SUPREME COURT OF INDIA

T. Lakshmipathi

Vs.

P. Nithyananda Reddy

C.A.No.4526 of 1999

(R. C. Lahoti and Arun Kumar, JJ.)

31.03.2003

JUDGEMENT

R. C. LAHOTI, J.:-

1. A decree for eviction passed in favour of the respondent No. 1 on the grounds available under S. 10(2)(i) and 10(3)(b)(iii) of A. P. Buildings (Lease, Rent and Eviction) Control Act, 1960 by the courts below and upheld by the High Court is under challenge in this appeal by special leave, filed by the persons in occupation of the premises. The facts of the case are complex and litigations between the parties are multiple. It will be useful to notice in brief the several litigations between the parties which will have an incidental bearing on the principal controversy and would enable precise appreciation of the facts.

2. The suit premises are non-residential bearing Door No. 18-7-4 situated in Ponniamman Koli Street of Chittoor town. This property was initially owned by one P. Nayarana Reddy. In the year 1959 a suit was instituted for partition of certain joint family properties wherein the suit property was one of the items. P. Narayana Reddy had two sons, namely, P. Nithyananda Reddy, the

respondent No. 1 and P. Manohar Reddy and five daughters. Late P. Narayana Reddy, his wife and his two sons were arrayed as plaintiffs. Partition of joint family properties was sought for from the branch of the family headed by brother of late P. Narayana Reddy. P. Narayana Reddy expired in the year 1981. By that time P. Manohar Reddy, the second son, had pre-deceased the father. Five daughters and the widow of pre-deceased son were brought on record by way of substitution in place of late P. Narayana Reddy and his wife who had also expired. A preliminary decree for partition was passed. At one stage in the appeals pending against the preliminary decree there was a compromise entered into by some of the parties in the year 1983. The compromise had the effect of allotting the suit property to the share of P. Nithyananda Reddy, the respondent No. 1. However, the compromise decree was recalled and set aside on an application filed by some of the co-sharers who were not joined as parties to the compromise. The appeal against the preliminary decree is still pending. Final decree in the partition suit is yet to be passed. Therefore, for all practical purposes though the shares of the parties to partition stand declared by the decree of the trial court, the declaration is still hanging fire in the pending appeal and partition by metes and bounds is yet to take place.

3. Here it would be relevant to state that during the course of hearing in the present appeal before us, some controversy was sought to be raised as to the extent of share to which P. Nithyananda Reddy, the respondent No.1, would be entitled to in the suit premises. However, we are not concerned with that controversy in the present appeal and leave the same to be adjudicated upon in the partition suit and the pending appeal and proceedings subsequent thereto. For the purposes of the present appeal, we will proceed on an assumption that P. Nithyananda Reddy, the respondent No.1, is a co-owner in the suit premises and there are other co-owners as well; the exact extent or proportion of co-ownership interests being irrelevant for the present proceedings.

4. Late P. Narayana Reddy had inducted a tenant in the suit premises, namely, G. Ethirajulu, the respondent No. 2. On the death of P. Narayana Reddy in the year 1981, the tenant, G. Ethirajulu acknowledged P. Nithyananda Reddy as landlord of the property and started paying rent solely to him. He also paid Rs. 3000/- by way of advance and incurred Rs.1300/- by way of repairs which was adjusted in payment of rent for the period January 1982 to April, 1984. Upto the end of April, 1985 the tenant G. Ethirajulu went on paying rent of the suit premises to P. Nithyananda Reddy, the respondent No. 1 treating him as landlord. Thereafter, P. Varadarajulu, the respondent No.3, entered upon the scene. The respondent No.3 is the brother-in-law of respondent No.2. The respondent No.3 claiming himself as tenant, tendered rent in April 1986 to the respondent No.1 which he refused to receive on the ground that the respondent No.3 had nothing to do with the suit property and the respondent No.1 did not recognized the respondent No.3 as tenant. Thereupon, the respondent No.3 initiated proceedings under S. 8(5) of the Act seeking permission to deposit rent in the Court on account of respondent No.1 having refused to receive the rent. In these proceedings the respondent No.3 claimed himself to be tenant and alleged and acknowledged the respondent No.1 to be the owner. Rent upto January 1990 was deposited in the proceedings under S. 8(5) of the Act. The proceedings came to be dismissed in default of appearance of the applicant therein.

