

Suresh Chandra and anr. Vs. Special Judge (E.C. Act)/Additional District Judge and ors.

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Court : Allahabad

Decided On : Jul-29-2008

Reported in : 2008(4)AWC4203

Judge : S.U. Khan, J.

Appellant : Suresh Chandra and anr.

Respondent : Special Judge (E.C. Act)/Additional District Judge and ors.

Disposition : Petition dismissed

Judgement :

S.U. Khan, J.

1. Heard learned Counsel for the petitioners.

2. This is tenants' writ petition. Landlords-respondent Nos. 3 and 4, Sanaullah and Nasrullah filed suit for eviction against their tenant Hards Lohia, who died during pendency of the suit and was substituted by petitioners and proforma respondent Nos. 5 to 7. In the suit, relief for eviction and recovery of arrears of rent was sought. Initially suit was filed on the regular side in the year 1970, however in the year 1972 Jurisdiction for trial of suits for eviction by landlord against tenant was

conferred upon J.S.C.C., hence suit was tried by J.S.C.C./Munsif Kounch, district Jalaun, where it was registered as S.C.C. Suit No. 49 of 1973, Sanaullah and Anr. v. Hardas Lohia.

3. It was stated in the plaint that rent with effect from 1st January, 1970 had not been paid. Landlord sent notice on 1.9.1970 terminating tenancy and demanding the rent. It was stated that initially tenant was in occupation of bigger portion as tenant however, in the year 1969 fresh agreement was entered into and part of the tenanted accommodation was handed over by the tenant to the landlord and landlord constructed a partition wall, however, later on tenant forcibly removed the said wall and again took possession of the portion, which had been handed over by him to the landlord. Possession over both the portions was sought.

4. It was further stated that initially rate of rent was Rs. 55 per month, however when tenant surrendered a portion of the tenanted occupation, the rent was reduced to Rs. 45 per month. As far as agreement of 1969 is concerned, the original tenant asserted that he had signed blank papers for fresh tenancy, which was to be of the entire old tenanted accommodation already in his possession and there was no such agreement, that he would surrender a part of the occupation, that he never surrendered any part of the accommodation and the entire accommodation was continuing in his tenancy occupation since before 1969 and rent always remained Rs. 55 per month.

5. Tenant further pleaded that he sent rent through money order but plaintiff refused to accept the money order. After the death of original tenant Hardas Lohia, his legal representatives were impleaded in the suit including the petitioners and they also filed written statement almost on the same lines on which original tenant had filed. Petitioners also took the plea that since 1970 till 1980, entire rent had been paid to the landlord without any receipt (at that time suit was pending).

6. The trial court did not accept the version of the tenant and decreed the suit for eviction through judgment and decree dated 14.12.1982. Against the said judgment and decree, petitioners filed S.C.C. Revision No. 1 of 1983. Special Judge, E.C. Act/A.D.J., Jalaun at Orai dismissed the revision on 13.1.1988, hence this writ petition.

Default in payment of rent.:

7. In order to prove that rent had been sent through money order, money order coupon was filed by the tenant. The said question has been decided by the trial court under issue No. 3.

8. Suresh Chandra defendant-petitioner No. 1 appeared as witness and stated that after receiving notice, his father sent Rs. 660 as rent to the landlord but the landlord refused to accept the same. Money-order coupon was filed and was numbered as Paper No. 154-Ka. Courts below held that on the said money order coupon, there 'is no seal of Kounch Post Office and there is a seal of Orai Post Office but it does not contain any date. Money-order receipt was not filed. D.W. 1 Suresh Chandra stated that receipt was not available. Postman was not examined to prove the writing on the money order coupon. Due to these reasons, courts below refused to accept the case of the tenants that after receiving notice Hardas original tenant had sent the rent through money order.

9. Learned Counsel for the petitioner has cited a judgment delivered by me on 27.3.1996 given in Writ Petition No. 16143 of 1991. Smt. Zohra and Ors. v. IV A.D.J., Jhansi and Ors. In the said authority, I placed reliance upon S.N. Chaudkary v. Naug & Co. 1981 ARC 680, (the said authority has been considered by the trial court also). Part of para 4 of S.N. Chaudhary's authority quoted by me in the aforesaid authority is quoted below:

4. The other argument on inadmissibility was regarding the money order coupon paper No. 50...it is true that it does not contain the reseal of post-office. The postman also denied it to be the coupon which was taken by him for delivery to the appellants' father. It may be suspicious and may be ignored. This is exactly what the appellate court did. It did not place any reliance on it. Even if it may be assumed for a moment that the letter sent by Superintendent of Post Offices could not be utilized the finding of the appellate court that the money order was sent within time based on the money order receipt and the evidence of defendant-respondent, cannot be said to be vitiated by any error or law. It is true the receipt by itself does not prove that the amount sent was the arrears of rent but the receipt alongwith statement do not leave any room for doubt that the amount sent was

towards arrears of rent.

