

(1986) 02 KL CK 0033

In the High Court Of Kerala

Case No : C. R. P. No. 2917 of 1983

Mavelikkara Ex-Servicemen's Multipurpose Co-operative
Society

APPELLANT

Vs

Parvathy Amma Rajamma

RESPONDENT

Date of Decision : 19-02-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10(4)(i), 11, 11(2), 11(3), 115
Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11(3), 15, 17

Citation : (1986) 23 KLJ 534

Hon'ble Judges : Varghese Kalliat, J

Bench : Single Bench

**Advocate : Usha Sukumaran, for the Appellant; George Varghese
Kannamthanam and P.C. Joseph Pazheparambil, for the Respondent**

Final Decision : Dismissed

Judgement

Varghese Kalliat, J.—This is a revision petition filed by the tenant in a proceeding under the Kerala Buildings (Lease and Rent Control) Act, 1965, for short the Act. The landlady filed the petition for eviction of the tenant u/s 11(3) of the Act. Now all the authorities including the revisional court have found that the landlady has established her case of bona fide need for own occupation and allowed the claim of the landlady.

2. The question regarding bona fide need is essentially a question of fact. Of course in certain circumstances, it may be linked up with questions of law. In Sri. Raja Lakshmi Dyeing Works and Others Vs. Rangaswamy Chettiar, the Supreme Court has held that to hold that a question is a mixed question of fact and law is not sufficient to warrant the exercise of revisional power. The Court said:

It must however, be shown that there was a taint of such unreasonableness resulting in a miscarriage of justice.

Since all the authorities have found that the landlady has established the bona

fide need and no question of law is involved in this aspect of the case, I do not think that I can interfere with this finding of the lower authorities exercising my power u/s 115 C. P. C. Further [see no tinge of unreasonableness in the conclusions of the lower authorities on this aspect.

3. The learned counsel for the revision petitioner now submits that the petition filed by the landlady before the Rent Controller was liable to be dismissed u/s 15 of the Act. This is the point she argued. elaborately. In order to appreciate the submission of the counsel on this count, I feel that it is necessary to state concisely certain facts.

4. The building in question is now occupied by the tenant. The tenant is a Co-operative Society. The Society is running a printing press in the building. The husband of the landlady was the paid secretary of the society. The society advanced to the landlady an amount of Rs. 3000/- for the construction of the building. The advance was on a hypothecation bond Ext.A1 Executed by the landlady. Ext.A1 is dated 1-12-1962. In the bond it is provided clearly that the building after the construction should be given on rent for five years to the society for the purpose of establishing a printing press by the society. Further it is seen provided in Ext. A1 that the Society can continue after the said period of five years, if the period is extended.

5. The husband of the landlady who was the secretary of the Society was dismissed from the service of the society on 8-1-1964. The landlady filed a rent control petition, O. P. 18/70 u/s 11 (3) of the Act. This application was allowed on 1-2-1972. The Society filed an appeal at R. C. A. 2/72. This appeal was allowed and the petition was dismissed.

6. The landlady had sold the building on 24-1-1972 under Ext. D11. But subsequently she purchased the building on 15-11-1976 under Ext. A2. Six years thereafter in 1982, the present rent control petition was filed as R. C. O. P. 4/82. The ground alleged, as stated earlier, is one u/s 11(3) for bona fide need for own occupation of the landlady. The learned counsel for the revision petitioner submits that in these circumstances the present petition is barred u/s 15 of the Act.

7. This point was considered by the rent controller, appellate authority and the revisional court and they held against the revision petitioner. Section 15 of the Act reads thus:-

Decisions which have become final not to be reopened.- The - Rent Control Court shall summarily reject any application under: sub-section (2), (3), (4), (5), (7) or subsection (8) of section 11 which raises between the same parties or between parties under whom they or any of them claim substantially the same issues as have been finally decided in a former proceeding under this Act or under the corresponding provisions of any law in force prior to the commencement of this Act or the corresponding provisions of any law repealed or superseded by such law.

8. Section 15 of the Act postulates a rule of estoppel by res judicata. To understand the integrants of the section, I feel I should remember the two basic theories on which the doctrine of res judicata is based. Of course, both these theories are so interlinked that they form the two sides of one and the same theory. On one side it is a norm of public policy and on the other side a rule of private justice. The public policy is the general interest of the community in the determination of disputes and in the finality and conclusiveness of judicial decisions. The private justice is based on the right of the individual to be ensconced from vexatious pullulation of suits at the instance of the adversary whose superior opulence, resources and power, may unless clipped by estoppel, gravitate and weigh down judicially declared rights. The House of Lords in (1939) 1 A.C. 1 (Mew Brunswick Rail Co. v. British and French Trust Corporation Ltd.) said : -

The doctrine of estoppel (per rem judicatam) is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

9. The question is how far the application of the doctrine can be pushed before it breaks down as a matter of practical common sense. Should the doctrine be pushed thus far to hold that the mandate in section 15 is that an adverse finding in a proceeding ended in 1972 on the question of bona fide need of a landlord in the year 1970 would constitute estoppel by res judicata when a claim based on bona fide need is raised in 1982 whatever be the changed circumstances. If feel extreme difficulty to attribute such an egregious legislative intention in section 15 of the Act of putting a permanent bar to raise the ground of bona fide need in a subsequent proceeding once it was rejected in a former proceeding I shall attempt a legalistic answer to this question.

