Surendra Nath Bibra

Vs

Stephen Court Ltd.

Civil Appeal No. 661 of 1963

(J. C. Shah, S. M. Sikri, V. Ramaswami-I JJ)

04.02.1966

JUDGMENT

SIKRI J. -

This appeal by special leave is directed against the judgment of the High Court of Calcutta in an application under s. 115 of the Code of Civil Procedure and under art. 227 of the Constitution filed by the tenant, Shri Surendra Nath Bibra, now appellant before us.

Stephen Court Limited, respondent before us, hereinafter referred to as the plaintiff, filed a suit in the Court of Small Causes, Calcutta, for the recovery of rent from September 1956 to November 1956, at the rate of Rs. 350/- per mensem, and interest, against the appellant, hereinafter referred to as the defendant, alleging that the defendant was a monthly tenant by virtue of a lease dated April 30, 1956, under the plaintiff, in respect of flat No. 17 at premises No. 18A, Park Street, known as Stephen Court in the town of Calcutta, and that the defendant had not paid the rent from September to November, 1956. The defendant, inter alia, pleaded that relying on the representation and assurance of the plaintiff that three bed-rooms, two bath rooms etc. would be available to the defendant in flat No. 17 he executed a lease on April 30, 1956, for a period of 21 years, but the plaintiff put him in possession only of two bed-rooms and not three, and according to him, in the circumstances he was entitled to suspend the rent altogether.

The Small Cause Court Judge, Mr. Mandal, found that the defendant had not been put into possession of one of the three bed-rooms. Purporting to follow Katyayani Debi v. Udoy Kumar Das (30 C.W.N. (P.C.) 1.) and Abhoya Charan Sen v. Hem Chandra Pal (33 C.W.N. 715.) he held that the defendant was entitled to suspend payment of rent to the plaintiff.

The plaintiff then preferred an application under s. 38 of the Presidency Small Cause Courts Acts against the dismissal of its suit. The Full Bench of the Small Causes Court, following Ram Lal Dutt Sarkar v. Dhirendra Nath Roy, (70 I.A. 18.) held that the plaintiff's claim for arrears of rent must succeed in spite of the fact that the landlord had failed to give possession of one out of the three bed-rooms of the demised premises. The Bench, however, made it clear that the "non-applicability of the principal of suspension of rent in the present suit for recovery of arrears of rent for a particular period will not necessarily debar the tenant from claiming other appropriate reliefs against the failure of the landlord to put him in possession of the entire demised premises by way of apportionment of rent or damages." Accordingly, it decreed the suit.

The defendant the filed an application under s. 115, Civil Procedure Code, and art. 227 of the Constitution. In the application the defendant prayed that the suit be dismissed. In the alternative,

the defendant alleged that the plaintiff was at best entitled only to a proportionate rent. The High Court dismissed the application and the defendant having obtained special leave, the matter is now before us.

Mr. N. C. Chatterjee, the learned counsel for the defendant, contends that the decision in Ram Lal Dutt's (A.I.R. (1961) Ass. 52)) case which the High Court and the Full Bench of the Small Cause Court had followed was distinguishable because in that case the tenancy was an agricultural tenancy and the tenant in that case had raised the point after the lapse of a number of years. He says that the doctrine of suspension of rent should be applied to the facts of this case because the plaintiff had deliberately not given possession of one bed-room. In the alternative he contends that the Full Bench of the Small Cause Court and the High Court should have made an order for appointment of rent.

We are unable to agree with Mr. Chatterjee that the decision of the Privy Council in Ram Lal Dutt's (70 I.A. 18.) case can be distinguished on the ground urged by him. It is no doubt true that the Privy Council was concerned with an agricultural tenancy but the Privy Council decided the appeal on a matter of principle, the principle being that the doctrine enunciated in Neale v. Mackenzie (150 E.R. 635.) should not be regarded as a rule of justice, equity and good conscience in India in all circumstances. It is interesting to note that the subject-matter of the lease in Neale v. Mackenzie (150 E.R. 635.) was dwelling house and land attached to it, and it was eight acres of land which was attached to the house that the tenant had kept out of possession. Be that as it may, in our opinion, the doctrine laid down in Neale v. Mackengie (150 E.R. 635) is too inflexible and cannot be applied to all cases. As observed by Sir George Rankin, the doctrine cannot be justified as a dependable rule to be adhered to notwithstanding hard cases. On the one hand it does not seem equitable that when a tenant enjoys a substantial portion of the property of the landlord, leased to him, without much inconvenience, he should not pay any compensation for the use of the property, in other words, to borrow the language of Sir George Rankin, that he should enjoy a windfall. On the Other hand it is unfair that if a tenant is not given possession of a substantial portion of the property, he should be asked to pay any compensation for the use of the property while he is taking appropriate measures for specific performance of the contract. It seems to us that it will depend on the circumstances of each case whether a tenant would be entitled to suspend payment of rent or whether he should be held liable to pay proportionate part of the rent. On the facts of this case we are of the opinion that the tenant is not entitled to suspend the payment of rent but he must pay proportionate part of the rent.

We may make it clear that like Privy Council in Ram Lal Dutt's (70 I.A. 18.) case we are not deciding that the doctrine of suspension of rent should or should not "be applied at all to cases of eviction of the lessee by the lessor from a part of the land, and if so, whether it is limited to rents reserved as a lump sum, and whether it is a rigid or discretionary rule - these questions will call for careful review when they are presented by the facts of a particular case." In view of this we need not consider cases like Hakim Sardar Bahadur v. Prakash Singh (A.I.R. (1962) Pun. 385.); Jatindra Kumar Seal v. Raimohan Bai (A.I.R. (1961) Ass. 52.); and Nilkantha Pati v. Kshitish Chandra Satati. (I.L.R. (1952) 1 Cal. 59.)

The High Court rejected the plea of apportionment of rent on the ground that the defendant had not taken a specific plea to this effect in the written statement. The second ground given by the High Court was that it would be unreasonable to trust a relief on the defendant unless he himself chooses one or more of the alternative reliefs available to him. Further, no prayer was made before the High Court to amend the written statement to include this relief.

In our opinion, the Full Bench of the Small Causes Court should have remanded the case for calculation of the proportionate rent for the portion of the premises taken possession of by the defendant. In our view, the High Court has taken too technical a view. It would be inequitable to allow the plaintiff to recover the full rent when he has not delivered possession of the whole of the premises in question.

Mr. Sarjoo Prasad, the learned counsel for the plaintiff, urges that the defendant had paid rent voluntarily for four months - this fact also is relied on by the High Court - and therefore we should not remand the case. But we find that three months rent was paid in advance as security deposit, and hence there is no force in the contention.

Mr. Sarjoo Prasad finally contends that as this appeal arises from an application under s. 115 of Civil Procedure Code and art. 227 of the Constitution, we should not interfere with the decision of the Full Bench of the Small Causes Court even though it be erroneous. A similar point was raised before the High Court and although the High Court found some substance in the point it chose to so into the merits of the case and not dismiss the application on this ground. It must be remembered that the application was also under art. 227 of the Constitution, and although ordinarily art. 227 should be used sparingly, on the facts of this case we are satisfied that the High Court was right in not throwing out the application on this ground.

In the result the appeal succeeds. We set aside the orders of the High Court and of the Full Bench of the Small Causes Court and of the Judge Small Causes Court, and remand the case to the Court of Small Causes Calcutta, with the direction that it will dispose of the suit in the light of this judgment. The parties would be at liberty to lead evidence before the Court of Small Causes on the question of apportionment of rent. In the circumstances of the case there would be no order as to costs.

Appeal allowed.

</html