

Edger Ferus Vs. Abraham Ittycheria

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Court : Kerala

Decided On : Feb-10-2004

Reported in : 2004(1)KLT767

Judge : K.S. Radhakrishnan and; Pius C. Kuriakose, JJ.

Acts : Kerala Buildings (Lease and Rent Control) Act, 1965 - Sections 5(1) and 11; [Constitution of India](#) - Articles 13(1), 19(1) and 21; Transfer of Property Act - Sections 116

Appeal No. : C.R.P. Nos. 1689, 1697 of 1999 and R.P. No. 23/04 in O.P. 10733/87

Appellant : Edger Ferus

Respondent : Abraham Ittycheria

Advocate for Def. : Bechu Kurian Thomas and; Prakash Puthiadam, Adv.

Advocate for Pet/Ap. : V.B. Unniraj,; Shermila and; Bindu Krishna, Adv.

Judgement :

ORDER

K.S. Radhakrishnan, J.

1. A Division Bench of this Court in Issac Ninan v. State of Kerala (1995 (2) KLT 848) declared Sections 5, 6 and 8 of Kerala Buildings (Lease and Rent Control) Act (2 of 1965) ultra vires the [Constitution of India](#) and held them void and violative of Arts. 14 & 19(1)(g) of the [Constitution of India](#). The legislative interdiction against receiving anything in excess of the fair rent even from a willing tenant in accordance with the prevailing rate of rent in the locality was held to be an unreasonable restriction on the right to carry on business envisaged in Article 19(1)(g) of the Constitution. Section 5 it was felt cannot stand alone without subsidiary and incidental provisions for periodical revision of the fair rent. This Court held the legislative scheme provided through Sections 5, 6 and 8 is a package and are mutually dependent and that one provision therefrom cannot be extricated from the other two to keep it alone alive.

2. Issac Ninan's case was later reiterated by a Division Bench of this Court in Jan Enterprises v. Aegee Enterprises (2000 (1) KLT 20) and in Mathew Mathew v. Bhaskaran and Ors. (2000 (1) KLJ 302) and referred to by the Apex Court in Raghavan v. Habeeb Mohammed and Ors. ((2000) 10 SCC 180). Issac Ninan's case was however distinguished in George v. Narayani (1998 (1) KLT 239). Relying on the provisions of Section 11(4)(iv) of the Act and learned Single Judge of this Court P.K.Balasubramanian, J. (as he then was) held that even if Section 5 is taken to be not available, that does not in any manner deprive the Rent Controller of his jurisdiction to fix the fair rent in cases coming under Section 11 (4)(iv) of the Act because the Court while ordering reconstruction has also to order that the landlord is bound to put the tenant in possession of the reconstructed building on a fair rent to be paid by the tenant to the landlord.

3. The Division Bench which heard Issac Ninan's case was not unconcerned about the necessity of a forum for resolution of disputes as to fair rent. The Bench passed the following order on 3.1.1996.

Shri. P.C. Chacko, Senior Advocate, instructed on behalf of the petitioner is present. This is posted as desired by the Additional Advocate General for reporting to the court regarding the steps taken by the Government on the emergency basis for filling up the vacuum arising from the judgment dated 2.11.1995. It was

represented before us by the Additional Advocate General that immediate steps would be taken for promulgating an ordinance incorporating provisions for fixing fair rent under the Kerala Buildings (Lease and Rent Control) Act. This posting is for reporting the matter to us. But Shri. Mohammed Yousuff, learned Government Pleader who is present submitted that there is nothing to report now. But he requested us to give one more posting and said that in the meanwhile some concrete information could be obtained from the Government. On this assurance we post it to 9.1.1996 in the Chambers.

Case was posted on 9.1.1996 and then to 23.1.1996. On 23.1.1996 the learned Advocate General informed the Bench that the Government is contemplating steps to be taken for amending the provisions relating to fair rent in the Rent Control Act which remains a dead letter even now.

