

(1995) 05 PAT CK 0029

In the Patna High Court

Case No : Appeal from Original Decree No. 139 of 1994 (R)

Punjab and Sind Bank

APPELLANT

Vs

Hotel Rajhans and Others

RESPONDENT

Date of Decision : 25-05-1995

Acts Referred:

Citation : (1995) 05 PAT CK 0029

Final Decision : Allowed

Judgement

S.K. Chattopadhyaya, J.—This appeal is by the defendant-appellant against the judgment and decree dated 6.6.1994 (decree signed on 17. 6.1994) passed by the learned Subordinate Judge III, Jamshedpur in Title Suit No. 79/82, by reason of which the court below has decreed the suit against the appellant.

2. The facts of the case lie in a narrow compass. The plaintiffs-respondents filed the aforesaid suit for eviction of the defendant-tenant on the ground of default of monthly rent from January, 1980 up to the date of filing of the suit including the electric charges. The plaintiffs also claimed arrears of rent for the aforesaid period @ Rs. 3263/- per month and also electric charges as per meter reading, which have been detailed in Schedule B of the plaint According to the plaintiffs, cause of action for filing the suit arose from April, 1981. Other reliefs were also claimed by the plaintiffs.

3. The case of the plaintiffs in the plaint is that in or about April, 1974, being approached by the defendant, the plaintiff Nos. 2 to 6 agreed to let out nearly 2837 Carpet feet of area on the Southern portion of the ground floor of the building at the monthly rent of Rs. 3,263/- which would be payable according to the English Calendar Month. The defendant also agreed to pay Rs. 200/- per month for "Neon Sign Board" besides electric charges according to metre reading and other charges as per electric consumption bills.

Further case of the plaintiffs is that at the time of induction of the defendant as a tenant, who is a Bank, it was agreed that the Bank would sanction a loan to the

plaintiffs for finishing the construction of the Upper floor of the hotel building but ultimately the same amount was not advanced. However, some loan was advanced on the hypothecation of some second hand trucks, The Bank was very irregular in payment of the rents and electric charges which necessitated in sending a demand notice to it. Subsequently, the Bank closed the loan account and filed a Money Suit No. 8/80 against the plaintiff Nos. 2 to 6 for recovery of the loan amount of Rupees three lakhs and odd. It is the case of the plaintiffs that after the loan account was closed by the tenant-Bank, the plaintiffs wrote a letter to the Bank to close their Savings Bank Account and also intimated to send the monthly rent and electric charges directly to the plaintiffs. It was further directed that the said amount should not be deposited either in the loan account of the plaintiffs or in the Savings account, As, in spite of above intimation the defendant-Bank has neither paid the electric charges nor the monthly rent from January, 1980 till the date of filing of the suit, the plaintiffs were compelled to file the instant suit for eviction.

Further case of the plaintiffs that they do not like to keep the defendant any longer in the suit premises and by defaulting the Bank has made itself liable for eviction.

4. In its written statement, the tenant-Bank, besides the usual defence regarding maintainability of the suit, has come forward with a case that the plaintiff No. 1 is not its landlord inasmuch as the Bank is a tenant in respect of the suit premises under the plaintiff Nos. 2 to 6. Regarding creation of tenancy, the defendant has admitted the case of the plaintiffs. However, about payment of Rs. 200/- per month for Neon Sign Board, the case is that after few days of fixation of the Sign Glow Board, the labourers of the plaintiff Nos. 2 to 6 who were engaged for construction of their building, broke the aforesaid Sign Glow Board causing a loss of Rs. 3,000/- to the defendant. Though the plaintiffs promises to replace the said Board but the same has not been done and as such the defendant is entitled to realise the said amount from the plaintiffs. On this account, it is stated that as the Neon Sign Board was not in existence after it was broken down the question of payment of monthly charges for the same does not arise. About payment of electric and water charges in respect of the tenanted premises, the case of the defendant is that it was agreed upon that the plaintiffs shall submit monthly electric and water charges bills to the defendant and on such submission of bills, the payment shall be made accordingly. In spite of repeated requests and demands by the Bank the plaintiffs never submitted the bills as aforesaid since the month of January, 1977. Though the defendant was not under any obligation to pay the electric and water charges without submissions of the bills as agreed upon, but still then the defendant never refused to pay any bill in respect of the same whenever it was submitted.

