

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.06.2015

CORAM :

THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

C.R.P.No.1466 of 2007

V.Hariharan

... Petitioner/Landlord

Vs.

Dr.P.G.Gopinath

... Respondent/Tenant

Prayer: Petition filed under Section 25 of the Tamil Nadu Buildings (lease and rent control) Act, 1960 against the order and decreetal order dated 18.10.2006 made in RCA.No.6 of 2005 on the file of the Sub Court, Poonamallee cum rent control appellate authority reversing the judgment and decree dated 18.01.2005 made in RCOP.No.31 of 1999 on the file of the District Munsif-cum-Judicial Magistrate, Ambattur.

For Petitioner : Mr.V.Raghavachari.

For Respondent : Mr.T.P.Prabhakaran.

O R D E R

The landlord is the petitioner herein. The revision petition is filed against the order made in RCA.No.6 of 2005 reversing the eviction order made in RCOP.31 of 1999.

2.The landlord and tenant relationship between the petitioner and the respondent is not denied. The respondent is in the occupation of the petition mentioned properties as tenant from 1966 onwards and the monthly rent during 1997 was Rs.1,250/-. The last payment of Rs.1358/- with excess amount of Rs.108/- was made on 26.11.1997 representing the rent for the month of October 1997. Thereafter, from November 1997 onwards the respondent did not pay any amount towards rent and the rent due from November 1997 to September 1999 (i.e) 23 months to the tune of Rs.28,750/- was not paid, in spite of repeated demands made by the petitioner, which compelled the

petitioner to approach the learned Rent controller by way of RCOP.No.31 of 1999 seeking eviction of the respondent/tenant. The RCOP was filed during December 1999 and the entire arrears of rent to the tune of Rs.31,250/- representing the rent for the period upto November 1999 was paid vide Ex.A2 memo dated 02.12.1999. Despite the payment the eviction petition was seriously contested.

3.The claim for eviction was seriously opposed by the tenant on the ground that the petitioner was paid totally Rs.40,000/- to the respondent and the same is more than what was payable by way of advance and as long as excess amount is with the landlord there was no act of default much less wilful default committed on the part of the respondent/tenant.

4.The trial court on the basis of the evidence adduced during trial found that a sum of Rs.30,000/- was paid not by way of advance for the demised premises, but was paid as advance for the new two shops to be allotted to the tenant in the new commercial complex proposed to be built up by the petitioner/land lord and the respondent/tenant neither made any demand nor issued any notice to the landlord to adjust the said amount towards rent payable by him and further found that the tenant was irregular in payment of rent even during the pendency of the RCOP resulting in filing of Section 11(4) petition by the land-lord and arrived at a conclusion that the conduct of the tenant in not paying the rent for 23 months and in defaulting to pay the rent during the pendency of RCOP amounts to wilful default and the tenant is hence liable to be evicted from the petition mentioned premises and accordingly allowed RCOP.

5.Aggrieved against the same, the tenant preferred RCA.No.6 of 2005 before the learned Rent Control Appellate Authority. The Rent Control Appellate Authority found the finding of the Rent Controller regarding wilful nature of the default committed by the tenant is without duly considering the excess sum of Rs.40,000/- in the hands of the landlord and without considering the payment of entire arrears after the institution of the Rent Control Proceedings but before the first date of hearing. As such, the appellate authority was of the view that there was no default in payment of rent and default, if any, cannot be construed as wilful default and accordingly allowed the RCA, thereby, reversing the order of eviction passed by the learned Rent Controller. Hence, this Civil Revision Petition by the land-lord before this court.

6.Heard the rival submissions made on both sides and perused the records.

7.The facts that the tenant paid advance of Rs.10,000/- to the landlord and there was oral agreement between the landlord and tenant for allotting two shops in the new commercial complex proposed to be put up in another place and the tenant paid a sum of Rs.30,000/- towards advance for the same and the landlord thus received Rs.10,000/- + Rs.30,000/- from the tenant for two different purposes and the tenant defaulted in payment of rent from November 1997 to September 1999 and the landlord having failed in his attempt to collect the rent from the tenant, filed RCOP seeking eviction of the tenant and before the first date of hearing, the tenant paid Rs.31,250/- representing the rental arrears for the period upto November 1999 are not seriously denied.

8.Though the theory of payment of Rs.40,000/- by the respondent to the petitioner/landlord is not denied, the same by itself will not in the present case absolve the tenant of his liability to pay the rent every month regularly for the following reason : The tenant, prior to the institution of the RCOP failed to pay the rent for nearly 23 months. The specific case of the petitioner that the rental arrears was not paid, in spite of repeated demands is not denied by the tenant. It is nobody's case, that the tenant while remaining in default, called upon the petitioner/landlord to retain one month rent by way of advance and to adjust the balance amount towards the arrears of rent. The arrears for 23 months + 2 months was cleared only after driving the landlord to approach the Rent Controller for evicting the tenant on the ground of willful default. The payment of rental arrears for 25 months was paid only after institution of the RCOP and after the receipt of the notice in the RCOP. The only reason which is sought to be advanced to excuse the act of failure to pay the rent is that the landlord was holding his amount in his hands.

