

CASE NO.:  
Appeal (civil) 5485-86 of 1993

PETITIONER:  
SHEIKH NOOR AND ANR.

RESPONDENT:  
SHEIKH G.S. IBRAHIM (DEAD) BY LRS.

DATE OF JUDGMENT: 04/08/2003

BENCH:  
R.C. LAHOTI & ASHOK BHAN

JUDGMENT:  
JUDGMENT

2003 Supp(2) SCR 204

The Judgment of the Court was delivered by

BHAN, J. Being aggrieved by the order of eviction passed by the trial court which was duly confirmed by the first appellate court, and later in the High Court the tenant/appellants (hereinafter referred to as 'the appellants') have filed these appeals. The court below have disposed of proceedings by a common order as the facts and the point of law involved in both the cases are the same. Both the appeals are being disposed of by a common order.

Shortly stated the facts are: House No. 2690 on City Survey No. 1900 of Bhusawal are the demised premises. One Mr. Mohammad Yahya was the owner. He let out the property to the appellants in the year 1946. After partition Mohammad Yahya migrated to Pakistan in the year 1947. He came to India in the year 1957 and collected the arrears of rent. For future he directed the tenants that the rent be paid to Fatimabi. Appellants accepted the arrangement and started paying the rent to Fatimabi. Municipal taxes which were required to be paid by the tenants were not paid in respect of the said house and a warrant of attachment was issued by the Municipal Council, Bhusawal. In execution of that warrant the house in dispute was ordered to be sold by the public auction. Fatimabi purchased the house in dispute in auction. Sale in her favour was confirmed. On 15th April, 1976 she transferred her ownership rights in favour of respondent Sheikh Ghasu Sheikh Ibrahim (Since deceased) represented by Lrs. (hereinafter referred to as 'the respondent'). On 16.4.1976 Fatimabi addressed a communication to the appellants informing them that she had transferred her rights in the property in favour of the respondent and directed the tenants to pay the arrears of rent due prior to the date of transfer as well as future rent to the respondent. This letter of attornment was received by the appellants. Respondent-landlord thereafter issued a notice to the tenants calling upon them to pay the rent due for the tenements in their occupation. Appellants refused to recognise the respondent as their landlord and pay the rent. Thereafter, the respondent filed separate suits seeking eviction against the appellants on the grounds (i) that appellants were defaulters as they had failed to pay rent for due for more than six months and (ii) that the respondent required the house bona fide for his personal occupation.

After service of notice appellants entered appearance. They did not seriously dispute the fact that they were in arrears of rent as had been stated by the respondent. They denied the title of the respondent and the relationship of landlord and tenant with him. They also challenged the sale deed executed by Fatimabi in his favour. They also stated that the transfer by the Municipal Council of the property in dispute to Fatimabi was no sale in the eye of law being illegal. According to them Fatimabi got the house transferred in her favour fraudulently. That Fatimabi was entitled to receive rent only. They did not recognise her as owner of the said house.

They challenged the title of the respondent and refused to accept him as owner of the house till he got his title decided from a competent court having jurisdiction.

On these pleadings several issues were framed. Trial Court held that the respondent had become the owner of the suit premises being transferee from Fatimabi. The ground of bona fide or personal occupation was declined. The appellants were found to be in arrears of rent for more than six months and consequently were ordered to be evicted. This order of the trial court was confirmed in appeal. Writ petitions filed by the appellants in the High Court challenging the said orders were also dismissed.

Learned Counsel appearing for the appellants vehemently argued that Fatimabi was neither landlord nor the owner of the property. She was only a rent collector on behalf of the original owner. The transfer of property in her favour by the Municipal Council was illegal as Municipal Council could neither attach nor sell property for arrears of municipal taxes. The sale was collusive and fraudulent. Only Rs. 1,000 were paid as sale consideration whereas the price of the house was much more. Adding corollary to the said argument, counsel for the appellants further argued that since Fatmabi did not become the owner of the property, the sale made by her in favour of the respondent was no sale in the eye of law. Fatimabi did not have a valid title to the property and therefore she could not convey the same to any other person. Another suspicious circumstance pointed out by the counsel for the appellants was that after obtaining the sale certificate from the Municipal Council, Bhusawal, Fatimabi sold the house in a great hurry on the same day to the respondent who is her near relation.

