Supreme Court of India
Martin & Harris Limited vs With Additional Distt. Judge & Ors on 11 December, 1997
Bench: S.B. Majmudar, M. Jagannadha Rao.

PETITIONER:
MARTIN & HARRIS LIMITED

Vs.

RESPONDENT:
WITH ADDITIONAL DISTT. JUDGE & ORS.

DATE OF JUDGMENT: 11/12/1997

BENCH:
S.B. MAJMUDAR, M. JAGANNADHA RAO.

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T S.B. Majmudar, J, Leave Granted Respondent nos. 1 and 2 are formal parties being authorities and hence it was not necessary to hear them. By consent of learned counsel for the contesting parties the appeal was taken up for final disposal and having heard them it is being decided by this judgment.

In this appeal question of maintainability of application for possession moved by respondent no.3-landlord against the appellant-tenant under Section 21(1)(a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as `the Act'] mainly falls for consideration. The appellant has also raised a subsidiary ground centering round a subsequent event to which we will make a reference at an appropriate stage in this judgment. A few introductory facts leading to this appeal are required to be noted at the outset to appreciate the aforesaid controversy between the parties. Introductory Facts Respondent No.3 purchased the suit property being Bungalow No. 21-C, Ashok Marg, Lucknow, wherein the appellant-company is occupying an area of 9000 sq.ft. as a tenant since 28th December 1966. Respondent no.3 was serving in Indian Army as Major General. He retired from the said post on 1st April 1985. He purchased the aforesaid tenanted property on 30th June 1985 from its erstwhile owner Dr. K.R. Chaudhary who coincidentally was his father-in-law. Respondent no 3-1 landlord gave a notice dated 20th September 1985 to the appellant seeking possession on the ground that he had purchased the property for his residential purpose and the bona fide required the same for the said

purpose. The appellant replied to the said notice on 20th October 1985 and refuted the claim of the respondent-landlord. Respondent no.3 thereafter filed an application on 24th January 1986 under Section 21(1)(a) read with Section 21(1-A) of the Act in the court of IIIrd Additional Civil Judge and Prescribed Authority, Lucknow. It was registered as P.A. Suit No.1 of 1986. In the written statement filed by the appellant on 17th September 1986 before the prescribed authority, amongst others, a contention was raised that the application was not maintainable under Section 21(1)(a) of the Act on twin grounds - (1) that it was filed prematurely before expire of three years from the date on which the premises was purchased by respondent no.3-landlord: and (2) respondent no.3 has not filed the suit after expire of six months from the date of the suit notice dated 20th September 1985 and consequently the application was not maintainable as per the first proviso to Section 21(1) of the Act. During the pendency of the proceedings, however, the appellant joined issues on merits by filing affidavit controverting the affidavit filed by the respondent-landlord in support of his case. After hearing the parties on merits of the claim of respondent-landlord, the prescribed authority by its judgment dated 23rd May 1990 decreed the suit of the respondent - landlord holding that respondent - landlord has proved his case for bona fide requirement of the suit premises. The appellant - tenant carried the matter in appeal under Section 22 of the Act before the District Judge, Lucknow. The appeal was pressed on merits of the controversy between the parties whereby the appellant sought to challenge the decree of the trial Court on the ground that the respondent - landlord did not require the premises for his bona fide use. The said contention of the appellant was rejected by the first Appellate Court and the appeal was dismissed on 21st March 1994. Thereafter the appellant carried the matter in a Writ Petition before the Lucknow Bench of the High Court of Allahabad under Article 226 of the Constitution of India. In the said writ petition the appellant's counsel mainly urged the question about the maintainability of the application for possession as moved by the respondent-landlord under Section 21(1)(a) of the Act. The finding of fact of bona fide requirement of respondent-landlord as concurrently reached by the courts below was not challenged before the High Court. One ancillary point was urged based on subsequent event. The High Court noted the contention of appellant's learned counsel that question of maintainability of the proceedings was not urged by the appellant before the courts below, but as the contention went to the root of the matter it was considered by the High Court on merits. The High Court, however, rejected the same and took the view that the application filed by respondent-landlord was maintainable. It also rejected the ancillary contention on behalf of the appellant-tenant that because of the subsequent event, namely, that respondent-landlord's wife had got undivided interest in the adjoining were situated, the respondent's bona fide requirement did not survive. In the result the High Court confirmed the decree for possession as passed by the Trial Court and as confirmed by the First Appellate Court.

