(1984) 10 KL CK 0004

In the High Court Of Kerala

Case No : O.P. No. 4114 of 1978

Mrs. Mariamma Thomas APPELLANT

Vs

M/s Bharat Refineries Ltd. RESPONDENT

Date of Decision : 10-10-1984

Acts Referred:

Burmah Shell (Acquisition of Undertakings in India) Act, 1976 — Section 7
Companies Act, 1956 — Section 23
Constitution of India, 1950 — Article 134A

Citation : (1985) KLJ 583

Hon'ble Judges : T. Kochu Thommen, J;K.P. Radhakrishna Menon, J

Bench : Division Bench

Advocate : K.V. Kuriakose, M. Shanmugham Pillai, P.N.K. Achan and T.R.G. Warrier, for the Appellant; M.M. Abdul Aziz, K. Prabhakaran and K. Narayana Kurup, for the Respondent

Judgement

Kochu Thommen, J.—The petitioner is the owner of an extent of 36 cents of land in Sy. No. 730/2 in Piravom Village. Muvattupuzha Taluk. It is stated that she has no other property, and that she resides in an old and small house situated in a portion of the land in question. In 1953 she entered into an agreement of lease with the Burmah Shell Oil Storage and Distributing Company of India Limited (the "Burmah Shell") acting through their agents. M/s. Ramaswamy Iyer & Sons, Muvattupuzha. The deed of lease provided that the term of the lease was to be 12 years. The rent was also specified. The deed did not contain any specific provision for renewal of the lease. At the end of 12 years, that is in 1965, the petitioner and the Burmah Shell renegotiated for renewal of the lease. The parties came to an agreement that the lease would be renewed upon the same terms and conditions, but subject to an enhancement of the rent. The rent was accordingly enhanced and the lease operated for another term of 12 years which expired on 31-12-1976, During the operation of the second term of the lease, that is on 24-1-1976, the impugned legislation, the Burmah Shell (Acquisition of Undertaking in India) Act, 1976 (Act No. 2 of 1976) (the "Act") came into force.

As a result of this Act all the right, title and interest of the Burmah Shell in relation to its undertakings in India stood transferred to she Government of India On the date on which the Act came into force, the Central Government issued a notification u/s 7 of the Act whereby the right, title and interest which vested in the Government stood transferred to a Government Company called the Burmah Shell Refineries Limited On 12-2-1976 by a fresh certificate of incorporation u/s 23 of the Companies Act 1956, the name of the Government Company was changed to Bharat Refineries Limited, the first respondent herein. By virtue of the provisions of Sections 5 and 7 of the Act, the first respondent wrote to the petitioner that it desired to have the lease between the petitioner and the Burmah Shell renewed in favour of the 1st respondent for another term with effect from 1-1-1977 upon "terms similar to those existed in the current lease". The petitioner informed the 1st respondent that she was willing to renew the lease for another term, provided the rent was enhanced. This is what she stated in Ext. P2 dated 25-10-1976:

Regarding renewal of the lease I have to inform you that the present rent of Rs. 50/- per month is not acceptable to me. This rate was fixed some 12 years ago which was low even at that time. It is my understanding that the prevailing market rate in the area for similar premises could be any where between Rs. 700/-and Rs. 1,000/-per month. If you can offer me a fair and reasonable rent for the premises, I will be willing to renew the lease................

2. The first respondent refused to accede to the request of the petitioner for revision of the rent. Letters were exchanged between the petitioner and her lawyer and the first respondent. Finally by Ext. P8 dated 3-11-1978 the first respondent wrote to the petitioner as follows:

....

We reiterate that we have no intention of vacating the site and assert our right to obtain a renewal of lease of this site for 12 years from 1-1-1977.

....

3. Aggrieved by the stand taken by the first respondent the petitioner has approached this Court contending that the first respondent has no power or authority to insist upon renewal of the lease without agreeing to a fair enhancement of the rent. It is contended that the Act in terms of which the first respondent purports to act has not conferred any such power. It is further contended that if any such power on a proper construction of the provisions of the Act, is found to have been conferred upon the first respondent, such conferment of power is violative of constitutional provisions and in excess of legislative competence.

4. Having heard counsel on both sides, we are of the view that the question raised by the petitioner can be dealt with without examining the validity of the Act, for we are of the view that on a proper construction of the provisions of the

Act there is much force in the petitioner''s contention that she is entitled to ask for enhancement of the rental a condition for renewal of the lease in terms of the provisions of the lease read with the provisions of the Act. In the circumstances we do not express any view as regards the challenge against the validity of the Act. That question is left open. In the circumstances, it is unnecessary to refer to the decisions cited at the bar on behalf of the respondents on the question of validity of the Act.