4. In Issac Ninan 's case right of the landlord to get fair rent was established. Lex semper dabit remedium - meaning if a man has a right, he must have a means to vindicate and maintain it. Lack of forum for fixation of fair rent put Issac Ninan and the litigant public to considerable agony. Many a tenant and landlord approached the Civil Court for panacea. Civil Court at least some of them closed their doors and refused to adjudicate them on the ground of maintainability, few others took contrary view and granted some solace. Original Petition No. 5485/99 was filed before this Court for setting aside judgments passed by the Principle Munsiff, Trichur in O.S. 2121/97 and also by the First Additional Munsiff, Trichur in O.S. 2120 of 1997 holding that Civil Courts do not have any jurisdiction to fix fair rent or enhance the rent already agreed to between the parties. Learned Single Judge dismissed the Writ Petition, against which a Writ Appeal was preferred. A Bench of this Court consisting of Chief Justice A.V.Savant and Justice K.S. Radhakrishnan in George v. State of Kerala (2000 (2) KLT 933) held that in the absence of any forum in the Rent Control Act the jurisdiction of the Civil Court under Section 9 of the Code of Civil Procedure would still be available for determination of fair rent of a building to which the provisions of the Rent Act would apply. Suits were accordingly restored for being disposed of in accordance with law on the footing that the suits filed by the landlord for determination of fair rent/increase of rent were maintainable under Section 9 of the Code of Civil Procedure.

5. We may point out though this Court had alerted the State though Issac Ninan & George's case and various orders passed subsequently, no concrete steps have been taken by the State to bring in suitable legislation or provisions in the Rent Act for fixation of fair rent. The issue again came up for consideration before this Bench in Aboobacker v. Vasu (2003 (2) KLT 1029) wherein this Bench had occasion to consider the situation prevailing aftermath of Issac Ninan's case and held that the remedy available to the landlord and tenant to approach the Civil Court would be always cumbersome and time consuming. We also alerted the State of the necessity to have a comprehensive legislation. We have also laid down certain parameters for the guidance of the Civil Court for fixation of fair rent. We also reminded the State Government to take necessary steps to bring in suitable legislation so that the unlawful system of demanding large amount by way of pakidi could also be curbed. Absence of suitable legislation and guidelines have also increased the workload in Civil Courts and also before the Rent Control Courts resulting in inconsistent orders and parallel litigations.

6. Issac Ninan's case was an eye opener in rent control jurisprudence and many courts in the country have followed the path of Issac Ninan. Issac Ninan could get the law declared, but the remedy evaded him; though he was aware of the maxim *ubi jus ibi remedium*. Octogenarian Issac Ninan did not succumb, but reminded this Court of his predicament by filing R.P.23/04 seeking restoration of Section 5(1) to the statute so that Rent Control Court itself could fix fair rent rather than the Civil Court and mitigate the grievance of many. Issac Ninan has now resurrected. Shri. Bechu Kurian Thomas represented the review petitioner and for the respondent in the C.R.P. Shri. M.C. Sen appeared for revision petitioner and the learned Addl. Advocate General Shri. V.K.Beeran appeared for the State. Difficulties caused to the litigant public to move Rent Control Court for eviction and the move Civil Court for fixation of fair rent were highlighted. Litigation costs are so exorbitant, and in many cases it is a reality that the landlord has to spend much more than the quantum of rent received by him for the whole of the lease period towards litigation expenses leave aside the time and energy spent on it. Challenge in Issac Ninon's case it was pointed out was only with regard to Sections 6 and 8, but this Court declared Sections 5,6 and 8 as unconstitutional and struck down those provisions. Review petitioner is aggrieved only to the extent that Section

5(1) has not been severed from the remaining objectionable provisions. Counsel also pointed out though this Court had struck down Sections 5, 6 and 8 other provisions relating to fair rent has been left untouched. Reference was made to Sections 4(5), 7, proviso to Section 11(4), Section 30 etc. Placing reliance on the decisions of the Apex Court in *R.M.D. C. v. Union of India* (AIR 1957 SC 628) and *Kihoto Hollohan v. Zachillhu* (1992 Supp. (2) SCC 651) counsel contended Section 5(1) shall be severed from other provisions so that inconvenience caused to the litigant public would be avoided. Counsel submitted preamble of the Act would show that the concept of rent and its control runs like a golden thread through out the length and breadth of the Act.

7. Counsel appearing for the respondent Shri. M.C. Sen submitted that the decision in Issac Ninan's case has stood the test of time and in the absence of legislation large number of civil suits have already been preferred before the Civil Courts and that the judgment in Issac Ninan's case has already been upheld by various Division Benches of this Court it is unnecessary to review the judgment, but to leave it to the Legislature as was done in *Milap Chandra Jains's* case for appropriate legislation. Counsel however fairly conceded the difficulties experienced by litigant public in the absence of any forum for fixation of fair rent and also the practical difficulties in conducting parallel litigations one before Civil Court and another before the Rent Control Court.

