
(1962) 09 GAU CK 0005

Gauhati High Court

Case No: Second Appeal No. 145 of 1960

Bhagwan Das Sukul and Others

APPELLANT

Vs

Dhanan Joy Paul and Another

RESPONDENT

Date of Decision: Sept. 20, 1962

Acts Referred:

- Assam Non-Agricultural Urban Areas Tenancy Act, 1955 - Section 5
- Transfer of Property Act, 1882 - Section 106, 116

Hon'ble Judges: G. Mehrotra, C.J; S.K. Dutta, J

Bench: Division Bench

Advocate: S.M. Lahiri and N.M. Lahiri, for the Appellant; S.K. Ghose, P. Choudhuri and S.K. Sen, for the Respondent

Final Decision: Dismissed

Judgement

G. Mehrotra, C.J.

This appeal is by the Defendants arising out of a suit for the delivery of possession over the land set out in the schedule attached to the plaint by evicting the Defendants there from and removing the houses and other constructions made by the Defendants thereon. The trial court decreed the suit for possession on deposit of Rs. 2,000/- as compensation to the Defendants Nos. 1 to 6 for those constructions and directed the Defendants to remove the houses from the land. Three months' time was granted to the Defendants to vacate the land, and the parties were directed to bear their own costs of the suit. On appeal by the Defendants the Additional Subordinate Judge affirmed the decree of the court below. It is against this decree that the present appeal has been filed.

2. Plaintiff's case as set out in the plaint was that the Plaintiff was the owner in possession of the land measuring 9 K. 2 Ch. within the Silchar Municipality. one Sarada Charan Acharyya was the owner of the disputed lands along with some other land. By a registered Kabala the land in dispute was purchased by one Rahman Mia

from-Sarada Charan Acharyya. Later Mahibur Rahman Barlaskar purchased the land by a registered sale deed from Rahman Mia. Mahibur Rahman Barlaskar sold the disputed property along with some other land on 10-3-1952 to the Plaintiff Dhananjoy Paul and thus the Plaintiff became the owner of the "and. Bhula Nath Sukul and Surendra Narayan look periodic settlement of the land" for a period of years. from 1st January 1935 to December 1944 from Sarada . Charan Acharyya on condition of payment of Ks. 30/-per year, as the rent and continued in possession of the land under the said, settlement.

On the 14th February 1935 a registered lease was executed between the aforesaid lessor and the lessees, on the expiry of the said lease the lessees without increasing the rent.remained In possession of the land of the schedule without/any right. The revenue of the land at the rate of Rs. 30/-" per year is alleged to have been paid by Rahman Mia and Mahibur Rahman Bar Laskar after their purchase. As the lessees remained in possession after the expiry of the term of the lease, they continued as tenants-at-will and the "Plaintiff has got a right to evict them. Bnuia-nath Sukut, one of the lessees, died and Defendants Nos. 1 to 6 are his heirs and successors. Defendant No. 7 is Surendra Narayan Sukul one of the original lessees. The Plaintiff needed the land for his own use and for occupation of his family. Plaintiff alleged that he sent a notice under registered post to the Defendants asking them to give up possession of the land by the end of March 195b. Defendant No. 7 accepted the notice addressed to him but the other Defendants returned the notice without accepting it. On these facts the present suit has been brought.

3. Defendants Nos. 1 to 4 filed one written statement by which they raised several pleas. The Defendants however admitted that when Sarada Charan Acharyya was the owner of that land,-a registered lease was executed on the 14th February 1935 under which the land was let out to the predecesscr-in-interest of the Defendants Nos. 1 to b for ten years expiring by the end of December 1944. After the sale by Sarada Charan Acharyya of the land to Abdur Rahman, Abchu Rahman accepted rent from the ancestor of the answering Defendants up to 1947 A. D. by admitting them as the only tenants. Thereafter the said Abdur Rahman sold out the said land to Mahibur Rahman as mentioned in the plaint and Mahibur Rahman filed an ejectment suit of 1950 in the Munsiffs court at Silchar by admitting Bholanath Sukul as the only tenant of the sun land. The suit was however dismissed. Afterwards Mohibur Rahman accepted rent from the father of the answering Defendants up to 1952. When Mohibur Rahman was the owner of the suit land the predecessor-in-interest of the answering Defendants with the knowledge and permission of the Zamindar constructed one double storeyed house with fourteen rooms and one cook-shed with seven rooms at the cost of Rs. 16,000/-. Afterwards he also constructed two more houses as the lessors gave out that they would never evict the Defendants. In addition to that, pucca latrine and pucca drain were constructed within the said holding. The receipt of the notice sent by the Plaintiff is denied by the Defendant. The Defendant pleaded the bar of Section 5 of the Assam

