M. RAMASWAMY PILLAI (DEAD) BY LRS. A

v.

HAZARATH SYED SHAH MIAN SAKKAF KHADIRI THAIKAL

SEPTEMBER 3, 1992

[KULDIP SINGH AND N.M. KASLIWAL, JJ.] B

Tenancy:

Madras City Tenants' Protection Act, 1921: Section 9—Tenant holding over—Claiming to be in occupation since 1942—Lease deed executed only in C
1955—Whether the lease commenced before the Wakf Act, 1954—Whether tenant entitled to the benefit of the provision.

The Respondent-plaintiff filed a suit for possession of a plot of land from the Appellant-tenant on the ground that the tenant was holding over the land even after the expiry of two years fixed in the rent deed. It was D
also alleged in the plaint that the tenant had put up a superstructure on the land without the knowledge or permission of the plaintiff. According to the plaintiff, he wanted to construct pucca terraced shops on the site for which he obtained the necessary licence from the Municipality and as such the suit property was needed for the plaintiff's own use. E

The appellant-defendant contested the suit claiming that the superstructures on the land had been put up by the previous tenants and he purchased the same from them. It was further claimed that the plaintiff had recognised the occupancy of the defendant and accepted him as tenant and the registered lease deed executed in 1955 was in fact a renewal of the F
existing tenancy since 1942.

The defendant also filed a separate petition under section 9 of the Madras City Tenants' Protection Act, and prayed for fixing a price for the suit site and to convey the property on payment of the price to be fixed by G
the Court. This petition was opposed by the plaintiff on the ground that the property being a Wakf property it was inalienable. The validity of the lease deed was also challenged by the plaintiff. He also pleaded that even if the tenant was entitled to the benefits of the Madras City Tenants' Protection Act, he can claim the benefit only in respect of the residential portion in the backside and not in respect of the entire property. H

A By a common judgment the Munsif decreed the suit for possession in favour of the plaintiff and dismissed the petition of the tenant. The appeals preferred by the tenant were dismissed by the Sub-Judge. On appeal, the High Court held that there was no relationship of landlord and tenant between the appellant and respondent even prior to the lease deed; that under the Mohammedan Law, the mutawalli had no power to B execute the lease deed in favour of the appellant for a period of two years and as such the lease was invalid. It also held that the lease was not binding on the Wakf and the same could be avoided by Respondent in the course of the proceedings under section 9 of the Madras City Tenants' Protection Act.

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Aggrieved against the High Court's judgment, the tenant has preferred the present appeals.

Allowing the appeals, this Court,

D HELD: 1. The High Court simply considered the lease deed dated 17.11.1955 and held that there was no evidence to show that the appellant had been in possession of the property as a tenant under the respondent prior to the execution of the lease deed. The High Court placed reliance on the recitals in the lease deed to indicate that the appellant was inducted E into possession for the first time pursuant to the terms of the lease and observed that had the appellant been in possession of the property earlier then such facts should have been recited in the lease deed. The High Court was wrong in taking such a view. There was overwhelming evidence on record to show that the appellant was in occupation of the property long F before 1955 and the stand taken by the appellant was correct that it was purely a renewal of the existing tenancy which had already come into existence from the year 1942. [389 B-C]

2. The only reason given for denying the benefit of section 9 of the Madras City Tenants' Protection Act by the High Court to the appellant G is that while executing the lease deed dated 17.11.1955, the mutawalli had no power to grant such lease under the provisions of the Wakf Act. The High Court was not correct in taking the aforesaid view. The appellant in the present case was a tenant long before the coming into force of the Wakf Act 1954. The plaintiff had come forward with a clear case in the H plaint that the appellant was a tenant holding over and as such he was not

entitled to take a different plea in reply to the petition filed under section 9 of the Act that the appellant was not a tenant as the property in question was a wakf property and the mutawalli had no right to grant a lease. Thus, in the facts and circumstances of this case the defendant-appellant was entitled to the benefit of the provision of section 9 of the Act. [389 E-F] A

3. The case is remanded to the trial court with a direction to decide the petition filed under section 9 of the Act in accordance with law. The trial court shall first decide the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. The court shall then fix the price of the minimum extent of the land according to the average market value of the three years immediately preceding the date of the order. While determining the aforesaid price of the land, the same shall be reckoned at the average market value of the three years immediately preceding the present order. [390-D] B C

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 783 and 784 of 1981. D

From the Judgment and Order dated 2.4.80 of the Madras High Court in Second Appeal No. 804 and C.R.P. No. 523 of 1978.

A.T.M. Sampath for the Appellant. E

A.V. Rangam for the Respondent.

