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

**Daya Ram Vs. Gurcharan Das**

**Daya Ram Vs. Gurcharan Das**

**SooperKanoon Citation** : sooperkanoon.com/454076

**Court** : Allahabad

**Decided On :** Aug-10-1973

**Reported in** : AIR1974All266

**Judge** : R.B. Misra, J.

**Acts** : Transfer of Property Act, 1882 - Sections 116

**Appeal No.** : Second Appeal No. 3079 of 1968

**Appellant** : Daya Ram

**Respondent** : Gurcharan Das

**Advocate for Def.** : K.C. Agarwal, ;G.P. Bhargava and ;A.N. Bhargava, Advs.

**Advocate for Pet/Ap.** : V.K.S. Chaudhary, Adv.

**Disposition** : Appeal allowed

**Judgement** :

**R.B. Misra, J.**

1. The present appeal by the plaintiff arises out of a suit for ejectment from the ahata in suit after demolition of the constructions made by the defendant. The disputed ahata is owned by the plaintiff-appellant. By a registered deed of agreement dated 11th January, 1952, the plaintiff let out the said ahata on an

annual rent of Rs. 150/-to the defendant for a period of three years, commencing from 12th November, 1951 to 11th November, 1954. It was let out to the defendant for establishing a cotton machine and a flour mill. It was stipulated between the parties that on the expiry of the term of the lease, the defendant would hand over possession to the plaintiff and no notice to quit would be necessary. It was further stipulated that the defendant might make any new construction or place chappar or make any additions or alterations according to his needs and requirements, but, after the expiry of the term of the lease, the defendant would restore the premises to its original condition and would hand over the same to the plaintiff after removing his materials. But on the expiry of the term of the lease, the defendant did not vacate the premises as stipulated. The plaintiff, therefore, sent a composite notice of demand and quit to the defendant and, thereafter, filed a suit for recovery of arrears of rent and ejectment, which was, later on, numbered as Suit No. 444 of 1956; The Court, however, dismissed the suit for ejectment and decreed it only for the recovery of arrears of rent. According to the plaintiff, the defendant had made additions and alterations in the suit premises after the expiry of the period of lease inasmuch as he installed a paddy crushing machine and kolhu without any prior permission of the plaintiff. The defendant thus used the premises for inconsistent purposes. During the pendency of the suit, he has replaced the kolhu by an oil expeller on 10th April, 1962. According to the plaintiff, the vibration of the additional machines adversely affected the premises and the same amounted to nuisance. The plaintiff, after serving a notice of termination on the defendant, filed the present suit.

2. The claim of the plaintiff was resisted by the defendant. His stand was that the additions and alterations were made at a cost of Rs. 1,000/- with the consent of the plaintiff, who had agreed to adjust the said amount in the rent, but he did not adjust the amount and had falsely instituted the suit. It was further alleged that the suit premises was taken for manufacturing purposes and so the defendant was legally entitled to instal the paddy crushing machine arid the Kolhu. The notice served by the plaintiff on the defendant was invalid.

3. The trial Court came to the conclusion that though the premises was let out for manufacturing purposes, a restriction was placed in the lease deed to run only

flour mill and cotton machine and the installation of the rice crushing machine, kolhu and oil expeller was inconsistent with the use of the premises for which it had been let out. It was also alleged that the additions and alterations in the suit premises did not cause any substantial damage nor did they create any nuisance and that the tenancy of the defendant had been validly terminated by the plaintiff. On these findings, the suit was decreed by the trial Court.

