Karuna Ram Medhi and Others

Vs

Kamakhya Prasad Baruah and Another

Civil Appeal No. 2825 of 1986

(K. Ramaswamy, D. P. Wadhwa JJ)

02.04.1997

ORDER

1. Substitution allowed.

2. This appeal by special leave arises from the judgment of the Full Bench of the High Court of Assam, made on 24-8-1982 in SA No. 58 of 1976.

3. The admitted facts are that the respondent had entered into an agreement of lease of land with the predecessor-in-title of the appellant on 5-1-1953 for a period of seven years on payment of premium of Rs. 30 p.a. The respondent constructed a house therein within five years from the date of the lease. The house was gutted in a fire on 4-4-1958 and thereafter the respondent reconstructed the house. The appellant had issued a notice on 12-12-1959 asking the respondent to vacate the land and deliver the possession on 1-1-1960. The respondent has resisted the contentions raised in the suit filed by the appellant for ejectment of the respondent from the demised property. The trial court decreed the suit. On appeal, the Additional District Judge confirmed the same. In the second appeal, the Full Bench of the High Court reversed the decree of the trial court and dismissed the suit. Thus this appeal by special leave.

4. Shri Prabir Chowdhury, learned counsel for the appellants, with his painstaking preparation, has contended strenuously that the High Court is wrong in coming to the conclusion that the respondent had constructed the house with permission of the predecessor of the appellant. The respondent has not pleaded any acquiescence in that behalf. Unless the lease deed does contain any term for construction of the house on the non-residential premises of the land, the respondent is not entitled to the protection of Section 5 of the Act. Consequently, he is liable to ejectment under Section 11 of the Assam Non-Agricultural Urban Areas Tenancy Act, 1955, (for short "the Act"). The suit notice terminating the lease is valid in law.

5. The question, therefore, is whether the view of the Full Bench of the High Court is vitiated by any error of law warranting interference ? The High Court, after elaborate consideration of the matter, has held that :

> "Here the suit was filed on 21-1-1960, whereas the notice was received by the defendant on 12-12-1959. Thereafter, the notice is not in accordance with law and the notice of termination without giving one month's time as provided under Section 11 of the Act is not valid.
>
> Next it was held that 'the house was constructed within five years.' There is clear

finding recorded by the courts below that both the structures, one constructed within five years of the lease and also the other one constructed after the earlier structure was gutted by fire, were of permanent nature."

6. The notice to quit is bad in law as one month's notice was not issued to the respondent. On that premise, the Court proceeded to decide on the facts whether the respondent is entitled to the protection of Section 5 of the Act. After elaborate consideration, the Full Bench had held :

> "A tenant although not entitled to build under the contract, has actually built permanent structure on the land of the tenancy for residential or business purpose with the knowledge and acquiescence of the landlord, shall not be ejected by the landlord except on the ground of non-payment of rent."

At p. 22, it was further held that :

> "The contention raised on behalf of the landlord that unless the construction is made within five years of the current lease which is relied upon by a party, such a tenant is not entitled to protection under Section 5(1) (a) of the Act is not correct.
>
> In the present case the permanent structure which was built earlier within the period of five years and thereby acquiring the protection under Section 5(1) (a) of the Act, it could not be said to have been whittled down by the mere fact that the said permanent structure has been gutted by fire. The act of fire in gutting the permanent structure was not within the control of the appellant, it was accidental without any violation on the part of the appellant. This was an event which could not be reasonably anticipated. A loss occasioned by the act of God or vis major or by any event beyond the control of a person, it cannot be said that such loss will fall on him."

On that premise, the Full Bench concluded in para 10 thus :

> "We are firmly of opinion that on the destruction of the permanent structure by accident, beyond the control of the tenant or by any act of God, the protection available to a tenant under the provisions of Section 5, by constructing a permanent structure, do not evaporate. Once the protection enures to the tenant by virtue of his having built the permanent structure, within five years of the lease for the purpose of residence and business, the destruction of the structures by some event beyond the control of the tenant would not deprive the tenant of the said protection provided he is continuing in the tenancy for the purpose of his residence or business."

7. On that finding, the decree of the trial court as confirmed by the appellate court came to be reversed.

8. It is true, as contended by Mr. Prabir Chowdhury, that the tenant is required to establish three essential facts as postulated under Section 5(1) (a) of the Act. It postulates thus :

> "5. (1) (a) "where under the terms of a contract entered into between a landlord and his tenant whether before or after the commencement of this Act, a tenant is entitled to build, and has in pursuance of such terms actually built within the period of five years from the date of such contract, a permanent structure on the land of the tenancy

> for residential or business purposes, or where a tenant not being so entitled to build, has actually built any such structure on the land of the tenancy for any of the purposes aforesaid with the knowledge and acquiescence of the landlord, the tenant shall not be ejected by the landlord from the tenancy except on the ground of non-payment of rent."

9. The following conditions must be satisfied for application of Section 5(1) (a) :

> "(1) Under the terms of the contract of tenancy, the tenant is entitled to build on the land of tenancy a permanent structure.
>
> (2) That pursuant to that liberty, he had actually constructed the building.
>
> (3) A permanent structure must be constructed within five years from the date of the contract of tenancy on the land of tenancy.
>
> (4) That the permanent structure is for residential or business purpose.
>
> (5) The construction was with the knowledge and acquiescence of the landlord."

