M/S. Sarwan Kumar Onkar Nath

Vs.

Subhas Kumar Agarwalla

Civil Appeal No. 2607 of 1987

(E. S. Venkataramiah, K. N. Singh, S. Ranganathan JJ)

09.10.1987

JUDGMENT

VENKATARAMIAH, J. -

1. The appellant is a firm carrying on business at Jharia. It took on lease a room bearing No. 1 in a building belonging to the respondent on a monthly rent of Rs. 70 on November 7, 1960 and paid in advance two months' rent, i.e., Rs. 140. The appellant paid rents regurlarly but did not pay the rent for the months of September and October 1972. Taking advantage of the non-payment of the rent in respect of the said two months the respondent filed a petition for eviction against the appellant contending that the appellant had become liable to be evicted from the premises in question under clause (d) of sub-section (1) of Section 11 of the Bihar Building (Lease, Rent and Eviction) Control Act, 1947 (hereinafter referred to as 'the Act') which provided that on failure to pay two months' rent a tenant was liable to be evicted from the premises taken on lease. The appellant pleaded inter alia in his written statement that at the time of the inception of the tenancy it had paid the respondent a sum of Rs. 140 as advance rent with an understanding that the amount of advance could be set off against the rent whenever necessary or required and that since under Section 3 of the Act it was not lawful for a landlord to claim or receive, in consideration of the grant, renewal or continuance of a tenancy of any building, the payment of any premium, salami, fine or any other like sum in addition to the rent or payment of any sum exceeding one month's rent of such building as rent, in advance, the appellant could not be considered as a defaulter in payment of rent for purpose of clause (d) of Section 11(1) of the Act as a least one month's rent which had been paid in excess of what was permitted under Section 3 of the Act was liable to be adjusted towards the arrears. The appellant therefore, contended that in any view of the matter it could not be treated as a defaulter liable to be ejected from the premises. Agreeing with the pleas of the appellant the trial court dismissed the suit and the appeal filed by the respondent before the Additional Subordinate Judge, Dhanbad against the judgment of the trial court was also dismissed. The respondent filed a second appeal before the High Court against the judgment of the Additional Subordinate Judge. The High Court found that the appellant had failed to pay the rent for the months of September and October 1972 although it accepted the plea of the appellant that he had paid the sum of Rs. 140 as rent in advance on the ground that the appellant had not requested the respondent to adjust the rent which he had paid in advance towards the rent due for the months of September and October 1972. The relevant part of the judgment of the High Court reads thus :

6. In paragraph 9 of the written statement, the respondent stated that Rs. 140 was advanced to the appellant, with an understanding that it could be set off against the rent whenever necessary or required. It will, therefore, appear that the respondent was entitled to claim adjustment if it was necessary or required. The respondent neither orally nor in writing informed that it was exercising

its option under the agreement for adjusting the amount paid in advance towards the rent of September and October 1972. According to the respondent's own showing, it remitted the rent for these two months also along with rent of November and December 1972 in January 1973. If it had exercised its option under the agreement, there was no necessity for it to remit the rent for the months of September and October because that amount was not due as it had been paid by adjustment. Mr. Sinha submitted that the pleading should not be construed in a pedantic manner. There is no question of construing the pleadings in this case in a pedantic manner because according to its own case, the respondent was entitled to adjust the amount if necessary or required and for that it was necessary for it to intimate the appellant that it was exercising his option. Further, in the written statement nowhere it is asserted that it may be allowed to adjust the amount against the rent of September and October 1973. Since the option was not exercised at any stage, the respondent cannot get the benefit of the amount paid by it in advance to the appellant. Mr. Merathia tried to make out that Section 3 of the Act prohibits the landlord to accept the rent for more than one month and as the advance was for two months, no benefit can be given to the respondent as the contract was against the statute. It is true that if the parties are in pari delicto court will not come in rescue of either. However, that does not help the appellant.

Accordingly the High Court set aside the concurrent judgments of the two courts below and directed the eviction. This appeal by special leave is filed by the appellant against the judgment of the High Court.

