

Sarabjit Singh Vs. Mohan Singh

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Court : Delhi

Decided On : Dec-10-1976

Reported in : 1977RLR79

Judge : B.C. Misra, J.

Acts : Transfer of Property Act - Sections 113

Appeal No. : Second Appeal No. 133 of 1976

Appellant : Sarabjit Singh

Respondent : Mohan Singh

Advocate for Pet/Ap. : A.K. Sen,; S.K. Tiwari,; M.N. Pombra,;

Judgement :

B.C. Misra, J.

(1) This second appeal has been filed under Section 39 of the Delhi Rent Control Act, 59 of 1958 (hereinafter referred to was the Act), by the tenant against the appellate order of the Rent Control Tribunal, dated 7th October, 1976, by which he dismissed the appeal and affirmed the order of the Additional Controller dated 12th May, 1975, dismissing the objections of the appellant against the execution of the order for eviction.

(2) The material facts of the case lie in a narrow compass. The respondent is the landlord and owner of the property No. C-382, defense Colony, New Delhi, which had been let out to the appellant on a rent of Rs. 650.00 per month. On 3rd January, 1968 the respondent filed a petition for eviction of the appellant on the ground of bona fide personal necessity mentioned in clause (e) of the proviso to sub-section (1) of section 14 of the Act. The petition was allowed and the order for eviction of the appellant from the premises in dispute was passed. Against this order, the appellant filed a first appeal before the Tribunal, which came up for hearing before Mr. G.C. Jain. On 25th April, 1970 the parties compromised the matter and the appellant before me withdrew the appeal, while the respondent allowed him three years time to vacate. The Tribunal, therefore, ordered the appeal to be dismissed as withdrawn and the appellant to vacate the premises after the expiry of three years, leaving the parties to bear their own costs. The three years mentioned in the order expired on 25th April, 1973. As a result of that order, the tenancy rights of the appellant stood legally determined and his eviction had been ordered though he had been allowed to continue in possession under cover of the order for three years.

(3) It appears that the compromise before the Tribunal did not make any provision for payment of the rent and a large amount of arrears of rent became due from the petitioner for the period commencing from 28th March, 1969. The respondent landlord gave an unfortunate notice dated 14th September, 1971 (Ex. Jdw 3/1). In this notice, the respondent through his counsel not only demanded arrears of rent, but also purported to terminate the tenancy of the appellant with effect from the expiry of the tenancy month in October, 1971. Not getting a response, the respondent instituted a fresh petition for eviction on 22nd December, 1971. This petition was first allowed *ex parte* and then the *ex parte* order was set aside and the petition was contested by the appellant. Eventually, on 28th February, 1975 the Additional Controller dismissed the petition on the ground that no relationship of landlord and tenant subsisted between the parties and the petition was, therefore, not maintainable. It appears that on 27th March, 1972 the respondent also instituted a suit for recovery of arrears of rent which suit is probably still pending.

(4) In the meantime, the period to vacate the premises allowed by the Tribunal had expired and the respondent on 16th May, 1973 applied for execution of the order for eviction. The main objection was that a fresh contract of tenancy had been arrived at between the parties and also by the issue of a fresh notice (Ex. Jdm 3/1) and institution of a fresh petition for eviction, the respondent had waived the right to dispossess the petitioner under the order for eviction, and so the previous order for eviction had become inexecutable. This objection has been dismissed by the Additional Controller by order dated 12th May, 1975 and the appeal against the name has been dismissed by the order impugned in this appeal. The Tribunal on appeal has held that the issue of the fresh notice and filing of the petition did not amount to waiver of the right to obtain eviction. The Tribunal also disbelieved the oral evidence produced on behalf of the appellant and has held that a fresh contract of tenancy had been arrived at between the parties Hence this record appeal. 4a. Mr. A.K. Sen, Senior Advocate, appearing to support the appeal, has contended that the previous notice of eviction as well as the benefit obtained under the order for eviction had been waived and a new contract of tenancy by consent of the parties has resulted from the fresh notice (Ex. Jdw 3/1) and the fresh petition for eviction dated 22nd December, 1971 as well as from the suit instituted by the landlord. Consequently, the order for eviction had become inexecutable and the respondent could not obtain dispossession of appellant without the institution of a fresh petition for eviction.

