

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.01.2017

CORAM :

THE HONOURABLE MS.JUSTICE R.MALA

C.R.P(NPD).No.3084 of 2015

1.Nirmala Daga
2.Vaibhav Daga

.. Petitioners

Vs.

C.Subramanian

.. Respondent

Prayer:- Civil Revision Petition is filed under Section 25(1) of Tamil Nadu Buildings (Lease and Rent) Control Act, 18 of the 1960, against the fair and decreetal order made in R.C.A.No.109 of 2015 by the learned VII Judge, Small Causes Court, Chennai, in reversing the fair and decreetal order dated 03.01.2015 passed in R.C.O.P.No.883 of 2014 by the learned XII Judge, Small Causes Court, Chennai.

For Petitioners : Mr.M.Bakthavatsalam
For Respondent : Mr.A.S.Balaji

ORDER

Civil Revision Petition is filed against the fair and decreetal order made in R.C.A.No.109 of 2015 by the learned VII Judge, Small Causes Court, Chennai, in reversing the fair and decreetal order dated 03.01.2015 passed in R.C.O.P.No.883 of 2014 by the learned XII Judge, Small Causes Court, Chennai.

2.The revision petitioners/landlord filed RCOP.No.883 of 2014 for eviction on the ground of willful default. The learned Rent Controller after considering the oral and documentary evidences had ordered eviction, as against which the respondent/tenant preferred an appeal in RCA.No.109 of 2015 on the file of the learned Rent Control Appellate Authority. The learned Rent Control Appellate Authority allowed the appeal by setting aside the order passed by the learned Rent Controller as against which the present Civil Revision Petition has been preferred.

3.The learned counsel appearing for the revision petitioners/landlords would submit that they had filed a petition in

RCOP.No.1172 of 2013 before the learned XV Judge, Small Causes Court for fixation of fair rent. The learned Rent Controller by an order dated 29.04.2014 fixed the fair rent at Rs.9,796/-, as against which, the tenant preferred an appeal in RCA.No.375/2014. The learned Rent Control Appellate Authority, by an order dated 03.12.2014, fixed the fair rent at Rs.7,120/- instead of Rs.9,796/-. However, the respondent/tenant had failed to pay the differential amount between the contractual rent and the fair rent for the period from 01.07.2013 to April 2014 and fair rent for the month of May 2014, totaling Rs.86,696/-. Hence, the revision petitioners/landlords filed an application for eviction on the ground of willful default. The learned Rent Controller after considering the oral and documentary evidence had ordered eviction, however the learned Rent Control Appellate Authority had set aside the same, against which the present revision has been preferred.

4.The learned counsel for the revision petitioner would further submit that the respondent has not obtained any interim stay for implementation of the fair rent fixed in RCOP proceedings. Further, the respondent herein had filed counter stating that he had preferred RCA against the fair and decretal order passed by the

learned Rent Controller and the same has not attained finality and hence, he has not paid the amount. Furthermore, the tenant had not even paid the agreed rent of Rs.2,100/-. In these circumstances, the landlords are entitled to file an application for eviction on the ground of willful default, as mere filing of an appeal does not operate as stay of decree or an order. To substantiate the same, the learned counsel relied on the decision reported in **(2005) 1 Supreme Court Cases 705, Atma Ram Properties (P) Ltd., v. Federal Motors (P) Ltd.**, and also the decision reported in **2011 (5) CTC 837, C.Raghunatha Reddy v. S.Rajasekaran**, wherein it was held that mere pendency of revision preferred by the landlord would not enable the tenant to contend that the fair rent had not reached finality.

5.The learned counsel would further submit that on the basis of the principle laid down in the above decision, the learned Rent Controller had passed an order of eviction. He would also fairly submit that only after filing of the revision in CRP(NPD).No.513 of 2015, the tenant obtained an order of interim stay on condition that the tenant shall pay the arrears of rent at Rs.4,000/- per month from the date of petition till the disposal of the revision.

6.The learned counsel would further submit that mere payment of rent arrears will not absolve the tenant from the consequences of the willful default. For the said proposition, the learned counsel relied upon para-15 and 16 of the decision reported in **2011 (2) MWN (Civil) 138, G.Suresh Kumar v. O.L.Muthu.** For the very same proposition, the learned counsel relied on the decision reported in **2011-3-TNLJ 413 (Civil), Girdharilal Chandak and Bros v. S.Mehdi Ispahani and others.**

7.It is further submitted by the learned counsel for the petitioners that even though he has filed written arguments and other decisions, the learned Rent Control Appellate Authority considered only one decision and set aside the fair and decreetal order passed by the Rent Controller. So he prays for setting aside the fair and decreetal order passed by the learned Rent Control Appellate Authority and restore the fair and decreetal order passed by the learned Rent Controller and prays for an order of eviction.

