
(1979) 09 MP CK 0034

In the Madhya Pradesh High Court

Case No : Second Appeal No. 89 of 1974

Vishnudayal Nityanand

APPELLANT

Vs

Angoori Rai Khushilal Jain

RESPONDENT

Date of Decision : 18-09-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 103
Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 12, 12(1),
12(1)(a), 12(1)(c), 13
Post Office Act, 1898 — Section 43, 44

Citation : (1980) JLJ 123

Hon'ble Judges : J.P. Bajpai, J

Bench : Single Bench

Advocate : B.G. Apte and N.P. Mittal, for the Appellant; J.P. Sharma and J.R. Sharma, for the Respondent

Final Decision : Allowed

Judgement

J.P. Bajpai, J.—This appeal is at the instance of the tenant against whom a decree for eviction from the tenanted premises has been passed by the Courts below by holding that two of the grounds, as specified in clause (a.) and clause (c) of sub-section (1) of section 12 of the M.P. Accommodation Control Act, 1961 have been established. The ground under clause (a) contemplates default in payment of arrears of rent and that under clause (c) relates to creating nuisance by a tenant.

2. A brief calendar of relevant facts for appreciating the contentions requiring determination in this second appeal is as below:

The plaintiff respondent (landlady) instituted a suit for eviction of the appellant tenant by alleging various grounds as contemplated by sub-section (1) of section 12 of the Act. However, after necessary trial, the trial Court was of the opinion that though the ground of sub-letting, based on the contention that the tenant had allowed his son and daughter-in-law to live in the house was not found to be

proved, the grounds as specified in clause (a), i.e. default in payment of arrears of rent within the prescribed period after service of notice of demand and that of creating nuisance by creating insanitary conditions due to discharge of dirty water through the drain pipe of the bathroom, were made out and, therefore, the tenant was liable to be evicted. The lower appellate Court affirmed the judgment and decree of the trial Court by holding that the tenant had committed default in payment of arrears of rent despite the fact that he had been remitting the entire amount of arrears of rent by moneyorder from time to time and that from the testimony of the plaintiff, it was also established that he created nuisance as stated above.

3. While assailing the finding about the availability of the ground under clause (a) of sub-section (1) of section 12 of the Act, it was contended that from the undisputed circumstances and those borne out from the positive material on record, it was fully established that the defendant tenant had always remitted rent by moneyorder and the same had been refused by the plaintiff with the ulterior motive of anyhow creating a ground for eviction ore the ground of default. The rent was alleged to be in arrears from 15th December 1968 on wards. Vide Ex. D-2, the amount of arrears of rent from 15th December 1968 upto 14th April 1969 was remitted by moneyorder on 17th April 1969, as is borne out from the corresponding moneyorder receipt. No. 4847 kept in File C-2 of the record of the trial Court. The plaintiff landlady refused to accept this moneyorder on 25th April 1969 as is evident from the endorsement by the postman. After refusing to accept the payment of the moneyorder, the landlady found it convenient to issue a notice of demand on the next day i.e. 26-4-1969 alleging that the tenant was in arrears and that he should pay the amount within the prescribed period. The conduct on the-part of the plaintiff-landlady makes it apparent that an effort was being made to anyhow create a ground of default in payment of arrears of rent. The amount of arrears of rent was already remitted and tendered, but the same was refused and, immediately, on the next day a notice of demand was issued. The said notice was served on the tenant on 30th April 1969. After the receipt of the notice the tenant again remitted the entire amount of arrears of rent from 15-12-1968 upto 14-5-1969 on 16-5-1969 vide Ex. D-1. The corresponding moneyorder receipt No. 7226 dated 16-5-1969 finds place at: page 13 of the record in File C-2. This moneyorder was also returned back. Thereafter, the tenant again remitted the entire amount of arrears of rent from 15th December 1968 upto 14th June 1969 by money order, Ex. D-3 on 19-6-1969. This was also returned with an endorsement that on 1-7-1969 the same was tendered to the payee but was refused. Despite all this, the defendant tenant has been held guilty of committing default in the matter of compliance of the provisions of clause (a) of sub-section (1) of section 12 of the Act.

