

(2007) 10 MAD CK 0001

In the Madras High Court

Case No : Writ Petition (MD) No's. 6395 to 6397 of 2007, M.Ps.1 of 2007 and W.P. No's. 3864 to 3873 of 2006 and W.P.M.Ps. 4068 to 4077 of 2006 and W.P. No's. 6169 to 6179 of 2006 and M.Ps.1 of 2006 and W.P. No's. 11366 to 11375 of 2006 and M.Ps.1 and 2 of 2006

A. Saravanan

APPELLANT

Vs

The Executive Engineer cum Administrative Officer, Tamil Nadu Housing Board, Trichy Housing Unit and The Managing Director, Tamil Nadu Housing Board

RESPONDENT

Date of Decision : 11-10-2007

Acts Referred:

Tamil Nadu State Housing Board Act, 1961 — Section 155

Citation : (2007) 5 CTC 340 : (2007) 6 MLJ 1562

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : S.K. Mani, for the Appellant; A. Kannan, for the Respondent

Final Decision : Allowed

Judgement

V. Ramasubramanian, J.—The petitioners in all these writ petitions were allotted houses in the Navalpattu Housing Scheme Phase-III,

Trichy on various dates ranging from 14.10.1991 to 15.05.1998, by the Executive Engineer cum Administrative Officer, Trichy Housing Unit,

Tamil Nadu Housing Board. The said scheme was part of a larger scheme promoted in three different phases by the Housing Board and there

were three categories of houses namely, High Income Group (HIG), Middle Income Group (MIG) and Low Income Group (LIG), which were

promoted in the said scheme. Even among those three categories, there were different types of houses, depending upon the size of the plot and the

total constructed area of the building. Since these details are not relevant for the

determination of the issue on hand, I do not propose to advert to them.

2. Some of the allotments which were originally under hire purchase agreements, later got converted into out-right purchases. In any case, most of the petitioners are either State Government employees or Central Government employees and there are no complaints of default in payments.

3. The possession of the individual houses were handed over to the petitioners in 1993, 1994, 1995, 1996, 1997 and 1998, depending upon the dates of allotment and the petitioners are in possession of these houses.

4. During the period from July 2005 to March 2006, the Executive Engineer cum Administrative Officer, Trichy Housing Unit issued individual

communications to the petitioners calling upon the petitioners to pay different amounts of money. Aggrieved by the said demand, all these

petitioners have come up with the present writ petitions. While the petitioners in 16 cases have merely sought to quash the demand made by the

respondents, the petitioners in the remaining 44 cases have not only prayed for quashing the demand made, but also sought a direction to the

respondents to pay interest at 8% per annum on the initial deposit made by them, from the date of the initial payment till the date of handing over possession.

5. Heard Mr. S.K. Mani, learned Counsel for the petitioners and Mr. A. Kannan, learned Standing Counsel for the Tamil Nadu Housing Board.

6. It is seen from the counter affidavit filed by the respondents that under Phase III of the Navalpattu Neighborhood Scheme, a total of 325 houses

were built by the Housing Board, out of which 63 were under the category HIG, 104 were under the category MIG and 158 under the category

LIG. The size of the plots under these categories were 222.96 sq.mts., 195.05 sq.mts., 162.58 sq.mts. and 74.32 sq.mts. The built up area of the

houses were 51.52 sq.mts., 73.72 sq.mts., 35.82 sq.mts., 31.08 sq.mts., 21.10 sq.mts. and 20.00 sq.mts. Therefore, the tentative cost fixed by

the Housing Board was different from one category to another, depending both upon the extent of land and upon the built up area. To be specific

the cost of a HIG house was Rs. 1,52,800/- for one type of design, Rs. 1,56,100/- for a second type of design, Rs. 1,78,700 for a third type of

design and Rs. 1,81,900/- for the fourth type of design. The cost of a MIG house

was Rs. 79,600/- for one type of design, Rs. 90,800/- for a second type of design and Rs. 97,900/- for a third type of design. Similarly the cost of a LIG house for one type of design was Rs. 45,100/- and it was Rs. 46,900/- for another type of design. These statistics are furnished only for the purpose of completion of narration and they have no bearing on the issue raised in the writ petitions.

