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Rajpal Singh Vs. Devendra Kumar

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Court : Allahabad

Decided On : Aug-13-2002

Reported in : 2002(4)AWC2947

Judge : Janardan Sahai, J.

Acts : Provincial Small Cause Courts Act, 1887 - Sections 23; Transfer of Property Act, 1882 - Sections 8, 50 and 109; Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Sections 20

Appeal No. : Civil Revision No. 257 of 2000

Appellant : Rajpal Singh

Respondent : Devendra Kumar

Advocate for Def. : K.M. Garg, Adv.

Advocate for Pet/Ap. : Rajesh Tandon and ;Rama Goel, Advs.

Disposition : Petition dismissed

Judgement :

Janardan Sahai, J.

1. Aggrieved by an order of ejectment and recovery of arrears of rent and house tax and water tax in respect of a shop, the defendant has filed this revision. The

shop originally belonged to Chandra Mohan Sahai Bhatnagar. The plaintiffs case is that by a sale deed dated 19,3.1982, the shop was sold by Chandra Mohan Sahai Bhatnagar to the plaintiff ; that the defendant was a sitting tenant at the rate of Rs. 100 per month in addition to a sum of Rs. 19 which he was liable to pay as house tax and water tax ; that the defendant did not pay the rent to the plaintiff despite having knowledge of the sale in favour of the plaintiff as the defendant had purchased other property from the plaintiff ; that notice dated 20.5.1990 was served upon defendant on 21.5.1990 to which a wrong reply was given in reply notice sent by defendant through his counsel denying the title of the plaintiff and defendant failed to pay the rent whereupon the plaintiff gave a reply dated 28.5.1990. The plaintiff claimed that rent for the period 20.2.1982 to 10.8.1990 and water and house tax was due but relief was sought only in respect of preceding three years. The suit was filed on 11.9.1990.

2. The defendant contested the suit on the ground that he was a tenant of Chandra Mohan Sahai Bhatnagar at Rs. 100 per month and was bona fide paying the rent to him ; that the defendant was not liable to pay house tax and water tax ; that no sale deed dated 19.3.1982 was executed by Chandra Mohan Sahai Bhatnagar in favour of the plaintiff ; that the alleged sale deed is forged and void document ; that Gyanendra Swarup Bhatnagar, who purported to execute the sale deed as Attorney of Chandra Mohan Bhatnagar, had no right to do so as no such Power-of-Attorney was executed by Chandra Mohan Sahai Bhatnagar and the document is forged ; that the defendant never admitted himself to be the tenant of the plaintiff ; that the defendant came to know about the forged sale deed on receiving plaintiffs notice dated 14.5.1990 ; that defendant had not got executed any sale deed from the plaintiff ; that complicated question of title was involved and the small cause court had no jurisdiction.

3. The trial court framed four points for determination (1) whether the Judge Small Cause Court had jurisdiction to decide the suit or whether it was liable to return the plaint under Section 23 of the Provincial Small Cause Court Act ; (2) whether there was any relationship of landlord and tenant between the parties ; (3) whether the defendant defaulted in the payment of rent ; and (4) whether the notice dated 14.5.1990 was invalid.

