

(1993) 07 MAD CK 0016
In the Madras High Court

Thomas George Kuriyan

APPELLANT

Vs

S.A. Kharche, Proprietor, S.A. Kharche and Associates

RESPONDENT

Date of Decision : 01-07-1993

Acts Referred:

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 — Section 10(3)(A)(i)

Citation : (1994) 2 MLJ 569

Hon'ble Judges : Thanikkachalam, J

Bench : Division Bench

Judgement

Thanikkachalam, J.—This revision is directed against the order passed in R. C. A. No. 428 of 1991, which in turn arose out of the order

passed in R.C.O.P. No. 2861 of 1986. The tenant is the revision petitioner. The landlord filed the petition for eviction against the tenant u/s 10(3)

(A)(i) of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960, as amended by Act 23 of 1973 and Act 1 of 1980 (hereinafter

referred to as the Act). According to the landlord the petition premises was let out for residential purpose on a monthly rent of Rs. 2,500 with

maintenance charges at the rate of Rs. 1,000 per month. The petitioner is employed in the Indian Oil Corporation at Bombay. The mother and the

son of the petitioner are residing in a rented premises. The landlord is not having any other premises of his own in the city of Madras. Hence, he

required the petition premises u/s 10(3)(a)(i) of the Act.

2. In the counter filed by the tenant, the tenant accepted the tenancy. But according to the tenant the petition premises was used both for residential

and non-residential purposes and predominantly for non-residential purposes. Therefore, according to the tenant the landlord cannot ask the

petition premises for residential purpose u/s 10(3)(a)(i) of the Act.

3. The petitioner examined himself as P.W. 1 and Mr. Kharche examined himself as R. W. 1. The landlord filed 21 documents and the tenant filed

11 documents. The Commissioner's report and the plans were marked as Exs. C-1 to C-6. Considering the facts arising in this case in the light of

the report and plans filed by the Commissioner, the Rent Controller came to the conclusion that there is bona fide on the part of the landlord in

requiring the petition premises u/s 10(3)(a)(i) of the Act, and accordingly ordered eviction. On appeal, the Rent Control Appellate Authority

confirmed the order passed by the Rent Controller. It is against this order, the tenant is in revision before this Court.

4. When this revision came-up before this Court for admission notice of motion was ordered and the notice was served on the Respondent, who

entered appearance through his counsel. Learned Counsel appearing for the tenant/ petitioner submitted as under:

The petition premises not only belongs to the respondent herein, but also to his brother. Consent from the co-owner was obtained and filed only at

a later stage of the proceedings. Therefore when the petition for eviction was filed there was no consent from the co-owner. In the petition for

eviction, there is no mention about the authority of the landlord to file the present petition. It is not correct to state that the ground floor and the first

floor portions are nearly equal in size. The Rent Control Appellate Authority was not correct in stating that the ground floor and the first floor

portions admeasure 1836.44 sq.ft. each. The actual measurement of the ground floor is 1836 44. sq.ft. plus 615.84 sq.ft. aggregating to 2452.28

sq.ft. as against 1834.94sq.ft. less un built area on the first floor measuring 386.56 sq.ft. amounting to 1448.38 sq.ft. Therefore, the non-residential

portion is larger than the residential portion by 69.31%. Hence the dominant purpose was non-residential. Therefore the decision rendered in the

case of Moinuddin Khan Sahib Vs. Rukmani Ammal, , would not be applicable to the facts of this case. All the correspondence between the

landlord and the tenant would go to show that the tenant was described as a proprietary concern of architect. Therefore the premises was let out

for the purpose of running the abovesaid concern. Even though a small portion was being used as residence of the proprietor, the Rent Control

Appellate Authority was not correct in adding un built area in the first floor to the built-up area for coming to the conclusion that the first floor

portion and the ground floor portion are equal in size. The appellate authority erred in excluding the out-house from the calculation of the ground

floor area. There was no mention about the second floor anywhere in the order passed by the authorities below. The report filed by the

Commissioner would go to show that the hall in the out-house is being used as electrical engineering room. The front room is used as store room

and the rear room is used as drawing room. Even in the lease deed the tenant is described as a proprietary concern. The landlord did not really

require the petition premises for his own use and the occupation as alleged. He is seeking eviction either for getting higher rent or for selling the

petition premises. It was, therefore, pleaded that there is no bona fide on the part of the landlord in requiring the petition premises u/s 10(3)(a)(i) of

the Act. Ultimately, it was submitted that the order of eviction passed by the authorities below u/s 10(3)(a)(i) of the Act is unsustainable.

