(1987) 09 MAD CK 0048

Madras High Court

Case No: S.A.No. 2021 of 1984

T.N. Noor Mohammed	APPELLANT
Vs	
S.V. Govindarajan	RESPONDENT

Date of Decision: Sept. 11, 1987

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11, 80
- Presidency Small Cause Courts Act, 1882 - Section 41
- Transfer of Property Act, 1882 - Section 11

Citation: (1987) 09 MAD CK 0048

Hon'ble Judges: David Annoussamy, J

Bench: Single Bench

Advocate: M.I. Meerasahib, for the Appellant; S.P. Subramaniam, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

David Annoussamy, J.
This is an appeal by the tenant-plaintiff. The suit property belongs to the defendant-respondent herein. The superstructures were put up in the suit property by the plaintiff who was paying an annual rent of Rs. 420 without arrears. The defendant filed a suit namely O.S. 297/76 on the file of the District Munsif of Salem praying for delivery of possession of the property after issue of notice under the Transfer of the Property Act. The suit was dismissed on 23.6.1977. The defendant filed an appeal namely A.S. 345/77 on the file of the District Judge of Salem. The appeal was allowed on 30.8.1978. The plaintiff took up the matter before the High Court on second appeal namely S.A. 1960/78 which was disposed of on 6.2.1979 on the basis of a joint memo filed by both the parties The joint memo reads as follows:

The Appeal is not pressed. However the appellant is granted 2 years" time for handing over vacant possession to the respondent. The appellant will hand over vacant

possession of the suit property on or before 28.2.1981.

The suit was decreed on the terms of the above joint memo. The present suit was instituted by the tenant on the plea that in view of the G.O.Ms. 802/1974 dated 27.3.1974 the Suraraangaiam Town Panchayat was upgraded to the status of a Municipality. The City Tenants Protection Act 1921 has been extended to all municipal towns by G.O.Ms. 7283 dated 10.12.1973 in respect of residential buildings and lay G.O.Ms. 10285 dated 31.3.1975 in respect of non-residential buildings. So, according to the plaintiff, from 31.3.1975 for all leases of vacant sites wherein superstructures have been put up by tenants for non-residential purposes as in the present case, the provisions of the City Tenants Protection Act alone would apply. On the basis of these facts, the plaintiff pleaded that the defendant did not issue notice as per S. 11 of the Act, that therefore, the decree he obtained in O.S. No. 297/76 is a nullity. Accordingly, he had prayed for a declaration that the plaintiff was entitled to the benefits of the Tamil Nadu City Tenants Protection Act and for a consequential injunction interdicting the defendant from executing the decree passed in the above said suit. Though the defendant-landlord resisted the suit on several grounds, after perusal of the plaint as well as the written statements, the trial court framed the following issues:

"1. Whether the suit property is correctly described?

2. Whether the plaintiff is entitled for declaration as prayed, with the consequential relies, of permanent injunction?

3. Whether the judgment and decree of A.S. 345/77 and S.A. 1960/78 and not binding on the plaintiff?

4. Whether the suit properly comes within the purview of the City Tenants Protection Act?

5. Whether this suit is maintainable when the plaintiff failed to file an original petition within 30 days after the filing of the suit in O.S. 296/76?

6. Whether the plaintiff has waived his rights, if any?

7. Whether the suit is barred by judicator ?

8. Whether the suit is vexatious one?

9. To what relief?"

After perusing the evidence adduced by both sides and upon hearing their arguments the trial Court (Court of Subordinate Judge, Salem) dismissed the suit with costs by judgment dated 4.4.1983. The matter went on appeal before the District Court of Salem. After hearing the parties, that Court took up for determination the following point. Whether the decree in S.A. 1960/78 is a nullity and non-executable in view of the provisions of the City

Tenants Protection Act. It answered that question in the negative after considering the pleas raised by the plaintiff and dismissed the appeal by judgment dated 24.11.1984. The Second Appeal is directed against that judgment.

2. The point urged before me by the learned counsel for the appellant is whether a decree passed in a suit filed in disregard of the provisions of the City Tenants Protection Act in respect of a property covered by that Act is not a nullity.