8. Preamble of the Act states that Act 2 of 1965 is an Act to regulate the leasing of buildings and to control the rent of such buildings in the State of Kerala. Section 2(3) of the Act defines landlord as a person who is receiving or is entitled to receive the rent of a building and the tenant has been defined under Section 2(6) as any person by whom or on whose account rent is payable for a building. Sub-section (7) of Section 2 says unconscionable rent means any rent which is more than double the maximum of the fair rent that could be fixed for a building under Section 5. Section 4(5) enables fixation of rent by the Rent Control Court. Section 4(5) reads as follows:

Section 4(5). If the building is required for the purpose of the State or Central Government or a local authority or any public institution or for the occupation of any

officer of such Government or local authority, or for occupation by any of the persons specified in Sub-section (3), the landlord shall deliver possession of the building to the Accommodation Controller and the Government, the local authority or public institution or officer or person shall be deemed to be the tenant of the landlord, with retrospective effect from the date on which the Accommodation Controller received notice under Sub-section (1) or Sub-section (2), the terms of the tenancy being such as may be agreed upon between the landlord and the tenant and in default of an agreement, as may be determined under Section 5.

Provided that the rent payable shall be the fair rent, if any fixed for the building under the provisions of this Act, and, if no fair rent has been so fixed, such fair rent as may be determined in accordance with the provisions of this Act:

Provided further that a building used as a residential building, shall not be used as a non-residential building or vice versa unless the Accommodation Controller after hearing the landlord grants permission under Sub-section (1) of Section 17:

Provided also that no structural alterations shall be made in the building, unless the consent of the landlord is also obtained therefore.

Sub-section (5) of Section 4 has also become inoperative since Section 5(1) was struck down. Further Section 7 deals with increase of rent in certain cases. The said provision is extracted below:

7. Increase of rent in certain cases: (1) Where the amount of the taxes and cesses payable by the landlord in respect of any building to a local authority has increased after fixation of the fair rent, such increase shall be recoverable by the landlord from the tenant. Provided that no such increase exceeding five percent of the original fair rent shall be so recovered from the tenant.

(2) Any dispute between the landlord and the tenant in regard to any increase claimed under Sub-section (1) shall be decided by the Rent Control Court.

Above mentioned provisions would indicate that the amount of taxes and cesses payable by the landlord in respect of any building to local authority has increased after fixation of the fair rent, such increase shall be recoverable by the landlord

from the tenant. Proviso says that no such increase exceeding five per cent of the original fair rent shall be so recovered from the tenant and that any dispute between the landlord and the tenant in regard to any increase claimed under Sub-section (1) shall be decided by the Rent Control Court, Therefore, fixation of fair rent under Section 7 also is controlled by Section 5(1) of the Act if there is any increase in the municipal taxes and cesses. So also third proviso to Section 11(4)(iv) which provides that the tenant who was evicted shall have the first option to have the reconstructed building allotted to him with liability to pay its fair rent. Section 30 of the Act also confers power on the court to fix fair rent suo motu under Section 5. Said provision reads as follows:

30. Fixation of fair rent suo motu by court: (1) If during the course of prosecution under this Act, it is disclosed that a landlord was receiving a rent in excess of the rent that may be fixed under Section 5, the court before which the complaint was filed shall, after the close of the proceedings before it, forward to the Rent Control Court the relevant extracts of the proceedings for the purpose of fixing the fair rent.

(2) The Rent Control Court, on receipt of such extracts of proceedings, shall issue notice to the concerned landlord and tenant and after giving them an opportunity of being heard, fix the fair rent of the building and the fair rent so fixed shall be deemed to be fair rent as determined under Section 5.

Some of the above mentioned provisions are inseparable like Siamese twins and it is dangerous to separate them, lest one or both of them would die. The preamble to the Act as well as the various statutory provisions mentioned herein before would indicate that the concept of rent and its control runs like a golden thread throughout the Act/Unless Section 5(1) is retained the object and purpose of Sections 4(5), 7 proviso to Section 11(4) and Section 30 would be frustrated.

9. The Apex Court in *RMDC v. Union of India* (AIR 1957 SC 628) and also in *Kihoto Hollohan v. Zachillhu and Ors.* (1992 Supp. (2) SCC 651) held that the doctrine of severability applies in a case where an otherwise validly enacted legislation contains a provision suffering from a defect of lack of legislative competence and the invalid provision is severable leaving the remaining valid provisions a viable whole. It is a well known principle of interpretation that a statute

is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable and a statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat*, meaning that a liberal construction should be put upon written instruments so as to uphold them, if possible, and carry into effect the intention of the parties.

