

(1986) 03 BOM CK 0004

In the Bombay High Court

Case No : Writ Petition No. 2694 of 1984 and Letters Patent Appeal No. 15 of 1980

Omprakash and Others etc.

APPELLANT

Vs

Fattelal Maganala and Company and Another etc.

RESPONDENT

Date of Decision : 20-03-1986

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 1987 Bom 3

Hon'ble Judges : V.A. Mohta, J;B.G. Deo, J

Bench : Division Bench

Advocate : G.B. Lohia and S.C. Mehadia, for the Appellant; V.G. Palshikar, A.S. Bobde, S.M. Laddha and A.D. Sonak, A.G., B.P. Jaiswal and M.M. Gadkar, Asstt, Govt Pleader, for the Respondent

Judgement

V.A. Mohta, J.—Following the ratio in the case of motor General Traders and another v. State of Andhra Pradesh AIR 1984 Sc 121 , a Division Bench of this Court in the case of the Prabhakar tanbaji Prabhakar and Another etc. Vs. State of Maharashtra and Others, has declared as unconstitutional the notification dated 6th Feb. 1952 issued under Cl 30 of the Central Provinces and Berar Letting of Houses and Rent Control Order 1949 (The HRC Order ") by which houses used for residential purposes constructed on a site lying vacant on 1st Jan. 1951 or on a site made vacant on or after that date by demolition of such structure standing on such site were exempted from the operation of the HRC Order on the ground that indefinite continuation of discriminatory and, therefore, hit by Art. 14 of the Constitution Point is whether the ratio of those decisions can be extended also to indefinite continuation of outer limits in the matter of fixation of fair rent with relation to cut off date - 1st April 1940 - mentioned in Cls 6 (1) and 7 (1) of the HRC Order.

2. We will first notice the principle laid down in the case of Motor General Traders AIR 1984 SC 121 (supra) and its background Sec. 32 (B) of the A, P. Buildings

(Lease Rent and Eviction) Control Act (15 of 1960) exempted from the provisions of the Said Act any building constructed after 26-8-1957. Point arose as to whether there was any valid justification for continuation of that exemption for years together despite changed conditions. Accepting that when the Act was brought into force 1960 exemption to houses constructed 3 years before was valid, it is held.

"What may be unobjectionable as a transitional or temporary measure at an initial stage can still become discriminatory and hence violative of Art. 14 of the Constitution if it is persisted of over a long period without any justification..... The long period that has elapsed after the passing of the Act itself serves as a crucial factor in deciding the question whether the impugned law has become discriminatory or not because the ground on which the classification of buildings into two categories is made is not a historical or geographical one but is an economic one..... After, giving our anxious consideration to the learned arguments addressed before us, we are of the view that clause (b) of Sec. 32 of the Act should be declared as violative of Art. 14 of the Constitution because the continuance of that provision of the Privileged class of landlords without any rational basis as the incentive to build which provided class of landlords without any rational basis as the incentive to build which provided a nexus for reasonable classification of such class of landlord no longer exists by lapse of time in the case of the majority of such landlords. There is no reason why after all these years they should not be brought at par with other landlords who are subject to the restrictions imposed by the Act in the matter of eviction of tenants and control of rents." (para 16, 23, and 30)

the passage in para 30 has been quoted with approval in the recent case of Mohinder Kumar and Others Vs. State of Haryana and Another,

3. In the case of Prabhakar and Another etc. Vs. State of Maharashtra and Others, short legislative history of the C. P. & Berar Regulation of Letting of Accommodation Act 1946 (the Act) under which the HRC order is made has been noticed. It is stated:-

"To appreciate this point it would be necessary first to trace in short the background of this legislation. The following Statement of Objects and Reasons of the Central Provinces and Berar Regulation of Letting of Accommodation Bill 1946 (Bill No. 7 of 1946) prepared on 15 Aug 1946 and which emerged as the Act speaks for itself:

"The influx of a large population to towns as a result of war condition necessitated the promulgation of the Central Provinces and Berar House Rent Control Order 12942, under the Defence of India Rules. The Defence of India Rules, will lapse at the end of Sept, 1946. The abnormal conditions created by the war still persist and are not likely to subside for some time. Rent Control measures will therefore continue to be necessary and Government proposes to take powers for regulating house rents in urban areas by new legislation. It is proposed to

keep the law in operation for a limited period of three years. If normal conditions return earlier, steps will be taken to repeal it."