5. On the other hand, learned senior Counsel appearing for the respondent/ landlord submitted as under: All the correspondence between the

parties would go to show that the premises was let out only to S.A. Kharche, who is the proprietor of S.A. Kharche and Associates. The petition

premises was not let out for the purpose of doing or conducting his business. The petition premises is a bungalow with an outhouse and a garage. It

is built only for the purpose of residence. Even in the counter, the tenant admitted that the petition premises was let out to Mr. S.A. Kharche in his

individual capacity and not for his proprietary concern. It is no doubt true that in the lease deed the purpose for which the petition premises is let

out is not mentioned. The tenant is using a portion of the petition premises for non-residential purpose. The ground floor alone is used for non-

residential purpose. The first floor and the second floor are used for residential purpose. According to the tenant he is using the petition premises

predominantly for non-residential purpose. If that is so, the onus is upon him to prove the same. If the area of the second floor and the open area

of the first floor are taken into consideration that would go to show that the area utilised for non residential purpose is lesser than that of the portion

used for residential purpose. Even otherwise the two portions would admeasure equally. It is not the case of the tenant that he is using the second

floor for non-residential purposes. If the premises is used equally for residential and non-residential purposes then it is open to the landlord to ask the petition premises for his residential purposes. The word "equally" does not mean that the portions used for residential and non-residential purpose should be mathematically equal. A consent letter from the brother of the landlord was filed to show that the consent was already obtained for prosecuting the eviction petition. The landlord who was hitherto employed in Bombay was transferred to Madras and he is residing in a rented flat in Adyar. The landlord issued a notice to the tenant calling upon him to quit and deliver vacant possession. The landlord is not having any other premises of his own in the city of Madras apart from the petition premises. The report and the plans filed by the Commissioner would go to show that the tenant is using the premises predominantly for residential purpose. Originally the landlord filed a suit O.S. No. 8707 of 1984 on the file of the City Civil Court at Madras. It was pending for a period of two years. The present petition was filed after withdrawing the said suit since after the decision of the Supreme Court the jurisdiction is vested with the rent control court. Even otherwise for the purpose of the Act, the respondent herein is receiving the rent and issuing receipts. Therefore, he would be the landlord. In order to support his contentions, learned Counsel appearing for the landlord relied upon the following decisions:

1. Dakshinamoorthy v. Thuluja Bai (1952) 1 M.L.J. 390.
2. Raman & Raman Limited v. State of Madras (1957) 1 M.L.J. 244.
3. S. Ramalingam v. Maria Jabamalai (1971) 2 M.L.J. (S.N.) 5.
4. A. Moinuddin Khan Sahib Vs. Rukmani Ammal, .
5. V. Balakrishna Menon Vs. M.A.K. Govindan, .
6. S. Jaswant Singh Vs. A.R. Ramanathan, .
7. T.N. Lakshmanan Vs. S.P. Hajee Alavudeen Saheb Sons, .
8. S. Raman Vs. T. Pakirisamy Pathar, .
9. Tikkamchand Mithalal Jain Vs. M.R. Narasimhachari, : .
10. B.K. Shankar Vs. L.M. Rajalakshmi and Others, .

Finally, it was submitted that inasmuch as both the authorities below concurrently came to the conclusion that the requirement of the landlord is

bona fide u/s 10(3)(a)(i) of the Act no interference is called for with the order of eviction passed by the authorities below.

6. I have heard the rival submissions.

7. The landlord filed a petition for eviction u/s 10(3)(a)(i) of the Act. The petition premises is situate at No. 2, Rutland Gate, 6th Street, Madras-6.

The tenant is one S.A. Kharche, Proprietor of M/S. S. AKharche and Associates. According to the landlord the petition premises was let out for

the purpose of residence only. But according to the tenant the petition premises is used both for residential and non-residential purposes.

