
(1972) 01 DEL CK 0034

In the Delhi High Court

Case No : Second Appeal No. 425 of 1968

Ram Pratap

APPELLANT

Vs

The Birla Cotton Spinning and Weavingmills Ltd., Delhi

RESPONDENT

Date of Decision : 14-01-1972

Acts Referred:

Citation : AIR 1973 Delhi 124 : (1972) 8 DLT 351 : (1972) RLR 37

Hon'ble Judges : Prithvi Raj, J

Bench : Single Bench

Advocate : B.S. Grewal and Ravinder Sethi, for the Appellant;

Judgement

Prithvi Raj, J.

(1) This second appeal from order is directed against the order dated 7th June, 1968, passed by the Rent Control Tribunal whereby the Tribunal set aside the order of the Rent Controller. Delhi, dated the 10th November, 1967. and remanded the case to the Bent Controller for decision on merits.

(2) The only question for determination in this appeals as to whether it is open to the appellant to raise the question of lack of notice u/s 106 of Transfer of Property Act after a long lapse of 4 years after the parties had proceeded to trial and led evidence on merits of the case.

(3) With a view to appreciate the contentions raised by the learned counsel for the parties it would bs expedient to record a few facts of the case. The respondents who are the owners of the kothi in dispute situated in Khilonewala Bagh near Rana Partap Bagh, filed an application u/s 22 of the Delhi Rent Control Act, 1958, (hereinafter referred to as "the Act") for eviction of the appellant who is a tenant under the respondents in respect of the said premises on various grounds such as, that the appellant was given the premises for use as residence alone but he is also using it for commercial purposes; that he is running business in the said premises in the name and style of "Bishnoi Finance Private Ltd,", that he is using the front portion of the premises for keeping buffaloes and for sale of

milk etc. and that the said uses are in contravention of the terms under which he was authorised to occupy the premises; that he has made unauthorised constructions and has put up a fence and also has constructed a buffaloe shed on the adjoining land not rented out to him and that he has occupied two out houses in an unauthorised manner.

(4) In para 13-B of the petition the landlord is required to state whether notice required has been given and, if so, particulars thereof and copies of such notice along with tenant's reply, if any, is also to be furnished. In the said para the respondents stated that no notice was required. The appellant resisted the petition controverting the allegations of the respondents and in particular in reply to para 13-B of the petition stated "no notice is given. But notice of such grounds is essential."

(5) Here it may be stated that the petition for ejectment was filed on the 12th December 1963, and reply to the petition was filed on 16th January, 1964. Replication to the reply filed by the appellant, was filed by the respondents-landlords on the 3rd February, 1964. and the parties thereafter led evidence. The respondents-landlords examined seven witnesses and there learned counsel closed the case on their behalf on the 3rd June, 1966. The appellant examined seven witnesses in addition to getting his own statement recorded and closed his case on the 2nd September, 1967. As already stated above, petition for ejectment was filed on the 12th December, 1963 and the appellant-defendant closed his case on the 2nd September, 1967. In other words, it took nearly about four years for the parties to complete the evidence.

(6) The appellant on the 18th September, 1957, moved an application under order 6 Rule 17 read with section 151, CPC , seeking permission for altering and/or amending reply given by him to para 18-B of the petition and wanted to substitute the same by the following reply:-

"IT is wrong and denied that no notice is necessary. The tenancy has not been terminated according to law and no notice of such termination has been given by the petitioner and not even alleged. The provisions of the Transfer Property Act have been extended to the Union territory of Delhi w. e. f. 26th December, 1962, and Therefore the present petition is not competent and the petition merits dismissal and the respondent is not liable to eviction inter alias for this reason."

(7) The appellant's request for proposed amendment was rejected by the Rent Controller vide his orders dated the 21st September, 1967, on the ground that the plea sought to be raised in regard to notice had already been taken by him in para 18-B of the written statement and that it would be open to the appellant to address arguments on the point during the course of arguments in the case.

(8) Subsequently the respondents tiled an application under order 6 Rule 17 read with section 151, C.P C. seeking permission to amend para 18-B of the petition stating the at the time of arguments the appellant had taken up the plea that the application was not maintainable for want of notice for terminating the tenancy.

