
(2013) 04 KL CK 0040
In the High Court Of Kerala
Case No : R.C.R. No's. 182 and 354 of 2012

George

APPELLANT

Vs

Saidu Muhammed

RESPONDENT

Date of Decision : 11-04-2013

Acts Referred:

Constitution of India, 1950 — Article 13(1), 19(1)(g), 21
Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11, 11(3), 11(4)(iv),
25, 30
Transfer of Property Act, 1882 — Section 116

Citation : (2013) 2 ILR (Ker) 578 : (2013) 2 KHC 326 : (2013) 2 KLJ 560 :
(2013) 2 KLT 513 : (2013) 2 RCR(Rent) 189

Hon'ble Judges : T.R. Ramachandran Nair, J;A.V. Ramakrishna Pillai, J

Bench : Division Bench

Advocate : Shaji P. Chaly, R. Sanjith and C.S. Sindhu Krishnah, for the Appellant; G. Sreekumar (Chelur), K. Ravi (Pariyarath) and Sajith Kumar Kanghinghat, for the Respondent

Judgement

T.R. Ramachandran Nair, J.—Fixation of fair rent on an application for the same by the landlord by invoking S. 5(1) of the Kerala Buildings (Lease and Rent Control) Act (for short "the Act") has led to the respective revision petitions filed by the tenant as well as by the landlord. R.C.R. No. 182/2012 is filed by the landlord and R.C.R. No. 354/2012 is filed by the tenant. During arguments, the issue boiled down to one point, viz., the date from which the fixation of fair rent can be made applicable by the Rent Control Court.

2. The above argument has come to light in the revision petition filed by the landlord, since the grant of benefit of fixation from the date of filing of the petition, viz., 15.12.2004 has been modified by the Appellate Authority, to be effective from 6.11.2010, i.e. the date of the order passed by the Rent Control Court. The question is whether the same is a permissive mode.

3. In the Revision Petition filed by the tenant, various grounds have been stated including the challenge against the amount fixed.

4. The tenancy started in the year 1989, exactly on 3.2.1989 on a monthly rent of Rs. 800/- for the building bearing door No. 15/543 of Vadakkancherry Panchayat having an area of 250 sq.ft. The landlord claimed fixation of fair rent at the rate of Rs. 4,000/- per month operative from the date of filing of the Rent Control Petition, viz., 15.12.2004. The amount has been fixed by the Rent Control Court at Rs. 4,000/- after an analysis of the evidence adduced in the matter and after assessing the relevant criteria including the importance of the locality and other relevant factors. The same is reduced to Rs. 3,750/- by the Appellate Authority.

5. We heard Shri S.P. Chaly, learned counsel appearing for the landlord in both the cases and Shri G. Sreekumar (Chelur) appearing for the tenant in both the cases.

6. Learned counsel for the landlord, Shri S.P. Chaly submitted that the effective date of implementation of an order fixing fair rent should be the date of filing of the petition, herein, it should be from 15.12.2004 as decided by the Rent Control Court. It is submitted that the date of passing of an order being an uncertain one, the landlord cannot suffer merely because of the time lag between the date of filing and the date of order. He relied upon the judgment of a Full Bench of this Court in Kunhammad Keyi and Others Vs. Premalatha and Others, under the Act of 1959 and that of a learned Single Judge of this Court in Premier Rubber Co. v. K.S.S.I. Corporation (1980 KLT 504) as well as a decision of the Apex Court in Miran Devi Vs. Birbal Dass, which was followed in Premier Rubber Co."s case (supra).

7. Learned counsel for the tenant, Shri G. Sreekumar (Chelur) submitted that in an application for fixation of fair rent, a pre existing liability is not the one that is being considered by the Rent Control Court. Therefore only after fixing fair rent alone the liability can be fastened. Hence, if a date prior to the date of passing of the order by the Rent Control Court is taken, that means the order is being implemented retrospectively. It is submitted that unlike a suit for money where a pre existing liability is being sought to be enforced, the position is different herein. Our attention was invited to Sections 7 and 30 of the Act in this context. It is submitted that under S. 7, where the amount of the taxes and cesses payable by the landlord in respect of any building to a local authority has increased after fixation of the fair rent, such increase shall be recoverable by the landlord from the tenant and going by the proviso, the limit fixed for recovery from tenant is 5 % of the original fair rent. It is submitted that such taxes or cesses cannot be imposed retrospectively and recovered from the tenant.

