

(2005) 02 MAD CK 0011

In the Madras High Court

Case No : C.R.P. No. 38 of 2005 and C.M.P. No. 230 of 2005

A.R.V. Venkatasamy Naicker and Sons and Others

APPELLANT

Vs

V.S. Krishnamoorthy and Others

RESPONDENT

Date of Decision : 01-02-2005

Acts Referred:

Evidence Act, 1872 — Section 116

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 — Section 10(3)

Citation : (2005) 02 MAD CK 0011

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : S. Subbiah, for the Appellant; M. Suresh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Prabha Sridevan, J.—The respondents 1, 5 and 8 in the Rent Control Proceedings are the revision petitioners, who are aggrieved by the

order of the appellate authority, Virudhunagar, ordering eviction on the ground of subletting, owners" occupation and denial of title.

2. Caveat was filed and the counsel for the caveators was present when the matter was listed for admission.

3. Heard the counsel. The nomenclature of the parties will be as per their array in R.C.O.P. No. 4 of 1994. The landlords are referred to as

petitioners and the tenants are respondents 1 to 7 and the sub-tenants are respondents 8 & 9.

4. The petitioners filed R.C.O.P. No. 4 of 1994 Under Sections 10(2)(ii)(a) and 10(3)(a)(iii) of the Tamil Nadu Buildings (Lease and Rent

Control) Act, 1960 ("the Act" in Short). According to the petitioners herein, the schedule building was required for the business of the third

petitioners son and the requirement is genuine and bona fide and therefore, they require the schedule property for their own occupation for non-residential purposes. The petitioners also claimed that as per the lease agreement, the respondents 1 to 7 could not sublet the property without the consent of the petitioners and yet the 8th respondent and the 9th respondent had been allowed to carry on their business in the petition premises, pursuant to a sub-lease. Since this is without the consent of the petitioners, the petitioners claim that the respondents were liable to be evicted. This RCOP was filed on 1.2.1993.

5. The respondents had earlier filed R.C.O.P. No. 43 of 1992 u/s 8(5) of the Act. According to the respondents, the petitioners deliberately refused to receive the rent claiming that they require the petition premises for their own use and that the requirement is not bona fide. When the rent was refused to be received, the respondents sent the rent through Money Order. This was also refused. Therefore, a lawyer's notice was issued on 16.7.1992 to which a reply was sent raising untenable grounds. However, the same had been closed pursuant to an agreement, by the petitioners to receive the rent, without prejudice to their rights in the eviction petition. This order was marked as Ex.R-9 before the Rent Controller.

6. The respondents also filed R.C.O.P. No. 22 of 1994 u/s 9(3) of the Act, since a claim was made by the Hindu Nadargal Devasthanam that, they were entitled to half the rent in respect of the petition premises. This petition filed by the respondents was taken up along with the R.C.O.P. No. 4 of 1994 and a joint order was passed by the learned Rent Controller, Virudhunagar on 28.2.1993, wherein it was held that the claim for owners occupation was not bona fide and that the respondents 1 to 7 had not sublet the property and therefore, the petitioners were not entitled to an order of eviction and has also directed the respondents to deposit the rent in Court.

7. It is seen from the said order that a suit O.S. No. 236 of 1996 had been filed before the Sub Court, Virudhunagar by the Devasthanam, claiming half share in the property. It is for these reasons that the respondents claim that there was a genuine doubt regarding, who is entitled to receive the rents and this necessitated the filing of the R.C.O.P. No. 22 of 1994.

This was accepted by the learned Rent Controller, who also gave a finding that until a decision is arrived at in O.S. No. 236 of 1996 the petitioners are not entitled to claim eviction.

8. Against this the petitioners filed R.C.A. No. 10 of 2003. The appellate authority came to the conclusion that there was clear evidence of

subletting and the petitioners had made out a case of bona fide requirement of the petition premises and further, the appellate authority also found

that the respondents had deliberately denied the title of the petitioners.

9. The learned counsel for the tenants submitted that the only averment in the petition with regard to owners' occupation is in paragraph 8 of the petition and that it says:

The petitioners have no other non-residential building at Virudhunagar. The schedule building is required for the business of the third petitioner's

son. The petitioners therefore require the schedule property for their own occupation. The requirement of the petitioners are more genuine and

bona fide.

