Nand Lal Agarwal

Vs

Ganesh Prasad Sah and Others

Civil Appeal No. 977 of 1986

(S. Natarajan JJ)

09.08.1988

JUDGMENT

NATARAJAN, J. –

1. This appeal by special leave is directed against a judgment of the High Court of Patna in Second Appeal No. 96 of 1982 confirming the decree for eviction passed by the lower courts against the appellant herein. The limited question for consideration in the appeal is whether the subordinate courts and the High Court have committed an error of law in holding that the appellant had rendered himself liable for eviction for non-payment of rent for the period February 1, 1975 to June 30, 1975 in spite of the courts holding that the appellant had paid excess rent of Rs. 10 per month for a period of 33 months.

2. The facts are not in dispute and are briefly as under. The appellant was running a grocery shop in the leased premises and was paying an agreed rent of Rs. 60 per month to the respondent. the respondent terminated the tenancy and filed a suit for eviction of the appellant on three ground, viz (1) bona fide requirement of the premises for opening a shop; (2) default in payment of rent for five months; and (3) wrongful conversion of the leased premises from a residential house to a grocery shop. The trial court and the appellate court decreed the suit for eviction on the first two grounds but not on the third ground. The High Court sustained the decree for eviction on the second ground and deemed it unnecessary to go into the merits of the other ground on which eviction was ordered.

3. As regards the non-payment of rent for the period February 1, 1975 to June 30, 1975, the appellant conceded that he paid the rent only on July 30, 1975 but nevertheless contended that he had paid an advance of Rs. 300 and out of the said advance a balance of Rs. 180 was available for appropriation towards the rent arrears, and secondly, the respondent had collected a sum of Rs. 70 every month towards rent as against the contractual rent of Rs. 60 for a period of 33 months and the excess collection in contravention of Sections 4 and 7 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1977 (for short 'the Act') and as such it ought to have been appropriated by the respondent towards the rent arrears. The trial court and the appellate court concurrently held that there was not proof the appellant had paid an advance of Rs. 300 and hence the question of appropriating the balance in the advance amount towards arrears of rent did not at all arise. Regarding the second plea pertaining to the excess payment of Rs. 10 every month for a period of 33 months and the adjustment of the excess payment towards the rent arrears, the courts held that the increase of the rent from Rs. 60 to Rs. 70 per month on the basis of the respondent providing additional amenities was not permissible under the Act but nevertheless, the appellant cannot take advantage of the situation because he had failed to exercise his option to seek adjustment of the excess payment towards the rent arrears. The High Court, as already stated, affirmed this finding of

the of the courts below and has observed that the appellant's prayer for adjustment of the excess payment can be sustained only if he had exercised his right of option under Section 8 (2) as the section lays down that any payment made in excess of the fair rent fixed for a building has to be refunded to the person by whom it was paid or at the option of such person it can be adjusted towards the arrears of rent. The view taken by the High Court is assailed by the appellant in this appeal.

4. It was urged by the learned counsel for the appellant the since the courts have found found that the respondent was not entitled to receive excess payment of Rs. 10 per month towards the amenities provided by him without the approval of the Rent Controller, he was bound to adjust the excess payments towards the arrears of rent and therefore he was not entitled to seek the appellant's eviction merely because the appellant had failed to exercise his option under Section 8 (2) of the Act for the appropriation of the excess payment towards the arrears of rent. It was further urged that so long as the excess payment had not been refunded, the respondent cannot seek eviction of the appellant on the ground of arrears of rent. Mr. M. P. Jha sought to draw support for his arguments from the decision in M/s Sarwan Kumar Onkar Nath v. Subhas Kumar Agarwalla. In that case a tenant's plea that a sum of Rs. 140 paid as advance rent for two months should have been adjusted towards the rent for the months of September and October 1972 without reference to his delayed payment of the rent in January 1973 was accepted by this court and the judgment of the High Court taking a contrary view was set aside. This court observed that since the sum of Rs. 140 had been specifically given by way of observed that since the sum of Rs. 140 had been specifically given by way of advance rent for two months, the landlord should have adjusted the amount towards the arrears even in the absence of a specific request from the tenant in that behalf. Learned counsel for the appellant also placed before us another judgment of this Court in Civil Appeal No. 1276 of 1988 dated March 30, 1988 Smt. Draupadi v. Gorakhnath Gupta where the tenant's plea for adjustment of excess amounts lying in the hands of the landlord towards the rent due for two months viz. February and March 1966 was sustained and the tenant's appeal was allowed.

5. Controverting the arguments of the appellant's counsel, Mr. S. N. Jha, learned counsel for the respondent submitted that this was not a case where the appellant had paid any rent in advance but a case where the appellant had been provided some amenities and in return therefor he had agreed to pay an additional sum of Rs. 10 per month. Such being the case, the additional payment of Rs. 10 was really not an excess payment of rent in the strict sense of the term but only a payment made without due permission being obtained from the Controller. It was also urged that as the additional payment of Rs. 10 was made as per a mutual agreement reached between the parties, this would be a case where the parties were 'in pari delicto' and in that resultant situation, one of the parties cannot seek the court's aid to score an advantage over the other. To strengthen his contention, the respondent's counsel relied upon the decision of a Full Bench of the Patna High Court in Gulab Chand Prasad v. Budhwanti and the dismissal of the appeal arising therefrom by this Court in Budhwanti v. Gulab Chand Prasad.