8. Section 30 provides for fixation of fair rent suo motu by the court. Sub-sections (1) and (2) are relevant herein. The same are extracted below:

30. Fixation of fair rent suo motu by the court--(1) If during the course of a prosecution under this Act, it is disclosed that a landlord was receiving a rent in excess of the rent that may be fixed u/s 5, the Court before which this complaint

was filed shall, after the close of the proceedings before it, forward to the Rent Control Court the relevant extracts of the proceedings for the purpose of fixing the fair rent.

(2) The Rent Control Court, on receipt of such extracts of proceedings, shall issue notice to the concerned landlord and tenant and after giving them an opportunity of being heard, fix the fair rent of the building and the fair rent so fixed shall be deemed to be fair rent as determined u/s 5.

It is therefore submitted that even in such cases, the court cannot fix fair rent to the detriment of the landlord on a retrospective basis. Therefore, the same yardstick will apply in proceedings between a landlord and the tenant under S. 5(1) of the Act. Learned counsel therefore submitted that the order passed by the Appellate Authority is perfectly justified. With regard to the rate of future increase at 5% per annum also learned counsel submitted that the same is on a higher side. It is submitted that if the order is made enforceable from 2004, then there will be a huge liability for the tenant. It is also submitted that the tenant has got an option to vacate the premises if he finds that the fair rent fixed is not agreeable. Therefore, if the order is retrospectively applied, such option cannot be exercised by the tenant. This also will justify the fixation of fair rent from the date of order. It is further submitted by the learned counsel for the tenant that in the decision relied upon him, viz., *Miran Devi Vs. Birbal Dass*, after stating the general principles, their Lordships have held that there can be change in certain circumstances and in that case the order was found enforceable from the date of the appellate order.

9. We will first come to the relevant principles stated by the Apex Court in the decision relied upon by the learned counsel for the landlord. The said case was concerned with the claim for fixation of fair rent. In para 5 the Apex Court held as follows:

Although in terms, the fourth section of the Act does not say as to from which date the fair rent fixed has to come in force, ordinarily and generally it is to be from the date of the application. But there may be circumstances justifying the fixation of another date. We think there are special circumstances existing in this case. The Rent Controller had upheld the agreed rate of rent, the District Judge fixed the fair rent in his appellate order passed on January 16, 1969. We think in the circumstances of this case the date of the order of the District Judge would be an appropriate one for enforcement of the fair rent as fixed by us.

The Apex Court was of the view that ordinarily and generally it is to be from the date of application and another date can be justified depending upon circumstances. In that case, the Rent Control Court upheld the agreed rate of rent and the District Judge fixed the fair rent and taking note of the same the date of the order of the District Judge was taken as appropriate.

10. In *Premier Rubber Co.'s case* (1980 KLT 504) the above judgment of the Apex Court was followed. The learned Single Judge, in para 5 has held as follows:

As for the combined effect of the order dated 4.11.1969 (fixing fair rent) and the notification dated 12.6.1968, which is the first point raised by the petitioner, it appears to me that a fair rent fixation made by a competent authority under Act 2/65 could not operate for ever, notwithstanding a notification under S. 25 exempting the buildings in question from the purview of the Act. The Act itself does not give any indication as to the date from which an order fixing fair rent is to be treated as operative; but in view of the decision of the Supreme Court in *Miran Devi Vs. Birbal Dass*, , the date of filing of the application has to be taken as the relevant date.

Therefore, this Court was of the view that since the Act does not give any indication as to the date from which an order fixing fair rent is to be treated as operative, the date of filing of the application has to be taken as the relevant date. This judgment has stood the test of time and no other contrary decision of this Court has been brought to our notice.

11. The Full Bench of this Court in *Kunhammad Keyi and Others Vs. Premalatha and Others*, , relied upon by the learned counsel for the landlord, in para 3, after referring to the proviso to S. 5(3) of the Act, has observed as follows:

The proviso related to the fixing of the fair rent and it is obvious that the point of time with reference to which it uses the words, "has been fixed" is the point of time when the fair rent is determined, which, under the ordinary rule governing legal proceedings, would date back to the date when the court was moved for relief.

Therefore, the Bench was of the view that the ordinary rule governing legal proceedings, would date back to the date when the court was moved for relief. This sentence is relied on by the learned counsel for the landlord to indicate the normal rule to grant reliefs.

12. The question whether a landlord is entitled for relief as pleaded, on the basis of the date of institution of the suit, has come up for consideration in various circumstances, especially when the tenant alleges eclipse of the need by a subsequent event. In that context, the relevant principles have been examined by the Apex Court in various decisions. We will refer to some of the decisions in that context.

13. In *Kedar Nath Agrawal (Dead) and Another Vs. Dhanraji Devi (Dead) by LRs. and Another*, the relevant principles have been examined from para 16 onwards. The basic rule has been stated in para 16, which is the following:-

...the basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit or proceeding and the suit/action should be tried at all stages on the cause of action as it existed at the commencement of the suit/action....

