

(2011) 09 AP CK 0091

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 3294 of 2006

Rayapuraju Venkatarama Rao (Died per LRs) Rayapuraju
Rajender Prasad and another

APPELLANT

Vs

Gangadharan Nair (Gangadharan Nambiar)

RESPONDENT

Date of Decision : 30-09-2011

Acts Referred:

Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 — Section 7,
7(1), 7(2), 7(3)
Transfer of Property Act, 1882 — Section 105

Citation : (2011) 09 AP CK 0091

Hon'ble Judges : B. Chandra Kumar, J

Bench : Single Bench

Advocate : J. Nataraja Sarma, for the Appellant; K. Pramod, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Sri. Justice B. Chandra Kumar

1. This revision is directed against the order dated 05.06.2006 passed in R.A. No.180 of 2002 by the Additional Chief Judge, City Small Causes Court, Hyderabad, whereby and whereunder the eviction order passed by the I Additional Rent Controller in R.C. No.343 of 1999, dated 26.04.2002 was set aside and dismissed the eviction petition in toto.

2. The parties hereinafter will be referred to as they are arrayed before the Rent Controller for the sake of convenience.

3. The case of the petitioner/landlord, in nutshell, is that he is the owner of the premises bearing No.3-2-844/5 situated at Kachiguda, Hyderabad. The respondent is the tenant of the said premises. The agreed monthly rent is Rs. 950/- per month and the same is payable on or before 5th of every succeeding month. A written lease deed was executed on 27.12.1992. The petitioner's grand son Dr. Ajay Kumar is the dentist and he passed BDS in January, 1997. He

wanted to start a clinic in the premises let out to the respondent and the petitioner issued a letter dated 21-12-1998 requesting the respondent to vacate the premises. Again another notice was issued on 07.04.1999. After receiving the said notice, the respondent has issued a cheque for Rs. 3,800/- towards four months rent with letter dated 28.05.1999 stating that the amount is towards the rent for the months from February to May, 1999. The petitioner/landlord adjusted the said amount towards the rent for the months of November, 1998 to February, 1999 and the rent is due from March 1999 onwards. Thus, the petitioner sought eviction of the respondent both on the grounds of willful default and bona fide requirement.

4. The respondent filed counter. His specific case is that he has deposited an amount of Rs. 40,000/- with the petitioner towards security deposit at the time of inception of tenancy. He has sent a cheque for Rs. 3,800/- towards rent for the months from February to May, 1999, and therefore he is not due for any period. Therefore, the contention of the petitioner that he is due for the rent from March, 1999 onwards after adjustment is not correct. The grand son of the petitioner was not qualified by the date of filing of eviction petition and there are no bona fides in the claim of the petitioner.

5. During the pendency of the proceedings, the petitioner died and his legal heirs are brought on record. During the pendency of the eviction proceedings, the mulgi Nos.1, 3 and 6 fell vacant and the legal heirs of the original landlord have been in possession of the same. Mulgi No.3-2-844/1 is even now vacant and the size of said Mulgi is double than the petition schedule mulgi. The landlords have constructed multi storied complex consisting of ground floor and upper four floors and the construction was completed in the year 2004 itself. The said commercial complex was named as Rajeswari Gayathri Sadan. In ground floor landlords have let out one Mulgi to a tenant in the name and style of "Net World" and other Mulgi is vacant and requirement if any of the landlords stands extinguished.

6. The landlords have filed a rejoinder. The landlords have denied that they are in possession of the Mulgies as contended by the respondent. They have also denied that Mulgi No.3-2-844/1 is even now vacant is available for starting clinic by the grand son of the petitioner. Their specific case is that two mulgies on the ground floor in the newly constructed multi storied complex are not available for requirement of the grandson of the petitioner because while taking of development of the premises No.3-2-844, the premises No.3-2844/A belonging to neighbours i.e., Sri M.J.Jagadishwar and M.J.Parameswar was also included as a passage and the owners of the said premises were given accommodation in the new construction. There was a tenant in the premises owned by M.J. Jagadishwar in the name and style of "Net World" and as the said tenant was given a mulgi in the new construction to settle dispute with the said tenant and adjacent Mulgi was given to the owner of 3-2-844/A in lieu of their right and as per the agreement. Thus, the landlords have denied the claim of the tenant with regard

to the additional accommodation subsequently said to have been available to them.

