

Jodhraj Vs. Suleman

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Court : Rajasthan

Decided On : Jul-28-1969

Reported in : 1969WLN355

Judge : C.M. Lodha, J.

Appeal No. : S.B. Civil Regular Second Appeal No. 394 of 1968

Appellant : Jodhraj

Respondent : Suleman

Judgement :

C.M. Lodha, J.

1. This is a defendant-tenant's second appeal arising out of a suit for eviction from a shop. The tenancy is admitted.

2. The suit for eviction is based on two grounds, viz. (1) default on the part of the tenant in paying rent; and (2) reasonable and bonafide personal necessity of the landlord. Both the lower courts have accepted the plaintiff's version that the shop in question is required by the plaintiff for his son. who wished to carry on business in that shop. Learned Counsel for the appellant has assailed this finding on the ground that the plaintiff has failed to establish his reasonable and bonafide personal necessity & there is a clear variance between pleading & proof. He has,

therefore, contended that the finding of the learned District Judge on this point is liable to be set aside.

3. On the other hand learned Counsel for the respondent, while supporting the finding of the learned District Judge on the question of personal necessity has further contended that the defendant had admittedly committed default in payment of rent and thereafter had not complied with Section 13(4) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (which will hereinafter be called the Act) and, therefore, his defence should be struck out under Section 13(6) of the Act.

4. I shall first deal with the contention raised on behalf of the appellant that the plaintiff has not succeeded in proving his reasonable and bonafide personal necessity for the shop. It is urged by him that in the plaint it has been stated in para 3(ga) that the shop in question is required by the plaintiff Suleman for his personal necessity, whereas in the course of evidence the plaintiff has tried to prove that the shop is required by the plaintiff's son Gafoor. Then it is argued that Gafoor (P.W.

1) has stated that he would do business either in cycles or in 'Kirana' in this shop, whereas Suleman (P.W.

5) states that Gafoor would do business either in bicycles or of dyeing (rangai). Nanoo (P.W.

2) is the son in law of the plaintiff states that Gafoor is at present employed on a salary of Rs. 60/-p. m. in a flour mill. In cross-examination he has, however, stated that Gafoor wants to do business in 'Kirana'. Gheesoo (P.W.

3) has stated that the shop in question is required by Suleman, who is living with his son Gafoor and that Suleman will do some business in this shop. In cross-examination this witness states that he does not know what would Gafoor do with this shop? Tulsiram (P.W.

4) is silent on the point. The defendant, however, has not led any evidence. It is submitted by Shri Prakash Chandra on behalf of the respondent that the plaintiff is

living with one of his sons Gafoor. The other sons of the plaintiff have separated from him. In these circumstances, he argued, that the plaintiff has mentioned that the shop in question is required for his personal necessity. He submitted that personal necessity includes the necessity of the land-lord himself as well as members of his family. According to him, if the allegation is the plaintiff in read in that light, it cannot be said that there has been any departure from the allegations made in the plaint.

5. The averment in the plaint for personal necessity, in my opinion, is undoubtedly vague and it was the duty of the plaintiff to have stated in specific terms that the shop in question is required by his son Gafoor, who was living with him, to carry on a particular business. The evidence produced by the plaintiff regarding the type of business, which Gafoor wants to carry on in this shop, is also vague and indefinite in as much as Gafoor himself said that he would carry on business either in cycles or in 'Kirana', whereas plaintiff Suleman(P.W. 5)states that Gifoor would carry on business either in bicycles or in dyeing. The learned District Judge has observed that it is not at all necessary for the plaintiff to show as to what particular business he would carry on in the shop and that he may keep his mind open till the premises are vacated. I find myself unable to subscribe to this view. It is the bourukn duty of the plaintiff, who wants to get the premises vacated for his own use or for the use of his family to allege and prove that the necessity for the premises is both reasonable and bonafide and that cannot be done unless the landlord in the first instance alleges what business he proposes to carry on in the shop. To accept any other view would tantamount to allowing the land-lord to claim eviction of the shop on most flimsy and unsubstantial grounds. The legislature has purposely used the words 'reasonable and bonafide,' and, therefore, it is the duty of the landlord in each case to prove that his personal necessity for the premises is genuine and is thus both 'reasonable and bonafide'. The observation made by the learned District Judge that 'for such requirement to be reasonable and bonafide it is not necessary that the landlord should make this decision over the particular business that he may want to do in the premises when vacant possession is made over to him,' is in my opinion, erroneous and against the language as well as the spirit of the Act. It is true that the defendant has not led any evidence on the point, even then it is open to him to argue on the basis of the

