

JAMMU AND KASHMIR HIGH COURT

Parshotam Lal

Vs.

Kalayan Singh

Civil Second Appeal No. 75 of 1969

(Anant Singh, J.)

17.04.1970

JUDGMENT

Anant Singh, J.

1. This second appeal is directed against the Judgment and the decree of the learned District Judge, Jammu dated 24th October 1961. decreeing the plaintiff's suit for ejectment from a shop after reversing, the Judgment of the trial court being the Munsiff, Judicial Magistrate, Jammu dated 22 May, 1969, whereby, he had dismissed the plaintiff's suit.
2. The suit was filed on 2-5-66, for ejectment of the defendant, Parshotam Lal from a shop situate at Parade ground, in the City of Jammu, on the ground of personal necessity within the meaning of Section 11, of the Jammu and Kashmir Tenancy (Stay) of ejectment proceedings Act, 1966, Act No. XXXIII of 1960 referred to hereafter as the Act.
3. The plaintiff has a number of sons in service, and some sons reading in school at Jammu. He has his residence at Jammu, but he has been carrying on business of grocery (Kerana) at Qazikund, near Srinagar, for the preceding ten years. It was alleged that as he was not keeping physically fit at Qazikund, he wanted to shift his business to Jammu, and therefore, he required this shop for his personal business. Several issues were raised before the trial court. One of them was issue No. 5 whether the defendant was served with any valid notice for vacating the shop. Other issue was issue No. 4 to the effect, whether the plaintiff reasonably required the shop and if his requirement was more than that of the plaintiff.
4. It was urged on the defendant's behalf that he had no other source of income, except the business, which he has been carrying on in this shop and in the event of this ejectment, his family, consisting of 4 children, and his wife would be thrown on the street.
5. The learned Munsiff decided both these issues No. 4 and 5 in favour of the defendant against the plaintiff.
6. The learned Munsiff on issue No. 5, has found that a notice was necessary but no notice was proved to have been served on the defendant. Referring to a post-card, which was on the record,

bearing an endorsement presumably of post office 'refused'. The learned Munsiff has held that the plaintiff took no steps to prove it nor did he in his own evidence make any claim of having given any notice to the defendant.

7. As regards issue No. 4 the learned Munsiff, after referring to the evidence adduced on behalf of the parties regarding the requirement of the shop and comparing the urgency of the comparative necessity of the two, he had held "the defendant's requirement of the shop in dispute is more than that of the plaintiff," and, therefore, he decided it in favor of the defendant.

8. On appeal the learned District Judge, in his judgment, while dealing with issue No. 4, has observed.

"In case the landlord reasonably requires the house or shop for his own use he will be entitled to a decree for ejection irrespective of any amount of inconvenience to the tenant. When the court comes to a conclusion that the suit premises are reasonably required by the landlord for his existence and not for expansionist designs, the decree for ejection cannot be refused to him on the consideration it would cause hardship to the tenant."

In support of his observations, he has referred to certain decisions of different High Courts including AIR 1967 J & K, 141 which is a decision of a single Judge of this Court. After making the above observations the learned District Judge, has concluded that :

"When the plaintiff appellant is earnest to shift his business to Jammu, he reasonably requires the suit shop for his need. In such a case the inconvenience of the defendant respondent cannot stand in his way to get a decree for ejection. Finding of the lower court with regard to issue No. 5 (which is a mistake for issue No. 4) is therefore, reversed and it is held that the suit shop is required by the Plaintiff for his own use even when looked from the comparative advantages and disadvantages of the parties."

9. It is, however, relevant to mention that the conclusions arrived at by the learned District Judge, as to a reasonable requirement of the shop by the plaintiff, and the comparative disadvantages of the defendant do not appear to be based on any discussion of the evidence particularly that of the defendant. As a final court of fact all the evidence should have been weighed by him. A decision on fact without due consideration of evidence is no decision in the eye of law.

10. As to the view of law he has rather put it too wide that the landlord is entitled to a decree, if he only requires the shop for his own use "irrespective of the amount of inconvenience to the tenant". He should not have set aside the findings of the learned trial court without referring to the evidence, adduced on behalf of the parties.