10. We are of the view unless Section 5(1) is retained Sections 4,5,7, proviso to Section 11(4) and Section 30 would become unworkable. In this connection we may refer to the decision of the Division Bench of the Andhra Pradesh High Court in *Suresh Gir v. K. Sahadev* (1998 (1) REC 53), wherein the Andhra Pradesh High Court considered the scope of Section 4 of the A.P. Buildings (Lease (Rent and Eviction) Control Act 1960. The court struck down Section 4(2), (3) and (4) laying down criteria for fixation of fair rent, However, Sub-section (1) of Section 4 was retained applying the doctrine of severability. The court held that if they hold that Sub-section (1) does not survive, there will be no provision at all to fix the fair rent with the result the agreed rent will prevail. The court felt neither the tenant nor landlord can apply to the court for fixation of fair rent. Such a situation would undoubtedly frustrate the objectives of the rent legislation, control of rent being one of the objectives. The court felt the total removal of Sub-section (1) would do far more damage to the legislative intent and social purpose sought to be achieved than its extrication from the allied provisions prescribing guidelines. Legislature, their Lordships held, would not have contemplated a vacuum in the arena of fixation of fair rent, when it is the avowed objective of the Legislature to provide a remedy both to the tenant and the landlord in the matter of fixation of fair rent. We are in respectful agreement with the above mentioned principles laid down by the Andhra Pradesh High Court in retaining Section 4 of the Andhra Pradesh Rent Control Legislation. Andhra Pradesh High Court has also placed reliance on *Issue Ninan's case*.

11. The Rajasthan High Court in *Khem Chand v. State of Rajasthan and Anr.* (1992 (2) WLC (Raj.) 228) had occasion to consider the constitutional validity of Section 6(2) of Rajasthan Premises (Control of Rent & Eviction) Act, wherein also

the Rajasthan High Court quoted with approval the decision in Issac Ninan 's case, but did not struck down Section 6(1) which provides forum for fixation of fair rent. The predicament of Milap Chandra Jain is however agonizing, waiting endlessly for legislative intervention, a situation Issac Ninan has been facing in spite of judicial verdicts. Issac Ninan could be saved, but not Milap Chandra Jain due to jurisdictional impotency. In Milap Chandra Jain v. State of U.P. (2001 (2) REEK 687) a learned Single Judge of Allahabad High Court examined the scope of Section 3(k), 4(2), 5, 6, 8, and 9 of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. Following Issac Ninan's case and also the decision of Apex Court in Malpe Vishwanath v. State of Maharashtra (AIR 1998 SC 602) and also certain other decisions on the point the learned Single Judge of the Allahabad High Court struck down the above mentioned provision as ultra vires of the [Constitution of India](#) and directed the State to redefine the word standard rent or fair rent in accordance with the model rent control legislation published by the Government of India in July, 1992 to remove the injustice done to a class of landlords. Learned Judge held that the fixation of the rent of the disputed building shall be done by the authority concerned after the new legislation is enacted by the Legislature.

12. We do not propose to follow the above line of thought since our experience is that legislation is hardly to come in the near future in spite of various directions issued by this Court from the year 1995 onwards. Unless Section 5(1) is retained and necessary parameters are laid down for proper fixation of fair rent the intention and object of the Act would be defeated and the litigant public would be considerably prejudiced. The doctrine of severability would save Issac Ninan. We are inclined to apply the doctrine of severability and sever Section 5(1) from other offending provisions which this Court has already struck down in Issac Ninan's case. Section 5(1) in our view should remain in the statute book without being subject to the clogs envisaged in rest of the provisions which have already been struck down in Issac Ninan's case. Legislature would not have envisaged a vacuum in the arena of fixation of fair rent especially when the object of the legislation to control the rent which is payable to the landlord by the tenant. We are inclined to retain Section 5(1) in the Act enabling the Rent Control Court to exercise its power to fix fair rent. Judgment in Issac Ninan's case is hereby

reviewed to extent of restoring Section 5(1) to Act 2 of 1965.

13. We have already laid down various parameters to be followed by the Civil Courts for fixation of fair rent in the decision in Aboobacker v. Vasu (2003 (3) KLT 1029). We may reiterate those principles in this judgment for guidelines to the Rent Control Court with a rider as far as guidelines No. 4 concerned that the expressions unless otherwise prescribed in the agreement between the parties in guideline No. 4 would stand omitted.

