

Hamsa Patel and Two ors. Vs. S. Balakrishnan and anr.

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Court : Chennai

Decided On : Feb-19-1997

Reported in : 1997(1)CTC367

Judge : K.A. Swami, C.J. and ;Kanakaraj, J.

Acts : Tamil Nadu City Tenants Protection Act, 1921 - Sections 2(4), 9, 9A and 11;
[Evidence Act, 1872](#) - Sections 115

Appeal No. : L.P.A. Nos. 36, 37, 39 and 40 of 1989

Appellant : Hamsa Patel and Two ors.

Respondent : S. Balakrishnan and anr.

Advocate for Def. : G. Subramanian, Sr. Counsel for ;V. Venkataswami and ;S. Kadarkarai, Advs.

Advocate for Pet/Ap. : T.R. Mani, Sr. Counsel for ;M.V. Venkateseshan, Adv.

Disposition : Appeal dismissed

Judgement :

ORDER

Kanakaraj, J.

1. All the four appeals under Clause 15 of the Letters Patent arise out of a suit filed by the two respondents in the appeals, against the appellants and two others, who had remained *ex parte* in the proceedings, seeking delivery of possession of the suit property, arrears of rent from 1.1.1975 to 31.12.1976, damages for use and occupation from 1.1.1977 to 29.4.1977 and for payment of future damages at the rate of Rs. 375 per month. In the suit, the appellant in L.P.A. No. 36 of 1989 and L.P.A. No. 37 of 1989 was the 5th defendant and the appellants in L.P.A. No. 39 of 1989 and 40 of 1989 were defendants 1 and 2 Defendants 3 and 4, are said to be the sub tenants of defendants 1 and 2, and they remained *ex parte* through-out the proceedings. The suit was filed originally against the first four defendants only. On defendants 1 and 2 filing a written statement stating that it was the fifth defendant who is the legatee under a Will of the original lessee, that the plaintiffs/respondents 1 and 2 filed I.A.No. 568 of 1978 to implead the fifth defendant as a party. We will refer to the parties by their rank and status as per the cause title in the suit.

2. The plaintiffs/respondents 1 and 2 are the owners of a site measuring 70' x 127' in Coimbatore Town. Under a lease deed dated 12.1.1957 marked as Ex.B.1 in the suit, the father of defendants 1 and 2 took the property on lease for running his business called 'Diesel (India)'. The rent was Rs. 300 per month and was subsequently raised to Rs. 375 per month from 1-3-1974 onwards. For the purpose of the present appeals, only two clauses in the lease deed have some significance. The first is that the lessee was given a right to construct tenements, sheds and superstructures on the property for his convenient enjoyment. The second is that the lessee was given a right to sub-let a part or the whole of the property demised under the document, to any third party. The plaintiffs had filed a suit O.S.No. 50 of 1975 claiming arrears of rent from the father of defendants 1 and 2. During the pendency of this suit, the father passed away on 31.3.1975. Defendants 1 and 2 and their mother were impleaded as legal representatives of the deceased G.M. Patel. It is the case of the plaintiffs that defendants 1 and 2 alone continued the business and agreed to pay rent to the plaintiffs. The suit O.S.No. 50 of 1975 was decreed in favour of the plaintiffs on 25.3.1977. It is the case of the plaintiffs that defendants 1 and 2 failed to pay rent even after 31.12.1974, and had also subleased portions of the property to strangers namely,

defendants 3 and 4. By a registered notice dated 26.9.1976, the plaintiffs called upon defendants 1 and 2 to vacate the premises by the end of 31.12.1976. They also offered to pay Rs. 15,000 towards the value of the superstructures constructed by the lessee. For the purpose of impleading the fifth defendant, the plaintiffs added paragraph 6-A in the plaint. In this paragraph the plaintiffs only state that as per the written statement of defendants 1 and 2, the original lessee G.M. Patel had bequeathed the business, M/S. Diesel (India), and the superstructure to and in favour of his daughter-in-law namely, the fifth defendant under a Will dated 11.4.1974. The plaintiffs however, stated that the fifth defendant was never in possession of the property and never claimed to be a tenant of the suit property.

