PATNA HIGH COURT

Ganesh Ram

Vs

Ramalakhan Devi

A.F.A.D. No. 696 of 1975

(K.B.N. Singh, C.J., Lalit Mohan Sharma and P.S. Sahay, JJ.)

25.09.1980

JUDGMENT

Lalit Mohan Sharma, J.

1. This second appeal arises out of a suit filed by the plaintiff-respondents for eviction of the defendant-appellant from a house and for recovery of arrears of rent as detailed in Schedules A and B of the plaint. The suit to which the Bihar Building (Lease, Rent and Eviction) Control Act, 1947 (hereinafter referred to as 'the Act') applied, was filed on 9.8.1966 on the grounds covered by Section 11 of the Act. It was, *inter alia*, alleged that the rent for the period November, 1964 to July, 1966 at the rate of Rs. 38/- per month was in arrears. The defendant filed a written statement challenging the statements made in the plaint and further claiming set off in respect of certain amount spent over the repairs of the house.

2. On 2.6.1967, the plaintiffs filed an application under Section 11A of the Act for a direction to the defendant to deposit the rent-past, current and future. In his rejoinder, the defendant claimed certain deductions by way of liability of the plaintiffs towards repairs of the house and averred that a sum of Rs. 493.86 only was due. However, the trial Court by its order dated 28.6.1967 directed the defendant to deposit the entire rent for the period November, 1964 to June 1967 amounting to Rs. 1,178/-. The defendant did not, however, make any deposit and on 20th July, 1967 the Court passed an order striking off the defense and directing *ex parte* hearing of the suit.

3. The suit was taken up for trial accordingly and the defendant was not permitted to lead evidence in support of his defense to the prayer for eviction. On 20th September, 1967, a decree was passed in favor of the plaintiffs and the defendant appealed. The lower appellate Court allowed the appeal on 16th June, 1971 and remanded the matter to the trial Court for fresh hearing after giving the defendant an opportunity to cross-examine the plaintiffs' witness. The plaintiffs' witness was accordingly recalled by the trial Court for cross-examination by the defendant, but the defendant was not permitted to lead any evidence in support of his defense. The suit was again decreed on 8th September, 1973 and the defendant once more filed an appeal which was dismissed by the lower Appellate Court on 28th August, 1975. The defendant has now come to this Court in second appeal.

4. It has been contended on behalf of the appellant that the trial Court, in view of a Special Bench

decision of this Court, had no power to direct the defendant under Section 11A of the Act to deposit the arrears of rent for the period prior to the institution of the suit and the order in this regard dated 28th June, 1967 as well the later order dated 20th July, 1967 striking off the defense are entirely without jurisdiction. As a result of these illegal orders, the defendant was wrongly prevented from leading evidence in support of his defense to the eviction and this has resulted in serious prejudice to him. The appeal should, therefore, be allowed and the case sent back for fresh trial.

5. The appeal was initially heard by a learned single Judge who directed the case to be placed before a Division Bench. Before the Division Bench, the respondent relied upon the decision dated *4th July, 1978 in the case of Ramnarain Prasad v. Seth Sao*[1] wherein in similar circumstances, the appellant's point was repelled on the grounds that the defendants had failed to deposit even the rent due for the period subsequent to the institution of the suit and that the question had not been raised and pressed in the two Courts below. The Bench hearing the present case doubted the correctness of the decision in S.A. No. 743 of 1974 and the appeal has, therefore, been referred to Full Bench.

6. In view of the decision in *Ram Nandan Sharma v. Maya Devi*[2], it must be held that the trial Court had no power to order, under Section 11A of the Act, for the deposit of the arrears of rent for the period before 9.8.1966, the date of institution of the suit, and this position has not been challenged on behalf of the plaintiffs. It has, therefore, been correctly conceded by Mr. Kailash Roy that so far as this direction is concerned, it may be treated as *ultra vires*. He has, however, urged that so far as the Court's Order in regard to the deposit of the rent for the subsequent period is concerned, the same is severable; and the defendant was under a peremptory duty to comply with this part. As he failed to do so, the order striking off his defense cannot be interfered with. He further argued that although a pure question of law can be taken for the first time in a second appeal, but this right is subject to Section 105 of the Code of Civil Procedure which requires a point, arising out of an error of the trial Court, to be taken in the memorandum of appeal before the first appellate Court. On failure to do so, the appellant must be deemed to have waived the point, rendering it incapable of being raised in the second appeal for the first time.

