

Laxmi Devi Vs. Chandramani Devi

Laxmi Devi Vs. Chandramani Devi

SooperKanoon Citation : sooperkanoon.com/460814

Court : Allahabad

Decided On : Apr-13-1971

Reported in : AIR1971All506

Judge : K.B. Asthana, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 17; [Transfer of Property Act, 1882](#) - Sections 105 and 106

Appeal No. : Second Appeal No. 1104 of 1970 and Cross Objection

Appellant : Laxmi Devi

Respondent : Chandramani Devi

Advocate for Def. : R.R. Shivahare, Adv.

Advocate for Pet/Ap. : Ambika Prasad Ji, ;Rabindra Narain Singh and ;Keshava Pd. Singh, Advs.

Disposition : Appeal dismissed

Judgement :

K.B. Asthana, J.

1. This is a defendant tenant's appeal from a decree of her eviction from a house, for recovery of arrears and damages.

2. It appears that the father of the defendant appellant in 1938 took on lease the premises in suit, commonly described as Garden House, situate in a decent locality of Varanasi City, from the father of the plaintiff respondent at a monthly rent of Rs. 75/- for residential purposes. In course of time the father of the plaintiff as well as of the defendant died. The plaintiff as the heir became the owner of the premises in suit and the defendant as heir of her father succeeded to the tenancy. In due course the rent was increased to Rs. 125/- per month. The plaintiff was married to a gentleman who was residing outside Varanasi with the family being in service. When the plaintiff's husband retired from service the family came back to Varanasi and the plaintiff was desirous of securing residence in her own property, that is, the Garden House, the premises in suit. She made an application under Section 3 of U. P. Act 3 of 1947 before the Rent Control and Eviction Officer for grant of permission to bring a suit for eviction of the defendant tenant. This application was opposed on behalf of the defendant appellant. The Rent Control and Eviction Officer after hearing the parties granted the necessary permission. This order was confirmed in revision by the Commissioner and as well as by the State Government under Section 7-F of the said Act. The plaintiff then by a notice under Section 106 of the Transfer of Property Act dated 19-5-1965 terminated the tenancy of the defendant and asked her to vacate the premises on the expiry of thirty days from the receipt thereof. The defendant gave a reply to the notice raising certain objections and did not vacate the premises. The plaintiff then instituted the suit giving rise to this appeal. The main cause of action pleaded was the termination of the tenancy by a notice and the refusal of the defendant to deliver vacant possession of the premises in suit to the plaintiff. Besides claiming the arrears of rent at the rate of Rs. 125/- per month the plaintiff claimed damages at the rate of Rs. 250/- per month.

3. The suit was contested by the defendant mainly on the plea that permission granted under Section 3 of U. P. Act 3 of 1947 was null and void being mala fide and given without properly considering the genuine need of the defendant to remain in possession of the premises in suit. A large number of pleas were raised in the written statement in support of the plea in respect of the invalidity of the permission under Section 3 of U. P. Act 3 of 1947. The usual plea that the notice of termination was invalid and ineffective was also raised without any specification

or particulars as to on what grounds the notice was invalid. The allegation of the plaintiff as regards the rate of rent and the rate of profits claimed was also refuted. It may be mentioned that the tenancy was admitted.

4. It is unfortunate that the order sheet of the court of the learned Munsif of Varanasi, where the suit was instituted, shows that the court allowed a large number of adjournments, some of which appeared to be mere indulgences to the defendant, thus prolonging the pendency of the suit. The suit was registered on 21-7-1965. The written statement was filed on 25-1-1966 and issues framed on 1-2-1966. Then on two consecutive dates fixed the suit was adjourned at the instance of the defendant. The final hearing of the suit was adjourned at the instance of the defendant on ground of illness. On 12-5-1966, the adjourned date fixed for final hearing, an application No. 44-C was moved by the defendant for amendment of the written statement. By this application the defendant applied for correcting certain typographical errors, to add some more pleas in support of the main plea as to the invalidity of the permission and a plea to the effect that the tenancy from the very inception was for manufacturing purposes and the notice of termination not having afforded six months to vacate as required by law, was bad in law. This was the substance of the amendment sought. The learned Munsif by his order dated 13-5-1966 after hearing the parties partly allowed the application. The typographical errors were allowed to be corrected. Pleas were added on the question of the invalidity of the permission but the application stood rejected for adding a plea that the tenancy was for manufacturing purposes as in the opinion of the learned Munsif that would have changed the nature of the case. On 2-6-1966 an application for review of the said order by the defendant was filed. This was rejected on 12-7-1966.

