

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 14.06.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(NPD)No.3436 of 2012

and

M.P.No.1 of 2012

K.Sherifa

.. Petitioner

Vs.

1.Ahmed Hussain

2.Azhar Hussain

.. Respondents

Prayer: Civil Revision Petition filed under Section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act 1960, against the Fair and Decreetal Order dated 26.10.2004 and made in R.C.O.P.No.2050 of 2003, on the file of XVI Judge, Court of Small Causes Chennai as confirmed by the judgment and decree dated 28.06.2012 and made in RCA.No.1710 of 2004, on the file of VII Court of Small Causes Chennai (Rent Control Appellate Authority).

For Petitioner : Mr.N.A.Nissar Ahmed

For Respondents : Mr.A.Saddiq Ali

ORDER

The tenant in RCOP.No.2050 of 2003 is the civil revision petitioner before this Court, challenging the order in RCA.No.1710 of 2004 against the order in RCOP.No.2050 of 2003 dated 28.06.2012, on the file of the VII Judge, Small Causes Court, Chennai.

2.The case of the respondents/landlords is that there was on lease agreement dated 01.03.1996 entered into between the respondents/landlords and the petitioner/tenant. The petitioner/tenant became a tenant under the respondents herein for residential purpose of the 2nd floor of the premises bearing No.5, Meera Lubai Street, II Floor, Chennai – 600 001, on a monthly rent of Rs.1,600/- exclusive of electricity and water consumption charges.

3.It is the case of the respondents/landlords is that as per Clause 11 of the lease agreement, the petitioner/tenant has agreed to pay enhanced rent of 15% of the over and above, the then existing rent on the expiry of every 3 years namely with effect from March 1999 at Rs.1,840/- exclusive of water and electricity consumption charges and thereafter, on expiry of 3 years, this petitioner/tenant has

agreed to pay enhanced rent by 15% on existing rent of Rs.1,840/- viz., Rs.2,116/- exclusive of water and electricity consumption charges. For the current rent payable by the respondent is Rs.2,118/- and infact, the petitioner/tenant had paid a security deposit of Rs.1,00,000/- with the respondents/defendants.

4.It is the further case of the respondents/landlords that the tenant had been chronic defaulter in payment of rent right from the institution of the tenancy and therefore, the Rent Control Proceedings in RCOP.No.327 of 2001 was instituted by the respondents/landlords (herein after called landlords) against the petitioner/tenant (herein after called tenant), who is the 1st respondent in the present RCOP before the learned Rent Controller for eviction on the ground of willful default in payment of rent with respect to November and December 2000. Thereafter, the RCOP.No.327 of 2001 was dismissed for default, since the 2nd landlord did not appear for the cross examination. Therefore, the petitioner, then belatedly paid the arrears for the month of November and December 2000. Though, the tenant has once again defaulted in payment of any amount towards monthly rent continuously from April 2002 till date or the balance increased rent for the month of March 2002 which amounts to Rs.276/-.

5.It is the case of the landlords that the tenant had issued a letter dated 20.02.2003 to the landlords stating that she had vacated the premises and asked the landlord to refund the advance amount, though the landlords were received the same, immediately on receipt of the said notice dated 20.02.2003, the landlords orally informed the tenant to meet them for setting the accounts. In spite of the oral communication, this tenant failed to approach the landlords, but the tenant has shifted from the second floor premises to the first floor premises belonging to her husband and is still in possession and enjoyment of the second floor portion of the premises till date. The tenant in RCOP.No.2050 of 2003 has also sub let the 2nd floor portion of the premises bearing No.5, Meera Lubai Street, II Floor, Chennai-600 001. In the said circumstances, the landlords without any alternative were forced to send a legal notice on 02.09.2003, requesting the tenant to pay the rental arrears due from April 2002 to till date, which comes to the amount of Rs.38,088/- along with the arrears of balance increased rent for the month of March 2002 amounting to Rs.276/-, by totaling Rs.38,366/- and deliver vacant possession of the schedule mentioned property.

6. On receipt of the notice, the tenant sent a reply notice on 12.09.2003 denying the averments made in the landlord's legal notice. Therefore, the landlords are constrained to file the petition for eviction in RCOP.No.2050 of 2003 against the tenant and the 2nd respondent one Mr.Sahul Hameed, on the ground that the respondent has continuously committed willful default in payment of the rent and also the tenant had let out the schedule of property to the 2nd respondent Sahul Hameed in RCOP.No.2050 of 2003 for residential purposes. The landlords also raised the ground saying that the petitioner/tenant also guilty of having sublet the schedule property to certain individuals on rent paid to her on daily basis and has violated Clause 6 of the lease agreement. Therefore, he prayed the Rent Controller for eviction of the tenant.

