decision : 14-12-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1
Transfer of Property Act, 1882 — Section 106

Citation : AIR 1972 Ker 257

Hon'ble Judges : E.K. Moidu, J

Bench : Single Bench

Advocate : P.H. Sankaranarayana Iyer, for the Appellant; M. Krishnan Nair, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Moidu, J.—The question that arises for decision in this revision petition is whether the sufficiency of a notice to quit which is shown to have been issued to a tenant in occupation of a building can be raised for the first time in appeal.

2. The petitioner was sought to be evicted out of a building which is in his occupation as tenant under the respondent on the ground that the petitioner kept the rent in arrears and that the respondent-landlord wanted the building for her bona fide occupation. These contentions of the respondent were repelled by the Rent Controller dismissing the respondent's application for eviction. But, in appeal, the Appellate Authority found that the ground for eviction due to arrears of rent was sustain-able and eviction was ordered. That order was also confirmed in revision by the Revisional Authority, which is the District Judge. Both the Appellate Authority as well as the Revisional Authority did not permit the revision petitioner to raise the contention in appeal that the quit notice Ext. P-1 was not sufficient as not in conformity with the provisions of Section 106 of the Transfer of Property Act Both the authorities held that the revision petitioner could not be permitted to raise for the first time in appeal the contention regarding

insufficiency of notice to quit. Hence this revision petition before this Court u/s 115 of the Code of Civil Procedure.

3. It is conceded that the petitioner received Ext. P-1, the notice issued by the respondent as condition precedent for eviction. Ext. P-1 was relied upon even by the petitioner in support of the rest of his contentions before the Rent Controller. Yet the petitioner failed to take up any contention either in the counter-statement which he filed before the Rent Controller or in support of his argument before him that Ext. P-1 notice is not sufficient to quit as not in conformity with the provisions of Section 106 of the Transfer of Property Act. It was only before the Appellate Authority for the first time the contention in this regard was raised. The learned counsel of the respondent argued that if he had notice of such a contention before the Rent Controller, he would have produced evidence regarding the sufficiency of notice or even a contract to the contrary consistent with the provisions of Section 106 of the T. P. Act. So the learned counsel argued that the petitioner having failed to take up a contention before the Rent Controller, he could not be permitted to raise such a contention for the first time before the Appellate Authority.

4. The Question that arises is whether the sufficiency of the notice which is shown to have been issued can be raised for the first time before the Appellate Authority. In *Krishna Prasad Singh Vs. Adyanath Ghatak and Another*, a Division Bench of that Court observed, dealing with an objection about notice to quit having been taken for the first time in appeal :

"This point has been raised for the first time in this court, and I gravely doubt whether an objection of this kind can be taken at this stage. In *Hanmantram Surajmal Marwadi v. Shankarlal Abaji Marwadi* 95 Ind Cas 573 it has been laid down that in a suit for possession and rent against the defendant as tenant the latter cannot for the first time in appeal be allowed to raise objection to sufficiency of notice to quit after having failed in the first Court on his plea of title."

In *Nazroo v. Lalman* AIR 1955 HP 44, the above Patna decision was followed. In that case the plaintiff made a reference to the service of notice and the defendant did not impugn the validity of the notice and therefore the court held that the objection as to the sufficiency thereof could not be raised for the first time in appeal. In *Sarada v. M. K. Kumaran* 1968 KLJ 839 Mr. Justice Krishnamoorthy Iyer considered an allied question. His Lordship observed:

"The third ground argued on behalf of the revision petitioners was that there was no valid termination of the lease u/s 106 of the Transfer of Property Act and, therefore, the petitions are not maintainable. The revision petitioners did not raise the contention based on Section 106 of the Transfer of Property Act either in their objections or before the rent control Court or the appellate authority The respondent produced along with the petitions the copies of the notices dated 5-10-1959 issued by his counsel to the revision petitioners for surrender of the

building There is no denial of the receipt of the notices by the revision petitioners Their counsel contends that notices do not satisfy the requirements of Section 106 of the Transfer of Property Act. The revision petitioner never contested the adequacy of the notices issued. The District Judge is, therefore, right in refusing to entertain the plea raised before him for the first time,"

It would also be relevant to refer to another Division Bench decision of this Court M.P. Sethurama Menon Vs. Thaiparambath Kunhukutty Amma's daughter, Meenakshi Amma and Others, . In that case also the validity of the notice to quit was not allowed to be raised in the High Court as a new point. However, in K. Narayanan Nair v. Kunhan Mannadiar AIR 1949 Mad 127 observations to the following effect were made :

"That statement was not a bare acknowledgment of any right of the plaintiff, but it was made contingent upon the plaintiff paying the Munpattom and Improvements in which event defendant I was prepared to give up occupation of the holding. Those sums were never paid. The statement, in my opinion, was no more than an offer which could have no effect save upon its acceptance by the plaintiff and his making the payment required."

