

Ranjit Chandra Chowdhury

Vs

Mohitosh Mukherjee

Civil Appeal No. 299 of 1966

(CJI M. Hidayatullah, V. Ramaswami, G.K. Mitter JJ)

17.03.1969

JUDGMENT

HIDAYATULLAH, C.J. -

1. In this appeal, by special leave, the appellant is the tenant of a house No. 120-B, Manoharpukar Road, District 24 Parganas, Calcutta-29 and the respondent is the landlord. Both the tenant and the landlord died after the institution of the suit and are represented by their legal representatives. The suit was for ejectment of the tenant for default in payment of rent as agreed to between the parties.
2. The suit was dismissed by the Munsif, 1st Court, Alipur, but on appeal the judgment was reversed by the subordinate Judge, 8th Court, Alipur, whose, whose decree was confirmed on appeal by the learned single Judge in the High Court at Calcutta. This appeal is against the judgment, dated August 14, 1965 of the Calcutta High Court.
3. The premises were rented out to the original tenant as far back as May, 1944, on monthly rent of Rs. 130/-. The tenancy was from month to month. According to the landlord the rent of the premises had to be paid on or before the 7th day of each calendar month. According to the tenant the rent was to be paid as and when the sarkars came to collect it on behalf of the landlord who employed such agents as had many other houses rented out to other tenants. The High Court and the appellate Court below have accepted the case of the landlord and that is a finding with which we must start. The monthly rent for eight months between September, 1954 to April 1955, was admittedly collected and paid beyond the period limited by the agreement. On August 11, 1955, a notice determining the tenancy was served on the original tenant and he was asked to quite on the expiry of the month of August, 1955, on pain of being held liable in damages at Rs. 5/- per day for wrongful occupation from the 1st September, 1955. On October 2, 1955, the original landlord accepted rent up to September, 1955 and thus waived the notice which was given. It appears also that the landlord accepted rent from November 1, 1955 to February 1, 1956 and granted receipt for the rent. On February 9, 1956, a second notice determining the tenancy was served calling upon the original tenant to deliver possession of the premises on the expiry of February, 1956. The notice this time also added a condition that in case the original tenant over-stayed in the premises beyond February, he would be liable to damages. The present suit was filed on March 1, 1956, with the result already stated.
4. In the written statement filed by the original tenant it was stated that the original landlord had waived the right of forfeiture for default up to August, 1955, when he accepted rent for September, 1955 and 'acquiesced' in the continuance of the tenancy by receiving rent up to January, 1956. This,

according to the original landlord, resulted in 'the revival of the dead tenancy'. The High Court had held that the old tenancy continued between the parties with all its advantages and weaknesses and that the original landlord was, therefore, able to take advantage of the old default and base the notice on them.

5. In this appeal it is contended that after the landlord accepted the rent for September a new tenancy came into existence and the old defaults could not therefore be made the foundation of the second notice to quit. This is opposed by the answering respondent, the legal represented of the original landlord.

6. The matter is governed by the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. It came into force on March 30, 1950. This temporary Act remained in force till March 31, 1955, when it was repealed by the West Bengal Premises Tenancy Act, 1956, which came into force from March 31, 1956. However, as the suit had already been filed it continued to be governed by the repealed Act in view of Section 4 of the new Act which states :

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Under the old Act there was protection to tenants against eviction and that was enacted in Section 12 of the old Act. We are concerned with Section 12(1)(i) and it reads as follows :

"12(1) 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 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 :

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(i) Subject to the provisions of Section 14, where the amount of two months' rent legally payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract, or in the absence of such contract by the fifteenth day of the month next following that for which the rent is payable or by not having been validly deposited in accordance with Section 19".

Section 14 which is referred to here provided as follows :

"14(1) If in a suit for recovery of possession of any premises from the tenant the landlord would not get a decree for possession but for clause (i) of the proviso to sub-section (1) of Section 12, the Court shall determine the amount of rent legally payable by the tenant and which is in arrears taking into consideration any order made under sub-section (4) and effect thereof up to the date of the mentioned hereafter, as also the amount of interest on such arrears of rent calculated at the rate of nine and three-eighths per centum from the day when the rents became arrears up such date, together with the amount of such cost of the suit as is fairly allowable to the plaintiff-landlord and shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order aggregate sum) on or before a date fixed in the order.

(2) Such date fixed for payment shall be the fifteenth day from the date of the order

excluding the day of the order.