7. On receipt of the notice in the said RCOP.No.2050 of 2003, this petitioner/tenant, who is the 1st respondent in RCOP.No.2050 of 2003 filed his counter stating that the petitioner/tenant has vacated the tenancy portion as early as 20.02.2002 and also sent a letter to the respondents/landlords by way of Registered Post with Acknowledgment due and further requested the respondents/landlords for return of the advance amount of Rs.1,00,000/- and the said letter dated

22.02.2002 was also duly acknowledged by the landlords on 22.02.2002 and therefore, the ground raised that the tenant has committed willful default in payment of rent does not arise.

8.The petitioner/tenant also states that the tenant has no legal liability to pay the rent on and from the year February 2002 and there is no landlords and tenant relationship exists between them. The tenant also states that she has not sublet the portion to any person or persons as falsely alleged. The landlords filed the above petition with a malafide intention to avoid return of the rental advance of Rs.1,00,000/-, which sum, the tenant is legally entitled to refund. Therefore, he prayed for dismissal of the RCOP.

9.On behalf of the landlords, the 1st respondent/1st landlord was examined as PW1 and four documents in Exs.A1 to A4 were marked. On behalf of the petitioner/tenant, one Kamaludeen was examined as RW1 and two documents were marked.

10.Considering both side cases, the learned Rent Controller by order dated 26.10.2004, allowing the RCOP.No.2050 of 2003, on the ground that RW1 in his cross examination admits that the possession

of the petition mentioned property is with the 1st respondent namely the petitioner/tenant herein till date. Even if the tenant is liable to pay the arrears from May 2002 to till date. The advance amount of Rs.1,00,000/- is with the landlords, but, the tenant has not sent any notice for adjustment of rental advance towards the arrears to the landlords. Therefore, the learned Rent Controller has decided that the tenant has committed willful default in payment of rents and liable to be evicted. The learned Rent Controller also states that the RCOP.No.2050 of 2003 is also allowed on the ground that though the landlords in their petition stated that the tenant committed willful default in payment of rents and liable to be vacated on the ground of subletting also, but the landlords were not proved through documents and he has also not stated the ground in his prayer. Therefore, the Rent Controller has decided that the landlords are entitled to get possession of the petition premises and the tenant are liable to be evicted from the petition premises. The learned Rent Controller also grant two months time to the tenant for vacating the petition mentioned properties.

11.Challenging the said RCOP.No.2050 of 2003 dated 26.10.2004, this petitioner, who is the 1st respondent in RCOP and

tenant has filed the Rent Control Appeal in R.C.A.No.1710 of 2004 before the learned VIIth Judge, Small Causes Court, Chennai, on the ground that he has vacated the tenancy portion as early as on 20.02.2002 and also sent a letter to the landlords to that effect and further requested for return the advance amount lying with the landlords. From February 2002 onwards, there is no landlord and tenant relationship in exist between the petitioner and 1st respondent.

12.Apart from this, the tenant also raised ground saying that he would not sublet the portion to any person as falsely alleged in the petition and the Rent Control Proceedings has been filed with a malafide intention to avoid return of rental advance of Rs.1,00,000/- without considering the grounds raised by the tenant, the learned Rent Controller had allowed the RCOP. Therefore, he has preferred the appeal since the Rent Controller has decided the tenancy and committed willful default in payment of rental amount. Considering the tenant's appeal, the learned Rent Control Appellate Authority also dismissed the R.C.A.No.1710 of 2004, by confirming the order passed in RCOP.No.2050 of 2003.

13.The Rent Control Appellate Authority states that the tenant is

in possession of the property and the key is also kept with the tenant till date. When in such circumstances, the possession of the property has not given to the landlord, he is not entitled to claim rent for the said period. Admittedly, the rent is not paid during the said period. Therefore, there is a default committed by the tenant, which is amounts to willful default on the part of the tenant. Therefore, the Rent Control Appellate Authority has dismissed the appeal. Challenging the said order, the petitioner who is the tenant has filed the present civil revision petition before this Court.

14.I heard Mr.N.A.Nissar Ahmed, learned counsel appearing for the petitioner/tenant and Mr.A.Saddiq Ali, learned counsel appearing for the respondents/landlords.