8.Resisting the same, learned counsel for the respondent would submit that R.C.O.P.No.883 of 2014 has been filed for

difference between the agreed rent and fair rent fixed by the trial Court before attaining finality. He would further submit that as per the decisions of the Apex Court and this Court, it is not amount to default that too wilful default. To substantiate his arguments, he has relied upon the decision reported in **1996 2 LW 849 (J.Visalakshi Ammal v. T.B.Sathyanarayana)** and submits that finality of fixation of fair rent is raised only at the time of disposal of civil revision petition as per Section 23(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter called as 'the Act') and it does not raise before the disposal of revision. So the fair and decreetal order passed by the learned Rent Control Appellate Authority is fair and just and it does not warrant any interference. Therefore, he prays for dismissal of the revision.

9.At this juncture, learned counsel for the petitioners would submit that there is no conditional precedent for filing subsequent R.C.O.P. for eviction, since the respondent/tenant has not obtained any stay for the order passed in the year 2013 for fixation of fair rent in R.C.O.P.No.1172 of 2013. Hence, he prays for allowing the revision.

10. Heard both sides and perused the typed set of papers.

11. The landlord-tenant relationship is admitted. It is also an admitted fact that the contractual rent is Rs.2,100/-. It is pertinent to note that the petitioners herein have also filed R.C.O.P.No.1172 of 2013 for fixation of fair rent. The learned Rent Controller by order dated 29.04.2014, fixed fair rent at Rs.9,796/-, against which, the respondent/tenant has preferred R.C.A.No.375 of 2014 on 09.07.2014. The present R.C.O.P.No.883 of 2014 has been filed in the month of June 2014 for eviction on the ground of wilful default in withholding the differential rental arrears from the date of petition in R.C.O.P.No.1172 of 2013 and the fair rent fixed by the Rent Controller in R.C.O.P.No.1172 of 2013 for the month of May 2014, by directing the tenant to vacate and deliver vacant possession of the petition building to the petitioners. The Rent Controller after hearing both sides, has granted order of eviction against which, the tenant/respondent herein has preferred R.C.A.No.109 of 2015 and the same was allowed. Challenging the same, the petitioners/landlords preferred this revision.

12. Now this Court has to consider whether non payment of difference between agreed rent and fair rent fixed by the Rent

Controller between the date of filing Section 4 application till the filing of the R.C.O.P. for wilful default is amounting to default that too wilful default?

13.It is pertinent to note that today only, this Court has passed order in C.R.P.NPD.No.513 of 2015, which is challenging the fair and decretal order dated 03.12.2014 passed in R.C.A.No.375 of 2014 modifying the order dated 29.04.2014 passed by the Rent Controller in R.C.O.P.No.1172 of 2013. The above said civil revision is preferred by the tenant/respondent herein. So the fair rent has been finally decided only today i.e. 25.01.2017.

14.At this juncture, it is appropriate to consider the following decisions relied upon by the learned counsel for the petitioners:

(i) In **2011 (5) CTC 837 (C.Raghunatha Reddy v. S.Rajasekaran and another)**, wherein it is held that mere pendency of the revision preferred by the landlord would not enable the tenant to contend that fair rent had not reached finality. Para-19 is extracted hereunder:

"19. If a person does not seek stay of an order passed by a Court below, it would only

indicate either of the two things viz., (i) that he is willing to comply with the order or (ii) that he has no objection to the orders of the Court below being put into execution. The failure of a person to seek from an appellate forum, a stay of the order of a subordinate forum, cannot mean anything else than the above two factors. The failure of a person to seek a stay from an Appellate Court, cannot lead to a disastrous consequence viz., that though he would not seek stay, there will automatically be a clog on the right of the decree holder to execute it. Such an interpretation, can never be permitted. ”

There is no quarrel over the ratio decidendi of the above citation. But it is not applicable to the facts of the present case, because in the above case, the landlord challenged the fair rent fixed by the Court. In the case on hand, the tenant himself has challenged the fixation of fair rent. In such circumstances, the above citation is not applicable to the facts of the present case.

