
(2012) 03 AHC CK 0101
In the Allahabad High Court
Case No : Civil Revision No. 775 of 2003

Smt. Shobha Chandra and Others

APPELLANT

Vs

U.P. Industrial Co-Operative Association Ltd. and Another

RESPONDENT

Date of Decision : 02-03-2012

Acts Referred:

Arbitration Act, 1940 — Section 1, 34, 8
Arbitration and Conciliation Act, 1996 — Section 8, 8(1), 8(2)
Presidency Small Cause Courts Act, 1882 — Section 25
Transfer of Property Act, 1882 — Section 111, 113

Citation : (2012) 4 ADJ 78 : (2012) 3 AWC 3183

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : K.J. Khare, A.K. Rastogi, Vishnu Gupta and Dharmendra Prasad Singh, for the Appellant; V.K. Birla, for the Respondent

Judgement

Hon''ble Prakash Krishna, J

1. This is defendants'' revision u/s 25 of the Small Causes Court Act and is directed against the judgment and decree dated 19th September, 2003 passed by the District Judge, Bulandshahar in SCC Suit No. 8 of 2002 whereby the suit for recovery of Rs. 94,485/- as arrears of rent and water tax upto the date of filing of the suit alongwith pendente lite and future damages for use and occupation and ejection of the defendant-tenant, has been decreed. The aforesaid suit was filed for ejection of the defendants from the disputed property described at the foot of the plaint, for recovery of arrears of rent, water tax and damages etc. on the allegations that the plaintiffs are the owners and landlords of the accommodation in question. It was leased out to the defendant on monthly rent of Rs. 2500/- and water tax Rs. 250/- per month. The defendants are in arrears of rent. The defendants did not pay outstanding amount despite of notice of demand. The tenancy has been determined by the notice dated 8th November, 2008. It was further pleaded that the provisions of U.P. Act No. 13 of 1972 are not applicable to the building in question.

2. The suit was contested by the defendants by filing joint written statement by denying the plaint allegations. It was pleaded that the plaintiffs have accepted a sum of Rs. 35,000/- towards arrears of rent after termination of tenancy and therefore, they have waived the notice. It was further pleaded that there is an arbitration clause between the parties and therefore, the suit is barred.

3. On the basis of the pleadings of the parties, the following issues were struck.

1. Whether the notices issued by plaintiffs terminating the tenancy of the defendants are illegal and invalid?

2. Whether this Court has no jurisdiction to entertain and decide the suit?

3. Whether the suit is barred by the principle of estoppel?

4. Whether the notices have waived due to payment of Rs. 35,000/- towards rent by the defendants to the plaintiffs after the service of notices and acceptance of the said rent by the plaintiffs?

5. Whether the suit is barred by the provisions of arbitration?

4. The trial Court found that the notice terminating the tenancy is valid, the Court has jurisdiction to decide the suit, and there is no waiver of notice.

5. Challenging the judgment and decree dated 19th September, 2003 of the trial Court, the present revision has been filed.

6. Shri V.K. Birla, Learned Counsel for the applicants urged the following two points in support of the revision.

Firstly, the finding recorded by the trial Court with regard to the arbitration clause is legally incorrect. Submission is that there being an arbitration clause, the trial Court had no jurisdiction to entertain the suit.

Secondly, the landlady has accepted part of rent after service of notice determining the tenancy, hence the notice determining the tenancy stood waived.

7. In reply, Learned Counsel for the opposite parties supports the judgment under revision and submits that the arbitration clause was never pressed by the defendants. Plea of arbitration was raised for the first time through the written statement. The defendants should have invoked arbitration clause before delivery of the written statement. It was further submitted that there is no waiver of notice as there is no overt act on behalf of the plaintiffs to show their intention that they have waived the notice. Acceptance the arrears of rent in part does not amount waiver of notice as the tenant is under legal obligation to clear the arrears of rent.

8. Considered the respective submissions of the Learned Counsel for the parties and perused the record.

9. Taking the first point first, it may be noted that the parties entered into a

tenancy agreement dated 9th July, 1998. Condition No. 9 of the said agreement contains arbitration clause which is reproduced below:

9. That in case any dispute arises out of this agreement or relating to or concerning this agreement of the said rental portion, it shall be first referred to the sole arbitration or Registrar Handloom Co-operative Societies, (U.P.) then the parties will be at liberty to approach the Court of law to settle the dispute.

