ALLAHABAD HIGH COURT

Raj Narain

Vs.

Sukha Nand Ram Narain

Civil Misc. Writ Petn. No. 1553 of 1975

(Satish Chandra, C.J. and Yashoda Nandan, J.)

18.08.1979

JUDGEMENT

Yashoda Nandan, J.

1. This petition which should normally have been decided by a learned single Judge is before us since when it came up for hearing before N.D. Ojha, J. he was of the opinion that the questions involved in the case were of considerable importance and not free from difficulty and he consequently thought it desirable that it may be decided by a Division Bench.

2. The material facts giving rise to this petition are that previously one Manohar Lal and Nirmal Kumar were the owners and landlords of the premises in dispute. At a court auction the petitioner purchased the property in question. By means of registered deed dated 20th March, 1948 the then landlords had leased out the premises to the tenants-opposite parties. One of the terms of the registered lease deed was that the tenants shall not be liable to ejectment at the instance of the landlords, except on the ground that they were in arrears of rent for a full year, Having stepped into the shoes of the landlords, the petitioner applied under Section 21 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, hereinafter referred to as the Act - before the Prescribed Authority for an order of eviction of the tenants-opposite parties from the building under their tenancy. They resisted the petitioner's claim by raising a preliminary legal objection to the effect that by reason of Section 21(4) of the Act, the petitioner-landlord had no right to obtain an order for their eviction. The Prescribed Authority held that under the terms of the lease, the opposite parties could be evicted only if one year's rent remained unpaid and there was no provision in the registered lease deed under which eviction could

be ordered on the ground of the landlord's personal need. The Prescribed Authority consequently upheld the objection of the opposite parties and rejected the application under Section 21 holding that it was not legally maintainable. The petitioner preferred an appeal against the order of the Prescribed Authority which was dismissed by the learned Third Additional District Judge, Kanpur. Aggrieved by the orders passed by the Prescribed Authority and the learned Third Additional District Judge, Kanpur, the petitioner had filed this writ petition praying for a writ, direction or order in the nature of *certiorari* quashing the orders dated 18th May, 1973 and 28th September, 1974 passed by opposite-parties Nos. 2 and 3.

3. Before the learned single Judge the orders passed by the authorities under the Act were supported by the tenants-opposite parties, who contended that under the terms of the lease dated 20th March, 1948 they were not liable to be ejected from the accommodation in question except on the ground of non-payment of rent for full one year. It was urged that the provision in the lease deed which gave immunity to the tenants from being evicted from the premises leased to them except on the ground of default in payment of rent for a year was a covenant running with the land and the petitioner who was the successor-in-interest of the previous landlords was bound by that covenant. On behalf of the petitioner, it was urged by the learned counsel that the law regarding covenants running with the land was codified in the T.P. Act and since in view of Section 2(d) thereof the provisions of this Act save as provided by Section 57 and Chap. IV thereof did not apply to a purchaser at a court auction, the petitioner was not bound by the aforesaid term of the lease even though the covenant contained therein may be one running with the land. It was further urged that if the main provisions of the T.P. Act do not apply the principles thereof also could not apply and in support of his contention, reliance was placed by the learned counsel for the petitioner on the decisions of this Court in *Nannu Mal v. Ram Chander* [1] and *Lalta Prasad v. Brahmanand* [2] Another submission made in the alternative before the learned single Judge by the counsel for the petitioner was that assuming that the term of the lease was binding on the petitioner, its legal efficacy had been obliterated by the statutory provisions contained in Section 21 of the Act inasmuch as the said Section entitled the petitioner to evict the tenant in case he *bonafide* needed the accommodation for his own use. The term in the lease deed, it was submitted, being in conflict with Section 21(1)(a) became

inoperative. The learned single Judge was tentatively of the view that the submission made in the alternative was without any substance. Since the learned single Judge was of the opinion that the question as to whether the covenant contained in the lease relied upon by the tenants bound the petitioner or not and as to whether it afforded the tenants immunity from eviction in proceedings under Section 21 of the Act except on the ground specified therein required consideration by a larger Bench, he referred the entire case to a larger Bench

4. We have heard learned counsel for the petitioner and the learned counsel for the tenants-opposite parties. The first question arising for consideration is as to whether the term in the lease restricting the landlords right to evict the tenant on the sole ground of his being in default of payment of rent for a year was a covenant running with the land. According to Cheshire's Modern Law of Real Property (Ninth Edition) page 427 "covenants running with the land are covenants that touch and concern the land demised, for it is only these, as distinct from those merely affecting the person, that are capable of running either with the reversion to with the land." It has further been stated in the same work that.

