

CASE NO.:
Appeal (civil) 5477 of 2004

PETITIONER:
Devasahayam (D) By LRS.

RESPONDENT:
P. Savithramma & Ors.

DATE OF JUDGMENT: 16/09/2005

BENCH:
S.B. Sinha & C.K. Thakker

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

This appeal is directed against a judgment and order dated 19.1.2004 passed by a Division Bench of the Andhra Pradesh High Court whereby and whereunder the appeal preferred by the Appellant herein from a judgment and order dated 3.6.2002 passed by the II Senior Civil Judge, City Civil Court, Hyderabad in O.S. No. 307 of 1998 was dismissed.

The basic fact of the matter is not in dispute. The Appellant herein was a tenant of the predecessors' in interest of the Respondent Nos. 1 to 4. Allegedly, an oral agreement of sale was entered into by and between the Appellant and the Respondents for a total consideration of Rs. 80,000/-. Allegedly, for execution of the deed of sale approval of the Ceiling Authorities was necessary wherefor the draft deed of sale was filed before the Ceiling Authorities. The said approval is said to have been granted in the year 1977. According to Appellant, the factum of grant of approval of the said deed of sale was not conveyed and only in the year 1997 he came to learn thereabout whereafter the said suit for specific performance of the contract was filed. During the pendency of the suit, the Respondent alienated the suit property in favour of the Respondent Nos. 6 & 7 herein by reason of a deed of sale dated 10.3.1998.

A written statement was filed on 20th July, 1998. In the said written statement, however, no counter-claim was filed. The Appellant herein filed an application for amendment of plaint inter alia questioning the alienation by the original defendants in favour of defendant No. 6 and praying for declaration that the deed of sale dated 10.3.1988 executed by defendant Nos. 2 to 5 in favour of Respondent Nos. 6 and 7 herein is null and void.

However, subsequently on or about 6.11.1995 a second written statement was filed wherein a counter-claim was made which is as under:

- "i) This defendant submits that the plaintiffs who are the tenants of the defendants since, denied the tenancy and the relationship of Land Lord and Tenant and falsely set up the plea of oral agreement of sale have forfeited the right to continue in possession, as tenants in the suit premises and the plaintiffs are liable to be vacated from the suit premises as persons not having right any more to be in possession of the suit property. Hence, the Counter claim for delivery of possession of the suit property. The defendants are also entitled for mean (sic) profits from the plaintiffs at the rate of Rs. 1500/- from 10th November, 1992, i.e., for the past three years and also in future.
- ii) The cause of action for Counter claim arouse on the

day plaintiff No. 1 filed suit and the plaintiff denied the defendant's title by setting up false agreement of sale. The Counter claim is therefore within time.

iii) These defendants are paying a Court fee of Rs. 2626/- on the 3/4th Market Value of Rs. 80,000/- framed in the plaint. Under Section 24-A of A.P. Court fee and Suit Valuation Act, which is proper and sufficient another Court fee of Rs. 2466/- paid of U/s 20 of APCF & S.U. on the claim of Rs. 54,000/- profit claimed for past 3 years i.e. from 10.11.92 to 9.11.95 which is proper and sufficient.

iv) It is, therefore, prayed that the Counter Claim be allowed by granting the following relief:

(A) The plaintiff be directed to deliver the defendants vacant and actual possession of the suit property.

(B) The defendants be directed to pay to the plaintiffs Rs. 54,000/- as mesne profits.

(C) The defendants be directed to pay to the plaintiffs Rs. 1500/- per month as further mesne profits from 10.11.95 to the date of eviction.

(D) The defendants be directed to pay to the plaintiffs the costs of the counter claim."

The Appellant herein in his replication asserted:

"The Plaintiffs submit that the relief of counter claim for delivery of possession of the property is not maintainable before this Hon'ble Court, as the suit premises is attracted by the provisions of A.P. (L.R.E.) Act as there was relationship of landlord and tenant prior to agreement of sale and the rent last paid was at Rs. 300/- p.m. Since this Hon'ble Court has no jurisdiction to entertain the counter claim for delivery of possession, the claim is liable to be rejected.

