

(1984) 02 PAT CK 0010
In the Patna High Court
Case No : A.F.A.D. No. 38 of 1976 (R)

Ujjal Singh and Sons and Others

APPELLANT

Vs

Rajendra Kr. Kedia and Others

RESPONDENT

Date of Decision : 13-02-1984

Acts Referred:

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 — Section 11, 11(1), 13(1)

Citation : AIR 1986 Patna 162 : (1986) 2 RCR(Rent) 71

Hon'ble Judges : S.J. Hyder, J

Bench : Single Bench

Advocate : D. Prasad, A. Sahay, I. Choudhury and D.Z. Zerath, for the Appellant; N.K. Prasad, P.K. Prasad, M. Sahu and A.K. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Hyder, J.—The suit giving rise to the above Second Appeal was filed by the plaintiff/respondent on July 9, 1968. It is governed by the provisions of law contained in the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (hereinafter to be referred to as "the Act").

2. In his statement of claim, the plaintiff/respondent urged two grounds in support of the relief for the ejectment of the defendant/appellant. According to him, the defendant/appellant had defaulted in the payment of rent for the months of June and July, 1966. It was further alleged that the defendant/appellant was guilty of illegal subletting.

3. The defendant/appellant in his rejoinder to the statement of claim filed by the plaintiff/respondent, stated that he had not sublet the accommodation in dispute. It was further averred by him that he sent the rent for June and July, 1966, by money order to the plaintiff/respondent who refused to accept the same on July 16, 1966. It was common ground between the parties that the agreed rent payable by the defendant/appellant was Rs. 88/- per mensem.

4. Both the courts below have found against the plaintiff/respondent on the ground of subletting. The correctness of this finding recorded by the courts below has not been called in question on behalf of the plaintiff/respondent. The two courts have, however, differed on the question as to whether there was any default in payment of rent as contemplated by Section 11(d) of the Act. The Munsif was of the view that the ground referred to in Clause (d) of Section 11 of the Act was not made out. In this view of the matter, the Munsif dismissed the suit of the plaintiff/respondent. The appellate court below has differed with the Munsif on this aspect of the case. According to the appellate court, the defendant/appellant was in arrears of rent for the months of June and July, 1966 and as such was liable to be evicted. The court of appeal below, accordingly, set aside the decree passed by the Munsif and decreed the suit of the plaintiff/respondent.

5. The controversy between the parties centres round a Money Order which is alleged to have been sent by the defendant/appellant to the plaintiff/respondent on July 4, 1966 which is said to have been refused by the plaintiff/respondent on July 16, 1966. No postal receipt of the Money order issued by the post Office has been filed in the case. The defendant/appellant only relied on Money Order coupon (Ext. B-23) with an endorsement by Jagdish Ram, postal peon, that the addressee of the Money Order had refused to accept the same. The said endorsement of refusal is Ext. C on the record.

6. At the time of the admission of this Second Appeal, certain substantial questions of law were formulated. The hearing of this Second Appeal commenced before me on Feb. 9, 1984. At the commencement of the hearing, I informed the counsel of the parties that another substantial question of law requires determination in this appeal. According to me, the question involved was whether the Money Order alleged to have been sent on July 4, 1966, could include the rent for July itself and whether the plaintiff/respondent was justified in refusing to accept the said Money order or not. In case the refusal of the Money Order on his part was justified, could the defendant/ appellant escape the consequence provided for in Section 11(d) of the Act.

After conveying this information, I adjourned this Second Appeal for hearing to Feb. 10, 1984. The case was heard on the said date but the arguments could not be concluded and have continued till today (Feb. 11, 1984).

7. The submissions of the learned counsel have covered a wide range. On behalf of the plaintiff/respondent, it has been urged that the findings recorded by the court of appeal below are findings of fact and cannot be called in question in Second Appeal. In reply to the said argument, it has been pressed upon me by the learned counsel for the defendant/ appellant that in arriving at the findings of fact, the court of appeal below has not taken into account certain important items of evidence which, if taken into consideration would have tilted this case in favour of the defendant/appellant. I have, therefore, been asked to ignore the findings of fact recorded by the court of appeal below and to assess the evidence myself.

