PETITIONER:
T.K. LATIKA

Vs.

RESPONDENT:
SETH KARSANDAS JAMNADAS

DATE OF JUDGMENT: 31/08/1999

BENCH:
A.P.Misra, K.T.Thomas

JUDGMENT:

THOMAS, J.

A landlord approached the Rent Control court prematurely and lost the cause not only regarding the timing of her approach to the court but on merits as well. The High Court found that the claim of the landlord for eviction of the tenant from the building lost its tenability on account of the factors which sprouted up pendente lite. The unsuccessful landlord has, therefore, reached this Court by special leave.

The tenant has been residing in the building of the landlord for nearly half a century by now, (a few more years from now may mark the golden jubilee year of the tenancy). When the building was originally leased in 1956, it was in the ownership of appellants father. He executed a gift deed in favour of his daughter (the appellant) on 2-8-1980, as per Ext.B-10. But the appellant, bereft of patience to wait for the expiry of the moratorium period of one year, hastened to file the petition for eviction of the tenant on 1- 7-1981 under Section 11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965, for short the Act. Appellant made an endeavour to circumvent the quarantine prescribed under the sub-section on the premise that the tenant had executed a fresh lease agreement in her favour on 18-8-1980 (Ext.A.1).

Section 11(3) of the Act reads thus: A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building if he bona fide needs the building for his own occupation or for the occupation by any member of his family dependent on him.

The sub-section has four provisos of which the third alone is relevant for consideration in this appeal and hence that is extracted below: Provided further that no landlord whose right to recover possession arises under an instrument of transfer inter vivos shall be entitled to apply to be put in possession until the expiry of one year from the date of the instrument.

The Rent Control court bypassed the ban contained in the aforesaid proviso by accepting the contention of the appellant that the right to recover possession of the leased premises is not based on Ext.B.10-Gift Deed executed by the erstwhile landlord, since a new lease arrangement has come

into effect between the appellant and the tenant as per Ext.A.1. Rent Control Court then proceeded to consider the merits of the claim for eviction and upheld the bona fides of the need highlighted by the landlord. So the Rent Control Court granted the order for eviction.

But the Appellate Authority under the Act reversed the findings both on the maintainability of the petition for eviction and also on the merits of the claim and consequently dismissed the petition of the landlord. The order so passed by the Appellate Authority remained undisturbed in the revision filed by the landlord before the District Court which was then the revisional authority. However, a learned Single Judge of the High Court of Kerala, while disposing of a writ petition filed under Article 227 of the Constitution expressed inclination to approve the contention that the petition filed by the landlord is not liable to be expelled solely on the strength of the ban contained in the third proviso to Section 11(3) of the Act. The observations made by the learned Single Judge, on that score, are the following:

I find some merit in the contention that after the tenant had, subsequent to the transfer inter vivos, attorned to the transferee-landlord, right to evict may arise out of that transaction itself and the transferee landlord then need not rely on the transfer in his favour.

After expressing as above learned Single Judge has stated thus:

Since in view of my finding that the Appellate Authority and the revisional court were right in negativing the claim for eviction under Section 11(3) of the Act on merits, I am not inclined to answer this question finally in this Original Petition. Even if the answer to this question were to be in favour of the landlord, she could not still succeed in view of my accepting the finding of the Appellate Authority and the revisional court on the merits of her claim under Section 11(3) of the Act. In that situation I decline to interfere with the finding by the Appellate Authority and the revisional court that the application is also not maintainable having been filed within one year of 2.8.1980.

The case of the landlord that she needed the building bona fide for her own occupation was then considered by the High Court on merits and learned Single Judge entered upon a finding that it is not bona fide. The writ petition was, hence, dismissed.

If the ban contained in the third proviso to Section 11(3) of the Act applies, its corollary is that the petition filed by the landlord has to be expelled on the sole ground that the landlord was then not entitled to file it. In such a situation the court should not enter into the merits because whatever is said or found on the merits would then be without jurisdiction. High Court should have first decided the question of maintainability of the petition and only if that point was found in the affirmative the merits need have been gone into.

