Thailammal and Others

Vs

Janardhan Raju and Others

Civil Appeal No. 3942 of 1991

(Dr. T. K. Thommen, B. P. Jeevan Reddy JJ)

20.12.1991

JUDGMENT

B.P. JEEVAN REDDY, J. -

1. After hearing counsel for both the parties we are of the opinion that the matter must go back to the High Court since certain relevant aspects are not clear from the record before us.

2. Defendants are the appellants. The respondents-plaintiffs instituted a suit for eviction in the Court of District Magistrate, Salem being O.S. No. 1472 of 1972. The plaintiffs' case was that they had let out the portion marked ABCD admeasuring 20 ft. x 16 ft., delineated in the plaint plan, on lease to the defendants for a period of three years. At the end of three years the plaintiff sent a notice terminating the defendants' tenancy under Section 106 of the Transfer of Property Act. The defendants not only did not vacate the land but also encroached upon an adjoining portion and have thus come into possession of a larger area MNOP. They are not only liable to be evicted and to pay the arrears of rent but are also liable to pay damages for use and occupation of the excess land occupied by them.

3. The defence of the appellants was that they were the tenants of the entire area marked as MNOP and that the tenancy had commenced in January 1955 and not on May 6, 1957 as alleged by the plaintiffs. They stated that they had also put up a thatched construction on the said land at a cost of Rs 3000 and that they are entitled to the benefit of Madras City Tenants' Protection Act (hereinafter called 'the Act'). They also filed an application under Section 9 of the Act in the said suit.

4. The trial court framed appropriate issues and after considering the evidence adduced by both the parties, decreed the suit on the following findings :

> "(a) The lease was in respect of the smaller portion ABCD only and that the defendants have subsequently encroached upon the adjoining portion.
>
> (b) The tenancy commenced on May 6, 1957 and not in January 1955.
>
> (c) That the Act was extended to Salem Town on September 19, 1956 and then again on January 29, 1958, but the subsequent extension was rescinded in G.O. No. 1695, which meant that the extension of the Act on September 19, 1956 was effective. Inasmuch as the defendants' tenancy commenced subsequent to September 19, 1956, the defendants are not entitled to the protection of the Act."

5. The application filed by defendants under Section 9 of the Act was also dismissed.

6. The defendants appealed against the decree of the trial court, which was allowed, and dismissed, on the following findings :

> "(a) The lease was in respect of ABCD area only and the defendants had indeed encroached upon the adjoining site as alleged by the plaintiffs.
>
> (b) The plaintiffs have not filed GOMs. 1695 dated June 17, 1959 which means that the extension of the Act on January 29, 1958 was effective. If so, the tenancy of the defendants having commenced on May 6, 1957 - i.e., earlier to January 29, 1958 - they are entitled to the benefit of the Act.
>
> (c) The plaintiffs have also not issued the notice under Section 11 of the Act terminating the lease and, therefore, the suit is not maintainable."

7. Against the judgment and decree of the trial court plaintiffs filed the second appeal which has been heard and allowed by a learned Single Judge under the impugned judgment. The learned Single Judge agreed with the contention of the counsel for the plaintiffs that GOMs. 1695 dated June 17, 1959 was indeed a part of the record and, therefore, it must be deemed that the extension of the Act on January 29, 1958 has been rescinded. Having said so, the learned Judge observed that the said circumstance has no significance inasmuch as the Act was subsequently extended to Salem town by Act 2 of 1980. Accordingly, the learned Judge held that the suit lease is covered by the Act and the defendants can seek the benefit of the Act provided they comply with the conditions prescribed therein. The learned Judge then examined whether the defendants did in fact comply with the requirements of Section 9 of the Act and found that they did not, inasmuch as they did not file an application under Section 9 within one month of the coming into force of the said Amendment Act. The learned Judge also noticed that the application filed under Section 9 by the defendants was rightly dismissed because the defendants were not entitled to the benefit of the Act on that date. The defendants' counsel then brought to the notice of the learned Single Judge the decision of Madras High Court in Johari Bi (Mrs) v. K. Vinayakam [(1976) 1 MLJ 220 : AIR 1976 Mad 267] wherein an application filed prior to the commencement of the Act was held to be in compliance with the requirements of the Act. The learned Single Judge distinguished the said decision on facts and held it inapplicable to the present case. He observed that the application under Section 9 previously filed by the defendants was rightly dismissed since at that time the defendants were not entitled to the benefit of the Act and that they did not file another application within the period prescribed by Section 9 after the coming into force of Amendment Act 2 of 1980. The learned Single Judge held further that the appellate court was wrong in holding that plaintiff's suit must fail on account of not issuing the notice under Section 11 of the Act. On this reasoning the learned Judge allowed the second appeal, set aside the appellate decree and restored the decree of the trial court.

