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**CHAGANLAL DEVCHAND  
NARENDRA KUMAR CHAGANLAL**

v.

**G. B. HARI & COMPANY LIMITED**

B

and

**PRICES AND INCOMES BOARD**

[SUPREME COURT—Dyke J.—15 November 1985]

Civil Jurisdiction

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*(Landlord and Tenant—Counter Inflation Order—Terms of Settlement the subject of Court fixing rent—subsequent Counter-Inflation (Rent) (Control) Order freezing rents—latter Order prevailed over earlier Court Order—Court may not make Order Contravening provisions of an Act or valid piece of subsidiary legislation or which had effect of overriding future legislation.)*

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*G. P. Shankar for the Plaintiffs  
J. K. L. Maharaj for the 2nd Defendant*

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Application by originating summons seeking a declaration that (i) certain Terms of Settlement were not affected by the Court Inflation (Rents) (Control) Order 1984, or that (ii) the Order was unfair and/or unreasonable or (alternatively) that (iii) the settlement between plaintiff and the first defendant had been frustrated and therefore of no effect.

The facts as stated by the learned Judge and so far as stated, include certain Terms of Settlement (said to have been recorded in 1978) recited whereby the plaintiffs granted to the first defendant a tenancy in respect of 'the theatre, two shops and Bulk Store' subject to the following conditions. The Terms included the following.

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"1. The plaintiffs and the defendant have settled the above action upon the Plaintiffs granting to the defendant a tenancy in respect of the said Theatre which tenancy shall be subject to the following terms and conditions.

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(c) The rental shall be a sum of \$800.00 a calendar month for the period 1st January, 1980 to 31st December 1984.

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- (d) The rental for the period 1st January 1985 to 31st December 1994 shall be such sum as shall be agreed between the parties failing agreement the rental shall be fixed by arbitration under the provisions of the Arbitration Act. A
- (e) (i) In the event that the tenant shall find the rental decided by arbitration for the period 1st January 1985 to 31st December 1994 excessive the tenant shall be entitled upon giving six months notice in writing to the landlord to terminate the remainder of the term from the date of expiry of such notice. B
- (ii) The tenant shall exercise such right to terminate within 3 months of the date of the award of the arbitration.
- (iii) The tenant agrees to pay the assessed rental until the date of termination or expiry of the tenancy as the case may be.
- (iv) The tenant also agrees to pay the assessed rental for the period from 1st January 1985 until it is so assessed. C
2. The defendant will pay to the plaintiffs the sum of \$11,200.00 being the agreed for the period 1st September 1978 to 31st December 1979 within 14 days from the date hereof.

The terms made no reference to the Prices and Incomes Board (second defendant). D

The terms were made an Order of the Court in C.A. No. 110 of 1979.

Rental was paid by first defendant at the rate of \$800 per month from 1 January 1980 until 31 December 1984. Thereafter plaintiff sought to increase the rent to \$1,850 per month as provided in the Terms. E

On 9 November 1984 the second defendant pursuant to section 12 of the Counter-Inflation Act enacted the Counter-Inflation (Rent) (Control) Order duly gazetted. Its effect was to freeze all rents with effect from 9 November 1984.

The First defendant did not enter an appearance in the proceedings. No argument was offered as to whether the Order was unfair or unreasonable or ultra-vires. F

It was submitted that the terms of the Order could not overrule an order of the Court; or in that there had been frustration of the Agreement (supra) between the parties in the Terms of Settlement and that the Order should be declared null and void. G

The Order was made subject to the Counter Inflation Act S.12 the effect of which, the learned trial Judge stated restricted any increases of rent in respect of any letting or continued letting. Its purpose was to counter inflation. H

- A *Held:* It should have been with the knowledge of all parties that rents could be restricted statutorily in the future. The Order contained the following provision:—

3(1) Except as provided in subparagraph (3), no person shall charge any rent in respect of the letting or continued letting of any premises under any excess of the rent applicable to those premises on the appointed day.

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Paragraph 3(1) was within the scope of S.12 of the Counter Inflation Act and must prevail even over an earlier Court Order.

