

A RADHA KISHAN SAO

v.

GOPAL MODI & ORS.

February 14, 1977

B [P. K. GOSWAMI AND P. N. SHINGHAL, JJ.]

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, ss. 11 and 11A
—Scope of—Rent of premises fixed by Rent Controller—Subsequent contract for
letting out furniture—Failure to pay rent of furniture—If a ground for eviction.

C Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 provides that a tenant shall not be liable to eviction except in execution of a decree passed by the Court on one or more of the grounds specified therein. Under s. 11A, if in a suit for recovery of possession of any building the tenant contests the suit, the Court may make an order for deposit of rent and arrears, if any, and on failure to deposit the arrears within fifteen days of the date of the order, the Court shall order the defence against ejection to be struck out.

D The plaintiff (respondent) let out two rooms of his premises to the defendant (appellant) at a rent fixed by the Rent Controller under s. 5 of the Act. Sometime later, the plaintiff let out some furniture to the defendant at a mutually agreed rent. The plaintiff's suit for eviction of the defendant on the ground of non-payment of rent for three months was dismissed by the trial Court holding that failure to pay the rent of furniture along with the rent of the premises did not amount to a default under s. 11(1)(d) of the Act. On appeal, the Subordinate Judge held that non-payment of rent of furniture along with the rent of the premises was a default within the meaning of s. 11(1)(d). The High Court upheld the decision of the Subordinate Judge. On the question of deposit of rent under s. 11A, the Subordinate Judge held that the defendant had filed documents to show subsequent deposit in a regular way. On the other hand, the High Court came to the conclusion that the defendant failed to produce any material to show as to what deterred him from "depositing the money himself on the passing of the challan and what caused the handing over of the money to the Nazir." On this ground, it allowed the plaintiff's suit.

E Allowing the appeal,

F HELD : The High Court and the Subordinate Judge committed an error of law in accepting the ground of default under s. 11(1)(d) on a wrong appreciation of the legal position on the facts found by the first appellate Court. There was, therefore, no basis for granting a decree for eviction under s. 11(1)(d) of the Act. [990C]

G 1. (a) It is the default in the payment of rent fixed by the Rent Controller which will furnish a ground for eviction under s. 11(1)(d). Section 4 of the Act provides that notwithstanding anything contained in any agreement or law to the contrary, it shall not be lawful for any landlord to increase, or claim any increase in, the rent which is payable for the time being, in respect of any building except in accordance with the provisions of the Act. [989E-F]

In the instant case, the Rent Controller having fixed the rent of the premises, the plaintiff could not alter that rent without an order of the Rent Controller. Default of the payment of furniture rent agreed to by the defendant subsequent to the lease of the premises could not be brought within the mischief of s. 11(1)(d) to entitle the landlord to a decree for eviction. The furniture rent remains divorced from the rent of the building under the original demise. [989D & P]

H (b) Any alteration of the fair rent fixed by the Rent Controller will have to receive the *imprimatur* of the Rent Controller under s. 7. There is no legal impediment if the parties approach the Controller and by consent obtain an order from the Controller fixing the revised rent admissible under the Act. No

enhancement of fair rent is legally permissible except in accordance with the provisions of the Act. Default of payment of any rent in excess of the fair rent fixed, if without recourse to the procedure under the Act, will not entail a ground for eviction under s. 11(1)(d) of the Act. [990A—B]

The penalty of striking out the defence for non-compliance of an order under s. 11A is distinct from the grounds of eviction permitted under s. 11. [988H]

2. The contention of the defendant that an order under s. 11A could be passed only by the trial Court is without force because an appeal is a continuation of the suit. The advantage given to the landlord under s. 11A for the purpose of realisation of the arrears of rent *pendente lite* can be secured by him at any stage of the litigation, whether in the trial Court or in appeal. [988G]

3. Where the first appellate court came to a positive finding of fact in favour of the defendant, the High Court was wrong in adopting a different course to reach a contrary conclusion for the first time on a vital fact. The matter would have been different if the High Court had called for additional evidence under O.41, r. 28, C.P.C. But the course adopted by the High Court has resulted in great prejudice to the defendant. [987E-F]

In the instant case the High Court itself had accepted that the amount of rent was handed over to the Nazir but the objection was that the defendant, instead of handing over the amount to the Nazir, should have himself deposited it. In the absence of a proper enquiry into the matter of delay of deposit by the Nazir the High Court was not right in second appeal to penalise the defendant by striking out his defence against ejection. [988B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 721 of 1976.

