
(2003) 11 AHC CK 0206

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 37562 of 2003

Sabir Hussain

APPELLANT

Vs

Allahtala Owner Waqf Alal Aulad and Another

RESPONDENT

Date of Decision : 10-11-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Provincial Small Cause Courts Act, 1887 — Section 25
Transfer of Property Act, 1882 — Section 106, 108, 111, 112, 113
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 2

Citation : (2005) 1 ARC 273

Hon'ble Judges : S.P. Mehrotra, J

Bench : Single Bench

Advocate : A.K. Roy, for the Appellant; Iqbal Ahmad, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Mehrotra, J.—The present writ petition, under Article 226 of the Constitution of India, has been filed, inter-alia, praying for quashing the judgment and order dated 29th July, 2003 (Annexure 1 to the writ petition) passed by the learned Additional District Judge, Court No. 9. Moradabad (Revisional Court) and the judgment and order dated 21st March, 2003 (Annexure 2 to the writ petition) passed by the learned Judge, Small Cause Court, Moradabad.

2. The dispute relates to a shop, situate Kazi Shaukat Hussain Road, Rafatpura Faizganj, Moradabad, the details whereof are given in the plaint of the suit referred to hereinafter. The said shop has, hereinafter, been referred to as "the disputed shop."

3. It appears that the respondent No. 1 filed a suit against the petitioner for ejectment, arrears of rent, mesne profits etc. in respect of the disputed shop. It was, inter-alia, alleged in the said suit that the disputed shop was a part of the Waqf property; and that the said Waqf was registered in the office of U.P. Sunni

Central Board of Waqf, Lucknow at Serial No. 140 Ex. 11; and that the petitioner did not pay rent with effect from 1.11.1996 despite demand; and that the respondent No. 1 gave notice dated 21.10.1997 through its Counsel by registered post to the petitioner which was personally served on the petitioner on 22nd October, 1997; and that by the said notice, the tenancy of the petitioner was determined, and the petitioner was required to pay rent for the period from 1.11.1996 to 30th September, 1997 within one month of the receipt of the notice; and that by the said notice, the petitioner was required to vacate the disputed shop after the expiry of one month from the receipt of the said notice and hand-over its possession to the respondent No. 1; and that the petitioner did not comply with the directions of the said notice and instead, the petitioner sent incorrect reply dated 24.11.1997 through his Counsel, The said suit was registered as S.C.C. Suit No. 64 of 1999. Copy of the plaint of the said suit has been filed as Annexure 3 to the writ petition.

4. It further appears that the petitioner contested the said suit and filed written statement, a copy whereof has been filed as Annexure 4 to the writ petition.

5. It was inter alia, stated in the said written statement that the provisions of the U.P. Act No. 13 of 1972 (hereinafter also referred to as "the Rent Act") were applicable to the disputed shop; and that the suit was barred by Section 114 of the Transfer of Property Act.

6. It further appears that by the judgment and order dated 1st March, 2001 the learned Judge; Small Cause Court, Moradabad dismissed the said suit filed by the respondent No. 1 Copy of the said judgment and order dated 1st March, 2001 has been filed as Annexure 5 to the writ petition.

7. It was, inter-alia, held in the said judgment and order dated 1st March, 2001 that the petitioner had deposited the entire rent payable with effect from 1.11.1996, and the respondent No. 1 was entitled to receive the said rent deposited by the petitioner; and that in view of the deposit having been made by the petitioner, the petitioner was not liable to be evicted from the disputed shop; and that as the petitioner complied with the provisions of Section 114 of the Transfer of Property Act, the respondent No. 1 was not entitled to evict the petitioner.

8. As regards the issue as to whether the provisions of the Rent Act (U.P. Act No. 13 of 1972) were applicable to the present case, the said issue was decided against the petitioner (Defendant). Hence, the provisions of the U.P. Act No. 13 of 1972 were held to be not applicable to the disputed shop.

9. Against the said judgment and order dated 1st March, 2001, the respondent No. 1 filed a revision which was registered as S.C.C. Revision No. 19 of 2001.

10. By the judgment and order dated 13.12.2001, the learned Special Judge (E.C. Act)/The Additional District Judge, Moradabad allowed the said S.C.C. Revision No. 19 of 2001, set aside the said judgment and order dated 1st March,

2001, and decreed the said suit of the respondent No. 1 for ejectment of the petitioner from the disputed shop along with recovery of arrears of rent claimed and for damages for use and occupation at the rate of Rs. 100/- per month till the date of vacation of the disputed shop. Copy of the said judgment and order dated 13.12.2001 has been filed as Annexure 6 to the writ petition.

11. It was, inter-alia, held in the said judgment and order dated 13.12.2001 that neither the respondent No. 1 (Plaintiff) produced the lease-deed nor alleged that there existed any lease-deed, nor the petitioner (Defendant) pleaded or proved that there was any lease-deed; and that Section 114 of the Transfer of Property Act applied only when lease was determined by forfeiture as mentioned in Section 111(g) of the Transfer of Property Act; and that in this case, the admitted position was that there was no lease-deed in between the parties; and that Section 111(g) of the Transfer of Property Act could not apply when there was no express condition, that is, in absence of any written lease deed; and that the learned Judge, Small Cause Court, Moradabad wrongly applied the provisions of Section 114 of the Transfer of Property Act in the present case.

