

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

SECOND APPEAL No.191 OF 2015

JUDGMENT:

This Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') aggrieved by the judgment and decree dated 27.11.2014 passed in A.S. No.74 of 2012 on the file of the XI Additional Chief Judge, City Civil Court, Hyderabad (for short, 'first appellate court'), wherein the first appellate court while allowing the appeal, set aside the judgment and decree dated 30.12.2011 passed in O.S. No.275 of 2010 on the file of the III Junior Civil Judge, City Civil Court, Hyderabad (for short, 'the trial court'). The appellant herein filed the original suit for eviction of the respondent herein from the suit schedule property, i.e., flat bearing municipal No.4-1-213/A, admeasuring 1,500 square feet, Jeevan Apartments, situated at Hanuman Tekdi, Hyderabad, and for mesne profits.

2. Heard the learned counsel for the appellant-plaintiff and the learned counsel for the respondent-defendant, apart from perusing the material on record.

3. Learned counsel for the appellant-plaintiff would contend that the respondent had obtained the suit schedule property from the appellant in the year 1985 on a monthly rent of Rs.1,300/-, which was enhanced from time to time and the present rent is Rs.6,000/- per month; the lease was oral and the

tenancy was for month to month governed by the provisions of the Transfer of Property Act, 1882; the appellant terminated lease of the respondent under quit notice dated 09.07.2008, which was served on the respondent on 11.07.2008; the trial Court rightly decreed the suit directing the respondent herein to vacate and deliver possession thereof to the appellant; the first appellate court without framing any point for consideration with regard to the alleged waiver of notice, held that mere acceptance of rent by the appellant after issuance of quit notice amounted to the waiver of quit notice and reversed the judgment and decree passed by the trial Court; the first appellate court failed to appreciate that when there was practice of enhancement of rent right from the beginning of tenancy and it was enhanced from Rs.1,300/- to Rs.6,000/-; subsequent to quit notice on 09.07.2008 till disposal of the original suit, there was no enhancement of rent which makes clear that the landlady had no intention to waive the quit notice; the first appellate court held that the collection of rents during the pendency of the suit amounts to severing the claim, which finding is against the law; and ultimately, prayed to allow the Second Appeal by decreeing the original suit filed by the appellant.

4. On the other hand, learned counsel for the respondent-defendant would contend that even after filing of the suit, the appellant-plaintiff was collecting the monthly rent of

Rs.6,000/- without any protests and to substantiate the same, the respondent-defendant has filed Ex.B.1-money order receipts along with postal complaints and the appellant has admitted the receipt of the rents during the pendency of the suit; the trial Court without considering the evidence of D.W.1 and the documents Exs.B.1 and B.2 marked on behalf of the respondent-defendant, erroneously decreed the suit for eviction; the first appellate court after appreciating the entire evidence on record, rightly set aside the decree and judgment passed by the trial Court, the said finding of the first appellate court is not perverse; and ultimately, prayed to dismiss the Second Appeal.

5. While admitting the Second Appeal on 09.09.2015, the following substantial questions of law are framed:

(1) Whether the Court below has committed a serious error in holding that the quit notice is waived on account of the receiving of rents by the plaintiff subsequent to the quit notice?

(2) Whether the Court below was in error in not considering the evidence brought on record that there is no waiver or intentional giving up of the notice to quit?

6. To adjudicate the *lis* and to answer the substantial questions of law, it is necessary to refer to the relevant pleadings of the parties.

(a) The appellant-plaintiff filed the original suit for eviction of the respondent-defendant from the suit schedule flat bearing No.4-1-213 at Jeevan Apartments and for mesne profits.

The respondent obtained the suit schedule flat for residential purpose in the year 1985 on a monthly rent of Rs.1,300/- and paid advance of Rs.5,000/-. The rent was enhanced from time to time and at the time of filing the suit, it was Rs.6,000/- per month. The respondent used the flat for residential purpose and thereafter the suit schedule property was converted into commercial office without consent of the appellant and used for the purpose of storing hazardous and harmful chemicals causing nuisance to the appellant and other occupants of the apartment. The appellant issued termination notice to the respondent on 09.07.2008. The respondent without any reply to the appellant, filed O.S. No.2112 of 2008 on the file of the XX Junior Civil Judge, City Civil Court, Hyderabad, for perpetual injunction. As such, the appellant was constrained to file the present original suit.

