

R. Kanthimathi and Another Vs Beatrie Xavier**None**

Court: Madras High Court**Date of Decision:** Sept. 27, 1995**Acts Referred:**

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 " Section 10(2)(i), 10(2)(iii)

Citation: (1996) 1 MLJ 666**Hon'ble Judges:** Thanikkachalam, J**Bench:** Division Bench

Judgement

Thanikkachalam, J.

The tenants are petitioners herein. The landlady filed a petition for eviction against the tenants under Sections 10(2)(i)

and 10(2)(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as "Act"), before the Rent Controller of

Coimbatore. The landlady is residing at Hyderabad. The petition for eviction was filed on the ground of wilful default in payment of rent and on the

ground of acts of waste. The 1st respondent before the Rent Controller is the wife of 2nd respondent, both of them are tenants under the landlady,

on a monthly rent of Rs. 120. The rent was paid upto March, 1977. Thereafter they did not pay the rent regularly to the landlady. In May, 1977,

the 1st respondent requested the landlady to sell the petition premises and an agreement dated 4.5.1977 was entered into between them.

Subsequently, the 1st respondent committed breach of the said agreement. The 1st respondent was not willing and ready to comply with the said

agreement. The respondents/tenants made certain alteration to the building in question. The said alterations are illegal and unlawful. The landlady

issued a notice to the tenants, but there was no response. Hence the petition.

2. According to the tenants, the 1st respondent took the premises on lease on a monthly rent of Rs. 120. The 2nd respondent is an unnecessary

party. The 1st respondent entered into an agreement with the landlady to purchase the petition premises for a sum of Rs. 25,000 on 4.5.1977. A

sum of Rs. 20,000 was paid by way of advance. As per the agreement, the 1st respondent continued to be in possession of the petition premises.

Therefore, it is not correct to say that the respondents/tenants were not paying the rent regularly. After paying a sum of Rs. 20,000 towards the

sale agreement, the respondents cannot be asked to pay the rent. As per the agreement, the 1st respondent was always ready and willing to pay

the balance of sale price, but the landlady was not ready and willing to execute the sale deed in favour of the 1st respondent. Therefore, there is no

wilful default in payment of the rent as alleged by the landlady. The 1st respondent put up a temporary shed with the permission of the landlady.

Therefore, it is not correct to state that the 1st respondent committed acts of waste, impairing the value and utility of the building. Hence the

petition is liable to be dismissed.

3. As per the agreement between the 1st respondent and the petitioner/landlady, the landlady agreed for the respondents to be in possession on

the basis of the agreement according to the tenants. Even in the agreement, it is stated that the possession was handed over to the 1st respondent.

Therefore, there is no relationship of landlady and tenants between the petitioner and the respondents in the eviction petition.

4. The landlady submitted that the tenants are in possession of the petition premises not in accordance with the sale agreement. Possession was not

handed over to the tenants, after the sale agreement. The 1st respondent sent a cheque for Rs. 20,000, but the same was returned by the landlady

to the 1st respondent. The agreement between the landlady and the 1st respondent came to an end by the petitioner's letter dated 4.10.1978.

5. So far as the ground relating to acts of waste is concerned, the Rent Controller pointed out that only a temporary shed was put up by the

respondents/tenants. On considering the facts of the case, the Rent Controller held that the tenants committed wilful default in payment of rent and

accordingly eviction was ordered u/s 2(i) of the Act.

6. On appeal, the Rent Control Appellate Authority confirmed the order passed by the Rent Controller u/s 10(2)(i) of the Act. It is against that

order, the tenants are in revision before this Court.

7. Learned Counsel appearing for the tenant/petitioners submitted that the possession was handed over to the tenants in pursuance of the sale

agreement, and therefore, it cannot be said that the tenants committed wilful default in payment of the rent. The tenants paid a sum of Rs. 20,000

towards advance as per the sale agreement. Therefore, it cannot be said that there is wilful default in payment of rent. According to learned

Counsel for the petitioners/tenants, even if there is any default in payment of rent, that can be adjusted towards the advance amount paid by the

tenants. The tenants are entitled to the benefit of part performance of the contract as contemplated u/s 53-A of the Transfer of Property Act. It

was therefore, pleaded that there is no wilful default in payment of rent. The acts of waste said to have been committed by the tenants was not

proved by the landlady. There is no Engineer's report to support the plea put forward by the landlady, the acts of waste were committed impairing

the utility and value of the building. It was therefore, pleaded that the authorities were not correct in ordering eviction u/s 10(2)(i) of the Act.

8. On the other hand, learned Counsel appearing for the landlady/respondent, while supporting the order passed by the Rent Control Appellate

Authority submitted that admittedly the rent was not paid for the petition period. No doubt there was an agreement to sell the petition premises,

and an advance of Rs. 20,000 was paid by way of cheque, which was later on returned by the landlady. There is no clause in the sale agreement

to the effect that the tenant can be in possession of the petition premises without paying the rent. Under such circumstances, it is not possible for

the tenants to contend that there is no wilful default in payment of rent. The tenants never asked the landlady to adjust the amount of Rs. 20,000

paid by way of advance. But the advance was already returned by the landlady to the tenants. The tenants have put up a structure in the petition

premises without the permission of the landlady and thereby materially impairing the value and utility of the building. Therefore, the tenants are liable

to be evicted u/s 10(2)(iii) of the Act also. It was submitted that since both the courts concurrently come to the conclusion that the tenants are in

wilful default in payment of rent, no interference is called for.

