(1959) 11 AHC CK 0009

Allahabad High Court

Case No: Second Appeal No. 2540 of 1955

Ram Krishna Prasad		APPELLANT
	Vs	
Mohd. Yahia		RESPONDENT

Date of Decision: Nov. 11, 1959

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 - Section 3, 3(1)

Citation: AIR 1960 All 482

Hon'ble Judges: S.S. Dhavan, J

Bench: Single Bench

Advocate: Sachitanand Sahai, for the Appellant; Iqbal Ahmad, for the Respondent

Final Decision: Allowed

Judgement

S.S. Dhavan, J.

This is a tenant''s second appeal against a decree for ejectment. This is one of the many cases coming to this Court from time to time in which the shortcomings and anomalies of the U. P. Control of Rent and Eviction Act are revealed. The facts which have led to the appeal are these: The appellant Rain Krishna Prasad is the tenant of a shop in Ghazipur of which the landlord is the respondent Mohd. Yahia. On 7-5-1953 the landlord sent him by registered post a notice written on a post-card, which, according to him, was a notice for demand for arrears of rent u/s 3 (1) (a) of the U. P. Control of Rent and Eviction Act. No rent was paid within one month of the receipt of this notice, but on 24-9-1953 the tenant remitted a sum of Rs. 225 by money order which was refused by the landlord. On 11-11-1953 the landlord filed his suit for ejectment.

The defendant denied that he had committed any default in payment of rent, he alleged that it was the other way about and that the landlord had several times refused the rent which was tendered by him. He also pleaded that the landlord''s

notice of demand was not according to law. The trial Court held that the appellant was not guilty of wilful default. (It may be mentioned that in 1953 the tenant could be ejected without the permission of the District Magistrate only for wilful default.) The learned Munsif believed the evidence of the appellant that he had tendered the rent which was refused by the landlord. He, therefore, dismissed the suit for ejectment but decreed the amount of arrears of rent due from the appellant.

2. In appeal the learned Judge took the view that any tender of payment by the appellant before the receipt of notice was irrelevant and that by his non-payment of arrears of rent after the service of notice, the tenant became guilty of wilful default within the meaning of Section 3(1)(a). He observed that the tenant had given no explanation for his failure to pay the rent. He allowed the appeal and decreed the suit for ejectment with cost. Aggrieved by this decision the defendant has come to this Court in Second Appeal.

3. Two points have been urged before me. First, it was argued that the learned Judge had completely ignored the evidence of the appellant that he had been regularly tendering the rent to the landlord who had refused it on each occasion. Instead of discussing the merits of the appellant''s evidence the learned Judge incorrectly observed that the defendant had produced no evidence to explain the non-payment of rent. This, according to counsel, is a misstatement apparent on the race of the record for the appellant had deposed that he could not pay rent because the landlord would not accept it.

Secondly the learned Judge had refused to consider the appellant''s explanation because he took the view that any tender of payment by the tenant before receiving the notice of demand was irrelevant and that the real question was whether, after the receipt of notice the tenant had paid the rent within one month. His refusal to consider material evidence vitiates his finding of fact on the question of wilful default. Learned counsel urged that this Court should in the exercise of its powers under Order XLI Rule 24 C P. C. re-examine the evidence and decide this question itself.

4. In my opinion the learned Civil Judge was wrong in his view that any tender of payment by a tenant prior to the service of notice of demand u/s 3 (1) (a) is irrelevant to the question whether he had committed wilful default. The appellant had explained in his defence that he had been unable to make payment because the landlord would not accept it whenever it was tendered. If this explanation was true it is obvious that he was never in default and the landlord was deliberately manoeuvring him into a position where he could be accused of being a defaulter.

If a landlord without lawful excuse refuses to accent rent tendered by the tenant, he cannot afterwards treat the tenant as a defaulter or serve a police of demand u/s 3 (1) (a) as an excuse for filing a suit for ejectment. Such a notice would be mala fide and a fraud on the section. The learned Judge was, therefore, in error in treating as

irrelevant the appellant''s evidence that he had tendered payment several times before receiving the notice of demand.

