

(1988) 08 PAT CK 0015

In the Patna High Court

Case No : Civil Revision No. 260 of 1987 (R) and A.F.A.D. No's. 61 and 62 of 1987 (R)

Ram Tahal Modi

APPELLANT

Vs

Ratan Lal
 K. Diwakaran and Another Vs Durga
Prasanna Choudhary and Others

RESPONDENT

Date of Decision : 02-08-1988

Acts Referred:

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 — Section 11(1), 19, 2, 20, 20(1)
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 6 Rule 17, 100, 101
Contract Act, 1872 — Section 10, 2
Transfer of Property Act, 1882 — Section 109, 52, 54, 55, 8

Citation : AIR 1989 Patna 13 : (1988) PLJR 950

Hon'ble Judges : Uday Sinha, J; Satyeshwar Roy, J

Bench : Division Bench

Advocate : Debi Prasad, S.N. Lal, P.K. Bhoumik and Ashok Kumar Sinha, for the Appellant; N.K. Prasad, P.K. Prasad and M. Sahu, for the Respondent

Judgement

Satyeshwar Roy, J.—In both the second appeals and the civil revision application one identical question is involved. In the second appeals other questions are also involved. In view of the fact that identical question involved in all these cases is very crucial, those were heard together and are being disposed of by this judgment.

2. This civil revision application arises out of an order passed by the Court below on an application filed under Order 6, Rule 17 of the Civil P.C. (the Code for short) by which it allowed the amendment of the plaint at the instance of the transferee of the suit property from the original plaintiff.

In the plaint it was stated by Akhouri Bajrang Sahay (Sahay for short), the original plaintiff, that Ram Tahal Modi (Modi for short) was defaulter in payment of rent and Modi, therefore, was liable to be evicted from the building. Eviction on the ground of personal necessity was also prayed. Sahay transferred the suit

property to opposite party, Ratanlal during the pendency of the suit.

Sahay thereafter died His name was deleted. Ratan Lal in his application for amendment of the plaint, inter alia, stated that Sahay had transferred the suit property along with arrears of rent to him. He asserted that he was entitled to prosecute the suit for a decree on the ground of default in payment of rent by Modi which occurred when Sahay was the owner and landlord and also on the ground of personal necessity. Decree for arrear rent was also prayed. The prayer was allowed by the Court below.

3. The matter came up for admission on 3-8-1987 before a learned single Judge. The point canvassed was whether a transferee pendente lite may pray for a decree for eviction on the ground of a default in payment of rent alleged to have been committed by the tenant before the property was transferred. It was noticed that there were two conflicting decisions of this Court on this point, namely, Nand Gopal Prasad v. Most. Prem Lata Devi 1985 Pat LJR 923 and Bibi Saboo v. Bibi Jaibusissa 1986 Pat LJR 1042 both rendered by P.S. Mishra, J. In Nand Gopal it was held that the transferee can pray for eviction of a tenant on, the ground of default in payment of rent when the property belonged to the transferor. In Bibi Saboo it was held that the transferee cannot take advantage of such default. In Bibi Saboo the case of Nand Gopal was not noticed.

In view of these conflicting decisions, the learned single Judge (S. B. Sinha, J.) in his order dt. 3-8-1987 observed that the matter should be heard by a Division Bench. In this case we are concerned with that part of the order by which the Court below allowed Ratan Lal to prosecute the suit for eviction of Modi on the ground of default in paying the rent alleged to have been committed long before the property in suit was transferred to Ratan Lal by a registered instrument dt. 29-3-1986 and also the amendment in the relief portion by which the prayer of Ratan Lal for a decree of arrears of rent was allowed.

It may be noticed that in the sale deed arrear rent was not specifically assigned by Sahay to Ratan Lal.

4. The two second appeals were listed for admission before one of us (S. Roy, J.) on 7-8-1987. One of the substantial questions of law involved in both the appeals was: whether the transferee landlord could take advantage of the default in payment of rent alleged to have been committed by the tenant prior to transfer of the property. The order passed in the civil revision application was noticed and it was ordered that both the second appeals should be heard by a Division Bench. This is the reason why the civil revision application and the two second appeals were listed for hearing before a Division Bench.