7. It is stated by the respondents in the counter affidavits that the construction of the houses were completed in 1991-92 and the tentative cost, referred to above, was fixed up to 30.06.1991. But all the houses could not be sold before 30.06.1991, as there were no takers. Therefore, the respondents were forced to issue extensive advertisements in Newspapers and ultimately the allotments came to be made in favour of persons like the petitioners herein, who applied in response to those advertisements, in 1993 and later.

8. Thus, there was a time lag between the date, with reference to which, the tentative cost was finalised (namely 30.06.1991) and the dates on which allotments were made to various persons including the petitioners herein (from 1993 to 1998). Initially the Housing Board did not think fit to revise the tentative cost either at the time of issuing advertisements in the Newspapers or at the time of making allotments. But when an audit objection was raised by the Local Fund Audit and by the Internal Audit Party, the respondents issued individual demand notices, calling upon the petitioners to make payment of the amounts indicated therein. According to the respondents, the amount claimed in the impugned demand notices represents the capitalisation of the interest. In simple terms, the respondents have calculated interest on the tentative cost, with effect from 30.06.1991 up to the dates of individual allotments and added the interest to the principal amount (tentative cost). This, in accounting parlance, is known as ""capitalisation of interest"". In other words, the notices impugned in the writ petitions contain a demand for payment of interest on the tentative cost, from 30.06.1991 up to the date of allotment, together with further interest and penal interest on the interest so capitalised.

9. A careful reading of the counter affidavits filed by the respondents would show that the amounts now demanded from the petitioners, contain three components namely-

- (a) Interest on the tentative cost from 30.06.1991 up to the date of allotment;
- (b) Interest on component (a); and
- (c) Penal interest.

It is this demand that is objected to by the petitioners in all these writ petitions.

10. In order to find out the legitimacy of the demand made by the respondents, it is necessary to see the Allotment Orders, Lease Cum Sale

Agreements as well as the Board Proceedings of the Tamil Nadu Housing Board and the Government Orders on the issue.

11. Allotment Orders:

In so far as the Allotment Orders are concerned, they merely contain the tentative cost fixed for the plot in question. Paragraph 4 of the Allotment

Order says that after the land acquisition proceedings are concluded, the final cost would be determined by taking into account, the outcome of

those cases as well as the additional expenditure incurred for developmental works. Clause 9 of the Allotment Order says that if the size of the plot

is found to be more, proportionate additional cost would be demanded. Clause 3 of the Allotment Order contains a stipulation that the total cost

less the initial deposit, should be paid in monthly instalments indicated therein along with maintenance charges before the 10th day of every month

and that interest at 12% per annum would be charged.

12. Apart from the above stipulations, the Allotment Order does not contain even a whisper about the capitalisation. It is needless to point out that

these Allotment Orders constitute the acceptance of the offer. Since acceptance to offer, is like a lighted match stick to a train of gun powder, the

contract becomes concluded with the issue of the Allotment Orders. Therefore, both the parties are bound by the Terms and Conditions of

Allotment, since the Allotment Order reflects the consensus ad idem between them. Unfortunately for the Housing Board, the demand for any extra

cost should fall only within the parameters of Clause 4 of the Allotment Order. As seen above, Clause 4 of the Allotment Order contemplates

enhancement of the tentative cost only on two contingencies namely-

(a) the enhancement of award amounts after the conclusion of the land acquisition proceedings; and

(b) additional expenditure incurred for undertaking developmental works.

There is no elbow space or leverage under any of the Clauses contained in the Allotment Order to include capitalisation of interest from the date

when the houses became ready for occupation upto the date on which allotments were made.

13. Lease cum sale agreement:

The Lease Cum Sale Agreement entered into between the Housing Board and the allottees, contains some provisions for the enhancement of

tentative cost and let us now deal with those Clauses to see if there is any provision for enhancing the tentative cost by capitalisation of interest.

14. In the preamble part of the Lease Cum Sale Agreement, the following portions deal with the cost:

Whereas the price for acquiring such lands remaining uncertain as the persons affected thereby are pursuing the matter for payment of increased

compensation for the land so acquired before the competent Tribunals and Courts. WHEREAS therefore the price of the lands as fixed by

lessor/vendor in this deed is purely tentative and his bound to be revised at a later stage in accordance with the decisions of the Tribunals and

Courts referred to above.

