

Babulal Vs. Rajendra Singh and ors.

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Court : Rajasthan

Decided On : Sep-25-2000

Reported in : 2007(3)WLN560

Judge : N.P. Gupta, J.

Appeal No. : S.B. Civil Second Appeal No. 163 of 2000

Appellant : Babulal

Respondent : Rajendra Singh and ors.

Disposition : Appeal allowed

Judgement :

N.P. Gupta, J.

1. This appeal has been filed by the defendant tenant against the judgment and decree of learned lower Appellate Court whereby, by reversing the judgment and decree of the learned trial court the plaintiffs suit for eviction from the suit premises has been decreed. Obviously the learned trial court had dismissed the suit.

2. The suit was filed way back on 10.12.1987 against three defendants being Bhanwarlal, Balchand and Babulal. However pending litigation Bhanwarlal expired and his legal representatives have been taken on record. In the original plaint the case of the plaintiff was that the suit premises is on rent with the defendants No. 1

and 2. It was also alleged that the ground of eviction as originally pleaded was that the defendant No. 1 has constructed his house In the name of his wife while the defendant No.2 has constructed his house at New Pali Road and thus neither of the defendants No. 1 and 2 nor any of their family members live in the suit premises. In the suit eviction was claimed on the grounds detailed in para 8 of the plaint being (i) default In payment of rent and (ii) that the premises have been sublet by the defendants No. 1 and 2 to the defendant No.2 (appellant or in the alternative the defendants No. 1 and 2 have parted with possession in favour of the defendant No.3 without consent of the plaintiff.

3. The defendant No.3 appellant, filed the written statement on 19.12.1989 contending inter alia that the premises were taken on rent from the grand father of the plaintiff, that the three defendants being brothers so also their father Shri Nenu Ram had been living as Hindu Undivided Family in the suit premises and as such had been carrying on the timber business in adjacent premises of the landlord. It was also contended that the mother of the defendants, is still continuing to live in the suit premises along with the appellant. It was also contended that right since beginning the rent of the premises was paid either by the defendants father Nenu Ram or by the defendant No.3, and receipts were issued in different names as tenant, but the tenant in both the premises were the same and the rent was paid by the same person, and it is in this process that receipt of rent for the suit premises was started to be issued In the name of 'Bhanwarlal Balchand'. It was also contended that the rent for the period 1.8.1978 to 31.7.1985 has been received by the plaintiff from the defendant No.3 on 9.7.1986. While the rent for the period 1.8.1985 to 31.7.1986 was also received by the plaintiff from the defendant No.3 and that the defendants No. 1 and 2 had started living in their houses since long long ago (18- 20 years) as the suit premises was small enough to house all of them, and despite knowledge of this fact the plaintiff had received the rent from defendant No.3 knowing him to be the tenant, has brought a false suit at this belated hour. Practically identical plea was taken in reply to para 8(b) of the plaint also.

4. It is thereafter that on 21.7.1990 plaintiff filed an application for amendment of the plaint seeking to add two more sub-paras In para 8; first being acquisition of

suitable alternative accommodation by the tenant (defendants No. 1 and 2) and second being that on account of defendants No. 1 and 2 having shifted to those accommodation, the suit premises is not being used by the tenant, for a period of six months since before filing of the suit for the purposes for which it was let. This amendment was allowed, amended plaint was submitted on 9.12.1990.

5. To this amended plaint an amended written statement was also filed by the appellant, contending that the defendants No. 1 and 2 are living in their houses since as early as 1969-1971, while parents of the defendants along with defendant No.3 are living in the suit premises and after death of father, the mother and the defendant No.3 along with his family are living. It was also contended that since the premises are being used by the tenant, it cannot be said that the ground of eviction is available.

6. The learned trial court framed issue No.2 regarding subletting, and issue No.3 comprehending question of defendants No. 1 and 2 having acquired alternative accommodation and non-user of the suit premises by the tenant. Issues No. 4 and 5 were framed on the question of comparative hardship and partial eviction.

7. The learned trial court vide judgment dt. 11.9.1996 dismissed the plaintiffs suit. Though by deciding the issue No. 1 the defendant No. 1 was held to be defaulter but was given the benefit of first default. Regarding issue No.2 it was held that the plaintiff or his rent collector must be knowing that the defendants No. 1 and 2 are living in a separate house and the appellant alone was living in the suit premises and still he accepted the rent from him. And thus admitted the defendant No.3 to be the tenant. It was also found that the signature of Nenuram on the receipt establishes that the premises was let out to Nenuram father of the... appellant. Thus it was held that the plaintiff has failed to establish subletting. Regarding issue No.3 it was held that undisputedly the defendants No. 1 and 2 have constructed house, and are living therein, but their mother and defendant No.3 are living in the suit premises, therefore, it cannot be said that no member of the family of the defendants No. 1 and 2 is living in the suit premises, and thus the issue was not decided in favour of the plaintiff. Issues No. 4 and 5 in my view are wholly irrelevant as the suit is not based on the ground of reasonable and bona fide

necessity of the landlord.