We do not find any force in this submission. Appellants are estopped from disputing the relationship of landlord and tenant between them and Fatimabi. They had attorned to her in the year 1957 according to their own admission and had been making payment of the rent to her as per directions of the original owner. The burden of proof that the sale made by the Municipal Council in favour of Fatimabi was collusive, fraudulent and without observing due formalities was on the appellants. It was for them to prove that Fatimabi did not become the owner of the suit house by virtue of sale certificate issued by the Chief Officer, Municipal Council, Bhusawal in her favour. Either with reference to the facts on record or with reference to any provision of the statute it has not been shown to us that the Municipal Council could not attach or sell the suit property for arrears of municipal taxes due on the said property. Further, it has not been proved by any evidence whatsoever that due formalities for holding auction sale were not observed. From the evidence, it appears that the appellants had challenged the auction sale conducted by the Municipal Council, Bhusawal by making complaints to the Collector, Jalgaon and also the Government of Maharashtra. Nothing has been brought on record to show that in pursuance to those complaints the sale in favour of Fatimabi was set aside. In our opinion, the appellants had already chosen the forum for challenging the validity of sale in favour of Fatimabi and since the appellants have not stated as to what action has been taken by the said authorities, it can be presumed that no action for setting aside the sale was taken by the government as well as the Collector. In the instant proceedings the appellants were not entitled to challenge the validity of the sale effected by the Chief Officer, Municipal Council, Bhusawal. The appellants could have done so by filing a separate suit for declaration challenging the sale which they did not do. Till the auction sale held in favour of Fatimabi is set aside it cannot be said that Fatimabi did not acquire a valid title to the property in dispute. After acquiring a valid title in property Fatimabi had an absolute right to transfer the property in favour of any person she liked. The sale effected by her in favour of the respondent was also not challenged. Nothing has been brought on record to show that the sale effected by Fatimabi in favour of the respondents suffered from any infirmity. Accordingly it is held that the transfer made

by the Chief Officer, Municipal Council, Bhusawal was a valid transaction and consequently the sale made by Fatimabi in favour of the respondent was also a valid transfer of property in favour of the respondent. Learned counsel for the appellants then argued that since Mohammad Yahya had left for Pakistan the property became evacuee property which could not be attached or sold by the Chief Officer of the Municipal Council, Bhusawal in the auction sale. This plea is being raised for the first time in this Court. Fact that the property was an evacuee property and declared as such has not been brought on record. In the absence of any pleadings to the effects that the property had become an evacuee property or proof thereof it cannot be held that the property was an evacuee property which could not be attached and sold for the recovery of arrears of municipal taxes due towards the property.

Lastly it was contended by the counsel for the appellants that arrears of rent prior to the sale in favour of the respondent could not be recovered as arrears of rent. That arrears prior to the transfer in favour of the respondent were in the nature of a 'debt due'. If the period Prior to the sale in favour of the respondent is excluded then the rent due would be for less than six months.

Under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (hereafter referred to as "the Act") the tenant becomes liable to be evicted on the ground of arrears of rent, only, if, he is in arrears of rent for more than six months on the date of filing the suit. In order to substantiate the plea that rent due from the tenant prior to the date of the transfer in favour of the transferee/landlord was not rent but a debt due, learned counsel for the appellants placed reliance on a single Judge judgment of the Bombay High Court in Vinayak Mahadeo Nirgum v. Savannas Sanitarium Bandekar, [1981] 2 SCR 551, in which it has been held that the transferee/landlord was not entitled to recover the rent due prior to the date of transfer of property in his favour as arrears of rent and seek eviction under the Act on that ground. The same would be a debt due and recovered by filing a separate suit.

