(2009) 10 MAD CK 0270

Madras High Court

Case No: C.R.P. (NPD) . No. 971 of 2006 and M.P. No. 1 of 2008

Kalyani Ragunath		APPELLANT
	Vs	
K. Muthuramalingam		RESPONDENT

Date of Decision: Oct. 30, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 107
- Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 - Section 4

Citation: (2009) 10 MAD CK 0270

Hon'ble Judges: M. Venugopal, J

Bench: Single Bench

Advocate: V. Lakshmi Narayanan, for V. Raghavachari, for the Appellant; Ashok Menon, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

M. Venugopal, J.
The petitioner/landlady has preferred this civil revision petition as against the order in M.P. No. 57 of 2006 passed by the learned Appellate Authority viz., VIII Judge, Court of Small Causes, Chennai in allowing the application filed by the respondent/tenant praying for appointment of an Advocate Commissioner to inspect the premises, which is subject matter of the Rent Control Appeal and assess the fair rent payable in respect of the same, if necessary with the help of the qualified Engineer and resultantly, appointing an Advocate Commissioner etc.

2. The learned Appellate Authority viz., VIII Judge, Court of Small Causes, Chennai, while passing order in M.P. No. 57 of 2006, has allowed the M.P. on 31.03.2006 by appointing Thiru. M. Suresh, Advocate as Court Commissioner and directed him to inspect the suit property along with building Engineer by issuance of notice to respective sides and also

directed the Commissioner to submit his report in regard to the status of the petition building before 17.4.2006 and fixed the remuneration of the Commissioner at Rs. 1,500/- etc.

3. According to the learned Counsel for the revision petitioner/landlady, the Appellate Authority has committed a manifest error in appointing the Advocate Commissioner in M.P. No. 57 of 2006 to inspect the petition mentioned property and as a matter of fact, the Appellate Authority should have taken into account of an important fact that it is not for an Advocate Commissioner to fix the Fair Rent in rent control proceedings and it is the essential function of the Court/Tribunal and the same cannot be delegated to the Commissioner and inasmuch as both the Engineers on respective sides have furnished the report after inspecting the petition building any further report on the subject is a superfluous one and as per Section 4 of the TN Buildings (Lease and Rent Control) Act, 1960 it is for the Rent Controller to fix the fair rent and not for the Advocate Commissioner and moreover, the respondent/tenant has not filed any objections to the Engineer''s report furnished on the side of the revision petitioner/landlady and indeed an Advocate Commissioner''s report cannot be a substitution for actual proof considering the dispute involved between the parties in fair rent proceedings and these aspects of the matter have not been looked into by the learned Appellate Authority viz., VIII Judge, Court of Small Causes, Chennai and therefore, prays for allowing the civil revision petition to promote substantial cause of justice.

4. In support of his contention that the appointment of an Advocate Commissioner at the appellate stage in R.C.A. No. 1087 of 2005 is incorrect, the learned Counsel for the revision petitioner cites the decision of this Court in Pappayee Ammal Vs. Subbulakshmi Ammal and Another, wherein it is held as follows:

The appointment of a Commissioner in appeal is a rarity and is seldom resorted to. Such an appointment is not authorised by Order 41, Rule 27. The rule relates to additional evidence. Where a Commissioner was appointed by the trial Court to make local inspection of the Suit property and no objection to his report was raised at the stage of trial before the trial Court, the appointment of another Commissioner by the appellate Court during the pendency of the appeal for the very same purpose for which the Commissioner had been appointed by the trial Court would be invalid as it is neither in the interest of justice nor is it recognised by the provisions of Order 41, Rule 27 or under Order 26, Rule 9 read with Section 107. T.R. Rajagopala Iyer Vs. T.R. Ramachandra Iyer, and (1979) 1 Mad LJ 358.

5. He also relies on the decision of this Court in Engineers Associates, Mechanical Engineers Vs. J. Parvathi and J. Revathi, at page 838 wherein it is among other things held thus:

...To put it in a nutshell, whether the common area was included or whether the tenant''s actual possession was only 538 sq. ft. and not 544 sq. ft. as alleged, it is purely a

question on fact to be appreciated by the learned Appellate Authority at the time of hearing of the main R.C.A. No. 42 of 1997 pending on its file. The evidence of both the Engineers and documentary evidence on record are very much available in the case, then it is otiose to for the tenant/petitioner to file the M.P. No. 90 of 2001 praying for an appointment of Commissioner and the same is not per se maintainable in the eye of law. In the considered opinion of this Court, the reason assigned by the learned Appellate Authority in dismissing the M.P. No. 90 of 2001, praying for appointment of Commissioner that the said appointment is not necessary in lieu of discrepancy of 6 sq. ft., etc., is not correct.

