
(1976) 04 GAU CK 0009
In the Gauhati High Court

Pohumal T. Mardani

APPELLANT

Vs

Tushar Kanti Paul Choudhury

RESPONDENT

Date of Decision : 27-04-1976

Acts Referred:

Citation : AIR 1977 Guw 17

Hon'ble Judges : Baharul Islam, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Baharul Islam, J.—This appeal is directed against the judgment and decree passed by the Assistant District Judge No. 2, Gauhati in Title Appeal No. 1 (H) of 1972. The appeal is by the defendant, who lost in both the courts below, and arises out of a suit for eviction from house.

2. The material facts are as follows:

The appellant hired the first floor of the holding No. 95A (old)/107 (new) of Jail Road Ward of the Shillong Municipality, belonging to the plaintiff. The defendant took it on hire on payment of Rs. 200 per month payable within the first 10 days of the month of tenancy. The tenancy was created on the first day of February, 1967. The plaintiff was in great need of the holding and as such requested the defendant to vacate the premises, but in spite of requests as the defendant did not vacate these, he issued (Against judgment and decree passed by Asst. Dist. J. No. 2, Gauhati in Title Appeal No. 1 (H) of 1972, D/- 25-9-1972.) a pleader's notice dated 25-8-70 and requested the appellant to vacate the premises and deliver him vacant possession thereof with effect from 1-10-70, the tenancy having been terminated on. 30th September, 1970. The plaintiff further stated in the notice that with effect from 1st October, 1970 the defendant would be treated as a trespasser and he would be liable to pay compensation at the rate of Rs. 10 per day from 1st October, 1970 till the date on which vacant possession was delivered to the plaintiff. But, as in spite of the notice, the defendant did not

vacate the premises, the plaintiff filed the instant, suit for eviction of the defendant from and for delivery of khas possession of the premises. The plaintiff also claimed Rs. 420 as damages from 1-10-70 to 10-11-70 on which date the suit was filed.

3. The defendant filed a written statement. His material pleas were that the suit was barred by the principles of waiver, estoppel and acquiescence, that no legal notice was served on him, and that he was not in arrear of any rent. He also denied any bona fide requirement of the premises by the plaintiff.

4. After trial, both the courts below have concurrently held that the plaintiff bona fide needed the premises for his use and occupation and decreed the suit.

5. The first submission of Mr. A.M. Mazumdar, Learned Counsel appearing for the appellant is that Ext. A, which was the original agreement between the parties, was admissible and the learned lower appellate court committed an error in holding it to be inadmissible. The lower appellate court held it to be inadmissible as it was not registered. But a finding to the contrary won't help the appellant. So this submission need not be examined.

6. The only other submission which the appellant strenuously contends is that the tenancy still subsists and that: it has not been terminated by any notice. His submission is that the plaintiff, having accepted rents under Exts. D and E after the issue of the eviction notice has waived the notice of eviction and a fresh tenancy has been created. It appears that the defendant remitted to the plaintiff two amounts of money of Rs. 200, each, by Money Order, which were received by the plaintiff on 3-12-70 and 14-12-70 respectively as disclosed by the M. O. Acknowledgment Receipts Exts. "D" and "E". (The learned lower appellate Court committed a serious error in stating in his judgment that the first money order was received on 3-10-70. I have examined the M. O. receipt, Ext. D, which clearly shows that the amount was received by the landlord on 3-12-70 and not on 3-10-70). The plea of creation of a fresh tenancy was not taken in the written statement nor was the point urged in any of the courts below.

7. Tenancy is created by act of parties or by operation of law. In the instant case, the submission of the appellant is, a fresh tenancy has been created by the act of the parties, namely, that rents paid by the tenant were received by the landlord. But in order to create tenancy the acts of the parties must be voluntary and with the definite intention to create a fresh tenancy. In the instant case the tenant presumably remitted the amounts as rents with the intention of the creation of a fresh tenancy, but the landlord did not accept the sums as rent; he accepted the amounts "under protest" and rightly or wrongly as "compensation". The conduct of the plaintiff clearly shows that he had no intention to waive the notice terminating the tenancy on 30-9-70 and to create a fresh tenancy.

8. In support of his submission Learned Counsel has relied on a decision of the Privy Council reported in AIR 1920 PC 190, in which it was held:

The landlord by the receipt of rent after a breach of covenant has occurred, with knowledge of such breach shows a definite intention to treat the lease as subsisting even though he accepts it conditionally and without prejudice to his right to insist on a prior forfeiture and therefore irrevocably elects to treat the lease as subsisting and can no longer avoid it, on account of the breach of which he had knowledge.

That apart in the instant case, the landlord accepted the sum by signing Ext. E in the following terms:

Received under protest as compensation.

Similarly he accepted the other sum on 14-12-70 under Ext. D with the endorsement, "Received as compensation under protest".

9. In the result this appeal fails and is dismissed with costs.