7. Reference was also made at the bar to the decision in *Bhagwanji Ram v. Babu Sagir Ahmad*[3], In that case, the defendant had earlier moved the High Court in its revisional jurisdiction against the order of the trial Court striking off his defense and the order was confirmed. As a result, the trial Court's order became final and it was not open to the defendant to challenge the same again in the second appeal which arose out of the decree. Admittedly, in the present case, the defendant never came to this Court earlier against the order dated 28.6.1966 and 20.7.1967, and the reported decision is, therefore, clearly distinguishable. It is true, however, that in that case one of the reasons given for the decision, independent of the aforementioned distinguishing fact, was that the order striking off the defense under Section 11A of
the Act could not be deemed to be an interlocutory one attracting the provisions of Section 105 of the Code of Civil Procedure . It was observed that it is not by virtue of the order of the Court that the defense is struck off. In the event of failure to abide by the Court's order for deposit of arrears of rent, it follows as a necessary consequence on account of the provisions of the section . With great respect, I do not find myself in a position to accept this proposition. It is true that the power to strike off the defense is derived from Section 11A of the Act and the test for doing so is as to whether the defendant has failed in making the necessary deposit within time. Before such

an order can be passed, it is necessary for the Court to record a finding that such a default has actually taken place. If the default is denied, the point may have to be decided on evidence. Sometimes, the dispute arises as to whether a deposit made by the tenant is adequate or it is merely a partial deposit, specially in cases where the amount is not mentioned in clear and unambiguous terms by the Court (in) its order. The Court, before it can proceed to reject written statement, is under a duty to determine the questions and may have to admit evidence in proper cases. The striking off the defense has, therefore, to be held to be an act of the Court - of course under the command of the law; and if in its performance some illegality is committed, it should be subject to scrutiny by a higher Court having jurisdiction in this regard. It can be compared with a suit which has been filed in the opinion of the Court after the expiry of the period of limitation. The law does not give a choice to the Court - the latter is enjoined to dismiss the suit. For that reason, the dismissal of the suit can be held not to have been a decision by the Court. Merely for the reason that the Court has no alternative but to pass its order in a particular way on the establishment of certain conditions, it will not be legitimate to hold that it does not amount to an order by Court.

8. For deciding as to whether the order striking of the defense is covered by the provisions of Section 105 of the Code of Civil Procedure , a reference may be made to the sub-section (1) which reads as follows :-

> "105. (1) Save as otherwise expressly provided no appeal shall lie from any order made by a Court in exercise of its original or appellate jurisdiction, but where a decree is appealed from, any error, defect, or irregularity in any order, affecting the decision of the case may be set forth as a ground of objection in the Memorandum of appeal."

The only condition laid down is that the order should affect the decision of the case. By an order striking off the defense under Section 11A of the Act, the tenant is placed in the same position as if he had not defended the claim to ejectment. He is not permitted to lead evidence in support of his plea and the issue has to be decided *ex parte*. There cannot be any manner of doubt that such an order must be held to affect the decision. In absence of any further restriction in Section 105, its application cannot be resisted.