6. Further, the learned Counsel for the revision petitioner brings it to the notice of this Court to the decision in T.R. Rajagopala Iyer v. T.R. Ramachandra Iyer AIR 1969 Madras 144 wherein it is held as follows:

Appointment of a Commissioner in the appeal is a rarity and is seldom resorted to. Such an appointment is not authorised by Rule 27 of Order 41. That rule relates to additional evidence and the language of Rule 27(1)(b) does not lend itself to a construction that the report of a Commissioner to be appointed and submitted in the appellate stage is regarded as additional evidence for purposes of that rule. Wide as the phraseology of Sub-section (2) of Section 107 may appear, when Sub-section (1) and the matters mentioned court under Sub-section (2) should be understood not as widely as it may prima facie appear to justify. In any case, assuming that Section 107(2) authorises the appellate court to appoint a Commissioner for inspection, that is a power which should be very sparingly used and only in the interests of justice.

7. In response, the learned Counsel for the respondent/ tenant submits that there are 3 points of difference between the parties. Firstly, in regard to 7 ft. in the built up area; secondly, in regard to the age of the building; thirdly, in regard to appurtenant land and as per Section 18A of the TN Buildings (Lease and Rent Control) Act, 1960, the Rent Controller shall have powers to appoint a Commissioner in any proceedings pending before him and in this regard, he has all the powers of a Civil Court as per CPC and in the present case on hand, unless an Advocate Commissioner with the help of an Engineer inspects the premises, the facts regarding the premises will not be available before the learned Appellate Authority for determining the actual state of affairs and therefore, the Appellate Authority has rightly appointed the Advocate Commissioner in the order in M.P. No. 57 of 2006 dated 31.03.2006 which need not be interfered by this Court sitting in revision.

8. To lend support to his contention that the Appellate Authority has power to appoint an Advocate Commissioner, the learned Counsel for the respondent cites the decision of this Court in C. Rajagopal Vs. Mrs. Mallika Begum, at page 213 wherein it is observed as follows:

The Rent Control Act provides for the issue of a commission and get a report after local inspection. The said power was given to the Rent Control Court by virtue of an amendment by incorporating Section 18-A in the Act. The purpose of incorporating the section is very clear. When there are two Reports by two person claiming themselves to be experts and the Reports are conflicting, it will be difficult for the Court to arrive at the correctness of the same. Both the Reports will be filed in Court at the instance of either party, and so it cannot be treated as impartial. It was under such circumstance, the Act was amended incorporating Section 18-A of the Act. By incorporating that Section, the entire procedure under Order 26 Rule 9 of the CPC is also impliedly incorporated in it. Once that power is given, the Court is given the power to appoint a Commissioner and get a Report, and that will be legal evidence in the case under Order 26 Rule 10 of the CPC etc.

9. He also relies on the decision of this Court in T.S. Ramu Vs. Neelakandan, wherein it is observed that "Though it was jurisdiction of the Controller only to appoint Commissioner, appeal being a continuation of original proceedings, Appellate Authority would have all powers which Controller as original authority had if it, "is provoked to appoint a commissioner although such an application was not sought before the Trial Court nor was it thought of by the trial Judge himself" and agreeing with the view in the decision reported in 1975 TLNJ 237 and held that Appellate Authority had all powers which the original authority had which includes power to appoint an Advocate Commissioner, u/s 18-A of the TN Buildings (Lease and Rent Control) Act, 1960."

10. Also the decision of this Court in Asokraj Kandaswamy v. Tiruvengadaswamy 1975 TLNJ 237 at page 238 is cited on the side of the respondent wherein it is observed that "under Section 18-A it was only the Controller who shall have the powers to appoint a Commissioner and not the appellate authority. An appeal is a continuance of the original proceedings and the Appellate Authority would, therefore, have all the powers which the controller had when he was having the petition originally as an original Authority. There may be circumstances, as it happens, in Civil cases when the Appellate Court, while dealing with an appeal, is provoked to appoint a Commissioner although such an application was not sought before the Trial Court nor was it thought of by the Trial Judge himself Once the authority is vested by statute in the original authority such as the Rent Controller, to appoint a Commissioner would also form part of the record of the Appellate Court and is bound to be scrutinised by him when the appeal is heard. This and other normal circumstances pertaining to the hearing of Civil proceedings compels the Court to disagree with the Appellate Authority that the text of Section 18-A of the Act has to be interpreted strictly and that the Appellate Authority under the Act has no authority to appoint a Commissioner in any proceeding before him but it is only the Rent Controller."

11. It is the contention of the learned Counsel for the respondent/tenant that in the report filed by the Engineer for the petitioner/landlady, the age of the building is shown as 10 years by physical observation and it is mentioned that the schedule 1 amenities including a large extent of vacant land and this has been indicated as 40 ft. x 32 ft. and has been

shown as 1280 sq. ft. and the plinth area of the petition portion has been indicated as 460 sq. ft. and further the revision petitioner''s Engineer has indicated that the excess land is 1050 sq. ft. (1280 sq. ft. - 230 sq. ft.) and moreover, the Engineer has indicated the schedule 1 amenities at 15% (being the large extent of site available) and has given the allowance of Rs. 168863/-. But in the report filed on behalf of the respondent/tenant, the area of the premises is indicated at 453 sq. ft. and the age of the building is indicated as 24 to 25 years and there is no mention of any appurtenant land whatsoever and in fact, it is clearly indicate that the premises is an out house lying more than 200 running feet away from the street.

