

Kewal Vs. Sesmal

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SooperKanoon Citation : sooperkanoon.com/759833

Court : Rajasthan

Decided On : Mar-03-1981

Reported in : 1981WLN45

Judge : S.K. Mal Lodha, J.

Appeal No. : S.B. Civil Misc First Appeal No. 44 of 1978

Appellant : Kewal

Respondent : Sesmal

Advocate for Pet/Ap. : Mr. Rewa Chand

Disposition : Appeal dismissed

Judgement :

S.K. Mal Lodha, J.

1. This appeal by the defendant-tenant under Section 22 of the Rajasthan Premises (Control of Rent and Eviction) Act (No. XVII of 1950) (which will hereinafter, for the sake of brevity, be referred to as 'the Act'), is directed against the order dated January 4, 1978 of the Additional Civil Judge, Jodhpur by which he struck out his defence against eviction. This order was passed by the Additional Civil Judge in Civil First Appeal No. 11 of 1977, which was filed by the plaintiff-landlord under Section 96, C.P.C. against the judgment and decree dated

November 26, 1974 of the Munsif City, Jodhpur. Reference herein to the provisions of the Act will be to those which existed then during the pendency of the suit and at the time of filing of Civil First Appeal No. 11 of 1977.

2. The material facts, necessary for the disposal of this appeal, may briefly be noticed: The plaintiff-respondent instituted a suit for arrears of rent and ejection in the court of Munsif City, Jodhpur on July 3, 1972. The ejection was sought, inter alia, on the ground that the defendant-tenant, had not paid rent for the period of 16 months and 26 days upto July 2, 1972 and, therefore, he has rendered himself liable to eviction under Section 13 (1) (a) of the Act. Another ground on which the ejection was sought was reasonable and bona fide necessity of the plaintiff, which is a ground mentioned under Section 13(1)(h) of the Act. An application under Section 13(5) of the Act was filed by the defendant raising dispute regarding the amount of rent and stating that he is not a defaulter. The learned Munsif determined Rs. 282 upto February, 1973 and directed the defendant to deposit it within 15 days from the date of the order i.e. March 24, 1973. He further ordered that rent for March, 1973 and later on should be deposited by the defendant as per Section 13(4) of the Act. The suit was contested by the defendant vide written statement dated November 18, 1972. It was denied that the rent as claimed by the plaintiff was due from him and that he is a defaulter. The trial court framed 4 issues inclusive of relief on April 7, 1973. Issue No. 3 when translated into English, reads as under.

Whether the defendant is a defaulter?

After trial, the learned Munsif by his judgment dated November 26, 1974 dismissed the suit for ejection and decreed it for Rs. 13 as rent. He decided issue No. 3 against the plaintiff and in favour of the defendant and held that it was proved that the rent upto April 12, 1972 has been paid and as such when the suit was instituted on July 3, 1972, six months' rent was not due and, therefore, the plaintiff cannot evict the defendant under Section 13 (1) (a) of the Act. Against the dismissal of the suit, the plaintiff went in appeal and prayed that decree for ejection and Rs. 83.10 may be passed. This appeal was lodged on January 2, 1975 in the court of the District Judge, Jodhpur. It was however, transferred for

disposal to the Additional Civil Judge, Jodhpur.