9.Regarding the payment of Rs.40,000/- by the tenant to the landlord, the sum of Rs.10,000/- was paid as advance for the present premises, and Rs.30,000/- paid as advance not for the premises in question but to allot two rooms in the commercial complex to be newly constructed by the petitioner/landlord. It is nobody's case that the landlord was either in the habit of receiving the rent in lumpsum or refused to receive the rent when it is offered by the tenant. The Rent Control Appellate Authority placed more weightage to the payment of sum of Rs.30,000/- in the hands of landlord to reverse the findings of the Rent Controller and held that there was no default much less wilful default on the part of the tenant.

10.As rightly argued by the learned counsel for the petitioner, as the sum of Rs.30,000/- was not paid by way of advance to the petition mentioned premises but for different purpose, the plea of adjustment of the same towards arrears of rent is not available to the tenant. The payment of Rs.30,000/- by the tenant to the landlord being for different purpose, the remedy available to the tenant for recovery of the same is by separate legal action and not by way of adjustment of the same for the arrears of rent. Even otherwise, the issue relating to the adjustment of excess amount is dealt with in the following judgments and is answered against the tenant.

1. 1980 (1) MLJ 116 - S.Balachandran V. A.Champalal Jain
2. 2005 (5) CTC 473 - R.Murugan V. M.O.M.Abubucker
3. 2008 (5) MLJ 163 - K.Selvaraj V. J.Narayanan & another

11.In the judgment reported in 1980 (1) MLJ 116 - S.Balachandran V. A.Champalal Jain our High Court is of the view that there is no automatic adjustment of advance as arrears of rent and the adjustment should be under Section 7(2)(b) of the Act, at the option of the tenant and in the absence of exercise of such option by the tenant, there is no question of any adjustment.

12.It is held in 2005 (5) CTC 473 - R.Murugan V. M.O.M.Abubucker that mere fact that the landlord had with him an advance amount does not mean that the tenant has not committed wilful default. The learned single judge of our High Court as she then was in para 16 of the order referred to another Supreme Court judgment reported in 2002 (4) SCC 675 - Raminder Singh Sethi V. D.Vijayarangam wherein the Supreme Court is of the view :

"4.Every tenant is obliged to pay or tender rent to the landlord within 15 days of the month to which the rent relates. The purpose of advance rent is to protect the landlord from the unscrupulous tenant who may run into arrears and vacate the premises and comfortably walk away with the arrears. The advance rent is available for adjustment or is liable to be refunded at the time of vacating of the premises except where the law or the contract between the parties provides to the contrary. We have already noticed that the provisions of the Act do not apply to the premises and, therefore, the landlord was not prevented by law from securing advance payment of rent by consent of the parties. It is not the case of the tenant that the contract between the parties provides for adjustment of rent no sooner it fell into arrears from out

of the amount of advance rent. In short, the appellant tenant was not absolved of his obligation to pay the rent due month by month in spite of an amount of advance rent being available with the landlord."

Applying the same view, the learned single judge has negatived the stand taken by the tenant that in view of the excess amount with the landlord, there is no wilful default.

13. In the third case, the learned brother judge is of the view that it is not open to the tenant to ask the landlord to adjust the arrears of rent with the advance amount he had paid, until he vacates and hands over vacant possession of the buildings to the landlord. As rightly argued by the learned counsel for the petitioner, it is for the tenant to satisfy the court about the sufficient cause or circumstances beyond his control for his failure to pay the rent.

14. In the present case, the tenant was at no point of time ready to vacate the premises and he intending to do so had not approached the landlord either orally or in writing to adjust the advance amount in the hands of the landlord and the plea of adjustment is raised for the first time only before the learned Rent Controller and it is only an after thought to escape the legal consequences of default.

15. The learned counsel for the petitioner also cited the following authorities for the legal proposition that the payment of arrears of rent on receipt of the summons or on the date fixed in the summons for appearance of the tenant would not rectify the disqualification suffered by the tenant already.

