



IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.340 of 2017

(From the judgment and decree dated 18.7.2017 and 28.7.2017 respectively passed by learned District Judge, Balasore in R.F.A. No.49/115 of 2009/2006, allowing the same and in the process setting aside the judgment and decree dated 29.7.2006 and 5.8.2006 passed by learned Civil Judge (Jr. Division), Balasore in T.S. No.486/1997)

A.F.R.

**Sanatan Bardhan (since dead)
Represented through her L.Rs
Mana Mohini Bardhan and others**

... **Appellants**

-versus-

Ranu Sen and others ... **Respondents**

Advocates appeared in the case through hybrid mode:

For Appellants : Mr.S.K.Mishra,
Sr.Advocate
Mr.J. Pradhan, Adv.

-versus-

For Respondents : Mr. R.K.Nayak, Advocate.

**CORAM:
JUSTICE SASHIKANTA MISHRA**

**JUDGMENT
22.11.2024.**



Sashikanta Mishra,J. This is a Defendant's appeal against a reversing judgment. The judgment passed by learned Addl. District, Balasore on 18.7.2017 followed by decree in R.F.A. No.49/115 of 2009/2006 is under challenge whereby the judgment dtd.29.7.2006 followed by decree passed by learned Civil Judge (Jr. Division), Balasore, in T.S. No.486 of 1997-I was reversed.

2. For convenience, the parties are referred to as per their respective status in the trial Court.

3. The suit in question was filed by the Plaintiff-respondents for eviction of the defendant from the suit house. The facts of the case, relevant for deciding the present appeal are that the suit house belongs to late Sisir Ch. Sen, the predecessor of the plaintiffs. He inducted the defendant as a monthly tenant for one year @ Rs.300/-. The defendant paid the house rent to said Sisir till his death whereafter, the plaintiffs having succeeded to the property accepted rent from him. The defendant was asked by the plaintiffs to pay



enhanced rent @ Rs.800/- per month as per the prevailing market rate but he did not pay the same nor cleared the arrear dues. As such, on 9.12.1996 the plaintiffs served Advocate's Notice on the defendant but the same was not responded to. On 15.12.1996, the suit house was found in a dilapidated condition needing urgent repair for which the plaintiffs asked the defendant to vacate the same but he did not vacate the house and continued to default in paying the enhanced rent from the month of October, 1995. Hence, the suit.

4. The defendant contested the suit by filing written statement challenging its maintainability. It is his case that no valid notice as per the provision under Section 106 of the Transfer of Property Act had ever been served upon him. Further, he was paying rent regularly to the plaintiffs for which receipts were issued by them. Initially the rent was Rs.300/- but since October, 1989, he paid the same @ Rs.330/- which was enhanced to Rs.360/- from October, 1992. On 06.10.1995, when he went to the house of the



Plaintiffs to pay the rent, they asked him to come later as they were busy in the funeral ceremony of Sisir. Again on 31.10.1995, when the defendant approached the plaintiffs, he was told that the old rent receipt book could not be traced out. The defendant remitted a sum of Rs.720/- for the months of September and October, 1995 through money order to Plaintiff No.1, which was duly acknowledged. Since then he has been remitting the house rent every month by money order to the Plaintiff No.1. However, on 27.11.1995 Plaintiff No.6 served a legal notice through his Advocate for enhancement of the house rent to Rs.600/-, to which the defendant replied on 14.12.1995. Again after one year he was served with a legal notice enhancing the rent to Rs.800/- per month. The defendant submitted his reply through his Advocate. It is further pleaded by the defendant that all the Plaintiffs are carrying out different businesses and none of them has bonafide requirement of the suit house but filed the suit only to evict him there from.



5. Basing on the rival pleadings, the Trial Court framed the following issues for determination;

- (1) Is the suit maintainable?*
- (2) Is there any cause of action to file this suit?*
- (3) Whether any notice is required to be served on the defendant for evicting him from the suit house, if so whether any notice was duly served on the defendant as per law?*
- (4) Are the plaintiffs entitled to a decree for evicting the defendant from their suit house?*
- (5) To what other relief(s), the plaintiffs are entitled?*

6. Taking up Issue No.3 for consideration at the outset, the trial court posed two questions for determination namely, whether any notice is required to be served on the defendant for evicting him from the suit house and whether any notice was duly served on him as per law. Analyzing the oral and documentary evidence, the trial court found that Sisir Ch Sen and after him, the plaintiffs were the landlords and that defendant was a tenant under Sisir and after him, the plaintiffs. It was held that there is no contract at all by which more parties are bound and therefore, the tenancy would be treated as tenancy at will. Holding



so, it was held that notice under Section 106 is required to be served on the defendant for evicting him from the suit house.

7. Coming to the second question, the trial Court found that initially the Plaintiff No.6 had served a legal notice, but the same being only on behalf of one of the co-owners cannot be treated as a valid notice. As regards the subsequent notice served on behalf of all the co-owners, the Trial Court found that only 7 days time had been granted to vacate the suit house, which is not in consonance with the provision of Section 106 of the T.P. Act. The issue was thus answered against the plaintiffs. The remaining issues were also accordingly answered against the plaintiffs and the suit was dismissed.

