

(1983) 04 PAT CK 0025
In the Patna High Court
Case No : A.F.A.D. No. 207 of 1978

Sugam Chand Agrawal and Another APPELLANT
Vs
Jivt Shah and Others RESPONDENT

Date of Decision : 14-04-1983

Acts Referred:

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 — Section 11
Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 115
Transfer of Property Act, 1882 — Section 106

Citation : AIR 1984 Patna 184 : (1984) 32 BLJR 244 : (1984) PLJR 135

Hon'ble Judges : S.K. Jha, J; Binodanand Singh, J

Bench : Division Bench

Advocate : Rama Kant Verma and N.K. Agarwal, for the Appellant; Balabhadra Prasad Singh and Nagendra Rai, for the Respondent

Final Decision : Allowed

Judgement

1. This is a plaintiff landlords' appeal against a judgment of affirmance arising out of Title Suit 18 of 1969.

2. The facts are ail admitted. When the case was first placed before learned single Judge of this Court, namely, Lalit Mohan Sharma, J., the learned Judge, by his order dated 30-8-1979, referred the case to a Division Bench for decision on 4 questions, namely, (i) whether the finding that the plaintiffs had personal necessity recorded in an earlier suit is a finding on the principle of res judicata, (ii) in view of the decision of the Supreme Court the service of notice u/s 106. T. P. Act, (hereinafter to be referred to as the Act) is not a necessary condition for maintenance of suit for eviction, (iii) in the view of the matter, the finding with regard to the legality of the notice u/s 106 of the Act in an earlier suit was incorrect and (iv) whether the respondents must be held on the facts and in the circumstances of the case, to be defaulters in the matter of payment of rent for the months of August to December, 1968. As already indicated earlier, the facts are not at all in dispute. The appellants instituted a suit, namely, Title Suit 85 of

1963 for eviction of the defendant respondents from holding 197, ward 2, circle 14 within the town of Chapra in the Chapra municipality. The case of the appellants in that suit was a composite one. The defendant respondents (tenants) were admittedly holding in tenancy one room in that holding for the purpose of running a shop. They, bow-ever, opened their mouth too wide and were bold enough to trespass upon the entire holding in question. In that suit, therefore, the claims made by the appellants were-- (a) eviction of the respondents from the major portion of the holding trespassed upon by them illegally and without any permission, (b) their eviction from the tenanted portion, namely, that one room meant for running the shop, (c) a decree for. damages to the tune of Rs. 302/- and interest at Rs. 10/-plus future damages pendente lite at the rate of Rs. 2/- per day for the trespassed portion.

3. That suit, namely, Title Suit 85/63 was decreed in part. The findings recorded by the trial Court in that suit were-- (i) the respondents were rank trespassers on a major portion of the holding, (ii) the appellants were entitled to recover possession of that portion with damages to the tune of Rs. 302/- plus Rs. 10/- as interest plus damages pendente life at Rs. 2/- pet day and (iii) the appellants had personal necessity.

4. The claim with regard to recovery of possession of the tenanted portion was, however, negated on the ground that there was no valid service of notice under Section 106 of the Act. It may be pertinent to point out here that at that time when the decree was passed on 20th July, 1968, the law was not settled that there was no necessity of any notice u/s 106 of the Act to be served on the tenant who had defaulted or whose election was sought for on any of the grounds mentioned in Section 11, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (hereinafter to be referred to as the Buildings Act). The respondents preferred an appeal being Title Appeal 173 of 1968 in relation to the portion of the holding on which they were held to have trespassed and also against the finding of the trial Court with regard to the. personal necessity of the appellants. That appeal was, however, dismissed on 6-8-1970. During the pendency of the appeal in the first appellate Court, the respondents had made a prayer for stay of Execution Case 8 of 1968 which the appellants had levied for the recovery of possession of the portion on which the respondents were held to have trespassed Being aggrieved by that stay order, the respondents came up to this Court in Civil Revision 1671 of 1968. An interim stay of further proceeding in the execution case was granted in that case. When the matter came to be finally beard by this Court in that civil revision, an order was ultimately passed on 4-7-1969, one of the terms of which for granting stay of the execution case was-

"That the petitioners (the present respondents) will deposit a sum of Rs. 500/- which will be adjusted towards arrears of rent by the 21st July, 1969, in the Court below and the plaintiff-respondents, opposite party, will be entitled to withdraw the same."

Another term laid down was-

"That the order of stay granted by this Court staying delivery of possession of the house in suit in Execution Case no. 8 of 1968, will continue till the disposal of the appeal in the Court below provided the petitioners fulfil the aforesaid two conditions failing which the stay order granted by this Court will stand vacated."

As has already been stated earlier, the appeal was disposed of by the first appellate Court on 6-8-1970, dismissing the appeal of the respondents. The respondents then preferred a Second Appeal in this Court which was registered as Second Appeal 502 of 1970, which was dismissed in limine under Order 41, Rule 11, Civil P. C. on 25-8-1971.

5. In the meantime the appellants instituted the present suit on 18-1-1969 which was registered as Title Suit 18 of 1969. The claim for eviction in this suit was only in respect of the tenanted portion on 2 grounds-- (i) default in the payment of arrears of rent from August, 1968 to December 1968 and (ii) personal necessity of the appellants.