7. The Rent Controller framed necessary points for consideration and on behalf of the petitioner son of the original petitioner is examined as P.W. 1 and his grand son is examined as P.W. 2 and Exs.P.1 to P.13 were marked and on behalf of the respondent, R.Ws.1 and 2 were examined and Exs.R.1 to R.91 were marked.

8. The learned Rent Controller on the issue of willful default came to a conclusion that since an amount of Rs. 40,000/- was deposited with the landlord even if the respondent fell due in payment of rent, the same has to be adjusted and therefore, the landlord failed to prove that the respondent has committed willful default. On point No.2, i.e., on the point of bona fide requirement, the Rent Controller came to a conclusion that the landlord is the best judge to decide whichever premises is required by him, and accordingly, upheld the contention of the landlords and ordered eviction. Challenging the same, tenant filed the appeal. During the pendency of the appeal, the original landlord died and his legal representatives are brought on record and subsequently, the tenant filed an application to amend the counter and it was allowed and additional evidence was let in. The appellate authority itself recalled the witnesses and further examined them and came to a conclusion that the landlords have constructed a big commercial complex and also obtained vacant possession of other adjacent mulgies and that the grandson of the petitioner may shift his dental clinic into one of the premises available with the landlords. Thus, it was held that the landlords have failed to prove that they bonafidely require the premises and accordingly allowed the appeal. Challenging the same, the present revision has been filed.

9. Sri J. Nataraja Sarma, Learned Counsel for the petitioners/landlords, submitted that the respondent/tenant did not specifically mention in his counter which mulgi was vacant and at the appellate stage he sought amendment seeking permission to make a specific pleading with regard to vacancy of mulgies, thus he made an attempt to fill up the lacunae in his case and the appellate authority ought not to have allowed such application. It is also his submission that though the said order was not challenged in revision, but when the decision of the appellate authority is based on the subsequent amendments made by the tenant in his counter same can be questioned in a revision. His main submission is that there are six mulgies in a row and mulgies 1 to 4 are in the occupation of the respective tenants, mulgi No.5 is the petition schedule premises and mulgi No.6 is not suitable since there is a stair case leading to the first floor and second floor in the said mulgi. It is also his submission that if the first and second floors were not constructed, mulgi No.6 may be useful, but after construction of the stair case in mulgi No.6, the said mulgi is not useful to the grand son of the petitioner. It is also submitted that mulgi No.1 is also not available, since the same has been alienated by the wife of the original landlord. It is also his submission that it is for the landlord to choose which mulgi is

suitable to him to start his own business and that a tenant cannot dictate terms to the landlord with regard to selection of mulgi.

10. He further submitted that though it is a fact that the amount of Rs. 40,000/- was lying as deposit with the landlord it is only a security deposit to adjust the same if any damage is caused to the building or any alterations are made to the building without the consent of the Landlord, and the remaining amount from the deposit amount will be returned to the tenant on the day when he vacates the premises. His main submission is that there is no prior understanding between the Landlord and the tenant that the deposited amount should be adjusted towards the dues of the rents as and when tenant failed to pay the rent. It is also argued that the tenant has not issued any written notice to the Landlord that in view of the advance amount the rents which he could not pay have to be adjusted from that advance amount. So, his main submission is that even if tenant paid security deposit, he cannot stop paying rents or commit default in payment of rents and plead adjustment of the same and the view taken by the Courts below on this aspect is erroneous and therefore the same is liable to be set aside. In support of his contention he has relied on a decision reported in *Madanlal v. Govardhandas* 1972 (II) ALTR 4.

