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T.K. LATHIKA

v.

SETH KARSANDAS JAMNADAS

AUGUST 31, 1999

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[K.T. THOMAS AND A.P. MISRA, JJ.]

Rent Control and Eviction :

Kerala Buildings (Lease and Rent Control) Act, 1965:

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Section 11(3) third proviso—Eviction petition—Maintainability—Landlord filed eviction petition before expiry of one year after execution of gift deed in her favour—Held: Third proviso to S.11(3) prevents the landlord from filing eviction petition before expiry of the moratorium period of one year—Hence, eviction petition has to be dismissed on that sole ground—

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Court should not have gone into merits of the case because whatever is said or found would be without jurisdiction—High Court erred in going into the merits of the case and giving a finding without first deciding the maintainability of the petition.

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Section 11(3) third proviso—Eviction petition—Filing of—Suit property—Right of Recovery—Arose to landlord under an instrument of transfer inter vivos—Subsequently, landlord entered into a new lease terminating the earlier one—Held: The third proviso would still continue to prohibit the landlord from filing the eviction petition for a period one year from the new lease deed—The reason is that his right to recover possession

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would then arise under that new instrument of lease which would also be inter vivos as envisaged in the third proviso.

Transfer of Property Act, 1882:

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Section 111(f)—Lease—Implied surrender—Determination of—Held: When a new relationship of lessor and lessee comes into existence regarding the same subject matter, the two sets cannot co-exist, being inconsistent and incompatible between each other—The new lease can come into effect only on termination of the earlier lease—Then only the earlier lease would be deemed to be terminated—A mere alteration or improvement or even impairment of the relationship of lessor and lessee would not ipso facto

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amount to implied surrender of lease.

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Practice and Procedure:

Suit—Maintainability—Held: Question of maintainability has to be decided first—If maintainable then only merits should be gone into.

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Words and Phrases:

“Inter vivos”—Meaning of—In the context of S.11(3) third proviso to the Kerala Buildings (Lease and Rent Control) Act, 1965.

Doctrine:

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Doctrine of Implied Surrender of lease—Discussed.

The Appellant-landlord became the owner of a building after execution of a gift deed by her father in her favour. The respondent-tenant executed a fresh lease agreement in favour of the appellant, which provided for a marginal increase in rent and the lessor was the appellant. The appellant, without waiting for the expiry of the moratorium period of one year prescribed under third proviso to Section 11(3) of the Kerala Building (Lease and Rent Control) Act, 1965, filed an eviction petition on the ground of *bona fide* requirement.

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The trial court bypassed the ban contained in the third proviso to Section 11(3) of the Act and considered the merits of the case and allowed the petition. However, the Appellate Authority reversed the findings both on the maintainability of the petition and also the merits of the claim for eviction and dismissed the petition. The revisional authority confirmed the said findings. The High Court, without going into the question of maintainability of the petition, entered into the merits of the case and dismissed the writ petition of the appellant. Hence the appeal.

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On behalf of the appellant it was contended that there was an implied surrender of the old lease under Section 111(f) of the Transfer of Property Act, 1882 when the new lease was executed and, therefore, the appellant had the right to recover possession notwithstanding the ban contained in the third proviso to Section 11(3) of the Act.

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Dismissing the appeal, the Court

HELD: 1. If the ban contained in the third proviso to Section 11(3) of

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A the Kerala Buildings (Lease and Rent Control) Act, 1965 applies, its corollary is that the petition filed by the landlord has to be expelled on the sole ground that the landlord was then not entitled to file it. In such a situation the court should not enter into the merits because whatever is said or found on the merits would then be without jurisdiction. High Court should have first decided the question of maintainability of the petition and only if that point was found in the affirmative the merits should have been gone into.

[121-B-C]

C 2. Assuming that a new lease is created after terminating the erstwhile lease, the grip of the ban contained in the third proviso would still continue to foreclose the landlord from filing the petition for a period of one year from the new lease deed. This is because “the landlord’s right to recover possession” would then arise under that new instrument of lease, which would also be transfer *inter vivos* as envisaged in the third proviso. [122-G]

D *Black’s Law Dictionary*, referred to

E 3. The principle which governs the doctrine of implied surrender of a lease is that when certain relationship existed between two parties in respect of a subject matter and a new relationship has come into existence regarding the same subject matter, the two sets cannot co-exist, being inconsistent and incompatible between each other, i.e. if the latter can come into effect only on termination of the former, then it would be deemed to have been terminated in order to enable the latter to operate. A mere alteration or improvement or even impairment of the former relationship would not *ipso facto* amount to implied surrender. It has to be ascertained on the terms of the new relationship *vis-a-vis* the erstwhile demise and then judge whether there was termination of the old jural relationship by implication. [121-G-H]

M.M. Ponniah Nadar v. Smt. Kalakshmi Ammal, [1989] 1 SCC, followed.