(ii) In **(2005) 1 SCC 705 (Atma Ram Properties (P) Ltd., v. Federal Motors (P) Ltd.)**, wherein it is stated that mere preferring of an appeal does not operate as stay on the decree or

order appealed against nor on the proceedings in the Court below.

Para-8 and 9 of the above decision are extracted hereunder:

“8.It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the Court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same. . . .

9.Dispossession, during the pendency of an appeal of a party in possession, is generally considered to be 'substantial loss' to the party applying for stay of execution within the meaning of clause (a) of sub-rule (3) of Rule 5 of Order 41 of the Code. Clause (c) of the same provision mandates security for the due performance of the decree or order as may ultimately be passed being furnished by the applicant for stay as a condition precedent to the grant of order of stay. However, this is not the only condition which the appellate Court can impose. The power to grant stay is discretionary and flows from the jurisdiction conferred on an appellate Court which is equitable in nature. To secure an order of stay merely by

preferring an appeal is not a statutory right conferred on the appellant. So also, an appellate Court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Therefore, an applicant for order of stay must do equity for seeking equity. Depending on the facts and circumstances of a given case, an appellate Court, while passing an order of stay, may put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal.”

There is no quarrel over the proposition laid down by the Apex Court. But it does not applicable to the facts of the present case. It is true, according to the respondent, R.C.O.P.No.1172 of 2013 has been disposed of on 29.04.2014 and its copy has been made ready on 26.06.2014. The respondent/tenant has preferred R.C.A.No.375 of 2014 on 09.07.2014. R.C.O.P.No.883 of 2014 has been filed on 17.06.2014 (i.e.) before filing R.C.A.No.375 of 2014.

(iii) But as per the decision reported in ***TLNJ 1998 167 (M/S.Prakash Pharmacy, represented by its Partner and others v. C.Thirupurasundari and another)***, in which, it is

stated as follows:

“.. .. Therefore, the finality in its proper sense shall be only when the final Court of the Country or the Nation gives its verdict. ”

From the above decision, it is clear that the fixation of rent by the Court, while disposing the revision alone, is the final. So the decision relied upon by the petitioners is supporting the case of the respondent not the case of the petitioner. Merely, because he has not filed the stay application, it will not be the reason for evicting the tenant. There is no quarrel over the above proposition.

(iv) In **2011 (3) TLNJ 413 Civil (Girdharilal Chandak and brothers (HUF) represented by its Kartha, Mr.Girdharilal Chandak (died) and another v. S.Mehdi Ispahani and others)**, wherein it is held that the failure of a person to seek a stay from an Appellate Court, cannot lead to a disastrous consequence viz., that though he would not seek stay, there will automatically be a clog on the right of the decree holder to execute it. Para-14 is extracted hereunder:

“14. Irrespective of whether the order passed

by this Court on 28.10.2005 in CRP (NPD) Nos.1657 and 1658 of 2005 was a conditional order or not, it is an admitted fact that the petitioner himself did not seek a stay of the orders passed by the Rent Controller and the Appellate Authority, while challenging the same by way of revision. If a person does not seek stay of an order passed by a Court below, it would only indicate either of the two things viz., (i) that he is willing to comply with the order or (ii) that he has no objection to the orders of the Court below being put into execution. The failure of a person to seek from an appellate forum, a stay of the order of a subordinate forum, cannot mean anything else than the above two factors. Take for instance, a case where a decree for recovery of money is passed. If out of fear that an Appellate Court may impose a condition for the grant of stay, the judgment-debtor chooses not to seek stay of the decree for money at all, it would either mean that he has no objection to the decree being put to execution or that he is even willing to pay the decretal debt subject to his rights in the first appeal. The failure of a person to seek a stay from an Appellate Court, cannot lead to a disastrous consequence viz., that though he would not seek stay, there will automatically be a clog on the right of the decree holder to execute it. Such an

interpretation, can never be permitted.”

In the case on hand, the landlords have not executed for the remaining amount, but they filed the petition for eviction on the ground of wilful default. So the above decision is not applicable to the facts of the present case.

