

(2014) 02 MAD CK 0097
In the Madras High Court
Case No : S.A. No. 1306 of 2008

M/s. Sundaram Co-operative Credit Societies Limited	APPELLANT
Vs	
M/s. Associated Clearing and Forwarding Agencies	RESPONDENT

Date of Decision : 24-02-2014

Acts Referred:

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 — Section 13 29 30 4 7
Transfer of Property Act, 1882 — Section 106

Citation : (2014) 4 CTC 528 : (2014) 2 LW 388 : (2014) 2 MLJ 728 : (2014) 2 RCR(Rent) 465

Hon'ble Judges : Pushpa Sathyanarayana, J

Bench : Single Bench

Advocate : Abitha Banu for M/s. Surana and Surana, for the Appellant; K.P. Ashok for R1 and R2, for the Respondent

Final Decision : Allowed

Judgement

Pushpa Sathyanarayana, J.—The plaintiff in O.S. No. 2611 of 2003 on the file of II Assistant Judge, City Civil Court, Chennai, who filed the suit directing the defendants to vacate and hand over the vacant possession of the suit property and to pay future damages at the rate of Rs. 50,000/- per month, is the appellant. The plaint in brief is as follows:

The plaintiff is the Co-operative Society registered on 20.03.1952 under the Tamil Nadu Co-operative Societies Act. The suit property belongs to the plaintiff, who purchased the same on 30.06.1989. The first defendant is the tenant in a portion in the ground floor bearing No. 3 (Old No. 2), Smith Road, Chennai-2 who has been in possession of the property, even before the property was purchased by the plaintiff. Therefore, after the purchase by the plaintiff, the tenancy was attorned in favour of the plaintiff. As the plaintiff wanted the premises for its own usage, the plaintiff filed R.C.O.P. No. 3022 of 1995, seeking eviction of the first defendant/tenant, which was dismissed on 20.12.1999. As the first defendant/tenant was paying only Rs. 1,700/-, the plaintiff also filed

R.C.O.P. No. 1219 of 1996 for fixation of fair rent for the said premises. The Rent Controller fixed the fair rent at Rs. 3,000/- per month against which, appeals were filed by both the plaintiff and the defendants, wherein defendants have taken a stand that the Rent Controller had no jurisdiction and the order passed was non-est. Therefore, the plaintiff withdrew the appeal. Now, the present suit for eviction is filed by the plaintiff on the ground that the plaintiff being a co-operative society is exempted from the purview of the Tamil Nadu Buildings (Lease and Rent Control) Act. It is stated by the plaintiff that only the provisions of Transfer of Property Act will apply. The plaintiff also issued statutory notice on 06.03.2003, which was also replied on 27.03.2003. The plaintiff had also claimed damages for use and occupation at the rate of Rs. 50,000/- per month stating that the premises is located in the very busy commercial locality. Hence, the suit for eviction was filed.

2. Defendants 1 and 3 filed a joint written statement contending that the Tamil Nadu Buildings (Lease and Rent Control) Act is applicable to the suit premises and that the Government order referred to in the plaint is not applicable to the suit building. The plaintiff having obtained a valid order of fixing the fair rent in R.C.O.P. No. 1219/1996, was estopped from claiming exemption subsequently. The proceedings in R.C.O.P. No. 2021 of 1990 for eviction filed by the plaintiff for additional accommodation was dismissed on 06.01.1993 for default, which fact was suppressed and not stated in the plaint. The plaintiff also had filed R.C.O.P. No. 3022 of 1995, which was filed for eviction on the very same ground was also dismissed for default on 20.12.1999. Yet another suit filed by the plaintiff society in O.S. No. 4870 of 1997 for permanent injunction was also dismissed for default on 22.03.2001. The defendants further contended that the plaintiff is not a society contemplated under the G.O. so as to claim exemption from the purview of the act. The other allegations made in the plaint and the claim of damages of Rs. 50,000/- per month were denied by the defendants. The defendants further contended that there is no cause of action to the plaintiff to file the present suit and such jurisdiction does not vest with the Civil Court and the plaintiff ought to have gone only to the Rent Controller.

3. The Trial Court has framed six issues and to prove the case, on the side of the plaintiff, one witness was examined as PW 1 and marked 9 documents as Exs. A1 to A9 and on the side of the defendants, one witness was examined as DW 1 and marked two documents as Ex. B1 and B2.