3. The Tamil Nadu City Tenants Protection Act 1921 is apiece of legislation of socialistic nature. It is intended to protect the tenants. It gives them two substantial rights. One is the payment of compensation for ejectment as per S. 3 of the Act in respect of the value of any building or trees and any improvements which have been brought about in respect of any building erected, any tree planted or any improvement made by the tenant. Another right even much more valuable, is the right for the tenant to apply to the Court for an order that the landlord be directed to sell for a price to be fixed by the Court the whole or part of extent of the land specified in the application as per S. 9 of the Act. In order to enable the tenant to exercise such a right S. 11 of the Act provides as follows:

No suit in ejectment or applications under S. 41 of the Presidency Small Causes Courts Act 1882 shall be instituted or presented against a tenant until the expiration of three months next after notice in writing has been given to him requiring him to surrender possession of the land and building and offering to pay compensation for the building and trees, if any, and stating the amount thereof.

This provision of law is intended to put the tenant on notice about his rights under S. 3 as well as S. 9 of the Tamil Nadu City Tenants'' Protection Act 1922. Further, S. 13 of the Tamil Nadu City Tenants Protection Act provides as follows:

In its application to the City of Madras and to any (Municipal town), (township) or village to which this Act is extended) the Transfer of Property Act 1882 shall to the extent necessary to give effect to the provisions of this Act, be deemed to have been repealed or modified.

Therefore, in respect of all properties to which the Act applies no suit can be instituted on the basis of the provisions of the Transfer of Property Act. On the contrary the suit should be instituted only after giving notice in writing as prescribed by S. 11 of the Act. This provision is a mandatory one as it may be seen from the opening phrase of the S. 11 and the suit which has been instituted without complying with the formality prescribed by that section is a nullity and, therefore, any decree passed in that suit is also a nullity.

4. The learned counsel for the respondent contended that a suit instituted without a notice under S. 11 is not a nullity for all purposes. In this connection he placed before me a decision of this Court in Vedhachala Naicker v. P.K. Duraisamy Mudaliar 1950 I M.L.J. 732. He would particularly place reliance on the following sentence:--

It appears to me that the observation of their lordship in that case lend support to the contention that the lack of a valid notice as required either under S. 80 of the CPC or S. 11 of the Madras City Tenants Protection Act would not render the institution of the suit ineffective for all purposes and that the non compliance with the provisions effects only the result of the suit.

In order to ascertain the true import of the observations made by the court in that case, it is necessary to bear in mind what was at stake in that case. There, the landlord filed a suit without giving notice under S. 11 of the Act, then he sought permission to withdraw his suit with liberty to file a fresh suit after giving the notice required under S. 11. Meanwhile, the tenant had filed an application under S. 9 of the Tamil Nadu City Tenants Protection Act. Under those circumstances, the Court held that the tenant''s right to have his pending application under S. 9 of the Act decided is not affected by the withdrawal of the suit by the plaintiff and that the tenant acquired an indefeasible right, consequent on the landlord filing the suit, to apply to the Court for a direction to the landlord under S. 9 of the Act and that the Court was bound to inquire into the application irrespective of the result of the suit. Therefore, this decision is of no help to the landlord-respondent to show that the decree of eviction obtained in the present suit without a notice under S. 11 is not a nullity. It was held that only for some limited purpose the suit, even though it is to be dismissed, would produce some effects and that too in favour of the tenant in the case relied upon by the learned counsel for the landlord. The ratio laid down in that case is that as soon as the tenant is informed unequivocally that, the landlord has decided to reject him, his right under S. 9 is born, and that the subsequent withdrawal of the suit would not affect such a right of the tenant under S. 9 of the Act. I do not see anything in that decision which would support the case of the landlord in his contention that the decree in this case is not a nullity. At any rate, there is nothing in that decision which would come to the help of the landlord defendant.

5. The learned counsel for the landlord-defendant, contended further that there was a waiver by the plaintiff of the notice under S. 11 of the Act. He placed reliance on a Bench decision of this Court in Sri Agatheeswarar P.V. Perumal Devasthanam v. Narasimhan 95 L.W. 412 = 1982-2 M.L.J. 70., in which it was held that S. 11 of the Act is mandatory and a suit filed without the requisite notice under S. 11 of the Act is liable to be dismissed but that the notice could be waived by the defendant either expressly or impliedly by conduct and that the burden of proving that the tenant as either expressly or by implication waived the suit notice is on the plaintiff. The learned counsel for the landlord would point out that there is not an averment in the plaint that the tenant was not aware of the provisions of the Act during the pendency of the previous suit and, therefore, he should be deemed to have had the knowledge of the provisions and that the failure on his part to invoke the favourable provisions of the Act would imply waiver. This contention is hard to accept. It is true that the plaintiff has not stated in the plaint that he was not aware of the provisions of Law. But it is not in the subsequent action of any of the parties that one should find out whether there was waiver or not. It is in the acts and conduct of the party during the

relevant proceeding that we can find whether there was implied waiver. The learned counsel for the landlord was not in a position to point out any circumstance in the earlier suit from which we could draw a safe conclusion that the tenant has waived his right.