The Plaintiffs further submit that the Defendants are not entitled for relief of mesne profits at the rate of Rs. 1500/- per month from 10.11.92 i.e. for the past 3 years and also in future as the Plaintiff No. 1 paid the entire sale consideration in respect of the Plaint Schedule Property as stated in the Plaint and are entitled to specific performance of agreement of sale and the Defendants are not entitled for any mesne profits as claimed. Hence, the claim of the Defendants is liable to be rejected.

The Plaintiffs deny all other adverse allegations which are not specifically traversed herein above and pray that the counter claim of the Defendants be rejected."

A separate written statement appears to have been filed by the third defendant on behalf of defendant Nos. 2,4 and 5 on or about 2.11.1999. The third defendant also filed an additional written statement.

The Trial Court, however, as regard counter-claim did not frame any specific issues. The issues framed by the learned Trial Judge are as under:

- "1) Whether there is an agreement of sale in between the parties?
- 2) Whether any payments were made under the alleged agreement?
- 3) Whether the suit is barred by limitation?
- 4) To what relief?"

Despite the fact that no issue was framed, the learned Trial Judge proceeded to consider the issue as regard the counter-claim of the defendant under Issue No. 4. Rejecting the contention made by the counsel for the plaintiff that the court has no jurisdiction to entertain the counter-claim, the learned Trial Judge stated that as the Appellant had denied the title of the landlord, the civil court has jurisdiction to entertain the counter-claim of the defendants in terms of Order VII, Rule 7 of the Code of Civil Procedure.

Without considering any evidence which might have been brought on records by the parties on the said counter-claim of the Respondents herein, the learned Trial Judge allowed the same only on the premise that the Appellants have failed to establish its case of oral agreement of sale.

The High Court by reason of the impugned judgment and relying upon a decision of this Court in *R. Kanthimathi and Another Vs. Beatrice Xavier (Mrs.)* [(2000) 9 SCC 339] rejected the claim of the Appellant as regard decree for specific performance of contract but as regard the Respondent's counter-claim, it held:

"That apart, having set up with such a false plea of agreement and totally in regard to his tenancy, it cannot be said that the remedy of the defendants is to approach the authorities under the provisions of Rent Control Act."

Mr. Anant Vijay Palli, learned counsel appearing on behalf of the Appellant was not able to persuade us to interfere with the concurrent findings of fact arrived at by the courts below as regard the Appellant's claim on specific performance of an oral agreement to sale. The learned counsel, however, would contend that as no issue had been framed as regard the said counter-claim, no decree thereupon could have been passed, as was purported to have been done by the Civil Court, and in any view of the matter the Civil Court has no jurisdiction to determine the same.

Mr. Dipankar Gupta, learned senior counsel appearing on behalf of the Respondent No. 6 herein, however, would submit that despite the provisions contained in A.P. Building (Lease, Rent & Eviction) Control Act, 1960, the Civil Court had the requisite jurisdiction to determine the counter-claim of the Respondents in view of the fact that the tenant cannot be permitted to approbate and reprobate at the same time. The learned counsel submitted that the Appellant herein in paragraph 4 of the plaint has claimed possession in his capacity as a vendee and not as a tenant and, thus, a different relationship between the parties having come into being, the relationship of the landlord and tenant did not revive automatically upon his failure to establish his claim. Strong reliance in this behalf has been placed on *Sultan and Others Vs. Ganesh and Others* [(1988) 1 SCC 664], *Arjunlal Bhatt Mall Gothani and Others Vs. Girish Chandra Dutta and Another* [(1973) 2 SCC 197] and *R. Kanthimathi* (supra).

It was urged by the learned counsel that when the plaintiff sets up title in himself which is inconsistent with his plea of tenancy and if he, having not succeeded in establishing his former claim, cannot now turn round and contend that he should be granted the relief to continue to be in possession of the suit premises as if he is a tenant. Although two inconsistent defences are permissible, Mr. Gupta would argue that such defences should not be mutually destructive and in support thereof strong reliance has been placed on *Abdul Rahim Vs. Md. Md. Azimuddin* [AIR 1965 Patna 156] and *C. Mohammed Vs. Ananthachari* [AIR 1988 Kerala 298].