(v) In **2011 (2) MWN (Civil) 138 (G.Suresh Kumar v. O.L.Muthu)**, in para-15 and 16, it is held as follows:

“15. Thus, the conduct of the tenant amounts to supine indifference and willful default in payment of rent. Therefore, merely because the tenant deposited the arrears of rent pursuant to interim orders granted by the learned Appellate Authority during 2002 does not absolve the willful default committed by the tenant. The Hon'ble Supreme Court in Sankaran Pillai v.V.P.Venguduswami and others, (1999) 6 SCC 396, considered a similar question, wherein also the tenant deposited the arrears of rent before the Appellate Authority. The Hon'ble Supreme Court held that the tenant's subsequent deposit of the arrears of rent before the Appellate Authority being requirement of law for hearing the appeal on merits, cannot be treated as bonafide deposit.

16. Therefore, the deposit of rents made by the tenant pursuant to orders passed by the Appellant Authority as a condition for hearing the appeal cannot be construed as a bonafide deposit for the purpose of absolving the tenant from the default committed. Accordingly, question No.(iii) is also answered against the tenant. "

As per the conditional order passed in M.P.No.1 of 2015 in C.R.P.(NPD).No.513 of 2015, the tenant has paid the arrears of rent to the tune of Rs.4,000/- per month, which will not absolve the tenant from consequence of wilful default. There is no quarrel over the ratio decidendi of the above decision. But it is not applicable to the facts of the present case. In the above decision, the landlord has filed a petition for eviction on the ground of wilful default. Thereafter, he has filed the petition under Section 11(4) of the Act to direct the tenant to deposit the entire arrears of rent into Court and continue to deposit the future rents. In that petition, a direction has been given to the tenant to deposit the amount, but he has not deposited the same. In the case on hand, in pursuant to the conditional order passed by this Court, the tenant has deposited the arrears of rent.

15.The instant case is very peculiar. Because R.C.O.P.No.883 of 2014 was filed by the landlords for eviction on the ground of wilful default for non payment of differential rent between contractual rent and fair rent fixed by the Rent Controller from the date of filing of R.C.O.P.No.1172 of 2013 till the date of order and also fair rent fixed by the Rent Controller for the month of May 2014 on June 2014. Admittedly, fair rent fixed by the Rent Controller does not attain finality, as per the decision reported in ***TLNJ 1998 167 (M/S.Prakash Pharmacy, represented by its Partner and others v. C.Thirupurasundari and another)***.

16.As per the decision relied upon by the learned counsel for the petitioners reported in ***TLNJ 1998 167 (M/S.Prakash Pharmacy, represented by its Partner and others v. C.Thirupurasundari and another)***, finality in its proper sense shall be only when the final Court of the Country or the Nation gives its verdict. In such circumstances, once R.C.A. is filed, I am of the view that fixation of fair rent has not been attained finality as on date when R.C.O.P.No.883 of 2014 has been filed.

17. Now it is appropriate to consider the fair and decreetal order passed by the Rent Controller in R.C.O.P.No.883 of 2014. The landlords have relied upon the decision of this Court reported in **2011 (5) CTC 837 (C.Raghunatha Reddy v. S.Rajasekaran and another)** and the respondent has relied upon the decision reported in **1996-2-L.W. 849 (J.Visalakshi Ammal v. T.B.Sathyannarayana) and K.M.Mohammed Fazal v. Ashraf and others reported in 2014(1) MWN(civil) 797**. Only head lines have been incorporated in the order. The Rent Controller has not considered whether those decisions are applicable to the facts of the present case.

18. Learned counsel for the petitioners has also relied upon the decision of this Court reported in **1999-1-L.W.-100 (C.K.R.Murugan v. T.S.Arunagiri and another)**, in para-10 and 13, it is held as follows:

“10. In *Sundaram Pillai v. Pattabiraman* (1985)1 S.C.C. 591, it was held that the landlord is entitled to get an order of eviction only if the tenant is shown to have committed default and that he is a wilful defaulter. Their Lordships of the Supreme

Court held that the default, in order to be wilful, must be intentional, deliberate, calculated and conscious with full knowledge of legal consequences flowing therefrom. Probably, it is on the basis of this judgment of the Honourable Supreme Court, the Appellate Authority set aside the order of eviction. But, one thing which the Appellate Authority omitted to consider is that, once the default is admitted, it is for the tenant to prove that the default was neither wilful nor wanton, or deliberate, and that he was not aware of the legal consequences arising therefrom.

12. . . .

13. In a recent decision reported in *The Nilgiris Co-operative Marketing Society v. Uthandi* (1998)2-L.W. 216, R. Balasubramanian, J., has considered this question and has said thus:

.. It is needless to say that there is legal obligation on the part of the tenant to tender the rent to the landlord month after month, whether there is any demand for it or not. If he wants to displace this legal obligation, he must prove it by acceptable documentary or oral evidence....