9. I have heard the rival submissions. The fact remains that the petitions/tenants are husband and wife and they are tenants under the

respondent/landlady in respect of the petition premises. The monthly rent was stated to be Rs. 120. According to the landlady, the rent was due

from April, 1977. There was an agreement to purchase the petition premises by the tenants dated 4.5.1977. According to the tenants, a sum of

Rs. 20,000 was paid by way of advance. The sale consideration for the petition premises was Rs. 25,000. On the date of agreement a sum of Rs.

20,000 was said to be paid under a cheque by the tenants as advance. According to the tenants, since possession was given in pursuance of the

sale agreement dated 4.5.1977 and advance was paid to the landlady to an extent of Rs. 20,000 the tenants need not pay the rent and therefore,

there is no wilful default in payment of rent for the petition period as alleged by the landlady On the other hand, according to the landlady, the

cheque for Rs. 20,000 sent by the 1st respondent/tenant was returned back to the tenants and inasmuch as there was no clause in the sale

agreement to the effect that the tenants can be in possession of the petition premises, without payment of rent, the tenants committed wilful default

in payment of rent for the petition period.

10. Ex. A-1 is the notice sent by the landlady and Ex. A-2 is the acknowledgement. There was no reply by the respondents/tenants. In the

agreement of sale, time was fixed to complete the sale transaction on or before 3.8.1977. The tenants say that the landlady is not willing to execute

the sale deed. On other hand, the landlady states that the tenants are not willing to complete the sale transaction. The courts below pointed out that

in Ex. B-1 sale agreement, no specific mention was made regarding possession. The tenants were already in possession of the petition premises.

So also in the sale agreement, there is no recital to show that the tenants need not pay the rent to the landlady, after the sale agreement. According

to the tenants, since the notice was sent by the landlady to a wrong address, it never reached them and therefore, there was no reply from their

side. We are not concerned with whether the sale agreement dated 4.5.1977 is still in force or not. We are only concerned with the fact whether

the tenant has committed wilful default in paying the rent during the petition period. Admittedly the rent was not paid for the petition period. In the

sale agreement, there was no mention to the effect that the tenant can be in possession of the petition premises without payment of rent. In the

absence of such recital, it is incumbent upon the tenant to pay the rent to the landlady. Under such circumstances, the relationship between the

petitioner and the respondents in the eviction petition would be that of landlady and tenants.

11. The Supreme Court in the case of Sardar Govindrao Mahadik and Another Vs. Devi Sahai and Others, , has held as under:

Mere possession cases to be of assistance when as in this case the person claiming benefit of part performance is already in possession, prior to

the contract and continues to retain possession....

If a person claiming benefit of part performance is inducted into possession for the first time pursuant to the contract, it would be strong evidence

of the contract and possession changing hands pursuant to the contract....

Where person claiming benefit of part performance of a contract was already in possession prior to the contract, the court would expect something

independent of the mere retention of possession, to evidence part performance. Therefore, mere retention of possession quite legal and valid, it

mortgage with possession is not discharged, could hardly be said to be an act in part performance unequivocally referable to the contract of sale.

While considering the similar question, this Court in the case of R. Ranganayaki Ammal Vs. Namagiri Venkataraman, , held as below:

From the aforesaid observations of the Supreme Court, it is clear that the mere retention of earlier possession as tenant would not be sufficient, but

that there must be some independent material or evidence to establish that the retention of possession was as, a result of part-performance of the

agreement to sell. In this case, there is absolutely no material whatever to show that the nature of the possession changed its character after

28.8.1969 or even after 5.11.1969.

12. In B. Kuppulal v. Dasagunthala and Anr. (1987) 2 All R.C.J. 314, this Court while considering the provisions of the Tamil Nadu Buildings

(Lease and Rent Control) Act and Section 53-A of the Transfer of Property Act, held that agreement of sale of petition premises would not

terminate the relationship of landlord and tenant.

13. The Karnataka High Court in the case of Kareem Beig v. Dr. Mohammad Khizar Hussain (1988) 2 All R.C.J. 222, while considering the

provisions of Section 53-A of the Transfer of Property Act, held that the doctrine of part performance cannot be permitted on the basis of an

agreement which has become unenforceable due to Law of limitation.

14. According to the facts of the present case, in pursuance of the sale agreement, no further action was taken by the tenants in the matter of

purchasing the petition premises. On the side of the landlady, it was submitted that the cheque for Rs. 20,000 given by the tenants was returned

back and the cheque was not encashed. Admittedly, there is no clause in the sale agreement for continuing the possession without payment of rent

and absolute possession was also not given in pursuance of the said sale agreement. Insofar as the ground relating to the acts of waste is

concerned, no evidence was adduced by the landlady to show that the tenants had committed acts of waste, which materially impaired the value of

the building. Therefore, eviction has not been ordered on that ground. In view of all these facts, I consider that the courts below were correct in

holding that the tenants have committed wilful default in payment of rent. Accordingly, I am not inclined to interfere with the order of eviction

passed by the Rent Control Appellate authority, u/s 10(2)(1) of the Act.

15. Accordingly the revision is dismissed. That there will be no costs. Time for eviction two months.