

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

C. 2. A No. 23/2011

Date of decision: 22.07.2015

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| Om Parkash | vs. | Thakur Bhan Singh and others |
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Coram:

Hon'ble Mr. Justice Janak Raj Kotwal, Judge

Appearing counsel:

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| For appellant (s): | Mr. K. S. Johal, Sr. Advocate with Mr. Amit Gupta, Advocate |
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| For respondent(s): | Mr. L. K. Sharma, Sr. Advocate with Mr. Rahul Sharma, Advocate |
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| i. | Whether approved for reporting in Press/Media | : | Yes/No |
| ii. | Whether to be reported in Digest/Journal | : | Yes/No |
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1. This is a Civil Second Appeal against judgment and decree dated 31.10.2011 passed by the learned Principal District, Jammu in Civil Appeal No. 01/Appeal/48 Appeal, whereby the judgment and decree dated 10.04.2006 passed by the learned Sub Judge, Batote in file No.06/Civil have been upheld.

2. With the consent of learned counsel for both the sides, recorded on 01.04.2015, this appeal is taken up for final disposal. The questions of law taken up for determination and adjudication are:

- (i) Whether in a suit for eviction based on a notice for termination of tenancy under section 106 of the Transfer of Property Act (for short TPA), the plaintiff is required to prove the contents of the notice at the trial ? and

(ii) Whether the notice relied upon by the plaintiff was invalid as it did not end with the month of tenancy?

3. The suit for eviction from a shop and recovery of arrears of rent was filed by the plaintiffs, namely, Thakur Bhan Singh (predecessor-in-interest of respondent No. 1), Karnail Singh and Chuni Lal (respondent Nos.2 and 3) against the defendant, Om Parkash (appellant). Eviction of the defendant was sought on the grounds of default in payment of rent, personal necessity of landlords (plaintiffs) and termination of the tenancy of the defendant by issuing a notice dated 11.09.2004. The suit was contested by the defendant among others on the ground that the notice of termination of tenancy neither was served upon him nor the notice was legal as it did not fulfill the requirement of "J&K Houses and Shops Rent Control Act, 1966" The defendant denied plaintiffs' ownership of the suit shop. He also denied personal necessity of the plaintiffs as also allegation of default in payment of rent. Learned trial court framed following issues in the case:

- i) Whether the plaintiffs suit shop has been under lease to the defendant since the year 1978?
(OPP)
- ii) Whether the defendant has proved to be a "bad tenant" as he has not paid rent regularly, particularly since January, 2004?
(OPP)
- iii) Whether the suit shop is required by the plaintiff for their personal use?
(OPP)

iv) In case issues no.2 and 3 are proved in affirmative. Whether the defendant is liable to be ejected from the suit shop by way of decree of ejectment?
(OPP)

v) Whether the suit shop is not owned by the plaintiffs and there is no relationship of landlord and tenant between the plaintiffs and the defendant?
(OPD)

vi) Relief?"

4. Learned trial court vide judgment dated 10.04.2006 decided issue Nos. 1 and 5 in favour of the plaintiffs holding that the suit shop belongs to the plaintiffs and is under lease to the defendant since 1984 when a new tenancy came into existence by virtue of a compromise decree dated 28.07.1984 between the parties in an earlier suit for eviction filed by the plaintiffs against the defendant in the court of learned Sub Judge, Ramban. Learned trial court decided issue No. 2 in favour of the plaintiffs holding that the defendant proved to be a bad tenant by not paying rent for the month of January, 2004 to September, 2004. Learned trial court decided issue No. 3 in favour of the plaintiffs too holding that the shop is required by the plaintiffs for their existing business which requires expansion as per requirement of their large family. Learned trial court also took up the question in relation to issue of notice by the plaintiffs to the defendant and while holding that tenancy was terminated, decreed the suit in favour of the plaintiffs vide Judgment dated 10.04.2006.

5. Defendant (appellant) questioned the Judgment and the decree passed by the learned trial court in first appeal before the learned Additional District Judge, Ramban which, however, later came to be transferred to the court of learned Principal District Judge, Jammu. Learned Ist. Appellate Court dismissed the appeal vide judgment and decree dated 31.10.2011. Hence, this Civil Second Appeal.
6. Mr. K. S. Johal, learned Senior Advocate, appearing for the appellant submitted on strength of the averments made in the appeal, mainly, that the appellant (defendant) in his written statement before the learned trial court had specifically denied service of notice upon him and had also denied the legality of the notice, copy whereof was produced by the plaintiffs. In support, Mr. Johal referred to para 8 of the written statement. Mr. Johal submitted that the Jammu and Kashmir Houses and Shops Rent Control Act does not apply to town of Batote, where the suit shop is situate and therefore, in order to secure eviction of the appellant, the plaintiffs were required to terminate the tenancy by serving notice in accordance with section 106 TPA on him and were required to prove the contents of the notice as well as its service upon the appellant by leading evidence.
7. Mr. Johal submitted further that neither the learned trial court had framed any issue in regard to service of notice under section 106 TPA on the appellant nor

