

Bhola Nath Vs. Mohammad Ibrahim and Another

Bhola Nath Vs. Mohammad Ibrahim and Another

SooperKanoon Citation : sooperkanoon.com/451278

Court : Allahabad

Decided On : May-19-1995

Reported in : AIR1996All119

Judge : R.B. Mehrotra, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 106; Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 - Sections 3 and 3(1); Uttar Pradesh (Temporary) Control of Rent and Eviction (Amendment) Act, 1972 - Sections 20, 20(4), 43 and 43(5); [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100 and 100(5) - Order 6, Rule 17 - Order 41, Rule 27; State Rent Control Act; Bihar Act; Kerala Lease and Rent Control Act, 1965; [East Punjab Urban Rent Restriction Act, 1949](#)

Appeal No. : S.A. No. 164 of 1983

Appellant : Bhola Nath

Respondent : Mohammad Ibrahim and Another

Advocate for Def. : M/s. Suresh Prasad, ;V.N. Singh, ;R.R. Agarwal and ;R.H. Zaidi, Advs.

Advocate for Pet/Ap. : M/s. K.N. Tripathi, ;K.M. Dayal, ;Dinesh Kakkor, ;B.N. Misra and ;S.M. Chaturvedi, Advs.

Judgement :

1. The present second appeal has been filed by the defendant-appellant.

2. The facts necessary for the decision of the appeal are as under.

Plaintiff-respondents filed a suit for ejectment, recovery of arrears of rent and damages for use and occupation with the allegation that they are the owners of the shop in suit of which the defendant appellant is the tenant at the rate of Rs.22.50/- per month. The defendant has not paid rent since 1-1-1965.

3. The suit was filed mainly on two grounds, namely, (1) on the ground of default in payment of rent and (2) on the ground of making material alterations, in the building without the consent of the landlord.

4. The defendant contested the suit on the ground that the tenancy is annual and not monthly and that the rent is Rs. 270/- per annum. It was alleged that initially for some time the plaintiffs used to take clothes etc. and, on account of that the rent was adjusted towards the price of the clothes by the plaintiffs. In August, 1967 the defendant fell ill seriously and was out of Allahabad for treatment and he remained out of station till 1968 and the shop in suit remained closed. It was further pleaded that no notice was received or refused by the defendant. The defendant also denied material alterations as alleged in the plaint.

5. The trial court decreed the suit. The decree was confirmed by the first appellate court. The present second appeal has been filed in this Court against the aforesaid two judgments of the courts below.

6. During the pendency of the appeal an application was moved on behalf of the defendant-appellant under Order VI, R. 17, C.P.C. For amendment in the written statement another application was moved under Order 41, Rule 27 for admitting two documents as additional evidence in the case. By the aforesaid amendment application, the defendant sought to raise the issue that the shop in dispute is a waqf property and the plaintiff have no locus to file the suit. This Court dismissed the aforesaid application by a detailed reasoned judgment dated Sept. 20, 1986. The defendant moved a review application against the aforesaid judgment which was also dismissed by this Court on 12-8-1987. The said judgment has become

final between the parties to the extent the defendant sought to raise the said controversy in the present matter.

7. The present second appeal has been admitted on 21-1-1983 and following substantial question of law was framed for decision of the appeal at the time of admission.

'Whether in a suit of this nature actually it was necessary to comply with the provisions of Section 106 of Transfer of Property Act and prove actual service of a valid notice, is a substantial question of law in this appeal.'

8. I have heard Sri K.M. Dayal, learned senior Advocate for the appellant and Sri Yogesh Agarwal for the respondents.

9. First of all I propose to consider the submissions of the learned counsel for the parties on the point on which the appeal has been admitted. Facts necessary for the decision of the aforesaid point are:-- Mohd. Ibrahim. and another filed original suit No. 389 of 1967 in the court of Munsif City, Azamgarh against Sri Bhola Nath, claiming a relief for ejecting the defendants from the shop in dispute detailed in the plaint and for further claiming rent from 1st June, 1965 to 23rd Oct. 1967 at the rate of Rs. 22.50 paise amounting to Rs. 759-75 paise and further claimed damages for use and occupation of the shop at the rate of Rs. 22.50 paise during the pendency of the suit. In the plaint inter alia it was stated that the defendant is the tenant of the plaintiff of the shop in dispute at the rate of Rs. 22.50 paise and had been paying rent till 1964. Thereafter stopped payment of rent despite demands. A notice dated 20-9-1967 was sent to the defendant by registered post in accordance with the provisions of Section 3 of U.P. (Temporary) Control of Rent and Eviction Act, 1947 (hereinafter referred to as Act No. 3 of 1947) for payment of Rs. 720/- towards arrear or rent since 1-1-1965 till the end of August, 1967 in accordance with Section 106 of the Transfer of Property Act and since the defendant refused to accept the notice on 23-9-1967, thereafter, notice should be deemed to have been served.

