Aundiappa Nadar

Vs

Gnanambal Ammal and Others

Civil Appeals Nos. 4753-54 of 1998

(S. B. Majmudar, M. Jagannadha Rao JJ)

14.09.1998

JUDGMENT

M. JAGANNADHA RAO, J.

1. Leave granted.

2. These two appeals have been preferred by the tenant against the judgment of the High Court of Madras dated 20-8-1996 in SA No. 1922 of 1984 and CRP No. 4646 of 1984, reversing the judgment of the Additional Judge, City Civil Court, Madras dated 25-4-1982 in AS No. 225 of 1981 and CMA No. 172 of 1981 and restoring the judgment of the 2nd Assistant Judge, City Civil Court, Madras dated 23-7-1980 in OS No. 2990 of 1970 and IA No. 12515 of 1970. The matters arise under the Madras City Tenants' Protection Act, 1921 (Act 3 of 1922) (hereinafter called "the Act"). That Act, as amended by Act 19 of 1955, confers certain rights on the tenant of the land to purchase the same if he or his predecessor-in-interest has put up a structure before 12-9-1955, on the leased land. On the facts of the case before us, the suit was filed in 1970 by the respondent and such a right was indeed available to the tenant as per the amendment by Act 19 of 1955, provided the tenancy in land was created on or before 12-9-1955 and the superstructure was also put up by the tenant before 12-9-1955 and before the tenancy of the land was terminated. Though the appellant in this case exercised such an option, the trial court rejected the same and decreed the eviction suit filed by the respondent-landlords while the first appellate court dismissed the Suit. The High Court set aside the appellate court's judgment and restored the trial court's judgment decreeing the suit in favour of the a respondent-landlord. That is how the tenant is in appeal before us.

3. The suit for eviction was filed by the respondents on 22-6-1970 after issuing a notice of termination of tenancy dated 12-12-1968 in respect of a rectangular piece of land, B Schedule 25'x 40' and for injunction against the appellant from constructing a structure in an area around the northern and eastern side of B Schedule (which piece was called C Schedule) wherein the tenant was making preparation to put up further constructions instead of removing the existing constructions already made as directed in an earlier suit, OS No. 2051 of 1965 which was then pending in second appeal. The sum total of B and C Schedules is described as A Schedule (25.75' x 142'). In other words, if is the encroached portion, eviction in regard not only for the tenanted portion B (25.75' x 40') but also for C, - in all for A (25.75' x C 142') was sought. Damages of Rs. 4500 as Rs. 125 per month were also claimed.

4. The appellant-tenant filed, within the prescribed period, an application, IA No. 12515 of 1970 on 14-8-1970 under Section 9 of the Act claiming a right to purchase the entire A Schedule, i.e., B+C. According to him, the B Schedule was leased to him in 1954. Soon thereafter he put up the structure

and subsequently, the landlord had orally leased the Schedule strip also. The plea for purchase of B+C Schedules was put up in spite of a judgment in OS No. 2051 of 1965 by the trial court and the first appellate court that only Schedule was leased to him. This was because the tenant's second appeal against the judgment of the first appellate court was pending in the High Court when the tenant filed the above IA No. 12515 of 1970 in the trial court in the present suit.

5. A counter-affidavit was filed by the landlady-plaintiff in that IA in November 1970 stating that the appellant was a tenant only of Plot B (25.75' x 40') and not of Schedule. In regard to the question whether any construction was made by the appellant-tenant, the respondent-plaintiff in her counter in the IA admitted in para 4 that the tenant had put up a structure in 1965 but not before the crucial date 12-9-1955. That admission reads as follows :

> "At the time when the defendant came to occupy the land, only a small superstructure of the extent of 8' x 10' was in existence and only in the year 1965, the defendant removed the original thatched superstructure and proceeded to construct the pucca superstructure over an area of about 14' x 40'. I deny that the defendant was, at any time, the tenant of the entire plot described in Schedule A to the plan."

(This admission has gained importance in this appeal because of the new plea raised for the tenant on the basis of Act 2 of 1980.) The landlady, however, contended that the defendant was not entitled to the benefits of the Act as he did not erect the superstructure for there was already a superstructure on the land, that the plaintiff's late husband had earlier filed OS No. 170 of 1957 in which there was a compromise on 17-7-1958 which resulted in a fresh tenancy at Rs. 17 p.m. and that the appellant having demolished the existing structure and "having constructed new superstructure" "after the prescribed date", (i.e., 12-9-1955) he could not claim any right under the Act. In the suit, the appellant filed written statement on 3-10-1970 denying the plaintiff's claim for possession.