8. Against this judgment and decree the plaintiff filed an appeal. What is significant to note is that a look at the Appellate Court's judgment shows that only issue assailed by the plaintiff was the decision of the learned trial court on issue No.2. Regarding issue No.3, in para 15 it is specifically recorded that both the parties have no objection, with respect to this issue, obviously to the finding recorded by the learned trial court.

9. However, the learned Appellate Court decided issue No.2 in favour of the plaintiff, by holding that receipts were issued in the name of Bhanwarlal Balchand, though the rent was paid many a times by Babulal, Sobha wife of Babulal and Nenuram, and their signatures have been obtained on the rent receipts but by these papers Babulal and Shobha do not become tenant. It was then held that no documentary evidence was produced to show that Nenu Ram and his sons have been residing in the suit premises from the year 1953--54 as no ration card, voter list etc. has been produced. Then a blank stamp paper purchased in the year 1964 was considered as it was purchased for execution of the rent note in the name of 'Bhanwarlal Balchand' and the rent receipts are also issued in the name of 'Bhanwarlal Balchand'. The learned lower Appellate Court, with these findings also held that in the face of this situation, even living of the other persons in the suit premises within the knowledge of landlord and even receipt of rent thereafter would not make such another person tenant. Thus, It was found that the learned trial court was in error in deciding issue No. 2 against the plaintiff. It was then held that admittedly Bhanwarlal and Balchand have shifted to their new houses in 1970 and 1971 and the defendant No.3 along with his mother continued to live in suit premises but there is no pleading in the written statement about any waiver or acquiescence nor any question has been raised and therefore, the defendant No.3 cannot be held to be tenant even on the basis of waiver or acquiescence.

10. Aggrieved by this judgment and decree the present appeal has been filed. The plaintiff landlord entered caveat and the other respondents being-legal representatives of defendant No. 1 as respondent No.2 while respondent No.3 being the defendant No.2, since were represented by the counsel for the appellant

(defendant No.3) in the court below, they did not file any written statement, for disposal of the present appeal effecting their service is dispensed with, with the consent of the learned Counsel for the parties as appearing.

11. The learned Counsel for the appellant has contended that some procedural errors have been committed by the learned courts below which according to the learned Counsel vitiated the impugned judgment and decree, inasmuch as according to the learned Counsel the present respondent Rajendra Singh had filed an affidavit in another litigation between defendant No.2 Balchand and Devi Singh to the effect that the quarter, Kotri and open land only were let out to Balchand and his father and brother by the deponent's father and grand father for residence and carrying on business. According to the learned Counsel this admission clearly establishes that the suit premises were let out to the appellant, his brother and father and therefore, there is no subletting. This affidavit has been taken on record by the learned Appellate Court Under Order 41 Rule 27 and in view of the learned Counsel for the plaintiff admitting the genuineness of the certified copy it has been marked as Ex.A-30, then the application of the appellant for recalling plaintiff for cross-examination has been turned down. The contention of the learned Counsel for the appellant is that the appellant should have been allowed opportunity to cross-examine the deponent of the affidavit by recalling him which would have established that the basic case of the plaintiff of subletting is false, and that the appellant is living in the suit premises as a tenant. The second contention that has been raised is that in view of the finding of the learned Appellate Court regarding issue No.3 having not disturbed the findings of the learned trial court on this issue to the effect that 'it cannot be said that none of the members of the family of defendant Nos. 1 and 2 lives in the suit premises' as admittedly the mother is living there who is very much a member of their family, since the appellant is also living with the mother the finding of the learned Appellate Court on issue No.2 are self contradictory. The next contention raised was that in any case, even if the appellant were to be taken to be sub-tenant yet since the plaintiff has not disclosed as to since when the premises were sublet, and since the appellant is living in the suit premises, at least for good number of years, for the period 1973 to 1986 rent has been received from the appellant with the knowledge that the appellant is living in the suit premises, and with the knowledge the defendants No. 1 and 2

being not living in the suit premises, there was acquiescence of the plaintiff in the alleged subletting, and therefore, also the suit could not be decreed, and that the finding of the learned Appellate Court on this question of acquiescence and waiver is based on patent misreading of the written statement.

