

**SUPREME COURT OF INDIA**

Nirbhai Kumar

Vs.

Maya Devi

C.A.No.1767 of 2005

(Dr. Arijit Pasayat and Lokeshwar Singh Panta JJ.)

24.03.2009

**JUDGEMENT**

**Dr.Arijit Pasayat, J.**

1. Noticing that there were two conflicting decisions of this Court in *Martin & Harris Ltd. v. VIth Additional District Judge and Ors.*<sup>1</sup> and *Anwar Hasan Khan v. Mohd. Shafi & Ors.*<sup>2</sup>, reference was made to larger Bench.

2. The case decided by two Hon'ble Judges of this Court in both the cases related to the scope of and ambit of proviso to Section 21(1)(a) of the *U.P. Urban Buildings (Regulation of Letting, rent and Eviction) Act, 1972* (in short the 'Act'). As directed by the Hon'ble The Chief Justice of India, the matter has been placed before us.

3. In Martin and Harris Limited's case (supra) it was held in para 13 as follows:

“It is not possible to agree with the contention of the learned Senior Counsel for the appellant that the provision containing the proviso to Section 21(1) of the Act was for public benefit and could not be waived. It is, of course, true that it is enacted to cover a class of tenants who are sitting tenants and whose premises are subsequently purchased by landlords who seek to evict the sitting tenants on the ground of bona fide requirement as envisaged by Section 21(1)(a) of the Act, still the protection available to such tenants as found in the proviso would give the tenants concerned a locus poenitentiae to avail of it or not. It is easy to visualise that proceedings under Section 21(1)(a) of the Act would be between the landlord on the one hand and the tenant on the other. These proceedings are not of any public nature. Nor any public interest is involved therein. Only personal interest of landlord on the one hand and the tenant on the other hand get clashed and call for adjudication by the prescribed authority. The ground raised by the landlord under Section 21(1)(a) would be personal to him and similarly the defence taken by the tenant would also be personal to him. Six months' breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get

alternative accommodation if the tenant realises that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived.

In this connection we may profitably refer to a decision of this Court in the case of *Krishan Lal v. State of J&K*<sup>3</sup> wherein Hansaria, J., speaking for a Bench of two learned Judges has made the pertinent observations concerning the question of waiver of a mandatory provision providing for issuance of notice to the parties sought to be proceeded against by the person giving the notice, in paragraphs 16 and 17 of the Report as under: (SCC p. 430)

"16. ... As to when violation of a mandatory provision makes an order a nullity has been the subject-matter of various decisions of this Court as well as of courts beyond the seven seas. This apart, there are views of reputed text writers. Let us start from our own one-time Highest Court, which used to be Privy Council. This question came up for examination by that body in *Vellayan Chettiar v. Govt. of the Province of Madras*<sup>4</sup> in which while accepting that Section 80 of the Code of Civil Procedure is mandatory, which was the view taken in *Bhagchand Dagadusa v. Secy. of State for India- in-Council*<sup>5</sup> it was held that even if a notice under Section 80 be defective, the same would not per se render the suit requiring issuance of such a notice as a precondition for instituting the same as bad in the eye of law, as such a defect can be waived. This view was taken by pointing out that the protection provided by Section 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right. A distinction was made in this regard where the benefit conferred was to serve 'an important purpose', in which case there would not be waiver, (see paragraph 14).

17. This point had come up for examination by this Court in *Dhirendra Nath Gorai v. Sudhir Chandra Ghosh*<sup>6</sup> and a question was posed in paragraph 7 whether an act done in breach of a mandatory provision is per force a nullity. This Court referred to what was stated in this regard by Mookherjee, J. in *Ashutosh Sikdar v. Behari Lal Kirtania*<sup>7</sup> ILR at p. 72 and some other decisions of the Calcutta High Court along with one of the Patna High Court and it was held that if a judgment-debtor, despite having received notice of proclamation of sale, did not object to the non-compliance of the required provision, he must be deemed to have waived his right conferred by that provision. It was observed that a mandatory provision can be waived if the same be aimed to safeguard the interest of an individual and has not been conceived in the public interest."