4. On the question whether the plaint was liable to be returned under Section 23 of the Provincial Small Cause Courts Act, the plaintiff examined P.W. 3 Devendra Kumar who stated that the sale deed dated 19.3.1982, was executed for Rs. 50,000 by Chandra Mohan Sahai Bhatnagar who had given special power of attorney to Gyanendra Swarup Bhatnagar. This witness also stated that the original sale deed was lost. Certified copy of the sale deed was obtained from office of Sub-Registrar and was filed in the suit. The original power-of-attorney was also filed ; P.W. 4 Desh Bandhu, deed writer was examined to prove the power-of-attorney. He stated that the power-of-attorney was written by him and was signed by Chandra Mohan Sahai Bhatnagar in his presence and the document was attested by Notary Roshan Lal. The plaintiff also relied upon the fact that defendant had obtained a sale deed dated 6.10.1989, treating the plaintiff as the owner of the property in favour of the defendant's wife Rameshwari Devi. To prove this fact P.W. 1 Mahavir Singh was examined by the plaintiff. On the other hand the defendant stated that he came to know about the alleged sale deed in favour of his wife only at the time of deposition in Court. The trial court disbelieved the statement of defendant and held that the statement of Mahavir Singh P.W. 1 was recorded in the presence of defendant on 14.8.1993 and Mahavir Singh had proved the sale deed in favour of Rameshwari Devi, defendant's wife and as such there was no question of defendant coming to know about this sale deed only on 5.1.2000, when his statement was recorded. Reliance was placed upon the fact that the sale deed was obtained by the defendant in favour of his wife from the plaintiff on 6.10.1989, treating the plaintiff as the owner of the property. The trial court also considered the fact that the name of the plaintiff was entered in the municipal records and the assessment certificate for the year 1991 (Paper No. 37-Ga) was filed by the plaintiff in proof of the fact that his name was recorded. An affidavit of Chandra Mohan Sahai Bhatnagar was also filed before the Municipal Board for mutation of the plaintiffs name. The trial court held that plaintiff is the owner of the disputed shop and no complicated question of title was involved and the Small Cause Court has jurisdiction to entertain the suit. The finding of the trial court about the title of the plaintiff is based on evidence referred to above.

5. In Rakesh Kumar v. VIth Additional District Judge, Bulandshahr and Ors. : 1998(3)AWC2353 , it was held that mere plea by defendant that the sale deed

executed by the original owner is illegal or does not confer right is not sufficient to return the plaint. The plaint can be returned under that provision only if a finding cannot be recorded except on the basis of title. Even if a question of title is incidentally involved, it can be adjudicated upon by the Small Cause Court. It is only if an intricate question of title is involved that the plaint is liable to be returned. In the present case, the facts would show that no such intricate question of title was involved. The sale deed was proved by P.W. 3. The name of plaintiff was also recorded in the Municipal Assessment register. Affidavit of erstwhile landlord Chandra Mohan Sahai Bhatnagar was filed before the Municipal Board that the properties have been transferred in the plaintiffs favour. Chandra Mohan Sahai Bhatnagar never challenged the sale deed even though the suit was filed about 7 years after the property was purchased by the plaintiff. The defendant himself had obtained a sale deed in favour of his wife from the plaintiff in respect of a portion of the land. On this material which is sufficient, the finding that no intricate question of title was involved and the plaintiff was the owner of the property in suit cannot be set aside. The submission of the learned counsel for applicant that the plaint was liable to be returned under Section 23 of the Provincial Small Cause Courts Act cannot be accepted.

6. It was then contended by the counsel for the applicant that the original sale deed was not filed and that only the photocopy of the sale deed was filed. The plaintiff has explained the loss of sale deed and the trial court relied upon the same. The certified copy of the sale deed was filed. So this point too has no weight. It was then contended by Shri Rajesh Tandon, learned counsel for the applicant that original power-of-attorney executed by Chandra Mohan Sahai Bhatnagar was not filed. The record of the trial court shows that original power-of-attorney was filed in the trial court with the affidavit of Chandra Mohan Sahai Bhatnagar and this objection has no foundation.

7. It was then contended that the defendant never attorned to the plaintiff but continued to be the tenant of the erstwhile landlord and there was no relationship of landlord and tenant between the plaintiff and the defendant and the suit was not maintainable. Reliance is placed upon Bishan Singh and Ors. v. IIIrd Additional District Judge, Kanpur Nagar and Ors., 1993 (2) ARC 187, in the context of

Section 109 of the Transfer of Property Act. Paragraph 18 of this judgment is extracted as follows :

'The conclusion in all the judgments appears to be that the section creates a statutory attornment by operation of law so far as the rights of the lessors are concerned in the same way which he could have on the basis of the contractual attornment but still it is difficult to say that there could be the privity of contract in absence of the option left by law to the lessee to elect the transferee as his lessor. In the absence of privity of contract, the relationship of landlord and tenant could not come in existence. The order of the revisional court suffers from manifest errors of law.'