Learned Judge also took note of an early

decision of this Court in Delux Road Lines v. P.K. Palani Chetty (1992-1-L.W.262, wherein M.Srinivasan, J., as he then was, has held thus:

“Unexplained default is undoubtedly wilful. It is for the tenant to plead and prove the circumstances under which he failed to pay the rent as required by the Statute. The obligation to pay rent is not merely contractual, but also statutory. Section 10(2)(1) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as the Act) reads that if the controller after giving the tenant a reasonable opportunity of showing cause against the application for eviction, is satisfied that the tenant has not paid or tendered the rent due by him in respect of the building, within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable, he shall issue a direction evicting the tenant. The Proviso to the Section reads that if the controller is satisfied that the tenant's default was not wilful, he may give the tenant a reasonable time, not exceeding fifteen days, to pay or tender the rent due by him. A reading of the main section and proviso makes it clear, that it is for the tenant to

prove that his default is not wilful. It is only the tenant who knows the relevant facts and he should plead the same and prove them before the Controller in order to satisfy the controller that the default was not wilful. If the tenant is not able to satisfy the controller that there were circumstances which prevented him from carrying out his contractual or statutory obligation of having paid the rent, then the necessary consequential inference is that the default is wilful. No doubt, the Explanation introduced by the Amending Act of 1973 is to the effect that a default should be construed as Wilful if the tenant fails to pay even after issue of two months notice by the landlord claiming the rent. But it is not necessary in every case that a notice should have been issued by the landlord to the tenant in order to hold that the default is wilful. Even in cases where there was no notice calling upon the tenant to pay the rent, the default could still be held to be wilful.”

As per Section 10(2) of the Act, once default is admitted, it is the duty of the tenant to prove that he has not committed wilful default and to pay the rent on or before tenth of every succeeding month. But the tenant has not followed the same, hence it amounts to wilful

default. But the facts of the above case are entirely different from the instant case. At this juncture, it would be appropriate to consider what is willful default? The term 'willful default' indicates that default in order to be willful must be intentional, deliberate, calculated and conscious, with full knowledge of legal consequences flowing therefrom. A petition has been filed for eviction on the ground of willful default and during the pendency of the proceedings, the tenant has not paid the rent, which would prove that inspite of knowing the legal consequences, the tenant has not paid the rent regularly. Hence, it would amount to 'willful default'. In the instant case, fair rent has been attained finality in C.R.P.(NPD)No.513 of 2015 only today i.e. 25.01.2017. In such circumstances, there is no default that too wilful default.

19.At this juncture, it is appropriate to consider the decision relied upon by the learned counsel for the respondent reported in **1996 2 LW 849 (J.Visalakshi Ammal v. T.B.Sathyanarayana)**, wherein it is held that the difference between agreed rent and fair rent held, is arrears and is payable when order fixing fair rent becomes final. Right of landlord to issue notice of 15 days from last day of that tenancy month demanding arrears, and failing

compliance to institute proceedings under Section 10(2)(i). Considering the above decision, as already stated that fixation of fair rent is final after the disposal of the civil revision petition in C.R.P.(NPD)No.513 of 2015, till then, it is sub judice. In such circumstances, the respondent/tenant has not committed wilful default. It is to be noted that there is a difference between default and wilful default. According to the respondent, when he tendered the contractual rent for the month of May 2014, the landlords had refused to receive the same. So he has not paid the rent. Since lis is pending, the tenant is unable to pay the amount, which is not wilful default. It is true, in the absence of considering the material evidence and decisions relied upon by the petitioners by the appellate authority, this Court has every right to interfere with the findings of the appellate authority. But the above factum was rightly considered by the Rent Control Appellate Authority. So I am of the view that there is no default committed by the respondent/tenant that too wilful default. Therefore, fair and decreetal order passed by the Rent Control Appellate Authority does not warrant any interference and it is hereby confirmed. Consequently, the civil revision deserves to be dismissed and it is hereby dismissed.

20.In the result, the Civil Revision Petition stands dismissed.

No costs.

25.01.2017

Index:Yes/No

kj

To

1.XII Judge, Small Causes Court, Chennai.

2.VII Judge, Small Causes Court, Chennai.

R.MALA,J

kj

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25.01.2017

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