IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 16.08.2018

Pronounced on : 22.11.2018

CORAM :

THE HONOURABLE MR. JUSTICE M.S.RAMESH

CRP.(NPD).No.695 of 2015
and
M.P.Nos.1 & 2 of 2015

Vishal .. Petitioner

V.

M/s.Mishri Gold House,
rep. by its Partner
Mr.C.Ariyant Raj,
Shop No.44, Ground Floor,
Dhanalakshmi Complex,
Door No.130,
N.S.C. Bose Road,
Chennai-600 079. .. Respondent

PRAYER : Civil Revision Petition is filed under Section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, against the judgment and decree dated 20.03.2014 passed in R.C.A.No.163 of 2013 on the file of the learned VIII Judge, Small Causes Court, Chennai, confirming the judgment and decree dated 12.09.2012 in R.C.O.P.No.1245 of 2010 on the file of the learned XIV Judge, Small Causes Court, Chennai.

For Petitioner	:	Mr.R.Ganesan for Mr.Arun Anbumani
For Respondent	:	Mr.N.Nagusah for Caveator

ORDER

The petitioner herein is the landlord in the proceedings initiated by the tenant under Section 4 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (herein after referred to as "the Act") for fixation of fair rent for the tenancy portion in one ground floor Shop bearing No.44, Dhanalakshmi Complex, Door No.130, NSC Bose Road, Sowcarpet, Chennai-600 079 (herein after referred to as "premises"). The learned Rent Controller by an order dated 12.09.2012 had allowed the petition and fixed the monthly fair rent of the premises at Rs.4460/- payable from the date of the petition. The Appellate Authority had also confirmed the order of the learned Rent Controller through his judgment and decree dated 20.03.2013 passed in RCA.No.163 of 2013 and as against these orders, the present revision has been preferred by the landlord/petitioner herein.

2.Heard Mr.R.Ganesan, learned counsel for the petitioner and Mr.N.Nagu Sah, learned counsel for the respondent.

3.The brief facts of the tenant's case is that they were in contractual monthly rent of Rs.12,884/- for the aforesaid premises, which is a Type-I building aged about 20 years as on the date of the original petition. Apart from the common water and drainage facilities, the premises was provided with other basic amenities. The premises is one among the 100 shops in the entire complex. The build up area as per the petition averments is about 180 sq. feet and according to the tenant, the market value of the land in which the premises is situated is about Rs.50 lakhs per ground. The tenant is also paying a sum of Rs.2500/- towards the maintenance charges to the association of the shopping complex. Taking into consideration the built up area, the costs of construction, the depreciation for 20 years for type one building and the costs of the site, the petitioner had prayed for fixation of the fair rent of the premises at Rs.1373/- per month before the learned Rent Controller.

4.The landlord, in his counter statement, had pleaded that the entire super structure of the premises consist of five floors and a partly constructed 6th floor. In view of the location of the complex and the abutting 33 feet wide road, the construction from the second floor till the sixth floor can be construed as unauthorised constructions carrying nil floor value, nil construction cost and nil indexation to the apportioned site value. Since there were only 60 tenants in the basement, ground and first floor, the construction areas of the unauthorised constructions cannot be taken into account for the purpose of calculating the fair rent. In view of the same, by taking various factors of the built up area, land value and amenities, the landlord indicated the fair rent for the premises to be fixed at Rs.18,974/- per month.

5.Before the learned Rent Controller, both the petitioner as well as the respondent herein had produced their respective Engineers reports. The learned Rent Controller had accepted the landlord's engineer's report opining the plinth area of the ground floor at 226.48 sq.feet and by taking into account that there are seven floors with 100 constructed shops in the complex, had fixed the monthly fair rent at Rs.4460/-.

6.The landlord/revision petitioner is aggrieved against the portion of the fair rent calculation whereby the learned Rent Controller had taken into account the existence of 100 shops spread over seven floors. The arguments were also advanced by the learned counsel for the petitioner on this aspect alone.