With regard to the change of circumstances, the Apex Court laid down the principles relevant in the following words:

A court of law may take into account subsequent events inter alia in the following circumstances:

- (i) the relief claimed originally has by reason of subsequent change of circumstances become inappropriate; or
- (ii) it is necessary to take notice of subsequent events in order to shorten litigation; or
- (iii) it is necessary to do so in order to do complete justice between the parties.

From para 18 onwards their Lordships considered the various decisions governing the principles in the matter. One of the decisions referred to is *Pasupuleti Venkateswarlu Vs. The Motor and General Traders*, . Therein, in para 4 the effect of subsequent event was considered. But the basic principle referred to is the following:

It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding.

Thereafter, the question as to how a fact which has arisen after the lis has come to court and having a fundamental impact on the right to relief or the manner of moulding it, must be considered, was explained. It may not be relevant for our context.

14. *Om Prakash Gupta Vs. Ranbir B. Goyal*, is another decision referred to in para 27, wherein in para 11 it has been explained thus:

The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of the subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate; or cannot be granted; (ii) the taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise.

The ordinary rule is evident from the opening sentence itself.

15. *Pratap Rai Tanwani and Another Vs. Uttam Chand and Another*, is another decision wherein the relevant principle was examined and the said point was considered in the light of the bonafide need pleaded under the Rent Control Act itself. Therein also, the impact of subsequent events has been examined. The delay taken by the courts and its impact, if any, in the matter was considered in para 10 in the following words:

10. The judicial tardiness, for which unfortunately our system has acquired

notoriety, causes the lis to creep through the line for long long years from the start to the ultimate termini, is a malady afflicting the system. During this long interval many many events are bound to take place which might happen in relation to the parties as well as the subject-matter of the lis. If the cause of action is to be submerged in such subsequent events on account of the malady of the system, it shatters the confidence of the litigant, despite the impairment already caused.

The Apex Court, after referring to various judgments, and after adopting the view taken in *Ramesh Kumar Vs. Kesho Ram*, , has held as follows:

8. We cannot forget that while considering the bonafides of the need of the landlord the crucial date is the date of the petition. In *Ramesh Kumar v. Kesho Ram* a two -Judge Bench of this Court (M.N. Venkatachalia, J., as he then was and N.M. Kasliwal, J.) pointed out that the normal rule is that rights and obligations of the parties are to be determined as they were and when the lis commenced and the only exception is that the court is not precluded from moulding the reliefs appropriately in consideration of subsequent events provided such events had an impact on those rights and obligations. What the learned Chief Justice observed therein is this: (SCC pp. 626-27, para.6)

6. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a "cautious cognizance" of the subsequent changes of fact and law to mould the relief.

16. In the decision in *Sait Nagjee Purushotham and Co. Ltd. Vs. Vimalabai Prabhulal and Others*, which is also under the Kerala Act itself, the same question was considered along with the aspect concerning subsequent events. In para 7, the view taken in *Pratap Rai Tanwani and Another Vs. Uttam Chand and Another*, was relied upon. We extract the same hereunder:

7. In the case of *Pratap Rai Tanwani and Another Vs. Uttam Chand and Another*, it was held that the bonafide requirement of the landlord has to be seen on the date of the petition and the subsequent events intervening due to protracted litigation will not be relevant. It was held that the crucial date is the date of petition. Their Lordships further observed that the normal rule is that the rights and obligations of the parties are to be determined on the date of the petition and that subsequent events can be taken into consideration for moulding the reliefs provided such events had a material impact on those rights and obligations. It was further observed by Their Lordships that it is a stark reality that the longer is the life of the litigation the more would be the number of developments sprouting up during the long interregnum. Therefore, the courts have to take a very pragmatic approach of the matter. It is common experience

in our country that specially landlord-tenant litigation prolongs for a long period. It is true that neither can the person who has started the litigation sit idle nor can the development of the events be stopped by him. Therefore, the crucial event should be taken as on the date when the suit for eviction was filed unless the subsequent event materially changed the ground of relief.

Their Lordships were of the view that a litigation between a landlord and tenant may prolong for a long period and therefore the courts will have to take a pragmatic approach in the matter. Finally it was held that crucial event should be taken as on the date when suit for eviction was filed unless the subsequent event materially changed the ground for relief.

