HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

WRIT PETITION Nos.19228; 19536; 19537; 19596; 19617; 19621; 19640; 19649; 19658; 19665; 19667; 19668; 19684; 19712; 19760; 19767; 19799; 19803; 19832; 19903 and 20032 of 2020

COMMON ORDER:

This batch of Writ Petitions are filed by traders, who are tenants of a complex in Produtturu, which is owned by the respondent-Prodduturu Municipality. They were inducted into the premises as tenants pursuant to a public notice in the year 2013. They have been continuing in possession since then as tenants of the respondent-municipality.

The dispute in these cases centers around the "hike / increase" in the rents for the period 2016-19 and 2019–22. There are two hikes in the rent which were intimated in July, 2020 and October, 2020 only to the petitioners. Challenging the same these Writ Petitions were filed.

Since common questions of fact and law are involved, learned counsels requested that all the matters should be taken up for hearing and accordingly with the consent of the learned counsels final hearing was completed.

PETITIONERS SUBMISSIONS:

Sri T.D.Phani Kumar, learned counsel appearing for the petitioners in all these cases submits that the petitioners are lawful tenants. He questions the manner and method in

which the rent has been enhanced in these cases. According to the learned counsel for the petitioners the 1st demand of rent, after the initial rental period expired in 2016, is for the period 2016-19 (01.04.2016 to 31.03.2019). He points out this communication of enhancement was received on 04.07.2020 by which enhanced rent, interest and penalty were determined and also demanded. A fifteen-day period was given for payment of the alleged arrears. Similarly, on 07.10.2020 another communication was sent by which the rent for the period 01.04.2019 to 31.10.2020 was fixed in the said notice. The enhanced rent, interest on the delayed payment and penalty was also demanded by this Notice of 07.10.2020.

Sri T.D.Phani Kumar, learned counsel for the petitioners submits that this retrospective enhancement of rent is not legally tenable. He points out that if such an enhancement is to be made; prior notice is to be given to the petitioners. Apart from that he submits that the power to enhance the rent can be traceable to Sub-rule 1 of Rule 12 of the A.P. Municipalities (Regulation of Receipts and Expenditure) Rules-1968, which is reproduced in the writ affidavit. According to the learned counsel for the petitioners this renewal must be done before the period expires and that fixing of the rent from 2016-22 by a notice in July, 2020 is absolutely incorrect and is contrary to the rule. He also submits that interest or penalty can only be levied if there is a

breach in the payment and only if there is a statutory power to levy the same. He points out that there is absolutely no statutory power for the Municipality to fall back upon in order to make these demands. He also points out that the petitioners had addressed a letter agreeing to pay the rent from 2016-19 and the petitioners have paid the rents under protest without any default even upto the date of the filing of the Writ Petition. Learned counsel for the petitioners relies upon the judgment in ***Rane Engine Valve Limited and Ors., v The Collector and Ors.,***[1] of a learned single Judge of the Madras High Court, wherein the enhancement of rent with retrospective effect was set aside. He therefore, prays that the entire demand should be set aside.

RESPONDENTS SUBMISSIONS:

In reply to this Sri Ranga Reddy, learned standing counsel for the 2nd respondent municipality strenuously argues that the petitioners are defaulters. He states that the rule relied upon by the petitioners themselves gives the power to the municipality to enhance the rent at 33 1/3 %. He submits that if the petitioners are aggrieved by the same they can vacate the premises. It is his contention that the municipality derives substantial income from its immovable properties and the petitioners are making unlawful gain by squatting on the property by paying old rent only. He also

[1] 2015–2–LW 638 = Manu/TN/0951/2015

submits that the petitioners have given undertaking letter in January, 2016 agreeing to the enhancement of 33.33% for the period 01.04.2016 to 31.03.2019. Therefore, he submits that the petitioners cannot question either the enhancement or the demand for interest or penalty. It is the contention of the learned standing counsel that in the absence of a formal lease the petitioners do not have a right to stay in the property. He states that they should vacate the property in the absence of a lease. He points out that the lease deed has to be executed as per Rule 11 (1) (f) within one month of the renewal of the lease and the same was not done. He also argues that Rule 12 (4) gives discretion to the municipality to raise the rent at 33 1/3%. Only if the lease period is for more than 3 years and upto 25 years he points out that the consent of the State is necessary. Therefore, he submits that in the present case an absolute discretion is vested with the municipality to demand the rent. By arguing that the possession of the petitioners is illegal as the lease has expired, the locus of the petitioners itself is questioned by him. Therefore, learned counsel argues that the Writ Petition should be dismissed on this ground itself. Lastly, he submits in the alternative, without prejudice to his rights, that the petitioners themselves given a letter agreeing for the 33 1/3 % enhancement for the period 2016-19. Therefore, he argues that the subsequent demand of the 2nd respondent based on this is also legal and correct. He submits that the conduct of

the petitioners estops them from questioning the demands for rent. He argues that as there is gross delay in paying the sums dues, the petitioners have to pay interest and penalty also. Hence, learned counsel prays that the Writ Petition should be dismissed.