5. It has been held by the Supreme Court that a finding of fact based On irrelevant evidence is vitiated by an error of law which can be corrected in Second Appeal. I would extend this principle to the reverse case where the appellate Court refused to consider material evidence on the erroneous ground that it was immaterial. In the present case file finding of the appellate Court is vitiated by such an error of law.

6. The question before me, however, is whether I should remand the case to the District Judge for a fresh decision or decide this question myself as suggested by counsel for the appellant. I have examined the record and find that evidence is sufficient to enable this Court to decide whether the appellant was guilty of wilful failure to pay the rent and whether the notice of demand in the circumstances alleged by the appellant was genuine.

7. The appellant deposed before the trial Court that he had sent the rent by a messenger to the landlord several fames but it was not accepted. He also produced that messenger. I have examined the evidence to both these witnesses. Their testimony remained unshaken in cross-examination. I see no reason to interfere with the assessment of the evidence by the trial Court which had the opportunity of seeing the witnesses and observing their demeanoor. I, therefore, confirm the finding of the trial Court that the case of the appellant that he tendered rent several times to the landlord who refused it is true.

8. Two results follow from this finding: firstly the tenant was not in arrears of rent on the date of notice of demand, and secondly the landlord could not avail of the exception in Clause (a) and file a suit for ejectment of the tenant without the permission of the District Magistrate. The plaintiff''s suit for eviction was, therefore, not maintainable.

9. The suit must fail on another ground because the notice of demand was not in accordance with law. Clause (a) requires the landlord to send a notice of demand to the tenant requiring him to pay the arrears of rent within a month. The notice sent by the plaintiff translated into English, runs thus (the translation was read out to both learned counsel and approved by them):

"A sum of Rs. 131/4/- was due from you as rent for the period 1st October, 1952, to 30th April, 1953. In spite of duns and demands you are not paying this rent but are adopting delaying tactics by all kinds of excuses. Now on account of your failure to pay rent, we hereby give you notice that we are not willing to have you as our tenant for the shop. Accordingly, by this notice I require that, after occupying this shop till 31st May, 1953 and then after vacating it and handing over possession to me on the 1st June, 1953, you should pay a sum of Rs. 150 as rent for the period from 1st October, 1952 till 31st May, 1953, otherwise, after the expiry of the period of this notice, I shall file a suit in the Civil Court against you for possession and recovery of

rent."

10. In my opinion this is a notice unconditionally terminating the tenancy. It is not necessary for me to consider the various authorities cited at the bar, in which the requirements of a notice u/s 3(1)(a) have been discussed. The language of Clause (a) is clear enough. It simply requires that the landlord should send a notice of demand. The exact language of the notice is immaterial. A polite request to pay rent may be a demand, though I would like to add that a mere statement of account will not be a demand. It is not necessary for the landlord to point out to the tenant the consequences of his failure to pay the rent, though he may add to the notice of demand a conditional notice, u/s 106 of the T. P. Act, warning the tenant that in the event of his failure to comply with, the demand the tenancy will stand terminated.

11. But whatever may be the language of the notice demanding arrears of rent u/s 3 (1) (a) of the Control to Kent and Eviction Act it must fulfil one condition: it must give the tenant an opportunity to save his tenancy from the consequences of default by paying the rent. The demand may even be coupled with a conditional termination of tenancy, such as "If you fail to pay within one month of the receipt of this notice, the tenancy will be at an end". This combined notice does not violate the purpose of the notice required by Section 3 (1)(a), for it preserves the tenant''s right to save his tenancy by paying all the arrears within one month. But it the notice unconditionally terminates the tenancy and asks the tenant to vacate the accommodation irrespective of whether he pays the arrears or not, it is not a notice of demand as required by Section 3 (1) (a). It cannot be said of such a notice of demand that it was served with the purpose of giving the tenant a final opportunity to preserve his tenancy, even though it may contain a demand that the tenant should clear off the arrears before he leaves the accommodation, for this is the demand of a creditor and not a landlord, whereas the section requires that he should make the demand as landlord.

