

Durga Devi, Etc. Vs. Brijmohan Lal

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Court : Delhi

Decided On : Sep-09-1975

Reported in : 1975RentLR566

Judge : B.C. Misra, J.

Acts : [Transfer of Property Act, 1882](#) - Section 106, 111,

Appeal No. : REGULAR SECOND APPEAL 151 Of 1974

Appellant : Durga Devi, Etc.

Respondent : Brijmohan Lal

Judgement :

B. C. MISRA, J.

(1) THE word 'tenant' has been defined in clause (1) of section 2 of the Act as "any person by whom or on whose account or behalf the rent of any premises is or but for a special contract would be, payable and includes a subtenant and also any person continuing in possession after the termination of his tenancy but shall not include any person against whom an order or decree for eviction has been made". The tenant as defined above is protected from eviction by section 14 of the Act. The contractual tenancy of a tenant is determined in any of the modes prescribed under section 111 of the Transfer of Property Act and one of them is a notice to

quit in accordance with section 106 of the Transfer of Property Act. In the instant case, notice to quit had been served on the original tenant, Babu Ram, on 29th July, 1954 requiring him to quit the premises by 31st August, 1954. The contractual tenancy of Babu Ram had, therefore, come to an end. Thereafter he only enjoyed the protection of the statute against his eviction. As held by the Supreme Court in *Anand Nivas Private Ltd V. Anand Kalyani's Ptd.* AIR 1965 SC 414, the protection of the statute against eviction was entirely personal to the tenant and was not capable of being transferred or assigned or inherited. Consequently, the legal representatives of Babu Ram were not tenants and did not enjoy the protection of the law nor did they have any legal right to remain in possession of the premises. The suit of the landlord for recovery of possession of the property from the legal representatives will therefore lie in a civil court and such a suit is based on the title of the landlord to recover the possession and not on the existence of any relationship of landlord and tenant between the plaintiff and the defendants. Such a suit is not hit by section 50 of the Rent Act, but is rather saved by the exception contained in subsection (4).

(2) RELIANCE has been placed by Mr. Raizada on a Full Bench decision of five judges of this court in *Kedar Nath V. Smt. Mohini Devi*, AIR 1974 Delhi 171, =1973. Rajdhani L. R, 701 but there is nothing in the said judgement to assist the appellants. In that case the court was dealing with a situation where after terminating the contractual tenancy by notice to quit, the landlord had instituted a petition for eviction before the Controller against the statutory tenant himself on the grounds mentioned in clauses (a) to (1) to the proviso to subsection (1) of section 14 of the Act. The petition as framed was perfectly valid and maintainable and did not suffer from any infirmity with regard to the jurisdiction of the Controller to try the same. During the pendency of the petition the statutory tenant died and his legal representatives were brought on record. The question before the Full Bench was whether the said petition would then abate or could be continued against the legal representatives of the deceased and the Full Bench answered the question that the jurisdiction of the controller to continue the petition against the legal representative of a tenant who was a party to the petition but had died during its pendency continued unabated and the legal representatives were bound to deliver possession of the property to the landlord, if he succeeded in establishing the

grounds of eviction which he had claimed. The Full Bench did not consider the case where the statutory tenant had died before the institution of proceedings for eviction. It also did not repel the right of the landlord to file a suit for recovery of possession against the legal representatives of the deceased tenant in civil court on the basis of his title. In fact, it observes in paragraph (30) of the report that the Controller can pass an order for eviction against the legal representatives only on the grounds mentioned in the statute, but in case the Controller "came to the finding that the landlord had not been able to establish any of the grounds. then he would have no power to pass an order for recovery of possession for the reason that the conditions on which his power to order recovery of possession rested, did not exist, but the landlord may then file, it' so advised, a regular suit for possession in the civil court, which would be on a different cause of action". The aforesaid observations of the Full Bench provide a complete answer to the appellants herein. The respondent was entitled to institute a suit in a civil court for recovery of possession of the premises from the legal representatives of a deceased statutory tenant, if he was not basing his claim on any of the grounds specified in clauses (a) to (1) to the proviso to subsection (1) of section 14 of the Rent Act of 1958. The case in hand relates to a suit for recovery of possession on the basis of title against the legal representatives of the deceased statutory tenant, who according to the well established principles of law did not have any legal right or title in the property. This contention of the learned counsel therefore, fails and is rejected. As such, the suit was, in my opinion, maintainable in civil court.