Plea that arrears prior to transfer could not be recovered as arrears of rent, the same being a "debt due" was not raised by the appellants either in their pleadings or before any of the courts below. Rather the appellants accepted them to be arrears of rent due and proceeded accordingly. This plea is being raised for the first time before us. Normally, such a plea would not be allowed to be raised for the first time but since the counsel insisted that it is a question of law and goes to the root of the matter he was permitted to argue the same. Before we go to the question of law factual aspect of the matter may be stated as under:

The sale deed executed by Ftimabi in favour of the respondent has not been produced on record to show as to whether there was an assignment of the arrears of rent or not. But this may not detain us as Fatimabi in her communication addresses to the appellants had specifically stated that she had transferred the property in favour of the respondent along with the arrears of rent due. That the appellants should attorn to the new landlord and start paying rent to him. It was specifically mentioned that transferee/landlord would be entitled to recover the arrears of rent due from them to the previous landlord. Similarly in the notice sent by the respondent/landlord it was specifically stated that he is entitled to recover the arrears of rent due prior to the date transfer of the property in his favour and asked the appellants to tender the rent due which they did not comply with. These facts are not disputed by the appellants. Based on this the first appellate court as final court of fact found that landlord/transferee was entitled to recover the arrears of rent prior to the date of transfer of the property in his favour. From this it can easily be inferred that Fatimabi had assigned the arrears of rent due to her in favour of the transferee/landlord. This finding of fact cannot be allowed to be disputed by the appellants who have failed to join any issue thereon by raising necessary plea in their pleadings.

Section 109 of the Transfer of Property Act reads:

"109. Right of lessor's transferee. - If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee show elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer ceased to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of the rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree such determination may be made by any court having jurisdiction to entertain a suit for the possession of the property leased."

The substantive part of the Section 109 of the Transfer of Property Act read with proviso necessarily indicates that the arrears of rent due is one of lessor's right as to the property transferred. Right to recover the arrears of rent vested with the original owner and on transfer of all his rights the same vests in the transferee as per provisions of Section 109 of the Transfer of Property Act. Proviso to section 109 clearly indicates that if there is an assignment of rent due then the transferee/landlord would be entitled to recover the same from the tenant as arrears of rent.

In Ramchander Narsey & Co. v. Wamanrao Shenoy, UJ (SC) 70(69), this Court approved the judgment of the High Court of Bombay in ordering ejectment of a tenant inter alia, on the ground that the tenant had failed to pay to the transfer landlord arrears of rent including the arrears prior to the transfer of the property in his favour. Incidentally the provisions of the statute considered in that case and in the present case are the same. This Court noticed the ratio of the judgment of the Calcutta High Court in Smt. Daya Debi v. Chapla Debi, AIR (1960) Cal., 378 wherein it was held that the assignment of arrears of rent ceased to be rent, they because debt in law and therefore there was no question of paying the same or tendering them in Court for payment to the landlord in eviction proceedings. This Court did not go into the correctness or otherwise of the said view. The contention raised by the counsel for the tenant was not accepted although the view expressed by the Calcutta High Court was not specifically disapproved.

