SUPREME COURT OF INDIA

Mahendra Saree Emporium

Vs.

G.V. Srinivasa Murthy

C.A.No.6296 of 1998

(R. C. Lahoti (CJI) and G. P. Mathur JJ.)

27.08.2004

JUDGMENT

R. C. LAHOTI (CJI) J.

Respondent, G.V. Srinivasa Murthy is the owner-cum- landlord of the suit premises, non-residential in nature. M/s Mahendra Saree Emporium was a sole proprietary concern, now a partnership firm, sued as the tenant and is the appellant before us. On 21.7.1987 proceedings for eviction were initiated by the landlord against the tenant on the ground alleged to be available under clause (f) of sub-section (1) of Section 21 of the Karnataka Rent Control Act, 1961, hereinafter, the '1961 Act' or the 'Old Act', for short. It is not disputed that the premises were taken on rent under Lease Deed dated 16.12.1968 executed by Jugraj, father of Indrachand. The business in the name and style of M/s Mahendra Saree Emporium was always conducted by Indrachand, who was minor on 16.12.1968 when the tenancy commenced. Later the business has been converted into a partnership business. Indrachand's two brothers, one brother's wife and one uncle's son are included in the partnership.

According to the landlord, the tenant has unlawfully sublet the premises. According to him, the premises were for an individual's business and entering into partnership amounts to a ground for eviction under Section 21(1)(f) of the 1961 Act which provides for the tenant being evicted if "the tenant has unlawfully sublet the whole or part of the premises or assigned or transferred in any other manner his interest therein". * The learned Rent Controller found the ground for eviction not made

out and directed the eviction petition to be dismissed. The landlord preferred a revision under sub-Section (1) of Section 50 of the 1961 Act. A learned Single Judge of the High Court has, vide his order dated 25.9.1998, reversed the finding of the Rent Controller and held the ground for eviction made out and directed the tenant to be evicted. On 13.11.1998, the tenant filed this petition seeking special leave to appeal. The leave has been granted.

During the pendency of the petition, the Karnataka Rent Act, 1999 (hereinafter referred to as the '1999 Act' or the 'New Act') has been enacted and has come into force with effect from 31.12.1999. The 1961 Act has stood repealed. Sections 69 and 70 of the New Act provide as under :

"69. Transfer of pending cases.- On the commencement of this Act, -

(1) all cases pertaining to matters in respect of which the Controller shall have jurisdiction under this Act and pending in the Court under the Karnataka Rent Control Act, 1961 shall stand transferred to the Controller and the Controller may proceed to hear such cases either de-novo or from the stage it was at the time of such transfer.

(2) All cases pertaining to matters in respect of which the Court shall have jurisdiction under this Act and pending before the Controller under the Karnataka Rent Control Act, 1961 shall stand transferred to the Court and the Court may proceed to hear such cases either de-novo or from the stage it was at the time of such transfer.

70. Repeal and Savings.-

(1) The Karnataka Rent Control Act, 1961 (Karnataka Act 22 of 1961) is hereby repealed.

(2) Notwithstanding such repeal and subject to the provisions of section 69, -

(a) all proceedings in execution of any decree or order passed under the repealed Act, and pending at the commencement of this Act, in any Court shall be continued and disposed off by such Court as if the said enactment had not been repealed;

(b) all cases and proceedings other than those referred to in clause (a) pending at the commencement of this Act before the Controller, Deputy Commissioner, Divisional Commissioner, Court, District Judge or the High Court or other authority, as the case may be in respect of the premises to which this Act applies shall be continued and disposed off by such Controller, Deputy Commissioner, Divisional Commissioner, Court, District Judge or the High Court or other authority in accordance with the provisions of this Act.

(c) all other cases and proceedings pending in respect of premises to which this Act does not apply shall as from the date of commencement of the Act stand abated.

