(1956) 08 AP CK 0017

In the Andhra Pradesh High Court

Case No : Civil Revision No''s. 169/4 and 334/4 of 1955

Yosuf Begum APPELLANT

Vs

Waheeda Banu Begum RESPONDENT

Date of Decision : 10-08-1956

Acts Referred:

Defence General Act — Section 11(3)
Defence of the Hyderabad Regulations — Regulation 2A
Emergency Powers (Defence) Act, 1939 — Section 3
General Clauses Act, 1897 — Section 6
Hyderabad General Clauses Act, 1908 — Section 3(4), 3(5)
Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954 — Section 10, 16(1), 28, 31, 4
Hyderabad Rent Control Order, 1353 — Section 31(1), 31(2)

Citation : (1956) 08 AP CK 0017

Hon'ble Judges : Kumarayya, J;Jaganmohan Reddy, J

Bench : Division Bench

Advocate : M.A. Hai Abbasi and M.K. Moinuddin, for the Appellant; Balwant Govind Rao Proapkari, for the Respondent

Judgement

1. These are two separate revision petitions brought by Waheeda Banu Begum and Yousuf Begum, calling in question the correctness of the order dated 15-3-1955 passed by the Chief Judge, Small Cause Court, as the appellate authority, whereby the contractual rate or monthly rent was reduced and fixed at Rs. 135/- as the fair rent at the suit houses.

2. Briefly stated the facts are that Waheeda Banu Begum under a rental agreement with the landlady, Yousuf Begum, occupied the premises hearing Municipal Nos. 236 and 237 situated at Nampalli on 1-8-1950. These houses were repaired and the required improvements were made at the instance of the tenant at a considerable outlay before they were occupied by her.

The period of tenancy as agreed upon was five years and the monthly rent was Rs. 300/-. A registered rental deed was executed on 8-9-1950 in evidence thereof. The tenant, Warhead Banu Begum made regular payments of the stipulated rent upto March, 1952 without demur. Thereafter on 15-4-1952 she applied to the Rent Controller for fixation of fair rent on the ground that the agreed rent was far in excess of a reasonable rent for the premises.

The Rent Controller dismissed her petition on 29-1-1954 holding that the rent fixed by mutual agreement cannot be varied unless the contract itself is tainted, of which there was no proof. Warhead Banu Begum went in appeal against this order. Meanwhile the Hyderabad Houses (Rent, Eviction and Lease) Control Act of 1954 came into force.

The appellate authority framed fresh issues in they light of its provisions and remanded the case for further inquiry. The Controller alter due inquiry came to the opinion that Rs. 110 was fair rent per mensum for both the houses and reported accordingly. The appellate authority on the material on record fixed the fair rent at Rs. 135/-. Against this order both the parties have come in revision.

3. We have heard the arguments of the learned advocates at length. Before going into the merits of the case, we propose to first consider the legal objections raised which are of considerable importance. It is argued that neither the provisions of Hyderabad Rent Control Order 1353 F and the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954 do not apply to cases where rent is fixed by an agreement between the parties and the order of the appellate Court is, therefore, ultra vires.

It is further urged by Mr. Abbasi that it was open to the tenant to waive the benefit by contracting himself out of the provisions of the law and agreeing to pay rent much above the fair rent to be fixed by the Controller. It was therefore the terms of the contract and not the legal provisions which will be given effect to.

In support of this proposition the learned advocate has relied on Dhondi Ram v. Sukka Ram ILR 1952 Hyd 681 : AIR 1953 Hyd 13 (A); S. Raja Ghetty and Others Vs. Jagannathadas Govindas and Others, ; Kishan Chand Hari Kishun Chand Vs. Diwan Chand Ghasi, ; Anandi Prasad Vs. Pritam Singh, .

4. The first question involved in this case therefore is whether the contract alleged to have been entered into after the Rent Control Order was promulgated in 1353F., with the full knowledge of its provisions and without any force or fraud could be construed as expressing an intention to contract out of the right conferred by the Rent Control Order, whether with respect to eviction or with respect to the fixation of fair rent.

