SUPREME COURT OF INDIA

VANNATTANKANDY IBRAYI

Vs.

KUNHABDULLA HAJEE

13/12/2000

(V.N.Khare, S.N.Phukan)

Appeal (civil) 2908 1999
Appeal (civil) 2909 1999

J U D G M E N T

KHARE, J.

In these appeals, two questions that arise for consideration are these - (a) whether the tenancy in respect of the premises governed by The Kerala Buildings (Lease and Rent Control) Act (hereinafter referred to as the State Rent Act) is extinguished by destruction of the subject matter of tenancy i.e. the premises by natural calamities and (b) on the destruction of property whether the civil court has jurisdiction to entertain and try the suit for recovery of possession of land brought by the landlord. The case in brief is that the predecessor-in-interest of the respondent landlord let out a shop to the defendant-appellant herein. The said shop was raised to the ground due to accidental fire on 9.1.1990 and there remained only the vacant land. The appellant- tenant, after destruction of the shop constructed a new shop on the same site without the consent and permission of the respondent-landlord. Under such circumstances, the respondent landlord filed a suit for mandatory injunction for demolition of the new shop constructed by the appellant and for recovery of possession of the land on which the old super structure stood. The contention of the appellant in the suit was that he was entitled to put up a new super structure in place of the old one since by virtue of Section 108(B)(e) of the Transfer of Property Act (hereinafter referred to as the Act) he, having not opted to render the tenancy void, the tenancy subsists. The trial court was of the view that after the destruction of the shop the tenancy in respect of land still subsists and the plaintiff is not entitled to recover the possession of the site over which the old shop existed. However, the trial Court granted decree for mandatory injunction directing the appellant to demolish and remove the new shop constructed by him as the same having been constructed without the consent and permission of the landlord. The plaintiff-respondent, as well as the defendant-appellant, filed separate appeals against the decree of the trial court. The First Appellate Court dismissed both the appeals and affirmed the decree of the trial court. Aggrieved, both the defendant-appellant and the plaintiff-respondent preferred two separate Second appeals. The High Court allowed the second appeal filed by the plaintiff-respondent, whereas, the second appeal filed by the defendant-appellant was dismissed. The High Court was of the view that on the total destruction of the premises by natural calamity the tenancy stood extinguished and, therefore, the landlord is entitled to the decree for recovery of possession of the land. It is in this way the defendant-appellant is in appeal before this Court.

Before we proceed to discuss the questions formulated above, it is necessary to state the admitted

facts of this case. It is not disputed that the shop of which the appellant was a tenant was governed by the State Rent Act. It is also not disputed that the tenanted shop was completely destroyed due to natural calamity i.e. by fire and it was not pulled down by the landlord. It is also admitted that as a result of destruction, the land on which the super structure stood was reduced to vacant land. It is also not disputed that what was let out to the appellant was shop and not land beneath the shop. It is also not disputed that the tenant made a new construction on the same site without the permission and consent of the landlord and the same was unauthorised.

Learned counsel appearing for the appellant urged that even if the tenanted shop was totally destroyed, there was no destruction of the tenancy. His argument is that the appellant is entitled to squat on the vacant land by virtue of Section 108(B)(e) of the Act, as he has not exercised the option for rendering the tenancy void. In other words, the argument is that even if the tenanted shop has been completely destroyed making it impossible for the tenant to occupy or use it, still the tenancy subsists in favour of the appellant.

In Simper vs. Coomba, (1948) 1 All England Report 306, a building was destroyed by explosion of a bomb during Second World War. The question arose whether tenancy was extinguished by the destruction of the building. Lord Denning, J. held that it was not. The Learned Judge observed thus:

The position at common law is plain. She had a contractual tenancy and that tenancy has never been determined by due notice to quit. It, therefore, continues in existence. The destruction of the house by a bomb did not determine the tenancy. It is well settled that the destruction of a house does not by itself determine the tenancy of the land on which it stands.