6. The trial court disposed of the suit and the IA on 23-7-1980. It noted that the appellant delivered up the Schedule portion after he lost in the second appeal arising out of OS No. 2051 of 1965 on 22-1-1970, and that, therefore, the dispute remained as regards the B Schedule property. It noted that the burden of proof was on the appellant to prove that he was a tenant before 12-9-1955 and that he had put up a structure before that date. It held that it was not the case of the appellant that he had put up a structure before 12-9-1955. The appellant as DW 1 admitted that he purchased the superstructure from one Krishnaswami Naidu which fact was not pleaded C either in the written statement or in the IA. It was not shown that the said Krishnaswami Naidu was a tenant under the owner, Kanniappa Asari. The said Krishnaswami Naidu was not even examined to show he was a tenant or had put up the superstructure prior to 12-9-1955. Though the appellant stated in evidence that he had a letter to show that he had purchased the superstructure, he did not produce the same. The appellant admitted that he had converted the tiled shed into a zinc shed in 1965, i.e., subsequent to 12-9-1955. Mere increase in rent under the compromise on 17-7-1958 did not create a new lease. On these findings, the suit was decreed for possession of the land and damages of Rs. 2050 and IA No. 12515 of 1970 filed under Section 9 by the appellant was dismissed.

7. On appeal, the judgment of the trial court was reversed holding that the appellant had, in fact, stated in his evidence that he had constructed the superstructure immediately after taking lease in June 1954 and in cross-examination, no question was put to him that he did not put up any superstructure in 1954 or before 12-9-1955. There was no evidence of the plaintiff that the appellant put up the structure after 12-9-1955. In such circumstances, it was to be accepted that the appellant had put up the superstructure in June 1954. The appellate court stated that in the earlier suit, OS No.

2051 of 1965, the plaintiff accepted that the superstructure was put up in 1954 itself and that the plaintiff's husband who purchased the property during 1955-56 would not have known as to when any construction was put up. No foundation walls were constructed. In such a situation, basing on the evidence of the defendant as DW 1 that the superstructure was purchased from Krishnaswami and renovation was done in 1965, it could not be said that the superstructure was totally demolished and a new construction was put up. No new tenancy was accepted on 17-7-1958 when the earlier suit of 1957 was compromised. On the evidence, it appeared that there was some superstructure, but it was retained and only the tiles were replaced with zinc sheet. Hence, it was proved that the lessee had put up a structure before 12-9-1955 and the same was renovated in 1965. On these findings, the appeal was allowed, the suit for possession was dismissed and the CMA of the tenant was allowed.

8. In second appeal and in the revision against the CMA, the High Court set aside the appellate judgment. It held that even though there was no dispute in respect of Schedule, the appellate court gave a decree for it and this showed non-application of mind by the appellate court. In the IA of the tenant under Section 9, the tenant had taken the plea that the lease was in 1954 for the whole of A Schedule and not merely for B Schedule and the same stand was taken by him at the trial. Once in the earlier suit, OS No. 2051 of 1965, it was held by the trial court, the first appellate and second appellate courts on 17-8-1968, 22-1-1970 and 26-8-1973 respectively that the appellant had encroached on Schedule, the plea of tenancy for the whole of A Schedule (i.e., B+C), ought to have been rejected by the appellate court and it could not have given relief for B Schedule "which was some other property". The High Court observed :

> "By claiming that he is a tenant of the entire property, it follows that it is not a tenancy as admitted by the plaintiff and the defendant wants fixity in respect of some other property."

The High Court observed that the appellate court had not also considered the evidence of the defendant as DW 1 that he had purchased the superstructure from one Krishnaswami Naidu, for which there was neither pleading nor proof. That meant that there was no structure put up by the appellant before 12-9-1955. Though the appellant referred to a letter as proof of purchase of the superstructure, the same was not produced. On these findings, the High Court set aside the appellate decree and restored that of the trial court.

9. In these appeals, a new question of law was raised by the learned Senior Counsel, Shri S. Sivasubramaniam for the appellant. It was argued that the High Court as well as the trial court failed to refer to and consider the admission of the plaintiff in para 4 of his counter-affidavit filed in IA No. 12515 of 1970 in October 1970 (extracted above) that the appellant had put up a superstructure in 1965. On that basis, the appellant was entitled to take advantage of the amendment to the Act by the Madras City Tenants' Protection (Amendment) Act, 1979 (Act 2 of 1980) which was published in the Gazette on 3-3-1980. It was contended that in view of the judgment of the Madras High Court in Raja D. V. Appa Rao Bahadur v. C. T. Senthilnathan ((1988) 101 LW 400 the protection of the Act must be deemed to have been extended to tenancies created after 12-9-1955 and also to cases where superstructure was put up after 12-9-1955, that being the cut-off date fixed by the Amending Act 19 of 1955. In that case, though an argument was advanced that the Act was given retrospective effect only from 9-1-1974 and that the amendment applied only to tenancies created after 9-1-1974 and before 3-3-1980 (when it was published in the Gazette) and that it did not apply to tenancies created between 12-9-1955 and 9-1-1974, the said contention was rejected and it was held that the Amending Act of 1979 (Act) 2 of 1980) applied also to tenancies created after 12-9-1955 up to 9-1-1974 in view of the fact that Section 3(iii) of the Amending Act substituted Section 1(3) of the