11. His next submission is that PW.2, grand son of the original Landlord, is a Dentist and that he wants to open his Dental Clinic and for that purpose he is in need of petition schedule mulgi and it is the choice of the landlord to select the premises for his own business and a tenant cannot dictate terms to a landlord to open a shop in a particular mulgi, though it may be vacant or subsequently fell vacant during the pendency of the proceedings. His main submission is that admittedly the original Landlord died leaving behind him three sons, two daughters and a wife and that the tenant while deposing before the Court admitted that he was paying rents to the wife of the original Landlord, but the tenant has not made the wife of the original Landlord and other daughters as parties to the appeal intentionally and thus the appeal is not properly framed and liable to be dismissed on this ground. In support of his contention, he has relied upon a decision of the apex Court reported in *Daya Ram and Others v. Shyam Sundari and Others* AIR 1965 SCC 1049 wherein it was held that a party to the litigation must make a bona fide attempt to ascertain the particulars of the legal heirs of the deceased party. It is also his submission that subsequent changes cannot be taken into consideration, otherwise there will be no end to it and, therefore, the position as on the date of filing of the eviction petition should alone be taken into consideration. In support of his contention he has relied on the decisions reported in *Gaya Prasad Vs. Sh. Pradeep Srivastava*, , *Batchu Ramakrishna and Another Vs. Golla Venkata Koteswararao and Others*, , *V. Radhakrishnan Vs. S.N. Loganatha Mudaliar*, and *Savitri Sahay Vs. Sachidanand Prasad*,

12. No representation for the respondent/tenant. The points that arise for consideration in this revision are;

1. Whether the amount deposited by the tenant while inducing him as a tenant could be adjusted towards the due rent amount to be paid by the tenant?
2. Whether the landlord has proved his bona fide requirement?
3. Whether subsequent events have to be taken into consideration?
4. Whether all the legal heirs of the original landlord have been brought on record, if not what is the affect?

Point No.1:

13. It is not in dispute that the landlords are having a deposit of Rs. 40,000/- with them. The Learned Counsel for the petitioner/landlord submitted that it is not a premium within the meaning of Section 7(a)(i) of the A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 (for short "the Act") and that it is only a security deposit. First of all it is not the case of the landlord that the amount deposited by the tenant is a security deposit to be adjusted, if any damage is caused to the building or any alterations are made to the building as submitted by the learned counsel. There is no such plea by the landlord. Section 7(1) of the Act is as follows.

7. Land-lord not to claim or receive anything in excess of fair rent or agreed rent:-Where the Controller has fixed the fair rent of a building-(a) the landlord shall not claim, receive or stipulate for the payment of (i) any premium or other like sum in addition to such fair rent, or (ii) save as provided in Section 5 or Section 6, anything in excess of such fair rent;

Provided that the landlord may receive, or stipulate for the payment of an amount not exceeding one month's rent by way of advance;

(b) save as provided in clause (a), any premium or other like sum or any rent paid in addition to, or in excess of such fair rent, whether before or after the commencement of this Act, in consideration of the grant, continuance or renewal of tenancy of the building after such commencement, shall be refunded by the landlord to the person by whom it was paid or at the option of such person, shall be otherwise adjusted by the landlord.

Provided that where before the determination of the fair rent, rent has been paid in excess thereof, the refund or adjustment shall be limited to the amount paid in excess for a period of six months prior to the date of application by the tenant or the landlord under sub-section (1) of Section 4 for fixing the fair rent.

14. As per Section 7(3) of the Act any stipulation in contravention of sub-section (1) or sub-section (2) shall be null and void.

15. Learned Counsel for the petitioner/landlord has relied on the decision reported in Madanlal v. Govardhandas (1 supra). In that case the parties have subsequently compromised the matter in terms of the compromise, the earlier rent was enhanced. Thus, the question that arose for consideration in that case

was whether the amount paid was an agreed rent or a premium. this Court referring to Clause (b) of sub section 2 of Section 7 of the Act observed as follows.

