

Boota Kam Vs. Balmukand

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Court : Delhi

Decided On : Oct-21-1970

Reported in : 7(1971)DLT299

Judge : S.N. Shankar, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 100; Displaced Persons (Compensation and Rehabilitation) Act, 1954 - Sections 29

Appeal No. : Second Appeal No. 341 of 1969

Appellant : Boota Kam

Respondent : Balmukand

Advocate for Pet/Ap. : Ravinder Sethi and; K.R. Gupta, Advs

Judgement :

S.N. Shankar, J.

(1) This appeal is directed agaiiist the order of the Rent Control Tribunal dated July 14, 1969, affirming the order of the Additional Rent Controller directing eviction of appellant Boota Ram.

(2) Balmakand, the respoadent in this appeal purchased evacuee property No, 178/1798, situated at Hardhian Singh Road, ward No, Xvi Krol Bagh, New Delhi by

means of a sale-certificate granted in his favor by the Rehabilitation Deptt. on July 29, 1959 declaring him to be an owner with effect from November 4, 1957. On January 23, 1965, he filed an application under section 14(2)(h) of the Delhi Rent Control Act claiming eviction of the tenant appellant from the premises in his occupation which formed a part of the above property on the ground that the tenant had built a residence in Kirti Nagar on plot No. 81, Block 'F' and that the tenant had denied the relationship of landlord and tenant between the parties even though after the purchase of the property by him (Balmukand) the respondent Boota Ram who occupied the premises as an allottee of the Custodian had become his tenant by operation of Section 29 of Displaced Persons (Compensation & Rehabilitation) Act, 1954, hereinafter called the Displaced Persons Rehabilitation Act. Boota Ram contested this application. In the first written statement filed by him he did not raise the plea that a notice terminating his tenancy was necessary and the eviction application without notice was incompetent but on November 27, 1967, he prayed for permission to amend his written statement to raise this plea. The application was accepted by the learned Additional Rent Controller. On December 8, 1967, he thus filed an amended written statement incorporating this plea. The learned Additional Rent Controller, after recording evidence came to the conclusion that Balmukand had succeeded in proving that Boota Ram had built a construction on plot No. F. 81, Kirti Nagar, as alleged by him and that by operation of Section 29 of the Displaced Persons Rehabilitation Act, Boota Ram had become a statutory tenant and was not contractual tenant. With these findings, on May 28, 1968, he granted an order for recovery of possession against Boota Ram. Aggrieved from this Boota Ram went up in appeal. The learned Rent Control Tribunal by the impugned order concurred with the finding of fact arrived at by the learned Additional Rent Controller that Boota Ram had acquired another residence for himself, but disagreed with the view that he was a statutory tenant. He, however, held that no notice terminating his tenancy was required because the tenancy in his favor had been created before the [Transfer of Property Act, 1882](#) came into force and in this view maintained the order of eviction and dismissed the appeal. This second appeal is directed against this order.

(3) Shri Ravinder Sethi, the learned counsel appearing for Boota Ram has urged that the learned Tribunal was in error in holding that the notice for eviction was not necessary. He placed strong reliance on the Division Bench decision of this court in *Batto Mal v. Rameshwar Nath etc* where it has been held that though the provisions of Section 106 of the [Transfer of Property Act, 1882](#), were made applicable to the Union Territory of Delhi with effect from 1st December, 1962, but even before that date the principle underlying it was applicable to Delhi and as a rule of justice, equity and good conscience a reasonable notice of about 15 days (even if it did not expire by the end of the month of tenancy) was essential to determine a monthly tenancy.

