

Babibur Rahman Vs. Rasheed Ahmad and Others

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Court : Allahabad

Decided On : Sep-29-1999

Reported in : 2000(1)AWC200

Judge : D.K. Seth, J.

Acts : Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Sections 2 and 25; Provincial Small Causes Courts Act, 1887 - Sections 15 - Schedule II - Article 4; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 7; [Transfer of Property Act, 1882](#) - Sections 105, 106 and 116; Uttar Pradesh Small Causes (Amendment) Act, 1966; Uttar Pradesh Civil Laws (Amendment) Act, 1972

Appeal No. : Civil Revision No. 363 of 1999

Appellant : Babibur Rahman

Respondent : Rasheed Ahmad and Others

Advocate for Def. : S.U. Khan, Adv.

Advocate for Pet/Ap. : Pramod Bhardwaj, Adv.

Judgement :

D.K. Seth, J.

1. One of the defendant, in a suit for eviction, initiated under the Provincial Small Causes Courts' Act being S.C.C. Suit No. 15 of 1998 before the Additional District Judge IVth Court, Aligarh. which was decreed, has challenged the same under Section 25 of the said Act before this Court.

2. In view of U. P. Amendment of Section 25 of the Provincial Small Cause Courts' Act, an order passed by the District Judge or Additional District Judge exercising Jurisdiction of a Judge of Small Cause is revisable under Section 25 of the Act before the High Court. The said amendment was brought about by U. P. Small Cause Amendment Act. 1966 (Act No. 17 of 1966) and U. P. Civil Laws. (Amendment) Act, 1972 (Act No. 36 of 1972).

3. The learned counsel for the revisionist Mr. Pramod Bhardwaj had contended that the suit could not be maintained before the Small Cause Court since it relates to an interest in the whole property, which is otherwise prohibited by reason of Section 7 of the Code of Civil Procedure. He also contends that since the tenancy was for manufacturing purpose, therefore, the same cannot come within the purview of U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act. 1972, and as such the suit could not be instituted before a Small Cause Court, in which otherwise suit for eviction under the 1972 Act would lie. He further contends that since it was a lease for manufacturing purpose and since there was no contract or local law or usage to the contrary, a lease of immovable property for manufacturing purposes would be deemed to be a lease from year to year, terminable by notice under Section 106 of the Act given for a period of six months ending with the year of tenancy. In the present case, notice having been given 30 days time, the same does not satisfy the test of Section 106 of the Act. He then contends that there was no allegation of sub-tenancy under the defendant Nos. 1 and 2 so far as defendant No. 3 was concerned. Therefore, on the basis of the finding that defendant Nos. 1 and 2 were tenants and the notice having been served on defendants Nos. 1 and 2, no order of eviction could be passed as against the defendant No. 3. Then again there cannot be any eviction even against the defendant Nos. 1 and 2 unless there was an allegation of subtenancy vis-a-vis defendant No. 3. No pleading of sub-tenancy having been incorporated, there could not be any decree of eviction as against defendant No. 3. He then contends

that apart from defendant Nos. 1 and 2, the mother of defendant Nos. 1 and 2 was also a tenant and no notice was served on her. According to him, defendant Nos. 1 and 2 could not become tenants since on the death of original tenant, Abdul Bari, one of them was one and half years old and therefore, they could not enter into any contract except without the mother. In absence of any notice on the mother, there could not be any eviction as against the defendant Nos. 1 and 2, which could bound the defendant No. 3- He further contends that the plaintiff had been receiving the rent from the defendant No. 3 regularly and had been executing rent receipts and, therefore, the plaintiff had admitted the defendant No. 3 as his tenant and as such, the suit could not be maintained as against the defendant Nos. 1 and 2 without serving a notice on the defendant No. 3 and without impleading the defendant No. 3 as the principal defendant. On these grounds he assails the order impugned.