> "If the covenant has direct reference to the land if it lays down something which is to be done or is not to be done upon the land, or, and perhaps this is the clearest way of describing the test, if it affects the landlord in his normal capacity as landlord or the tenant in his normal capacity as tenant, it may be said to touch and concern the land."

(Emphasis supplied)

5. Discussing the subject, Foa in General Law of Landlord and Tenant (Eighth Edition) page 422 states that,

> "Covenants of a lease (and in this respect conditions stand on the same footing as covenants) are sometimes said to be of two kinds :- those which touch and concern the thing demised (usually spoken of as "running with the land" though this is not altogether accurate since they run also with the reversion), and those which are merely personal to the covenantor (usually spoken of as "collateral"). It has been said that, as

general principle, a covenant ought to run with the land, if it is of such a nature that it directly affects the use of the demised premises in a manner which the lessor chooses to assume will be beneficial to him."

6. A covenant by the lessor not to serve on the lessee a notice to quit unless he required the premises for his own occupation was in *Breams Property Investment Co. v. Stroulger* [3] held to be a covenant running with the land, and binding on the assignee of the lessor's right of reversion.

7. Applying the test mentioned above, it is clear that the covenant in the registered lease deed under consideration affects the landlord in his normal capacity as landlord and the tenant in his normal capacity as tenant and consequently may be said to touch and concern the land. The covenant which came up for consideration in *Breams Property Investment Co. v. Stroulger* (supra) was a covenant by the landlord disentitling him to require the tenant to quit except under a specified condition. Harries. C.J. and Das, J. in *Jamini Bala Dasi v. Administrator General of West Bengal.*[4] applying the above mentioned tests and relying on *Mansel v. Norton* [5] held that a covenant by the landlord to pay for the improvements by the lessee on the termination of the tenancy attached to the reversion and to the person in whom the reversion vested. We consequently unhesitatingly hold that the covenant relied upon by the opposite parties in the lease deed executed in their favor by the previous landlords was a covenant running with the land.

8. Covenants running with the land attach to the reversion and to the person in whom the reversion vests and there is ample authority for the proposition that such a covenant binds the assignee of the lessor as also the assignee of the tenant by act of parties. (See *Saradakripa Lala v. Bepin Chandra Pal* [6] *Nabjan Sardar v. Neburali Molla* [7] and *Jamini Bala Dasi v. Administrator General of West Bengal ILR (1953) 1 Calcutta 34).* In the instant case, however, the petitioner is not an assignee of the landlord's right as a consequence of a voluntary transfer effected by the earlier owners and the question is whether a purchaser at a court auction is bound by a covenant running with the reversion.

9. It was contended by the learned counsel for the petitioner that assuming that the term in the lease deed relied upon by the tenants opposite parties was a

covenant running with the land, it was ineffective to bind the petitioner who was a purchaser at a court suction. Reliance was strongly placed by the learned counsel on the privy Council decision in *Nur Mohammad Peerbhoy v. Dinshaw Hormasji-Motiwalla* [8] Our pointed attention was invited to the observations of the Judicial Committee to the effect that "Judicial sales would be robbed of all their security if vague references to antecedent contracts could be held to invalidate the Buyer's title." In that decision, the Privy Council was not concerned with a covenant running with the land. The decision was based on the assumption that the covenant under consideration was of the nature contemplated by Section 40 of the T.P. Act.