(3) Except as otherwise provided in section 69 and in sub-section (2) of this section, provisions of section 6 of the Karnataka General Clauses Act, 1899 (Karnataka Act III of 1899), shall so far as may be applicable in respect of repeal of the said enactment, and sections 8 and 24 of the said Act shall be applicable as if the said enactment had been repealed and re-enacted by this Act." *

It is not disputed that the area of the suit premises, which are non-residential in nature, exceeds 14 sq. metres and, therefore, in view of the provisions contained in clause (g) of sub-section (3) of Section 2 of the 1999 Act, the provisions of the 1999 Act do not apply to the suit premises. On May

1, 2002 a Bench (Coram of two) of this Court formed an opinion that if the premises would have been one to which the 1999 Act is applicable, then under Section 70(2)(b) the hearing would have continued and the case disposed of in accordance with the provisions of the New Act but that was not the case here and, therefore, the case attracted the applicability of Section 70(2)(c) and hence directed the proceedings to stand abated. The decision is reported as Mahendra Saree Emporium Vs. G.V. Srinivasa Murthy, . On a review petition preferred by the landlord, vide order dated February 21, 2003 the order dated May 1, 2002 was recalled and the appeal was directed to be listed for hearing in view of the question of law centering around the interpretation of Section 70 of 1999 Act arising for decision.

Two questions arise for decision : firstly, as to the effect of Section 70 of the 1999 Act on the proceedings pending before this Court; and secondly, if the proceedings continue to survive unabated for adjudication on merits whether a ground for eviction under Section 21(1)(f) of the 1961 Act is made out?

We have heard Shri A. Subba Rao, the learned counsel for the appellant and Mr. P.R. Ramasesh, the learned counsel for the respondent. The first question to be examined is the effect of Section 70 of the 1999 Act on the proceedings under Article 136 of the Constitution initiated before 31.12.1999, i.e. the date on which the 1999 Act came into force and the 1961 Act stood repealed.

The effect of coming into force of the 1999 Act and the effect of repeal of the 1961 Act have been dealt with by Sections 69 and 70 of the 1999 Act exhaustively. A careful reading of Sections 69 and 70 discloses the legislative scheme underlying the repeal of the Old Act and coming into force of the New Act as under : -

(i) The cases pending at the stage of trial, whether before the Controller or the Court, are taken care of by Section 69 of the 1999 Act. The forum competence in a pending case, depending on the averments made in the plaint, shall be determined by reference to the provisions of the 1999 Act. Such forum competence having been determined, the case may continue to be tried by the forum in which it is pending or be transferred from the Controller to the Court or vice versa, as the case may be.

(ii) The validity of all decrees or orders passed under the 1961 Act has been saved if such decree or order has already been put into execution and the execution is pending on 31.12.1999. The proceedings in execution shall continue and be disposed of as if the 1961 Act has not been repealed. Inasmuch as the validity of decrees or orders passed before 31.12.1999 has been saved and as they have not been rendered ineffective or nullified by the 1999 Act, such decrees or orders shall continue to remain available for execution in the same manner as if saved although any application for execution was not actually pending at the commencement of 1999 Act. This is the reasonable interpretation which can be placed on clause (a) of sub-Section (2) of Section 70 of the 1999 Act; else the provision runs the risk of being declared void under Article 14 of the Constitution as arbitrary and discriminatory. It will be reasonable to read clause (a) to include therein the decrees or orders passed before 31.12.1999 as pending in execution inasmuch as they were awaiting execution when the New Act came into force.

