Ram Sarup vs Sm. Gayatri Devi And Anr. on 14 May, 1952

Equivalent citations: AIR1952ALL863, AIR 1952 ALLAHABAD 863

JUDGMENT

Mushtaq Ahmad, J.

1. This is an appeal by defendant 1 in a suit for ejectment from a house and arrears of rent at the rate of Rs. 50 a month for the period from March to June 1949. The main grounds on which the relief for ejectment was prayed for were that the defendants had been guilty of wilful default in the payment of rent within the meaning of Clause (a) of Section 3, U.P. Temporary Rent Control and Eviction Act III [3] of 1947 and that they had sublet a portion of the house to a third party without any right.

2. On 14-9-1948 the plaintiff sent a notice to the defendants demanding rent for the months of July and August 1948, and on or about 13-10-1948 the defendants sent a money order to the plaintiff for Rs. 62/8/- after debiting Rs. 37/8- alleged to have been paid by them as house and water taxes. That is to say, the defendants by this remittance intended to pay a total sum of Rs. 100 and it was clearly mentioned in the money order form that this was for the months of August and September 1948. The amount was, however, not accepted by the plaintiff.

3. The notice of 14-9-1948 was served on the defendants on 22-9-1948. Subsequently a notice under Section 106, T.P. Act was also sent to the defendants on 4-4-1949 asking them to leave the premises by the end of that month. A few days later, on 10-4-1949 the defendants sent a money order for Rs. 362-8-0 to the plaintiff as rent for the period up to February 1949, and the amount was accepted by her, though, according to her, only under protest as shown by a letter from her dated 26-4-1949. Along with this remittance a cheque was also sent by the defendants to the plaintiff for Rs. 100 being the rent for the next two months, that is March and April 1949. The cheque was not accepted on the ground that the plaintiff had no accounts in the bank on which it had been drawn.

4. The suit giving rise to the present appeal was then filed on 11-7-1949 for recovery of Rs. 200 as arrears of rent for the period already mentioned. In the plaint there was an allegation that the tenants had sublet a portion of the house after October 1946, that is to say, after the coming into force of Ordinance III of 1946.

5. The defence taken was that the rent demanded by the notice of 14-9-1948 had been duly paid and that hence there was no default on the part of the defendants within the meaning of Clause (a) of Section 3 of the aforesaid Act, that, even if there had been such default, the plaintiff had waived his right to claim ejectment by subsequent acceptance of rents and that the act of subletting a portion of the house had really preceded the promulgation of the Ordinance, no new portion having been sublet after the same.

6. The trial Court decreed the suit, holding that the defendants had been guilty of wilful default, inasmuch as they had not proved the precise date on which the amount of Rs. 62-8-0 was remitted by them to the plaintiff and also because by the time this amount was sent the rent for the next succeeding month had also fallen due. It may be remembered that the defendants had paid this amount as rent expressly for the months of August and September 1948, so that no part of it covered the previous month of July 1948 in respect of which also the plaintiff's notice of 14-9-1948 had been given. The trial Court also found that the plaintiff had not waived her right of ejectment and that the defendants had sublet a portion of the house without her consent.

7. The lower appellate Court affirmed this decree on the same findings.

8. Mr. B.L. Gupta, learned counsel for the defendant-appellant, has contended before me (1) that the findings of the Courts below with regard to the defendants' wilful default cannot be legally sustained, (2) that the plaintiff had waived her right by subsequently accepting the rent from the defendants, and (3) that the subletting by the tenants being in accordance with the conditions of the original contract of benancy was not forbidden in the present case.

9. I propose to examine these contentions seriatim :

10. As regards the first argument, Mr. B.L. Gupta urged that the defendants having admittedly sent to the plaintiff the amount demanded by her on 14-9-1948, there could be no question of any wilful default on their part. His point was that the amount demanded by the plaintiff having actually been sent by the defendants, though less by the amount of house and water taxes already paid by them on her behalf, the terms of the notice of 14-9-1948 had been complied with. It is at the same time conceded by him that the money order receipt showing the remittance of the said amount mentioned the period for which the rent was sent as the months of August and September 1948 and not July, 1948. There is no suggestion that there was any evidence led by the defendants of payment of the rent for the month last mentioned and the argument before me proceeded on the assumption that there was nothing on the record to prove the payment of rent for that month. The question is whether in this context the finding of the lower appellate Court that there had been wilful default on the part of the defendants, could be disturbed.

