
(2016) 04 GAU CK 0041
In the Gauhati High Court
Case No : CRP No. 25 of 2009

Shri Jugal Kishore Joshi

APPELLANT

Vs

Sri Babulal Kucheria and others

RESPONDENT

Date of Decision : 26-04-2016

Acts Referred:

Assam Urban Areas Rent Control Act, 1972 — Section 5(4)

Citation : (2016) 4 GauLJ 299 : (2016) 5 GauLR 12 : (2016) 3 GauLT 72 :
(2017) 1 NEJ 533

Hon'ble Judges : N. Chaudhury, J.

Bench : Single Bench

Advocate : Mr. M.U. Mahmud and Mr. M.I. Hussain, Advocates, for the Appellant;
None appeared at the time of hearing, for the Respondent

Final Decision : Allowed

Judgement

N. Chaudhury, J. (Oral) - Whether deposit of rent in court under Section 5(4) of the Assam Urban Areas Rent Control Act, 1972 within a fortnight of its falling due from the due date mentioned in the written agreement is required although the parties by subsequent conduct and understanding over long period gave up the due date articulated in the written agreement is the crux of the present case.

2. The opposite parties herein as plaintiffs instituted Title Suit No.4/2005 in the court of learned Civil Judge (Senior Division) at Goalpara praying for a decree of eviction against the present petitioner on the ground of default. The suit was subsequently transferred to the court of the learned Munsiff No.2 at Goalpara on enhancement of pecuniary jurisdiction of the court of Munsiff and thereupon the suit was renumbered as Title Suit No.59/2006 of that court. It was the case of the plaintiffs that the defendant became tenant with respect to the suit premises with effect from 01.11.1987 under the predecessor of the plaintiffs at a monthly rental of Rs.1600/- payable within first week of next month as per English calendar. The agreement was for a period of three years and was supposed to expire on 31.10.1990. It was agreed that in case of renewal of the tenancy there

shall be an enhancement of rent by 15%. After death of the original landlord the plaintiffs became the landlord and were realising rent. However, a fresh agreement was executed on 01.06.1998 raising the monthly rental to Rs.2500/- as agreed upon. The defendant paid rent upto September, 2000 but thereafter defaulted. After long time the defendant filed Misc. N.J. Case No. 11/2004 in the court of learned Civil Judge No.1 at Goalpara and deposited rent for the months of April, 2004 to July, 2004 at the rate of Rs.2875/- per month without considering the 15% enhancement as stipulated and without renewal of tenancy. Having received the notice of the aforesaid N.J. case the plaintiff found that the defendant was liable to make payment of arrear rent to the tune of Rs.45,875/- and that they were defaulter. Accordingly, suit was instituted for eviction of the defendant from the suit premises along with realisation of arrear rent.

3. On being summoned the defendant appeared and submitted written statement denying the allegation that he was a defaulter. It was specifically pleaded that there was no fixed mode of payment. The landlord used to reside at Delhi and used to collect rent for months together as per the convenience of the parties. As and when the rents were demanded the defendant paid the same regularly. The plaintiffs did not approach the defendant for execution of a fresh agreement after expiry of the agreement dated 01.06.1998 but subsequently plaintiff No.2 approached the defendant with a new agreement of lease terminable after a year to which the defendant did not agree. At this the defendant was informed that an eviction suit will be instituted against him. Compelled, the defendant started depositing rent in court.

4. On the basis of the aforesaid pleadings of the parties, following 7 issues were framed by the learned trial court :-

- "1) Whether there is any cause of action for the suit?
- 2) Whether the suit is maintainable in the present form?
- 3) Whether all the plaintiffs are the heirs of Late Manik Chand Kucheria?
- 4) Whether the defendant is a tenant under the present plaintiffs for the suit premises?
- 5) Whether the defendant is a defaulter in payment of rent for the suit premises?
- 6) Whether the plaintiff is entitled for a decree as prayed for?
- 7) To what relief/reliefs parties are entitled to under law and equity?"

