

(2012) 12 AHC CK 0232

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 3115 of 2000

Smt. Noorul Subah and Another

APPELLANT

Vs

Additional District Judge-I, Bijnor and Others

RESPONDENT

Date of Decision : 06-12-2012

Acts Referred:

Transfer of Property Act, 1882 — Section 106, 111, 111(g), 114
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 2(1)(bbb), 20(4)

Citation : (2013) 2 ADJ 454 : (2013) 3 ALJ 244

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Dev Raj, Anurag Khanna and Fahim Ahmad, for the Appellant; D.C. Mathur and S.P. Kapoor, for the Respondent

Judgement

Sudhir Agarwal, J.—Heard Sri Fahim Ahmad, Advocate, holding brief of Sri Anurag Khanna, Advocate for the petitioner and perused the record. The writ petition is directed against judgment and order dated 7th August, 1997 passed by Small Cause Court, Bijnor dismissing SCC Suit No. 48 of 1995 and revisional judgment and order dated 30.11.1999 of 1st Additional District Judge, Bijnor dismissing petitioner's S.C.C. Revision No. 46 of 1997 and confirming Trial Court's judgment dated 7.8.1997.

2. The petitioners filed ejectment suit before Small Cause Court on the ground that respondent No. 3, who is a tenant in the disputed accommodation namely a shop situated at Mandi Pamarganj, Bijnor has committed default in payment of rent and therefore, is liable for ejectment. The petitioners" pleaded that property in dispute is a Wakf property and, therefore, Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act, 1972") has no application, hence, after issuing notice u/s 106 of Transfer of Property Act, 1882 (hereinafter referred to as "Act, 1882") tenancy of respondent No. 3 was determined and he was liable for ejectment.

3. The respondent No. 3 disputed the fact that property in dispute is a Wakf property and also contended that Wakf Board itself ought to have been impleaded as plaintiff and in any case since entire dues have been deposited u/s 20(4) of Act, 1972 on the first hearing of the suit, decree of eviction is not liable to be passed against him.

4. The Trial Court held that disputed accommodation could not be proved to be a Wakf property, therefore, it was governed by Act, 1972. It also held that there was no default on the part of tenant, inasmuch as, pursuant to demand notice sent by petitioners, respondent No. 3 remitted demanded rent during notice period itself but petitioner No. 1 declined to accept rent and hence there was no default. Besides above, rent and other dues u/s 20(4) of Act, 1972 were also deposited on the first date of hearing, hence also, ejectment, of respondent No. 3 is not justified in law.

5. The petitioners thereafter preferred SCC Revision No. 46 of 1997 wherein Revisional Court reversed findings of Trial Court that property in dispute is not a Wakf property observing that mere registration of property as a Wakf with Wakf Board is not a criteria to determine whether a property is a wakf property or not and since Wakf was created on 7.7.1937, it must be deemed to have been created on that date and registration cannot be treated to be a condition precedent to hold a Wakf to be so or not. It, therefore, held that property being a Wakf property, Act, 1972 is exempted in view of Section 2(1)(bbb), as inserted vide U.P. Act, No. 5 of 1995 w.e.f. 26.9.1994. It, therefore, held that protection under Act, 1972 was not applicable to respondent No. 3. Having said so, it proceeded to hold, where lease is terminated for non-payment of rent and not a termination simplicitor, benefit of Section 114 of Act, 1882 would be attracted to the tenant and in that view of the matter he was not liable for ejectment.

6. Learned counsel for the petitioners contended, when tenancy was terminated giving a notice u/s 106 of Act, 1882, benefit of Section 114 of Act, 1882 cannot be given since it shall have no application and placed reliance on a decision of this Court in B.R. Trading Company and. another v. Dharam Raj Sahu and others, 2008 (3) ARC 148.

7. In my view, the judgment in B.R. Trading Co. (supra) has no application for the benefit of the petitioners and it clearly makes a distinction founded on language of notice given to the tenant. In the present case copy of notice has been placed on record as Annexure 1 to the rejoinder-affidavit. The notice dated 6.12.1994 reads as under:

You are a tenant occupying the upper part of shops of my client which is located at Mandi Chamar Gandh, District Bijnaur with a monthly rent of Rs. 125/- plus water & house tax. The property next to the premises forming aforesaid tenanted part and aforesaid shops including other property belonged to Dr. Zia-Ul-Haq, son of Munshi Ali Bakhsh, resident of Mohalla Kazipada, Bijnaur, Dr. Zia-Ul-Haq had given the entire aforesaid property in Waqf and my aforesaid client is