4. Mr. S. U. Khan, learned counsel for the opposite parties on the other hand contends that even if the defendant No. 3 had paid the rent, he had paid the rent on behalf of the tenants. There was no termination of agreement of tenancy between the plaintiff and defendant Nos. 1 and 2 and, therefore, there was no scope for defendant No. 3 to become tenant in respect of the said property. Even if the rent is paid by him, the same could be payment of rent on behalf of the tenants. None of the rent receipts disclose the name of the defendant No. 3 either as a tenant or as a person tendering the rent. In such a situation, therefore, defendant No. 3 cannot claim to be a tenant. If he is not a tenant, then there is no locus standi to assail the order impugned. He further contends that the plaintiff had never contended that he was a sub-tenant. Therefore, the defendant No. 3 cannot set up any independent right in order to assail the order impugned. He then contends that admittedly the tenancy does not come within the purview of 1972 Act either by reason of Section 2 (c) or by reason of Section 2 (d) therefore, which excludes the properties described therein from the operation of 1972 Act. He also contends that in the agreement for tenancy that was entered into with the plaintiff, the tenancy was from month to month and there was a condition contained that the tenancy would be terminated by the tenant by giving one month's notice which would mutually apply to either of the parties. Even if it is holding over, in that event the holding over would be governed by the original tenant under which the tenancy

was created and the same would apply mutatis mutandis. It cannot be said that by reason of the death of the original tenant or the expiry of the period mentioned in the agreement, the said agreement would not be binding on account of such holding over. Inasmuch the principle of holding over does not accommodate a principle of creation of a new tenancy. Holding over is a continuation of the old tenancy from month to month basis. On these grounds, he claims that there is no merit in the revision and it should be dismissed.

5. I have heard both the learned counsel at length.

6. It is admitted that the suit property is a workshop where electroplating is being carried on. Mr. Bhardwaj has contended that the electroplating is a manufacturing process. Even if it is not a manufacturing process, still then it comes within the scope and ambit of Section 2 (d) of the 1972 Act which includes even processing of any goods. Therefore, admittedly the suit cannot be included within the scope and ambit of 1972 Act.

7. If it is a suit not covered by the 1972 Act, then having related to an interest in the immovable property, the same is excluded from the purview of Provincial Small Cause Courts Act by reason of Section 7 of the Code of Civil Procedure, read with Section 15 of the Provincial Small Cause Courts Act, which prescribes in Schedule II the suits which are excepted from the cognizance of a Court of Small Causes. In Schedule II, Article 4, suit for possession of an immovable property or recovery of interest in such property is excepted from the jurisdiction of the Provincial Small Cause Courts Act. By an amendment brought about through U. P. Civil Laws (Amendment) Act, 1972 (U. P. Act No, 37 of 1972). Article 4 in its application in U. P., was amended to the extent that suit for possession of an immovable property or for recovery of interest in such property, but not including the suit by lessor for the eviction of lessees from the building after the determination of his lease and for recovery from him of compensation for use and occupation of such building after such determination of lease. Thus, though possession of immovable property is excepted from the jurisdiction of Small Cause Courts Act but by reason of U. P. Amendment of Article 4, Schedule II, a suit concerning eviction of a lessee from the building after determination of the lease is included. As such, the present suit

being a suit for eviction of a lessee in respect of the workshop, which is a building within the meaning of Explanation to Article 4 of Schedule II is very much maintainable. Inasmuch as Explanation to Article 4, Schedule II prescribes that building means a residential or non-residential roofed structure and includes any land (including any garden, garages and out-houses appurtenant to such building and also includes any fittings and fixtures affixed to such building for the more beneficial enjoyment thereof.

8. In the present case, the workshop is definitely a roofed one and there were certain fittings and fixtures which are described in the agreement itself being the plant used for the purpose of the workshop. Therefore, definitely the suit properly comes within the scope and ambit of the Explanation for the purpose of bringing the same within the purview of Article 4, Schedule II of the Provincial Small Cause Courts Act.

9. So far as the question of maintainability of the application under Section 25 of the Provincial Small Cause Courts Act is concerned, the same appears to have been within the scope and ambit of Section 25 as amended in U. P. as observed at the initial stage.