Rival Contentions Learned senior counsel Shri P.P. Rao, appearing on behalf of the appellant submitted in support of the appeal that the High Court has patently erred in law in taking the view that respondent-landlord's application under Section 21(1)(a) was maintainable. He submitted, placing reliance on various decisions of this Court to which we will make a reference hereinafter, that the suit as filed before expire of the period of six months from the date of the service of the suit notice was clearly not maintainable and that as the said provisions was for the benefit of the suppressed class of tenants it was in public interest and objection regarding the same could not be waived by the appellant as wrongly held by the High Court. It was also contended that the

application for possession under Section 21(1)(a) of the Act was not maintainable as it was filed within three years of the date of purchase of the property by the respondent- landlord and consequently the prescribed authority had no jurisdiction to entertain such an application from the very inception. It was submitted that the term `entertain' as employed by the first proviso to Section 21(1)(a) of the Act was synonymous with the word `institute' and in any case at the time the court took cognisance of the suit for possession by issuing notice to the appellant it could be said that the Court has entertained the said proceedings and such entertaining of the proceedings was clearly barred by the aforesaid provision of the Act and consequently the decree for possession as passed by the Trial Court and confirmed by the First Appellate Court and the High Court was a nullity. It was also contended that because of the subsequent event brought to the notice of the High Court to the effect that respondent was staying with his wife in the adjoining part of the building where the suit premises was situated and as the said property jointly belonged to respondent's wife and her brother it could not be said that the respondent-landlord had any felt need for occupying the suit premises and his need for the suit premises, if any, had come to an end.

On the other hand learned senior counsel for the respondent-landlord, Shri Gopal Subramaniam supported the decision rendered by the High Court. It was submitted that the term `entertain' as employed by the first proviso to Section 21(1) of the Act only meant that the Trial Court could not decide the ground under Section 21(1)(a) on merits if three years' period from the date of the purchase of the property by the respondent-landlord has not expired by then. That in the present case when the prescribed authority took up the said ground for consideration on merits after 1986 three years' period had a already expired from the date of purchase of the suit property by respondent-landlord and hence there was no question of bar against such entertainment and consideration of the ground by the Trial Court. So far as the question of notice of six months was concerned, it was submitted that though it was a mandatory requirement of the provision and application could not be filed before expire of six months from the date of the service of the suit notice as joined by the first proviso to Section 21(1) of the Act and as such a contention which was already raised by the appellant in its written statement was not pressed into service at subsequent stages of the trial and on the contrary the appellant jointed issues on merits by filing affidavit and seeking cross-examination of the plaintiff on the question of his bona Fide requirement of the suit premises. Such a contention can be said to have been consciously waived by the appellant. That if during the trial such a contention was canvassed for consideration the respondent-landlord could have filed a fresh suit on that ground by withdrawing the suit based thereon. Thus because of the conduct of the appellant in not pursuing this point during the trial the respondent-landlord has irretrievably changed his position and it would have resulted in grave prejudice to the respondent-landlord if such a plea was entertained subsequently. It was also submitted in this connection that the proceedings were personal in nature between the landlord and the tenant and the provision of service of six months' notice before filing of the suit as found in the proviso to Section 21(1) of the Act was for the protection and benefit of the tenant concerned and such a protection could be given up and waived by the tenant. It would not be said that such a protection was not capable of being waived being in public interest. That no such public interest was involved in the said provision. It was also submitted that the respondent- landlord was rightly held not to be in any way adversely affected only because he was staying with his wife in the adjoining part of the building where the suit premises was situated, and where in his wife has an undivided interest. That