Under Clause (3) of the Rent Control Order 1353 F., where it appears to the Rent Controller either on written application by the landlord or tenant or otherwise that the rent is excessive or insufficient he is authorised to make summary enquiry arid fix the rent in accordance with the provisions laid down in Clause (5) of the said Order. Both under the Rent Control Order of 1353 F., as well as u/s 4 of the Act of 1954 the landlord and tenant have an equal right, to have fair rent fixed whether the rent is high or low.

It may here be mentioned that the Rent Control Order 1353 F. was made under the powers conferred by the Defence of the Hyderabad Regulation which has been held to have lapsed on or about September, 1946 by the Full Bench judgment in the case of Pannalal Lahoti v. State of Hyderabad ILR (1954) Hyd 441 : AIR 1954 Hyd 129 (E) and having regard to this judgment the Rent Control Order cannot be said to be in force when the parties to this litigation had entered into a lease. The provisions of that Order could not therefore govern the lease in this case.

If no action was taken by the Legislature after the Full Bench judgment neither party would have had any right, apart from the contract, to have the rent fixed. The Legislature, however, intervened by enacting the Hyderabad Houses (Rent Eviction and Lease) Control Act, 1954 on 12-6-1954 (hereinafter referred to as the Act), Section 31 whereof is in the following terms:

Section 31(1) The Hyderabad Rent Control Order, 1353 F. is hereby repealed.

(2) Notwithstanding any decision or order of any Court to the contrary-

(a) Any order made or deemed or purporting to have been made, any decision or direction given or deemed or purported to have been given, any notification issued or deemed or purporting to have been issued, any action or proceeding taken or deemed or purporting to have been taken, or any thing done or deemed or purporting to have been done under the provisions of the said Order shall, so far as may be, be deemed to be made, given, issued, taken or done under the provisions of this Act;

(b) any liability or penalty incurved or deemed or purporting to have been incurred, any punishment awarded or deemed or purporting to have been awarded and any prosecution commenced or deemed or purporting to have been commenced under the provisions of the said order shall be deemed to have been incurred, awarded, made or commenced under the corresponding provision of this Act;

(c) any application made, appeal preferred or other proceedings instituted under the said Order and pending at the commencement of this Act shall be deemed to have been made, preferred or instituted under the corresponding provision of this Act, and shall be disposed of as if this Act had been in force at the time when such application, appeal or proceeding was made, preferred or instituted.

5. It is apparent from Sub-section (1) however that the Legislature purported to repeal the Hyderabad Rent Control Order 1353 F., as if that order was a valid and extant order on the date when the Legislature passed the Act. Now it is clear that a repeal can only be made of an Act which is ex-tant and valid on that date and in so far as the. House Rent Control Order 1353 F., is concerned, it was already declared to have expired in or about September 1946 and there was therefore no

question of repealing that Order.

But in so far as Sub-section (2) of Section 31 is concerned it attempts to give retrospective operation to the provisions of the Act in the contingencies set out in Clauses (a), (b) and (c) of the said Sub-section, notwithstanding any decision or order of any court to the contrary. If the Legislature merely intended to give retrospective operation in certain contingencies, there was no purpose in providing for repeal of an Order which had already expired and consequently the question how far Sub-section (2) of Section 31 is governed by the assumption in Sub-section (1) or Whether it is independent of it would be a matter for consideration.

In so far as this case is concerned, Clause (c) of Sub-section (2). of Section 31 of the Act provides that the provisions of the Act are deemed to apply to an application made, appeal preferred or other proceedings instituted under the Hyderabad Rent Control Order, 1853 F., and pending at the commencement of the Act, as if the Act had been in force at the time when such application, appeal or proceedings were made preferred or instituted.

6. It is well to remember that as a general rule after a temporary Act has expired, as in this case, the Defence of Hyderabad Regulation and consequently the Hyderabad Rent Control Order are deemed to have expired, no proceedings can be taken upon it and it ceases to have further effect. If any action has been taken under the expired Act with respect to any matter arising under it during its continuance, the question whether such action would lie or not would depend, upon any special provision to the contrary in the temporary Act it-self. In any case this would be a question of construction.