11. Explanation to Section 2 of the Act, is quite a speaking one. The material portions :

"The court and in determining reasonableness of requirement for occupation shall have regard to the comparative advantage and disadvantage of the landlord or the person for whose benefit the house or shop is held and of the tenant."

12. The cases referred to by the learned District Judge, have not recorded any discordant note to this proviso. It has rather been endorsed also in some other cases of this court as well Cases of other High Courts having no similar provision as in the above explanation, have no application to this State.

13. In 1968 J & K Page 59, in para 24 at page 64 a Division Bench of this court, Bhat and Mukerjee JJ. had laid emphasis on the above proviso by saying that it "enjoins upon the courts to bear in mind the respective advantages and disadvantages accruing from the proposed order to the respective persons competing for the occupation of the premises namely the landlord and the tenant."

14. The proviso has been interpreted also in 1963 K.L.J. page 38, wherein, it has been emphasized that the courts have to go into comparative advantages and disadvantages of the landlord and that of the tenant. I would put it in other words, as comparative convenience and inconvenience to the landlord, and the tenant in the matter of requirement of the house or the shop as the case may be. Even 1967 J & K 141, on which the learned District Judge, has relied, has not taken a contrary view. It has only explained that the requirement of a landlord should be in an objective sense, and not the whimsical, and capricious desires of landlord.

15. The question of requirement will always differ from case to case depending on the facts of its own. The advantages and disadvantages of the parties have to be balanced. The landlord may be reasonably requiring the shop for his use but with a view to Judge a comparative disadvantage to the tenant, it may have to be ascertained, if the requirement of the landlord is reasonably imperative, and a pressing, one, if he cannot manage otherwise, and if he cannot defer it till any reasonable time during which the tenant can arrange to shift, etc. The learned District Judge in his judgment as I have already indicated has not discussed the evidence, keeping in view, the comparative advantage and disadvantages of the parties. His Judgment, is.. therefore, bad in law in this regard and must be set aside.

16. Now, coming to issue No. 5, the learned District Judge, appears to be of the view that a notice under section 106 of the T. P. Act was, of course, necessary, but he has found on the record a postcard with an endorsement on its back as 'refused' as also an acknowledgement form, bearing some postal seals. He has considered this to be sufficient notice to the defendant on the authority of several decisions he has quoted, and the provisions of Section 27, of the General Clauses-Act, read with section 114 of the Evidence Act. The learned District Judge, seems to have misdirected himself in relying on this postcard with an acknowledgement form sufficient notice. They were neither proved nor exhibited. The postcard was addressed to Shri Bhim Sain s/o Sunder Dass Khatri, shop No. 21 near prade ground Jammu. It is dated 3-2-66. Below the address column, there is an endorsement in English "absconded/refused 15-2". The acknowledgement form lying by the side of the postcard bears the same address as the postcard.

17. It would appear from the plaint that there were two defendants, the present appellant Parshotam Lal, defendant No. 1 and his brother, Bhim Sain. defendant No. 2. The averment in the plaint is that it was Parshotam Lal, defendant No. 1 the present appellant, who had taken the shop on rent through his brother Bhim Sain, defendant No. 2, with effect from 3-9-69, on executing a rent deed for a period of 11 months. The tenant of the shop, according to the plaint

itself, was Parshotam Lal, defendant No. 1, and it does not make any claim that Bhim Sain defendant No. 2. was also a tenant along with defendant No. 1, but the post card, referred to above, was addressed to Bhim Sain alone. Thus, there was absolutely no notice to Parshotam Lal, defendant No. 1, even if it were to be supposed that the post card, in due course of the business of the post office, had reached the addressee being defendant No. 2, who refused to acknowledge it. Any notice to defendant No. 2, was no notice to the tenant, defendant No. 1.