(5) The word 'tenant' is defined in clause (l) of section 2 of the Act as meaning any person by whom or on whose account of behalf the rent of any premises is or but for a special contract, would be payable and includes (i) a sub tenant; (ii) any person continuing in possession after the termination of the tenancy..... but does not include any person against whom an order or decree for eviction has been made... Section 14(1) of the Act grants protection to the tenants by the provision that not with standing anything to the contrary contained in any other law or contract, an order or decree for the recovery of possession of any premises shall be made by any court or Controller in favor of the landlord against a tenant..... except on the existence of the specified grounds. Section 43 of the Act provides that the order passed by the Controller or an order passed on appeal shall be final and shall not be called in question in any original suit, application or execution

proceedings, and section 42 provides that an order made by the Controller or an order passed on appeal shall be executable by the Controller as a decree of a civil court and for this purpose the Controller shall have all the powers of a civil court. The order passed by Mr. G.C. Jain, Rent Control Tribunal, on 25th April, 1970, reads as follows :

'THIS appeal is directed against the order dt. 7.5.69 passed by Shri S.R. Goel, Additional Rent Controller, Delhi directing the eviction of the appellant from the premises in dispute. 2. The parties have compromised. The appellant has withdrawn the appeal. The respondent has allowed him three years time to vacate the premises, i: 2. As a result, I dismiss the appeal as withdrawn. The appellant would however vacate the premises after the expiry of three years from today. The parties are left to bear their own costs.'

5a. From the aforesaid order, it is clear that an order for eviction had been duly passed against the appellant under the rent Act. The appellant has ceased to enjoy the protection afforded by the Act. The only change made by the appellate order was that instead of the time of six months allowed by sub-section (7) of section 14 of the Act in the case of eviction on the ground of bona fide personal necessity, the Tribunal has substituted the period of three years. The right and protection of the appellant as a tenant was therefore, completely extinguished by the aforesaid order and he ceased to be a tenant within the meaning of the expression defined in the Act. The appellant, however, continued to be subject to the obligation of a tenant and it was his duty to pay the rent, and perform other obligations and deliver possession of the premises to the landlord in accordance with the order. Reference may be made to Kedar Nath v. Smt. Mohani Devi Etc. 2nd (1974) 1 Del 151, where a Bench of five Judge of this court held that although on death of the statutory tenant his rights to remain in possession might be extinguished, his obligations to deliver its possession to the landlord still survived and could be enforced against the legal representatives.

(6) Mr. A.K. Sen has placed strong reliance on the notice (Ex. JDW3/1), dated 14th September, 1971. The material portion of the notice states that the appellant tenant is in occupation of the premises..... as tenant under the respondent the

tenancy being from 28th of a month and ending on 27th of the following month at a monthly rent of Rs. 650.00 and the premises had been let out for residence. Paragraph 2 of the notice states that the respondent filed an eviction petition on 3rd January, 1961 and the matter went up in appeal and the Rent Control Tribunal by order dated 25th April, 1970 allowed the appellant time up to 25th April, 1973 to vacate the premises and that the appellant had been continuing in occupation of the demised premises by virtue of the said order or decree of the Rent Control Tribunal, but he was bound to pay the monthly rent regularly and perform other contractual obligations. In paragraph 4 the arrears of rent from 28th March, 1969 amounting to Rs. 19,500.00 are claimed and it is stated in paragraph 5 that the appellant had rendered himself liable to eviction on the ground of non-payment of rent. Paragraph 6 on which the counsel for the appellant relies reads as follows :

'THAT my client, therefore, does not want you to continue in occupation of the premises and terminates your tenancy with effect from close of 27th day of October, 1971 i.e. expiry of tenancy month of October, 1971.'

6a. The notice ends with the intimation that if the appellant does not pay the whole arrears within two months of the receipt thereof, failing which a petition for his eviction from the demised premises would be filed against him in a court of law. In reply dated 11th November, 1971 the appellant stated that paragraph 3 of the notice was not denied in so far as it said that the appellant had been continuing in occupation of the demised premises, and he was liable to pay rent at Rs. 650.00 per month, but he was entitled to adjustment on account of repairs and other charges. In paragraph 6 the appellant denied the termination of the tenancy and asserted that he was entitled to some deductions on account of repairs and some electric charges and was, therefore, liable to pay only Rs. 14,100.00. This was followed by a petition for eviction in which the respondent described the appellant as a tenant and himself as a landlord. In paragraph 19 of the petition he, however, reverted to the facts relating to the order for eviction already passed and the time to vacate the premises allowed to the appellant by the Tribunal. He further stated that the notice had been given and the arrears of rent for the period from 28th March, 1969 amounting to Rs. 20,800.00 at the rate of Rs. 650.00 had not been paid in spite of notice of demand and expiry of the period of two months. In the

written statement filed, the appellant contended that the previous proceedings had been compromised and he prayed that the petition be dismissed. A replication to the written statement was also filed in which reference was made to civil suits relating to recovery of rent. It was further asserted in paragraph 19 that the respondent before me had never agreed to allow the appellant to continue to be his tenant on the same old terms and conditions.