10. If the aforesaid conditions are satisfied, the tenant shall not be ejected by the landlord from the tenancy except on the ground of non-payment of rent. This view was laid by this Court in Rafiquennessa v. Lal Bahadur Chetri [(1964) 6 SCR 876 : AIR 1964 SC 1511] and Biswambhar Roy v. Girindra Kumar Paul [AIR 1966 6 SC 1908 : 1966 Supp SCR 114].

11. This was construed by this Court in Dhananjoy Singh v. Usha Ranjan Bhadra [ILR (1970) 22 Ass 82 (SC)] (ILR at p. 82). This view was reiterated by this Court in Biswambhar Roy case [AIR 1966 SC 1908 : 1966 Supp SCR 114].

12. It is seen that the High Court after considering the question of law, following the earlier Full Bench judgment of that Court in Bireswar Banerjee v. Sudhir Ranjan Bose [Ass LR 1973 A&N 15] held that the tenant constructed the permanent structure on the land taken on lease within five years from the date of the lease. He is entitled to the protection of tenancy. The mere fact that the said building was destroyed by fire subsequently does not destroy the tenancy rights acquired by the tenant and thereby the tenant is not liable to ejected from the demised premises. Thus, he is entitled to the protection of Section 5(1) (a) of the Act.

13. The decision cited by Mr. Prabir Chowdhury, viz., Venkatlal G. Pittie v. Bright Bros. (P.) Ltd. [(1987) 3 SCC 558 : (1987) 3 SCR 593] (SCR at p. 601) on the nature of the permanent structure as defined in Section 3(d) of the Act as laid down in some of the decisions of the Calcutta High Court referred to by this Court in the above judgment, is of no relevance for the purpose of this case. It is true that Section 3(d) of the Act defines "permanent structure". The permanent structure must be construed as defined in Section 3(d). Since the permanent structure is built as per the permission expressly contained in the contract of lease or by necessary acquiescence of the landlord the tenant constructed it with the knowledge of the landlord. What will be a permanent structure for the purpose of the protection of Section 5 of the Act is a question of fact. The question of nature of the structure, i.e., whether it is permanent within the meaning of Section 3(d) of the Act, was not put in issue before the High Court. Therefore, we cannot go into that question for the first time in deciding the nature of the construction made by the respondent before the fire had broken out. Under these circumstances, the above judgment renders little assistance to the appellant.

14. He then contended that it is for the tenant to prove that the landlord had permitted the construction. In the light of the recitals in the lease deed, no such permission was given in writing; so it is not valid in law. Therefore, the High Court was not right in concluding that he has constructed the permanent structure. Therefore, the landlord cannot be deprived of his statutory right to eviction on the ground of acquiescence without any pleading or proof in this behalf. We find no force in the contention. He had constructed the house within five years obviously with the knowledge of the landlord and he acquiesced to it as it was not objected to.

15. It is rather unfortunate that the question was not raised by the appellant in the High Court and we do not find the same issue in the pleadings. This Court in Karam Singh Sobti v. Pratap Chand [(1964) 4 SCR 647 : AIR 1964 SC 1305] (SCR at p. 649) merely considered the question whether the construction made by the tenant should be regarded as a permanent structure in relation to the legality of the plot ? It was found that he has no evidence to show when exactly the said house was constructed. In other words, the ratio therein is with reference to the period during which the construction was made and this Court did not find that it was not a permanent structure. The decision therein is of little assistance to the appellant.

16. In Canara Bank v. Canara Sales Corpn. [(1987) 2 SCC 666] the question was whether the customer account-holder to whom the monthly pass-sheets of account are communicated is deprived of his right to file a suit for account. It was contended that since in the regular course, pass-sheets of the account were being communicated and he had acquiesced to the same, the suit was not maintainable. In this context, this Court had held that the question of acquiescence does not arise so long as he is entitled to the settlement of account. The ratio also is not of any assistance to the appellant. In Shiromani v. Hem Kumar [(1968) 3 SCR 639 : AIR 1968 SC 1299] (SCR at p. 644) the question therein was under the Mitakshara Law of the Benares School of Hindu Law, viz., whether a wife is entitled to an equal share in the property along with the sons. There was a prior partition between the sons evidenced by Ex. D-4 to which their mother was a signatory. It was contended in the suit filed by the mother that she had acquiesced to the division of the property and thereby when she claimed her share was declared disentitled. In this context, it was held that the plea of acquiescence must be specifically pleaded and proved. In that case, it was not done. The ratio thereof has no application to the present case for the reason that the appellant has not disputed the construction of the house and that it was not his case that his predecessor-in-title had acquiesced to the construction of the permanent structure in the land leased out to the respondent.

17. He has also placed reliance on an unreported judgment of this Court in Pramila Rani Nag v. Mohd. Mir Hussain [(1996) 7 SCC 387] which is on the nature of the construction. That also has no relevance to this case.

18. Thus we hold that the view taken by the High Court is not vitiated by any error of law warranting interference. The appellant is entitled to withdraw the amounts under deposit.

19. The appeal is accordingly dismissed. No costs.