
(2015) 04 BOM CK 0259
In the Bombay High Court
Case No : Second Appeal No. 197 of 2015

Ramratan Pannalal Jaiswal	Vs	APPELLANT
Rohit Raghunathdas Udasi and Others		RESPONDENT

Date of Decision : 20-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97
Transfer of Property Act, 1882 — Section 106, 116

Citation : (2015) 04 BOM CK 0259

Hon'ble Judges : Anand Vasant Nirgude, J

Bench : Single Bench

Advocate : M.G. Bhangde, Senior Advocate assisted by V.V. Bhangde, for the Appellant; S.V. Purohit, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Anand Vasant Nirgude, J.—Heard.

2. This appeal challenges the concurrent findings of the Courts below.

3. The facts leading to this litigation are rather complicated and I would try to simplify the narration:--

"The appellant Ramratan occupied the suit shop. This shop belongs to respondent/landlord or their predecessor. This shop was originally let out long back to one Kanhaiyalal. Kanhaiyalal allowed the appellant to joint him in the shop. The landlord initially filed application, seeking permission to issue quit notice under the provisions of C P and Berar Letting of Premises and Rent Control Order, 1949 [for short, "the Rent Control Order, 1949"]. This application was moved on the ground mentioned in clause 13(3)(i)(ii) of the Rent Control Order, 1949. He alleged that Kanhaiyalal was committing defaults in payment of rent. At that time, the rent was Rs. 17/- per month. Kanhaiyalal opposed this petition. Kanhaiyalal, however, failed to prove that he was not a defaulter. The matter went up to Supreme Court. While this was going on, the respondents"

predecessor/landlord filed another application, seeking leave to give quit notice to Kanhaiyalal on the ground that he had created unauthorised subtenancy in favour of the appellant. This proceedings were taken up against both Kanhaiyalal as well as the appellant. Both of them tried to defend the same. They took a defence that the appellant and Kanhaiyalal were the partners etc. The trial Court rejected their defence and permitted the landlord to give quit notice. The matter went up to High Court. While this was pending in High Court, the earlier mentioned proceedings were pending before the Supreme Court. At that time, there occurred a compromise between the landlord and Kanhaiyalal. This time Kanhaiyalal agreed to pay Rs. 1000/- per month as rent and in exchange the landlord agreed not to press the said application. In the order of Supreme Court, there is no mention as to what the parties would do about the other proceedings which was pending in the High Court in which the allegations of subtenancy were made."

4. Kanhaiyalal through his "subtenant" i.e. the appellant, continued payment of rent but despite of this positive development, the landlord did not withdraw his case based on allegation of subtenancy. Ultimately, this Court also upheld the action of landlord. Because of this the position of the appellant became very precarious. Leave to give quit notice now became reality and such notice was given to Kanhaiyalal. Soon, thereafter, the suit was filed for eviction, In such a suit the subtenant is not necessary party, therefore, the appellant was not made party. But Kanhaiyalal still defended this suit. He stated that due to the compromise that was recorded in the Supreme Court the earlier tenancy had come to an end and a new tenancy was created, with creation of new tenancy, the notice under Section 106 of the Transfer of Property Act had become ineffective and the same stood waived. The Court rejected this defence and the matter went to appeal Court. Suddenly, Kanhaiyalal withdrew this appeal and left the appellant/ subtenant high and dry. The appellant then took evasive action by filing an application seeking permission to file appeal against the decree of eviction on one hand and also started the present proceedings under Order XXI Rule 97 of the Code of Civil Procedure. This was treated as a suit and tried accordingly.

5. The contention of the appellant/ plaintiff in this litigation was that due to compromise in the Supreme Court between the landlord and Kanhaiyalal, new tenancy was created in his favour and he became tenant. He has an independent right as tenant and the decree of eviction will not bind him.

6. The substantial question of law, thus, is "whether the compromise recorded in the Supreme Court created new tenancy in favour of the appellant?". Answer to such question would depend on facts and conduct of the parties. When the compromise was recorded in Supreme Court the landlord had already made allegations against the appellant who was unauthorized subtenant. So, while recording compromise, if the landlord and Kanhaiyalal did not take care of the subsequent proceedings in which the appellant was party they clearly indicated

to the appellant that they would keep the proceedings against him pending and alive. Unfortunately, as said above, when the compromise took place between the landlord and Kanhaiyalal the appellant was not present there. He did not know what happened between the landlord and Kanhaiyalal and on what terms the compromise had occurred. He was, thus, not a party to the said arrangement. In view of this, there is hardly any possibility of his taking a plea that because of such event the tenancy was created in his favour. The learned Counsel for the appellant tried to contend that if the enhanced rent was continuously accepted by the landlord from the appellant there should be inference that a new tenancy was created. I am afraid, this would also not be acceptable. The enhancement of rent was contract between the landlord and Kanhaiyalal. If the rent was deposited by the appellant, it was for then Kanhaiyalal. It would not give him independent status. The situation was more difficult for the appellant because the tenancy was protected by the provisions of the Rent Control Order, 1949. A landlord would not easily and by implication create a tenancy. In other words, unless there is express contract between landlord and the tenant the inference of tenancy is virtually impossible.