8. Before considering the cases cited by the counsel for the parties upon the question whether attornment by the lessee is necessary, it would be useful to refer to the relevant provision of the Transfer of Property Act. Section 8 of the Transfer of Property Act reads as follows :

'8. Operation of transfer.--Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ;

and,

where the property is machinery attached to the earth the movable parts thereof ;

and,

where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys bars, doors, windows and all other things provided for permanent use therewith ;

and,

where the property is a debt or other actionable claim, the securities therefor (except where there are also for other debts or claims not transferred to the transferee) but not arrears of interest accrued before the transfer ;

and,

where the property is money or other property yielding Income, the interest or income thereof accruing after the transfer takes effect.'

It would thus be seen that right to receive rent of a house or of land accruing after the transfer is a covenant running with the land and would pass to the lessor's transferee. There may not be any privity of contract between the lessor's transferee and the sitting lessee but there is a privity of estate, which is sufficient to create a relationship of landlord and tenant. The following passage from Chapter IV of Foa's General Law of Landlord and Tenant in Raj Narain Jain v. Firari Sukhanand Ram Narain, 1979 AWC 637 (DB), states the law :

'The relation of landlord and tenant may be created by assignment where the lessee assigns his term or where the lessor assigns his reversion. The former assignment creates the relation of landlord and tenant between the lessee and the assignee ; the latter creates it between the assignee and the lessee while the concurrence of both creates it between the two assignees.'

9. Section 109 of the Transfer of Property Act. which directly relates to the subject - the rights of the transferee landlord, reads as follows :

'109. Rights of lessor's transferee.--If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon hirn by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has

been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and. in case they disagree, such determination may be made by any court having jurisdiction to entertain a suit for the possession of the property leased.'

10. This section makes a distinction between the effect of the transfer upon and rights of the lessor on the one hand and that on his liabilities on the other hand. In regard to the transfer of the lessor's right, it is provided that transferee in the absence of a contract to the contrary shall possess all lessee's rights. In respect of liabilities of lessor, it is provided that these shall be transferred to his transferee if the lessee so elects.

11. It is to be noted that the words 'lessor' and 'lessee1 have been used in this provision as also the word 'owner'. The transfer of lessor's right would include right to rent from the lessee and all other rights that are stipulated in Section 108 of the Transfer of Property Act. However, the transferee will not be subject to the liabilities of the lessor unless the lessee so elects.

12. The first proviso of Section 109 of the Transfer of Property Act stipulates that the transferee is not entitled to arrears of rent due before the transfer and that if the lessee without knowledge of the transfer pays rent to the original lessor, the lessee shall not be liable to pay such rent over again to the transferee. It is apparent from the proviso that once the lessee has acquired knowledge of the transfer, he cannot disown his liability to pay the rent thereafter to the transferee on the ground that he has paid the rent to the original lessor. This proviso is confined to a situation where the lessee does not have reason to believe that the transfer has been made. The proviso is in harmony with Section 50 of the Transfer of Property Act. That provision reads as follows :

'50. Rent bona fide paid to the holder under defective title.--No person shall be chargeable with any rents or profits of any immovable property which he has in

good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment of delivery' was made had no right to receive such rents or profits.'