(Appeal by Special Leave from the Judgment and Order dated the 27th April 1976 of the Patna High Court in Appeal from Appellate Decree No. 6 of 1974).

Harbans Singh Marwah, for the appellant.

K. K. Sinha, S. K. Sinha and Devi Prasad, for respondents.

The Judgment of the Court was delivered by

GOSWAMI, J.—This appeal by special leave is directed against the judgment of the Patna High Court in a second appeal arising out of a suit for eviction of the tenant.

Two rooms being shop Nos. 17 and 18 of Modi Building in Commissioner's Compound, Ranchi, were let out by the plaintiff (respondents herein) on a monthly rental to the defendant (appellant herein). We will describe them as the plaintiff and the defendant. It is common ground that fair rent of Rs. 50/- per month (including water tax) was determined for the two shops by an order of the Rent Controller under section 5 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (briefly the Act) on May 30, 1953. Later on, certain furniture, such as five almirahs and six racks, were also let out by the plaintiff to the defendant on a monthly rental of Rs. 28/-. A suit was instituted by the plaintiff on April 18, 1966, praying for eviction of the defendant on the ground of non-payment of rent of the said two shops and furniture for three months from July to September 1965.

A The Munsiff, Ranchi, dismissed the suit holding that failure to remit rent for furniture along with rent for the two shops did not amount to default under section 11(1)(d) of the Act. The Munsiff also held that there was no valid service of notice under section 106 of the Transfer of Property Act.

B On appeal the Second Additional Subordinate Judge, Ranchi, reversed the judgment of the trial court and decreed the suit for eviction upholding the ground of default. The Subordinate Judge held that the plaintiff was entitled to realise rent at the rate of Rs. 78/- per month which included the rent for furniture and hence remittance by the defendant of Rs. 50/- per month was not a valid discharge of his rental liability and he was a defaulter within the meaning of section 11(1)(d) of the Act. The Subordinate Judge also held that there was no proper service of the notice of eviction. We are not concerned in this appeal with the question of service of notice.

C Since the Subordinate Judge was the final court of facts, it will be appropriate to note the following findings material for our purpose :

- D (1) "I, therefore, decide that the plaintiff was entitled to realise Rs. 50/- as monthly rent.
- (2) In view of the evidence of the parties and Ext. 2 I hold that plaintiff had supplied the furniture detailed in Schedule B of the plaint and rent fixed for the same had been Rs. 28/- per month.
- E (3) The subsequent supply of furniture and that of sufficient value must be construed as a quite independent contract unconnected with the original tenancy....".

F The defendant's second appeal to the High Court failed. The High Court agreed with the first appellate court that the rent for furniture was also lawfully payable under section 11(1)(d) and hence the ground of default of payment of Rs. 78/- per month from July to September 1965 was available to the plaintiff.

G The High Court also gave an additional reason for sustaining the eviction decree. There was an order by the Subordinate Judge, in the course of the appeal, under section 11A of the Act directing the defendant to deposit the rent of the premises at the rate of Rs. 50/- per month in terms of that Section. It appears there was some controversy before the Subordinate Judge as to whether this order under section 11A was complied with or not by the defendant. The Subordinate Judge, however, repelled the contention of the plaintiff to strike out the defence of the defendant on the ground of non-compliance with the court's order under section 11A in the following terms :

H "It was argued on behalf of the appellant (plaintiff) that the defendant had not deposited subsequent rent in spite of direction by the court and so this court had to

strike out the defence against ejectment. The defendant had filed the documents to show subsequent deposit in regular way. So this plea of plaintiff fails".

A second attempt, and this time successfully, was made in the High Court by the plaintiff to press the ground under section 11A of the Act to strike out the defendant's defence against ejectment.