3. On August 20, 1977, an application under Section 13(5) of the Act was filed on behalf of the plaintiff. It was stated in the application that after the dismissal of the suit by the Munsif City, Jodhpur on November 26, 1974, the defendant has neither paid nor deposited rent every month and, therefore, his defence against eviction may be struck out. Thereafter, on September 19, 1977, another application was submitted praying for striking out defence against eviction. In this application, it was stated that the defendant-tenant has not deposited the rent for the month of May, 1973 in the trial court in time inasmuch as it should have been deposited on July 2, 1973, but it was deposited in July 13, 1973. It was also stated in it that though the appeal was filed on January 2, 1975 against the judgment of the trial court dated November 26, 1974, the defendant has not deposited the rent every month from December, 1974 to August, 1977 as required by Section 13(4) of the Act. It was, therefore, prayed that the defence against eviction may be struck out. In this application, details of the rent deposited month by month by the defendant in the trial court were also stated in the Schedule. Both these applications were contested by the defendant on various grounds. It was inter alia, contested in the reply that it was not necessary for the defendant to have deposited the rent month by month after the suit for ejectment was dismissed on November-26, 1974. An objection was raised that no grievance regarding non-deposit of the rent month by month after the suit for ejectment was dismissed on November 26, 1974. An objection was raised that no grievance regarding non-deposit of the rent month by month after the dismissal of the suit for ejectment and late deposit of the rent for the month of May, 1973 was made in the memo of appeal. The learned Additional Civil Judge by his order dated January 4, 1978, accepted both the aforesaid applications and struck out the defence against eviction of the defendant. The defendant has preferred this appeal under Section 22 of the Act challenging the order of the learned Additional Civil Judge by which he struck out the defence in appeal which he was filed against the judgement and decree dated November 26, 1974 of the learned Munsif City, Jodhpur. As stated above, this order was passed on the applications, which were filed under Section 13(5) of the Act.

4. I have heard Mr. Rewa Chand for the defendant appellant and Mr. G.R. Singhvi for the plaintiff-respondent.

5. A preliminary objection was raised by the learned Counsel for the respondent that the appeal under Section 22 of the Act was not maintainable in this court, for, the applications were filed by the plaintiff before the Additional Civil Judge for striking out the defence against eviction, that the applications were accepted and the defence was ordered to be struck out and so, on appeal against the order of the Additional Civil Judge should have been preferred before the District Court under Section 22 of the Act. The objection is met by Mr. Rewa Chand, learned Counsel for the appellant by stating that the Additional Civil Judge, as an appellate court, has passed the order under appeal and as such under Section 11 of the Act, the appeal as filed in this Court is competent.

6. Material portion of Section 22 of the Act is as under:

Section 22. Appeal & Revision.--(1) From every decree or order presented by a Court under this Act, and appeal shall lie to the Court to which appeals ordinarily lie from original decrees and orders passed by such former court.

(2) No second appeal shall lie from any such decree or order.

(3)

According to Section 22, which regulates the filing of the appeals against the decree or order passed by a court under the Act, an appeal lies to the court, to which the appeal ordinarily lies from the original decree and orders by such former court. The appeal against the judgment and decree dated November 26, 1974 of the Munsif was lodged in the Court of District Judge, Jodhpur. The proceedings of the appeal went on in the Court of the District Judge from the date of its filing until May 28, 1973. On July 18, 1977, the appeal was ordered to be transferred to the Court of Additional Civil Judge, Jodhpur by the order of the District Judge, Jodhpur. Because of the transfer, the learned Additional Civil Judge, as a transferee-court came to be seized of the appeal. The learned Additional Civil Judge has passed the order in appeal, as an appellate court. He was asked to

strike out the defence of the defendant against eviction. Had the appeal been retained by the District Judge, and not transferred to the Additional Civil Judge, the appeal against the order passed by the District Judge, in exercise of his appellate jurisdiction would have laid before this Court. So also an appeal against the order passed by the Additional Civil Judge in appeal on being transferred by the District Judge, would ordinarily lie to this Court. As the order striking out the defence was passed by the learned Additional Civil Judge in exercise of the appellate jurisdiction. I am of opinion that the appeal as preferred by the defendant was rightly filed in this Court. The preliminary objection raised by the learned Counsel for the respondent that the appeal is not maintainable as it has been wrongly filed in this Court, is, therefore, overruled.