12. Thereafter, it appears that the petitioner filed a writ petition before this Court being Civil Misc. Writ Petition No. 3996 of 2002. By the judgment dated 29th January, 2002, the said writ petition was partly allowed by this Court. The relevant portion of the said Judgment dated 29th January, 2002 is quoted below:

"In view of the above, the writ petition is partly allowed and the impugned judgment and order dated 13.12.2001 (Annexure 1 to the writ petition) passed by Respondent No. 2 in SCC Revision No. 19 of 2001 (Waqf Allah Tala owner and creator Waqf Alal Aulad, Quazi Shaukat Hussain (deceased) through Quazi Nusrat Hussain Mutwalli v. Sabir Hussain) to the extent it decreed the suit by itself, is set aside and further direct Judge, Small Causes Court to decide JSCC Suit No. 64 of 1999 afresh after noting specified point of dispute between the parties and the issue to be decided in the light of revisional Court order. Judge, Small Causes Court shall endeavor to decide the suit expeditiously, preferably within a period of six months from the date of receipt of a certified copy of this judgment and order.

The writ petition is partly allowed subject to the observations and directions made above.

No order as to costs."

Copy of the said Judgment dated 29.1.2002 is annexed as Annexure 7 to the writ petition.

13. In view of the directions given in the said Judgment dated 29.1.2002, the learned Judge, Small Cause Court, Moradabad noted that the point for determination between the parties was as to whether the petitioner (Defendant) was entitled to the benefit of Section 114 of the Transfer of Property Act, and passed the judgment and order dated 21st March, 2003 (Annexure 2 to the writ

petition) considering the said point for determination. By the said judgment and order dated 21st March, 2003, the learned Judge, Small Cause Court, Moradabad decreed the said SCC Suit No. 64 of 1999.

14. Against the said judgment and order dated 21st March, 2003, the petitioner filed a revision u/s 25 of the Provincial Small Cause Courts Act which was registered as SCC Revision No. 9 of 2003.

15. By the judgment and order dated 29th July 2003 (Annexure 1 to the writ petition), the learned Additional District Judge, Court No. 9, Moradabad dismissed the said SCC Revision No. 9 of 2003.

16. Thereafter, the petitioner has filed the present writ petition seeking the reliefs mentioned above.

17. I have heard Shri A.K. Roy, learned Counsel for the petitioner and Shri Iqbal Ahmad, learned Counsel for the caveator-Respondent No. 1.

18. Shri A.K. Roy, learned Counsel for the petitioners submits that the petitioner having deposited the entire arrears of rent etc. was entitled to the benefit of Section 114 of the Transfer of Property Act.

19. It is further submitted that the Courts below erred in holding that the provisions of Section 114 of the Transfer of Property Act were not applicable to the present case. On a correct interpretation of the relevant provisions of the Transfer of Property Act, the submission proceeds, the provisions of Section 114 of the said Act were applicable to the present case.

20. Shri A.K. Roy, learned Counsel for the petitioner has placed reliance on the following decisions:

1. Arjun Khiamal Makhijani and Others Vs. Jamnadas Tuliani and Others,
2. Surjeet Singh v. Additional District Judge, Haridwar and Ors. 1994 AWC 17 : 1993 (2) ARC 470.

21. In reply, Shri Iqbal Ahmad, learned Counsel for the caveator-respondent No. 1 submits that the provisions of Section 114 of the Transfer of Property Act are to be read along with Section 111(g) of the said Act. The provisions of Section 111(g) of the said Act, the submission proceeds, apply only where there is lease-deed in writing. It is submitted that the provisions of Section 111(g) of the said Act have no application in a case where there is no lease-deed in writing.

22. In the present case, it is submitted by Shri Iqbal Ahmad, there is no dispute that there is no written lease-deed. Hence, the provisions of Section 111(g) of the Transfer of Property Act are not applicable to the present case. As Section 114 of the Transfer of Property Act applies only in case where Section 111(g) of the Transfer of Property Act applies, the provisions of Section 114 of the said Act are also not applicable to the present case, as there is no lease-deed in writing in the present case.

23. Shri Iqbal Ahmad has placed reliance on the following decisions:

1. U.P. State Road Transport Corporation, Moradabad v. IInd Additional District Judge, Moradabad and Ors. 1981 ARC 474 : 1981 ALJ 608.
2. Shri Kant Gupta v. XIIIth Additional District Judge, Moradabad and Ors. 1995 (1) ARC 212.
3. Ram Bali Pandey (Since deceased) through his Legal Representatives v. IInd Additional Judge, Kanpur and Ors. 1998 (2) ARC 362
4. Arun Kumar v. The VIIIth Additional District Judge, Budaun and Anr. 2002 (1) ARC 579.
5. Shiv Shankar v. Additional District Judge, Court No. 8, Agra and Ors. 2002 (1) ARC 13.

24. I have considered the submissions made by the learned Counsel for the parties. In order to appreciate the submissions made by the learned Counsel for the parties, it is necessary to refer to the relevant provisions of the Transfer of Property Act, 1882.

