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91 CWN 475

Calcutta High Court

Case No: Appellate Decree No. 49 of 1981

M/s. Bungo Steel Furniture (Pvt.) Ltd.		APPELLANT
	Vs	
Pulin Chandra Daw		RESPONDENT

Date of Decision: Sept. 22, 1986

Acts Referred:

- Transfer of Property Act, 1882 - Section 111, 111(g), 112, 3

Citation: 91 CWN 475

Hon'ble Judges: Shyamal Kumar Sen, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: Saktinath Mukherjee and Subrata Nayek, for the Appellant; B.C. Dutta and B.M. Mitra, for the Respondent

Final Decision: Allowed

Judgement

1. The suit that has wended to this Court in this second appeal was instituted by the respondent-lessor for eviction of the appellant-lessee from the lease-hold premises on the ground of determination of the lease by forfeiture under the provisions of Section 111(g) of the Transfer of Property Act, 1882, the provisions relating to eviction as under the West Bengal Premises Tenancy Act, 1956 not being applicable to the lease in view of Section 3of the said Act as the lease was for more that 15 years. Eviction has been decreed by the trial court and the said decree has also been confirmed by the first appellate court and hence this second appeal by the lessee.

2. In assailing the concurrent finding of the courts below as to the determination of the lease by forfeiture, Mr. Saktinath Mukherjee, the learned counsel for the appellant, has mainly urged that even assuming that there was forfeiture of the lease on the ground of non-payment of rent and sub-letting as alleged, there was a clear waiver of forfeiture on the part of the lessor and as a result of such waiver eviction could in no way be decreed on the ground of determination of the lease by such forfeiture. This plea, though taken in

a way in paragraph 17 of the written statement as amended, does not appear to have been pressed in the courts below and has not also been urged in the Memorandum of Appeal to this Court. But even then we have allowed the appellant to urge the point as it appears to us to be a question of law apparent on the face of the record involving no further development of evidence of fresh investigation of facts. The entire plea of waiver of forfeiture have been made out on the averments in the plaint itself, and there can therefore be no legitimate objection on the ground of prejudice or surprise to the plaintiff-respondent as a result of such plea being allowed to be raised. A plea made out on the averments in the plaint itself can never be regarded to cause any prejudice or surprise to the plaintiff. Even though no citation may be necessary for the purpose, Yet reference may be made to he observations of Supreme Court in Keshavlal Lallubhai Patel and Others Vs. Lalbhai Trikumlal Mills Ltd., where it has been ruled that the High Court may allow a plea of law to be raised before it for the first time in second appeal, even though the same was not raised in the courts below nor taken even in the Memorandum of Appeal. We must also note that Mr. B. C. Dutt, the learned counsel for the plaintiff-respondent, has not, with his usual fairness, seriously argued that the defendant-appellant, not having urged the plea of waiver of forfeiture J the courts below and also in the Memorandum of Appeal, can no longer be allowed to urge the same before us, but Mr. Dutta has mainly argued that there was or could be no waiver of forfeiture in this case. Let us, therefore proceed to consider, Whether there was any waiver of forfeiture in this case and this is undisputed that if there was any such waiver, this second appeal must be allowed on reversal of the concurrent decrees of the courts below, while the appeal must be dismissed and the decrees must be affirmed if their was no such waiver.

3. Determination of lease by forfeiture is dealt with in Section 111(g) of the Transfer of Property Act which reads as hereunder :-

"111. A lease of immovable property determines -

(g) by forfeiture; that is to say,

(1) in case the lessee breaks an express condition which provides that on breach thereof, the lessor may re-enter; or

(2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title himself; or (3) the lessee is adjudicated an insolvent and the lease provides that lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease".

4. As has been pointed out by the Supreme Court in Namdeo Lokman Lodhi Vs. Narmadabai and Others, , u/s 111(g) of the Transfer of Property Act, as amended by the Amendment Act of 1929, a notice in writing has become an essential element, an integral