10. The defendant denied receiving or refusing any notice. The trial court inter alia framed two issues on the aforesaid point, namely-

(2) Whether the notice dated 20-9-1967 sent by registered post has been served upon the defendant, if so, its effect?

(3) Whether the tenancy of the tenant has been terminated in accordance with law.

11. Both the aforesaid issues have been decided by the trial Court in favour of the plaintiffs on appraisal of evidence including testimony of postman concerned. The trial court recorded a finding that the notice will be deemed to have served on the defendant, as the defendant refused to accept the notice. The trial court held that the plaintiffs by cogent evidence have proved said service of notice by refusal. The trial court believed by the testimony of postman, who appeared in the witness box, stated on oath that he went to serve the defendant but the defendant refused to accept the notice. The trial court also held that the tenancy of the tenant stood terminated in accordance with the provisions of Section 106 of the Transfer of Property Act and notice served upon the defendant was a valid notice. The trial Court, further inter alia held that since the suit was filed in accordance with Section 3(i) of U.P. Act No. 3 of 1947, no notice was required for terminating the tenancy of the defendant in view of the law laid down in *V. Dhanpal Chettiar v. Yesodai Animal*, (AIR. 1979 SC 1745).

12. The first appellate Court affirmed the finding of the trial Court on both the aforesaid issues. While affirming the finding of the trial Court that a notice was not required in the present matter, the appellate Court quoted a passage from the aforesaid decision of the Supreme Court wherein it has been held that the action of the landlord in instituting a suit for eviction on the ground mentioned in any State Rent Act will be tantamount to an expression of his intention that he does not want the tenant to continue as his lessee and the jural relationship of lessor and lessee will come to an end on the passing of an order or decree for eviction.

13. In the aforesaid decision, the Apex Court categorically held that in the matters wherein the Rent Act have permitted filing of suit and there is no provision for serving notice under the Rent Act. No formal notice is required to be served on the defendant for terminating the tenancy of the defendant and the suit for eviction can be decreed. The relevant portion of the judgment is being extracted below:

'..... It will bear repetition to say that under the Transfer of Property Act in order to entitle the landlord to recover possession determination of the lease is necessary as during its continuance he could not recover possession, while under the State Rent Act the landlord becomes entitled to recover possession only on the fulfilment of the rigour of law provided therein. Otherwise not. He cannot recover possession merely by determination of tenancy. Nor can he be stopped from doing so on the ground that he has not terminated the contractual tenancy. Under the State Rent Control Acts the concept of the contractual tenancy has lost much of its significance and force. Identical is the position under the Bihar Act. The definition section permits the tenant to continue as a tenant even after the determination of the contractual tenancy. Section 11 gives him protection against eviction by starting with non-obstante clause and providing further that he shall not be liable to eviction from any building except in execution of a decree passed by the Court for one or more grounds mentioned in Section 11. Does it not stand to reason to say that a decree can be passed if one or more of the grounds exist and such a decree can be passed against an existing tenant within the meaning of the State Rent Act. Similar is the position under the Kerala Lease and Rent Control Act, 1965 and the [East Punjab Urban Rent Restriction Act, 1949](#). We shall refer to the provisions of the Madhya Pradesh and Andhra Pradesh State Rent Acts when come to review the decisions of this Court in relation to those Acts.'

14. Learned counsel for the appellant has placed reliance on certain decisions of this Court, wherein it has been held that for filing a suit for eviction even in cases permissible under the Rent, Act a notice is required to be served before filing a suit for eviction of the tenant.