13. It is thus clear that the principal condition for saving the liability of the lessee to pay the rent to the transferee is the existence of good faith in payment of rent to the person of whom he, in good faith, held such property. The illustration to the said section demonstrates that even on a transfer by the lessor, the lessee may in good faith, having no notice of the transfer, make payment to the previous landlord. In such cases, the lessee is not chargeable with the rent so paid. The effect of Section 50 and Section 109 of the Transfer of Property Act is that if the lessee has notice of the transfer, he is liable to pay rent to the transferee landlord but if he has no such notice, he may pay the rent to the original lessor. If the view is taken that inspite of the transfer of the lessor's right and notice thereof to the lessee, the liability to pay the rent is at the option of the lessee and he may either pay it to the transferee or to the original lessor. The provision in Section 109 that the transferee shall possess all the rights of the lessor would become redundant especially in view of the fact that the right to rent accruing after the transfer is a covenant which runs with the land by virtue of Section 8 and the transferee would, therefore, be entitled to payment of such rent. It is implicit in the right to receive 'rent' that relationship of landlord and tenant exists. The condition in the proviso of Section 109 that 'not having reason to believe that such transfer has been made' would also be redundant as it would be open to the lessee not to attorn to the transferee landlord and to continue paying the rent to the original lessor. Section 109 of the Transfer of Property Act creates a statutory attornment and the relationship of landlord and tenant comes into an existence on the strength of such statutory attornment. Reference may usefully be made to the definition of landlord and tenant in U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U. P. Act No. 13 of 1972) wherein 'landlord', in relation to a building, means a person to whom its rent is or if the building were let, would be, payable and includes, except in Clause (g), the agent or attorney, of such person. 'Tenant', in relation to a building, means a person by whom its rent is payable. Thus, in respect of buildings covered by the U. P. Act No. 13 of 1972, the landlord is a person to whom the rent is payable. Now if a lessor has a right to receive rent, the

said right would, on a transfer by a lessor, pass on to the transferee by operation of Section 109 and Section 8 of the Transfer of Property Act which provide that on transfer by the lessor the transferee shall possess all the rights of the lessor.

14. If the view is taken that it is it only on the election by the lessee that relationship of landlord and tenant would be created, it would give rise to various difficulties which the Legislature could not have intended to create. A question would then arise about the nature of relationship between the transferee of the lessor's (landlord's) right with the original tenant. If he is not to be treated as the transferee's tenant, the transferee would not be able to terminate his tenancy or evict him and as such, this power would continue to vest with the original lessor who already has sold the property - a result which could not have been intended.

15. We may now refer to some of the decided cases on the point.

16. In Mohar Singh v. Devi Charan and Ors. : AIR 1988 SC1365 . the Apex Court interpreting the provision of Section 109 of the Transfer of Property Act held that :

'5. It is trite proposition that a landlord cannot split the unity and integrity of the tenancy and recover possession of a part of the demised premises from the tenant. But Section 109, T. P. Act, provides a statutory exception to this rule and enables an assignee of a part of the reversion to exercise all the rights of the landlord in respect of the portion respecting which the reversion is so assigned subject, of course, to the other convenant running with the land. This is the true effect of the words 'shall possess all the rights ... of the lessor as to the property or part transferred ....' occurring in Section 109, T.P. Act. There is no need for a consensual attornment. The attornment is brought about by operation of law.'

17. In Smt. Kalawati Tripathi and Ors. v. Smt. Damayanti Devi and Anr. : AIR1993 Pat1 , the Patna High Court considered some of the previous decisions interpreting Section 109 of the Transfer of Property Act. The following lines in Paragraph 19 of the judgment of the Patna High Court are quoted below :

'19. From the perusal of the aforesaid section it is clear that after the transfer of lessor's right in favour of the transferee he gets all the rights and liabilities of the

lessor in respect of the subsisting tenancy. This section does not insist that the transfer will take effect only when the tenant attorns. The provisions of this section give a validity to the transfer made by the lessor with regard to his right in favour of the transferee regarding the subsisting tenancy. The question as to whether the attornment is necessary or not to create a relationship of landlord and tenant between the transferee landlord and tenant came for consideration before the Lahore High Court in the case of Daulat Ram v. Haveli Sah, AIR 1939 Lah 49 ; wherein it was held as follows :

