

Smt. Chander Kali Bai and Others

Vs

Shri Jagdish Singh Thakur and Another

Civil Appeal No. 110 of 1976

(N. L. Untwalia, Jaswant Singh JJ)

06.10.1977

JUDGMENT

UNTWALIA, J. –

1. In this appeal by special leave the appellants and respondent 2 were the defendants in a suit filed by plaintiff-respondent 1 for eviction and other reliefs in respect of the suit premises. The suit was dismissed by the trial Court but decreed by the first appellate Court. The second appeal filed by the defendant in the High Court of Madhya Pradesh was dismissed.

2. The demised property is a shop situated at a place in the District of Hoshangabad. It was let out by the father of the plaintiff to the husband of defendant 1 and the father of the other defendants in the year 1951 at a monthly rent of Rs. 50. A Bhojnalaya was being run in the shop by the tenant. The plaintiff's father was running a sweetmeat shop in a rented premises the rent of which was Rs. 225 per month. The plaintiff's father died in 1970. Sometime later the original tenant, the predecessor-in-interest of the defendants, also died. He had paid rent upto September, 1972. After the death of the original tenant, the defendant became the tenants of the suit shop. The plaintiff served a notice on the defendants terminating the contractual tenancy w.e.f. December 31, 1972. The suit for eviction was filed on March 8, 1973 claiming therein a decree for eviction chiefly on the ground of bona fide personal necessity of the plaintiff, for arrears of rent amounting to Rs. 150 for October, November and December, 1972 and damages for the months of January and February, 1973 at the rate of Rs. 225 per month as also future damages till the delivery of possession.

3. The trial Court dismissed the suit holding that the plaintiff did not require the suit shop bona fide for his personal necessity. On appeal by the plaintiff, the first appellate Court by its judgment dated August 11, 1975 took a contrary view and held in favour of the plaintiff. It decreed the suit for eviction, arrears of rent and also for past and further damages at the rate of Rs. 125 per month - damages to be payable on and from January 1, 1973 until delivery of the vacant possession to the plaintiff. The High Court has affirmed this decree.

4. Mrs. Leila Seth, learned Counsel for the appellants advanced a very able and succinct argument and urged only the following three points :

(1) The business for which the accommodation was required by the plaintiff was not "his business" within the meaning of clause (f) of sub-section (1) of Section 12 of The Madhya Pradesh Accommodation Control Act, 1961 hereinafter referred to as the Act.

(2) That the rented shop in which the business of sweetmeat and namkin was carried on should have been held to be an accommodation "of his own in his occupation" within the meaning of the second part of the clause (f).

(3) That no decree for damages could be awarded from the date of termination of the contractual tenancy. It could be awarded only from the date when an eviction decree was passed.

5. In our judgment the first two points of the appellants have got to be rejected but the third must succeed.

6. The plaintiff had clearly pleaded in paragraph 8 of his plaint that the sweetmeat shop which he was running in the rented premises was his business and he wanted to shift it to the accommodation in question. The defendants did not deny the statement made in paragraph 8 of the plaint - rather in paragraph 8 of their written statement they admitted them to be correct. In such a situation it was not open to them to take a stand at a very late stage of the litigation that the sweetmeat shop was the business of the joint family of the plaintiff - the karta of which was his father and on his death it was the business not of the plaintiff alone but of his entire joint family. The High Court has rightly rejected this point on this ground. In *Siddik Mahomed Shah v. Mt. Saran* [1930 PC 57(1) : 58 MLJ 7 : 121 IC 204] it has been pointed out that where a claim has never been made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward. If it could be so even at the trial stage, undoubtedly, such a new question of fact could not be entertained at any appellate stage. This decision has been followed by this Court in *Bhagat Singh v. Jaswant Singh* [AIR 1966 SC 1861 : (1962) 1 SCJ 162 : (1961) 1 Ker LR 539]. To the same effect is the view expressed in another decision of this Court in *Bachan Singh v. Dhian Dass* [AIR 1974 SC 708 : (1973) 2 SCC 109]. Hegde, J. pointed out in paragraph 6 of the judgment that a contention involving determination of questions of fact ought not to have been allowed to be raised for the first time in the second appeal in the High Court. In this case we may add further that neither any issue was struck nor was any evidence adduced by the parties on this question. The case proceeded to trial on the admitted footing that the business which the plaintiff wanted to shift to the suit shop was his business.

7. Apropos the second point it would be useful to point out that the Act replaced an earlier Act of 1955 entitled as The Madhya Pradesh Accommodation Control Act, 1955. In a similar provision as contained in Section 4(h) of the 1955 Act, the expression used was that the landlord "is not in occupation of any other accommodation in the city or town for that purpose". There is a clear departure in the 1961 Act where the phraseology is that the landlord "has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned", in the second part of clause (f) of Section 12(1). A tenanted shop in mere occupation of the landlord filing a suit for eviction against his tenant was sufficient to deny him a decree on the ground of clause (h) of Section 4 of the 1955 Act. But under the 1961 Act, mere occupation of another premises is not sufficient. The premises must be his own, meaning thereby that they must be owned by or belong to the landlord and he must be in occupation of the same. It is, therefore, plain that the tenanted shop in occupation of the plaintiff was not sufficient to deny him a decree for eviction against his tenant under Section 12(1)(f) of the Act.

