Provash Chandra Dalui and Another

Vs

Biswanath Banerjee and Another

Civil Appeal No. 2977 of 1984

(G. L. Oza, K. N. Saikia JJ)

03.04.1989

JUDGMENT

K. N. SAIKIA, J. –

1. This defendant's appeal by special leave is from the judgment and order of the High Court of Calcutta dated February 18, 1982 in S. A. T. No. 87 of 1981 summarily dismissing the second appeal against the appellant order in T. A. No. 381 of 1980 which affirmed the judgment and decree in title suit No. 56 of 1966.

2. The instant second respondent Narendra Nath Mukherjee leased out in the land measuring 6 cottas 5 chittacks 30 sq. ft. at 5/2/A Russa Road, now known as 34/A Shyama Prasad Mukherjee Road, Calcutta, by a registered lease deed September 26, 1946, hereinafter referred to as ' the lease' at the first instance for a period of 10 years from April 1, 1946 but if the lessee did not fail to pay the rent to the lessor and rates and taxes to the municipality during that period, the lease would be extended for a further period of 5 years i. e. up to March 31, 1961 at the rent of Rs 250 in place of Rs 200 per month; and if he continued to do likewise to do likewise, it would be extended for a further period of 5 years, that is, up to March 31, 1966, at a monthly rent of Rs 300 in place of Rs 250 and if he contained to do likewise during the period of 20 years, he would be entitled to obtain extension for a further maximum period of one year at a rent of Rs 500 per month in place of Rs 300 per month.

3. The instant appellants are stated to have exercised their option of extension at the expiry of 10 y ears for a period of 5 years i. e. from April 1, 1956 to March 31, 1961 on increased rental of Rs 250 per month and then for the second term of 5 years from April 1, 1961 to March 31, 1966 at the increased rental of Rs 300 per month. During the lease, on March 31, 1959 the instant second respondent by a registered instrument transferred the land to the first respondent who thereby became the landlord. Alleging that the instant appellants failed to exercise the option of extension for one year at an enhanced rent of Rs 500 and also failed to give peaceful and vacant possession of the land to him, the instant first respondent as a plaintiff instituted title suit No. 56 of 1966 for ejectment has possession and mesne profits. The instant appellants as defendants contested the suit by filing a joint written statement stating inter alia, that they did not exercise option of renewal after the expiry of the original term of 10 years as they became thika tenants from February 28, 1949 i. e. on the date of commencement of the Calcutta Thika Tenancy Act, 1949 as admitted by the plaintiff's predecessor in interest, the instant second respondent, in Miscellaneous Execution Case No. 126 of 1953 (Thika) before the Controller under the Calcutta Thika Tenancy Act, 1949, hereinafter referred to as ' the Act ', and by both the respondents in Misc. Judicial Case No. 74 of 1958 (Thika) before the said Controller. It was also stated that they (appellants) always paid rent at the rate of RS 200

per month and never any enhanced rent; and that the first respondent's claim for the differential rent was also rejected in the first respondent's suit No. T. S. 80 of 1965 and the appeal therefrom was also rejected and ultimately the special leave petition (Civil No. 1363 of 1980) was also dismissed by the Supreme Court on March 10, 1980.

4. T. S. No. 56 of 1966 was decreed by the trial court wherefrom the appeal, being T. A. No. 381 of 1980, was also dismissed. The Additional District Judge while dismissing T. A. No 381 of 1980 relied on the decision of the Calcutta High Court, since reported in 1980 (1) CLJ 377, holding that as the lease was for a period of 20 years and not for a period of 12 years sub-section (5) (b) of Section 2 of the Act had no application and that the respondents were not barred by waiver, estoppel, res judicate or principal analogous thereto because of the Misc. Case No. 74 of 1958 filed by the Second respondent under Section 5 of the Act as there could be question of giving a status under the Act when in the facts of the case such a status was not available. The Second appeal being S. A. T. of 1981 having also been summarily dismissed by the High Court by the impugned order, the appellants have preferred this appeal by special leave.

