Thulasibalan and Another Vs. Rajesh

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SooperKanoon Citation : sooperkanoon.com/781675

Court : Chennai

Decided On : Feb-23-2001

Reported in : (2001)1MLJ777

Judge : Prabha Sridevan, J.

Acts : Transfer of Property Act, 1882 - Sections 106, 111 and 116; Tamil Nadu Act, 1960 - Sections 8(5); Rent Control Act - Sections 8(5); Code of Civil Procedure (CPC), 1908 - Order 7

Appeal No. : S.A. No. 901 of 1999

Appellant : Thulasibalan and Another

Respondent : Rajesh

Advocate for Def. : Mr. Rama Narayan for ;M/s. Sampath Kumar Association, Adv.

Advocate for Pet/Ap. : Mr. P.K. Sivasubramaniam, Adv.

Judgement :
ORDER

1. The appellants, the owners of the suit property let out the same to the respondent on 15.2.1991 for a period of 11 months. The lease was not renewed. Since the property was constructed within 5 years before the suit was filed, the

property was not subject to the purview of the Tamil Nadu Buildings (Lease and Rent Control) Act. However, the appellants had file rent control proceedings which were dismissed on 27.7.1993 on the ground that the Tamil Nadu Act 18 of 1960 will not apply. Another notice was given by the appellanton 3.9.1993 calling upon the respondent to vacate the premises on or before 31.10.1993. The respondent did not vacate and so the suit was filed.

2. The respondent attacked the notice as being invalid in law and not according to the provisions to the Transfer of Property Act and also denied the averments in the plaint of wilful default in paying rents.

3. Actually, two suits were filed by the appellant against two tenants. Both the suits were decreed on 10.12.1997, giving each of the defendants two months time to vacate the premises. Both the defendants filed appeals. One appeal was dismissed confirming the decree for possession. But the appeal filed by the respondent herein was allowed and therefore, the present second appeal has been filed. The question of law that arises in this second appeal is whether the occupation of the respondent after the expiry of lease would confer on him the status of a tenant holding over entitled to a notice of termination of tenancy?

4. Mr.P.K. Sivasubramaniam, learned counsel for the appellants submitted that there was no intention on the part of the appellants to continue the lease after 15.1.1992. He referred to Ex.B1 dated 1.8.1991 wherein the appellant had clearly informed the respondent that he should handover possession on the expiry of the lease on or before 15.1.1992 and that they are not willing to extend the lease. Therefore, according to the learned counsel the tenancy came to be determined by efflux of time and thereafter there was no necessity for the appellant to issue any further notice. The learned counsel also submitted that after 15.1.1992 they have not accepted any rents which is why when the appellants had mistakenly filed R.C.O.P.No.1029 of 1992, the respondent had to resort to Section 8(5) of the Tamil Nadu Act 18 of 1960 for deposit of rents. The learned counsel submitted that it was true that the word tenant by holding over was used in the plaint but the conduct of the parties and also the evidence both oral and documentary must be taken into account and by no sketch of imagination could the court have found any

material to come to the conclusion that the appellants had recognised the respondent as tenant after 15.1.1992. The learned counsel referred to the following judgments to support his case.

(1) Arulmighu Thandumariamman Thirukkoil v. Erammal, 1998 (1) L.W 236, wherein this court held that when a lease is for a fixed period the lease automatically terminates by virtue of Section 111(a) of the transfer of Property Act and no notice is necessary under Section 106 of the same Act.

(2) Kal Khushroo Bezonjee Capadia v. Bai Jerbal Hirjibhoy Warden and another, . The learned Judges of the Federal Court have held that,

' the tenancy which is created by the 'holding over' of a lessee or under-lessee is new tenancy in law even though many of the terms of the old lease might be continued in it, by implication; and it cannot be disputed that tobring new tenancy into existence, there must be a bilateral Act.' The following words were extracted.