3. In the written statement of defendants 1 and 2, the material averments for the purpose of the appeals before us, are as follows:-

The constructions in the suit property were put up at the cost of their father G.M. Patel, and that the rent was Rs. 145 per month and later on increased from time to time. They denied the enhancement ;of the rent from Rs. 300 to Rs. 375 with effect from 1.3.1974. They categorically state that their father G.M. Patel had bequeathed the business and the superstructures and all other assets to the fifth defendant under the Will dated 11.4.1974. It is also stated that the fifth defendant is the tenant in occupation of the property and that she is the sole owner of the business 'Diesel (India)'. In fact, they deny, that they continued to do the business and had agreed to pay the rent. The following sentence in the written statement is worth quoting:-

'That do not stand in relationship of lesserer vis-a-vis the plaintiffs, so far as the suit property is concerned. There is no relationship of Landlord and tenant between plaintiffs and ;these defendants. The plaintiffs' claim remedy, if any, would lie only against the legatee under the Will referred to above i.e. Mrs. Hansaben Patel.' However, they added that if the fifth defendant's claim is found to be unacceptable, they themselves are entitled to the benefits of the Tamil Nadu City Tenants Protection Act, 1921 (hereinafter called 'the Act') and entitled to buy the property as per the provisions of the Act.

4. The averments in the written statement of the fifth defendant are identical to the averments of defendants 1 and 2 in so far as the bequest made to the fifth defendant in support of the suit property. She also claims a right to purchase the property as a tenant by exercising the power under Section 9 of the Act. She agreed to pay the arrears of rent but denied the liability to pay the damages for use and occupation.

5. In conformity with the written statements filed by defendants, an application was filed by defendants 1 and 2 for purchasing the property under Section 9 of the Act, in I.A. No. 1213 of 1978. Similarly, the fifth defendant filed I.A.No. 1420 of 1978 for purchasing the suit property. Only one plea of the plaintiffs in the counter statement filed in I.A.No. 1420 of 1978 is relevant. It is the statement that the fifth defendant never entered possession of the suit property and that she is not a tenant coming within the purview of the Act. The plaintiffs also disputed the genuineness of the Will and also contended that defendants 1 and 2 cannot blow hot and cold.

6. The trial Court raised the following issues :-

(1) Whether the defendants 1 and 2 are not the plaintiffs' tenants liable to pay the arrears of rent and deliver possession of the property to the plaintiffs?

(2) Whether the Will dated 11.4.1974 alleged to have been executed by late G.M. Patel is true, valid and binding on the plaintiffs?

(3) Whether the 5th defendants gets any right to superstructures and the lease hold rights by virtue of the alleged Will?

(4) Whether the defendant were ever in possession of the property as tenant, under the plaintiffs?

(5) Whether the defendant is entitled to the benefits of the City Tenants Protection Act ?

(6) Whether defendants 3 and 4 are not tenants under defendants 1 and 2?

(7) What is the value of the superstructures?

(8) To what reliefs the plaintiffs are entitled?

On the second issue the trial Court held that the Will Ex.B.5 had not been proved to be true and genuine and the propounder had not discharged the suspicious circumstances surrounding the execution of the Will. On the first issue, the trial Court, held that defendants 1 and 2 are not the lessees having regard to their own plea that the fifth defendant succeeded to the lease hold rights. In view of his finding that the Will was not proved and in view of the fact that the fifth defendant had not paid any rent, it was held, that she did not get any right as lessee of the property. On the fourth issue, the trial Court held that defendants were never in possession of the property as tenants under the plaintiff and therefore, not entitled to the protection of the Act. On the sixth issue, it was held that the sub-lessees, defendants 3 and 4 were continuing in possession as sub-lessees. Inasmuch as defendants 1 and 2 did not admit in their written statement that they had sub-let the property to defendants 3 and 4 and did not also enter the witness box to make such an averment, it was held that defendants 3 and 4 were not sub-lessees under defendants 1 and 2 and that they were sub-lessees under the quondam lessee, meaning, father of defendants 1 and 2. Accordingly, the trial Court decreed the suit for possession for arrears of rent and for damages for use and occupation at the rate of Rs. 375 per month. The trial Court also held that the value of the superstructures was Rs. 15,000 and the same was directed to be deposited. Applications, I.A. Nos. 213 of 1978 and 1428 of 1978 were accordingly, dismissed.

