
(1996) 10 PAT CK 0004
In the Patna High Court
Case No : C.W.J.C. No. 4809 of 1996

Jainarayan Prasad Choudhary

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-10-1996

Acts Referred:

Citation : (1996) 10 PAT CK 0004

Final Decision : Dismissed

Judgement

A.K. Ganguly, J.—This writ petition has been referred to this Court by a Division Bench in view of divergence of views between two learned Single Judges on the construction of Section 8(1)(c) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 (hereinafter referred to as the said Act).

2. Before resolving the aforesaid conflict of interpretation, this Court finds that in this writ petition a declaration has been prayed to the effect that proviso to Section 8(1)(c) of the said Act is ultra vires. But there is no prayer for quashing or setting aside any order or proceeding. So it is not necessary for this Court to go over the facts as pleaded in the writ petition more than what is noted below:

3. The Petitioner claimed to be the owner of Holding No. 48/1 to Holding No. 48/25 situated at Ashok Raj Path, Opposite B.N. College, Patna in the name and style of M/s. Chaudhary Market. The said holding of the Petitioner consists of 25 shops. The annual rental value of the said holding in the year 1978-79 was Rs. 1500/- and thereafter on re-assessment, the annual rental value was assessed at Rs. 3700/-. During last annual general assessment year 1992 all the 25 shops bearing holding Nos. 48/1 to 48/25 were re-assessed and the annual rental value was, revised. The said revised rental value is subject matter of challenge in Misc. Appeal No. 71 of 1988 before the 4th Additional District Judge, Patna.

4. Various legal questions about annual rental value and imposition of tax by Patna Municipal Corporation have been stated in the writ petition but this Court is not going into those questions primarily because those questions have not been

referred to this Court and also because of the reasons that those questions are now concluded by a judgment of the Supreme Court in the case of State of Bihar v. Sachchidanand Kishore Prasad Sinha and Ors. reported in 1995 (1) P.L.J.R. 86 (S.C.)

5. In the writ petition it has been pleaded that proviso to Section 8(1)(c) of the said Act restricts the power given to the Controller under the substantive part of Section 8(1)(c) and as such it has been urged that the proviso to Section 8(1)(c) of the said Act is ultra vires Section 8(1)(c) and Rule 3 of the Bihar Buildings (Lease, Rent and Eviction) Control Rules, 1983 (hereinafter referred to as the said Rules). Those rules are, however, framed u/s 33 of the said Act which is the rule making provision of the said Act.

6. Since the controversy is over interpretation of proviso to Section 8(1)(c) to the said Act, this Court sets out the relevant portions of the Section which is as follows:

8. (1)(c) In determining the fair rent of any other building u/s 5 or 6, the Controller shall have due regard to the prevailing rates of rent in the locality for the same or similar accommodation in similar circumstances at any time during the twelve months preceding the first day of December, 1980, and to the increased cost of repairs, and in the case a building which has been constructed after that date, also to any general increase in the cost of site and building construction:

Provided that where the Controller is satisfied, on an application made to him by the landlord u/s 5, that the rent of a building referred to in this clause is low, the Controller shall, in determining the fair rent of such building to be payable by a tenant, fix the rent of the building at a figure which shall not be less than the average monthly rent actually paid for the same or similar accommodation by any tenant over the period of twelve months preceding the first day of December, 1980, increased by not more than 25 per cent of the average monthly rent so received by the landlord during the aforesaid period in addition to the enhancement, if any, on account of the increased cost of repairs or the general increase in the cost of sites and building construction, where such enhancement is admissible under the foregoing provision of this clause.

7. The two decisions in which divergence of views was expressed are (i) Bihar State Madarasa Education Board, Patna Vs. Madarasa Hanfia Arabic College Jamalia and Others, and (ii) Ram Adhin Singh Vs. The State of Bihar and others,

8. In the case of Secretary, Balika Shiksha Bhawan (supra) the learned Judge has come to the conclusion in paragraph 6 of the judgment the proviso to Section 8(1)(c) of the said Act is not happily worded but about its function the learned Judge observed, "the proviso does not provide anything more than the maximum. It does not provide for a maximum otherwise it could have simply stated that rent shall not be less than twelve months average rent payable before 1st December, 1980 and not more than 25 per cent over and above of

such rent". In paragraph 6, the learned Judge further made it clear that "I have, therefore," no doubt that proviso to Sub-section (c) of Section 8(1) only lays down the minimum that the Controller must determine by way of monthly rent where application is made to him by the landlord u/s 5 complaining that the rent being paid to him by the tenant is low". The learned Judge further held that "I, therefore, hold that there is nothing in the aforesaid proviso to hold that the Controller is not authorised to fix fair rent which is more than 75 percent of the average monthly rent paid during the period of twelve months preceding 1st December, 1980. In my view, it is open to the Controller to fix higher amount of rent by way of a fair rent having regard to the provisions of Section 8 of the Act and Rule 3 of the Rules."