8. Section 11 of the Act deals with the grounds on which a suit for eviction against a tenant may be filed. The said section begins with the nonobstante clause and lays down :

"Notwithstanding anything contained in any contract or law to the contrary but subject to the provisions of the Industrial Disputes Act, 1947, and to those of section 12, where a tenant is in possession of any building, he shall not be liable to eviction therefrom except in execution of a decree passed by the court on one or more of the following grounds."

The section then proceeds with the enumeration of the grounds on which a suit for eviction may be filed against a tenant of a building. Clause (d) of that section is relevant and is quoted below :

Section 11(d) : "where the amount of two months" rent lawfully payable by the tenant and due from him is in arrears by not having been paid, within the time fixed by contract or, in the absence of such contract, by the last day of the month next following that for which the rent is payable or by not having been validly remitted or deposited in accordance with Section 13."

Now Sub-section (1) of Section 13 lays down : --

"When a" landlord refuses to accept any rent lawfully payable to him by a tenant in respect of any building, the tenant may remit such rent and continue to remit any subsequent rent which becomes due in respect of such building by postal money order to the landlord."

9. Whatever may be rights of a landlord and a tenant in respect of a building occupied by the tenant under the general law, they stand abrogated in matters relating to eviction by Section 11 of the Act. The said provision of law is a self-contained Code in a suit filed by a landlord for the eviction of a tenant of a building. The Court is not required to look beyond the provisions of that section and to such sections which are referred to in Section 11 itself.

10. In order to attract the application of Clause (d) of Section 11(1) of the Act, three elements must co-exist before a landlord can claim a decree for the ejectment of his tenant. In the first place, two months" rent should be payable by the tenant to the landlord. In the second place, the amount due from the tenant should be lawfully payable by him. In the third place, the tenant should be in arrears of rent due from him, in the sense that he has not paid the rent either in accordance with the terms of the conditions of his tenancy or on the last day of the month next following that for which the rent is payable. In order to meet the contingency, where the rent is tendered to the landlord and is refused by him, the procedure adumbrated in Sub-section (1) of Section 13 has to be followed by the tenant. It is evident from the perusal of Sub-section (1) of Section 13, extracted above, that the tenant is entitled to remit the arrears of rent by money order to the landlord. Such remittance should, however, be in respect of rent which fulfils the requirements of Clause (d) of Sub-section (1) of

Section 11 of the Act.

11. On a fair reading of Section 11(1)(d) read with Section 13 of the Act, it is evident that no rent can be said to be lawfully payable by a tenant unless it is due.

12. I find nothing in Clause (d) of Sub-section (1) of Section 11 or in Section 13(1) of the Act which may enable tenant to send the rent in advance to the landlord by money order.

13. According to the appellant's own case the rent sent by money order to the plaintiff/respondent on July 4, 1966, was in respect of the months of June and July 1966. In my opinion, the rent for the month of July 1966, could not have been remitted by money order on July, 4, 1966. The remittance was not in accordance with Section 11(1)(d) read with Section 13(1) of the Act. Assuming that the money order was tendered by the postal peon to the plaintiff/respondent who refused to accept the same, such refusal cannot be said to be unjustified. It was not possible for the plaintiff respondent to have accepted the money order in part, that is, in respect of the rent for the month of June, 1966 only. The tender of the rent to the plaintiff/respondent not being in accordance with law, the consequence enumerated in Section 11(1)(d) of the Act must naturally follow. I would, therefore, sustain the decree of the learned appellate court, though on a different ground.

14. This appeal must fail for another reason. As already stated earlier the defendant/ appellant has not filed the postal receipt by means of which the rent for the months of June and July 1966 is said to have been sent by the defendant/ appellant to the plaintiff/ respondent on July 4, 1966. Appellant's own witness admits that all the postal receipts relating to money orders sent by the appellant are kept with the defendant/ appellant. No reason is assigned on behalf of the defendant/appellant as to why the crucial postal receipt has been withheld or not produced by him. The endorsement of refusal (Ext. C) contained in the money order coupon (Ext. P-23) made by Jagdish Ram, Postal peon, may be presumed to have been correctly made if it is established that the money order was actually sent by the defendant/appellant on July 4, 1966 to the plaintiff/respondent for a sum of Rs. 176/-. True it is that the defendant/appellant has tried to sustain his case by producing secondary evidence about the despatch of the money order. This type of evidence is of two kinds. In the first place, the appellant has examined Deshraj Munim as D.W. 5 to prove the despatch of the money order. This witness has specifically stated that he went with the money order of Rs. 176/- addressed to the plaintiff/respondent on July 4, 1966 and handed it over for being despatched at the counter of the post office. Assuming for the time being, that the defendant appellant was entitled to lead secondary evidence to prove the despatch of the money order by post, I am not inclined to place any reliance on the testimony of Deshraj and in this respect, I feel, that the appellate court was right in ignoring his testimony. Deshraj (D.W. 5) could not possibly remember the date on which he went to the Post Office with the money order. He