Krishna Kumar Khema v. Grindlays Bank, [1990] 3 SCC, relied on.

G *Halsbury’s Laws of England*, 4th Edn. Vol 27 p.355 and *Hill and Redman’s Law of Landlord and Tenant*, (16th Edn.) p. 451, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 237 of 1999.

H From the Judgment and Order dated 20.5.98 of the Kerala High Court

T.K. LATHIKA v. SETH KARSANDAS JAMNADAS [THOMAS, J.] 119
in O.P. No. 243 of 1994. A

A.S. Nambiar, Smt. Shanta Vasudevan and P.K. Manohar for the
Appellant.

Subramonium Prasad for the Respondent. B

The Judgment of the Court was delivered by

THOMAS, J. A landlord approached the Rent Control Court prematurely
and lost the cause not only regarding the timing of her approach to the Court
but on merits as well. The High Court found that the claim of the landlord
for eviction of the tenant from the building lost its tenability on account of
the factors which sprouted up *pendente lite*. The unsuccessful landlord has,
therefore, reached this Court by special leave. C

The tenant has been residing in the building of the landlord for nearly
half a century by now, (a few more years from now may mark the golden
jubilee year of the tenancy). When the building was originally leased in 1956,
it was in the ownership of appellant's father. He executed a gift deed in favour
of his daughter (the appellant) on 2-8-1980, as per Ext.B-10. But the appellant,
bereft of patience to wait for the expiry of the moratorium period of one year,
hastened to file the petition for eviction of the tenant on 1- 7-1981 under
Section 11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965, for
short "the Act". Appellant made an endeavour to circumvent the quarantine
prescribed under the sub-section on the premise that the tenant had executed
a fresh lease agreement in her favour on 18-8-1980 (Ext.A.1). D

Section 11(3) of the Act reads thus: E

"A landlord may apply to the Rent Control Court for an order directing
the tenant to put the landlord in possession of the building if he *bona
fide* needs the building for his own occupation or for the occupation
by any member of his family dependent on him." F

The sub-section has four provisos of which the third alone is relevant
for consideration in this appeal and hence that is extracted below: G

"Provided further that no landlord whose right to recover possession
arises under an instrument of transfer *inter vivos* shall be entitled to
apply to be put in possession until the expiry of one year from the H

A date of the instrument.”

B The Rent Control Court bypassed the ban contained in the aforesaid proviso by accepting the contention of the appellant that the right to recover possession of the leased premises is not based on Ext.B.10-Gift Deed executed by the erstwhile landlord, since a new lease arrangement has come into effect between the appellant and the tenant as per Ext.A.1. Rent Control Court then proceeded to consider the merits of the claim for eviction and upheld the bona fides of the need highlighted by the landlord. So the Rent Control Court granted the order for eviction.

C But the Appellate Authority under the Act reversed the findings both on the maintainability of the petition for eviction and also on the merits of the claim and consequently dismissed the petition of the landlord. The order so passed by the Appellate Authority remained undisturbed in the revision filed by the landlord before the District Court which was then the revisional authority. However, a learned Single Judge of the High Court of Kerala, while disposing of a writ petition filed under Article 227 of the Constitution expressed inclination to approve the contention that the petition filed by the landlord is not liable to be expelled solely on the strength of the ban contained in the third proviso to Section 11(3) of the Act. The observations made by the learned Single Judge, on that score, are the following:

E “I find some merit in the contention that after the tenant had, subsequent to the transfer *inter vivos*, attorned to the transferee-landlord, right to evict may arise out of that transaction itself and the transferee landlord then need not rely on the transfer in his favour.”

F After expressing as above learned Single Judge has stated thus:

G “Since in view of my finding that the Appellate Authority and the revisional court were right in negating the claim for eviction under Section 11(3) of the Act on merits, I am not inclined to answer this question finally in this Original Petition. Even if the answer to this question were to be in favour of the landlord, she could not still succeed in view of my accepting the finding of the Appellate Authority and the revisional court on the merits of her claim under Section 11(3) of the Act. In that situation I decline to interfere with the finding by the Appellate Authority and the revisional court that the application is also not maintainable having been filed within one year of 2.8.1980.”