8. In this appeal it is contended by Shri Bhasme, learned counsel for the appellant that the learned Single Judge was not right in holding that the principle of the decision in Johari Bi [(1976) 1 MLJ 220 : AIR 1976 Mad 267] was not applicable to the facts and circumstances of this case. He submitted that the application filed prior to the coming into force of Amendment Act 2 of 1980 should be deemed to be in compliance with the requirement of Section 9 and the defendant must be held to be entitled to the benefit of the Act. On the other hand, the learned counsel for the plaintiffs-respondents submitted that Section 9 of the Act contemplates an independent application and that Section 9-A provides for an appeal too against the orders passed on such application. He submitted

that no appeal was preferred by the defendants against the order of the trial court dismissing their application under Section 9 and, therefore, no application under Section 9 was pending on the date the Amendment Act 2 of 1980 came into force.

9. The first aspect which could not be clarified before us is this : If the Act was extended to Salem town on September 19, 1956 in the first instance, why was it necessary to extend it over again on January 29, 1958. It is equally not clear what is the effect of G.O. No. 1695 dated June 17, 1959 rescinding the extension on January 29, 1958. Yet again, what was the occasion for extending the Act once again in 1980 by the Amendment Act 2 of 1980. We are unable to understand this repeated application of the Act to the same town and the occasion or the necessity therefor. We are of the opinion that this aspect is quite material for the decision of this case and must be clarified.

10. So far as the contention of the learned counsel for the plaintiffs is concerned, we are of the opinion that according to Section 9 it is open to a defendant to file an application thereunder in the suit for ejectment filed by the landlord against him. Such an application would be in the nature of an interlocutory application in the suit. In such a situation, it follows that once an appeal is filed by the defendant against the decree of the trial court, he is entitled to challenge the correctness of any interlocutory order passed in the suit, in such appeal, by virtue of Section 105 of the Civil Procedure Code. It is not necessary in such a case that he should prefer an independent appeal against the order dismissing an interlocutory application, even if it is appealable. This principle is of equal application herein even though the interlocutory application is one under Section 9 of the Act. Accordingly, it must be held that in the appeal/second appeal against the decree of the trial court, it was open to the defendants to challenge the correctness of the order dismissing their application under Section 9. The High Court was, therefore, not right in holding that the said application having been dismissed by trial court and no fresh application having been filed, it must be held that there was no application under Section 9. The application filed by the defendants in the trial court must be deemed to be pending during the pendency of the appeal/second appeal. Of course, what is its effect in law is a matter to be considered by the High Court hereinafter.

11. We may, at this stage, refer to Section 9(1)(a) and Section 9-A(1) of the Act. They read thus :

> "9. Application to Court for directing the landlord to sell land. - (1)(a)(i) Any tenant who is entitled to compensation under Section 3 and against whom a suit in ejectment has been instituted or proceeding under Section 41 of the Presidency Small Cause Courts Act, 1882, taken by the landlord, may, within one month of the date of the publication of Madras City Tenants' Protection (Amendment) Act, 1979 in the Madras Government Gazette or of the date with effect from which this Act is extended to the municipal town, township or village in which the land is situate or within one month after the service on him of summons apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court, the whole or part of, the extent of land specified in the application.
>
> # * * *##
>
> (ii) Notwithstanding anything contained in clause (a)(i) of this sub-section, any such tenant as is referred to in sub-clause (ii)(b) of clause (4) of Section 2 or his heirs, may, within a period of two months from the date of the publication of the Madras City Tenants' Protection (Amendment) Act, 1973 apply to the Court. Whether or not a suit for ejectment has been instituted or proceeding under Section 41 of the

Presidency Small Cause Courts Act, 1882 (Central Act 15 of 1882) has been taken by the landlord or whether or not such suit or proceeding is pending having jurisdiction to entertain a suit for ejectment or in the city of Madras either to such Court or to the Presidency Small Cause Court, for an order that the landlord under the tenancy agreement shall be directed to sell for a price to be fixed by the Court the whole or part of the extent of land specified in the application.

9-A. Appeals. - (1) An appeal shall lie from an order passed by a Court under Section 6, Section 7, Section 7-A or Section 9 to the Court to which an appeal would lie from any decree passed by the former Court and the decision in such appeal shall be final :

Provided that from an order passed -

(i) by the Chief Judge of the Presidency Small Cause Court, an appeal shall lie to the High Court, and

(ii) by any other Judge of the Presidency Small Cause Court, an appeal shall lie to the Chief Judge."

12. For the reasons stated above, the appeal is allowed in part and the matter is remitted back to the Madras High Court. The High Court shall now deal with the same and dispose it of in accordance with law. We make it clear that if the High Court finds it necessary, it shall be open to it to receive such additional material as it thinks appropriate for clarifying the aspect mentioned hereinabove or to call for a finding from the courts below in that behalf.

13. Having regard to the facts of the case, there shall be no order as to costs in this appeal.

</html