The judgment of the Calcutta High Court in Smt. Daya Debi's case (supra) was taken note of in a subsequent judgment by this Court in Satti Krishna Ready v. Nallamilli Venkata Reddy and Anr., [1982] 3 SCC 364. It was held that the view expressed in Smt. Daya Debi's, case (supra) was not correct. It was held that arrears of rent assigned to the transferee landlord do not lose their character and become an actionable claim and eviction proceedings can be maintained by the successor landlord on the ground of arrears of rent. It was held:

"I do not see any reason to interfere with the order passed by the High Court, But there is one point to which I must refer, and that arises out of a decision of the Calcutta High Court in Daya Debi v. Chapala Debi. That decision has taken the view that when a claim for arrears of rent is assigned by A to B, it loses the character of a claim for rent as soon as it is assigned and it becomes merely an actionable claim. This view is, of course, not shared by most of the other High Courts and even the Calcutta High Court itself in other decisions has not accepted this view. It does

appear to me that this view is not correct because it is difficult to see how a claim for arrears of rent ceases to be such when it is assigned by the owner when the transfers his properties to another. So far as the tenant is concerned, the amount remains payable by him to the successor landlord as arrears of rent because that is his own liability and it does not acquire any other character. And so also when the successor landlord claims the amount assigned to him his cause of action against the tenant would be for arrears of rent because there is no other basis on which he found his cause of action against the tenant. There is, therefore, no doubt that in the present case the 1st respondent who was the assignee of the claim for arrears of rent from the predecessor landlady was entitled to recover the arrears of rent from the petitioner and the arrears of rent were due from the petitioner to the 1st respondent at the date when the application was made before the Rent Controller by the 1st respondent for an order of eviction against the petitioner. The special leave petition is accordingly rejected...."

In *Girdharilal (dead) by LRs. v. Hukam Singh and Ors.*, AIR (1977) SC 129, the point as to whether the transfer is entitled to the rent due before the transfer of the property in his favour was considered. Interpretation put by the Rajasthan High Court of proviso to Section 109 of the Transfer of Property Act, to the effect that usually the transferee is not entitled to the arrears unless there is a contract to the contrary was approved. If there was an assignment of arrears then certainly the transferee landlord could maintain the petition for eviction on the ground of arrears of rent including the arrears due prior to the transfer in favour. It was held:

"An objection based upon the proviso to Section 109 of the Transfer of Property Act was, we think rightly, disposed of by the High Court as follows;

"The next objection is that under the proviso to Section 109 of the Transfer of Property Act the transferee is not entitled to arrears of rent due before the transfer. In our opinion he ordinarily not so entitled unless there is a contract to the contrary. There was an express contract to the contrary contained in the compromise petition which was incorporated in the compromise decree passed by the Court."

In *N.M Engineer and Ors. v. Narendera Singh Viridi and Anr.*, AIR (1995) SC 448, this Court again held that in the absence of any assignment of the rent in favour of the transferee the assignee is not entitled to the rent due before the assignment. Negatively it means that if there was an assignment of the arrears then the same could be recovered as arrears of rent by the subsequent transferee landlord.

Similar is the view taken by a Division Bench of the Allahabad High Court in *Ram Prakash Ghai v. Karam Chand*, AIR (1963) All. 47, Full Bench in *Champak Lal Dahyabhai Natali and Ors. v. Saraswatiben and Ors.*, AIR (1977) Guj. 48 and in single Judge Bench *Pratap Muktassa Tak v. Vishnu Giopal Pathak*, (1997) Bom. R.C. 416. We are not referring to what has been held in these decisions as they are in conformity with the decisions of this Court referred to above.

In view of the cases referred to above, in our opinion, the correct position of law is that a transferee is not entitled to recover the arrears as rent for the property on transfer unless the right to recover the arrears is also transferred. If right to recover the arrears is assigned, then the transferee/ landlord can recover those arrears as rent and if not paid maintain a petition for eviction under the rent laws for those arrears as well. Since in this case we have found that there was an assignment of right to recover the arrears in favour of the respondent transferee he was entitled to recover the same as arrears of rent. If that period is taken into consideration then the tenant/ appellants were certainly in arrears of rent for more than six months and became liable to be evicted from the premises in dispute on the ground of default on their part in payment of

rent for more than six months on the date of filing the suit.

For the reasons stated above we do not find any merit in these appeals and dismiss the same. Parties shall bear their own costs in this court.

JUDIS