(iii) All cases or proceedings other than those in which decrees or orders have already been passed or which are pending at the stage of trial, appeal or revision and which were initiated under the 1961 Act are covered by clauses (b) and (c). Such cases are divisible into two categories:

a) Premises to which 1999 Act applies: The cases and proceedings initiated under the 1961 Act in respect of such premises to which the 1999 Act is also applicable, shall continue to be heard and disposed of whether at the stage of trial (subject to the provisions contained in Section 69 of the 1999 Act) or in appeal or revision, but the substantive law which would govern the decision in such cases and proceedings shall be the one contained in the 1999 Act. Thus, Section 70(2)(b) has to be read with Section 69 so far as cases or proceedings at the stage of trial are concerned.

b) Premises to which 1999 Act does not apply: All cases and proceedings initiated under the 1961 Act in respect of the premises to which the 1999 Act does not apply, if not pending at the stage of trial before the Court or the Controller, shall stand abated. The abatement shall take place of such proceedings as were pending on 31.12.1999. The original case itself does not stand abated; the case or the proceedings at the stage at which it is on 31.12.1999 shall terminate as abated. The New Act liberalises the law in favour of the landlords.

The Statement of Objects and Reasons accompanying the Bill states inter alia : "Economic Administration Reforms Commission and the National Commission on Urbanisation have recommended reform of the Rent Legislation in a way that balances the interest of both landlord and the tenant and also stimulates future construction."

As to the premises which have been taken out of the operation of the Rent Control Law because of the non-applicability of the New Act, the landlord can secure eviction of the tenant without much difficulty simply by making out a case for eviction under the general law which is the Transfer of Property Act. If the proceeding pending on 31.12.1999 is by the landlord seeking eviction of tenant, the proceeding need not continue as the landlord has available to his advantage, the easier course of initiating fresh proceedings and securing an order of eviction without much ado and therefore it becomes unnecessary for him to pursue the pending proceedings in which he will have to satisfy a more stringent test for securing a decree or order of eviction. Similarly if the pending proceedings are those in which the tenant has put in issue a decree or order of eviction, he need not be allowed to pursue the same inasmuch as even if he succeeds, it will always be open for the landlord to initiate fresh proceedings of eviction wherein he would be able to secure the same order of eviction with more ease. The scheme of the New legislation and its comparative reading with the provisions of the preceding legislation make such interpretation more reasonable and sensible.

(iv) To all such cases as are not specifically covered by Section 69 and sub-Section (2) of Section 70 of the 1999 Act, sub-Section (3) of Section 70 expressly provides for being governed by Sections 6, 8 and 24 of the Karnataka General Clauses Act, 1899. By making such provision, the legislature has saved such residuary category of cases and proceedings from the operation of the 1999 Act and allowed them to be governed by the 1961 Act. That would have been the position of law even if sub-Section (3) of Section 70 of the 1999 Act would not have been expressly enacted. #

The next question is as to the applicability of the provisions contained in clauses (b) and (c) of sub-section (2) of Section 70 of the New Act to the proceedings pending before this Court in exercise of the jurisdiction conferred by Article 136 of the Constitution of India.

It was submitted by Shri A. Subba Rao, the learned counsel for the appellant that the expression 'cases and proceedings' should be so interpreted as to hold that on commencement of the New Act, the case itself, i.e. the proceedings for eviction of tenant, initiated by landlord, though under the Old Act, stand abated on the commencement of the New Act leaving nothing for this Court to decide. However, Shri Ramasesh, the learned counsel for the respondent would not agree. His submission is

two-fold. He submits, firstly, that the legislature has not intended the case for eviction itself to abate; what would abate is the proceedings pending in this Court. Meaning thereby, submitted Shri Ramasesh, the petition or appeal under Article 136 would abate with the result of leaving untouched the decree of eviction as passed by the High Court.

In the alternative, he submitted that if this Court may form an opinion that the proceedings under Article 136 of the Constitution do not fall within the purview of Section 70 of the New Act which is a State legislation, then the same shall continue to be heard and decided in accordance with the provisions of the Old Act.

