SUPREME COURT OF INDIA

Maganlal Chhotabhai Desai

Vs.

Chandrakant Motilal

C.A.No.392 of 1965

(R. S. Bachawat, J. M. Shelat and A. N. Grover, JJ.)

22.04.1968

JUDGEMENT

BACHAWAT, J.:-

1. This appeal arises out of a suit between landlord and tenant.The defendant as a tenant of Moti Villa Bungalow No. 1 in Ahmedabad under the plaintiff. The contractual rent was Rs. 800 per month. Since October 1, 1948 the defendant stopped payment of rent on the ground that it was excessive. The disputes between the parties were referred to the arbitration of one Sankalchand Parikh who made an award fixing the standard rent at Rs. 300 per month and directing the defendant to deliver possession of the premises and to pay arrears of rent and future rent at that rate. A decree was passed according to the award on September 21, 1949. The plaintiff recovered moneys by executing the decree but the defendant continued in possession. On April 20, 1950 the defendant made an application for fixation of standard rent. This application was withdrawn by him on November 11, 1950. On August 1, 1955 the High Court declared that the award decree was null and void on the ground that the claim for fixation of the standard rent and recovery of possession could not be referred to arbitration.

2. On September 5, 1955 the plaintiff served a notice upon the defendant demanding payment of arrears of rent and asking him to vacate the premises on the expiry of the month of October next. On December 26, 1955 the plaintiff instituted Suit No. 5092 of 1955 claiming possession on the ground of non-payment of rent and sub-letting and also claiming arrears of rent and mesne profits. The defendant filed his written statement on May 1, 1956 asking for fixation of the standard rent at Rs. 125 per month, denying the sub-letting and alleging that the plaintiff had recovered more than the rent legitimately due to him. On March 14, 1957 he filed Suit No. 34 of 1957 against the plaintiff claiming refund of Rs. 15224 realised in execution of the void decree. The first date of the hearing of Suit No. 5092 of 1955 was December 26, 1957. On June 19, 1958 the Trial Court decreed the suit and directed the defendant to give possession of the premises and to pay Rs. 10750 on account of arrears of rent and mesne profits at the rate of Rs. 500 per month from the date of the suit. The Trial Court held that the defendant sublet the premises, that having withdrawn his application for fixation of the standard rent it was not open to him to ask for fixation of the standard rent, that if the matter were still open the standard rent would be Rs. 125 per month, that a sum of Rupees 14169/2/- was realised from the defendant in execution of the award decree, that the defendant was liable to pay rent at Rs. 300 per month, that the rent was in arrears and that the notice to quit dated September 5, 1955 was valid. The defendant filed an appeal against this decree. During the pendency of the appeal the plaintiff recovered the sum of Rs. 10,750 decreed by the Trial Court. The Assistant Judge Ahmedabad allowed the appeal, set aside the decree of the Trial Court and directed the plaintiff to render an account of the overpayments made to him. He held that the defendant did not sub-let the premises, that the standard rent was Rs. 125 per month, that it was open to the defendant to ask for fixation of standard rent, that in execution of the award decree since 1950 the plaintiff recovered Rs. 14,169/2/- before the institution of the suit and Rs. 10,750 during the pendency of the appeal and that taking into account all the recoveries the rent was not in arrear. The plaintiff filed a revision application against this decree. On November 20, 1962 the High Court allowed the revision application, set aside the decree of the Assistant Judge, restored the decree for eviction passed by the Trial Court and directed the defendant to pay mesne profits at Rs. 125 per month from the date of the suit until recovery of possession. The High Court accepted the findings of the courts below that there was no sub-letting of the premises, that the standard rent was Rs. 125 per month, that it was open to the defendant to ask for fixation of the standard rent and that Rs. 14,169/2/was recovered from him in execution of the award decree before the institution of the suit. The High Court held that the rent was in arrear, that the defendant was not ready and willing to adjust the overpayment against the rent falling due, that the amount recovered from the defendant was less than the standard rent due from him and the cost of the suit and that he was not entitled to the protection of Secs. 12 (1) and 12 (3) (b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bombay Act No. LVII of 1947). The High Court refused to allow the defendant to raise a new contention, viz., that there was no valid notice under Section 12 (2) of the Act. The defendant filed this appeal after obtaining special leave from this Court.

3. Mr. M. C. Chagla contended that the High Court had no jurisdiction to interfere with the decree of the Assistant Judge under Section 115 of the Code of Civil Procedure. We are unable to accept this contention. The decree passed by the Assistant Judge was manifestly illegal. Suit No. 5092 of 1955 was for possession, arrears of rent and mesne profits. In his written statement, the defendant asked for fixation of standard rent and prayed for dismissal of the suit. In that suit the court had no power to pass a decree directing the plaintiff to render an account in respect of any overpayment of rent made to him. In giving the direction that "the landlord do render an account of the overpayments made to him", the Assistant Judge acted illegally and with material irregularity. The

High Court had full power to revise this decree under Section 115 and to give such direction in the matter as it though fit.

4. Mr. Chagla then contended that there was no valid notice under S. 12 (2). He argued that this point arose on the pleadings and the issues. But we find that in the Trial Court the contention was that there was no valid notice to quit. It was not argued there that there was no valid notice under Section 12 (2). The point regarding the validity of the notice was not raised before the Assistant Judge. The High Court properly refused to allow the point to be taken for the first time in revision. We are of the opinion that the point about the absence of a proper notice under S. 12 (2) is not now open.

