

Ms. Mani Mann Vs. Smt. Ram Dulari (Dead.), Through Legal Representative

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Court : Delhi

Decided On : Jan-19-2001

Reported in : 90(2001)DLT305

Judge : Mr. Arun Kumar and; Mr. A.K. Sikri, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order XII, Rule 6 - Order XV, Rule 1;
[Transfer of Property Act, 1882](#) - Sections 106 and 113

Appeal No. : RFA, 415 of 1999

Appellant : Ms. Mani Mann

Respondent : Smt. Ram Dulari (Dead.), Through Legal Representative

Advocate for Def. : Mr. Arun Mohan, Sr. Adv., ; Mr. Deepak Gupta, ; Mr. B.B. Gu

Advocate for Pet/Ap. : Mr. A.S. Chandhiok, Sr. Adv.,; Mr. Atul Bhuchar and; Mr. B.

Judgement :

ORDER

A.K. Sikri, J.

1. This first appeal is filed by the tenant against the judgment and decree dated 30th April, 1999 passed by Additional District Judge, Delhi whereby decree for

possession has been passed against him under Order XII Rule 6 of the Code of Civil Procedure. The suit premises, being the ground floor of property no. 76, Sunder Nagar, New Delhi, were let out by the respondent-plaintiff to the appellant-defendant by a Lease Deed dated 21st May, 1977. Rent was fixed at the time was Rs.2000/- per month which was increased from time to time. At the time when quit notice was served under Section 106 of the Transfer of Property Act (hereinafter referred to as the Act, for short) the Suit for possession was filed by the respondent herein, rent of the premises was Rs.10,000/- per month. The period of Lease Deed dated 21st May, 1977 had expired since long. No fresh lease deed had been executed. Respondent served notice dated 7th November, 1997 under Section 106 of the Act terminating the tenancy which, according to the respondent had become month to month tenancy. By the said Notice, tenancy was terminated w.e.f. 30th November, 1997 and appellant was asked to vacate the premises. It was also mentioned in the Notice that in case the appellant fails, to vacate the premises she would be liable to pay manse profits @ Rs. 5000/- per day w.e.f. 7th December, 1997. As the appellant did not vacate the premises plaintiff-respondent filed Suit No. 522 of 1997 in the Court of Additional District Judge, Delhi. Even before the appellant filed the written statement, the respondent herein filed an application under order XII Rule 6 read with Order XV of Rule 1 of the Code of Civil Procedure seeking decree on the basis of admissions. Later on, however, the appellant filed the written statement taking number of objections and contested the Suit. The appellant also filed reply to the application under Order XII Rule 6 of the Code of Civil Procedure. Arguments in this application were heard and impugned judgment and decree for possession dated 30th April, 1999 was passed by the learned Additional District Judge, Delhi. In so far as manse profits are concerned, the enquiry under Order XX Rule 12 of the Code of Civil Procedure has been ordered by appointing Ms. Hema Baweja, Advocate as Local Commissioner, who was to undertake this enquiry and determine the manse profits and damages for use and occupation of the demised premises. Preliminary decree of manse profits, however, was passed observing that final decree would be passed when the report of the Local Commissioner is received.

2. It may be stated at the outset that following facts are admitted between the parties:--

i. Rent of the premises: Rs. 10,000/- p.m.

ii. Relationship of landlord and tenant between the respondent and the appellant.

iii. Receipt of quit notice issued by the respondent under Section 106 of the Act terminating tenancy. It is also an admitted case that the tenancy was month to month tenancy, as after the expiry of the lease period, no fresh lease deed had been executed and registered.

3. Notwithstanding the aforesaid admissions, it is the case of the appellant that decree for possession on the basis of admission could not have been passed as in the written statement filed by the appellant various jurisdictional, factual and legal pleas were taken and for adjudication of the same trial was necessary inasmuch as these could be determined only by evidence. Learned counsel for the appellant however paraphrased the pleas by taking the following twin contentions:

1. Notice dated 7th November, 1997 issued under Section 106 of the Act was not a valid and legal notice. His submission was that as per para 6 of the said notice the tenancy was determined w.e.f. 30th November, 1997 calling upon the appellant to handover the vacant and peaceful possession of the premises on or before the said date. It was, therefore, not terminated by the end of the tenancy month inasmuch as the appellant had right to occupy the premises till 30th November, 1997 and demanding the possession on 30th November, 1997 invalidated the notice.

Alternative, submitted that the tenancy in this case started on 21st May, 1977 by the Lease Deed dated 21st May, 1977. therefore, if tenancy month is to be taken from 21st of the month till 20th of the following month still notice was invalid inasmuch as clear 15 days time from the date of receipt of notice for determination of the tenancy, as per the provision of Section 106 of the Act, was not given as the Suit itself was filed on 5th December, 1997.