4. After elaborate consideration of documents and evidence filed by both the parties, the Trial Court decreed the suit directing eviction of the suit property by the defendants. Aggrieved by the same, defendants 1 and 3 preferred A.S. No. 290 of 2007. By judgment dated 23.01.2008, the VII Additional Judge, City Civil Court, Chennai, allowed the appeal, reversing the judgment and decree passed by the Trial Court. Against which, the present appeal is filed by the plaintiff/landlord.

5. At the time of admission, the following substantial questions of law were

framed:

a) Whether the Appellate Court can deny the appellant a legal remedy, applying principles of res judicata just because the appellant (landlord) approached the Rent Control Court on an earlier occasion prior to the instant suit, particularly when the Rent Control Court does not have jurisdiction to entertain in respect of buildings owned by Co-operative Societies in view of G.O. Ms. No. II(2)/HO/6060/76?

b) Whether the Appellate Court is right in upholding the applicability of G.O. Ms. No. II(2)/HO/6060/76 and finding that the same is applicable to the appellant/plaintiff but refusing the plaintiff of his legal remedy in O.S. No. 2611/2003?

6. Learned counsel appearing for the plaintiff/landlord contended that the Appellate Court ought to have confirmed the decree for eviction, having accepted the applicability of G.O. Ms. No. II(2)/HO/6060/76, to the suit property and having found that the landlord society is exempted from the purview of the applicability of the provisions of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The reasoning given by the Appellate Court is that the plaintiff was estopped from filing the suit for possession under Transfer of Property Act, as the appellant had already elected to file petition before the Rent Control Authority. It was further contended by the counsel for the appellant that even if the plaintiff had exercised its right to move the Rent Control Authorities for eviction, in view of the G.O. exempting the Co-operative societies from the purview of the act, any order passed by the Rent Controller would be a nullity and therefore, the suit filed by the plaintiff is maintainable.

7. Per contra, the learned counsel for the defendants/ respondents contended that the appellant society is the limited company and therefore, it is not exempted under the G.O. Learned counsel for the respondents contended that the plaintiff/appellant having filed more than two R.C.O.Ps. before the Rent Controller, now cannot be allowed to go back and make contradictory statement claiming that only suit is maintainable. The main contention of the respondents was that the plaintiff having submitted to the jurisdiction of the Rent Controller earlier and having lost before the Rent Controller, cannot be allowed to go back on its stand and file a suit for eviction on the same cause of action before the same forum.

8. Heard the learned counsel for the appellant and respondents, who made their rival arguments.

9. Learned counsel for the appellant relied on G.O. Ms. No. II (2)/HO/6060/76 which states that in exercise of the powers conferred by Section 29 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (Tamil Nadu Act XVIII of 1960), the Government of Tamil Nadu hereby exempts the buildings owned by all Government undertakings including Government Companies registered under the Indian Companies Act, 1956 (Central Act 1 of 1956) and by all the Co-operative Societies, from all the provisions of the said Act.

10. The plaintiff being a Co-operative Society registered under the Tamil Nadu Co-operative Societies Act contended that Rent Control Act is not applicable, only the suit is maintainable under the Transfer of Property Act. Accordingly, the statutory notice u/s 106 of Transfer of Property Act was issued to the respondent on 06.03.2003, terminating the tenancy.

11. It is evident from Ex. A7/register of Co-operative Society, dated 17.02.2005 and Ex. A9/annual report dated 07.10.2005 that the plaintiff society is a Co-operative Society as defined under the Act. However, the Appellate Court had dismissed the suit on the ground that though the earlier proceedings before the Rent Control Authorities were dismissed for default, were held to operate as res judicata for the present suit. The only point to be considered in this appeal is whether the suit filed by the plaintiff is maintainable, in view of the fact that they have already exercised their right and submitted to proceedings under the Rent Control Act. Section 29 of the Tamil Nadu Buildings (Lease and Rent Control) Act deals with the exemptions, which is quoted below:

29. Exemptions Notwithstanding anything contained in this Act, the Government may, subject to such conditions as they deem fit, by notification, exempt any building or class of buildings from all or any of the provisions of this Act.

12. The Act speaks of two types of exemptions. One is floating and the other one is static or fixed exemption. The above said Section 29 is to provide for contingencies where the statutory protection from eviction causes great hardship to the landlord or is subject of abuse by the tenant himself. Therefore, the purpose of this Section 29 is to soften the rigor of hardship in the working of the Act which is an emergency legislation. The exemption u/s 30 is a static or fixed exemption which can be withdrawn only by way of amendment to the Act.