4. Clause (a) of sub-section (1) of section 12 of the Act, as reproduced below consists of three ingredients; firstly--the tenant should be in arrears of rent; secondly--a notice of demand should be served on him; and thirdly., he shall tender or pay the amount of arrears of rent within two months from the date of

service of such a notice:

12. Restriction on eviction of tenants. (1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely:

(a) that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner;

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In the present case before 26th April 1969 when the notice of demand was issued by the plaintiff landlady, the defendant had already remitted the entire amount of rent by moneyorder on 17-4-1969 and the plaintiff landlady had refused the same on 25th, i.e. just a day before the date of notice of demand. It is apparent that the anxiety was not for securing payment of arrears of rent but for any how creating a ground for eviction. It was, however, contended on behalf of the respondent-landlady that even if the plaintiff had refused the moneyorder on 25th April, she was fully entitled and competent to issue the notice of demand claiming arrears of rent and the tenant was bound to comply with the same by again paying or tendering the amount within the prescribed period of two months. The argument was that the amount of rent was not due. It was thereafter contended that so far as the second moneyorder is concerned disclosing remittance of the entire amount of arrears of rent on 16-5-1969 and the return of the same vide Ex. D-1, the document on record could not be relied for holding that such a remittance was made and refused by the plaintiff-landlady because, Ex. D-1 the money-order coupon does not bear the endorsement of refusal by the plaintiff landlady. I have looked into the document and the corresponding moneyorder receipt issued under the seal of the post office and the signature of the official of the department.

5. From the document, it is fully established that the necessary amount of arrears of rent was remitted by money order No. 7226 on 16-5-1969. It is also borne out that the same was returned because even according to the plaintiff, she had not received any such payment. It is true that the money-order coupon Ex. D-1, does not bear the endorsement of refusal and, therefore, there is sufficient scope for the plaintiff to contend that the moneyorder receipt and the coupon filed by the defendant cannot be treated as conclusive proof that the same was tendered to the landlady and she happened to refuse it. But the matter does not end here. Again, there is the third remittance on 19-6-1969. This time, the moneyorder coupon, which had been returned, does bear the endorsement made by the postman disclosing the refusal to accept the payment by the payee. The learned counsel for the respondent made an effort to meet this situation by contending that despite the fact that the tenant had remitted

the amount of arrears of rent by moneyorder on 19th June itself, i.e. about more than 10 days before the expiry of the prescribed period, which was 30th June. The argument was that the ground under clause (a) of sub-section (1) of section 12 of the Act is created if there is a default in payment of arrears of rent within the period of two months from the date of service of notice of demand. The contention was that in the present case, the said period expired on 30th June 1969 and the endorsement of refusal on 1st July 1969 was, therefore, of no avail.

6. On behalf of the appellant, it was contended that since even according to the plaintiff, the rent was being paid and accepted in the mode of remittance by moneyorder, as is evident from the document, Ex. P-1 and Ex. P-2, filed and relied by the plaintiff herself, showing payment of rent by the tenant to the plaintiff by moneyorder and as is implicit from the statement of the plaintiff herself that the practice of payment of rent by money-order was the accepted mode in between the parties, the remittance made by the tenant on 19th June amounted to a tender to the plaintiff because in the facts and circumstances of the present case, the post office was the agent of not only the sender but also of the payee, and, therefore, even if for any reason beyond the control of the tenant, the moneyorder, which was to be delivered locally, either happened to be delayed in normal course, or was so managed for creating a ground for eviction, and could be tendered only on 1st July 1969, i.e., delayed by one day; the tenant cannot be held liable for the default. According to the tenant, he had tendered the amount on the 19th June itself and apparently with sufficient margin of time, i.e. of 11 days before the expiry of the prescribed period because according to the normal course of practice, a moneyorder can be paid locally within a period of 7 days as is borne out from the dates in respect of the previous remittances.