15. The body of the Lease Cum Sale Agreement contains about 32 Clauses, some of which deal with the Power of the Board to revise the

tentative cost.

Those Clauses are as follows:

14. (a)The lessor agrees to sell the property more particularly described in the schedule hereunder to the lessee for such price as the Executive

Engineer and Administrative Officer or the lessor may at any time in his sole discretion finally fix and at which time the Executive Engineer and

Administrative Officer or the lessor is entitled to consider whether the price of the land acquired under the land Acquisition Act together with

suitable modifications there to by the local laws become final by a conclusive adjudication thereon by the concerned tribunals and courts, and also

the cost of construction after the finalisation of the accounts. The decision of the Executive Engineer and Administrative Officer or the lessor as to

the price of property is final and binding on the lessee and the lessee agrees to purchase the property from the lessor at the said price on the terms

and conditions here in after mentioned.

b) On the conclusive fixation of the cost of the property and on realisation of this amount together with interest, penal interest etc., the

lessor/vendor shall convey the title of the property to the allottee subject to covenant that resale of the property to another is prohibited for a

period of five years from the date of handing over of the property.

15. The lessee will pay to the lessor the purchase price of the property as per Clause 14 and other covenants in this agreement and incidental

charges such as stamp duty, registration charges management charges, insurance and other outgoings payable in respect of the property to the

Government. State or Central and any other local or other authority as fixed by the Executive Engineer and Administrative Officer or the lessor in

monthly instalment of such amounts as may be fixed by the Executive Engineer and Administrative Officer or the lessor in his sole discretion. Such

instalment shall be paid on or before the 10th day of each month for which it due.

16. Until such time as the lessor finally determines the purchase price and the incidental charges of the property or is enable to do so and finally

determines the purchase price of the property, the lessee. Shall pay to the lessor, subject to Clause 2 and supra, a sum of Rs. 387/- (Rupees three

hundred and eighty seven only) per month as provisional instalment towards the purchase price of the property, such payments being made on or

before the 10th day of each month.

18. After the purchase price has been duly determined by the lessor/vendor, the lessee shall pay the difference in cost if any between the tentative

cost and final cost of the property and land within a month from the date of such demand.

16. Apart from conferring power upon the Executive Engineer-cum-Administrative Officer, to determine the final cost, the Lease Cum Sale

Agreement also makes the allottee bound by the rules and regulations. Clause 32 of the Lease Cum Sale Agreement reads as follows:

32) The lessee/purchaser shall be also bound by the terms and conditions not provided for in this agreement but contemplated in the Application

Form and Rules and Regulations prescribed in the prospectus of this scheme which will form part and parcel of this indenture. Further, the

lessee/purchaser shall also be bound by the directions being given by the Executive Engineer and Administrative Officer from time to time in the

interest of the upkeep of the buildings and general management.

17. In the light of Clause 14 and 32 of the Lease Cum Sale Agreement, we have to see if the respondents are entitled to the capitalisation of

interest on the tentative cost, either by an executive fiat of the Executive Engineer cum Administrative Officer or by taking recourse to the Board

Proceedings and Government Orders by virtue of Clause 32. But before doing so, we may now examine whether there are Board Proceedings or

Government Orders providing for capitalisation of interest on the tentative cost.

18. The Government had issued an order way back in the year 1988 in G.O.Ms. No. 1666, Housing and Urban Development (K1) Department

dated 16.12.1988, which deals with the question relating to capitalisation of interest charges. The entire Government Order throws light upon this

issue and hence, it is reproduced as under:

At present in respect of flats/houses allotted by the Govt. (Under Govt. Discretionary quota/Surrendered/cancelled/declined vacancies) and by the

Board (from the waiting list) interest charges for the period from the date of ready for occupation, till the date of allotment order is capitalised and

collected from the allottees concerned.