(7) Under these circumstances Mr. Sen submits that the previous notice and the benefit under the order for eviction had been waived, and he relies on section 113 of the Transfer of Property Act and the decision of the High Court of Bombay in *Bapurao v. Woman*, : AIR1963 Bom179 , and the decision of the Supreme Court in *Tyabali Jaffarbai Tankiwala v. Messrs Asha & Co.* 1970 Rcr 150. Section 113 of the Transfer of Property Act reads as follows : 'A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.' 7a. The provision contains two illustrations. The first illustration is where after the expiry of the notice to quit the tenant tenders and the landlord accepts rent which had become due in respect of the property after the expiration of the notice, the notice is waived. In the second illustration, the notice to quit expires, but the tenant remains in possession and the landlord gives to the tenant 2nd notice to quit, the first notice is waived. 8, 9. [In paras 8 & 9, observation in above 2 Cases are reproduced]

(8) The matter came up for consideration before a single Bench of this court in *Rajkishan Jain v. Master Hoshier Singh*, 1972 Rcj 876, where the case of *Bapurao v. Woman*, : AIR1963 Bom179 , was considered. The court observed that in the case of *Bapurao v. Waman* the court did not taken into consideration that the illustrations to section 113 raise only rebuttable presumptions of fact and the case did not consider the Supreme Court decision in *Ganga Dutt Mararka v. Kartik Chandra Das*, : [1961]3SCR813 . The matter was also considered by me in *Kasturi Lal v. Shiv Charon Das Mathur*, 1972 Rcj 582, where I agreed with my learned brother, V.S. Deshpande J. in his observations contained in paragraph 9 of the said judgment. I also relied upon a decision of the Federal Court in *Kai Khushroo Bezonice Capadia v. Bai Jerabai Hirjibhoy Warden* , *Ganga Dutta Murarka's case* :

(9) In *Shivjit v. Char an Singh*. 1973 Rcj 14, the Full Bench of the High Court of Punjab & Haryana observed that the issuance of a second or third notice to quit the leased property, by the lessor to the lessee, per se did not amount to a waiver of the first such notice within the meaning of section 113 of the Transfer of Property Act and that the crucial element from which a waiver of the earlier notice might be implied was the intention of the parties and this was particularised as an intention to treat the lease as a subsisting one. A two-fold requirement was visualised, namely, an act of one party showing an intention to treat the lease as subsisting and the express or implied consent of the other party; it was evident, therefore, the intention to treat the lease as subsisting had not to be merely a unilateral one but had to be bilateral; at one particular point of time. there must exist a mutual intention of the Lessor and of the lessee to continue the lease despite its earlier determination by a notice under section 111(h) of the Act and equally clear was from the language of the provision itself that this intention might be inferred from the conduct express or implied.

(10) In *Shri Raja Ram v. Shri Manohar Lal* 1971 Rcr 730, Jaswant Singh, J. (as his lordship of the Supreme Court then was), held that the acceptance of rent after the decree of ejectment did not create a fresh tenancy and the decree did not become inexecutable and the use of the word 'rent' in the receipts issued by the landlord could not be taken to imply that parties were ad idem to the renewal of the tenancy. The High Court of Patna in *Purn Mal Jaiswal v. Onkar Nath Choudry*, : AIR1959 Pat128, observed as follows: 'The most important thing to notice is that waiver of notice to quit does not, like waiver of forfeiture, depend upon the will of one party, namely, the landlord, but upon the consent of both, the landlord and the tenant. There cannot be waiver of notice to quit under section 113 without the express or implied consent of the persons to whom the notice is given.

(11) Where there is a repudiation of the tenancy and disclaimer of the title of the landlord by the tenant, the mere demand of rent for the period subsequent to the expiration of the notice cannot constitute waiver of notice to quit, for the simple reason that in such a case there can be no question of consent of the tenants

either express or implied to the waiving of the determination of the tenancy.

(12) Further, the question whether or not there was waiver of notice to quit is purely a question of intention of the parties. In order, therefore, to determine whether or not in a particular case there was waiver of notice to quit one has to see whether from the conduct of the landlord and tenant, by demand and acceptance of rent or by demand followed by express promise to pay, or otherwise an intention to treat the lease as subsisting can be inferred, and this would certainly depend upon the facts and circumstances of each case. When it is a question of intention, it is plain that not even the payment and acceptance of rent by the landlord after the notice to quit, much less a mere demand of rent, necessarily waives the notice. When the tenancy has been legally determined by a notice to quit and a suit also is instituted by the landlords for the eviction of the tenants, a mere combination of the claim for both rent and damages for the period subsequent to the expiration of the notice does not operate as waiver of the notice.