Then on 19-7-1966 the defendant filed another application for amendment of her written statement, 54-C, praying for the incorporation of the same plea, though put in a slightly different form that the tenancy was a manufacturing one, as raised on the earlier application together with some more pleas in respect of the invalidity of the permission. By an order dated 23-9-1966 the learned Munsif partly allowed the said application incorporating the further amendments in respect of the plea of invalidity of permission and rejecting the amendment sought for the plea that the

lease was for manufacturing purposes, The defendant then went up in revision to the High Court against the rejection of her prayer for amending her written statement by adding a plea to the effect that the lease was for manufacturing purposes and the notice of termination was not in accordance with law. Her revision application was rejected by the High Court on 15-11-1966 on the ground that there was no jurisdictional error in the order of the court below. It appears that the proceedings in the suit remained stayed for sometime, may be because of the pendency of the revision in the High Court. The order sheet then shows that on numerous dates fixed for final hearing the hearing was adjourned at the instance of the defendant on ground of illness. Some of the adjournments were, no doubt, due to the court being busy with other work.

Then on 3-10-1968 the defendant filed another application for the amendment of her written statement, 119-C, but in this application no plea was sought to be introduced regarding the lease being for manufacturing purposes. The amendment sought in this application was confined only to the invalidity of the permission. This application was allowed on 28-10-1968 with the result that further issues were framed and the hearing was adjourned on 24-3-1969. to a long date.

Then on 29-9-1969 when the case was called up the defendant filed an application 130-C for amendment of the written statement repeating the same prayer as the one made in the very first application No. 44-C for adding a plea to the effect that the tenancy was for manufacturing purposes from the very inception and the notice of termination was insufficient and invalid. 30-9-1969 was the date fixed in the suit for final hearing. When the suit was called up for hearing on that date Sri R.P. Singh, learned counsel for the defendant, appeared and pressed the application 130-C. After hearing the objection of the plaintiff the learned Munsif rejected the application and proceeded with the hearing of the suit. The plaintiff's witnesses were examined.

In the course of the hearing Sri R.P. Singh, learned counsel for the defendant, moved another application 132-C praying for adjournment of the hearing to enable the defendant to approach the High Court in revision against the order rejecting the application for amendment and obtaining stay, order. This application was also

rejected the same day by the learned Munsif who proceeded with the examination of the plaintiff's witnesses. The plaintiff closed his evidence. Neither the defendant nor his counsel seemed to have taken any further part in the proceeding. The English notes of the learned Munsif showed that the defendant's counsel did not produce any evidence. The learned Munsif further recorded that since the defendant's counsel had appeared in the case at the outset it was proposed to dispose of the case on merits, there being sufficient evidence on the record to decide the case on merits. Arguments then were heard 'obviously of the plaintiff's counsel and 4-10-1969 was fixed for pronouncing judgment. No attempt seems to have been made on behalf of the defendant between 30th September 1969 to 4-10-1969 for being afforded an opportunity to be heard. On 4-10-1969 judgment was pronounced decreeing the plaintiffs suit for eviction, recovery of arrears at the rate of Rs. 125/- per month and mesne profits for wrongful use and occupation at the rate of Rs. 250/- per month. Against the above judgment and decree of the learned Munsif the defendant resorted to twofold procedure. She filed an application purporting to be under Order 9, Rule 13, Civil P. C. in the court of Munsif for setting aside the decree and as well as a substantive appeal from the judgment and decree of the learned Munsif. Her application filed under Order 9, Rule 13, Civil P. C. was rejected mainly for the reason that she had already preferred an appeal from the judgment and decree of the trial court.

5. In the appeal heard by the Additional District Judge two main points seem to have been urged. The first point was that the defendant was denied an opportunity to place her case by the refusal of the trial court to amend the written statement by adding a plea to the effect that the tenancy was for manufacturing purposes, the notice terminating the tenancy was insufficient, The second point was that the decree of the court below was an ex parte decree, the appellate court after setting it aside ought to have remanded the case. The finding granting mesne profits at Rupees 250/- per month was questioned. Another point which seems to have been urged was on the validity of the permission granted under Section 3 of U. P. Act 3 of 1947, the learned Munsif having held that the permission was valid and effective permission. The learned Additional District Judge on a consideration, of the entire circumstances of the case emerging from the record dismissed the appeal. He held, in agreement with the learned Munsifs view, that repeated

attempts of the defendant for amendment of her written statement were not bona fide and were made with the ulterior purpose of prolonging the pendency of the suit to avoid the evil day of eviction. He further held that the decree passed by the learned Munsif was not an ex parte decree but was on merits. The finding on the validity of the permission under Act 3 of 1947 was also affirmed. The learned judge reduced the rate of mesne profits to Rs. 125/- per month. The defendant being aggrieved then filed the second appeal before this Court from the judgment and decree of the learned Additional District Judge.

