

(1979) 08 KL CK 0002
In the High Court Of Kerala
Case No : E.S.A. No. 14 of 1977-A

Thirumalai Tobacco Company

APPELLANT

Vs

K. Moideen Koya Hajee

RESPONDENT

Date of Decision : 06-08-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60
Contract Act, 1872 — Section 23
Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11(4), 12(1), 2(6)
Transfer of Property Act, 1882 — Section 108

Citation : (1979) 08 KL CK 0002

Hon'ble Judges : Khalid, J

Bench : Single Bench

Advocate : P.C.B. Menon and V.P. Mohankumar, for the Appellant; P.K. Balasubramanyan, Amicus Curae, for the Respondent

Final Decision : Dismissed

Judgement

Khalid, J.—The Appellant is the decree-holder in O.S. No. 41 of 1973. In execution of a money decree, the Petitioner filed E.P. No. 194 of 1973 for attachment of the Respondent's tenancy rights in Shop Room No. 10/227 in the Calicut Corporation. Apprehending that the Respondent was attempting to transfer his tenancy interest, the Petitioner got it attached on 26th November 1973. The Respondent raised an objection that he had no saleable interest in the property. This objection was overruled by the execution court on 17th January 1975 and sale papers were ordered to be produced. In appeal, the learned District Judge reversed the decision of the execution court and held that the tenancy interest could not be attached. Hence this second appeal.

2. The appellate Judge held that the provision of the Kerala Buildings (Lease and Rent Control) Act, for short the Act, applies to the building in question, the provisions of which prohibited transfer of tenancy interest; such transfers entailing forfeiture of the lease. The tenancy interest of a tenant governed by the Act is not saleable and hence it cannot be attached or sold in execution of a

decree. The learned Judge observed in paragraph 3 of his judgment that the decree-holder's Counsel conceded before him that he did not know whether the judgment-debtor was in possession of the building as a lessee for a term or as a tenant at will or as a tenant from month to month. It was without further ascertaining the status of the Respondent that the appellate Judge reversed the order of the executing court.

3. When the appeal originally came before me for hearing, I felt that this aspect of the matter had to be made clear and therefore directed the appellate Judge to record a finding as to whether the judgment-debtor was in possession as a lessee for a term or was a tenant holding over and also to ascertain whether the judgment-debtor was in possession of the shop room or whether he had ceased to have interest in it, because the judgment-debtor did not appear before me. The appellate Judge examined two witnesses and admitted a document (coolychit) in evidence and recorded the following findings:

In the result, I give the findings as follows:

(i) The judgment-debtor in E.P. 194/73 in O.S. No. 41 of 1973 of the Subordinate Judge's Court, Kozhikode (K. Moideen Koya Haji) is in possession of the building which is the subject-matter of the dispute.

(ii) Moideen Koya Haji has not lost interest in the building and he is still in possession of the same.

(iii) He entered into possession of this building as per Ext. X-1 coolychit.

(iv) After the term fixed in Ext. X-1 expired he is holding over the property on the strength of Ext. X-1.

From the above findings, it is seen that the judgment-debtor is still in possession of the property, that the term fixed in the rent deed is over and that he is in possession of the shop room as a tenant holding over. The question that has to be considered in this second appeal is whether the tenancy interest of the Respondent is liable to be attached.

4. The learned Judge who was directed to return the findings was not perhaps properly alerted as to the object with which the findings were called for. Finding No. 4 that the term fixed in Ext. X-1 has expired and that the tenant is holding over on the strength of Ext. X-1 does not clearly indicate as to whether he was in law a tenant holding over or only a tenant at will. A person in possession of the property under a contract of tenancy after the expiry of the term does not ipso facto become a tenant holding over. Certain other factors have to be proved. The act of holding over after the expiration of the term does not necessarily create a tenancy of any kind. A lessee remaining in possession after the determination of the term is a tenant at sufferance. A distinction in law has to be borne-in-mind between a tenant continuing in possession after the determination of the lease without the landlord's consent and with the landlord's consent. A tenant without consent of the landlord is called a tenant by sufferance and with the consent of

the landlord a tenant holding over. The distinction is necessary to appreciate the nature of the right of a tenant holding over with or without landlord's consent. A tenant holding over with the landlord's consent is in possession of an estate and has a right to property. For this there should be consensus ad idem. Not so, the possession of a tenant at sufferance. It is not clear from the finding returned whether the tenant was holding over with the consent of the landlord. Since finding No. 4 is not based on sufficient materials, I am not prepared to accept the said finding that the Respondent is a tenant holding over. The finding is rejected.