4. Feeling aggrieved by the judgment of the trial Court, the defendant preferred an appeal. It appears that during the pendency of the appeal, the defendant moved an application on 12th February, 1964, for amendment of the written statement to incorporate the plea that the suit was barred under Order 2, Rule 2, Civil P. C. The application was hotly contested by the plaintiff, but the Additional Civil Judge allowed the application and remanded the case to the trial Court to decide the suit afresh. The plaintiff came up in appeal to this Court against that order, which was allowed by this Court and the order of remand was set aside and the Additional Civil Judge was directed to decide the appeal on merits. Consequently, the Additional Civil Judge heard the appeal and decided it on merits. He allowed the appeal and set aside the judgment and decree of the trial Court. The learned Additional Civil Judge took the view that the defendant continued in possession even after the expiry of the stipulated period of the lease deed on payment of rent, which was accepted by the landlord and, therefore, it was a case of holding over within the meaning of Section 116 of the Transfer of Property Act. Accordingly, he held that the defendant's tenancy continued on the terms contained in the lease deed dated 11th January, 1952. The plaintiff has now come up in second appeal to this Court.

5. Sri V. K. S. Chaudhary, appearing for the plaintiff appellant, contended that the learned Judge has gone wrong in accepting the case of holding over, as set up by the defendant-respondent.

6. The facts in this case are not very much in dispute. Under the registered lease deed D/- 11th January, 1952, the plaintiff had let out the premises to the defendant on an annual rent of Rs. 150/- for a period of three years. It is further admitted by the parties that the defendant did not vacate the premises after the expiry of the

said period. It is further not in dispute that the plaintiff had accepted rent from the defendant even after the expiry of the period of the lease. Now, the question is whether the acceptance of the rent by the landlord after the expiry of the period of lease would create a fresh tenancy in favour of the defendant by holding over.

7. In order to appreciate the point raised on behalf of the appellant, it is necessary, at this stage, to read Section 116 of the Transfer of Property Act. It reads:

'116. Effect of holding over.

If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased as specified in Section 106.'

8. This section is applicable to lessees or wider-lessees of property, remaining in possession thereof, after the determination of the lease granted to them, if the lessor of his legal representative-

(i) accepts rent from the lessee or under-lessee, or

(ii) otherwise assents to his continuing in possession.

9. In such a case, in the absence of an agreement to the contrary, the lease is renewed from year to year, or from month to month, according to the purpose for which the property was leased.

10. A lease is terminated in the ways contemplated by Section 111 of the Transfer of Property Act. One of these ways is termination by efflux of time. In the instant case, the lease had been granted to the defendant for a period of three years, This period expired on 12th November, 1954. In all fairness, the lessee should have given possession to the plaintiff, but he did not do so and remained in possession. If it is established that the lessee made an offer to continue in possession on payment of the same rent and the lesser accepted the offer, either by accepting

the rent from the lessee or otherwise assenting to his continuing in possession, a fresh tenancy would come into existence on the same terms on which the earlier lease had been granted to him.

11. Sri V. K. S. Chaudhary, however, contended that by efflux of time, the contractual tenancy between the parties came to an end. Still the lessee could not be ejected, as his eviction was prevented by the U. P. (Temporary) Control of Rent and Eviction Act. His status thereafter would become that of a 'statutory tenant' as popularly known. The acceptance of rent from the defendant would not create a fresh tenancy. It would be taken to be a payment for the use and occupation of the premises as a statutory tenant. In support of his contention, Sri Chaudhary relied upon Ganga Dutt Murarka v. Kartik Chandra Das : [1961]3SCR813 . In that case, it was held:--

'Where a contractual tenancy to which the rent control legislation applies has expired by efflux of time or by determination by notice to quit and the tenant continues in possession of the premises by virtue of statutory protection, acceptance of rent from the tenant by the landlord after the expiration or determination of the contractual tenancy will not afford ground for holding that the landlord has assented to a new contractual tenancy.

There is, however, no prohibition against a landlord entering into a fresh contract of tenancy with a tenant whose right of occupation is determined and who remains in occupation by virtue of the statutory immunity Apart from an express contract, conduct of the parties may undoubtedly justify an inference that after determination of the contractual tenancy, the landlord had entered into a fresh contract with the tenant but whether the conduct justifies such an inference must always depend upon the facts of each case.'