7. In order to meet this contention, the learned counsel for the plaintiff relied on certain single Bench decisions (1962 JIJ Short Note 146) (1965 JIJ Short Note 124) and (1963 JIJ Short Note 68) and one unreported decision in S.A. No. 68/65, Dt/- 7-2-1965, Gwalior Bench of this Court holding that the post office was not the agent of the payee but was the agent of the sender alone and, therefore, the date of remittance could not be taken as the date for tendering the amount to the landlady and the actual date on which the moneyorder was tendered for payment by the postman will be treated as the date of payment or tender. It was contended that even if the tenant sent the moneyorder with more than sufficient margin and for any reason, the moneyorder was not delivered within the prescribed period, the tenant would be guilty of default in payment of arrears of rent despite having remitted the amount by moneyorder within time. Support to this contention was sought also by pointing out the provisions of section 44 of the Indian Post Offices Act wherein it has been provided that even after remitting the amount by moneyorder the remittance can at any time, before actual payment to the addressee, be withheld by the tenant by giving necessary directions to the department. In the present case, however, there is nothing to infer that the sender had at any time issued any such direction for withholding payment to the addressee. But the question which needs to be

determined is whether the post office was the agent of both the sender and the payee, or of the sender alone.

8. Irrespective of the effect of the provisions of section 44 of the Indian Post Offices Act, making the post office the agent of the sender-debtor, remitting the amount, the post office in a given case, may be the agent of the creditor also, if there is evidence of an agreement either express or implied in between the creditor and the debtor for payment by moneyorder or through the agency of the post office in any other manner. In such a case, since the creditor agrees expressly or impliedly that the amount may be paid by sending the same by moneyorder, the post office becomes the agent of both the remitter and the payee. However, if there is nothing to infer any such express or implied agreement about the mode of payment, then of course in the context of the provisions of the Indian Post Offices Act, there may be sufficient scope to contend that the post office would be the agent of the sender alone. This was the view taken by the Supreme Court in the case of *Shri Jagadish Mills v. I.T. Commissioner* AIR 1959 SC 119. Their Lordships of the Supreme Court have clearly laid down that where there is material to infer that the parties may have intended that the payment should be made by sending the amount through post, there was by necessary implication an implied request, for payment through the agency of post office, and, therefore, the party entitled to payment thus constituted the post office as its agent.

9. The same view was further reiterated by the same Court in the subsequent case of *Indore M.U. Mills v. I.T. Commissioner* AIR 1966 SC 1466. Their Lordships, in that case, further specifically laid down that when by an agreement express or implied by the creditor, the debtor is expected to pay the debt through the agency of post, the post office becomes the agent of the creditor to receive the payment and the creditor receives the payment when the same is tendered to the post office. These observations were made in a case where simply a cheque was sent by post and it was held that in the context of an agreement express or implied, it could be said that the creditor received payment as soon as the cheque was posted. The leading case of *The Commissioner of Income Tax, Bombay South, Bombay Vs. Ogale Glass Works Ltd., Ogale Wadi*, was referred and relied. Thus from the aforesaid observations of the Supreme Court, the legal position which stands settled is that if there is even implied agreement with the creditor for payment by the debtor through the agency of the post office and the same had been the accepted mode of payment, then the post office becomes the agent of the creditor also and it can always be held that when the remitter tendered the amount to the post office for being paid to the creditor, either by moneyorder or otherwise, the creditor had received the payment.

10. It is true that in cases where the remitter issues any instructions otherwise or stops or withholds payment or the cheque is dishonoured, he will not be entitled to take the benefit of this position and contend that despite having

withheld the payment of money or the cheque having been dishonoured, the creditor should be deemed to have received the payment on the date the same was remitted. In the three decisions of this Court, which had been referred, there was no occasion for considering the above referred decisions of Supreme Court either because they were not brought to notice or there might not have been a case of implied or express agreement for receiving payment by money-order. The decision in Jagdish Mills case (supra) is, however, apparently a subsequent one. Even otherwise, the aforesaid decisions do not come in the way because there is no quarrel with the effect of the provisions of section 44 of the Indian Post Offices Act. The aforesaid provisions of section 43 are not the sole test for determining the question of post office being the agent of both the creditor and the debtor. As discussed above, the crucial circumstance for determining the controversy in such a case is the existence of an express or implied agreement in between the creditor and the debtor for receiving payment through the agency of the post office, and the post office becomes the agent of the payee not by virtue of section 44 of the Indian Post Offices Act but by an agreement express or implied.