17. According to us, the view taken by the Apex Court in the above decisions will justify the plea raised by the learned counsel for the landlord that the normal rule that the relief should be granted as on the date of filing of the petition should govern. Only in the case of a subsequent event which has vital impact alone, the relief can be moulded. We find that a Division Bench of this Court in *Kochappan Pillai v. Chellappan* (1976 KLT 1) had also considered the same principle and has ruled that the date of filing of the petition can be taken as the safe one which is the normal rule. The view of the Bench is clear from the following paragraph:

As proviso is a part of the section itself the words "direction to a tenant to put the landlord in possession" occurring in the second proviso to S. 11(3) should mean the same direction that is referred to in the principal enacting provision in S. 11(3). Under S. 11(3) application for an order for eviction is contemplated based on the circumstances which exist on the date of the filing of the application and not on the date of its disposal. The landlord is not expected to file application in anticipation of change of circumstances in his favour by the time the application is disposed of. As the conditions mentioned in S. 11(3) have to exist on the date of the application to make the provisions of S. 11(3) applicable, to resist such an application based on the provisions of the second proviso, which is a part of S. 11(3) the facts referred to in that proviso must also exist on that date. Consequently the point of time material for determining availability of other suitable building is the date of the application under S. 11(3) and not the date of the order for eviction. Any other interpretation is likely to lead to injustice. Ordinarily an application under S. 11(3) takes a long time for disposal and by the time it is finally disposed of in revision several years would have passed after the filing of the application. In the instant case itself although the application under S. 11(3) was filed on August 19, 1963 it is being finally disposed of only now, more than 12 years after. There may have been several alternative suitable buildings in the locality for the tenant to shift in 1963 but not one now. In such a case the fault for not having shifted in 1963 to one of the alternative buildings is of the tenant and not of the landlord.

Of course, it was a case where the Division Bench was considering the availability of suitable buildings, for considering the application of the proviso to S.

11(3).But significantly, the Division Bench held that the landlord is not expected to file application in anticipation of change of circumstances in his favour, by the time his application is disposed of. Herein also, the landlord can file an application for fixation of fair rent based on the circumstances existing at the time of filing. We only observe that the various decisions have considered different aspects under the rent control legislation itself.

18. Looking from the said angle, it can be seen that the view taken by the Appellate Authority that the date of effect shall be the date of order of the court cannot be supported. Even though learned counsel for the tenant, Shri G. Sreekumar submitted that there can be distinction between a suit and a petition for fixing fair rent that in the former a pre existing liability is sought to be adjudicated and in the latter, the court is entering upon fixation of rent itself, we find that the said subtle distinction cannot help the learned counsel for the tenant. We notice that under S. 5(1) of the Act, an application for fixation of fair rent can be one filed by the tenant or the landlord. Herein the landlord is seeking fixation of fair rent after raising various pleas including the important developments in the locality and other relevant factors. All those are factors which are relevant, in the light of the decisions of this Court, especially *Edger Ferus Vs. Abraham Ittycheria*, wherein the Division Bench held that S. 5(1) of the Act will remain the statute book enabling the Rent Control Court to fix fair rent and other parameters for fixing fair rent, have also been laid down therein. For easy reference, we extract para 14 hereunder:

14. We therefore, enunciate the following principles:

1. Section 5(1) would remain in the statute book enabling the Rent Control Court to fix fair rent.
2. The claim for payment of any premium by way of pakidi in consideration of grant, renewal or continuance of tenancy is immoral and opposed to public and any agreement entered in to for payment or receipt of pakidi in consideration of grant, renewal or continuance of tenancy would be unlawful and cannot be enforced through court of law in view for the decision in *Aboobacker Vs. Vasu*, .
3. The construction of buildings and letting them out to the tenants would come within the ambit of business under Art. 19(1)(g) of the Constitution of India and hence is a fundamental right. Total prohibition in claiming enhanced rent would amount to unreasonable restriction and also would be violative of the fundamental rights of the landlords guaranteed under Art. 21 of the Constitution of India.
4. Section 116 of the Transfer of Property Act, if has the effects of imposing any restriction in revision of rent it would amount to unreasonable restriction affecting the fundamental rights guaranteed under Art. 19(1)(g) and to the extent of its inconsistency the said provision would be void under Art. 13(1) of the Constitution of the India so far as fixation of rent is concerned.

5. The judgment in John Zacharia's case (1987 (1) KLT 156), holding that even beyond the period originally stipulated, till evicted under S. 11 of the Kerala Buildings (Lease and Rent Control) Act only the agreed rent alone is payable by the tenant is not good law and to that extent it stands overruled.