7.Mr.R.Ganesan, learned counsel for the petitioner, by relying upon the provisions of the Tamil Nadu Town and Country Planning Act, 1971 as well as the Development Regulations for the Chennai Metropolitan Area, mainly submitted that while calculating the fair rent, the learned Rent Controller ought not to have taken the unauthorised constructed area also as a factor.

8.On the other hand Mr.Nagu Sah, learned counsel for the respondent submitted that there is no provision under the Act to state that only the approved floors alone should be taken into account for the apportionment of the site and the unapproved floors should not be taken into account. According to him, there is neither any provision in the Act nor any precedent to the effect that the illegally constructed floors cannot be taken into account for apportionment of land while ascertaining the extent of the site. He further submitted that in the absence of any provision in the Act defining the term "building", to be restricted to authorized building alone and in the absence of any definitions to the term "site", the learned Rent Controller had properly calculated the fair rent by including the alleged unauthorised constructions.

9.In view of the submissions made by both the learned counsels, the only point that requires to be addressed in the present case is as to whether the learned Rent Controller and the learned Appellate Judge were correct in holding that the unauthorized constructions from the second floor onwards could be taken into consideration for the purpose of fair rent calculation.

10.Before answering the above point, I deem it appropriate to have a cursory glance at the Act in general and the provision with regard to fixation of fair rent in particular.

11.The Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 is a welfare legislation providing protection to both the landlords as well as the tenants. The scheme and object of Section 4 of the Act is worded appropriately in order to strike a balance between the landlord and the tenant for arriving at a fair rent. For the sake of convenience, Section 4 of the Act is extracted below:-

> *"4.* ***Fixation of fair rent.****--*
>
> *(1)The Controller shall, on application made by the tenant or the landlord of a building and after holding such inquiry as he thinks fit, fix the fair rent for such building in accordance with the principles set out in the following sub-*

sections.

(2)The fair rent for any residential building shall be at nine per cent gross return per annum on the total cost of such building.

(3)The fair rent for any non residential building shall be nine per cent gross return per annum on the total cost of such building.

(4)The total cost referred to in sub-section (2) and sub-section (3) shall consist of the market value of the site in which the building is constructed, the cost of construction of the building and the cost of provision of anyone or more of the amenities specified in Schedule I as on the date of application for fixation of fair rent:

Provided that while calculating the market value of the site in which the building is constructed, the Controller shall take into account only that portion of the site on which the building is constructed and of a portion up to fifty percent, thereof of the vacant land, if any, appurtenant to such building the excess portion of the vacant land, being treated as amenity:

Provided further that the cost of provision of amenities specified in Schedule I shall not exceed-

(i)in the case of any residential building, fifteen per cent and

(ii)in the case of any non residential building, twenty-five per cent, of the cost of site in which the building is constructed, and the cost

of construction of the building as determined under this section.

5(a)The cost of construction of the building including cost of internal water-supply, sanitary and electrical installations shall be determined with the due regard to the rates adopted for the purpose of estimation by the Public Works Department of the Government for the area concerned. The Controller may, in appropriate cases, allow or disallow an amount not exceeding thirty per cent of construction having regard to the nature of construction of the building.

(b)The Controller shall deduct from the cost of construction determined in the manner specified in clause (a), depreciation, calculated at the rates specified in Schedule II"

12.Fixation of fair rent is a percentage of gross return per annum on the total cost of the building. The provision also takes into account, the amenities provided for highlighting the value of the building. It has been held by the Hon'ble Division Bench of this Court in a judgment in ***T.V.Angappan and another Vs. State of Tamil Nadu, rep. by the Secretary to Government, Education Department, Chennai and others*** reported in ***2006 (3) MLJ 1073*** that when the fair rent is fixed through an intervention of the Court, it being a fair return on the property let out, necessarily, the fixation has to have some acceptable, logical basis that the end product is a just rent having regard to all the circumstances. Therefore, the provision for fixation of fair rent in the Act provides for a guideline which does not lean favouring one party nor is it so one-sided that it introduces an element of arbitrariness in the computation.

13.The issue as to whether unauthorised constructions in a shopping complex can be taken into account for the purpose of calculation of fair rent requires a recollection of some necessary facts of the case in hand.