According to the tenant even his predecessor in business viz. Kothari and Associates were also using the petition premises for both residential and

non-residential purposes. The landlord submits that if the petition premises is used for both residential and non-residential purposes, it is open to

him to ask for possession u/s 10(3)(a)(i) of the Act for his residence. According to the tenant the petition premises is predominantly used as a non-

residential building. Therefore, the landlord cannot ask the petition premises for his residential purposes. Ex. R-3 is the lease agreement executed in

the year 1967 between the landlord and the tenant. In the lease deed, there is no mention as to for what purpose the petition premises was let out

to the tenant. The petition premises is stated to be a bungalow with two floors, an out house and a garage. In order to find out the physical features

of the petition premises a Commissioner was appointed. The Commissioner inspected the petition premises and filed his report along with several

plans. According to the reports filed by the Commissioner, the outhouse admeasures an area of 484.64 sq.ft. with a verandha in the front and in

the back of the out-house admeasuring about 131.02 sq.ft. The out-house is constructed just by the side of the eastern side of the compound wall

and about 5 feet away from the northern side of the compound wall of the petition premises. The total built-up area of the ground floor covered by

reinforced concrete terrace works out to 1613.56 sq.ft. and the total built-up area covered by asbestos sheet works out to 222.88 sq.ft. Thus the

total built-up area of the ground floor comes to Rs. 1836.44 sq.ft. The total built up area of the first floor which is covered by RCC. roof comes to

1386.288 sq.ft. and the total built up area covered by asbestos sheet works out to 62.1. sq.ft. Thus the total built-up area of the first floor comes

to 1448.13 sq.ft. and the area open to sky is 386.56 sq.ft. The total built-up area of the second floor of the petition premises which is covered by

RCC roof works out to 123.17 sq.ft. and the total built-up area covered by asbestos sheet works out to 292.89 sq.ft. Thus the total built-up area

in the 2nd floor of the petition premises works out to 416.06 sq.ft. The garage admeasures 214.2 sq.ft. The total area of the premises is stated to

be 15,370 sq.ft.

8. Where a building is let out both for residential and non-residential purposes then to which category the building belongs, whether residential or

non-residential has to be determined with reference to the predominant purpose for which the building was let out. If the building is let out equally

both for residential and non-residential purposes then applications for eviction u/s 10(3)(a)(i) or u/s 10(3)(a)(iii) of the Act are maintainable. See

B.K. Shankar Vs. L.M. Rajalakshmi and Others, . In the absence of any definite averments with reference to the nature of the building that has

been let out one can only turn to the user of the premises and taking into consideration the user and the acquiescence on the part of the landlord

See: T.N. Lakshmanan Vs. S.P. Hajee Alavudeen Saheb Sons, . In order to ascertain whether a building is a residential or a non-residential one

will have to look at the structure of the building and also the use to which it was put. If the building is part of the larger structure one has necessarily

to take also into account the nature of the entirety of the structure, the location of the specific portion of the building in that structure, the size of the

portion and all other attended circumstances See: S. Raman Vs. T. Pakirisamy Pathar, .

9. In the Full Bench decision of this Court in the case of Dakshinamoorthy v. Thuluja Bai (1952) 1 M.L.J. 390, it has been held that where a court

finds the letting to be equally for residential and nonresidential purposes and for mainly or substantially have been used for either kind of purpose,

the application filed by the landlord may well stand whether u/s 7(3)(a)(i) or (ii) under the old Act. It is therefore clear that the landlord is legally

entitled to claim eviction of the premises in question which has been let but partly for residence and partly for nonresidential purposes. See:

Moinuddin Khan Sahib Vs. Rukmani Ammal, .

10. In order to find out the predominant purpose for which the petition premises

was let out, in the absence of any documentary evidence, the Rent Controller appointed a Commissioner. The Commissioner inspected the petition premises and filed his report and the plans. In the plans the petition premises was stated to be a bungalow with a compound wall, out-house and a garage. Even according to the tenant the petition premises is used for both residential and non-residential purposes. But according to the tenant the petition premises is used predominantly for non-residential purposes. But according to the landlord the petition premises was originally let out to the tenant for residential purpose and later on the tenant used the petition premises both for residential and non-residential purposes. But according to the landlord the petition premises was put to use predominantly for residential purpose only. According to the landlord even if the petition premises is equally used for both residential and non-residential purposes he is entitled to ask for eviction u/s 10(3)(a)(i) of the Act. In the oral evidence the tenant stated that the ground floor is used for non-residential purpose and the first floor is being used for residential purposes. The landlord sent a notice to the tenant dated 3.5.1979 marked as Ex. R-1. In the said notice, the landlord stated that the petition premises was let out for residential purpose. The tenant sent a reply which is marked as Ex. R-2. In the said reply, the tenant said that the petition premises is let out for non-residential purpose. Exs. P-1, P-2, P-35, and Exs. R-1, R-2, R-4, R-6 and R-10 would go to show that the tenant was using a portion of the petition premises for non-residential purpose, but the landlord was keeping quiet. This would go to show that the landlord acquiesced in for the tenant to use the ground floor portion for his non-residential purpose.

