Mohan Lal Vs. Sameer Kunwar

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Court : Allahabad

Decided On : Feb-27-1963

Reported in : AIR1964All374

Judge : S.S. Dhavan, J.

Acts : Transfer of Property Act, 1882 - Sections 116

Appeal No. : Second Appeal No. 3366 of 1960

Appellant : Mohan Lal

Respondent : Sameer Kunwar

Advocate for Def. : R. Dwivedi, Adv.

Advocate for Pet/Ap. : Rajesh Ji Verma, Adv.

Disposition : Appeal allowed

Judgement :

S.S. Dhavan, J.

1. This is a tenant's second appeal from the concurrent decisions of the Courts below decreeing the landlord's suit for his ejectment. Mr. Rajeshji Verma urged only one point in support of this appeal. He contended that the Courts below should have held that the landlord by accepting rent for the period after the

termination of the tenancy and the filing of the suit had waived the notice of termination, or alternatively, created a fresh tenancy. The relevant facts on which this argument is based are these. The appellant Mohan Lal was the tenant of a shop in Oral of which the plaintiff respondent Sumer Kunwar is the landlord. The agreed rent was Rs. 10/8/- per month. The appellant did not pay the rent for 18 months and the landlord on 4-7-1957 served on him a combined notice of demand and conditional termination of tenancy.

On 27-7-1957 the appellant sent a reply alleging that his previous remittances had been refused by the landlord and assuring him that the entire rent would be paid by 15-8-1957. However, he paid no rent even by that date and on 9-9-1957 the landlord filed the present suit for ejectment and for recovery of arrears of rent and mesne profits pendente lite. Sometime in January the appellant tendered to the landlord a sum of Rs. 189/- in respect of the arrears of rent and another sum of Rs. 73/8/-. Both these amounts were accepted by the landlord. There is no dispute that the former amount was in respect of rent which had accrued before the termination of tenancy and the entire controversy centres round the nature of the second payment and its legal effect. In his defence the appellant claimed that he had tendered this amount as rent and the landlord had accepted it as such and treated him as his tenant, while the landlord deposed that he accepted it as damages for use and occupation.

The landlord issued a printed receipt in which the amount of Rs. 73/8/- was entered, in the blank space against the head 'amount of rent received'. In another place the sum of Rs. 10/8/-was entered in the blank space under the head 'monthly rate of rent''. The date of receipt is 10th January 1958. On the next day, 11th January, the plaintiff moved an application before the Court for the amendment of his plaint alleging that the defendant had paid him Rs. 189/-towards the arrears of rent 'and over the amount the mesne profits upto November 1957 after the filing of the suit'. He asked for permission to withdraw the claim for arrears of rent. Notice of this application was served on the defendant's counsel. On or about 3oth May 1958 the appellant tendered another sum of Rs. 42/4/- which was also accepted, and the plaintiff again moved an application before the Court alleging that ha had received this amount as mesne profits and seeking

permission to withdraw the claim under this head. Both these applications were allowed on the date of hearing which took place on 3-10-1958.

2. On the basis of these facts Mr. Verma contended that the suit for ejectment should have been dismissed on the ground that the landlord by accepting rent after the termination of the tenancy had created a fresh tenancy. Learned counsel relied strongly on the receipt issued by the landlord in his own handwriting in which the appellant was described as a tenant, the amount received as rent, and Rs. 10/8/- specified as the rate of rent. On the other hand, learned counsel for the respondent argued that the use of the words 'rent' and 'tenant' was the result of an error of which the appellant cannot take advantage as he was well aware that the landlord did not want him as a tenant and accepted the amount as compensation for use and occupation.