6. Landlord or the tenant as the case may be, can approach the Rent Control Court for revision of rent quinquennially. Even if there is no provision for periodical revision of the rent in the rent deed even then the landlord can approach the Rent Control Court for revision of rent. We hold that the plea of continuous occupation by holding over or the protection as statutory tenant since those rights are subservient to the fundamental rights guaranteed to the landlord under Art. 19(1)(g) and 21 of the Constitution of India.

7. Rent Control Court while fixing fair rent could take note of the inflation and resultant reduction in the purchasing power of money, variations in the cost of living index in the area since commencement of the lease, demand for accommodation and availability of the buildings in the locality.

8. The cost of construction of the building including cost of labour and building materials, capital value of the entire premises in the enjoyment of the tenant inclusive of the value of the land under the actual enjoyment of the tenant whether immediately appurtenant to the building or otherwise, type of construction, locational importance, situations of the tenanted premises, ground floor, first floor etc., and other advantages and amenities, such as access to places of public importance like bus stand, railway station, educational institution, hospitals etc., would also be guiding factors.

9. The Rent Control Court will also take into consideration the prevailing rent in the locality for the same and similar accommodation. The type of construction, the amenities, general or special provided in the building, the open land attached to the building, whether residential or nonresidential are also to be borne in mind.

10. Annual rental value of the building at the time of filing the application for fair rent may also be taken as a guiding factor along with others.

11. Revision or fresh imposition of municipal taxes, cess, rate in respect of other increase in the charge of electricity or water consumption by the tenant and also by the landlord and increase on account of sufficient repairs would also be taken note of by the Rent Control Court.

12. The Rent Control Court can while resolving any rent control dispute on a application either by the landlord or tenant examine whether the rent is static and requires revision and fix fair rent accordingly permitting the parties to adduce evidence.

13. The judgment of the learned Judge in George v. Narayani (1998 (1) KLT 239) fixing fair rent while reinduction under the third proviso to S. 11(4)(iv) is affirmed.

Sub para 6 will show that the landlord or the tenant as the case may be, can approach the Rent Control Court for revision of rent quinquennially. Even if there is no provision for periodical revision of the rent in the rent deed even then the landlord can approach the Rent Control Court for revision of rent. Going by sub para 7, in fixing fair rent the Rent Control Court could take note of the inflation and resultant reduction in the purchasing power of money, variations in the cost of living index in the area since commencement of the lease, demand for accommodation and availability of the buildings in the locality. The prevailing rent in the locality for the same and similar accommodation, the type of construction, the amenities general or special, are all factors which have been specified in sub para 9.

19. In this case, these factors have been considered by both the Rent Control Court as well as by the Appellate Authority. We are not expected to reappraise the evidence since we are sitting only in revision. The relevant evidence has been considered in finding that the landlord is entitled for fixation of fair rent, as the initial rent was fixed in the year 1989 and the petition was filed on 15.12.2004. After referring to the decisions of this Court, the fair rent has been fixed by the Rent Control Court. The Appellate Authority in para 10 of the judgment, found that the area is 250 sq. ft. and Rs. 15/- per sq. ft. can be fixed as a reasonable amount. Accordingly, the amount has been fixed at Rs. 3,750/-. Periodical increase at 5% every year also is found justifiable.

20. We find that the method adopted cannot be said to be defective or unsupportable. It cannot be said to be perverse also. Therefore, we confirm the same. Even though learned counsel for the tenant submitted that the amount fixed is on a higher side, we do not agree. In fact, the tenant in the objection also, submitted that he is prepared to provide a reasonable rent which has been adverted to by the authorities.

21. We are therefore of the view that the fair rent will be as fixed by the Appellate Authority at the rate of Rs. 3,750/- per month with increase at the rate of 5% every year, as already ordered by both the authorities. We are of the view that in the light of the judgment of this Court in Premier Rubber Co.'s case (1980 KLT 504) and the other judgments of the Apex Court we have discussed above, the date of application has to be taken as the relevant date. Unlike the decision of the Apex Court in Miran Devi Vs. Birbal Dass, where the original authority did not increase the rent but the Appellate Authority has fixed the fair rent, herein it can be seen that the original authority itself has fixed the fair rent. Therefore, even though learned counsel for the tenant, Shri G. Sreekumar submitted that the Apex Court was of the view that in some cases where circumstances justify a variation, an order can be made, we are of the view that herein no other changed circumstances were there including any subsequent event justifying a variation of the normal rule as laid down by the Apex Court in Miran Devi's case (supra) and by this Court in Premier Rubber Co.'s case (supra).

Accordingly, we allow R.C.R. No. 182/2012 and hold that the order passed by the Rent Control Court will be effective from 15.12.2004. R.C.R. No. 354/2012 is consequently dismissed. No costs.