15. In Jagdish Kumar Khanna v. Smt. Shakuntala Devi, (1980 All Rent Cases 535) this Court was considering a question whether under Section 20 of U.P. Act No. 13 of 1972 a notice is required to be served on the defendant before filing a suit for eviction of the defendant. The Court held that there is a specific provision in the section itself for requiring service of notice. The ratio of Dhanpal Chettiar's case AIR 1979 SC 1745 (supra) will not be available to the cases under U.P. Act No. 13 of 1972 in relation to cases where the plaintiff filed a suit under the provisions of Section 20(4) of U.P. Act No. 13 of 1972. In this decision the Court also held that

no notice is required in a case where suit has filed under 1947 Act. The relevant portion of the judgment is extracted herein:

'It was then submitted that for lack of notice to quit under Section 106, Transfer of Property Act, the suit was not maintainable. Recently, the Supreme Court in *Dhanpal Chettiar v. Yesodia Ammal*, AIR 1979 SC 1745, has held that in proceedings governed by Rent Control Acts and notice to quit under Section 106, Transfer of Property Act is not necessary. The accommodation in dispute was governed by Rent Control Acts. The present suit was filed in 1969, when the U.P. Rent Control Act of 1947 was in operation. During the pendency of the suit, that Act was repealed by the Rent Control Act of 1972. All through the file of the present litigation, the accommodation in dispute was governed by the Rent Control Acts. Prima facie according to the Supreme Court decision, no notice to quit under Section 106, Transfer of Property Act was necessary to maintain a suit for eviction so long as a ground for eviction mentioned in the Rent Control Act was established.'

16. In the present case, the observation made in the aforesaid decision is of no help to the appellant as in the present case the provisions of U.P. Act No. 13 of 1972 are not attracted.

17. It may be useful to mention here that the suit for eviction was filed in the year 1967. U.P. Act No. 13 of 1972 came into force in the year 1972. The suit was decreed in favour of the plaintiffs only in the year 1982. The reasons for delay in decision of the suit are given in brief in paragraph 5 of the judgment of the trial Court. The proceedings remained stayed for some time as the tenant-appellant has agitated the question about the applicability of Section 20(4) of U.P. Act No. 13 of 1972 up to the High Court. This Court ultimately held that the provisions of U.P. Act No. 13 of 1972 are not applicable in the present matter. The aforesaid controversy stands concluded between the parties. The suit was filed under the provisions of Section 3 of U.P. Act No. 3 of 1947, wherein there was no requirement of serving notice on the tenant before filing the suit. The ratio of *Dhanpal Chettiar*, AIR 1979 SC 1745 (*supra*) was squarely attracted in the present matter. Section 3 of the U.P. Act No. 3 of 1947 is reproduced below: -

'3. Restrictions on evictions -- (1) Subject to any order passed under sub-section (3) no suit shall, without the permission of the District Magistrate, be filed in any civil Court against a tenant for his eviction from any accommodation, except on one or more of following grounds:

(a) that the tenant is in arrears of rent for more than three months and has failed to pay the same to the landlord within one month of the service upon him of a notice of demand.....'

18. It may also be mentioned that in Jagdish Kumar Khanna's case 1980 All Rent Cases 535 (supra) this Court itself held that in cases covered by the old Act, no notice for termination of tenancy will be required before filing the suit for eviction.

19. In view of the above discussion, I am of the view that the courts below committed no error of law in taking the aforesaid view.

20. Learned counsel for the appellant, however, submitted that in addition to the points, on which the appeal has been admitted, there are other substantial questions of law, which arise for consideration in the matter.

21. Section 100(5) of C.P.C. and the proviso thereto is as under:--

'(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed, to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.'

For considering the question as to whether other substantial question of law not formulated by the Court, should be considered. I have permitted learned counsel for the appellant to formulate the other substantial question of law for considering as to whether they should be permitted to be raised in the appeal.

22. Learned counsel for the appellant has submitted that following substantial questions of law also arise for consideration in the matter.

(1) The suit was not maintainable unless the notice demanding arrears of rent, was duly served and service of such notice is proper.

(2) The original notice was lost from the record and the trial Court illegally admitted and relied upon secondary evidence which was not admissible in accordance with law.

(3) A portion of the building was reconstructed after 3-7-1960 after new agreement, as such, the building was new construction and was not covered under Section 1(A) of U.P. Act No. 3 of 1947,

(4) After enforcement of U.P. Act No. 13 of 1972 the building having been taken outside the purview of U.P. Act No. 3 of 1947, the provisions of Section 3 of U.P. Act No. 13 of 1972 were applicable and the defendant-appellant should have been given the advantage of the aforesaid provisions.