12. Sri Bhargava, on the other hand, placed reliance on a Full Bench decision of This Court in Shiv Nath v. Shri Ram Bharosey Lal : AIR1969 All333 . In that case the original 'lease was for eleven months.' It stipulated that on the expiry of the said period, the lessee would vacate the shop and hand over possession to the lessor without notice. There was no provision for extension of the lease. The lessee continued to be in possession even after the expiry of the stipulated period

and after the death of the lessee, his son remained in possession of the shop for several years. There was also evidence that the rate of rent was increased subsequently. In these circumstances, it was held that the lessee was not a tenant at will at the time of his death. Either he was a tenant under a specific renewed lease or he was a tenant holding over. In either case, he was a tenant from month to month.

13. In Bhawanji Lakhamshi v. Himat-lal Jamnadas Dani : [1972]2SCR890 , dealing with Section 116 of the Transfer of Property Act, the Supreme Court observed as follows :--

'The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. There is a distinction between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former is a tenant at sufferance in English Law and the latter a tenant holding over or a tenant at will. The assent of the landlord to the continuance of possession will create a new tenancy. What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise. Mere acceptance of amounts equivalent to rent by a landlord from a tenant in possession after a lease had been determined, either by efflux of time or by notice to quit, and who enjoys statutory immunity from eviction except on well defined grounds as in the Act (Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947) cannot be regarded as evidence of a new agreement of tenancy. If the tenant asserts that the landlord accepted the rent not as statutory tenant, but only as legal rent indicating his assent to the tenant's continuing in possession, it is for the tenant to establish it. Where he fails to so establish it cannot be said that there was holding over by him.'

14. In Hari Shanker v. Chaitanya Kumar, (1968 All WR 197), a Division Bench of this Court held that if after the institution of the suit, the landlord accepted rent for a period after the time mentioned in the notice had expired, it did not amount to waiver of notice to quit under Section 113 of the Transfer of Property Act. It was only because he will obtain protection of the provisions of the U. P. (Temporary) Control of Rent and Eviction Act and would be immune from ejectment and would be popularly called as a 'statutory tenant.' While continuing in possession of the premises as a statutory tenant, he would be liable to pay rent in accordance with the provisions of the Act. The mere acceptance by the landlords of the rent for a period after the time mentioned in the notice has expired cannot, accordingly, amount to the waiver of notice to quit by them.

15. In Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden dealing with Section 116 of the Transfer of Property Act, it was held by the Federal Court :

'The tenancy which is created by the 'holding over' of a lessee or under-lessee is new tenancy in law even though many of the terms of the old lease might be continued in it, by implication; and it cannot be disputed that to bring new tenancy into existence, there must be a bilateral act. What Section 116 contemplates is that on one side there should be an offer of taking a renewed or fresh demise evidenced by the lessee's or sub-lessee's continuing in occupation of the property after his interest has ceased and on the other side there must be a definite assent to this continuance of possession by the landlord expressed by acceptance of rent or otherwise. The assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it.'

16. On an analysis of the various authorities, it is quite evident that in order to attract the provisions of Section 116 of the Transfer of Property Act, there must be a bilateral agreement between the landlord and a tenant, that is, there must be an offer on the one side and acceptance on the other. It is further clear by the various authorities that the question whether the acceptance of rent was in token of a fresh contract of tenancy between the parties will be a question depending upon the facts and circumstances, of each case. In this view of the legal position, it has to

be examined whether the landlord had accepted the rent after the termination of the lease in token of accepting the defendant as a tenant.

17. Reliance has been placed on para 3 of the plaint of the original suit. It is in the following term: --

'3. Yah ki Prati Vadi ki kirayadan 11 November, 1954 ko khatam bo gai thi. Prati vadi uske baad bhai bataur kirayedar aabad hai aur kanoonan uski kirayadari mah ba mah ho gai aur kiraya bhi bataur mah ba mah deta raha.'