The main defence as spelled out in the written statement is that on 17.5.1977 the plaintiff Nos. 2 to 6 applied to the defendant-Bank for grant of a loan to the extent of Rs. 2,58,000/- (two lakhs and fiftyeight thousand) and the defendant

on such request advanced as loan a sum of Rs. 2,57,312.32 (Rupees two lakhs fifty seven thousand three hundred twelve and thirty two paise) on 1.6.1977 in cash. For advancing such loan, an agreement was entered into between the parties and terms were to the effect that the said amount was to be repaid on demand with interest; the plaintiffs will go on repaying the said loan on monthly instalment of Rs. 3,000/- plus the monthly rent of Rs. 3,262/- would be adjusted toward the said loan account. In view of the said agreement. It is stated that the rent for the each month was being adjusted regularly month by month. However, the plaintiffs failed and neglected to pay the regular monthly instalment as per the agreement, as a result of which the huge sum had become due. When inspite of repeated requests the plaintiffs failed to clear the said amount, the defendant Bank had to file Money Suit No. 8/80 for recovery of the Bank's dues.

The averments of the plaintiffs that the Bank was intimated in writing to close their savings bank account and also to send the monthly rent and electric charges directly to the plaintiff, have been denied by the defendant. Regarding allegation of irregular payment the defendant has refuted the same by asserting that as the defendant was entitled to adjust the rent of the suit premises towards the satisfaction of the loan account till the entire loan amount is satisfied, the same being adjusted in view of the agreement and as such, the question of irregular payment and default does not and cannot arise.

5. On the basis of the aforesaid pleadings of the parties the learned court below framed the following issues :

1. Whether the suit is maintainable in its present form and for the reliefs claimed?
2. Whether the suit is bad for mis-joinder of parties and causes of action ?
3. Whether the suit is barred under the provisions of estoppel, waiver and acquiescence?
4. Whether the suit is barred under Indian Partnership Act ?
5. Whether the suit is barred under the provisions of Specific Relief Act and Indian Contract Act ?
6. Whether the suit is hit by the provisions of Bihar Building Act and whether the plaintiff no. 1 is a landlord and entitled to receive rent from the defendants ?
7. Whether any loan was advanced by the defendants to the plaintiffs No. 2 to 6?
8. Whether the defendant is entitled to the adjustment of rent of the suit premises towards the satisfaction of the loan account ?
9. Whether the plaintiff Nos. 2 to 6 are entitled to receive the rent of the suit premises before the entire loan is adjusted?
10. Whether the defendant is in arrears of any rent and/or electricity charges as claimed in the suit.

11. Whether the defendant is liable to be evicted from the suit premises ?

12. To what relief or reliefs the plaintiff is entitled to ?

6. After discussing the oral and documentary evidences, the court below has come to the following conclusion :

(a) That no adjustment of rent towards loan amount was made in each month as stipulated in the undertaking.

(b) The defendant is the defaulter within the meaning of Section 11(1)(d) of the Bihar Buildings Act and

(c) The plaintiffs are entitled to a decree for eviction of the defendant as well as arrears of rent etc.

7. Mr. P.K. Sinha, learned Counsel appearing on behalf of the defendant-appellant, vehemently criticised the judgment and decree of the court below on the ground that the court below has not given any weight to the agreement entered into between the plaintiffs and the defendant-Bank, which in unequivocal terms stipulates that the amount of loan advanced by the tenant-Bank to the plaintiffs-landlords will be repaid by two modes i.e. the plaintiffs would deposit a sum of Rs. 3,000/- per month with the Bank in its loan account and the monthly rent of Rs. 3,263/- will be adjusted. Secondly, it is urged that during the pendency of the eviction suit, the Money suit filed by the Bank was decreed on 30.11.1989 in favour of the Bank and admittedly the plaintiffs did not prefer any appeal against the said decree. He further submits that in view of the findings of the court below in the said Money suit which is between the same parties, the present suit is barred by the principles of res judicata.