(13) Reference may further be made to the decisions of the Supreme Court. In *Dr. H.S. Rikhy v. The New Delhi Municipal Committee*, : [1962]3SCR604 , the court observed in paragraph 6 that the use of the word 'rent' was not conclusive of the matter and it might be used in the legal sense of recompense paid by the tenant to the landlord for the exclusive possession of premises occupied by him or it might also be used in the generic sense, without importing the legal significance aforesaid of compensation for use and occupation. Hence, the use of the term 'rent' could not preclude the landlord from pleading that there was no relationship of landlord and tenant.

(14) In *P. Dasa Muni Reddy v. P Apparao*, : [1975]2SCR32 , Ray, C.J. speaking for the court observed as follows. Waiver is an intentional relinquishment of 'a'known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain

advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is 'that there must be a voluntary and intentional relinquishment of a right. Voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. There can be no waiver of non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent.'

(15) From the above noted authorities, it is obvious that waiver is a question of fact, which is to be determined in the facts and circumstances of each case as to whether the intention of the parties is to abandon the previously acquired right or benefit, and this intention is to be gathered from the documents read as a whole as well as the conduct of the parties, and circumstances of the case, and wrong use of a word here or there is not decisive. In the instant case, the notice (Ex Jdn 3/1) construed as a whole shows that there was not the slightest intention on the part of the respondent landlord to treat the lease and the tenancy of the appellant as subsisting, still less to renew it. The notice makes a specific reference to the order for eviction passed by the Rent Control Tribunal and the time allowed by it to vacate the premises and contains nothing inconsistent with it. The notice proceeds to state (whether rightly or wrongly) that the appellant had failed to pay the rent since 28th March, 1969 and so was liable to eviction not only on the ground of bona-fide personal necessity, (on which basis the previous eviction petition had been allowed), but also on the ground of non-payment of arrears of rent. In my opinion, the clear intention of the notice was to abridge the period allowed by the Tribunal to vacate the premises rather than to extend the period or treat the eviction order as waived or the lease as subsisting or renewed.

(16) The dominant intention of the respondent was to claim and recover rent and should the tenant decline to pay the arrears of rent as was his duty to pay, the landlord claimed his eviction on the ground of non-payment of rent immediately even before the expiry of the period allowed by the Tribunal. This intention is further manifest from the eviction case filed by the appellant. There also he mentioned the

(17) The institution of the suit for recovery of rent also shows his intention and the efforts of the respondent to obtain the rent. All these documents properly construed only show the anxiety of the respondent landlord to recover the amount of rent for the period during which the appellant had been in arrears, though he was continuing in occupation of the premises under cover of the order of the Tribunal. The intention of the landlord was to either obtain arrears of rent or to obtain possession of the premises even earlier than the expiry of the time allowed by the Tribunal. There was absolutely no intention on his part to create any fresh tenancy or to waive the benefit obtained under the previous order for eviction. The use of the words 'tenant' and 'rent' by the respondent in the documents was really unfortunate and perhaps ill-advised. But their use does not militate against the clear and dominant intention of the respondent which was not to waive the benefit obtained under the previous order for eviction, but to expedite the eviction and obtain it earlier. The respondent landlord certainly had never exhibited any intention to allow the appellant to continue in possession of the premises beyond the time allowed by the order for eviction or in derogation of the order for eviction which had already been passed. Consequently, it is impossible to read into the acts and conduct of the respondent any intention to waive the benefit or treat the lease as subsisting or create a new contract of tenancy and the contention of the learned counsel has no force.

(18) Mr. Chopra for the respondent has also invited my attention to a reply filed by the appellant to have the ex parte order for eviction passed in July, 1972 in the second petition for eviction set aside, in which the appellant is claimed to have asserted that no relationship of landlord and tenant subsisted between the parties. Be that as it may, the order of the Additional Controller, dated 28th February, 1975, has finally determined the point and has held that the appellant is not a

tenant of the respondent and there is no subsisting tenancy. There is no ground to hold why this order cannot operate as *res judicata*, between the parties as that order has become final. It is, therefore, not open to the appellant to urge that he is still a tenant of the respondent and the order for eviction already passed against him is not executable.

(19) There is another important point for consideration. The appellant in his objections was not content to rely on the notice and pleadings mentioned above, but he had raised a specific plea of the conclusion of the fresh contract of tenancy by express offer and acceptance which he sought to substantiate by leading oral evidence. Both the rent control authorities below have concurrently disbelieved the evidence produced by the appellant and have come to the conclusion that no such contract of tenancy had been arrived at. Mr. Sen has most fairly not attempted to challenge the said findings of fact, since they are not open to review in second appeal in this court. But the fact remains that when the express contract of tenancy pleaded has failed, the case of implied contract of tenancy is still weaker. Considered from any point of view, I find that there is no force in the contention of the appellant.