23. In the trial Court on the basis of the pleadings of the parties, following issues were framed:

(1) Whether the defendant is the tenant of the plaintiffs on monthly basis?

Issues (2) and (3) have already been discussed above

(4) plaintiff was entitled how much amount of rent and damages during the pendency of the suit?

(5) Whether the suit is barred by the principle of estoppel?

(6) Whether the plaintiff is entitled for costs?

(7) Whether the defendant has made material alterations in the premises, if so, its effect?

24. Issue No. 7 has been decided in favour of the defendant and it has been held that no material alteration has been made in the building. Rest of the issues have

been decided in favour of the plaintiffs and it has been held that the defendant was a monthly tenant of the plaintiffs.

25. Out of the additional points raised in the present appeal only on point No. 1 the parties, contested the suit as such, I am not inclined to permit any of the additional points, which was not an issue between the parties. However, it may be stated that so far as the points Nos. 4 and 5 are concerned the defendant had been successful, in delaying the decisions of the suit for 17 long years, contesting on the issue that provisions of New Act became applicable after enforcement of U.P. Act No. 13 of 1972. The defendant has ultimately lost up to this Court and defendant cannot be permitted to agitate the issues which the defendant has contested and lost.

26. Sub-section (1) of Section 43 of U.P. Act No. 13 of 1972 mandates for any suit for eviction of a tenant instituted on any ground mentioned in sub-section (1) of Section 3 of the Old Act may be continued and concluded in accordance with the Old Act, which shall, for that purpose, be deemed to be continued in force. In view of the above provision, the appellant cannot be permitted to agitate any issue contending that the provisions of New Act were made applicable, during the pendency of the suit.

27. It may also be mentioned that before the appellate Court also besides the issue of material alteration, which has been decided in favour of the defendant, only two issues were pressed, namely, issues Nos. 2 and 3, inter alia, it was also contended that the notice has not been proved in accordance with law, as the secondary evidence of notice permitted by the trial Court, was not admissible in accordance with evidence.

28. Learned counsel for the appellant has laboured at length by pointing out that service of notice is required to be made under Post and Telegraph Manual Volume 6 and the notice was not served according to detailed procedure provided therein.

The evidence of the postman clearly establish that the procedure contemplated by Post and Telegraph Manual has not been followed as such, the findings of the courts below regarding service of notice are vitiated in law.

29. Both the Courts below have dealt with in detail the evidence of the parties and have placed reliance on the testimony of the postman, who has categorically stated that he went to serve the notice on the defendant who refused to accept it. The aforesaid findings recorded by the Courts below are findings of fact and are not liable to be interfered in exercise of jurisdiction under Section 100, C.P.C. Even assuming that there was some irregularity in making endorsement on the service of notice and the procedure prescribed in post and Telegraph Manual was not followed, this cannot be a ground for interference in the findings of the Courts below, which have believed the testimony of the postman who gave a direct evidence of proving service of notice by refusal.

30. I am clearly of the view that the findings recorded by the Courts below do not suffer from any such error of law which can be termed as substantial question of law arising in the present matter.

31. So far as the question of secondary evidence is concerned, it may be mentioned that during the period of 17 long years when the matter remained pending in various Courts on the question as to whether provisions of Section 20(4) of U.P. Act No. 13 of 1972, some papers including original composite notice of demand for termination of tenancy and deed of agreement reached between the parties reciting the terms of tenancy, surreptitiously disappeared from the record, without going in the question as to who was responsible for such loss of record, both the Courts below have held that the notice has been proved by secondary evidence and the minor discrepancy in the amount of rent may be due to some copying error in the copy of the notice and have held that the notice was proved by secondary evidence.

32. I do not find any illegality in the aforesaid finding. I have myself seen the copy of the notice brought on record by means of a secondary evidence, there is no illegality in the notice on the basis of which it can be held that the tenancy of the defendant was not properly terminated.

33. In view of the above discussion, I am of the opinion that the additional question, which the appellant's counsel has sought to be raised in the present appeal, do not arise in the matter, as such, they do not require to be dealt with.

34. The appeal accordingly fails and is dismissed with costs throughout. Interim order passed in appeal is vacated forthwith.

35. Appeal dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com