It is clear from the judgment of the High Court that there was no material, without further enquiry, to reach a conclusion contrary to that of the first appellate court with regard to non-compliance with section 11A of the Act. The High Court, therefore, allowed parties to produce some documentary evidence and relying upon the same held as follows:—

"Learned Advocate appearing for the appellant (defendant) contended that inasmuch as the delay in depositing the money in the Bank occasioned on account of the default of the officers of the court, no penalty should be imposed on the appellant (defendant). Learned Advocate, however, failed to produce any material to show as to what detracted the appellant (defendant) to deposit the money himself on 15-3-1974 on the passing of the challan and what caused the handing over the money to the Nazir".

In a matter where the first appellate court came to a positive finding in favour of the defendant with regard to the non-compliance with its order under section 11A, we do not consider that the High Court was right in adopting the course it did in a rather unsatisfactory manner to reach a contrary conclusion, for the first time, on a vital and clinching fact about handing over the amount of rent to the Nazir in absence of the latter's oral testimony. There is no denial even in the written information furnished by the Nazir that the rent was handed over to him on March 14, 1974. The matter would have been different if the High Court, in the interest of justice, had called for additional evidence under order 41, rule 28, Civil Procedure Code, so that the parties would have proper and adequate opportunity to establish their respective versions including the procedure of the particular court regarding acceptance of deposit in a given situation. It is true that the High Court could itself permit documentary evidence to be produced before it under order 41, rule 27, but, as we have seen, this course has resulted in great prejudice to the defendant. Even the counsel were unable to inform us about the procedure of depositing the money in compliance with the order under section 11A in the court of the Subordinate Judge even after entertaining of additional evidence before the High Court.

In view of the fact that the first appellate court held the deposit of the amount sufficient under the law being within the statutory period laid down under section 11A, we are most reluctant to prefer the contrary conclusion of the High Court on the materials produced before it. This is particularly so since the High Court itself appears to have accepted the position that the amount was handed over to the Nazir on March 14, 1974, in the extract from the judgment quoted

- A above. The only objection of the High Court was that the defendant instead of handing over the amount to the Nazir should have "himself" deposited the amount on March 15, 1974. Since the money was deposited by the Nazir on May 28, 1974, in absence of a proper enquiry into the matter of delay of deposit at the hands of the Nazir and the reasons for it, the High Court was not right, in second appeal, to penalise the defendant by striking out his defence against ejectment. The second ground relied upon by the High Court for decreeing the plaintiff's eviction suit, therefore, fails.
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Further section 11 describes the circumstances under which eviction of tenants can take place. Under that section a tenant shall not be liable to eviction except in execution of a decree passed by the court on one or more of the grounds specified therein. Section 11A which was inserted by amendment by Bihar Act 16 of 1955 reads as follows:—

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- D "Deposit of rent by tenants in suits for ejectment.—If in a suit for recovery of possession of any building the tenant contests the suit, as regards claim for ejectment, the landlord may make an application at any stage of the suit for order on the tenant to deposit month by month rent at a rate at which it was last paid and also the arrears of rent, if any; and the Court, after giving an opportunity to the parties to be heard, may make an order for deposit of rent at such rate as may be determined month by month and the arrears of rent, if any and on failure of the tenant to deposit the arrears of rent within fifteen days of the date of the order or the rent at such rate for any month by the fifteenth day of the next following month, the Court shall order the defence against ejectment to be struck out and the tenant to be placed in the same position as if he had not defended the claim to ejectment. The landlord may also apply for permission to withdraw the deposited rent without prejudice to his right to claim decree for ejectment and the court may permit him to do so. The Court may further order recovery of cost of suit and such other compensation as may be determined by it from the tenant".
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- G It is submitted by the defendant that an order under section 11A can be passed only by the trial court. We are, however, unable to accept this position, since appeal is a continuation of the suit. The advantage which is given to the landlord under section 11A for the purpose of realisation of the arrears of rent *pendente lite* which is in the nature of lawful enforcement of the conditions of tenancy, can be secured by the landlord at any stage of the litigation, whether in the trial court or in appeals. The penalty of striking out defence for non-compliance of an order under section 11A has to be kept distinct from the grounds of eviction permitted under section 11 of the Act.