Non-Agricultural Urban Areas Tenancy Act (Assam Act 12 of 1955) (hereinafter called the Act. It should be pointed out that the Act came into force during the pendency of the suit But as the Act" has, been held to be retrospective, the defence was allowed to be taken.

4. Both the courts below have held that the Defendants -(have failed to prove that they constructed a permanent "structure within five years of the lease executed in 1935 and as such they are not entitled to protection under -Section 5 of the Act. The finding further is that the Defendants received the notice given by the Plaintiff.

5. Two points have been urged before us by the Defendants. Firstly it is contended that the courts below have not applied their mind properly to the question of the applicability of Section 5 of the Act. The contention is that after the expiry of the lease of 1935 the lessees re-mained in occupation of the land and the landlords Rahman Mia and Mahibur Rahman Barlaskar received rent from them. Thus a fresh tenancy came into existence by virtue of Section 116 of the Transfer of Property Act and admittedly as the Defendants had made new constructions in 1946 and 1947, the Defendants will be deemed to have reconstructed the permanent structures within five years of the fresh tenancy which came into existence in 1945 and thus they are entitled to protection u/s 5 of the Act. As to the finding of notice the contention is that the finding is not based on any evidence.

6. In the plaint the specific case set up by the Plaintiff is that the predecessor-in-interest of Defendants Nos. 1 to 6 and Defendant No. 7 took lease of the land for ten years in January 1935 from Sarada Charan Acharyya-

After the expiry of ten years the Defendants remained in possession as tenants at will liable to be evicted by the Plaintiff. The Plaintiff acquired title to the property by transfer. The suit is thus based on the ground that after the expiry of the lease executed in 1935 the Defendants, became tenants-at-will. The Defendants in their written statement have stated that the Defendants after taking settlement of the suit lands were in possession under Sarada Charan Acharyya by constructing three houses on payment of rent regularly. After the sale by Sarada Charan Acharyya to Abdur Rahman, Abdur Rahman accepted rent from the ancestors of the Defendants upto 1947. At the time when the suit was brought the Act was not in force, issue No. 7 was added after the coming in force of the Act, which runs as follows:

Whether the Defendants are protected from ejection u/s 5(1)(a) of the Assam Non-Agricultural Urban Areas Tenancy Act or entitled to any compensation for improvements u/s 5(1) (b) of the same Act The trial Court came to the conclusion that the evidence was not sufficient to establish that a permanent structure was built within a period of five years from the date of the lease, that is, before 1940. The structures in existence at the time of the suit were however, pucca houses which according to the trial Court must have been built after 1946 and 1949. The trial Court however granted a decree in favour of the Defendants for compensation as

the constructions were treated as improvements made by them u/s 5 of the Act. The lower appellate Court also found that the Defendants have failed to prove that they made permanent constructions within five years of the lease.

7. The contention of the Defendants is that within five years of 1945 - the date on which a fresh tenancy came into existence - u/s 116 of the Transfer of Property Act the Defendants had made permanent constructions and thus they are entitled to get protection u/s 5 of the Act. This point does not appear to have been specifically taken in either of the Courts below. It was never contended by the Defendants that u/s 116 of the Transfer of Property Act, fresh tenancy came into existence and they were entitled to claim protection u/s 5 of the Act as they had made construction within five years of 1945. It is however contended by the Defendants Appellants that the question being one of law, this Court can go into that question and further that as the point has been raised that the Defendants are entitled to protection u/s 5 of the Act and it is open to them to contend that they are protected u/s 5, though the grounds may be different from what they argued before the Court below.