The contention of the tenant to vacate possession if improvement value was paid to him was treated only as an offer in the above case and the offer, not having been accepted, it was held that the same could not be treated as a waiver of notice to quit. It was in that regard the Madras High Court made the above observation. It could also be seen from that ruling that absence of notice to quit and of termination of the tenancy by the Landlord went to the root of his claim for possession and so, even though it had not been raised either in the trial Court or in the lower appellate Court on in second appeal, being a question of law going to the root of the case, it could be raised for the first time in Letters Patent Appeal. It can be pointed out that in the above Madras case there was no allegation of notice having been issued, and so that was not a case where notice to quit had been given to the tenant and referred to in the plaint. But that was a case where the contest was raised for the first time in appeal about the sufficiency of the notice. The above Madras decision is more or less in the same line as the Mysore decision in Dvamappa v. Somappa AIR 1969 Mys 252. The relevant portion of the judgment of the Mysore High Court is seen at page 253. It runs as follows :

"In that case also a similar objection was allowed to be taken by this Court for the first time in revision. Since it goes to the very root of the maintainability of the petition for eviction as his very right to obtain possession depends on the termination of tenancy in accordance with law, and in the facts and circumstances of the case, it may not be just or proper to prevent the petitioner from urging this ground." In the decision reported in Muni Lal Vs. Nand Lal, it was held that the tenants cannot be allowed to raise the plea of non-service of a notice to quit before terminating tenancy, especially when it has been raised for

the first time in second appeal. Thai! decision further stated that the question as to waiver of notice to quit is a question of fact, and as such it cannot be allowed to be raised for the first time in second appeal. The observation in that case is at page 304 which reads:

"But notice being the requirement of a contract is a question of fact, required to be established by evidence. If by their conduct, the tenants have not given the landlord an opportunity to prove the fact of termination of tenancy, they cannot now, after the trial ended several years back be allowed to urge a plea for the first time The lands lord has been deprived of the opportunity to withdraw the petition at the earlier stage and to file another one after serving a notice to quit, if the tenants had urged this objection at the proper time and the landlord considered this plea to be of any force."

On this question there is yet another decision of the Delhi High Court in Batoo Mal Vs. Rameshwar Nath and Others, . The opinion in that Division Bench case was expressed in the following terms:--

"Compliance with Section 106, T. P. Act is not a jurisdictional condition nor does the inherent jurisdiction of a Court or the Rent Controller depend on the satisfaction of this condition. Therefore the failure of the tenant to raise the objection regarding the non-compliance with Section 106 of the T. P. Act at an early stage of the litigation would amount to a waiver of the plea by him. It would depend upon the facts and circumstances of each case when the conduct of the tenant would amount to such a waiver. The greater the delay on the part of the tenant in raising such a plea the greater the probability of his conduct amounting to waiver. The failure of the tenant to raise such a plea before the Controller would amount to a waiver off such a plea and, therefore, the plea cannot be raised for the first time in the first appeal much less in the second appeal."

I am in respectful agreement with the above observation.

5. In an unreported decision by Krishna Iyer, J. in S. A. No. 655 of 1970 of this Court a similar view was expressed. After considering the Madras decision referred to above Krishna Iyer, J. made the following observation:

"I may straightway state that that was a case where no averment of notice had been made, and not one where notics to quit had been given and referred to In the plaint and the only contest raised for the first time in appeal was about the sufficiency thereof. The first, perhaps, may be a question of law going to the root of the case, available to be raised for the first time even in second appeal -- I express no opinion about it -- but the second definitely is a mixed question of fact and law and cannot be permitted to be raised in appeal de novo. And on the other aspect it falls to be noticed that in the present case the plea of the tenant is not anything like a conditional offer but a willingness to treat the notice as ending the demise, pleading alongside that he be given some more time. There is. therefore, a basic difference between the present case and the one considered

in AIR 1949 Mad 127."

6. Taking into consideration the respective contentions of the parties in the case, I am of opinion that the petitioner should have taken the contention as to the insufficiency of notice u/s 106 of the T. P. Act at the earliest opportunity. The petitioner did not allege either in his counter or advanced any argument before the Rent Controller that Ext. P-1 notice is insufficient u/s 106 of the T. P. Act. Ordinarily a landlord suing or applying for eviction of a tenant is expected to plead that the contractual tenancy has been terminated. If the tenant does not take the plea that the suit or the application is untenable due to the non-termination of the contractual tenancy, it can be said that he is deemed to have admitted the allegation of the landlord to have waived the benefit of the protection u/s 106 of the T. P. Act. There is no case that the landlord's application to recover possession of the building could be dismissed for want of notice to quit. As a matter of fact, the landlord produced Ext. P-1 in support of his contention that notice had been issued and he called upon the tenant to quit the premises. It is then open to the tenant to take the plea that the application for eviction is untenable due to the insufficiency of notice. The tenant having failed to take such a plea before the Rent Controller, that would amount to waiver of such a plea, which being a pure question of fact or both a question of fact and law, the plea cannot be raised for the first time in appeal. The conclusion of both the Revisional Authority as well as the Appellate Authority is therefore correct. Hence no interference is called for.

In the result, the revision petition is dismissed with costs.