The Court may not make an Order which would have the effect of over riding future legislation.

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To the extent that Paragraph 1 (e) of the Terms (supra) cannot be given effect so long as the Order remains those terms have been frustrated.

Insofar as the terms envisaged and arranged for an increase in rental and this was a necessary or important term the agreement was frustrated and must be considered null and void as from 1 June 1985.

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An 'Order' referred to as (No. 35) Order 1979 was not published in the gazette, no evidence of it was served on the parties. The Court could not take judicial note of it or give any effect to it. It could not be taken into account in any way.

Declaration that the terms had not been affected by Counter Inflation (Rents) (Control) Order 1984 refused.

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Declaration that the Agreement (supra) had been frustrated made.

DYKE, J

### Judgment

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This action was commenced by originating summons and concerns the terms of settlement worked out by the plaintiff and first defendant and made an order of the Court in C.A. No. 110 of 1979.

The terms of the settlement are set out herewith—

- G Plaintiffs granting to the defendant a tenancy in respect of the said Theatre which tenancy shall be subject to the following terms and conditions:

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- (a) The term of tenancy shall be 14 years from the 1st day of January, 1980 provided that the tenant shall be entitled to terminate the tenancy as provided hereinafter.
  - (b) The premises shall be the whole of building on C.T. 10587 comprising the Theatre, two shops and Bulk Store.
  - (c) The rental shall be a sum of \$800.00 a calendar month for the period 1st January, 1980 to 31st December 1984.

- (d) The rental of the period 1st January, 1985 to 31st December, 1994 shall be such sum as shall be agreed between the parties failing agreement the rental shall be fixed by arbitration under the provisions of the Arbitration Act. A
- (e) (i) In the event that the tenant shall find the rental decided by arbitration for the period 1st January 1985 to 31st December, 1994 excessive the tenant shall be entitled upon giving six months notice in writing to the landlord to terminate the remainder of the term from the date of expiry of such notice. B
- (ii) The tenant shall exercise such right to terminate within 3 months of the date of the award of the arbitration.
- (iii) The tenant agrees to pay the assessed rental until the date of termination or expiry of the tenancy as the case may be.
- (iv) The tenant also agrees to pay the assessed rental for the period from 1st January, 1985 until it is so assessed. C
- (f) The tenant shall pay town rates levied on the whole of the property comprised in C.T. 10587 during the tenancy.
- (g) The following terms and conditions in the Agreement of 29th June, 1972 made between the parties shall be included:
- (i) Clause 2(a) to 2(1) inclusive.
- (ii) Clause 3(a) to 3(d) and
- (iii) Clauses 5, 6, 7, 8 and 10. D
- (h) The tenant shall not sublet assign or transfer the premises or any part thereof without the written consent of the Landlord first had and obtained provided that such consent shall not be unreasonably or arbitrarily withheld:
- (i) The Landlord and the tenant shall pay their own solicitors' costs of preparing and stamping the Tenancy Agreement and both parties shall bear the stamp duty equally. E
2. The defendant will pay to the plaintiffs the sum of \$11,200.00 being the agreed rental for the period 1st September, 1978 to 31st December, 1979 within 14 days from the date hereof.
3. The tenants to the Agreement shall be G. B. Hari & Co. Ltd. and G. B. Hari & Co. (Films) Ltd. jointly. F
4. Each party will pay his own costs of this action.
5. Liberty to apply generally is reserved to either party.
6. (a) The tenants do have possession use and occupation of the whole land comprised and described in C.T. 10587 including the vacant land but only in the event of the landlord obtaining permission of the Local or other lawful authority to develop the vacant portion of the land on the said C.T. the tenants shall give possession of the vacant portion to the landlord upon the landlord giving 30 days notice in writing to the tenant BUT the tenants shall always have free and unrestricted use and enjoyment of an access to the theatre building from the rear and more particularly to the bulk store and exists. G
- (b) The tenants shall register a caveat against the said Title to protect their tenancy and the Landlord shall not make any attempts to remove it, except when the tenancy has been lawfully terminated. H

- A (c) The Landlord shall take no action or proceeding, to invalidate the tenancy hereby created merely because it is not registered under the land Transfer Act, 1971.