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The case of the landlord that she needed the building *bona fide* for her own occupation was then considered by the High Court on merits and learned Single Judge entered upon a finding that it is not *bona fide*. The writ petition was, hence, dismissed. A

If the ban contained in the third proviso to Section 11(3) of the Act applies, its corollary is that the petition filed by the landlord has to be expelled on the sole ground that the landlord was then not entitled to file it. In such a situation the court should not enter into the merits because whatever is said or found on the merits would then be without jurisdiction. High Court should have first decided the question of maintainability of the petition and only if that point was found in the affirmative the merits need have been gone into. B C

Thus the question is whether appellant's right to recover possession of the building arose under Ext.B.10 — Gift Deed or under the new lease agreement Ext.A.1 dated 18.8.1980. No doubt appellant got the right to recover possession when she got the gift executed by her father. The contention is that the said lease came to an end when the new lease agreement was executed. The aforesaid contention is based on Section 111(f) of the Transfer of Property Act on the premise that there was an implied surrender of the old lease when the new lease was executed. D

It must be pointed out that only two differences could be noticed as between the lease agreement of 1956 and Ext.A.1. They are : in the former the lessor was appellant's father and the rent of the building was Rs.65 per month, while in the latter the lessor is appellant and the rent is Rs.150 per month. How could an implied surrender of the lease be inferred therefrom. It is admitted that the tenant continues to be in possession of the building in the same manner as before and the building also remains the same. E F

The principle which governs the doctrine of implied surrender of a lease is that when certain relationship existed between two parties in respect of a subject matter and a new relationship has come into existence regarding the same subject matter, the two sets cannot co-exist, being inconsistent and incompatible between each other, i.e. if the latter can come into effect only on termination of the former, then it would be deemed to have been terminated in order to enable the latter to operate. A mere alteration or improvement or even impairment of the former relationship would not *ipso facto* amount to implied surrender. It has to be ascertained on the terms of the new relationship *vis-a-vis* the erstwhile demise and then judge whether there was termination of the old jural relationship by implication. G H

A The following passage in the Halsbury's Laws of England; 4th Edn. Vol.27 at page 355, is apposite:

B “449. Surrender by change in nature of tenant's occupation. A surrender is implied when the tenant remains in occupation of the premises in a capacity inconsistent with his being tenant, where, for instance, he becomes the landlord's employee, or where the parties agree that the tenant is in future to occupy the premises rent free for life as a license. An agreement by the tenant to purchase the reversion does not of itself effect a surrender, as the purchase is conditional on a good title being made by the landlord.”

C In Hill and Redman's Law of Landlord and Tenant (16th Edn.) at page 451 it is observed that “a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, or other variation of its terms, unless there is some special reasons to infer a new tenancy, where, for instance, the parties make change in the rent under the belief that the old tenancy is at an end.”

D In *N.M. Ponniah Nadar v. Smt. Kalakshmi Ammal*, [1989] 1 SCC 64 a three-Judge Bench of this Court found that an arrangement by which rent of the building was increased in respect of existing tenancy will not bring an end to the pre-existing lease.

E In *Krishna Kumar Khema v. Grindlays Bank*, [1990] 3 SCC 669 a two-Judge Bench of this Court held thus:

F “Surrender of a part does not amount to implied surrender of the entire tenancy and the rest of the tenancy remains untouched..... Likewise the mere increase or reduction of rent also will not necessarily import a surrender of an existing lease and the creation of a new tenancy.”

G Assuming that Ext.A.1 has created a new lease after terminating the erstwhile lease, the difficulty is that the grip of the ban contained in the third proviso would still continue to foreclose the landlord from filing the petition for a period of one year from the new lease deed. This is because “the landlord's right to recover possession” would then arise under that instrument of lease, which would also be a transfer inter vivos as envisaged in the third proviso. In Black's Law Dictionary the expression inter vivos is given the following meaning:

H “Between the living; from one living person to another. Where property

passes by conveyance, the transaction is said to be inter vivos, to distinguish it from a case of succession or devise." A

So the landlord had to wait for a still further period if he were to root his right in Ex.A1 to recover possession of the building.

As the third proviso to Section 11(3) disentitles a landlord from applying for eviction of the tenant before the expiry of the quarantine period, the petition filed by the landlord in this case has to be dismissed only on that ground. Any observation made on the merits of the case in the proceeding based on such a non-maintainable petition must stand erased from judicial notice. If the present landlord files a new petition for eviction under the Act, as the ban period is over, the same has to be considered and disposed of uninfluenced by any of the observations made by the High Court or the courts below thereto. B C

The appeal is dismissed in the above terms, without any order as to costs. D

V.S.S.

Appeal dismissed.