5. Mr D. K. Sen, the learned counsel for the appellants submits inter alia, that there could be no controversy about the appellants' status of thika tenants in view of the fact that the lease was at the first instance for 10 years only and its first and subsequent extension were contingent on the appellant's regular payment of rents, rates and taxes and enhancement of rent; that contingency did not happen as they did not pay any enhanced rent, but simply were holding over; that the second respondent who is the predecessor in interest of the first respondent, admitted the thika tenants status of the appellants in the earlier proceedings before the Controller and were therefore estopped from questioning that status; and that the learned courts below erred in ignoring these vital pieces of evidence.

6. Mr Shankar Ghosh the learned counsel for the respondents refuting submits that the lease having clearly been for a period of 20 years, the appellants have rightly been held not to be thika tenants under the Act; and that there could be no estoppel against a statute.

7. Two question are, therefore, to be decided in this appeal, namely whether the instant appellants acquired the status of thika tenants in respect of the lease; and whether there was estoppel, waiver, acquiescence or res judicata on the part of the respondents as in earlier proceedings they treated the appellants as thika tenants before the Controller.

8. The Act was passed in 1949 to make better provisions relating to the law of landlord and tenant in respect of thika tenancies in Calcutta. It came into force on the day on which the Calcutta Thika Tenancy Ordinance, 1948 ceased to operate. Section 2(5) in Chapter I defined" thika tenant" as follows :

> 2(5) "thika tenant" means any person who holds, whether under a written lease or otherwise, land under another person, and is or but for a special contract would be liable to pay rent, at monthly or at any other periodical rate, for that land to that another person and has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose and includes the successors in interest of such person, but does not include a person -
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> (a) who holds such land under that another person in perpetuity; or

(b) who holds such land under the another person under a registered lease, in which the duration of the lease is expressly stated to be for a period of not less than twelve years; or

(c) who holds such land under the another person and uses or occupies such land as a Khattal.

9. This new clause (5) was substituted by West Bengal Act 6 of 1953. The crucial words to be noted in clause (b) are that " the duration of the lease is expressly stated to be for a period of not less than twelve years". In other words, if the stated period is of less than 12 years the lease will be a thika tenant and not otherwise. The important feature of the provision contained in Section 5(1) of the Act is that the application for ejectment of the thika tenants has to be made to the Controller. We have, therefore, to ascertain the duration of the leas. Admittedly clauses 9, 11, 12 and 13 of the lease read as follows :

9. If the second party lessee keeps the rent for two months in arrear at a time or if contravenes or commits any breach in respect of any provision of this deed not comply with his duties within 7 days in spite of service of warning notice or does not refrain from doing improper Act, or if he is declared insolvent then in spite of the tenure of this lease having not expired, this lease, that is the tenancy of the second party lessee will be cancelled or extinguished and the first party lessor will be entitled to take has possession of the said property. No plea or objection of the second party lessee will be entertained.

11. The tenure of this lease will be for a period of ten years firstly form April 1946 A. D. But if the second party lessee, performs acts regularly according to provisions within this stipulated period and pays fixed rent to the fist party lessor regularly and pays rates and taxes to the municipality and does not default in doing his duties then the period will be extended under all the aforesaid terms for a further a period of five years, i. e. up to March 31, 1961, by fixing the monthly rent of Rs 250 (two hundred fifty rupees) in place of Rs 200 (two hundred rupees) and the second party lessee shall be bound absolutely by the aforesaid provisions in paragraphs 1 to 10 during the said enhanced period and all the said terms will remain in force, only the rent of Rs 250 (two hundred fifty) in place of Rs 200 (two hundred) will be fixed.