principal Act in its entirety. It was also held that the a retrospectivity from 9-1-1974 was intended to validate certain executive orders passed by the Government with effect from 9-1-1974 extending the principal Act to certain other townships and was not intended to affect the provisions of Section 1(3) as substituted.

10. Learned Senior Counsel for the appellant also submitted that the second appellate court had erred in thinking that the B Schedule property was a property different from the A Schedule property. The High Court did not notice that B Schedule was part of A Schedule and that once C Schedule was surrendered, the defendant could limit the plea of tenancy to a lesser extent, i.e., B Schedule. It was argued that the finding of fact arrived at by the appellate court was disturbed by the High Court on a misapprehension of the schedules.

11. On the other hand, learned Senior Counsel for the respondents, Shri M. S. Ganesh, contended that the High Court was justified in interfering with the findings of fact arrived at by the first appellate court as the said Court had not given proper consideration to the admission of the defendant that he purchased the superstructure from one Krishnaswami Naidu and there was neither pleading nor proof that Krishnaswami Naidu was a previous tenant of the owner. On the new question of law raised before us by the appellant based on Madras Act 2 of 1980, learned Senior Counsel for the respondent contended that the view taken by the Madras High Court in Raja D. V. Appa Rao Bahadur case (1998) 101 LW 400) was not correct and that the Amending Act 2 of 1980 being retrospective only from 9-1-1974, - even if there was an admission of the plaintiff that the appellant made a fresh construction in 1965, - Act 2 of 1980 would not apply. It would not apply to tenancies created or superstructures constructed during the period 12-9-1955 to 9-1-1974.

12. On the above contentions, the following points arise for consideration :

> (1) Was the High Court justified in disturbing the findings of fact arrived at by the lower appellate court and in holding that no construction was made by the appellant before 12-9-1955 and that no superstructure was put up by a previous tenant before 12-9-1955 nor was any such structure purchased by the appellant ?
>
> (2) Does the Madras Act 2 of 1980 help the appellant-tenant if the admission of the respondent-plaintiff that the appellant-tenant had made a fresh construction in 1965 is to be accepted ?
>
> (3) Whether the matter requires to be remanded for purposes of determining the "minimum extent" necessary for the convenient enjoyment by the tenant under Section 9(b) of the Act ?

Point 1

13. On the factual issue, the High Court may be partly right in stating that the lower appellate court had not considered the evidence of the appellant-tenant to the effect that he had purchased the superstructure from Krishnaswami Naidu. There was no evidence that the said Krishnaswami Naidu was a former tenant of the same landlord. We find that the first appellate court no doubt made a reference to Krishnaswami Naidu in its judgment but did not specifically say why it was not putting the said fact against the tenant. On the other hand, the lower appellate court concentrated upon the other evidence in the case regarding construction of the shed by the appellant well before 12-9-1955, the cut-off date. That was the basis for the finding of the lower appellate court. The High

Court, in our view, was in error in thinking that the B Schedule property was different from the A Schedule property. B Schedule was part of A Schedule. Further, if the tenant in his IA and written statement had pleaded tenancy for the whole of A Schedule (because his second appeal against OS No. 2051 of 1965 was pending at that time) the High Court ought to have considered the question as to whether the appellant could not limit his claim of tenancy to a lesser extent, i.e., B Schedule. Obviously, the High Court thought that B Schedule was a different property from A Schedule as appears from the passage extracted from the judgment earlier.

14. It, therefore, becomes necessary to remand the matter to the High Court on this issue of fact - subject of course to our decision on Point 2. If the appellant's contention under Point 2 based on the Madras Act 2 of 1980 read with the respondents' admission in para 4 of the counter in the IA that the appellant made construction in 1965 is to be accepted, then remand under Point 1 will not be necessary. Point 1 is decided accordingly.