2. The Govt. have received several representations from the allottees that it is not fair to collect the interest charges from them for the period of

belated allotment, as it is not a fault of theirs. However as the flats/houses are constructed by the Tamil Nadu Housing Board by obtaining loan

from other agencies, especially the housing and urban dev. corporation and as the board has a commitment to pay the interest charges on the loan

amount obtained from such agencies, besides payment of principal, the ""Capitalisation of interest charges"" cannot be completely dispensed with. If

this request is complied with, the board will incur a very heavy loss. Therefore, with a view to see that the board do not incur any loss, and the

allottees are not unnecessarily penalised by the ""Capitalisation of interest charges"" the Govt. in consultation with TNEB have considered various

measures. The Tamilnadu Hg. Board in its Res. No. 29, dt. 29.1.88, have agreed with the suggestion of the Govt. to collect the interest from the

allottees on the amount of the initial cost and the monthly instalments that would have been paid from the date of ready for occupation till the date

of allotment order.

3. The Govt. in supersession of all the previous orders on this subject direct that in respect of TNEB flats /houses /reserved under Govt. Disc.

quota and the flats/houses/surrendered/ cancelled etc., and allotment made from the waiting list, interest at the prevailing market rate should be

collected from the allottees for the period from the date of ready for occupation till the date of allotment order on 1/3 or 1/4 of the initial cost as the

case may be. Besides, interest at the same rate of the monthly instalments that would have become due from the date of ready for occupation till

the date of allotment should also be collected at the prevailing market rate for the said period.

4. This procedure should be adopted in respect of all allotments made on or after 1st 1/1985. The Chairperson and M.D., TNHB is requested to

issue suitable instructions to the subordinates, authorities to carryout the above instructions.

5. The Chairperson and M.D., TNHB is requested that the new procedure for Capitalization of interest charges should be incorporated in the

advertisement calling for applications and in the application forms also.

19. Despite a clear direction in para 5 of the aforesaid Government Order to the Chairman and Managing Director of the Tamil Nadu Housing

Board to incorporate the issue of capitalisation of interest charges, even in the advertisements calling for applications, the respondents appear to

have omitted to carry out the said instructions. If the instructions contained in the aforesaid Government Order had been incorporated in the

advertisements, application forms, Allotment Orders and the Lease Cum Sale Agreement, the present problem would not have arisen. As seen

from para 4 of the above G.O., the Government had issued clear instructions to the Housing Board to adopt the procedure of capitalisation of

interest charges, for all allotments made on or after January 1985. The procedure prescribed under para 3 of the above G.O. is to collect interest

at the prevailing market rate from the date on which the houses were ready for occupation, till the date of allotment on 1/3 or 1/4 of the initial cost,

as the case may be and to collect interest at the same rate of the monthly instalments that would have become due from the date of ready for

occupation till the date of allotment. If the said procedure prescribed in the above Government Order had been incorporated in the Allotment

Orders, the petitioners could not have challenged the same.

20. Section 155 of the Tamil Nadu Housing Board Act, 1961 empowers the Government to issue such directions to the Housing Board as are

necessary or expedient for carrying out the purposes of this Act. Section 155 of the Act reads as follows:

155. Power of Government to give directions to the Board and local authorities.-

(1) The Government may give the Board such directions as in their opinion are necessary or expedient for carrying out the purposes of this Act,

after giving an opportunity to the Board to State its objects, if any, to such directions and after considering the said objections; and it shall

thereupon be the duty of the Board to comply with the such directions.

(2) The Government may give any local authority such directions as in their opinion are necessary or expedient for enabling the Board to carry out

the purposes of this Act, after giving an opportunity to the local authority concerned to state its objections, if any, to such directions and after

considering the said objections; and it shall thereupon be the duty of the local authority to comply with such directions.

21. Therefore, the respondents ought to have been vigilant in incorporating a Clause relating to capitalisation, in the Allotment Orders as well as in

the Lease Cum Sale Agreements. Unfortunately, both the Allotment Orders as well as the Lease Cum Sale Agreement are conspicuously silent

about such a right on the part of the Board to demand capitalisation of interest charges. The respondents did not even wake up to this lacuna, for

about 13 to 14 years till the Local Fund Audit and Internal Audit Party pointed out the same. After issuing Allotment Orders in 1993 and handing

over possession in 1993 (in a majority of the cases), the demand for capitalisation of interest charges has been made only in the year 2005.

