

The Calcutta Credit Corporation Ltd., & Anr.

Vs

Happy Homes (P) Ltd.

Civil Appeal No. 71 of 1965

(J. C. Shah, S. M. Sikri, J. M. Shelat JJ)

23.10.1967

JUDGMENT

SHAH, J. -

A building in the town of Calcutta belonging to the Chitpore Golabari Company (Private) Ltd. was let out under a written lease for a period of twelve, years commencing from January, 1, 1939, to Messrs Allen Berry & Co. Ltd. - hereinafter called 'Allen Berry'. Under the terms of the lease sub-letting or parting with the possession of the demised premises or any part thereof by the tenants without the previous consent in writing of the landlord was expressly prohibited. After the expiry of the period Allen Berry continued to hold over the premises. On August 12, 1953 Allen Berry served a notice in writing upon the landlord intimating their intention to vacate the premises "on August 31, 1953, at 3-30 P.M." and requested the landlord to arrange to take delivery of possession. By letter dated August 26, 1953, Allen Berry informed the landlord that they did not intend to vacate the premises on August 31, 1953, as originally intimated or at all, and that the notice dated August 12, 1953, be treated as cancelled. By letter dated August 28, 1953, attorney of the landlord informed Allen Berry that the earlier notice dated August 12, 1953, could not be withdrawn except by mutual consent, and since the landlord had agreed to lease and premises to Messrs. Dunlop Rubber Co. (India) Ltd. with effect from September 1, 1953, the landlord was unable to give his consent to such withdrawal, and that it would insist upon Allen Berry vacating the premises as already intimated. Allen Berry addressed a letter to the landlord on September 14, 1953, intimating that they were holding over the premises on the expiry of the lease" according to the provisions of the Rent Control Act". On February 20, 1954, the landlord called upon Allen Berry to vacate and deliver possession of "the premises on the expiry of March 31, 1954". Allen Berry failed to carry out the requisition, and on May 7, 1954, they sub-let a part of the ground floor measuring approximately 2100 sq. ft. to Happy Homes (P) Ltd. - respondent in this appeal.

The landlord then instituted a suit against Allen Berry claiming a decree in ejectment in respect of the demised premises and for mesne profits and other reliefs. This suit was settled on March 28, 1955, and a consent decree was passed. The important recitals in the decree were that (1) Allen Berry had surrendered the tenancy by notice dated August 12, 1953; (2) that they had handed over possession of the portion of the premises in their occupation to the landlord; (3) that the landlord will be at liberty either to retain the sub-tenant or to eject him; and (4) that the sub-tenancy had been created without the knowledge and consent of the landlord.

The landlord then sued Messrs Happy Homes (P) Ltd. - hereinafter called the respondent' - in the High Court of Calcutta for a decree for possession of the premises in its occupation and for mesne profits. The suit was resisted by the respondent principally on two grounds : (i) that the tenancy of

Allen Berry was not determined before the sub-letting in their favour; and (ii) that even if it be held that the tenancy of Allen Berry was determined before May 7, 1954, by virtue of the provisions of the West Bengal Rent Control (Temporary Provisions) Act, 1950, the respondent became a direct tenant of the landlord and was entitled to the benefits of that Act.

S. P. Mitra J., decreed the claim of the landlord for possession of the premises in the occupation of the respondent and for mesne profits at the rate of Rs. 495/- per month from March 1, 1955 till delivery of possession.

During the pendency of the appeal against the decree passed by S. P. Mitra, J., the landlord transferred the premises to Messrs Calcutta Credit Corporation Ltd. The landlord and the transferee will collectively be referred to hereinafter as "the landlords". A Division Bench of the High Court reversed the decree passed by S. P. Mitra, J., and ordered that the claim of the landlords be dismissed.

Whether the tenancy of Allen Berry stood determined by the notice dated August 12, 1953, may first be considered. Allen Berry were tenants holding over in respect of the demised premises after the expiry of the period of the original lease. By their notice dated August 12, 1953, they intimated their intention to vacate the premises on August 31, 1953, at 3.30 P. M. They thereafter withdrew this intimation by letter dated August 25, 1953. The landlord did not agree to the withdrawal of the notice dated August 12, 1953, and insisted that possession of the demised premises be delivered. By cl. (h) of s. 111 of the Transfer of Property Act, 1882, a lease of immovable property is determined on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. It was urged on behalf of the landlord that the notice of intention to quit the property leased and to determine the lease given by the tenant to the landlord could not be withdrawn, and the relation of landlord and tenant may be restored only if by mutual agreement between the landlord and tenant a fresh tenancy was created. Reliance in support of this contention was placed upon the observations made in Foa's General Law of Landlord & Tenant, 8th Edn. at p. 613 :