1. 2011 (1) CTC 516 - Gumani Bai and others V. K. Muthusamy and
2. (2002) 3 MLJ 412 - R. Govindammal and others V. A. Nirmala

16. The learned counsel for the petitioner has also at this juncture, brought to the notice of this court, the failure on the part of the tenant to pay the rent even during the pendency of RCOP. It is stated by the petitioner that on the failure of the tenant to do so the petitioner had to file IA.No.117 of 2002 under Section 11 (4) and even thereafter the amount was not paid and the amount was paid subsequently. Such plea is also not seriously disputed by the tenant. Such conduct on the part of the tenant would lead no doubt in the mind of this court that the default committed by the tenant is intentional, deliberate, conscious and manifestly amounts to wilful default.

17.The Apex Court in the judgment reported in AIR 1985 SC 582 - S.Sundaram Pillai and others V. R.Pattabiraman and others has laid down the guidelines as follows :

"(1) when no notice, as required by the Explanation, is given to the tenant, the Controller or the court can certainly examine the question whether the default has been wilful and to such a case the Explanation would have no application,

(2) when the landlord chooses to issue two months' notice and the rent is not paid then that would be a conclusive proof of the default being wilful unless the tenant proves his incapability of paying the rent due to unavoidable circumstances."

18.Thereafter, the Apex Court has in Paragraphs 64 and 65 referred to some of the decisions of the Madras High Court and expressed their complete agreement with the view taken by the Madras High Court. For better appreciation Paragraphs 64 and 65 are extracted hereunder

64. We would, however, refer to some case law on the question of wilful default as interpreted by the Madras High Court because there appear to be three decisions of the Madras High Court taking somewhat contrary views. In Rajeswari v. Vasumal Lalchand it was held that non-payment of rent amounted to such supine and callous indifference on the part of the tenant as to amount to a wilful default. However, the learned Judge does not appear to have noticed the effect of the Explanation to Section 10(2) introduced in 1973. This decision undoubtedly supports the view that a wilful default is not merely a pure and simple default but a default which is per se deliberate and intentional. In N. Ramaswami Reddiar v.S.N. Periamuthu Nadar Explanation to the proviso to Section 10(2) of the Act was expressly considered and Ratnam, J. observed as follows:

"A reading of the Explanation indicates that it is not exhaustive of all cases of wilful default, but it specifies only one instance where the default should be construed as wilful. If a tenant does not pay the rents at all for a considerable time and the landlord files a petition for an order of eviction on the basis that the tenant had committed wilful default without issuing any notice, then, in the absence of any other explanation by the tenant, the default should be construed as wilful, in spite of the fact that the landlord had not chosen to issue a notice to the

tenant claiming the rents. In this view, I hold that counsel for the petitioner cannot be of any assistance to him."

65. We feel ourselves in complete agreement with the view taken by the learned Judge on the interpretation of the proviso read with the Explanation. In the case of Khivraj Chordia v.G. Maniklal Bhattad Ramamurti, J. has drawn a very apt and clear-cut distinction between a simple default and a wilful default and has pointed out that in order to be a "wilful default" it must be proved that the conduct of the tenant was such as would lead to the inference that his omission was a conscious violation of his obligation to pay the rent. In this connection, the learned Judge observed thus:

"The decisions of this Court have repeatedly pointed out that there is a clear difference in law between default and wilful default and that non-payment of rent within the time specified by the Act, though would amount to default cannot by itself be treated as wilful default, and that if the rent was paid after the expiry of the time in the following month within a short time thereafter, the default cannot be said to be wilful to warrant the punishment of eviction..."

Keeping in mind the main object of the enactment, namely, prevention of unreasonable eviction of tenants, the principle that emerges from the several decisions is that for default to be regarded as wilful default, the conduct of the tenant should be such as to lead to the inference that his omission was a conscious violation of his obligation to pay the rent or reckless indifference. If the default was due to accident or inadvertence or erroneous or false sense of security based upon the conduct of the landlord himself, the default cannot be said to be wilful default."

19.If the facts of the present case is appreciated in the light of the distinction between default and wilful default explained in the decisions of the Hon'ble Apex Court and other Courts referred to in the foregoing paragraphs, it would lead to an irresistible conclusion that the default in payment of rent by the tenant in the present case is not simple default, but it is deliberate and intentional one and is conscious violation of his obligation to pay the rent or reckless indifference on the part of the tenant even during the pendency of the eviction petition and is construed to be

wilful default. However, the learned Appellate Authority committed a serious irregularity in disagreeing with the findings of the learned Rent Controller to that effect and in reversing the well considered order of the Rent Controller and the order the Appellate Authority hence, warrants interference by this court.

20.In the result, the civil revision petition is allowed by setting aside the judgment of the Rent Control Appellate Authority and by restoring the order of Rent Controller. Time for eviction is three months.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Sub Judge,
Poonamallee. (rent control appellate authority)
- 2.The District Munsif-cum-Judicial Magistrate,
Ambattur.
- 3.The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.28938
+1cc to Mr.T.P.Prabhakaran, Advocate, S.R.No.29043

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