10. Learned Counsel for the applicants submits that it has been held by the Apex Court in *Rashtriya Ispat Nigam Limited and another v. Verma Transport Company*, 2006 (4) AWC 4011 (SC), that in presence of arbitration clause, no discretion is left with the Court. A Court cannot refuse to refer the matter to the Arbitrator. Much emphasis was laid by him on paragraphs No. 36 and 39 of the report. Section 8 of the Arbitration and Conciliation Act, 1996 is reproduced below:

8. Power to refer parties to arbitration where there is an arbitration agreement.-
(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

11. Section 8 reproduced above has been subject matter of interpretation by the Apex Court from time to time. It has compared Section 8 with Section 34 of the old Arbitration Act, 1940. A bare perusal of Section 8 of the Act would show that it mandates a judicial authority before which an action has been brought in respect of a matter, which is a subject matter of an arbitration agreement, shall refer the parties to arbitration if a party to such agreement applies not later than when submitting his first statement. Unlike Section 34 of the old Arbitration Act it does not provide for stay of the proceedings before the Court. The case of the Learned Counsel for the applicant is that a plea with regard to the arbitration clause has been set out in para 18 of the written statement. For the sake convenience, the said para is reproduced below:

18. That admittedly a rent note was executed between the defendants and the plaintiff No. 1. By para 9 of the rent note, it was agreed that in the case of any dispute arises in between the parties, it shall be first referred to the sole arbitration or Registrar, Handloom Co-operative Societies (U.P.). The parties will be at liberty to approach the Registrar, Handloom Cooperative Societies (U.P.) to settle the dispute. Thus, the suit is barred by the provisions of the Arbitration Act.

12. The question which now falls for consideration is whether raising a plea with regard to the arbitration clause in the written statement fulfills the condition for referring the parties to arbitration where there is an arbitration agreement or not.

13. For the present purposes of this case, the key-words are "If a party so applies" used in Section 8(1) of the Act. It is not the case of the applicant tenant that at any point of time it applied invoking the Section 8 of the Act. "If a party so applies" used in sub-section (1) and sub-section (2) of Section 8 wherein it has been mentioned that "The application referred to in sub-section (1) shall not be entertained" are the key-words. These words do indicate that there should be an application drawing the attention of the Court towards the arbitration clause with request to refer the parties to arbitration. The question now falls what is the meaning of word "application" and whether the written statement u/s 8 can be treated as an application or not.

14. The dictionary meaning of the word "application" as noted by the Apex Court in Shaik Saidulu @ Saida Vs. Chukka Yesu Ratnam and Others, , is reproduced below:

The dictionary meaning of the word "application is: "(1) a formal request to an authority, (2) the action of putting something into operation, practical use or relevance, (3) the action of applying something to a surface, (4) sustained effort, (5) computing a program or piece of software designed to fulfil a particular purpose. "The word "application" could be understood in a generic sense as a prayer made to an authority for some relief to set aside an order of another authority.

15. In Prem Raj Vs. Ram Charan, , the Apex Court has observed that the plaint which makes a request to the Court, is an application. However, the written statement was held not to be an application because it does not include any request to the Court.

16. In P. Philip Vs. The Director of Enforcement, New Delhi and Another, , the Court held, the word "application" is synonymous with the term "petition" which means a written statement or material facts, requesting the Court to grant the relief or remedy based on those facts. It is a peculiar mode of seeking redress recognised by law.

17. Now, coming to the facts of the present case, there is no request or prayer on behalf of the defendant tenant in the written statement, requesting the Court to refer the parties to arbitration. Under the statutory setup of Section 8, it is requirements of law that the filing of an application alongwith the original arbitration agreement or a duly certified copy thereof not later than when submitting the first statement on the substance of the dispute is mandatory. In other words, in absence of an application inviting the attention of the Court towards the arbitration clause or mere setting out arbitration clause in the written statement is of no avail.

18. It is interesting to note that even in para 18 of the written statement, reproduced above, there is no prayer by the defendant tenant requesting the Court to refer the parties to arbitration in the light of the arbitration clause. The plea set out therein is that the suit is barred by the provisions of the Arbitration Act. It appears that the plea that the suit is barred by Arbitration Act was raised under misconception of law without noticing the changes brought by the Arbitration Act, 1996 through Section 8 thereof.