9. In the later judgment in the case of Ramadhin Singh (supra) the learned Judge held that "the decision in the case of Secretary, Balika Shiksha Bhawan (supra) was decided "per incuriam" in view of some discrepancy between the authorised Hindi text and English text. The learned Judge rendering the judgment in the case of Ramadhin Singh (supra) in paragraph 20 of the judgment came to the conclusion "that the fair rent cannot be enhanced by more than 25 percent of the average rent fixed with regard to the cut off date prescribed u/s 8(1)(c) of the said Act."

10. Therefore, the divergence between the two views is apparent.

11. To my mind before construing the provision of Section 8(1)(c) of the said Act and its proviso, the Court must take into consideration the concept of fair rent and the definition given to the same under the Act. The provision of Section 8 merely deals with the matters which are to be considered in determining fair rent. Fair rent has been defined u/s 2(e) of the said Act which is as follows:

(e) "fair rent" means the rent of a building determined or re-determined under Sections 5, 6 or 7.

12. The said definition refers to Sections 5, 6 and 7. Section 5 of the said Act talks of determination of fair rent of building in occupation of the tenant. The provisions of Section 5 of the said Act are set out below:

5. Determination of fair rent of buildings in occupation of tenants.-

(1) When, on application by the landlord or by the tenant in possession of a building or otherwise, the Controller has reason to believe that the rent of that building is low or excessive, he shall hold a summary enquiry and record a finding.

(2) If, on a consideration of all the circumstances of the case, including any amount paid by the tenant by way of premium or any other like sum in addition to the rent, the Controller is satisfied that the rent of the building is low or excessive he shall determine the fair rent for such building.

13. Provisions of Section 6 of the said Act deal with determination of fair rent of

a building not in occupation of tenant and Section 7 of the said Act deals with redetermination of fair rent in certain cases.

14. Apart from the aforesaid statutory definition, the concept of fair rent obviously presupposes determination of a rent which is fair both to the landlord and tenant. In rent legislation relating to regulated tenancy "it is conceived that a rent is not a fair rent unless it is fair to the landlord as well as to the tenant". (See Woodfall's Law of Landlord and Tenant, 23rd Volume, page 3073, 28th Edition, Sweet and Maxwell).

15. In Hill and Redman's Law of Landlord and Tenant, 15th Edition, Butterworths, the learned authors while giving their comment on Section 46 of the Rent Act, 1965 expressed the same view at page 965 of the treatise. The learned authors have said "that the rent should be fair to the landlord as well as to the tenant and one method of seeing what is fair to the landlord is to examine as to what would be a fair return on the capital value of his property and fixing rent accordingly."

16. In almost all the developed and developing countries legislature has stepped into control and regulate the incidence of tenancy and matters of fixation of rent by various legislations having regard to over population and housing problems in most of the cities and semi urban areas. In India series of legislations have been made by different States with the dominant intention of controlling through legislation the basis for determination of fair rent. And for such determination of fair rent, quasi judicial tribunals with all the trappings of Court have been set up with various tiers of adjudication-both appellate and revisional. The Act is one such law.

17. In consonance with the concept of fair rent a right has been given under the Act to both the landlord and tenant u/s 5 of the Act to make an application to the Controller for determination of fair rent. In deciding such application, the Controller has been given complete discretion in the matter to initiate proceeding. If the Controller has reasons to believe that the rent of the building is either low or excessive and then the Controller shall hold a summary inquiry and record a finding.

18. Section 8 merely enumerates the matters to be considered in determination of fair rent.

19. Therefore, the construction of Section 8(1)(c) of the Act including the proviso as given by the learned Judge in Balika Shiksha Bhawan (supra) to the effect that the Controller is authorised to fix only the minimum rent is inconsistent with (i) the concept of fair rent and also contrary to (ii) Section 5 of the said Act which authorises the Controller to determine the rent of a building if he has reasons to believe that it is either excessive or low."

20. I am of the view that when Section 5 of the said Act itself shows that the Controller has the jurisdiction under the Act to determine fair rent of a building

about which he has reasons to believe that the rent is either low or excessive, the Controller while exercising power u/s 8(1)(c) of the Act has jurisdiction to fix both the maximum and minimum of the rent as the fair rent of the premises within the guidelines under the Act.