7. Against the above judgment of the trial Court, two appeals, A.S. Nos. 623 and 875 of 1980 were preferred against the decree in the suit and two C.M.As.430 and 452 of 1980 were preferred against the dismissal of the two applications for purchase of the property, C.M.P. No. 4891 of 1995 was filed by the fifth defendant for reception of certain additional evidence. After hearing the arguments, learned single Judge of this Court framed the following points for consideration:-

'(1) Whether the Will dated 17.4.1974 is true?

(2) Whether the bequest of the leasehold interest is valid in law?

(3) Whether the Defendants 1 and 2 are entitled to the benefits of Section 9 of the City Tenants Protection Act?

(4) Whether the Fifth Defendant is entitled to the benefit of Section 9 of the City Tenants Protection Act?'

Learned Single Judge has devoted the major part of his judgment in considering the validity of the Will and ultimately agreed with the trial Court that the Will Ex.B.5 had not been proved. On the second point, learned single Judge held that the bequest of the lease-hold right in favour of the fifth defendant was void in law. On the third point also the Appellate Judge agreed with the trial Court. Defendants 1 and 2 had denied their relationship with the landlord and therefore, are not entitled to the benefit of the Act. Though the fourth point did not arise for consideration, learned Judge referred to the definition of the word 'tenant' in the Act and held that the fifth defendant could claim to be a tenant only if there was a tenancy agreement between her and the landlord. Learned Judge also expressed the view that the word 'heir' means only a person who inherits the property by descent and not a person who claims to be a legatee. Accordingly, learned single Judge dismissed all the appeals. However, C.M.P.No. 4891 of 1985 was allowed in part and certain documents were marked as Ex.B.8 to B.14.

8. Before us. Mr. T.R. Mani, learned Senior Counsel, appears for all the appellants and Mr. G. Subramanian, learned Senior Counsel appears for the respondents. The argument of Mr. T. R. Mani is that the dichotomy between the rival claims of defendants 1 and 2 on the one hand and the fifth defendant on the other hand should be kept in mind and either of the two groups are entitled to purchase the property as tenant within the meaning of the Act. He attacks the findings of the Courts below on the validity of the Will Ex.B.5. According to him, the word 'heir' includes a legatee and therefore, the fifth defendant should be deemed to be a tenant under Section 2 (4) of the Act. In the alternative defendants 1 and 2 should be deemed to be the tenants. In either case, the further submission is that the possession of the sub-lessees should be deemed to be the constructive possession of the lessees especially because the lease deed permits the sub-lease by the main lessee. In answer to the above arguments, Mr. G. Subramanian,

learned Senior Counsel, submits that physical possession is the sine-quo-non of the definition of the word 'tenant' and neither the fifth defendant nor defendants 1 and 2 claim to be in physical possession of the property. According to him, a person who is not in possession of the property cannot be treated as a tenant for the purpose of the Act. In this view of the matter, learned Counsel for the respondents says that there is really no need for a finding on the question of the validity of the Will.

9. After deliberating on the above arguments of the Senior Counsel for the parties, we are also of the opinion that it is not necessary to decide on the validity of Ex.B.5. That question can be left open to be urged in an appropriate proceedings between the parties. A discussion on the other requirements of law, of either of the appellants to succeed in establishing their right to purchase the property under the Act, will also lead to the same conclusion. We will therefore, refer to the provisions of the Act and the decided cases on the relevant issues before considering the other questions involved in the appeals.

