Mangalbhai and others

Vs

Dr. Radhyshyam

Civil Appeal Nos. 2588-89 of 1992

(N. M. Kasliwal, K. Ramaswamy JJ)

17.07.1992

JUDGEMENT

KASLIWAL, J.:-

1.Special leave granted. Dr. Radhyshyam, the respondent, filed an application under Section 13 of the C. P. and Berar Letting of Houses and Rent Control Order, 1949 (hereinafter referred to as "The Rent Control Order") against the appellants for permission to serve with notice of ejectment. The application was based on several grounds, but the eviction was pressed in the High Court only on the ground of need of the entire house for bona fide occupation and habitual default in the payment of rent. The matter was argued only on the aforesaid two grounds, before us also. The Deputy Collector and Rent Controller, Gondia, decided all the grounds against the landlord and dismissed the application by his order dated 13-9-1985. The Resident Deputy Collector, Bhadara dismissed the appeal by order dated 31-3-1986. Dr. Radhyshyam, the landlord then filed a Writ Petition No. 1356 of 1986 under Articles 226 and 227 of the Constitution of India before the Bombay High Court. Learned single Judge held that the tenants were habitual defaulters, and that the landlord had established his bona fide need. The learned single Judge however took the view that it would be proper to remand the case to the Rent Controller for determining the extent of the need of the petitioner (respondent in this appeal) for his residence and clinic/ dispensary and also for examining the case of the petitioner to reconstruct the house. Learned single Judge of the High Court also directed that full opportunity be given to the parties to amend the pleadings and lead evidence and thereafter to pass such suitable orders under clauses 13(3) (vi) and (vii) of the Rent Control Order in accordance with law. The learned single Judge by his order dated 11-12-1987 remanded the matter to the Rent Controller with the above directions.

2. The tenants/ appellants aggrieved against the Judgment of the learned single Judge filed a Letters Patent Appeal before the Division Bench of the High Court. The Division Bench by order dated 23-10-1989 dismissed the appeal taking the view that in truth and substance the order was passed by the learned single Judge under Art. 227 of the Constitution against which Letters Patent Appeal was not maintainable. The tenants have come in appeal by grant of special leave in S.L.P. No. 3484 of 1991 against the Judgment of the learned single Judge of the High Court dated 11-12-1987 and S.L.P. No. 2980 of 1990 against the Judgment of the Division Bench of the High Court dated 23-10-1989.

3. It was contended on behalf of the tenants/appellants that the Writ Petition No. 1356 of 1986 was filed by the respondent/landlord under Articles 226 and 227 of the Constitution. In the relief prayed in the writ petition it was clearly mentioned that the orders dated 13-9-1985 passed by the Rent Controller, Gondia, and the order dated 31-3-1986 passed by the Resident Deputy Collector, Bhandara be quashed and set aside by a suitable writ, order or direction. It was submitted that in the

heading of the petition it was clearly stated that it was a petition under Articles 226 and 227 of the Constitution. It was further argued that even though Art. 227 was mentioned in the writ petition but in substance it was a petition under Art. 226 and the entire tenor of the order of the learned single Judge clearly showed that it was dealing with a petition under Art. 226. It was thus contended that the learned Division Bench was not correct in taking the view that no appeal was maintainable against the order of the learned single Judge and in holding that the learned single Judge had passed the order under Art. 227 of the Constitution. It was also submitted that the Division Bench of the High Court wrongly placed reliance on a Full Bench decision of the High Court in Sushilabai Laxminarayan Mudliyar v. Nihalchand Waghajibhai Shaha, 1989 Mah LJ 695.

4. After a perusal of the contents of the writ petition filed before the High Court as well as the Judgment of the learned single Judge, we are clearly of the view that both the petition filed in the case and the order of the learned single Judge were in substance under Article 226 of the Constitution. The Full Bench of the Bombay High Court has wrongly drawn the deductions from the case of this Court in Umaji Keshao Meshram v. Smt. Radhikabai, (1986) 1 SCR 731 : (AIR 1986 SC 1272). Where petitions are filed under Articles 226 and 227 of the Constitution, this Court in Umaji Keshao Meshram's case observed as under (at pp. 1320-21 of AIR) :-