(4) The submission of Shri Sethi has force. Previously, the law on the point whether a notice terminating the tenancy was or was not necessary before filing of the application of eviction of the tenant appeared to be little obscure in view of a line of decisions taking the view that the Rent Acts were a complete code in themselves and termination of tenancy before seeking eviction of the tenant from the Tribunals constituted under the Act was not necessary. Relying on the observations of the Supreme Court in *Northern India Caterers Private Ltd State of Punjab and another* the Division Bench in *Batto Mal's* case held that Rent Control legislation did not deprive the tenant of the pre-existing protection enjoyed by him under section 100 of the [Transfer of Property Act, 1882](#). On the basis of *Bhaja Punjalal Bhagwandin v. Dave Bhagwat Prasad Prabhuasad* it further said that right to possession was to be distinguished from the right to recover possession. The right to possession, it was observed, arose when the tenancy was determined and then followed the right to recover possession which accrued when the tenant failed to hand over possession as he was bound to do under law on the termination of his tenancy and the necessity arose to recover possession through court. After referring to the other decisions of the Supreme Court, the bench in conclusion held that no distinction could there be made between the tenancy which commenced before the provisions of section 106 of the Transfer of Property Act came into force in the Union Territory of Delhi and the tenancy that came into being after the coming into force of this provision. In both cases, it was necessary for the landlord to terminate the tenancy of the tenant before the right to recover possession through court could accrue to him. The authority fully supports Mr Sethi's

contention.

(5) Shri K R. Gupta, appearing for Balmukand, respondent however, strenuously urged that in this case Boota Ram was only a statutory tenant and not a contractual tenant and no notice of eviction was, therefore, necessary to terminate his tenancy. He also urged that in the fact of this case, the appellant should have been held to have waived his right to the notice of ejectment because he did not take these objections in the first written statement filed by him and that it was only after the lapse of over two years that he moved the Additional Rent Controller for amendment of his written statement, to incorporate this plea. In these circumstances the learned counsel urged, even if it be assumed that such a notice was necessary it should be held to have been waived by the tenant appellant.

(6) In support of the first condition, the learned counsel placed reliance on *Kesar Das v. Jaisa Ram* and *Harbans Lal v. RurnDhatt*. In *Kesar Dass's* case the house of which the premises in suit formed a part was an evacuee property which was originally allotted to the respondent Jaisa Ram on his undertaking to pay Rs. 6/8- per mensem to the Custodian. Subsequently, the portion shown in red in the plan filed in this case was taken out of his possession and allotted to Kesar Dass, appellant, in consideration of Rs. 2/7.00 per mensem. The remaining portion continued with Jaisa Ram. Subsequently, the entire house was purchased by Jaisa Ram and he became its owner. An appeal preferred by Kesar Dass against this order of transfer in favor of Jaisa Ram was dismissed by the Settlement Commissioner. Jaisa Ram duly intimated Kesar Dass of these facts but he refused to recognize the title of Jaisa Ram and also refused to pay him anything by way of rent or for use and occupation of the premises. In this situation Jaisa Ram, on December 26, 1969, applied for ejectment of Kesar Dass under section 13 of the Urban Rent restriction Act on several grounds including non-payment of rent. Kesar Dass pleaded that there was no relationship of landlord and tenant between him and Jaisa Ram. On this plea, Jaisa Ram withdrew his application for ejectment and served a notice on Kesar Dass that the license in his favor in respect of the premises stood terminated and called upon him to hand over its vacant possession. On the failure of Kesar Dass to comply with this notice, he filed a suit for

possession of the property with the plea that Kesar Dass had no right or interest in the property and was not entitled to remain in its possession as he had originally entered into possession as a licensee under the Custodian and his licence stood revoked. He also pleaded that this license in favor of Kesar Dass also stood revoked because of the latter's repudiation of Jaisa Ram's title in the property. An argument was advanced in this case before the Court that Kesar Dass had originally occupied the property not as a tenant under the Custodian but as an allottee, who, according to the definition of the word given in the Evacuee Property Act meant nothing more than a licensee. Dealing with this plea, on page 503 of the report, the court observed as under:-

'EVEN if it be accepted that before the property was purchased by the respondent Kesar Dass was in its possession as a mere licensee, his case will still be covered by section 29 of the Displaced Persons (Compensation and Rehabilitation) Act, and he can claim the status of a tenant under the purchaser of the property as this provision is not confined to a tenant under Custodian, but to every person who is 'in lawful occupation of the transferred property', and such a person in lawful occupation is to be deemed a tenant.'