5. On 24-1-1990, the appellants Nos.3 to 5 before us got a sale deed of the suit premises executed in

their favour four daughters of P. Narayana Reddy and the widow of pre-deceased son late Manohar Reddy. P. Nithyananda Reddy, the respondent No.1 and his one sister, did not join in the execution of sale deed and therefore their rights, to the extent they may be, do not stand transferred to the appellants. P. Varadarajulu, respondent No.3 claims himself to be the tenant in the suit premises, while according to respondent No.1, it is the respondent No.2 who is the tenant and P. Varadarajulu was inducted illegally as a sub-tenant. The fact remains that subsequent to the execution of the sale deed dated 24-1-1990 referred to hereinabove, P. Varadarajulu, respondent No.3 has with the consent, express or implied, of G. Ithirajulu, respondent No.2, handed over possession over the suit premises to the appellants Nos.3 to 5 herein. The rights and interests of the respondents No.2 and 3, have come to vest in the appellants Nos.3 to 5 apart from theirs being purchasers of interest of some of the co-owners of the joint property.

On 26-3-1990 the respondent No.1 initiated the present proceedings for eviction of the respondent Nos. 2 and 3 (allegedly the tenant and the sub-tenant) under S. 13 of the A. P. Buildings Control Act. It was alleged that the respondent No.1 required the premises bona fide for his own use and that the tenant was in arrears of rent and had also sub-let the premises parting with possession in favour of a third person. In these proceedings the appellants Nos.3 to 5 herein sought for intervention and being joined as parties to the proceedings. The prayer for impleadment was rejected by the learned Rent Controller vide his order dated 14-2-1992. However, in revision preferred by the appellants Nos.3 to 5, the prayer for their impleadment was allowed by the High Court vide order dated 16-4-1992 in view of their having entered into possession of the premises. On 17-7-1993 appellants Nos. 3 to 5 transferred their right and interest in the property along with possession in favour of the appellant Nos. 1 and 2 through a registered deed of sale. They were also joined as parties and this is how the five appellants are parties to the eviction proceedings.

6. On 10-4-1990 the respondent No.1 filed Original Suit No. 59 of 1990 seeking an injunction against the appellant Nos. 3 to 5 restraining them for interfering with the possession over the suit premises. The Trial Court granted the temporary injunction. However, the Appellate Court, vide its order dated 1-10-1990 directed the injunction to be vacated recording a finding that the appellant Nos. 3 to 5 had entered into actual possession of the property in the purported exercise of their title under the sale deed dated 24-1-1990, and therefore the temporary preventive injunction against them was uncalled for.

7. Reverting back to the present proceedings, the appellant Nos. 3 to 5, on having been joined as parties to the eviction proceedings, filed a written statement on 12-7-1994, taking a plea that they were owners in possession of the property and there was no landlord-tenant relationship between them and the respondent No.1. On being joined as parties to the proceedings, the appellant Nos. 1 and 2 also filed their written statement on 7-3-1996 raising a similar plea.