' The assent of the landlord which is founded on acceptance of rent must be a acceptance of rent as such and in clear reconginition of the tenancy right asserted by the persons who pays it.'

(3) M/s Sudarshan Trading Company Limited v. MMrs. L. D' Souza, , where the Division Bench of the Karnataka High Court have hold that,

'if, after the expiry of the period of lease or after its determination, a tenant merely holds over without the landlords consent there is no tenancy of any kind at all.'and further, 'if there is no fresh contract of tenancy between the parties- and such a contract cannot come into existence without the consent of both- the position is that the case clearly falls under Section 111(a) and no notice under Section 106 becomes necessary as there is no month to month tenancy by holding over. This would be so notwithstanding the unilateral assertions in the plaint that there was a month to month tenancy.'

(4) Bhawanji Lakhamshi and others v. Himtlala Jamadas Dani and others, , where the Supreme Court held that,

' the Act of holding over after the expiration of the term does not create a tenancy of any kind..... There is a distinction between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent.'

(5) Ganga Dutt Murarka v. Kartik Chandra Das and others, , in which the Supreme Court held that even the payment and acceptance of contractual rent by landlord after the lease had expired by efflux of time the tenant will not accrue the status of a tenant holding over and he will not be entitled to notice under Section 106.

(6) M. Vijayalaxmi v. G. Goverdhan Reddy, 1997 (2) SCC 358. This was a case where the premises was let out for a period of 11 months from 1.4.1984 and on 28.1.1985, as notice was issued by the landlord stating that on and from 1.3.1985 is tenancy came to an end and his occupation would be unauthorised. The Supreme Court held that merely because a notice was given terminating the tenancy would not mean that landlord is not entitled to recover the possession of the property after the tenancy had come to an end. The Supreme Court said that even if the notice was not a valid under Section 106 it could be regarded as a notice indicating that the tenancy would not be continued after the expiry of the term.

(7) Kanyakumari District Consumers Co-operative Wholesales Stores Limited represented by its President v. S. Paramesawari 2000 (3) MLJ 501, where this Court had held that when once the period got over, the owner was entitled to seek possession without issuing notice under Section 106 of the Transfer of Property Act.

(8) Shanthi Devi v. Amal Kumar Banerjee, AIR 1981 SC 1550, was relied on for the purpose that parties could not by their pleadings alter the intrinsic character of the lease or bring about a change of rights and obligations flowing therefrom.

Therefore, according to the learned counsel a period of lease had come to end on 15.1.1992. By Ex-B1 in August 1991 itself, the appellants had indicated that he had intention of renewing the lease, they have not received any rents, they had not indicated in any manner that they were consenting to the continuance of the tenant

in the suit property. The words 'tenants by holding over' in the plaint cannot be construed to the advantage of the appellant. The entire pleading must be read as a whole and if so read it would clearly demonstrate that the lease had expired as per Section 111(a) of the Transfer of Property Act and no notice was necessary and even if any notice was issued by the appellant which was invalid as per the provisions of the Section 106 of the Transfer of Property Act, it could be ignored, since the tenant was not entitled to any such right.

5. Mr. Rama Narayanan, on the other hand appearing for the respondent urged that the appellant had clearly indicated that he recognised the possession of the respondent as a tenant even in his pleadings. He referred to the following sentence in para 4 of the plaint,

'The said lease agreement on expiry of 15.1.1992 was not renewed and the defendant continued to occupy as a tenant by holding over.'