12. The learned Counsel for the respondent on the other hand contended that the premises referred to in the affidavit at para 13 are different properties, the mere fact that the findings on issue No.3 was not challenged before the learned Appellate Court does not amount to upholding the findings on issue No.2. It was also tried to be contended on the basis of the contents of para 15 of the impugned judgment that both the parties did not object to issue No.3 that Bhanwarlal and Balchand started living in their own houses since 1970-71, and therefore, according to the learned Counsel it is to be assumed that the suit has been decreed on the basis of the ground also. The learned Counsel then contended that no question of waiver and acquiescence has been framed nor defendant No.3 has raised it as well. It was then contended that the learned Appellate Court was right in holding that the appellant cannot be said to be tenant, and there being no plea about acquiescence and or waiver. Thereafter it was alternatively contended that even if this Court were to find or spell out from the written statement any plea of waiver or acquiescence, being raised by the defendant appellant then, since the plaintiff remained under impression of absence of plea, an appropriate issue may expressly be framed and it be remitted to the learned trial court Under Order 41 Rule 25.

13. Having heard learned Counsel, in my view the present appeal involve following substantial questions of law:

(1) Whether the learned Appellate Court was right in holding the appellant to be sub-tenant?

Whether the learned lower Appellate Court was in error in not accepting the appellants stand that he is living in the suit premises as a member of Hindu Undivided Family since the life time of Nenu Ram and after his death, with his mother being widow of Nenu Ram?

(3) Whether in a suit for eviction on the ground of subletting, the plaintiff can be non-suited if he is shown to have acquiesced in alleged subletting, resulting into waiver of permission requisite for validity of subletting.

(4) If the answer to Q.3 is in affirmative whether the learned lower Appellate Court is in error in declining to go into the question of acquiescence and waiver on the basis of misreading of written statement?

Having considered the submissions and having perused the record of the learned courts below I would like to decide question Nos.3 and 4 first.

14. The question, In the first instance requiring to be gone into is, as to whether there can be any acquiescence or waiver in subletting so as to non suit the plaintiff? Because if there can be no acquiescence or waiver, then pleading of the written statement may have to be considered only for the purposes of going into the question as to whether the alleged sub-tenant is a sub-tenant or tenant himself? But if the subletting can be acquiesced in or waived, then the pleadings of the alleged sub-tenant while amounting to plea of denial of subletting, and claiming himself to be the tenant may also amount to a plea of acquiescence or waiver on the part of the plaintiff in not filing a suit for eviction on the ground of subletting despite knowledge of subletting for a good long number of years, having received rent from the subtenant, may be with issuing receipts of rent in the name of original tenant.

15. For deciding this legal question I have to look into the provisions of the statute being Section 13(1)(e) which reads as under:

13(1)(e) that the tenant has assigned, sub-let or otherwise parted with the possession of, the whole or any part of the premises without the permission of the landlord; or

16. There are identical provisions prohibiting subletting enacted in various Rent Control Legislations of different States and language of different statutes is differently worded inasmuch as many of the statutes prohibit subletting 'without written consent'. Some statutes prohibit subletting 'without prior written consent.'

While some statutes only prohibit subletting 'without permission'. The Rajasthan Rent Control law falls in the last category. The cases where the statute prohibits subletting without previous written consent, by implication exclude applicability of the principle of acquiescence or waiver. The second category of statutes, I do not propose to deal with at this juncture as it is not relevant. Coming to the third category of statutes, I find that in *Matiabir Singh v. Anant Ram* reported in : AIR1966 All214 , while dealing with the case of subletting, it was found in second appeal that land lord had admitted in his cross-examination that Chhota had been living as sub-tenant for four years, though he had seen him in the house during this period, though he had paid rent to the appellant in his presence, and that on occasions the money paid by Chhota to the appellant in his presence was passed on to him. On these facts, High Court held that the court shall presume, from the landlord's conduct that he had acquiesced in the sub-tenancy. It was also held that:

the learned Judge has rightly observed that mere knowledge of sub-tenancy does not of itself establish acquiescence but in this case there was more than mere knowledge. Where the tenancy has lasted for four years with the knowledge of the landlord; and the rent has been paid by the sub-tenant in the presence of the landlord and on several occasions passed on to him by the tenant, a presumption of acquiescence will arise a presumption which will be strengthened by the fact that the landlord offered no explanation why he had waited for four years before filing the suit for ejectment on the ground of illegal sub-letting. Such a presumption will not be displaced by a bare denial of the landlord that he had acquiesced, as it is based on the unexplained conduct of the landlord.