"A notice to quit cannot be "waived" : for once a valid notice is given, the tenancy will inevitably be determined upon its expiration. But though the parties cannot waive the notice, they may nullify its operation as to quitting, by agreeing upon a new tenancy, whether on the terms of the former or not, to commence from the time of its expiration.";

and upon similar observations in Woodfall on Landlord and Tenant, Vol. I, 26th Edn., Art. 2114, at p. 973; and upon the judgment of the Court of Exchequer in Tayleur v. Wildin [(1867-68 L.R. 3 Ex. Cases 303.]. Counsel for the respondent contended that the rights and obligations of the parties are governed by the provisions contained in s. 113 of the Transfer of Property Act, and that it is open to a tenant to withdraw the notice of intention to quit before the expiry of the period thereof. Counsel also contended that the tenancy was not determined, because the notice served by Allen Berry was not a notice "duly given" within the meaning of s. 111 of the Transfer of Property Act.

Section 113 of the Transfer of Property Act provides :

"A notice under Section 111, 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."

Clearly s. 113 contemplates waiver of the notice by any act on the part of the person giving it, if such an act shows an intention to treat the lease as subsisting and the other party gives his consent—express or implied thereto. The law under the Transfer of Property Act on the question in hand is not different from the law in England. Once a notice is served determining the tenancy or showing an intention to quit on the expiry of the period of the notice, the tenancy is at an end, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be treated as subsisting. It was held in *Tayleur v. Wildin* [(1867-68) L.R. 3 Ex. Cases 303.] that a notice determining a tenancy cannot be withdrawn. In *Tayleur v. Wildin* [(1867-68) L.R. 3 Ex. Cases 303.] an annual tenancy of a farm under a written lease commencing on Lady Day, i.e. March 25, was determined by a notice by which the landlord called upon the tenant to quit the farm at the expiration of the current year's tenancy. Before the expiry of the year of tenancy, the arrears of rent were paid up by the tenant, and the notice was withdrawn and the tenant continued in occupation of the farm under the terms of the original agreement. It was held by the Court of Exchequer that the tenancy was determined by the notice to quit, and a surety for payment of rent under the original lease was not liable for rent falling due after the expiry of the notice. Kelly C. B., observed that whether the notice is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both. The consent of the parties makes a new agreement, and the rent became due under a new agreement. In our judgment, that principle applies to the law of landlord & tenant in India. Therefore on the expiration of the period of notice dated August 12, 1953, the tenancy of Allen Berry stood determined.

But, it was contended, the notice intimating an intention to quit at 3-30 P.M. on August 31, 1953, was not a notice "duly given" within the meaning of s. 111(h) of the Transfer of Property Act. It is not necessary to decide for the purpose, of this case whether the month of the tenancy of Allen Berry expired on the midnight of the first day of every calendar month, for, in our judgment, a notice which is defective may still determine the tenancy, if it is accepted by the landlord. A notice which complies with the requirements of s. 106 of the Transfer of Property Act operates to terminate the tenancy, whether or not the party served with the notice assents thereto. A notice which does not comply with the requirements of s. 106 of the Transfer of Property Act in that it does not expire with the end of the month of the tenancy, or the end of the year of the tenancy, as the case may be, or of which the duration is shorter than the duration contemplated by s. 106, may still be accepted by the party served with the notice and if that party accepts and acts upon it, the party serving the notice will be estopped from denying its validity. The defect in the notice served by one party may undoubtedly be relied upon by the other party and he may plead that the tenancy does not stand determined but after the notice is accepted by the other party who acts upon it, the party serving the notice cannot contend that the notice served by him was defective, and on that account the tenancy was not determined. The reason of the rule is clear. A tenancy is determined by service of the notice in the manner prescribed by s. 111(h) read with s. 106 of the Transfer of Property Act. If the notice is duly given, the tenancy stands determined on the expiry of the period of the tenancy. Even if the party served with the notice does not assent thereto, the notice takes effect. If the notice is defective, it does not operate to terminate the tenancy by force of the statute. But a tenancy is founded in contract, and it is always open to the parties thereto to agree that the tenancy shall be determined otherwise than by notice served in the manner provided by s. 106 of the Transfer of Property Act, or by a notice of a duration shorter than the period provided by the Act. If the parties so agree, the tenancy will come to an end.