13. It is well settled that the remedy of exemption u/s 29 of the Act is not a substitute for remedies available to a landlord for eviction under the Act itself. But on the other hand, if the remedy under the Act is not available to him, there will be a justification for according exemption u/s 29 of the Act if a case therefore is made out. The exemption of buildings owned by a Co-operative Society, from the purview of the act will have to be regarded as a rational classification, as the Co-operative Societies are intended to serve public purpose. Therefore, the power to exempt or not, a building or class of buildings is purely one of discretion and such power is to be used sparingly by the State Government exercised its discretion. Therefore, the exemption contemplates u/s 29 of the Act, whereby the Government can exercise the power to grant exemptions to ensure that unnecessary or undue hardship is not resulted. Whereas the exemption in the case of certain building as provided u/s 30 is a statutory one. Therefore, the exemptions defined under both the Sections cannot be treated identical.

14. The counsel for respondents 1 and 2 contended that in this case, the plaintiff who had submitted to the Act and filed R.C.O.Ps seeking eviction of the tenant and also benefited by the order passed therein viz. getting the rent enhanced,

now cannot be allowed to go back to the provisions of Transfer of Property Act and file a suit for eviction. Earlier, the RCOPs filed for eviction on various grounds, were allowed to be dismissed for default by the appellant.

15. However, learned counsel for the appellant contended that even presuming that the plaintiff had wantonly submitted to the provisions of the Rent Control Act despite the G.O. exempting the plaintiff, any order that would have been passed in the R.C.O.P. proceedings would automatically become a nullity and non-existent in the eye of law. Therefore, there is no impediment for the plaintiff to file the suit invoking the provisions of the Transfer of Property Act.

16. In this regard, learned counsel for the appellant placed reliance on the following decisions:

In *Shri Lachoo Mal Vs. Shri Radhey Shyam*, , it has been held as follows:

6. The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the non observance of the statutory provision is *cuilibet licet renuntiare juri pro se introducta*. (See Maxwell on Interpretation of Statutes, Eleventh Edition, pages 375 & 376) If there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy....

Therefore, the Supreme Court held that it was open to a landlord to waive the exemption conferred by the Act as it was beneficial to him and was not opposed to public policy.

In *P. Dasa Muni Reddy Vs. P. Appa Rao*, , it has been held as follows:

16. The appellant proved that the appellant made a mistake of fact in regard to the building being outside the mischief of the Act. The appellant instituted the suit before the Rent Controller in mistake about the underlying and fundamental fact that the building was outside the ambit of the Act. The Civil Court has jurisdiction in the subsequent suit which is the subject of this appeal. The appellant is not disentitled to any relief on the grounds of *res judicata* or estoppel or waiver. As one cannot confer jurisdiction by consent similarly one cannot by agreement waive exclusive jurisdiction of Courts. The Civil Court and not the Rent Control possesses jurisdiction over the building in question.

In *Globe Theatre Private Ltd. Vs The State of Madras* represented by Deputy Secretary to Government and another reported in 1961(1) MLJ 85, it has been held as follows:

Another argument which we have not been able to follow is that the respondent

was estopped from making an application for exemption because he had made an application u/s 4 of the Act for fixation of fair rent and had succeeded in obtaining an enhanced rate of rent. We need not spend more time in meeting this point than to say that because he resorted to Section 4 of the Act, it does not mean that he cannot take advantage of another provision of the Act, namely Section 13. It must not also be overlooked that the exemption is only from the provisions of Section 7 of the Act. The respondent is well within his rights to resort to Section 4 and at the same time seek exemption from Section 7. None of the necessary ingredients to found a plea of estoppel is to be found in this case. We agree with the reasoning and conclusion of the learned judge, Rajagopalan, J. and dismiss the appeal.

In *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, , it has been held as follows:

6..... It is possible that the appellant might have thought that since no notification exempting the appellant from sales tax had been issued by the State Government u/s 4A, the appellant was legally not entitled to exemption and that is why the appellant might have chosen to accept whatever concession was being granted by the State Government. The claim of the appellant to exemption could be sustained only on the doctrine of promissory estoppel and this doctrine could not be said to be so well defined in its scope and ambit and so free from uncertainty in its application that we should be compelled to hold that the appellant must have had knowledge of its right to exemption on the basis of promissory estoppel at the time when it addressed the letter dated 25th June, 1970. In fact, in the petition as originally filed, the right to claim total exemption from sales tax was not based on the plea of promissory estoppel which was introduced only by way of amendment. Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that everyone is presumed to know the law, but that is not a correct statement: there is no such maxim known to the law. Over a hundred and thirty years ago, Maule, J. pointed out in *Martindale v. Faulkner* (1846) 2 Q.B. 786: There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so. Scrutton, also once said: It is impossible to know all the statutory law, and not very possible to know all the common law. But it was Lord Atkin who, as in so many other spheres, put the point in its proper context when he said in *Evans v. Bartlem* (1937) A.C. 473 - the fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application. It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dated 25th June, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government.