5. Plaintiffs examined five witnesses and adduced some documentary evidence. The defendant examined as many as four witnesses and also introduced some documents.

6. Learned trial court after consideration of the evidence led by the parties found that by Ext-E defendant paid rent from 1st January, 2004 to 31.03.2004 at the rate of Rs.2875/-. According to the defendant, plaintiff No.1 issued the receipt,

however, the same was denied by the plaintiff. DW Ramgopal Prajapat on being examined by the defendant deposed on oath that the Ext-E receipt was written and signed by Ranjit Kucheria. Similarly, by Ext-N the defendant paid rent at the rate of Rs.2875/- per month to the plaintiff Ranjit Kucheria for the months of April, 2004 to July, 2004 and thereafter by Misc. N.J. Case No.13/2004 the defendant deposited rent for the month of August, 2004. For the period thereafter the defendant was depositing rent for two months interval. The learned trial court noticing such evidence held that although as per the settlement between the parties they were accepting rents for months together as per their convenience but when dispute arose between them the tenant was duty-bound to make deposit of rent as per the written agreement existing between them. The learned Munsiff made the following observation :-

"But when a dispute has been arises regarding the continuance of the tenancy itself, and the tenant apprehend that he is sought to be declared a defaulter for non-payment of rent, the question or existence of any mutual understanding regarding the mode of payment of rent after its falling the ceases, and to protect itself from being declared as defaulter, the tenant has to deposit rent as per earlier agreement.

As per the original agreement Ext-"1" which has been continued till the death of original landlord Manik Chand Kucheria, the rent falls due and has to be paid within the first week of the succeeding month, similar stipulation was incorporated in Ext-2, the continued agreement on enhanced rent. Thus, if the plaintiffs refused to accept rent since April, 2004, it was incumbent upon the tenant to deposit the rent within fortnight of the 1st week of May, 2004, and so on, but the records of Misc. (NJ) cases called for goes to show that, the tenant has been depositing rents to two months together.

Thus, the tenant has not been depositing monthly rent in the court in strict compliance of Section 5(4) of Assam Urban Areas Rent Control Act. So situated the tenant has to be treated as defaulter for non-payment of rent within the statutory period of its falling due. The issue No.5 is decided in affirmative."

7. Having found that the deposit was not made within a fortnight from the last date mentioned in the agreement Ext-2, the learned trial court was of the view that the defendant was a defaulter and was liable to be evicted under Section 5 of the Assam Urban Areas Rent Control Act, 1972. Accordingly, the suit was partially decreed in favour of the plaintiffs directing recovery of vacant possession by evicting the defendant and his men and agents. This judgment and decree was passed on 31.08.2007.

8. Aggrieved, the defendant preferred Title Appeal No.9/2008 in the court of learned Civil Judge at Goalpara. The learned First Appellate Court having noted the pleadings of the parties and issues framed therein did not frame any point for determination as required under law but decided the crux issue of default. Having noted the observations made by the learned trial court the learned First

Appellate Court held that trial court did not commit any error in holding the defendant defaulter. However, it was also observed that rents for the months of June, July, August, September and October, 2005 was not deposited by the tenant in court. It is to be noted that the defendant submitted evidence-in-chief in the year 2004 and so there was no question of exhibiting these documents as they relate to the period of 2005. However, the petitioner has annexed the challans of rent deposit for this period as annexure to the present revision petition. The learned First Appellate Court dismissed the appeal holding that there was no error insofar as the finding of the learned trial court in regard to default is concerned and as such the judgment and decree passed by the learned trial court was upheld by the judgment and decree dated 08.12.2008. The aforesaid two judgments and decrees passed by the learned two courts below concurrently against the defendant have been challenged in the present revision petition.