5. The next question to be considered is as to what is the character of Respondent's tenancy and the rights flowing from it. He is a tenant entitled to the benefits of the Act. A tenant under the Act cannot be evicted even after the expiry of the term except on some specified grounds. Such a tenant is commonly called a statutory tenant. His right to remain in possession after the determination of the contractual tenancy, is personal. The common law right u/s 108(j) is not available to him. The Supreme Court has this to say about the scope of this tenancy in the decision reported in *Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others*, .

For the protection of tenants the Clause imposes a prohibition against the landlord against recovery of possession of the premises demised to a tenant so long as he pays or is ready and willing to pay the standard rent and performs the other conditions of the tenancy consistent with the provisions of the Act. A person remaining in occupation of the premises let to him after the determination of or expiry of the period of the tenancy is commonly though in law not accurately, called "a statutory tenant". Such a person is not a tenant at all: he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute. The right of a lessee from a landlord on the other hand is an estate or interest in the premises and in the absence of a contract to the contrary is transferable and the premises may be sublet by him. But with the determination of the lease, unless the tenant acquires the right of a tenant holding over, by acceptance of rent or by assent to his continuing in possession by the landlord, the terms and conditions of the lease are extinguished, and the rights of such a person remaining in possession are governed by the statute alone. Section 12(1) of the Act merely recognises his right to remain in possession so long as he pays or is ready and willing to pay the standard rent permitted increases and performs the other conditions of the tenancy, but not the right to enforce the terms and conditions of the original tenancy after it is determined....

I have already found that the Respondent is not a tenant holding over and can only be statutory tenant. On the strength of the above ruling, it has to be held that he has no saleable interest in the property, wherefore there is nothing to attach and sell. Hence his objection has to be upheld, and the appeal has to be dismissed.

6. But the matter cannot rest there. There is still something more to be considered. Can it be said that a tenant under the Act, who is continuing in possession, after the term, has no right in property? Tenant is defined in Section 2(6) of the Act and reads:

"tenant" means any person by whom or on whose account rent is payable for a building and includes--

(i) the heir or heirs of a deceased tenant, and

(ii) a person continuing in possession after termination of the tenancy in his favour.

By this definition a person like the Respondent gets all the rights that a tenant has. Such rights can go to the legal heirs by inheritance. Thus a statutory tenant under the Act gets right in the property. The only inhibition is what is contained in Section 11(4) of the Act, by which the landlord gets a cause of action to evict the tenant if the latter transfers his right under the lease or sublets the entire building or a portion thereof. It is to this extent that the general law right u/s 108(j) of the Transfer of Property Act are curtailed. The Supreme Court has held in the decision reported in *Demadi Lal and Ors. v. Paras Ram and Ors.* 1976 2 S.C.W.R. 125 135, that a statutory tenant retains an interest in the property and it is not necessarily a personal right. I shall read the relevant portion from the judgment for a better appreciation of the discussion:

We find it difficult to appreciate how in this country we can proceed on the basis that a tenant whose contractual tenancy has determined but who is protected against eviction by the statute, has no right of property but only a personal right to remain in occupation, without ascertaining what his rights are under the statute. The concept of a statutory tenant having no estate or property in the premises, which he occupies is derived from the provisions of the English Rent Acts. But it is not clear how it can be assumed that the position is the same as in this country without any reference to the provisions of the relevant statute. Tenancy has its origin in contract. There is no dispute that a contractual tenant has an estate or property in the subject-matter of tenancy, and heritability is an incident of the tenancy. It cannot be assumed, however that with the determination of the tenancy the estate must necessarily disappear and the statute can only preserve his status of irremovability and not the estate he had in the premise in his occupation. It is not possible to claim that the "sanctity" of contract cannot be touched by legislation. It is therefore necessary to examine the provisions of the Madhya Pradesh Accommodation Control Act, 1961 to find out whether the Respondents' predecessors-in-interest retained a heritable

interest in the disputed premises even after the termination of their tenancy.

