(1978) 04 BOM CK 0019

Bombay High Court

Case No: Second Appeal No. 84 of 1969

Hashmatrai Hiranand Sindhi and another		APPELLANT
	Vs	
Tarachand Laxmichand Mohota and Others		RESPONDENT

Date of Decision: April 18, 1978

Acts Referred:

- Transfer of Property Act, 1882 - Section 111, 113

Citation: (1978) MhLj 750

Hon'ble Judges: B.C. Gadgil, J

Bench: Single Bench

Advocate: D.L. Dharmadhikari, for the Appellant; B.N. Mohta, for the Respondent

Final Decision: Dismissed

Judgement

B.C. Gadgil, J.
Appellants 1 and 2 (the legal representatives of the original defendant Hiranand Gurumukhdas), have filed this appeal against the decree for possession passed against them in Civil Suit No. 2 of 1964 on the file of the Civil Judge (Senior Division), Wardha, and which was confirmed by the District Judge, Wardha in Appeal No. 60 of 1966.

2. At this stage there are certain undisputed facts. The suit property is a part of a plot situate at Wardha. Initially the entire plot was owned by one Murarka. In or about 1948, he let it out to Laichand on the annual rent of Rs. 101. It seems that Laichand started his own business after erecting some structures thereon. Thereafter he sold that business along with the leasehold rights to the original defendant Hiranand. As far as the lessor''s interests are concerned, they were sold by public auction and a firm known as Mahabir-prasad Shyamsundar (acting through Motilal) purchased the suit plot. The purchaser divided the plot in three parts. One of them was sold to Manik-chand, second to Krishna Chartie and the third, i. e., the suit property, to Mannalal Sanchahya and

Kishorilal Sancharija. After these sale-deeds, the rent amount was apportioned and consequently, each purchaser became the separate lessor of Hiranand so far as his part was concerned. The rent of the suit plot was fixed at Rs 35 per year. Mannalal and Kisfaorilal terminated the tenancy of the defendant by giving a notice and then filed a suit No. 306 of 1962. It was dismissed on 9-4-1962, on the ground that the tenancy of Hiranand was not terminated by a valid and proper notice. This finding was given as Hiranand contended that the tenancy was an annual tenancy and that 15 days notice would not be sufficient. After decision of the suit, the original plaintiffs Mannalal and Kishorilal gave another notice dated 10-6-1963, terminating the Defendant"s tenancy by the end of 31-12-1963. They also claimed arrears of Rs. 52.98. This notice was received by Hiranand on 13-6-1963. The notice was not complied with. The plaintiffs therefore, filed suit under appeal to recover possession and mesne profits. Hiranand resisted the suit on various grounds. All of them are, however, not relevant for deciding this appeal. I will give in nut-shell the relevant pleas. He contended that the notice was invalid as the tenancy was beginning from 25th of June and, as such, the notice expiring by the end of 1963 was bad. Hiranand paid Rs. 50 to the plaintiffs in January 1964 as rent. A contention was, therefore, raised that by accepting this rent, the plaintiffs have waived the notice, as contemplated by section 113 of the Transfer of Properly Act. One more contention was that the C. P. &Berar Letting of Houses and Rent Control Order, 1949, is applicable to the suit premises. Under that Order the landlord is not entitled to terminate the tenancy without previously obtaining the permission of the Rent Controller. Hiranand pleaded that no such permission was obtained by the plaintiffs and, as such, the termination of the tenancy was bad. Hiranand died during the pendency of the suit. His heirs (viz., the present appellants) filed the written statement at Ex. 22 and resisted the suit. That written statement is practically similar to the one that was filed by Hiranand at Ex. 9.

