MODERN HOTEL, GUDUR REPRESENTED BY M.N. NARAYANAN

v.

K. RADHAKRISHNAIAH & ORS.

APRIL 26, 1989

[RANGANATH MISRA AND M.N. VENKATACHALIAH, JJ.]

Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960: s. 7—Advance rent refundable at the expiry of lease—Stipulation—Validity of—Amount whether adjustable—Tenant whether a defaulter.

The proviso to s. 7(2)(a) of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 prohibits payment of any sum exceeding one month's rent by way of advance, clause (b) thereto makes any such sum refundable or at the option of the tenant otherwise adjustable, and sub-s. (3) declares the stipulation for payment of rent in advance beyond that of one month as null and void.

The appellant-tenant took the demised premises on a thirty year lease beginning from September 9, 1969 and paid a large amount as advance, only a part of which was adjustable towards the stipulated rent in the subsequent months and the balance was to be paid back under a valid receipt after the expiry of the lease period. The lease deed did not have a forfeiture clause. The respondent-landlord initiated action for eviction in October 1973 on the plea that the tenant had failed to pay rent for a certain subsequent period. The tenant advanced the plea of payment. The landlord placed the account books of the appellant and claimed the benefit of s. 34 of the Evidence Act. All the courts below found that the payment as claimed had not been established.

In this appeal by special leave, it was contended that the balance of advance which lay in the hands of the respondent-landlord was either refundable to the tenant or adjustable against rent under s. 7 of the Act, and if out of that sum the arrears were available to be adjusted the tenant was not at all in default; that the lease of 1969 being for a term of thirty years certain, eviction could not be claimed against a contractual tenant during the subsistence of the lease, and that the lease did not have a forfeiture clause so as to bring the matter within the ambit of section 111(g) of the Transfer of Property Act.

A **Allowing the appeal by special leave,**

HELD: 1. The stipulation in the lease-deed that the amount of advance would be refundable at the end of the tenancy was null and void under s. 7(3) of the Act. The said amount became payable to the tenant immediately. It was thus held by the landlord on account of the
B **tenant on the date of filing of the petition for eviction. The tenant could not, therefore, be considered a defaulter for a smaller amount by not paying the rent for some months. [730D, 729BC, 730E]**

Mohd. Salimuddin **v.** *Misri Lal & Anr.,* **[1986] 1 SCR 622 and** *M/s. Sarwan Kumar Onkar Nath* **v.** *Subhas Kumar Agarwalla,* **[1987] 4**
C **SCC 546 referred to.**

2. The lease being for a term of thirty years was to expire in September, 1999. The deed did not stipulate a forfeiture clause. In the absence of such a clause the contractual tenancy was subsisting under the provisions of the Transfer of Property Act. There could not, there-
D **fore, be any eviction from such a tenancy. [730F]**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4108 of 1982.

From the Judgment and Order dated 23.12.1981 of the Andhra
E Pradesh High Court in C.R.P. No. 3547 of 1981.

P.P. Rao, R. Venkataramani, V.G. Pragasam and Satya Mitra Garg for the Appellant.

P. Krishna Rao, B. Krishna Prasad and K.K. Gupta for the
F Respondents.

The Judgment of the Court was delivered by

RANGANATH MISRA, J. This is a tenant's appeal by special leave against the order of eviction from a commercial premises at
G Gudur in Andhra Pradesh. The Controller, the Appellate Authority and the High Court have concurrently found that the appellant was a wilful defaulter liable to be evicted.

Under document No. 1327 of 1969, a thirty-year lease with an annual stipulated rent was granted in favour of one Narayanan, a
H partner of the hotel, for a term of 30 years beginning from 9th of

September, 1961. For the first 15 years rent was stipulated at the rate of Rs. 150 per month and for the second span of 15 years rent was to be escalated to Rs.200 per month, and the tenant undertook to pay the rent by the 9th of every succeeding month.

The lease-deed further stipulated:

> "Out of the advance of Rs.6,500, the second party shall deduct every month Rs.75 from the stipulated rent upto Rs. 1,500 and the balance of Rs.5,000 shall be paid back to the second party by the first party under valid receipt after the expiry of the lease period."

Thus, by March 1971 the amount of Rs. 1,500 had been adjusted and the landlord held Rs.5,000 refundable to the tenant.

Action for eviction was initiated on the plea that the tenant had failed to pay the rent for a certain subsequent period. Courts below debated the main—perhaps the only—contention as to whether the plea of payment which the tenant advanced had been established. On behalf of the landlord the account books of the Hotel were placed and the benefit of s. 34 of the Evidence Act was claimed. Lot of attention was bestowed in the Courts below on the question as to whether the oral evidence along with the presumption arising under s. 34 of the Evidence Act had not established the position that no payment as claimed had been made. On the finding that payment had not been established, eviction was ordered.

Two contentions have been advanced by Mr. P.P. Rao appearing for the appellant to maintain that the order of eviction was contrary to law and cannot be sustained. Reliance is placed on s. 7 of the Andhra Pradesh Buildings (Lease, Rent & Eviction) Control Act, 1960, (hereafter 'Act') in support of the stand that the sum of Rs.5,000 which lay as advance in the hands of the respondent-landlord was either refundable to the tenant or adjustable against rent and if out of the sum of Rs.5,000 the arrears were available to be adjusted, the tenant was not at all in default. It has next been contended that the lease of 1969 was for a term of 30 years certain and eviction has been claimed against a contractual tenant during the subsistence of the lease. Admittedly, the lease does not have a forfeiture clause so as to bring the matter within the ambit of s. 111(g) of the Transfer of Property Act. The application for eviction, a copy of which is available on the record (at p. 10 of the second paper-book), refers to a notice in paragraph 7 in the following terms:

"The petitioners caused a registered notice through their counsel dated 28.10.1973 to the respondent demanding the rent due and also for the eviction from the schedule mentioned premises since the respondent has become a wilful defaulter. The respondent received the notice and has not chosen to give any reply."