The Judgment of the Court was delivered by

KASLIWAL, J. This appeal by grant of special leave is directed against the judgment of the Madras High Court dated 2.4.1980. The Hazarath Syed Shah Mian Sakkaf Khadiri Thaikal through trustee S.S. Peeran Sahib (hereinafter referred to as the 'plaintiff') filed a suit on 15.9.1967 for possession of a plot of land measuring 124' x 20' situated in the town of Tanjore. The original tenant was M. Ramasamy Pillai who is now dead and is represented through his legal representatives who are the appellants in the present appeal. The plaintiff brought the suit on the allegation that the defendant took the suit property on lease for a period of 2 years from 1.2.1955 on a monthly rent of Rs. 10 and executed a rent deed on 17.11.1955. It was further alleged that the defendant was in occupation of the site as a tenant ever since 1.2.1955 and after the expiry F G H

A of the period of 2 years fixed in the rent deed, the defendant was continuing as a tenant holding over on the same terms. The defendant raised a superstructure on the land in suit. Till October, 1966 the superstructure was made up of mud walls and thatched roofing. But suddenly, the defendant renewed the roofing of the front portion into one of calicut tiles
B without the knowledge or permission of the plaintiff. It was further alleged in the plaint that the plaintiff wanted to construct pucca terraced shops on the site for which the necessary licence had been obtained from the Municipality and as such the property in suit was needed for the plaintiff's own use.

C The defendant filed a written statement on 7.11.1967 and *inter alia* alleged that the site was originally in the occupation of Damodara Nair and one Panchapakesan as lessees. Damodara Nair had put up a pucca mangalore tiled roofing over the back portion of the land. Panchapakesan and his father Sundaram Mudaliar had put up a thatched structure on the front
D portion of the land. The defendant had purchased the superstructures from both the above persons in or about the year 1942. The defendant used the back portion for his residence and the front portion for carrying on bicycle and motor-cycle repairing shop. It was further alleged in the written statement that the plaintiff had recognised the occupation of the defendant and had also accepted him as a tenant and was receiving the rent from the
E defendant since 1942. In 1955 the plaintiff wanted a registered rent deed and as such a registered lease deed was executed on 17.11.1955. It was in fact, a renewal of the existing tenancy. The defendant also took the plea that under the Madras City Tenants Protection Act, it was open to the tenant to claim compensation or pray for conveyance of the site on a price
F to be fixed by the court. The defendant also took a plea that the suit was not maintainable as the property formed part of a Minor Inam under the Minor Inams Abolition Act 30 of 1963, but we are not concerned with this objection now.

G The defendant also filed a separate petition under Section 9 of the Madras City Tenants' Protection Act (hereinafter referred to as the 'Act') on 6.11.1967 and prayed for fixing a price for the suit site and to convey the property on payment of the price to be fixed by the Court. In reply to this petition under Section 9, a stand was taken by the plaintiff that the property being a wakf property as such it was inalienable. It was also
H pleaded that the lease of the site under the lease deed of 1955 was invalid.

It was also pleaded that even if the tenant was found entitled to the benefits of the City Tenants' Protection Act, he can claim the benefit only so far as the residential portion in the back side was concerned and not in respect of the entire property. The Learned Munsif after remand of the case to him, by a common judgment dated 10.3.1976 decreed the suit for possession in favour of the plaintiff and dismissed the petition of the tenant filed under Section 9 of the Act. The Learned Munsif held that the lease deed dated 17.11.1955 being invalid, the tenant was not entitled to take benefit of Section 9 of the Act. The tenant then filed appeals against the judgment in the suit for possession as well as miscellaneous appeal against the dismissal of his petition filed under Section 9 of the Act. Both the appeals were dismissed by the Learned Subordinate Judge. The second appeal in both the matters were also dismissed by the High Court by a common judgment dated 2.4.1980. The tenant aggrieved against the judgment of the High Court has filed the above-mentioned two appeals.

We have heard learned counsel for the parties. The High Court held that there was no evidence on behalf of the appellant to show that he had been already recognised as a lawful tenant of the property prior to 1955 by the respondent. The High Court observed that a perusal of the recitals in Exhibit A.5 the lease deed dated 17.11.1955 indicated that possession was with the respondent and the appellant was being inducted into the possession for the first time and if really, the appellants had earlier been in possession of the property concerned as a tenant having been inducted therein as far back as on 1942 there was nothing that precluded the parties from reciting this fact in 1955. The High Court thus held that under the above circumstances it was not possible to conclude that there existed the relationship of landlord and tenant between the appellant and the respondent even prior to Exhibit A.5.

The High Court further held that under the Mohammedan Law the mutawalli had no power to execute the lease in favour of the appellant for a period of two years and as such the lease was invalid. The High Court then held that though the lease in favour of the appellant was not void but only voidable, but in the counter filed by the respondent to the application filed by the appellant under Section 9 of the Act, a specific objection had been taken that the lease was not binding on the wakf as the same was not for its benefit nor made for any necessity. The lease was thus not binding

A on the wakf, even in 1955 and the same can certainly be avoided by respondent in the course of the proceedings under Section 9 of the Act. Taking the aforesaid view the High Court held that the appellants were not entitled to invoke any benefits under the Act.