(d) The tenant agree to remove the caveat if it shall be so required by any mortgagee of the landlord and the tenant shall register another caveat simultaneously with the registration of this mortgage but the mortgagee shall have priority over the caveat".

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It is to be noted that no where in the terms of settlement is there any reference to the Prices and Incomes Board, though both parties knew or ought to have known that rents might be or become subject to restriction or control under the Counter-Inflation Act.

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Apparently rental was paid by the first defendant at the rate of \$800 per month from the 1st January 1980 until the 31st December 1984. Thereafter the plaintiff sought to increase the rental to \$1850 per month as provided in the terms of settlement.

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Meanwhile on 9/11/84 the second defendant, in accordance with powers conferred on it by section 12 of the Counter Inflation Act; enacted the Counter Inflation (Rents) (Control) Order 1984 which was duly published in the Gazette. The effect of this Order was to freeze all rents with effect from 9/11/84; that is, in respect of the subject premises, at \$800 per month. And of course the effect of this would be to frustrate the provision in the terms of settlement relating to increases in rents.

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Hence this action by the plaintiff commenced by originating summons seeking a declaration that the terms of settlement are not affected by the Counter Inflation (Rents) (Control) Order 1984, or that it is ultra vires, unfair, and/or unreasonable or alternatively, that the settlement between the plaintiff and the first defendant was frustrated and therefore of no effect.

The first defendant has not entered appearance or taken any part in these proceedings, but this makes no difference in respect of the first two prayers, because the dispute there is really between the plaintiff and the second defendant. But this may have a bearing on the third prayer.

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No argument has been put forward on the question of the unfairness or unreasonableness of the Order or on whether it is ultra vires. The only argument put forward is that the terms of the Order cannot overrule an Order of the Court.

The Counter Inflation Order is made under section 12 of the Counter Inflation Act which reads—

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"12(1) Subject to the provisions of section 33, but notwithstanding the provisions of any other written law, the Board may, with the approval of the Minsiter, by order, restrict increases of rent in respect of the letting or continued letting by any person or class of persons (including the Crown) of any premises under any tenancy.

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(2) Any order made under subsection (1) may include provisions excluding adapting or modifying any provisions contained in, or having effect under, any written law which relates to rent, and in the exercise or any power to make subsidiary legislation under any such written law regard may be had to matters connected with the operation of this section".

It will be noted that an Order made under this section can restrict any increases of rent in respect of any letting or continued letting, and even where the landlord is the Crown. The purpose of the Act is, as its name implies, to counter inflation, and control over rents must naturally be complete. It would make nonsense of the purposes of the Act if the Court were to be permitted to contravene the provisions of the Act or any Order made under the Act. Or if parties could frustrate the purposes of the Act or any Order, by merely agreeing terms of settlement and having them incorporated in a Court Order. A  
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There is no reason to believe that the terms of settlement as recorded in 1978 were then contrary to the terms of settlement as recorded in 1978 were then contrary to the terms of any invalid order, but it should have been within the knowledge of all the parties that rents could be restricted statutorily in the future. In the absence of any restriction the terms would have remained quite valid and of full effect. C

The Counter Inflation (Rents) (Control) Order 1984 is hereunder set out—  
“In exercise of the powers conferred upon it by Section 12 of the Counter Inflation Act, the Prices and Incomes Board, with the approval of the Minister of Finance, has made the following Order:

*Short title*

1. This Order may be cited as the Counter-Inflation (Rents) (Control) Order, 1984. D

*Interpretation*

2. In this Order, unless the context otherwise requires—“appointed day” means 9 November, 1984. E

*Rent*

3. (1) Except as provided in subparagraph (3), no person shall charge any rent in respect of the letting or continued letting of any premises under any tenancy in excess of the rent applicable to those premises on the appointed day. F
- (2) Except as provided in subparagraph (3), the provisions of this Order shall prevail over any contract insofar as the contract governs the payment of rent and any such contract shall be deemed to be amended so that such rent shall not exceed the rent permitted under this Order. G
- (3) Nothing in this paragraph shall prevent an increase in the rent charged by a person in accordance with a determination made by the Board in respect of any proposed increase of rent of which due notice was given to the Board under the Counter Inflation (Notification of Proposed Increases in Rent) Order 1981 before the appointed day. H

Dated this 9th day of November, 1984.