Proficiency of the same and she also looks after the aforesaid property and since the aforesaid shop is property of Waqf, Act 13/1972 (No. 13 of 1972) does not apply to the aforesaid property. A rent of Rs. 1,625/- with interest of Rs. 146.25 @ 9% for the period of 1.11.1993 to 30.11.1972 alongwith Rs. 150/- for memo notice and water and house tax of Rs. 585.30 are due against you which you have not paid even after demand. This way, a total of Rs. 2,604.60 for rent, cost of notice and water and house tax are due against you. You are called upon through this notice to pay my client a total of Rs. 2,604.60 within one month. You are informed through this notice that your tenancy shall be terminated after 30 days of receipt of the notice and after expiry of this period, please vacate the aforesaid premises and ensure delivery of its possession to my client otherwise after 9 days of expiry of this period my client shall initiate proceedings for eviction, recovery of rent, damages and cost of memo notice with water and house tax before a competent Court for which you shall be liable for damages and costs arising on this count.

(English Translation by the Court)

8. A bare perusal of notice shows that it is not a notice simplicitor determining tenancy but it is a notice exercising right of re-entry by landlord on account of forfeiture due to non-payment of rent by the tenant. The distinction between a notice simplicitor determining tenancy i.e. a quit notice and a notice forfeiting tenancy on account of some default on the part of tenant has been considered in paras 12 and 13 of the judgment in B.R. Trading Company and another (supra) which reads as under:

12. The word "forfeiture" has not been defined under the Act but it means the loss of a legal right by means of some breach of an obligation.

13. On general principles, a suit for ejectment against a tenant is not maintainable unless a previous notice to quit or a notice demanding possession either u/s 106 or 111 (g) of the Act is given. There is, however, a distinction between a notice to quit and a notice determining tenancy under clause (g) of Section 111 of the Act. In determination of tenancy by forfeiture, a right is exercised while tenancy is still subsisting but in a notice to quit, the tenancy is not subsisting and in such a case, there arises no question of relief against forfeiture.

9. The Court has relied on an earlier decision in Mohammad Nasir Vs. District Judge, Nainital and others, , wherein inter relationship of Sections 106, 111(g) and 114 of Act, 1882 was considered in detail and the Court said as under:

14. This Court in Mohammad Nasir (supra) elaborately examined whether the provisions of Section 114 of the Act would be applicable when the tenancy is terminated by giving one months notice u/s 106 and it was observed:

Section 114 of the Act confers a power on the Court to grant an equitable relief to the defaulting lessee. In order to claim benefit under this section, it has to be

shown by the tenant that one of the terms of the lease was that the landlord will have a right of re-entry if the rent for any specified period remained unpaid and he has to show further that forfeiture has been incurred as provided u/s 111 (g). Section 114, of the Act thus postulates existence of determination of lease by forfeiture as a condition precedent and provisions contained in this section will have no application where the lease has been determined by serving a notice to quit u/s 106, of the Act. The relief u/s 114 of the Act is confined to those cases only which are strictly covered u/s 111 (g) and not to those cases which fall u/s 106 of the Act. A monthly tenancy is determinable by one month's notice by either party and if the tenancy is terminated by serving one month's notice u/s 106 of the Act, there is no forfeiture of tenancy and in that event, Section 114 cannot be applied. Thus, a notice u/s 106, of the Act by no means could be treated as one u/s 111 (g).

Section 114 applies to those cases Where the landlord invokes his rights under what is known as forfeiture clause and determines the lease by forfeiture and sues for the ejectment of the tenant. I may illustrate it by an example which will make the picture more clear. Suppose there is a lease for a fixed term of five years containing a clause that the landlord will be entitled to determine the lease and to re-enter upon the demised premises even during the period of five years if the tenant does not pay rent for more than three months. But for this clause the lease must run for the entire period of five years and the landlord during the said period will have no right to eject the tenant before the expiry of the fixed period of five years. If the tenant fails to pay rent for more than three months, forfeiture clause enables the landlord to determine the lease before its expiration. In such a case, the subsisting tenancy cannot be determined by serving a notice *Simpliciter* u/s 106 of the Act and it can only be determined where the landlord forfeits the tenancy by serving a notice u/s 111 (g). In such an event, Section 114 can be pressed into service but where the tenancy runs from month to month and the same has been determined by a valid notice u/s 106 of the Act, Section 114 of the Act shall have no application.