could not also remember the month in respect of which the said money order was sent. The other kind of evidence adduced by the defendant/appellant to support this point consists of his bahikhatas. In the bahikhata, a sum of Rs. 176/- is written as having been despatched by money order to the plaintiff/respondent on July 4, 1966. Admittedly, bahikhata was produced in the court on June 20, 1972, after the evidence adduced on behalf of plaintiff/respondent had closed. The trial court relied on the fact that the said bahikhata had been produced by the defendant/appellant in Money-Suit No. 198 of 1967 and the same were returned to the defendant/appellant on 19-6-1972. The court of appeal on the other hand has, however, considered the fact that an application had been filed by the defendant/appellant for the return of the bahikhata in Original suit No. 198/67 on 1-12-1967 and an order for the return of these documents was passed by the court, in which the said suit was pending, on December 6, 1967. In the opinion of the appellate court below there was undue delay in the production of the account books. The reasoning adopted by the court of appeal cannot be said to be incorrect.

15. What has been stated earlier in the paragraphs just preceding is on the assumption that the secondary evidence relating to the sending of the money order was admissible. I have already stated that the defendant/appellant has not been able to explain as to why the receipt issued by the post office for the despatch of the money order had not been produced in the case. There was, thus, no occasion for the defendant/appellant to prove the despatch of the money order on July 4, 1966 by means of secondary evidence.

16. The basis on which the defendant/ appellant invited this Court to draw a presumption of refusal of the postal money order by the plaintiff/respondent is wanting in the instant case. No presumption on the basis of an endorsement (Ext. C) made by Jagdish Ram, Postal peon, can be drawn about the despatch of the money order by the defendant/appellant and its refusal by the plaintiff/respondent.

17. There is evidence on record which goes to show that the rent for the months of June and July 1966 was sent by the defendant/ appellant to plaintiff/respondent in September, 1966 by postal money order. In case the defendant/appellant had sent the rent for these two months to the plaintiff/respondent on July 4, 1966, as alleged by him, there was no occasion for him to repeat the same exercise in futility in September 1966. Significantly, rent in respect of two months has not been resent by the defendant/appellant in respect of any other months. This is the only occasion in which the defendant/appellant adopted this course of action for which there is no explanation. It may be stated that the suit giving rise to the second appeal was instituted as late as on July 9, 1968. The rent was being sent by the defendant/appellant to the plaintiff/ respondent by money order from the year 1961 and was being refused by the plaintiff. No satisfactory explanation has been given by the defendant/appellant as to why the suit should have been based by the plaintiff/respondent on the basis of default

with respect of the months June and July, 1966 alone.

18. The court below has gone into the question at length. It has subjected the evidence of the parties to a careful scrutiny and has come to a conclusion that no money order was sent by the defendant/appellant to the plaintiff/respondent on July 4, 1966 and that the latter did not refuse to accept the same. The learned counsel appearing for the defendant/appellant submitted that the said finding is vitiated on account of non-consideration of material evidence. I have carefully examined the evidence which is said to have been ignored by the court of First Appeal. In my opinion, that evidence was not material for the decision of this case and would not have tilted this scale in favour of the defendant/appellant. Sitting as a court of Second Appeal, it is not possible for me to go behind the findings of fact recorded by the court of First Appeal. I, accordingly, confirm the decree passed by the said court. The result is that, the Second Appeal fails and it is dismissed with costs throughout. The decree passed by the 5th Additional Subordinate Judge, dt. the Mar. 31, 1976 in Title Appeal No. 56 of 1974 is hereby confirmed.