3. The courts below have observed that acceptance of rent by the landlord after the filing of the suit for ejectment does not amount to waiver of the termination of tenancy and they relied on two decisions of this Court Kamlapat Sahai v. Manho Bibi AIR 1948 Oudh 127 and Moti Lal v. Basant Lal : AIR1956 All175 in which it was held that there can be no waiver after the landlord has filed his suit for ejectment. , But in both these decisions it was held that it is always open to a landlord to renew the lease at any time he pleases, and the real question in the present suit was whether a new tenancy had been created by the acceptance of rent by the landlord during the pendency of the suit, but the courts below did not consider it. The defendant had expressly raised it in para 10 of his written statement. He deposed that he paid rent and the landlord continued to treat him as a tenant and issued receipts indicating that he accepted the amount as rent. I shall now consider whether the plaintiff renewed or by his conduct must be deemed to have renewed the tenancy.

4. In Kai Khushroo v. Bai Jerbai the Federal Court held that a landlord who accepts rent from a tenant after the determination of the tenancy cannot be permitted afterwards to say that he did not take the money as rent. In that case the landlord refused the first offer of rent, but accepted a second offer and paid the amount into his bank. He tried to escape the legal effect of his acceptance by

writing a letter to the tenant, two months later, that the remittance had not been accepted as rent. The Court held that he was estopped from denying that the amount had been tendered and accepted as rent.

5. In the present case I have to consider whether the evidence has established that the landlord renewed the tenancy or his conduct was such that he is estopped from denying that he renewed it.

6. Before deciding this point I would like to mention that Mr. Verma on behalf of the appellant made an offer to learned counsel for the landlord respondent that he was prepared to continue as a tenant on enhanced rent at the rate of Rs. 20/- per mensem, but the offer was declined on the ground that counsel had no instructions to make a compromise. Counsel asked the Court for an adjournment of the case to obtain instructions, but I am afraid I cannot grant any further adjournments. The case was adjourned once to enable counsel to contact big client.

7. Learned counsel for the respondent then argued that the appellant should not be allowed to set up a new case in second appeal. He pointed out that the courts below framed an issue on the question of waiver of notice but not of renewal of tenancy. But I do not think that the appellant has taken a new case. In paragraph 16 of his written statement he expressly alleged that the plaintiff had taken rent from him and agreed not to eject him. This is not a plea of waiver of notice which was advanced in another paragraph. It is not the appellant's fault if the courts below did not frame an issue on paragraph 16 of the written statement.

8. I shall now summarise the tenant's evidence in support of his case that the landlord renewed his tenancy during the pendency of the suit. In reply to the notice of demand the appellant sent a card in which he assured him that the arrears of rent would be paid by the 15th of August. He was not able to make good this promise and the landlord had filed a suit on 9th of September 1957. The appellant's case is that he got very worried after this and, though a very poor man, collected enough money to pay off the entire arrears of rent, including the rent which had accumulated after the termination of the tenancy. He deposed that be was successful in his efforts and paid a sum of Rs. 105/- in October 1957 and the balance soon after. He stated on oath that the landlord regularly accepted rent

from him after the termination of the tenancy and treated him as a tenant and issued receipts indicating that payment was accepted as rent. One such receipt has been filed which is Ext. A-1, dated 10th January 1958. It is on a printed form, but filled in by the landlord in his own handwriting. The receipt is for a sum of RS. 73/8/- described as rent (kiraya). The appellant is described as a tenant ('kirayadar') and there is another column stating that the rate of rent ('dar masik kiraya') was Rs. 10/8/- per month. After the figure Rs. 73/8/- the following words occur; 'Seventy three and a half rupees of seven months from May till November 1957' ('sadhe tihattar rupaya mas sat ka mab Mai se November 1957 tak'). The sheet-anchor of the appellants case is this receipt.