Therefore, it is to be seen how far the allottees are bound by the aforesaid Government Orders and as to whether Clause 14 of the Lease Cum

Sale Agreement could be read in such a manner to make room for accommodating the aforesaid Government Order. Before examining the above

issues, it is to be noted that the Housing Board by itself appears to have ignored this issue of capitalisation of interest charges and the Board sought

to make a claim only because of the audit objections. This is borne out from paragraph 12 of the counter affidavits filed in the present writ

petitions. Paragraph 12 reads as follows:

12. Though the Tamil Nadu Housing Board initially has given concession the Local Fund Audit and the Board Audit; on perusal of the records

specifically instructed for the adoption of capitalisation of interest so as to avoid revenue loss to the Board. The Board cannot incur revenue loss

also much against the observation of the Local fund Audit and Board Audit. Therefore, the capitalization of interest is inevitable and unavoidable.

22. Therefore, it is clear that despite the Government Order issued in G.O.Ms. No. 1666, dated 16.12.1988, the respondents failed at three

stages in informing the allottees of the right of the Board, to charge capitalisation of interest charges. These three stages are:

(a) At the time of issuing advertisements calling for applications;

(b) At the time of issuing allotment orders; and

(c) At the time of executing Lease cum Sale Agreements.

It is needless to point out that the mutual rights and obligations between the allottees and the Housing Board flow out of the contracts, in the form

of Allotment Orders and Lease Cum Sale Agreements. Therefore, any obligation on the part of any of the parties to the contract could be traced

only to the terms and conditions incorporated in the contract and not to any statutory directions issued by the Government. The orders issued by

the Government in G.O.Ms. No. 1666, dated 16.12.1988, may have a binding effect upon the Housing Board by virtue of Section 155 of the Act,

but they cannot have a binding effect upon the allottees. The Government was fully aware of the fact that the instructions issued in G.O.Ms. No.

1666 will not bind the allottees. This is why it was specifically ordered in para 5 of the said G.O. that the procedure for capitalisation of interest

charges should be incorporated (i) in the advertisements calling for applications and (ii) in the application forms also. But unfortunately, the

respondents have failed to carry out the above directions of the Government and hence, the issue of capitalisation did not form part of the

concluded contract between the parties.

23. As a matter of fact, the Chairman and Managing Director appears to have issued proceedings in Proceeding Nos.S2/74488/90 dated

16.04.1991 ordering the collection of capitalisation charges. Even then, the same was not intimated to the allottees. Therefore, the respondents are

not entitled to fall back upon the Government Orders G.O.Ms. No. 1666, to create an obligation on the part of the allottees. It is to be

remembered that a statutory obligation is distinct from a contractual obligation. In the matter of allotment of houses, the obligations are only

contractual in nature but not statutory. Therefore, unless the directions contained in G.O.Ms. No. 1666 had been incorporated in the Allotment

Orders or the Lease Cum Sale Agreements, they cannot be enforced as against the allottees.

24. Coming to Clause 14 of the Lease Cum Sale Agreement, it is seen that the said Clause confers absolute discretion upon the Executive

Engineer cum Administrative Officer, to finally fix the price of the house. But such discretion is circumscribed by two factors mentioned in Clause

14 itself namely,

(a) The final adjudication of the disputes relating to land acquisition proceedings; and

(b) The finalisation accounts relating to cost of construction.

Therefore, Clause 14 of the Lease Cum Sale Agreement cannot be taken to be a blank cheque for the Executive Engineer but should be

understood to mean that it confers discretion upon the Executive Engineer only to vary the tentative cost to the extent necessary to accommodate

such components of cost which were not known with precision on the date of allotment or on the date of execution of Lease Cum Sale Agreement.

Clause 14 cannot be interpreted to confer a discretion upon the Executive Engineer to enhance the tentative cost by a cost component which was

already known or available at the time of inviting applications and making allotments. In other words, Clause 14 of the Lease Cum Sale Agreement

gives room for uncertain and indeterminable cost components but does not give room for already existing cost factors, known to the Executive

Engineer.