4. We do not find any force in this submission of the learned counsel for the appellant. We have gone through the notice dated 7th November, 1997. Para 3 of the notice clearly stipulates that the tenancy qua the premises in question is

according to Gregorian calendar month which commences on first day of every such English calendar month. It may be mentioned here that the appellant had replied to this notice by sending communication dated 27th November, 1997 which the appellant termed as an 'interim reply'. This is not a paradise reply. After mentioning in one sentence that contents of notice dated 7th November, 1997 are not admitted, what is stated is that the appellant was looking for documents and papers concerning the tenancy and as soon as the same are traced out, detailed reply would be sent. Respondent was further requested to send copy of the contract between the parties. Thus, averments contained in para 3 of the notice that tenancy was according to English calendar month has not been specifically denied. Moreover, in para 4 of the plaint also specific averment is made that the tenancy was a month tenancy according to Gregorian calendar month. Significantly, in the written statement, apart from bald denial the appellant does not mention as to what was the tenancy month. If the appellant-defendant was disputing calendar month to be the tenancy month, then it was obligatory upon her to give positive averments as to what was the tenancy month according to her. One has to bear in mind that in such cases where a person is inducted as the tenant on the basis of lawful agreement, it is permissive possession as against a case of hostile title. In the absence of any other suggestion and specific plea as to what was the tenancy month according to her. One has to bear in mind that in such cases where as person is inducted as a tenant on the basis of lawful agreement, it is permissive possession as against a case of hostile title. In the absence of nay other suggestion and specific plea as to what was the tenancy month, we have to believe that the tenancy month was English calendar month. Moreover some of the documents filed by the appellant herself in this Court on 4th December, 2000 suggest that the tenancy month was English calendar month. Moreover some of the documents filed by the appellant herself in this Court on 4th December, 2000 suggest that the tenancy month was English calendar month inasmuch as the appellant herself has been sending 'rent' for each English calendar month.

5. The validity of the notice is, thereforee, to be determined keeping in view that tenancy month of the Suit premises was English calendar month. Once that be so, termination of this tenancy was in accordance with Section 106 of the Act. Para 6

and 7 which are relevant for this purpose may be quoted below:--

6. WITHOUT PREJUDICE TO HER RIGHTS IN ENQUITY AND IN LAW, my clientless does no wish to keep you as here tenant any longer and has instructed me to give you notice, which, I hereby do, informing you notice, which, I hereby do, informing you that your tenancy of the said premises shall stand determined on the 30th day of November, 1997 and also calling upon you to hand over the vacant and peaceful possession of the said 'demised premises' to my clientless on or before the said date.

7. That in case you dispute your month of tenancy, kindly take notice that your tenancy qua the demised premises shall stand determined on the day, atleast 15 days after the date of the receipt hereof, on which, according to your own allegations, your month of tenancy expires.

In such a case, you are hereby called upon to surrender vacant and peaceful possession of the premises presently demised to you on the day, at least 15 days after the receipt of this notice, on which according to your own allegations, your month of tenancy expires.

6. According to para 6 quoted above, tenancy is determined on the last date of the calendar month i.e. 30th November, 1997. Merely because it is mentioned in the notice that possession should be given on or before the said date would not invalidate the notice.

7. It is not permissible for the appellant to read the notice too technically. We have to see as to whether the requirements of Section 106 of the Act are substantially complied with or not in the Notice dated 7th November, 1997. It terminates the tenancy on the last date of tenancy month i.e. 30th November, 1997. Admittedly, notice was received more than 15 days before this date. Moreover, in para 7 it was further clarified that even if the appellant was disputing the month of the tenancy then the same be treated as determined at least 15 day after the date of receipt thereof. Such a notice substantially complies with the provision of Section 106 of the Act and is, thereforee, valid. A Notice under Section 106 of the Act is not to be read so as to find fault with it. (Ref. Bhagabandas Agarwalla versus Bhagwandas

Kanu and others : [1977]3SCR75 and Smt. Chander Kanta Sigal versus M/s. Kapadia Exports reported in : 65(1997)DLT926 and Capital Boot House and others versus Intercraft Limited : 1999(51)DRJ245).

8. 2. Second contention of the counsel for the appellant was that he had set up the plea of waiver in the written statement as well as in reply to application under Order XII Rule 6 of the Code of Civil Procedure, by alleging that even after serving of notice dated 7th November, 1997, the respondent had accepted the rent on 3rd December, 1997.

9. To substantiate the aforesaid argument learned counsel referred to various paras in the written statement where such pleas were taken. It was his further submission that in the impugned judgment and decree the learned Additional District Judge, Delhi had not even referred to or dealt with any of these arguments. According to him, plea of waiver was a plea on which evidence was required to be led and decree on the basis on admission could not have been passed.