8. On 12-3-1996 the Rent Controller directed the eviction petition to be decreed. According to the Rent Controller the respondent No.1 was landlord of the suit premises and the respondent Nos. 2

and 3 were the tenants having attorney in favour of respondent No.1, and therefore, the persons inducted into possession by them were also liable to be evicted along with them. On 24-7-1998 the Principal Senior Civil Judge dismissed the appeal, confirming the order of the Rent Controller. The Civil Revision preferred before the High Court also came to be dismissed on 2-12-1998. Two relevant facts may be stated here by way of clarification. The judgment of the High Court record under a mistaken apprehension as to the facts either on the part of the Court or on the part of the learned counsel for the appellants that the two sale deeds executed respectively in favour of the appellant Nos. 3 to 5 and then appellant Nos. 1 and 2 were unregistered and therefore did not have the effect of transferring title to them. It was conceded at the Bar and very fairly by the learned counsel for both the parties before us that the sale deeds are in fact registered and the statement of fact contained in the judgment of the High Court in that regard is incorrect. Both the learned counsel appearing before us made their submissions proceeding on the foundation that the two sale deeds are registered. The other point is that the only plea raised before the High Court on behalf of the appellants was that they being transferees in possession from some of the co-owners, they would also acquire the status of co-owner and they can never be tenants of the respondent No.1 who is just one of the co-owners and therefore the eviction proceedings based on landlord-tenant relationship are fundamentally misconceived and deserve to be dismissed so far as they are concerned. The remedy of one co-owner against the other co-owner if possession is by way of suit for partition and not by way of eviction. It is noteworthy that before the High Court no challenge was laid to the findings on the availability of the grounds of eviction arrived at by the courts below. The result is that the finding as to availability of grounds of eviction has achieved a finality and is immune from challenge before this Court. Very fairly the learned senior counsel for the appellants has not made any submissions in that regard. The controversy surviving for decision is as to the nature and character of possession of the appellants over the suit premises. If the appellants can be held to be co-owners in possession of the property the suit for eviction would not lie, submits Shri P. P. Rao, the learned senior counsel for the appellants. On the contrary, the stand taken by Sri Lalit, the learned counsel for the respondent No.1, is that the appellants have been inducted into possession by the tenants in the suit property, without consent of the landlord-respondent No.1, and therefore, it is a clear case of parting with possession by the tenant. The fact that the appellants have also acquired title from some of the co-owners would not make any difference. The respondents Nos. 2 and 3 have acknowledged and attorned the respondent No.1 as landlord of the property. They have not surrendered possession to the respondent No.1. They have admittedly transferred possession to the appellants Nos. 3 to 5 who have in their turn transferred the possession to appellants Nos. 1 and 2. They are inducted into possession of the tenancy premises by the tenants or the tenant and his sub-tenant. Simply because the appellants have also acquired title of some of the co-owners it would not have the effect of merging the tenancy with ownership and bringing the landlord-tenant relationship between the respondent No.1 and respondent Nos. 2 and 3 to an end so as to get rid of their obligation of placing the landlord in possession of the tenancy premises on the tenancy coming to an end.

9. It is not disputed that the tenancy premises have been demolished and new premises have been reconstructed in place of the old one by the transferees in connivance with the tenants.

10. We have set out the facts in brief incorporating the bare essential details by way of backdrop. Certain neat questions of law arise for decision in this appeal. For dealing with those questions, we

sum up and set out as follows the factual foundation or which we are now proceeding. Out of the several co-owners of the property, the respondent No.1 was a landlord dealing with the tenants as such and his landlordship was attorned to and acknowledged by the tenants; the respondents Nos. 2 and 3 shall both be treated as tenants, as they themselves claim to be, without entering into the controversy whether one of them is tenant and other is a sub-tenant or a person inducted in possession by the tenant; the tenants i.e. respondents Nos. 1 and 3 have parted with possession in favour of the appellants without the consent, express or implied, of the respondent No.1, who is landlord cum-co-owner of the suit premises; and the appellants being transferees from some of the co-owners of the property, have acquired partial proprietary interest (to the extent of the interest held by their predecessors in interest) in the suit premises. These facts are beyond any pale of controversy so far as the present appeal is concerned.