9. Mr. Roy contended that the provisions of Section 105 of the Code of Civil Procedure mandatorily required the point to be mentioned in the memorandum of appeal filed in the first appellate Court before it can be permitted to be taken in second appeal. I do not find any reason to uphold such an interpretation of the section . The section applies not only to first appeals but also to second appeals. It is true that before an error in an order affecting the decision of the case can be permitted to be urged, it should be set forth as a ground in the memorandum of appeal; and reference in the section in this regard is to the memorandum of appeal of that Court where the point is sought to be urged. There does not appear to be any reason to hold that the section requires the appellant to mention the point in the memorandum filed in the first appellate Court for permission to press it in the second appellate Court. It has been urged that the appellant must be deemed to have waived the point if he did not take it in the first appellate Court. Reliance was placed in the decision in *Lachoo Mal v. Radhey Shyam*[4], para 6 in support of the proposition that every one has a right to waive and to agree to waive the advantage of law made for his benefit. In

that case during the tenancy governed by a Rent Control Act, an agreement entered into between the landlord and the tenant by which the tenant was to vacate the premises for reconstruction and the landlord was to redeliver the same after reconstruction was held to be binding on a finding that the landlord could and did waive the exemption benefit available under the Act for reconstruction. In the present case, neither there is an agreement between the parties in regard to the deposit of the rent nor has the appellant made any representation in that regard on which the respondent has acted to his detriment. If the appellant has got in law the right to agitate, which is a pure question of law for the first time in the second appellate Court he cannot be estopped from so doing, if he has not misled, by his conduct the respondent is acting to his disadvantage.

10. As the argument proceeded, the point was reformulated in a slightly different form. Mr. Roy urged that it was the duty of the appellant to have taken all the points, which were relevant for his success, and if he choose not to mention them before the first appellate Court, he must be deemed to have given them up. The learned Counsel emphatically claimed that the principle of waiver fully applied. There does not appear any force in the point which must be rejected for more than one reason. Although the expression 'waiver' is freely and frequently used in the field of law, the principle governing it is often misunderstood and many a time the term is confused with 'estoppel'. In *Basheshar Nath v. The Commissioner of Income Tax*[5], Mr. Justice S.K. Das observed in Para 53 of the Judgment as follows :-

> "It has been said that 'waiver' is a troublesome term in the law. The generally accepted connotation is that to constitute 'waiver' there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an interference of the relinquishment of a known right of privilege. Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right, estoppel is a rule of evidence."

Proceeding further it was observed that although it is well established that ignorance of law is no excuse but this maxim cannot be carried to the extent of saying that every person must be presumed to know as to the correct interpretation of a particular law for the purpose of application of the principle of waiver and it will be going too far to
hold that every unsuspecting submission to a law, subsequently declared to be invalid, must give rise to a plea of waiver. The case before the Supreme Court was one relating to the enforcement of constitutional right and in that view it may not directly cover the case before us; but the principle as mentioned above is of general application and cannot be ignored. In Halsbury's Laws of England, it has been stated that waiver is the abandonment of a right and where it is not expressed, it may be implied from the conduct which is inconsistent with the continuance of the right. Where one party has by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise or assurance must be deemed to have waived his right, even though it may not be supported in point of law by any consideration. Where the right is a right of action, or an interest in property, an express waiver depends upon the same consideration as a release. If it is a mere statement of an intention not to insist upon the right, it is not effectual unless made with

consideration. It has further been held that for a waiver to be effected, it is essential that the person granting it should be fully informed as to his right. Viewed in this background, it is manifest that the mere omission in taking a point in the appellate Court cannot by itself amount to waiver. Abandonment or relinquishment is not purely negative in nature. By holding otherwise, the well established proposition that a pure question of law can be taken for the first time in a second appeal will have to be negatived. In the present case, no reliance has been placed on any act of the appellant or the respondent or, for that matter, any circumstance whatsoever to indicate that the appellant had the knowledge of the legal point which became available to him on the decision of the Full Bench in *Ram Nandan Sharma v. Maya Devi*[6], overruling the earlier contrary view and that he intentionally gave it up. Besides, it is firstly established that an objection to jurisdiction cannot be waived, for consent cannot give the Court jurisdiction where there is none. If the trial Court had no authority to pass an order for deposit of rent for the period prior to the institution of the suit, the order in this regard must be held to be without jurisdiction. For all these reasons, I overrule the argument of the learned Counsel for the respondent.