6. It may be worthwhile to note here that it was unfortunate for the appellants that the law had not been settled at the time when the first title suit was decided, namely, that no notice u/s 106 of the Act was required for eviction of the defaulter tenant on any of the grounds mentioned in Section 11 of the Buildings Act. It was only subsequently that the law was settled by the Supreme Court as well as by this Court that no notice u/s 106 of the Act was required to be served for such a purpose. If the law had been settled by that time, the appellants were bound to succeed entirely in the earlier suit. Be that as it may, in view of the direction of this Court, albeit by the agreement of parties, Rs. 500/- was deposited pursuant to the order dated 4-7-1969 in Civil Revision 1671/68. It is the usual practice of this Court for granting an order of stay of an execution case for delivery of possession to put the losing party to terms. And, it was only in that context that the order dated 4-7-1969 has to be interpreted. Not only that, the admittedly monthly rental of the disputed portion was Rs. 30/- per month. The suit had been decreed on 20th July, 1968 and the Civil Revision application was disposed of by this Court on 4-7-1969. Therefore, the arrears of rent, as mentioned in the consent order, are manifestly referable to the period between the date of the decree and the date of the order passed by this Court plus the damages for trespass and wrongful use and occupation of the major portion of the holding in question. There can thus be no question of waiver. The argument of learned counsel for the respondents that by depositing Rs. 500/- towards arrears of rent and the withdrawal of the same by the appellants amounted to waiver is not at all tenable, only more so because it was in connection with the execution levied by the appellants for the delivery of possession of the premises held to have been in wrongful occupation of the respondents. In such cases, the acceptance of rent cannot amount to waiver because it was in a different proceeding altogether. It has been settled by this Court by a Bench decision in the case of Kalipada Das alias Mahanto and Others Vs. Bimal Krishna Sen Gupta (Dead) by Lrs., that a tenant resisting a decree

for eviction on the ground that he had paid in excess of the rent under an illegal contract. Where the remedy provided by law had not been availed of by serving notice for adjustment, there cannot be said to be any question of waiver. The principle is further fortified by a Full Bench decision of this Court in the case of Raj Kumar Prasad Vs. Uchit Narain Singh, in which it has been laid down that acceptance of the rent by landlord, after there has been a default, does not amount to waiver because after default has occurred, he is merely a statutory tenant. Mr. Balabhadra Prasad Singh, learned counsel for the respondents, however, contended that there seemed to be an apparent conflict between two Full Bench decisions of this Court, one in the case of Rajkumar Prasad (supra) and the other in the case of Bibi Amna Khatun and Others Vs. Zahir Hussain and Another, We, however, find that there is absolutely no inconsistency or contradiction between these two Full Bench decisions and, therefore, this case does not need to be referred to a larger Bench for decision.

7. On those two grounds, namely, (i) that the deposit of Rs. 500/- was in connection with another proceeding and the acceptance was only to put to terms the respondents for stay of the execution proceeding levied for recovery of possession of the portion which was not in tenancy and (ii) once a default had occurred, mere acceptance by itself will not amount to waiver, the argument of the learned counsel for the respondents that the principle of waiver should be applied has no force.

8. In so far as the default in payment of rent is concerned for the period from August, 1968 to December, 1968. the concurrent finding--rather the admitted position of the parties--is that such a default had actually occurred. On that ground alone, the suit ought to have been decreed. The submission of Mr. Balabhadra Pd. Singh. learned counsel for the respondents, that once the earlier suit was dismissed with respect to the tenanted portion on the ground of non-service of notice u/s 106 of the Act, it would bar us res judicata for all times to come for the purpose of eviction, does not stand to reason. It would bear repetition to say that it was merely unfortunate for the appellants that at that time when the earlier suit had been decided, the law was still in fluid stage and the principle had not been firmly established. The question of res judicata on the ground that the earlier, suit was dismissed in respect of the tenanted portion for non-service of notice u/s 106 of the Act cannot be upheld either in law or in equity.

9. Mr. Rama Kant Verma, learned counsel for the appellants, argued that the finding in the earlier suit that the appellants were in personal necessity of the disputed portion of the house will operate as res judicata since the concurrent finding of the trial Court, the first appellate Court as affirmed by this Court in a second appeal with regard to the personal necessity need not be gone into in the view that we have taken. We may, however, observe that even if the principle of res judicata does not apply (this may not be taken to be a considered opinion of ours), fresh evidence had been led in this case with respect to the appellants"

personal necessity which was not considered for all practical purposes by either of the Courts below merely because they proceeded upon the footing that the finding in the earlier suit will not operate as res judicata even though the respondents had preferred appeal and had lost on the ground that no appeal lay against that part of the judgment and decree of the trial Court as the suit had been dismissed in so far as tenanted portion was concerned. We need not detain ourselves on this question. As has already been held earlier, the respondents must be held to be defaulters in the eye of law and the appellants must succeed. 10. In the result, this appeal is allowed and the appellants' suit is decreed with costs throughout.