Learned counsel for the respondent argued that the use of the words kiraya and kirayadar in the receipt are not conclusive and he relied on two decisions of this Court which were cited by the courts below and another decision of Kidwai Justice in Khumani v. Saktey Lal : AIR1952 All579 . In all of them it was held that there can be no waiver of a notice terminating the tenancy if the landlord continues to prosecute his suit for the ejectment of the tenant, and in two of them it was observed that the mere use of the word 'rent' by the landlord in some of the receipts which he issued is not conclusive because the person issuing the receipts may have used the word 'rent' in the sense of damages for use and occupation. But in all these cases the question before the Court was whether there was any waiver of termination of tenancy and not whether the landlord has renewed the tenancy. In fact, in AIR 1948 Oudh 127 and : AIR1956 All175 it was observed that though there can be no waiver after a suit for ejectment has been filed, it is always open to a landlord to renew the lease at any time he pleases.

9. I respectfully agree that the mere use of the word 'rent' is not conclusive, but combined with other circumstances it may establish either that the landlord intended to renew the tenancy or that any reasonable person dealing with him would have thought that he had this intention. In the present case, the tenant's letter in reply to the notice of demand reveals his anxiety to save his tenancy by paying off the arrears. He is a very poor man carrying on the trade of a halwai, but he managed to collect nearly Rs. 250/- which he paid to the landlord. There can be no doubt that this object in paying such a large amount during the pendency of the

suit was to save his tenancy by persuading the landlord to continue to recognize him as a tenant. It is common ground that the amount was paid not by money order but direct to the landlord and there are no witnesses except the plaintiff and the defendant.

The crucial question which I have to consider is whether the landlord knew at the time of these payments that they were being tendered as rent and he accepted them as rent or induced the tenant to believe that he was accepting it as rent. I have given this matter my anxious consideration and heard both counsel at considerable length on this question. I think that the-receipt itself combined with the surrounding circumstances indicates that the landlord accepted payment as rent or at any rate induced the tenant that he was prepared to accept it as rent.

The words in the receipt 'of seven months from May till November 1957' are conclusive. They indicate that the landlord was treating the payment due under each of these 7 months as of the same kind. But as the tenancy was terminated in July 1957 the payment in respect of the months of May and June could only be as rent, and it follows that the payment in respect of the other five months which were bracketed with the first two was also accepted as rent. Learned counsel for the respondent argued that the words do not prove that there was any payment but indicate that the rent for these seven months was still due ('baqi'). But this makes the position worse for the landlord for he treated the arrears for each of these seven months as rent. Learned counsel also relied on an application moved by the landlord before the Court on the 11th of January in which it was stated that he had received payments as mesne profits, and the tenant made no protest. There are two short answers to this argument. The question is not what the landlord had in mind but how he conducted himself when dealing with the tenant. It is possible that his object may have been to induce the appellant to pay all the arrears of rent and also make payment for use and occupation during the pendency of the suit so that he was saved the trouble and expense of the execution of the decree. But if his conduct was such that the appellant was led to believe that the landlord was willing to renew the tenancy if the arrears of rent were paid up to date, he cannot be permitted to deny that he never intended to renew it. In this context the words of the receipt describing the dues for the seven months indiscriminately as rent

become significant and indicate that the landlord induced the appellant to believe that his tenancy was being renewed. I am not inclined to believe that the landlord used the word 'tenant' and 'rent' in the receipt dated 10th January 1958 under a mistake. On the next day he filed an application in which the words 'mesne profits' were used. It is difficult to believe that he learnt the difference between rent and mesne profits within a day of accepting payment from the appellant, and I think he filled the words in the receipt with the intention of making the appellant feel that he was being treated as a tenant. He may have had other ideas in his own mind but he is estopped by his conduct from denying that he accepted rent and renewed the tenancy. He tried to escape from the legal effects of acceptance of rent, but as observed by the Federal Court in he cannot be permitted now to deny that he took the money as rent.

10. I allow this appeal and set aside thedecision of the lower court and dismiss the plaintiff respondent's suit for ejectment. However, inview of the fact that the appellant brought thislitigation upon himself by falling in arrears, Idirect the parties to bear their own costs throughout. Leave to appeal is refused.