9. I have heard Mr. M.U. Mahmud, learned counsel for the petitioner. No one has come forward to argue the case on behalf of the opposite parties although names of the learned engaged counsel was duly shown in the cause list. The item was also displayed in the electronic display board when the matter was taken up for hearing. I have perused the evidence on record in addition to the pleadings and noted the contents thereof.

10. Mr. Mahmud, learned counsel for the petitioner, would argue that there was no fixed mode of payment of rent and the learned courts below have committed jurisdictional error in not arriving at any finding in regard thereto before holding that the petitioner is a defaulter. Relying on the judgment of this Court in the case of Tushar Kanti Dey v. Sulata Choudhury and others, reported in 2002 (1) GLT 51 Mr. Mahmud would argue that in the absence of a finding as to due date the impugned judgments and decrees are vitiated and the same are liable to be set aside and quashed.

11. It is seen from the records that the first tenancy agreement is Ext-1 which was executed on 01.11.1987. In para 3 of the agreement it was stated that house rent is fixed at Rs.1600/- per month and the same is payable by the tenant to the landlord within first week of the succeeding English calendar month by obtaining proper receipt from the landlord himself or through any authorised agent or representative. This agreement was subsequently replaced by a new agreement dated 01.06.1998 and it has been exhibited as Ext-2. In para 3 of the Ext-2 agreement it is provided that house rent is fixed at Rs.2500/- per month and the same is payable by the tenant to the landlord within first week of the succeeding English calendar month by obtaining proper receipt from the landlord himself or through any authorised agent or representative. The tenant, on the other hand, had adduced a series of documentary evidence. Ext-A is a rent receipt issued by the original landlord Manik Chand Kucheria on 18.06.1999 whereby the landlord accepted Rs.30,000/- as rent for months upto July 31, 1999. Obviously, it was not rent for one month. On 01.06.1998 the same original

landlord issued another rent receipt vide Ext-B. It was Rs.5000/- for two months i.e. June and July, 1998. Ext-C is rent receipt dated 24.01.2000 for a sum of Rs.20,000/- for months upto March 31, 2000. On 28.08.2000 a rent receipt was issued by the plaintiff for Rs.15,000/- towards rent for the months of April, 2000 to September, 2000 at the rate of Rs.2500/- per month. Ext-E was adduced by the defendant to show that a sum of Rs.43,125/- was received by Ranjit Kucheria on 12.03.2004 in presence of one Ramgopal Prajapat towards rent of 15 months from January, 2003 to March, 2004. Thus, by these exhibits it has been established that the landlord used to collect rent on various intervals and there was no fixed date for receipt of rent. It is the case of the defendants that landlords used to reside at Delhi and whenever they used to visit Goalpara they used to collect rent from the tenant. Ext-F is yet another receipt to show that Manik Chand Kucheria has received rent in advance for three months from 1st day of November, 1987 to 31st January, 1988. The learned courts below have noticed these exhibits. Although the learned trial court has not arrived at a definite finding that there was no fixed mode of payment of rent in the present case, but it has also not been held that rent falls due as per the agreement dated 01.06.1998 (Ext-2). The learned trial court has held that so far as the acceptance of rent by the landlord as per their convenience is correct but when dispute arose between them and the tenant felt the necessity of making depositing rent in court the tenant was duty bound to make deposit within a fortnight of its falling due as per the written agreement i.e. Ext-2. Question arises whether such finding given by the learned trial court and impliedly upheld by the learned First Appellate Court is acceptable. The question of default relates to jurisdictional fact and the same has to be decided by the revisional court for which this Court has also examined the evidence available on record.