Thus the question is whether appellants right to recover possession of the building arose under Ext.B.10 Gift Deed or under the new lease agreement Ext.A.1 dated

18.8.1980. No doubt appellant got the right to recover possession when she got the gift executed by her father. The contention is that the said lease came to an end when the new lease agreement was executed. The aforesaid contention is based on Section 111(f) of the Transfer of Property Act on the premise that there was an implied surrender of the old lease when the new lease was executed.

It must be pointed out that only two differences could be noticed as between the lease agreement of 1956 and Ext.A.1. They are: in the former the lessor was appellants father and the rent of the building was Rs.65 per month, while in the latter the lessor is appellant and the rent is Rs.150 per month. How could an implied surrender of the lease be inferred therefrom. It is admitted that the tenant continues to be in possession of the building in the same manner as before and the building also remains the same.

The principle which governs the doctrine of implied surrender of a lease is that when certain relationship existed between two parties in respect of a subject matter and a new relationship has come into existence regarding the same subject matter, the two sets cannot co-exist, being inconsistent and incompatible between each other, i.e. if the latter can come into effect only on termination of the former, then it would be deemed to have been terminated in order to enable the latter to operate. A mere alteration or improvement or even impairment of the former relationship would not ipso facto amount to implied surrender. It has to be ascertained on the terms of the new relationship vis-Ã -vis the erstwhile demise and then judge whether there was termination of the old jural relationship by implication.

The following passage in the Halsburys Laws of England, 4th Edn. Vol.27 at page 355, is apposite:

449. Surrender by change in nature of tenants occupation. A surrender is implied when the tenant remains in occupation of the premises in a capacity inconsistent with his being tenant, where, for instance, he becomes the landlords employee, or where the parties agree that the tenant is in future to occupy the premises rent free for life as a license. An agreement by the tenant to purchase the reversion does not of itself effect a surrender, as the purchase is conditional on a good title being made by the landlord.

In Hill and Redmans Law of Landlord and Tenant (16th Edn.) at page 451 it is observed that a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, or other variation of its terms, unless there is some special reasons to infer a new tenancy, where, for instance, the parties make change in the rent under the belief that the old tenancy is at an end.

In N.M. Ponniah Nadar v. Smt. Kalakshmi Ammal, {1989(1) SCC 64} a three-Judge Bench of this Court found that an arrangement by which rent of the building was increased in respect of existing tenancy will not bring an end to the pre-existing lease.

In Krishna Kumar Khema v. Grindlays Bank {1990 (3) SCC 669} a two-Judge Bench of this Court held thus:

Surrender of a part does not amount to implied surrender of the entire tenancy and the rest of the tenancy remains untouched. Likewise the mere increase or reduction of rent also will not necessarily import a surrender of an existing lease and the creation of a new tenancy.

Assuming that Ext.A.1 has created a new lease after terminating the erstwhile lease, the difficulty is that the grip of the ban contained in the third proviso would still continue to foreclose the landlord from filing the petition for a period of one year from the new lease deed. This is because the landlords right to recover possession would then arise under that instrument of lease, which would also be a transfer inter vivos as envisaged in the third proviso. In Blacks Law Dictionary the expression inter vivos is given the following meaning:

Between the living; from one living person to another. Where property passes by conveyance, the transaction is said to be inter vivos, to distinguish it from a case of succession or devise.

So the landlord had to wait for a still further period if he were to root his right in Ex.A1 to recover possession of the building.

As the third proviso to Section 11(3) disentitles a landlord from applying for eviction of the tenant before the expiry of the quarantine period, the petition filed by the landlord in this case has to be dismissed only on that ground. Any observation made on the merits of the case in the proceeding based on such a non-maintainable petition must stand erased from judicial notice. If the present landlord files a new petition for eviction under the Act, as the ban period is over, the same has to be considered and disposed of uninfluenced by any of the observations made by the High Court or the courts below thereto.

The appeal is dismissed in the above terms, without any order as to costs.