...The prohibition is directed against payment of premiums or of other sums analogous to premiums. The act makes a clear distinction between premium and rent and regards them as having totally different characteristics. This position does not admit of any doubt. The very fact that both the sub-sections 1 and 2 of Sections 7 have dealt with the two aspects distinctly and made separate provisions in regard to premiums and rents is sufficient indication that the legislature made a distinction between the two concepts. Neither of the expressions have been defined by the Act. Section 105 of the Transfer of Property Act conceives of premium as the price paid or promised in consideration of the transfer of the right to enjoy immoveable property, whereas rent is the money, share, service or other thing rendered periodically, or on specified occasions by the person who accepts the transfer. The essence of premium is that it is a single or lumpsum paid in consideration of the transfer where as rent is the recurring payment rendered as quid pro quo for the use of the property....

...It is the fair rent and that alone that can be claimed or collected and all stipulations varying the fair rent to the detriment of the tenant, are forbidden....

16. In my considered view, the facts of the said decision are entirely different and do not apply to the facts of the present case. In this case, admittedly, the landlords have taken deposit of Rs. 40,000/- . Even if one month premium is deducted towards advance, the landlord is deemed to be holding a deposit of Rs. 39,050/- which is clearly a contravention of Section 7(2) of the Act. Therefore, the amount already in deposit with the landlord was rightly adjusted towards the arrears of due rents by both the Courts below and no interference is called for therewith.

Point No.4:

17. It is also argued that the tenant failed to bring all the legal heirs. It is not in dispute that during the pendency of the appeal, the original landlord died and as per the orders in I.A. No.1231 of 2002, dated 27.12.2002 the petitioners 2 and 3 who are the sons of the original landlord were brought on record. The contention of the Learned Counsel for the landlord is that the respondent ought to have added all the LRs of the original landlord as parties to the appeal. Admittedly, this point was not raised before the appellate authority. It is not the case of the petitioners 2 and 3 herein that they filed any memo before the lower Court intimating the particulars of all the legal heirs of the original landlord. A feeble attempt has been made by the Learned Counsel for the petitioner to show that the tenant himself paid rents to the wife of the original landlord on one occasion. The settled legal position is that no abatement of suit or appeal will be caused merely on the ground that some of the legal heirs of the deceased have not been brought on record. In *Daya Ram and others V. Shyam Sundari and others* (2

supra), the Apex Court observed as follows.

...The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal.

18. When the petitioners herein had not filed a memo before the Court below or raised this point, the petitioners are not justified in raising this aspect before this Court. Moreover as per the definition of landlord any person who is collecting rents or authorized to collect rents or an agent of the landlord is to be treated as a landlord. It is not the case of the petitioners herein that there is any conflict of interest between the petitioners herein and their mother.

Points 2 and 3:

19. As far as the bona fide requirement is concerned, I have gone through the entire record. The appellate authority has assigned valid reasons and re-appreciated the evidence on well settled principles of law and the findings of the appellate authority are based on evidence. Nothing has been pointed out to show that the findings of the appellate authority are not based on record or misreading of evidence. The facts of this case reveal that PW.2 is the grand son of the original landlord. He passed BDS in 1997. The case of the petitioner is that PW.2 wanted to start a clinic and for that purpose the petition schedule mulgi is required. It is not in dispute that the eviction petition was filed on 12.07.1999. When the tenant tried to rely on the subsequent events, Learned Counsel for the landlord relied on the judgment of the Apex Court in *Gaya Prasad v. Pradeep Shrivastava* (3 supra), wherein it was held that the crucial date for deciding as to the bona fides of the requirement of the landlord is the date of his application for eviction. The Apex Court in the said decision also observed as follows.

Antecedent days may perhaps have utility for him to reach the said crucial date of consideration. If every subsequent development during the post petition period is to be taken into account for judging the bona fides of the requirement pleaded by the landlord there would perhaps be no end so long as the unfortunate situation in our litigative slow process system subsists. The subsequent events to overshadow the genuineness of the need must be of such nature and of such a dimension that the need propounded by the petitioning party should have been completely eclipsed by such subsequent events.