REJOINDER:

In rejoinder, learned counsel for the petitioners argues that for the period 2016-19 there is no agreement between the parties for payment of enhanced rent and the proposal was not accepted. He also submits that as the proposal was not accepted within a reasonable time it should be taken as lapsed. Apart from that he also submits that payment of rent was made under protest. Therefore, learned counsel argues that this is a fit case in which Court should interfere and set aside the entire demand made.

COURT:

This Court after hearing both the counsel notices that there is no dispute about the essential facts. The rent for the initial period 2013 to 2016 was agreed and paid.

2016 – 2019:

For the period 2016-19 the petitioners have given a letter dated 19.01.2016 itself (before the expiry of the 1ST period). They agreed to pay the rent with enhancement of 33 1/3 %. The contention of the petitioners' counsel is that there is no acceptance of this proposal within a reasonable

time and that the proposal has lapsed. The letter filed with the counter affidavit does not stipulate any time for acceptance. It merely requests the respondent to extend the lease by three years and for enhancing the rent by 33 1/3%. The petitioners have also paid the enhanced rent which was also accepted by the respondent-Municipality. Thus, 'consensus' is clear by virtue of the conduct of both parties. The contention of the learned counsel for the petitioners about the rents being paid "under protest" is also not borne out by the record. The enhanced rent in the 2nd period (2016–19) was paid for more than 3 years. No evidence is produced or filed to show that this was paid under protest. This Court therefore holds that the conduct of the petitioners estops them from claiming that the proposal was not accepted or that the payments were made under protest. Neither of these defenses are supported by record.

2019 – 2022:

Coming to the issue of enhancement of rent from 2019 to 2022, this Court after hearing the submissions notices that there is no statutory power vested in Corporation to enhance the rent with retrospective effect. A formal agreement is also not there between the parties much less with a clause permitting retrospective enhancement. No statutory or other rule is produced or relied upon to justify the fixation of rent with retrospective effect.

The fact that the enhancement was agreed upon in 2020 will not also give the respondent the right to make this the basis for the enhancement in the next block (2019 – 2022) and the reason for this conclusion is:

As per the relevant G.O. (G.O.Ms.No.56, dated 05.02.2011), which is relied upon by the counsel for the petitioners further extension of 3 years can be made with enhancement of at 33 1/3 % over the earlier rent "if the present lessee agrees" only. If clause 12 (4) of G.O. is broken down into its component parts it reads as follows:

a. The Municipal Council may renew the lease of immovable properties for a period of three years at one time;

b. And with the prior sanction of the Government it can renew the lease for a period exceeding three years and not exceeding twenty-five years at a time without conducting public auction

c. If the present lessee agrees to renew the lease in his favour at the rent as fixed hereunder and for revision of the rent once in three year as per the procedure specified .....

It is thus clear that an extension of lease for three years at once or for the period 3 to 25 years (with State Government's consent) is possible only if the lessee agrees for the enhancement. Unilateral enhancement is not

permissible. The clause deals with "renewal of a lease" and also talks of renewal of 3 years or 3 to 25 years with consent of the State "without public auction". The words "if the present lessee agrees to renew the lease in his favour" also makes this very clear. This is an option (with the tenants' consent) for extension of the lease without a public auction. The general rule for disposal of municipal properties or for leasing the same is public auction and this extension with consent is the exception. In the absence of any contractual clause or power in the rule / GO the respondent cannot demand enhanced rent. The consent of the lessee is necessary for the enhancement. The demand for this period is thus bad in law. The case law relied on by the petitioners' counsel in **Rane Engine** case (1 Supra) (W.P.No.24411 of 2013) and its ratio is applicable to this case too.

In the absence of any rule/statutory provision or a clause in the agreement between parties, the demand of the enhanced rent with retrospective effect is bad in law. the following passage from ***National Sample Survey Organisation and Ors., v Champa Properties Ltd., and Ors.,***[2] is very apt and relevant –

> "….. A lease is governed by the terms of the contract (deed or agreement of lease) between the parties. If the contract prescribes a rent for the period of lease, the same being agreed rent, it is binding on the parties. If

[2] (2009) 14 SCC 451 = Manu/SC/1152/2009

> the lease provides for revision of rents periodically, and specifies the method and manner of revision, such revised rent would also be the agreed rent. Where a statute governing tenancies and/or rents provides for fixation of rent or increases in rent, and such statute is applicable to the tenancy in question, then the rent will have to be determined in accordance with the statutory provisions. Subject to the above, any increase can be only by consent of parties. If the lease period expires and the parties are not able to agree upon the increase in rent or terms of renewal, it is open to the landlord to initiate action for evicting the tenant. But under no circumstances can the landlord require the tenant to pay during the period of a lease, a rent higher than what is agreed between them or what is provided for in the statute. The assessment or determination of rent by the Hiring Committee is an expert advice to the lessee and nothing more. Except where there is an agreement to abide by the fixation of rent by the Hiring Committee, neither party can insist or require the other party to abide by the rent assessed by such Committee, as determination of rent by the Hiring Committee is not statutory or contractually binding on the parties."