14.The demised premises is a commercial shop located in a building which houses 100 shops, over seven floors. The petitioner herein is an owner of one shop alone in the ground floor. Apparently, he had purchased a shop from the developer of the entire complex. It is suggested that the shops that have been put up from the second floor upwards are unauthorised constructions. In view of these unauthorised constructions put up by some third parties in the complex, the fair rent fixed for the demised shop vis-a-vis., the fair rent claimed by the landlord, has been considerably reduced.

15.It is nobody's case that the unauthorised construction from the second floor onwards was put up by the petitioner herein. Nevertheless, the landlord has been made a victim of such unauthorised constructions. Before the learned Rent Controller, both the landlord and the tenant had produced their respective Engineer's report, evidencing calculation for the purpose of fixation of fair rent. While the Engineer's report produced by the tenant refers to the plinth area of the ground floor at 196.21 sq. feet and the existence of 100 shops in the entire complex, the Engineer's report furnished by the landlord evidences the plinth area of the said shop to be at 226.48 sq. feet and 60 shops alone were taken up for calculation and the constructions from the second floor upwards were treated to be unauthorised constructions carrying nil floor value, constructions costs and indexation to the apportioned site value. The learned Rent Controller had taken the plinth area of 226.48 sq. feet evidenced in the landlord's Engineer's report into consideration and had refused to reject the constructed area of the alleged unauthorised constructions.

16.In answer to the plea put forth before the learned Rent Controller that such unauthorised constructions should not be taken into account, it was held, that since there is a provision under the

Tamil Nadu Town and Country Planning Act, 1971 debarring the Courts to take cognizance of the offence under the said Act without a complaint in writing, a logic was derived that unauthorised constructions can also be taken into consideration, while calculating fair rent.

17.Section 2(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act defines "a building" as follows:-

> *"building" means any building or hut or part of a building or hut let or to be let separately for residential or non-residential purposes and includes-*
>
> *(a) the garden, grounds and out-houses, if any, appurtenant to such buildings, hut or part of such building or hut and let or to be let along with such building or hut, (b)any furniture supplied by the landlord for use in such building or hut or part of a building or hut, but does not include a room in a hotel or boarding house;"*

18.There is no reference to an unauthorised building or an unauthorised portion of the building in the Act. It is in this corollary that the learned Rent Controller had arrived at the conclusion that such unauthorised constructions could also be taken into account for calculating the fair rent. The fair rent is a right guaranteed to the landlord under the statute and as such, the landlord cannot expect to get more rent than the fair rent. It is the settled proposition that the assessment of valuations must take into account the measure of fair rent as determinable under the Act alone. But, in a case, like the one in hand, the question arises is as to whether the landlord can be made a victim for certain unauthorised constructions put up in a building, in which he had legally purchased one shop of an authorised portion of the building.

19.No multi storeyed building can be built when a sanctioned plan takes into account the various factors like the width of the road abutting the proposed site, the extent and location of the land while granting the planning permission. Any construction made over and above the permitted area of construction is deemed to be an unauthorised construction. Subject to regularization, unauthorised constructions is not only illegal but is also an offence. None of the laws of the State recognize such unauthorised constructions or extends benefits to these constructions.

20.When the law mandates and regulates the type or extent of construction that could be put up in a given locality, it goes without saying that a purchaser of such an authorised building would be entitled for all consequential benefits required for such a building like a completion certificate, electricity/water service connections, license, permits etc. Even the Transfer of Property Act, 1882 does not recognize the rights of a lessee to put up constructions without the consent of the lessor as per Section 108(P). Unauthorised constructions or deviations is an offence under the provisions of the Tamil Nadu Town and Country Planning Act as well as the other building regulations. When the law does not recognize nor extend any sort of benefit for an unauthorised construction, can the Rent Controller recognize these illegal constructions to the detriment to the interest and rights of the landlord, in the instant case?