12. According to the learned Counsel for the respondent/ tenant, the learned Rent Controller has come to the conclusion that the building is 10 years old without any evidence having been let in and also the difference in area even though small (460 sq. ft. - 453 sq. ft.) is also a point at which the two Engineers have not agreed to and another important aspect is that there is no appurtenant land whatsoever and appurtenant land is not indicated anywhere in the report of the Engineer for the tenant and the appurtenant land is an amenity and even though there is no appurtenant land whatsoever, the petitioner''s Engineer has earmarked 15%.

13. Continuing further, the learned Counsel for the respondent/tenant submits that in the report filed by the Engineer of the revision petitioner/landlady, the fair rent has been indicated at Rs. 9,710/- per month. But in the report of the Engineer filed on behalf of the respondent/ tenant the fair rent has been indicated at Rs. 1,536/- and therefore, there is a vast difference in the fair rent determined by the two Engineers. But the learned Rent Controller has determined the fair rent at Rs. 8,535/- per month.

14. It is to be borne in mind that neither the TN Buildings (Lease and Rent Control) Act, 1960 nor the rules framed thereunder envisages the appointment of a Commissioner for the purpose of inspecting and submitting a report regarding the determination of fair rent in an application u/s 4 of the Act, in the considered opinion of this Court. But generally a Commissioner is appointed to assist the Court by placing a report of local investigation. However, an order appointing a Commissioner ought not to become a lever to protract the litigation.

15. At this stage, this Court recalls the observation made in the decision in Tulamaya Chettri and Anr. v. Younarayan Pradhan AIR 2004 Sikkim 39 wherein it is observed as follows:

Ordinarily we would not have interfered with an order appointing an amin commissioner but in the case at hand parties have closed their evidence and when the matter was at the stage of arguments the respondents came up with prayer for appointment of a commissioner. In view of the admitted fact that parties have already closed their evidence, acceding to the prayer for appointment of an amin commissioner at this belated stage would amount to permitting the respondents to fill up lacunae in their evidence thus

leading to a roving inquiry. A learned single Judge of the Calcutta High Court in Satish Agarwal v. Tirath Singh 1996 AIHC 1791 has held that when the matter awaits arguments, the prayer made by the defendants for local investigation, if allowed would amount to filling up lacunae in their evidence and such prayer should not be allowed.

16. On a careful consideration of respective contentions and in view of the fact that an appointment of an Advocate Commissioner is an interlocutory and procedural one and bearing in mind of the fact that the main R.C.A. No. 1087 of 2005 is ripe for hearing of the final arguments of the respective sides, it is for the Appellate Authority viz., VIII Judge, Court of Small Causes, Chennai to act based on the available oral and documentary evidence on the basis of the facts and circumstances of the case especially when the two Engineers" reports are very much available on record and in regard to the difference in area (460 sq. ft. - 453 sq.ft = 7 sq. ft.) is only a pure question of material fact to be appreciated by the learned Appellate Authority during the course of arguments of main R.C.A. No. 1087 of 2005 pending on his file and in fact, an Advocate Commissioner can only perform a ministerial act and not a judicial act in regard to the fixation of fair rent u/s 4 of the Act and moreover, it is not the case of the Appellate Authority that there is insufficient or doubtful evidence available on record and in that view of the matter, the order passed by the Appellate Authority, in M.P. No. 57 of 2006 dated 31.03.2006 appointing an Advocate Commissioner etc., is not correct in the eye of law and resultantly, the civil revision petition is allowed.

17. In the result, the Civil Revision Petition is allowed. The order of the Appellate Authority viz., VIII Judge, Court of Small Causes, Chennai in M.P. No. 57 of 2006 is set aside. The learned Appellate Authority is directed to take up the main R.C.A. No. 1087 of 2005 for hearing finally and to dispose of the same within three months from the date of receipt of copy of this order. It is also observed by this Court that at the time of hearing of the appeal if the Appellate Court after scanning the evidence on record comes to the conclusion that the point involved in the subject matter cannot be resolved on the basis of the evidence on record, then it may consider/direct the respondent/tenant to file an application praying for appointment of an Advocate Commissioner and it shall provide due opportunity to the revision petitioner/landlady to file a counter and to dispose of the same on merits together with the hearing of the main RCA and to dispose of the same. Considering the facts and circumstances of the case, the parties are directed to bear their own costs. Consequently, connected miscellaneous petition is closed.