In a case arising in England under Regulation II-A of Defence General Regulation, Section 3 of Emergency Powers (Defence) Act, 1939 which expired on 24-2-1946, the accused was charged for the offence of assisting the enemy and the trial haying taken place on May 27 and 28, 1946 with respect to acts alleged to have taken place between April 1943 and January, 1944, it was held in Wicks v. The Director of Public Prosecutions 1947 AC 362(F) by the House of Lords that the language of the saving Section 11(3) of the Regulation was wide enough to make the provisions of the statute operate in respect of any act done before its expiration.

The defence of Hyderabad Regulation did not contain any saving provision and even if it did, the right to have the fair rent fixed did not arise before the expiry of the Rent Control Order 1353 F.

7. If the Defence of Hyderabad Regulation and consequently the Hyderabad Rent Control Order of 1353 F., made thereunder expired by effluxion of time, Sub-sections (4) and (5) of Section 3, Hyderabad General Clauses Act 3 of 1308 F., corresponding to Section 6, Indian General Clauses Act of 1897, do not apply to them but are addressed to Acts which have been repealed. This distinction is well-known and both on principle and on authority is well-established and every

draftsman is or at any rate deemed to be aware of it at the time of drafting a bill.

In these circumstances the important question that will have to be considered is whether the application made under the Rent Control Order 1353 F., long after the expiry of the Act, can be said to be pending at the commencement of the Act and what provisions govern it in determining the rights of the lessor and lessee It may be contended that Sub-section (2) of Section 31 is independent and that Clauses (a), (b) and (c) of the said Sub-section give it a retrospective effect deeming the application to be one pending under its provisions.

It may on the contrary be contended that when neither a Rent Controller nor an appellate authority could be in existence, at any rate, after the) decision in the Full Bench case on 22-3-1954, the forum of the above authorities could not validly exist unless appointed under the Act after its coming into force; consequently an application made before a non-existent forum cannot be deemed to have been made under the Act and Sub-section (2) of Section 31 though it intends to save it from the operation of any decision or order of a Court, is proceeding on the assumption that the Hyderabad Rent Control Order is valid on the date the act came into operation with avowed object of bringing into effect provisions relating to savings on repeal under Sub-sections (4) and (5) of Section 3, Hyderabad General Clauses Act.

Taking into consideration the several possible contentions in our view, Sub-section (2) of Section 31 must be taken to provide for the contingency created by the Full Bench decision in Pannalal Lahoti''s case (E) declaring the Defence of Hyderabad Regulation to have expired and gives a retrospective effect to the new Act notwithstanding that decision.

The entire section could have been better drafted and provision could have been inserted to revive the Rent Control Order till the date of the Act and repeal it as from that date which would have saved all pending proceedings as well as all rights, privileges, obligations or liability accrued or incurred thereunder and would have avoided the confusion arising out of a repeal of an order which has already been declared to have expired.

Even if we hold that the Hyderabad Rent Control Order 1353 F., could not be repealed and, here not been revived, neither the retrospective character given to the Act of 1954 by Sub-section (2) of Section 31, nor the competence of the Legislature to enact such a provision can be doubted.

8. In Potti sarviah v. Warvara Naraslnga Rao ILR 1954 Hyd 766 : (S) AIR 1955 Hyd 2571 (G), not cited by the advocates of either party) a Division (sic) Bench of this High Court, consisting of Misra O.J., and Ansari J., was considering the validity of Section 31 of the Act, and after holding that the same was not ultra vires the Legislature, observed at p. 775 (of ILR)(at p. 259 of AIR) thus:

The distinction sought to be drawn by the learned Counsel for the Applicants between a statute that had lapsed and the one that is repealed, scarcely affects the question before us. It would appear after the Full Bench decisions of this Court to which reference has been made at the commencement of this judgment, the State applied for leave to appeal to Supreme Court and while the application was pending, the Legislature stepped in to pass the Hyderabad Houses (Rent, Eviction and Lease) Control Act in order to set the controversy at rest. By Sub-section (2) of Section 31, it did not render the orders or proceedings passed under the Hyderabad Rent Control Order us though they were passed under a good law. It merely directed that those orders shall be deemed to be orders under the new Act to the extent to which they might be covered by it. Obviously, there is nothing wrong in a provision being given a retrospective operation and this is all which the legislature purports to do.

