

K.S. Abdullah Vs. S. Srinivasan

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Court : Chennai

Decided On : Nov-13-1970

Reported in : (1971)1MLJ385

Appellant : K.S. Abdullah

Respondent : S. Srinivasan

Judgement :

G. Ramanujam, J.

1. As all the above three revisions are connected they are dealt with together. The respondent, who is the same in all the three revisions, filed three petitions for eviction of the petitioner, who is also the same in all the revisions, from three different portions of premises No. 1, Smith Road, Mount Road, Madras-2 on the grounds (1) that he bona fide required the premises for the purpose of immediate demolition and reconstruction and (2) that the petitioner had denied the title of the landlord and that such denial was not bona fide. The tenant-petitioner resisted all the eviction petitions and stated that he is entitled to the benefits under the City Tenants Protection Act, in respect of a portion of the premises wherein he had put up superstructure, that the request of the landlord for the purpose of demolition and reconstruction was not bona fide and that there has been no valid notice terminating the tenancy in his favour. He also alleged that the premises from which he is sought to be evicted has been constructed after 1960 and therefore, the

landlord cannot seek eviction under the provisions of the Madras Buildings (Lease and Rent Control) Act, 1960. The Rent Controller, however, overruled the objections of the petitioner and ordered eviction. There was an appeal to the appellate authority constituted under the Act and the order of eviction passed by the Rent Controller has been affirmed therein. The appellate authority also agreed with the Rent Controller that the requirement of the premises by the landlord for the purpose of demolition and reconstruction had been established and that concurrent finding has not been canvassed before me and the learned Counsel for the petitioner fairly conceded that he is not questioning that finding. On the question whether the petitioner was entitled to the benefits under the Madras City Tenants Protection Act, in respect of that portion of the land over which he had put up the superstructure, the appellate authority also agreed with the Rent Controller that the petitioner was not entitled to the benefits under that Act, and this finding also has not been challenged in these revisions. On the questions whether there has been a valid notice determining the tenancy in favour of the petitioner and whether the premises is one constructed after 1960 so as to exclude the application of the provisions of Madras Act (XVIII of 1960) the view of the Rent Controller as well as the appellate authority was that there has been a valid notice determining the tenancy and that the premises came within the purview of the Act. This alone is challenged by the learned Counsel for the petitioner.

2. The question whether the premises was constructed after 1960 can easily be disposed of. It was the case of the petitioner that there was a complete reconstruction of the premises in 1961 after he took the premises on lease under Exhibit P-8, dated 24th August, 1959, and that as such the building will get exempted from the provisions of Madras Act (XVIII of 1960). But a perusal of the lease deed Exhibit P-8 shows that the premises let out was a storeyed Madras terraced Building together with zinc shed on its back eastern side and a vacant plot on its northern side. Clause 7 of the lease deed permitted the lessee to put up pucca superstructures on the northern front portion and the eastern back portion of the existing terraced superstructure at a cost of Rs. 3,000 and to adjust the same at the rate of Rs. 40 per month from the monthly rentals of Rs. 100 fixed under the lease deed. The petitioner in his evidence as R.W. 1 had stated that, in 1961 the terrace was constructed in front side and zinc shed was put up on the back side

and a terraced portion was put up further back. From the terms of the lease deed and the evidence of the petitioner it is clear that the constructions after 1960 were only additional constructions to the existing building which was taken on lease. Hence it is not possible to hold that the entirety of the building leased out to the petitioner under Exhibit P-8 is a new building constructed after 1960 so as to exclude it from the provisions of Madras Act (XVIII of 1960).

