

Budhwanti and Another

Vs

Gulab Chand Prasad

Civil Appeal No. 4110 of 1985

(Sabyasachi Mukharji, S. Natarajan JJ)

04.03.1987

JUDGMENT

S. NATARAJAN, J. –

1. This Appeal by special leave by the tenants is directed against the judgment of a Full Bench of the Patna High Court in a second appeal against Appellate Decree No. 51 of 1982. By the impugned judgment the High Court allowed the appeal preferred by the landlord (respondent herein) and restored the order of eviction passed by the trial court against the appellants herein on grounds of default in payment of rent and bona fide requirement of the leased premises for the business needs of the landlord.

2. The circumstances under which the suit came to be filed and the contentions of the parties may be summarised as below.

3. One Babu Lal who died on November 14, 1973 and the respondent were brothers and were members of a Joint Hindu Family governed by the Mitakshara law. The joint family was the owner of a non-residential building in the G.B. Road, Gaya. One room in the said building was given on rent in the year 1932 to one Dr. Ramachandra, the husband of the first appellant and father of the second appellant for running a medical shop known as Punjab Dental and Optical Works. The joint family has been running its business in the other portions of the building. The rent was fixed at Rs. 16 per month. Over the years the rent came to be increased from Rs. 16 to Rs. 60 per month. It would appear that the rent was increased to Rs. 20 in 1943, to Rs. 25 in 1946, to Rs. 30 in 1947, to Rs. 32 in 1951, to Rs. 35 in 1963, to Rs. 40 in 1967, to Rs. 50 in 1970 and finally to Rs. 60 in 1971. Dr. Ramachandra, the tenant died in or about 1960 and thereafter his wife, the first appellant came to be recognised as the tenant and rent receipts were issued in her name. Before the trial court it was sought to be contended that the second appellant had become the tenant after the demise of his father and as such the notice of termination of tenancy issued to the first appellant was not an effective and valid notice. The contention was repelled by the trial court and that finding has not been challenged before the appellate court and the High Court.

4. As already stated Babu Lal the Karta of the Family died on November 14, 1973. Consequent on his death the respondent herein became the karta of the family as the seniormost male member of the joint family. The respondent issued a notice on June 12, 1974 terminating the tenancy with effect from June 30, 1974 and called upon the first appellant to surrender possession of the leased shop from July 1, 1974. It was the case of the respondent that the first appellant had committed default in payment of rent from November 1973 onwards and furthermore the leased portion was required for expansion of the joint family business carried on in the other portion of the building. As

the appellants failed to deliver possession a suit for eviction was filed under the Bihar Buildings (Lease, Rent and Eviction) Control Act (hereinafter referred to as the 'Act') for a decree for eviction against the appellants. A sum of Rs. 540 was also claimed in the suit as arrears of rent.

5. The appellants contested the suit raising various defences. The principal defences were that the respondent was not the karta of the family and one Ram Prakash Gupta, the eldest son of deceased Babu Lal was the karta, that rent was tendered to him after the death of Babu Lal but the said Ram Prakash Gupta demanded rent at Rs. 150 per month and refused to receive the rent that was tendered, that thereupon the rent was sent by money order but it was refused and as such there was no default in payment of rent. It was alternatively contended that even if there had been default in payment of rent it would not afford a cause of action for seeking eviction because the original rent Rs. 16 had been illegally raised to Rs. 60 per month in contravention of the terms of the Act, that as such the appellants were entitled to seek adjustment of the excess payments made by them towards the alleged arrears of rent and consequently there can be no arrears of rent under law. Insofar as the requirement of the shop for the business needs of the respondent is concerned it was contended that it was not a bona fide claim but only a make-believe story in order to get the appellants evicted.