(b) The defendant filed written statement denying all the allegations made in the plaint and contended that the appellant with an evil intention got issued legal notice though they are paying monthly rents regularly. The lease is oral and the appellant permitted the defendant to use the suit schedule property for commercial use by receiving regular rents. The legal notice issued by the appellant is defective and invalid and no cause of action is accrued to the appellant.

7. The trial Court basing on the pleadings of both sides, framed the following issues for adjudication of the suit:

- (1) Whether the plaintiff is entitled to get evicted defendant and whether termination notice is in terms of Section 106 of T.P.Act?
- (2) Whether the plaintiff is entitled to Rs.11,000/- per month from date of suit till date of handing over suit schedule property to plaintiff?
- (3) To what relief is plaintiff entitled to in facts and circumstances of case?

8. In order to establish the case, the plaintiff placed the evidence of P.W.1 and got marked Ex.A.1-office copy of legal notice, Ex.A.2-postal acknowledgment, Ex.A.3-served copy of plaint in O.S. No.2112 of 2008 on the file of the XX Junior Civil Judge, City Civil Court, Hyderabad and Ex.A.4-general power of attorney. On the other hand, on behalf of the defendant, D.W.1 was examined and Ex.B.1-15 money order receipts along with postal complaints and Ex.B.2-13 maintenance receipts were marked.

9. The trial Court after considering the entire evidence on record, partly decreed the suit directing the respondent to vacate the suit schedule property within two months and hand over the vacant possession to the appellant. Aggrieved by the said judgment and decree, the respondent herein preferred A.S. No.74 of 2012 before the first appellate court. The first appellate court, after appreciating the entire evidence on record, held that

the notice issued under Section 106 of the Transfer of Property Act, 1882, before filing of the original suit was waived and a fresh quit notice is mandatory and in the absence of such fresh notice, the original suit is liable to be dismissed and ultimately, the first appellate court was pleased to allow the appeal by setting aside the judgment and decree passed by the trial Court. Questioning the said judgment of the first appellate court, the Second Appeal is preferred by the appellant-plaintiff raising the substantial questions of law referred to supra.

10. In view of the submissions of both the learned counsel, the only point that arises for determination is, whether the judgment and decree dated 27.11.2014 passed by the first appellate court is liable to be set aside?

11. As per the record placed before the Court, the appellant filed the original suit for eviction of the respondent from the suit schedule property and for mesne profits. The respondent-defendant admitted jural relationship with the appellant-plaintiff and that there was oral lease entered between them in the year 1985. Originally, the rent was Rs.1,300/- per month and thereafter, it was enhanced from time to time. The defence set up by the respondent is that the notice issued under Section 106 of the Transfer of Property Act, 1882, is invalid and defective and the appellant is not entitled to eviction and mesne profits @ Rs.11,000/- per month. Though the respondent

contended that they paid an advance of Rs.1,00,000/-, it was not established by leading cogent and convincing evidence. Both the Courts below negated the same. The trial Court held that the appellant-plaintiff is entitled to file a separate application to seek the mesne profits as per her entitlement. The first appellate court while determining the *lis*, held that the conduct of the appellant-plaintiff in accepting the rents tendered by the respondent-defendant for the period subsequent to the quit notice without any reservations clearly leads to the inference that she was treating the lease as subsisting and she waived the notice and ultimately, held that the parties have waived the notice of eviction.

12. Learned counsel for the appellant-plaintiff has relied on the decisions of the Hon'ble Supreme Court in **Shanti Prasad Devi and another Vs. Shankar Mahto and others**¹ and **Sarup Singh Gupta Vs. S.Jagdish Singh and others**², wherein it is held that the mere acceptance of rent by lessor on expiry of period of lease would not amount "assent" for continuance of lease, the order of ejectment of lease was not interfered by the Hon'ble Supreme Court.