This statement of law does not explain whether the destruction of a house will destroy the tenancy of the house itself but only indicates its effect on the tenancy of the land. In Woodfalls Law of Landlord and Tenant, 28th edition, Vol. I para 1-2056, page 928 - the proposition stated as thus:

A demise must have a subject-matter, either corporeal or incorporeal. If the subject matter is destroyed entirely, it is submitted that the lease comes automatically to an end, for there is no longer any demise. The mere destruction of a building on land is not total destruction of the subject matter of a lease of the land and building. So demise continues.

The last two sentences, i.e. The mere .. and building, so demise continues are based upon the decision by Lord Denning in Simper vs. Coomba (supra). It appears that in Simper vs. Coomba (supra), there was a tenancy of building and land and therefore, it is inapplicable in the case where tenancy is in respect of building alone governed by the State Rent Act which is a case before us.

In Article 592 of American Jurisprudence, the statement of law on the consequences of complete destruction of a building is stated as under:

592. Complete destruction. The common-law rule that a lessee is not relieved of his obligation to pay rent through the accidental destruction of the building demised to him presupposes that some part of the premises remains in existence for occupation by the tenant, irrespective of the destruction. If the destruction of the premises is complete - nothing remaining, the subject matter or thing leased no longer existing then the liability of the tenant for rent cases. Thus, it has been held that the destruction of the property extinguishes the liability for rent, as under a lease of a river front and landing consisting of a narrow footing at the base of a bluff without any wharf, dock, or pier, where the unprecedented ravages of the river effectually took away the use of the landing by

washing away all but a shallow fragment of the lot. Upon the termination of lease in advance of the expiration of the term, by reason of the destruction of the leased premises, the lessor is entitled to recover such part of the rent for the entire terms as is proportionate to the period of occupancy by the lessee.

The consequence of destruction of buildings has been discussed by R.E.Megarry and H.W.R.Wade in The Law of Real Property as under:

Destruction of buildings. If there is a lease of land and buildings, the destruction of the buildings does not affect the continuance of the lease, so that the lessee remains entitled to possession of the land and any buildings that may subsequently be erected on it. But the complete destruction of the while of the demised premises, as where an upper-floor flat is destroyed by fire, produces problems that yet have to be solved. One view is that the tenancy would come to an end, and with it liability on the covenants, for there would no longer be any physical entity which the tenant could hold of his landlord for any term, and there can hardly be tenure without a tenement. Another view is that the tenancy (and with it liability on the covenants) would endure in the air space formerly occupied by the flat, and would thus attach to the corresponding flat in any building erected to replace the building destroyed. The former view has theoretical attractions, and the latter view practical merits, not free from possible complications, e.g., if there were substantial differences between the segments of air space occupied by the old flats and the new.

In Mahadeo Prasad vs. Calcutta D & C Company (A.I.R) 1961 Cal.70), it was held thus:

The structure has been demolished and is not in existence, so no question of tenants option arises with regard to the non-existing properties. The structure was leased out, not the land underlying and after the structure was demolished, the tenant cannot be put in possession of that structure as a matter of fact even if he would like to be so put in possession.

In George vs. Varghese (1979 K.L.T. 859), there was a complete destruction of a shop let out to the tenant by fire. The tenant shifted his business elsewhere. Subsequently, the landlord put up a fresh construction on that very site where the earlier tenanted shop existed. After the shop was constructed, the tenant claimed that his tenancy continued and he is entitled to occupy the re-constructed shop. The Kerala High Court held that where after the destruction of the lease hold property landlord constructed new shop, the tenant cannot compel the landlord to surrender possession of newly constructed shop on the premise that the old contract of tenancy continued.

In Thomas vs. Moram Mar Baselious Ougen (AIR 1979 Kerala, 156), the tenanted shop was wholly destroyed due to fire. The landlord brought a suit for recovery of arrears of rent, eviction and recovery of damages as well as injunction restraining the tenant from construction to any unauthorised structure on the land. The tenant defended the suit by asserting that notwithstanding the destruction of the shop his monthly tenancy continued. The High Court held thus:

It is presumably to avoid a contingency of the lessee being fastened with the liability of payment of rent even if a material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let, that the tenant is conferred an option by S.108(e) to treat the contract as void. That does not mean that in a case where the subject matter of the lease like the building here is totally destroyed, the tenant is entitled to squat on the ground where the building was situate or construct a new building in its place or require the landlord to put up a new structure.