10. The Act is a peculiar legislation meant for protecting the interest of tenants of vacant sites who had erected building on the demised property and who were forced to demolish such construction and seek alternative accommodation in the event of eviction by the landlords, leading to congestion in the City of Madras. Section 2(4) of the Act defines the word 'tenant'. It is necessary to quote the entire definition of the word 'tenant' for a proper understanding of the claims put forward by the appellants. :-

'Tenant' in relation to any land -

(i) means a person liable to pay rent in respect of such land under a tenancy agreement express or implied, and

(ii) includes -

(a) any such person as is referred to in Sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement.

(b) any person who was a tenant in respect of such land under a tenancy agreement to which this Act is applicable under sub-Section (3) of Section 1 and who or any of his predecessors-in- interest had erected any building on such land and who continues in actual physical possession of such land and building notwithstanding that-

(1) such person was not entitled to the rights under this Act by reason of the proviso to Section 12 of this Act as it stood before the date of the publication of the Madras City Tenants' Protection (Amendment) Act 1972 (Tamil Nadu Act 4 of 1972). Or

(2) a decree for declaration or a decree or an order for possession or for similar relief has been passed against such person on the ground that the proviso to Section 12 of this Act as it stood before the date of publication of the Madras City Tenants Protection (Amendment Act 1972) (Tamil Nadu Act 4 of 1972 disentitled such person from claiming the right under this Act and)

(c) the heirs of any such person as is referred to in Sub-clause (i) or Sub-clauses (ii) (a) or ii (b) but does not include a sub- tenant or his heirs)'

Section 9 of the Act enables a tenant who is entitled to compensation under Section 3 of the Act to apply for purchasing the whole or part of the property which may be necessary for convenient enjoyment by the tenant. It is not necessary to refer to the other provisions of the Act relating to the time of application and the price to be fixed for the land.

11. The above provisions of law especially the ingredients of the word 'tenant' in Section 2(4) of the Act have come up for consideration in several cases. On an analysis of the entire definition of the word with reference to the other provisions of law, the Courts have held that physical possession of the property by the tenant is a sine quo non for the tenant seeking to purchase the property under Section 9 of the Act. We will briefly refer to the cases on the point which in our opinion, will put at rest all other arguments in the case. In Estate of T.R. Ramaswami Pillai v. Mohd. Yousuf, 1983 2 M.L.J. 319 Ratnam, J. was dealing with an identical matter. Learned Judge had noticed the facts of the said case and observed as follows:-

'The second Judge of the Court of Small Causes, Madras who enquired into this application, found that the petitioner admitted that possession of the land and the superstructure thereon was not with the petitioner and that in the absence of actual physical possession of the land and the superstructure with the petitioner, the benefits of Section 9 of the Act cannot be claimed.'

The argument of the tenant that a person liable to pay rent would satisfy the definition under Section 2 (4)(i) of the Act. irrespective of whether he was in possession of the land and superstructure or not, was rejected. It is interesting to note that in that case also lessee who put up the superstructures had sub-let the same to the different tenants and the actual physical possession of the premises and the superstructures were never with the lessee. Rejecting the contention, Ratnam, J. observed:

'Inasmuch as the acceptance of the contention urged by the learned counsel for the petitioner would result in the conferment of the benefits of the Act upon persons not in possession of the land and superstructures at all during the subsistence of the tenancy, it is not possible to accept that contention.'

12. In *P. Ananthakrishnan v. G. Ramakrishnan*, : [1987]2SCR734 the application under Section 9 of the Act was dismissed on two grounds. One of them being that the applicants had not been in possession or occupation of the property because they had let out the entire building to sub-tenants. Examining the provisions of the Act, the Supreme Court emphasising the words 'for convenient enjoyment by the tenant' in Section 9 of the Act, observed:

'If the tenant does not occupy the land or the superstructure or if he is not residing therein or carrying on any business, the question of convenient enjoyment of the land by him could not arise.'