(3) If within the time fixed in the order under sub-section (1), the tenant deposits in the court the sum specified in the said order, the suit, so far as it is a suit for recovery of possession of the premises, shall be dismissed by the court. In default of such payment the court shall proceed with the hearing of the suit :

Provided that tenant shall not be entitled to the benefit of protection against eviction under this section if he makes default in payment of the rent referred to in the clause (i) of the proviso to sub-section (1) of Section 12 on three occasion within a period of eighteen months".

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7. The tenant claims the benefit of Section 14 but the landlord relies upon the proviso to sub-section (3) quoted above. Further the tenant also relies upon Section 24 of the repealing Act which is to be following effect :

"24. When there is no proceeding pending in court for the recovery of possession of the premises, the acceptance of rent in respect of the period of default in payment of rent by the landlord from the tenant shall operate as a waiver of such default".

Therefore it is contended that the acceptance of rent in respect of the period of default in payment of rent under Section 12(1)(i) in September operates as a waiver of the default under Section 24.

Mr. Bhattacharji on behalf of the tenant contends that the old tenancy was dead after the notice and on acceptance of rent a new tenancy came into existence. The other side contends that by the acceptance of rent, the old tenancy on the old terms continued. Each side has cited a number of rulings. We do not consider it necessary to refer to these rulings or to discuss the question. In *Ganga Dutt Murarka v. Kartik Chandra Das and Another* (AIR 1961 SC 1067) and in *Anand Nivas Private Ltd. v. Anandji Kalyanji Pedhi and Others* (AIR 1965 SC 414) (particularly the first at page 1069), it was held in connection with a statutory tenancy that a landlord accepting rent does not assent to a new contractual tenancy but continues the old tenancy. In the *Calcutta Credit Corporation Ltd and Another v. Happy Homes (P) Ltd.*, ((1968) 2 SCR 20) the subject has been discussed in detail. Under Section 113 of the Transfer of Property Act a notice is waived, by an act on the part of the person giving it showing an intention to treat the lease as subsisting, provided there is the express or implied consent of the person to whom it is given. Here the difficulty is solved by the attitude the tenant took in this case. His case was that the old tenancy revived and continued. According to him, the landlord acquiesced in having the old tenancy continued. If we go by the tenant's own case it is obvious that the old tenancy with the default continued and the landlord was thus able to use the provisions of Section 12(1)(i) against the tenant as also the proviso to sub-section (3) of Section 14 of the repealed Act. There were two consecutive defaults and in the period of 18 months there were more than three defaults. The benefit of Section 14, sub-section (1) of the repealed Act is not available to the tenant because of the operation of the proviso to sub-section (3). Further Section 24 of the new Act can hardly assist the tenant. That section is not retrospective and will operate from the date on which it came into force. Mr. Bhattacharji claimed that it may be taken as a rule of decision or laying down a rule of evidence but we think it impinges upon the substantive rights of landlord and tenants which can only be claimed after the commencement of Act and not before. The section puts an embargo on any claim based on default in payment of rent when the landlord accepts

rent after default and therefore it affects the substantive right of the landlords. According to the accepted canons of interpretation of statutes, a substantive right cannot be taken away retrospectively unless the law expressly so states or there is a clear intendment. There are no express words in the statute making Section 24 retrospective and we fail to see any intendment in it to apply to cases pending on March 31, 1956, when the new Act came into force, and this suit was then pending. If it had been merely a matter of procedure or creating a rule of decision we might have held that the provisions applied to the suit, but that is not case here. As we said the section creates a change in the substantive rights and therefore must be held to be prospective in operation and not retrospective unless we can gather retrospectively from the language of the statutes or by clear implication in it.

9. There is no question in this case that the tenant was in default according to Section 12(1)(i) because he had been paying rents beyond the period limited by the agreement or by the section. These defaults were also more than three and therefore the proviso to Section 14(3) deprived the tenant of the benefit of Section 14(1). On the whole, therefore, the decision of the High Court was correct and we see no reason to differ from it.

10. The appeal therefore fails and is dismissed but in view of the fact that the rent of the premises has been paid up to the date of hearing and the previous default were only so far that the rent was not paid before the date fixed for payment, we are of opinion that the parties in this case should be left to bear their own costs throughout. The tenant is further granted six month's time from the date of this judgment to vacate the premises. The tenant further undertakes to deposit the rent as and when it falls due.

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