8. Being aggrieved, the plaintiffs carried the matter in appeal. After analyzing the provision under Section 106 of the T.P. Act and the oral and documentary evidence on record, the First Appellate Court found that the lease agreement executed between the original



owner and the defendant is an unregistered agreement executed on 29.12.1987 for a period of one year i.e. up to 28.12.1988. Thereafter the tenancy continued without any agreement. As per Section 17 of the Indian Registration Act, any tenancy created for term exceeding one year requires compulsory registration. Since the defendant continued beyond the period of one year on the basis of the unregistered lease agreement he became a tenant from month to month and therefore, no notice terminating his tenancy was necessary in view of Section 111(a) of the Act. Since the defendant continued in possession in absence of an assent by the lessor, he would be a tenant by sufferance and can be sued for ejectment at any time without any previous notice or demand of possession.

Further, being a trespasser and not a tenant holding over, no notice is necessary. On such finding, the appeal was allowed and the defendant was directed to give vacant possession of the suit house to the plaintiffs along with the arrear house rent.



9. Being further aggrieved, the defendant has preferred the present Second Appeal, which was admitted on the following substantial questions of law;

“Whether the finding of the First Appellate Court that no notice under Section 106 of the Transfer of Property Act (TOP Act) is required to be served upon the Defendant-Respondents asking him to vacate the tenanted shop house within the time as prescribed/stipulated is legally sustainable.”

10. Heard Mr. S.K.Mishra, learned Senior counsel assisted by Mr. J. Pradhan, for the defendant-appellants and Mr. R.K. Nayak, learned counsel appearing for the Plaintiff-Respondents.

11. Assailing the impugned judgment Mr. Mishra would argue that the First Appellate Court fell into error in treating the defendant as a tenant by sufferance completely ignoring the evidence on record that the defendant continued to possess the suit house long after expiry of the period stipulated in the original lease, but with full consent of the plaintiffs. According to Mr.Mishra, the defendant becomes a tenant holding



over for which notice under Section 106 of the T.P. Act has to be mandatorily served upon him for eviction. In the case at hand, as rightly held by the trial Court, no valid notice was issued and therefore, the suit was dismissed.

12. Per contra, Mr. R.K.Nayak, learned counsel for the Petitioner submits that the lease in question was admittedly for a period of one year and expired on 28.12.1988. Since this is a case of a lease expiring by efflux of time as per Section 111(a) of the T.P. Act, no notice is required to be served on the defendant for his eviction. Shri Nayak has cited the judgment of the Supreme Court in the case of ***K.M.Manjunath vs. Erappa G (dead) through L.Rs.***¹; and argues that if the lease is for a fixed term, it is not open to the defendants to plead anything further to determine the nature of the lease nor can he alter the intrinsic character of the lease.

¹ 2022 SCC Online S.C. 2316



13. From the rival contentions as noted above and in view of the substantial question of law framed, it is evident that the only question that is required to be determined is, whether any notice under Section 106 of the T.P.Act was required to be served upon the defendant for his eviction from the suit house. Admittedly, the defendant was inducted as a tenant by the predecessor of the plaintiffs namely, Sisir Ch. Sen by executing a lease agreement on 29.12.1987. The lease deed was admitted into evidence as Ext.3. The recitals of the agreement would make it clear that the lease was for one year i.e. from 29.12.1987 to 28.12.1988. Therefore, the lease stood automatically determined on 28.12.1988 in view of the provision under Section 111(a) of the T.P.Act, which is quoted herein below;

“111(a) by efflux of the time limited thereby”.

14. Further admittedly, the defendant did not vacate the suit house upon expiry of the lease but continued to possess the same. The original landlord died on



1.10.1995 as averred in paragraph-4 of the plaint. The defendant continued to possess the suit house and paid rent as per the expired lease deed. Even after the death of the original land lord, the defendant continued to possess the suit house and paid rent to them under receipts issued by them. Several such receipts have been admitted to evidence as Exts.A, C, C/1, C/2 etc. There is no evidence whatsoever to show that prior to issuance of the legal notice dtd.20.11.1995 (Ext.4), there was any move by plaintiffs to have the defendant vacate the suit house. Even reading of Ext.4 would show that there was a demand for enhancement of the rent purportedly as per a settlement in the month of September, 1995, which the defendant allegedly defaulted. Said notice was issued by Shri N. Panda, Advocate on behalf of only the Plaintiff No.1 namely, Sanatan Bardhan. As has been rightly held by the trial Court, said Sanatan Bardhan could not have issued the notice on his own in relation to the suit house as he is merely one of the co-owners. The subsequent notice issued by all the co-



owners (Plaintiffs) on 9.12.1996 again speaks of non-payment of agreed enhanced rent of Rs.800/- per month w.e.f. 01.11.1995. All the above facts taken conjointly would make it manifestly clear that defendant had continued in the suit house with consent of the plaintiffs.