10. I pose a question. Is the issue to be decided in the second proceedings (the present proceedings) substantially the same issue, as was contested in the first? If it is not, there can be no operation of section 15 of the Act. Spencer Bower dealing with the point "the same issue" observes:-

for this purpose, identity of subject matter means not only eadem res, but also eadem quaestio, ...not only identity of subject matter in a physical sense, but identity of subject matter in a juridical sense.

In (1939) 1 A.C. 1, the House of Lords held that the construction which the court has in one proceedings placed on a contract between the parties will not found "an estoppel" precluding any other constitution being placed in later proceedings on another, but distinct, contract made between them in identical terms. Commenting on the principle laid down in this decision, Spencer Bower said. This may be said to be because the two contracts are physically different, in that they are written on different pieces of paper." Sir Alexander Kingdome Turner. Editor

of the Doctrine of Res Judicata by Spencer Bower tells us that he would prefer to say that it is because the two contracts will not necessarily have been executed in the same circumstantial context, and that therefore the construction to be placed upon them is not necessarily the same question in each case, even though it may be highly probable that it will be the same. In *Burman v. Woods* (1948) 1 K. B. 111, the Court of Appeal held that a decision declining an order for possession of premises protected by rent restriction Acts on the ground that balance of hardship does not require making of an order, will not prevent a second proceeding between the same parties in regard to the same premises at a later date, for the factors contributing to hardship may change. Again in (1967) 2 All. E.R. 100 (*Mills v. Cooper*), the Queens Bench Division held that a decision, the foundation of which was a finding that it had not been proved that respondent was a gipsy was held to be no bar to the litigation in subsequent proceedings of the different question whether he was a gipsy on a later date. The principle behind these decisions seems to be that there can be no *eadem quaestio* and therefore no estoppel by res judicata unless every limb of the controversy in the proceedings where the question of res judicata is raised was also in controversy in the prior litigation which resulted in the judicial decision relied upon for the purpose of res judicata.

11. In the light of the formulation of the principles, I shall examine the width of the provision contained in section 15 of the Act, The section mandates that an application under Sub-Sections (2), (3), (4), (5), (7) or sub-section (8) of section 11, which raises between the same parties under whom they or any of them claim substantially the same issues as have been finally decided in a former proceeding, should be summarily rejected. Section 11(2) provides a ground for eviction of the tenant, if the tenant defaults payment of rent. Did the section mandates that a prior decision rejecting an application based on arrears of rent would be a bar for a second petition, based on arrears of rent subsequently accrued. It will be quite irrational to say that when once a petition was dismissed on the ground that there was no arrears of rent at a given time, will be an eternal bar for presenting a petition on a subsequent occasion on the same ground of arrears of rent. Of course, here it is plain and explicit that the arrears of rent claimed in the previous petition may not be the same arrears of rent which formed the basis for the second application. So, the issue involved may not be substantially the same. Sub-section (4) of section 11 concerns with sub-letting. The fact that the landlord was not able to substantiate his case of sub-letting in a former proceeding cannot be a bar for raising a ground of sub-letting under changed circumstances in a subsequent proceeding. There is possibility of the tenant sub-letting the premises subsequent to the disposal of the earlier application. Here there is absolutely no difficulty in holding that the issue decided in the earlier proceeding, though based on the ground of sub-letting is not substantially the same issue in the subsequent proceedings even though the ground is sub-letting in the subsequent proceedings also Similarly, a second application under sub section (5) of section 11 which deals with rennovation of

the building also can be salvaged on the basis that the renovation which was the ground urged in the prior litigation may not be the same when a second petition was moved by the landlord for renovation of the building. Both are not identical or substantially the same issues. Sub-section (7) of section 11 deals with the right of a landlord who is a religious, charitable, educational or other public institution to claim eviction when the institution need the building for the purpose of the institution in this case also it is difficult to hold that a finding in a previous litigation will be a permanent bar for raising the question that the landlord requires the building on a subsequent date under changed circumstances. Here also it has to be held that even if the court finds at a particular point of time that the landlord did not require the building for the purpose of the institution, there can be change of circumstances which will enable the landlord to ask for eviction on the same ground that the building is needed for the purpose of the institution. Though, generally speaking the ground raised may be identical but the issues in the former and later litigations may not be substantially the same. A similar view has to be taken in the case of the ground urged u/s 11(3) namely, bona fide need for own occupation. The ground may be identical but the issues are not substantially the same issue's in the former and latter litigations. In considering section 15, it has to be kept in mind that the words used in the section are not "substantially the same ground" but the words are "substantially the same issues."