The jurisdiction conferred on this Court by Article 136 of the Constitution is a plenary jurisdiction in the matter of entertaining and hearing appeals by granting special leave against any kind of judgment or order made by Court or Tribunal in any case or matter and the jurisdiction can be exercised in spite of other specific provisions for appeal contained in the Constitution or other laws. This article confers on the Supreme Court special or residuary powers which are exercisable outside the purview of the ordinary laws in cases where the needs of justice demand interference by the Supreme Court (see: Constitution Bench decisions in Durga Shankar Mehta Vs. Thakur Raghuraj Singh and others and Union Carbide Corporation Vs. Union of India , para 58). In Durga Shanker Mehta's case (supra) the Constitution Bench held that Section 105 of the Representation of People Act, 1951 which gives finality to the decision of the Election Tribunal has the effect of giving finality so far as that Act is concerned and the fact that it does not provide for any further appeal cannot cut down, or have an overriding effect on, the powers which the Supreme Court can exercise by virtue of Article 136 of the Constitution. The Constitutional jurisdiction conferred by Article 136 cannot be limited or taken away by any legislation subordinate to the Constitution. # This view finds support from the Constitution Bench decision of this Court in S.P. Sampath Kumar Vs. Union of India and others and the recent decision of this Court in Surya Dev Rai Vs. Ram Chander Rai and others . In Surya Dev Rai's case (supra), this Court has on a review of several authorities held that any legislation subordinate to the Constitution cannot whittle down, much less take away the jurisdiction and powers conferred on the constitutional courts of the country.

Shri A. Subba Rao, the learned counsel for the appellant, submitted that Section 70 of the New Act legislatively enacts the doctrine of statutory abatement as distinguished from abatement of civil proceedings by death or otherwise caused by an event or happening which is non-statutory. Reliance was placed on a series of four decisions, namely, Ram Adhar Singh Vs. Ramroop Singh and others , Chattar Singh and others Vs. Thakur Prasad Singh , Satyanarayan Prasad Sah and others Vs. State of Bihar and another 1980 Supp(SCC) 474 and Mst. Bibi Rahmani Khatoon and others Vs. Harkoo Gope and others 1981 (3) SCC 173. All these cases deal with statutory abatement consequent upon a notification under the State Consolidation of Holding legislation having been issued. A perusal of these decisions shows that the provisions of the State legislation which came up for consideration of the Court provided for the original case, wherefrom the subsequent proceedings had originated, itself to stand abated on the commencement of such legislation and/or on the issuance of the requisite notification thereunder, without regard to the stage at which the proceedings were pending. It was held that appeal was a continuation of suit and inasmuch as the local law made provision for an effective alternative remedy to be pursued before an exclusive forum to redeem the grievance raised before the Court, the local law had the effect of terminating and nullifying the initiation of the proceedings itself and therefore nothing remained for the court to adjudicate upon in the appeal which was rendered infructuous.

Such is not the case before us. The decisions of this Court relied on by the learned counsel for the

appellant are clearly distinguishable and have no applicability to the situation emerging from the facts of the case before us. The nearest case relevant to the case in hand is the one relied on by Shri Ramasesh, the learned counsel for the respondent and that is Gyan Chand Vs. Kunjbeharilal and others .

