'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7554 OF 2021
(Arising out of SLP (C)No. 3432 of 2017)

MAHESH KUMAR AGARWAL (DEAD) BY LRS **Appellant (s)**

VERSUS

NARESH CHANDRA & ORS. **Respondent(s)**

J U D G M E N T

K. M. JOSEPH, J.

(1) Leave granted.

(2) This matter arises under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as 'Act' for brevity). A proceeding was instituted for eviction of the respondents by the appellant on the basis of a purchase made by him on 04.01.1977 from the previous landlord. The application was filed under section 21 of the Act before the Rent Controller. This was preceded by a legal notice which was dated 22.12.2007 purporting to comply with the requirement of the first proviso to Section 21(1)(a). The respondents sent a reply notice on 22.02.2008. In the said reply notice, the respondents did not raise any objection based on

the requirements in the proviso to Section 21. The case went to trial. By order dated 16.05.2013, the Rent Controller ordered eviction of the respondents. The respondents carried the matter in appeal. It was unsuccessful as the appellate authority dismissed the appeal on 21.07.2016. The respondent filed a writ petition before the High Court. By the impugned order, the High Court has allowed the writ petition. The sole ground on which the High Court allowed the writ petition filed by the respondent is that the appellant-landlord had not complied with the requirement under the proviso under Section 21(1)(a) insofar as no notice of six months was given prior to the filing of the application.

(3) We have heard Mr. Joy Basu, learned senior counsel for the appellants. Noticing that, though served, there is no appearance for the respondents, we appointed Mr. Senthil Jagadeesan, learned counsel to assist the Court as *Amicus*. We have heard the learned *Amicus* as well.

(4) Mr. Joy Basu, learned senior counsel for the appellants, would, firstly, draw our attention to the terms of the notice by the appellant. He would point out that it is pertinent to note that, though in notice, it is *inter alia* stated that tenancy of the tenant was being terminated within 30 days of the receiving of the notice and the tenant was asked to hand over the possession, he would point out that the application was filed after the expiry of six

months. The application was filed, in fact, on 20.11.2008 whereas the notice is dated 22.12.2007. Secondly, he would submit that, even for a moment, assuming that the notice dated 22.12.2007 falls foul of the mandate of the proviso, the conduct of the tenant is such that it must be held that he has waived his right. In this regard, he drew support of the judgment of this Court which is reported in *Martin & Harris Ltd.* v. *VIth Additional Distt. Judge* (1998) 1 SCC 732. He would submit that this is a case where to begin with, the tenant did not set up any objection in reply notice. Still further, he did not take up any contention in his written statement before the trial Court in regard to the notice. The tenant did not even raise objection when he filed the appeal before the appellate authority. It is for the first time that in the writ petition that the tenant raised this point and the High Court has allowed the petition. On the basis of the judgment of this Court, he would, therefore, submit for our acceptance, the principle that even assuming that the notice sent by the appellant was defective, it is capable of being waived and it was, in fact, waived.

(5) *Per contra*, learned *Amicus* would draw our attention to a unreported judgment of this Court *in Gopal Krishan Verma v. Tahir* (Civil Appeal No. 7896-7897 of 2015). Therein, a Bench of two learned Judges was dealing with the very same provision with which we are concerned. We may refer to the

discussion by this Court after noticing the fact that the purchase of the property in the said case was made by the landlord on 13.07.2009 and the ejectment petition was filed after the expiry of three years on 21.12.2012. The Court found that the first requirement under the proviso was fulfilled. It is, thereafter, the Court proceeded to hold as follows:

> **"The more relevant aspect of the matter is, whether the appellant landlord had given a notice to the tenant, for a period of not less than six months, before such application for eviction was filed by him. It is undoubtedly true, that the appellant could have relied upon the legal notice dated 20.11.2009 if there was no period depicted therein (for seeking ejectment of the respondent thereon). However, since the extract of the legal notice dated 20.11.2009 reproduced above reveals, that the legal notice was for a period of 30 days, inasmuch as, the tenant had been required".... to quit, vacate and deliver vacant possession of the said premises to my client immediately after the expiry of 30 days of the service of the notice upon you....", we are satisfied with the second requirement in the proviso under Section 21(1), namely, that "the landlord has given a notice in that behalf to the tenant not less than six months...."**,**cannot be deemed to have been complied with. Since the notice was limited to a period of thirty days, its validity had expired on 19.12.2009. The notice contemplated under the proviso to Section 21(1) extracted above, is a six months notice. In the above view of the matter, we are satisfied that the High Court committed no error in rejecting the claim of the appellant."**