11. In the present case, as already indicated above, there is sufficient material on record to infer that there was an implied agreement with the landlady for receiving payment of the rent through moneyorder. There is evidence not only of the defendant but also of the plaintiff herself in the shape of moneyorder coupons filed and relied by her showing remittances of the amount of arrears of rent by moneyorder and acceptance of the same through the agency of the post office for the period immediately preceding the period for which the rent was due in the present suit. In her statement, the landlady has stated that despite service of notice, the tenant did not tender the amount either personally or by moneyorder. She has further stated that she had been receiving the rent by moneyorder and had exhibited the moneyorder coupons. There is no suggestion in the cross-examination that the mode of payment by moneyorder was not agreed to by her. The only contention which had been put forth was that since the moneyorder happened to be tendered by the postman on 1st July and not on or before the 30th June there was non-compliance of the provisions of clause (a) of sub-section (1) of section 12 of the M.P. Accommodation Control Act. A full Bench Decision of the Allahabad High Court in the case of Bhikha Lal and Others Vs. Munna Lal, has also held by relying on the observations of the Supreme Court in the above cited three cases, that whenever there is even an implied agreement between the parties for receiving the payment of moneyorder, the post office becomes the common agent of both the creditor and the debtor, and the date on which moneyorder had been sent can be taken to be the date of payment to the creditor even if for any reason beyond the control of the remitter, the moneyorder reached the landlord after the expiry of the prescribed period and the tenant could not be held liable for eviction on the ground of default of making payment within the prescribed period of notice. This Court is also of the same opinion in the context of the three decisions of this Court stand

distinguished and cannot be preferred as against the observations made by the Supreme Court.

12. Being faced with this situation, an objection was raised for the first time at this stage in second appeal that though the first two remittances by moneyorder were to the plaintiff landlady herself, the third one which was returned with the endorsement of refusal dated 1-7-1969 was addressed to the counsel of the landlady and not to the landlady herself. In the opinion of this Court, this objection too does not improve the case of the plaintiff respondent. It is apparent that when the plaintiff landlady refused the moneyorder and instead served the tenant with a notice, through his counsel Shri J.R. Sharma, the tenant again remitted the amount by moneyorder. The same was also returned. Under these circumstances, the tenant remitted the amount to the counsel disclosing him as the counsel of the plaintiff and giving the details of the payment in the space meant for incorporating a message regarding payment on the moneyorder form. It will therefore, not be possible to hold that the tender was not to the landlady.

13. I have gone through the contents of the notice. It does not prohibit the payment being made to the counsel. It simply made a demand asking the tenant to pay the arrears of rent. The tenant complied with the said notice but when the plaintiff went on refusing, he was fully justified in again making the payment by moneyorder to the counsel in his anxiety to avoid the liability for eviction on the ground under clause (a) of sub-section (1) of section 12 of the Act, which was sought to be created. The contract of agency need not be expressed in all respects. When a client engages a lawyer to act for him, it is normally expected that he would be able to do all acts which were necessary and incidental to be done in connection with the work in the case of *Jamunaprasad v. Bijlibai* 1963 MPLJ 80 , this Court had already held that when a lawyer was engaged by a client to act for him, it was normally expected that he would be able to do all acts which were necessary to be done in connection with the work for which he was engaged and the authority to act for the landlady was not spent since the notice was sent by her. It is further significant to note that no such objection was raised at any time before the Courts below. The validity of the remittances was challenged only on the ground that the same was delayed by one day, and as such, the ground u/s 12(1)(a) of the Act was created. It was also not brought on record to show that the counsel happened to refuse the moneyorder for this reason. Under these circumstances, the tender of arrears of rent to the lawyer, who issued the notice of demand was a valid tender. This is the view taken by the Allahabad High Court also in the case of *Sri Noor Mohd. Vs. Sri Nanwa and Another*,