The landlord according to the terms of the agreement by its letter dated August 28, 1953, informed Allen Berry that it did not agree to the withdrawal of the notice, since it had already agreed to lease out the premises to Messrs Dunlop Rubber Co. (India) Ltd. with effect from September 1, 1953. The

contents of the letter clearly prove, in the absence of any evidence to the contrary, that the offer to terminate the tenancy on August 31, 1953, was accepted by the landlord and the landlord had acted upon that offer. The tenancy stood determined as proposed by Allen Berry. Allen Berry could not thereafter claim, in the absence of a fresh agreement, that there was a subsisting contractual tenancy.

We are unable to agree with counsel for the respondent that in order to determine a tenancy under the Transfer of Property Act at the instance of a tenant. There must be actual delivery of possession before the tenancy is effectively determined. That contention is contrary to the plain terms of s. 111(h) of the Transfer of Property Act. We are therefore of the opinion that by virtue of the notice dated August 12, 1953, and acceptance thereof by the landlord, the tenancy of Allen Berry was determined at 3-30 P.M. on August 31, 1953. It is unnecessary in that view to consider whether the notice dated February 20, 1954, requiring Allen Berry to vacate and deliver possession of the premises to the landlord on expiry of March 31, 1954, was a valid notice.

Counsel for the respondent urged that granting that the tenancy of Allen Berry stood determined by the notice dated August 12, 1953, and acceptance thereof by the landlord, Allen Berry acquired the status of "statutory tenants" and could claim protection of the West Bengal Premises Rent Control (Temporary Provisions) Act 17 of 1950, and were competent by virtue of the provisions of that Act to sub-let the premises in their occupation.

In *Anand Nivas (Private) Ltd. v. Anandji Kalyanji Pedhi & Ors.* [[1964] 4 S.C.R. 892.], this Court in dealing with the analogous provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, explained the nature of the right and interest of a "statutory tenant" in premises in his occupation. It was observed at p. 908 by the majority of the Court :

"A person remaining in occupation of the premises let to him after the determination of or expiry of the period of the tenancy is commonly, though in law not accurately, called a "statutory tenant". Such a person is not a tenant at all : he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal : it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute."

In *Solomon v. Orwell* [[1954] 1 All E.R. 874.], Denning L.J., in dealing with the provisions of the Landlord and Tenant (Rent Control) Act, 1949, spoke as follows :

"When a statutory tenant sub-lets a part of the premises, he does not thereby confer any estate or interest on the sub-tenant. A statutory tenant has no estate or interest himself, and he cannot carve something out of nothing. The sub-tenant, like the statutory tenant, has only a personal right or privilege. The question is : What is the position of the sub-tenant when the statutory tenancy comes to an end ? A statutory tenancy may, of course, come to an end without a notice to quit, e.g. by death (if there are no entitled relatives) or by the delivery up of the premises to the landlord. When the statutory tenancy comes to an end, the sub-tenant's right automatically comes to an end unless there is some statutory protection afforded to him."

It was urged that the West Bengal Premises Rent Control (Temporary Provisions) Act 17 of 1950

expressly conferred upon a statutory tenant the right to sub-let the premises and a sub-tenant inducted into the premises by the statutory tenant acquires, on the determination of the tenancy of the statutory tenant, the rights of a tenant of the premises under the landlord. Reliance in that behalf was placed upon the definition of "tenant" in s. 2(11) and ss. 12 & 13 of the Act. The expression "tenant" is defined in s. 2(11) as meaning any person by whom rent is, or but for a special contract would be, payable for any premises, and includes any person who is liable to be sued by the landlord for rent. Section 12 grants protection to tenants against eviction. By sub-s. (1), insofar as it is material, it is provided :

"Notwithstanding anything to the contrary in any other Act or law, no order or decree for the recovery of possession of any premises shall be made by any court in favour of the landlord against a tenant, including a tenant whose lease has expired :

Provided that nothing in the sub-section shall apply to any suit for decree for such recovery of possession, -

(a) against a tenant who has transferred his tenancy right in whole or in part with possession otherwise than by sub-lease;

(b) against such transferee;

(c) against a tenant who has sub-let the whole or a major portion of the premises for more than seven consecutive months :

Provided that if a tenant who has sublet major portion of the premises agree to possess as a tenant the portion of the premises not sub-let on payment of rent fixed by the Court, the Court shall pass a decree for ejection from only a portion of the premises sub-let and fix proportionately fair rent for the portion kept in possession of such tenant which portion shall thenceforth constitute premises under clause (8) of Section 2 and the rent so fixed shall be deemed standard rent fixed under Section 9, and the rights and obligations of the sub-tenants of the portion from which the tenant is ejected shall be the same as of sub-tenants under the provisions of Section 13;

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Section 12(1) confers protection to a tenant - which expression includes a tenant whose lease has expired - against eviction by any order or decree of the Court. But that protection is lost in cases contemplated by cls. (a) to (i) of sub-s. (1).