(emphasis supplied)

10. Earlier also in *Tikka Ram v. Prakash Chandra*, 1966 ALJ 1016, this Court has observed as under:

Mr. Chaturvedi then argued that this Court should exercise its power to grant relief against the landlord's forfeiture of the lease for non-payment of rent. He contends that the Court's power to grant such relief is not confined to the cases falling within Section 114 of the Transfer of Property Act, and he relied on a number of decisions. *Jabab Vellalhi v. Smt. Kaderved Thayammal*, AIR 1958 Mad. 232; AIR 1944 229 (Nagpur) and *Malappa Venkatesh Shatti v. Janardan Govinda Mahab*, ILR 1950 Bom. 450. In all these cases, the Court exercised its equitable power to grant relief against forfeiture, though the case did not fall within Section 114. But the power to grant relief against forfeiture, whether equitable or u/s 114, can be exercised by the Court only if there has been a forfeiture on the

ground of nonpayment of rent But where there is no forfeiture and the landlord has terminated the lease under his right u/s 106, the question of granting relief against forfeiture does not arise. A suit for ejectment by the landlord after determining the lease u/s 106 is not based on forfeiture of the lease, but on the landlord's ordinary right to terminate the lease and eject the tenant. This right is restricted by Section 3(1) (a) of the U.P. Control of Rent and Eviction Act, but as soon as the tenant loses the protection of this Section, the landlord's right to determine his lease and eject him is freed of all restrictions. The tenant cannot in such a case ask the Court to exercise its equitable power against a forfeiture, for the simple reason that there is no forfeiture to give relief against.

(Emphasis supplied)

11. Besides above, the matter has also been examined in Ram Bali Pandey (Decd.) through L.Rs. Vs. IInd Additional Judge, Kanpur and others, , wherein the Court has stressed upon a tenancy terminated simpliciter or on account of forfeiture etc. The relevant observations in para 23 of the judgment in Ram Bali Pandey (supra) are as under:

The tenancy was terminated u/s 106 of the T.P. 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 T.P. Act by 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 T.P. Act. No authority is required for the proposition that where there is simpliciter termination of tenancy u/s 106 of the T.P. Act and not u/s 111 (g) of T.P. Act, then provisions of Section 114 of the T.P. Act cannot be attracted. This argument of respondents' counsel also does not appeal to the Court and has to be rejected.

(emphasis added)

12. However, wherein tenancy is terminated on account of default in payment of rent i.e. exercising provision relating to forfeiture, benefit of Section 114 of Act, 1882 would be applicable. This has been stated in Surjeet Singh v. A.D.J., Haridwar and others, 1993 (22) ALR 482 and relevant observations in paras 6, 7 and 14 reads as under:

6. Sri Rajesh Tandon, learned counsel for the petitioner contended that once the revisional Court has upheld the finding that the U.P. Act No. 13 of 1972 is not applicable then the provisions of Section 114 of the Transfer of Property Act becomes applicable automatically. In support of his contention he has relied upon a decision in Arjun Khiama Makhijani v. Jamandas C. Tuliani, 1989 SC and FBRC

500. According to it Section 114 of Transfer of Property Act applies to that case where a lease of immovable property has been determined by forfeiture for non-payment of rent.

7. Applying the same principle in the instant case I am of the view that since the U.P. Act No. 13 of 1972 is not applicable the petitioner was entitled for the relief as contemplated u/s 114 of the Transfer of Property Act.

14. After hearing the learned counsel for the parties and perusing the record I am of the view that since 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.

13. The aforesaid two decisions have been considered and referred by this Court in Writ Petition No. 10455 of 2005 (Acharya R.N. Kela Inter College v. Sabir Khan) decided on 10.10.2012.

14. In the present case, a bare reading of notice clearly shows that here tenancy was determined on account of forfeiture as contemplated in Section 111(g) of Act, 1882. Though in the plaint, petitioners have claimed that notice was simplicitor but that does not appear correct on a plain reading of the notice. It does not refer to any provision of statute. A bare reading thereof would clearly go to show that it was a notice determining tenancy on account of forfeiture and thus may be referable to Section 106 read with Section 111(g) of Act, 1882.

15. That being so, the Court below has rightly resorted to Section 114 of Act, 1882 so as to deny any relief to the petitioners and I find no error in the impugned judgment warranting interference.

16. Dismissed. Interim order, if any, stands vacated.