21.The learned counsel for the petitioner/landlord submitted that the shop is located in NSC Bose road, Chennai, which is 30 feet in width and in view of the special rules for the multi storeyed building for Chennai City, the construction over and above the first floor is deemed to be unauthorised and therefore, such constructions should not be taken into consideration for calculating the fair rent. He also placed reliance on the provisions of the Tamil Nadu Town and Country Planning Act, the Chennai City Corporation Building Rules, 1972 and the Development Regulations for Chennai Metropolitan Area to substantiate this proposition.

22.While Section 4(2) and 4(3) of the Act empowers the Rent Controller to fix the fair rent for residential and non residential buildings based on the total costs of the building, Sub Section 4 mandates the Rent Controller to take into account the market value of the site in which the building is constructed, the costs of the construction of the building and the costs of the amenities provided, for determining the total costs of the building. The proviso to Section 4(4) also mandates the Rent Controller to take into account only that portion of the site on which the building is constructed and of a portion upto 50% thereof of the vacant land, if any, appurtenant to the building. The remaining 50% of the vacant land is required to be treated as amenities. The scope of the provision has been dealt with in a decision of this Court reported in ***1983 (2) MLJ 252*** in the case of ***K.Kaliammal and others Vs. Athi Ramachandra and others.***

23.This leads to the aspect of the mode of determination of calculating the value of the portion of the site on which the building is constructed.

24.The term "Site" is not defined under the Act. The definition of site in ***P.Ramanathan Iyer's Advanced Law***

Lexican reads to include "the ground or the land on which the house stands and would not include a terrace or other open portion of the building on which the additional construction is made".

25.The learned counsel for the petitioner/landlord attempted to give a meaning to the term "Site", insofar as it relates to a multi storeyed building, to include the entire plinth area of the building distributed evenly over each of the constructed floors. In other words, it is his submission that if the building has more than one floor, the principle to be adopted is by apportionment in accordance with the number of storeys. In support of his proposition, the learned counsel relied upon the following judgments of this Court:-

*a)**1972 (2) MLJ 446** [Rainbow Electric Supply Corporation V. S.V. Chenchuramiah and another]*

*b)**1968 (2) MLJ 406** [S.Attendroloo Ghetty's Charities by its President and Trustees, S.Venkataranagam and others V. Sadhana Aushadalaya by its Proprietor Naresh Chandra Ghose]*

*c)**1969 (1) MLJ 101** [R.Sivagnanam and another V. Everest Boarding and Lodging by its Managing Partner R. Manoharan]*

Furthermore, before answering the aforesaid submission, it would be appropriate to refer to the concept of "undivided share of land" in a multi storeyed building.

26.Undivided Share of land is an interior part of a flat in a residential apartment/complex or in a shop in a commercial complex, which is exclusively sold together with the constructed area or with an agreement for construction of a portion of the building. The costs of such undivided share of land is also spelt therein in the Deed of Conveyance. Theoretically, undivided share of land is the ratio of the constructed area of the single shop or apartment with the total built up area of the complex, by taking such ratio into account with the total land area, on which the entire complex is constructed. The development regulations entitles the builder to put up the maximum constructed area for an earmarked shop or residential apartment in the entire building. Such specified entitlement also takes into account the common areas provided in the entire building. To put it in other words, the area of construction, a builder is entitled to put up for a single unit, would correlate with the corresponding undivided share of land transferred to such buyer and no additional construction could be made, over and above the prescribed area of construction. Therefore, while applying the phrase "that portion of the site on which the building is constructed” found in the proviso to Section 4(4) of the Act, would necessarily mean the undivided shares of land conveyed during the construction of a multi storeyed building. As such, I am of the view that the term “site” referred to Section 4(4), insofar as it relates to multi storeyed building, would only refer to the undivided share of land, conveyed along with the constructed portion of a shop/apartment, forming a part of a larger building.

27.The proviso to Section 4(4) was introduced through Act 23 of 1973. The judgments referred to by the learned counsel for the petitioner were prior to the insertion of the proviso to Section 4(4) of the Act, which gives the mode of calculating the market value. Furthermore, the aspect of calculating the undivided share of land were not taken into consideration in the said judgments where the term “Site” came to be construed. In view of the position that the term “Site” has not been defined under the Act and in the light of my aforesaid discussions, it is my view that the site in a multi storeyed building could only refer to the undivided share of land through which a shop/apartment is constructed in a multi storeyed building.