25. Section 111 of the Transfer of Property Act which deals with the determination of lease, provides as follows:

"111. Determination of lease.--A lease of immovable property, determines--(a) by efflux of the time limited thereby;

(b) where such time is limited conditionally on the happening of some event--by the happening of such event;

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event--by the happening of such event;

(d) in case the interest of the lessee and the lessor in the whole of the property become vested at the same time in one persons in the same right;

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

(f) by implied surrender;

(g) by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounce his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may reenter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;

(h) on the expiration of a notice to determine the lease, or to quit, or of intention

to quit, the property leased, duly given by one party to the other.

Illustration to Clause (f)

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease and such lease determines thereupon."

Section 111, Clause (h) deals with the determination of lease of immovable property on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

26. Section 106 of the Transfer of Property Act deals with the notice contemplated under Clause (h) of Section 111 of the Transfer of Property Act. Section 106 of the Transfer of Property Act as amended in Uttar Pradesh provides as follows:

"106. Duration of certain leases in absence of written contract or local usage.--In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months" notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days" notice expiring with the end of a month of tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants, at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

State Amendment

Uttar Pradesh

(1) The words "expiring with the end of a year of tenancy and "expiring with the end of a month of the tenancy", shall be omitted.

(2) For the words "fifteen days notice" the words "thirty days notice" shall be substituted. (U.P. Act 24 of 1954, Section 2)"

27. Section 113 of the Transfer of Property Act provides for waiver of notice to quit given u/s 111, Clause (h) of the said Act. The said Section 113 lays down as follows:

"113. Waiver of notice to quit.--A notice given u/s 111, Clause (h) is waived with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting,

Illustrations

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders and A accepts rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived."

28. Section 111, Clause (g) of the Transfer of Property Act provides for determination of lease by forfeiture, Category (1) of Clause (g) of Section 111 of the Transfer of Property Act contemplates determination of lease by forfeiture in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter. Category (2) of Clause (g) of Section 111 of the said Act provides for determination of lease by forfeiture in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself. Category (3) of Clause (g) of Section 111 of the said Act makes provision for forfeiture in case the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event.

29. In each of the aforesaid three categories, it is further necessary that the lessor or his transferee must give notice in writing to the lessee of his intention to determine the lease.

30. Section 112 of the Transfer of Property Act deals with the waiver of forfeiture. The said Section 112 is quoted below;

"112. Waiver of forfeiture.--A forfeiture u/s 111, Clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred;

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver,"

31. Section 114 of the Transfer of Property Act provides for relief against forfeiture for non-payment of rent. The said Section 114 lays down as under:

"114. Relief against forfeiture for non-payment of rent.--Where a lease of immovable property has been determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred."

32. Section 114A provides for "relief against forfeiture in certain other cases." The said Section 114 is as follows:

"114A. Relief against forfeiture in certain other cases.--Where a lease of immovable property has been determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing--

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach:

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of nonpayment of rent."

33. A combined reading of Category (1) of Clause (g) of Section 111, Section 114 and Section 114A of the Transfer of Property Act shows that the provisions of Section 114 as well as Section 114A pertain to the determination of lease by forfeiture u/s 111, Clause (g), Category (1) of the said Act. While Section 114 of the said Act deals with the relief against forfeiture in case the lease has been determined by forfeiture for non-payment of rent. Section 114A of the said Act provides for relief against forfeiture in certain other cases of determination of lease by forfeiture under Category (1) of Clause (g) of Section 111 of the said Act.

34. As Section 114 as well as Section 114A of the Transfer of Property Act pertain to the determination of lease by forfeiture u/s 111, Clause (g), Category (1) of the said Act, it is necessary for the applicability of Section 114 as well as Section 114A of the said Act that the requirements of Section 111(g). Category (1) of the said Act not satisfied in case the requirement of Section 111(g), Category (1) of the said Act are not satisfied, neither Section 114 nor Section 114A of the said Act will be applicable even if the requirements of Section 114 or Section 114A, as the case may be, are fulfilled.

35. A perusal of Section 111, Clause (g), Category (1) shows that for determination of lease by forfeiture, the following conditions must be fulfilled.

(1) There must be a condition in the lease.

(2) The condition must be an express condition.

(3) The express condition must provide that in case of breach of the said condition, the lessor may re-enter.

(4) The lessee breaks such express condition.

(5) The lessor or his transferee gives notice in writing to the Lessee of his intention to determine the lease.

36. Therefore, it follows that for the applicability of Section 114 of the Transfer of Property Act, it is necessary that the following conditions, as per the provisions of Section 111(g), Category (1) of the said Act must be fulfilled:

(1) There must be a condition in the lease regarding payment of rent.

(2) The condition must be an express condition.

(3) The express condition must provide that in case of breach of the said condition (regarding payment of rent), the lessor may re-enter.

(4) The lessee breaks such express condition.

(5) The lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease.

37. In case where the aforesaid conditions, as per the requirements of Section 111(g), Category (1) of the Transfer of Property Act, are satisfied, and further, the requirements of Section 114 of the said Act are also satisfied, the provisions of the said Section 114 will be applicable.

38. Similarly, for the applicability of Section 114A of the Transfer of Property Act, it is necessary that the following conditions, as per the provisions of Section 111(g), Category (1) of the said Act, must be fulfilled:

(1) There must be a condition in the lease.

(2) The condition must be an express condition.