6. During the pendency of the appeal in the High Court it appears the defendant was advised to file a revision under Section 115 of the Civil P. C. against the order of the learned Munsif rejecting her application under Order 9, R 13. Civil P. C. This revision was admitted by the High Court on 11-2-1971 and connected with this second appeal.

7. As far as the revision is concerned, I have passed separate orders on the revision rejecting it on merits after hearing the parties.

8. In this appeal before me learned counsel for the defendant appellant firstly contended that the application for amendment of the written statement filed by the defendant was wrongly refused, thus depriving her of an opportunity to place her case before the Court. Learned counsel submitted that the court below on an erroneous assumption that the repeated applications for amendment were not bona fide and were made for prolonging the proceedings, failed to apply a judicial mind to the merits of the matter, thus the finding of the court below that the application for amendment was mala fide was vitiated. Learned counsel drew my attention to the fact that the defendant had approached the High Court against the rejection of her earlier application for amendment which showed that she was serious about the matter and the learned Judge of the court below wrongly assumed that the defendant was never serious about the matter as she never approached the High Court for redress.

Another aspect on which great emphasis was laid by the learned counsel for the defendant was that there was an admission on the part of the plaintiff that the lease was for manufacturing purposes which served as a bona Me foundation for

the defendant to apply for amendment and in such circumstances the application could not be found to be lacking in bona fide. In this connection the learned counsel relied upon the contents of the application made by the plaintiff under Section 3 of U. P. Act 3 of 1947 before the Rent Control and Eviction Officer. In that application the plaintiff while describing the accommodation for which permission for eviction was sought, alleged that the tenant was paying Rs. 100/- for the house and Rs. 25/- for the workshop in the compound. It was argued that the plaintiff herself admitted that a part of the premises at least were used for manufacturing purposes. It was also urged that the plaintiff being an old, sick Pardanashin woman may not have succeeded in properly instructing her counsel when the written statement was originally drafted and subsequently when true facts came to the knowledge of her counsel the application for amendment was made. It was also submitted that the prayer for amendment of the pleadings ordinarily ought not to have been refused and the plaintiff should have been compensated by award of costs.

9. I have given my due consideration to the arguments of the learned counsel for the defendant appellant. None of the above arguments commends itself to me. Any party can claim amendment of the pleadings as of right. The court always has the discretion in the matter. The law is well settled that once an application for securing amendment is rejected then a second application for the same purpose can always be properly rejected by the court. Judged from that point of view the rejection of the last application which was the fourth one (paper No. 130-C) on 30-9-1969 was correct and proper. The learned counsel of the defendant would be presumed to have known the law that the fourth application seeking the same kind of amendment of the written statement had no chance of success and in fact any responsible counsel would not have advised even filing of any such application.

Besides this, it was not disputed on behalf of the defendant that the terms and conditions of the original lease were reduced in writing (paper No. 10A 1) duly executed on a stamp paper which clearly shows that the lease was for residential purposes. It appears that the defendant at some later stage started carrying on a workshop in the compound which led to the increase of rent by the plaintiff. But by the amendment the defendant did not seek to raise the plea that subsequently a

part of the demised premises were allowed to be used for manufacturing purposes for which a separate rent was paid. The amendment which was sought by the defendant was that from its very inception the lease was for manufacturing purposes. This itself demonstrates how wrongly the defendant was advised to apply for amendment after the suit had already remained pending for months and then at every subsequent stage repeating the same mistake. In that view of the matter the plaintiff's version in the application made under Section 3 of U. P. Act 3 of 1947 hardly can be of any use to the defendant for supporting her bona fides. Had the defendant by the amendment sought to plead that a part of the demised premises was let out for manufacturing purposes some thing could have been said in her favour and the so-called admission of the plaintiff in the application may have been of some benefit, but that is not her case. She attempted before the court to show that it was a genuine plea which ought to have been raised but was by mistake not raised when the written statement originally was drafted that the lease from the very inception was a manufacturing lease. How could that be in face of a written document of lease? Indeed 'her learned counsel before me had to fall back upon a truncated case in justification of the amendment that some part of the demised permises was for manufacturing purposes. But that even would not be conclusive of the matter. Merely because a tenant uses the premises for manufacturing something by fitting machines that fact by itself will not prove that the lease was for manufacturing purposes. What has to be established prima facie is that when the original contract of lease was made between the parties it was with the intent that some manufacturing process would be carried on.