It was further stated that assuming, though not conceding, that such a notice was required, no such plea was raised by the appellant during the entire course of proceedings and that a notice required u/s 111(h) read with section 106 of the Transfer of Property Act can be waived and since the appellant had kept quiet about the service of the said notice for about four years, the appellant will be deemed to have waived the said plea and that the said objection was not open to him. It was further contended that since the appellant raised the objection relating to non-service of notice only at the time of arguments the respondents were not able to take up the plea of waiver specifically in its pleadings and the respondents sought permission to raise the said plea by amending para 18-B of the petition accordingly.

(9) The above application of the respondent was rejected by the Rent Controller vide his order dated 9th November, 1967, on the ground that the appellants request for amendment of the written statement had already been rejected and secondly, for the reason that the amendment sought by the respondents, even if allowed, would not help the respondents as it was a part of the cause of action to be stated by the landlords respondents in its petition that a notice u/s 106 of the Transfer of Property Act was given to the tenant before instituting the ejectment proceedings and that if the landlords failed to make the aforesaid averment in the ejectment petition, it was liable to be rejected under Order 7 Rule 11, C.P. C., and the question of waiver, Therefore, would not arise in such a case.

(10) The Rent Controller vide his order dated the 10th November, 1967, rejected the petitioner under Order 7 Rule 11, C. P. C. on the ground that no notice u/s 106 of the Transfer of Property Act was given by the respondents. Feeling aggrieved, the respondents filed appeal before the Rent Control Tribunal who set aside the order of the Rent Controller on the ground that the plea of want of notice as required u/s 106 of the Transfer of Property Act had not been taken up by the appellant at the appropriate stage and the same could not be urged in arguments after four years of institution of the case. The Rent Control Tribunal further held that the respondents in its application had stated that no notice was necessary to be given to the appellant and the appellant did not set up a plea of non-maintainability of the petition for his eviction on the ground of want of notice terminating the tenancy u/s 106 of the Transfer of Property Act and the appellant having not taken up the plea of requirement of service of reasonable notice terminating the tenancy in the written statement, was deemed to have waived it. In the result, the Rent Control Tribunal remanded the case to the Rent Controller under Order 41 Rule 23, C. P. C. for decision on merits.

(11) Mr. Balbir Singh, the learned counsel appearing for the appellant, vehemently contended that the appellant had taken up the plea of want of notice u/s 106 of the Transfer of Property Act in the written statement in para 18-B. Not only this, the learned counsel submitted, the appellant even moved an application under Order 6 Rule 17, C. P. C. seeking permission to amend the written statement which application was not allowed by the Rent Controller on

the ground that the plea having already been taken, it was open to the appellant to argue the same during the course of arguments. The learned counsel, Therefore, submitted that taking into consideration the record of the case, it was wrong on the part of the Rent Control Tribunal to hold that the plea was waived by the appellant.

(12) The learned counsel for the appellant in support of his above contention that notice u/s 106 of the Transfer of Property Act was required to be given before the petition could be filed relied upon *Rajendranath Mookhopadhyaya v. Bassider Ruhna Khandkhar*. In that case the plaintiff-respondent was the tenant under the appellant landlord who without giving any notice to the respondent put in a fresh tenant on the land. The respondent brought the suit to recover possession. The suit was resisted on the ground that the respondent had relinquished his tenure. On the facts of the case, it was observed that the tenant was a tenant from year to year and the appellant landlord could not recover possession without determining the tenancy by proper notice, and the contention that the institution of the suit itself was a sufficient demand of possession, was repelled. This authority is of no help to the appellant as the point for consideration is whether the appellant had waived the plea of want of notice or not.

(13) The learned counsel for the appellant next relied upon the decision of a Division Bench of this Court in *Batto Mal v. Rameshwar Nath*, in which it was observed that it was necessary to terminate a contractual tenancy before the landlord could proceed to evict the tenant under the Rent Control Legislation. But the point in the instant appeal is whether the plea of want of notice had been waived by the appellant or not. It may be stated here that in *Batto Mal*'s case (*supra*) the Bench also observed that the requirement of section 106 of the Transfer of Property Act was not mandatory and that if the conduct of the tenant in not insisting upon the notice had been acted upon by the landlord, then the landlord would be altering his position by relying upon the conduct of the tenant and the tenant would be estopped at a later stage from resiling from his conduct and raising the objection of want of notice to the suit of the landlord. It was further observed in the said case that ordinarily a landlord suing or applying for the eviction of a tenant must plead that the contractual tenancy had been terminated, but the failure to make such a pleading would not ordinarily amount to non-disclosure of the cause of action itself and that the failure of the tenant to raise the objection regarding non-compliance with section 106 of the Transfer of Property Act at an early stage of the litigation would amount to a waiver of the plea by him. I would advert to this aspect of the matter at a subsequent stage of this judgment.