18. Besides, the mere presence of the post card, and the acknowledgement form with certain postal seals and an endorsement thereon, will not lead to any presumption that this post card was addressed by or on behalf of the plaintiff to the addressee, and its acknowledgement was refused by the latter. It is not a public document. It was required to be duly proved by calling the writer of the post card or one who was conversant with his writing or at least the person who had posted it, and also by calling the postman, who may have made the endorsement of refusal, when the acknowledgement of the post card is denied by the defendant. It was so held in AIR 1918 Nagpur 202. The principle of proving a notice by calling competent person or persons is well settled. Any presumption of any correspondence sent through post, having reached the addressee can arise only, when proper posting is proved and, similarly refusal by an addressee can be presumed, when an endorsement to that effect by the postal peon is proved by calling him, or some one to prove his handwriting.

19. For all these reasons it must be held that there was no notice served on the appellant to quit the shop.

20. The learned counsel appearing for the respondent has however, raised a point that no notice was necessary to be served on the defendant, to quit the shop, within the meaning of Section 106 of the T.P. Act. it was urged that the provision of Section 106 of the T. P. Act, has no application, since after the introduction of the Act, giving certain protections to the tenants in respect of their premises, the defendant became a statutory tenant after the period of his tenancy expired in September, 60.

21. In support of his contention he has relied upon a decision of the Supreme Court in *Ganga Dutt Muraka v. Kartik Chandra Dass and others*¹ In that case the contractual tenancy was determined by efflux of time on 15.6.67 and ever since the tenant had

¹ AIR 1961 SC 1067

continued in possession of the premises without any fresh contract of the tenancy. The tenant continued in possession by virtue of the protection afforded in certain Rent Control Legislations. Interpreting Section 116 of the Transfer of property Act it was held that :

"Where a contractual tenancy to which the rent control legislation applies has expired by efflux of time or by determination by notice to quit and the tenant continues in possession of the premises by virtue of statutory protection, acceptance of rent from the tenant by the landlord after the expiration or determination of the contractual tenancy will not afford ground for holding that the landlord has assented to a new contractual tenancy".

It was also held in that case that :

"Apart from an express contract, conduct of the parties may undoubtedly justify an inference that after determination of the contractual tenancy, the landlord had entered into a fresh contract with the tenant, but whether the conduct justifies such an inference must always depend upon the facts of each case".

22. In short, the *ratio decidendi* of the case was that because the tenant failed to prove that he was holding over his tenancy within the meaning of Section 116 of the T. P. Act, no notice under Section 106 of that Act was necessary.

23. Reliance has been placed on behalf of the plaintiff landlord also on a Division Bench of this Court in *Bega Begum and others v. Abdul Ahad Khan and others reported in*² to say that no notice is necessary, but in that case, no rent was accepted by the landlord after the tenancy expired by efflux of time.

24. The crux of the question, however, is whether in the circumstances of the present case, the tenant defendant can be deemed to have been holding over the tenancy within the meaning of Section 116 of the Transfer of Property Act after the tenancy was determined on the expiry of the covenanted period of 11 months from the commencement of the tenancy from 3rd September, 1959. It is not disputed that the tenant continued in possession of the shop on the same terms till the date of the suit, and the plaintiff landlord went on accepting the same rent from him. The plaintiff unlike the case of *Ganga Dutt Murarka*. never tried to obtain possession of the shop. In *Ganga Dutt Murarka's* case the landlord had made at least two attempts by service of notice to quit, but the tenant could not be ejected because of the protection afforded under the Rent Control Legislation. In the present case, it cannot be said that the tenancy was being continued only by the protection of the Rent Legislation, though, he has had the protection of the Rent Control Legislation, as well.

25. The lease deed of the tenant defendant provides for one month's notice to vacate, and if the defendant is found to have been holding over his tenancy he is entitled to notice under the terms of his lease as well.