12. In Tushar Kanti Dey (supra) relied upon by Mr. M. U. Mahmud, learned counsel for the petitioner, the question as to due date has been considered by this Court with reference to the earlier judgments in the case of Upendra Chandra Deb Roy v. Subhasini Deb Roy and others, reported in 1989 (2) GLR 7. Paragraphs 7 and 8 of the judgment in Tushar Kanti Dey (supra) are quoted below for ready reference :-

"(7) To buttress his argument above mentioned, Mr. Banerjee placed reliance on a decision of this Court in Upendra Chandra Deb Roy v. Smti Subhashini Deb Roy and two Ors. reported in (1989) 2 GLR 7 and stated that ratio of the said case is squarely applicable in this case. On perusal of the above cited case, it is found that in the said case this Court allowed the revision petition holding in paragraph 8 that "the most important fact that has to be proved, therefore, is "the date when the rent actually fell due". Without determination of the aforesaid fact, it is difficult or rather impossible to hold a tenant defaulter, because in that case, the very starting point from which the period of a fortnight within which the rent has to be paid runs is not available. The determination of the fact when the rent actually falls due in a particular case depends upon the arrangement or agreement between the parties. The rent may be fixed on monthly basis but that

by itself will not indicate the date when the rent will fall due. The parties might mutually agree that the rent would be paid monthly say within a week or a fortnight or a month or at any other interval from the expiry of the month for which it is due. There may be cases where no due date is fixed between the parties for payment of the rent and the rent is paid on demand to the landlord from time to time. There may be cases where the landlord, due to various reasons or for his own convenience wants the rent to be paid for two or three months at a time either in advance or on expiry of the period for which it is due. There may also be cases where the landlord resides at some distance away from the place where the house is situated and makes an arrangement with that the tenant that the rent would be paid to him from time to time as and when he visits the town and demands the payment thereof instead of remitting the same month to month or at any other interval to the place of his residence. Such contracts or arrangements are not unknown or uncommon. Nor are they always in writing. The landlord has therefore, to prove by adducing suitable evidence as to when the rent fell due. Where there is no agreement in writing fixing the date for payment of the rent, the landlord has to prove the same by other evidence. In considering the evidence of the landlord in such cases, the Court may also take into account the conduct of the parties. There may be evidence before the court to show that the rent was being paid at varying intervals which the landlord has been accepting without any protest or grievance. That may indicate that there was no arrangement between the parties to pay the rent by any specific date. In such cases, the Court can infer and imply the agreement between the parties to pay the rent at varying intervals on demand from the landlord at his convenience. Even if it is shown that there was some agreement or arrangement to pay the rent within a specific time from the expiry of the month, conduct of parties spreading over fairly long period of time to the contrary without any protest or objection from either party may indicate that the agreement or arrangement in regard to the payment of rent between the parties was modified. A landlord who continues to receive the rent at varying intervals from the tenant without any objection whatsoever for several years cannot be permitted to suddenly turn back and say that the arrangement between him and his tenant was otherwise and seek eviction of a tenant on the ground that he was a defaulter."

(8) Having regard to the judicial pronouncement above cited and upon perusal of the impugned judgment and decree passed by the Courts below, I find enough force in the submissions of Mr. Banerjee and I am of the considered opinion that the Courts below failed to determine as to when the rent becomes due for payment failure of which has required intervention of this Court in revisional jurisdiction. I am in full agreement with the proposition of law laid down in Upendra Chandra Deb Roy's case (supra) and in my view the ratio of the same is very much applicable in the present case."

13. The present position of Section 5(4) of the Assam Urban Areas Rent Control Act, 1972 prescribing the scope to the defendant for making deposit of rent in

court in case of refusal by the landlord originally occurred in Section 6 of the earlier Act. The same provision came up for consideration before a Full Bench of this Court in the case of Kali Kumar Sen and another v. Makhan Lal Biswas and another, reported in AIR 1969 Assam and Nagaland 66. Hon"ble Mr. Justice P.K. Goswami, as his Lordship then was, considered this aspect of the matter and observed as follows in last part of paragraph 20 and the same is quoted below for ready reference :-

"Reading, therefore, Section 6(1) and 6(1) proviso (e) and section 6(5) together, it is absolutely clear that the tenant in order to successfully resist eviction under the law, must be required to prove that he has not only performed the conditions of the tenancy but has paid the rent that is lawfully due within the time limit agreed upon under the contract, if there be any, and in case [emphasis supplied] of refusal, within a fortnight of its becoming due. In the instant case, the finding of the court below being that the tenant was under an obligation to pay the rent within 7th of the succeeding month, in order to have the benefit of Section 6(1), he has to show that he has paid his rent within a fortnight of its becoming due after he has established that the landlord has refused to accept his rent which was offered within the time agreed upon....."