V. P. BALDEO  
Secretary  
Prices and Incomes Board H

Approved by me this 9th day of November, 1984.

M. QIONIBARAVI  
Minister for Finance”



- A Paragraph 3(1) is in unambiguous terms, is quite within the scope of section 12 of the Act, and must prevail even over a Court Order. It should not require stating that a Court may not make an order which contravenes the provisions of an Act or a valid piece of subsidiary legislation. Nor may a Court make an Order which has the effect or would have the effect of overriding future legislation. So to the extent that paragraph 1(e) of the terms of settlement can not be given effect to (at least insofar as an increase in rental is proposed), so long as the Counter Inflation (Rents) (Control) Order 1984 remains in effect, it may be said that the terms of settlement have been frustrated, though as I have said it ought to have been within the knowledge of both parties that this could happen. And of course even if the terms of settlement were held to be null and void on grounds of frustration, the plaintiff would not be able to let the premises to anyone else at a higher rent.
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- C Counsel has argued that since paragraph 3(2) of the Order says that the provisions of the Order shall prevail over any contract and that the terms of the contract shall be deemed to be amended accordingly, this must mean that Court Orders are unaffected. Of course the terms of settlement were worked out between the parties themselves, so really they are a contract between them, but given the added dignity and force of a Court Order. But in any case paragraph 3(2) only deals with or clarifies a particular problem. Paragraph 3(1) is the general provision and this is wide enough to cover all rent.
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So the plaintiff is not entitled to a declaration that the Counter Inflation (Rents) (Control) Order 1984 does not apply to the terms of settlement.

- E There remains the question of whether there has been frustration of the agreement between the parties embodied in the terms of settlement and whether it should be declared null and void. On this question the Prices and Incomes Board is not concerned but the first defendant is. And the first defendant, although served, has not entered any appearance or filed any affidavit in reply. I cannot see that such a declaration as sought by the plaintiff can be of any value to him. But in so far as the terms of the agreement envisaged and arranged for an increase in rental as from 1/1/85, and that this was necessary or important term, then the agreement certainly has been frustrated and must be considered null and void as from that date. The plaintiff may have the declaration sought in prayer (c).
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There is a matter raised by counsel for the second defendant that I must comment on. In his submissions he referred to what he called the Counter Inflation (Rent) (Control) (No. 39) Order 1979 which purported to restrict the rent chargeable on the Rex Theatre Building comprised in the C.T. 10587 to \$500.

- G This so called Order has never been published in the Gazette, none of the affidavits in this case have referred to it, and if it exists there is no evidence whatsoever whether it was ever served on the parties to this case. And yet the Court is now being asked to take notice of it. If it has not been gazetted the Court cannot take judicial note of it and cannot give any effect to it.

- H In any case the Act empowers the Board to do certain things by Order and any such Order must come under the heading of subsidiary legislation. It certainly so comes under the definition of "subsidiary legislation" in the Interpretation Act, and in the absence of any other assistance in the Counter Inflation Act the provisions of the Interpretation Act must apply. This provides that subsidiary legislation comes into force—subject to any other provision in the subsidiary legislation itself or the enabling statute—upon publication in the Gazette.

Counsel's supplementary submissions on the point have no merit whatsoever. So on several grounds e.g. that the Order was not gazetted, that no judicial notice can be taken of it by the Court or anyone else, that it has not been brought before the Court by affidavit, that there is no evidence whatsoever that any such order was even served on the parties concerned, the so called "Counter Inflation (Rent) (Control) (No. 39) Order 1979" can not be taken into account in any way whatsoever. A

*Partial declaration in favour of the Plaintiff.* B

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