In Gyan Chand's case (supra), proceedings for eviction of tenant under the provisions of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 were pending. During the pendency of the proceedings in this Court under Article 136 of the Constitution, the said Act came to be amended by an Ordinance conferring certain additional benefits on the tenant and the tenant sought for the decree being modified in the light of the provisions of the Ordinance. The Ordinance applied to pending proceedings. The term 'proceeding' was defined to mean suit, appeal or application for revision. P.K. Goswami, J., speaking on behalf of Y.V. Chandrachud, J., (as His Lordship then was) and for himself held that an application for special leave under Article 136 of the Constitution against a judgment or an order cannot be equated with the ordinary remedy of appeal, as of right, under any provisions of law. It is an extraordinary right conferred under the Constitution, within the discretion of this Court, and such an application for special leave does not come within the contemplation of appeal pending before the Court under Section 13A(a) of the Act. It was further held that in view of the connotation of the word "proceeding" as given under the Explanation to Section 13A it is impermissible to extend the meaning of the word "proceeding" to include an application for special leave under Article 136 of the Constitution. The collocation of the words, "suit, appeal or application for revision" in the Explanation to denote "proceeding" would go to show that suits, regular appeals therefrom, as provided under the ordinary law, and applications for revision alone are intended. It is inconceivable that if the legislature had intended to include within the ambit of "proceeding" an application for special leave under Article 136 of the Constitution it would have omitted to mention it in express terms. Their Lordships opined that under the scheme of the Act it was reasonable to hold that the legislature clearly intended to include only the hierarchy of appeals under the Civil Procedure Code and not an appeal or a petition under Article 136 of the Constitution. Fazal Ali, J., in his concurring opinion, held that if the intention was to extend the benefit to appeals for special leave it should have been so stated clearly. The benefit conferred by Section 13A of the Act does not extend even to the execution proceedings and in these circumstances it cannot be assumed that it would have applied to a Court which is beyond the frontiers of the State and to a remedy which has been provided not by the State Legislature but by the Constitution itself.

Abatement kills the right to sue and has the effect of unceremoniously terminating the pending legal proceedings without adjudication on merits. It has to be strictly construed and applied only to such cases to which its applicability is undoubtedly attracted. Excepting where an otherwise legislative intention is expressly or by necessary implication deducible, a provision for abatement of pending proceedings shall abate only such proceedings as were pending on that day and at that stage and not the original proceedings which had already stood concluded but were reopened by a superior forum for the purpose of examining legality or propriety thereof.

We are, therefore, of the opinion that the State Legislature enacting the New Act could have provided for the suit itself which originated under the local law to abate on the date of coming into force of the New Act but that the Legislature has not chosen to do. The Legislature could not have provided, nor has it provided, for the jurisdiction of this Court under Article 136 being taken away or curtailed in any manner whatsoever and rightly so. The appeal would, therefore, survive unabated for adjudication on merits. #

The next question which arises for consideration is whether there has been sub-letting of the premises within the meaning of Section 21(1)(f) of the Old Act.

The term 'sub-let' is not defined in the Act new or old. However, the definition of 'lease' can be adopted mutatis mutandis for defining 'sub-lease'. What is 'lease' between the owner of the property and his tenant becomes a sub-lease when entered into between the tenant and tenant of the tenant, the latter being sub-tenant qua the owner-landlord. A lease of immovable property as defined in Section 105 of the Transfer of Property Act, 1882 is a transfer of a right to enjoy such property made for a certain time for consideration of a price paid or promised. A transfer of a right to enjoy such property to the exclusion of all others during the term of the lease is sine qua non of a lease. A sub-lease would imply parting with by the tenant of a right to enjoy such property in favour of his sub- tenant. Different types of phraseology are employed by different State Legislatures making provision for eviction on the ground of sub-letting. Under Section 21(1)(f) of the Old Act, the phraseology employed is quite wide. It embraces within its scope sub-letting of the whole or part of the premises as also assignment or transfer in any other manner of the lessee's interest in the tenancy premises. The exact nature of transaction entered into or arrangement or understanding arrived at between the tenant and alleged sub-tenant may not be in the knowledge of the landlord and such a transaction being unlawful would obviously be entered into in secrecy depriving the owner-landlord of the means of ascertaining the facts about the same. However still, the Rent Control Legislation being protective for the tenant and eviction being not permissible except on the availability of ground therefor having been made out to the satisfaction of the Court or the Controller the burden of proving the availability of the ground is cast on the landlord, i.e. the one who seeks eviction. In Krishnawati Vs. Hans Raj, , reiterating the view taken in Associated Hotels of India Ltd. Delhi Vs. S.B. Sardar Ranjit Singh, , this Court so noted the settled law