6. On a careful consideration of the contentions of the parties, we are clearly of the view that the pleas of the appellant have no merit in them. It is no doubt true that it has been held by the trial court and the appellate court that the increase of rent by Rs. 10 per month by way of return for the additional amenities provided by the respondent was not permissible under the Act because Section 4 does not permit any increase being made in the rent except in accordance with the provisions of the Act. In spite of this finding, the question for consideration would be whether the respondent has to necessarily adjust the excess payments towards areas of rent and desist from filing a suit for eviction of the appellant for non-payment of rent. It is in that context the legislative prescription

contained in sub-section (2) of Section 8 of the Act assumes significance. The sub-section inter alia provides that if any rent has been collected in excess of the fair rent determined for a building, then the tenant is entitled to a refund of the excess amounts paid by him unless he opts for a different course of action viz. the adjustment of the excess amounts paid by him unless he opts for a different course of action viz the adjustment of the excess payment towards rent past or future. Though Section 8 (2) deals with payment of excess rent for building for which the fair rent has been determined or re-determined by the Controller, the same principal, in the absence of a different prescription under the Act, has to govern the buildings for which the rent is payable in accordance with the terms of the contract between the parties. It therefore follows that even if the rent for the building leased out to the appellant had not been determined by the Controller but had been fixed by the parties themselves, the right to seek adjustment for the excess payments made by the appellant has to be in accordance with the principle set out in Section 8 (2). Viewed in that light the logical conclusion will have to bat without the appellant calling upon the respondent to adjust the excess payment towards the arrears or rent, he cannot seek such suit for eviction. The High Court has not therefore committed any error in holding that without the appellant exercising his option and calling upon the respondent to adjust the excess payments towards arrears of rent he cannot seek an automatic adjustment of the excess payments made by him and contend that he was not liable to be evicted for non-payment of rent.

7. We do not think the judgment in Sarwan Kumar Onkarnath case can be of any assistance to the appellant in this case. Manifestly that was a case where the tenant had paid two months rent in advance and as such the advance payment could always be adjusted towards rent by the landlord whenever the tenant committed default in payment or rent. Notwithstanding his position the landlord in that case took the standard that without a specific direction to him by the tenant to adjust the advance payment towards the rent arrears he was not bound to make such adjustment. It was in that context this Court set aside the judgment of the High Court and allowed the tenant's appeal and held that inasmuch as the tenant had paid the rent for two months in advance, the landlord could not put forth a plea that the tenant had failed to give him specific directions for adjustment of the advance towards arrears of rent and in the absence of such a direction he was entitled to seek the eviction of the tenant. The judgment was confined to the facts of the case as made clear by the following sentence in the judgment : (SCC p. 550, para 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. " The judgment does not lay down any general principle that in whatever circumstances the excess payment had been made and whatever be the period of default the landlord was bound to adjust the excess payment towards arrears of rent and exonerate the tenant of the default committed by him in payment of rent. Even the decision in Civil Appeal No. 1276 of 1988 will stand confined to the acts of that case and it does not lay down a ratio of general application to all cases in which a tenant seeks adjustment of excess payments towards his rent arrears.

8. Learned counsel for the respondent submitted that there is another perspective to the appellant's case and viewed form that angle also the appellant has to fail in his contention. The argument was that since the appellant had been as much a party as the respondent to the contravention of Section 4 of the Act by agreeing to pay an extra amount of Rs. 10 per month in return for the amenities provided in the premises, the doctrine of "in pari delicto" was attracted and hence the appellant cannot claim any indulgence on the ground he is a tenant and subjected exploitation by the landlord. there is neither justice nor grace., it was urged, in the appellant pleading for an advantageous treatment for himself in the eviction proceedings instituted by the respondent. The learned counsel referred to the observation in mohd. Salimuddin v. Misri Lal in the following terms : (SCC p. 381, para 4)

The doctrine ("in pari delicto") is attracted only when none of the parties is a victim of such exploitation and both parties have voluntarily and by their free will joined hands to flout the law for their mutual gain.

9. We do not think it necessary to go into this aspect of the matter because of our view that the High Court had not erred in any manner in refusing to countenance the appellant's plea regarding the adjustment of the excess payment made by him towards arrears of rent without his having opted for such adjustment and calling upon the respondent to make such adjustments. For the same reason it is also not necessary for us to advert to the decision of the Patna High Court the in Gulab Chand Prasad and the decision of this Court in the appeal arising therefrom in Budhwanti v. Gulab Chand Prasad.

10. In the result the appeal fails and is accordingly dismissed. There will, however, be no order as to costs.

</html