Mangal Sen

Vs

Kanchhid Mal

Civil Appeal No. 965 of 1980

(R.S. Pathak, E.S. Venkataramiah, V.B. Eradi JJ)

20.08.1981

JUDGMENT

ERADI, J. –

1. This appeal by special leave is against a judgment rendered by the First Additional District Judge, Bulandshahr, allowing a revision petition filed before him by the respondent herein.

2. The respondent is the owner of a shop building in Jahangirabad town which he had let out to the appellant on a month to month tenancy basis. A suit for ejectment was filed by the respondent in the Court of Small Causes (Civil Judge), Bulandshahr, praying for eviction of the appellant from the shop under Section 20(2)(a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (for short, 'the Act') on the ground that the tenant was in arrears of rent for not less than four months commencing from April 9, 1972 and had failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand (October 19, 1972). It was alleged in the plaint that the agreed rent of the shop was Rs. 100 per month and that the tenant had kept the rent in arrears from April 9, 1972 onwards despite notice having been served on him on October 19, 1972 demanding payment of arrears of rent and determining the tenancy.

3. The appellant (defendant) pleaded on defence that the rent was only Rs. 90 per month, that he had not committed any default in payment of the same and hence the suit for ejectment was not maintainable. According to the defendant, after service of the notice of demand for payment of arrears of rent, the respondent had approached him with a request to stand surety for him for the payment of arrears of sales tax due by him for the realisation of which the Amin had come with a warrant for the arrest of the respondent and since the appellant had acceded to the said request and stood surety for the respondent, there could be no further question of any arrears of rent being outstanding as due by him to the respondent.

4. The trial court held that the rent of the shop was Rs. 90 per month, that it had been kept in arrears by the tenant from April 9, 1972 onwards and a default had been committed by the tenant in payment of arrears of rent for more than four months after the notice of demand. Notwithstanding the aforesaid finding that there had been such default committed by the tenant, the trial court took the view that the conduct of the plaintiff-respondent in inducing the defendant to stand surety for him for the payment of sales tax arrears due by him constituted a waiver of the demand made in the notice for surrender of possession on the ground of arrears of rent made. On this reasoning, the trial court denied the plaintiff the relief of ejectment and decreed the suit only for recovery of arrears of rent.

5. The respondent-plaintiff carried the matter in revision before the District Court, Bulandshahr. The learned District Judge found that the plea of waiver had not been put forward by the defendant either in the written statement or in any other manner at any stage before the trial court and that the issue covering the question of waiver had been framed by the trial court of its own accord. The District Judge further found on the merits that no conduct amounting to waiver on the part of the plaintiff had been established by the evidence because even according to the case of the defendant himself, excepting for standing surety for the plaintiff, he had not actually made any payment on behalf of the plaintiff towards the sales tax dues since the plaintiff had specifically refused to make any endorsement in the rent deed adjusting the proposed payment of sales tax against the arrears of rent due by the defendant. Inasmuch as the trial court had found that the default in payment of the arrears of rent for a period exceeding four months had been committed by the defendant and it had denied a relief of ejectment only on the reasoning that there had been a waiver of the demand for eviction on the part of the plaintiff, the District Judge allowed the revision petition and granted the plaintiff a decree for ejectment under Section 20(2)(a) of the Act.

6. Thereafter, the appellant-defendant took up the matter in further revision before the High Court under Section 115, Code of Civil Procedure. The High Court by its judgment dated November 28, 1979 confirmed the findings of the District Judge and dismissed the revision petition.

7. The defendant thereupon approached this Court for the grant of special leave to appeal against the said judgment of the High Court. It would appear that, at the time of the preliminary hearing of the special leave petition, the appellant realised that the revision petition filed by him before the High Court was not maintainable in law. Hence, this position was conceded by the appellant before a Bench which heard the special leave petition and a request was made by the appellant for the grant of special leave to him to appeal against the judgment of the District Court. That request was granted by Order of this Court dated April 23, 1980. This civil appeal is thus directed against the judgment of the District Judge.

8. After hearing counsel on both sides, we are satisfied that the District Court was perfectly right in its view that there had not been any conduct on the part of the plaintiff which would constitute a waiver by him of the demand for surrender of possession made as per the notice dated October 9, 1972 which was served on the tenant on October 19, 1972. As rightly observed by the District Court, the defendant had not put forward any plea of waiver in the written statement filed by him before the trial court and in the absence of any specific pleading in that behalf, the trial court was not really called upon to go into the question of waiver. Further, it being the specific case put forward by the defendant himself that no amount whatever had been paid by the appellant-defendant to the sales tax authorities on behalf of the plaintiff and that the respondent-plaintiff was not agreeable to make any endorsement on the rent deed adjusting the proposed payment of sales tax against the arrears of rent, we fail to see how it can be said that there had been any waiver by the plaintiff-respondent of the demand for surrender of possession already made by him as per the notice dated October 9, 1972. The finding rendered by the trial court that the effect of the notice had been effaced by the subsequent conduct on the part of the landlord which amounted to a waiver was manifestly illegal and perverse and it was rightly set aside by the District Judge.

9. Before us, an additional point was sought to be raised by the appellant which had not been put forward by him either before the trial court or before the District Judge at the revisional stage. It was urged that on the date of first hearing of the suit, the defendant had deposited into the trial court an amount of Rs. 1980 and hence he is entitled to the benefit of sub-section (4) of Section 20 of the Act which empowers the court to pass an order relieving the tenant against his liability for eviction

on the ground mentioned in clause (a) of sub-section (2) of the said section. It is necessary in this context to reproduce clause (a) of sub-section (2) and sub-section (4) of Section 20 of the Act. They are in the following terms :

#20(2) * * * *##

> (a) that the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand.
>
> (4) In any suit for eviction on the ground mentioned in clause (a) of sub-section (2), if at the first hearing of the suit the tenant unconditionally pays or tenders to the landlord the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annum and the landlord's costs of the suit in respect thereof, after deduction therefrom any amount already deposited by the tenant under sub-section (1) of Section 30, the court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground :
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> Provided that nothing in this sub-section shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area.

10. The provisions of sub-section (4) will get attracted only if the tenant has, at the first hearing of the suit, unconditionally paid or tendered to the landlord the entire amount of rent and damages for use and occupation of the building due from him together with interest thereon at the rate of nine per cent per annum and the landlord's costs of the suit in respect thereof, after deduction therefrom any amount already deposited by him under sub-section (1) of Section 30. There is absolutely no material available on the record to show that the alleged deposit of Rs. 1980 was made by the tenant on the first date of hearing itself and, what is more important, that the said deposit was made by way of an unconditional tender for payment to the landlord. The deposit in question is said to have been made by the appellant on January 25, 1974. It was only subsequent thereto that the appellant filed his written statement in the suit. It is noteworthy that one of the principal contentions raised by the appellant-defendant in the written statement was that since he had stood surety for the landlord for arrears of sales tax, there was no default by him in the payment of rent. In the face of the said plea taken in the written statement, disputing the existence of any arrears of rent and denying that there had been a default, it is clear that the deposit, even if it was made on the date of the first hearing, was not an unconditional tender of the amount for payment to the landlord. Further, there is also nothing on record to show that what was deposited was the correct amount calculated in accordance with the provisions of Section 20(4). In these circumstances, we hold that the appellant has failed to establish that he has complied with the conditions specified in sub-section (4) of Section 20 and hence he is not entitled to be relieved against his liability for eviction on the ground set out in clause (a) of sub-section (2) of the said section.

11. This appeal is, therefore, devoid of merits and is accordingly dismissed. We direct the parties to bear their respective costs.

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