7. The learned Counsel for the appellant placed reliance on the judgment of Supreme Court in case of Bhuneshwar Prasad and Another Vs. United Commercial Bank and Others, AIR 2000 SC 2796 : (2000) 9 JT 392 : (2000) 6 SCALE 111 : (2000) 7 SCC 232 : (2000) 2 SCR 635 Supp : (2000) AIRSCW 2966 : (2000) 5 Supreme 727 . The following paragraphs would throw eloquent light on the subject which I am discussing in this judgment :--

"7. Mr. Sanyal, learned Senior Counsel appearing for the appellants contends that Section 116 of the Transfer of Property Act would not be attracted merely on acceptance of rent. Reliance is placed upon a decision of the Federal Court in Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden. We agree that to bring a new tenancy into existence within the meaning Section 116, there should be an agreement as the section contemplates that on one side, there should be an offer of taking a fresh demise evidenced by the lessee's continuing occupation of the property after the expiry of the lease and on the other side, there must be a definite assent to this continuance of possession by the lessor/ landlord and that such an assent of the landlord cannot be assumed in cases of tenancies to which the Rent Restriction Acts apply on account of the immunity from eviction which a tenant enjoys even after the expiry of lease. In such cases, the landlord cannot eject him except on specified grounds mentioned in the Rent Restriction Acts and thus the acceptance of rent by the landlord from a statutory tenant, whose lease has already expired, would not be taken as evidence of a new agreement of tenancy and it would not be open to such a tenant to urge that by acceptance of rent, a fresh tenancy was created. We do not expect lessor not to accept the rent when, in view of the protection granted by the rent restriction laws, without existence of one or the other ground, he is precluded from seeking eviction of the lessee and in such a case, there would be no question of creation of tenancy from month to month. Under these

circumstances, mere acceptance of amount equivalent to rent or the standard rent would not attract Section 116. Assent to the lessee continuing in possession would be absent in such cases. However, an agreement creating fresh tenancy within the meaning of Section 116 can be implied from the conduct of the parties. In *Ganga Dutt Murarka v, Kartik Chandra Das* while affirming the dictum laid down in *Khushroo* case it was held that apart from an express contract conduct of the parties may undoubtedly justify an inference that after determination of the contractual tenancy, the landlord had entered into a fresh contract with the tenant, but whether the conduct justifies such an inference must always depend upon the facts of each case. In *Bhawanji Lakhamshi v. Himatlal Jamnadas Dani* again the question that came up for consideration was as to whether a fresh tenancy was created or not by acceptance of rent by the lessor after the termination of the tenancy by the efflux of time. This Court declined the prayer to reconsider *Ganga Dutt Murarka* case and held that acceptance by the landlord from the tenant, after the contractual tenancy had expired, of amounts equivalent to rent or any amount which was fixed as standard rent did not amount to acceptance of rent from a lessee with the meaning of Section 116 of the Transfer of Property Act. The present is not a case of acceptance of amounts equivalent to rent or amounts fixed as standard rent but acceptance of increased rent. It was also observed that : (SCC p. 394, para 13)

"We do not say that the operation of Section 116 is always excluded whatever might be the circumstances under which the tenant pays the rent and the landlord accepts it."

The whole basis of Section 116 is that a landlord is entitled to file a suit for ejectment and obtain a decree for possession and, therefore, his acceptance of rent after expiry of lease is an unequivocal act referable to his desire to assent to the tenant continuing possession. It would be absent in cases where there are restrictions as contemplated by rent laws. In such cases, therefore, it is for the tenant where it is said that the landlord accepted the rent not as a statutory tenant but only as a legal tenant indicating his assent to the tenant's continuing possession, to establish it.

8. In the present case, the Bank from the conduct of the owners has established that the acceptance of increased rent was in token of the owners' assent to the Bank continuing in possession after expiry of the lease, thereby creating lease from month to month within the meaning of Section 116 of the Transfer of Property Act, 1882. The High Court has rightly reversed the judgment and decree of the trial Court. Before parting, we may make it clear that we are not concerned with the proceedings for fixation of the rent if pending before the appropriate authorities under the Act, as the same are not the subject-matter of this appeal and the fixation of the standard rent and from when it is payable is a matter to be decided by the said authorities in accordance with law."

In view of this, the theory of creation of new contract between the landlord and

the appellant deserves to be rejected.

8. The learned Counsel for the appellant also pointed out that if the suit for eviction of tenant is suddenly decreed by consent as it happened in this case, would it amount to stabbing the subtenant in the back? Therefore would he be not entitled to equity? The answer to this is in negative. In the facts and circumstances of the case, the appellant was aware that he was branded as unauthorized subtenant and his eviction was eminent, on one hand, he tried to file independent appeal against the decree of the Small Causes Court directing eviction, on the other hand, he initiated proceedings. This proceeding, thus, was virtually last ditch attempt.

9. The learned Counsel for the appellant then brought to my notice the amended provisions of Clause 12-A of the Rent Control Order, 1949, it reads as under :--

"12-A. No person being a tenant shall sub-let any portion of the accommodation under his occupation except in pursuance of a condition in the lease-deed executed in favour of the tenant or with the written consent of the landlord:--

+ [Provided that, on and from the date of commencement of the Central Provinces and Berar letting of Premises and Rent Control (Amendment) Order, 1989, if any premises or part thereof are lawfully sub-let to a sub-tenant the sub-tenant shall become the tenant of the landlord on the same terms and conditions, as he would have held from the tenant if the tenancy had continued.]

For the purpose of this clause the expression "tenant" shall not include a "sub-tenant".

+ Proviso inserted by Amendment Order dated 26-10-1989, Cl3."

10. This provision is introduced probably for protecting the number of lawful subtenants who could achieve the status of lawful subtenant and thereby become tenant themselves. The learned Counsel for the appellant asserted that the development that took place at Supreme Court virtually amounted to authorizing the subtenancy of the appellant into tenancy. In view of the facts discussed above, I am not accepting this contention at all.

11. The appeal does not give rise to any substantial question of law. Hence, the Second Appeal is dismissed.

12. At the request of learned Counsel for the appellant, decree for eviction shall remain stayed for a period of eight weeks from today.