17. Learned counsel for the respondents in turn placed his reliance on Shaligram Vs. Daulat Ram, , which reads as follows:

3. A person who appears in obedience to the process of a foreign Court and applies for leave to defend the suit without objecting to the jurisdiction of the Court when he is not compellable by law to do so must be held to have voluntarily submitted to the jurisdiction of such Court. Shaik Atham Sahib Vs. Daoud Sahib, . Therefore, it cannot be said that this decree suffered from the defects which a foreign ex parte decree without such submission would suffer from. The order for transfer was made at a time when the Indian CPC became applicable to the whole of India including the former territories of Hyderabad State. The order of transfer was, therefore, valid and effective and the decree could, therefore, be executed.

The above decision is not applicable to this case in view of the facts. From the above discussions, it can be seen that when a benefit or privilege conferred upon a person it can always be waived unless the statute imposes a bar from contracting out. 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 waiving or giving up the advantage or benefit contemplated by the Section.

18. The next contention raised by the appellant is that whether the filing of the suit is barred by res judicata, in view of the Rent Control proceedings initiated earlier. It is contended that once by the Government order, the Co-operative Society has exempted from the purview of the Rent Control Act and therefore an order passed by the Rent Controller would be a nullity.

19. In the present case, it is contended that parties who were at logger heads before the Rent Control Tribunal are the same parties contesting each other in the suit. The landlord as a petitioner before the Rent Control Authorities though exempted from the purview of the Rent Control Act, filed the petition for eviction. The first defendant/tenant also had not raised any objection regarding the maintainability of the RCOP and suffered an order fixing the fair rent. No doubt, the petitions filed for eviction on various grounds, were dismissed for default. Now when the suit is filed by the plaintiff for eviction of the tenant invoking the Transfer of Property Act, the tenant is making a hue and cry about the applicability of the Act, waiver, etc. It can be seen that though the plaintiff had filed the earlier proceedings under the Rent Control Act, it was dismissed for default and the plaintiff/ landlord had not taken any executable order. Mere filing of the RCOP by the landlord, cannot be said that he has waived his right to file a suit subsequently. Even in the cause of action paragraph, the plaintiff has stated that cause of action for the suit arose on 30.06.1989, when the plaintiff purchased the property and on subsequent dates, when the plaintiff issued notice seeking eviction of the first defendant and on the date on which the plaintiff filed eviction petition against first defendant on 20.12.1999, when the eviction petition was dismissed and again on 06.03.2003, when the plaintiff issued statutory notice terminating the tenancy. Once it is held that the building is

exempted as per the G.O., the Rent Controller will not have jurisdiction to pass any order. Even though the plaintiff had filed R.C.O.P. for eviction, they were only dismissed for default and there was no merited order for eviction. When the RCOP. was dismissed for non-prosecution, it is not a decision on merit. Consequently the said order cannot operate as res judicata. Therefore, the appellant is not precluded from filing a fresh suit for eviction under the Transfer of Property Act because the act of filing of RCOP. does not amount to waiver and the right to sue by the plaintiff is not lost.

20. If as contended by the learned counsel for the defendants/respondents that the plaintiff/appellant had lost their right to maintain the suit in view of the earlier petitions filed before the Rent Controller either on the ground of waiver or res judicata, the plaintiff will not have a right to file a suit at all either before the Civil Court or before the Rent Controller. The plaintiff also have sought for damages for use and occupation of the suit property which relief certainly cannot be obtained from the Rent Controller. Therefore, for the above said reasons, the judgment of the Lower Appellate Court dismissing the suit by setting aside the decree, granted by the Trial Court cannot be sustained. Thus, the substantial questions of law 1 & 2 are answered in favour of the appellant.

21. In the result, this Second Appeal is allowed, restoring the decree of the Trial Court. No costs.

22. At the time of pronouncing the judgment of the above appeal, the learned counsel for the respondents 1 and 2 requested this Court to grant six months time to the respondents to vacate the premises.

23. The learned counsel for the appellant has also agreed for the same.

24. With the consent of both parties, six months time is granted to the respondents to vacate the premises. The learned counsel for the respondents 1 and 2 is directed to file an affidavit of undertaking to that effect within a period of two weeks from today.