5. The crucial point in the case was whether the defendant paid or was ready and willing to pay the standard rent due from him. According to the defendant he was compelled to pay Rs. 15,224/2 between March 14, 1950 and August 4, 1954. The courts below found that between those two dates he paid Rupees 14,169/2/- on account of rent from October 1, 1948 at Rs. 300 per month. From the plaint in Suit No. 34 of 1957 it appears that until March 14, 1957 the defendant did not make any other payment. As the High Court pointed out, no further payment was made by the defendant till the disposal of suit No. 5092 of 1955.

6. Thus up to August 4, 1954 the defendant paid Rs. 14,169/2/- on account of rent due up to that date at Rs. 300 per month. The payments were in excess of the standard rent. He did not pay the rent falling due after August 4, 1954. The question is whether the rent was in arrear or whether it should be treated as paid by adjustment or deduction of the overpayments. The right of a tenant to recover the overpaid rent is regulated by Section 20. That section reads:

"Any amount paid on account of rent after the date o the coming into operation of this Act shall, except in so far as payment thereof is in accordance with the provisions of this Act, be recoverable by the tenant from the landlord to whom it was paid or on whose behalf it was received or from his legal representative at any time within a period of six months from the date of payment and may without prejudice to any other remedy for recovery, be deducted by such tenant from any rent payable by him to such landlord."

7. The section gives the tenant a general right of recovery of the overpaid rent within six months from the date of payment. Without prejudice to any other mode of recovery, he may deduct the overpayment from any rent payable by him to the landlord. Deduction is one mode of recovery. If the amount is incapable of recovery because of the bar of limitation, it cannot be recovered by deduction. In other words, the right of recovery by deduction is barred at the same time as the right of recovery by suit. If the tenant seeks recovery of the overpaid amount he must bring the suit or make the deduction within six months.

8. In Karamesy Kanji v. Velji Virji (1954) 56 Bom LR 619 the learned Chief Justice of the Bombay High Court repelled the tenants contention that for deduction of rent no period of limitation was provided by Section 20. He observed:

"It seems to me clear on a plain and natural construction of the section itself that if a tenant could not recover any excess amount paid by him beyond six months from the date of payment and if such amounts became irrecoverable, it is difficult to understand how a tenant could deduct what he could not recover and what was irrecoverable in law. The same view of the law has been taken in a parallel piece of legislation in England in Bayley v. Walker, (1925) 1 KB 447. I see no reason to take a view different from that taken by the appellate court that the interpretation put by the English Court on a similar provision of law is the correct interpretation."

In (1925) 1 KB 447 (supra) the tenant on discovering that he had overpaid considerable sums in excess of the standard rent stopped payment of rent retaining the amounts as they fell due by way of deduction under the provisions of S. 14, sub-section (1) of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920. He continued to deduct his rent after expiry of the period of limitation prescribed by Section 8, sub-section (2) of the Rent and Mortgage Interest Restrictions Act 1923. The landlord contended that the tenant had no right to so continue to deduct and that consequently his rent was in arrear and on that ground brought an action for possession. The question was whether the rent was in arrear or not. The matter turned on life constriction of Section 14 of the Act of 1920, and Section 8 of the Act of 1923. Section 14, sub-section (1) gave the tenant a general right of recovery of overpaid rent and the amount recoverable might without prejudice to any other mode of recovery be deducted by the tenant from any rent payable by him Section 8, sub-section (2), provided that "any sum which under sub-s. (1) of Section 14 of the principal Act (of 1920) is recoverable by the tenant. . ..... shall be recoverable at any time within six months from the date of payment but not afterwards or in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards." Salter, J., held that the period of limitation prescribed by Section 8 of the Act of 1923 applied to recovery by deduction as well as recovery by action. As the amount was incapable of recovery by action it could not be recovered by deduction. The rent was therefore in arrear and the landlord was entitled to recover possession on that ground. In Soharab Tavaria v. Jafferali (1956) 58 Bom LR 680 at pp. 687-88 a Division Bench of the Bombay High Court approved of these decisions.

9. Now the right of recovery of the excess rent paid before August 4, 1954 became barred on and after February 4, 1955. Within that period the defendant took no steps for recovery of the amount by filing a suit or making a deduction. As the claim for recovery of the amount became barred after February 4, 1955, he could not thereafter deduct it from the rent falling due. As a matter of fact, he did not deduct it from rent at any time. Instead of making any deduction he filed a suit for its recovery. The overpayments cannot now be deducted from or adjusted against the rent falling due since August 4, 1954. It follows that the rent was in arrear.

10. In these circumstances, the defendant could not claim protection of Section 12 (1) of the Rent Act. During the pendency of the suit he did not pay the standard rent due from him from August 4, 1954 nor was he ready or willing to pay it. Instead of showing his readiness and willingness to pay the rent due he claimed that he was not liable to pay any amount at all.

11. Likewise he could not claim the protection under Section 12 (3) (b). Before the first hearing of the suit on December 26, 1957 or any other date fixed by the trial court he did not pay or tender in court the standard rent then due from him. Nor did he thereafter continue to pay or deposit in court such rent till the suit was finally decided. It follows that the defendant cannot claim protection from eviction under the Rent Act. The High Court therefore rightly decreed the suit for eviction.

12. In the result, the appeal is dismissed. We direct that execution of the decree for eviction be stayed for a period of one year from to-day. In all the circumstances of the case, we make no order as to costs.

Appeal dismissed.