3. The learned Civil Judge (Senior Division), who heard the suit, came lo the conclusion that the Rent Control Order was not applicable and that there was no waiver of notice. A finding was recorded that the notice terminating the tenancy was legal and proper. The decree for possession was passed against the defendants. They preferred an appeal No. 60 of 1966 to the District Court, Wardha. During the pendency of the appeal, the original plaintiffs Mannaial and Kishorilal sold their interest in the suit property to Tara-chand Laxmichand, the present respondent No. 1. Tarachand"s name was substituted in the said appeal. The appellate Court confirmed the decree and dismissed the appeal. It is this dismissal that is being challenged before me.

4. It was contended by Mr. Dharmadhikari that the notice expiring by the end of December 1963 was bad as the tenancy year was beginning on 25th of June. This contention, however, is without any substance inasmuch as Hiranand in suit No. 306 of 1962 has specifically admitted that the tenancy was beginning on 1st of January. Ex 28 is a notice given by Hiranand to the plaintiffs. In that notice also such a statement has been made. It appears that the contention that the tenancy year began from 25tb June was

taken simply because the original plaintiff Mannaial and Kishorilal purchased the property on 25-6-1962 Such a purchase, however is not relevant for determining the tenancy year. Hiranand was already a tenant when Mannaial and Kishorilal purchased the property. That tenancy was beginning on 1st of January It would continue even after the purchase by Mannalai and Kishorila). It would not, therefore, be possible for the appellants to urge that the notice was bad as it did not expire by the tenancy year.

5. It was next urged that the notice dated 10-6-1963 should be treated as waived as Mannaial and Kishorilal accepted the rent of Rs. 50 in January 1964. It should, however, be remembered that the rent due upto 31-12-1963 was Rs. 52.98. The amount of Rs. 50 was paid towards the part satisfaction of this rent. There cannot be any waiver of a notice simply because the tenant has paid the rent for a period before the expiry of the tenancy. Mr. Dharmadhikari then submitted that the finding as to the waiver of notice should be recorded in favour of the appellants on account of the acceptance of Rs. 35 by Mannalal and Kishorilal on 22-6-1964, It may be noted that neither Hiranand nor the present appellants have raised any plea about waiver of notice on account of payment of Rs 35. There is no dispute that the original plaintiffs have received Rs 35 on 22-6-1964. Mr. Dhdrandhikari submitted that a plea of waiver on account of this waiver could not arise in the written statement as the payment was made after the written statement was filed. But there was nothing in the way of Hiranand to amend the written statement so as to include such a plea. I have already stated that Hiranand died during the pendency of the suit. His heirs (i. e., the present appellants) were brought on record. They filed their written statement Ex. 22 on 27-8-65. Even in that written statement, no plea of waiver on account of payment of Rs. 35 has been raised. Mr. Mohta for the respondents, therefore, urged that it would not be open for the appellants to raise a question about waiver of notice without there being any plea in that respect. There is much substance in this contention inasmuch as the said plea of waiver is based upon the facts and it was necessary for the defendants to plead those facts in their written statement.

6. The position, however, would not be different even if the case of waiver, as contended by the appellants, is considered on its own merits. Section 113 of the Transfer of Property Act reads as under :

"A notice given u/s 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

Illustrations.

(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 properly since the expiration of the notice. The notice is waived

(b) ....."

Mr. Mohta for the respondents submitted that mere acceptance of rent would not constitute waiver. He relied upon a decision of the Supreme Court in Bhawanji Lakhamshi v. Himmatlal Jamnadas 1973 Mh. LJ l. In that case the tenancy came to an end by efflux of time. However, the tenant was protected on account of the Rent Legislation, viz., the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947. The tenant after the expiry of the lease continued in possession on account of this statutory protection. The landlord thereafter accepted the rent and a contention was raised that by such acceptance, the fresh tenancy was created. The Supreme Court held that there would not be any fresh tenancy unless intention to create such tenancy is clearly established. It was also held that if the tenant tenders the rent payable under the statutory tenancy, the landlord cannot by accepting it as rent, create a tenancy by holding over. I will presently show that the Rent Control Order was not applicable to the suit premises. Hence, after the termination of tenancy, Hiranand was not possessing the property as a statutory tenant. The above decision will not, therefore, be applicable.