²1968 Jam and Kash 58

26. On behalf of the defendant reliance has been placed upon the following cases.

1. *Bhaiya Punjalal Bhagwanddin v. Dave Bhagwatprasad Prabhu Prasad and others, reported in*³
2. *Mangilal v. Sujan Chand Rathi (deceased) and after him, his heirs and legal representatives and another, reported in*²
3. *Manujendra Dutt Vs. Purnedu Prosad Roy Choudhury and others, reported in*⁵
4. *Niranjana Pal and another v. Chaitanyalal Ghosh and another reported in*⁶

27. Referring to the provisions of Section 12 of the Rent Control Legislation in case of *Bhaiya Punjalal*. It has been pointed out that the provision of the Rent Control "will operate against the landlord after the determination of the tenancy by any of the modes referred to in Section 111 of the Transfer of property Act..... Where a tenant is in possession under a lease from the landlord,

he is not to be evicted for a cause which would give rise to a suit for recovery of possession under Section 12, if his tenancy has not been determined already. It follows that whenever a tenant acts in a way which would remove the bar on the landlord's right to evict him, it is necessary for the landlord to serve him with a notice determining his tenancy and also serve him with a notice under sub-section (2) of Section 12 of the Act".

28. In this State, however, the Rent Control Legislation in question has made no provision for service of any notice for the determination of the tenancy other than the conditions which have been laid down for eviction of the tenant under Section 11, but as will appear from the decision in the above case of *Bhaiya Punjalal*, a notice under Section 106 of the T. P. Act is necessary, if the contractual tenancy has continued as it must be held to have continued in the present case.

29. In the case of *Mangilal*, the landlord had filed the suit for eviction of the tenant on the ground of personal necessity amongst others as provided in Section 4 of the M. P. Accommodation Control Act, and it was held by the Supreme Court :

"The provisions of Section 4 of the Accommodation Act are in addition to those of the Transfer of Property Act and that before a tenant can be evicted by a landlord, he must comply both with the provisions of Section 106 of the Transfer of property Act and those of Section 4 of the Accommodation Act".

It was further held referring to notice under Section 106 of the T. P. Act, that :

"Such a notice is essential for bringing to an end the relationship of landlord and tenant. Unless the relationship is validly terminated the landlord does not get the right to obtain possession of the premises by evicting the tenant".

It has further been explained in para 8 of the judgment :-

"The character of the tenancy as one from month to month remains, but to it is added a condition that the unfettered right to terminate the tenancy conferred

³1963, S.C. page 120

⁵1967 S. C. page 1419

⁴1965 S.C. 101

⁶AIR 1964 Pat (F. B.) 401

by Section 106 will be exercisable only, if one of the grounds set out in Section 4 of the Accommodation Act is shown to exist".

30. The view taken in the case of *Mangilal* was repeated in the case of *Manujendra Dutt* with an observation that the provision of Rent Control Legislation "where in addition to that of the T. P. Act, and therefore before a tenant could be evicted by a landlord he must comply with both the provisions of Section 106 of the Transfer of the Property Act and those of Section 4". In that case it was also made clear. It is well settled that statutory tenancy normally arises when a tenant under a lease holds over, that is, he remains in possession after the expiry or determination of the contractual tenancy. A statutory tenancy therefore comes into existence where a contractual tenant retains possession after the contract has been determined".

31. The majority view of the Full Bench in *Patna* case was similar that a landlord cannot

maintain an action for eviction of a tenant under Section 11 of the Bihar Buildings Control Act unless the lease was determined in accordance with the methods provided by Section 111 of the T. P. Act.

32. Rent Control Legislations, referred to in cases mentioned above, were similar to the provision of Section 11 of our Act. It would appear that the provision of Section 11 of the Act is in no way inconsistent or repugnant to the relevant provisions of the T. P. Act, providing for the determination of a monthly tenancy, but for the Rent Control Legislation a landlord could terminate a tenancy by giving a requisite notice to the tenant. Now under the Rent Control Legislation, a further protection is given to the tenant providing conditions for determining a tenancy. The conditions in the two Acts are not mutually derogatory. They are rather complimentary and supplementary of each other. The conditions of both have to be satisfied. The statutory tenancy does not wipe of the privileges accruing to a tenant under his contractual tenancy, but it gives an added protection to the tenant. Both the requirements, therefore, have to be fulfilled by a landlord before he can eject a tenant.

33. I have shown above that there was no notice served on the defendants as required under Section 106 of the T. P. Act. Hence. the suit is incompetent, and must be dismissed.

34. In the result, the appeal is allowed with costs. The Judgment and decree of the learned court of appeal below are set aside, and those of the learned trial court dismissing the suit is restored. In others words, the suit is dismissed.
Appeal allowed.