A lease as such could be determined only in one of the ways pointed out in S.111 of the Transfer of Property Act. These ways of determination denote the continued existence of the subject matter of the lease. Under S.108(e) even if a material part of the lease is destroyed or rendered substantially or permanently unfit for the purposes for which it was let out and such injury is not covered by the lessee, the lease though continuing can be treated as void by the lessee and thus get rid of his liabilities under the demise. But it would be too much to say that if there is a total destruction of the subject matter of the lease, and that too on account of the wrongful act of the lessee he can treat the lease as continuing, and either construct the building in the place of the destroyed building the subject matter of the lease or require the landlord to reconstruct the building. The lease being a transfer to enjoy the property transferred, with the total destruction of the property the lease cannot be considered as continuing, there cannot be a lease subsisting in regard to a property not in existence. Therefore the first defendant is liable to be evicted."

In Siddharthan vs. Ramadasan (AIR 1984 Kerala 181), it was held that when there was a total destruction of the shop the tenancy stood extinguished as the demise must have a subject matter and if the same is destroyed, the tenancy comes to an end.

The aforesaid decisions show that where the tenancy is exclusively for premises and not for land and on the destruction of the subject matter the tenancy stands extinguished. However, the Bombay High Court in Hind Rubber Industries Pvt. Ltd. vs. Tayebhai Mohammedbhai Bagasarwalla (AIR 1996 Bombay 389) and a Division Bench of Kerala High Court in V.Kalpakam Amma vs. Muthurama Iyer Muthurkrishna Iyer (AIR 1995 Kerala 99) have taken a contrary view of the matter.

Learned counsel appearing for the appellant pressed into service the aforesaid two decisions, one in Hind Rubber Industries Pvt Ltd. (supra) and second in V. Kalpakam Amma (supra) and contended that on the destruction of the building the tenancy right of the tenant is not extinguished. It is also stated that a special leave petition filed against the decision in Hind Rubber Industries Pvt. Ltd. (supra) was dismissed by this Court and, therefore, the said decision has seal of approval by this Court. In the case of Hind Rubber Industries Pvt. Ltd. (supra) the plaintiff was the owner of the building. The said building was let out to the defendant and the building so let out caught fire and the building occupied by the defendant was gutted and destroyed. The plaintiff brought a suit in the City Civil Court, Bombay for mandatory injunction restraining the defendant from carrying out any work or construction on the disputed land or enter upon the said laid. The defendant raised an objection that the suit filed by the plaintiff in City Civil Court was not maintainable. A preliminary issue was struck as to whether the Court had jurisdiction to entertain the suit. The trial Court held that it had jurisdiction to entertain and try the suit. On a Civil Revision petition filed by the defendant, the Bombay High Court held that since on the destruction of the property the tenancy is not extinguished and relationship of landlord and tenant continued to exist, therefore the City Civil Court had no jurisdiction to entertain and try the suit. While holding so the High Court relied upon Section 108 (B) (e) of the Act which runs as under:

108(B)(e) If by fire, tempest or flood, or violence of any army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void;

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision;

The aforesaid Section provides that in case of destruction of the property by fire, tempest or flood, or violence of any army lease may be rendered void at the option of the lessee provided that such injury to the leased property has not been occasioned by the wrongful act or default of the lessee. According to the High Court the rights of the tenant in leased property subsisted even if the leased premises has been destroyed by fire, unless the tenant exercises his option that the tenancy is rendered void. The question therefore arises whether on destruction of tenanted shop governed by the State Rent Act, the tenant can assert his possession on the vacant land on the footing that the tenancy continued to exist under Section 108 (B) (e) of the Act. In other words whether in the aforesaid situation the provisions of Section 108 (B) (e) has any application.