(6) The learned *Amicus,* in fact, submits that this Court may have erred in the view it has taken, in that, it may be misplaced to hold that even if the proceeding is instituted for eviction after the expiry of the period of six months

after the notice is given, the requirement of the proviso is not fulfilled. However, he does point out that in the said case, despite being alerted by the reply notice of the notice of the landlord was defective, the landlord persevered. He further submitted that there is a further requirement in the statutory provision which consists of the mandatory order of compensation. We may notice the relevant provisions of Section 21:

> **"Section 21. Proceedings for release of building under occupation of tenant**
>
> **(1)- The prescribed authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists namely**
>
> **(a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust;**
>
> **(b) that the building is in a dilapidated condition and is required for purposes of demolition and new construction:**
>
> **Provided that where the building was in the occupation of a tenant since before its purchase by the landlord, such purchase being made after the commencement of this Act, no application shall be entertained on the grounds, mentioned in clause (a), unless a period of three years has elapsed since the date of such purchase and the landlord has given a notice in that behalf to the tenant not less than six months before such application, and such notice may be given even before the expiration of the aforesaid period of three years:**

> **Provided further that if any application under clause (a) is made in respect of any building let out exclusively for non-residential purposes, the prescribed authority while making the order of eviction shall, after considering all relevant facts of the case, award against the landlord to the tenant an amount not exceeding two years' rent as compensation and may, subject to rules, impose such other conditions as it thinks fit."**

(7) We have already noticed the facts. Indeed, it is much after the period of six months of the notice given by the appellant that the proceeding has been instituted. We are, in fact, inclined to take the view that the notice which has been served would be in conformity with the proviso. However, we cannot proceed to decide the matter on the said basis for the reason that such a premise is inconsistent with the view taken by this Court in the unreported judgment. However, we are of the view with due respect that this Court may have erred in the said judgment. Judicial discipline requires that we should not found our decision on such a view for the reasons already set out. We defer from doing that.

(8) We proceed to consider the argument of the appellants based on the principle of waiver. In this regard, we notice the judgment of this Court reported in *Martin & Harris Ltd.* (supra). In the said case, there were two points which arose. The first point revolved around the question as to whether the application which was admittedly filed within the period of three years mentioned in the first proviso

could be considered. This Court took the view that the law did not veto the institution of proceedings but instead interdicted entertaining of the proceeding. Answering point no. 2 which is more apposite in the context of the facts of this case, the Court went on to hold, *inter alia,* as follows:

> **"12. However the further question survives for consideration, namely, whether the beneficial provision enacted by the legislature in this connection for the protection of the tenant could be and in fact was waived by the tenant. So far as this question is concerned on the facts of the present case the answer must be in the affirmative. As we have noted earlier after the suit was filed the appellant filed its written statement on 17-9-1986. In the said written statement the appellant, amongst others, did take up the contention that the application as filed by the respondent-landlord under Section 21(1)(*a*) was not maintainable and was premature as six months' period had not expired since the service of notice dated 20-9-1985 when the suit was filed. But curiously enough thereafter the said contention raised by the appellant in written statement was given a go-by for reasons best known to the appellant. It is easy to visualise that if at that stage the appellant had pressed for rejection of the application on the ground of Section 21(1)(*a*) as not showing completed cause of action due to non-expiry of six months from the date of service of notice invoking Order VII Rule 11(*a*) and (*d*) CPC, alleging that the plaint did not disclose a cause of action or it appeared to be barred by law, respondent-plaintiff could have withdrawn the suit on that ground under Order XXIII Rule 1 sub-rule (3) CPC as the suit based on grounds under Section 21(1)(*a*) of the Act would have been shown to have suffered from a formal defect and he would have been entitled to claim liberty to file a fresh suit on the same cause of action after the expiry of six months' period from the date of service of notice. That opportunity was lost to the respondent-landlord as the appellant did not pursue this contention any further. On the contrary the appellant joined issues on merits by seeking permission to cross-examine the plaintiff on merits of the case on grounds as pleaded**

under Section 21(1)(*a*) of the Act. When the decree was passed against the appellant, even while challenging the said decree in appeal no such ground was taken in the memo of appeal, nor was it argued before the first appellate court. Under these circumstances, the High Court rightly held that the contention, regarding the suit being premature as filed before expiry of six months from the date of the notice, must be treated to have been waived by the appellant. Joining issue on this question learned Senior Counsel, Shri Rao, for the appellant, invited our attention to a decision of this Court in the case of *Badri Prasad* v. *Nagarmal* [AIR 1959 SC 559 : 1959 Supp (1) SCR 769] . In that case a suit filed by an unregistered company was found to be hit by the provisions of Section 4 sub-section (2) of the Rewa State Companies Act, 1935. The said contention was permitted to be taken for the first time during averments in appeal before this Court. It was held that as this contention went to the root of the maintainability of the suit it could be agitated as a pure question of law. We fail to appreciate how that decision can be of any avail to the appellant in the present case. This Court, placing reliance on a decision of the Privy Council in the case of *Surajmull Nargoremull* v. *Triton Insurance Co. Ltd.* [(1924) 52 IA 126 : AIR 1925 PC 83] extracted with approval the observations of Lord Sumner at p. 128 of the Report of the Privy Council judgment to the following effect:

> **"The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset: *Nixon* v. *Albion Marine Insurance Co.* [(1867) LR 2 Exch 338] The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases."**

The decision of the Privy Council referred to with approval by this Court in the aforesaid decision clearly indicates that if a proceeding before a court is barred by a law, a plea to that effect being a pure question of law can be agitated any time. But if the prohibition imposed by the statute is with a view to affording

protection to a party, such protection can be waived by the party. He may avail of it or he may not avail of it as he may choose. It is not the case of the appellant that the application for possession as filed by the respondent-plaintiff was barred by any provision of law. All that was contended was that it was prematurely filed as six months' period had not expired from the date of issuance of the suit notice. That provision obviously was enacted for the benefit and protection of the tenant. It is for the tenant to insist on it or to waive it. On the facts of the present case there is no escape from the conclusion that the said benefit of protection, for reasons best known to the appellant, was waived by it though it was alive to the said contention as it was mentioned at the outset in the written statement filed before the prescribed authority. Thereafter it was not pressed for consideration. The result was that the respondent-landlord by the said conduct of the appellant irretrievably changed his position and would get prejudiced if such a contention is entertained at such a late stage as was tried to be done before the High Court after both the courts had concurrently held on facts that the respondent-plaintiff had proved his case on merits."

No doubt, the Court also went on to tide over the objection based on the proviso incorporating the provision based on public policy. A Bench of three learned Judges has affirmed the view taken in the aforesaid judgment but then, we must note that the decision of the Bench of three learned Judges in *Nirbhai Kumar* v. *Maya Devi & Ors.* (2009) 5 SCC 399 relates to the requirement under the first part of the first proviso to section 21 of the Act, namely the embargo against entertaining the application except after expiry of three years of the transfer.

(9) In view of the judgment of this Court in *Martin & Harris Ltd.*(supra), where this Court has taken the view interpreting the very same provision with which we are

concerned, that the objection relating to defective notice is capable of being waived, we are of the view that the appellant should not be denied the benefit of the said view. We further notice that, on facts, the present case stands on a more sturdier footing. In *Martin & Harris Ltd.* (supra), the tenant had, in fact, raised objection, which he did not press, whereas, in the facts of this case, the tenant has not raised any objection in not only the reply notice, but even in the written statement before the Rent Controller. What fortifies us further is that even in the appeal before the appellate Court, the tenant did not urge the ground. If at all there is a case for waiver, this would be one.

(10) However, under Section 21 of the Act, as correctly pointed out by the learned *Amicus,* under the second proviso, in respect of a non-residential premises or a building let out exclusively for non-residential purpose, an order for payment of an amount not exceeding two months' rent as compensation is called for:

> **"Provided further that if any application under clause (a) is made in respect of any building let out exclusively for non-residential purposes, the prescribed authority while making the order of eviction shall, after considering all relevant facts of the case, award against the landlord to the tenant an amount not exceeding two years' rent as compensation and may, subject to rules, impose such other conditions as it thinks fit."**

(11) In this case, admittedly, a building was let out exclusively for non-residential purposes. In terms of the

said proviso, having heard learned senior counsel, we are inclined to order that the appellants shall pay a sum of Rs.30,000/-to the respondents.

The appeal is allowed. The impugned order is set aside. The order of the Rent Controller, as affirmed by the appellate authority, will stand restored with the modification that the appellants will pay a sum of Rs.30,000/- to the respondents within a period of two months which shall be paid by making deposit within a period of one month before the appropriate Court concerned. Upon deposit, it will be open to the respondents to withdraw the said amount.

No orders as to costs.

(12) We place on record our appreciation for the efforts put in by Mr. Senthil Jagadeesan, learned *Amicus Curiae*, who has researched the matter and placed the correct legal position in law before us, besides the facts.

(13) A copy of the order may be sent to the address of the respondents.

……..J.
[K.M. JOSEPH]

……..J.
[PAMIDIGHANTAM SRI NARASIMHA]

New Delhi;
December 08, 2021.