plaintiff's evidence that a case for reasonable and bonafide personal necessity has not been made out. The averment in the plaint is most vague and indefinite and, in my opinion, does not embrace within itself the necessity, which the plaintiff has tried to prove during the course of evidence. That apart, the evidence itself is discrepant besides being vague and indefinite. That finding of the learned District Judge on this point, as already stated, is vitiated on account of the wrong view he has taken regarding personal necessity and I am not impressed by the plaintiff's evidence that he has reasonable and bonafide personal necessity of the shop in question. I therefore, reverse the finding of the learned District judge on this point and hold that the plaintiff has failed to prove his reasonable and bonafide personal necessity for the shop in question.

6. This brings me to the contention raised on behalf of the plaintiff-respondent that even apart from the question of personal necessity, the defendant is liable to be evicted on the ground of default in payment of rent. There is no denying the fact that more than six months' rent had fallen into arrears at the time of the institution of the suit. It, was alleged by the plaintiff in para No. 3 of the plaint that the defendant had failed to pay the rent for a period of 20 months. The defendant did not deny this allegation specifically in his written statement and paid arrears of rent claimed by the plaintiff along with the interest calculated at the rate of 6% per annum and claimed the benefit of Section 13(4) of the Act by an application dated 9-11-66 and, the court proceeded to try the suit on the question of personal necessity. It may be noted here that the defendant did not pay month to month rent thereafter as provided in Section 13(4). After recording the evidence, the trial court came to the conclusion that the defendant was liable to be ejected on the ground of plaintiff's personal necessity and decreed the suit. In the appeal filed by the defendant in the court of District Judge, Merta, the plaintiff made an application under Section 13(6) of the Act on 11-12-67 and prayed that since the defendant had not paid rent month to month as provided in Section 13(4) of the Act, his defence may be struck out. The defendant resisted this application by his reply dated 1-3-68 and stated that he had not commuted any default, but had deposited arrears of rent along with the written statement and further that he had never been asked by the court: to deposit month to month rent thereafter. It appears that the learned District Judge did not pass any order on this application but the arguments

were heard on the main appeal and the appeal was dismissed, and there is no mention about the application made under Section 13(6) of the Act in the judgment of the learned District Judge. The argument of the learned Counsel for the respondent is if the defendant wanted protection from eviction on the ground of payment of arrears of rent, he ought to have conformed with the provisions of Section 13(4) and thus should have continued to deposit or pay month by month, by the fifteenth of each succeeding month a sum equivalent to the rent at which it was last paid. There is no dispute between the parties that after paying the arrears of rent along with the written statement on 9-11-66 no rent has been paid thereafter by the defendant. By virtue of Section 13(6), it is argued by Mr. Prakash Chandra that the defendant's defence against eviction must be struck out and the case must be decided as if the defendant has no defence against eviction under the Act. On the other hand learned Counsel for the appellant submitted that his client has offered rent to the plaintiff within a month after he had deposited the arrears of rent Rs. 276/-, but he refused to take the payment and stated that he would accept it after the case is decided. In support of his submission he has relied on the affidavit of Jodhraj filed in this Court on 10-1-69. The respondent has filed counter affidavit dated 2-2-69 that after the payment of Rs. 276/-, the defendant failed to deposit or pay rent month by month as required by Section 13(4) of the Act. In this connection it would be relevant to refer to the reply filed by the defendant-appellant to the application made by the plaintiff under Section 13(6) of the Act in the court of District Judge, Merta, wherein the defendant has nowhere stated that he had at any time offered the rent falling due month to month after the payment of the arrears. On the other hand he cannot be said to have committed any default in this connection as there had been no order by the court for payment of rent month to month. This reply, in my opinion leaves no doubt that the assertion made by the defendant in this Court in his affidavit dated 10-1-69 that he had offered rent within one month of the deposit of the arrears is incorrect. I have, therefore, no hesitation in holding that the defendant had neither deposited nor paid nor tendered the rent falling due month by month after he had paid the arrears of rent on 9-11-66.