Section 2(i) of the Madhya Pradesh Accommodation Control Act, 1961 defines "tenant" to mean, unless the context otherwise requires:

a person by whom or on whose account or behalf the rent of any accommodation is, or, but for a contract express or implied, would be payable for any accommodation and includes any person occupying the accommodation as a subtenant and also any person continuing in possession after the termination of his tenancy whether before or after the commencement of this Act, but shall not include any person against whom any order or decree for eviction has been made.

The definition makes a person continuing in possession after the determination of his tenancy a tenant unless a decree or order for eviction has been made against him, thus putting him on par with a person whose contractual tenancy still subsists. The incidents of such tenancy and a contractual tenancy must therefore be the same unless any provision of the Act conveyed a contrary intention. That under this Act such a tenant retains an interest in the premises, not merely a personal right of occupation, will also appear from Section 14 which contains provision restricting the tenants' power of subletting.

* * * * * "A statutory tenant has no estate or interest in himself and he cannot carve something out of nothing. The subtenant, like the statutory tenant, has only a personal right or privilege." In England, the statutory tenant's right to sublet is derived from specific provisions of the Acts conceding this right to him, in the Act we are concerned with in this appeal the right flows from his statute as a tenant. This is the basic difference between the English Rent Restrictions Acts and the Act under consideration and similar other Indian statutes.... The concept of statutory tenancy under the English Rent Acts and under the Indian Statutes like the one we are concerned, with in this appeal rests on different foundations. It must, therefore, be held that the predecessors-in-interest of the present Respondents had a heritable interest in the premises and consequently the Respondent had the right to prosecute the appeal in the High Court....

There are minor differences between the Madhya Pradesh Act and the Kerala Act. In the Madhya Pradesh Act, a subtenant is also a tenant. The heirs are not. This difference is not of much consequence for the application of the principle laid down in the above decision to the Kerala Tenants. What then is the position regarding the rights of a statutory tenant. Can it be attached and sold.

7. The rights of a tenant of a residential building cannot be attached. This is so by virtue of Section 60 of the Code of Civil Procedure. This would imply that the rights of a tenant of a non-residential building can be attached. There, the provisions of the Act come to the aid of the tenants. u/s 11(4) of the Act, there is a curb on the tenant's general law right to transfer his right under the lease or to sublet. If he does so he exposes himself to the risk of eviction, for, it affords a cause of action for the landlord to evict him. This restriction on his right has been imposed in the interests of public policy. The Supreme Court had occasion to

consider the validity of a contract opposed to the provisions of the Rent Act. In *Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co.*, a person who purchased the premises in the occupation of tenants asked the tenant to vacate and provided him with a portion of his new building. The tenant had four subtenants under him. Three of them shifted to the new premises. The 4th subtenant was fixed up in some other place. The document which fell for consideration before the Supreme Court permitted the tenant to keep subtenants. The landlord brought a suit for ejectment for non-payment of rent and subletting of the premises. The tenant contended that under the terms of the lease he had the right to sublet the premises. The trial Court held that the subletting was lawful and dismissed the suit for ejectment. On appeal the Sessions Judge reversed the decree which was confirmed by the High Court in revision. The matter came before the Supreme Court by special leave. The Supreme Court had to consider the effect of Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1957, which provided that notwithstanding anything contained in any law, it shall not be lawful after the coming into operation of the said Act for any tenant to sublet the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. Repelling the contention that the contract permitted subletting the Court held as follows:

7. This Section prohibits subletting and makes it unlawful for a tenant to assign or to transfer his interest in the premises let to him. The non-obstantis Clause would mean that even if any other law allowed subletting, e.g., Section 108 of the Transfer of Property Act the subletting would because of Section 15, be unlawful. This would apply to contracts also as all contracts would fall under provisions of the law relating to the contracts i.e., Contract Act. An agreement contrary to the provisions of that Section (Section 15) would be unenforceable as being in contravention of the express provisions of the Act which prohibits it. It is not permissible to any person to rely upon a contract the making of which the law prohibits (Section 23 of the Contract Act.)

**** **** 13. ...In the instant case the question is not merely of waiver of statutory rights enacted for the benefit of an individual but whether the Court would aid the Appellant in enforcing a term of the agreement which Section 15 of the Act declares to be illegal. By enforcing the contract the consequence will be the enforcement of an illegality and infraction of a statutory provision which cannot be condoned by any conduct or agreement of parties....