10. Now it is alleged that the defendant No. 3 is a tenant. The plaintiff had never admitted him to be a tenant. The payment of rent does not make a person tenant. Rent can be tendered by any person on behalf of the tenant. Then again the receipt does not disclose the name of the defendant No. 3. There is nothing mentioned that even the rent was received from the defendant No. 3. It also does not disclose the name of the tenant, namely defendant Nos. 1 and 2. Absence of any name does not pre-suppose that defendant No. 3 is a tenant. When a positive fact is asserted, the same has to be established by positive evidence. Absence of evidence will not prove that the defendant No. 3 is a tenant. Even then if he intends to be a tenant, in that event there must be cessation of relation of tenancy between the plaintiff and defendant Nos. 1 and 2. There is nothing on record to show that there was any cessation of tenancy. If it is holding over, in that event there is no scope of cessation of tenancy.

11. Admittedly, Abdul Bari was the original tenant who died leaving behind his widow and defendant Nos, 1 and 2, who were minors at the time of his death. Admittedly a minor cannot enter into an agreement but such minor is supposed to be represented by a guardian until he attained majority. A minor can also be a tenant. If it is a case of holding over, then the holding over was by widow and the minor children, namely, the heirs of the deceased tenant Abdul Bari. On attainment of majority, the minors also became tenants. It is not alleged that there was any split up of the tenancy. It was one and the same tenancy where there were joint tenants. If the tenancy is Joint one, in that event non-service of notice on one of the joint tenant would not make the suit non-maintainable particularly when the other joint tenant is the mother of the remaining two joint tenants,

12. Lessor and lessee are the transferor and transferee respectively as defined in Section 105 of the Transfer of Property Act, 1882 (hereinafter referred to as T. P. Act). Lessee includes the legal representative or the assignee of the tenant. In the case of *Rees and Mears v. Perroi*, (1930) 4 C & P 230, the above view finds support. That apart, the interest in leasehold is an immovable property, which is heritable. Therefore, the interest vests on the legal representatives of the deceased lessee. The heirs, if they are more than one, of the original lessee, all become joint lessee/joint tenants in respect of the lease on the death of the lessee unless there is any specific assignment by the lessee. Thus, on the death of the original lessee, in the present case, all his heirs have become joint tenants.

13. The contention that the defendant Nos. 1 and 2 were minors, incapable of entering into contract and as such did not become tenant is unsustainable. Inasmuch as minority does not preclude devolution of leasehold interest. They may be represented by the guardian. The devolution does not require any contract. The minors on attaining majority need not be represented by the guardian.

14. In the present case, the lease being one, the heirs of deceased lessee became joint tenants. Whether the tenants are joint, a notice to one is sufficient. It was so held in the case of *Kanji v. Trustees of Gout. of Bombay*. AIR 1963 SC 468 ; *Shri Nath v. Saraswati Devi*. AIR 1964 All 52 ; *Roshan v. Purushottam Lal*, AIR 1965

All 287 ; Tata iron and Steel Co. v. Abdul Ahad, AIR 1970 Pat 338. In Abdulahed Moulvi Abdulsamad., v. Gul Mohammad Gulam Nabi Bardoliwala, AIR 1975 GUI 1. it was held that where the heirs of the lessee held over after the lessee's death, it was a Joint tenancy in favour of all the heirs and a notice to quit served on any one of them would be sufficient. The Calcutta High Court in Ajit Kumar Roy v. Satyabala Dutta, AIR 1973 Cal 339. had held that a notice to quit addressed to all the tenants, but served on one of them was sufficient and the principle applies not only to Joint tenants but also to tenants in common.

15. Section 116 of the T. P. Act deals with holding over of a lease and its effect. If after determination of the lease, the lessee continues in possession with the assent of the lessor to his continuation, the lease stands renewed from year to year or month to month unless there is an agreement to the contrary. Acceptance of rent by the landlord after expiry of the lease is treated to be an assent. By reason of Section 116 of the T. P. Act, the possession of a tenant, after cessation of the tenancy, is protected. Such possession is juridical, as was held in K. K. Verma v. Union of India, AIR 1954 Bom 358. In Bhawanji Lakhamshi v. Himmatlal Jamnadas, AIR 1972 SC 819, it was held that what Section 116 contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee remaining in possession after expiry of the lease, and on the other side, there must be a definite consent to the continuance of possession by the lessor by the acceptance of rent or otherwise ; there must be a bilateral contract by implication. The same view was reiterated in Badrilal v. Indore Municipality. AIR 1973 SC 508.