(3) The express condition must provide that in case of breach of the said condition, the lessor may re-enter.

(4) The lessee breaks such express condition.

(5) The lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease.

39. In case where the aforesaid conditions, as per the requirements of Section 111(g), Category (1) of the Transfer of Property Act, are satisfied, and further, the requirements of Section 114A of the said Act are also satisfied, the provisions of the said Section 114A will be applicable.

40. It should, however, be noted that in view of the last paragraph of Section 114A of the Transfer of Property Act, the said Section 114A will not apply in case the express condition, as contemplated in Section 111(g), Category (1), is any of the following:

(i) Express condition against assigning of the property leased.

(ii) Express condition against under-letting of the property leased.

- (iii) Express condition against parting with the possession of the property leased.
- (iv) Express condition against disposing of the property leased.
- (v) Express condition relating to forfeiture in case of non-payment of rent.

41. It is note-worthy that express condition relating to forfeiture in case of non-payment of rent (head (v) above) is in fact covered u/s 114 of the Transfer of Property Act.

42. Having noted the relevant provisions of the Transfer of Property Act, let us now proceed to consider the present case.

43. In order to decide the controversy involved in the present case, it is pertinent to refer to the contents of the notice dated 21st October, 1997, copy where of has been filed as Annexure 9 to the writ petition. The said notice is reproduced below:

"NOTICE OAR SE ALLATAL MALIK WAQF ALLA ALLAD, KAYAM KARDA KAZI SHAUTAKAT HUSSAIN MARHUM BAJRIYE MUTWALLI WA KUNTJIMAY SHRI KAZI NUSARAT HUSSAIN PUTTRA KAZI ESHARA T HUSSAIN NIWASI SHAUKAT BAAK, FAIJGANJ MORADABAD DWARA MOHD.HUNED AJAJ ADVOCATE, SIDHISARAY MORADABAD.

v.

SABIR PUTTRA NANHEY HALWAE DUKANDAR DUKAN KAZI SHAUKAT HUSSAIN ROAD FAIJGANJ MORADABAD.

MAHODAY

ME. MOHD. JUNAD AJAJ, ADVOCATE APNE PAKSHKAR UPROKT ALLA TALA MALIK WAQF KE MUTWALLI WA MUNTJIM SHRI KAZI NUSARAT HUSSAIN KE NIRDESANUSAR AAPKO NIMNLIKHT NOTICE PRESHIT KAHTA HAI:-

1. YAH KI AAP NOTICE PRAPT KARTA MERE PAKSHKAR KI EK KITA DUKAN KEALAWA CHHAT SHUMALRUWA WAQYA KAZI SHAUKAT HUSSAIN ROAD RAFATPURA FAIJGANJ MORADABAD.

PURAB--DIGAR WAQF MERE KIRAYEDARI PUTTAN HAJJAM.

PASCHIM--DIGAR SAMPATI WAQF MERE KIRIAYEDARI SHARIF.

UTTAR--SARAK.

DAKSHIN--DIGAR SAMPATTI WAQF NE ANKAN 100/- RUPAYE MASIK KI DAR SE KRIYADAR HAI.

2. YAH KI SAMPATTI WAQF HAI JIS PAR U.P. ACT 13/72 KE PRAVIDHAN LAGU NAHI HOTE HAI.

3. YAH KI SAMPATTI KI MERE PAKSHKAR KO AWASHYKATA ESLIYE AAGE AAPKO KIRAYADAR RAKHNA SWIKAR NAHI HAI.

4. YAH KI AAPKO AUR 1.11.1996 SE KIRAYA DUE HAI AUR DINANK 1.11.1996 SE 30.9.1997 TAK KUL 11 MAAH KA KIRAYA KUL ANKAR 1100/- RUPAYE WAJIV HO CHUKA HAI JISKO AAPKO BAVJOOD TALAB WA TAKAJE KE AADA KARNE KO TAIYAR NAHI HAI. ES KARAN BHI AAPKO KIRAYEDAR RAKHNA SWIKAR NAHI HAI.

5. YAHU KI PRASTUT NOTICE DWARA AAPKI KIRAYEDARI SAMAPT KI JATI HAI JO PRAPTI NOTICE KE EK MAAHBAD SAMJHIJAYEGI.

ATTAH: BAJRIYE NOTICE HUWA HAJA AAPSE TAKAJA KIYA JATA HAI KI AAP NOTICE PRAPTI KE EK MAAH KE ANDAR UNROKT WAJKIB KIRA YA RASHIANKAN 1100/- RUPA YE WA MAAHRAWA WA AIENDAR TAYEM DAKHAL KAR PAKSHKAR KE MUTAWALLI WA MUNTJIM SHRI KAZI NUSRAT HUSSAIN KA ADA KAR DE TATHA NOTICE PRAPTI KE EK MAAH BAD PRATHAM DIVAS KO SAMPATTI JER KIRAYEDARI RIKTT KARKE MERE PAKSHKAR KE MUTAWALLI WA MUNTJIM KE VADAKHAL NA DE KARNA AAPKE VIRUDH KANOONI KARYAVKI KO BADAHYA HONA PAREGA AUR US SOORAT ME AAP MERE PAKSHKAR KE SAMAST HARJE WA KHARCHE KE JIMMEDR HONGEY.