The Supreme Court upheld the order of ejectment finding that the contract permitting the subletting offended the provisions of the Act and a contract to the contrary cannot be urged in defence of a suit for ejectment.

8. The Supreme Court had to consider a kindred question in the decision reported in *Murlidhar Aggarwal and Another Vs. State of Uttar Pradesh and Others*, -- Civil Appeal No. 583 of 1971) In that case, the Court had to consider Clause 20 of the Lease Deed which in effect waived the requirements contained in Section 3 of the U.P. (Temporary) Control of Rent and Eviction Act, 1947.

Section 3(1) in so far as it is material read as follows:

(1) Subject to any order passed under Sub-section (3) no suit shall, without the permission of the District Magistrate, be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds--

Under this section, no suit for eviction shall be filed without the permission of the District Magistrate. The lease deed in question contained Clause (20) which read as follows:

That this agreement of lease has been made between the parties with the knowledge of the existing Rent Control and Eviction Act. The parties do hereby agree and declare that no party will ever claim benefit of the said Acts and that the provisions of the said Acts have been agreed by mutual consent to be inapplicable to this deed.

The question arose whether Clause 20 offended Section 23 of the Indian Contract Act in so far as it went against public policy laid down in Section 3 of the Act. Mathew, J. held that Section 3 is based on public policy and that the Section was intended to protect the weaker Section of the community by creating equality of bargaining power and therefore Clause 20 of the lease deed was unenforceable. This principle squarely applies to the case on hand.

9. In *Anandan Nadar v. Ramachandra Menon* 1976 KLT 443, Poti, J., speaking for the Bench observed that an agreement between tenant and landlord, the tenant undertaking to remove the building occupied by him after a period of three years was not opposed to public policy. The question considered was whether such a Clause was opposed to public policy in view of the protection given to a tenant under the provisions of the Kerala Buildings (Lease and Rent Control) Act. The learned Judge after an exhaustive discussion of the case-law on the point held that the term in the agreement to demolish the building cannot be considered as one to surrender the lease and is in no way opposed to public policy. With great respect, I have my own reservations about the principles laid down in the said judgment. The case before me concerns with a different set of facts.

10. On the strength of the Supreme Court decisions referred to above, it has to be found that the provisions in the Rent Control Act, prohibiting transfer of the right under the lease or subletting is enacted in the interest of public policy. Tenants belong to a weaker Section of the community. They have been given a bargaining power under the Act. Landlords cannot as of right evict tenants because of the in-built safeguards available in the Act in favour of the tenants. It is in recognition of the need to protect tenants from unreasonable eviction that the salutary provisions in the Rent Control Act have been enacted. A voluntary transfer or subletting by the tenant entails forfeiture of his lease and is not encouraged by the Act. A contract permitting such transfer or subletting is held to violate Section 23 of the Contract Act. By a parity of reasoning, it has necessarily to be held that an involuntary transfer by way of attachment of

tenancy interest is also bad in law, because by allowing an attachment of the tenancy interest of a tenant, the court will be using its coercive machinery to aid something which is contrary to law and public policy. What cannot be done directly in the interest of public policy cannot be permitted to be done indirectly through coercive methods. The two decisions of the Supreme Court reported in Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, and 1976-11 S.C.W.R. 125 seemingly lay down conflicting principles. I do not think it necessary to reconcile the two decisions for the purpose of this case. Both of them are binding on me. Both have been rendered by a Bench of three Judges. For the purpose of this case, if it is to be held that a statutory tenant has no interest in the property, the said right is not saleable; if it has to be held that he has interest in the property, even then his right cannot be attached and sold since it would be opposed to public policy.

11. I therefore hold that the tenancy interest of the Respondent is not liable for attachment and sale in execution of the decree in question.

12. In the absence of the Respondent, I requested Mr. P.K. Balasubramoniam, Advocate, to help me. He assisted me in the matter and I record my thanks for the assistance rendered by him.

13. I had delivered judgment in this second appeal on 25th July 1979 dismissing the appeal. I felt thereafter that I should refer to the two Supreme Court decisions which have discussed the rights of statutory tenants also in the judgment. So I posted the case to 4th August 1979 for being spoken to. Thereafter it is that this judgment is pronounced to-day.

In the result, I affirm the order of the Appellate Court and dismiss the second appeal. Since the Respondents has not appeared, I pass no order as to costs.