5. So far the two second appeals are concerned, Durga Prasanna Choudhary (Choudhary for short) filed title suit No. 60 of 1983 and title suit No. 59 of 1983 for eviction of K. Diwakaran (appellant in S.A. No. 61 of 1987/R) and H.S. Mazumdar (appellant in S.A. No. 62 of 1987/R) respectively from two tenanted buildings. The grounds on which decree for eviction was prayed by Choudhary

were that both the tenants-appellants defaulted in paying the rent from Jan. 1983 they had committed breach of the terms of tenancy and Choudhary required the suit property for his own use and occupation.

In March, 1985, Choudhary transferred the suit property to Raj Kumar Gupta and Ranjeet Lal, respondents herein, and they were added as plaintiffs in both the suits. The trial Court disbelieved the case of personal necessity and also the case of breach of terms of tenancy. It, however, decreed both the suits on the ground that Diwakaran and Mazumdar had defaulted in payment of rent as alleged by Choudhary. The lower appellate Court confirmed the findings. The tenants have preferred these second appeals.

6. The common question which arises in all the three cases is :

a) Whether the transferees pendente lite can take advantage of the default in paying the rent alleged to have been committed by the tenants while the owner and the landlord was the transferor who had filed the suits.?

The other question which arises in the Civil revision application is :

b) In absence of any recital in the sale deed that Sahay transferred the arrear rent also to Ratan Lal, whether the latter's prayer for amendment of relief for a decree for arrear rent could have been allowed.

The other substantial questions which are common to these appeals are :

c) Whether tender of rent is a pre-condition for remittance of rent by money order?

d) Whether any condition which is mentioned on the rent receipt, can form stipulation for the agreement between the lessor and the lessee.

7. Question No. (b) : Although under the Transfer of Property Act (the T.P. Act), the transferee acquires all the rights of his transferor, in view of the proviso to Section 109 of the T.P. Act the transferee ipso facto is not entitled to arrears of rent accrued before the transfer. Section 8 of the T.P. Act provides that on transfer, the transferee is entitled to the rents and profits thereof accruing after the transfer. Similar is the position u/s 55 of the T.P. Act, In law, a transferee cannot claim that as the corpus has been transferred to him, the rent accrued prior to the transfer shall also be deemed to have been transferred. If the arrear of rent accruing prior to the transfer is claimed by the transferee, he must show that that has also been specifically assigned. Reference may be made to Rameshwar Narain v. Rekhanath Koeri, A1R 1923 Pat 165 and Sheo Gobind Singh Vs. Gouri Prasad and Others, . It has not been shown in the civil revision application that Sahay assigned the arrear rent to Ratan Lal. That being the position, this question must be answered in the negative.

8. Question No. (a) : This is common to all the cases. It will be noticed from the facts stated hereinabove that in all these cases, the property in suits were transferred by the Original plaintiffs during the pendency of the suits to different

persons and the transferees were added as plaintiffs in the suits. All the suits were filed by the original plaintiffs for eviction of the tenants from building (the suit property) on various grounds. But we are concerned in all these cases with the ground of default, i.e. Section 11(1)(d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 (the Rent Act).

Admittedly, according to the original as well as the added plaintiffs, the alleged default in payment of rent was committed by the tenants long before the suit properties were transferred by the original plaintiffs to the added plaintiffs. In none of the sale deeds, the rent which was in arrear was assigned on transferred to the added plaintiffs.

9. u/s 8 of the T.P. Act, unless a different intension is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof which includes, inter alia, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer. u/s 54 of the T.P. Act, "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

10. There is no dispute in these cases that the original plaintiffs were the owners of the suit properties and they were landlords in relation to the defendants-tenants. There is also no dispute that the original plaintiffs transferred their interest in the suit properties to the added plaintiffs during the pendency of the suits and the added plaintiffs became the owners-land lords in relation to defendants with regard to the suit properties.