> "Petitions are at times filed both under Articles 226 and 227 of the Constitution. The case of Hari Vishnu Kamath v. Syed Ahmad Ishaque, (1955) 1 SCR 1104 : (AIR 1955 SC 233), before this Court was of such a type. Rule 18 provides that where such petitions are filed against orders of the tribunals or authorities specified in Rule 18 of Chapter XVII of the Appellate Side Rules or against decrees or orders of courts specified in that Rule, they shall be heard and finally disposed of by a single Judge. The question is whether an appeal would lie from the decision of the single Judge in such a case. In our opinion, where the facts justify A party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. Such was the view taken by the Allahabad High Court in Aidal Singh, AIR 1957 All 414 (FB) and the Punjab High Court in Raj Kishan Jain v. Tulsi Dass, AIR 1959 Punjab 291 and Barham Dutt v. Peoples' Co-operative Transport Society Ltd., New Delhi, AIR. 1961 Punjab 24 and we are in agreement with it."

5. Applying the correct ratio laid down in Umaji Keshao Mehsram's case (AIR 1986 SC 1272) and perusing the writ petition filed in the present case as well as the order passed by the learned single Judge we are clearly of the view that the present case clearly falls within the ambit of Article 226 of the Constitution. In Umaji Keshao Meshram's case (AIR 1986 SC 1272 at p. 1320) it was clearly held that :

> "where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the Court ought to treat the application as being made under Article 226."

6. The learned single Judge in his impugned Judgment dated 11-12-1987 nowhere mentioned that he was exercising the powers under Art. 227 of the Constitution. The learned single Judge examining the matter on merit and set aside the orders of the Rent Controller as well as the Resident Deputy Collector on the ground that the aforesaid Judgments were perverse. The findings of the Rent Controller and Resident Deputy Collector were set aside on the question of habitual defaulter as well as on the ground of bona fide need. Thus in the totality of the facts and circumstances of the case, the pleadings of the parties in the writ petition and the Judgment of the learned single Judge leaves no manner of doubt that it was an order passed under Art. 226 of the Constitution and in that view of the matter the Letters Patent Appeal was maintainable before the High Court. After taking the aforesaid view one course open was to set aside the order of the Division Bench and to remand the matter for being disposed of on merits by the Division Bench of the High Court. However, taking in view the fact that this litigation is going on for nearly a decade and also the fact that even the learned single Judge in his impugned order dated 11-12-1987 had remanded the case to the Rent Controller, we consider it proper in the interest of justice to hear the appeal on merits against the Judgment of the learned single Judge. We have heard learned counsel for the parties at length on the merits of the case.

7. As already mentioned above all the grounds for eviction taken by the respondent/landlord were decided against him by the Rent Controller as well as the Resident Deputy Collector. In the writ petition before the learned single Judge the arguments were restricted to clause 13(3)(ii) and (vi) only. It may be noted that the provision as regards default in the payment of rent is contained in clause 13(3)(ii) of the Rent Control Order which provides that in order to seek permission to serve with notice of ejectment on this ground it must be proved by the landlord that the tenant was "habitually in arrears with the rent". According to the respondent/ landlord himself the rents from 1-1-1972 till the filing of the application under clause 13 of the Rent Control Order on 24-9-1981 the rent was accepted without any demur even when the ,same was paid late by several months. A perusal of the statement of rents paid and received by the respondent clearly shows that at several occasions the rent was even paid in advance and at least after 1978 the payment of rent was never late for more than two months on any occasion. The contention of the appellants is that it was neither their intention nor to call it a habit of remaining in arrears of rent. The legislature has clearly used the word "habitually" in respect of delaying the payment of the arrears Of rent and not to cover a case of a tenant who bona fide paid the rent on demand from the side of the landlord or as and when his munim came to collect the rent as was done in the present case. The tenants in the present case were even paying the rent in advance and such tenants cannot be considered as habitually in arrears with the rent as contemplated under clause 13(3)(ii) of the Rent Control Order. If such is the practice and course of conduct adopted for receipt of rent for a number of years, the tenant cannot be taken by surprise by at once resorting to an application under clause 13(3)(ii) that the tenants/appellants were habitual defaulters. In the present case the landlord/ respondent had served a notice on 21-8-1981 that he wanted the rent to be paid every month before the due date and filed the present petition on 24-9-1981. The tenants also sent a reply to such notice on 29-8-1981 and refuted the allegation of any default in the payment of rent and took the plea that the landlord's munim used to collect the rent and later on passed the receipts. There was no alternate arrangement for payment of rent. There was an established practice to pay rent to Raghuji Munim who used to come to collect the same as per his convenience. Thus it is proved beyond any manner of doubt that the parties had adopted the practice of payment of rent in lump sum and not month by month and which continued from 1-1-1972 to the date of filing the present application under clause 13 of the Rent Control Order.