14. We therefore, enunciate the following principles:

1. Section 5(1) would remain in the statute book enabling the Rent Control Court to fix fair rent.

2. The claim for payment of any premium by way of pakidi in consideration of grant, renewal or continuance of tenancy is immoral and opposed to public and any agreement entered in to for payment or receipt of pakidi in consideration of grant, renewal or continuance of tenancy would be unlawful and cannot be enforced through court of law in view for the decision in Aboobacker's case reported in 2003 (3) KLT 1029.

3. The construction of buildings and letting them out to the tenants would come within the ambit of business under Article 19(1)(g) of the [Constitution of India](#) and hence is a fundamental right. Total prohibition in claiming enhanced rent would amount to unreasonable restriction and also would be violative of the fundamental rights of the landlords guaranteed under Article 21 of the [Constitution of India](#).

4. Section 116 of the Transfer of Property Act, if has the effects of imposing any restriction in revision of rent it would amount to unreasonable restriction affecting the fundamental rights guaranteed under Article 19(1)(g) and to the extent of its inconsistency the said provision would be void under Article 13(1) of the Constitution of the India so far as fixation of rent is concerned.

5. The judgment in John Zacharia's case, (1987 (1) KLT 156), holding that even beyond the period originally stipulated, till evicted under Section 11 of the Kerala Buildings (Lease and Rent Control) Act only the agreed rent alone is payable by

the tenant is not good law and to that extent it stands overruled.

6. Landlord or the tenant as the case may be, can approach the Rent Control Court for revision of rent quinquennially. Even if there is no provision for periodical revision of the rent in the rent deed even then the landlord can approach the Rent Control Court for revision of rent. We hold that the plea of continuous occupation by holding over or the protection as statutory tenant since those rights are subservient to the fundamental rights guaranteed to the landlord under Article 19(1)(g) and 21 of the [Constitution of India](#).

7. Rent Control Court while fixing fair rent could take note of the inflation and resultant reduction in the purchasing power of money, variations in the cost of living index in the area since commencement of the lease, demand for accommodation and availability of the buildings in the locality.

8. The cost of construction of the building including cost of labour and building materials, capital value of the entire premises in the enjoyment of the tenant inclusive of the value of the land under the actual enjoyment of the tenant whether immediately appurtenant to the building or otherwise, type of construction, locational importance, situations of the tenanted premises, ground floor, first floor etc. and other advantages and amenities, such as access to places of public importance like bus stand, railway station, educational institution, hospitals etc. would also be guiding factors.

9. The Rent Control Court will also take into consideration the prevailing rent in the locality for the same and similar accommodation. The type of construction, the amenities, general or special provided in the building, the open land attached to the building, whether residential or non residential are also to be borne in mind.

10. Annual rental value of the building at the time of filing the application for fair rent may also be taken as a guiding factor along with others.

11. Revision or fresh imposition of municipal taxes, cess, rate in respect of other increase in the charge of electricity or water consumption by the tenant and also by the landlord and increase on account of sufficient repairs would also be taken

note of by the Rent Control Court.

12. The Rent Control Court can while resolving any rent control dispute on a application either by the landlord or tenant examine whether the rent is static and requires revision and fix fair rent accordingly permitting the parties to adduce evidence.

13. The judgment of the learned Judge in George v. Narayani (1998 (1) KLT 239) fixing fair rent while reinduction under the third proviso to Section 11 (4)(iv) is affirmed.

15. Issac Ninon's case and George's case paved the way for filing several suits before Civil Courts. Several applications under Section 11(2)(b) on the basis of rent refixed unilaterally by landlords were filed before the Rent Control Courts. Some of the applications for fixation of fair rent filed before Rent Control Courts are also pending consideration before the Rent Control Courts or Appellate Authorities and even before this Court. So far as cases in which decision has already been taken by Civil Court and fair rent has already been fixed finally those matters would not be reopened. Those cases where applications are already pending before Rent Control Court or Appellate Authority or before this Court the same would be disposed of in the light of Section 5(1) of the Act following the principles enunciated by us. As regards matters pending before Civil Courts they can be made over to Rent Control Courts/Appellate Authorities in which event necessary court fees refund orders can also be passed by the courts.

16. We find no good reasons in the present proceedings to interfere with the fixation of fair rent concurrently by Rent Control Court and the Appellate Authority applying the above mentioned parameters. On facts we are convinced that the fixation of fair rent is reasonable taking into consideration the importance of the locality if not less.

17. Under such circumstance both the C.R.Ps. would stand dismissed. Review Petition is disposed of restoring Section 5(1) to the Rent Control Act and landlord and tenant can approach the Rent Control Court under Section 5(1) of Act 2 of 1965 for fixation of fair rent, and the jurisdiction of Civil Court would stand ousted.

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