11. Although Mr. Sanyal claimed the point as one involving a pure question of law, the appellant can justifiably bring the ground also within the scope of clause (c) of Section 100(1) of the Code of Civil Procedure, which permits a point, based on a substantial error or defect in procedure resulting in an error or defect in the decision on merits to be taken in a second appeal. The trial Court by striking off the defense illegally denied the right of the defendant to contest the claim for eviction and to lead evidence on this point. This clearly amounted to a serious error in procedure affecting the merits of the case. The relevant facts in this regard are matters of record of this case and are not dependant on any evidence. A party to a litigation cannot be denied the right to refer to the course, the proceeding has taken, and this includes the question as to whether a particular order passed by the trial Court or the lower Appellate Court was earlier challenged or not by a revision application and, if so, with what result. The point urged on behalf of the appellant, therefore, cannot be shut out on the ground that it is not known as to whether the order of the trial Court, complained of, was the subject of a civil revision application or not. The parties are
expected to know the course, the litigation has taken, and the Court will not refuse to take note of the same. However, as stated earlier in the present case, the admitted position is that none of the parties had earlier challenged any of the orders passed by the trial Court before the High Court in its revisional jurisdiction.

12. The only other point pressed by Mr. Roy was that the trial Court's order dated 20th June, 1967 was made up of two parts, the first being in regard to the direction to pay the arrears for the period prior to the institution of the suit; and that the appellant was under a duty to have obeyed the other part of the order which was good and should have deposited the rent for the period commencing on 9.8.1966. that having not been done, the order dated 20th July, 1967 striking off the defense cannot be interfered with. I do not find any merit in this argument either. The order striking off the defense was not passed for the partial default as mentioned above. It was founded on the omission of the defendant to deposit the entire amount of Rs. 1,178/- which covered the full period beginning from November, 1964. The order rejecting the written statement is one and indivisible. The defendant could not have saved his defense by making a partial deposit. We have

to examine the directions given and the orders by the Court as they are. They cannot be reconstituted retrospectively at this stage. It is, therefore, no use suggesting that the defendant should have engaged himself in an exercise in futility. The conclusion is that since his written statement was illegally struck off, which robbed him of the right to lead and establish his case, the decree of eviction passed by the two Courts below must go and he should get a fair chance to plead and prove his case.

13. The defendant has challenged the claims for arrears of rent, as mentioned in the plaint, but could not substantiate his plea as he was not permitted to lead the evidence on the question of his liability in this regard. As has been held above, he was entitled to lead evidence. The decree in this respect, therefore, must also be set aside.

14. In the result, the appeal is allowed, the decree passed is set aside and the case is remanded to the trial Court. The orders dated 28.6.1967 and 20.7.1967, mentioned above, are also set aside and the Court is directed to hold further trial of the suit in accordance with law. The evidence which has already been received will not be ignored, but both the parties will be permitted to lead further evidence in the suit. If the plaintiffs press their application under Section 11A of the old Act, the trial Court may postpone the trial for sometime and pass orders on the application in accordance with law. In such an eventuality the Court may give lawful direction in regard to the deposit of the rent after permitting adjustment of any amount which the defendant might have deposited in pursuance of an order by this Court while disposing of the stay matter. If the defendant defaults in complying with the Court's direction, it will be open to the plaintiffs to pray for striking off the defense. The parties are directed to bear their own costs of this second appeal.

K.B.N. Singh, C.J. –

15. While agreeing with the judgment of my learned brother, L.M. Sharma, J., I may add a few observations of my own.

16. The contention of Mr. Kailash Roy that striking off of the defense against ejectment as a result of non-deposit of rent within the statutory period of fifteen days, under Section 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, flows from the Statute itself and not as a result of an order passed by the Court to that effect, is based on a misconception that only such orders which the Court passes by virtue of a non-mandatory provision of law can be regarded as "an other passed by the Court" and not those which the Court passes in conformity with a mandatory provision of law. The distinction sought to be made by Mr. Roy here appears to me to be wholly unwarranted. A Court of law has to function in the manner prescribed by law or according to the principle laid down by law both procedural and substantive. The Court while passing orders has no doubt to conform to the law, but nonetheless, in every case, it is the Court's order which decides the controversy or dispute between the parties and the relevant Statute is a guide to the Court in passing appropriate orders in the cases before it. In certain matters, the law leaves certain discretion with the Court while in some matter it does not. As for example, the general rule as prescribed under Section 3(1) of the Limitation Act is that every suit, appeal or application made after the prescribed period thereof in the first Schedule shall be dismissed. Certain relaxation to this general rule has been made in the case of filing of appeals and applications as laid down in Section.