6. The learned counsel for the landlord would then argue that the very fact that the tenant did not put forth in the earlier suit any plea based on the provision of the Act would show that he has waived the notice under S. 11 of the Act. No doubt if the earlier suit was instituted by the landlord under the provisions of the Act and if the tenant has not invoked any of the provisions of the Act favourable to him nor did he challenge the suit on the ground that the notice given was not in confirmity by S. 11 then such an argument could be accepted. But the previous suit was not instituted by the landlord under the provisions of the Act. If we read the previous judgments from the trial court upto the High Court we can see that in the previous suit none of the party has made a single allusion to the provisions of the Act In this connection, it is worth referring to the judgment of the Supreme Court in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, ., and reproduce some passages:

Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be "an intentional act with knowledge", per Lord Chelmsford, L.C. in Earl of Darnley v. London, Chatham and Dover Rly. Co., (1867) 2 H.L. 43 at p. 57. There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it.

Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that every one 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. Falkner (1846) 2 C.B. 796.. "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." Scruttion, L.J., also once said: "It is impossible to know all 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. Bartlam (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.

In the earlier suit, the landlord who initiated the proceedings failed to issue notice under S. 11 of the Act and has deliberately or out of ignorance failed to make any reference to the Act. If the course taken by the landlord is deliberate and treacherous the landlord cannot be allowed to reap any benefit of such a course. After taking the other party into a trap hiding from him the provisions of the Act, he will be ill-advised to plead that the other party had knowledge of and waived his rights. If the landlord acted bona fide and had himself no knowledge of the Act, he cannot impute such a knowledge to the tenant nor can the landlord presume such a knowledge in the mind of the tenant so as to conclude

to a waiver. This contention is also repelled.

7. The next contention of the learned counsel for the landlord is that as per Explanation 4 to S. 11 of the CPC the tenant could have in the earlier suit put up as a defence the absence of notice under S. 11 and that such a matter which has been directly and substantially in issue in that suit cannot be agitated in this suit. But S. 11 of the CPC would apply only to suits regularly instituted in accordance with law. When a suit has been instituted in violation of a mandatory provision of law like S. 11 of the Act and is ah initio invalid, findings on issues raised will not be valid. Consequently the failure to raise any plea would have no effect whatsoever. S. 11 of the CPC has no application in such cases. This contention is also repelled.

8. It was then contended by the learned counsel for the landlord that in the compromise decree in S.A. No. 1960 of 1973, two years time was given by the landlord to the tenant for handing over vacant possession, that after taking from the landlord such an advantage and not pressing the appeal he should not be allowed to turn round and contend that the compromise decree is a nullity. If we consider the compromise decree strictly as a decree, the decree would be invalid since the suit itself is not a proper one. The decree passed in one such suit cannot have any force. If on the contrary the compromise decree is considered as a contract between the parties then it would come within the mischief of S. 12 of the Act. Nothing in any contract would bind the tenant or limit his rights under the Act. By such a provision the law maker has sought to protect the tenant against any contractual engagements which might have been made by him and which would deprive him of the protection intended by the Act. Therefore, from whatever angle we consider the compromise decree, it is a nullity. No doubt the landlord has a feeling that the tenant acted in an unfair manner in filing this suit, after entering into a compromise through which he gained two years. But we are here in a field of policy law and such a law has been given effect to strictly. Further, the earlier suit is the making of the landlord and he has to suffer any disadvantage arising in that suit instituted in disregard to law.

9. The learned counsel for the appellant raised also another contention. He stated that out of the land originally leased, viz., 1 acre and 67 cents, the Government has taken over 1 acre and 8 cents and paid compensation for the structure found on the portion taken over, that the tenant has put up a new structure in the remaining portion, that such a structure was put up after the coming into force of the Act in that locality and that therefore the land will not be subject at all to the provisions of the Act. But unfortunately for the landlord this plea was not raised neither before the trial court nor before the first appellate court and the answer to the contention implies findings of fact which this Court is not in a position to give, and therefore this question cannot be entertained in the second appeal. In the result, the appeal is allowed. The judgment of the courts below are set aside. The suit is decreed as prayed for. In view of the special circumstances of the case, each party shall bear the costs.