DINANK-21.10.1997.

NOTICE DEHANDA H. ASPASHTH MOHD. JUNED AJAJ ADVOCATE"

44. A perusal of the said notice quoted above shows that the same was a notice to quit u/s 111(h) read with Section 106 of the Transfer of Property Act. No doubt, there is demand for arrears of rent to be paid within one month of the receipt of the notice, but the same is not the ground for determination of lease. There does not appear to be anything in the said notice suggesting that the lease is being determined by forfeiture u/s 111(g) of the Transfer of Property Act in exercise of any alleged right to re-enter in view of breach of any alleged express condition which gives any right of re-entry. The said notice dated 21st October, 1997 is a notice to quit simpliciter u/s 111(h) read with Section 106 of the Transfer of Property Act.

45. As already noted above, the learned Judge, Small Cause Court, Moradabad in his judgment and order dated 1st March, 2001 held that the provisions of the Rent Act (i.e., U.P. Act No. 13 of 1972) were not applicable to the present case. The said finding does not appear to have been questioned by the petitioner before the higher Courts, and the said finding became final. In view of the fact that the provisions of the Rent Act (i.e., U.P. Act No. 13 of 1972} were not applicable to the present case, the lease of the petitioner could be determined by a notice to quit u/s 111(h) read with Section 106 of the Transfer of Property Act as has been done in the present case.

46. Since the said notice dated 21st October, 1997, as noted above, is not a notice u/s 111(g) of the Transfer of Property Act on the ground of forfeiture of lease Section 114 or Section 114A of the said Act has no application to the present case.

47. Therefore, the petitioner is not entitled to the benefit of Section 114 of the

Transfer of Property Act. The submission made by the learned Counsel for the petitioner in this regard cannot, in my view, be accepted.

48. Reference in this regard may be made to certain judicial decisions.

49. In *Geetabai Namdeo Daf Vs. B.D. Manjrekar*, it was laid down as follows (Paragraph 3 of the said AIR):

"3. I am somewhat unhappy that the law relating to forfeiture of tenancy has been misunderstood by both the Courts below. I have no objection to the Courts committing mistakes. We all of us do so at one time or the other; but the question which I am dealing with should normally have been regarded as one of elementary principle. I am not happy that mistakes are committed by confusion of elementary principles.

The legal position to be noted is that there is a world of difference between liability of the tenant for eviction on the ground of forfeiture of tenancy and his liability on the ground of termination of the tenancy by a notice of termination simpliciter. The law relating to determination of tenancy is incorporated in Section 111 of the Transfer of Property Act. There are various reasons for determining the tenancy and there exist various modes by which the tenancy comes to an end. If the tenancy is to come to an end by virtue of the principle of forfeiture, what is required under the law is that the tenancy should be for a particular period and the lease deed must contain a clauses of forfeiture on the ground of breach of certain conditions of the tenancy. If the breach is committed, the tenancy becomes liable for forfeiture even before the expiry of the agreed period of the tenancy. When the tenant incurs forfeiture, there is a further thing required to be done by the landlord, namely, that the landlord must exercise his right of forfeiture either expressly or by necessary implication. If he exercises the right of forfeiture, then the tenancy comes to an end even before the agreed period of tenancy. In such a case no question of notice of termination of tenancy as provided by Section 106 of the Transfer of Property Act arises, although, in certain cases, some kind of notice indicating exercise of the right of forfeiture by the landlord may be advisable. On the other hand, when the lease is not for a particular fixed period but is only a periodical lease like a yearly lease or a monthly lease and if the agreement of tenancy provides that the lease can be terminated by notice of termination as contemplated by Section 106 of the Transfer of Property Act, no question of forfeiture as such arises. The tenant might happen to be a paragon of virtue and he might have been paying every single farthing of the rent with strict punctuality and might have been performing every term of the tenancy with enviable devotion; still, if the tenancy is terminated by the notice to quit provided for expressly or impliedly by the agreement of tenancy, the conduct of the tenant and absence of breach of termination (condition) to tenancy on his part are irrelevant factors.

This is the position in the Transfer of Property Act. The legislature had found that sometimes this position was abused by some of the rapacious landlords, and that

is the reason why the various Rent legislations were enacted. At the places where the Rent Act applies, the tenants are relieved to some extent, of this inexorable position under the Transfer of Property Act mentioned above; but for the premises which are not governed by the Rent Act, the position under the Transfer of Property Act continues to subsist. If the lease is capable of being terminated by a notice of termination u/s 106 of the Transfer of Property Act, the legal position is not that the tenancy is terminated by forfeiture. Termination of tenancy on account of forfeiture is an entirely different concept, and the Court must bear in mind that the concept of termination of tenancy on account of forfeiture and the concept of termination of tenancy by a notice to quit u/s 106 of the Transfer of Property Act are two distinct and independent concepts. In the instant case no doubt the plaintiff-landlady had a grievance against the defendant that he had innate reluctance to pay the rent. It may be also true that the motive behind terminating the tenancy was the tenant's reluctance to pay the rent; but still when the tenant remained in arrears of rent, no such thing as forfeiture was incurred by him, because the tenancy was not for any fixed period, and hence there was no question of there being any forfeiture clause in the agreement. Further, when the landlady terminated the defendant's tenancy on account of her dissatisfaction about him, no forfeiture was enforced by her, once again because there existed no forfeiture clause in the agreement of tenancy. The fact that the tenant had been guilty of non-payment of rent is just one of the historical facts having no relevance what so ever with the landlady's right to terminate the tenancy.