In terms of Section 109 of the T.P. Act, the transferees-plaintiffs came to possess all the rights of the transferors-lessors with regard to the suit properties. Under the general law the transferees in all these cases, the tenants being tenants month to month, could have immediately after the purchase, terminated the tenancy and filed suit for eviction. Under the general law again, they as owners of the properties could have prosecuted suit filed by the transferor on the basis of title. But in these cases, the transferees can obtain decree for eviction of the tenants only if at least one of the grounds mentioned in Section 11(1) of the Rent Act is proved.

11. It was contended on behalf of the tenants that as no rent lawfully payable by the tenants was due from them to the transferees, no decree in favour of the transferees could have been passed by the Courts below. It was urged on behalf of the landlords that since they by transfer acquired interest of the erstwhile landlords they can take advantage of the default committed by the tenants before the suit properties were transferred.

12. The precedents cited at the Bar in support of the respective contention were the cases of Nand Gopal. (1985 Pat BLJR 923) and Bibi Saboo, (1986 Pat UR 1042) (supra). The learned single Judge, if I may say so with respect, gave no reason in either case while laying down conflicting legal position.

13. The transferees were added as plaintiffs in the suits under Order 22, Rule 10 of the Code. Sahay and Choudhary after they executed the sale deeds ceased to have any interest in the property. They also ceased to be the landlords within the meaning of Section 2(D of the Rent Act. They could not have prosecuted the suits. When the suits were filed Sahay and Choudhary had cause of action against the tenants but it was not available to them as soon as they transferred their interest in the suit properties, because decree for eviction can be passed only in favour of a person who is landlord within the meaning of the Rent Act which includes an owner. Continuance of the name of Choudhary as one of the plaintiffs in the suits was ornamental, if that word may be used. In any case it was of no consequence.

14. Could the transferees obtain decree for eviction? The answer could have been in the affirmative had they been suits to which the Rent Act was not attracted. The Rent Act has put impediment on the right of landlord to evict a tenant from a building, For obtaining decree for eviction, against a tenant it must be proved (1) that the plaintiff is landlord within the meaning of the Rent Act. and (2) must also prove any of the grounds enumerated in Section 11(1) which are as many as six in number. From the perusal of the grounds, there is no difficulty in holding that some cause of action or occasion for filing suit are not available to a transferee-pendente lite. for instance eviction on the ground of personal necessity, i.e. Section 11(1)(c). Again there is no difficulty in holding that some cause of action may be said to be continuing, for instance, breach of condition of tenancy, or subletting without the consent of the landlord or where the condition of the building has materially deteriorated owing to acts of waste or negligence or default of the tenant or on the expiry of period of lease, i.e. Clauses (a), (b) and (e) of Sub-section (1) of Section 11. The transferee-pendente lite may prosecute the suit if these grounds are available. But can such transferee take advantage of default in payment of rent by tenant, ground stated in Section 11(1) (d) ?

15. Relevant portion of Section 11(1)(d) reads as follows :

"(d) Where the amount of two months rent, lawfully payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract, or in the absence of such contract, by the last day of the month next following that for which the rent is payable or by not having been validly remitted or deposited in accordance with Section 19."

Rent is payable by a tenant to the landlord. Landlord has right to file suit when two months rent due from a tenant is in arrear within the meaning of this clause. Rent cannot be said to be in arrear if it has been in fact paid to the landlord. In law rent shall be deemed to be not in arrear if it has been validly remitted in terms of Sub-section (1) or validly deposited in terms of Sub-section (2) of Section 19 of the Rent Act.

16. It was submitted in the appeals on behalf of the tenants that even if rent was

in arrear it was qua tenants of the transferors. As the period for which the rent was said to be in arrear, the transferees were not the landlords nor the appellants their tenants, the transferees cannot get any advantage.