If a tenant has sub-let the premises let to him in its entirety, he loses the protection of s. 12. If he has sub-let a major portion of the premises for more than seven consecutive months, he also loses the protection. It is implicit that if the tenant has sub-let only a small portion of the premises occupied by him he does not lose the protection. The tenancy continues, and the sub-tenant of such a small portion would, it is apprehended, be entitled to remain in possession. Where, however, a major portion of the premises has been sub-let, it would be open to the tenant to offer to possess as a tenant the portion of the premises not sub-let by him. In that case the sub-tenants would have the same rights and privileges as are conferred by s. 13. Section 13 provides :

"(1) Notwithstanding anything contained in this Act, or in any other law for the time being in force, if a tenant inferior to the tenant of the first degree sub-lets a whole or in part the premises let to him except with the consent of the landlord and of the

tenant of a superior degree above him, such sub-lease shall not be binding on such non-consenting landlord, or on such non-consenting tenant.

Explanation - In this sub-section -

(a) "a tenant of the first degree" means a tenant who does not hold under any other tenant;

(b) "a tenant inferior to the tenant of the first degree" means a tenant holding immediately or mediately under a tenant of the first degree;

(c) "landlord" means the landlord of a tenant of the first degree.

(2) Where any premises or any part thereof have been or has been sub-let by "a tenant of the first degree" or by "a tenant inferior to a tenant of the first degree", as defined in explanation to sub-section (1), and the sub-lease is binding on the landlord of such last mentioned tenant, if the tenancy of such tenant in either case is lawfully determined otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in clause (h) of the proviso to sub-section (1) of Section 12, the sub-lessee shall be deemed to be a tenant in respect of such premises or part as the case may be, holding directly under the landlord of the tenant whose tenancy has been determined, on terms and conditions on which the sub-lessee would have held under the tenant if the tenancy of the latter had not been so determined :

Provided....."

We are not directly concerned in the present case with sub-s. (1) of s. 13. That sub-section only deals with sub-letting by a tenant inferior to "the tenant of the first degree". In the present case, Allen Berry were direct tenants from the landlord and initially were "tenants of the first degree". Sub-section (2) deals with cases of sub-letting by tenants of the first degree or by a tenant inferior to the tenant of the first degree as defined in the Explanation to sub-s. (1), and such sub-lease is binding on the landlord of such last mentioned tenant. It is provided thereby that if the tenancy of such tenant is lawfully determined otherwise than for personal occupation, the sub-lessee will be deemed to be a tenant in respect of such premises or part thereof and will hold directly under the landlord of the tenant whose tenancy has been determined.

Counsel for the respondent contended that a sub-tenant of a statutory tenant is entitled to the protection of s. 13(2) of Act 17 of 1950, and relied upon the following observations made by this Court in Indra Kumar Karnani v. Atul Chandra Patitundi and Anr. [[1965] 3 S.C.R. 329.] :

"Section 13(2) refers to both the classes of sub-leases and states that if the sub-lease has been made by a tenant of the first degree, the sub-lessee shall be deemed to be a tenant in respect of the premises demised to him if the tenancy of such tenant is lawfully determined under the provisions of the Act otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in cl. (h) of the proviso to sub-section (1) of Section 12.

It follows that in the case of sub-letting by a tenant of the first degree no consent of the landlord to sub-letting is required as a condition precedent for acquisition by the sub-lessee of the tenant's right but in the case of sub-letting by a tenant inferior to the tenant of the first degree the consent of the

landlord and also of the tenant of the superior degree above him to the sub-letting is necessary if the sub-lessee is to acquire the rights of the tenant contemplated by s. 13(2)."

But the Court decided in Indra Kumar Karnani's case [[1965] 3 S.C.R. 329.] that a covenant in the lease prohibiting a tenant from sub-letting, in respect of premises governed by the West Bengal Premises Rent Control (Temporary Provisions) Act 17 of 1950 does not prevent the sub-tenant under a contractual tenant from setting up the claim that he has become entitled under s. 13(2) of the Act to the rights of the tenant in respect of the premises or part thereof sub-let to him. The case is not an authority for the proposition that a tenant whose tenancy is determined, and who continues to remain in occupation merely by virtue of the protection conferred upon him by the statute is entitled to sub-let.