15.It is the case of the landlords is that the 1st respondent who is the petitioner herein is a lawful tenant under the petition premises in second floor. The tenancy is for residential purpose and monthly rent payable is at Rs.2,166/-. The tenant has deposited a sum of Rs.1,00,000/- as security deposit, but the landlord says that the tenant is a chronicle defaulter in payment of rent. Therefore, from April 2002 to till the filing of the Rent Control Proceedings, there was a

huge arrears of Rs.38,088/-.

16. Apart from this, the landlord also raised ground saying that this tenant, who is the 1st respondent in the Rent Control Proceedings is a lawful tenant under the landlord, after letting out the premises to the 1st respondent/tenant in the RCOP has let out the premises in the 2nd respondent Mr. Sahul Ahmed, without the consent of the landlord. Therefore, the landlord has filed the above RCOP.No.2050 of 2003, against the tenant on the ground of the willful default and sublet the premises to the 2nd respondent in the Rent Control Proceedings.

17. The case of the tenant is that she already vacated the premises and handed over the possession on 20.02.2002 to the respondent/landlord and to that effect she has also sent a letter to the landlord and she requested for return of advance amount of Rs.1,00,000/-, and therefore, from February 2002 onwards there is no landlord and tenant relationship was in exist between them. Both the Courts considered that when the tenant given deposition before the Rent Controller, she stated as follows:

“(uz;lhk; jsk; g{l;ona vd; Rthjpdj;jpy; itj;Js;nsd; vd;why;
rhpjhd;)”

18. Even as per the statement given by the tenant that though the 2nd floor is locked, but the key was with the tenant as on date of filing the RCOP. The advance amount paid by the tenant to the landlord for a sum of Rs.1,00,000/- is kept with the landlord. The landlord can be adjusted the said advance amount already paid by the tenant.

19. When the advance amount of Rs.1,00,000/- was retained by the landlord, the landlord have the right to deduct the said amount as a rental amount, but without doing so, the landlord has stated that the petitioner/tenant has committed willful default.

20. The Hon'ble Apex Court very categorically held that excess amount available with the landlord is only for the benefit of the tenant and the liability to refund the same to the tenant being immediate unless the tenant exercises the option to get it adjusted otherwise, it is made clear that the excess advance amount is liable to adjust with the rent paid by the tenant, even became no demand from the tenant. By supporting his case, the learned counsel appearing for the petitioner/tenant has produced a judgment of this Court in the case of

M.K.Selvaraj & others v. Hameed Fathima Ghani reported in **2013 (4) CTC 574** stated as follows:

“16.The learned Counsel for the petitioner relied on the decision of the Apex Court in reported in ***K.Narasimharao v. T.M.Nasimuddin Ahmed***, 1996 (2) CTC 78. In the said decision the Hon'ble Supreme Court has dealt with an issue with regard to the retention of excess amount by the Landlord as advance more than the one month rental amount. The Apex Court after considering various aspects of the matter and also the provisions under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 came to the conclusion that excess amount available with the Landlord is only for the benefit of the tenant and the liability to refund the same to the Tenant being immediate unless the Tenant exercises the option to get it adjusted otherwise. It is further held therein that the provision of adjustment of the excess amount at the option of the Tenant clearly visualises its adjustment towards the rent due from the Tenant since the jural relationship envisages payment only of rent by the Tenant to the Landlord towards which it can be adjusted.

After having observed so, the Hon'ble Supreme Court at the penultimate paragraph has, thus, concluded that the Landlord was bound to immediately refund that excess amount even before the arrears accrued and he not having made the refund was bound to adjust it towards the rent due from the Tenant.

17. The other decision relied on by the learned Counsel for the Petitioner is reported in ***Mahalingam v. Pichaiammal***, 2000 (2) MLJ 202, an order passed by the learned Single Judge of this Court. There also it was held that excess advance amount is liable to be adjusted in the rent payable by the Tenant as and when it becomes due even without any demand from the Tenant.

18. From the above referred rulings of the Apex Court as well as this Court, it is made clear that the Landlord is entitled to receive only one month agreed rent by way of advance and any amount in excess of the same is liable to be refunded to the Tenant or to be adjusted towards rent at the option of the Tenant. The Apex Court in fact found that when the amount has not been refunded then the Landlord is bound to adjust the same towards the

rental arrears due from the Tenant. The said decision of the Apex Court was in fact followed by the learned Single Judge of this Court in the other decision made in ***Mahalingam v. Pichaiammal***, 2000 (2) MLJ 202.