Point 2

15. This point, as already stated, has been raised by the appellant for the first time before us and is based upon the Madras Act 2 of 1980 and the admission of the respondent-plaintiff in the counter to the IA of the tenant. The admission - which has already been extracted - is to the effect that the appellant made the construction on the land in 1965.

16. The question is whether even if the lease was of 1954 and the superstructure was constructed by the tenant in 1965 (and not before 12-9-1955), the application of the appellant filed in 1970 by the tenant under Section 9 of the Act could be allowed granting him the right to purchase the land covered by B Schedule.

17. As already stated, the appellant's counsel relied upon the judgment of Srinivasan, J. (as he then was) in Raja DV Appa Rao Bahadur v. C. T Senthilnathan, (1998) 101 LW 400) As stated above, the Madras Act 2 of 1980 was given retrospective effect in Section 1(2) of that Act only from 9-1-1974. Basing on that fact, the learned Senior Counsel for the respondents, Shri M. S. Ganesh contended that the beneficial provisions of the amendment were applicable only to tenancies created after 9-1-1974 and up to 3-3-1980 when Act 2 of 1980 was gazetted. It was argued that though the Act as amended by Act 19 of 1955 gave benefit to tenancies created up to 12-9-1955, there was a gap for the period from 13-9-1955 to 8-1-1974 and tenants whose tenancies came into existence during that period were not entitled to file any application under Section 9 of the Act. It was argued by the learned Senior Counsel that the view taken in Raja D. V. Appa Rao Bahadur case was not a correct and that if there was no construction before 12-9-1955, then Act 2 of 1980 would not apply and the appellant could not succeed.

18. It may be noticed that under certain GOs, the Government of Tamil Nadu had extended the benefit of the Act to some townships with effect from 9-1-1974 and a doubt arose whether the notifications were ultra vires the Act. As stated in the Statement of Objects and Reasons for the Bill which preceded Act 2 of 1980, that was the main reason for the Amending Act being given retrospective effect from 9-1-1974. But while validating the GOs, the Act also inserted by virtue of Section 3(iii), a fresh Section 1(3) in the principal Act, by way of "substitution". Section 1(3) of the Act (as it stood after the amendment in Act 19 of 1955) and before it was amended by Act 2 of 1980 read as follows :

> "1. (3) This Act shall apply in the city of Madras only to tenancies of land created

> before the commencement of the Madras City Tenants' Protection (Amendment) Act, 1955 and in any municipal town or village to which this Act is extended by notification under sub-section (2), only to tenancies created before the date with effect from which this Act is extended to such town or village."

After the amendment by Act 2 of 1980, Section 1(3) of the principal Act reads as follows :

> "1. (3) This Act shall apply, -
>
> (a) in the areas in which this Act is in force on the date of publication of the Madras City Tenants' Protection (Amendment) Act, 1979 in the Tamil Nadu Government Gazette, only to tenancies created before that date;"

19. From the express language of Section 1(3) as substituted by the Madras Act 2 of 1980, it is clear that it is to apply "to tenancies of land created" before the date of the Gazette publication of that Act, i.e., 3-3-1980. Therefore, it is clear that so far as Section 3(iii) of Act 2 of 1980 which amended Section 1(3) of the principal Act was concerned, it made the Act retrospective for the period anterior to 9-1-1974. In our view, Section 1(2) cannot, therefore, restrict the retrospectivity created by Section 3(iii) of Act 2 of 1980. No doubt, Section 1(2) of Act 2 of 1980 states that except Sections 9, 10 of the Amending Act, other provisions shall be deemed to have come into force on 9-1-1974. But these words, in our view, were intended merely to validate certain executive orders issued with effect from 9-1-1974 extending the Act to other townships and were not intended to override the express provisions of Section 3(iii) of the Amending Act 2 of 1980.

20. Learned Senior Counsel for the respondents invited our attention to para 4 of the Statement of Objects and Reasons, which says :

> "It has also been decided to amend the said Act so as to secure its application over all areas from a uniform date. It has further been decided that the crucial date shall be the date of publication of the proposed Amendment Act in the Tamil Nadu Government Gazette in respect of the tenancies in the areas to which the provisions of the said Act have already been extended and in respect of tenancies in the areas to which the provisions of the said Act are proposed to be extended in future, the crucial date will be the date on which the said Act is extended to such area."

Learned Senior Counsel contended that the words "uniform date" meant 9-1-1974 and hence the date of retrospectivity is only from 9-1-1974 for all purposes. We are unable to agree. This contention ignores the latter part of the above passage which says that the said idea of giving uniform retrospectivity is confined to the applicability of the Act to areas already extended and to areas proposed to be extended. It does not affect the width and amplitude of Section 3(iii) of the Amending Act by which a new Section 1(3) was substituted. This aspect is also clear from Sections 9 and 10 of Act 2 of 1980 which proceed to validate actions taken by executive orders subsequent to 9-1-1974.