20. It is not in dispute that the landlord has taken up construction of multi-storied building just behind the petition schedule premises consisting of ground floor and upper three floors and the construction was completed in the year 2004. The stand of the landlord is that all the upper floors starting from first floor are residential and that as per the understanding entered with their neighbours M.J. Jagadishwar and M.J. Parameshwar in lieu of the space given by them they were accommodated two non-residential premises in the ground floor. One mulgi

was allotted to Net World who was a tenant of M.J. Jagadishwar and another mulgi was allotted to M.J. Jagadishwar and M.J. Parameshwar. It is argued that since the said building is not towards road side that is not suitable to the landlord. Even if the argument of the landlord is accepted on this aspect, but admittedly there are six mulgies towards the main road side. The petition schedule premises is mulgi No.5. As far as mulgi No.6 is concerned, it is submitted that there is a stair case in the said mulgi leading to the first and second floors. Even if mulgi No.6 is not useful for opening a clinic by PW.2 still there remains mulgi Nos.1 to 4. The son of the original landlord was examined as PW.1. According to him, the petition schedule mulgi fell to his share. PW.1 has categorically deposed that the measurements of shop Nos.1, 2, 3, 4 and 6 are 14/22 to 24 feet and further admitted that one Ramgopal is in occupation of mulgi No.1 carrying on SB Travels business for the last one year and prior to occupation of mulgi No.1 by Ramgopal it was vacant for one year. Earlier to that one Satish had occupied as tenant for more than 5 years. According to him, mulgi No.2 is in occupation of Mr. Ravi and mulgi No.4 is in occupation of Muniratnam Travels and those tenants are in occupation for the last more than 5 years. According to him, mulgi No.3 is in occupation of Sairam Reddy who was in occupation for the last more six years. The crucial aspect we have to consider is PW.1 has deposed the above facts in further cross-examination on 16.02.2006. Thus, it is clear that mulgi No.1 was vacant for about one year prior to 16.02.2005. Mulgi Nos.2 and 4 were occupied by the new tenants in 2001 and mulgi No.3 was occupied by the tenant in 2000. Admittedly, the eviction petition was filed in 1997. Thus, it is clear that after filing of the eviction petition the original tenants vacated the above referred mulgies and new tenants were inducted. As seen from the evidence of PW.2 for whose benefit the eviction of tenant is sought, he has admitted that he completed his house surgeon in 1998. He further admitted that the first floor of the petition schedule premises was constructed in the year 1997. He further admitted as follows. "As I was not experienced in my profession I did not start my private practice in the year 1998 itself. Thus, it is clear that PW.2 had no intention to start his private clinic as on the date of filing of the eviction petition on 12.07.1997. Admittedly, he had completed his house surgeon in November 1998 and he was not prepared to start his practice since he was not experienced in his profession in 1998. He further admitted in his cross-examination that he has intention to start dental clinic since last 6 years i.e., the need arose only in the year 2000. PW.2 was further examined on 03.03.2006. As discussed above subsequently other Mulgies (shops) fell vacant. More over, the appellate authority has elaborately discussed all these aspects and given cogent reasons for its findings. The appellate authority has also referred to Ex. P14 Will said to have been executed by the original landlord in favour of his wife and discussed that there is no reference about such will in the rejoinder filed by the landlords which was filed much after the execution of the alleged Will. PW.1 admitted that he cannot say the reasons for not mentioning about Ex. P14 Will in the rejoinder. However, we are not concerned with all those aspects.