8. The Act defines a "tenant" to be a person who holds land under another person, other than Government and who is, but for a special contract liable to pay rent for that land to the latter, and includes a person who derives his title from a tenant, and a person who continues in possession of any land after termination of his tenancy in respect of that land. Thus a person who is in fact a tenant on the date of a suit is entitled to get protection under the Act and also a person who after the expiry of his lease has continued in possession is to be deemed to be a tenant for the purposes of the present Act.

9. Section 5 of the Act reads as follows:

5. (1) Notwithstanding anything in any contract or in any law for the time being in force - (a) where under the terms of a contract entered into between a landlord and his tenant whether before or after the commencement of this Act, a tenant is entitled to build, and has in pursuance of such terms actually built within the period of five years from the date of such contract, a permanent structure on the land of the tenancy for residential or business purposes, or where a tenant not being so entitled to build, has actually built any such structure on the land of the tenancy for any of the purposes aforesaid with the knowledge and acquiescence of the landlord the tenant shall not be ejected by the landlord from the tenancy except on the ground of nonpayment of rent; (b) where a tenant has elected improvements on the land of the tenancy under the terms whereof he is not entitled to effect such improvements the tenant shall not be ejected by the landlord from the land of the tenancy unless compensation for reasonable improvements has been paid to the tenant.

(2) No tenant shall be ejected by his landlord from the land of the tenancy except in execution of a decree for ejectment passed by a competent civil Court.

(3) No decree for ejectment passed on the ground of non-payment of rent shall be executed within a period of thirty days from the date of the decree and if the tenant pays no the Court whose duty it is to execute the decree the entire amount payable under the decree within the aforesaid period, the Court shall record the decree as satisfied.

A tenant who has built a permanent structure is protected under certain circumstances from ejectment u/s 5 of the Act. As the definition of the "tenant" includes a person who has remained in possession after the expiry of his tenancy, such a person is also entitled to get benefit of Section 5, provided the provisions of Section 5 are otherwise attracted. The case of the Defendants in substance is that they for the purposes of the Act will be deemed to be tenants as they have continued in possession after the expiry of their lease executed in the year 1935 if that is the contention of the Defendants they have to establish before they can get protection u/s 5 that they have made permanent constructions within five years of the tenancy. The protection is afforded u/s 5 to the tenant, who under the contract of tenancy is "entitled to build and has in pursuance of such terms actually built or if there is no such contract which entitles him to build, he has in fact built with the knowledge and acquiescence of the landlord. But if a tenant is sued for ejectment on the ground that after the expiry of a certain term of lease he has remained in possession and has not made any permanent construction within five years of the tenancy as contemplated u/s 5 of the Act, he cannot set up a new tenancy in that suit and say that because he has built structures under the new tenancy, he is protected u/s 5 from ejectment in this suit. If the new tenancy is still subsisting in effect his case is that the suit for ejectment would not lie unless the tenancy is terminated by a proper notice. If however the tenancy is determined, he has to prove that he is in possession of the land after the determination of the new tenancy and thus he is entitled to get protection u/s 5 of the Act. In the present case nowhere the Defendants have set up the plea that the new tenancy which came into existence after 1945 by virtue of Section 116 of the Transfer of Property Act has been determined by notice and the Defendants being in possession after the determination of the said lease are entitled to protection u/s 5. Nor has the plea been taken that the new tenancy which came into existence after 1945 is still subsisting and unless proper notice is given terminating the new monthly tenancy, no suit for ejectment would lie. If the point had been specifically raised, the Court below would have considered the facts and would have determined whether a fresh lease has come into existence by virtue of Section 116 of the Transfer of Property Act and that the relationship of landlord and tenant still subsists under the new tenancy and that the said tenancy has not been determined by any proper notice or might have decided whether the Defendants' possession can be said to be that of a tenant who has remained in possession after the determination of the new lease which has come into existence in 1945. In the absence of any such plea, the Defendants cannot be allowed to canvass that point before us in second appeal.

10. Section 116 of the Transfer of Property Act provides as follows:

If a lessee or under lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.