3. The only further question that remains to be considered is whether the view taken by the Courts below that there has been a proper notice of determination of tenancy preceding the eviction petitions is correct or not. It is seen that there was a notice, dated 13th May, 1967, by which the respondent determined the tenancy in favour of the petitioner and called upon him to vacate on or before 31st May, 1967. The petitioner, however, did not vacate as per the notice but instead issued a reply notice on 18th May, 1967 wherein he alleged that the respondent had demanded a monthly rent of Rs. 470 that as he was not willing to pay the higher rent the respondent has come forward with the notice of termination, and that the notice of termination has been motivated. He was not willing to vacate the premises as demanded by the respondent. The respondent by a rejoinder, dated 2nd June, 1967, addressed to the petitioner disputed the allegations made against him by the petitioner in his reply notice, dated 18th May, 1967, and stated that he has been asking for vacant possession from 14th July, 1966, and that the petitioner has been evading the same, and called upon the petitioner to immediately vacate and deliver vacant possession failing which, he threatened to take proceedings in eviction. The petitions for eviction have been filed in September, 1967. The learned Counsel for the petitioner contended that the notice determining the tenancy given on 13th May, 1967 had been waived by the respondent (i) by issuing a further notice, Exhibit P-25 dated 2nd June, 1967, and (ii) by the receipt of rents for the subsequent period. The Rent Controller as well as the appellate authority held that neither the receipt of rents subsequent to the issue of the notice on 13th May, 1967, nor the issue of a second notice on 2nd June, 1967, constituted a waiver of the notice of termination already issued. The learned Counsel for the petitioner questions the correctness of the view taken by the Court below.

4. According to the learned Counsel the contractual tenancy between the petitioner and the respondent though originally put an end to by the notice, dated 13th May, 1967, has been revived by the respondent's waiver of the notice by issuing a second notice on 2nd June, 1967, and by receiving the rents due subsequent to 13th May, 1967, the date of the original termination notice. The learned Counsel refers to Section 113 of the Transfer of Property Act and the illustrations given thereunder. Section 113 of the Transfer of Property Act and the illustrations are set out hereunder:

Section 113 : A notice given under section in, Clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it, showing an intention to treat the lease as subsisting.

Illustrations:

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires; B tenders, and A accepts rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

The learned Counsel wants to treat the notice, Exhibit B-25, dated 2nd June, 1967, as a second notice to quit so as to invoke the explanation (b) of Section 113 in support of his plea based on the respondent's waiver of the first notice dated 13th May, 1967. But a perusal of the notice Exhibit P-25, dated 2nd June, 1967, clearly shows that it is not a second notice determining the tenancy but it is merely a rejoinder disputing the allegations made by the petitioner in his reply notice, dated 18th May, 1967. The said notice Exhibit P-25 does not proceed in the basis that the respondent had waived the first notice in sending the same. The facts in this case are entirely different from the facts in *Mohanlal v. Vijai Narain*, where it was held that giving of a second notice to quit is a waiver of the first notice so far as the person giving notice is concerned. I therefore feel that the petitioner is not right in invoking the said illustration (b). The decision in *Basheshar Nath v. Delhi*

Improvement Trust , on similar facts supports my above view. I therefore hold that by issuing Exhibit B-25, tnG respondent has not waived his notice dated 13th May, 1967, determining the contractual tenancy.

5. The petitioner also invokes the aid of illustration (a) to Section 113 by relying on the receipt by the respondent of the rents accrued on or after 1st June, 1967. In his petition for eviction the respondent has relied on his notice, dated 13th May, 1967, to show that the tenancy in favour of the petitioner has been determined by that notice. In the counter statements filed by the petitioner in answer to the eviction, he merely stated that the notice alleged to have been given is not sustainable in law and that there has been no valid and sufficient determination of the tenancy. Even in his evidence the petitioner had not stated as to when the rent was received by the respondent and for what period. The respondent-landlord, however, admitted in his cross-examination that after the notice of termination of the tenancy he had received rents. This admission of the respondent is relied on by the learned Counsel for the petitioner to show that by receipt of rents subsequent to the termination of the tenancy the respondent has waived the notice. As pointed out by Ramamurti. J., in *Saleh Bros. v. K. Rajendran* : AIR1970 Mad165 , if the rent has been received after the eviction petition had been filed it cannot be construed as a waiver of the notice, because once the matter has come to the Court, the election has become irrevocable. In this case the notice, dated 13th May, 1967, determined the tenancy after the expiry of 31st May, 1967. Therefore to invoke the aid of Section 113, the petitioner-tenant has to show that the respondent-landlord has received the rent due for the period subsequent to 1st June, 1967, before he filed the eviction petition in September, 1967. The receipt of rent for the period anterior to 31st May, 1967, will not constitute a waiver under Section 113 of the Transfer of Property Act. It is only the receipt of rent which has become due since the expiration of the notice that will constitute waiver. The petitioner has, therefore, to prove that the rent which has become due since the expiration of the notice on 31st May, 1967, had been received by the respondent before the filing of the eviction petitions with an intention to treat the lease as subsisting. Ramamurti, J., in the above decision has elaborately gone into the question of waiver under Section 113 of the Transfer of Property Act and expressed that:

The plain language of Section 113, indicates that a waiver does not ipso facto result from any act of omission or commission on the part of the lessor, but the act must be such as clear evidence of the lessor's intention to treat the lease as subsisting. It is the intention of the lessor to treat the lease as subsisting which is the predominant and deciding factor in bringing about a waiver and not any particular act by itself. Illustration (a) must, therefore, be understood and applied in consonance with the principle underlying the section with due reference to the intention of the lessor. There is no warrant for the view that mere receipt of rent, whatever may be the intention of the lessor, should of its own force, divorced from the circumstances' of the case, be regarded as amounting to a waiver. Illustrations are useful as aids to construction and for securing the proper meaning of the section, but they cannot control the plain meaning of the section.

The preponderance of the weight of judicial authority is that in addition to the receipt of rent by the landlord there should be proof that the receipt was with the intention to treat the lease subsisting. There should be either an expressed contract or conduct of the parties justifying the inference that, after the determination of the contractual tenancy, the landlord's intention was that the occupation of the premises was as a tenant. As already stated in this case the evidence is not specific as to whether the landlord received any rent due for the premises after the expiration of the notice with an intention to treat the lease as subsisting, before he filed the eviction petitions. I am of the view that on the facts of this case it is not possible for the petitioner to invoke the aid of Section 113 of the Transfer of Property Act.

6. As pointed out by Lord Goodard, C.J., in *Clarke v. Grant* (1949) 1 All. E.R. 768, there is a distinction between an acceptance of rent after notice to quit and an acceptance of rent after notice of forfeiture. If a landlord seeks to recover possession of the property on the ground that there has been a forfeiture of the lease, it has always been held that the acceptance of rent after notice waives the forfeiture, the reason being that in the case of a forfeiture the landlord has the option of saying whether or not he will treat the breach of covenant as a forfeiture and by accepting the rent after the notice of forfeiture he acknowledges or recognises that the lease is continuing. But with regard to the receipt of rent after

the notice to quit such a result will not follow. If a proper notice has been given in respect of a tenancy and that tenancy has been brought to an end by such notice, the payment of rent after the termination of the tenancy would operate in favour of the tenant only if it could be shown that the parties intended that there should be a new tenancy. In the case of payment of rent after a notice to quit the question is *quo animo* the rent was received, and what the real intention of both parties was? If the tenancy has been properly put an end to by the issue of a notice, it has to be seen whether the respondent, by receiving the rent, intended to create a new lease in favour of the petitioner. The evidence does not disclose any positive intention on the part of the respondent to create a new Contractual lease in favour of the petitioner. On the other hand the issue of a notice of rejoinder, Exhibit P-25 on 2nd June, 1967, shows clearly the anxiety of the respondent to recover possession and to have the petitioner evicted. Hence the receipt of rent by the respondent in this case cannot be treated as a waiver of the notice of termination dated 13th May, 1967.

7. In *Kuppuswami v. Mahadeva* (1950) 1 M.L.J. 72 : I.L.R. (1950) Mad. 844, the effect of acceptance of rent from a tenant by the landlord was considered and the Division Bench had expressed as follows:

If there had been an act by the tenant which entitled the landlord to bring the tenancy to an end and the landlord thereafter accepts rent, his action is construed as a waiver of his rights arising out of the forfeiture. Similarly, if after the issue of a notice to quit but before the period determining the lease has expired, the landlord accepts rent, it may be construed as a waiver of the right that has accrued to him upon the issue of a notice to quit. Where, however, the period fixed by the notice has expired, the tenancy is at an end; and no money accepted after the termination of the tenancy operates as a waiver or gives the tenant any right to continue in possession.

In view of the consistent judicial opinion that in a case where rent is received by the landlord after notice to quit, the notice to quit can be said to have been waived by the landlord only if by such receipt of rent the landlord intended to treat the lease subsisting. In this case, I am not in a position to infer any such intention on

the part of the respondent to continue the tenancy or create a new tenancy in favour of the petitioner. I have to, therefore, hold that the notice determining the tenancy issued on 13th May, 1967 by the landlord is a valid notice to quit and his petitions for eviction cannot be defeated on the ground that there has been no valid notice to quit.

8. In the result I uphold the order of eviction and dismiss all the revision petitions. There will, however, be no order as to costs in any of these petitions, Time for vacating two months.

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