12. If the second party lesee performs his acts regularly according to the aforesaid terms within last 5 years and abides by the rules and pays the fixed monthly rent of RS 250 (two hundred fifty rupees) to the first party lessor month by month and pays the rates and tax to the municipality then on the expiry of the said tenure of five years the tenure of this lease will be enhanced for a further period of 5 years i. e. up to March 31, 1966 having fixed the monthly rent of Rs 3000 (three hundred rupees) in place of Rs 250 (two hundred fifty rupees) under all the aforesaid terms in paragraphs 1 to 10 and the second party lessee shall fully remain bound absolutely by all the aforesaid terms and all the said rules shall fully remain in force, only the monthly rent of Rs 300 (three hundred) in place of Rs 250 (two hundred fifty) will be fixed.

13. If the lease is not determined for acting contrary to any provisions within the tenure of the aforesaid term, then on the expiry of the said term as mentioned in this deed, i. e. on April 1, 1966 A. D. the second party lessee on paying the entire receivable amount in respect of the demised premises to the first party lessor, will give has possession of the said land by treating the houses etc. constructed on the demise land i. e. the houses etc. constructed on the land by him i. e. the second

party lessee by treating the same to be a portion of the demised land shall vacate the said houses and said land. But if the second party lessee, within the aforesaid 20 years, performs acts according to all the aforesaid provisions duly and regularly and abides by all the same duly and regularly pays the fixed rent and rates and taxes at the proper place then the second party lessee if so desire, will be entitled to get the same for a further extended period of maximum one year from April 1, 1966 A. D. by serving written notice at least one month prior to the expiry of the aforesaid tenure of 20 years by fixing monthly rent of Rs 500 (five hundred rupees) in place of Rs 300 (three hundred) under all the provisions of the aforesaid paragraph 1 to 10 and the first party lessor shall be bound to grant the said extended period and if the second party lessee, accepts such extended period shall pay the entire dues of the first party lessor within the last mentioned extended period up to the expiry of the said last extended period and upon that, by demolishing the houses etc. constructed on the demised land will remove and replace the same. The first party lessor shall not have any objection to the same nor the same shall be tenable - and shall give has possession on the demised land to the first party lessor, and in that event the first party lessor shall be bound to give up his claim and contention on the houses etc. of the said second party lessee and shall only take possession of the demised land that is, in such circumstances the houses etc. constructed by the second party lessee to be a portion of the demised land. But if for any reason the second party lesee, within the extended stipulated period does not give has possession to the first party lessor on the demised land according to the aforesaid manner, or if he neglects to do so or is unable then the first party lessor shall not be bound to give up his claim in respect of the houses etc. constructed by the said second party lessee. Moreover, by treating the houses etc. constructed on the demised land to be a portion of the said land, shall be entitled to take has possession of the said demised land and besides the same, the first party lessor shall also entitled to get any other remedy or damage or compensation according to law.

10. 'Ex-praecedentibus et consequentibus optima fit interpretation.' The best interpretation is made from the content. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. It is an accepted principle of construction that the sense and meaning of the parties in any particular part of instrument may be collected ' ex antecedentibus et consequentibus', every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that is possible. As Lord Davey said in N. E. Railway Co. v. Hastings [(1900) AC 260, 267] :

... the deed msut be rad as a whole in order to ascetain the true meaning of its several clauses, and... the words of each clauses should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible...

In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words, are clear, there is very little the court can do about it. In the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to the circumstances surrounding their creation and the subject matter to which it was designed and intend they should apply.

11. The habendum in the lease states :

> Upon the prayer of the second party lessee to take the said land in arrangement and settlement for a stipulated period for starting factories, lathe works, manufacturing and repairing of motor car parts, manufacturing and repairing electric fans and

> various manufacturing business constructing pucca buildings on the aid and or in portion thereof or subletting houses etc. and for constructing shop rooms etc. under the following terms and provisions to which he agreed and upon giving possession of the said land to the second party lessee, the second party lessee hereby admit and promise that.