21. The long title of the Act shows that it is enacted for regulating the letting of building and the rent of such building and to prevent un-reasonable eviction of tenants. So the Act is a regulatory piece of legislation and regulates various aspect of tenancies and one of them is fixation of rent. Therefore, I hold that Section 8(1)(c) of the said Act read with the proviso authorises the Controller to fix both the maximum and minimum of fair rent within the ceiling prescribed by law. The right of the Controller to fix the fair rent has to be within ceiling prescribed by law is also clear from his power to re-determine fair rent after its determination u/s 5 or 6 of the Act. This is clear from a reading of Section 7(2) of the said Act. Section 7 of the said Act is set out below:

7. Re-determination of fair rent in certain cases. -(1) If at any time after the fair rent of a building has been determined u/s 5 or 6 it appears to the Controller that subsequent to such determination some addition, improvement or alteration not included in the repairs, which the landlord is bound to make under any law, contract or custom, has been made to the building at the landlord's expense, the Controller may after making such inquiry, as he thinks fit, re-determine the fair rent of the building.

(2) Any increase in the fair rent allowed under Sub-section (1) shall not in any month exceed 5/8 per cent of the cost of addition, improvement or alteration.

22. One would arrive at the same conclusion if Rule 3 of the Rules framed u/s 33 of the Act for carrying out the purposes of the Act is perused. In this connection, rules 3(v) and 3(vi) which are relevant are set out below:

3(v). If at any time after the first fixation of standard rent the market price of the land and the cost of construction increases by more than twenty five per cent on the basis of the value of the land and the cost of construction estimated at the subsequent prevailing market rates, then the landlord shall be entitled to have the monthly rent increased by an amount not exceeding one-twelfth of the seven-half per cent of the additional increase in the original market price of the land and the cost of construction from the date as may be determined in the manner prescribed subject to a maximum of fifty per cent of the original standard rent.

(vi) If at any time after the standard rent is fixed under the provisions of the Act any addition, improvement or alteration (not being repairs) is effected at the landlords expenses which was not taken into consideration in fixing the standard rent, then the landlord shall be entitled to have the monthly rent increased by an amount not exceeding one-twelfth or seven-half per cent per annum of the cost of such addition, improvement or alteration with effect from the date on which the addition, improvement or alteration was completed.

23. Rule 3(iii) makes it clear that in determination of fair rent the Controller will follow the provisions of the Act and in case of any doubt or conflict between the Act and the rules, the provisions of the Act will prevail.

24. This provision further emphasises the legislative intent of control envisaged under the Act over the Controller's power to determine fair rent. So in my view it is writ large over the various provisions of the Act that the jurisdiction of the Controller to fix fair rent is a controlled and regulated one.

25. In the context of such overwhelming legislative intent, the finding of the learned Judge in *Balika Shiksha Bhawan* (supra) that the Controller is authorised to fix only the minimum and the Controller can fix any amount of rent which may be higher than 25 per cent of the average monthly rent paid during the period of 12 months preceding 1st December, 1980 by way of fair rent (paragraph 6 of the judgment) is, if I may say so, with respect, erroneous. Such a reading has not been made on a harmonious construction of the Act.

26. If I may say, with profound respect, to the learned Judge, that His Lordship while construing Section 8(1)(c) of the Act with the proviso has unfortunately overlooked the entire scheme of the Act and also the provision of Sections 5, 6 and 7 of the Act and also the concept of fair rent the fixation of which is legislatively controlled under the Act which itself is a regulatory and welfare measure. So the interpretation given to Section 8(1)(c) read with the proviso to the said Act has unfortunately become a truncated one. Thus I have the misfortune to differ with the reading of Section 8(1)(c) of the Act as given in *Balika Shiksha Bhawan* (supra) by the learned Judge for whose judgment I always have a very high respect.

27. This Court is also of the view that the learned Judge rendering the judgment in the case of *Ramadhin Singh* (supra) has, with respect, correctly interpreted the import of Section 8(1)(c) of the Act by holding that the said Section authorises the Controller to fix by way of fair rent the maximum within the ceiling limit of 25 per cent enhancement.

28. Now the question which survives is whether the proviso to Section 8(1)(c) of the Act is ultra vires Section 8(1)(c) of the said Act.