INTEREST:

The demand for interest is made in the 1st notice for 36 months (2016-19) and in the second notice for 19 months (April, 2019 to October, 2020). It is a trite to note that both these demands were given in July, 2020 and October, 2020 respectively. Interest in the opinion of this Court can only be charged –

a. if there is a statutory provision permitting the charging of interest (like Negotiable Instruments Act etc.,) or a contractual condition for payment of interest'

b. if there is custom or usage of trade applicable to the transaction permitting the payment of interest or

c. by issuing a statutory notice for demand of interest under Section 3 (b) of the Interest Act, 1978.

It is only under these conditions the respondents can claim interest and the Court can also award interest. In the case on hand there is no statutory rule or contractual clause under which interest can be claimed. Nothing was disclosed to this Court. Apart from that custom usage or trade is neither raised as a ground nor proved for demanding interest. Custom and usage is a matter of pleading and proof. Lastly, no notice as required under Section 3(b) of Interest Act demanding interest was specifically issued. A bulk demand is raised.

Apart from all these, this Court also notices that the petitioners agreed to pay rent on 13.01.2016 and paid the enhanced rent for the period 01.04.2016 to 31.03.2019. This was also accepted by a resolution No.3153-06-2020, dated 26.06.2020. The "delay" in this case cannot therefore be attributed to the petitioners and the "delay" is solely caused due to respondents.

As per the decision in ***Secretary Irrigation Department v G.C. Roy***[3] a person deprived of the use of his money to which he is legitimately entitled has a right to

[3] (1991) 3 SCR 417

compensated for the deprivation; call it by any name. it may be called interest; compensation or damage. Such a deprivation is not present in this case.

Hence, both on law and on fact the demand for interest is untenable and is set aside.

PENALTY:

'Penalty' is defined as per Blacks Law Dictionary as follows:

> "PENALTY. The sum of money which the obligor of a bond undertakes to pay in the event of his omitting to perform or carry out the terms imposed upon him by the conditions of the bond."

"An extra charge against a person who violates a contractual provision."

It is also defined as a punitive measure for the failure to perform a required act.

Penalty is thus something that is imposed *in terrorem* or as a punishment for a wrong; as an extra charge for a breach of contract or for failure to do an agreed thing at an agreed time. Therefore, the law imposes a very strict duty on the person demanding penalty to justify the same. The injury or loss must be proved apart from proving that the demand is reasonable. In the case on hand, as can be seen the demand is made in July and October, 2020 with retrospective effect. This Court cannot find any breach or fault on the part of the petitioners/tenants for levying penalty. No rule or provision

of law was pointed out to justify the levy of penalty. The basis for the levy and the quantum of penalty demanded are both not supported by any rule or clause. Apart from that the law is settled that a penal provision when it exists has to be strictly construed. Even in agreements which contain a clause for imposing penalty the Court is not bound to award the same. Section 74 of the Indian Contract Act and the case law on the same like (a) ***Fateh Chand v Balakishan Das***[4] ***Union*** (b) ***Verma Narasimha Rao v Superintendent of Excise***[5] are very relevant here. No provision of law has been brought to the notice of this Court nor is any rule / clause relied upon to justify the levy of this penalty at 1.5%. Both on fact and on law the demand for penalty is untenable and is set aside.

CONCLUSION:

In the result the Writ Petition is partially allowed with the following directions:

1. The respondent-municipality is only entitled to enhance the rent at 33 1/3% for the period 2016-19. This enhancement is payable with the GST as applicable.
2. The respondent-municipality cannot levy rent with retrospective effect more so without the tenants'

[4] 1964 (1) SCR 515
[5] AIR 1974 AP 157

consent. The demand for the period 2019-22 is therefore set aside.

3. If the petitioners consent for extension of the lease the respondent is directed to calculate the rents afresh from the date of this order in this batch of cases and make a demand for the enhanced rent as per the G.O. Ms.No.56 referred to above. The petitioners are directed to convey their willingness or refusal to continue in the premises within 2 weeks of the date of receipt of this order. If the petitioners do not agree / consent, the respondent is free to take steps to evict them as per law.
4. The respondent is not entitled to claim either penalty or interest as claimed in the notices that are impugned. The said demand for interest and penalty in these notices are set aside.

With the above observations the Writ Petitions are partially allowed. There shall be no order as to costs.

Consequently, the miscellaneous applications, pending if any in these Writ Petitions, shall also stand closed.

D.V.S.S.SOMAYAJULU, J

Date:08.12.2020.
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