19. In this case, as already discussed supra, the defaulted period is only three months, that means Rs.725/- in total being the arrears of rent. When admittedly a sum of Rs.10,000/- is lying with the Landlady towards advance, a sum of Rs.9,725/- is retained by the Landlady as an excess amount towards the advance. Out of this Rs.9,725/-, three months rental amount payable by the Tenant being only Rs.725/-, still an amount of Rs.9,000/- is retained by the Landlady in excess. When that being the factual position, even assuming that there was no option exercised by the Tenant to adjust the rental arrears from the advance amount, still the Landlady cannot maintain the Eviction Petition without refunding the said amount to the Petitioner/Tenant. Accordingly, the orders passed by the Courts below in ordering eviction on the ground of wilful default is not sustainable.”

21.He has also produced the order passed by the Hon'ble Supreme Court in a case of ***K.Narasimharao v. T.M.Nasimuddin Ahmed*** reported in ***1996 (II) CTC 78***, the Hon'ble Supreme Court has clearly held in the said case stated as follows:

“4.It was admitted that a sum of Rs.3000/- was paid by the respondent to the appellant as advance even though according to Section 7(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, (hereinafter referred to as "the Tamil Nadu Act") the landlord could receive only one month's rent in advance. Accordingly, the excess amount of Rs.2850/- paid as advance by the tenant to the landlord was required to be refunded by the landlord. The question, therefore, is whether the said excess amount paid by the tenant to the landlord being available with the landlord, the tenant can be held to have committed wilful default in payment of rent even though he had not expressly asked the landlord to adjust that amount towards the arrears of rent.

7.Section 7 of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 reads as under :-

"7. Landlord not to claim or receive anything in excess of fair rent or agreed rent. - (I) Where the Controller has fixed or refixed the fair rent of a building -

(a) the landlord shall not claim, receive, or stipulate for the payment of (i) any premium or other like sum in addition to such fair rent, or (ii) save as provided in Section 5 or Section 6, anything in excess of such fair rent:

Provided that the landlord may receive, or stipulate for the payment of an amount not exceeding one month's rent by way of advance;

(b) save as provided in clause (a), any premium or other like sum or any rent paid in addition to, or in excess of, such fair rent, whether before or after the date of the commencement of this Act, in consideration of the grant, continuance or renewal of the tenancy of the building after the date of such commencement, shall be refunded by the landlord to the person by whom it was paid or at the option of such person, shall be otherwise adjusted by the landlord:

Provided that where before the fixation or refixation of the fair rent, rent has been paid in excess thereof, the refund or adjustment shall be limited to the amount paid in excess for the period commencing on the date of the application by the tenant or landlord under sub-section (1) of Section 4 of sub-section (3) of Section 5, as the case may be, and ending with the date of such fixation or refixation.

(2) Where the fair rent of a building has not been so fixed-

(a) the landlord shall not claim, receive or stipulate for the payment of, any premium or other like sum in addition to the agreed rent:

Provided that the landlord may receive, or stipulate for the payment of an amount not exceeding one month's rent by way of advance;

(b) save as provided in clause (a), any sum paid in excess of the agreed rent, whether before or after the date of the commencement of this Act, in consideration of the grant, continuance or renewal of the tenancy of the building after the date of such commencement, shall be

refunded by the landlord to the person by whom it was paid or, at the option of such person, shall be otherwise adjusted by the landlord.

(3) Any stipulation in contravention of sub-section (1) or sub-section (2) shall be null and void." (Italics supplied)

The provisions in sub-sections (1) and (2) are similar and provide for cases where fair rent has been fixed or not fixed, as the case may be. Sub-section (3) declares any stipulation in contravention of sub-section (1) or sub-section (2) to be null and void. In this case, it is admitted that fair rent of the building had not been fixed and, therefore, sub-section (2) applies. Clause (a) of sub-section (2) enacts that a landlord is entitled to claim and receive only the agreed rent, which was Rs.150 per month in this case. The proviso to clause (a) permits the landlord to receive by way of advance an amount not exceeding one month's rent only i.e. Rs.150 in the present case. Clause (b) provides for the situation where any sum is paid by the tenant to the landlord in excess of the agreed rent save as provided in clause (a), i.e., any sum paid in excess

of the agreed rent and amount not exceeding one month's rent by way of advance. Clause (b) enacts that the amount in excess of the sum which the landlord is permitted to take under clause (a) shall be refunded by the landlord to the person by whom it was paid, i.e., the tenant, or at the option of the tenant, shall be otherwise adjusted by the landlord. In other words, clause (b) requires that the excess amount paid to the landlord has to be refunded by the landlord to the tenant unless the tenant exercises the option of requiring the landlord to otherwise adjust the excess amount. It is clear that this excess amount available with the landlord is only for the benefit of the tenant, the liability to refund the amount to the tenant being immediate unless the tenant exercises the option to get it adjusted otherwise. The character of the excess amount undoubtedly is that it is the tenant's money in the hands of the landlord for return to the tenant or for adjustment towards the dues of the tenant, at the tenant's option. Any other stipulation in contravention to it has no legal effect being null and void."