15. Keeping the above finding of this Court in the perspective, a reading of the impugned judgment reveals that the First Appellate Court, by holding that the lease had been determined by efflux of time limited in the agreement as per Section 111(a) of the T.P. Act, further held that no notice was necessary as after expiry of such term the lessee (defendant) would be a tenant by sufferance and therefore, a trespasser but not a tenant holding over. On such finding, it was held that no notice is necessary.

16. The distinction between a tenant holding over and 'tenant at sufferance' has been discussed in several judgments. This Court, in the case of **Raj Kishore Biswal and others vs. Bimbadhar Biswal**



and others; Vol.34 (1992) O.J.D. 499 (Civil) held as follows;

"14. Under the general law, if a lessee governed by the Transfer of Property Act more often called a tenant, continues in possession of the lease-hold, after the tenancy is terminated, he may be called a 'tenant holding over', if the lessor or his legal representative accepts rent from him or otherwise assents to his continuing in possession. But if it is not so i.e, if his continuance is not by the assent of the lessor, he is merely a "tenant at sufferance", which expression is merely a fiction to distinguish him from a trespasser. A trespasser's possession is wrongful both in its inception as well as in its continuance whereas in case of "tenant at sufferance" his possession was rightful in its inception, but became wrongful in its continuance after termination of tenancy. There exists no relationship between a 'landlord' and 'tenant at sufferance' as lessor and lessee and a suit for his eviction was not necessary to be preceded by a notice u/s. 106 of the Transfer of Property Act. A lease of immoveable property validly created under law can come to an end by various modes as enumerated under Section 111 of the aforesaid Act. Thus "tenancy at sufferance" is not a right at all. Continuance of possession of a "tenant at sufferance" though wrongful, such possession by itself does not become adverse to the lessor. His character of possession the past no doubt was that of a lessee, but not after determination of the lease by any of the modes given in Sec. 111 of the Transfer of Property Act. Continuance of possession with the assent of the landlord could make him a "tenant holding over" but without landlord's assent his attributable to the inaction of the lessor in taking steps for his eviction. In such a position the landlord at any time is entitled to enter upon the land without notice to him and put an end to his continuance in



possession. Therefore, a tenant at sufferance must establish some overt act in defiance of the title of the landlord, so as to change the character of his possession to the possession of a trespasser to enable him to prescribe title against his landlord. That is why, a tenancy at sufferance comes to an end by the demand for possession or by entry by the landlord without notice or by the tenant's quitting. If the landlord demands and the tenant instead of giving up possession still continues to possess his possession thereafter may be sufficient to be categorized as adverse to the landlord."

From a bare reading of the aforequoted observations, it is clear that when the possession of the lessee after expiry of the lease is with the assent of the lessor, he would be a 'tenant holding over' but if his continuance is not by the assent of the lessor, he is merely a 'tenant at sufferance', the expression being a fiction to distinguish him from a rank trespasser.

17. In view of the evidence particularly, the legal notices(Exts.4 and 5), it would be manifestly clear that continuance in possession of the defendant after expiry of the period stipulated in the lease agreement was entirely with the assent of his landlords (plaintiffs). Further, there being no express agreement executed between the lessor and the lessee after expiry of the



original lease, the tenancy would be treated as a monthly tenancy. In this context, the provision of Section 116 of the Act would be relevant, which is quoted herein below;

“116. Effect of holding over. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.”

18. Such being the legal position, the provision under Section 106 of the Act requiring 15 days’ notice, cannot be done away with. As has been held and rightly so by the trial Court, the first notice under Ext.4 being issued by only one of the landlords is not a valid notice. The second notice (Ext.5), though issued on behalf of all the co-owners granted only 7 days’ time to the defendant to vacate the suit house. It goes without saying that such notice cannot be held to have



fulfilled the requirement of Section 106 of the T.P. Act. Evidently, the First Appellate Court has fallen into error in treating, the defendant as a tenant at sufferance and not a tenant holding over. For the reasons indicated above, it has to be held that the First Appellate court committed an error of law. As regards the case law cited by Shri Nayak, in the facts and circumstances of the present case narrated above, the same is not applicable for the reason that in the said case the Supreme Court held that on expiry of the term fixed under the deed the tenant would not be entitled to statutory notice under Section 106 of the T.P. Act. The facts obtaining in the present case and entirely different.

19. Thus, from a conspectus of the analysis of facts and law and the contentions raised by the parties, this Court is of the considered view that the First Appellate Court committed an illegality in holding that no notice under Section 106 is necessary for which the impugned judgment cannot be sustained in the eye of



law. Since this Court has found that the defendant was a tenant holding over, there being admittedly no valid notice served upon him before filing of the suit, the same was not maintainable and therefore, rightly dismissed by the trial Court.

20. In the result, the appeal succeeds and is therefore, allowed. The impugned judgment passed by the First Appellate Court is hereby set aside. The judgment passed by the trial Court in dismissing the suit is confirmed.

.....
Sashikanta Mishra,
Judge

Ashok Kumar Behera

Signature Not Verified

Digitally Signed
Signed by: ASHOK KUMAR BEHERA
Designation: A.D.R.-cum-Addl. Principal Secretary
Reason: Authentication
Location: High Court of Orissa, Cuttack
Date: 25-Nov-2024 11:20:15