28.In this background, I had perused the reasonings of the learned Rent Controller in rejecting the petitioner's plea to exclude the unauthorised constructions for the purpose of calculating the fair rent. The learned Rent Controller was of the view that when cognizance of an offence under the Tamil Nadu Town and Country Planning Act itself is barred except on a written complaint of the concerned authority, the plea of the petitioner to exclude unauthorised construction for the purpose of calculating the fair rent need not be taken into consideration. It is on this sole reasoning that the learned Rent Controller had rejected the petitioner's plea to exclude the unauthorised construction from the purview of the calculations. Such a justification may not be proper in my view.

29.The embargo in the Tamil Nadu Town and Country Planning Act of taking cognizance of an offence without written complaint will have no nexus for consideration of the proposition to exclude unauthorised construction for the purpose of calculating the fair rent. In view of my aforesaid reasoning that the phrase "that portion of the site on which the building is constructed" in Section 4(4) of the Act can only mean the undivided share of land conveyed through a Deed of Conveyance, the reasoning of the learned Rent Controller requires to be reviewed.

30.At this juncture, the learned counsel for the petitioner made a submission that all the tenants in the entire complex, having similar extent of shops, are paying more than Rs.40,000/- monthly rent apart from a sum of Rs.2500/- towards monthly maintenance and as such, the learned Rent Controller was not justified in fixing the fair rent at Rs.4460/-. Such a plea was neither a part of the pleadings before the learned Rent Controller nor was any evidence let in, in this regard and as such, I do not think that the said submission requires any consideration at all. Nevertheless, since the entire case has neither been laid to rest upon the new proposition, it would be appropriate to remand back the matter to the learned Rent Controller for a fresh consideration in the light of the above observations.

31.For the sake of clarity, the findings of the learned Rent Controller insofar in classifying the type of building as Type One construction, the age of the building at 25 years, the plinth area at 226.48 sq feet, fixing of the basic amenities and Schedule-I amenities, depreciation calculated at 1% for 25 years old building and the land value at Rs.2 crore per ground is hereby confirmed. The findings of the learned Rent Controller with regard to calculating the fair rent by taking into account the seven floors in the entire building and the 100 shops constructed therein is set aside, since it requires reconsideration.

32.It is seen that the evidence let in by the respective parties do not much touch upon the aspect of undivided share of land, as well as the unauthorised construction alleged to have been made in the entire building, in order to facilitate the learned Rent Controller to come to a fair and logical conclusion. Hence, it would be appropriate to grant liberty to the parties to let in additional evidence, both oral and documentary and accordingly such liberty is granted.

33.For all the aforesaid reasons, the fair and decreetal order of the learned Rent Controller dated 12.09.2012 passed in RCOP.No.1245 of 2012, which is confirmed by the learned Appellate Authority in RCA.No.163 of 2013 dated 20.03.2014 are set aside, insofar as refusing to exclude the unauthorised construction while calculating the fair rent and the matter is remanded back to the learned Rent Controller (XIV Small Causes Court, Chennai) for reconsideration on these aspects. While reconsidering, the learned Rent Controller shall afford due opportunity to both the parties to let in additional evidences both oral and documentary and thereby determine the fair rent by taking into account all the observations made in this order. The learned Rent Controller shall also endeavor to complete the proceedings as expeditiously as possible.

34.In fine, the Civil Revision Petition stands ordered accordingly. Consequently, connected Miscellaneous Petitions are closed. No costs.

22.11.2018

Index : Yes

Order :Speaking

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To

1.The VIII Court of Small Causes, Chennai.

2.The XIV Court of Small Causes, Chennai.

M.S.RAMESH, J.

DP

Order made in

**CRP.(NPD).No.695 of 2015
and
M.P.Nos.1 & 2 of 2015**

22.11.2018