I will explain the position further. If there existed a forfeiture clause to the effect that no account of breach of certain conditions of tenancy the landlady would be entitled to forfeit the tenancy, any number of notices she might give and still the tenancy would remain unaffected, if no breach of any of the conditions of the tenancy was committed by the tenant. On the other hand, if there existed no forfeiture clause but the landlady was entitled to terminate the tenancy, the tenancy being a monthly tenancy, the notice of termination will be effective in law, even if no breach whatsoever was committed by the tenant. This is the position in law resulting directly from the provisions of Section 111 of the Transfer of Property Act. If this is the position also in the present case, Section 114 of the Transfer of Property Act does not come into play at all. The fallacy in the reasoning of the lower Court lies in the fact that merely because there exists Section 114 in the Transfer of Property Act, the Court volunteers to give the benefit of the same to the tenant, forgetting that Section 114 does not come into play unless the forfeiture is incurred by the tenant in pursuance of forfeiture clause contained in the agreement of lease. When there is no such clause in the agreement, Section 114 does not come into play at all. The position of law is as simple as that."

50. In Shiv Shankar case (supra), a learned Single Judge of this Court held as follows (paragraphs 4, 6 and 14 of the said ARC):

"4. Section 114, Transfer of Property Act quoted above, gave an option to a tenant to make deposits contemplated therein within the prescribed period mentioned in the Section. In the case of forfeiture only the expression, used in the said Section 114, Transfer of Property Act" whether a lease of immovable property has been determined by forfeiture.....:" leaves no doubt that right of lessee to avoid suit for ejectment can" be restored to only in a case where a lease of immovable property determines by forfeiture and not otherwise. Consequently, defendant-petitioner cannot take advantage of the aforesaid Section 114, Transfer of Property Act in a case where lease of a transferee determine only itself or to quit the property leased, duly given by one party to the other; as contemplated u/s 111(h) of Transfer of Property Act.

6. A perusal of the said unregistered rent deed clearly shows that tenancy was month to month only after expiry of initial three years period of lease not having been extended specifically, it shall be deemed that the tenancy in question became a monthly tenancy. The defence of the defendant-petitioner on this score, thus has no merit.

14. Having given my considered thought, to the expression used in the notice of the present case (Annexure-S A-3), in the light of ratio laid down in the aforementioned Division Bench judgment, it will be clear that expression "terminated" used in Form E of the reported judgment or the expression "terminates" used in the notice of the present, are not determinative of the fact whether the notice is in present or not? Reading the notice, in the present case, as a whole, one can gather intention of the notice giver, and that is to determine tenancy on the expiry of 30 days as required u/s 106, Transfer of Property Act and not in present and reading the notice as given above, u/s 106, Transfer of Property Act in the present, cannot be said to be a invalid notice."

51. In Ram Bali Pandey case (supra), a learned Single Judge of this Court laid down as follows (Paragraph 23 of the said ARC):

"23. Smt. Poonam Srivastava, learned Counsel for the respondents further argued that no decree of eviction could be passed against the tenants as on account of the deposit made by them in Court, they were entitled to the protection of Section 114 of the Transfer of Property Act. It may be suffice to mention here that it had never been pleaded either by the original tenant or the substituted heirs in the Courts below that they were entitled to claim the benefit under the aforesaid provision. In any view of the matter Section 114 of the Transfer of Property Act has no application to the facts of the present case as it was not a case of forfeiture of tenancy for non-payment of rent. The tenancy was terminated u/s 114 of the Transfer of Property Act simpliciter. For the applicability of Section 114, existence of an agreement containing a stipulation empowering the landlord to re-enter in the demised premises in case of breach of a condition regarding payment of rent is essential. In the present case there was no such agreement and as U.P. Act No. 3/47 was not applicable to the premises, there was simpliciter termination of tenancy u/s 106 of the Transfer of

Property Act serving a notice thereunder. The mere fact that the notice stated about non-payment of rent also besides termination of monthly tenancy and demand of vacant possession it would not be a case of forfeiture under Clause (g) but one of determination of tenancy by exercising power under Clause (h) of Section 111 of the Transfer of Property Act. No authority is required for the proposition that where there is simpliciter termination of tenancy u/s 106 of the Transfer of Property Act and not u/s 106 of the Transfer of Property Act and not u/s 111(g) of the Transfer of Property Act then provision of Section 114 of the T.P. Act cannot be attracted. This argument of respondent's Counsel also does not appeal to the Court and has to be rejected."

52. Thus, these decisions support the conclusion mentioned above.

53. The question may be examined from another angle, as has been done by the Courts below. Section 114 of the Transfer of Property Act, as noted above, is to be read with Section 111(g), Category (1) of the said Act. Section 111(g), Category (1) of the said Act provides that there must be an "express condition" in the lease, which should also provide that in case, the said condition is broken, the lessor may re-enter. The word "express condition" clearly imply that Section 111(g), Category (1) of the Transfer of Property Act applies only in case where the lease is in writing. The submission of Sri A.K. Roy, learned Counsel for the petitioner that "express condition" may be oral also, in my opinion, cannot be accepted in view of the various requirements of Section 111(g), Category (1) which the "express condition" must fulfill.