16. In the present case, the predecessor-in-interest of the defendant Nos. 1 and 2, was the tenant who retained the possession after expiry of the lease and the landlord continued to accept rent paid on their behalf. Thus, it was a case of holding over. After the death of the predecessor-in-interest of defendant Nos. 1 and 2, the heirs of the deceased being the widow and two children. viz., the defendant Nos. 1 and 2 continued to be the tenant from whom the landlord continued to accept rent. Thus, the holding over continued throughout.

17. In *Mohammad Ali. v. Nimar Ali*. AIR 1973 Gau 8. it was found that after the expiry of the lease the successor-in-interest of the original lessee continued in possession and the successor of the landlord had assented to such possession by acceptance of rent offered by the tenant. In such circumstances, it was held therein that, the burden of proving that the relationship of landlord and tenant had ceased to exist between the parties lay on the landlord.

18. This decision thus supports the proposition that unless disproved by the landlord, the existence of holding over is implied. It is the landlord who may deny the relationship and treat the tenant as trespasser. It is not dependant on the stand taken by the tenant or his successor in interest. If rent is paid by the tenant or by his successor, the tenancy cannot be denied by the tenant. Whether he is a tenant or trespasser, is dependant on certain facts only when the landlord refused to accept him as tenant. If the landlord accepts him as a tenant, the tenant cannot plead anything else in such a situation.

19. in the present case, the landlord accepted the heirs of the original tenant as lessee. Thus, there was a contract between the landlord and the heirs by implication through payment and acceptance of rent.

20. There cannot be any question of holding over either by a transferee or assignee of the lessee /tenant. The holding over is a creation of tenancy after expiry of the lease by implication through consent of bothsides. There cannot be any scope of holding over by a person other than the lessee under Section 116 of the T. P. Act. it does not conceive of such a situation. The holding over is a continuation of a contract by consent of the parties. It cannot include a new contract by substituting a party who is not a heir of the tenant if deceased.

21. The above view may find support from the decisions in *Durgi Nikarini v. Gobardhan*. 19 CWN 525 : *Sirjanam Abraham v. Mathevan Pillai*, AIR 1952 Tr. & Cochin 359 and *Kisan Punjabi, v. Yashodabai*, (1968) 70 Bom LR 765.

22. Be that as it may. These are questions which can be assailed, if it could be assailed, by the defendant Nos. 1 and 2. The defendant No. 3 cannot raise these questions when he is neither a tenant nor a sub-tenant. On the other hand, he

always claimed to be a tenant. Since there was nothing to show that he was a tenant, therefore, he has no right to assail the order as against defendant Nos. 1 and 2.

23. It is not a tenant, then he cannot take any of the grounds. Then again so far as the question of notice under Section 106 of the Transfer of Property Act is concerned, it appears that in absence of written contract or local law or usage, a tenancy in respect of manufacturing purposes shall be deemed to be a lease from year to year, terminable, by six months' notice expiring with the end of a year of the tenancy.

24. In the present case, there was an agreement for tenancy which prescribes the same to be from month to month. Tenancy has to be determined by the tenant by one months' notice, which pre-supposes that the tenancy was on month to month basis and when it could be determined by one month's notice by the tenant, in that event it would be applicable to the landlord as well. Therefore, the question of six months' notice ending with the year of tenancy does not seem to be sound.

25. Therefore, I am unable to persuade myself to agree with the contention of Mr. BhardwaJ in this regard.

26. For all these reasons, the writ petition fails and is accordingly dismissed, no cost.

27. At this stage Mr. BhardwaJ prays that reasonable time may be given to the revisionist for vacating the premises, if he is in occupation.

28. In case the defendant No. 3 gives an undertaking in the learned trial court within a period of four weeks from date that he would vacate the premises, within six months, in that event, the execution of the decree for eviction shall remain stayed till six months from the date of filing of such undertaking provided the revisionist defendant No. 3 deposits the decretal amount in the Court below. Such undertaking shall contain that in the event of failure, he would be liable to be evicted through Court without any objection and during the period of such possession, he would be liable to pay damages after the expiry of six months @

Rs. 6,000 per month. Till six months of such occupation, he will be liable to pay damages @ Rs. 900 per month.

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