according to him the respondent-landlord was forced to stay, in the absence of his own house, in another premises belonging to his son-in-law and even assuming that he was staying also in the adjoining property partly belonging to his wife along with her brother, her cannot be complied to remain as a licensee of his wife for the rest of his life. he, however, fairly conceded that the reasoning of the learned Judge of the High Court, that because the respondent-landlord was a retired army officer his case was covered by Explanation (iii) to Section 21(1) of the Act and, therefore, ipso facto his need of the building for residential purpose shall be deemed sufficient for proving his case under clause (a) of sub-section (1) of Section 21 of the Act, could not be sustained. However he submitted that even independently thereof, on the basis of the evidence on record and the current findings to which the Trial Court and the First Appellate Court reached, the High Court was justified in confirming the decree for possession under Section 21(1) (a) of the Act.

Points for Consideration In view of the aforesaid rival contentions the following points arise for our consideration;

1. Whether the respondent-landlord's application under Section 21(1)(a) of the Act was not maintainable in view of the proviso to the said Section as it was filed before the expiry of three years from the date of purchase of the suit premises by the respondent.

2. Whether the said application was not maintainable on the additional ground that it was filed prior to the expiry of six months from the date on which notice was given by the respondent to the appellant as required by the very same proviso.

3. Whether the bona fide requirement of the respondent landlord did not survive in view of the subsequent event, namely, that respondent's wife had acquired an undivided interest in the adjoining part of the building in which the suit premises were situated and where in the respondent-landlord was staying with his wife.

We shall deal with these points seriatim.

Point No.1 In order to appreciate the controversy centering round this contention it is necessary to have a look at the relevant statutory provisions. Section 21(1) with its relevant clauses and the provisos reads as under:

> "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 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 lenient an amount not exceeding two years' rent as compensation and may, subject to rules, impose such other conditions as it thinks fit:

Provided also that no application under clause (a) shall be entertained-

(i) ... .

.....

(ii) ....

(iii) in the case of any residential building, against any tenant who is a member of the armed forces of the Union and in whose favour the prescribed authority under the Indian Soldiers (Litigation) Act, 1925 (Act No. IV of 1925) has issued a certificate that he is serving under special conditions within the meaning of Section 3 of that Act, or where he has died by enemy action while so serving then against his heirs:

Provided also that the prescribed authority shall, except in cases provided for in the Explanation, take into account the likely hardship to the tenant from the grant of the application as against the likely hardship to the landlord from the refusal of the application and for that purpose shall have regard to such factors as may be prescribed.

Explanation - In the case of a residential building:-

(i) ....

.....

(ii)..... .....

.....

(iii) Where the landlord of any building is-

(1) a serving or retired Indian Soldier as defined in the Indian Soldiers (Litigation) Act, 1925 (IV of 1925), and such building was let out at any time before his retirement, or (2) .....

.....

.....

and such landlord needs such building for occupation by himself or the members, of his family for residential purposes, then his representation that he needs the building for residential purposes for himself or the members of his family shall be deemed sufficient for the purposes of clause (a), and where such landlord owns more than one building this provision shall apply in respect of one building only."

As the respondents application was also based on another ground under Sub-Section (1-A) of Section 21 of the Act it will be necessary to note the said provision also at his stage. It reads as under:

> " 21(1-A). Notwithstanding any thing contained in Section 2, the prescribed authority shall, on the application of a landlord in that behalf, order the eviction of a landlord in that behalf, order the eviction of a tenant from any building under tenancy, if it is satisfied that the landlord so such building was in occupation of a public building for residential purposes which he had to vacate on account of the cessation of his employment:
>
> Provided that an application under this sub-section may also be given by a landlord in occupation of such public building at any time within a period of one year before the expected date of cessation of his employment. But the order of eviction on such application shall take effect only on the date of his actual cessation."