17. This judgment then came to be followed in *Reoti Prasad v. Ajai Pal Singh* reported in 1979(2) RCJ- 11, wherein in para 9 it was, found and held as under:

In the present case, plaintiff Vijai Pal Singh appeared as P.W. 1. In his examination-in-chief he said that defendant No.2 sat on one of the three defendant No. 1 and further that it was wrong to say that the sub-tenancy was with his or any of his brothers consent, When cross-examined on behalf of the second defendant, P.W. 1 showed full knowledge of the relationship between the parties and even of

the payment of Rs. 15/- as rent by him to defendant No. 1, and also admitted serving notice in the year 1965 on the second defendant; and the fact that the second defendant was carrying on cloth business in the disputed portion of the shop for the last 15-16 years. The plaintiff Vijay Pal Singh did not offer any explanation as to why he did not take any action for the ejectment of the first defendant for these 10 to 16 years, and at any rate after the notice served in the year 1965. From the own statement of the plaintiff. Vijay Pal Singh, it is clear that he had the fullest knowledge of the sub-letting, if any and took no action to eject the first defendant from the shop in suit inspite of such knowledge for a period of 15-16 years. If the sub-letting had been without the plaintiffs consent and unlawful, it can be presumed that they would not have been shown in instituting the suit for the defendant's eviction as soon as they came to know of it, and at any rate they would not have acted in the manner in which the plaintiffs in the present case did act.

18. Then in *A.S. Sukochana v. C. Dharmalingam* reported in : [1987]1SCR379 the Hon'ble Supreme Court held as under:

The mere fact that for as many as 18 years no objection was raised, and no action for possession was instituted against the father of the appellant (respondent?) in his lifetime notwithstanding the fact that a sub-tenant was openly in occupation of a part of the rented premises, would give rise to an inference that it was never treated as unlawful subletting by the appellant or her father.

19. In view of these judgments, In my opinion, the principle of acquiescence and waiver is also applicable In appropriate case to non-suit the plaintiff seeking eviction on the ground of subletting without permission. In other words even if the plaintiff is able to establish the tenant to have sublet the premises without landlord's permission or consent, still with the knowledge of the sub tenancy if the A plaintiff continues to receive rent from the sub-tenant and with the knowledge of the person paying rent to be sub-tenant for reasonable period of time then it may attract, in particular circumstances of individual case waiver or acquiescence on the part of the landlord in subletting so as to disentitle him for maintaining suit for eviction on the ground of Section 13(1)(e). The question No.3 is thus answered in

the affirmative.

20. In view of my these conclusions, since the principle of acquiescence and/or waiver are attracted. I now come to question No.4. A perusal of the written statement filed on 19.12.1989 so also 14.5.1991 does show that the written statement dt. 19.12.1989, that in para 5 it has been clearly pleaded that the plaintiff very well knows about the defendants No. 1 and 2 living at different place and even since before 31.7.1986 the plaintiff has received rent from the defendant No.3 only, with the knowledge of defendant No.3 being the tenant. Then while replying to para 8 of the plaint, again it was contended that the defendant No.3, the appellant himself has regularly been paying rent to the plaintiff, and that rent has been received by the plaintiff consistently despite knowledge of the defendant No.3 living in the suit premises. Then the same plea has been maintained in the amended written statement also. True it is that the appellant has not expressly used the words 'acquiescence' or 'waiver' on the part of the plaintiff. But then a fair reading of this pleading does mean nothing less than this that the plaintiff did receive the rent from the appellant despite knowledge of defendants No. 1 and 2 having left premises by starting to live elsewhere and despite knowledge of the defendant No.3 himself living in the suit premises for good number of years, and obviously since no suit for eviction has been filed, the plaintiff has acquiesced in the alleged subletting even if there be. The learned lower appellate Court has thus clearly misread the written statement. This question is also thus answered in affirmative.

21. I also find some force in the contention of the learned Counsel for the plaintiff respondent inasmuch as though the pleadings taken in the written statement as mentioned above do clearly make out a pleading of acquiescence or waiver but at the same time the fact also does remain that the plea was taken predominantly with intention to plead that the defendant No.3 is not the sub-tenant but is living in the premises as a tenant and in his own right, and since the pleadings taken by the defendant in the written statement as mentioned above can and do amount to a plea of acquiescence or waiver on the part of the plaintiff, and since according to the learned Counsel for the plaintiff respondent he could not and did not lead any evidence on this question with requisite consciousness, in order to do substantial

justice to the parties, the matter should be remanded back to the learned trial court.

22. Since I purpose to remand matter back to the learned trial court with a direction to the learned trial court to frame appropriate issue on the question as to whether the plaintiff has disentitled himself from maintaining the present suit for eviction from the sub-tenant on the principle of acquiescence/waiver, I am not inclined to decide the other two questions raised and arising in the present appeal.

23. Accordingly the appeal is allowed, impugned judgment and decree of the learned courts below are set aside and the case is remanded back to the learned trial court for deciding afresh in view of the observations made above while deciding question Nos.3 and 4. The parties are directed to appear in the trial court on 6th November, 2000. Since the matter is very old; the learned trial court is further directed to decide the suit expeditiously.

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