I have come to the conclusion that it was a correct finding and must be upheld. The plaintiff having demanded a certain amount as rent for a certain specified period and the defendants not being proved to have paid the amount for the whole of that period, there was failure on their part and, as things stand, a wilful failure in the payment thereof. An instance may be mentioned of a case in which a tenant, while remitting to the landlord the entire amount demanded by the latter, expressly earmarks a portion of that amount as discharging a certain loan re-payable to the landlord. In such a case, although the full amount demanded was sent, the entire rent demanded was not paid, inasmuch as the rent due for a particular period actually remained unpaid. How then it can be said that the terms of the demand were complied with and there was no default on the part of the tenant in that behalf is beyond my comprehension. I must, accordingly, affirm the findings of the Courts below that there was wilful default on the part of the defendants within the meaning of the law.

11. As regards the second argument, we may recall that the defendants, as I have above observed, made default in paying the rent demanded by the plaintiff's notice of 14-9-1948 and thereby rendered themselves liable to be ejected under the provisions of Section 3, U.P. Temporary Rent Control & Eviction Act. Subsequently a notice under Section 106, as also noted by me, was sent by the plaintiff to the defendants asking the latter to vacate the premises by the end of April 1949. The alleged payments of rent on which the argument regarding waiver is founded are those dated 10-4-1949, partly by money order and partly by a cheque. While, as we know, the first was accepted, the second was refused. The argument is thus solely based on the acceptance of the amount of Rs. 362-8-0 by the plaintiff which had been remitted to her on the date just mentioned. This amount admittedly was for the period up to 28-2-1949, that is for a period prior to the end of April 1949 by which time the defendants were required by the notice of 4-4-1949 to leave the house. The amount did not refer to any period subsequent to that time. The question is whether on these facts the acceptance of Rs. 362-8-0 by the plaintiff as rent for the aforesaid period could successfully feed a plea of waiver.

My own reaction so far as this point is concerned is that no such plea can be advanced on such a basis. Speaking generally, after a landlord has served a notice on his tenant asking him to leave the premises within a certain time, if within that time rent already due from the tenant for a period falling prior to the date on which the tenant has to vacate is accepted by the landlord, such acceptance cannot entail a deprivation of his right to follow up his notice by a suit for ejectment. Precisely the same was the case here. The rent accepted was in respect of the period falling prior to the time by which the tenant had to vacate. As already said it was for the period up to February 1949, whereas the tenants had been asked to quit by April 1949. Section 113, T.P. Act dealing with the question of waiver in this connection provides :

> "A notice given under Section 111, Clause (h) is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting."

12. There was nothing done, by the plaintiff in this case conveying an intention on her part to keep the tenancy alive after the period within which the tenants had been asked to quit. The illustrations to the section just quoted clarify the point further. They are :

> "(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.
>
> (b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived."

In both these illustrations something was done by the landlord after the expiry of the period fixed by the notice implying an intention that the landlord wanted the tenancy to subsist. Nothing of the kind was done in the present case, as nothing was done after the expiry of the period fixed by the

plaintiff's notice for the defendants to leave the house. This position is, however, affirmed by a decision of the Calcutta High Court in Kanto M. Mullick v. Jyotish Ch. Mukherjee, A.I.R. 1949 Cal. 571, where also a plea of waiver was pressed but overruled on the ground that nothing had been done by the landlord carrying that effect with reference to a period after the expiry of the notice.