A mere look at the aforesaid provision of the first proviso to Section 21(1) of the Act shows that no application filed by a landlord is to be entertained by the prescribed authority on grounds mentioned in clause (a) unless a period of three years has expired since the date of purchase of the property by the landlord when the building which is purchased is having a sitting tenant. It is not in dispute between the parties that the appellant was a sitting tenant since 1966 in the said building when it was purchased by respondent Landlord on 30th June 1985, It is, of course, true that respondent landlord moved an application for possession, against the appellant both under Section 21(1)

(a) of the Act and also under Section 21(1-a) of the Act. However, so far as the ground under Section 21(1)(a) of the Act is concerned the application was filed before the expiry of three years from the date of such purchase. It was in fact filed within seven months from the date of purchase of the premises. The moot question is whether the very filing of such application was barred by the provisions of the said proviso. It must be kept in view that the proviso nowhere lays down that no application on the grounds mentioned in clause (a) of Section 21(1) could be 'instituted' within a period of three years from the date of purchase. On the contrary, the proviso lays down that such application on the said grounds cannot be 'entertained' by the authority before the expiry of the period. Consequently it is not possible to agree with the extreme contention canvassed by the learned senior counsel for the appellant that such an application could not have been filed at all within the said period of three years. Learned senior counsel for the appellant Shri Rao in this connection invited out attention to a decision of this Court in the case of Anandilal Bhanwarlal and another v. Smt. Kasturi Devi Ganeriwala and another [(1985) 1 SCC 442]. In the said decision this Court was concerned with the interpretation of Section 13(3-A) of the West Bengal premises Tenancy Act. 1956. The said provision reads as under:

> "Where a landlord has acquired his interest in the premises by transfer, no suit for the recovery of possession of the premises on any of t he grounds mentioned in clause (f) or clause (ff) of sub- section (1) shall be instituted by the landlord before the expiration of a period of three years from the date of his acquisition of such interest...."

As in that case the very 'institution' of suit for recovery of possession was barred for a period of three years form the date of acquisition of interest of the landlord in such premises this Court took the view that the decree for possession passed in the face of such statutory prohibition was illegal. As the proviso to Section 21(1) of the Act in the present case is not so worded the said decision cannot be of any avail to learned senior counsel for the appellant. However he submitted that the word 'entertain' should be construed as being synonymous with the word 'institute'. It is difficult to agree. The statutory scheme of Section 21(1) contra-indicates such a contention, sub-Section (1) of Section 21 lays down that '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.....' Section 21(1) deals with grounds mentioned not only in clause (a) but also in clause (b) The proviso to Section 21(1) bars entertainment of the application only on the grounds mentioned in clause (a) thereof, It is easy to visualise that an application for possession may be filed by the landlord not only invoking grounds mentioned in clause

(a) of Section 21(1) but even other grounds mentioned in that sub-section. Therefore, the stage at which the court has to consider whether grounds mentioned in clause (a) are made out be the plaintiff or not will be reached when the Court takes up the application for consideration on merits. It has to be kept in view that applications for possession filed under Section 21(1) of the Act are not placed for admission before the prescribed authority. Once they are filed they are to be processed for being decided on merits after issuing notices to the parties concerned. Therefore, when the application reaches final hearing on merits the authority has to sift the grounds on which the application is based and if it finds that the application is based, amongst others, on the grounds

mentioned in clause (a)) it has to ascertain whether three years' period has expired since the day of the purchase of the said property by the plaintiff- landlord and if the period of three years is found to have expired then the grounds mentioned in clause