7. Mr. Dharmadhikari drew my attention to the decision of the Division Bench of this Court in case of Chaturbhuj Sitaram Vs. Manjibai Hirachand and Another, . The relevant head note reads as follows:

"Waiver of notice determining tenancy can be inferred from the conduct of the person serving notice indicating an intention to treat the lease subsisting. In the absence of any other circumstances, acceptance of rent which has become due in respect of the premises 3ince the expiration of the notice amounts to waiver of the notice. That is made clearly by illustration (a) to section 113, Transfer of Property Act."

No doubt, this decision supports the contention of Mr. Dharmadhikari to a certain extent. However, the question of waiver will have to be decided on the basis of facts of each case. Here the plaintiffs filed a suit on 6-1-1964 with an allegation that Hiranand"s tenancy stood terminated and that the plaintiffs were entitled to possession, arrears, and mesne profits from the latter. The amount of Rs. 35 was paid long after the institution of the suit. Mr. Mohta submitted that the acceptance of Rs. 35 during the pendency of the suit would not constitute waiver. Mr. Dharmadhikari argued that the pendency of a suit would not make any difference. He relied upon a decision of the Allahabad High Court in Ram Dayal v. Jawala Prasad AIR 1966 All. 623. In that case payment was made during the pendency of the suit and the Allahabad High Court held as follows :

"Once it is found that the rent for a period subsequent to the notice to quit was accepted by the plaintiff landlord it is that circumstances alone which has to be taken into consideration for finding out whether by so accepting the rent the plaintiff intended that the relationship of landlord and tenant should subsist between the parties. That the defendant was unable to satisfy the Court by his evidence affirmatively that there was an agreement arrived at for continuing the leniency is immaterial. It is not the diligent prosecution of the suit which is material in judging whether the plaintiff as landlord intended to continue the tenancy of the defendant, what is material is the acceptance of

rent by him for a period subsequent to the notice to quit."

Mr. Mohta contended that section 113 of the Transfer of Property Act would come into picture only when there is an act on the part of the lessor showing an intention to treat the lease as subsisting. According to him, there could not be any occasion for the landlord to show such an intention when he has already filed a suit on the basis of the termination of tenancy. Mr. Mohta further submitted that in such a case, it is the suit that has to be decided and mere payment of some amount of rent would be irrelevant, unless a party pleads and proves that on account of the said payment, there was a compromise of the suit. I think that there is much substance in this contention. This very point has been considered by the Oudh High Court in Kamlapat Sahai v. Mr. Manho Bibi A I R 1948 Oud 127 wherein it is held that once a suit for ejectment has been instituted, it cannot possibly be said that any act of the lessor shows an intention to treat the lease as subsisting unless he withdraws the suit. He may renew the lease, in which case it would not be a question of waiver but a question of fresh lease. In the present case also the plaintiffs had filed the suit and as such acted on the termination of the tenancy. They cannot be said to have waived notice by accepting some amount during the pendency of the suit. It appears very difficult to uphold the contention of the appellants that a termination of tenancy which has been made as a cause of action for filing a suit should be treated as done away with on account of the alleged waiver by acceptance of Rs. 35. I would, therefore hold that the contention of waiver is not permissible for want of plea and even on merits that plea must fail.