8. For appreciation of the third point urged for the appellant it would be again useful to refer to a few corresponding provisions of the two Acts. In the 1955 Act, tenant was defined in clause (f) of Section 3 to mean "a person by whom rent is payable or but for a contract express or implied would

be payable for any accommodation and includes any person occupying the accommodation as a sub-tenant". In the 1961 Act, however, the definition of tenant has been widened and Section 2(i) reads thus :

"tenant" means a person by whom or on whose account or behalf the rent of any accommodation is, or, but, for a contract express or implied, would be payable for any accommodation and includes any person occupying the accommodation as a sub-tenant and also, any person continuing in possession after the termination of his tenancy whether before or after the commencement of this Act; but shall not include any person against whom any order or decree for eviction has been made.

On a plain reading of the definition aforesaid it is clear that a tenant even after the termination of his contractual tenancy does not become an unauthorised occupant of the accommodation but remains a tenant. It has been pointed out by this Court in *Damadilal v. Parashram* [1976 Supp SCR 645 : (1976) 4 SCC 855.] that such a tenant is conveniently called a statutory tenant. Whether the expression aforesaid borrowed from the English Law is quite apposite or not, but, what is certain is that a person continuing in possession of the accommodation even after the termination of his contractual tenancy is a tenant within the meaning of the Act and on such termination his possession does not become wrongful, until and unless a decree for eviction is made. If he continues to be in possession even after the passing of the decree, he does so as a wrongful occupant of the accommodation.

9. Mrs. Seth in support of her argument rightly pressed into service a few other provisions of the Act. Section 13(1) giving protection against eviction on the ground of default in payment of rent provides therein that even after the institution of the suit if he clears off the amount of rent due within a period specified in the section and thereafter "continue to deposit or pay, month by month, by the fifteenth of each succeeding month a sum equivalent to the rent at that rate" calculated at the rate of rent at which he was paying earlier, no decree for eviction can be passed. The conclusion is inevitable, therefore, that if a suit is filed on the ground of non-payment of rent after termination of the contractual tenancy, the tenant still continues to be a tenant liable to pay rent not only for the past period but in future also. In absence of a decree of eviction the person in occupation of the accommodation continues to be a tenant and is not liable to pay any damages as his occupation is not unauthorised or wrongful even after the termination of the contractual tenancy. In *Damadilal's* case (*supra*), Gupta, J. delivering the judgment of this Court has said at page 653 (SCC p. 864) with reference to the definition of tenant in Section 2(i) of the Act :

The definition makes a person continuing in possession after the determination of his tenancy a tenant unless a decree or order for eviction has been made against him, thus putting him on par with a person whose contractual tenancy still subsists. The incidents of such tenancy and a contractual tenancy must therefore to be the same unless any provision of the Act conveyed a contrary intention. That under this Act such a tenant retains an interest in the premises, and not merely a personal right of occupation, will also appear from Section 14 which contains provisions restricting the tenant's power of sub-letting.

10. In *Kikabhai Abdul Hussain v. Kamlakar* [1974 MPJ 485] a Bench of the Madhya Pradesh High Court seems to have opined even with reference to the 1961 Act that if a person continues to be in occupation after the termination of the contractual tenancy then on the passing of the decree for eviction he becomes a wrongful occupant of the accommodation since the date of termination. It

seems a theory akin to the theory of "relation back" has been applied in the sense that if no decree for eviction is passed then the person is not in unlawful occupation but on the passing of such a decree his possession becomes unlawful not from the date of the decree but such a decree makes his occupation unlawful from the date of the termination of the contractual tenancy. Whatever could be said with reference to the provisions of 1955 Act it is clear to us that the law so enunciated by the High Court with reference to 1961 Act is not correct.

11. Mr. Goswami, appearing for the plaintiff-respondent relied upon the decision of this Court in *Ganga Dutt Murarka v. Kartik Chandra Das* [(1961) 3 SCR 813 : AIR 1961 SC 1067]. In our opinion the said decision is of no help to the respondent. The question for determination there was a different one. With reference to the provisions of the West Bengal Premises Rent Control Act the argument advanced before this Court was that if after the determination of the tenancy by efflux of time or by a notice to quit the tenant continued in possession of the premises and the landlord accepted rent from him because no decree for eviction could be made in view of the subsequent Control Acts it was tantamount to holding over within the meaning of Section 116 of the Transfer of Property Act. This argument was repelled. Whether a new contractual tenancy would come into existence by acceptance of rent by the landlord in such a situation is a different matter. But this case does not lay down that the occupation of the premises by the tenant whose tenancy has been terminated by efflux of time or by notice to quit becomes unauthorised or wrongful.

12. For the reasons stated above it is manifest that the defendants remained in occupation of the accommodation on and from January 1, 1973 as a tenant, conveniently to be called statutory tenant, under the Act. Their occupation was not unauthorised or wrongful until a decree for eviction was passed by the first appellate Court on August 11, 1975. Their occupation became unauthorised or wrongful only from that date. They are not, therefore, liable to pay any damages or mesne profits for the period commencing from January 1, 1973 and ending on August 10, 1975. Decree for damages either in respect of the two months prior to the institution of the suit or for the subsequent period must therefore be set aside. The defendant-appellants will be liable to pay damages or mesne profits at the rate of Rs. 125 per month (the rate of damages could not be and was not challenged before us) from August 11, 1975 only, until the delivery of the vacant possession of the accommodation.

13. In the result the appeal is allowed in part only to the extent stated above. In the circumstances, we shall make no order as to costs in this Court.

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