10. The decision of the Bombay High Court in *Gordhandas Vithaldas v. Mohanlal Maneklal* [9] was also concerned with a restrictive covenant of the nature envisaged by Section 40 of the T.P. Act. The view taken therein that a mere restrictive covenant by which the owner of an immovable property restricts the ordinary user of the property does not bind a purchaser unless he has notice has no application to the instant case.

11. It cannot be disputed that the petitioner is an assignee the rights of the previous owners and initial lessors of the tenants-opposite parties. According to Cheshire's views expressed at page 436 in the book from which a passage has been quoted earlier,

> "The term 'assignee' is very comprehensive : it applies to all persons who take the estate either by act of party or by act of law, such as the executors of a lessee or assignee, and per-son, taking the premises by way of execution for debt....."

(Emphasis supplied).

12. In General Law of Landlord and Tenant, Foa states in Chap.IV that,

> "The relation of landlord and tenant may be created by assignment where the lessee assigns his term, or where the lessor assigns his reversion. The former assignment creates the relation of landlord and tenant between the lessor and the assignee the latter creates it between the assignee and the

lessee whilst the concurrence of both creates it between the two assignees. Either kind of assignment, too may be effected in two ways, by act of the parties, and by act of law."

13. There is a clear distinction between 'privity of contract' on the one hand and 'privity of estate' on the other. Though there is no '

privity of contract' between an assignee of the lessor's right of reversion and the tenancy rights of the lessee, there is 'privity of estate' between such assignees. According to Cheshire, 'privity of estate' describes the relationship between two parties they respectively hold the same estates as those created by the lease. This is the position where one holds the original reversion and the other the original term, or rather, the whole of what is now left of the original term. Thus there is privity of estate between, the lessor and an assignee from the lessee of the residue of the term; also between the lessee and an assignee of the reversion also between an assignee of the reversion and an assignee of the residue of the term....."

In the instant case, the petitioner indisputably is an assignee of the lessor's interests in the premises in question and consequently there exists 'privity of estate' between the petitioner and the opposite-parties even though the petitioner stepped into the shoes of the previous owners and landlords by virtue of an auction sale.

14. It was urged before us as it was before the learned single Judge, that the law regarding covenants with the land has been codified in Section 40 of the T.P. Act and since in view of Section 2(d) thereof the provisions of the Act "save as provided by Section 57 and Chapter IV" do not apply to a purchaser at a court suction, the petitioner was not bound by the aforesaid term of the lease even though the covenant contained therein might be one running with the land. This contention, in our opinion, is unsound and is consequently unacceptable.

15. Section 40 of the T.P. Act, on which reliance has been placed for the submission that the entire law on the subject regarding covenants running with the land has been codified is not concerned with covenants running with the land. A mere reading of the Section shows that the provision deals with

easements and restrictive covenants as distinguished from covenants running with the land. Under the heading "Summary of law as to covenants running with the land", it has been stated by Foa that,

> "The result seems to be that the assignee of the term will be bound by the following classes of covenants :- (1) All covenants running with the land. (2) Any other covenant of a negative or restrictive nature contained in the lease, or in any document forming part of the chain of title, of which he has constructive notice, (3) All other covenants of a restrictive kind, of which he has actual notice, relating to the user of the demised premises, and entered into by the lessee under the lease."

16. Section 40 of the T.P. Act is not concerned with the covenants of the nature mentioned at (1) of the quoted above.

17. It must be borne in mind that the Transfer of Property Act is not an exhaustive or consolidating Code (See *Satyabadi Behara v. Hirabati* [10] *Bangsa Das v. Gena Lal* [11] *Mahommad Shafikul Haq, v. Krishna Gobinda* [12] *Chotesha v. Maktum Bi*).[13] There is judicial precedent for the view that where a case is not contemplated by any of the provisions of the T.P. Act, High Courts as Courts of Equity are entitled to administer principles of equity as laid down by English or Indian decisions not distinctly prohibited by statute. In *Ahmadabad Municipal Corporation v. Haji Abdul Gafur* [14] it has been held that it is axiomatic that the purchaser at a court auction takes the property subject to all the defects of title and the doctrine caveat emptor (let the purchaser beware) applies to such purchaser. A covenant running with the land creates no defect in the title of the purchaser but in its true character becomes an incident of the property itself. It strikes us as inequitable that the suction purchaser should be allowed to rid himself of such a covenant to the detriment of the lessee.