7. The question then arises as to what is the effect of this default on the part of the defendant? For a correct appreciation of the contention raised by Mr. P.C. Mathur,

it would be proper to reproduce here Section 13(4), (5), (6) and (7) of the Act-

(4) In a suit for eviction on the ground set forth in Clause (a) of Sub-section (1), with or without any of the other grounds referred to in that sub-section, the tenant shall, on the first day of hearing or on or before such date as the court may, on an application made to it, fix in this behalf, or within such time, not exceeding two months, as may be extended by the court, deposit in court or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit of payment is made together with interest on such calculated at the rate of six percent per annum from the date when any such amount was payable upto the date of deposit and shall thereafter continue to deposit or pay, month by month, by the fifteenth of each succeeding month a sum equivalent to the rent at that rate.

(5) If in any suit referred to in Sub-section (4), there is any dispute as to the amount of rent payable by the tenant, the court shall determine, having regard to the provision of this Act, the amount to be deposited or paid to the landlord by the tenant, within fifteen days from the date of such order, in accordance with the provisions of Sub-section (4).

(6) If a tenant fails to deposit or pay any amount referred to in Sub-section (4) or Sub-section (5), on the date or within the time specified therein, the court shall order the defence against eviction to be struck out and shall proceed with the hearing of the suit.

(7) If a tenant makes deposit or payment as required by Sub-section (4) or Sub-section (5), no decree for eviction on the ground specified in Clause (a), Sub-section (1) shall be passed by the court but the court may allow such costs as it may deem fit to the landlord.

Provided that a tenant shall not be entitled to any relief under this subsection if having obtained such benefit or benefit under Section 13-A in respect of any such accommodation, if he again makes a default in the payment of rent of that accommodation for six months.

Section 13(6) makes it abundantly clear that if a tenant fails to deposit or pay rent month by month as envisaged by Section 13(4) of the Act, the court shall order the defence against eviction to be struck out and shall proceed with the hearing of the suit. This clearly means that the court would not allow the defendant to take benefit of any of the provisions contained in the Act against eviction, though it will be open to him to take other defences, outside the purview of the Rent Control Law. This position has not been controverted by the learned Counsel for the appellant also and I think rightly so, On this point we have a decision of our own court *Nane Shah v. Ramkumar* 1956 RLW 446. Learned Counsel for the appellant has, however, argued that the ground of default relied upon by the plaintiff was waived in the trial court in as much as plaintiff did not press this matter either before the trial court or in the first appellate court and, therefore, the plaintiff cannot take the benefit of Section 13(6) of the Act. He has also argued that even though the plaintiff had made an application under Section 13(6) of the Act before the first appellate court, yet he did not press it and consequently he will be deemed to have given up this ground. Learned Counsel for the respondent has, however, strenuously contended that at no stage his client has abandoned this ground and since Section 13(4) and (6) contains a mandatory provisions of law and have been enacted for the benefit of the public, imposing positive duty on the tenant, the principle of waiver cannot apply as a defence to noncompliance with the provisions of Section 13(4).

8. That the statutory requirement of Section 13(6) is mandatory cannot be doubted in as much as the language of the Sub-section itself is clear and once a default is committed as contemplated by this section, the court has no discretion but to strike out the defence and proceed with the hearing of the suit. The question therefore, is whether the requirements or conditions for the benefit of the landlord under Section 13(4) can be waived. It was held in *Equitable Life Assurance Society of the United States v. Reed* 1914 A.C. 587 (p. 595) and *Edward Ramia, Ltd. v. African Woods, Ltd.* 1960 All ELR 627 (PC) (p. 630) that the principle of waiver applies when the requirements of the statute do not involve any question of public policy, the performance of the conditions cannot be waived. On the other hand if certain requirements or conditions are provided by a statute in the interest of a particular person, the requirements or conditions although mandatory may be

waived by him if no public interests are involved See *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh and Ors.* : [1964]6SCR1001 . It is therefore necessary first of all to determine whether the provisions contained in Section 13(4) and (6) involve any question of public interest or public policy or are only in the interests of a particular person.