In V. Kalapakam Ammas case (supra) the Kerala High Court held that where a premises governed by the State Rent Act is destroyed by fire the tenancy does not continue to exist under Section 108 (B) (e) since the said Section has no application to such a situation. However, the High Court held that the tenants tenancy continued to exist under the State Rent Act by virtue of the definition of the building in the Act.

In V. Dhanapal Chettiar vs. Yesodai Ammal [1979 (4) SCC 214] the question arose as to whether the landlord is required to give notice under Section 106 of the Transfer of Property Act before filing a petition for eviction under Tamil Nadu Building (Lease and Rent Control) Act. In that context it was held thus :

Purely as a matter of contract a lease comes into existence under the Transfer of property Act. But in all social legislations meant for the protection of the needy, there is appreciable inroad on the freedom of contract and a person becomes a tenant of a landlord even against his wishes on the allotment of a particular premises to him by the authority concerned. Now, under the Transfer of Property Act no ground for eviction of a tenant has to be made out once a contractual tenancy is put to an end by service of a valid notice under Section 106. Once such a notice is served it is open to the lessor to enforce his right of recovery of possession of property. But when under the various State Rent Acts it has been provided that a tenant can be evicted on the grounds mentioned in certain sections of the said Acts no question of determination of a tenancy by notice arises. Once the liability to be evicted is incurred by the tenant he cannot turn round and say that the contractual lease has not been determined. The action of the landlord in instituting a suit for eviction on the ground mentioned in any State Rent Act will be tantamount to an expression of his intention that he does not want the tenant to continue as his lessee and the jural relationship of lessor and lessee will come to an end on the passing of an order or decree for eviction. Until then under the extended definition of the word tenant under the various State Rent Acts the tenants continues to be tenant even though the contractual tenancy has been determined by giving of a valid notice under Section 106 of the Transfer of Property Act, 1882.

In Pradesh Kumar Bajpai vs. Binod Behari Sarkar [1980 (3) SRR 348] it was held that where a Rent Act is applicable to a premises and landlord applies for eviction on the ground of default in payment of arrears of rent the tenant cannot claim benefit under Section 114 of the Act and ask for opportunity to deposit arrears. It was further held that the tenant is not entitled to seek double protection of the State Rent Act and the Transfer of Property Act.

In K.K. Krishnan vs. M.K. Vijaya Ragavan [1980(4) SCC 88] this Court held that the right conferred on landlord and tenant by virtue of Section 108 and other provisions of the Transfer of Property Act has no application where the premises is governed by the State Rent Act and if the tenant has sought to proceed with under the Rent Act for his eviction the tenant cannot resist the

said eviction on the basis of rights conferred by the Transfer of Property Act.

In Prithvichand Ramchand Sablok vs. S.Y. Shinde [1993 (3) SCC 271] it was held that the provisions contained under the Rent Control Act being a special provision would exclude the operation of Section 114 of the Transfer of Property Act. In substance it was held that a building cannot be governed by the provisions of two Acts, one by the State Rent Act and other by the Transfer of Property Act.

From the aforesaid decisions there is no doubt that if a building is governed by the State Rent Act the tenant cannot claim benefit of the provisions of Sections 106, 108 and 114 of the Act. Let us test the arguments of learned counsel for the appellant that on the destruction of the shop the tenant can resist his dispossession on the strength of Section 108(B)(e). In this case what was let out to the tenant was a shop for occupation to carry on business. On the destruction of the shop the tenant has ceased to occupy the shop and he was no longer carrying on business therein. A perusal of Section 108(B)(e) shows that where a premises has fallen down under the circumstances mentioned therein the destruction of the shop itself does not amount to determination of tenancy under section 111 of the Act. In other words there is no automatic determination of tenancy and it continues to exist. If the tenancy continues, the tenant can only squat on the vacant land but cannot use the shop for carrying on business as it is destroyed and further he cannot construct any shop on the vacant land. Under such circumstances it is tenant who is to suffer as he is unable to enjoy the fruits of the tenancy but he is saddled with the liability to pay monthly rent to the landlord. It is for such a situation the tenant has been given an option under Section 108(B)(e) of the Transfer of Property Act to render the lease of the premises as void and avoid the liability to pay monthly rent to the landlord. Section 108(B)(e) cannot be interpreted to mean that the tenant is entitled to squat on the open land in hope that in future if any shop is constructed on the site where the old shop existed he would have right to occupy the newly constructed premises on the strength of original contract of tenancy. The lease of a shop is transfer of the property for its enjoyment. On destruction of the shop the tenancy cannot be said to be continuing since the tenancy of a shop presupposes a property in existence and there cannot be subsisting tenancy where the property is not in existence. Thus when the tenanted shop has been completely destroyed, the tenancy right stands extinguished as the demise must have a subject matter and if the same is no longer in existence, there is an end of the tenancy and therefore, Section 108(B)(e) of the Act has no application in case of premises governed by the State Rent Act when it is completely destroyed by natural calamities.