(7) In this case the court observed in para 12 that after Jaisa Ram had acquired property from Rehabilitation Department Kesar Dass being previously in possession as an allottee or a licensee under the Custodian by virtue of sub-section (1) of Section 29 of the Act, became a tenant under Jaisa Ram but since he persistently refused to acknowledge Jaisa Ram as his landlord and never paid rent to him, his status remained that of a statutory tenant only in the sense that he was entitled to the protection under Section 29 for two years. These observations do not at all help Balmukand because in the instance case it is not denied that after the purchase of this property by him Boota Ram did actually pay rent to him besides the above observations strenuously relied upon were made in the judgment only in the context of the facts of the case and for determination of the question whether rights could be inherited by the legal representatives of Kesar Dass. Jaisa Ram's case thus cannot be relied upon for the proposition set up. The same considerations apply in the second case of Harbans Lal v. Ram Dhan, cited by Shri Gupta. In this case, Jaisa Ram's case was simply followed.

(8) Shri K. R. Gupta, then urged that Boota Ram was simply a licensee in respect of the premises and not a tenant of the Custodian and therefore, the provisions of Section 29 of the Displaced Persons Rehabilitation Act will not make him a tenant. Relying on *Dr. H. S. Rikhi v. New Delhi Municipal Committee* the learned counsel urged that the concept of tenancy is wholly different from that of a license and distinction should, therefore, be made between the two. I am unable to see how this difference is of any relevancy in the contest of the point in issue. Section 29 covers the case of all persons in lawful possession of any immovable property of the class notified in sub-section (2) of Section 29 which is transferred to another person under the provisions of this Act and .makes no distinction between a licensee or an allottee. Both these persons are lawful occupants of property within the meaning of Section 29 of the Displaced Persons Rehabilitation Act After the transfer of the property in their occupation this provisioa says that they would be deemed to be tenants of the transferee in respect of the property in their respective occupation. The word 'deemed' in the section creates a legal fiction and the court is bound to give full effect to it. Reference in this connection may be made to *State of Bombay v. Pandurang V'inayak and others* where it was held that when a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purpose s between what persons the statutory fiction is to be resorted to and thereafter full effect must be g^en to the statutory fiction and it should be carried to its logical conclusion.

(9) I am, therefore, of the opinion that the appellant had become a tenant of the respondent by operation of law and had been paying rent to him as such and the respondent was bound to terminate his ten-ncy before the right to claim eviction could accrue to him,

(10) Coming now to the second contention of Shri Gupta, I find that the plea of waiver urged was nowhere taken by the respondent either before the Additional Rent Controller or before the Rent Control Tribunal Waiver is essentially a question of fact. It has to be conscious and deliberate. The submission that because the appellant had not taken the plea of want of notice in the first written statement and that the same was taken by him only after the lapse of over two

years in the amended written statement does not by any stretch lead to the conclusion that there was waiver of this plea on the part of Boota Ram. The word 'waiver' according to Wharton's Law Lexicon means to forego, decline to take advantage of. Until and unless it is clearly proved to the satisfaction of Court that the person having the right conclusively decided to forego it or take advantage of it, waiver is not to be inferred. Waiver is a deliberate and conscious act not distinguished from estoppel which may be created by law. Whether the objection has been waived or not in a given case is a question which has to be decided on the direct as well as circumstantial evidence available on the record. The fact that Boota Ram sought to get his written statement amended to incorporate this plea specifically is an indication to the contrary and shows that he did not waive this plea even at the stage of trial. Reference in this connection may also be made to *Manohar Lal v. Sadhu Ram*. It is, therefore, not possible to sustain the submission of Shri Gupta that Boota Ram had waived the plea of notice.

(11) In view of the above discussion I have no hesitation in holding that a notice terminating the tenancy of the appellant was necessary before the application claiming his eviction and the order passed in this case is not sustainable in law.

(12) S.A.O. 341 of 1969 is, therefore, accepted but the parties are left to bear their own costs.