12. It has to be remembered that the factors contributing to the bona fide need alleged in 1970 may change substantially and radically in 1982, Though the ground urged in 1982 and in 1972 is for bona fide need for own occupation of the building by the landlord, the facts and circumstances contributing to the need may not be the same in 1970 and 1982. So, it not difficult to say that the issues are not substantially the same in the edition filed in 1970 and the petition filed in 1982, Though there may be identity of the subject-matter in a physical sense- eadem res - there is no identity of subject in a juridical sense - eadem quaestio. In (1965) 2 All E. R. 4, Diplock L. J said:-

An issue, in the sense relevant to issue estoppel, is a decision as to the legal consequences of particular facts, constituting a necessary step in determining what are the legal rights and duties of the parties resulting from the totality of facts; and accordingly neither a determination of fact alone, divorced from legal consequences, nor the determination by the High Court of a question of law on a special case stated in the course of an arbitration before the relevant issue is determined raises issue estoppel.

13. In the decision reported in 1976 R.C.R. 249 (Krishan Kumar v. Vimala Sehgal), the Delhi High Court held that when the circumstances are changed, a second petition can be filed for own occupation even if the earlier application of the landlord is rejected by the Rent Controller. In paragraph 30" of that decision, the Delhi High Court held;-

The needs of the landlord when he filed the first petition in 1961 were limited.

His son had not come from England. His children were quite young AH of them are now grown up. He himself is a man of 64 years of age. He has retired. It would not, therefore, be right to say that the decision in the first petition operates as a res" judicata, Obviously the circumstances have changed. In changed circumstances a second petition can always be made.

In 1986 KLT 109 (Thananppan Pillai v. Sukumari Amma; Sreedharan, J. said that in a case where the landlord wanted the building occupied by the tenant for demolition and for putting up a new building for his residences the need urged by the landlord is a new need. The learned Judge said;-

This need, is an entirely different one thin the one pleaded in the earlier application. In this view this petition cannot be considered as one wherein the landlord has put forth a claim which is substantially the same as the one urged earlier.

14. The discussion made above tells me that the landlady should not be prevented from prosecuting her application for eviction of the tenant for the bona fide need of her own occupation, u/s 15 of the Act.

15. In this case it has to be remembered that the earlier proceedings began in 1972. Further it has to be noted that in the earlier proceedings the first authority, namely, the Rent Controller found the bona fide need of the petitioner and when at the time of disposing the appeal, the petitioner ceased to be the owner of the building. In such a circumstance, the appeal had only to be allowed on the ground that the respondent-appellant bad no interest in the building. An adjudication of the question of bona fide need in such a case was not called for. No issue on the question of need subsisted at the time of hearing the appeal. So no effective adjudication of that issue is possible. So in fact, there is no adjudication which would be binding on the respondent in this revision petition.

16. In C R. P. No. 1390 of 1975, dated 23-2-1976, (A. I. R. 1977 NOC 169 (Mad)), the Madras High Court in considering the question of res judicata on the basis of a finding in a prior proceeding made under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, observed thus:-

Findings as to bona fides of landlord in the prior petition cannot act as res judicata. When section 10 (4) (i) mandatorily prohibits a court from passing an eviction order against a person squarely falling u/s 10 (4) (i) other issues need no consideration and findings on such issues are ab initio void. Section 19 is no bar in such subsequent proceedings.

Section 19 of the Tamil Nadu Buildings (Lease and Rent Control) Act, is almost identical to the. provision contained in section 15 of the Act. Sub-section (3) (a) of Section 10 of the Tamil Nadu Buildings (Lease and Rent Control) Act, deals with eviction on the ground of bona fide occupation of the landlord.

17. The learned counsel for the revision petitioner further submitted that on the terms of Ext. A1, the Society is entitled to continue in the building

notwithstanding the fact that the landlady has proved the ground u/s 11(3) of the Act. I have to examine this point also. The relevant clause in the agreement reads thus:-

The interdiction that the landlady should not ask for surrender of the building is certainly confined to the first five years period. If, after the first five years period, parties agree for the continuance of the arrangement, I feel no doubt that such continuance would create only a normal landlord-tenant relationship. Such a tenancy can be determined as an ordinary tenancy in accordance with law. In this view, I think there is absolutely no substance in the contention raised by the counsel for the petitioner. The learned counsel for the revision petitioner next contended that the building is being used by the tenant for a commercial purpose and now the landlady wants to convert this building for residential purpose and that it is not permitted u/s 17 of the Act. I shall quote the section.

17. Conversion of buildings and failure by landlord to make necessary repairs -
(1) No residential building shall be converted into a nonresidential building or vice versa and no such building shall be divided into separate portions for letting on rent or for other purposes except with the permission in writing of the Accommodation Controller:

Provided that where such conversion involves structural alteration of the building, the consent of the landlord shall also be necessary." It is clear from the proviso that the prohibition is confined to and directed against the tenant only. It only provides safe guards against the conversion of a residential building into a non-residential building or vice versa by the tenant. I see no merit in this contention also.

In the result, the C. R. P. has to be dismissed. I do so. No order as to costs.