part of, and a condition precedent to a forfeiture. As has been observed in Mulla''s Transfer of Property Act, (7th Edition, at 744-745), u/s 111(g) as it stands after the 1929 Amendment, "the forfeiture of a lease requires he operation of two factors: (1) a breach by the lessee of an express condition of the lease provides for re-entry on such breach, and (2) a notice be the lessor expressing his intention to determine the lease". The observations in Namdeo (supra), a two-Judge Bench decision, as well as the above-quoted observations in Mulla''s Transfer of property Act (supra) have been cited with approval by a three-Judge Bench of the Supreme Court in Shri Rattan Lal Vs. Shri Vardesh Chander and Others, and it has been ruled that "the happening of any of the events specified in section 111(g) does not, ipso facto, extinguish the lease but only exposes the lessee to the risk of forfeiture and clothe the lessor with the right, if he so chooses, to determine the lease, by giving notice in that behalf". The happening of any of the events specified in 111(g) only makes the lease avoidable, but the forfeiture is not complete unless and until the lessor gives notice that he has exercised his option o determine the lease. "A forfeiture u/s 111, clause (g)", can therefore result only from two factors operating together, namely, (1) happening of any of the events specified in Section 111(g) and (2) a notice by the lessor expressing his intention to determine the lease. Mr. Dutt has, however, urged on the authority of a Single-Judge decision of this court in Godabari Debi Ganeriwalla Vs. Nand Kishore Bagaria and Others, that a forfeiture u/s 111(g) does not include the notice mentioned in that clause and though what determines the lease is forfeiture plus notice, yet a notice does not form part of the forfeture. But this can not be taken to be as good law in view of the observations of the Supreme Court in Namdeo (supra) and Rattan Lal (supra). If, as stated in Namdeo (supra) and confirmed in Ratan Lal (supra), a notice is an "integral condition of the forfeiture" and without the notice "there is no completed forfeiture at all", the notice is obviously a part of forfeiture u/s 111(g). It appears that the view of another learned Single-Judge of this Court in a much earlier decision in Talbot and Co. Vs. Haricharan Halwasiya and Others, was to that effect and that view having been endorsed by the Supreme Court in Namdeo (supra) and Rattan Lal (supra) would now govern us.

5. But if a notice u/s 111(g) is a part, rather an integral part, of forfeiture, it may not be quite easy to appreciate the provisions of Section 112 of the Transfer of Property Act Providing for waiver of forfeiture. The Section runs thus :-

"112. A forfeiture u/s 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress of such rent, or by any other act on the part of he lessor showing an intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver."

6. If "a forfeiture u/s 111, clause (g)" consists not only of any of the three events specified therein but also of the notice to be given to the lessee by the lessor or his intention to determine the lease, hen the first proviso to Section 112, providing that forfeiture may stand waived by acceptance of rents or some other act on the part of the lessor " provided that the lessor is aware that the forfeiture has been incurred", might appear to be somewhat anomalous. If in order to constitute forfeiture there must be a notice by lessor of his intention to determine the lease, then a lessor, who has given such a notice to determine the lease, then a lessor, who has given such a notice to effectuate forfeitures, can not but obviously be "aware that the forfeiture has been incurred" and in that view the first proviso to Section 112 becomes very much otiose. This has also been pointed out in Godabari (supra, at 539) where it has been observed that "if forfeiture includes notice, the first proviso to Section 112 becomes meaningless." It has also been observed in Mulla"s Transfer of Property Act, (7th Edition, page 755) that "if "a forfeiture u/s 111, clause (g)" means the happening of any of he three specified events followed by a notice from the lessor, the first proviso to Section 112 becomes meaningless, for there can not be a forfeiture u/s 111(g) without the knowledge of the lessor". This aspect, and this we say with respect, does not appear to have been considered by he Supreme Court in Namdeo (supra), Rattan Lal (supra) or any other decision.

7. Be that as it may, proceeding on the basis that the expression "a forfeiture u/s 111, clause (g)" as used in Section 112 of Transfer of Property Act, would comprehend also the notice to be given by the lessor u/s 111(g), we find that in the case at hand such a notice has admittedly been given by the lessor-respondent to the lessee-appellant on 18.9.1971, being Ext. B, and the categorical case of the lessee in its written statement is that the categorical case of the lessee in its written statement is that the said notice was received by the lessee on 23.9.1971. But admittedly the lessor issued another notice dated 8.11.1971, being Ext. 2, which was received by the lessee on 10.11.1971 and in paragraph 13 of the plaint, as amended, the plaintiff has categorically asserted that the lessee-defendant has become a trespasser liable for mesne profits and damages on and from 10.11.1971. As would appear form paragraph 13 of the plaint, the plaintiff has very clearly and unequivocally stated that " the defendant has not complied with the said notice dated - 8.11.1971 and is still continuing in unlawful occupation of the leasehold premises as described in the schedule below as a trespasser making himself liable for mesne profit and damage @Rs.60/- per day from 10.11.71 till eviction". When the second notice, Ext. 2, was issued on 8.11.1971 and when he plain was filed in May, 1972, the lessor-plaintiff was fully aware that forfeiture was incurred by the lessee and that the notice dated 18.9.1971, being Ext.B, was also issued for the purpose. If still, thereafter, the lessor has Clearly manifested his intention to treat the lease as subsisting upto 10.11.1971, the lessor must be taken to have waived the forfeiture for which Ext. B was firstly issued on 18.9.1971 and for which the suit for ejectment has eventually been filed. The Court below were therefore wrong in decreeing eviction on the ground of forfeiture and their decision must be overturned.

8. We accordingly allow this appeal, set aside the judgments and decrees passed by he trial court and the first appellate court and dismiss the suit. But we, however, make no order as to costs.

Shyamal Kumar Sen, J.

9. I agree,