any evidence in this regard was led by the plaintiffs. Mr. Johal submits further that the trial court fell into error by decreeing the suit in terms of section 106 TPA on the basis of a notice which was neither proved nor was legal being not in conformity with section 106 TPA. Referring to the copy of the notice lying on the record of the learned trial court, Mr. Johal pointed out that the same was illegal as it did not end with the month of tenancy, which, if any, started from 28.07.1984, that is, the date of compromise. Mr. Johal submitted further that the learned Appellate Court fell into similar error inasmuch as learned Court did not accord any consideration to the grounds on which the judgment rendered by the learned trial court was questioned in first appeal.

8. Per contra, Mr. L. K. Sharma, learned Senior Advocate, appearing for the respondents referred to the evidence on the file of learned trial court to support the impugned judgment rendered by the learned appellate court as also the judgment rendered by the learned trial court. Mr. Sharma argued that the respondents had proved by producing the postman, PW Ghulam Hussain that the notice was duly served upon the defendant who, however, had refused to accept the delivery. Mr. Sharma also sought to make out that the notice was legal as it gave fifteen days' time ending to the

defendant to vacate the suit shop ending with the month of tenancy.

9. It is not disputed nor it can be that the J&K Houses and Shops Rent Control Act, 1966 has not been extended to the town of Batote and is not applicable there inasmuch as the learned Ist. Appellate court in para 15 of the impugned judgment has recorded admission of the parties in this behalf that 'the Rent Control Act has not been made applicable at Batote' where the suit shop is located. Contextually, it is noticed that the learned trial court, even while holding that the defendant (appellant) proved to be a bad tenant by committing default in payment of rent and that the suit shop was required by the plaintiffs (respondents) for their personal use, decided the suit on the basis of the termination of tenancy in terms of section 106 of the TPA, even though no issue in this regard was framed. Learned trial court on appraisal of the evidence held that by virtue of the notice defendant was asked to deliver the possession of the suit shop to the plaintiff on or before 30th September, 2004 and that it is presumed that notice was duly served to the defendants on 30th September, 2004. Learned trial court took the view that fifteen days' clear time was given in the notice for vacating the premises and that the month to month tenancy has been terminated with 15 days' notice expiring with the end of the month of tenancy.

10. The first question, thus, arising is whether the learned trial court should have taken up the question relating to the service of a notice said to have been issued by the plaintiffs to the defendant without framing any issue in this regard. This question was raised by the appellant in the first appeal as well but the learned Ist Appellate Court seems to have agreed with the view taken by the learned trial court that there was presumed service of the notice on the defendant. On perusal of the judgment of the learned trial court, I am persuaded not to disagree with the finding in regard to service of a registered cover on the defendant by the Post Man PW, even if no issue in this regard was framed as there was sufficient material in the evidence led by the plaintiffs and statement of the defendant to deal with this aspect of the matter.
11. The other questions arising are whether the registered cover which was tendered to the defendant contained the notice for termination of tenancy of the suit shop issued by the plaintiffs and whether the notice relied upon by the plaintiff was in accordance with the requirement of section 106 TPA. These questions arise in backdrop of the fact that contents of the notice were not proved and exhibited before the learned trial court. This aspect of the matter has not been accorded consideration by the

learned first appellate court and are entertained in this second appeal.

12. Section 106 TPA provides for duration of leases (tenancy) of immoveable property for agricultural or manufacturing purposes as also a lease (tenancy) for other purposes. It also provides for termination of the said leases. Section 106 reads:

“106. Duration of certain leases in absence of written contract or local usage-

In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purpose shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months's notice expiring with the end of a year of the tenancy; and lease of immoveable property for any other purposes shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen day's notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and [either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party], or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.”

(underlining by me)

13. Tenancy of the suit shop was for a purpose other than agricultural or manufacturing and therefore, was a month to month tenancy terminable by fifteen days' notice expiring with the end of the 'month of tenancy'.