12. Applying these principles to the present case, the notice under review terminated the tenancy. Its object was not to give the tenant a final opportunity to continue as tenant on payment of rent but to ask the appellant to vacate the shop at the end of the month -- that is, to terminate his tenancy irrespective of whether he paid or not. It is true that the notice did include a demand for rent but in the context of this notice, the landlord was asserting his right as a creditor against an ejectment. whose tenancy he had just terminated and was not giving him an opportunity as a tenant to save the tenancy by paying the rent.

13. Learned counsel for the respondent contended that it was open to the appellant, even after the receipt of the notice, to pay the rent and thus save himself from ejectment. That may be true. But the question is not what the tenant could have done after receiving a notice which was not according to law but whether the notice itself is "a notice of demand" as required by Section 3(1)(a). It is no answer to an objection against the legality of the notice that the tenant could have ignored the

illegality. The question is not whether the law still gave the tenant an opportunity but whether the landlord gave him an opportunity. In my opinion, the plaintiff did not send a notice of the demand in accordance with Section 3 (1) (a) of the Act.

14. Learned counsel for the respondent then advanced an ingenious argument. He contended that if the notice in dispute is regarded as an unconditional termination of tenancy, the Court must further hold that the appellant was not a tenant on the date when the respondent filed the suit for his ejection. He pointed out that Section 3 bars a suit for the ejection of a tenant but is no bar against a person who is not a tenant but merely an ex-tenant and a trespasser. The Act, as framed, permits a landlord to terminate the tenancy and then to file a suit against the ex-tenant as a trespasser.

This argument was skilfully pressed by Mr. Ambika Prasad who took the fullest advantage of the numerous lacunae in the Control of Rent and Eviction Act, but in view of the purpose of Section 3 it must be rejected. The words used are:

".. No suit shall, without the permission of the District Magistrate, be filed in a Civil Court against a tenant, for his eviction from any accommodation. ."

According to Mr. Ambika Prasad, the word "tenant" relates to the status of the person who is sought to be evicted on the date of the filing of the suit. I do not agree, and am of the opinion that the word "tenant" includes a person whoes tenancy may have been terminated, but who cannot be evicted without the permission of the District Magistrate.

15. For these reasons, the plaintiff''s suit must fail. But before leaving this case I would draw the attention of the Government to several short-comings or lacunae in the Control of Rent and Eviction Act which were revealed during: the arguments and which are fruitful causes of much avoidable litigation resulting in enormous waste of public money. I shall point out only two. The first concerns Section 3. which is intended to serve as a protection for the tenant against arbitrary eviction. It provides that no suit shall be filed for his ejectment without the permission of the District Magistrate. But the section, is so worded that it does not prevent the landlord from terminating the tenancy by serving a notice u/s 106 of the T. P. Act.

Thus whereas the landlord can terminate the tenancy, he cannot file a suit for the tenant''s ejection without the permission of the District Magistrate, and the tenant can continue to occupy the premises, though his status would be that of a trespasser. The anomaly could be avoided by amending Section 3 and providing that the landlord, without the permission of the District Magistrate cannot terminate the tenancy in any manner as has been done under the Madhya Pradesh Rent Control Act. The second lacuna is in Section 7 which provides for the control of letting. It empowers the District Magistrate to direct a landlord to let any accommodation to a person nominated by him, but gives him no power to let the accommodation himself if the landlord fails to comply with his order.

He has to depend upon the deterrent effect of Section 8 which provides, in effect, that the disobedience of the order of the District Magistrate will render the landlord liable to imprisonment after conviction by a criminal Court. But sending the landlord to prison will not create a tenancy. The section does not provide for cases where the District Magistrate''s order may not be carried out because there is no one to carry it out -- for example, where several persons are disputing the ownership of the house, or where the landlord if untraceable and the accommodation is locked. I may point out that the corresponding English law providing for the control of accommodation invests the controller with the power to let the accommodation himself if the landlord fails to do so.

16. I have pointed out two of the most obvious lacunae in the Act but there is no doubt that the Act needs revision to avoid unnecessary litigation in the future.

17. This appeal is allowed and the decree for ejectment of the tenant is set aside. In the circumstances of this case I direct the parties to bear their own costs.

18. In view of the fact that I have upheld the findings of fact by the trial Court, I do not think that this is a fit case for special appeal. Leave to appeal is refused.