7. Now I proceed to examine the appeal on merits.

8. Mr. Rewa Chand, on behalf of the appellant, strenuously contended that it was not incumbent on the defendant-tenant to have deposited the rent month by month as required by Section 13(4) of the Act after the dismissal of the suit for ejectment based, inter alia, on the ground of default in payment of rent, when the plaintiff has preferred the appeal against the judgment and decree dated November 26, 1974 on January 2, 1975. According to him, after the dismissal of the suit based on the ground of default in payment of rent, the parties were re egated to the same position, which existed prior to the filing of the suit and if the defendant-tenant had committed any default in payment of the rent month by month, the plaintiff could only institute a second Suit for ejectment on the ground of default. He maintained that the learned Additional Civil Judge went wrong when he held that since the case is in continuation of the suit and so, the defendant should have deposited the rent month by month under Section 13(4) of the Act. Mr. G. G. Singhvi, on the other hand, supported the order of the learned Additional Civil Judge in this regard. A serious question that, thereof, emerges for determination is whether it was necessary for the defendant-tenant to have deposited the rent month by month as required by i 13(4) of the Act after the dismissal of the suit, which, amongst others, was based on the ground of default, was dismissed as the defendant-tenant had not committed any default in payment of rent within the meaning of Section 13(1) (a) of the Act. The case of the plaintiff was that upto July

2, 1972, an amount of Rs. 101.20 for 16 months and 26 days was outstanding against the defendant. The learned Munsif, after considering the evidence of the parties on record vide his judgment dated November 26, 1974, came to the conclusion that the defendant had paid rent upto April 12, 1972 and as the suit was filed on July 3, 1972, the rent for six months was not due and, thereof, he was not a defaulter in payment of rent. The suit of the plaintiff was dismissed and an appeal was filed by the plaintiff on January 2, 1975. The applications for striking out defence against eviction were filed in the appeal on the grounds (1) that the defendant had not deposited the rent month by month after November 26, 1974, the date when the suit was dismissed; and (2) that the defendant had not deposited the rent for the month of May, 1973 in the trial court in time. According to Section 13 (A), if the suit is based on the ground set forth in Clause (A) of Sub-section (1) of Section 13, with or without any other grounds referred in that Sub-section, the court, on the first date of hearing or on or before such date, as the court may, on the application made to it fix in this behalf within such time not exceeding two months as may be extended by the court, the tenant is required to 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 upto the end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of six per cent per annum from the date when any such amount was payable upto the date of deposit and, thereafter, to continue to deposit or pay month by month, by the fifteenth of each succeeding month a sum equivalent to the rent at that rate. Sub-section (5) of Section 13 provided that if in any suit referred to in Sub-section (4), there was any dispute as to the amount of rent payable by the tenant, the court was required to determine, having regard to the Provisions of the 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 Sub-section (4) of Section 13. According to Sub-section (7) of Section 13, if a tenant had made deposit or payment as required by Sub-section (4) or Sub-section (5), no decree for eviction on the ground specified in Clause (a) of Sub-section (1) of Section 13 could be passed by the court but the court had discretion to allow such costs as it deemed fit to the landlord. In this case, the dispute regarding the

amount of rent payable by him (tenant) was raised by the defendant. The court determined the amount on March 24, 1973 at Rs. 202 and directed him to deposit within 15 days from the date of the order. After trial, the learned Munsif found that the defendant was not a defaulter within the meaning of Section 13(1) (a) of the Act, for, the rent of six months was not due on the date of the institution of the suit i.e. July 3, 1972, for, it was proved that the rent was paid upto April 12, 1972. The learned Additional Civil Judge, relying on *Lalchand Jamatmal v. Nanabhai Ranchhoddas (1)* : AIR1976 Guj122 , held that as the defendant has failed to deposit the rent month by month after the service of notice on him of the appeal, which was filed by the plaintiff-respondent against the dismissal of the suit, inter alia, based on the ground of default under Section 13(1)(a) of the Act and so for non-compliance of the second part of Section 13(4) i.e. failure to deposit rent month by month, his defence should be struck out. This was based on the ground that appeal is a continuation of the suit.

9. In *Dayawati v. Inderjit* : [1966]3SCR275 , the question of appeal being a continuation of the suit arose. Hidayatullah, J., as he then was, while delivering the judgment of the Supreme Court, observed as under:

An appeal has been said to be 'the right of entering a superior Court, and invoking its aid the interposition to redress the error of the Court below'. The only difference between a suit and an appeal is this that an appeal 'only reviews and corrects the proceedings in a cause already constituted but does not create the cause.' As it is intended to interfere in the cause by its means, it is a part of it, and in connection with some matters and some statutes it is said that an appeal is a continuation of a suit.'