In the instant case the written document of lease paper No. 10-A1 on record demolishes the defendant's case, Further I find it difficult to disagree from the learned Munsif when he rejected the very first application No. 44-C folr bringing in such plea by way of amendment on the ground that it changed the nature of the case. As the pleadings stood up to the stage when application No. 44-C was filed the parties proceeded on the footing that the tenancy was purely for residential purposes and that must be so as there was a written document evidencing the tenancy. It was obviously an after-thought, which occurred, as possibly there was no other defence to the suit available, to introduce a plea for the sake of prolongation of the proceedings by setting up altogether a different defence that

the tenancy was for manufacturing purposes requiring six months' notice of termination.

10. For the reasons given above I reject the first point raised in the appeal.

11. The second point raised in support of the appeal was that all the proceedings are vitiated in law inasmuch, as the learned Munsif was not competent to pass a decree on merits in the absence of the defendant and could only proceed under Rule 2 of Order 17, Civil P. C. and decide the case under the relevant provisions of Order 9 of the Code. It was further submitted that though the learned Munsif professed to proceed with the hearing of the suit on merits, even so the decree passed by him in law would be an ex parte decree against the defendant and the court below in appeal ought to have held so and remanded the case for re-hearing to the trial court. Reliance was placed on a Division Bench decision of this Court in the case of Kesho Singh v. Om Prakash. (1970 All LJ 189). I do not find any substance in this argument.

In the instant case in fact the defendant was not absent. The order sheet of 30-9-1969 records that Sri R.P. Singh, learned counsel for the defendant, was present. What I have mentioned above in regard to the happenings on 30-9-1969 in the court of the Munsif when the suit was called up for hearing shows that the defendant was represented by his counsel who first filed an application for amendment and later on an application for adjournment. There is nothing on the record to show that Sri R.P. Singh at any stage, oral or in writing, stated before the court that he had no instructions beyond making applications for adjournment. In these circumstances, therefore, resort to fiction introduced by the explanation added to the amended Rule 2 of Order 17 by the High Court is not called for. The ratio of the decision in case of 1970 All LJ 189 (supra) therefore, does not help the defendant. The learned Munsif was right in recording that the case was to be heard and decided on merits. In any view of the matter even if the learned Munsif had not recorded that he was proceeding on merits, in law the hearing and the decree of the learned Munsif would not be ex parte so as to attract Rule 9 of Order 9, Civil P. C. The view taken by the lower appellate court that the Munsif was not competent to set aside the decree under Order 9, Rule 13, Civil P. C. is correct.

The decree would be on merits and not ex parte.

I concede that if a case was made out that the decree was ex parte it was open to the lower appellate court and it is even open in the second appeal, to set aside the judgment and decree and remand the case for re-hearing in the interest of justice so as to afford an opportunity to the defendant for presenting her case. But the defendant herself is to blame for the unfortunate stand taken up by her counsel on the final day of hearing on 30-9-1969. I think I will be overreaching the extent of my discretion if I were to accede to the prayer of learned counsel for the defendant appellant that an opportunity be afforded to her to defend her case which for all practical purposes was decided ex parte against her, as I am in agreement with the conclusion of the learned Additional District Judge that the defendant was guilty of adopting deliberate tactics of prolonging the proceedings and warding off the evil day of her eviction. A litigant in the place of the defendant does not deserve any further indulgence at the hands of the Court.

12. The third point raised was that the so-called notice served on the defendant purporting to terminate her tenancy under Section 106 of the Transfer of Property Act was not a valid notice as it terminated the tenancy in praesenti and not on the 30th day of service of the notice on her. Though no such argument was raised in the court below, I allowed it to be raised before me in second appeal as it involved purely a question of law depending on the interpretation and construction of the language of the notice, a copy of which is on record, paper No. 148-C. In order to appreciate the argument advanced I think it proper to quote the relevant portion of the notice which is in English. It is as follows:--

'I served you with notice dated 30th November 1964 and in that continuation again on 20th of April 1965 I hereby serve you with the legal notice under Section 106, Transfer of Property Act, to terminate your tenancy and to require you to vacate the said premises and deliver vacant possession to me after thirty days from the receipt of this notice and to pay up the arrears of rent up to that time.

You are, therefore, informed that your tenancy is hereby terminated and after occupying the premises for thirty days from the date of the receipt of this notice, you must vacate it on 31st day and deliver me vacant possession over it with

arrears of rent up to that time, otherwise suit for your ejection and recovery of arrears of rent at the contractual rate up to that day will be filed'. .

