

PETITIONER:
K. NARASIMHA RAO

Vs.

RESPONDENT:
T.M. NASIMUDDIN AHMED

DATE OF JUDGMENT: 23/02/1996

BENCH:
VERMA, JAGDISH SARAN (J)
BENCH:
VERMA, JAGDISH SARAN (J)
SINGH N.P. (J)
VENKATASWAMI K. (J)

CITATION:
1996 AIR 1214 1996 SCC (3) 45
JT 1996 (3) 181 1996 SCALE (2)570

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

J.S. VERMA. J.

Leave granted.

Respondent is a tenant of the appellant in a premises at Chengalpattu in Tamilnadu. The appellant filed a petition for eviction of the respondent-tenant on the ground of wilful default in payment of rent for the period July 1990 to November 1990 in spite of a notice dated 16.11.1990. The monthly rent is Rs.150/-. The respondent denied that there was any wilful default. He contended that certain repairs had been made in the premises by him with the consent of the landlord for which Rs.1000/- was spent by him; that amount had to be adjusted towards the rent due for the said period; on receipt of the notice from the landlord, he sent a demand draft for Rs.750/- as the rent for five months, which was received by the landlord; and the amount of Rs.2,850/- paid as excess advance was also available with the landlord for adjustment towards the rent due.

The Rent Controller rejected the respondent-the tenant's contention and held that there was wilful default committed by the tenant in the payment of rent for that period. An order of eviction was made against the respondent tenant. The appellate authority rejected the tenant's appeal. The tenant then preferred a Civil Revision Petition in the High Court which has been allowed by the impugned order dated 9.2.1993 taking the view that on these facts there was no wilful default in payment of the rent by the respondent.

It was admitted that a sum of Rs.3000/- was paid by the respondent to the appellant as advance even though according to Section 7(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, (hereinafter referred to as "the Tamil Nadu Act") the landlord could receive only one month's rent in advance. Accordingly, the excess amount of Rs.2850/- paid

as advance by the tenant to the landlord was required to be refunded by the landlord. The question, therefore, is whether the said excess amount paid by the tenant to the landlord being available with the landlord, the tenant can be held to have committed wilful default in payment of rent even though he had not expressly asked the landlord to adjust that amount towards the arrears of rent.

The High Court, on a construction of section 7(2) of the Tamil Nadu Act, held that the tenant could not be held to have committed wilful default in payment of rent on these facts. The High Court also took the view that Section 7 of the Tamil Nadu Buildings (Lease and Rent and Eviction) Control Act, 1960. For this reason, it held that the decision on this Court in *Modern Hotel, Gudur*, Represented by *M.N.Narayanan Vs. K.Radhakrishnaiah and Others* (1989 [2] SCC 686) is applicable to hold that the tenant has not committed any wilful default in payment of the rent. The other decisions under provisions of the corresponding Act in Bihar were distinguished on the different language of the provisions in the Bihar Buildings (Lease, Rent and Eviction) Control Act (hereinafter referred to as "the Bihar Act"). Aggrieved by the decision of the High Court allowing the tenant's Civil Revision Petition, this appeal by special leave has been filed by the landlord.

It is clear from the narration of facts that the ground of wilful default in payment of rent by the tenant for the period July 1990 to November 1990 @ Rs.150/- per month amounting to Rs.750/- was nonexistent if the excess amount of Rs.2850/- available with the landlord in the form of excess advance required adjustment towards the arrears of rent. The nature of this excess amount of advance and its availability for adjustment towards the arrears of rent without an express request by the tenant to this effect would determine the decision on this point. The language of the relevant provision in the statute is of significance for this purpose.

Section 7 of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 reads as under :-

"7. Landlord not to claim or receive anything in excess of fair rent or agreed rent. - (1) Where the Controller has fixed or re-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 date of the commencement of this Act, in consideration of the grant, continuance or renewal of the tenancy of the building after the date of 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 other wise adjusted by the landlord:

Provided that where before the fixation or re-fixation 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 the period commencing on the date of the application by the tenant or landlord under sub-section (1) of Section 4 of sub-section (3) of Section 5, as the case may be, and ending with the date of such fixation or re-fixation.

(2) Where the fair rent of a building has not been so fixed-

(a) the landlord shall not claim, receive or stipulate for the payment of, any premium or other like sum in addition to the agreed 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 sum Paid in excess of the agreed ,rent, whether before or after the date of the commencement of this Act, in consideration of the grant, continuance or renewal of the tenancy of the building after the date of 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 other- wise adjusted by the landlord.

(3) Any stipulation in contravention of sub-section (1) or sub-section (2) shall be null and void."

(emphasis supplied)

The provisions in sub-sections (1) and (2) are similar and provide for cases where fair rent has been fixed or not fixed, as the case may be. Sub-section (3) declares any stipulation in contravention of sub-section (1) or sub-section (2) to be null and void. In this case, it is admitted that fair rent of the building had not been fixed and, therefore, sub-section (2) applies. Clause (a) of sub-section (2) enacts that a landlord is entitled to claim and receive only the agreed rent, which was Rs.150/- per month in this case. The proviso to clause (a) permits the landlord to receive by way of advance an amount not exceeding one month's rent only i.e. Rs.150/- in the present case. Clause (b) provides for the situation where any sum is paid by the tenant to the landlord in excess of the agreed rent save as provided in clause (a), i.e., any sum paid in excess of the agreed rent and an amount net exceeding one month's rent by way of advance. Clause (b) enacts that the amount in excess of the sum which the landlord is permitted to take under clause (a) shall be refunded by the landlord to the person

by whom it was paid, i.e., the tenant, or at the option of the tenant, shall be otherwise adjusted by the landlord. In other words, clause (b) requires that the excess amount paid to the landlord has to be refunded by the landlord to the tenant unless the tenant exercises the option of requiring the landlord to otherwise adjust the excess amount. It is clear that this excess amount available with the landlord is only for the benefit of the tenant, the liability to refund the amount to the tenant being immediate unless the tenant exercises the option to get it adjusted otherwise. The character or the excess amount undoubtedly is that it is the tenant's money in the hands of the landlord for return to the tenant or for adjustment towards the dues of the tenant's at the tenant's option. Any other stipulation in contravention to it has no legal effect being null and void.