6. The trial court, after a detailed consideration of the oral and documentary evidence adduced by the parties, held that the appellant had neither tendered the rent to Ram Prakash Gupta nor had the latter refused to receive it, that in the absence of a refusal to receive rent the appellant were not entitled under the Act to make remittances of the rent by money order, that in any event the payment of rent to a junior member of the family instead of to the karta was not a valid payment and that as such the appellants had committed default in payment of rent and were, therefore, liable to be evicted. On the other ground also the trial court held that the leased portion was bona fide required by the karta for the gainful engagement of two members of the joint family who were unemployed and that was a second ground for ordering eviction. Accordingly the trial court decreed the suit for eviction.

7. On the appellants preferring an appeal, the appellate court reversed the findings of the trial court and dismissed the suit for eviction. The appellate court held that even if the appellants had failed to pay the rent from November 1973 onwards the appellants cannot be deemed to have committed default in payment of rent because the enhancement of rent from Rs. 16 to Rs. 60 was in contravention of the provisions of the Act and as such the appellant were entitled to have the excess payments adjusted towards arrears of rent as well as future payment of rent. The ground of bona fide requirement was also not accepted by the appellate court.

8. Against the judgment of the appellate court the respondent herein preferred a second appeal to the High Court. As there was a conflict of decisions of different Benches of the High Court on the question whether tenants paying rent in excess of the agreed rent would be affected by the rule of "in pari delicto" and cannot, therefore, seek adjustment of the excess payments towards arrears of rent to resist a suit for eviction for default in payment of rent, the second appeal was referred to a Full Bench. The Full Bench, after elaborately considering the matter held that the rule of "in pari delicto" would squarely apply to tenants who pay enhanced rents in contravention of the terms of the Rent Restriction Acts and hence the appellants are guilty of pari delicto and cannot, therefore, seek adjustment of the excess payments made by them and seek avoidance of their eviction for default in paying the rent. The Full Bench further held that the finding of the appellate court on the question of the landlord's bona fide requirement of the leased premises was vitiated on account of misreading of facts and misapplication of law and hence the trial court's finding warranted restoration. The Full Bench, therefore, allowed the appeal and restored the decree of eviction passed

by the trial court on both the grounds set out in the plaint.

9. Mr. Javali, learned counsel for the appellants strenuously contended that the High Court was not justified in allowing the second appeal since the appellants had not committed any default in payment of rent and furthermore even if there was any default, due to their erroneous tender, they were entitled to seek adjustment of the excess payments made by them and avoid eviction. It was also submitted that the appellants, being in the disadvantageous position of tenants, cannot be placed on par with the landlord and held that they are "in pari delicto" and cannot seek adjustment of the excess payments towards arrears of rent. The further submission was that the respondent's requirements of the shop for the business needs of the members of the joint family was not established either by the pleadings or the evidence and as such the appellate court was perfectly in order in rejecting the second ground on which eviction was sought for and the High Court had erred in interfering with a finding of fact in a second appeal.

10. In the view we propose taking of the matter we do not think it necessary to go into the question whether the appellants had committed default in payment of rent and secondly even if they had committed default, they are entitled to adjust the excess rent paid by them over a span of 30 years without reference to the rule of "in pari delicto". The reason for our refraining to go into these questions is because we find the decree for eviction passed against the appellants can be sustained on the second ground viz. bona fide requirement of the shop for the business requirements of the members of the joint family. Even so we think it necessary to point out an error contained in the argument of Mr. Javali. The learned counsel submitted that the decision of the High Court on the question of "in pari delicto" may not be good law in view of a recent decision of this Court in *Mohd. Salimuddin v. Misri Lal* ((1986) 2 SCC 378). It is true that the case related to a dispute regarding default in payment of rent between a landlord and a tenant and this Court held that it will be a judicial sin to treat the landlord and tenant on a par and apply the doctrine of pari delicto because the parties were placed in the position of "oppressor" and "oppressed". The learned counsel has failed to notice that the facts in that case were entirely different. It was a case where a tenant was obliged to advance a loan of Rs. 2000 to the landlord in order to secure the lease of a premises. The agreement between the parties specifically provided that the loan amount was to be adjusted against the rent which accrued. In spite of it the landlord sought the tenant's eviction on the ground of arrears of rent and set up a plea of "in pari delicto" against the tenant. It was in such circumstances this court held that the doctrine of pari delicto cannot be applied since the tenant was perforce compelled to advance a loan to secure the lease even though such advancement of loan was against the terms of the Rent Act. The learned Judges have taken care to set out that the doctrine will not be attracted when there is no element of compulsion or exploitation and both parties have by consensus contravened the provision of law for their mutual advantage. They, however, found that the tenant concerned in that case was a victim of exploitation and hence he was not "in pari delicto". The relevant portion of the judgment reads as follows : (SCC p. 381, para 4)