19. In the case on hand it appears that there was no dispute that the defendant tenant is in arrears of rent as pleaded by the plaintiff in the plaint. A reading of the written statement would show that there is no specific denial about the plea with regard to the arrears of rent and water tax. Written statement is a small document and upto paragraph 13 there is admission and general denial of the contents of paragraph Nos. 1 to 15 of the plaint. In the remaining part, the defendants have not stated a word as up to what period they have paid the rent and water tax. In other words, there is no specific denial with regard to the plea relating to the arrears of rent and water taxes. Only one witness was examined on behalf of the defendants namely Ashok Kumar Sharma DW/1 who has stated that the department is in bad financial condition. Salaries of the employees for the last eighteen months have not been paid nor any amount was given to the plaintiff. A draft of Rs. 1,25,000/- for payment to the plaintiff was drawn but it was not handed over to her as there was no settlement between the parties. All these leads to an irresistible conclusion that as a matter of fact, there was no dispute with regard to the amount due to the plaintiffs and there being no dispute between the parties in this regard, the defendant apparently did not press the arbitration clause except by setting it out in the written statement.

20. There is nothing on record to show that alongwith the written statement, the agreement containing the arbitration clause was filed.

21. By filing the written statement, the defendants submitted to the jurisdiction of Court.

22. On the facts of the present case, in any case, it is not desirable to refer the matter to arbitration. The property was let out for a period of five years under the aforesaid rent agreement. However, there is a renewal clause being, clause No. 4, which is reproduced below:

4. That after the expiry of FIVE years, the Second party will have option to renew this agreement for a further period of FIVE years on the terms and conditions agreed upon except revision in rent at the rate of 10% enhanced only.

23. The said clause gives right of only one renewal for further period of five years subject to enhancement of rent by 10%. Thus, at the most, the defendants-tenant were entitled to remain in occupation of the property in dispute for a period of 10 years at the most i.e. five years terms fixed in the lease plus five years under the renewal clause. The agreement is of the year 1998 i.e. 9th July, 1998 and from that date a period of 10 years has already been expired. There is

no justification for not vacating the disputed accommodation. There is another aspect also. Pointedly, a query was put to the Learned Counsel for the applicants to demonstrate as to whether the defendants-tenant ever exercised their right to opt for renewal of lease. He could not place any material to show that the said right of renewal was opted by the defendants-tenant. Even otherwise also, there is no iota of evidence that the defendants-tenant have ever offered the enhanced rent by 10% as is provided for under the said renewal clause.

24. In view of the above discussions, it is not appropriate to refer the matter to arbitration. No useful purpose is going to be served as in any case, original tenancy period and the renewal period, if any, has come to an end.

25. For the reasons given above, the point No. 1 is decided against the defendant tenants though on different reasons which were recorded by the trial Court. The reasons given by the Court below in support of the point No. 1 does not appear to be correct.

26. Now I take up second point regarding waiver of notice. Learned Counsel for the defendants laid much emphasis on the statement of the landlady recorded as P.W. -1. She in her deposition, has stated that she is prepared to accept the rent from the tenant and she has no objection if the tenant gives the reasonable rent. From this portion of evidence, submission is that intention to waive the notice is clearly culled out, particularly in view of fact that after service of notice, the landlady has accepted part of arrears of rent.

27. On a careful reading of the entire deposition, it is difficult to agree with him. The landlady is firm in her deposition that she is not prepared to take back the case even after accepting the entire arrears of rent. A fair reading of the statement would show that the landlady intends to let out the property at the current market value. Specifically, she states that she is not prepared to let it out to the defendants even if, the defendants clears the arrear of rent. In earlier part of deposition, she has stated that she is not ready to continue the contract of tenancy, even if, she is paid the entire arrears of rent. There is no dearth of judicial pronouncements of the Apex Court and of this Court that mere acceptance of rent after service of notice does not amount to waiver of notice. Paragraphs 9, 10, 11, 12 and 13 of the decision of this Court in *Om Prakash v. Mst. Khairunnisa and another*, 2009 (3) ARC 18, are reproduced below:

9. Section 113 of the Transfer of Property Act, provides for waiver of notice to quit. It says that a notice given u/s 111 is waived, with express or implied consent of the person to whom it is given, by any act on the part of a person giving, it shows an intention to treat the lease as subsisting. A bare perusal of Section 113 of the Transfer of Property Act, would show that a notice can be waived upon the consent of both the parties i.e. the lessor and the lessee. The expression used in the said provision "with express or implied consent of the person to whom it is given" signifies that there should be a consent express or implied on the part of the lessee also. A waiver is an intentional relinquishment

of a known right. There can be no waiver, unless the person against whom the waiver is claimed had full knowledge of his rights and facts enabling him to take effectual action for the enforcement of such rights. See *Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh*, .

10. There are catena of cases wherein, it has been held to constitute waiver u/s 113, mere tender and acceptance of rent are not sufficient. These two actions show an intention on the part of the landlords to treat the lease as subsisting. Whenever there is an acceptance by the landlord for any sum tendered by the tenant as rent, the Court is obliged to look to such acceptance in the light of the last of such requirement of Section 113 as to whether this acceptance has shown an intention on the part of the landlord to treat the lease as subsisting. Reference can be made to *New India Assurance Co. Ltd. v. Ghanshyam Das*, AIR 1997 Allahabad 383 : 1997 (2) ARC 53.

11. In *C. Albert Morris v. K. Chandrasekaran and others*, 2006(1) ARC 519, the Apex Court has examined its earlier judgment on the point and has held that consensus of judicial opinion in this country is that a mere continuance in occupation of the demised premises after the expiry of the lease, notwithstanding the receipt of an amount by the landlord would not create a tenancy so as to confer on the erstwhile tenant the status of a tenant or a right to be in possession.

12. More appropriately in *Sarup Singh Gupta v. S. Jagdish Singh*, 2006 (3) ARC 320, the Apex Court interpreted Section 113 of the Transfer of Property Act and observed as follows :

...A mere perusal of Section 113 leaves no room for doubt that in a given case, a notice given u/s 111, clause (h), may be treated as having been waived, but the necessary condition is that there must be some act on the part of the person giving the notice evincing an intention to treat the lease as subsisting. Of course, the express or implied consent of the person to whom such notice is given must also be established. The question as to whether the person giving the notice has by his act shown an intention to treat the lease as subsisting is essentially a question of fact. In reaching a conclusion on this aspect of the matter, the Court must consider all relevant facts and circumstances, and the mere fact that rent has been tendered and accepted, cannot be determinative

13. In the case, referred to above, the landlord even after accepting the rent tendered, filed a suit for eviction and even while prosecuting the suit accepted the rent, which was paid to him by the tenant. Even on these facts, the plea of waiver of notice was not accepted. The Court observed that the fact that in any event, even if, the rent was neither tendered nor accepted, the landlord in the event of success would be entitled to the payment of arrears of rent, cannot be ignored. There being no other fact or circumstance to support the plea of waiver, the said plea was rejected.

28. Coming to the facts of the present case, the import of the statement of P.W.

-1 has already been discussed above which does not show any intention to waive the notice. The second circumstance, which was pointed out is that the suit was not filed immediately after expiry of the notice period but after about one year. This circumstance is of no help to the defendants-tenant as suit was filed within the period of limitation. There is no merit in the second point also.

29. In view of the above discussions, I find no merit in the revision. The view taken by the Court below is perfectly justified and calls for no interference u/s 25 of the Small Causes Court Act.

Any other point was not pressed.

30. The defendants-tenant are granted time upto 30th September, 2012 to vacate the disputed accommodation subject to the following conditions:

(1) The defendants-tenant shall deposit the entire arrears of rents and damages for its use and occupation, after adjusting the amount, if any, already deposited for the period upto 30th September, 2012 within a period of one month from today before trial Court.

(2) Within one month, a responsible officer of the defendants-tenant shall file an undertaking on affidavit before the trial Court that the tenant will vacate the disputed accommodation on or before 30th September, 2012 and shall hand over its peaceful vacant possession to the plaintiffs-landlady without creating any third party interest.

In case of default in compliance of any of the conditions stipulated above, the time granted shall stand vacated automatically. The revision is dismissed with cost.