

ALLAHABAD HIGH COURT

Baboo Ram

Vs.

Ishrat Ali

Second Appeal No. 8 of 1968

(Jagmohan Lal and S.K. Kaul, JJ.)

12.03.1974

JUDGEMENT

Jagmohan Lal, J.

1. This second appeal has been filed by a tenant against whom a decree for ejectment has been passed by the lower appellate court though the trial court had dismissed the suit of the plaintiff-respondent. The accommodation, which is the subject-matter of the suit, is governed by the provisions of the U. P. (Temporary) Control of Rent and Eviction Act (to be hereafter called as the Act) which has since been repealed. The ejectment of the tenant was sought by the landlord on the ground that he had committed default within the meaning of Section 3 (1) (a) of the Act. A notice dated 16-9-1964 demanding arrears of rent due till then for a period of more than three months was served by the landlord on the tenant on 17-9-1964 requiring him to pay the arrears of rent within one month from the date of the receipt of that notice. The tenant sent the arrears of rent by money order on 10-10-1964. The money order was addressed to the landlord who resided in district Sitapur though the accommodation is situate in the city of Lucknow. The money order was taken by the postman to the landlord on 31-10-1964 and on that date the postman reported that the landlord had gone out of station for indefinite period and so he returned the money order to the tenant who received it back on 9-11-1964. On these facts the landlord alleged that the tenant was liable to ejectment under Section 3 (1) (a).

2. The defense of the tenant was that there was an agreement between the parties that rent would be sent by the tenant to the landlord through money order after deducting money order commission. As such, the defendant did not commit any default when he sent the arrears of rent to the landlord by means of

a money order on 10-10-1964 which in ordinary course must have reached him before the expiry of the period of one month' notice. If for some reason the money order did not reach the landlord within time or he did not accept it, the tenant was not at fault and the Post Office in such circumstances shall be deemed to be the agent of the landlord.

3. The trial court accepted the plea of the defendant and dismissed the suit. The lower appellate court while agreeing with the finding of the trial court that there was an agreement between the parties under which rent could be remitted by the tenant through money order after deducting money order commission, was, however, of the opinion that merely because the tenant remitted the arrears of rent by money order on 10-10-1964 will not protect him unless the money actually reached the landlord before the expiry of the period of notice. The learned Civil Judge relied on a decision of this Court in *Jodha v. Ayodhya Prasad*,¹ in support of this view. He accordingly held that the defendant was liable to ejection under Section 3 (1) (a) of the Act and passed a decree for ejection against him.

4. The defendant filed this second appeal against that decree. The appeal had a chequered history in this Court. It came for hearing before G. D. Sahgal, J. who under his order dated 23-8-1968 noted that there was a difference of opinion in this Court on the question whether in the circumstances of the case when rent was remitted by the tenant to the landlord by money order, the Post Office acted as an agent of the tenant or of the landlord and so referred it to a larger Bench. The two decisions in which contradictory views on this point were taken were *Jodha v. Ayodhya Prasad*, 1967 All LJ 491 (supra) and *Ratan Lal v. Jagannath Prasad*,²

5. The appeal then came before a Bench consisting of G. D. Sahgal and O. P. Trivedi, JJ. Along with this appeal there was another appeal also in which a similar point of law was involved though there was no agreement between the parties in that case with regard to remitting the rent by money order as it was found to be in the present case.

6. After hearing these appeals a difference of opinion arose between the two Judges. Sahgal, J., was of the view that the remittance of arrears of rent by

money order well in time by the tenant was a good payment for the purposes of Section 3 (1) (a) and that the tenant was not to suffer if for no fault of his the money order does not reach the landlord within normal time. Further, so far as the present case is concerned, he was of the view that since there was an agreement between the parties permitting the tenant to send the money by money order after deducting money order commission, the Post Office was acting as agent of the landlord after the tenant had tendered the money to it on 10-10-1964. On the other hand, Trivedi J. was of the opinion that the remittance of rent by money order before the expiry of the period of notice under Section 3 (1) (a) was not by itself sufficient unless the money reached the landlords before the expiry of the period of notice. According to him the Post Office acted, in such conditions, as agent of the tenant and not as agent of the landlord. In respect of the finding of fact that there was an agreement between the parties that the tenant could send rent by money order, he was of the opinion that no such agreement could be spelt out from the facts of the case.

