ALLAHABAD HIGH COURT

Basant Lal Sah

Vs

Bhagwati Prasad Sah

Second Appeal No. 3549 of 1960

(S.S. Dhavan, J.)

19.08.1960. 25.04.1953

JUDGMENT

Dhavan, J.

1. This is a tenant's second appeal from the concurrent decisions of the Courts below decreeing the landlord's suit for his ejectment. The defendant appellant Basant Lal Sah is the tenant of a shop in Nainital of which Bhagwati Prasad Sah is the landlord and owner. The plaintiff alleged that the defendant occupied the shop under a monthly tenancy. He obtained the permission under Section 3 of the U.P. Control of Rent and Eviction Act for the ejectment of the tenant and then served on him a notice terminating his tenancy and requiring him to quit. The notice also contained a demand for payment of arrears of rent. According to the plaintiff, the defendant did not pay the rent within the prescribed period of one month. The defendant resisted the suit and denied that his tenancy was from month to month. He alleged that it was a yearly tenancy in accordance with the prevailing custom in Nainital. He also pleaded that the rent was always paid annually and, therefore, he had committed no default at the time of receiving the notice. He further alleged that after the receipt of notice he remitted the balance of the rent due but it was refused by the landlord.

2. It may be noted that the permission obtained by the plaintiff under Section 3 was quashed by the Commissioner during the pendency of the suit, which however proceeded because the plaintiff claimed that the bar of Section 3 had been removed because of the default in payment of rent.

3. The trial Court held that the tenancy was monthly, and that the defendant had made default in the payment of rent. Accordingly it decreed the suit. On appeal the learned Judge confirmed both these findings. The defendant had corns to this Court in second appeal.

4. I have heard Mr. L.M. Pant for the appellant and Mr. K.C. Agarwal for the respondent, and have perused the judgments of the courts below and the entire evidence on the record. I am of the view that the decision of the lower Courts is erroneous. It is common ground that the plaintiff sent a notice of demand sometime in September 1956 claiming the arrears of vent due, and the defendant did not make any remittance within the prescribed period of one month. The question,

however, is whether this omission made him a defaulter as contemplated by Clause (a) of Section 3 of the Control of Rent and Eviction Act. The most important question before the Courts below was whether the rent of the shop was to be paid every month or annually. No issue was framed on this point, though the Courts decided the other issue namely, whether the tenancy was monthly or annual. Their concurrent finding is that the tenancy was initially for one year but the defendant continued in possession with the permission of the landlord, and as there was no registered lease the tenancy after the first year could May be from month to month. But both courts overlooked that it is possible even in a monthly tenancy to provide for annual payment of rent. The defendant had taken a specific plea that he had paid vent every year in December and no rent was due on the date when the plaintiff sent his notice of demand. This question was not decided fly the courts presumably under the impression that in A monthly tenancy the rent must be paid every month. That, however, is not so. It is possible to create a monthly tenancy but provide for payment of rent by the year. *Ram Kumar Das v. Jagdish Chandra*[1], and *Chinti Kaharin v. Kripashankar*[2], Even, if the defendant failed to prove that the tenancy was from year to year, the courts should have decided whether the rent was to be paid every month or at the end of the year. The question before me is whether I. should remand the case for a finding on this issue or decide it myself. I do not think that a remand would be in the interests of justice as it would lead to further delay which is not in the interests of either party. Moreover, as the entire evidence had been read out before me, I requested learned counsel for the parties to argue their respective cases on this point.

5. After hearing the counsel I have come to the conclusion that the mode of payment of rent was not from month to month but annual. It is necessary to relate very briefly the circumstances under which the tenancy came into being for the first time. The plaintiff's own case is that initially the defendant took the shop for one year but continued to occupy it with the plaintiff's permission at the end of the year. But he did not state that the rent was fixed at the rate of Rs. 23/8/- per month or any other rate. In fact he mentioned no monthly rent and when he demanded Rs. 219/- as rent by his notice of demand dated 9-9-1956 he calculated the rent for each month by dividing the sum, of Rs. 282/-, which was the yearly rent, by 12. This manner of calculation, was not open to him if the defendant had been paying and he had been accepting rent at the end of each year. The defendant on the other hand deposed that he had been a tenant for the last 30 years and had always paid lent at the end of each year in December. This is the only oral evidence on this point. I prefer to believe the defendant's version because it is corroborated by the surrounding circumstances. If the rent had been fixed on a monthly basis, the plaintiff would have mentioned the amount of Pent due to him in his notice of demand. But the notice mentions no monthly vale of rent and merely contains a vague demand for payment of arrears of rent. Moreover, the plaintiff himself admitted that the rent for the first year, of tenancy was Rs. 282/-, and it was not his case that on the expiry of the first year the parties agreed to fix a monthly rent and there is no statement by him to this effect. I am satisfied that though the tenancy could only be from month to month under the law, the rent was to be paid annually in December of each year as alleged by the defendant. That being so, the defendant was not in arrears of rent in the middle of 1956 when he received the notice of demand. Therefore, the bar of Section 3 was not lined and the plaintiff 's suit was incompetent.