Essentially and clearly the Act is a war time measure intended to operate for a limited period. Conditions favourable to its repeal were never restored with the result the Act became a permanent feature. Sec 2 of the Act empowers the Provincial government to provide by general or special Order for regulation the letting and subletting of any accommodation or class of accommodation in areas of the specified and in particular-

for controlling the rents for such accommodation either generally or when let to specified persons or class of persons or in specified circumstances.

for preventing the eviction of tenants of sub-tenants from such accommodation in specified circumstances.

for requiring such accommodation to be let either generally or to specified persons or in specified circumstances and.

For collecting any information or statistics with a view to regulating any of the aforesaid matters.

The Act has barely nine sections. In exercise of the authority conferred by the above provisions, the Central Provinces and Berar Collection of Information and Letting of Houses Order, 1946 and Central Provinces and Berar House Rent Control Order, 1947, and in 1949 the HRC Order came to be issued under the General Administration Department No. 3730-3141- 11 dated 26th July 1949."

4. In these matters it is necessary also to notice the provisions relating to fixation of fair rent right from the year 1942 when the first Order known as "the C. P. & Berar House Rent Control Order 1942" was made under R. 18 of the Defence of India Rules, 1939. Cls 3 to 7 of the said Order dealt with the subject of determination of fair rent. They read as under:--

3. When on a written complaint or otherwise, the Controller has reason to believe that the rent of any house within the area to which this order is extended is excessive he shall hold a summary enquiry and record a finding.

4. If on a consideration of all the circumstances of the case including any amount paid or to be paid by the tenant by way of premium or any other like sum in addition to rent the Controller finds that the rent of the house is excessive he shall determine the fair rent to be charged for the house.

5. In fixing the fair rent under clause 4 the Controller shall have due regard to the prevailing rates of rent of the same or similar accommodation in similar circumstances during the twelve months prior to the 1st April 1940 and to the rental value as entered in the municipal or local board assessment registers as the case may be relating to that period, and in the case of a house which has been constructed after that date, also to any general increase in the cost of sites and building construction.

6. When the Controller has determined the fair rent of a house-
the landlord shall not charge any rent in excess of such fair rent.

any agreement for the payment of rent in excess of such fair rent shall be null and void in respect of such excess and shall be construed as if it was an agreement for payment of the said fair rent:

any sum in excess of such fair rent paid, whether before or after the commencement of this Order, in respect of residence after the commencement of this Order shall be refunded to the person by whom it was paid, or at the option of such person. Otherwise adjusted.

7. (a) After the commencement of this Order an increase in rent shall be permissible only where some additional improvement or alteration, not included in necessary repair or repairs which are usually made to houses in the area to which this order is extended, had been carried out at the landlord's expense since the rent was fixed.

(b) Any such increases in rent shall not exceed 7 per cent per annum on the cost of such additional improvement or alteration. And shall not be chargeable until such additional improvement or alteration had been completed.

If a landlord of a house had on the date on which this Order comes into force been charging rent for such inclusive of (a) latrine or conservancy tax (b) a tax for the construction and maintenance of public latrine or (c) a water rate and if the amount of any such tax or rate is enhanced on or after the aforesaid date, then the landlord may notwithstanding anything contained in subclauses (a) and (b) increase the amount of the rent so charged by an amount equal to the sum by which such tax or rate is enhanced.

Any dispute between the landlord and the tenant in regard to any increase or rent claimed under this clause shall be decided by the Controller.

That Order was published in C. P. and Berar Gazette Extraordinary dated 31st March 1942 and brought into force at once. In Oct. 1942, there were minor amendments to Cl. 6 which need not be noticed. Sec 3 of the Act provided for continuation of orders made under the Dentence of India Rules. In exercise of power conferred by S. 2 of the Act the C. P. and Berar Collection of Information and letting of House Order, 1946 was made and published in the C. P. and Berar Gazette dated 18-10-1946 Part 1. Second Order under the Act known as the C. P. and Berar House Rent control Order 1947 was published in C. P. and Berar Gazette Extraordinary dated 11-1-1947. The HRC Order is the third order under Act. By Cl. 31 (1) of the HRC Order the two earlier Orders of 1946 and 1947 were repealed with usual saving provision contained in Cl. 31 (2). The HRC Order was amended in 21-11-1952 by which Cls. 3-A and 7-A were added and consequential amendments made in Cls. 5, 3 to 9 as they stand today read thus:--

3. For any area within his jurisdiction to which this chapter is extended the collector shall appoint an officer being a gazetted officer to be a controller.