Before Section 116, can be attracted it is first necessary that the lessee after the determination of the lease remains in possession and secondly that the lessor or his legal representative either accepts rent or otherwise assents to his continuing in possession. The acceptance of rents is thus also regarded as an assent to the continuance of the tenant in possession. The tenant when he remains in possession after the determination of the lease, makes an offer by giving the rent to remain in possession on same terms or payment of rent and when the rent is accepted by the lessor, he assents to his continuing in possession and that brings about the completed fresh contract of tenancy. In order that the acceptance of rent should therefore, amount to an assent of the lessor to retain the lessee in possession of the property, it has to be established that the offer of rent was made on the express ground that the lessee intended to continue his lease and when the acceptance was made it was done with the full knowledge of the nature of the offer. This is a question of fact which will have to be determined from the circumstances of each case and as the point was not raised in the present case, the Courts below did not go into that question and have given no finding that the payment of money was as rent and there was an assent of the lessor to the holding over.

11. Reliance is placed by the counsel for the Appellants on the case of AIR 1949 124 (Federal Court) . The following passage at page 127 of the report may be referred to:

This argument, though plausible at first sight, does not appear to me to be sound. It is perfectly right that the tenancy which is created by the "holding over" of a lessee or under-lessee is new tenancy in law even though many of the terms of the old lease might be continued in it, by implication; and it cannot be disputed that to bring new tenancy into existence, there must be a bilateral act. what Section 116, T. P. Act, contemplates is that on one side there should be an offer of taking a renewed or fresh demise evidenced by the lessee's or sub-lessee's continuing in occupation of the property after his interest has ceased and on the other side there must be a definite assent to this continuance " of possession by the landlord expressed by acceptance of rent or otherwise. It can scarcely be disputed that the assent, of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it.

Thus before Section 116 can be attracted it is clear from these observations that certain facts have got to be established and as the point was never taken before the

courts hallow, the Courts below did not apply their mind to that question. The point taken by the Defendants all along- was that after the determination of the lease in the year 194b they continued in possession and are entitled to claim protection u/s 5 of the Act from ejectment based on the determination of the lease of 1935 as they have made permanent constructions within five years of the said lease. It was contended by the counsel for the Respondent that the observations of their lordships of the Federal Court, quoted above only lay down that a new tenancy u/s 116 of the Transfer of Property Act is created in cases other than the cases governed by the special Act under which a tenant seeks protection. The following observation at page 128 is quoted in support of this contention:

With regard to the first part of the argument of the learned Counsel for the Appellant, it may be pointed out that in cases of tenancies relating to dwelling houses to which the Rent Restriction Acts apply, the tenant may enjoy a statutory immunity from eviction even after the lease has expired. The landlord cannot eject him except on specified grounds mentioned in the Acts themselves. In such circumstances, acceptance of rent by the landlord from a statutory tenant, whose lease has already expired could not be regarded as evidence of a new agreement of tenancy and it would not be open to such a tenant to urge, by way of defence, in a suit for ejectment brought against him, under the provisions of Rent Restriction Act that by acceptance of rent a fresh tenancy was created which had to be determined by a fresh notice to quit.

These observations do not apply to the facts of the present case. The present suit for ejectment is not a suit under a special Rent Restriction Act. The Act with which their Lordships of the Federal Court were dealing laid down that no tenant could be ejected except on the grounds mentioned in the Act. In the present case there is no bar to the landlord filing a suit for ejectment of the tenant. Section 5 only provides that if the tenant has made a permanent construction, he will not be evitable. Section bin which provides that no tenant shall be ejected by his lane-lord from the land of the tenancy except in execution of a decree for ejectment passed by a competent civil Court, also shows that there is no bar to any suit for ejectment of the tenant and the Court which can entertain such suits is the civil Court. More over in the Federal Court case on the date when the rent was paid there was in existence a law under which the tenant could not be evicted and was only liable to pay rent and thus the acceptance of rent by the landlord was attributable to the fact that the landlord had no option in the matter and no assent of. the landlord for the continuance of the old tenancy could thus be inferred from acceptance of rent But in the present case on the date on which the alleged payments were made there was no law in existence.

12. Reference is made to the case of [Ganga Dutt Murarka Vs. Kartik Chandra Das and Others](#) ; That was a case which arose out of the West Bengal Premises Rent Control (Temporary Provisions) Act XXXVIII of 1948. The allowing observation at

page 1069 is relied upon by the counsel for the Respondent:

It is, however, well settled 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, 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.