6. Mr. K.C. Agarwal argued that the suit should have been decreed because the plaintiff had obtained permission under Section 3 of the U.P. Control of Rent and Eviction Act to file a suit for the ejectment of the defendant and the subsequent cancellation of this permission could not

affect the competency of the suit. For this purpose, learned counsel relied on the view taken by Desai, J. (as he then was) in *Dwarika Nath Munshi v. Gayatri Devi*[3], and also on an unreported decision of Desai, C.J., and Mukerji, J. in *Gopi Chand v. State of U.P*[4]. I have read both these decisions with care and respect but I am afraid I am unable to agree with the observations made in them.

7. In Special Appeal No. 870 of 1962 (All) the question before the Division Bench was whether the State Government had any jurisdiction to quash, the permission granted under Section 3 after a suit for ejectment had been instituted, and the Ber.ch held that it had. The question of the effect of the cancellation of the permission by the State Government was not before the Bench though certain observations were made to the effect that a suit for ejectment can go on even after the permission is cancelled by the appellate authority or the State Government. These observations, however, are obiter and though entitled to great respect, do not amount to a decision which is binding on me. In 1961 All LJ 353 Desai J. observed that Section 3 does not require the permission to remain valid or in existence up to the passing of the decree, but the other learned Judge expressly dissented from this view. I had to consider the observations of Desai J., in an earlier case *Rehtu Ram v. Karam Singh*[5], in which I respectfully disagreed with the view taken by the learned Judge.

8. It appears that the attention of the learned Judges who decided 1961 All LJ 353 (supra) and Special Appeal No. 870 of 1962 (All) was not drawn to an earlier decision of a Division Bench reported in *Dr. S.L. Khoparji v. State of Uttar Pradesh, Lucknow*[6], decided by Mootham, C.J. and R. Dayal, J., in which the whole question of the effect of the cancellation of the permission granted by the Commissioner or the State Government on a suit for ejectment filed in pursuance of that permission was considered. It was held by the Bench that the right to file a suit for ejectment en grounds other than those mentioned in Clauses (a) to (g) of Section 3 is ultimately dependent not only on the permission granted by the District Magistrate or the Commissioner but on the ultimate orders of the State Government under Section 7-F if any, and that the permission granted by the District Magistrate or the Commissioner will stand or fail according to the final orders of the State Government and that the validity of the institution of a suit for ejectment will depend on the nature of the final orders of the Government. This principle was laid down in an appeal from the decision of a learned Judge of this Court holding that after a suit had been filed with permission, "any subsequent cancellation of the permission will not compel the Civil Court to dismiss a suit properly instituted, in such a case cancellation of a permission subsequent to the filing of the suit will have practically no effect." I prefer to follow the principle enunciated in this decision, with which I respectfully agree, and which was binding on the learned Judges who decided the other two cases if it had been brought to their notice. A Judge, sitting singly, is not bound by the observations of a Division Bench which were made without considering an earlier decision of a Division Bench in which the principle of law was laid down in s matter directly in issue, and he can follow the earlier decision which is in accord with his awn opinion.

9. In 1961 All LJ 353 it was observed, "The restriction imposed by the Act was solely on (landlord's) right to file a suit in a civil Court; once the suit was filed, the subsequent proceedings continued to be governed ..... as regards adjective law, by that C.P.C., the Evidence Act etc. The Control of Rent and Eviction Act does not profess to govern the subsequent proceedings at all..... It means that once a suit is filed with the District Magistrate's permission and the civil Court takes cognizance of it, the permission exhausts itself and its existence or non-existence

ceases to be of any consequence in the further proceedings." The learned Judge further observed, "The words 'subject to any orders passed under Section 3 do not affect the landlord's right to a decree and civil court's right to go on with the suit." With very great respect, the real question is whether the order passed by the District Magistrate under Section 3 granting the landlord permission to eject the tenant is subject to conditions. Sub-Section (2) of this section makes the order granting permission subject to a right of revision by the party aggrieved and subject to the power of the Commissioner to revoke the permission and also subject to any orders passed by the State Government under Section 7-F. The various sections dealing with the order granting permission have to be read together and the Court must avoid an interpretation which will enforce one part of the Act at the expenses of rendering another futile. If the cancellation of the permission by the Commissioner in revision is ineffective after the suit has already been filed, the provision for revision becomes meaningless, the right to file a revision an empty right and the revisional power an impotent power. I would, therefore, hold that every order under Section 3 of the U.P. Control of Rent and Eviction Act granting the landlord permission to file a suit for the ejectment of the tenant must be read as if the statute has added to u an implied condition that the permission will become an effective if the Commissioner revokes the permission or if the State Government revokes it in the valid (but not arbitrary) exercise of its power under Section 7-F. Therefore, a landlord who files a suit without waiting for the result of the revision before the Commissioner must be deemed to have had notice of the implied condition attached to the order by the statute and it cannot be said that the landlord after obtaining permission acquires an absolute right to have his suit decided on merits in accordance with the Civil Procedure Code and that the subsequent cancellation of the permission by the Commissioner has no effect on the maintainability of the suit.

10. I allow this appeal and set aside the decisions of the courts below and dismiss the plaintiff-respondent's suit for ejectment. In the circumstances, however, I would direct the parties to bear their own costs throughout.

Appeal allowed.

Cases Referred.

1AIR 1952 SC 23
2AIR 1941 Pat488
31961 All LJ 353
4Special Appeal No. 870 of 1962 (All)
5Second Appeal No. 2145 of 1960 : (AIR 1964 All 208)
61958 All LJ 724