18. It was ultimately urged that because of the statutory provision contained in U.P. Act No. 13 of 1972 which entitled the landlord to obtain an order of eviction of his tenant on the ground of his personal need under Section 21(1)(a) of that Act, the covenant which restricted the right of the lessor to evict his tenant only on the ground of non-payment of rent for a year stood obliterated. It is contended that the term in the lease being inconsistent with Section 21(1)(b)

of U.P. Act No. 13 of 1972 ceased to be of any legal effect. In support of this contention reliance was placed on the decision of the Supreme Court in *Woman Shriniwas Kini v. Ratilal Bhagwandas and Co.* [15] That decision has, in our opinion, no relevance to the statute under consideration or to the facts of the present case. The material facts giving rise to the appeal before the Supreme Court were that the landlord had entered into an agreement permitting sub-letting by the lessee which was prohibited by Section 15 of the Bombay Hotel and Lodging House Rates Control Act. The Supreme Court held that the agreement was prohibited by Section 15 of the Act and consequently was void by reason of Section 23 of the Contract Act. A number of other cases were relied upon in which Section 23 of the Contract Act was pressed in aid for the purpose of holding particular clauses in agreement as void. Section 21 of U.P. Act No. 13 of 1972 does not prohibit a landlord from entering into a covenant of the nature we are concerned with by which the landlord confined his right to obtain eviction of his tenant on a certain specific ground, and relinquished right to evict him on any other ground including his personal need. Under the general law of Landlord and Tenant, the landlord has an unrestricted right to obtain possession of the property leased out to a tenant subject only to such restrictions as have been laid down with regard to termination of tenancy etc. provided for by the T.P. Act.

19. U.P. Act No. 13 of 1972 does not enlarge the rights which a lessor possessed either under the general law dealing with the subject of Landlord and Tenant or under the provisions of the T.P. Act. The Act has placed restrictions on the rights of the landlord to obtain eviction of his tenant on such grounds as are mentioned in Section 20 or 21 of U.P. Act No. 13 of 1972. Like the enactment which came up for consideration before the Supreme Court in *Trimbak Damodhar v. Assaram Hiraman* [16]it is a piece of beneficial legislation conferring on the tenant additional rights and protection against eviction as a matter of public policy. If the lease deed had contained a covenant surrendering any protection provided to him by U.P. Act No. 13 of 1972 it might have been possible to successfully contend that such a covenant was against public policy and consequently void by reason of Section 23 of the Contract Act. There is nothing in the Act, however, to prevent the landlord from waiving such rights as have been left to him by U.P. Act No. 13 of 1972. There is no public policy involved in Section 21 of the Act as far as it restricts the rights of a landlord to