13. Learned counsel for the appellant-plaintiff has also relied on a decision of this Court in **Purohit Lakshmanchandji**

¹ AIR 2005 SC 2905

² AIR 2006 SC 1734

Vs. Vetcha Venkata Sree Ramachandra Murty³, wherein it is held as follows:

"The question whether the mere acceptance of rent after a notice to quit and in particular acceptance of rent even after the suit is filed would operate as a waiver has been the subject of several decisions and divergent views have been expressed. The preponderance of authority appears to be in favour of the view which I have taken, viz., that the acceptance of rent subsequent to the filing of the suit will not operate as a waiver in the usual course. All the authorities expressing the different views have been considered and dealt with in an elaborate judgment by the Madras High Court in Saleh Bros. v. K. Rajendran. AIR 1970 Mad. 165. After considering all the decisions as also the law in England, it was held that acceptance of rent after the suit in ejectment is not regarded as a waiver, because, once the matter has come to court, the election has become irrevocable. The plain language of Section 113 of the Transfer of Property Act indicates that the act of the lessor must be such as to constitute a clear evidence of his intention to treat the lease as subsisting and the illustration (a) must be understood and applied in consonance with the principle underlying the action with due reference to the intention of the lessor. There is no warrant for the view that mere receipt of rent, whatever may be the intention of the lessor, should of its own force, divorced from the circumstances of the case, be regarded as amounting to a waiver."

14. It is the case of the appellant-plaintiff that the rents were sent by the respondent-defendant by way of money order and she received those rents under protest and she made endorsement on the acknowledgment given by her. Ex.B.1 is the bunch of money order receipts (15 in number) along with postal complaints. The respondent-defendant did not file the acknowledgments given by the appellant-plaintiff. The decisions on which reliance is placed by the learned counsel for the

³ AIR 1976 AP 428

appellant-plaintiff and the language of Section 113 of the Transfer of Property Act, 1882, indicate that the acts or intention of the lessor must be very clear with regard to extension of lease. It is also held in the aforementioned decisions that mere acceptance of rents after expiry of lease would not amount to waiver of quit notice. However, it is also appropriate to state that when acknowledgments given by the appellant-plaintiff were in possession of the respondent-defendant, those might have been filed before the Court to prove that the rents were not received under any protest. There is oral evidence of the appellant/plaintiff that she received rents under protest and made endorsement to that effect on the postal acknowledgements. When the said postal acknowledgements were not filed, an adverse inference can be drawn against the respondent/defendant that the amounts were received under protest by the landlady. In view of the language envisaged in Section 113 of the Transfer of Property Act, 1882, notice of waiver should be with 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. In the case on hand, there is no such express or implied consent on the part of the landlady with regard to waiver. Further, the suit was promptly instituted for eviction and possession. In view of the same, the finding of the first appellate court is perverse and not in consonance with the provisions of Section 113 of the Transfer

of Property Act, 1882. While dealing with the matter, the first appellate court misread the provisions of Section 113 of the Act and held that there was waiver of the quit notice, which is against the settled legal principles. Further, the first appellate court committed error in not appreciating the evidence adduced on behalf of the appellant/plaintiff and misread the evidence adduced on behalf of the respondent/defendant, and recorded erroneous findings with regard to setting aside the judgment and decree passed by the trial Court. The impugned judgment of the first appellate court is unsustainable in law. Both the substantial questions raised herein are answered in favour of the appellant/ plaintiff accordingly.

15. In the result, the Second Appeal is allowed setting aside the judgment and decree dated 27.11.2014 passed by the first appellate court in A.S. No.74 of 2012, and consequently, the judgment and decree dated 30.12.2011 passed by the trial Court in O.S. No.275 of 2010 is restored. Miscellaneous Petitions pending, if any, shall stand closed. There shall be no order as to costs.

Dr. SHAMEEM AKTHER, J

13.08.2018
Siva/DRK