7. In view of this difference of opinion the Bench framed the following point and referred it for the opinion of the third Judge under the proviso to subsection (2) of Section 98 of the Civil Procedure Code:-

Does a tenant, who has arranged to send to the landlord arrears of rent, referred to in clause (a) of sub-section (1) of Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947 (Act III of 1947), through postal money order well within time so as to reach him within one month of the service of notice of demand on the tenant, "fail to pay the same" under the provision of law if the amount fails to reach the landlord within that period for no fault of the sender."

8. This reference came before Lakshmi Prasad, J. who in his opinion dated July 8, 1969, partly agreed with Sahgal, J. and partly with Trivedi, J. He held that it cannot be laid down as a general rule that where a tenant arranges to send to the landlord arrears of rent demanded from him under Section 3 (1) (a) of the Act, through postal money order well within time so as normally to reach the landlord within the period of notice, he shall be deemed to have made such payment and he cannot be said to have failed to pay the same even though the money is actually tendered by the postman to the landlord beyond the period of notice. He was of the view that normally the Post Office in such cases acts as an agent of the tenant who chooses to send the arrears of rent through postal money

order and it cannot be deemed to be an agent of the landlord. So the liability of payment of rent is discharged only when the money is actually tendered by the postman on behalf of the tenant to the landlord. But this ordinary rule was subject to an exception where the tenant sends to the landlord arrears of rent through money order either on the request of the landlord or under an agreement with the landlord and in that case the Post Office acts as an agent of the landlord. If the tenant has tendered money to the Post Office well within time, he cannot be said to have failed to pay the same within the meaning of Section 3 (1) (a), even though the amount is actually taken to the landlord by the postman for some reason or the other after the expiry of the period of notice.

9. The learned Judge further tried to resolve the difference of opinion between Sahgal, J. and Trivedi, J. on the question of fact whether or not there was an agreement between the parties in the present case under which the landlord had permitted the tenant to send rent through money order after deducting money order commission. He agreed with the finding of Sahgal, J. on that point and disagreed with the finding of Trivedi, J. After recording this opinion, he further observed that so far as the 2nd Appeal No. 614 of 1962 was concerned, the tenant had failed to pay the arrears of rent within the meaning of Section 3 (1) (a) when he himself chose to remit the rent by money order and that money order actually reached the landlord after the expiry of the notice. But so far as the present case is concerned, the defendant-appellant could not be said to have committed a default because he had sent the arrears of rent by money order in pursuance of the agreement between the parties.

10. When this opinion of the third Judge was received by the Bench consisting of Sahgal and Trivedi, JJ., Second Appeal No. 614 of 1962 was dismissed in accordance with the opinion of the third Judge. But with regard to his opinion in relation to the present second appeal, a further controversy was raised by the learned counsel for the plaintiff-respondent that the difference of opinion on question of fact as to whether or not there was an agreement between the parties that rent could be sent by the tenant to the landlord by money order, could not be referred to the third Judge under Section 96, C. P. C., and that in view of sub-section (2) of that section the decree passed by the lower appellate Court should be confirmed. The Bench under its order dated 4-11-1969 adjourned the case to another date so that this objection raised by the counsel for the plaintiff-

respondent could be heard and decided after hearing the arguments on behalf of both the parties.

11. The case then came before another Bench consisting of Gursharan Lal and Jagmohan Lal, JJ. since by that time Sahgal, J. as well as the third Judge Lakshmi Prasad, J. had retired. That Bench accepted the contention of the learned counsel for the plaintiff-respondent that a difference of opinion between the two Judges on a question of fact could not be referred to a third Judge under Section 98, C. P. C., but only a legal point could be so referred under the proviso to sub-section (2) of that section. The Bench reframed the reference arising out of the difference of opinion originally existing between Sahgal, J. and Trivedi, J. and referred it for the opinion of the third Judge.

12. This time the reference went before K. B. Srivastava, J. He was of the opinion that the question so referred to him could be sub-divided in three parts out of which the first two parts related to questions of fact, while the third part alone was a legal point. So far as the first two parts were concerned, they could not be referred under Section 98 to the third Judge. Since the legal point covered by the third part was dependent on the finality of the facts as involved in the first two points, he did not think it possible to record his opinion on the legal point also.