"the onus of proving sub-letting is on the landlord. If the landlord prima facie shows that the occupant, who was in exclusive possession of the premises, let out for valuable consideration, it would then be for the tenant to rebut the evidence". * Thus, in the case of sub-letting, the onus lying on the landlord would stand discharged by adducing prima facie proof of the fact that the alleged sub-tenant was in exclusive possession of the premises or, to borrow the language of Section 105 of the Transfer of Property Act, was holding right to enjoy such property. A presumption of sub-letting may then be raised and would amount to proof unless rebutted. In the context of the premises having been sub-let or parted with possession by the tenant by adopting the device of entering into partnership, it would suffice for us to notice three decisions of this Court. Murlidhar versus Chuni Lal and others 1970 AI(RCJ) 922) is a case where a shop was let out to a firm of the name of Chuni Lal Gherulal. The firm consisted of three partners, namely, Chuni Lal, Gherulal and Meghraj. This partnership closed and a new firm by the name of Meghraj Bansidhar commenced its business with partners Meghraj and Bansidhar. The tenant firm was sought to be evicted on the ground that the old firm and the new firm being two different legal entities, the occupation of the shop by the new firm amounted to subletting. This court discarded the contention as 'entirely without substance' and held that a partnership firm is not a legal entity; the firm name is only a compendious way of describing the partners of the firm.

Therefore, occupation by a firm is only occupation by its partners. The two firms, old and new, had a common partner namely Meghraj, who continued to be in possession and it was fallacious to contend that earlier he was in possession in the capacity of partner of the old firm and later as a partner of the new firm. The landlord, in order to succeed, has to prove it as a fact that there was a subletting by his tenant to another firm. As the premises continued to be in possession of one of the original tenants, Meghraj, then by a mere change in the constitution of the firm of which Meghraj

continued to be a partner, an inference as to subletting could not be drawn in the absence of further evidence having been adduced to establish subletting. # In Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri & Ors. , the tenant had entered into a partnership and the firm was carrying on business in the tenancy premises. This Court held that if there was a partnership firm of which the appellant was a partner as a tenant, the same would not amount to sub-letting leading to forfeiture of the tenancy; for there cannot be a sub-letting unless the lessee parted with the legal possession. The mere fact that another person is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. # Thus, the thrust is, as laid down by this Court, on finding out who is in legal possession of the premises. So long as the legal possession remains with the tenant the mere factum of the tenant having entered into partnership for the purpose of carrying on the business in the tenancy premises would not amount to sub- letting. # In Parvinder Singh Vs. Renu Gautam & Ors., , a three-Judges Bench of this Court devised the test in these terms "if the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, maybe along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub- tenant." *

In the present case there is un-rebutted evidence available on record to show that the family of the tenant consists of sixteen members which includes cousins as well. The family is joint and depends for its livelihood on the business run in the suit premises. The tenant has not parted with possession in favour of any stranger. The brothers, a wife of one of the brothers and a cousin have entered into partnership with the tenant for the purpose of carrying on the pre-existing business in the suit premises. There is no evidence adduced and no material available on record to draw an inference that the tenant has dissociated himself from the business activity leaving for the partners alone to carry on the business or that the so-called partners are in exclusive possession of the premises having no relationship with the tenant and the partnership is nothing but a camouflage for parting with by the tenant of the possession or right to use the tenancy premises in favour of the persons in possession. The High Court was not right in holding a case of sub-letting having been made out simply because the sole propriety business was converted into a partnership business. #

For the foregoing reasons we hold that in spite of the Old Act, i.e. the 1961 Act having been repealed by the New Act, i.e. the 1999 Act, the present appeal under Article 136 of the Constitution does not abate and survives for adjudication on merits. However, the ground for eviction under Section 21(1)(f) of the Old Act is not made out and, therefore, the proceedings for eviction initiated by the respondent-landlord cannot succeed. #

The appeal is allowed and the proceedings for eviction are directed to be dismissed. No order as to the costs.