17. It has already been held that rent accrued prior to assignment was required to be specifically assigned if the transferee intends to recover it. That is not the case here. The added plaintiffs although could not claim the arrear rent, according to them, they could take advantage of default in payment of the rent by the tenants for the period long before the transfer. The right of the transferees commenced with the assignment. They were neither the owners nor landlords when the cause of action accrued. They cannot continue the suits for breaches which became complete before the suits were filed, i.e. default in payment of rent. Landlord alone in relation to whom tenant defaulted in payment of rent may get a decree for eviction and not his transferees. In *M.M. Quasim Vs. Manohar Lal Sharma and others*, this question was involved; the Supreme Court left this question open while remitting the case to the first appellate Court. Our attention was drawn to *Radhabai Bapurao Shelar and Others Vs. Trimbak Madhavrao Shirole and Others*, . But this case is of no assistance as the definition of landlord under Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 includes transferee. It is held that transferees of Choudhary and Sahay who were added as plaintiffs cannot pray for decree on the ground of default in payment of rent for the period prior to transfer.

For the reasons aforesaid, it must be held that the ultimate conclusion on this question recorded in *Bibi Saboo* 11986 Pat LJR 1042) (supra) is correct and that recorded in *Nand Gopal* (1985 Pat BLJR 923) (supra) is overruled.

18. Question No. (c) : According to the plaint, the appellants neither paid nor validly remitted the rent from Jan.. 1983. The Courts below have held that as the tenants did not tender the rent before they remitted it by money order, the remittance of rent by money order was not valid. It was contended on behalf of the appellants that the finding of the Courts below that tenants were required to prove that before remitting the rent by money order, they had tendered the rent to the transferor-landlord is not correct in law. It was urged on behalf of the respondents that in view of the language of Section 19 of the Rent Act it was incumbent on the tenants to prove that they had tendered the rent which having been refused by the transferor-landlord, the tenants remitted by money order.

19. In *Raj Kumar Prasad Vs. Uchit Narain Singh*, . a Full Bench of this Court held (page 249 of the report) that "when Section 13(1) speaks of remittance of rent by postal money order to the landlord on refusal on the part of the landlord to accept such rent, the law clearly envisages two positions. If the tenant apprehends that for some ulterior motive the landlord would refuse to accept the rent for the purpose of making the tenant a defaulter within the meaning of the Rent Act, he may well remit such rent by postal money order.....That would make the remittance a valid payment within the meaning of Section 11(1) (d)....." In *Mrs. Veena Rani and Others Vs. Mrs. Ishrati Amanullah and Another*, , a Division

Bench of this Court in para 6 of the judgment following Raj Kumar (supra) held that a tenant may send rent by money order although there has been no refusal by the landlord. In *Bharat Road Ways v. Shailendra Kumar Birla* 1984 BCJ 103 (SC) decision of a learned single Judge between the same parties was challenged. The judgment of the learned single Judge is reported in (*Bharat Roadways and Another Vs. Shailendra Kumar Birla*,). In that case the rent for Jan., 1976 was sent by the tenant by money order on 3-2-1976 which was refused by the landlord. Rent for February, 1976 sent by money order was also refused. It was held by the learned single Judge that to take advantage of Section 19 of the Rent Act, (which was Section 16 of the 1977 Act) the tenant was required to remit the rent by money order for the month of Jan., 1976 again, the remittance by money order on 3-2-1976 being "tender" and as that was not done, the continued remittance of rent by money order was not valid. Consequently it was held that tenant was a defaulter. The Supreme Court held that the finding of the learned single Judge with regard to default in paying the rent was not sustainable in law and it was set aside.

20. Both the Courts below have held that the tenants were entitled to "tender" the rent by money order; but when the first money order with regard to rent for the month of January, 1983 sent in February, 1983 was refused by the landlord, the tenants were required to send it again and as that was not done, the remittance of rent by money order was not valid. In view of the law noticed above, the findings of the Courts below cannot be sustained. It must be held that for remitting rent by money order, tender of it is not a precondition.

21. Question No. (d) ; It was urged on behalf of the landlords that the tenants were required to pay the rent of a month by the 5th of the next following month. It was submitted that in view of the admitted fact that the rent was not remitted by the 5th of the next following month, the remittance cannot be said to be valid. Both the Courts below held that there was contract between the parties that the rent of a month would be paid by 5th of the next following month.