18. It is sought to be argued by Sri Bhargava that the use of the word 'tenant' in para 3 of the earlier plaint indicates that the plaintiff had accepted the defendant as a tenant. I feel difficulty in accepting this contention. In my opinion, the use of the word 'tenant' should be taken in a broader sense, as was held in Habib Seth v. Kashi Nath, (1968 All WR 340). Even after the expiry of the period of lease, the defendant was entitled to the protection of the U. P. (Temporary) Control of Rent and Eviction Act, which, admittedly, was applicable to the present case, and, therefore, the defendant would acquire the status of a tenant (popularly called statutory tenant). If the plaintiff had assented to the continuance of the defendant as a tenant on the old terms, he would not possibly have mentioned in para 3 of the earlier plaint that his tenancy was only from month to month. It has already been mentioned in the earlier part of the judgment that the lease had been given to the defendant for manufacturing purposes and it was an yearly tenancy. Again, para 4 of the plaint in the present suit, indicates that the defendant has taken advantage of the U. P. (Temporary) Control of Rent and Eviction Act. The contents of paragraph 4 of the plaint have not been denied in the written statement and there is not a suggestion in the written statement that there was a fresh contract of tenancy between the plaintiff and the defendant whereby the plaintiff permitted the defendant to continue on the same old terms. In these circumstances, the mere fact, that the defendant has paid rent, which was accepted by the plaintiff, cannot lead to the irresistible conclusion that the landlord had given his assent to the defendant to continue as a tenant on the same old terms. I have closely gone through the plaint and the written statement of the present suit as also the plaint of the earlier suit and I am fully satisfied that the plaintiff appellant has not given his

assent to the defendant to continue as a tenant. He wanted to evict the defendant and with that intent in view, he sent notice after notice demanding the defendant to vacate the premises, but he failed. He was, under the circumstances, obliged to file the earlier suit, but he could not succeed there also. He, therefore, had to file the present suit. The circumstances and the conduct of the plaintiff do not warrant the conclusion that the plaintiff had entered into a fresh contract with the defendant and allowed him to continue as a tenant on the same old terms. In these circumstances, Section 116 of the Transfer of Property Act has no application to the present case.

19. Sri Chaudhary wanted to rely on the recitals in the notices sent by the plaintiff in connection with the earlier suit, but those papers were not filed before the learned Judge. Mr. Chaudhary contended that as the copy of the plaint of the earlier suit was filed, for the first time, before the appellate stage and the plaintiff had no reasonable opportunity to produce documents in rebuttal, he prayed that the notices of the earlier suit filed along with the memo of appeal along with an application be accepted by this Court, under Order 41, Rule 27, Civil P. C. From the Order Sheet, it is evident that the plaintiff had been given an opportunity to produce documents in rebuttal, but he did not avail of the opportunity. He cannot now make a grievance that he had no reasonable opportunity. The new papers sought to be filed by the plaintiff before this Court cannot be accepted under Order 41, Rule 27, C. P. C. Neither the defendant nor his counsel has any notice of the application under Order 41, Rule 27, Civil P. C. filed by the plaintiff-appellant. For these reasons, the fresh evidence sought to be filed before this Court, cannot be taken into consideration. From the materials, however, on the record, I have not the slightest doubt that, in this case, the defendant-respondent has failed to establish a fresh contract between the parties. The lower appellate Court has been swayed by the mere fact that the plaintiff had accepted rent even after the expiry of the period of the lease. That by itself may or may not amount to a fresh contract. That will depend upon the circumstances of each case. But the circumstances in the present case do not warrant such a conclusion.

20. For the reasons given above, the appeal must succeed. It is, accordingly, allowed with costs and the judgment and decree of the lower appellate Court are

set aside and that of the Court of the first instance is restored. As the respondent has installed flour mill and oil expeller, it seems desirable that he should be given some time to remove the installations. He will not be ejected, in these circumstances, for a period of three months.

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