2. It is unfortunate that the High Court has approached the entire case in a technical fashion. It is not disputed that the respondent was not entitled to receive more than one month's rent by way of advance. Yet, the respondent had received in advance the rent for two months. The receipt under which the was received dose not state that the amount received was liable to be adjusted towards the arrears of rent only on the appellant informing the respondent orally or in writing that such adjustment is to be made. In the written statement, however, the appellant pleaded that the amount paid by way of advance could be set off by way of rent whenever necessary or required. This is not a cases where there was any agreement to the effect that such adjustment could be made only on the tenant asking the landlord to make such adjustment. Nor is this a case where the tenant was liable to the landlord on any other account. The only transaction between them was the lease in question and the amount in question had been paid as rent in advance. There was also no agreement that the amount was liable to be adjusted at the termination of the lease. It was, therefore, open to the respondent to appropriate the said sum towards the arrears even without any option being exercised as regards such adjustment by the appellant. The High Court erred in observing that the appellant had not asserted in its written statement that it may be allowed to adjust the advance amount towards the rent due for the months of September and October 1972. In substance the plea set out in para 9 of the written statement amounts to such an assertion. In any case the appellant could not be treated as a defaulter who had failed to pay rent for two months. The High Court was also wrong in coming to the conclusion that the appellant could not rely on the provisions of Section 3 of the Act on the ground that if the parties were in pari delicto the court would not come to the rescue of either.

3. In Mohd. Salimuddin v. Misri Lal ((1986) 1 SCR 622 : (1986) 2 SCC 378) this Court has held that where in a suit by landlord for eviction of tenant it was found that the tenant, in order to secure the tenancy advanced certain amount to the landlord (although in violation of prohibition to do so as embodied in Section 3 of the Act) under an agreement containing a stipulation that the loan amount was to be adjusted against the rent which accrued, and the amount so advanced was sufficient to cover the landlord's claim of arrears of rent for the relevant period, it could not be said that the tenant was not entitled to claim adjustment of the loan amount so advanced against the rent which

accrued subsequently, simply because the loan advanced was in violation of the prohibition contained in the Act. Accordingly, this Court held that as the tenant was not in arrears of rent after the adjustment of loan amount towards the rent, he was not liable to be evicted from the premises in question. This Court further observed that the doctrine of in pari delicto was not attracted to such a situation. The principle enunciated in the above case is equally applicable to the case before us.

4. The learned counsel for the respondent, however, relied upon a Full Bench decision of the High Court of Patna in Gulab Chand Prasad v. Budhwanti (AIR 1985 Pat 327) in which it had been held that any excess rent paid by a tenant to his landlord in pursuance of a mutually agreed enhancement of rent which was illegal did not get automatically adjusted against all the subsequent defaults in the payment of the monthly rent under the Act. The decree for eviction passed by the High Court of Patna in the above case has no doubt been affirmed by this Court in Budhwanti v. Gulab Chand Prasad ((1987) 2 SCC 153). But, this Court affirmed the judgment of the High Court not on the ground that the tenant in that case was a defaulter in payment of rent but on the ground that the landlord required the premises for his bona fide use and occupation. This Court in its judgment observed that : (SCC p. 158, para 10)

In the view we propose to take ... we do not think it necessary to go into the question whether the appellants had committed default in payment of rent and secondly even if they had committed default, they are entitled to adjust the excess rent paid by them over a span of 30 years without reference to the rule of "in pari delicto". The reason for our refraining to go into these questions is because we find the decree for eviction passed against the appellants can be sustained on the second ground, viz., bona fide requirements of the shop for the business requirements of the members of the joint family.

It is not now necessary for us to consider the correctness of the observation made by the Full Bench of Patna High Court on the question of default and the right of the tenant to claim adjustment because what was claimed by way of adjustment in the said case was a certain excess amount paid over a long period of 30 years as enhanced rent under a mutual agreement though such payment was contrary to law. But in the case before us the amount of Rs. 140 had not been paid as enhanced rent undo any such agreement. It was, in fact, an amount which had been paid in advance which was liable to be adjusted whenever it was necessary or required.

5. On the facts and in the circumstances of the case we are satisfied that the appellant was not in arrears of two months' rent. We are of opinion that the High Court was in error in holding that the appellant was a defaulter who was liable to be evicted under clause (d) of sub-section (1) of Section 11 of the Act. The judgment of the High Court is, therefore, liable to be set aside and we accordingly set it aside. The judgment of the trial court which has been affirmed by the first appellate court is restored. The appeal is accordingly allowed with costs.

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