14. Another Division Bench of this Court had occasion to consider the point of due date in the case of Hari Shankar Sahu v. Giridharilal Sarmah, reported in 1989 (2) GLJ 201, the Hon"ble Division Bench held that the word "due" appearing in clause (e) of sub-section (1) of Section 5 of the Act merely means "payable". It was further held that landlord should establish when under the arrangement the rent was payable and it could be said to be due so that if not paid within a fortnight from that date the tenant could be said to have committed default, for, otherwise it would not be possible or at least extremely difficult to determine as to when could it be said that the rent was due but had not been paid within a fortnight thereafter. Even in that case tenant used to pay in lump sum for months together and having noticed such mode of payment the Division Bench arrived at the finding that landlord used to accept rent in lump sum for the whole year whenever he needed in all probabilities under some arrangement. Since the landlord never insisted on payment of rent after the end of the month but received payment of rent for one year it appears whenever he wanted it. Under such circumstances opinion was expressed that it shall not be reasonable to interfere from such fact that defendant had committed default in payment of rent.

15. In the case of Bhawani Sankar Sharma v. On the death of Jugal Kishore Garodia, His Heirs and Legal Representatives Smt. Laxmi Devi Garodia & others reported in (1984) 2 GLR 182 this Court found that practise had been in vogue for last 18 years as to acceptance of rent sometimes for one month and sometimes for 2/3 months in lump sum. So, although technically the rent would fall due on the expiry of last day of month of tenancy but in view of such practise over long period of time this Court held that question as to due date would

depend not only on the recital of the agreement but also upon other factors as well. This is because lessor and the lessee may specifically agree as to when and in what manner the rent would be paid or recovered. The lessor may agree with the lessee that he would at his convenience visit the place of the lessee and collect the rent from him. The mode and the date of payment of rent may vary from case to case. The lessor may adopt a practise of visiting the place of the lessee and collect the rent according to his convenience. In all such cases tenant may set up the plea that according to clause (e) of proviso to Section 5(1) of the Act the rent would fall due on the date the lessor visits the place of lessee and demands payment of rent. If in such a case tenant fails to pay the rent or fails to deposit in court within a fortnight thereafter, he would become a defaulter within the meaning of Section 5(1)(e) of the Act. The relevant part of this judgment is quoted below for ready reference :-

"It has thus been found by the courts below that the settled practise between the parties had been that the plaintiff would visit the place of the defendant according to his convenience and would collect the rent from him. The plaintiff sometimes collected rent in advance and sometimes for one month and sometimes for two to three months in lump sum. That practise had been in vogue for the last 18 years. Technically the rent would fall due on the expiry of the last day of the month of tenancy, but the question as to when the rent would fall due would also depend upon other factors as well. The lessor and the lessee may specifically agree as to when and in what manner the rent would be paid or recovered. The lessor may agree with the lessee that he would at his convenience visit the place of the lessee and collect the rent from him. The mode and the date of payment of rent may vary from case to case. The lessor may adopt a practise of visiting the place of the lessee and collect the rent according to his convenience. In all such cases the tenant may set up the plea that according to clause (e) of the proviso to sub-section (1) of section 5, the rent would fall due on the date the lessor visits the place of the lessee and demands payment of rent and in such a case if the tenant fails to pay the amount of rent or fails to deposit the rent in court within a fortnight he would become a defaulter within the meaning of clause (e) of the proviso to sub-section (1) of section 5 of the Assam Act No.II of 1962. In the present case it was found as a fact that it was a practise between the parties that the landlord would visit the premises in question at Dibrugarh to collect rent from the tenant. He sometimes collected rent in advance and sometimes for one month and sometimes even for two to three months in a lump sum. It was also found as a fact that when the landlord did not visit the defendant's place in the early part of 1964, the defendant sensed some mischief and therefore he remitted the rent by money order which the landlord refused to accept. On these findings of fact it was held that the defendant was not a defaulter. In my view the findings reached by the courts below on these questions of fact are based on evidence and they are neither perverse nor illegal nor are such which no reasonable person could arrive at. The defendant, on the facts and circumstances of the case, was rightly held