17. It gives a Court power to condone the delay in filing an appeal or application provided the appellant or applicant satisfies the Court that 'it has sufficient causes' for not filing the appeal or application within the prescribed period of limitation. There is no such discretion with the Court in matters of suit and it has to be dismissed if filed beyond time as Section 5 has not been made applicable to suits. If the argument of Mr. Kailash Roy is accepted then an order condoning or refusing to condone the delay in filing an appeal or application will be an order of the Court, but not those orders where the law does not leave any such discretion with the Court, such as suit filed beyond the prescribed period of limitation which has to be dismissed. According to Mr. Roy such an order flows from the Statute i.e. Section 3, and the Court has no volition in it. But the Civil Procedure Code treats such a dismissal or rejection by the order of the Court and an appeal is provided from such an order which has the force of a decree under Section 96 of the Code. The appeal thus will be from the order of the Court dismissing the plaint although it may flow from the mandatory provisions of the Statute. The starting point of limitation for filing appeal also in such cases will be the date of dismissal of the plaint and not the date when the plaint was filed beyond the time fixed by the Statute.

18. The other contention of Mr. Roy is that a pure point of law can be agitated in a second appeal subject to the provisions of Section 105 of the Code of Civil Procedure , that is to say, it must have been raised in the memorandum of appeal before the lower appellate Court for the point being made available in the second appeal. The misconception in the argument of Mr. Roy lies in the fact that the provisions of Section 105 apply equally to a first appeal and a second appeal, as held by Sharma, J., with whom I entirely agree. The section no where says that the point must be raised in the memorandum of first appeal before it could be raised in the second appeal. No such restriction flows from the express provisions contained in Section 105, and it will amount to reading something in Section 105 for which there is no warranty and will be piling further restriction on the already restricted scope within which a second appeal can be entertained under Section 100 of the Code. A question of law like the one arising in this case that the Court has no jurisdiction under Section 11A of the Act to direct deposit of rent for the period prior to the institution of the suit by the tenant and on failure to deposit to strike out the defense could for the first time be raised in second appeal is supported by a Full Bench decision of this Court in the case of *Narinjan Pal v. Chaitanyalal Ghosh*[7], where lack of notice under Section 106 of the Transfer of Property Act was permitted to be taken for the first time in the second appeal although not taken either in the trial Court or before the lower appellate Court. The decision, no doubt, stands overruled so far as the requirement of notice under Section 106 is concerned, but the principle laid down that such a question could be taken for the first time in second appeal still holds good [Vide decision of the Supreme Court in the case of *V. Dhanpal Chettiar v. Yasodai Ammal*[8],].

19. It may also be mentioned that it was futile to expect the appellant to take up this point in the lower appellate Court in face of earlier Bench decision of this Court taking the view that arrears prior to the suit also could be deposited as those decisions of this Court would be binding on the lower appellate Court, or, for the matter of that, on all subordinate Courts. The earlier decisions were reversed, the legal position in this regard has been settled by a Full Bench decision of this Court in the case of Ram Nandan Sharma (supra) decided on 10th October, 1974, that is to say, long after the filing of the memorandum of appeal before the lower appellate Court.

P.S. Sahay, J.

20. I agree.

Appeal allowed.

Cases Referred.

[1](S.A. No. 743 of 1974 D.B)
[2] AIR 1975 Pat 283 (FB)
[3]1975 BLJR 598 (DB)
[4] AIR 1971 SC 2213
[5] AIR 1959 SC 149
[6] AIR 1975 Pat 283
[7]1964 BLJR 583
[8] AIR 1979 SC 1745