14. The important ingredients of section 106 TPA among others are that notice terminating tenancy must be in writing and signed by or on behalf of the person giving it and in case of a month to month tenancy the notice must be of fifteen days' 'expiring with the end of the month of tenancy'.
15. Plaintiff in a suit for eviction based on a notice under section 106 TPA has to prove *inter alia* that the notice was signed by him or on his behalf by a person authorized by him such as a counsel engaged by him. This can be done only by proving the execution and contents of the notice and for that purpose the plaintiff is required to prove execution and contents of the notice in the manner in which a document is proved. It is noticed that the plaintiffs in their plaint had contended that they had served a notice dated 11.09.2004 upon the defendants through counsel under registered cover on 13.09.2004 and had annexed with the plaint undelivered registered cover bearing the endorsement of refusal made by the Post Man as also a copy said to be that of the said notice. It is also stated that by virtue of the said notice, the tenancy of defendant was terminated and he was requested to quit the shop by or before 30th September, 2004. Relying upon the evidence rendered by the postman PW Ghulam Hussain and his report (EX.PW-PM) proved by him and admission of the

defendant, learned trial court held that the notice to quit was served upon the defendant.

16. What is, however, further noticed is that neither it appears that the registered cover, which was said to be containing the notice said to have been refused by the defendant, was opened in the course of recording the statement of plaintiff No.2, Karnail Singh, as plaintiffs' witness nor there is any whisper in regard to such a notice in his statement. There is nothing in the plaintiff's statement before the trial court or in the other evidence that any notice was ever issued by the plaintiffs to the defendant. Plaintiffs, thus, while proving that a registered cover said to be containing the notice of the plaintiffs was refused by the defendant, have failed to prove that a notice to quit much less a notice in terms of section 106 TPA was ever issued by the plaintiffs or any one of them or on their behalf and much less that any such notice had been signed by the plaintiffs or any one of them or by any one on their behalf.

17. As per the trial court judgment, learned trial court seems to have acted upon the copy of the notice annexed to the plaint and the undelivered registered cover which is evident from a portion of the judgment which reads:

“Plaintiff has annexed a copy of notice and undelivered register cover with the file original copy of the notice was founding in the register envelope which was addressed

to the defendant and defendant has refused to accept.”

18. Learned trial court also seems to have accorded consideration to the contents of the copy of notice without any evidence that the same was a copy of the notice issued by a counsel engaged by the plaintiffs and under his instructions. The plaintiffs, thus, have failed to prove that the copy of the notice produced by them and relied upon the learned trial court was that of a notice issued by them or on their behalf. Such a notice could not have been acted upon by the learned trial court. This aspect of the matter was ignored by the learned first appellate court as well.
19. Assuming that such a notice was issued by the plaintiffs and acceptance was refused by the defendant, it has been noticed that the same is invalid for the reason that the fifteen days’ time given therein and there under did not end with the month of tenancy. The relevant para of this notice reads:

“That my clients hereby determine your lease in respect of the said shop and require you to quit the said shop and handover the vacant possession to my clients by or on the 30th of September, 2004. Please take further notice, in case of your failure to comply with this notice, my clients shall be constrained to sue you in the competent Court of law at your risk and costs.”

Yours faithfully,

P. B. Katoch
Advocate Batote”
(underlining by me)

20. It has been held by the learned trial court that a fresh tenancy qua the suit shop was created by virtue of compromise decree dated 28.07.1984. It was thus, a tenancy ending not with a calendar month but in the mid-night of 27th and 28th of every month. A notice in terms of section 106 TPA to terminate the said tenancy should end with the end of the month of the tenancy, that is, by the mid- night of 27th and 28th of a month. This is because in case of a month to month tenancy after expiry of one month of tenancy the tenant gets a right to remain in occupation of the premises till expiry of the next month of tenancy and so on and he can be asked to quit only by the end of a month of tenancy and not before that.
21. Here defendant after 27th of September 2004 was entitled to continue in possession of the suit shop up to mid of the night intervening 27th and 28th October, 2004 and the notice asking him to quit by 30th September, 2004 was invalid as a fresh month of tenancy had started after the mid-night intervening 27th and 28th September, 2004. This aspect of the matter was ignored by the learned Ist Appellate court.
22. Viewed as above, this appeal has merit. In the result, without disturbing finding on the issues recorded by the learned trial court, this appeal is accepted and in the result, the judgment and decree rendered by the learned trial court as well as the first Appellate Court are set aside. It shall, however, be open for the

respondents to issue fresh notice for termination of the tenancy and proceed under law, if they are so advised.

23. Disposed of as above.

(Janak Raj Kotwal)
Judge

Jammu:
22.07.2015
Meenakshi