25. The respondents were aware of the fact that the tentative cost indicated in the advertisements and allotment orders was fixed with reference to

the date 30.06.1991, which was the date on which the houses were ready for occupation. Since the respondents could not sell the houses for

more than a year, applications were invited from the members of the public in the year 1993 and allotments were made. The respondents were

also aware of the time taken from 30.06.1991 up to the date of allotment in the years 1993, 1994, etc., and the consequent capitalisation cost. If

despite being aware of the impact of capitalisation, the respondents failed to include the same in the tentative cost, they cannot now take refuge

under Clause 14 of the Lease Cum Sale Agreement. As stated earlier, Clause 14 will only save unknown and indeterminable factors as on the date

of allotment and it would not save known and determinate factors.

26. As a matter of fact, capitalisation of interest charges, seeks to place the allottees of the year 1991 on par with the allottees of the year 1993 to

1998. Allottees of the year 1991 had occupied the houses and started paying the monthly instalments. The allottees of the years 1993 to 1998 are

now made to pay interest on the tentative cost from 1991 to the date of allotment, treating them on par with defaulters. This is totally absurd.

27. A Division Bench of this Court had an occasion to consider the same issue in K.V. Krishnan Vs. The Chairman and Managing Director, Tamil

Nadu Housing Board and The Executive Engineer, Administrative Officer, Tirunelveli Housing Unit, . In the said case also, persons who were

allotted the houses subsequently after the houses became ready for occupation, were directed to pay capitalisation charges. But the Division Bench

held such a demand to be illegal.

28. Mr. A.Kannan, learned Standing Counsel for the Housing Board relied upon the last paragraph of the Division Bench Judgment to contend

that the Division Bench ultimately directed the allottees to pay interest. But I do not know the circumstances under which such a direction was

issued by the Division Bench. In paragraphs 15 to 18 of the said judgment, the Division Bench clearly pointed out that if the interest component

from the date on which the house became ready for occupation up to the date of allotment is to be included, it should have been included in the

tentative cost itself and notified to the allottees even at the time of allotment. Therefore, the law laid down by the Division Bench is found only in

paragraphs 15 to 18 of the said judgment and the direction contained in paragraph 19 should be confined only to those cases.

29. Mr. A.Kannan, learned Standing Counsel for the Housing Board also relied upon an order passed in Review Application No. 145 of 2004 by

another Division Bench on 03.04.2006. The Division Bench which reviewed the

aforesaid decision, made it clear that the decision rendered in

K.V. Krishnan Vs. The Chairman and Managing Director, Tamil Nadu Housing Board and The Executive Engineer, Administrative Officer,

Tirunelveli Housing Unit, is to be confined only to the parties in the said proceedings. Thus, the order passed on the Review Application also do

not advance the case of the respondents.

30. The learned Standing Counsel for the Housing Board relied upon the order passed by the State Consumer Disputes Redressal Commission in

a batch of cases, following the orders passed by the Division Bench in the aforesaid Review Application. But it is seen that the decision in K.V.

Krishnan Vs. The Chairman and Managing Director, Tamil Nadu Housing Board and The Executive Engineer, Administrative Officer, Tirunelveli

Housing Unit, , which was clarified in the Review Application and followed by the State Consumer Commission arose out of the Tirunelveli

Housing Scheme. While the legal issue was not settled either in the Review Application or in the orders of the State Consumer Commission, it was

settled only in paragraphs 15 to 18 of the Judgment in K.V. Krishnan Vs. The Chairman and Managing Director, Tamil Nadu Housing Board and

The Executive Engineer, Administrative Officer, Tirunelveli Housing Unit, .

31. In view of the above, I hold that the demand made by the respondents in the notices impugned in the writ petitions, are not in conformity with

the orders of allotment and the Lease Cum Sale Agreement, which form a concluded contract between the allottees and the Housing Board and

which is binding on both the parties. However, in so far as the prayer of the 44 writ petitioners seeking interest at 8% per annum from the date of

initial payment up to the date of handing over possession, I find that the Allotment Orders and the Lease Cum Sale Agreement do not provide for

such a contingency. Therefore, the allottees are also not entitled to any interest for the period from the date of initial payment up to the date of

handing over possession.

32. Consequently, all the writ petitions are allowed and the proceedings impugned in the writ petitions are set aside. No costs. Consequently,

connected miscellaneous petitions are closed.