30. This Court fails to appreciate this argument. It must be kept in mind that Section 8(1)(c) of the said Act read with the proviso is not a piece of subordinate legislation nor is it delegated legislation. But it represents the sovereign will of the legislature. It can be declared bad and its vires can be challenged only on very limited grounds, namely, if it violates the national character especially, part III of the Constitution, or any other provision relating to legislative competence as enumerated in the Constitution. But here the challenge is not on those lines. Here the challenge is that the proviso by limiting the power of the Controller to fix the maximum rent of a building by way of fair rent upto a certain limit has curtailed the power given in substantive part of the Section to fix fair rent. Thus it puts an embargo and a rider on the main provision and is, therefore, ultra vires

the main provision.

31. A proviso to a Section has various functions. Some times a proviso may be simply an exception to what has been said before it in the substantive portion, some time it may be contrary to the substantive portion. At times a proviso may widen the scope of substantive part or it may narrow down, the scope or it may clarify or quieten a doubt in the substantive portion. Even at times it may be treated as a repeal of the substantive provision. But as the proviso reflects the last will of the legislation, it must prevail. In an old English case in *Attorney General v. Governor and Co. of Chelsea Waterworks*, reported in 94 ER 716, it has been held "that where the proviso of an Act of Parliament is directly repugnant to the purview; the proviso shall stand and be a repeal of the purview as it speaks the last intention of the makers". The old ease has been accepted as an authority both by Craies on Statute Law, 17th Edition page 200 and also Francis Benion on Statutory Interpretation, 2nd Edition page 809 and by G.P. Singh in his Principles of Statutory Interpretation, 5th Edition, page 144.

32. Therefore assuming, that the proviso in this case is inconsistent with the main provision, even then it cannot be declared ultra vires.

33. Apart from that the entire enactment with the proviso has to be read as a whole. This is quite clear, based as it is, on the high authority of the House of Lords in the case of *Jennings v. Kally* reported in 1940 A.C. 206. At page 229 of the report. Lord Wright expressed the proper course to construe a proviso in these words:

The proper course is to apply the broad general ride of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest, I do not think that there is any other rule even, in the case of a proviso in the strictest or narrowest sense.

34. Here looking at various parts of the Act relating to determination of fair rent and gathering the intention of the legislature from all those parts, this proviso must be construed as a substantive part of the enactment. Even though it is in the form of a proviso, it was intended as providing a substantive guideline to the Controller in the matter of fixation of both the maximum and minimum limit of the fair rent.

35. The Supreme Court has accepted this mode of construing a proviso in the case of *Commissioner of Income Tax Kerala and Coimbatore Vs. Krishna Warriar*, At page 63 of the report, Subba Rao, J., (as His Lordship then was) quoting Maxwell stated this principle in these words:

It is not an inflexible rule of construction that a proviso in a statute should always be read as a limitation upon the effect of the main enactment. Generally the natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the substantive provision as well as the proviso may establish that the proviso is not a qualifying clause of the

main provision but is in itself a substantive provision. In the words of Maxwell, "the true principle is that the sound view of the enacting clause, the saving clause and the proviso taken and construed together is to prevail. (Emphasis added).

36. Going by those principles, as I must, I hold that the proviso here must be construed as a substantive provision and the entire Section 8(1)(c) including the proviso must be read as an operative component of the Act. The proviso, therefore, cannot be read severed from the rest of the Section. So the argument that the proviso is ultra vires the substantive part of the Section is opposed to all canons and principles of statutory interpretation and must be rejected.

37. An argument has been rather feebly advanced that if the aforesaid construction is put to the proviso in that event Section 8(1)(c) of the Act is likely to cause some hardship to the landlord. But the Court has very little to do with the legislative wisdom in fixing the criteria of determination of fair rent. In *Sant Lal Bharti Vs. State of Punjab*, Section 4 of East Punjab Urban Rent Restriction Act, 1949 was challenged as violative of Article 14 as in that section rent prevalent for 12 months prior to January 1, 1939 was fixed as the basis for determination of fair rent. The said challenge was turned down, by the Supreme Court in paragraph 4, at page 370 of the report with the following observation:

We are unable to accept this contention because each legislature in the several States has provided the method of determination of fair rent on the basis of legal conditions, as judged to be, by each such legislature. It is well settled that the legislative wisdom of such legislation is not a ground for which the validity of the Act can be challenged.

38. In this case in the Act, which is Bihar Act 4 of 1983, rent for 12 months preceding 1st of December, 1980 has been accepted as the basis and the same cannot, therefore, be said to be either harsh or un-reasonable.

39. For the reasons indicated above, I hold that the declaration sought for in the writ petition cannot be given and the writ petition being devoid of merit, is dismissed. There will be no order as to cost.