- H The only ground that remains for consideration is whether the defendant defaulted in the payment of rent from July to September, 1965. If it were merely a finding of fact by the first appellate court,

there would be nothing wrong for the High Court to dismiss the second appeal. The question, however, assumes a legal complexion even on the findings of facts of the first appellate court.

The first appellate court found that rent for the premises was Rs. 50/- per month and there was no default of that rent at any time. The first appellate court found that the rent of Rs. 28/- per month for the furniture was a subject matter of "subsequent supply" and "a quite independent contract unconnected with the original tenancy". It, however, found that since the same was not paid by the defendant during the months in question along with the rental of Rs. 50/- per month for the premises, the defendant was a defaulter within the meaning of section 11(1)(d) of the Act. The High Court has accepted this legal conclusion of the Subordinate Judge.

We are, however, unable to accept the above legal position of the defendant's default in this case on the findings of facts set out above. Rent has been always Rs. 50/- per month for the premises after the same was fixed by the Rent Controller under section 5 of the Act as far back as 1953. The parties having been already before the Rent Controller for fixation of fair rent of the premises, the plaintiff could not alter that fixed rent without order of the Rent Controller. Section 4 of the Act provides that "notwithstanding anything contained in any agreement or law to the contrary, it shall not be lawful for any landlord to increase, or claim any increase in, the rent which is payable for the time being, in respect of any building except in accordance with the provisions of this Act". The two shops, which are building for the purpose of section 2(aa) of the Act, were rented out as an unfurnished building. This amount of rent of Rs. 50/- was determined by the Rent Controller as fair rent under section 5 of the Act. It is the default in the payment of this rent fixed by the Rent Controller which will furnish a ground for eviction under section 11(1)(d) of the Act. Default of the furniture rent agreed by the defendant subsequent to the lease cannot be brought within the mischief of section 11(1)(d) to entitle the landlord to a decree for eviction. On the findings of the first appellate court the furniture rent remains divorced from the rent of the building under the original demise. Even if the furniture be returned, the lease for the building in this case will not be affected.

The plaintiff submits that since the definition of building includes furniture the rent becomes consolidated and the defendant was liable to pay the total amount of Rs. 78/- and any default for two months to pay the consolidated rent will attract sections 11(1)(d) of the Act. The plaintiff further submits that since the furniture rent is the rent agreed between the parties there was no occasion nor legal requirement to approach the Rent Controller for redetermination of the rent under section 7 of the Act.

We are unable to accept the above submission. Any alteration of the fair rent fixed by the Rent Controller either by improvement of the building or by addition of furniture to the building will have to receive the *imprimatur* of the Rent Controller. Section 7, *inter alia*,

- A provides that if, at any time after the fair rent of a building has been determined, it appears to the Rent Controller that subsequent to such determination some addition or improvement has been made to the building at the landlord's expense, the Controller may redetermine the fair rent of the building. There is no legal impediment if the parties, landlord and tenant, approach the Controller and by consent obtain an order from the Controller fixing the revised rent which is admissible under the Act. Any other course is bound to lead to mal-practices and unholy devices detrimental to the interests of the tenants. No enhancement of fair rent fixed by the Rent Controller is legally permissible except in accordance with the provisions of the Act. Default of payment of any rent, in excess of the fair rent fixed, if without recourse to the procedure under the Act, will not entail a ground for eviction under section 11(1)(d) of the Act. The High Court, and earlier the Additional Subordinate Judge, therefore, committed an error of law in accepting the ground of default under section 11(1)(d) on a wrong appreciation of the legal position on the facts found by the first appellate court. There was, therefore, no basis for granting a decree for eviction under section 11(1)(d) of the Act.
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In the result the judgment of the High Court is set aside and the judgment and the decree of the Munsiff dismissing the suit stand restored. The appeal is allowed with costs.

P.B.R.

Appeal allowed.