9. Learned Counsel for the respondent has argued that the provisions of Section 13 of the Act are for the benefit of public and based on public policy, and cannot be said to be in the interest of a particular person and, therefore it is not open to any party to set up waiver or estoppel in case of non-compliance of this mandatory provision. In support of his submission the learned Counsel has relied upon *Maritime Electric Co., Ltd. v. General Dairies. Ltd.* AIR 1937 PC 114, where in it was observed by the Privy Council-

The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a Section of the public, that is, on grounds of public policy in a general sense, In such a case their Lordships do not propose to express any opinion as to statutes which are not within this category where as here the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is not only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law.

No doubt in that case their lordships were dealing with a private company which sold electrical power and was a public utility company within the meaning of the Public Utilities Act. It was under a statutory duty to furnish reasonable adequate service and facilities. The rationale of the Privy Counsel decision does not strictly apply to the facts and circumstances' of the present case. But one thing is clear,

that the Rajasthan Premises (Control of Rent and Eviction) Act is a special law made for protection of the tenant from eviction and is thus for the benefit of a Section of the public. It will, therefore, not be incorrect to hold that this statute has been enacted on grounds of public policy. The nature of the obligation imposed under section 13(4) is, in my opinion, of an imperative nature and the admission of waiver or estoppel would nullify this statutory provision.

10. I am, therefore, of the view that the defendant cannot successfully plead waiver or estoppel against the noncompliance with the statutory provisions of Section 13(4) of the Act. There was a statutory obligation on the part of the defendant to have paid the rent month to month by fifteenth of the succeeding month if he wanted to take the benefit of Section 13(4) & (7) of the Act and since he failed to do so, he must face the consequences provided by Section 13(6) of the Act.

11. I am also not inclined to hold as the counsel for the appellant wants me to do, that the plaintiff had waived this ground. The plaintiff expressly relied on the ground of default in his plaint. The defendant admitted the default and deposited the arrears of rent and also made an application under Section 13(4) of the Act to save himself from the eviction on the ground of default. The plaintiff did not abandon this ground at any stage of the litigation and thus there was no intentional or voluntary relinquishment. A waiver is an intentional relinquishment of a known right which is conspicuously absent in the present case. The plaintiff got the decree of eviction on the ground of personal necessity from the trial court and in the first appellate court also. He brought this ground to the notice of the first appellate court by making an application under Section 13(6) of the Act. The defendant filed a reply to this application, but the lower appellate court maintained the decree of ejectment on the ground of personal necessity. In these circumstances I am not prepared to accept the contention advanced on behalf of the appellant that the plaintiff had given up this ground before the first appellate court. In my considered opinion there was no waiver or abandonment of this plea on the part of the plaintiff and the question of waiver must be in the negative.

12. As stated earlier the defendant did not take any defence against eviction on any ground other than those contained in the Act and the natural consequence is that he is liable to be evicted. The liability of eviction, he had incurred by virtue of default: in payment of rent under Sub-section (1) of Section 13 of the Act continued and could have been escaped only by compliance of the provisions of Section 13(4) of the Act and since he did not do so there is no escape from the conclusion that a decree for eviction must be passed against him.

13. As a result of the foregoing discussion, I hold that the decree for eviction passed against the defendant appellant must be upheld though on different grounds. This appeal is, therefore, dismissed. But in view of the fact that the respondent has failed to substantiate the ground of personal necessity, I leave the parties to bear their own costs throughout. With this slight modification the judgment and decree of the lower appellate court are maintained and the appeal is dismissed.

14. Taking all circumstances into consideration, the appellant is granted four months' time to vacate the shop provided he pays the arrears of rent upto the end of June, 1969, if any, within one month from to-day and also goes on paying rent month to month hereafter regularly within fifteen days of its falling due.

15. Learned Counsel for the appellant prays for leave to appeal to Division Bench. I do not consider it a fit case to grant leave to appeal, The prayer is rejected.