It is, therefore, manifest that provisions of Section 4 of the Act which would govern this case confer equal right both on the landlord and on the tenant be have the fair rent fixed. The point that arises for consideration is, as we have already seen, whether the tenant could waive or agree to waive an advantage conferred by law upon him, that is, whether such an advantage can be contracted out.

On this point the Madras High Court, has in a case under the corresponding Kent Control Act in force in that State held that in so far as the landlord is concerned, he could contract out of his right to have the tenant evicted for non-payment of rent and a Division Bench of this High Court has held that a tenant could contract out of his right to continue as a tenant under an agreement by fixing a specific period on which the tenancy would terminate.

In Anr. Madras case it was held that the mere fact that a landlord has entered into an agreement after the Act came into force restricting his rights more than those restricted in the Act does not operate in itself as a waiver of the statutory rights conferred under the Act. We will now deal with these cases.

9. In S. Raja Ghetty and Others Vs. Jagannathadas Govindas and Others, , the Madras High Court was considering the effect of an agreement entered into between the parties on 15-11-1948, after the Madras Buildings (Lease and Rent Control) Act, 1946, had been enforced under which a tenant cannot be evicted if he pays rent regularly and satisfies the stipulations in the Act and the landlord has a right to evict the tenant on non-payment of rent or on the noncompliance with the provisions of the Act.

Clause (2) of the agreement stipulated, among other things, that if two months rent was not paid, the lessor could re-enter upon the demised premises or any part thereof. The tenant having defaulted payment of rent for one month, the lessor claimed to be entitled to evict the tenant. It was contended that the parties knew or must be deemed to have known the provisions of the Madras Rent Control Act and it was open to the parties to enter into a contract containing terms inconsistent with the provisions of the Act and that if any terms of the contract expressly provided for any matter, they would prevail over the provision of the statute in so far as they are inconsistent. Rajamannar C.J,, and Krishnaswami Nayudu J., after citing the following passage of Maxwell, Edn. 9 at page 389:

Every one has a right to waive and agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may, be dispensed with without infringing any public right or public policy.

Observed that the Rent Control Act would not apply to the lease in question on the ground that the parties are presumed to have known its provisions. They further observed at page 286 thus:

There is no express prohibition against contracting out of it. Though we realise that thee Act was passed in accordance with general policy, we cannot say that that policy would be violated if a contract is entered into between a landlord and tenant giving the tenant larger rights and greater privileges than those conferred on him by the Act....

In the absence of authority that it is not permissible for the parties to contract themselves out of the provisions of this Act, we hold that they can agree to be governed by terms and conditions which may be inconsistent with some of the provisions of the Act. There is no provision in the Act which has a material bearing on this aspect couched in imperative terms, as, for example, found in some enactments which declare that any action done in-contravention of the enactment is void.

Later in Anr. case of George Oakes Ltd. Vs. The Chief Judge, Small Causes Court and Another, , Rajamannar C.J. and Viswanatha Sastri J., held that where a lease was executed on 22-6-1946 i.e., before the passing of Madras Buildings (Lease and Rent Control) Act of 1946 fixing certain rent, the landlord who had no right to apply to the Controller for fixation of fair-rent, could not subsequently after the Act came into force conferring this right on him, apply for having the fair rent fixed.

In that case the lease of 1946 had been renewed in 1949 after the Act came into force. Notwithstanding this fact it was held that without any evidence that the landlord has knowledge of the provisions of Section 4 relating to fixation of fair rent and that with such knowledge he deliberately consented to abandon his right at the time when the lease was renewed, it cannot be assumed that the parties wanted to contract out of the rights conferred by the statute on the lessor.