3. A-0n or after steh 1sr Dec 1952 no landlord shall demand or receive and no tenant shall pay and premium is cash or kind as a condition precedent of letting a house or taking of a house on rent.

4. When on a written applicant by the landlord or tenant the Controller has reason to believe that the rent of any house within his jurisdiction is insufficient or excessive as the case may be he shall hold such enquire as may be an sary and record a finding.

5. If, on a consideration of the circumstances of the case, including any amount paid (before the 1st Dec 1952) by the tenant by way of premium or any other like sum in addition to rent the controller finds that the rent of the house is insufficient or excessive as the case may be he shall determine the fair rent to be charged for the house.

6(1) In determining the rent under cl. 5 of a house constructed before the 1st April 1940 and occupied wholly or mainly for purpose of residence the controller shall have due regard to the prevailing rates or rent for the same or similar house in similar circumstances during the twelve months immediately before that date and to the rental value as entered in the Municipal or Local Board Assessment Registers as the case may be, relating to that period and shall increase the rent so determined by 12 per cent if he is satisfied that the house has been maintained by the landlord in a proper state of repair.

(2) In determining the fair rent under clause 5 of the house constructed after the 1st April 1940 and occupied wholly or mainly for purpose of residence the controller shall have due regard to the prevailing rates of rent of the same or a similar house in similar circumstances and also to any general increase in the cost of materials and building construction.

7(1) In determining the fair rent under clause 5 of house constructed before the 1st April 1940 and occupied wholly and mainly for non-residential purpose, the Controller shall have due regard to the prevailing rates of rent for the same or a similar house in similar circumstances during the twelve months immediately before that date and may after considering any general rise in the rental values for business or other similar purpose increase the rent so determined up to 50 per cent if he is satisfied that the house had been maintained by the landlord in a proper state of repair;

Provided that that where a house had been let for educational purpose the increase shall not exceed 12 per cent.

(2) In determining the fair rent under clause 5 of house constructed after the 1st April 1940 and occupied wholly or mainly for residential purpose, the Controller shall have due regard to the prevailing rates of rent for the same or a similar house for similar purpose and also any general increase in the cost of site

and building construction.

7-A In the case of a house constructed before the 2st April 1940 of which the fair rent has not been determined the landlord may with the consent of the tenant increase the rent within the limits of the increase allowed under sub-clause (1) of clause 6 or clause 7, as the case may be, and the rent so agreed shall be subject to any order that may be made by the Controller in pursuance of clauses 4, 5, 6, 7 and 8, be deemed to be fair rent for the purposes of this order.

8. subject to the provisions of clauses 9, 10 and 11, when the controller has determined the fair rent of the house.

the landlord shall not claim or receive any premium or other like sum in addition to rent, or any rent in excess of such fair rent; but the landlord may stipulate for the payment of such rent in advance each month;

any agreement for the payment of any sum in addition to rent or of rent in excess of such fair rent shall be null and void in respect of such addition or excess and shall be construed as if it were an agreement for the payment of the fair rent.

any sum paid in excess of or short of fair rent from the date of the filing of application before the Controller to the date on which the fair rent is determined shall be refunded by the landlord or paid by the tenant as the case may be, or may otherwise be adjusted by mutual agreement.

9. After an order determining a fair rent has been passed, the landlord may increase the rent so determined only where some addition improvement or alteration not included in necessary repairs or repairs which are usually made to houses in the area to which this chapter is extended has been carried out at the landlord's expense:

Provided that such increase shall not exceed 7 per cent per annum on the cost of such addition improvement or alteration and shall be chargeable only from the date such addition improvement or alteration is complete.

We may mention that Cls. 6 and 7 of the HRC Order are virtual reproduction of the relevant provisions of Order of 1947 but which first time distinguish between houses constructed prior to 1st April 1940 and after was made for the purposes of determination of fair rent also concept of different permissible increases and 50% in respect of residential houses was introduced. Permissible increase in respect of houses let out for educational purposes which was 200% in the Order of 1947 was however reduced to 12% under the HRC Order.