5. From the uncontroverted facts narrated above, it is clear that the contract between the petitioner and the Burmah Shell was understood between the parties as enabling the landlord to insist upon a revision of the rent according to the rate prevalent in the market at the end of every term of 12 years as a condition for renewal. Even if the lease deed did not provide for renewal, the parties had understood at all material times that it was open to them to negotiate renewal upon the same terms and conditions, subject to a variation in the term regarding rent. It was understood by the parties, as seen from their conduct, that the rent expressly mentioned in the contract was subject to variation at the end of every term before the lease was renewed. The document of lease thus understood with reference to the surrounding circumstances, including the conduct of the parties, provided for the enhancement of the rent as stated above. That fresh agreement, which is in the nature of a proviso to the relevant term, though not expressly stated, but acted upon by the parties, is thus read into the contract as a part of its terms and conditions. The parties have therefore to this extent varied the contract by mutual consent. Whether the position thus emerges is seen as a variation of the terms by mutual consent or as a waiver by the lessee at the request of the lessor or as an implied term or a new agreement inferred from the conduct of the parties to the written instrument, without reference to the subsequent change brought about by the parties as regards rent will not truly represent all the terms and conditions of their contract.

6. Sections 5 and 7 read together enable the first respondent to ask for a renewal of the lease for a further term commencing on 1-1-1977. Section 5 provides:

5. Central Government to be lessee or tenant under certain circumstances.

(1) Where any property is held in India by Burmah Shell under any lease or under any right of tenancy, the Central Government shall, on and from the appointed day, be deemed to have become the lessee or tenant, as the case may be, in respect of such property as if the lease or tenancy in relation to such property had been granted to the Central Government, and thereupon all the rights under such lease or tenancy shall be deemed to have been transferred to and vested in, the Central Government.

(2) On the expiry of the term of any lease or tenancy referred to in subsection (1), such lease or tenancy shall, if so desired by the Central Government, be

renewed on the same terms and conditions on which the lease or tenancy held by Burmah Shell immediately before the appointed day.

Section 7 states:

7. Power of Central Government to direct vesting of the undertakings of the Burmah Shell in a Government Company.

(1)...

(2)...

(3) The provisions of sub-section (2) of section 5 shall apply to a lease or tenancy, which vests in a Government Company, as they apply to a lease or tenancy vested in the Central Government and reference therein to the ''Central Government'' shall be construed as a reference to the Government Company.

7. It is by virtue of section 7(3) that the first respondent has the same right as that which was vested in the Central Government in terms of Section 5. Sub-section (2) of Section 5 shows that if the Central Government desired to have a renewal of the lease, the lease had to be renewed on the same terms and conditions on which the Burmah Shell had held it. As we have pointed out above, the undisputed facts show that the conditions under which the lease was held by the Burmah Shell included a term by variation or implication or inference, or a specific understanding acted on by the parties, for revision of the rent on the expiry of every term. The first respondent is competent to ask for a renewal of the lease only if it is prepared to honour the lease as it existed, and understood and acted upon by the parties, prior to the coming into force of the Act. That lease did not confer any right on the lessee to insist upon a renewal without a revision of the rent. The only difference that the Act has made to it is that, unlike in the past, the authority under the Act is entitled to insist upon a renewal even if the landlord is unwilling to renew it. But that right is subject to the condition that the terms and conditions as they existed in the past had to be honoured and complied with by the lessee. The totality of the terms and conditions thus entitled the lessor to insist upon revision of the rent on a fair basis. Such revision is a condition precedent to the exercise of the option that is postulated in terms of Section 5 (2) read with Section 7(3). If the first respondent is not willing to agree to a reasonable revision, it will have no authority to insist noon renewal. That is how the Act had provided, and, in our view, very fairly too.

8. Counsel for the petitioner Sri K V. Kuriakose submits that the petitioner is willing to agree to a rent which will be determined by any qualified engineer. We are of the view that, if the parties are not able to agree on the quantum, it would be fair and proper if the revised rent is determined by an engineer deputed by the Central Public works Department or any other competent officer of the Government. In the circumstances we direct the 2nd respondent the Union of India, to issue proper instructions to the Central Public works Department or any other competent authority of its choice to determine the fair rent that is payable

in respect of the property in question. This direction is of course Without prejudice to the right of the parties to negotiate independently and come to terms on a fair rent. The respondents are directed to have the fair rent determined in either of the two ways within a period of 3 months from today, and pay the rent as determined as from 1-1-1977. The Original Petition is allowed in the above terms. The parties will, however, bear their respective costs.

The learned counsel for the first respondent makes an oral application under Article 134A of the Constitution of India for leave to appeal to the Supreme Court of India. In our view no substantial question of law of general importance which needs to be decided by the Supreme Court arises in this case. Leave is accordingly rejected.