From this decision, it is clear to my mind that an appeal is a continuation of the suit in the context of some statutes only. The crucial question is whether under Section 13(4) of the Act for the purposes of the second part of Section 13 (4), an appeal is also a continuation of the suit. Under Section 13(4), when the suit was based on the ground specified in Clause (a) of Sub-section (1) of Section 13, with or without the other grounds mentioned in Sub-section (1) of Section 13, the tenant was required to deposit the rent month by month as envisaged by Section 13(4) of the

Act. When the ground so specified in Clause (a) of Sub-section (1) of Section 13 of the Act was not held to be established by the learned Munsif and the suit was dismissed, how can it be said that the defendant should have complied with the provisions to deposit the rent falling due month by month in the court which was required to be done in some situations after the service of notice of the appeal. In this case, the plaintiff has appealed against the judgment and decree dismissing the suit. It is possible that by the time service is affected on the tenant regarding the appeal preferred by the plaintiff-landlord, few months may elapse. In that case, how is the tenant expected to know that the landlord has appealed and that he is required to deposit the rent from month to month regularly. Not only this, in which court should he deposit the amount even if he were considered liable to deposit it in anticipation of such an appeal, which may be filed against the dismissal of the plaintiff-landlord's suit for ejection based on the ground of default when he has not been found to be liable to eviction on the basis of the ground specified in Clause (a) of Sub-section (1) of Section 13? There is no provision in the Act enabling the appellate court or the revisional court to strike out the defence against eviction of the tenant in an appeal or revision filed against the dismissal of the suit for ejection based on the ground specified in Clause (a) of Sub-section (1) of Section 13 of the Act. For all these reasons, I am therefore, firmly of the opinion that it was not open to the learned Additional Civil Judge while seized of the appeal against the judgment and decree of the dismissal of the suit for ejection based, inter alia, on the ground specified in Clause (a) of Sub-section (1) of Section 13 of the Act, to have struck out the defence against eviction of the defendant-tenant on the ground that he has not deposited rent month by month regularly after the service of the notice of the appeal on him.

10. In Lalchand's case : AIR1976 Guj122 , Section 12(3)(b) of the Bombay Rents, Hotels and Lodging House Rates Control Act (No. LVII of 1947) (for short 'the Bombay Act') came up for interpretation, which runs as under:

(b) In any other case, no decree for eviction shall be passed in any such suit, if on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and

permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court.

In that case, the question which, the learned Judges were called upon to decide was whether in view of the language used in Section 12(3)(b) of the Bombay Act in order to earn the protection of that Clause the tenant whose case falls under that Clause must continue to pay the standard rent and permitted increases and continue to pay or tender in Court regularly such rent and permitted increases during the pendency of the appeal filed by the landlord, after dismissal of the landlord's suit for recovery of possession on the ground of non-payment of rent. The Full Bench considered Section 5(iv)(10) Section 11 and Section 12 of the Bombay Act. Having regard to the language used in the aforesaid provisions and the Scheme of the Bombay Act and relying on *Vora Abbasbhai v. Haji Gulamnabi*, : [1964]5SCR157 , the Full Bench held that Section 12(3)(b) applies even at the appellate stage and the words 'till the suit is finally decided' occurring in Section 12(3)(b) refer also to the decision of the suit in appeal by the appellate court when an appeal is preferred by the landlord against a decree passed by the trial court dismissing this suit and the question arises before the appellate Court whether the tenant is entitled to the protection of Section 12(3)(b), the appellate court would have to consider whether the tenant has, after paying or tendering in court the arrears of standard rent and permitted increases on the first day of hearing of the suit on or before such other date as might have been fixed by the Court, continued to pay or tender in Court regularly the standard rent and permitted increases till the decision of the appeal, and that if he has not paid the amount of standard rent and permitted increases as fixed by the trial court and in case the appellate court has enhanced the standard rent and permitted increases has not been paid, the difference arising because of such enhancement on or before such date as the appellate court might fix and after such date continued to pay regularly the enhanced rent and permitted increases the tenant would be deprived of the protection of Section 12(3)(b). Because of the aforesaid provision and Sections 5(10)(iv), 11 and 12, it was held that it applies to an appeal filed against the dismissal of the suit and when the question arises before the appellate court whether the tenant is entitled to the protection of Section 12(3)(b) of the Bombay Act. This authority, in my opinion, is clearly distinguishable and on its basis, I find it