13. More recently, in *Hindustan Petroleum Corporation Ltd., v. Yaukum (died)* : (1994)1MLJ189 , Abdul Hadi, J. had to deal with an identical issue relating to a Petroleum Corporation who was the lessee and who had parted with possession to a dealer selling petroleum products seeking to purchase the property under Section 9 of the Act. The contention of the petroleum Corporation that the dealer

was only a licensee under the Corporation and that his possession must be deemed to be the possession of the Corporation was rejected by Abdul Hadi, J. and the learned Judge observed:

'So, the abovesaid admission by D.Ws. 1 and 2 that the 2nd defendant is paying rent to the 1st defendant all these years and the abovesaid non-denial of the abovesaid relevant allegations in the plaint have to be given full effect and it must be held that the 1st defendant is not in physical possession of the suit site. The 1st defendant is not entitled to invoke the abovesaid Section 9 and purchase the suit site. As already indicated, this court has also held consistently that if the tenant under the Act is not in physical possession of the site in question, he is not entitled to invoke Section 9 of the Act.'

14. We are clearly of the opinion that the above decisions conclude the issue between the parties before us. In the instant case, neither defendants 1 and 2 nor the fifth defendant have been able to show that they were in physical possession of the property. On the other hand, the pleadings and the evidence clearly show that they are not in possession of the property. We will only advert to certain passages in the evidence to support our conclusion. Defendants 1 and 2 did not at all plead that they were in possession of the property, they did not even say that they had sub-leased the property to defendants 3 and 4. We have adverted to the finding of the trial Court that defendants 3 and 4 were in possession of the property. At the trial of the suit defendants 1 and 2 did not enter the box to put forth their claim of possession. On the other hand, the fifth defendant alone gave evidence as D.W.1. In her evidence she stated that in the suit property there are several machines and they all belong to St. Joseph Automobiles. She also stated that the said Automobiles were doing business in the suit property. The evidence of P.W.I (second plaintiff) that defendants 1 and 2 were not in possession of the property and defendants 3 and 4 alone were in occupation of the property, was not questioned in cross-examination by the defendants. We are therefore, clearly of the opinion, that defendants 1 and 2 as well as the fifth defendant have miserably failed to prove that either of them were in possession of the property entitling them to file an application under Section 9 of the Act. Once it is held that defendants/appellants are not entitled to purchase the property under Section 9 of

the Act, the decree for possession has to be upheld. A plea, in frustration, was sought to be taken that no notice under Section 11 of the Act was issued to the fifth defendant. Such a plea was never taken in the Courts below and we are of the opinion that the fifth defendant cannot be permitted to raise only such plea at this stage. That a part having filed an application under Section 9 of the Act, and the application having been considered on merits, she is stopped from raising the issue of notice under Section 11 of the Act. This proposition is also laid down by the decision of this Court in *Natesa Naicker v. Vedagiri*, : (1975)1MLJ301 , P.R. Gokulakirshnan, J. observes:

'If they are not tenants under the respondent herein, there is no necessity to give notice under Section 106 of the Transfer of Property Act, as contented by Thiru N.C. Raghavachari. As regards notice under Section 11 of the Act, it is clear from the decision in *Vedachala Naicker v. Duraiswami Mudaliar*, : AIR1951 Mad593 , that the tenants have lost their right by waiver of such notice, inasmuch as they had filed applications under Section 9 of the Act.'

15. In view of our findings as set out above, the findings of the Courts below on the invalidity and proof of the Will Ex.B.5 are set aside and we specifically leave the question of validity and proof of the Will Ex.B.5 to be decided in an appropriate proceedings reserving all contentions of the parties to be raised at the appropriate time. We are also not deciding any other question raised before us except holding that the appellants are not entitled to purchase the property under Section 9 of the Act and the decree for possession passed against them is perfectly legal and justified.

16. All the appeals are therefore, dismissed. There will however, be no order as to costs.