54. Hence, for the applicability of Section 111(g), Category (1), and, as such, of Section 114 of the Transfer of Property Act, it is necessary that the lease must be in writing containing the express condition as per the requirements of Section 111(g), Category (1). In case, there is no written lease-deed, the provisions of Section 111(g), Category (1), and as such, of Section 114 of the Transfer of Property Act will not apply. The provisions of Section 111(g), Category (1), and consequently, of Section 114 of the Transfer of Property Act are not applicable to oral lease. This view gets support from various judicial decisions.

55. In U.P. State Road Transport Corporation case (supra), a learned Single Judge of this Court held as follow (Paragraphs 5 and 6 of the said A.L.J.):

"5. Section 114 of the Transfer of Property Act entitles a lessee for relief against forfeiture for non-payment of rent. In the instant case, there is no agreement of lease between the parties. The lease has not been forfeited for non-payment of rent. In the circumstances, Section 114 of the Transfer of Property Act does not apply.

6. Learned Counsel for the petitioner has relied on Praduman Kumar Vs. Virendra Goyal (Dead) by L. Rs., The principle laid down in the case of Praduman Kumar (supra) would not apply because as I have already held above, there was no agreement of lease between the parties and neither there was any question of forfeiture for non-payment of rent. It is only in a case where there is a forfeiture

of a lease because of non-payment of rent that the provisions of Section 114 of the Transfer of Property Act would apply."

56. In *Shri Kant Gupta* case (supra), a learned Single Judge of this Court held that Section 114 of the Transfer of Property Act would apply only to such a case where lease is forfeited on account of non-payment of rent in accordance with written lease-deed. Reliance was placed by the learned Single Judge on the decisions in *U.P. State Road Transport Corporation* case (supra) and *Geetabai Namdeo Daf* case (supra).

57. In *Arun Kumar* case (supra), the learned Single Judge of this Court held as follows (Paragraph 7 of the said ARC);

"7. On combined reading of Sections 111(g), and 111 (h) of the Transfer of Property along-with Section 114, the inevitable conclusion is that in case, the tenancy is forfeiture only for non-payment of the rent and suit is situated, in that event the tenant is entitled for the benefit of Section 114 to the effect that if within fifteen days of decree passed by the trial Court the amount of decree is deposited the tenant shall be absolved of the liability of eviction from the accommodation in dispute. The Revisional Court has recorded a finding that the petitioner-tenant failed to demonstrate that there is any lease-deed or agreement about the tenancy in writing between the plaintiff-respondent and defendant-petitioner in which there was a clause that the tenancy shall stand forfeiture due to non-payment of the rent. There being no such contingency and particularly when the revisions against the decree is pending and the tenancy stands terminated by a notice u/s 106 of Transfer of Property Act, the question of giving benefit of Section 114 of the Transfer of Property Act does not arise and the said benefit cannot be granted to the petitioner-tenant. The Revisional court fixed the date of hearing and ultimately vide its judgment dated 23.3.2001 rejected the aforesaid revision. Before the Revisional Court at the time of hearing learned Counsel for the petitioner-tenant has reiterated the same argument which were already advanced claiming the benefit of Section 114 of the Transfer of Property Act."

58. Hence, Section 111(g) of the Transfer of Property Act, and therefore, Section 114 of the said Act apply only in a case where the lease is in writing, and not an oral lease. In the present case, there is no dispute that the lease is an oral one, and not in writing. Consequently, Section 111(g) and Section 114 of the Transfer of Property Act are not applicable to the present case.

59. Therefore, there is no question of giving benefit of Section 114 of the Transfer of Property Act to the petitioner.

60. The question can be examined from yet another angle. Section 114 of the Transfer of Property Act requires that at the hearing of the suit, the lease should pay or tender to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or should give such security as the Court thinks sufficient for making such payment within 15 days.

61. In view of the finding recorded on Issues Nos. 1 and 2 in the judgment and order dated 1st March, 2001, it is evident that the requisite deposit sufficient to cover the amounts mentioned in Section 114 of the Transfer of Property Act was made by the petitioner. No contrary finding appears to have been recorded in any of the subsequent judgments.

62. Therefore, the requirement of Section 114 of the Transfer of Property Act regarding payment or tender of the arrears of rent etc. by the lessee is fulfilled in the present case. However, as noted above, Section 114 of the Transfer of Property Act applies, in case, the lease is determined by forfeiture u/s 111(g), Category (1) of the Transfer of Property Act. Therefore, the conditions of Section 111(g), Category (1) of the Transfer of Property Act must be fulfilled before Section 114 of the said Act can be held to be applicable.

63. Consequently, as noted earlier, for the applicability of Section 114 of the Transfer of Property Act, it is necessary that the following conditions as per the requirement of Section 111(g), Category (1) must be fulfilled:

- (1) There must be a condition in the lease regarding payment of rent.
- (2) The condition must be an express condition.
- (3) The express condition must provide that in case of breach of the said condition (regarding payment of rent), the lessor may re-enter.
- (4) The lessee breaks such express condition.
- (5) The lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease.