14. Thus, in view of the discussion made above, the Courts below erred in law in holding that the ground under clause (a) of sub-section (1) of section 12 of the Act existed on the date of the suit. The provisions in the context of the scheme of the M.P. Accommodation Control Act, permitting institution of a suit for eviction on the ground of default in payment of arrears of rent, are intended to

give protection to the tenant to save his tenancy by remitting the amount of arrears of rent within the prescribed period of notice of demand and thereby also to ensure the interest of the landlord in the matter of recovery of rent. This provision has, therefore, to be applied in the manner so as to advance the intention of the Legislature and not to penalise the tenant by upholding the mischievous attempt of the landlord to anyhow create a ground of default and claim eviction of the tenant, who had been repeatedly tendering the amount of arrears of rent within the prescribed period of notice.

15. Lastly, an attempt was made to sustain the decree for eviction on the ground of default in payment of arrears of rent by contending that since in the earlier suit, the tenant had already availed of the protection against eviction on the ground of the default in payment of arrears of rent and had thereafter again been in arrears continuously for 3 months from 15th December onward upto 14th April he was liable to be evicted even if no ground u/s 12(1)(a) of the Act was constituted. Support was sought in this respect from the proviso appended to sub-section (3) of section 12 of the Act, which is reproduced below--

12(3) No order for the eviction of a tenant shall be made on the ground specified in clause (a) of sub-section (1), if the tenant makes payment or deposit as required by section 13;

Provided that no tenant shall be entitled to the benefit under this sub-section if, having obtained such benefit once in respect of any accommodation, he again makes a default in the payment of rent of that, accommodation for three consecutive months.

16. This argument is absolutely misconceived. The effect of the proviso appended to sub-section (3) of section 12 of the Act is that when once the tenant had availed of the benefit of the protection in the earlier suit, he will not be entitled to avail the protection even by making compliance of the provisions of section 13 of the Act regarding, payment of arrears of rent in the subsequent suit. This does not mean that continuous default for three months is in itself a ground u/s 12(1) of the Act. Even the subsequent suit claiming eviction on the ground of default in payment of arrears of rent must disclose the ground as contemplated by clause (a) of sub-section (1) of section 12 of the Act and for that purpose, it will be essential to disclose that despite service of notice of demand, the tenant failed to pay or tender the amount of arrears of rent within two months from the date of service of such notice. Once such a ground is again created then, alone a suit for eviction on the ground of default can be brought and in such, a subsequent suit, the tenant will not be entitled to claim the protection even by making the payment of arrears of rent in compliance with the provisions of section 13 of the Act which applies to a stage subsequent to the institution of the suit, if he had already once availed such a protection. If this contention raised by the respondent plaintiff is accepted, then it would mean adding, one more ground for eviction u/s 12(1), namely default for three consecutive months by a tenant who had already availed of the protection of sub-section (2) of section 12 of the Act.

The question of giving protection arises only when there is a liability for eviction. The liability for eviction arises only when there is a ground u/s 12(1)(a) of the Act. Hence if there is no ground on which the subsequent suit could be based, there was no question of the tenant claiming protection and consequently no question of attracting the applicability of the proviso appended to sub-section (3) of section 12 of the Act.

17. No other point was pressed in this respect. It is therefore, held that that the decree for eviction made on the ground of section 12(1)(a) of the Act cannot be sustained and the judgment and decree of the Courts below in this respect are set aside.