13. The case has now come before this Bench since in the meantime Gursharan Lal, J. also retired.

14. We have carefully perused the opinions originally recorded by Sahgal, J. and Trivedi, J. with regard to this aspect of the case. Sahgal, J. observed as follows:-

"In the case giving rise to 2nd Appeal No. 8 of 1968 we have the additional ground that in that case as the landlord resided in Khairabad in the district of Sitapur, the property being situated in Lucknow, he had authorised the tenant to send the money by money order allowing the money order commission to be deducted and if the tenant had sent the money order well in time, the mere fact that it reached the landlord later

than the date on which it ought to have reached to avoid the mischief of ejection, the tenant cannot be held liable."

On the other hand, Trivedi, J. observed :

"The first appellate court held that there was an agreement between the parties that the tenant may send the rent by money order after deducting the money order commission. On the basis of this finding it was urged by learned counsel for the appellant that in his case the post office should be deemed to be the agent of the landlord and when admittedly the rent was tendered in the post office before the expiry of one month of the service of notice there was no default. To my mind it is impossible to spell out in this case an agreement between the tenant and the landlord to the effect that the tenant should send rent to the landlord through post office. The landlord appears to have agreed that if the plaintiff exercised the option of sending rent by money order he may deduct the commission. To my mind that circumstance alone would not justify the inference that the landlord had either made a request or had agreed to remittance of the rent to him through post office."

15. It is, therefore, necessary to find what is the finding on this question which has been recorded by the courts below. The Munsif made the following observation in his judgment :

"The defendant states that there was an agreement whereby he was to remit the rent to the plaintiff by M. O. after deducting the M. O. charges. The plaintiff denies the existence of any such agreement..... I therefore believe the defendant on this point and hold that there was an agreement whereby the rent was to be remitted by M. O. after deducting the M. O. charges."

16. The Civil Judge after referring to the finding recorded by the trial Court on this point made the following observation of his own :

"In my opinion also there was an agreement between the parties that the defendant may pay rent by money order after deducting money order commission."

17. From the above, it is clear that so far as the lower Courts are concerned,

they have recorded a concurrent finding of fact in clear terms that there was an agreement between the parties under which the tenant was permitted to send the rent by money order after deducting money order commission. It was argued by the learned counsel for the plaintiff-respondent that in any case since the two Judges who originally heard this appeal recorded divergent opinions as regards this finding the decree of the lower appellate Court should be confirmed under sub-section (2) of Section 98. In our opinion, sub-section (2) would have been applicable to bring out this result if the difference between the two Judges had been confined only to this finding of fact. But actually the difference of opinion between them was also as to the application of law to the finding of fact as recorded by the Courts below. Ordinarily, this Court while hearing a second appeal does not interfere with a finding of fact. In any case, a finding of fact recorded by the courts below cannot be interfered with when there is a difference of opinion between the Judges constituting the Bench. It, therefore, follows that the finding of fact as recorded by the Courts below has to be accepted. In such a case sub-section (2) will be applicable as respects that finding alone on which there is a difference of opinion and not to the result of the appeal itself when in the opinion of one Judge the lower court has misapplied the law on the facts found but the other Judge does not concur in that view. So the question that survives is whether on that finding of fact the lower appellate Court had correctly applied the law by holding that even though the rent was sent by the tenant in accordance with that agreement, the post office was holding the money as an agent of the tenant and if the money was not actually delivered to the landlord before the expiry of the notice, the tenant had failed to pay the arrears of rent within the meaning of Section 3 (1) (a). The Bench, which originally heard the second appeal, had differed on that point. The third learned Judge to whom a reference was made has clearly recorded his opinion that in view of this agreement the post office was holding the money on behalf of the landlord and not as an agent of the tenant and so the tenant cannot be deemed to have failed to make the payment after he had tendered the money to the post office on 10-10-1964. This opinion of Lakshmi Prasad J. on this legal point is severable from his opinion on the finding of fact respecting the alleged agreement which is in conformity with the finding of the lower court which finding becomes conclusive by the application of sub-section (2) of Section 98, Civil Procedure Code irrespective of the opinion recorded by the third Judge. In this view of the matter no further reference to third Judge is

called for to resolve the difference existing in the opinions recorded by the two Judges who originally heard this appeal.

18. In accordance with this opinion the appeal has to be allowed. The appeal is accordingly allowed. The result will be that the suit of the plaintiff shall stand dismissed, but under the circumstances of the case, parties shall bear their own costs throughout.

19. The opinion recorded by Sahgal, J., Trivedi, J. and Lakshmi Prasad, J. shall be deemed to form part of this judgment.

Appeal allowed.

Cases Referred.

1. 1967 All LJ 491
2. 1967 All LJ 1029