In this connection a case of this Court in Mt. Bitti Kuer v. Benarsi Babu, A. I. R. 1949 ALL. 610, appears to have been cited on behalf of the defendants in the Courts below, but that case was quite distinguishable from the present. The landlord thereafter obtaining the permission of the Town Rationing Officer to eject the tenant on the ground of arrears of rent not having been paid, accepted those arrears from him before utilising his privilege of filing a suit for the tenant's ejectment, and it was held that the right to eject had been waived as a consequence of such acceptance of rent. In the case before me nothing was done by the plaintiff to destroy the right which she had acquired to sue for the defendants' eviction after the period fixed in her notice of 4th April 1949 had expired and the tenants had not left the premises. The essence of a plea of waiver, I understand, is that there should be some inherent conflict between the conduct of the landlord in bringing a suit for his tenant's ejectment and his previous conduct or attitude towards that tenant necessarily suggesting an intention to continue the tenancy. It is difficult to find such a conflict in the present case.

13. Learned counsel for the appellant in this connection urged that, in view of the long interval of time between 14th October 1949 (1948 ?) when the defendants became liable for wilful default and 11th July 1949 when the suit was filed, it must be taken that the plaintiff had waived her right to eject them. It is, however, settled law that a mere permission obtained by the landlord under Section 3 (a), U.P. Temporary Rent Control and Eviction Act does not entitle him to file a suit for ejectment straightway. He has still to serve a notice on the tenant under Section 106, T.P. Act. This position was affirmed in a case of this Court in Khumani v. Saktey Lal, 1951 ALL. L. J. 331 where the following remark was made :

> "Where a notice is issued and the tenant fails to make payment within the time allowed, the parties are relegated to the general law and the landlord is entitled to evict after giving the requisite notice."

14. The notice given in the present case to the defendants under Section 106, T.P. Act would not only account for part of the interval of time between the aforesaid dates but serve as strong evidence of the plaintiff's intention to terminate the lease and negative all idea of a waiver on her part.

15. In view of these considerations I am not prepared to accept the contention that the Courts below were wrong in holding that the plaintiff had not waived her right to eject the defendants.

16. As regards the third contention, learned counsel for the appellant was unable to refer to any pleading by his client or any evidence on the record relating to the terms of the original lease. He merely contended that a term for subletting should be inferred from what he called a past practice. Apart from the fact that I am unable to accede to this contention, I do not discover any definite evidence of any such practice in the past as suggested by him. In this connection he referred to Clause (e) of Section 3 of the Ordinance which has the words "that the tenant has contrary to the

terms of the contract sublet the whole or any portion of the accommodation."

He then cited Clause (e) of Section 3, U.P. Temporary Rent Control and Eviction Act which has the words "that the tenant has on or after the 1st day of October 1946 sublet the whole or any portion of the accommodation without the permission of the landlord."

According to the former provision a tenant makes himself liable to ejectment if he sublets the premises contrary to the terms of his tenancy, whereas, according to the latter, he incurs that liability if he sublets the same after 1st October 1946 without the permission of the landlord. The Ordinance was in force up to 28th February 1947, the Act coming into force on the following day 1st March 1947, though it was made retrospective from 1st October 1946. According to the proviso to Section 18 no person incurred any liability for anything done under Clause (e) of the Ordinance between 1st October 1946 and the date of publication of the Act, namely 1st March 1947, merely on the ground of Clause (e) of Section 3 of the latter being inconsistent with Clause (e) of Section 3 of the former. That is to say, if a tenant sublet the whole or any portion of the premises with the permission of the landlord on any date during this interval, he did not render himself liable to ejectment.

The defendants' case in their written statement was that a certain person had been a sub-tenant of a portion of the house since 1945 within the plaintiff's knowledge, but one of them, defendant 2, in his evidence admitted that neither the plaintiff nor her father-in-law had given any permission in that behalf, and the lower appellate Court also found as a fact that no such permission had been given. This being so, the entire basis of the defendants' right to sublet any portion of the premises disappeared, and the defendants became liable to be ejected in consequence of their having sublet a portion of the house to a third party. I am, therefore, unable to accept the appellant's contention that in spite of the defendants having sublet the same, they were not liable to be ejected under Section 3 of the said Act.

17. For these reasons I have no option but to affirm the decrees of the Courts below, and I, accordingly, dismiss this appeal with costs.

18. Leave to appeal to a Division Bench is granted.