8. Mr. Debi Prasad, learned Counsel appearing on behalf of the respondents-landlords, controverting the submissions of Mr. Sinha, submits that the alleged agreement said to have been arrived at between the parties cannot be said to be a valid agreement inasmuch as it is in a printed form. Advancing his argument. Mr. Prasad contends that the said loan was advanced not against the construction of the buildings but was given on hypothecation of three trucks and in such view of the matter the amount advanced as loan towards hypothecation of trucks cannot be adjustable against monthly rent of the suit premises. It is contended that there being no specific agreement regarding adjustment of the monthly rent from the advanced loan amount, the tenant cannot claim for an automatic adjustment. It is also urged by Mr. Prasad that even assuming there was an agreement as asserted by the defendant, but after the intimation In writing was given to the Bank to close the loan account and to send the aforesaid amount including the electric charges directly to the plaintiffs, which facts have not been specifically denied by the appellant even in absence of any documentary evidence to that effect, it should be presumed that such written instruction was received by the Bank.

9. In order to appreciate the contention raised by the learned Counsel for the

parties, let me examine the relevant documentary evidences on record. Ext. B dated 1.6.1977 is a printed form of agreement, by reason of which the plaintiffs agreed to pay the loan amount by giving Rs. 3,000/- per month regularly to the credit of the account in addition to monthly rent of Rs. 3,262/- to be adjusted by the Bank. This document is a crucial one. It is necessary to refer to the said agreement which is in following language :

The Manager,

The Punjab & Sind Bank Ltd.

Jamshedpur.

Dear Sir,

With reference to my/our loanaccount, I/we beg to assure you that I/we shall adjust it shortly I/we shall at any rate pay Rs. 3,000/- P.M. regularly to the credit of the account. In addition to monthly rent of Rs. 3,262/- to be . adjusted by you.

The above of course is without prejudice to the Bank's right to demand adjustment at any time whensoever it pleases.

Yours faithfully.

It is not in dispute that the above agreement was signed by all the plaintiffs.

In relation to the aforesaid agreement, it is necessary to refer the letter of request by which the plaintiff asked for the above loan amount. By this letter, the plaintiffs agreed to repay the amount to the Bank @ Rs. 3,600/- every month and the rent of Rs. 3,262/-payable by the Bank to the plaintiffs was to be adjusted against the loan. According to this letter, some trucks were hypothicated as security for the loan. This document was marked "X" for identification with objection.

10. The decree passed in the said Money Suit is Ext. D is in respect of the amount with interest. However, the said decree excludes Rs. 3,262/- per month, the rent payable by the Bank to the plaintiffs. A certified copy of the judgment dated 23rd November, 1989 passed in aforesaid Money Suit No. 8/37 of 1980-89 is on the record. This certified copy of the judgment was filed before the lower court on behalf of the plaintiffs. The certified copy of the judgment being a public document, is undisputedly admissible into evidence without any formal proof.

From a bare perusal of the aforesaid judgment it appears that the learned court below after considering the effect of legal documents on record, has come to a finding that the defendant Nos. 1 to 5 in that suit (i.e. plaintiff nos. 2 to 6 in the present suit) had taken a loan from the Bank of Rs. two lakhs and odd on 1.6.1977 for which the landlords applied on 17.5.1977 for carrying on the business of their hotel named as "M/s Hotel Raj Hans" at Bistupur. It was also found by the court below that a sum of Rs. 3,000/- was to be paid as monthly instalment as well as another sum of Rs. 3,262/- being the monthly rent of Bank

building owned by the defendants of that suit (plaintiffs in the present suit was to be adjusted against the said monthly instalment. The defendant No. 6 in the said suit was a guarantor for such payment of loan. Hypothication of four trucks and one bus by way of security was also made by the landlords. Ledger of the Savings Bank accounts in its certified form was exhibited in the said Money Suit as Ext. 4/A. Above all some ledgers of the loan accounts in certified form have been annexed as Annexure 2 series and Ext. 3 . in the present suit also.

11. From a perusal of the aforesaid Bank ledgers, it appears that the loan was being adjusted by the Bank on the basis of the aforesaid agreement. Rent for January, 1991 also credited in the said loan account of the plaintiffs. It is now well settled that Bank ledgers are sufficient to prove the loan transaction between the Bank and its customers. Reference in this connection may be made to the decision reported in State Bank of India Vs. Yumnam Gouramani Singh, .

The Money Suit was filed on 21.3.1980 and judgment was delivered on 23.11.1989. Ext. C. is another Bank ledger which indicates that pursuant to the decree in the said Money Suit the decretal amount was debited on 16.2.1994 and monthly rent was also deposited as directed by the court up to February, 1994. The monthly rent of Rs. 3262/- was credited in the account of the plaintiffs.