Relying on or on the basis of the decisions of this Court in *Nagubai Ammal and others Vs. B. Shama Rao and others* [AIR 1956 SC 593] and *R.N. Gosain Vs. Yashpal Dhir* [(1992) 4 SCC 683], the learned counsel would contend that the plaintiff cannot approbate and reprobate at the same time.

Mr. L. Nageshwara Rao, learned senior counsel appearing on behalf of the Respondent Nos. 2 to 5, would supplement the argument of Mr. Gupta. Drawing our attention to the counter-affidavit filed herein in this appeal he would contend that Shri P. Someswar Rao, father of original defendant filed an eviction petition in the court of Rent Controller against the Appellant herein on the ground of wilful default in payment of arrears of rent wherein the Appellant herein in his written-statement raised a plea of the agreement for sale claiming a title in himself.

A.P. Buildings (lease, Rent & Eviction) Control Act, 1960 (the said Act) was enacted "to consolidate and amend the law relating to the regulation of leasing of buildings, the control of rent thereof and the prevention of unreasonable eviction of tenants therefrom in the State of Andhra Pradesh". Section 10 of the said Act provides that except one or more grounds stated therein no tenant can be evicted from a tenanted premises except by obtaining a decree passed by the Rent Controller. Section 10 (1) of the said Act reads as under:

"(1) A tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this Section or Sections 12 and 13:

Provided that where the tenant, denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is bona fide and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a Civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in the said sections, notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded."

Denial of relationship of landlord and tenant is one of the grounds for eviction of a tenant. Section 10(2)(vi) and the proviso appended thereto read as under:

"(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied \026

(vi) that the tenant has denied the title of the landlord or claimed a right of permanent tenancy and that such denial or claim was not bona fide.

The Controller shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he shall make an order rejecting the application"

Paragraph 4 of the plaint which is referred to by the Counsel for the parties at the hearing is as under:

"The plaintiff No. 1 also paid a sum of Rs. 10000/- as advance and earnest money on the date of the said oral agreement and symbolic possession was delivered on the date of agreement. Earlier to the date of entering into agreement of sale, the plaintiff No. 1 was in possession of the plaint schedule property as tenant and continued thereafter as a purchaser after entering into an agreement of sale in part performance of the agreement of sale."

The Respondent Nos. 1 to 4 herein, however, in their written statement contended:

"In reply to para 4 of the plaint these defendants submits that it is incorrect to say that the plaintiff No. 1 paid Rs. 10000/- on the date of alleged oral agreement. It is also incorrect to say that the symbolic possession was delivered on the date of the alleged oral agreement. The plaintiff No. 1 was in possession of Plaint schedule property as a tenant and his possession is that of tenant even to this day."

The pleadings as is well-known must be construed reasonably. The contention of the parties in their pleadings must be culled out from reading the same as a whole. Different considerations on construction of pleadings may arise between pleadings in the mufossil court and pleadings in the original side of the High Court.

So read, the plaintiffs in its plaint merely ascribed that he continued to be in possession of the tenanted premises after the oral agreement of sale was entered into by and between the parties pursuant to or in furtherance thereof. It has not been and could not have been the contention of the Appellant that he has derived title as a vendee in respect of the premises in question. Such a plea, in view of Section 54 of the Transfer of Property Act, was not available. He at best could raise a claim of possession of the said premises in part performance of contract as envisaged under Section 53-A thereof.

A suit for eviction under the said Act would lie before a Rent Controller and not before a Civil Court. In terms of proviso appended to Section 10(1) of the said Act before the parties to pursue their remedies in a civil court a Rent Controller is required to arrive at a finding as regard the bona fide or otherwise the claim of the tenant.

Under the provisions of the Transfer of Property Act, a landlord can evict his tenant only upon service of proper notice as envisaged under Section 106 of the Transfer of Property Act. A lease can be determined by forfeiture inter alia when the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself. But even in such a case, the lessor must give notice in writing to the lessee of his intention to determine the lease.