22.As per the above judgment rendered by the Hon'ble Apex Court and this Court held that the landlord is entitled to receive only one month aggrieved rent by way of advance, shall be refunded by the landlord and adjusted the excess amount in the rent by way of advance only for the benefit of tenant.

23.Per contra, the learned counsel appearing for the respondents submit that though the advance amount of Rs.1,00,000/- with the respondents/landlords, but the tenant must have informed the landlord to adjust the advance amount, if any, but in this case, there is no information by the tenant to adjust the advance amount for the rental amount. Therefore, the petitioner/tenant is a chronicle defaulter in payment of rent, to support his case, he has produced a judgment rendered by this Court in ***M.K.Swaminathan v. V.Thangam*** reported in ***CDJ 2010 MHC 5880*** in CRP(NPD)(MD)No.1198 of 2007 dated 20.08.2010 stated as follows:

"7.Mr.M.Vallinamayam, the learned counsel appearing respondent/tenant submitted that it is not in dispute that the landlord was having Rs.10,000/- with him as advance and as per Act, he is entitled to retain one month rent as advance and therefore, the landlord was having Rs.9,400/- with him and even assuming that the tenant has committed wilful default in the payment of rent,

without admitting the same, the alleged arrears of rent should have been adjusted from the amount available with the landlord and in that event, there is no default much less wilful default in the payment of rent.

13.It is also seen from Ex.R7 that the tenant could not have sent the rent for Avani, Puratasi and Ayppasi 2001 along with Ex.R5. Under Ex.R7, the tenant sent a notice, which was, dated 19.02.2002 and it was alleged in the notice that the rent of Rs.1,800/- representing the rents for Avani, Puratasi and Ayppasi 2001 was sent along with the notice by pay order. If really the tenant has sent a postal order for all these three months, under Ex.R5, dated 13.12.2001, there is no need for him to send the rent for the same periods under Ex.R7. The landlord disputed the receipt of pay order under Ex.R5 and even then, no attempt was made by the tenant to prove that the pay order sent by him was encashed by the landlord by producing evidence from the bank. Therefore, though the tenant has stated that he has paid the rent for the month of Avani, puratasi and ayppasi 2001, except the notices no proofs were produced by the tenant for having sent the rent for all three months and on the contrary, Ex.R7 makes it clear that the rents for those 3 months were not paid through Ex.R5."

24.It is my absolute view that the default period, the amount is totally 38,088/-, when admittedly a sum of Rs.1,00,000/- is lying with

the landlords towards advance, a sum of Rs.2,116/- is retained by the landlords as an excess amount towards the advance. Out of this, the balance amount of Rs.97,884/- ($\text{Rs.1,00,000} - \text{Rs.2,116} = \text{Rs.97,884}$), out of this amount Rs.97,884/- and the arrears of rental amount is Rs.38,088/- still an amount of Rs.38,088/- is retained by the landlord in excess. When that being the factual position, even assuming that there was no option exercised by the tenant to adjust the rental arrears from the advance amount, still the landlord cannot maintain the eviction petition without refunding the said amount to the petitioner/tenant.

25. Therefore, both the Courts when they have not agreed to sublet to the 2nd respondent miserably failed to note that the advance amount of Rs.1,00,000/- with the above calculation, even today there is a balance advance amount, which can be adjusted. Therefore, the orders passed by both the Courts namely the Rent Control Appellate Authority, in RCOP and RCA is warranting necessary interference by this Court. Accordingly, the same is liable to be set aside.

26. In the result, this civil revision petition is allowed, by setting

aside the judgment and decree dated 28.06.2012 in RCA.No.1710 of 2004, on the file of the VIIth Judge, Court of Small Causes, Chennai (Rent Control Appellate Authority), confirming the order passed in RCOP.No.2050 of 2003, dated 26.10.2004, on the file of the XVIth Judge, Court of Small Causes, Chennai. Consequently, connected miscellaneous petition is closed. No costs.

14.06.2017

Speaking Order
Index:Yes

To

The VII Assistant Judge,
Small Causes Court, Chennai.

M.V.MURALIDARAN, J.

VS

Pre-Delivery order made in
CRP(NPD)No.3436 of 2012
and
M.P.No.1 of 2012

14.06.2017