13. The submission was that for all intents and purposes the landlady terminated the tenancy in praesenti. Emphasis was laid on the words, 'that your tenancy is hereby terminated' occurring in the first sentence of the second paragraph in the quotation above. Learned counsel wanted me to interpret the words 'tenancy is hereby terminated' as 'tenancy is terminated today'. According to the learned counsel 'hereby' is indicative of the time and when one says that I hereby do this, it will always mean that I am doing it now and forthwith. In this connection learned counsel drew my attention to the case of Hakim Ziaul Islam v. Mohammad Rafi, (1971 All WR (HC) 121) = (AIR 1971 All 302). I am unable to appreciate the argument so advanced and I do not think the ratio of the decision in the case of 1971 All WR (HC) 121 = (AIR 1971 All 302) can, in any way, assist me in interpreting and construing the notice in the instant case. The decision in the case cited turned on the phraseology of the notice that came up for consideration in that case. There in so many words the landlord had said that 'your tenancy of the aforesaid house is terminated with effect from today'.

Here in the instant case in the notice itself there is no such express language used. However, the learned counsel submitted that use of the word 'hereby' conveyed the same idea as 'now' and 'forthwith'. I do not agree. The word 'hereby' used in business and legal correspondence does not connote the point of time. It always means 'through'. When it is said that the tenancy is hereby terminated, it will mean that the tenancy is terminated through the notice. The word 'hereby' is always used in writing a letter or a document to convey the idea that through the said writing or the document, intimation for doing or not doing a thing is being conveyed to the addressee thereof. In Oxford English Dictionary it is explained that the word 'hereby' is formed by the words 'here', an Adverb plus 'by' a preposition and the meaning given is 'by' or near the place; closeby; and the second meaning is 'by, through, or from this'. The word 'hereby' thus by no stretch of imagination can be said to connote a moment of time or the timing of any event.

Moreover, both paragraphs quoted above from the notice when read together show a clear intention that the relationship of landlord and tenant was to be kept subsisting for a period of thirty days from the receipt thereof by the tenant. Learned counsel for the defendant entirely ignores the effect of second sentence of para one of the quotation above starting from 'I hereby serve you a legal notice under Section 106, Transfer of Property Act' to end of that sentence 'to pay up the arrears of rent up to that time'. It is a clear manifestation of an intention on the part of the landlady that the notice was a notice under Section 106, Transfer of Property Act, and the tenancy was terminated requiring the vacation of the premises by the tenant after thirty days from the receipt thereof. The first sentence of the second paragraph of the quotation, therefore, is nothing but a repetition of the same idea. In the case of Ahmad Ali v. Mohammad Jamal Uddin, (1963 All LJ 567) = (AIR 1963 All 581) a Division Bench held that where a landlord uses an expression 'your tenancy is terminated' and asks the tenant to vacate the premises on the thirtieth day after the receipt thereof, such a notice cannot be interpreted to mean a notice terminating the tenancy with immediate effect and calling upon the tenant to deliver possession after thirty days. There is thus no substance in this point also.

14. Rightly the learned counsel for the defendant appellant did not question the correctness of the finding that the permission under Section 3 of Act 3. of 1947 was valid inasmuch as the Supreme Court in a latest decision has held that the attack on the validity of the permission cannot be collaterally made in a suit for eviction. See Ramji Das v. Trilok Chand, (1970 All WR 615) = (AIR 1971 NSC 155).

15. Now there remains to consider the cross objection preferred by the plaintiff respondent against that part of the decree of the court below by which it reduced the rate at which the mesne profits were to be calculated. It would be recalled that the learned Munsif awarded mesne profits at the rate of Rs. 250/- per month, while the learned Judge in appeal reduced the rate to Rs. 125/- per month which was the rent payable to the plaintiff by the defendant as a tenant. I think on the authority of the decided cases of this Court the learned Judge of the lower appellate court was right in awarding mesne profits at the rate of Rs. 125/- per

month. The learned Munsif was in error in fixing the rate at Rs. 250/- per month as there was no reliable evidence on record adduced by the plaintiff to the effect that the defendant actually received or might with ordinary diligence have received during the period of his wrongful possession Rs. 250/- per month as profits from the premises in suit. The burden was on the plaintiff to show that the defendant had earned a profit or could have earned a profit had she applied diligence to the extent of Rupees 250/- per month. What the plaintiff proved was that had she let it out to another tenant if the premises in suit were vacated by the defendant on the expiry of notice she would have earned an income of Rs. 250/- per month. Such evidence, to my mind, would not be relevant for the purpose of calculating the mesne profits as defined under Sub-section (12) of Section 2 of the Civil P. C. The cross-objection, therefore, has no force. 16. As a result of the discussion above I dismiss the appeal and the cross objection both with costs.

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