Distinction between clause (f) and clause (h) of Section 111 is that in the former the right of forfeiture is exercised while the tenancy is still subsisting while in a case falling under clause (h) the lease is determined by a notice to quit.

The right of the Respondents to forfeit the tenancy, if any, had also not been exercised and no notice therefor was served upon the Appellant.

It may be true that, as was submitted by Mr. Nageshwara Rao, that the predecessors' in interest of the Respondents had filed a suit for eviction before the Rent Controller on the ground of default on the part of the Appellant in payment of rent as it appears from the statement made by PW-I that the said suit was dismissed for default. In this appeal, the Respondents should not be allowed to raise a contention for the first time that only in view of such a statement a suit for eviction was not pursued. Neither there exists any material in this behalf nor the court below went into the said question. The consequences resulting from a suit being dismissed for default must ensue and it must be held that the question as regard the right of the Respondents to evict their tenant on one or more of the grounds enumerated in Section 10 of the Act must be determined by the Rent Controller in an appropriate proceeding.

SCC 375] whereupon Mr. Nageshwara Rao placed strong reliance, Lahoti, J., as the learned Chief Justice then was, while construing the provisions of clause (c) of sub-section (1) of Section 12 of the M.P. Accommodation Control Act, 1961 observed:

"13. The law as to tenancy being determined by forfeiture by denial of the lessor's title or disclaimer of the tenancy has been adopted in India from the law of England where it originated as a principle in consonance with justice, equity and good conscience. On enactment of the Transfer of Property Act, 1882, the same was incorporated into clause (g) of Section 111. So just is the rule that it has been held applicable even in the areas where the Transfer of Property Act does not apply. (See: Raja Mohammad Amir Ahmad Khan v. Municipal Board of Sitapur.) The principle of determination of tenancy by forfeiture consequent upon denial of the lessor's title may not be applicable where rent control legislation intervenes and such legislation while extending protection to tenants from eviction does not recognize such denial or disclaimer as a ground for termination of tenancy and eviction of tenant. However, in various rent control legislations such a ground is recognized and incorporated as a ground for eviction of tenant either expressly or impliedly by bringing it within the net of an act injurious to the interest of the landlord on account of its mischievous content to prejudice adversely and substantially the interest of the landlord."

It was further observed:

"17. In our opinion, denial of landlord's title or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substantially the interest of the landlord and hence is a ground for eviction of tenant within the meaning of clause (c) of sub-section (1) of Section 12 of the M.P. Accommodation Control Act, 1961. To amount to such denial or disclaimer, as would entail forfeiture of tenancy rights and incur the liability to be evicted, the tenant should have renounced his character as tenant and in clear and unequivocal terms set up title of the landlord in himself or in a third party. A tenant bona fide calling upon the landlord to prove his ownership or putting the landlord to proof of his title so as to protect himself (i.e. the tenant) or to earn a protection made available to him by the rent control law but without disowning his character of possession over the tenancy premises as tenant cannot be said to have denied the title of landlord or disclaimed the tenancy. Such an act of the tenant does not attract applicability of Section 12(1)(c) abovesaid. It is the intention of the tenant, as culled out from the nature of the plea raised by him, which is determinative of its vulnerability."

There cannot be any doubt whatsoever that the Respondents could have maintained a proceeding for eviction before the Rent Controller on the said ground. Once such a proceeding could be initiated under the said Act, the jurisdiction of the civil court would be held to have been ousted.

It is true as has been submitted by Mr. Gupta that a party to a lis cannot raise pleas which are mutually destructive but ordinarily inconsistent defences can be raised. The Respondent No.2 to 5 were Plaintiffs in respect of their counter-claim and, thus, it was for them to prove their case by

pleading such foundational facts as were required to obtain a decree in their favour. The Respondents, as noticed hereinbefore, in their written statement categorically stated that the plaintiff had been in possession of the land as a tenant and his possession is that of tenant even to this day and, thus, according to the defendant the Appellant continued to be a tenant. As in the counter-claim such a plea had been taken, the Respondents on their own showing raised inconsistent pleas which are said mutually destructive.

