Tayabali Jaffarbhai Tankiwala

Vs

Messrs. Asha & Co. and Another

Civil Appeal No. 1741 of 1966

(J. C. Shah, V. Ramaswami-I, A.N. Grover JJ)

24.09.1969

JUDGMENT

GROVER, J. -

1. This is an appeal by special leave from a judgment of the Bombay High Court and arises in the following circumstances.

2. The suit premises consisting of a shed at 130, Shuklaji Street, Bombay were the property of the appellant, and were let out to the respondent as a monthly tenant. By means of a notice, dated June 13, 1956, the tenant was informed by the landlord that he was in arrears of rent since July 1, 1953 and was liable to pay to the landlord a sum of Rs. 1,826/- being the amount of rent calculated up to the date of the notice. As he was an habitual defaulter and had been making illegal use of a passage attached to the premises without the consent of the landlord his tenancy was being terminated. He was further called upon to make payment of the amount of arrears. The tenant did not vacate the premises and a second notice was sent dated October 18, 1957 calling upon him to deliver vacant possession of the premises which were stated to be in his occupation as a monthly tenant. In the second notice another ground was mentioned for getting the premises vacated. It was that the same were required for the personal use and occupation of the landlord. It may be mentioned that prior to the despatch of the second notice the landlord had been paid and he had received the amount of arrears which were said to be due in the first notice. In other words the rent had been received up to March, 1955. On October 30, 1957 the tenant made a tender by means of a cheque of the full amount of arrears then due but the cheque was returned by the landlord.

3. On March 31, 1958 the landlord filed a suit for ejectment and for recovery of rent from April, 1955 to November, 1957 and compensation for use and occupation from December, 1957 to February, 1958 as also for a certain amount for vacant possession being rack rent of twelve month's rent, the total amount of all the items being Rs. 2,448.12 P. In July, 1960 the plaintiff sought and was allowed to amend the plaint by introducting the following paragraph :

> "Notice dated 13th June, 1956 under Section 12 of the Bombay Rent Control Act was given by the plaintiff's advocates to the defendants demanding payment of arrears of rent from 1st July, 1953 upto date 1956, which has been duly acknowledged. Copy of the said notice in hereto annexed and marked Ex. 'A'."

The ejectment was claimed on the ground of default in payment of arrears of rent and for personal use and occupation. The learned trial Judge held that by serving a second notice and by various acts and conduct the landlord showed a clear intention to waive and condone the ground of default in

payment of arrears contained in the first notice. As regards the ground of personal requirement the trial Court was not satisfied that the premises were reasonably and bona fide required by the plaintiff for his own use. The suit for eviction was dismissed although a decree for Rs. 1,822.97 was granted. The matter was taken in appeal to the Court of Small Causes. The appeal Court held that there was no waiver on the part of the landlord as regards the default committed by the tenant in not paying the arrears of rent within one month after the receipt of the first notice. In other words the service of a second notice and other facts which had been found by the Trial Court did not amount to a wavier of the first notice. But it was of the view that the demand of the arrears of rent made in the notice, dated June 13, 1956, was excessive and illegal which made the notice invalid. The other point about personal necessity appears to have been abandoned by the plaintiff before the appeal Court. The landlord filed a petition under Article 227 of the Constitution in the High Court which was dismissed in limine.

It has been contended before us on behalf of the landlord that the view of the appeal Court on the effect of an excessive demand having been made in the notice was altogether erroneous. In Civil Appeal No. 387 of 1964, Raghunath Ravji Dandekar v. Anant Narayan Apte (Decided on April 5, 1966) this Court laid down that a notice to quit under the Transfer of Property Act would not be bad because by mistake or oversight more was demanded in the notice under Section 12(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Act LVII of 1947), hereinafter called the Act, than was due. It is urged that since the aforesaid infirmity in the notice dated June 13, 1956 alone had prevailed with the appeal court the High Court ought to have entertained the petition under Article 227 and after setting aside the judgment of the appeal court the suit for ejectment should have been decreed. Reliance has been placed on Section 12(3)(a) of the Act according to which where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court shall pass a decree for eviction in any such suit for recovery of possession. It is argued that the notice dated June 13, 1956 was the only notice which after the amendment introduced in the plaint by Paragraph 3-A was to be treated as a valid notice and since there had been non-compliance with the demand made in that notice the Court was bound to pass a decree for eviction. As there was failure to exercise jurisdiction the High Court had the power and the authority to interfere in a petition under Article 227 of the Constitution.

4. It seems to us that on the facts which have been established the landlord was bound to fail. It is abundantly clear that he had, in the second notice, dated October 18, 1957, treated the tenancy as subsisting and not only the respondent was described as a monthly tenant but also in the plaint, even after the amendment had been allowed, rent was claimed upto November 1957; thereafter the amount due was described as compensation for use and occupation. The plaintiff was thus fully alive to the distinction between rent and damages for use and occupation and it cannot be said that he had abandoned the second notice and asked for the same to be treated as non est or that he had relied solely on the first notice dated June 13, 1956. Under Section 113 of the Transfer of Property Act a notice given 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. Illustration (b) is in the following terms :

> "(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived."

If only the language of the illustration were to be considered, as soon as the second notice was given the first notice would stand waived. Counsel for the appellant has relied on the observation of Denning J., (as he then was) in Lowenthal v. Vanhoute (1947 (1) KBD 342) that where a tenancy is determined by a notice to quit it is not revived by anything short of a new tenancy and in order to create a new tenancy there must be an express or implied agreement to that effect and further that a subsequent notice to quit is of no effect unless, with other circumstances, it is the basis for inferring an intention to create a new tenancy after the expiration of the first. The Privy Council in Harihar Banerji and Others v. Ramsashi Roy and Others (45 IA 222) had said that the principles governing a notice to quit under Section 106 of the Transfer of Property Act were the same in England as well as in India. For the purpose of the present case it is wholly unnecessary to decide whether for bringing about a waiver under Section 113 of the Transfer of Property Act a new tenancy by an express or implied agreement must come into existence. All that need be observed is that Section 113 in terms does not appear to indicate and such requirement and all that has to be seen is whether any act has been proved on the part of the present appellant which shows an intention to treat the lease as subsisting provided there is an express or implied consent of the person to whom the notice is given.

5. In the present case there can be no doubt that the serving of the second notice and what was stated therein together with the claim as laid and amplified in the plaint showed that the landlord waived the first notice by showing an intention to treat the tenancy as subsisting and that this was with the express or implied consent of the tenant to whom the first notice had been given because he had even made payment of the rent which had been demanded though it was after the expiration of the period of one month given in the notice.

6. It further appears that the rent was sent by the tenant treating the tenancy as subsisting and not as having come to an end by virtue of the first notice. There is another significant fact which shows that it was the second notice which was considered by the landlord to be the effective notice. It was in the notice sent in October, 1957 that the landlord, for the first time, raised the ground of personal necessarily. In the suit requirement of personal necessarily was made one of the main grounds on which eviction was sought. In the first notice which was sent in June, 1956 no such requirement or ground had been mentioned. It was not open, therefore, to the landlord to say that he did not want to rely on the second notice and should be allowed to base his action for eviction only on the first notice containing the ground of the default in payment of arrears of rent. We are satisfied that the suit of the landlord was rightly dismissed though we have sustained its dismissal on different reasoning.

7. The appeal, therefore, fails and it is dismissed with costs.

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