10. This contention is equally fallacious. Plea of waiver set up on the basis of Section 113 of the Act has to be determined from the existence of consent of Lesser and lessee. This aspect has come up for consideration in number of cases. In the recent judgment of this Court in the case of Bank of Rajasthan Ltd. versus Sarin and Company reported in 2000 (52) DRJ analysing the provision of Section 113 of the Act, the Court held that plain reading of that Section shows that it consists of two essential components: (a) the express or implied consent of the person to whom the notice is given and (b) act of the person giving notice showing the intention to treat the lease subsisting. In order not to constitute waiver, both the ingredients must concurrently exist which means the act of acceptance of rent by itself without reference to the intention of the Lesser, cannot be deemed to be the waiver. Illustration (a) of Section 113 of the Act cannot be construed so as to water down the substantive provision of Section 113. Thus, in addition to the receipt of rent by the landlord there should be other conclusive evidence to show that the landlord intended to treat the lease as subsisting. Of course, the intention can be gathered from attending circumstances but these circumstances must be such which irresistibly lead to the conclusion, that the Lesser had intended to keep

lease subsisting. The conduct of parties must justify such an inference. While laying down the aforesaid proposition of law various judgments of the Supreme Court and other High Courts as well as of this Court are referred to.

11. In the present case, it cannot be said that there was any intention of the Lesser i.e. the respondent to accept the rent after giving the notice. In fact in para 8 of the notice dated 7th November, 1997 itself the respondent made it clear that if the appellant does not vacate the premises after the determination of her tenancy she will have to pay to the respondent the charges for illegal use and occupation thereof at market rate which was estimated at Rs. 1,25,000/- to Rs. 1,50,000/- per month. It was further specifically mentioned that after the receipt of the notice any payment made by the appellant shall be accepted, if at all, by the respondent without prejudice to her rights and contentions in law and shall necessarily be appropriated towards 'manse profits/damages for use and occupation' of respondents's premises and acceptance of such payment would not amount to either revocation/notice to quit or waiver of the notice or assenting to appellants to continue occupying the premises. Thus, plea of waiver has to fail on this ground itself. (Ref. Ram Pistons and Rings Ltd. versus Dr. Banwari Lal reported in 1998 (46) DRJ (DB); East India Synex Ltd. versus Gaurav Mangla reported in 1996 (2) RCR 33).

12. Reliance by the appellant on the recent judgment of Supreme Court in the case of Bhuneshwar Prasad and another versus United Commercial Bank and others : AIR 2000 SC2796 is of no avail. That was a case where the landlord, after serving quit notice, accepted rent voluntarily and consciously. The facts stated in para 6 of that judgment would clearly demonstrate that this is not applicable to the facts and circumstances of the present case. Para 6 of the judgment reads as under:-

' The present is not a case of payment and acceptance of the rent which was stipulated in the lease deed. It is also not a case where standard rent fixed by any another authority had been paid. The increased rent as aforestated was deposited after 31-3-1991. The same was accepted by withdrawal of the amount. In terms of letter dated 5-9-1992, in fact, the owners asked for payment of the rent 'hitherto

deposited'. It has been established on the record that the rent demanded, deposited and withdrawn was increased rent. In the light of these established facts, we would examine whether in law monthly tenancy as contemplated by Section 116 of the [Transfer of Property Act, 1882](#) came to existence or not.'

13. Thus, in that case increased rent in terms of lease was tendered and was accepted by the landlord after notice to quit was served. It was also found as a fact that landlord have even asked for the repayment of rent after serving the quit notice. On the other hand, in the present case, respondent-landlady did not mince word in making her intentions clear in the notice to quit itself to the notice to quit itself to the effect that quit notice is not going to be waived in any circumstance.

14. Nodoubt the respondent herein showed undue haste and over-enthusiasm on filing application under Order XII Rule 6 of the Code of Civil Procedure even before the written statement was filed. However, fact remains that this application was considered and decided only after the written statement had come on record. Not only this, the appellant was given opportunity to file reply to the application under Order XII Rule 6 of the Code of Civil Procedure as well. thereforee, this act of respondent in filing the application before the written statement would not itself vitiate the impugned judgment and decree more so when it has not caused any prejudice to the appellant. It is a matter of record that in reply dated 27th November, 1997 the relationship of landlord and tenant or the rental of the premises being Rs.10,000/- per month had not been denied. Moreover, giving of interim reply itself meant that the receipt of the notice was admitted. May be due to this reason the respondent bonafide believed in her over enthusiasm that there was no defense left with the appellant and that all the ingredients for Suit for possession existed and she filed in application immediately after filing the plaint. Be as it may, no prejudice is caused to the appellant who was not only given chance to file the written statement but also reply to the application under order XII Rule 6 of the Code of Civil Procedure before this application was found considered. For this reason, judgment in the case of Balraj Teneja and another versus Sunil Madan and another reported in (1999) 8 SCC 96 as cited by the appellant is of no help to her.

15. In view of this we are of the opinion that the impugned judgment and decree for possession was rightly passed on the basis of admission. As the admissions narrated above are sufficient to enable the respondent to get the decree in her favor, the pleas which were raised by the appellant in the written statement or before us were purely legal pleas which could be considered without any evidence and as noticed above, these pleas as being meritless could not deter the learned Additional District Judge from passing the impugned judgment and decree. (* Ref: M/s. Deenar Builders Pvt. Ltd versus M/s. Khoday Distilleries Limited : AIR2000 Delhi147 ; Zulfiquar Ali Khan (dead) through LRs and others versus Straw Products Limited and others reported in (2000) vi AD (Delhi) 347.)

16. This appeal accordingly fails and is dismissed with costs.

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