12. Particulars and four boundaries of the property in Schedule 'Ka' are given as :

> In the District of 24 Parganas, within the Police Station Bhowanipore, in Mouza Bhowanipore Village, within the jurisdiction of the Sub-Registry Alipore, in Government Khas Mahal in Division 6, Sub-Division "E" (E) relating to Dihi 55 gram, in holding No. 224 within the surplus land of scheme No. 4 of the Calcutta Improvement Trust, portion of the plot No. 62 of the aid scheme, the rent free land measuring more or less 0-6-5-30 six kathas, five chittaks, thirty square feet together with foundation of the wall together with all fittings and fixtures and easement and other rights etc. with all rights and entire right is the property whose current Municipal premises No. 5/2-A, Russa Road and the second party lesee have taken the said property on lease for a stipulated period of twenty years.

13. In clause 9 of the lease it would be seen how and when the rent is to be paid and when the lease would be liable to be cancelled have been stated. Clause 11 stipulates that at the first instance the period of lease was made 10 years and in case the lessee acted in accordance with what was expected of him under clause 9, the period of the lease would be extended for a further period of 5 years up to March 31, 1961 at enhanced rent of Rs 250 per month, and if the lessee continued to Act in accordance with what was expected of him under clause 9 during this period of 5 years the period of the lease would be extended for a further period of 5 years, that is, up to March 31, 1966 at a monthly rent of Rs 300 and in case the lessee continued to Act during this period as expected of him under clause 9 till the end of the period of 20 years he would be entitled by serving a notice to obtain an extension for a further maximum period of one year at enhanced rent of Rs 500 per month.

14. It is pertinent to note that the word used is ' extension' and not ' renewal'. To extend means to enlarge, expand, lengthen, prolong, to carry out further than its original limit. Extension, according to Black's Law Dictionary, means enlargement of the main body; addition of something smaller than that to which it is attached to lengthen or prolong. Thus extension ordinarily implies the continued existence of something to be extended. The distinction between ' extension and ' renewal' is chiefly that in the case of renewal, a new lease is required, while in the case of extension the same lease continues inforce during additional period by the performance of the stipulated Act. In other words, the word 'extension' when used in its proper and usual sense in connection with a lease means a prolongation of thee lease. Construction of this stipulation in the lease in the above manner will also be consistent when the lease is taken as a whole. The purpose of the lease were not expected to last for only 10 years and as Mr A. K. Sen rightly pointed out the schedule specifically mentioned the leas as "for a stipulated period of 20 years". As these words are very clear, there is very little for the court to do about it.

15. The learned counsel for the appellants in support of his contention that the appellants were thika tenants refers us to Kanai Lal Sur v. Paramnidhi Sadhukhan [AIR 1957 SC 907 : 1957 SCR 360]; Mahadeolal Kanodia v. Administrator General of West Bengal [AIR 1960 SC 936 : (1960) 3 SCR 578]; Annapurna Seal v. Tincowrie Dutt [66 Cal WN 338]; Shaffiuddin v. G. C. Banerjee [69 Cal

WN 842]; Sheikh Gufan v. S. K. Ganguly [AIR 1965 SC 1839 : (1965) 3 SCR 364].

16. In Kanai Lal v. Paramnidhi [AIR 1957 SC 907 : 1958 SCR 360], the status of the appellant as thika tenant was not in question. The question therein was whether under Section 5(1) of the Act as amended by the Amending Act of 1953 execution proceedings taken out by the decree holder against the appellant could be entertained only by the Controller and not by the civil courts. This Court held that Section 5(1) did not apply to a case where the landlord had already obtained a decree for ejectment against his thika tenant and consequently the civil court had jurisdiction to entertain the application. It was noted that until 1948 the rights and liabilities of the landlords and their thika tenants were governed by the provisions of the Transfer of Property Act. On October 26, 1948, the Calcutta Thika Tenancy Ordinance 11 of 1948 was promulgated because it was thought expedient, pending the enactment of appropriate legislation to provide for the temporary stay of the execution of certain decrees and orders of ejectment of thika tenants in Calcutta. The object of the Ordinance was to give protection to the thika tenants in Calcutta and to afford them interim relief by staying execution of certain decrees and orders as mentioned in Section 3 until an appropriate Act was passed by the legislature in that behalf.