64. In case where the aforesaid conditions, as per the requirements of Section 111(g), Category (1) of the Transfer of Property Act, are satisfied and further, the requirements of Section 114 of the said Act are also satisfied, the provisions of the said Section 114 will be applicable.

65. In the present case, it has not been shown that there was any express condition for payment of rent month to month in the lease, which condition further provided that in case of breach of the said condition (for payment of rent), there would be right to re-enter. Therefore, the requirements of Section 111(g) of the Transfer of Property Act are not fulfilled in the present case. Consequently, Section 114 of the said Act would not apply.

66. No doubt, Section 108 of the Transfer of Property Act provides for rights and liabilities of the lessor and the lessee in the absence of a contract or local usage to the contrary. Clause (1) of Section 108 of the Transfer of Property Act provides that "the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf." However, the said condition given in Clause (1) of Section 108 of the said Act, which comes into play in the absence of contract or local usage to the contrary, is a statutory condition. The said condition is implied in every lease unless there is a contract

or local usage to the contrary. The said condition is not an "express condition" as contemplated in Section 111(g) of the Transfer of Property Act.

67. Needless to add, the provisions of Section 114A or Section 112 of the Transfer of Property Act are not attracted to the present case.

68. Before parting with the case, it is necessary to deal with the cases cited by Shri A.K. Roy, learned Counsel for the petitioner.

69. In Arjun Khaimal Makhijani case (supra), their Lordships of the Supreme Court were dealing with the provisions of the Bombay, Rents, Hotel and Lodging House Rates Control Act (57 of 1947) as amended by Maharashtra Act 18 of 1987. As regards Section 12(3) of the said Act as amended by Maharashtra Act 18 of 1987, their Lordships of the Supreme Court held as follows (Paragraph 12 of the said AIR):

"12. So far as the tenants are concerned, the only material aspect is to consider whether the benefit of the amendment in Section 12(3) is available to them. The amendment became operative from 1.10.1987 and the default related to a period beyond a score of years in the past. On the facts as appearing on the record, even if the amendment was retrospective the tenants were not entitled to the benefit not being strictly covered by what is envisaged in the amendment. The Bombay High Court has taken the view that the provisions is not retrospective and special leave petitions against such judgments have been dismissed in this Court. It is represented that in some other cases special leave petitions have been entertained. We do not propose to examine that aspect of the matter here as in our view on facts the benefit is not available, as the rent had not been paid on demand or on the first day of the hearing. On that simple score apart from anything else the tenants made themselves liable to be evicted. There are several other aspects which the High Court has dealt with for supporting the eviction and we do not intend to reiterate them."

This decision; in my opinion, is not applicable to the facts and circumstances of the present case, where the controversy involved regarding applicability of Section 114 of the Transfer of Property Act.

70. In Surjeet Singh case (supra) relied upon by the learned Counsel for the petitioner, it was held by a learned Single Judge of this Court that in case, the U.P. Act No. 13 of 1972 was not applicable, the tenant became entitled for protection u/s 114 of the Transfer of Property Act, and the said benefit would be given to the tenant at the appellate stage.

It is true that the said decision in Surjeet Singh case (supra) laid down that the benefit of Section 114 of the Transfer of Property Act may be given to a tenant if the U.P. Act No. 13 of 1972 is not applicable, but the benefit may be given only when the requisite conditions for the applicability of Section 114 read with Section 111(g) of the Transfer of Property Act are satisfied. In the present case, as noted above, the requisite conditions for the applicability of Section 114 read

with Section 111(g) of the Transfer of Property Act are not satisfied. Therefore, the decision in Surjeet Singh case (supra) is not applicable to the present case.

71. In view of the aforesaid discussion, I am of the opinion that the present writ petition lacks merit, and the same is liable to be "dismissed. The writ petition is accordingly dismissed.

72. Shri A.K. Roy, learned Counsel for the petitioner then submits that reasonable time may be granted to the petitioner for vacating the disputed shop.

73. I have heard Sri A.K. Roy, learned Counsel for the petitioner and Shri Iqbal Ahmad, learned Counsel for the caveator-respondent No. 1 on this question also.

74. Having considered the submissions made by the learned Counsel for the parties and having regard to the facts and circumstances of the case, it is directed that the petitioner will not be evicted from the disputed shop till 31st March, 2004 provided the petitioner gives an undertaking on his personal affidavit within six weeks from today incorporating the following conditions:

1. The petitioner will vacate the disputed shop on or before 31st March, 2004 and will hand over peaceful vacant possession of the same to the respondent No. 1.
2. The petitioner will deposit the entire decretal amount including rent/damages upto September, 2003 within six weeks from today. The amount, if any, already deposited by the petitioner, may be adjusted.
3. The petitioner will continue to deposit rent/damages at the decretal rate with effect from October, 2003 by 7th of each such month till the date of vacating the disputed shop.
4. The amount, so deposited by the petitioner, may be withdrawn by the respondent No. 1 without furnishing any security.

75. In case, the aforesaid requisite undertaking is not given by the petitioner within the time mentioned above, or the petitioner does not comply with any of the aforesaid conditions incorporated in the undertaking, this order granting time to the petitioner for vacating the disputed shop will stand automatically vacated, and it will become open to the respondent No. 1 to execute the decree forthwith.