He also submitted that when the case of the appellant is that the tenancy came to an end on 15.1.1992 itself, in the cause of action paragraph, there was no reference to this date, on the other hand, there was only a reference to the notice dated 3.9.1993, which was not in accordance with the provisions of the Section 106 of the Transfer of Property Act. When the appellant had based his case on a notice which was invalid his suit must fail. The learned counsel also pointed out to the extracts from the judgment of the Court below wherein it was stated that the receipt of rents as per the English calendar month would not entitle the appellant to issue notice determining the tenancy with the expiry of 15 days of the end of the English calendar month. The tenancy was from 15th to 15th, therefore, end of month of the tenancy should be in accordance with that. He therefore submitted that the judgment of the Court below was unassailable. He referred to the following judgments:

(1) S. Mariammal and others v. Sornavalli Achi and others, 1997 (1) MLJ 232. In that case, the lease deed was for a period of 33 years beginning from 13.4.1969. The rent was agreed to paid before the 10th of succeeding English month. The notice to quit treating the tenancy as starting from the 1st date of the English month and ending with the end of the English month clearly invalid in law and

there was no proper termination of tenancy. The learned Judge held that it was settled law that the date of payment or rent need not synchronize with the commencement of the tenancy and the tenancycommences on the 13th of every English month and the notice to quit treating the tenancy as starting from the 1st date of the English month and ending with the end of the English month is clearly invalid in law.

(2) Satish Chand Makhan and others v. Govardhan Das Byas and others, . In this case, the Supreme Court held that the defendants were holding over under Section 116 of the Transfer of Property Act as tenants from month to month and therefore, notice under Section 106 was required.

(3) Rajangam (died) and 5 others v. Clara Ammal and 3 others, 1997 (1) CTC 490. This was also for the proposition that provision for payment of rent on the first date of the English calendar month does not make the monthly tenancy on the first date of the English calendar month but upto the 15th day of the English calendar month.

(4) N. Raju Reddiar and another v. The Tamil Nadu Electricity Board Represented by its Chairman and another, 1995 (1) MLJ 561. This was relied on by the learned counsel for the purpose that in the absence of pleadings no party can raise any contention at the time of the argument. According to the learned counsel for the respondent the appellant had admitted the respondent's status as a tenant and therefore, cannot be now heard to say that the lease had expired in 1992 itself. He strenuously urged that if that were there was no necessity for the appellant to issue another notice terminating the tenancy. This itself would show that the landlord-tenant relationship persisted evenafter 1992 when the lease expired. Therefore, according to him the judgment of the Court below shall not be interfered with.

6. As stated earlier, the question is whether the Court below was right in holding that the respondent was entitled to a notice under Section 106 of the Transfer of Property Act and whether the Court below was right in dismissing the suit on the ground that the notice issued by the appellant was not in accordance with the said provisions. As per the lease agreement the lease expired on 15.1.1992. There was

no renewal of lease thereafter. To come to the conclusion that the respondent was continuing in possession with the consent of the landlord there must some evidence. The respondent points out to the phrase in the plaint where the appellant refers to the respondent as the tenant holding over and also to the use of the word tenancy in paragraph 7 of the plaint wherein it was pleaded by the appellant that it was determined by a month's notice dated 3.9.1993 and also to the cause of action paragraph wherein it was stated that the tenancy was terminated with the expiry of 31.10.1993. Juxtaposed against this, we have, Ex.B1, which is dated 1.8.1991, where the appellant had clearly indicated that the want the property back on 15.1.1992 and he was not inclined to renew the lease and the fact that the appellant had not received rents from the respondents after this period. The use of the word 'tenancy' in the plaint or the words 'tenant' by holding over cannot advance the case of the tenant. It is clear from the aforesaid materials that the appellant was not inclined to renew the lease at all. The learnedAppellate Judge finds that the appellants had recognised the respondents as tenants for the following reasons:

In the decision, Bhawanji Lakhamsi and others v. Himatlal Jamnadas Dani and others, a passage from which has already been extracted, the Supreme Court has clearly and categorically stated that even 'holding over' after the expiration of the term will confer on the tenant a right only if he does so with the consent of the landlord. Even acceptance of amounts equivalent to rent by the landlord shall not be regarded as evidence of a new agreement of tenancy, according to this decision. This is what their Lordships say;

'If the tenant asserts that the landlord accepted the rent not as statutory tenant but only as legal rent indicating his assent to the tenant's continuing in possession, it is for the tenant to establish it. Where in fails to so establish it cannot to be said that there was holding over by him.'