(3) THE second contention is again without any force. The petition for eviction had been dismissed by the Controller on the ground that the tenant had died and the petition had abated against the legal representatives. Rule 9 of Order 22 of the Code of Civil Procedure on which the learned counsel for the appellants relies only bars the institution of a fresh suit on the same cause of action. It is difficult to hold that the proceedings for eviction before a Rent Controller under the Rent Act, constitute a suit and that those proceedings will, apart from the provisions of section 10 of the Rent Act bar the institution of any suit in civil court. In fact in *Om Prakash v. Dr. Rattan Singh* , 1960 PLR 543, the Supreme Court observed that the finding of the Controller with regard to the existence of relationship of landlord and tenant though final so far as the Controller is concerned, was only tentative

and indeed subject to review by civil court. This authority would show that the jurisdiction of the civil court is different and is not barred by anything that the Controller does or omits to do, apart from the statutory provisions taking away the jurisdiction of the civil court like section 50 of the Rent Act or any other provision of law which expressly or by necessary intendment bars its jurisdiction. I am, however, assuming for the sake of arguments that Order 22 Rule 9 applies to the suit. Still the contention of the counsel has absolutely no force. The cause of action before the Rent Controller consisted of the grounds of eviction specified in the Rent Act. The suit filed in the civil court is based on a different cause of action : it is known as a title suit and the landlord has instituted it on the allegations that he was the owner of the property and the appellants had no right, title or interest to remain in the property and so they must deliver its possession to the respondent. This is entirely a different cause of action. Considered from any point of view, I find that there is no provision or principle of law which barred the instant suit in the civil court. Moreover, it should not be forgotten that this suit had been instituted on 7th November, 1966 before the Controller passed an order on 4th March, 1967 dismissing the petition as having abated and so there is nothing in the order of the Controller or provisions of law to unseat the already instituted suit of the respondent.

(4) I mention that the first two contentions of the appellant had not been advanced before the lower appellate court and I have found them to be devoid of merit. However, the third and the fourth contentions had been pressed before it. So far as the waiver of the notice is concerned the lower appellate court has rightly repelled the contention and I agree with its findings. The first notice dated 23rd July, 1954 (Ex. P 2) stated that the tenant had fallen into arrears of rent and was not paying rent in spite of demand and the landlord required the premises in dispute for his own residence and the notice was given to quit the premises on or before 31st August, 1954. This was clearly a notice to quit and contractual tenancy came to an end on its expiry and no defect has been pointed out in this notice. Reliance is, however, placed on the second notice (Ex. D1) dated 10th September, 1962. It has been sent by registered post and had been returned as refused. The first paragraph of the notice describes the fact of giving premises on rent and states that Babu Ram is a tenant and the second paragraph describes the fact of

the said monthly tenancy starting from 1st and the third describes that the tenant is habitual defaulter and the next paragraph states that the tenant is a source of nuisance and the following paragraph states that the respondent was the owner of the premises and he needed it for his own occupation and occupation of the members of his family and the next following paragraph is that the tenant did not allow the respondent to use the roof of the house. The last paragraph states as follows : "your tenancy is, therefore, terminated and you are directed by this notice to pay the rent up to date as detailed above against clear receipt of discharge and also vacate the premises in dispute and hand over its peaceful possession to our client within two months of this notice failing which suit shall be instituted against you at your costs and risk. "

(5) CLEARLY this is a notice of demand provided by clause (a) of the proviso to Subsection (1) of section 14 of the Act and it cannot be construed as a notice to quit so as to have the effect of waiving the first notice within the meaning of the second illustration to section 113 of the Transfer of Property Act. Indeed the first notice, dated 28th July, 1954 had validly terminated the contractual tenancy and had specifically notified that in the event of not getting compliance with the notice, the eviction proceedings would be initiated against the tenant. This was in fact followed by a suit for eviction under the Rent Act and the aforesaid notice formed a part of the cause of action. The suit was tried till its decision and decree. After the decision of the suit, the cause of action merges in the decree. Consequently, the notice to quit which has resulted in a suit and decree had served its object and purpose and the rights and obligations of the parties had then to arise out of the decree and there was nothing left in the notice to quit to be waived by any further act of the parties, since the matter has travelled from the domain of the parties into judicial proceedings and judicial verdict. It has not even been suggested that the decree of the court in the first suit revived the contractual tenancy of the parties which had legally been terminated by the notice to quit and there is no reliable evidence of any fresh contract of tenancy between the parties arrived at with their express or implied mutual consent. Under the circumstances the issue of the subsequent notice (after the passing of the decree) in respect of demand of arrears of rent for a period subsequent to the one covered by the previous suit did not have a legal effect of waiving the previous notice which had validly terminated

the contractual tenancy. Wood fall on Landlord and Tenant, 27th Edition, in paragraph 2040 has observed that generally speaking, giving a second notice to quit does not waive a notice previously given unless, with other circumstances, it is the basis for inferring an intention to create a new tenancy after the expiration of the first and a second notice to quit given to expire before the first is valid; a good parol notice to quit will not be waived by a subsequent insufficient notice in writing.