21. In *V. Radhakrishnan v. S.N. Loganatha Mudaliar* (5 supra), relied on by the Learned Counsel for the petitioner, it was held that the fact that the landlord, who seeks eviction for the benefit of a member of his family is himself occupying a building of his own, cannot operate as a bar to the landlord seeking eviction for the benefit of a member of his family, who does not occupy any premises of his own. In the instant case, it is not the one non-residential premises owned by the landlord, but there are several non-residential premises owned by the landlord. When a landlord owns several non-residential premises, Section 10(3)(a)(iii) comes into play and the landlord seeking eviction of the tenant could be disentitled from claiming possession of the non-residential premises, unless he establishes that size, suitability, convenience of all those premises owned by him are not suitable for his own business. Of course, own business includes starting of business by his son, or any other dependant. Then the landlord has to specifically plead and establish the factors such as size, quality, suitability and convenience. In this case the landlord has not pleaded about the availability of other non-residential premises in his original pleadings. Even in his subsequent pleadings the landlord did not whisper with regard to five Mulgies in the same row in which petition schedule premises is situated. He has also not pleaded how they are not suitable and convenient to him. It is also not pleaded whether those Mulgies were vacant or not, if vacant, why they are not suitable for starting a clinic by PW.2. In fact, not whispering about other non-residential premises by the landlords amounts to suppression of fact. Though the landlord has started multi-storied construction behind the petition schedule premises he has not whispered about the same also. The landlord ought to have specifically pleaded how the other mulgies i.e., mulgies 1 to 4 and 6 are not suitable for opening the clinic by his grand son (PW 2). Therefore, initially there was no plea of the landlord with regard to availability of the other non-residential premises, their suitability or otherwise. It has to be seen that the tenant in his counter at the initial stage itself had pleaded that there is lot of accommodation available to the landlord in the same building apart from multi-storied building under construction in the same premises. Of course, by way of amendment he has pleaded that premises 1, 2 and 3 fell vacant during the pendency of the premises. Learned Counsel for the petitioner has also relied on a decision reported in *Savitri Sahay v. Sachidanand Prasad* (6 supra).

22. There is no dispute with regard to the principles laid down in those decisions. As far as *Savitri Sahay*'s case (6 supra) is concerned, their lordships were dealing with the specific provisions of Section 11(1)(c) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982. Explanation II of the said Act provided that even though a landlord may have two or more premises which have been let out, it is for the landlord to choose which one would be preferable to him or her and the tenant could not question such preference. In that case the landlady had given a specific preference for the flat occupied by the tenant. She had given a reason why she had preferred that flat. She was an old lady. She therefore could not climb to the first floor and thus the two flats on the first floor

were not suitable to her. The other flat on the southern side of the building faced a road which was a very busy road and would therefore be noisy. This particular flat faced the bungalow in which she has been residing for so many years and also faced an open piece of land belonging to her husband. Explanation II to Section 11(1)(c) of above referred Bihar Act permitted the landlord to ignore other premises and to prefer a particular premises. It was further held that the appellant having made a preference cannot be forced to occupy other premises which may become available. The provision of Section 10(3)(a)(iii) of the Act is very clear and even if the bona fide requirement is given liberal meaning, a landlord who is owner of more than one non-residential premises should specifically plead and prove as to how the other non-residential premises owned by him are not suitable for his own business or expansion of business and if the Rent Controller having regard to the facts and circumstances of the case comes to a conclusion that all other non-residential premises are not suitable for the business or expansion of business or the business of his son or dependant, then only eviction can be ordered, otherwise no eviction of a tenant in such circumstances could be ordered and relative hardship also has to be considered.

23. In the instant case there is no such specific pleading by the landlord that the other mulgies are not suitable for opening the clinic by PW.2. Of course, during the trial a theory was introduced that the mulgi No.1 was not suitable according to vastu and that the mulgi No.6 is not suitable as there is stair case in that. But, admittedly, there were no such pleas in the original pleadings. As discussed above, even if mulgi Nos.1 and 6 are taken out of consideration, the fact remains that the mulgi Nos.2, 3 and 4 fell vacant during the pendency of the proceedings and they were leased out to new tenants and PW.2 never bothered to occupy those premises. Admittedly on the date of filing of eviction petition PW.2 was not prepared to start his own clinic. It is clear that the claim of petitioner landlords is not bona fide.

24. In view of the above discussion, I am of the considered view that the appellate authority has passed a well reasoned order and no interference is called for by this Court in exercise of its revisional jurisdiction.

25. Accordingly, the CRP is dismissed. However, in the circumstances, no costs.