'A fresh attornment by the lessee to the landlord's assignee is not necessary under the Transfer of Property Act.' A Bench of Calcutta High Court had occasion to consider the said question in the case of Pulpin Behari Shaw v. Lila Dey ILR (1958) 2 Cal 427 ; wherein it was held that under the Indian Law, a letter of attornment is not necessary to complete the title of the assignee of the reversion. Again the said question was considered by a Bench of Calcutta High Court in the case of M. C. De and Brothers v. Smt. Gita Sen, 1969 (73) CWN 856, wherein it was held as follows : 'The point is : the lessor transferring a tenanted house, the tenant does not become the tenant of the transferee, so long as he does not attorn to the transferee as his new landlord by paying rent to such a one amicably, or so long as he is not forced to pay rent to such a one by a decree of the Court. It completely beats us hew a proposition as this can be contended for, in all seriousness. We find no warrant for such an extravagant proposition which throws the transferee landlord at the mercy of a sitting tenant.....'

18. The Rajasthan High Court in Babulal and Ors. v. Kanhaiyalal , held that :

'Moreover it is not necessary for the plaintiff to prove that rent had actually been paid to him, or his predecessor-in-title or that there had been attornment in his favour or for the matter of that in favour of his predecessor-in-title, in case he is able to establish that he is the transferee of the lessor. In this connection, reference may be made to Seqtion 109 of the Transfer of Property Act which provides that if the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all

the liabilities of the lessor as to the property or part transferred so long as he is the owner of it, with certain provisos which obviously have no application to the present case....'

19. A Division Bench of Madhya Pradesh High Court in B. P. Pathak v. Dr. Riyazuddin : AIR 1976 MP55 , considered the point in paragraphs 19 and 28 and also took the same view as the Patna and Rajasthan High Courts.

20. The decision in Bishan Singh and others (supra) was rendered on different facts. In that case the premises leased out to the tenant were transferred by different sale deeds in portions and on those facts the application of the third part of Section 109 of the Transfer of Property Act by which the lessor, the transferee and the lessee are required to determine the proportion of the premium or rent reserved by the lease payable in respect of the part so transferred was involved unlike in the present case. In the context of facts of that case where the question of proportion of rent payable by the lessee in respect of the portions purchased by different transferees, was involved contractual attornment was necessary.

21. Learned counsel for the applicant also relied upon Nanhey Mian v. Sheikh Mohd. Yusuf and Ors., 1965 ALJ 321, in which it was held that on the landlord transferring property without informing the tenant and the transferee demanding rent, the tenant is entitled to demand clear proof of title from transferee before he can be asked not to pay the rent to the old landlord.

22. 'It appears that the true position in law is that in respect of covenants which run with the land which includes rent accruing after the transfer, the transferee gets all the lessor's rights by virtue of Sections 8 and 109 of the Transfer of Property Act and the relationship of landlord and tenant is created between the transferee' and the sitting lessee by statutory attornment and no contractual attornment is necessary. If the original lessor and the transferee give notice of the transfer to the lessee, he has to make payment of rent to the transferee. If, however, no notice is given of the transfer by the original lessor but the lessee acquires knowledge of the transfer either by a notice of the transferee or otherwise, he is bound to make payment of rent to the transferee. He can, however, demand proof of the transfer from the transferee. The election by the lessee contemplated by Section 109

creates a contractual attornment. Once a contractual attornment is made, the effect is that while on the one hand, the lessee is estopped from even challenging the derivative title of the transferee, he, on the other, can enforce the liabilities of the original lessee against the transferee. The object of the law appears to be that it is only after accepting the transferee as a landlord that a lessee can be allowed to enforce the liabilities of the original lessor against him. A lessee cannot be allowed to approbate and reprobate, on the one hand, not to elect the transferee as his landlord and on the other, to enforce the liabilities of the lessor. The lessor is also put to a similar condition. By virtue of the transfer alone, he does not cease to be subject to the liabilities. If he does not inform the lessee about the transfer, the lessee may either not know or be in doubt about the transfer and about the person to whom the rent is to be paid. Mere transfer does not absolve the lessee of his liability under the lease. The tenant must not be left in doubt about the transfer and put to risk in identifying the person to whom he must pay the rent. If, however, the lessor informs the lessee of the transfer, he is estopped from questioning the lessee attorning to the transferee and paying rent to him.

