

SHRI MEHBOOB ALI AND ORS.

v.

SMT. HABIBAN

SEPTEMBER 14, 2006

[ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

Transfer of Property Act, 1882—Section 106—Institution of eviction petition—Requirement of notice—Decision by Single Judge of High Court relying on the decision of Division Bench of High Court—Legality of—Held: In view of the principles laid down in Jaswant Raj Soni's case by Supreme Court, matter remitted back—Precedent.

Appellant-tenants filed an application under Order VI Rule 17 CPC permitting them to take a plea on the basis of non-termination of tenancy by landlord by serving notice under section 106 of Transfer of Property Act, 1882. Application was allowed relying on **Prakash Mal's* case by Single Judge of High Court that if there is condition in the rent deed relating to service of notice, eviction can be maintained only after the service. Division Bench of High Court in ***Fateh Lal Dak's* case set aside *Prakash Mal's* case. Respondent-landlord filed an appeal. Following *Fateh Lal Dak's* case, Single Judge of High Court allowed the appeal. Hence the present appeal.

Allowing the appeal and remitting the matter to High Court, the Court

HELD: High Court relied upon the decision in *Fateh Lal's* case to allow the appeal filed by the respondents. It would be appropriate for the High Court to re-hear the matter keeping in view the principles set out in ****Jaswant Raj Soni's* case that there is no legal requirement for issuance of notice before institution of eviction petition; and that the only requirement regarding notice, if at all, arises from the condition printed on the back of the rent receipt which cannot be said to be an agreement between the parties laying down requirement for issuance of a notice for institution of an eviction petition. Thus, the order of High Court is set aside and matter is remitted back to High Court for fresh consideration.

[175-G-H; 176-A; 175-E-G]

- A **Prakash Mal and Ors. v. Jaswant Raj Soni RLW, (2000) 2 Raj. 1227; **Fateh Lal Dak v. Sheshmal, (2002) 2 CDR 1686 (Raj.) and ***Jaswant Raj Soni v. Prakash Mal, [2005] 8 SCC 38, referred to.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4138 of 2006.

- B From the Judgment and Order dated 30.8.2005 of the High Court of Rajasthan at Jodhpur in S.B.C.M.A. No. 17/2004.

B.D. Sharma and Deep Shikha Bharti for the Appellants.

Rani Chhabra for the Respondent.

- C The Judgment of the Court was delivered by

! **ARIJIT PASAYAT, J.** Leave granted.

- D Challenge in this appeal is to the legality of the judgment rendered by a learned Single Judge of the Rajasthan High Court at Jodhpur allowing the Civil Misc. Appeal filed in terms of Order XLIII Rule 1(U) of the Code of Civil Procedure, 1908 (in short the 'C.P.C.'). The only controversy involved in this appeal is whether the first Appellate Court could have allowed the application filed under Order VI Rule 17 C.P.C. and permitted the defendants-tenants to take a plea relating to non-termination of tenancy by the landlord by serving notice under Section 106 of the Transfer of Property Act (in short the 'T.P. Act'). The First Appellate Court allowed the amendment on the basis of the judgment of a learned Single Judge of the High Court in the case of *Prakash Mal & Ors. v. Jaswant Raj Soni* reported in (RLW 2000 (2) Raj. 1227), wherein it was held that if there is a condition in the rent-deed relating to service of notice, then the suit of eviction can be maintained only after service of notice under Section 106 of the T.P. Act.

- G The High Court in the impugned judgment noted that the judgment in *Prakash Mal's* case (supra) had been reversed by a Division Bench of the High Court in *Fateh Lal Dak v. Sheshmal, (2002) 2 CDR 1686 (Raj.)*. Following the Division Bench's judgment and order in *Fateh Lal's* case (supra) the appeal was allowed.

- H In support of the appeal, learned counsel for the appellant submitted that the issue is no longer *res integra* in view of the judgment of this Court in the case of *Jaswant Raj Soni v. Prakash Mal, [2005] 8 SCC 38*. It was, therefore, submitted that the High Court's view is clearly unsustainable.

In response, learned counsel for the respondent submitted that though *Prakash Mal's* case (supra) was subject matter of consideration of this Court in *Jaswant Raj Soni's* case (supra), the factual scenario is different here. A

Paras 5 and 6 in *Jaswant Raj Soni's* case (supra) read as follows :

“5. In the second case the requirement as per the rent notice is: “on being asked to vacate and ... on being told to do so” thus, there is no requirement of a written notice before institution of an eviction petition. The case of the landlord in the plaint is that he had intimated to the tenant to vacate the premises before institution of the eviction petition. Of course, the tenant denied the same in the written statement. Whether this condition was actually fulfilled or not is a question of fact to be decided by the trial court. The counsel for the parties informed that the case has not gone for trial. Therefore, so far as the second case is concerned, the trial Court will decide the issue after allowing the parties to lead evidence with respect thereto. Therefore, the eviction suit must proceed to trial and final decision. B C D

6. The learned counsel for the respondents-tenants tried to argue that in view of Section 28 of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950, the provisions of Section 106 of the Transfer of Property Act will apply to the facts of the present case and a notice to quit in terms of the said provision was required to be given. In view of *V. Dhanpal's* case (supra) we are unable to accept this argument. There is no legal or statutory requirement for a notice being given in the facts of the present case. The only requirement regarding notice, if at all, arises from the condition printed on the back of the rent receipt which in our view cannot be said to be an agreement between the parties laying down requirement for issuance of a notice for institution of an eviction petition. In any case as noticed above, the landlords have tried to meet that requirement. In *Jaswant Raj Soni's* case the requirement of notice has been met, as observed by us above, while in *Jabar Lal* case the trial Court will consider whether the requirement has been met on basis of evidence led by the parties.” E F G

It appears that the High Court relied upon the decision in *Fateh Lal's* case (supra) to allow the appeal filed by the respondents. In our view, it would be appropriate for the High Court to re-hear the matter keeping in view the principles set out in paragraphs 5 and 6 of *Jaswant Raj Soni's* case H

A (supra), as quoted above.

Accordingly, we set aside the impugned judgment and order of the High Court and remit the matter to the High Court for fresh consideration. Since the matter is pending since long, we request the High Court to explore the possibility of disposal of the matter as early as practicable and preferably

B by the end of March, 2007.

The appeal is allowed to the aforesaid extent. No costs.

N.J.

Appeal allowed.