It, therefore, follows, appellant's counsel has contended, that the lease remained unterminated and the right created under the lease cannot be taken away by filing an application for eviction on the plea of wilful default in the matter of payment of rent.

Section 7 of the Act as far as relevant, provides:

"7 (2) Where the fair rent of a building has not been so fixed—

(a) the landlord shall not, after the commencement of this Act 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 commencement of this Act, in consideration of the grant, continuance or renewal of the tenancy of the building after 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 otherwise adjusted by the landlord.

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

The lease-deed described the amount of Rs.6,500 as *advance* at four places and stipulates adjustment of a sum of Rs.1,500 out of it and the balance amount of Rs.5,000 to be paid back to the tenant after the expiry of the lease period. The provio to s. 7(2)(a) prohibits payment of any sum exceeding one month's rent by way of advance and sub-s. (3) declares the stipulation for payment of rent in advance beyond that of one month as null and void.

The receipt of Rs.6,500 by the landlord was, therefore, contrary to law and opposed to public policy. A sum of Rs.1,500 has already been adjusted in the manner indicated in the petition for eviction and the fact that a sum of Rs.5,000 was still held by the landlord was admitted therein. On the facts appearing on the record it is thus clear that the landlord held a higher amount than the rent due on the date when the petition for eviction was filed on the plea of wilful default of payment of rent. The stipulation of holding the excess amount of Rs.5,000 free of interest to be refunded under a valid receipt after the expiry of the lease period is the null and void stipulation and the amount of Rs.5,000 in the hands of the landlord was an amount held by the landlord on account of the tenant on the date of filing of the petition for eviction.

This Court in *Mohd. Salimuddin* v. *Misri Lal & Anr.*, [1986] 1 SCR 622 had occasion to deal with a more or less similar situation arising under the Bihar Buildings (Lease, Rent & Eviction) Control Act, 1947. There, a sum of Rs.2,000 had been advanced by the tenant to the landlord stipulating adjustment of the loan amount against the rent which accrued subsequently. The landlord asked for eviction on the ground of arrears of rent by filing a suit. The trial court had decreed the suit but the lower appellate court reversed the decree by holding that the tenant was not in arrears of rent since the amount advanced by the tenant was sufficient to cover the landlord's claim of arrears. The High Court, however, vacated the appellate judgment and restored that of the trial court holding that the loan amount by the tenant was in violation of the prohibition contained in s. 3 of the Bihar Act and the tenant was in arrears of rent and liable to be evicted. This Court set aside the judgment of the High Court by saying:

> "The view taken by the High Court is unsustainable inasmuch as the High Court has lost sight of the fact that the parties to the contract were unequal. The tenant was acting under compulsion of circumstances and was obliged to succumb to the will of the landlord, who was in a dominating position. If the tenant had not agreed to advance the loan he would not have been able to secure the tenancy."

The Court referred to the doctrine of *pari-delicto* and held that the same was not applicable against the tenant.

In *M/s. Sarwan Kumar Onkar Nath* v. *Subhas Kumar Agarwalla*,

A [1987] 4 SCC 546, *Salimuddin's* case came for consideration. This was also a dispute under the Bihar Act where two months' rent had been paid in advance by the tenant to the landlord on the stipulation that the advance amount would be liable to be adjusted towards arrears of rent, whenever necessary or required. The Court held that the tenant B could not be evicted on the ground of default in the payment of rent for two months even if the tenant failed to ask the landlord to make adjustment of the advance amount in the absence of any agreement requiring the tenant to inform the landlord as to when such adjustment is to be made. This Court said that when the Rent Act prohibited the landlord to claim such advance payment, the tenant could not be considered to be a defaulter and the doctrine of *pari-delicto* was not at- C tracted to such a fact-situation.

Mr. Rao building upon the ratio of these two decisions rightly contended before us that when the landlord had Rs.5,000 on tenant's account with him which he was holding for years without paying D 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 s. 7(3) of the Act, the amount became payable to the tenant immediately and the landlord with Rs.5,000 of the tenant with him could not contend that the E tenant was in default for a smaller amount by not paying the rent for some months.

The second contention advanced before us is equally weighty. The lease being for a term of 30 years is to expire in September, 1999. As we have already said, the lease did not stipulate a forfeiture clause F and in the absence of a forfeiture clause in the lease leading to termination by forfeiture, the contractual tenancy was subsisting under the provisions of the Transfer of Property Act and there could not be any eviction from such a tenancy.

We are somewhat surprised to find that these irresistible G defences were not advanced in the Courts below and the course of the litigation was confined to a consideration of s. 34 of the Evidence Act.

The appeal is allowed, the concurrent decision of all the three Courts below directing the tenant to be evicted are set aside and the application for eviction is dismissed with costs throughout. Hearing fee H in this Court is assessed at Rs.3,000.

P.S.S. Appeal allowed.