5. What follows from the above legislative background is.

That the Defence of India Rules under which the Order of 1942 was made were to lapse at the end of Sept. 1946 in operation initially for a limited period of three years only and that outer limit for fixation of fair rent was for the first time provided in the Order of 1947.

6. Now, it is apparent that in the year 1942 intention was to bring all old houses constructed prior to 1st April 1940 at par for determination of their rental value for the purposes of fixation of fair rent. The reason must be that rents prior to that date were meagre and uneconomic and the landlords should be permitted to get fair rent fixed at higher rate. After all right to get fair rent determined is given both of landlord and tenant. In 1947 concept of permissible increase up to an outer limit (12 or 50 as the case may be depending upon the use) in respect of houses constructed on or before 1st April 1940 was introduced. It is quite obvious that not of then increase in rental value of the urban properties had been taken. Period subsequent to 1st April 1940 had been a period of inflation in rental values of urban properties. Between 1947 and 1949 increase was not much as a result the same outer limit continued. Originally the Act was to last only for a limited period of three years. Conditions favourable to its repeal did not return as a result the Act has continued and so also the HRC Order made under it. The graph of rental values of real estate in general and urban areas in particular has been continuously showing upward trend and in the recent past it has reached unimaginably high level. Judicial notice of these notoriously be taken. Indeed that position is fairly not disputed before us. Now legal position as it emerges today is that all houses are governed by the HRC Order as a result fair rent of a house constructed in 1986 can be determined on the basis of its today's rental value whereas today's rental value is totally irrelevant of fixation of rental value is totally irrelevant for fixation of fair rent in respect of houses constructed on or before the cut off date under the circumstances does not indefinite continuation of the old rates of outer limit in the matter of fixation of fair rent with relation to houses constructed on or before the cut off date mentioned in a measure which was essentially intended to be transitory and for a fixed period found arbitrary and without any justification whatsoever? It may be mentioned in this connection that even the maintenance of old houses from the rent received or recoverable within permissible limits is nearly an impossibility in many cases. In this connection mandatory obligations cast on landlord to maintain a house in proper state of affairs cast By Cl. 16 of the HRC Order may be noticed Cl 16 reads:--

"(1) If a landlord fails to make necessary repairs to a house electric installation or water connections within a reasonable time after notice given by the tenant the Controller may, by an order made on an application by the tenant containing, inter alia an approximate estimate of expenses required for the repairs. Direct the such repairs as may be specified in the order may be made by the tenant and the cost thereof deducted from the rent payable by him to the landlord.

(2) If the Controller on an application by the tenant is satisfied that the house requires repairs urgently he may, after due notice to the landlord direct that such repairs as may be specified in the order may be made by the tenant and the cost thereof deducted from the rent payable by him to the landlord,

(3) No application under Sub-clause (1) or sub-clause (2) shall be entertained by the Controller from a tenant who is in arrears of rent for an aggregate period

of three months."

In *Prabhakar and Another etc. Vs. State of Maharashtra and Others*, it has been already noticed that the HRC Order had become completely outdated and continues to..... into account the changed conditions after 1949 and the felt necessities of time. In our judgement therefore the ratio of *Motor General Trader AIR 1984 121* applies to Cls. 6 (1) and 7 (1) of the HRC Order also and hence they are declared violative of Art 14 and are struck down as such.

7. We must make it clear that we see nothing basically wrong in initial fixing of a particular outer limit with relation to a particular cut off date. What gives blow to the validity is indefinite continuation of the formula without any justification despite wholly changed circumstances during a long span of time or which judicial notice can be taken, There was debate before us as to what point of time does the terminology "prevailing rate of rent" use in Cl. 6 and 7 connote. This Court in *Special Civil Application No. 150 of 1970* decided on 26 July 1971 *Gulabrao v. Devidas Wakare* 1971 Mh LJ 75 has taken a view that it connotes the date of application for fixation of fair rent. We consider it unnecessary to go into that controversy. Equally unnecessary is the controversy as to whether 12 and 50% increase mentioned in the clauses represent the cost of repairs or the general rise of rental values; though in our prima facie view the increase represents the rise in rental value and not the cost of repairs. That percentage has no nexus with the cost of repairs. Maintenance in a proper state of affairs of the property is mentioned merely as a condition precedent of entitlement to increase. In this connection useful reference may be made to Cls 9 and 10 which provide for additional permissible increases—one in the case of amount etc and the other in case of increase in taxes in a given set of circumstances.