12. In the aforesaid premises, the argument of Mr. Prasad that when the plaintiffs gave instruction in writing to the Bank for not crediting the monthly rent in his Savings Bank Account rather to send it directly to them is to be considered. It is not in controversy that though the plaintiffs have stated in their plaint that a written instruction was given to the Bank to this effect, no documentary evidence has been adduced before the court. It is true that no specific denial of this averment has been made in the written statement but in my view, it is a settled principle of law that the plaintiffs case must stand or fall on its own pleadings and weakness in the defence case, is of no consequences.

Moreover coupled with the findings of the learned court below in the aforesaid Money Suit and the several documents exhibited in the instant suit, it is amply clear that there was a specific agreement between the parties to the effect that the monthly rent of Rs. 3262/- will be adjusted towards the loan amount and Rs. 3,000/- per month will be paid by the plaintiffs to the Bank against the advanced loan. The findings in Money Suit having not being challenged in appeal by the plaintiffs, in my view the same will operate as *res judicata*. The respondents cannot be allowed to take different stand in the present case from that taken in the Money Suit.

13. Next submission of Mr. Prasad is that there is no previous agreement for adjustment of rent from the loan amount, and is such there cannot be a question of automatic adjustment.

In support of his contention he has strongly relied upon a decision in the case of Gulab Chand Prasad Vs. Budhwanti and Another, and in Patny & Company Pvt. Ltd. v. Dundoo Bala krishnamoorthy and Ors. reported in : (1994)4SCC734 .

In the case of Gulab Chand Prasad (supra) the Full Bench has, inter alia, held that in absence of any specific provision in the Act itself providing for automatic adjustment of excess rent paid against the monthly rent itself, no question of such an adjustment against the rent due could arise in favour of the defaulter under the Act nor could such a defaulter seek such a relief or a double protection of invoking the provisions of another law. However, the said decision has been considered by the Supreme Court in the case of Sarwan Kumar Onkar Nath Vs. Subhas Kumar Agarwalla, . This was also a case under the Bihar Buildings (Lease, Rent and Eviction) Control Act. Their Lordships in the said decision after noticing several decisions has held that a tenant could not be evicted on the ground of default in payment of rent for two months even if the tenant failed to ask the landlord to make adjustment of the advance amount in absence of any agreement requiring the tenant to inform the landlord as to when such adjustment to be made. The fact of the case was that the appellant took on lease a room on a monthly rent of Rs. 70/- and paid in advance two month's rent. The appellant paid rents regularly but did not pay the rent for the two months in 1972. Taking advantage of the non-payment of the rent in respect of the said two months the landlord filed a petition for eviction against the appellant on the ground of default. In his written statement the appellant-tenant pleaded, inter alia, that at the time of the inception of the tenancy an advance of Rs. 140/- was paid to the landlord with an understanding that the amount of advance could be set off against the rent whenever necessary or required and as such the appellant could not be considered as a defaulter of payment of rent. The trial court accepted the contention of the appellant and dismissed the eviction suit and the appeal filed by the plaintiff-landlord was also dismissed. However, in Second Appeal the High Court found that the appellant had failed to pay the rent for the months of September and October, 1972, although it accepted the plea of the tenant that an advance sum of Rs. 140/- was paid but held the appellant a defaulter on the ground that the appellant had not requested the respondent to adjust the rent which he had paid in advance towards the rent due for the months of September and October, 1972. While setting aside the Judgment of the High Court, the Apex Court held as follows :

It is unfortunate that the High Court has approached the entire case in a technical fashion. It is not disputed that the respondent was not entitled to receive more than one month's rent by way of advance Yet, the respondent had received in advance the rent for two months. The receipt under which the said advance, was received does not state that the amount received was liable to be adjusted towards the arrears of rent only on the appellant informing the respondent orally or in writing that such adjustment is to be made. In the written statement, however, the appellant pleaded that the amount paid by way of advance could be set off by way of rent whenever necessary or required. This is not a case where there was any agreement to the effect that such adjustment could be made only on the tenant asking the Landlord to make such adjustment. Nor is this a case where the tenant was liable to the Landlord on any other

account. The only transaction between them was the lease in question and the amount in question had been paid as rent in advance. There was also no agreement that the amount was liable to be adjusted at the termination of the lease. It was, therefore, open to respondent to appropriate the said sum towards the arrears even without any option being exercised as regards such adjustment by the appellant. The High Court erred in observing that the appellant had not asserted in its written statement that it may be allowed to adjust the advance amount towards the rent due for the months of September and October, 1972. In substance the plea set of in para 9 of the written statement amounts to such an assertion. In any case the appellant could not be treated as a defaulter who had failed to pay rent for two months. The High Court was also wrong in coming to the conclusion that the appellant could not rely on the provisions of Section 3 of the Act on the ground that if the parties were in *pari delicto* the court would not come to the rescue of either.