difficult to hold that in view of Section 13(4) of the Act, as the tenant had not deposited the rent month by month after the dismissal of the suit in the appellate court after the service of the notice on him, he should be considered to have failed to deposit or pay the amount referred in Sub-section (4) of Section 13 of the Act and, therefore, his defence against eviction should be struck out. In these circumstances, the learned Additional Civil Judge was not right when he held that the defendant-tenant's defence against eviction for failure to deposit rent month by month under Section 13(4) of the Act after service of notice of the appeal, should be struck out. I may, however, make it clear that if the tenant has not complied with Section 13(4) of the Act as envisaged by it, and the trial court has failed to strike out the defence under Section 13(6), the appellate court has power to strike out the defence against eviction under Section 13(6) of the Act, for, under Section 107(2), C.P.C. the appellate court has same powers and performs as nearly as may be the duties as are conferred and imposed by the Civil Court of original jurisdiction in respect of the suit instituted therein.

11. The only point that now remains to consider is whether the finding of the learned Additional Civil Judge that as the defendant-tenant had deposited the rent for the month of May, 1973 on July 13, 1973, which should have been deposited on July 2, 1973, the defendant has contravened the provisions of Section 13(4) of the Act, so, therefore, his defence against eviction has been rightly struck out. Tender No. 765 for depositing the rent for May, 1973 was submitted on July 13, 1973, though the amount on account of the strike of the government employees was deposited on September 4, 1973. The contention of the learned Counsel for the plaintiff-respondent is that the tender for the deposit of the amount should have been submitted on July 2, 1973 when the court had reopened after summer vacation. In pursuance of the order of the learned Munsif, which was passed on March 24, 1973, the defendant deposited the rent month by month as is clear from the Schedule submitted by the plaintiff with his application dated September 19, 1977. The defendant had deposited the monthly rent upto October, 1974. The suit was dismissed by the learned Munsif on November 26, 1974. The tender for the deposit of the rent for the month of May, 1973 was submitted on July 13, 1973. No objection about this belated deposit of the rent for the month of May, 1973 was raised in the trial court. No application for striking out the defence against the

eviction under Section 13(6) of the Act was filed during the pendency of the suit. No objection was taken even in the memo of appeal about this which was filed against the decree of dismissal of the suit. The learned Munsif has held that the defendant is not a defaulter under Section 13(1)(a) of the Act, for, six months' rent was not due. From these facts, it will not be unreasonable to infer that the plaintiff has condoned the omission of the part of the defendant in not depositing the rent for the month May, 1973 in time. It is also clear that in the trial court, the plaintiff has not insisted on a right which accrued to him on account of belated deposit of rent of rent for the month of May, 1973. There is, thus, implied relinquishment or foregoing of the right which could be enforced after the default in payment of rent for the month of May, 1973 was committed. For failure to deposit the rent for the month of May, 1973 in time, as contemplated by Section 13(4) of the Act, the defence against eviction could not have been struck out.

12. In view of the conclusion, to which I have arrived at, I do not consider it proper to pass any order in regard to point No. 4, formed by the learned Additional Civil Judge, to the effect whether the defendant-respondent is entitled to take advantage of amended Section 13A.

13. For the aforeaid reasons, I am unable to sustain the order of the learned Additional Civil Judge striking out the defence against eviction of the defendant-tenant.

14. The result is that the appeal is allowed and the order dated January 4, 1978 of the learned Additional Civil Judge striking out the defence against eviction of the defendant-appellant, is set aside and both the applications. filed by the plaintiff are dismissed. In the circumstances of the case, I direct that the parties shall bear their own costs of this appeal.