8. Admittedly, even on the date of filing such application there were no arrears of rent due against

the appellants and in these circumstances both the Rent Controller as well as the Resident Deputy Collector were, right in holding that the tenants/appellants cannot be considered as habitual defaulters in the payment of rent. Learned single Judge of the High Court was totally wrong in ignoring the past practice between the parties and in taking the view that the tenancy being month to month the tenants were bound to pay the rent at the close of the tenancy month in the absence of any other contract to the contrary. It is nowhere established by the respondent-landlord that rent was not paid to Raghuji Munim even when he had gone to collect the same. The notice was given on 21-8-1981 which can be considered as a warning for the first time to pay the rent every month and it cannot be held that even thereafter the appellants were making belated payment of rent, inasmuch as the present petition itself was filed before the Rent Controller on 24-9-1981.

9. This Court in Rashik Lal v. Shah Gokuldas (1989) 1 SCC 542 : (AIR 1989 SC 920) took a similar view while considering the similar provisions of the Rent Control Order. In the above case it was observed as under (at p. 922 of AIR) :

> "We do not see any reason for holding that unless the rent was paid and accepted at a fixed period or interval, no such implied agreement can be inferred. In the S. P. Deshmukh case (AIR 1977 SC 1985) the rent had been paid at the varying interval of 3 or 4 months. The crucial test appears to be the conduct of the landlord in receiving the rent offered belatedly. If he receives the same under a protest and warns the tenant to be regular in payment in the future, he cannot be assumed to have agreed to a modified agreement in this regard. But if he, without any objection and without letting the tenant know his thought process, continues to receive rent at intervals of several months, he cannot be allowed to scoring a surprise on the tenant by suddenly starting a proceeding for eviction. Having lulled the tenant in the belief that things were all right, the landlord was under a duty to serve him with a notice demanding regular payment, if he wished to insist upon it. In the case before us there was no objection whatsoever, raised on behalf of the landlord against the delayed payments. We, therefore, hold that the High Court was not right in reversing the concurrent finding of the two courts below."

The ratio of the above decision fully applies to the facts of the case before us.

10. As regards the question of bona fide need the learned single Judge has given detailed reasons that the finding recorded by the Rent Controller and the Resident Deputy Collector was perverse and the evidence led by the landlord/ respondent cannot be overruled or ignored merely on the ground that the witnesses were related or interested in the respondent. Learned single Judge was also right in observing that the Rent Controller and the Appellate Authority went wrong in holding that the respondent/landlord had failed to establish the ownership of the suit premises and on this count the ground for bona fide need must fail. The learned single Judge of the High Court was perfectly right in holding that not only the landlord/respondent had proved that the suit property came in his share in partition but the tenants had also attorned in favour of the landlord/respondent by paying rent to him for a long number of years before the filing of the present application. The learned single Judge in this regard after recording the finding of bona fide need has already given a direction to remand the case to the Rent Controller for recording a finding for the extent of need of the landlord/respondent for his residence and clinic/dispensary and also for examining the case of the landlord to reconstruct the house by giving full opportunities to the parties in respect of amending the pleadings as well as leading evidence. We do not find anything wrong in such direction and uphold the same.

11. As a result of the above discussion we allow the appeal arising out of S.L.P. (Civil) No. 2980 of 1990 and set aside the Judgment of the Division Bench of the High Court dated 23-10-1989, however, we do not consider it just and proper to remand the case to the Division Bench of the High Court for fresh decision for reasons already recorded above. The appeal arising out of S. L.P. (Civil) No. 3484 of 1991 is allowed in part, the Judgment of the learned single Judge of the High Court dated 11-12-1987 is set aside with regard to the finding in respect of habitual default as contemplated under clause 13(3)(ii) of the Rent Control Order and we uphold and maintain the finding on the question of bona fide need and the order of remand. In the facts and circumstances of the case the parties to bear their own costs in this Court. Order accordingly.

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