22. Paragraph 2 of the plaint in Title Suit No. 60 of 1983 giving rise to S.A. No. 61 of 1987(R) reads as follows :

"2. That the defendant is occupying the portions of the above holding detail mentioned in the schedule below as per letter of confirmation and acceptance dated 16-9-1966 by defendant himself as a tenant. The defendant is paying monthly rent of Rs. 180/-(Rupees one hundred eighty) which also covers the rent of furnitures and fittings in the premises. That it is agreed that the monthly tenancy will be English month commencing from 1st day of the month ending to the last day of the English calender month and it was further agreed between the plaintiff and defendant that the rent of each month shall be payable within 5th day of the succeeding month."

This was traversed in paras. 10, 11 and 12 of the written statement. The tenant denied the facts. It was asserted that the rent was payable by the last date of

the next following months. The same is the position in Title Suit No. 59 of 1983, giving rise to Second Appeal No. 62, of 1987(R).

23. The landlord pleaded contract. The onus was on him to prove it. In Title Suit No. 60 of 1983 (S.A. No. 61 of 1987/R) letter dated 16-9-1966 referred in para. 2 was brought on record as exhibit 1 and in Title Suit No. 59 of 1983 (S.A. No. 62 of 1987/R) inner foils of rent receipts were brought on record as exhibits 1 to 1/c to prove that rent was payable by the 5th of next following month.

24. So far S.A. No. 61 of 1987(R) is concerned, exhibit 1 is a letter under the signature of Diwakaran whereby he agreed to pay the rent of a month by the 5th of the next month. The finding of the Courts below in this case in favour of the landlord cannot be interfered in second appeal as there was a concluded contract between the parties, the offer of Diwakaran having been accepted by the landlord.

25. So far S.A. No. 62 of 1987(R) is concerned, only evidence was exhibits 1 to 1/c. Can in law it be held that in this case also there was a concluded contract b"etween the parties ? With reference to the inner foils of rent receipts (exhibits 1 to 1/c) it was urged that the tenant, Majumdar, had specifically accepted that the rent was payable by the 5th of the next following month that for which it becomes due. These exhibits are in printed forms and there are some conditions printed therein including that the rent of a month was payable by the 5th of the next following month. It bore the signature of the tenant Majumdar.

26. Section 20(1) of the Rent Act provides that :

"Every tenant who makes a payment on account of rent to his landlord shall be entitled to obtain forthwith from the landlord a receipt in the prescribed form for the amount of rent paid by him, duly signed by the landlord or his appointed agent."

In the prescribed form there is no provision incorporating terms and conditions of tenancy. Further, if 5th was the date on which the rent of a month was payable, it was not necessary for the landlord to obtain signature on such term repeatedly every month from the tenant. It must be held in this appeal that the Courts below have erred in law in recording a finding that there was a Contract between the parties that the rent of a month was payable by 5th of the next following month.

27. In view of the finding, I am of the opinion that so far S.A. No. 61 of 1987(R) was concerned, it was incumbent on Diwakaran (tenant) to send the rent by money order for the month of Jan., 1983 by the 5th of Feb., 1983 and the rent for the month of Feb., 1983 by 5th of March, 1983 and so on. So far S.A. No. 62 of 1987(R) was concerned there being no such contract Majumdar (tenant) was entitled to send the rent of Jan., 1983 by money order by the last date of Feb., the rent of Feb., 1983 by the last date of March and so on.

28. In view of finding recorded on question No. (a), it must be held that the

transferees pendente lite were not entitled to decree for eviction. In the result, so far S.A. Nos. 61 and 62 of 1987 (R) are concerned, those are allowed, the judgments and decree of both the Courts below are set aside and the suits are dismissed. So far Civil Revision is concerned, it is allowed and the order of amendment of plaint passed by the Court below is set aside. There shall be no order as to costs.

Uday Sinha, J.

29. I agree.