11. The first question which arises for decision is whether the appellants are absolved of their obligation of delivering possession over the suit premises to the landlord respondent No.1 because the tenancy rights in the suit premises held by respondents Nos. 2 and 3 and transferred by them to the appellants have merged in the ownership entailing determination of tenancy. The learned senior counsel for the appellants has placed strong reliance on the doctrine of merger.

12. Law Lexicon (P. Ramanatha Aiyar, Second Edition, 1997) defines "merger" as the "destruction or 'drowning' by operation of law of the less in the greater of two estates coming together and vesting without any intervening estate in one and the same person in the same right." "Whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or in the law phrase is said to be merged that is, sunk or drowned in the greater (2 Black. Com. 177; Tomlins Law Dic.). According to Foa (General Law of Landlord and Tenant, Eighth Edition, P. 642), a lease may be determined by merger. A merger takes place where a tenant acquires the immediate reversion: for when a greater estate and a less coincide in the same person without any intermediate estate, the less is said to be merged in the greater.

..... For merger, however, to take place, the two interests must come to one and the same person in one and the same right."

13. The common law doctrine of merger is statutorily embodied in Transfer of Property Act, 1882. Section 111(d) provides :-

"111. Determination of lease.- A lease of immovable property determines -

xxx xxx xxx xxx

(d) In case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;

xxx xxx xxx xxx

A bare reading of the doctrine of merger, as statutorily recognized in India, contemplates (i) coalescence of the interest of the lessee and the interest of the lessor (ii) in the whole of the property (iii) at the same time (iv) in one person (v) in the same right. There must be a complete union of the whole interests of the lessor and the lessee so as to enable the lesser interest of the lessee sinking into the larger interest of the lessor in the reversion.

14. In Badri Narain Jha and Ors. v. Rameshwar Dayal Singh and ors., 1951 SCR 153, it was held by this court that if the lessor purchases the lessee's interest, the lease no doubt is extinguished as the same man cannot at the same time be both a landlord and a tenant, but there is no extinction of the lease if one of the several lessees purchased only a part of the lessor's interest. In such a case the leasehold and the reversion cannot be said to coincide. AIR 1951 SC 186

15. In Shaikh Faqir Baksh v. Murli Dhar and ors, AIR 1931 PC 63, the plaintiff was holding on lease a portion of the entire property. Subsequently, plaintiff and defendant became pro indiviso joint proprietors of the property by purchasing shares from the earlier owners. The lease was subsisting when the shares were bought by the parties. In a suit for accounts filed by the plaintiff it was held that the plaintiff's rights under lease of a part do not merge in his right; as joint proprietor of the whole of the property and as between the parties the plaintiff held a valid and subsisting lease.

16. A Division Bench of Patna High Court in Parmeshwar Singh and ors. v. Sureba Kuer and ors., AIR 1925 Patna 530, held that S. 111(d) applies only to a case where the interests of the lessee and of the lessor in the whole of the property become vested at the same time in one person in the same right. Where a co-proprietor in the property purchased for himself, the interest of the lessees of the whole property, there could be no merger. On purchase of a partial interest in tenancy rights by the owner, the onus of proving that the distinction between the interests continued to be kept alive subsequently also cannot be placed on the party alleging that the distinction was so kept alive. To the same effect is the view of the law taken in Lala Nathuni Prasad and ors. v. Syed Anwar Karim and Ors., 1919 IC 16 (Patna). Merger is largely a question of intention, dependent on circumstances, and the courts will presume against it when it operates to the disadvantage of a party, as was held by this Court in Nalakath Sainuddin v. Koorikadan Sulaiman, (2002) 6 SCC 1 (Para 20). AIR 1919 Patna 390

AIR 2002 SC 2562 : 2000 AIR SCW 2860

17. In the case at hand, it cannot be denied, nor has it been denied, that the appellants herein are not

purchasers of the entire ownership interest in the property. What they have purchased is interest of some out of all the co-owners of the property. The interest of the respondent No.1, whatever be its extent, has not come to vest in the appellants. The appellants have also acquired the tenancy rights in the property. Thus they have acquired partial ownership and full tenancy rights. It cannot be said that the interests of the lessee and the lessor in the whole of the property have become vested in the appellants at the same time and in the same right. The lease cannot be said to have been determined by merger. So long as the interests of the lessee, the lesser estate and of the owner, the larger estate to not come to coalesce in full either the water of larger estate is not deep enough to enable annihilation or the body of lesser interest does not sink or drown fully.

