

(1958) 08 CAL CK 0012
In the Calcutta High Court
Case No : Civil Revision Case No. 969 of 1957

Yusuf Driver alias Md. Yusuf

APPELLANT

Vs

Sudharani Roy Choudhury

RESPONDENT

Date of Decision : 05-08-1958

Acts Referred:

Bengal Tenancy Act, 1885 — Section 87, 87(2)
Calcutta Thika Tenancy Act, 1949 — Section 9
Calcutta Thika Tenancy Rules, 1949 — Rule 6

Citation : (1959) 2 ILR (Cal) 431

Hon'ble Judges : Banerjee, J

Bench : Single Bench

Advocate : Ghulam Mohiuddin, for the Appellant; Manindra Nath Ghosh and Samarendra Nath Banerjee, for the Respondent

Judgement

Banerjee, J.—By right of purchase, the opposite party became landlord of the Petitioner, a thika tenant. Admittedly, the Petitioner used to hold a plot of land, measuring one and one-fourth cottahs, forming part of holding No. 13/H/6, Rajabali Lane, Khidderpore, at a rental of Re. 1-14-0 per month.

2. Alleging that the Petitioner had voluntarily abandoned his holding without notice to the landlord and without arranging for the payment of rent as it fell due, the landlord, opposite party, filed a notice as contemplated u/s 9 of the Calcutta Thika Tenancy Act and re-entered the land in dispute.

3. Under the provisions of Section 9 of the Calcutta Thika Tenancy Act, read with Rule 6 of the Calcutta Thika Tenancy Rules, 1949, the notices are to be in form No. 1, appended to the Rules, and are to be filed in the office of the Controller, in triplicate, of which one copy to be affixed at the notice-board of the Controller, one copy to be published upon the holding and the remaining copy is to be on the record.

4. It appears that there was no publication of the notice on the holding. Two attempts were made to publish the notice upon the holding but on both the

occasions the process-server returned the notice on the ground that the thika tenant, named in the notice, could not be traced.

5. Considerably one month after the attempted service of notice, the thika tenant appeared and claimed cancellation of the notice, on the ground that there had been no abandonment of the holding by him.

6. The Controller repelled the contention of the thika tenant to the effect that there had been no abandonment and declared that the landlord applicant was at liberty to enter on the disputed holding.

7. The decision of the Controller was affirmed in appeal. It is against the appellate order that the present rule was obtained by the Petitioner, the quondam tenant. Mr. Mohiuddin, the learned advocate for the Petitioner, urged two points for my consideration. He argued, in the first place, that in order to entitle a landlord to re-enter, service of notice was a condition precedent, because it was by service of notice only that the right to re-enter came into existence. He argued, in the next place, that the provisions contained in Section 9 of the Calcutta Thika Tenancy Act, read with Rule 6 of the Calcutta Thika Tenancy Rules, 1949, were mandatory in nature and unless notice was served in the prescribed manner the landlord would have no right to re-enter.

8. I am unable to accept both the contentions advanced by Mr. Mohiuddin. Section 9 of the Calcutta Thika Tenancy Act is in pari materia with Section 87 of the Bengal Tenancy Act. In deciding a question of similar nature, u/s 87 of the Bengal Tenancy Act, it was observed by a Division Bench of this Court in a case reported in *Ram Pershad Koeri v. Jawahir Roy* (1907) 7 C.L.J. 72 as hereinbelow quoted:

The first Sub-section of Section 87 provides that if a rayat voluntarily abandons his residence without notice to his landlord and without arranging for payment of his rent as it falls due and ceases to cultivate his holding either by himself or by some other person, the landlord may at any time after the expiration of the agricultural year in which the rayat so abandons and ceases to cultivate the holding, enter on the holding and let it out to another tenant or take to cultivation himself. The reasonable construction of which this Sub-section admits, appears to us to be that abandonment is the effect of the act of the tenant in vacating the holding without making arrangement for payment of his rent as it falls due, and for cultivating the land. If a tenant ceases to cultivate his holding either by himself or by some other person, if he omits to make arrangement for the payment of rent as it falls due, and if he does these acts without notice to his landlord, there is an abandonment. No doubt whether there is abandonment or not in any individual case is a question of intention to be determined upon the facts of the particular case. But we are unable to accept the contention of the learned vakil for the Appellants that in order to effect a legal abandonment and to allow a valid re-entry by the landlord, service of notice under Sub-section (2) of Section 87 is necessary. One test seems to be conclusive upon the point. If the

service of notice by the landlord is necessary for the determination of the tenancy, how is it that under Sub-section (3) it is open to the tenant even after such notice has been served, to recover possession from the landlord, on the ground that as a matter of fact there was no abandonment, because although he might have temporarily vacated his holding, he had no intention to abandon it. Sub-section (3) conclusively shows that the abandonment, if there is one, is independent of the service of notice. The only effect of the service of notice is to make it obligatory upon the tenant to have a speedy determination of the question, whether there has been an abandonment or not. If the landlord re-enters without service of notice under Sub-section (2), it is open to the tenant to bring a suit for recovery of possession till his rights have been extinguished by the law of limitation.

9. The question, therefore, in the present case is whether there was an abandonment in fact. On that point both the courts below have come to the concurrent conclusion that there was an abandonment by the tenant. I quote below the material portion of the judgment of the Appeal Court on that point:

In addition to the oral evidence of the husband of the Petitioner landlady, the landlady's version of abandonment is well supported by Bilyat (P.W. 1) who does not owe any affiliation to the landlady nor bear any animus against Yusuf. There is no cogent reason to disbelieve him. Both these witnesses agree amongst themselves that Yusuf works in connection with his job in East Pakistan and lives there and this he has been doing since May, 1952. It is also alleged by the landlady party that the thika tenant left the place without any information and without making arrangement for payment of rent. The thika tenant Yusuf deposing as O.P.W. 1 does not allege that he ever made any arrangement for payment of rent. Equally, he does not deny that he has been living with his family at Narayangunge. Yet, he puts up the claim which I do not find to be well supported by the evidence and circumstances that he left his daughter and son-in-law in charge of the holding in question.***I have no doubt that the evidence given by o.p.w.s. Nos. 1 and 2 are palpably false and teems with improbability. I believe the landlady's version of abandonment and hold that the tenant has no right to get the order of service of notices cancelled under Sub-section (3) or to continue in possession of the disputed premises.

10. This finding, that there was abandonment in fact, is binding on me. On the authority of the decision reported in *Ram Preshad Koeri v. Jawahir Roy* (Supra), a relevant extract from which has been quoted above, I hold that if there has, in fact, been an abandonment, non-service of notice or irregular service of notice will not debar the landlord from entering upon the premises abandoned. The provision as to notice and its publication fixes the period of limitation within which the thika tenant is to come and oppose the claim of the landlord to re-enter. It is safeguard to the landlord. The effect of non-publication may be to extend the period of limitation, that is to say, where there has been no service of notice the tenant would be entitled to come beyond one month and dispute the

re-entry made by the landlord.

11. In my view of the matter, it not the notice which terminate the tenancy. Voluntary abandonment, coupled with acts on the part of the landlord indicating that he considers the tenancy at an end and intends to re-eater, is what puts an end to the tenancy. In the instant case, abandonment by the tenant and the intention by the landlord to re-enter have been established. The fact that there was no service of notice according to the provisions of Rule 6 of the Calcutta Thika Tenancy Rules had the result that the tenant was entitled to dispute the claim of the landlord for re-entry even after the statutory period of limitation. The tenant's objection has been heard and determined against him.

12. Both the contentions urged by Mr. Mohiuddin, therefore fail and I discharge the Rule with costs, hearing fee being assessed at one gold mohur.