8. Our attention was invited to the case of *Roshan Lal Mehra Vs. Ishwar Das*, in which question arose as to whether providing two different forums for determination of fair rent in respect of old and new houses in the Delhi and Ajmer Merwara Rent Control Act 1947 was violative of Art. 14, The said act was brought into force on 24-3-1947 and applies only to houses completed before that date. In Sept. 1947 Sec. 7-A along with Schedule IV was introduced by an amendment bringing into the purview of the Act even buildings constructed after 24-3-1947 While under the unamended Act the Courts were empowered to determine standard rent in respect of houses to which it was originally applicable, the authorization to determine standard rent in respect of the new houses was given under Schedule IV to the Rent Controller. Supreme Court considered the background and scheme of that Act and held that criteria for fixation of standard rent for both new and old houses were by and large the same and hence Art, 14 and not attracted. Supreme Court in this connection recorded approval to the following observations of the Full Bench of the Punjab High Court in the case of *G.D. Soni Vs. S.N. Bhalla*,

"For these reasons I am of the opinion that the criterion for the fixation of standard rent for new and old buildings is substantially the same the does not

violate Art. 14 of the Constitution and there is no valid reason for coming to the conclusion that the standard rent of old and new buildings of the same type and in the same locality would necessarily be different. The first ground therefore fails and is rejected."

In this background it is difficult to see how the aforesaid ratio can apply to the controversy at hand. In this case main issue is about validity of indefinite continuation of outer limit for fixation of fair rent in the context of cut off date of 1940. Moreover we are not concerned with the forum and/or procedure but with the criterion for determination of fair rent which unlike the Delhi and Ajmer Merwara Rent Control Act is quite different in respect of the old that new houses in the HRC Order. The schemes of the two enactments are entirely different. It will not out be of place to take note of the fact under HRC Order the term "Fair rent" is not even defined.

9. It is contended that as a result of striking down Cls. 6 (1) and 7(1) violative of Art 14, the whole HRC Order or in any case whole Chapter relating to fixation of rent should be struck down. We do not agree. The HRC Order deals with many facets of fair rent is but one of them and is a separate part of the scheme. Even different provisions relating to fixation of fair rent are separable. Cl. 4 refers to the width of power to determine fair rent, Cl.5 to the mechanics of determination and Cls. 6 and 7 to the norms on the basis of which determination is to take place. It is not our view that in such a social legislative fair rent cannot be legally determined. Indeed in our view it is necessary to do so. We have found fault merely with the norms of fixation and nothing else. Those provisions are Cls. 6, 7 and 7-A. However, it does seem to us that these provisions are inextricably mixed up with each other and are inseparable. If Cls. 6(1) and 7(1) are expunged the remainder cannot be enforced without making alterations and modifications. To make such alteration would mean judicial legislation which is impermissible. An inevitable result. Cls. 6 (2) 7(2) and 7-A are also struck down as unconstitutional along with Cls. 6 (1) and 7(1).

10. In the view we have taken it is unnecessary to consider whether Art. 137 of the Limitation Act applies to proceedings for fixation of fair rent or whether applications can be dismissed on the sole ground of "staleness"

11. Undisputed positions of facts before us are that in respect of a house in Writ Petition No. 2694 of 1984, Cl 7 910 applies and in respect of house in Letters Patent Appeal No. 15 of 1980 Cl., & 9") applies. Writ Petition is against the preliminary order relating to maintainability or application for fixation of fair rent whereas Letter Patent Appeal arises out of an order of determination of fair rent. Needless to mention that petitioners/appellants are landlords. As a necessary consequence of striking down Cls. 6, 7, 7-A as ultra vires the proceedings filed for determination of fair rent in both these matters and so also the orders passed therein are quashed and set aside. Both the writ petition as well LPA are allowed. As. Pure question of law has been raised in these matters we choose not to make any order as to costs.

12. Needless to mention that the State Governments has ample power to fix appropriate norms for fixation of fair rent and substitute Cls. 7 and 7-A by appropriate clauses. We do repeat our hope and trust that decision in respect of the HRC Order in general and relevant provisions in particular will be taken soon by the State Government.

13. Order accordingly.