23. In this case sale deed in favour of the wife of the lessee was executed by the transferee on 6.10.1989 in respect of the part of the property, which was purchased by the plaintiff. The sale deed is on the record. It is thus clear that the plaintiff was treated as a transferee of the original lessor and the defendant had knowledge of the transfer.

24. Learned counsel for respondent relied upon Ila Mitra (Smt.) v. Justice Amitabh Banerji, Retired Chief Justice, Sole Arbitrator and Ors. : 2000(3)AWC2538 of the judgment is quoted below :

'11. Whether the petitioner had knowledge or not, need not be gone into at this stage in view of the fact that the notices were issued to all the shareholders. Therefore, it can be presumed that her husband was a party to the proceeding may be one of the factor that may be counted for the presumption that the petitioner had knowledge about the proceeding. This presumption cannot be avoided unless it is proved that the petitioner is living separately from her husband or that there is no link between the husband and the wife.'

25. The trial court has recorded a finding of fact that with the said transfer on 6.10.1989 in favour of his wife, the defendant had acquired knowledge of the transfer made in favour of plaintiff at least from 6.10.1989 when the sale deed was executed and any payment made to the erstwhile landlord Chandra Mohan Sahai Bhatnagar after 6.10.1989 would not be valid. The inference drawn by the trial court is reasonable. It was submitted that the rent was paid to the earlier landlord upto 31.3.1990 and it was only after notice dated 14.5.1990 that the defendant acquired knowledge of alleged sale in favour of plaintiff and as such, in any case, the liability to pay the rent to the plaintiff arose only after the notice. It has already been held that the applicant had knowledge of the transfer in favour of plaintiff at least on 6.10.1989, the date the sale deed was executed by the plaintiff in favour of wife of the defendant and as such, any payment thereafter to the erstwhile landlord was not bona fide or valid. It is not disputed that no rent either to the original landlord or to the plaintiff was paid for the period after 31.3.1990. The suit was filed on 11.10.1990 and in any case, more than four months rent had become due by that date. The applicant was thus a defaulter within the meaning of Section 20 of the U. P. Act No. 13 of 1972. The defendant cannot, therefore, save his eviction. The trial court has decreed the suit for recovery of rent from 6.10.1989, the date of the sale deed in favour of the defendant's wife treating that date as the one on which the defendant acquired knowledge of the plaintiffs title by purchase from the previous landlord. There was no justification then to claim that he continued to pay the rent to the previous landlord and there is no reason to differ from the finding recorded by the trial court upon this point. The defendant thus was a defaulter since 6.10.1989.

26. As regards the rate of rent, the case of the plaintiff is that it was Rs. 100 per month in addition to house and water tax amounting to Rs. 19 and thus a sum of Rs. 119 was payable as rent. In Para 1 of the plaint, it is stated that the rate of rent was Rs. 100 per month and taxes amounting to Rs. 19 per month. In the written statement, it was admitted that the rate of rent was Rs. 100 per month. As regards the taxes, it was found by the trial court that these were payable by the defendant. It is submitted by the defendant that previous landlord Chandra Mohan Sahai Bhatnagar was not examined to prove the rate of rent. In my opinion, it was not necessary to examine the previous landlord. The finding on question of rate of rent

is a finding of fact and there is no reason to disagree with the finding recorded by the trial court.

27. The trial court has held that the notice terminating the tenancy was a valid one. The service of the notice was found to be proved. The plaintiff was the landlord when the notice was given. The finding recorded by the trial court that the notice was a valid one, is affirmed.

28. As a result of the foregoing discussion, the trial court's order calls for no interference. The revision lacks merit and is dismissed.

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