18. Now remains the question about the availability of the ground of nuisance as specified in clause (c) of sub-section (1) of section 12 of the- Act. The case of nuisance was sought to be made out by pleading the following three circumstances. Firstly, it was alleged that Ramesh, the son of the tenant being of quarrelsome temperament had been very often quarreling with the landlady and neighbours and thereby nuisance was created. The second circumstance pleaded was that the members of the family of the tenant had been throwing dirt and waste material in the courtyard of the residential portion occupied by the plaintiff-land-lady. The third allegation was that the water of the bathroom of the tenant spreads over the tinshed of the adjacent premises occupied by one other tenant Mayachand and due to the same there remains bad smell and the nuisance of mosquitoes and that the plaintiff or Mayachand were required every now and then to get the tinshed cleaned. At the stage of evidence, nothing could be brought on record as regards the first two allegations. The plaintiff and his witnesses had to admit that the actual grievance was that Ramesh, the son of the tenant and his wife were not soft-spoken but were rude and harsh in conversation. There was nothing to show that the tenant or the members of his family had been abusing or very often quarreling with the other occupants so as to create a nuisance. The Courts below also did not find this allegation as proved. Similar is the position regarding the second contention which too has not been found to be proved. Even the witness Mayachand had to admit in cross-examination that he did not see the tenant or the members of his family throwing dirt or waste. The trial Court had, however, without giving any reason recorded the conclusion that the tenant created nuisance because the dirty water, urine etc. discharged from the small drain (MORI) of his bathroom spread over the tin-shed of the neighbouring occupant Mayachand and which created bad smell and was the cause for mosquito breeding.

19. Whenever the trial Court simply records a finding on a question of fact without giving reasons for arriving at the same and the lower appellate Court also happens to affirm the same without discussing the evidence and proper application of mind, such finding actually amounts to no stage of second appeal. It amounts to as if the said question of fact had not been decided by recording a finding and the Court at the stage of second appeal is required u/s 103 of the

CPC to deal and decide the same on the basis of the material on record.

20. It is apparent from the statement of the plaintiff landlady herself that initially there was no MORI, i.e. small drain of the bath room provided to the tenanted accommodation. It was provided by the landlady later on. It is also apparent from the statement not only of the plaintiff landlady but also of Mayachand examined by her that the said pipe, provided for discharge of water from the bath room of the tenanted premises was laid in such a manner that it had its opening on the tinshed itself. It was not fixed in such a manner so as to ensure discharge of water downwards into the main drain on the ground floor. When the landlady herself makes certain sanitary arrangement, which itself is defective, the tenant cannot be held liable for creating nuisance on the ground of any inconvenience so caused due to such insufficient or ineffective arrangement.

21. Naturally when the MORI provided by the landlady was left with an opening on the tinshed itself, the occasion for the dirty water spreading over the tinshed was apparent. The trial Court, while recording a finding that the ground u/s 12(1) (c) of the Act was available did not at all apply its mind to the evidence brought on record. It simply recorded the finding that the ground of nuisance was made out because the plaintiff and her witnesses had stated that dirty water of the bathroom used to spread over the tinshed of Mayachand and that the same caused bad smell and occasion for mosquito breeding. The trial Court further observed that since the defendant could not establish the fact that the dirty water did not spread over the tinshed, the allegation made against him about creating nuisance in the aforesaid manner must be held to be proved. As pointed out above, the lower appellate Court also unfortunately affirmed the said finding without applying its mind to the material brought on record either on Law or on facts. From the admitted circumstances, it is apparent that even if there was any inconvenience due to the fact that dirty water from the bath room, happened to spread over the tinshed of Mayachand, the same was due to the insufficient and ineffective arrangement provided by the landlady herself and the said inconvenience could always be removed by providing a proper discharge-pipe from the bathroom by ensuring that the water does not spread over the tinshed. There was no justification on the part of the plaintiff who had herself provided a discharge pipe with its opening on the tinshed to complain against the tenant for claiming eviction on the ground of creating nuisance on that count. In view of the facts and circumstances stated above, the finding about nuisance is also found to be based on no evidence and, therefore, warrants interference at this stage in second appeal. It is accordingly set aside.

22. Thus, since no other ground under sub-section (1) of section 12 of the Act has been found to be established, the suit of the plaintiff for the relief of eviction of the tenant stands dismissed. This appeal accordingly succeeds and is allowed. In the circumstances of the case, parties will bear their own costs throughout.