(a) would become alive for consideration of the authority. If not, said grounds would not be entertained for consideration. Thus the word 'entertain' mentioned in the first proviso to Section 21 (1) in connection with grounds mentioned in clause (a) would necessarily mean entertaining the ground for consideration for the purpose of adjudication on merits and not at any stage prior thereto as tried to be submitted by learned senior counsel, Shri Rao, for the appellant. Neither at the stage at which the application is filed in the office of the authority nor at the stage when summons is issued to the tenant the question of entertaining such application by the prescribed authority would arise for consideration. This conclusion also flows from the statutory scheme discernible from the third proviso to section 21(1) of the Act. It is seen that the said proviso uses the similar terminology to the effect that such application under Section 21(1)(a) shall not be entertained under contingencies contemplated by various sub-clauses of the said proviso. These provisions clearly show that while entertaining the application for possession under clause (a of sub-section (1) of Section 21 of the Act the Court has to find out, on evidence led before it, as to what is the purpose of the charitable trust and also whether the residential building is sought for occupation for business purposes or whether the tenant of residential premises, if he is a member of armed forces has got a certificate to the effect that he is serving under special conditions mentioned in Section 3 of the Indian Soldiers (Litigation) Act, 1925 or whether he has died by enemy action while so serving an the proceedings are being filed against his heirs. All these questions of fact will have to be considered whole entertaining the application under clause (a) of Section 21 (1) of the Act as laid down by the third proviso. It is obvious that said stage would be reached only when the prescribed authority takes up the application for consideration on merits of the grounds mentioned in clause

(a)) of Section 21(1) which are pressed in service by the landlord for getting possession.

Even that apart there is an internal indication in the first proviso to Section 21(1) that the legislature has made a clear distinction between 'entertaining of an application for possession under Section 21(1) (a) of the Act and `filing' of such application. so far as the filling of such application is concerned it is clearly indicated by the Legislature that such application cannot be filled before expiry of six months form the date on which notice is given by the landlord to the tenant seeking eviction under Section 21(1) (a) of the Act. The words, `the landlord has given a notice in that behalf to the tenant not less than six months before such application', would naturally mean that before filing of such application or moving of such application before the prescribed authority notice must have preceded by at least six months. similar terminology is not employed by the Legislature in the very same proviso so far as three years' period for entertaining such application by the prescribed authority is concerned. Therefore, it must necessarily mean that when the prescribed authority is required to entertain an application on the grounds mentioned in Clause (a) of Section 21(1) a stage must be reached when the Court applies its judicial mind and takes up the case for decision on merits concerning the grounds for possession mentioned in clause (a) of Section 21(1) of the Act. Consequently on the very scheme of this Act it cannot be said that the word 'entertain' as employed by the Legislature in the firs proviso to Section 21(1) of the Act would mean 'Institution' of such

proceedings before the prescribed authority or would at least mean taking cognisance of such an application by the prescribed authority by issuing summons for appearance to the tenant-defendant. It must be half that on the contrary the term 'entertain' would only show that by the time the application for possession on the grounds mentioned in clause (a)) of Section 21(1) is taken up by the prescribed authority for consideration on merits, at least minimum three years' period should have elapsed since the date of purchase of the premises by the landlord.