The doctrine is attracted only when none of the parties is a victim of such exploitation and both parties have voluntarily and by their free will joined hands to flout the law for their mutual gain. Such being the position the said doctrine embodying the rule that a party to a transaction prohibited by law cannot enforce his claim in a court of law is not attracted in a situation like the present.

11. Coming now to the ground of eviction based on the bona fide requirement of the respondent. Mr. Javali argued that the bona fides of the claim is not established either by the pleadings or the evidence and hence the trial court and the High Court were in error in sustaining the said ground of

eviction. It was pointed out by the counsel that in the plaint there is only a casual statement about the requirement of the shop by the landlord and in the evidence it was not made clear whether the shop was required for expansion of the existing business or for starting a new business venture for the benefit of the younger members of the joint family. The trial court has discussed the case of bona fide requirement in para 14 of its judgment and has held that the landlord is bona fide in need of the shop to engage two members of the joint family in business. The appellate Judge has reversed the findings of the trial court on four grounds viz. that the tenants were refugees from West Pakistan and had no shop of their own in the town of Gaya, that from the point of comparative hardship it would be the tenants who would suffer more than the landlord by an adverse decision, that the shop occupied by the appellants is only a small portion of a massive building in the occupation of the landlord and that the landlord's requirement of the building was more attributable to a desire to recover possession rather than on account of any genuine need for it. The High Court has pointed out that the appellate Judge and completely misdirected himself in his approach to the question because of erroneous assumptions of facts as well as law. Admittedly, the tenancy had commenced in 1932 which was long prior to the partition in 1947 and hence there can be no question of the tenant being a refugee from West Pakistan. Likewise, the application of the test of comparative hardship between the landlord and the tenant was an extraneous test because no such test has been prescribed by the Act for going into the reckoning. Then again it was noticed that without any evidence or materials the appellate Judge has assumed that the main building in the occupation of the joint family is a massive building and that the leased portion constitutes only a negligible area. Likewise the appellate Judge had no materials to hold that the landlord's requirements of the building was only born out of desire and not on account of any genuine need. Since the appellate Judge had rendered his findings on the question of bona fide requirements of the shop by the landlord on baseless assumptions and wrong principles of law, the High Court was justified in setting aside the finding of the appellate Judge even though it was factual in character. It is true that in a second appeal a finding of fact even if erroneous will generally not be disturbed by where it is found that the finding is vitiated by application of wrong tests or on the basis of conjectures and assumptions then a High Court will be well within its rights in setting aside in a second appeal a patently erroneous finding in order to render justice to the party affected by the erroneous finding. Mr. Javali tried to canvass that the appellate Judge had rendered his finding mainly with reference to the pleadings and the evidence and his incidental references to other factors and circumstances were only to reinforce his conclusion and as such his finding does not suffer from any infirmity or error. We are not persuaded by this argument because it cannot be predicated as to how far the appellate Judge's conclusions was influenced by the mistaken tests applied by him to determine the issue.

12. We are, therefore, of the view that the finding of the trial court which has been confirmed by the High Court regarding the respondent being bona fide in need of the shop for the business needs of the joint family does not call for any interference by this Court in this appeal under Article 136 of the Constitution.

13. In the result, the appeal fails and will stand dismissed. There will be no order as to costs. To enable the appellants to find alternate accommodation to shift their business they are given time till June 30, 1987 to vacate the premises.

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