Counsel then contended that the Legislature has, notwithstanding the disabilities of the statutory tenant, by express enactment conferred upon him the privilege of inducting into the premises held by him a sub-tenant, who would be entitled to claim the rights of a contractual tenant against the landlord in the events mentioned in the proviso to s. 12(1)(c) and s. 13(2). Relying upon the definition of tenant in s. 2(11) of the Act, counsel argued that in s. 12 the expression "tenant" includes a statutory tenant as well as a contractual tenant, and that if a sub-tenant in respect of a part of the premises is protected by the express provision contained in the proviso to s. 12(1)(c), a sub-tenant of the entire premises whether the tenant is a contractual tenant or a statutory tenant is entitled to protection of the Act. According to counsel ss. 12(1)(c) proviso and 13(2) are parts of a single scheme, and the expression 'tenant' in both the sections includes a statutory tenant, and sub-tenants inducted by the statutory tenants in the premises are entitled to the protection of the Act. Reliance in support of this contention was placed upon a Full Bench judgment of the Calcutta High Court in Krishna Prosad Bose v. Smt. Sarajubala Dassi and Anr. [A.I.R. 1961 Cal. 505.] wherein it was held that a tenant under the Act includes an extenant, that is, a tenant whose contractual tenancy has come to an end, but who is still in possession (occupation) - actual or constructive - of the premises; and such a tenant who continues in possession by virtue of protection against eviction under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, is entitled to sub-let the premises and the sub-tenant may claim the benefit and protection of s. 13(2).

We are unable to agree with the contention raised by counsel for the respondent. In our view, since a statutory tenant has merely a personal right to protect his possession, and has no estate or interest in the premises occupied by him, he cannot convey an estate or interest which he does not possess. A statutory tenant by parting with possession forfeits the protection of the Act, and unless the statute expressly provides or clearly implies otherwise, the person inducted by him cannot claim the protection of the Act. In our judgment, cl. (c) of s. 12(1) applies only to a case in which the tenant has an interest in the estate which he could sub-let. Similarly, s. 13 contemplates a case in which a contractual tenant has sub-let the premises. If it be held that the expression 'tenant' in s. 13(2) and in cl. (c) of s. 12(1) includes a statutory tenant an estate or an interest in the demised premises would be conferred by him upon a transferee which the tenant himself does not possess, and that a tenant who has acted contrary to the provisions of cls. (m), (o) & (p) of s. 108 of the Transfer of Property Act, or has used the property for immoral or illegal purposes, or has committed acts of negligence and default which may materially deteriorate the condition of the premises, or has otherwise been guilty of conduct which is a nuisance or annoyance to occupiers of adjoining or neighbouring premises including the landlord, or has failed to pay rent exceeding two months and has thereby incurred liability to forfeit the protection of the statute granted to him by s. 12(1) and whose right has been forfeited by due notices, may still sub-let the premises and the sub-lessee would then be entitled to claim the right under s. 13(2) on the determination of the tenancy of the tenant.

Considered in the light of the scheme and object of the Act, the expression "tenant" in cl. (c) of s. 12(1) or in s. 13(2) must, in our judgment mean a contractual tenant alone and not a statutory tenant. The definition in s. 2(11) of the expression "tenant" includes a statutory tenant. But the definition does not apply if there is anything repugnant in the subject or context. A statutory tenant has no interest or estate in the premises occupied by him, and we are unable to hold that the Legislature without making an express provision to that effect intended to invest him with power to induct into the premises in his occupation a person who would be entitled to claim the right and interest of a contractual tenant. If the view which has appealed to the High Court of Calcutta be accepted, a statutory tenant whose right of occupation is determined by a notice to quit, because of conduct which entails forfeiture of the protection of the Act, may induct a sub-tenant so as to defeat the claim of the landlord, and presumably a tenant sued in ejectment may also exercise that privilege, for the right if granted would enure till a decree in ejectment is passed. The Legislature has not made any such express provision, and no provision to that effect which makes the right of the landlord conferred by the Act to obtain a decree in ejectment against his tenant wholly illusory may be implied.

The appeal is therefore allowed and the decree passed by the trial Court restored with the modification that mesne profits will be payable from September 1, 1953 at the rate of Rs. 495/- per month till delivery of possession. The landlords will be entitled to their costs in this Court and before the Division Bench of the High Court.

Appeal allowed.

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