Learned senior counsel, Shri Rao, for the appellant invited our attention to a decision of this Court in the case of Kiran Singh and others v. Chaman Paswan and others [(1955) 1 SCR 117] for submitting that a decree without jurisdiction is a nullity and such an objection to it can be raised even in execution proceedings. There cannot be any dispute on this legal proposition. However, the question is whether decree passed by the prescribed authority under Section 21(1) (a) of the Act can be said to be a nullity at all. As we have seen above the decree of the Trial Court was passed much after the expiry of the three years from the date on which the respondent Landlord purchased the property. To recapitulate, the property was purchased on 30th June 1985 while the decree of the Trial Court is dated 23rd May 1990. In fact the Trial Court had taken up the application for consideration of the aforesaid grounds more than three years after 20th December 1985 in 1988-89 onwards. Consequently it must be held that the application for possession on the grounds under Section 21(1)(a) was entertained by the Trial Court after the expiry of three years from the date of purchase of the suit property by the respondent, plaintiff. Hence it cannot be said that the said decree was a nullity being without jurisdiction. On the same reasoning, therefore, reliance placed by learned senior counsel, Shri Rao, for the appellant on the decision of this Court in the case of Chiranjilal Shrilal Goenka (Decease) through LRs. V. Jasjit Singh and others [(1993) 2 SCC 507], cannot be of any avail to him as in the said case this Court reiterated the very same principle that contention about a decree passed by a court without jurisdiction on the subject-matter or on the grounds on which the decree is made goes to the root of its jurisdiction or by a court which lacks inherent jurisdiction is to be treated as one passed by a coram non justices. Learned senior counsel for the appellant also invited our attention to a decision of a Constitution Bench of this Court in the case of Shri Charan Lal Sahu & Another v. Shri K.R. Narayanan & Another [JT 1997 (9) SC 253] where in S.C. Agrawal, J., speaking for the Constitution bench held in para 31 of the Report that Rs. 10,000/- are quantified as costs to be paid by the petitioners and it was directed that no petition filed by either of the petitioners-in-person shall be entertained in this Court till the amount of costs imposed is paid. Relying on these observations learned senior counsel for the appellant submitted that in the aforesaid decision the Constitution Bench, employed the term `entertain' as meaning `institute'. It is difficult to appreciate this contention. This Court in that case was not concerned with the question as to when an application can be said to be entertained. The statutory scheme with which we are concerned in the present case was not on the anvil of consideration in the aforesaid case. Therefore, even assuming that the direction in the aforesaid decision might contain instruction to the office of this Court not to permit filing of such Election Petition without payment of costs, the same cannot be considered to be a decision on the question with which we are concerned on the scheme of the Act. Learned senior counsel, Shri Rao, for the appellant then invited our attention to two decisions of this Court in the case of M/s. Lakshmiratan Engineering Works Ltd, V. Asst. Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur and another [AIR 1968 SC 488, (1968) 1 SCR 505] and Hindustan Commercial Bank Ltd., V. Punnu Sahu (Dead) through Legal

Representatives [(1971) 3 SCC 124]. In Lakshmiratan Engineering (supra) this Court was concerned with the meaning of the word `entertain' mentioned in the proviso to Section 9 of the U.P. Sales Tax Act, 1948. Hidayatullah, J., speaking for the Court observed in the light of the statutory scheme of Section 9 of the said Act that the direction to the Court in the proviso to Section 9 was to the effect that the Court shall not proceed to admit to consideration an appeal which is no accompanied by satisfactory proof the payment of the admitted tax. In the case of Hindustan Commercial Bank (supra) the term 'entertain' as found in the proviso to Order XXI Rule 90, Code of Civil Procedure ('CPC') fell for consideration of the Court. Hedge, J., speaking for a Bench of two learned Judges of this Court in this connection observed that the term 'entertain' in the said provision means 'to adjudicate upon' or 'to proceed to consider on merits' and did not mean 'initiation of proceeding'. The aforesaid decisions, in our view, clearly show that when the question of entertaining an application for giving relief to a party arises and when such application is based on any grounds on which such application has to be considered, the provisions regarding 'entertaining such application' on any of these grounds would necessarily mean the consideration of the application on the merits of the grounds on which it is based. In the present case, therefore, it must be held that when the Legislature has provided that no application under Section 21 (1) (a) of the Act shall be entertained by the prescribed authority on grounds mentioned in clause (a) of Section 21(1) of the Act before expiry of three years from date of purchase of property by the landlord it must necessarily mean consideration by the prescribed authority of the grounds mentioned in clause (a) of Section 21(1) of the Act of merits. On the facts of the present case, as we have seen earlier, that stage was reached after 1988 when the prescribed authority on the basis of the affidavit evidence led before it took up the plaintiff's case for consideration on merits of the grounds under Section 21 (1) (a) of the Act and at that stage more than three years had expired. from the date on which the respondent-landlord had purchased the property. Consequently no fault can be found with the decision of the High Court to the effect that the prescribed authority was justified in entertaining the consideration of the grounds under section 21(1) (a) of the Act at that stage and the decree passed on the said ground, therefore, cannot be said to be a nullity, nor can the entertaining of such application on the ground under Section 21(1) (a) of the Act be said to be illegal. The first point for consideration is, therefore, answered in the negative, in favour of the respondent landlord and against the appellant.