8. It was next urged that the plaintiffs should have obtained permission of the Rent Controller under clause 13 of the C. P. and Berar Letting of Houses and Rent Control Order, 1949, for terminating the tenancy and that in the absence of such a permission, there cannot be any valid termination and consequently there cannot be any decree for possession. It may be noted that the said Rent Control Order primarily applies to the houses let out in certain areas. There is no dispute that the Rent Control Order applies to Wardha. But the controversy is as to whether the lease in question is covered by that order. I have already stated that initially a big plot was let out by one Murarka to Lalchand and thereafter there was a divolution of Murarka''s interest to three persons, viz. . (i) the present plaintiffs, (ii) Manikchand and (iii) Krishna Charde, A faint attempt was made by Mr. Dharmadhikari to contend that what was let out by Murarka was a house together with open space and that, therefore, the Rent Control Order would apply. However, the written statement of the defendants at Ex. 9 clearly states in paragraph 9 that the said Murarka has leased out the entire site to one Lalchand on annual rent of Rs. 101, and that the said site was then open. There is also other evidence to prove that what was leased out to Lalchand was an open space. It is true that Lalchand erected some structure and that thereafter he transferred his leasehold rights in the open space as well as the structure standing thereon to one Hiranand. But the construction made by Lalchand would not make any difference. Reliance was placed on the definition of the word "house", as given in clause 2 (3) of the Rent Control Order. It reads as follows:

""House" means a building or a part of a building whether residential or non-residential and includes (a) garden, grounds and outhouses (if any)ï¿½appurtenant to such a part of building, and (b) any furniture supplied by the landlord for use in such building or part of a building."

It was contended that what was let out to Lalchand was a building and open space and, as such, the present open space, which is the subject matter of the suit, would be a "house" as contemplated by this definition. Fallacy in this submission is twofold. In the first place, there was no building on the land when it was let out by Murarka to Lalchand. Secondly, after the three sale-deeds by auction purchaser Mahabirprasad, each of the purchasers treated himself as the owner of a specified portion. Hiranand accepted each purchaser as a landlord with respect to the portion that has been purchased. It is in this manner that he started paying rent at Rs. 35 to the original plaintiffs Munnalal and Kishorilal. There is no dispute that what was purchased by Munnalal and Kishorilal was an open space. Thus, there was a sort of novation by which a separate lease was created of an open space between Mannalal and Kishorilal on one hand and Hiranand on the other. With such separate lease, Hiranand was a tenant not of any house or structure, but only of an open space. I have already stated that the Rent Control Order does not apply to leases of open lands. What is contemplated by clause 2 (3) of the order is that the open space appurtenant to a house would be included in the definition of a house. That does not, however, mean that an open space without any connection with a home or building can be termed as a house. Thus, there is no case for applying the provisions of the Rent Control Order.

9. Mr. Mohta for the respondent submitted that an error has occurred in the lower Court"s decree as no enquiry as to future mesne profits from the date of suit till the delivery of possession has been ordered. He, therefore, argued that such an order may be passed by me while disposing of this appeal. Mr. Dharmadhikari submitted that the plaintiffs have prayed for future mesne profits from the date of suit and that such a prayer shall be treated as refused when the Court did not pass any order for an enquiry in that respect. According to him, the plaintiffs should have preferred an appeal against rejection of that claim of mesne profits and the plaintiffs would not be able to have an order in their favour without preferring any such appeal. Ordinarily, an aggrieved party is expected to prefer an appeal for getting relief which was refused by the lower Court. But there are certain exceptional circumstances which are contemplated by the Legislature and it is for that purpose that Order 41, rule 33, CPC has made a provision which enables the appellate Court to make such orders as the case may require. The power can be exercised notwithstanding that the appeal is as to part only of the decree. It can also be used in favour of any of the respondents although they have not filed an appeal or cross-objection. Here the plaintiff have succeeded in getting a decree for possession. They are entitled to mesne profits from the date of suit till delivery of possession, It seems that the trial Court has accidentally Omitted to pass any orders in that respect. In these circumstances I am satisfied that this is a fit case where I should exercise powers under

Order 41, rule 33, Code of Civil Procedure. Hence I pass the following order. 10. The appeal is dismissed with costs and the decree in Suit No. 2 of 1964 is confirmed with the modification and direction that the plaintiffs are entitled to mesne profits from the date of suit till date of possession and that an enquiry in that respect be made under Order 20, rule 12 (1) (c). Code of Civil Procedure.