Viswanatha Sastry J., observed that Sections 6 and 7 of the Act (corresponding to Sections 7 and 10 of the Hyderabad Act) prevented a tenant from contracting out of the terms of those sections and depriving himself of the right to insist on a fair rent and the right to continue in possession even though the stipulated terms have expired, and that Section 16(1) of the Act (corresponding to Section 28 of the Hyderabad Act) makes the transgression of Section 6 and the exaction of a rent in excess of the rent fixed as fair rent by the Controller, an offence punishable with imprisonment.

In these circumstances he doubted whether the learned Judges who decided S. Raja Ghetty and Others Vs. Jagannathadas Govindas and Others, would have held that the tenant had validly; contracted himself out of the right to a fair rent and immunity from eviction conferred on him by the Act. Rajamannar C.J., explaining the decision in George Oakes Ltd. Vs. The Chief Judge, Small Causes Court and Another, , to which he was a party with reference to the doubt expressed by Viswanatha Sastry J., observed at page 223:

There was no doubt in our mind that he could not. I would be prepared to go the length of holding that it would be against public policy and the spirit of the Act.

The learned Chief Justice further says this at page 224:

But I fail to see why in the absence of a specific prohibition and when there is no offence against public policy, a landlord should not waive a benefit conferred on him by the Act, why, for instance, he should not agree that he would not take out an application for eviction unless there is default in payment of rent for two or three consecutive months.

With great respect when a statute confers rights both on the lessor and the lessee, one cannot discriminate between these rights. To say that in the case of lessor it would not be a question of public policy and hence he could waive his right to his detriment while in the case of a tenant it was a question of public policy and he cannot waive it, would be to create an invidious distinction.

Where the principle is that in the act there is no express prohibition against contracting out of it, it is always necessary to consider whether it is one which is intended to deal with private rights only or whether it is an Act intended as a matter of public policy to have a more extensive operation.

The Act by Sub-section (3) of Section 7 (like Sub-section (3) of Section 6 of the Madras Act) makes null and void any stipulation to claim or receive or stipulate any payment of any premium or any other sum in addition to fair rent or except as provided in Sections 5 and Cany rent in excess of a fair rent or where the fair rent is not fixed or has not been determined, to receive or stipulate for the payment of any amount or other like sum in addition to the agreed rent.

Similarly Section 10 also prohibits eviction whether in execution of a decree or otherwise except in accordance with the provisions of that section. These provisions are clearly indicative of an express prohibition against contracting out of the statutory obligations and rights by both the lessor and the tenant.

While this position appears to us to be deducible from the provisions of the Act, a Division Bench of this Court in ILR (1952) Hyd 681 : AIR 1953 Hyd 13(A) have no doubt observed on the Hyderabad Rent Control Order made under the Defence of Hyderabad Regulation that it is open to a party to waive or agree to waive the advantage conferred by the Hyderabad Rent Control Order and that in that case the agreement and not the provision of that particular Act will be acted upon.

Even Clause 6 of the expired Rent Control Order made the stipulation for payment of any rent or premium in excess of fair rent null and void. This case was one which arose on an application for writ of certiorari directed against the order of the Collector of Bhir who had declined to pass an order of eviction and had allowed the appeal of the tenant.

The landlord had applied to the Hyderabad Rent Controller for the eviction of the tenant on two grounds, first that he had entered into an agreement with the tenant to vacate the premises within a period of live months and that that period had expired and secondly on the ground that the Mulgi was required for his personal use. In the circumstances the Division Bench held that the tenant has expressly waived the benefit that he might be entitled to under the Rent Control Order.

If the fixation of fair rent is in furtherance of public policy and for the benefit of the tenant and cannot be waived, the provisions preventing the eviction of tenant except under certain circumstances provided in the statute on the same parity of reasoning are equally for the protection of the tenant and cannot be waived. In the circumstances that decision cannot be reconciled with the provisions of either the Rent Control Order of 1353F; or those of the Act which make stipulations against certain statutory provisions invalid.