so far as this point is concerned it must be held on the clear language of the first proviso to Section 21(1) of the Act that application for possession under Section 21(1)

(a) had to be filed by the landlord concerned not earlier than expiry of six months from, the date of issuance of the notice by the landlord. On the facts of the present case it cannot be disputed that when the notice was issued on 20th September 1985 the application for possession could not have been filed by the respondent invoking the grounds mentioned in clause (a) of Section 21(1) of the Act, at leas till 20th March 1986, while the application was filed in January 1986. To that extent it can be said that the application was premature. The provision in this connection has to be treated to be mandatory.

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 17th September 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 20th September 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 the 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 shows 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 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 his question learned senior counsel, Shri Rao, for the appellant invited our attention to a decision of this Court in the case of Seth Badri Prasad and others v. Seth Nagarmal and other [(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 arguments 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 Nargoremuil v. Triton Insurance Company Ltd. (1924) L.R. 52 I.A. 126, extracted with approval the observations of Lord Summer at page 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 vailed, nor is obedience o such an enactment a thing from which court cab be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset; Nixon v. Alibion Marine Insurance Co., (1867) L.R. 2 Ex. 338. The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not s 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 a fording projection 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. Result was that the respondent landlord by the said conduct of the appellant irretrievably changed his position and would set 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.

It is not possible to agree with the contention of the learned senior counsel for the appellant that the provision containing the proviso to Section 21(1) of the Act was for public benefit and could not be waived. It is, of course, true that it is enacted to cover a class tenants who are sitting tenants and whose premises are subsequently purchased by landlords who seek to evict the sitting tenants on the ground of bona fide requirement as envisaged by Section 21(1) (a) of the Act, still the protection available to such tenants as found in the proviso would give the tenants as found in the proviso would give the tenants concerned a locus penintentiae to avail of it or not. It is easy to visualise that proceedings under Section 21(1) (a) of the Act would be between the landlord on the one hand and the tenant on the other. These proceedings are not of any public nature. Nor any public interest is involved therein. Only personal interest of landlord on the one hand and the tenant on the other hand get clashed an called for adjudication by the prescribed authority. The ground raised by the Landlord under Section 21(1) (a) would be personal to him and similarly the defence taken by the tenant would also be personal to him. Six months' breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get alternative accommodation if the tenant realises that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived. In this connection we may profitably refer to a decision of this Court in the case of Krishan Lal v. State of J & K [(1994) 4 SCC 422] where in Hansaria, J., speaking for a Bench of two learned Judges has made the pertinent observations concerning the question of waiver of a mandatory provision providing for issuance of notice to the parties sought to be proceeded against by the person giving the notice, in paragraphs 16 and 17 of the Report as under:

> "As to when violation of a mandatory provision makes an order a nullity has been the subject- matter of various decisions of this Court as well as of Courts beyond the seven seas. This apart, there are views of reputed text writers. let us start from our on one time Highest Court, which used to be privy Council. This question came up for examination by that body in Vellayan Chettiar v. 'Government of the province of

> Madras AIR 1947 PC 197 in which while accepting that Section 80 of the Code of Civil Procedure is mandatory, which was the view taken in Bhagchand Dagadusa v. Secretary of State for India in Council 54 IA 336 it was held that even if a notice under Section 80 be defective, the same would next per se render the suit requiring issuance of such a notice as a precondition for instituting the same as bad in the eye of law, as such a defect can be waived. This view was taken by pointing out that the protection provided by the Section 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right. A distinction was made in this regard where the benefit conferred was to serve "an important purpose" , in which case there would not be waiver (see paragraph 14). This point had come up for examination by this Court in Dhirendra Nath Goral v. Shudhir Chandra Ghosh AIR 1964 SC 1300: (1964) 6 SCR 1001 and a question was posed in paragraph 7 whether an act done in breach of a mandatory provision is per force a nullity.
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> This Court referred to what was stated in this regard by Mookherjee, J. In Ashutosh Sikdar v. Behari Lal Kirtania ILR 35 Cal. 61 at page 72 and some other decisions of the Calcutta High Court along with one of Patna High Court and it was held that if a judgment-debtor, despite having received notice of proclamation of sale, did not object to the non- compliance of the required provision, he must be deemed to have waived his right conferred by that provision. It was observed that a mandatory provision can be waived if the same be aimed to safeguard the interest of an individual and has not been conceived in the public interest."