Consequently it must be held that the provision for six months' notice before initiation of proceedings under Section 21(1) of the Act, though is mandatory and confers protection on the tenant concerned, it can be waived by him. On the facts of the present case there is no escape from the conclusion that the appellant, for reasons best known to it, consciously and being alive to the clear factual situation that the suit was filed on that ground prior to the expiry of six months' notice, did not think it fit to

pursue that point any further and on the contrary joined issues on merits expecting a favourable decision in the suit and having lost therein and got an adverse decision did not think it fit even to challenge the decision on the ground of maintainability of the suit while filing an appeal and argued the appeal only on merits and only as an afterthought at the stage of writ petition in the High Court such a contention was sought to be taken up for the first time for consideration. On the facts of the present case, therefore, it must be held that the appellant had waived that contention about the suit being premature having been filed before the expiry of six months from the date of the suit notice.”

4. In Anwar Hasan Khan's case (supra) it was held in para 10 as follows:

“Keeping in mind the object of the Act to provide safeguards to the tenant, the first proviso to Section 21 of the Act was added to ensure that the unscrupulous litigants do not transfer properties only for the purposes of creating grounds for eviction of the tenant in occupation thereof. The aforesaid proviso, however, was not intended to put any restriction upon the owners of the property not to transfer it under any circumstances. To ensure that the sale transaction was valid and not mala fide, a statutory bar was created vide the aforesaid proviso for the transferee to seek the eviction of the tenant with respect to such purchased property. The proviso mandates that no application shall be entertained by the prescribed authority on the grounds mentioned in clause (a) of sub-section (1) of Section 21 of the Act unless a period of three years had elapsed since the date of such purchase. It further provides that no application under the said clause shall be entertained unless the landlord had given a notice to the tenant not less than six months before the filing of such application and such notice may be given even before the expiration of a period of three years. The object of the service of the notice is to furnish information to the tenant about the requirement of the landlord in order to enable him to search for an alternative accommodation or to find out as to whether the sale made by his erstwhile owner was genuine and bona fide or not. The proviso and the notice contemplated under it was never intended to be permanent clog on the rights of the purchaser. The period contemplated for not initiating the eviction against the tenant on the ground as specified in clause (a) of sub-section (1) of Section 21 of the Act was intended to be for a period of three years and in no case for more than three years and six months. Any proceedings initiated for release of building under occupation of tenant on the aforesaid ground after the period contemplated under the aforesaid proviso does not require the service of the aforesaid notice of six months.”

5. Section 21(1) of the Act so far as relevant reads as follows:

“21. Proceedings for release of building under occupation of tenant:

1. The prescribed authority may, on an application of the landlord in that behalf, order eviction of a tenant from the building under tenancy or any of the following grounds exist, namely- (a) xxxx (b) xxxx Provided that where the building was in the

occupation of a tenant since before its purchase by the landlord, such purchase being made after the commencement of this Act, no application shall be entertained on the grounds mentioned in Clause (a) unless a period of three years has elapsed since the date of such purchase and the landlord has given a notice in that behalf to the tenant not less than six months before such application and such notice may be given even before the expiration of the aforesaid period of three years.”

6. A three years period becomes relevant when there is a change of ownership. This three years period is a sort of moratorium intended for the tenant's protection. It is to be noted that the crucial expression in the proviso is "and such notice may be given even before the expiration of the aforesaid period of three years". In other words notice can be given either before or after the three years period. After expiry of the three years period the protection given to the tenant from being evicted has no further relevance. Thereafter it is only the question of notice.

7. Above being the position the decision in *Martin & Harris Ltd.*'s case (supra) expressed the correct view. Unfortunately, the said decision not appear to have been placed before the Bench which heard *Anwar Hasan Khan*'s case (supra).

8. That being the position the appeal deserves to be allowed which we direct.

<sup>1</sup>[1998 (1) SCC 732]

<sup>2</sup>[2001 (8) SCC 540]

<sup>3</sup>(1994 (4)SCC 422)

<sup>4</sup>(AIR 1947 PC 197)

<sup>5</sup>(1927) 54 IA 338

<sup>6</sup>(AIR 1964 SC 1300)

<sup>7</sup>(ILR 35 Cal 61)