11. Ex. C-1 is the report filed by the Commissioner. The petition premises consists of two floors, an out house and a garage. In the evidence, the tenant mentioned only about the ground floor and the first floor. The tenant did not say anything about the user of the second floor. The tenant did not say that the second floor was used for non-residential purpose. Therefore, the authorities below came to the conclusion that the second floor is also used for residential purpose. The out-house is stated to be used by the tenant for non-residential purpose. The Rent Controller pointed out that the tenant in his evidence did not say anything about the user of the second

floor and the outhouse. In the report filed by the Commissioner, it is stated that in the out-house there is a kitchen. Therefore, the Rent Controller came to the conclusion that the out-house is also being used for residential purpose. The total area of the ground floor is stated to be 1836.44 sq.ft. The total area of the first floor is stated to be 1448.38 sq.ft. and the area open to the sky is stated to be 386.56 sq.ft. In the first floor if there is any portion open to sky that should also be taken into consideration while determining the area of the first floor. If that is so, the total area of the first floor would be 1834.94 sq.ft. The total area of the second floor is stated to be 416.06 sq.ft. and as already stated it is not the case of the tenant that the second floor is also used for non-residential purpose. Hence, it should be considered that the second floor is being used for residential purpose. The total area of the out-house with verandha is stated to be 484.64 sq.ft. plus 131.02 sq.ft. = 615.66 sq.ft. The area of the garage viz. 214.2 sq.ft. was not taken into consideration. The ground floor portion used for non-residential purpose by the tenant would come to 836.44 sq.ft. The total area of the first floor which is used for residential purpose would come to 1834.94 sq. ft. The area of the second floor is 416.06 sq.ft. This should be added to the area of the first floor. Therefore the first floor and the second floor total area would come to 2251 sq.ft. which is used for residential purpose. The area of garage is stated to be 214.02 sq.ft. The user of the garage depends upon the predominant user of the main building. Therefore, it remains to be seen that the tenant is using the petition premises predominantly for residential purpose only. As already seen if the premises is used both for residential and non-residential purposes the landlord is entitled to ask for eviction u/s 10(3)(a)(i) of the Act. The words the premises is equally used for both residential and non-residential does not mean that the premises should be used mathematically two equal portions for two different purposes. The words that the premises should be used equally means, equally used for residential and non-residential purposes. The word "equally" relates to the word "equal user". Therefore the authorities below were correct in coming to the conclusion that the petition premises is being used equally by the tenant both for residential and non-residential purposes and hence the provisions of Section 10(3)(a)(i) of the Act is applicable to the facts of this case.

12. Now what remains to be considered is the bona fide requirement of the landlord as contemplated under the provisions of Sections 10(3)(a)(i) and 10(3)(e) of the Act. It is stated that the landlord has been transferred from Bombay to Madras and he is residing in a rented flat in Adyar. The owner of the flat in Adyar was stated to have issued a notice to the landlord calling upon him quit and deliver vacant possession. Therefore the landlord is also under the threat of eviction. In the petition for eviction the landlord asked the petition premises for the occupation of his mother and daughter. But now he requires the petition premises for his own use also. There is no evidence on record on the side of the tenant to show that the landlord is having any other premises of his own in the city of Madras. The brother of the landlord is another co-owner of the petition premises. The consent letter of the co-owner was produced at the time of cross-examination of P.W. 1. Consent letters can be produced at any stage of the trial. Therefore, it cannot be said that since the consent letter was filed at the time of enquiry the petition for eviction is liable to be dismissed on that score. According to the landlord if the petition premises is available to him it would be of great help to him so as to enable him to live in his home without paying any rent. Appraising the facts arising in this case, both authorities below concurrently came to the conclusion that the requirement of the landlord of the petition premises u/s 10(3)(a)(i) of the Act is bona fide. Thus on a careful consideration of the facts arising in this case, in the light of the judicial pronouncements cited supra, I hold that the order of eviction passed under Sec. 10(3)(a)(i) of the Act by the authorities below is in order. Hence, I am not inclined to interfere, with the same. In the result the revision is dismissed with costs. Time for eviction two months.