Coming to V. Kalapakam Ammas decision (supra) wherein it was held that on the destruction of the tenanted premises, the tenancy continues under the State Rent Act, we would like to examine the provisions of the State Rent Act. The State Rent Act was passed with a view to regulate the leasing of buildings and to control the rent of such buildings in the State of Kerala. The State Rent Act is applicable only to the buildings and not to the land. The Act is not intended to govern the vacant land. Section 2 (1) of the Kerala Rent Act defines building which reads as under:

2 (1) building means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes and includes

(a) the garden, grounds, wells, tanks and structures, if any, appurtenant to such building, hut, or part of such building or hut, and let or to be let along with such building or hut;

(b) any furniture supplied by the landlord for use in such building or hut or part of a building or hut;

(c) any fittings or machinery belonging to the landlord, affixed to or installed in such building or part of such building, and intended to be used for the tenant for or in connection with the purpose for which such building or part of such building is let or to be let,

but does not include a room in a hotel or boarding house;

Section 4(1) of the State Rent Act provides that every landlord may within fifteen days before completion and shall, within fifteen days after the construction or reconstruction of a building intended to be let out or after a building becomes vacant by his ceasing to occupy it, or by the termination of a tenancy, or by release from requisition give notice of availability or vacancy in writing to the Accommodation Controller. Sub-section (3) of Section 4 provides that if the Accommodation Controller does not intimate to the landlord in writing that the building of which notice has been given is required for the purposes mentioned therein the landlord shall be at liberty to let the building to any tenant or to occupy it himself. Sub-section (5) of Section 4 further provides that if the Accommodation Controller allots the building to any person mentioned in sub-section (3), such person shall be deemed to be the tenant of the landlord on terms of tenancy as has been agreed upon between the landlord and tenant and in default of an agreement, as may be determined under Section 5 of the Act. Section 5 further provides the determination of fair rent. Section 11 provides the grounds on which a tenant can be evicted from the premises governed by the State Rent Act. Sub-Section 4 (iv) of Section 11 of the Kerala Rent Act provides that a tenant can be evicted if the building is in such a condition that it needs reconstruction and if the landlord requires bona fide to reconstruct the same and he satisfies the Court that he has the plan and licence and ability to built. Proviso to clause (iv) provides that a landlord who evicts a tenant and does not reconstruct completely the building within a time which may be fixed or extended by the Rent Control Court is liable to a fine if it is proved that he has been wilfully neglecting to reconstruct completely the building within such time. Second proviso to clause (iv) of sub- section (4) of Section 11 further provides that the Court shall have power to issue directions regarding the reconstruction of the building and on failure of compliance by the landlord to give effect to the order in any manner the Court deem fit and in appropriate cases to put the tenant back in possession. The third proviso to clause (iv) further provides that a tenant who was evicted on the ground of demolition and reconstruction shall have the first option to have the reconstructed building allotted to him with liability to pay its fair rent. The aforesaid provisions would show that where a building is governed by the State Rent Act the landlord is not free to let out the building to a tenant of his own choice or on a rent which he may dictate to the tenant and the tenancy that comes into existence is not a contractual tenancy and further the State Rent Act is applicable to the building and not to the vacant land.