7. Except to point out to a phrase in the plaint, the respondent in this case has not been able to establish that the appellant assented to his continuance in possession as a tenant. In the Federal Court decision relied on by the learned counsel for the appellant, the learned Judges held that, 'the principle underlying in

Section 116 of the Transfer of the Property Act is implied contract and test of renewal of tenancy is the consensus between the parties and not an option exercisable by the lessor alone and when a tenant holds over after the expiration of lease wants to demonstrate that there was a renewal of lease he must show that there was a mutual agreement to this effect which may be an implied Act or an explicit one.' It cannot be seriously said that there was any such mutual agreement in this case. On the other hand the landlord has taken a series of steps to show that he was not interested in renewing the lease. In the first place, the lease itself is only for 11 months and before the expiry of the 11th of the month the appellant had issued notice which stales that he wanted the property back, then he filed thought misguidedly a Rent Control Petition for eviction. He refused to receive rents. The respondents had to resort to the provisions of Section 8(5) of the Rent Control Act. The Rent Control Petition was dismissed on the ground the remedy of the appellant was to file a civil suit. By way of abundant caution, they had issued the notice on 3.9.1993, and then he filed the suit. The notice dated 3.9.1993 itself was redundant and was not necessary since the lease had clearly expired as per Section 111(a) of the Transfer of property Act.

8. The learned counsel for the respondent pointed out to the alleged lacuna in the pleadings wherein it was stated that the expiry of lease on 15.1.1992 was not referred to in the cause of action of paragraph. Now we see the provisions of the Code of Civil Procedure with regard to plaint. Order 7, gives the standard particulars that the plaint should contain. One among themis that the plaint should contain the facts constituting the cause of action and when it arose. These particulars have been clearly set out in the plaint where the appellant has stated that the said lease agreement on expiry of 15.1.1992 was not renewed. Therefore, the respondent cannot be heard to complain that these particulars were not furnished, the pleadings state the term of lease, the expiry of lease and the filing of the R.C.O.P. and the subsequent notice and the suit. Therefore, the fact that the expiry of the lease on 15.1.1992 was not referred to again in the cause of action para specifically is not fatal to the appellant's case.

9. The tenancy commenced on the 15th of the English Calendar month. But payment of rents were to be made on the first date of the English Calendar month.

There are admitted facts. The notice, Ex.A4 dated 3.9.1993 was issued calling upon the respondent to vacate the premises on or before 31.10.1993. The learned First Appellate Judge rejected this notice as being invalid on the ground that the notice ought to have terminated the tenancy ending with the month of tenancy, which in the instant case is the 15th day of the English Calendar month and to this purpose the learned counsel for the respondent referred to several cases. There is no dispute regarding the question that the payment of rent need not synchronize with the commencement of the tenancy and the notice to quit under section 106 should be in conformity with the period of tenancy and not the date fixed for the payment of rent. But in the instant case, the tenancy came to an end on 15.1.1992, therefore, the validity or invalidity of the notice, Ex-A.4, is not mutual since the respondent is not entitled to any notice after the lease period came to an end.

10. Ultimately, when once the period of lease agreed upon by the parties has come to an end, a new lease can come about only if the parties thereto agree to such renewal. While the payment and acceptance of rents may be one of the factors to prove the creations of a new lease that perse will not amount to a renewal. There must be indicators in the conduct of the parties which show that there was an offer to renew the lease by one party and assent to such renewal on the side of the other. Without such an offer and an implied or explicit acceptance the new contract of lease cannot be held to have been created. The question of law is therefore answered in favour of the appellant. The judgment and decree of the Court below setaside. The second appeal is allowed with costs throughout. The respondent is granted one months time to handover the possession. Consequently, the C.M.P.No.8280 of 1999 is also closed.