to be not a defaulter within the meaning of clause (e) of the proviso to sub-section (1) of section 5 of the Assam Act No.II of 19062."

16. The admitted position of facts in the present case as emanated from the concurrent findings of the learned courts below is that although there was a prescribed due date in para 3 of the Ext-1 and Ext-2, yet, since the landlord did not reside in Goalpara and used to ordinarily reside at Delhi, he used to collect the rent as per convenience. From Exts-A to F it goes to show that rents for several months were accepted by the landlord together since 1988 till 2004. It being a practise over 15 years it can safely be said that the parties had given go bye to the mode of payment suggested in para 3 of the Ext-1 and Ext-2. Applying the ratio laid down by this Court in the case of Bhawani Sankar Sharma (supra) it cannot be said that rent was payable within the first week of the succeeding month as provided under clause 3 of the agreements Exts-1 and 2. The tenant knew that whenever the landlord would come or send his representative the rent has to be paid. Accordingly rents were being paid for a period of over 15 years. If the landlord continued in accepting rent as per convenience for months together during his visit to Goalpara from Delhi, they cannot turn around after 15 years and say that due date was the first week of the next month as per English calendar. Even if they claim, such a condition would be impossible as landlord himself did not reside at Goalpara and there was no other mode of payment except personal demand and payment. The learned courts below have accepted this position and that is why there is no specific finding anywhere in either of the two judgments that due date was first week of next month as per English calendar. By following the law laid down in the case of Tushar Kanti Dey (supra) straightway it can be said that in the absence of a specific finding as to the due date the learned courts below have committed error in holding the tenants defaulter. Learned trial court held that the moment dispute arose and the defendant started depositing rent in court the defendant was dutybound to make the deposit within a fortnight of its falling due as per the contract. Such a finding does not appear to be correct in view of specific provision of Section 5(4) of the Assam Urban Areas Rent Control Act, 1972 as well as the law discussed herein above. In the Full Bench judgment in Kali Kumar Sen (supra) it was observed that rent has to be deposited within the time limit agreed upon as per contract, if there be any. A contract may be in writing or it may be oral as well. In the case in hand there was written contract but the parties did not act upon the same insofar as the due date is concerned. Landlord demanded whenever he wanted for one month or many months at a time and the tenant also paid accordingly. So, it cannot be said that parties had agreed upon to make payment of rent in the first week of the succeeding month as per English calendar. In the case in hand there was no due date as there was no fixed date for payment of rent. Parties did not act upon clause 3 of the Exts-1 and 2 agreements and by practise they did away with the provision of payability of rent in the first week of the succeeding month. In the case in hand there was no due date by agreement of the parties in view of their conduct for long period

over 15 years and so it is not possible to hold that clause 3 of the Exts-1 and 2 will be binding on the tenant. Since there was no due date, the question of committing default cannot arise. The learned courts below have committed error in holding that the tenant is a defaulter for not having complied with the requirement of clause 3 of the agreement insofar as it relates to due date.

17. The revision petition stands allowed. The impugned judgments and decrees are hereby set aside. No order as to cost.