obtain an order for the eviction of his tenant on certain limited grounds specified in that provision. For the principle enunciated above, we are fortified in our view by the decision of the Supreme Court in *Lachoo Mal v. Radhey Shyam* [17] Section 1-A of U.P. Act No. 3 of 1947 made inapplicable the provisions of that Act to buildings constructed after the 1st January, 1951. In the case before the Supreme Court, the facts were that the appellant had been occupying a shop belonging to the respondent for a very long time on a specified monthly rent. In 1962 that is to say after the 1st January, 1951 since the respondent wanted to construct rooms on the upper storey of the shop for his own residence, the parties entered into an agreement on June 4, 1962 in which it was provided that the appellant would vacate the shop in his tenancy on the condition that as soon as the required construction had been completed he would resume possession of the shop. One of the terms of the agreement was that "after the construction of the shop, the first party shall be entitled to get the same amount as rent from the second party. All the Sections of the U.P. Rent Control and Eviction Act shall be fully applicable to this house. The first party shall in no case be entitled to derive benefits from it as the property built after 1-1-1951." After the shop had been reconstructed, as contemplated by the agreement the appellant entered into possession of the constructed shop and when he offered rent to the respondent, he declined to accept the same and the tenant was compelled to make the depot of rent due, in court under Section 7-C of U.P. Act No. 3 of 1947. The respondent served a notice under the provisions of the T.P. Act purporting to terminate the tenancy of the appellant and instituted a suit for his ejectment for default in payment of rent and for damages. The trial court dismissed the suit holding that the appellant was entitled to the protection conferred by Section 3 of U.P. Act No. 3 of 1947 which was applicable. On appeal, the learned District Judge took a different view and decreed the suit. The High Court on appeal affirmed the judgment of the District Judge and took the view that the respondent was entitled to rely on Section 1-A of U.P. Act No. 3 of 1947 and the appellant could not be given the benefit of Section 3. The tenant consequently took the matter in appeal to the Supreme Court. The Supreme Court was called upon to decide the question as to whether it was open to the respondent-landlord to give up the benefit of Section 1-A of U.P. Act No. 3 of 1947 and waive it by means of an agreement of the nature which was entered into between the appellant and the respondent. After considering the various provisions of U.P. Act No. 3 of 1947 which in its

scope and objective is very similar to the U.P. Act No. 13 of 1972, it was held that,

> "The Act was enacted for affording protection to the tenants against eviction except in the manner provided by the Act ..... At the same time it appears that the legislature was conscious of the fact that the Act might retard and slacken the pace of construction of new buildings because the landlords would naturally be reluctant to invest money in properties the letting of which would be governed by the stringent provisions of the Act. It was for that purpose that the saving provision in Section 1-A seems to have been inserted. The essential question that has to be resolved is whether Section 1-A was merely in the nature of an exemption in favour of the landlord with regard to the building constructed after January, 1, 1951 and conferred a benefit on them which they could give up or waive by agreement or contractual arrangement and whether the consideration or object of such an agreement would not be lawful within the meaning of Section 23 of the Indian Contract Act."

20. The Supreme Court found it unable to hold that the performance of the agreement which was entered into between the parties in the case before it would involve an illegal or unlawful act. It was observed that :

> "In our judgments Section 1-A was meant for the benefit of owners of buildings which were under erection or were constructed after January, 1, 1951. If a particular owner did not wish to avail of the benefit of that Section there was no bar created by it in the way of his waving of giving up or abandoning the advantage or the benefit contemplated by the Section. No question of policy, much less public policy, was involved and such a benefit or advantage could always be waived."

In the result, the appeal was allowed and the view taken by this Court was overruled.

21. As observed earlier in the Transfer of Property Act there was no restriction with regard to the grounds on which the landlord could obtain eviction of his tenant, except such as those to which the parties might have agreed. The effect

of U.P. Act No. 13 of 1972 is that the landlord's right to obtain the eviction of his tenant has become confined to certain specified grounds. It is clearly open to the landlord to waive even such rights and confine his rights to evict his tenant on conditions specified in the agreement of the lease. There is no element of public policy involved in the landlord waiving such rights as have been left intact to him by the provisions of U.P. Act No. 13 of 1972.

22. For the reasons given, we find no merits in this petition, which we accordingly dismiss with costs to opposite parties Nos. 1 and 2.

Petition dismissed.

Cases Referred.

1. (AIR 1931 All 277)
2. (AIR 1953 All 449)
3. (1948) 2 KB 1
4. ILR (1953) 1 Cal 34
5. (1383) 22 Ch D 769
6. AIR 1923 Cal 679
7. AIR 1933 Cal 506
8. (AIR 1922 PC 393)
9. (AIR 1921 Bom 161)
10. (1907) ILR 34 Cal 223
11. (1911) 12 Ind Cas 155 (Cal)
12. (1918) 47 Ind Cas 428 (Cal)
13. AIR 1928 Nag 223
14. AIR 1971 SC 1201
15. (AIR 1959 SC 689)
16. (AIR 1966 SC 1758)
17. (AIR 1971 SC 2213)