In V. Kalpakam Amma (supra) the Kerala High Court relying up on the definition of the building in the State Rent Act held that there cannot be a building without a site and once a structure is put up in the land the site becomes part of the structure and thereafter the site becomes part of the building and on that basis the High Court held that once the premises covered by the State Rent Act is raised to the ground tenancy continues to survive in respect of the vacant land. In our view this is not the correct interpretation of Section 2(1) of the State Rent Act. Section 2(1) uses the words part of a building or hut. The words part of the building do not refer to the land on which the building is constructed but it refers to any other super structure which is part of that main building e.g. in addition to the main building if there is any other super structure in the said premises i.e. motor garage or servant quarter and the same would be part of the building and not the land on which the building has been so constructed. So far the appurtenant land which is beneficial for the purpose of use of the building is also the part of the building. Thus according to the definition of the Building

in the State Rent Act the building would include any other additional super structure in the same premises and appurtenant land. We are, therefore, of the view that the interpretation put by the Kerala High Court of Section 2(1) for holding that the words part of a building means the land on which the building has been constructed is not correct. The provisions of the State Rent Act clearly show that the State Rent Act is self contained Act and the rights and liabilities of landlord and tenant are determined by the provisions contained therein and not by the provisions of the Transfer of Property Act or any other law. The rights of a landlord under the general law are substantially curtailed by the provisions of the State Rent Act as the Act is designed to confer benefit to tenants by providing accommodation and to protect them from unreasonable eviction. In the present case what we find is that the subject matter of tenancy was the shop room which was completely destroyed on account of accidental fire and it was not possible for the tenant to use the shop for which he took the shop on rent. After the shop was destroyed the tenant, without consent or permission of the landlord, cannot put up a new construction on the site where the old structure stood. If it is held that despite the destruction of the shop, tenancy over the vacant land continued unless the tenant exercises his option under Section 108 (B) (e) of the Act the situation that emerges is that the tenant would continue as a tenant of a non-existing building and liable to pay rent to the landlord when he is unable to use the shop. The tenancy of the shop, which was let out, was a super structure and what is protected by the State Rent Act is the occupation of the tenant in the super structure. If the argument of appellants counsel is accepted then it would mean that although the tenant on the destruction of the shop cannot put up a new structure on the old site still he would continue to squat on the vacant land. Under such situation it is difficult to hold that the tenancy is not extinguished on the total destruction of the premises governed by the State Rent Act. Under English Law in a contractual tenancy in respect of building and land the liability to pay the rent by the tenant to the landlord continues even on the destruction of the building whereas there is no liability of the tenant to pay rent to the landlord on the destruction of the premises governed by the State Rent Act. Therefore, the view taken by the Bombay High Court in Hind Rubber Industries Pvt. Ltd. (supra) does not lay down the correct view of law. This Court on number of times has held that any special leave petition dismissed by this Court without giving a reason has no binding force on its subsequent decisions. Therefore, the two aforesaid cases relied on by counsel for the appellant are of no assistance to the argument advanced by him.

However, the situation would be different where a landlord himself pulls down a building governed by the State Rent Act. In such a situation the provisions contained in Section 11 of the State Rent Act would be immediately attracted and the Rent Control Court would be free to pass appropriate order.

Coming to the next question whether the Civil Court was competent to entertain and try the suit filed by the respondent for recovery of possession of the vacant land. As already stated above, the tenancy in the present case was of a shop room which was let out to the tenant. What is protected by the State Rent Act is the occupation of the tenant in the super structure. The subject matter of tenancy having been completely destroyed the tenant can no longer use the said shop and in fact he has ceased to occupy the said shop. Section 11 of the State Rent Act does not provide for eviction of the tenant on the ground of destruction of the building or the super structure. Thus when there is no super structure in existence the landlord cannot claim recovery of possession of vacant site under the State Rent Act. The only remedy available to him is to file a suit in a Civil Court for recovery of possession of land. In view of the matter the Civil Court was competent to entertain and try the suit filed by the respondent landlord.

For the aforesaid reason we are in full agreement with the view taken by the High Court.

Consequently, the appeals fail and are accordingly dismissed but there shall be no order as to costs.