(6) NO authority directly bearing on the subject has been cited before me by either of the counsel. Some assistance may, however, be derived from other authorities. In Mademsetty Satyanarayana v. G. Yelloli Rao. AIR 1965. S. C. 1405, the court observed that the expression 'waiver' in its legally accepted sense, meant that waiver was contractual and might constitute a cause of action ; it was an agreement to release or not to assert a right. Surely the first notice to quit had been used by the plaintiff respondent to assert his right to obtain eviction of the appellant in the first suit. The same, therefore, would not constitute any subject of waiver in the circumstances of the case. In Illahibux v. Munir Khan, AIR 1953 Nagpur 212, B. P. Sinha C.. (as his Lordship then was) observed that in a case where after service of a notice to quit the landlord had actually instituted a suit for ejectment and for recovery of damages for use and occupation, the defendant should before making the payment insist upon the plaintiff withdrawing the suit for eviction and without it if the defendant made certain payment, they could not be taken to be inconsistent with the plaintiff's right which is sought to be enforced by the suit. The learned Judge further observed that an act of waiver was an act of the party and if the parties were already litigating in court, their rights could not be affected except by an express contract between them to the effect that the rights asserted in the suit by the plaintiff and by the defendant had been adjusted out of court. In this authority an earlier decision of the High Court reported as Shah Wall Ahmed v. Mt. Hussaini Begnm, AIR 1917 Patna 469, was followed. Similarly in Puran Mal Jaiswal v. Onkar Nath, AIR 1959 Patna 128, the Division Bench held in paragraph (7) that when the tenency had been legally determined by a notice to quit and a suit had also been instituted by the landlords for eviction of the tenants, a mere combination of the claim for both rent and damages for the period subsequent to the expiration of notice did not operate as waiver of the notice. The High Court of Bombay in Navnitlal Chunilal v. Baburao, AIR 1945 Bombay 132

also took the same view. In *Khumani v. Saktey Lal*, AIR 1952 Allahabad 579, the court observed in paragraph (6) that if the landlord actively continued the prosecution of the case or appeal with regard to the ejectment of the tenant, mere acceptance of rent by him could not be treated as waiver so as to deprive him of the right of ejectment in pursuance of the decree which he had obtained. I have, therefore, no doubt that the contention of the learned counsel for the appellants that the issue of the second notice, if served, has had the effect of waiving the first notice dated 28th July, 1954 which had terminated the contractual tenancy and had culminated in the decree in the previous suit is without any substance.

(7) THE lower appellate court dealt with the contention of the appellants in an interesting manner. It observed that the argument of the learned counsel for the appellants was very strange and fallacious and the counsel did not admit the service of the second notice, then how could he say that first notice had been waived and if he admitted the service of the second notice the second notice thus terminated the tenancy, even if the first notice had not been waived. The question of waiver of the first notice did not arise if he did not accept the service of the second notice and thus the tenancy is terminated by the first notice. So in this way the court held that the contractual tenancy of the deceased tenant had been terminated either by the first notice or by the second notice. In any event, the status of the deceased tenant was only of a statutory tenant. However, I am of the view that the tenancy had been finally terminated by the first notice dated 28th July, 1954 and the second notice in law does not operate to waive the first notice. I do not find any legal infirmity in the finding of the court below that the contractual tenancy of Babu Ram had been terminated and he was only a statutory tenant and on his death no right or interest in the property was transmitted to his legal heirs or representatives in any way. The contention, therefore, fails. Under the circumstances, it is unnecessary for me to consider whether or not the second notice which had been refused will be presumed to have been served.

(8) SO far as the ownership is concerned, the respondent has claimed the property as owner of the house and he has established in evidence that he was the adopted son of Smt. Ram Piari who had executed a registered will dated 26th June, 1931 (Ex.

P. 9) in his favour wherein she had declared the respondent to be her adopted son under the authority of her husband The said will was admitted to probate Ex. P. 8. The will, has, therefore, been duly proved and in my opinion, it constitutes sufficient evidence (coupled with the oral evidence on the subject) to establish that the respondent is the owner of the property and the findings of the court below are unassailable. The contentions of the appellants have no force and are rejected.

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