18. It was submitted by the learned senior counsel for the appellants that assuming if the tenancy has not determined by merger still what was held by the respondents Nos.2 and 3 on tenancy was 'building' or super structure only and not the land beneath. Admittedly, the building has been demolished. As tenancy premises have ceased to exist, the tenancy has come to an end in view of the very subject matter of tenancy having ceased to exist. Assuming also that the act of the appellants is wrongful still the remedy of the respondent No.1 who is only a co-owner in the property would be to sue for partition and seek recovery of damages; a suit based on landlord tenant relationship and seeking recovery of possession is misconceived and must fall, submitted the learned senior counsel Shri P.P. Rao.

19. The tenancy cannot be said to have been determined by attracting applicability of the doctrine of frustration consequent upon demolishing of the tenancy premises. Doctrine of frustration belongs to the realm of law of contracts; it does not apply to a transaction where not only a privity of contract but a privity of estate has also been created inasmuch as lease is the transfer of an interest in immovable property within the meaning of S. 5 of the Transfer of Property Act (wherein the phrase 'the transfer of property' has been defined), read with S. 105, which defines a lease of immovable property as a transfer or a right to enjoy such property. (See observations of this Court in this regard in Raja Dhruv Dev Chand v. Raju Harmohinder Singh and Anr., 1968 (3) SCR 339). It is neither the case of the appellants nor of the respondents Nos.2 and 3 that the subject matter of lease was the building and the building alone, excluding land whereon the building forming subject matter of tenancy stood at the time of creation of lease. AIR 1968 SC 1024

20. In Woodfall's Laws of Landlord and Tenant (28th Edition, Vol. 1) the relevant law is so stated :-

"Where the lessee covenants to pay rent at stated period (without any exception in case of fire), he is bound to pay it, though the house be burnt down; for the land remains, and he might have provided to the contrary by express stipulation, if both parties had so intended. And this rule applies, although the lessee's covenant to repair contain an exception in case of fire. Similarly, an action for use and occupation still lies in respect of the whole period of the tenancy notwithstanding the destruction of the premises by fire." (Para 1-0778)

"In a lease of land with buildings upon it the destruction of even the entirety of the buildings does not affect the continuance of the lease or of the lessee's liabilities under it, unless so provided by express contract." (Para 1-2055)

"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 the demise continues. But if by some convulsion of nature the very site ceases to exist, by being swallowed up altogether or buried in the depths of the sea, it seems clear that any lease of the property must come to an end." (Para 1-2056)

21. A lease of a house or of a shop is a lease not only of the superstructure but also of its site. It would be different of not only the site but also the land beneath ceases to exist by an act of nature. In the present case the appellants who are the successors of the tenancy right have demolished the superstructure but the land beneath continues to exist. The entire tenancy premises have not been lost. Moreover, the appellants cannot be permitted to take shelter behind their own act prejudicial to the interest of the respondent No.1 under whom the respondents Nos.2 and 3 were holding as tenants and then inducted the appellants.

22. In D. G. Gouse and Co. (Agents) Pvt. Ltd. v. State of Kerala and anr., (1980) 2 SCC 410, while dealing with Entry 49 of List II of the Seventh Schedule of the Constitution, making a reference to Oxford English Dictionary, this court has held that the site of the building is a component part of the building and therefore AIR 1980 SC 271 inheres in the concept of ordinary meaning of the expression 'building'. Referring to Corporation of the City of Victoria v. Bishop of Vancouve Island, AIR 1921 PC 240, it was held that the word 'building' must receive its natural and ordinary meaning as 'Including the fabric of which it is composed, the ground upon which its walls stand and the ground embraced within those walls".