21. We accordingly hold that Act 3 of 1922 applies to all tenancies created before 3-3-1980 and also applies to the tenancies created during the period from 9-1-1974 to 3-3-1980 in respect of areas to which the Act was applicable before 1955. We agree, with great respect, with the reasoning and conclusion of Srinivasan, J. (as he then was) in Raja D. V. Appa Rao Bahadur case (1998) 101 LW 400)

22. On the facts of this case, going by the admission of the respondent - landlady referred to above, the position is that the land was leased in 1954, the tenant put up the structure in 1965, the termination notice was given thereafter on 12-12-1968 and the eviction suit was filed in 1970. The Amending Act 2 of 1980 applies to all tenancies created before 3-3-1980 provided the construction is made before 3-3-1980 and before the date of termination of the tenancy, i.e., 12-12-1968. It does not matter if the construction is after 12-9-1955.

23. We are, therefore, of the view that the second point urged by the learned counsel for the appellant is required to be accepted and the decree for possession and profits as granted by the High Court in respect of B Schedule is to be vacated and the decree of the lower appellate court is to be restored, subject to our direction contained under Point 3.

Point 3

24. Once the conclusion is reached that the tenant is entitled to purchase the land beneath the structure put up by him in Schedule B, the question arises as to the extent of land appurtenant to the said structure, that he could be allowed to purchase.

25. Sub-clause (b) of Section 9 of the Act states that on the application of the tenant, the court shall first decide the "minimum extent" of the land which may be necessary for the convenient enjoyment of the tenant. We may state in this connection that there was some discussion before us as to the minimum extent that could be so left to the tenant out of the land in Schedule B appurtenant to the structure. We adjourned the matter to see if the parties could arrive at a settlement. Unfortunately, the parties could not arrive at any settlement.

26. In our order dated 21-7-1998, we recorded that the tenant was willing to leave 5 ft of the entire land along the line GF in the chart at para 33 of Annexure A of Volume II of the paper-book. The matter was adjourned to find out if the landlady was willing to accept this offer. The order dated 21-7-1998 reads as follows :

> "This matter was placed for finding out whether the parties are in a position to settle the matter or not. Today the petitioner is present. His counsel has informed us after consulting him that by way of settling the dispute about the B Schedule property for which the present dispute now survives, he is prepared to surrender out of this property 5 ft land on the entire line G to F on the chart at p.33, Annexure A of Volume II of the paper-book and the line G and F can be treated as shifted backwards accordingly. Leaving aside that much portion, the rest of the Schedule B property, namely, D, E, shifted line F and G will be purchased by him and he is willing to purchase the same and he is also willing to pay the appropriate market price for the land as per the provisions of the Act. It is obvious from the map at p.33 aforesaid that the portion M, N, D and O comprises of the land above which the structure of the petitioner stands. The portion M, E, F, G, O and N is lying vacant. Learned counsel for the respondent landlady seeks time to have instructions from her in this connection. If the respondent landlady is agreeable to this suggestion of the petitioner, the next question will pertain to the appropriate market price to be paid by the petitioner. The modalities which are to be resorted to in this connection will be decided hereafter subject to finding out the response of the respondent landlady to the offer made by the petitioner before us. For that purpose, six weeks' time is granted, as prayed for. To be placed on 8th September; 1998, when both the

petitioner and the respondent landlady shall personally remain present along with their counsel."

27. The matter was heard again on 8-9-1998 when both the parties were present. The landlady was not agreeable for just 5 ft but was wanting some more extent of vacant land or rather the whole of the vacant land. This was not acceptable to the tenant.

28. We have, therefore, no choice but to remit the matter to the trial court for determining the minimum extent of the land from the B Schedule property which may be necessary for the convenient enjoyment of the tenant who is held entitled to purchase the structure in B Schedule and the appurtenant land in B Schedule to the minimum extent required as specified in Section 9(b) of the Act.

29. The matter is, therefore, remanded to the trial court for going into the above issue. The question of fixing the market value of the land to be purchased by the tenant will also arise for consideration before the trial court. The trial court will, therefore, decide these issues after giving reasonable opportunity to the parties. The matter is remanded to the trial a court accordingly.

30. As this litigation had started in 1970 and nearly twenty-eight years have passed by, we direct the trial court to dispose of the above matter expeditiously and at any rate, within four months from the receipt of this judgment.

31. Appeals are allowed and the matter remanded as above. There will be no order as to costs.