17. The facts of the instant case are entirely different inasmuch as the lease was dated September 26, 1946 and no question of eviction by executing any decree arose until the Act was passed. The only point to be noted is that the tenancy under the lease on the relevant date of creation was governed by the Transfer of Property Act.

18. In Mahadeolal Kanodia v. Administrator-General of West Bengal [AIR 1960 SC 936 : (1960) 3 SCR 578] the question for decision was whether the appellant against whom proceedings for execution of a decree for ejectment was pending, who had applied for relief under Section 28 and when that section was in force, was entitled to have his application disposed of in accordance with the provisions of Section 28, which had ceased to exist retrospectively though it remained undisposed on the date the Amendment Act, 1953 which omitted Section 28 of the Act, came into force. This case is therefore, of no assistance to the appellants.

19. In Annapurna Seal v. Tincowrie Dutt [66 Cal WN 338], it was held on the fats of the case that what as let out was land with structures and it could never come under the operation of the Act inasmuch as the property in suit had a history of 24 years under the registered lease before that claim to become a thika tenant would arise under the Act. It was also held that where there was a covenant for renewal in a lease and the option did not state the terms of the renewal, the new lease, if created would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself. This case therefore is hardly relevant.

20. In Shaffiuddin v. G. C. Banerjee [69 Cal WN 842], it was held that the status already acquired by the tenants in Tollygunje under the West Bengal Non-agricultural Tenancy Act, 1949, could not be prejudiced and affected by the Act and the landlords were therefore not entitled to any order of ejectment under the Act. This case has, therefore, no bearing.

21. In Sheik Gufan v. S. K. Ganguli [AIR 1965 SC 1839 : (1965) 3 SCR 364, the question was whether Section 30(c) of the At was applicable to land in respect of which betterment fee was levied. It is therefore not relevant for us.

22. We do not find any reason in the above decisions to enable us to hold that the lease in the instant

case was for a period of less than 12 years and not for a period of not less than 12 years. The High Court correctly held the lease to be for not less than 12 years.

23. The next question is that of waiver, estoppel and res judicata. The appellants urged that there were two previous proceedings namely Misc. Execution Case No. 126 of 1953 (Thika) and Misc. Judicial Case No. 74 of 1958 (Thika) under the Act before the Controller. Except the implication that the proceedings having been before the Controller the respondents treated the appellants as thinks tenants, no particular order finally conferring that status has been shown to us. By the order of this Court dated March 10, 1980 in Special Leave Petition (Civil) No. 1363 of 1980 which was from the judgment and order dated September 16, 1976 of the High Court of Calcutta in F. A. No. 458 of 1978 the petition dismissed" without going into the question whether the Thika Tenancy Act was applicable or not". Misc. (J) Case No. 74 of 1958 wherein the first respondent prayed for being added as petitioner 2 ended in a compromise. No status could, however, be said to have been determined.

24. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right. It means the forsaking the assertion of a right to the proper opportunity. The first respondent filed suit at the proper opportunity after the land was transferred to him, and no covenant to treat the appellants as thika tenants could be shown to have run with the land. Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estopped. An estoppel may result, though thee party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in the question. Nothing of the kind could be proved in this case to estop the first respondent.

25. In Shanti Devi v. A. K. Banerjee [(1981) 2 SCC 199], it was held that parties could not by their pleadings alter the intrinsic character of the lease or bring about a change of the rights and obligations flowing there form. The court would only look into the terms of the lease irrespective of the averments in the pleadings. In the instant case as we have already held the lease to have been for 20 years its character could not have been changed by the pleadings, if any in the above cases. Nor could the respondents be held to have waived their rights under the lease. We do not find any infirmity in the impugned High Court order on this court also.

26. In the result, this appeal fails and is dismissed but without any order as to costs. Stay order, if any, stands vacated.

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