Consequently it must be held that the provision for six months' notice before initiation of proceedings under Section 21(1) of the Act, though is mandatory and confers protection to the tenant concerned, it can be waived by him. On the facts of the present case there is no escape from the conclusion that the appellant, for the reasons best known to it, consciously and being alive to the clear factual situation that the suit was filed on the ground prior to the expiry of six months' notice, did not think it fit to pursue that point any further and on the contrary joined issues on merits expecting a favorable decision in the suit and having lost therein and got an adverse decision did not think it fit even to challenge the decision on the ground of maintainability of the suit while filing an appeal and argued the appeal only on merits and only as an afterthought at the stage of writ petition in the High Court such a contention was sought to be taken up for the first time for consideration. On the facts of the present case, therefore, it must be held that the appellant had waived that contention about the suit being premature having been filed before the expiry of six months from the date of the suit notice.

Apart from waiver the appellant was stopped from taking up such a contention as the respondent, on account of the aforesaid contention of the appellant, had irretrievably changed his position to his detriment and lost an opportunity of seeking leave of the Court to withdraw the suit with liberty to file a fresh suit, as seen earlier. The second point for consideration is, therefore, answered in the negative, in favour of the respondent-landlord and against the appellant.

So far as this point is concerned it is true that as a last resort the appellant's learned senior counsel, invited attention of the High Court on the subsequent event, namely, that the respondent's wife had got an undivided interest in the adjoining part of the building where the suit premises were also situated. But the said subsequent event was rightly held to have no effect on the merits of the respondent's claim as the respondent was a retired army major General who had no property of his own in Lucknow town and who could not be compelled to stay as a licensee of his wife in a property which did not even exclusively belong to her but was jointly owned by her brother. It is, of course, true that the further observation of the High Court that the respondent's claim was covered by Explanation (iii) to Section 21(1) of the Act was not justified as respondent had not let out the building before his retirement from army service. He was not the owner of the building when he retired from army service. To that extent the reasoning of the High Court cannot be sustained as rightly and fairly conceded by learned senior counsel for the respondent- landlord. Still however, the subsequent event was rightly held by the High Court not to have any effect on the bona fide requirement of the respondent-landlord as seen by us earlier. The third point for consideration is also answered in the negative, in favour of the respondent-landlord and against the appellant.

These were the only points raised in support of the appeal and as they fail to assist the appellant the appeal fails and has to be dismissed. However it was contended by learned senior counsel for the appellant that if this appeal is to be dismissed then the appellant-company, which is carrying on the business of manufacturing life saving drugs and which has its office in the suit premises since 1966 and as there is an air-conditioned godown in the said premises, may be given reasonable time to vacate the premises so that it can search out any alternative premises. Learned senior counsel for the respondent has fairly left to us this question of giving time to the appellant. In the facts and circumstances of the case, therefore, while dismissing this appeal we deem it fit to grant time to the appellant-company to vacate the suit premises till 31st December 1998 on the appellant filing a usual undertaking within four weeks in this Country. If such an undertaking is not filed or if any of the conditions of the undertaking is committed breach of by the appellant , the grant of time to vacate the premises will stand recalled. Appeal is dismissed subject to the aforesaid grant of time to vacate, with no order as to costs n the facts and circumstances of the case. Ad interim relief granted earlier will stand vacated.