The provision clearly enacts the course to be adopted in the case of any excess amount being paid by the tenant to the landlord, taking into account the factor that the tenant in certain circumstances may be compelled to make payment as advance of an amount in excess of that required to be paid to the landlord according to law. For that situation the provision imposes the legal obligation on the landlord to immediately refund the excess amount to the tenant unless the tenant exercises the option of requiring the landlord to adjust that amount towards any dues of the tenant or in any other manner indicated by the tenant. This provision has the effect of creating a corresponding enforceable right in the tenant to recover the excess amount from the landlord or to have it adjusted for his benefit in case the landlord fails to discharge his obligation of refunding that amount. The provision of adjustment of the excess amount at the option of the tenant clearly visualizes its adjustment towards the rent due from the tenant since the jural relationship envisages payment only of rent by the tenant to the landlord towards which it can be adjusted.

There is no illegality attaching to the payment of the excess amount by the tenant to the landlord and a legally enforceable right clearly flows from the provision to the tenant. The *pari delicto* principle is, therefore, clearly excluded for the purpose of envisaging the consequences of an excess amount being taken by the landlord from the tenant because the provision requires the landlord to refund that excess amount. The corresponding provisions in the Bihar Act are different which import the *pari delicto* principle. This difference in the language of the provisions of the two enactments distinguishes the cases under the Bihar Act.

Modern Hotel. Gudur. Represented by M.N. Narayanan Vs. K. Radhakrishnaiah and Others (1989 [2] SCC 686), was a case under Section 7(2) of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act which is in *pari materia* with the corresponding provision in the Tamil Nadu Act. In that case the amount of arrears of rent was smaller than the amount of advance held by the landlord on account of the tenant and it was held that there was no default of rent to permit a decree for eviction on the ground of arrears of rent. While dealing with the effect of sub-sections (2) and (3) of Section 7, it was held as under :

"Mr. Rao building upon the ratio of these two decisions rightly contended before us that when the landlord had Rs.5000/- on tenant's account with him which he was holding for years without paying interest and against the clear statutory bar, there could be no

justification for granting a decree of eviction on the plea of arrears of rent. In view of the fact that the stipulation that the amount would be refundable at the end of the tenancy is null and void under Section 7(3) of the Act, the amount became payable to the tenant immediately and the landlord with Rs.5000/- of the tenant with him could not contend that the tenant was in default for a smaller amount by not paying the rent for some months."

With respect we are of the opinion that this decision squarely applies in the present case under the Tamil Nadu Act and was rightly relied on by the High Court.

The cases relating to the provisions in the Bihar Act from which some support was sought by learned counsel for the appellant to overcome the effect of the decision in *Modern Hotel, Gudur (supra)* are *Budhwanti and Anr. vs. Gulab Chand Prasad* [1987 (2) SCC 153], *M/s.Sarwan Kumar Onkar Nath vs. Subhas Kumar Agarwalla* [1987 (4) SCC 546], *Nand Lal Agarwal vs. Ganesh Prasad Sah and Others* [1988 (4) SCC 215], and *Bhoia alias Bhoja Ram Gupta vs. Rameshwar Agarwala and Others* [1993(2)SCC 443].

For the purpose of this case, it is sufficient for us to say that there are provisions in the Bihar Act, which clearly make it illegal to claim or receive any payment in excess of the amount in addition to the rent or any sum exceeding one month's rent in advance and there is a clear declaration that any excess amount received would not be lawful. There is no provision in the Bihar Act corresponding to that in sub-section (1) and (2) of Section 7 in the Tamil Nadu and Andhra Pradesh Acts, which creates a legal obligation in the landlord to refund the excess amount to the tenant creating a corresponding right in the tenant to recover that amount from the landlord. The absence of such a provision in the Bihar Act making the excess amount refundable and imposing an obligation on the landlord to make that refund immediately or to adjust it, is the distinguishing feature in the Bihar Act. However, on the clear provision of the Tamil Nadu Act which applies in the present case, there is no ambiguity. Further reference to the decisions under the Bihar Act is, therefore, not necessary.

In the present case, excluding from consideration the tenant's claim for adjustment of the amount of Rs.1000/- spent on repairs and the amount of Rs.750/- sent by demand draft on receipt of the notice, the amount of Rs.2850/- with the landlord as the excess amount of advance paid by the tenant to the landlord, was alone sufficient to negative the landlord's claim of ejection. The arrears of rent from July to November 1990 was only Rs.750/- , while the excess amount of advance was Rs.2850/-, far in excess of the arrears. The landlord was bound to immediately refund that excess amount even before the arrears accrued, and he not having made the refund was bound to adjust it towards the rent due from the tenant. On these facts, the tenant could certainly not be held to be a willful defaulter in the payment of rent. The High Court is, therefore, right in deciding against the landlord.

Consequently, the appeal is dismissed with costs.

JUDIS