(14) The learned counsel for the appellant next cited *Boota Ram v. Balmukand* in which S.N. Shankar, J., observed at page 109, waiver is a deliberate and conscious act as distinguished from estoppel which may be created by law. Whether the objection has been waived or not in a given case is a question which has to be decided on the direct as well as circumstantial evidence on the record.

The fact that Boota Ram sought to get his written statement amended to incorporate this plea specifically is an indication to the contrary and shows that he did not waive this plea at the stage of trial. It is, Therefore, not possible to sustain the submission of Shri Gupta that Boota Ram had waived the plea of notice". The learned counsel, Therefore, contended that since the appellant had specifically sought permission to amend the written statement, it indicated that he had not waived the plea of want of notice; on the contrary the appellant had raised this plea in para 18-B of the written statement.

(15) It may be stated here that the notice u/s 105 of the Transfer of Property Act is only required to be given in case of a contractual tenancy while no such notice has to be given in case of a statutory tenancy. The appellant in his written statement has nowhere taken the plea that the tenancy was a contractual tenancy. If it is so, no notice was required to be given u/s 106 of the Transfer of Property Act terminating the tenancy. See *Bhaiya Ram v. Muhavir Parshad*.

(16) As already noted in an earlier part of this judgment the petition was filed on the 12th December, 1963 and the written statement was filed on the 16th January, 1964. The landlords respondents had clearly mentioned in para 18-B of the petition that no notice was required to be given. The appellant did not take up the plea that the tenancy was a contractual tenancy and that the same was not terminated by the respondents by a proper notice. Not only this, the parties proceeded to trial and produced evidence in support of their respective contentions. It was only after the evidence had been closed by the parties that the appellant filed application under Order 6 Rule 17, CPC seeking permission to amend para 18-B of the written statement to raise the plea of want of notice u/s 106 of the Transfer of Property Act. That being so it has to be held that the conduct of the appellant in not insisting upon notice u/s 105 of the Transfer of Property Act was acted upon by the landlords who altered their position by relying upon the conduct of the appellant in not seeking permission of the Court at an early stage to amend the petition by pin pointedly asserting that although no notice was required to be given u/s 106 of the Transfer of Property Act yet such a plea, if it was at all open to the appellant, had been waived by him. The appellant having allowed the lime to pass and contested the petition for four years is estopped at a late stage from resiling from his conduct by raising the objection that notice u/s 106 of the Transfer of Property Act had not been served. Since the appellant had failed to raise this objection at an early stage of the litigation, the Rent Control Tribunal was justified in concluding that the plea of want of notice had been waived by the appellant.

(17) It is pertinent here to note that the appellant while appearing as his own witness did not take up the plea that his tenancy was a contractual one and the same had not been terminated by a notice u/s 106 of the Transfer of Property Act. It is, Therefore, evident that the appellant had waived the plea of want of notice deliberately and consciously not only at an early stage of the case but even at the time when he appeared as his own witness in August, 1967, i.e.,

after about 3" years of the filing of the petition. This silence on the pan of the appellant not to take up the plea of want of notice even in his statement is by itself sufficient to hold that in a way he held out to the respondents that the appellant had waived the plea of want of notice as was observed by a Bench of this Court in Batto Mal's case (supra) that the failure of the tenant to raise the objection regarding non-compliance with section 106 of the Transfer of Property Act at an early stage of the litigation would amount to a waiver of the plea by him. Besides, it would be inequitable to allow the appellant to raise the plea, which he had already waived, at a late stage of the case after four years as in case if the appellant had raised this plea at an early stage of the case in 1963 when the petition was filed, the respondents might have chosen to withdraw the petition and serve a proper notice on the appellant but the appellant having persuaded the landlord to believe that the plea of lack of notice had been waived by him, cannot suddenly turn round and raise this plea at a late stage of the case.

(18) For the reasons stated above there is no force in this appeal and the same is dismissed but in the circumstances of the case, with no order as to costs.