23. We are, therefore, of the opinion that in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of subject matter of demise and the destruction of the building alone does not determine the tenancy when the land which was site of the building continues to exist; more so when the building has been destroyed or demolished neither by the landlord nor by an act of nature but solely by the act of the tenant or the person framing under him. Ample judicial authority is available in support of this proposition and illustratively we refer to Georage J. Ovenugal v. Peter, AIR 1991 Kerala 55, Rahim Bux and ors. v. Mohammad Shafi, AIR 1971 Allahabad 16, Hind Rubber Industries Pvt. Ltd. v. Tayebhai Mohammedbhai Bagasarwalla and ors., AIR 1996 Bombay 389 and Jiwanlal and Co. v. Manot and Co. Ltd., 64 CWN 932. The Division Bench decision of Kerala High Court in Dr. V. Sidharthan v. Pattiori Ramadasan, AIR 1984 Kerala 181, appears to take a view to the contrary. But that was a case where the building was totally destroyed by fire by negligence of the tenant. It is a case which proceeds on very peculiar facts of its own and was rightly dissented from by Bombay

High Court in Hind Rubber Industries Pvt. Ltd. v. Tayebhai Mohammedbhai Bagasarwalla (supra).

24. In the facts and circumstances of the case, no defence or shelter is available to the appellants behind the plea that they have acquired interest of some of the co-owners. The law as to co-owners is well settled. Where any property is held by several co-owners, each co-owner has interest in every inch of the common property, but his interest is qualified and limited by similar interest of the other owners. One co-owner cannot take exclusive possession of the property nor commit an act of waste, ouster or illegitimate use, and he does so he may be restrained by an injunction. A co-owners may, by an arrangement, expressed or implied, with his other co-owners, possess and enjoy any property exclusively. Such a co-owner can also protect his possession against the other co-owners and if he is disposed by the latter, he can recover exclusive possession. (See Jahuri Sah v. Dwarika Prasad Jhunjhunwala (1966) Supp SCR 280). It is beyond any controversy that on the death of late P. Narayana Reddy, his rights devolved upon the several heirs including respondent No.1. The respondent No.1 is the only male person in the body of the co-owners, all others being women. It may be for this reason, or otherwise, that the respondent No.1 was in possession of the property, through tenants, realizing the rent peacefully and with the consent, expressed or implied, of other co-heirs of late P. Nithyananda Reddy. So far as the respondents Nos. 2 and 3 are concerned, by operation of S. 116 of the Evidence Act, they were estopped from challenging or denying the ownership of the respondent No. 1 and his rights in the tenancy premises. As held in Vasudeo v. Balkishan, (2002) 2 SCC 50, the rule of estoppel between landlord and tenant continues to operate so long as the tenancy continues and unless the tenant has surrendered possession to the landlord. The estoppel would cease to operate only on the tenant openly restoring possession by surrender to the landlord. Neither the respondents Nos. 2 and 3 nor their successors in interest or the persons claiming under could have denied the title of the respondent No.1 during the continuance of the tenancy and even thereafter unless they had restored possession over the tenancy premises to the respondent No.1. Looking at the status of the appellants whether as co-owners or as persons inducted in possession by the tenants they have no legs to stand on. AIR 1967 SC 109 AIR 2002 SC 569 : 2002 AIR SCW 152 If other co-owners could not have dispossessed the respondent No.1 or demolished the property without the consent of respondent No. 1 it is difficult to conceive how their transferees could have demolished the tenancy premises and raised their own construction over the land on which the tenancy premises stood earlier.

25. For the foregoing reasons, we find the appeal devoid of any merit and liable to be dismissed. It is dismissed accordingly and with costs. The judgment and decree of the Trial court as upheld by the High Court are maintained.

Appeal dismissed.