The Civil Court's jurisdiction to entertain a suit for eviction on the ground of denial of relationship of landlord and tenant could have been invoked only strictly in terms of the provisions of the said Act wherefor the requirement of law, as contained in the proviso appended to Section 10(1) of the Act was to be complied with.

Moreover, in the counter-claim although the Respondents have claimed mesne profits at the rate of Rs. 1500 per month from 10.11.1992 till 9.11.1995, i.e., for a period of only 3 years only and also in future, the Trial Judge did not discuss the evidence which might have been adduced by the parties in that behalf. The Division Bench of the High Court, as noticed hereinbefore, on the other hand, examined the question on the premise that the Appellants were in arrears of rent for the period from January, 1977 to June, 1996 and, thus, became a defaulter. The contention of the Appellant that the Civil Court has no jurisdiction was repelled by the High Court, as noticed hereinbefore without going into the aforementioned aspect of the matter.

We have noticed hereinbefore that the Respondents in the counter-claim did not advance a plea for forfeiture of tenancy nor did they raise any contention that the landlord has issued a notice conveying his intention to determine the lease.

The doctrine of approbate and reprobate is a species of estoppel. However, there cannot be any estoppel against a statute. [See MD, Army Welfare Housing Organisation Vs. Sumangal Services (P) Ltd. Vs. Sumangal Services (P) Ltd., (2004) 9 SCC 619]

In Nagubai Ammal (supra), whereupon strong reliance has been placed by Mr. Gupta, this Court observed that the maxim that a person cannot approbate and reprobate is only one application of the doctrine of election and its operation must be confined to the reliefs claimed in respect of the same transaction and to the persons who are parties thereto. In that case a plea that an earlier proceeding was not a collusive one was allowed to be raised holding that the said principle has no application inter alia on the ground that the plaintiff therein did not obtain any advantage against the appellants by pleading therein that the earlier proceedings were collusive nor did they acting on those pleadings acquire rights to the suit properties. The said decision has no application to the fact of the present case.

Evidence of the Appellant, in this behalf, to which our attention was drawn reads as under:

"As a tenant, I used to pay Rs. 300/- per month till the date of purchase of the property. The 1st defendant filed a Rent case No. 617 of 1988 on the file of IV Addl. Rent Controller, Hyderabad after filing the present suit. The said R.C was dismissed for default on 16.6.1992. The 1st defendant did not get it restored the said Rent Case nor they have filed any case for eviction."

The Respondents herein on the aforementioned premise cannot be permitted to raise a plea that the suit for eviction was not pursued before the Rent Controller, Hyderabad only because the Appellant had raised the plea that the Rent Controller had no jurisdiction in the matter. The matter might have been otherwise if in the said proceedings a finding was arrived at that

the court has no jurisdiction upon acceptance of the said plea by the Appellants herein.

In R.N. Gosain (supra), different types of undertakings were given by the tenant that he would vacate the premise which having been acted upon, it was held that having done so, the petitioner cannot be permitted to invoke the jurisdiction of this Court under Article 136 of the Constitution of India. The said decision has no application to the fact of the present case.

In Arjunlal Bhatt Mall Gothani (supra), admittedly there was an agreement to sell the suit property to the tenant wherein it was provided that the payment would be made in equal instalments and on failure of do so, the sale agreement would be cancelled. In the aforementioned situation, this Court held that when the agreement was entered into, the old relationship of landlord and tenant came to an end and the rights and liabilities of the parties were required to be worked out on the basis of that agreement.

Here, in this case the existence of the agreement itself was in question. As noticed hereinbefore, the specific case of the Respondents themselves was that the Appellants continued to be a tenant and in that view of the matter, the said decision has no application.

In R. Kanthimathi (supra), whereupon reliance has been placed by the High Court, this Court held that where a new jural relationship was created between the parties upon non-establishment thereof, parties cannot fall back upon the old one. Therein, the seller \026 landlord accepted the amount under the agreement and such acceptance was preceded by agreement of sale and in the aforesaid factual backdrop it was held that the relationship of landlord and tenant between the parties changed. Such is not the case here. The said decision, therefore, has no application to the fact of the present case.