Be that as it may, even on a consideration of. that decision, if it was permissible for the parties to contract out of the provisions of the Rent Control Order, 1353F., that order having expired long prior to the execution of a registered rental lease deed in 1950, it cannot be said that the parties contemplated, by that agreement, to contract out of any of the provisions of a subsequent law made operative retrospectively: as such the question of contracting out of the provisions of the Act would not ex facie arise. The application made by the tenant and the decision of the appellate authority in November 1954 remanding the case to the Rent Controller and the further orders of the Rent Controller and the decision of the appellate authority, which is the subject-matter of these revisions will all be deemed to have been made under the provisions of the Act and consequently the Rent Controller has a right to determine fair rent u/s 4 thereof.

10. Adverting to the merits of the case, we find that both the tenant and the landlady have challenged the correctness of the order. The tenant''s contention is that the allowance of 50 percent increase on rental value u/s 4(4)(1) of the Act could not be lawfully extended to any in-crease in the fair rent u/s 5(1) of the Act.

It appears that the appellate authority after ascertaining the rental value of the building u/s 4(2) has in view of the improvements made in the house calculated the increase at the rate of 6 percent, of the cost of such improvements u/s 5(1) and then made an allowance of 50 percent on the total amount u/s 4(4)(1). Evidently, this is not the correct way of assessment of the fair rent as warranted by Sections 4 and 5 of the Act. Section 4 relates to the determination of the fair rent whereas Section 5 to an increase therein. 50 per cent, allowance contemplated by Section 4(4) is intended only for the fair rent and not for any increase therein. Thus the figure arrived at is manifestly wrong. No doubt, the tenant has also challenged the finding as to the costs of improvements in the building but on the evidence adduced we see no reason to differ from the concurrent findings of the Courts below.

11. There is also an allegation of the landlady that the Rent Controller has not complied with the provisions of Section 4(2)(a) and (c) as he has not made local inquiry into the prevailing rates of rent in the locality for the houses similarly circumstanced by personally going to the place.

It is also urged that u/s 4(2)(c) it was the duty of the Controller to give maximum weight to the circumstances under which the premises were leased, including the flourishing state of the business carried on therein and also the stipulated rate of rent in assessing the fair rent. In our opinion it is not incumbent on the Controller to make local enquiry by going to the spot to ascertain the prevailing rate of rent.

All that the section enjoins is that he should hold summary enquiry. The parties were called upon to lead evidence. They were given sufficient time and opportunity. That is sufficient compliance with the provision. Again, there is nothing in the wording of Section 4(2)(c) to support the view urged by the learned advocate. It is not the case of any of the parties that any amount by way of premium or otherwise has been paid in addition to rent.

The situation of the building, the purpose for which it was leased, the agreed rate of rent, and the profitable nature of the business carried on therein cannot outweigh the consideration of prevailing rates of rent and the rental value as entered in the books of the Municipality in fixing the (sic) rent. The Courts below have certainly (sic) with the provisions of Section 4(2) of the Act.

12. The landlady has now along with her revision petition filed a certified copy of the judgment of the appellate authority in relation to fixation of rent of two of her houses in that very locality. This order was passed on 31-3-1955, subsequent to the (sic) in this case. The rate of rent allowed was Rs. 45/- per month and there seems to be also an observation that there is wide scope for further enhancement of rent.

It is urged that when the house with only two rooms and a hall covering an area of 96 yards in the locality can justifiably fetch a rent of Rs. 45/- per month, a rent of Rs. 135/- per month fixed for be house in dispute which consists of 19 rooms and four, verandahs with outhouses covering an area of 500 square yards must necessarily be deemed to be unreasonably low. Though we feel that the party ought to have led evidence at the time of enquiry before the Rent

Controller, yet, in the circumstances of the case, having regard to the fresh evidence now available, we think that interests of (sic) will be better served if the case is remanded for further enquiry in that regard.

We, therefore, set aside the orders of the Courts below, remand the case for further enquiry in relation to prevailing rates of rent of the houses similarly circumstanced. The Rent Controller after due enquiry will pass his orders according to law keeping in view the directions with regard to the method of calculation of fair rent referred to above. Costs will abide the result. This order will govern the connected revision petition also.