10. In the aforesaid authority, reliance was placed upon money order receipt. In the instant case, receipt was not filed. Receipt is evidence of sending and without it no presumption of delivery can be raised.

11. Moreover, petitioner has filed supplementary-affidavit annexing therewith, copies of oral statements given in the suit. In his oral statement, D.W. 1/petitioner No. 1 stated that 'my father after receiving the notice sent Rs. 660 as rent of 1970 to Meer Khan, however Meer Khan refused to accept the same.'

Such type of evidence is not admissible. Under Section 32 of the Evidence Act, anything said by a dead person is admissible. However, petitioner No. 1 did not state in his statement that his deceased father original tenant told him that rent was sent through money order, which was refused by the landlord.

12. Suit was filed on 12.10.1970. Rs. 660 would be the rent of the whole year @ Rs. 55 per month. Default was alleged w.e.f. 1.1.1970. Until filing of the suit, only nine months¹ rent was due, hence there appears to be no reason for sending the rent of three months' advance. It was not stated that advance rent for three months was sent.

13. Accordingly, in my opinion, both the courts below rightly held that sending of Rs. 660 by money order and its refusal by the landlord was not proved. The aforesaid authorities are distinguishable.

14. Learned Counsel for the petitioner has cited another authority in *Badri Prasad v. D.J., Gonda* 1983 ALJ 41. In the said authority, it has been held that endorsement of the postman on money order coupon that he repeatedly went to the place of the landlord but he could not contact the landlord amounted to payment. In the said case, the said endorsement was not challenged by the landlord. In view of this, it was held that tenant had not neglected to pay the rent.

15. Learned Counsel for the petitioner has argued that before the trial court, a certificate issued by post-master was filed, which was not considered by the courts below. Alongwith supplementary-affidavit dated 9.12.2007, as Annexure-2, copy of

an application has been filed. The said application was filed before the trial court stating therein that post-master had given a certificate, which was being annexed alongwith the said application. However, alongwith Annexure-2 to the supplementary-affidavit filed in this Court, no copy of any certificate has been annexed.

16. Moreover, there is no discussion on the said point in the Judgments of the courts below. It appears that either that certificate was not filed or if filed, was not adverted to during the arguments. In the application dated 22.11.1982, neither the date of the certificate nor nature of the contents of the said certificate was mentioned. Accordingly, the said question cannot be considered.

17. Accordingly, I do not find any legal error in the findings of the courts below to the effect that sending of rent, through money order was not proved.

Other points:

18. Courts below further held that eviction could be granted only in respect of that portion, which was in tenancy occupation of the tenant and not in respect of the portion over which tenant had encroached. In , respect of encroachment, version of learned Counsel was accepted by the courts below.

19. The version of the tenant that rent from 1970 to 1980 was paid during pendency of the suit was thoroughly disbelieved by the courts below. I fully agree with the said finding. The courts below rightly held that as suit was pending, hence if any amount had been paid, it would have been recorded through compromise. Petitioner No. 1 had already appeared in the suit in 1979 after the death of his father and had also filed vakalatnama. The evidence given by the defendants in respect of payment of ten years rent during pendency of suit without any receipt or writing was thoroughly discussed and disbelieved by the courts below.

20. In view of the above, I do not find any error in the findings recorded by the courts below. Writ petition is therefore dismissed.

21. Tenants-petitioners are 'granted six months time to vacate provided that:

1. Within one month from today tenants file an undertaking before the J.S.C.C. to the effect that on or before the expiry of aforesaid period of six months they will willingly vacate and handover possession of the property in dispute to the landlord-respondent.

2. For this period of six months, which has been granted to the tenants-petitioners to vacate, they are required to pay Rs. 3,000 (at the rate of Rs. 500 per month), as rent/damages for use and occupation. This amount shall also be deposited within one month before the J.S.C.C. and shall immediately be paid to the landlord-respondent.

3. Within one month from today tenants shall deposit entire decretal amount due till date after adjusting any amount already deposited, before J.S.C.C. for immediate payment to landlord-respondent.

22. In case of default in compliance of any of these conditions tenants-petitioners shall be evicted through process of Court after one month. It is further directed that in case undertaking is not filed or decretal amount and Rs. 3,000 are not deposited within one month then tenants-petitioners shall be liable to pay damages at the rate of Rs. 1,200 per month since after one month till the date of actual vacation.

23. Similarly if after complying with the above conditions shop in dispute is not vacated on the expiry of six months then since after six months till actual vacation tenants petitioners shall be liable to pay rent/damages for use and occupation Rs. 1,200 per month. It is needless to add that this direction is in addition to the right of the landlord to file contempt petition for violation of undertaking and execution application.