The case of Gulab Chand Prasad was relied by the respondent before their Lordships and their Lordships observed that; "the decree for eviction passed by the High Court of Patna in the above case has no doubt been affirmed by this Court in "Budhwanti v. Gulab Chand Prasad. But, this Court affirmed the judgment of the High Court not on the ground . that the tenant in that case was a defaulter in payment of rent but on the ground that the landlord required the premises for his bona fide use and occupation." The correctness of the observation made by the Full Bench of this Court on the question of default and the right of the tenant to claim adjustment was not considered by their Lordships of the Supreme Court.

In the case of Bhoja alias Bhoja Ram Gupta Vs. Rameshwar Agarwala and others, again the Supreme Court has held that a tenant cannot save himself from the consequences of eviction under the Act on the ground of default in the payment of rent by claiming automatic adjustment of any excess rent paid consequent upon mutual enhancement of rent, even if illegal unless there is an agreement between the parties for such an adjustment. Continuing it is held that the tenant may also in a given case seek adjustment of the excess rent in the hands of the landlord against the arrears by specifically asking the landlord for such an adjustment before filing of the suit or in response to the notice to quit and even in the written statement by way of set-off within the period of limitation and by following the procedure for claiming such a set-off, while resisting the claim for eviction on the ground of default in payment of arrears of rent but . he cannot claim "automatic adjustment".

14. In the light of the aforesaid enunciation the matter herein be examined. The learned court below, in my opinion, has committed an error of law by coming to the conclusion that the appellant was not entitled for adjustment. In arriving at the aforesaid decision, the court below has taken into consideration the mere submission in the plaint that the respondents though initially had given an undertaking to the Bank to adjust the rent towards the loan amount but

subsequently directed the Bank not to adjust the same. I have already discussed above that except the said statement nothing has been brought on record to show that such request was made to the Bank. Moreover, it is specific case of the plaintiffs that the instruction was given on writing. On the other hand, the court below has refused to give any importance to Ext. B, which is the document, by which under-taking was given to the Bank for adjusting the monthly rent of Rs. 3262/- from the loan account. In the case of State Bank of India v. Y.G. Singh reported in 1994 SC 1644, their Lordships have held that such document is admissible in evidence in Bank transaction.

15. Another relevant factor to be considered is the conduct of the landlord-respondent. It is not disputed that they had taken loan and had given an undertaking but subsequently they did not deposit the sum of Rs. 3,000/- towards the loan account, as a result of which Money Suit was filed by the Bank. The said Money Suit was decreed on contest against which no appeal was preferred. Moreover, the statement made in paragraph 11 of the plaint is a clear indication of the fact that the plaintiffs did not like to keep the defendant any longer in the suit premises. The present suit was filed during pendency of the said Money Suit which also suggests that the respondents having taken a loan did not want to re-pay the same and file the eviction suit as a counter blast of the said Money Suit. After decree of the money suit the Bank complied with the decree by depositing the monthly rent in the loan account of the plaintiffs which fact also proves that the Bank was not a wilful defaulter.

16. In the case of Gowali Charan v. Surendra Kumar reported in 1988 PLJR 37 (S.C .), the Apex Court has held that to make a tenant defaulter, wilful default has to be established. Similarly in the case of Rashik Lal and Others Vs. Shah Gokuldas, where accumulated rent received by the landlord without any protest or objection, the Supreme Court has held that the tenant cannot be held to be a defaulter and crucial test is the conduct of the landlord.

17. No other point has been canvassed on behalf of the respondents. Having scrutinised the evidence on record, I am of the view that the appellant cannot be held to be a defaulter and as such the learned court below has committed an illegality in decreeing the suit for eviction on that ground.

18. In the result, this appeal is allowed and the judgment and decree passed by the court below is hereby set aside. However, there will be no order as to costs.