In Sultan (supra), the suit was filed based on the possession of title wherein the tenant \026 Appellant denied the relationship of landlord and tenant claiming to be the owner by adverse possession. Only in that situation it was held that the tenant for the first time before this Court could not raise a plea that his tenancy was protected under the Rajasthan Rent Restriction Act.

In Rekha Mukherjee Vs. Ashish Kumar Das and Another [(2004) 1 SCC 483], this Court held:

"16. An undertaking of this nature furthermore must be construed in favour of the person giving such undertaking. It should not be stretched too far. A party giving an undertaking is bound thereby but by reason thereof, the same cannot be given a meaning whereby the scope and extent thereof is enlarged."

It is now well-settled that a decree passed by a court having no jurisdiction is a nullity. The Civil Court had no jurisdiction to pass a decree for eviction only on the basis that the tenant has denied their title. The matter might have been different if the civil court has otherwise jurisdiction to entertain a suit. The legislature has created new rights and liabilities for both the landlord and tenant in terms of the provisions of the said Act and provided a forum therefor. The jurisdiction of the civil court having been barred except in a situation where the proviso appended to sub-section (1) of Section 10 would be attracted, the Civil Court has no jurisdiction to entertain a suit for eviction on a ground envisaged under Section 10(2)(vi) of the A.P. Building (Lease, Rent & Eviction) Control Act. The Civil Court, thus, had no jurisdiction to entertain the counter-claim.

In Kiran Singh and others Vs. Chaman Paswan and others [AIR 1954 SC 340], it was stated:

"\005It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties...."

In Bihar State Mineral Development Corporation and Another Vs. Encon Builders (I) (P) Ltd. [(2003) 7 SCC 1], this Court held:

"31\005An order which lacks inherent jurisdiction would be a nullity and, thus, the procedural law of waiver or estoppel would have no application in such a situation."

In Dwarka Prasad Agarwal Vs. B.D. Agarwal [(2003) 6 SCC 230], it was opined :

"37. It is now well settled that an order passed by a court without jurisdiction is a nullity. Any order passed or action taken pursuant thereto or in furtherance thereof would also be nullities. In the instant case, as the High Court did not have any jurisdiction to record the compromise for the reasons stated hereinbefore and in particular as no writ was required to be issued having regard to the fact that public law remedy could not have been resorted to, the impugned orders must be held to be illegal and without jurisdiction and are liable to be set aside. All orders and actions taken pursuant to or in furtherance thereof must also be declared wholly illegal and without jurisdiction and consequently are liable to be set aside. They are declared as such."

[See also Ashok Leyland Ltd. Vs. State of T.N. and Another, (2004) 3 SCC 1 and MD, Army Welfare Housing Organisation (supra)].

In Church of North of India Vs. Lavajibhai Ratanjibhai & Ors. [JT 2005 (5) SC 202], this Court observed:

"78. The provisions of the Act and the Scheme thereof leave no manner of doubt that the Act is a complete code in itself. It provides for a complete machinery for a person interested in the trust to put forward his claim before the Charity Commissioner who is competent to go into the question and to prefer appeal if he feels aggrieved by any decision. The bar of jurisdiction created under Section 80 of the Act clearly points out that a third party cannot maintain a suit so as to avoid the rigours of the provisions of the Act. The matter, however, would be different if the property is not a trust property in the eye of law. The civil court's jurisdiction may not be barred as it gives rise to a jurisdictional question. If a property did not validly vest in a trust or if a trust itself is not valid in law, the authorities under the Act will have no jurisdiction to determine the said question."

The impugned judgment to the aforementioned extent, therefore,

cannot be sustained which is set aside accordingly. The appeal is allowed in part so far as it relates to the counter-claim made by the Respondents herein. However, that part of the judgment whereby and whereunder the Appellant's suit for specific performance of contract has been dismissed is upheld. No costs.

JUDIS