In the facts and circumstances of this case the view taken by the High
B Court is wrong and is liable to be set aside. A perusal of the plaint dated 15.9.1967 clearly shows that the plaintiff had come forward with a clear case that the defendant was a tenant holding over and the High Court was not right to to make out a new case beyond the pleadings. In para 3 of the plaint it was stated as under:-

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> "The defendant is in occupation of the site of the undermentioned property as a tenant ever since 1.2.1955 and is continuing as a tenant after the expiry of the period fixed in the rent deed holding over on the same terms."

D Again in para 10, it was stated as under:-

> "As the defendant has specifically undertaken in the rent deed to surrender vacant possession of the site after the expiry of the lease period and as he is now holding over on the same terms, with the consent of the Plaintiff-Thaikal,
E he has no right to refuse to deliver vacant possession of the site to the Plaintiff-Thaikal whenever called upon to do so, particularly when the Plaintiff-Thaikal requires the site for raising pucca terraced structures thereon."

F The defendant had taken the plea that he had purchased the superstructures in or about the year 1942 from Damodara Nair and Panchapakesan and had taken up his residence in the tiled portion and in the front portion he had been carrying on bicycle and motor-cycle repair shop. The trial court had recorded the finding that it was made manifest by the evidence adduced in this case both oral and documentary that the
G defendant was in possession of the superstructure even from the year 1942. The defendant had filed property tax receipts issued by the Thanjavur Municipality to the mutawalli, the amount having been paid by the defendant as disclosed by Exhibits B.5 to B.51 ranging over a period from 1942 to 1960. The trial court also observed that Exhibits B.61 to B.68 were the
H receipts issued to the defendant evidencing payments of rent to the

mutawalli. The trial court held that there can be no doubt that even from the year 1942 the defendant must have been in possession of the superstructures on the suit property. The High Court simply considered Exhibit A.5 dated 17.11.1955 and held that there was no evidence to show that the appellant had been in possession of the property as a tenant under the respondent prior to the execution of Exhibit A.5. The High Court placed reliance on the recitals in Exhibits A.5 to indicate that the appellant was inducted into possession for the first time pursuant to the terms of the lease and observed that had the appellant been in possession of the property earlier then such facts should have been recited in Exhibit A.5. The High Court was wrong in taking the above view. There was overwhelming evidence on record to show that the appellant was in occupation of the property long before 1955 and the stand taken by the appellant was correct that it was purely a renewal of the existing tenancy which had already come into existence from the year 1942. Be that as it may the suit for eviction has been filed on 15.9.1967 and the plaintiff himself had come forward with a clear case that the defendant was a tenant holding over.

The only reason given for denying the benefit of Section 9 of the City Tenant's Protection Act by the High Court to the appellant is that while executing the lease deed Exhibit A.5 dated 17.11.1955, the mutawalli had no power to grant such lease under the provisions of the Wakf Act 29 of 1954 as amended by Amendment Act 34 of 1964. In our opinion that the High Court was not correct in taking the aforesaid view. The appellant in the present case was a tenant long before the coming into force of the Wakf Act 1954. The plaintiff had come forward with a clear case in the plaint dated 15.9.1967 that the appellant was a tenant holding over and as such he was not entitled to take a different plea in reply to the petition filed under Section 9 of the Act that the appellant was not a tenant as the property in question was wakf property and the mutawalli had not right to grant a lease vide Exhibit A.5. dated 17.11.1955. Thus, in the facts and circumstances of this case we hold that the defendant appellant was entitled to the benefit of the provision of Section 9 of the Act.

It may however be noted that Clause (b) to sub-section (1) of Section 9 as added by Section 6 (ii) of the Madras City Tenants' Protection (Amendment) Act, 1960, reads as under:-

"On such application, the court shall first decide the min-

A imum extent to the land which may be necessary for the convenient enjoyment by the tenant. The court shall then fix the price of the minimum extent of the land decided as aforesaid, or of the extent of the land specified in the application under clause (a), whichever is less. The price aforesaid shall be the average market value of the three years immediately preceding the date of the order. The court shall order that within a period to be determined by the court, not being less than three months and not more than three years from the date of the order, the tenant shall pay into court or otherwise as directed the price so fixed in one or more instalments with or without interest."

According to the above provision the court shall first decide the minimum extent of the land which may be necessary for the convenient enjoyment by the tenant. The court shall then fix the price of the minimum extent of the land according to the average market value of the three years immediately preceding the date of the order. While determining the aforesaid price of the land, we make it clear that the price shall be reckoned at the average market value of the three years immediately preceding the present order.

In the result, we allow these appeals, set aside the impugned order of the High Court as well as of the courts below and remand the case to the trial court with a direction to decide the petition filed under Section 9 of the Act in accordance with law and in the manner indicated above. Parties to bear their own costs.

G.N. Appeals allowed.