At page 1070 it has been remarked as follows:

Of course there is no prohibition against a landlord entering into a fresh contract of tenancy with a tenant whose right of occupation, is determined and who remains in occupation by virtue of the statutory immunity. Apart from a express contract, conduct of the parties may undoubtedly) justify an inference that after determination. of the contractual tenancy, the landlord had entered into a trash contract with the tenant, but whether the conduct justifies such an inference must always depend upon the facts of each case. Occupation of premises by a tenant whose tenancy is determined is by virtue of the protection granted by the statute and not because of any right arising from the contract which is determined. The statute protects his possession so long as the conditions which justify a lessor in obtaining an order of eviction against him do not exist. Once the prohibition against the exercise of jurisdiction by the Court is removed, the right to obtain possession by the lessor under the ordinary law springs into action and the exercise of the lessor's right to evict the tenant will not, unless the statute provides otherwise, be conditioned.

13. It will be clear from the examination of these two cases that the material fact to be determined is whether on the date when the payment was made of rent there was any rent legislation under which the tenant could claim protection and could say that he was in possession under the said statute and was not liable to be evicted in those circumstances the acceptance of rent by the land lord cannot constitute assent. It is also open to the lessor to create a fresh tenancy even though the tenant may have a right to continue in possession due to rent control legislation and such a new tenancy can be inferred by implication. On the parity of reasoning even on the date when the rent in the present case was paid, there was no rent control law in existence, it was not compulsory on the landlord to accept payment and thus If Section 116 of the Transfer of Property Act applies, there was no bar to the creation of a new tenancy by virtue of Section 116. But as I have already pointed out as this point was not pleaded, the Courts below have not examined that question.

14. It is further contended by the Respondent that Section 5 gives protection to the tenant only if there is a contractual tenancy which has been determined and the tenant has made constructions within five years of the said tenancy Section 5 of the Act will not be attracted in the case of statutory tenancies. It is true that Section 5

contemplates the cases where the tenant has built within five years of the contract in accordance with the terms of the contract or If there is no terms in the contract authoring construction, in fact he has made constructions within five years of "the contract and thus existence of a con-tract is necessary for getting protection tinder Section 5. But as observed by their lordships of the Federal Court, a tenancy created u/s 116, Transfer of Property Act itself is based on an offer and acceptance and thus it can be regarded as a contractual tenancy and if the terms of the old tenancy can be looked into as part of the terms of the new tenancy, there is no bar to the applicability of Section 5 to the tenancies created u/s 116. But as I have already indicated, in the present case the lesser has not terminated the tenancy created u/s 116 and has not asked for possession on the ground that the Defendants are in possession after the determination of the said tenancy and thus the question of Defendants seeking protection u/s 5 of the Act on the ground that they have made permanent constructions within five years of the said implied contract does not arise. The suit being one based on the ground that the Defendants have been in possession after the determination of the lease in 1945, as tenants-at-will they could only get protection from ejectment if they had proved that they made permanent constructions within five years of the lease of 1935. It is not the case of the Defendants that the tenancy created u/s 116 has not yet teen determined and thus unless that is determined by a proper notice, the present suit for ejectment is not main trainable. The point taken in both the cases referred to above by me was in effect that the suit was not maintainable as the tenancy created u/s 116 had not been determined by proper notice. In this view of the matter the decree of the Court below is perfectly correct and the Defendants cannot now get advantage of the observations of the Court that some permanent constructions may have been made in the years 1946 and 1949.

15. The other point raised by the Appellants was about the service of notice. That is a question of fact and the courts below after having considered the evidence have come to a definite finding that the notice was served on all the tenants and thus this finding is binding on this Court in second appeal.

16. It was also contended by the counsel for the Respondent that if the constructions no longer exist the Defendants cannot claim protection u/s 5 of the Act. We do not think that the point has any substance if the permanent constructions were made within five years of the lease and were in existence it the time of the suit the defence cannot be defeated on the ground that the houses have subsequently fallen down. In the result therefore, this appeal falls. But In the circumstances the parties will bear their own costs throughout.

S.K. Datta, J.

17. I agree.