According to the learned counsel, on these pleadings, eviction cannot be ordered on the ground of owners' occupation. The petitioners have not

established that the 3rd petitioner's son for whom the building is required is a non-residential building at Virudhunagar. There is nothing to show

what is the business for which the schedule property is required. There is nothing to show what steps the petitioners had taken towards the

commencement of the business. As regards the ground of subletting, the learned counsel pointed out to the judgment of the learned Rent

Controller, who had discussed in detail, the oral and documentary evidence and had found that a case of subletting had not been made out. The

learned counsel submitted that the first respondent is the registered partnership firm and the 8th and the 9th respondents in the RCOP are only

sister concerns. The first respondent had at no point of time handed over exclusive possession of the petition premises to the 8th and 9th

respondents. There is no evidence to show that the first respondent did not continue in possession of the premises. The learned counsel submitted

that even if a tenant allows another person to occupy the petition premises along with him without receiving any consideration, it would amount only

to licence and not subletting. The learned counsel submitted that R.W.1, who is

the 8th respondent had admitted that the alleged sub-tenants are the sister concerns of the respondents and also that they are under the control of the first respondent.

The learned counsel pointed out that the learned Rent Controller had taken note of Ex.R-11, which would show that the 9th respondent is carrying

on business in 166/2 Municipal Office Road, whereas the petition premises is situate at 31, Municipal Office Road. The learned Rent Controller

also had taken note of the evidence that the account books of the 8th and 9th respondents are with the first petitioner and therefore, there is no

subletting. The learned Rent Controller had found that there was no denial on the part of the landlords that the alleged sub-tenants are subject to

the control of the first respondent and therefore, the conclusion of the Rent Controller that the case of subletting has not been fully proved cannot

be lightly disturbed. As regards the finding relating to the denial of title, the learned counsel submitted that this was not the case putforth in the

RCOP and therefore, no opportunity was given to the respondents to refuse the same and that the doubt that they entertained with regard to the

title of the landlords was a bona fide one, in view of the fact that Hindu Nadargal Devasthanam had claimed half share in the property. The learned

counsel submitted that if the petitioners had an opportunity to demonstrate the bona fides of the doubt they would have done so, but the appellate

authority suo motu cannot conclude that the denial of title was not bona fide and therefore, on that ground also the petitioners are not liable to be

evicted.

10. The learned counsel for the petitioners relied on the decisions J.J. Lal Pvt. Ltd. and Ors. v. M.R. Murali and Anr., 2002 (1) CTC 487;

Petroleum Workers" Union, represented by the General Secretary v. A. Mohamed & Co., Madras, 1966 (1) MLJ 356; and P. Senniappan and

others Vs. Kannammal and 2 others, . In J.J. Lal Pvt. Ltd and Ors. v. M.R. Murali and Anr., 2002 (1) CTC 487, the Supreme Court held that the

scheme of the Act contemplates the landlord filing eviction petition on stated grounds followed by requisite plea and proof and the plea of the

landlord that denial of title by tenant in counter would enable, landlord to seek eviction of tenant on that ground was negated by the Supreme

Court. The Supreme Court held that in such a case resort must be had to

amendment of pleadings and in the absence thereof the landlords plea for eviction of tenant on the ground of denial of title must be rejected. In *Petroleum Workers' Union, represented by the General Secretary v. A.*

Mohamed & Co., Madras, 1966 (1) MCJ 356 and P. Senniappan and others Vs. Kannammal and 2 others, , it was held that for eviction on the

ground of subletting there must be a transfer of exclusive right by the tenant in favour of the third party in lieu of payment of compensation or rent

and unless the tenant parts with legal possession in favour of the third party, there is no subletting.

11. The learned counsel for the caveator on the other hand would submit that there is clear evidence that the respondents had sublet the property.

The first respondent business is not at all carried on in the petition premises. The third respondent is in total control of the petition premises. This

has been established both by oral and documentary evidence. In another judicial proceedings, the respondents, have given evidence that it is the

third respondent, who is carrying on business in the petition premises. This was marked as Ex.P-10. The learned counsel also submitted that it is

not necessary for the landlords to show the actual business that was started. It is sufficient, if the intention to start the business is proved and that

the landlords have no other property in the same locality for use and occupation for non-residential purposes. The learned counsel submitted that

the petitioners had unambiguously denied the title of the landlord and therefore, they deserve to be evicted.

12. The learned counsel for the caveator referred to the evidence of R.W.1, where he had admitted that before the learned subordinate Judge,

Virudhunagar in S.C. No. 27 of 2001, he had given evidence on behalf of the State that the 8th and 9th respondents in R.C.O.P. No. 4 of 1994

were carrying on business in 31, Municipal Office road.

The learned counsel for the caveator referred to Ex.P-12, which would show that the name board of the third petitioner is affixed on the petition

premises.

13. The learned counsel relied upon the decision *Mohammedkasam Haji Gulambhai v. Bakerali Fatehali (D) by LR.*, 1992 (2) LW 58, where the

premises let out was a sole proprietorship firm, the tenant, entered into partnership with his sons and thereafter withdrew from the partnership, the

Apex Court found that the original tenant did not exercise his power as tenant and that he was neither in physical nor in actual or constructive

possession of the plaint schedule premises and therefore, ordered eviction on the ground of subletting.

14. The learned counsel relied on the decision *Arumugha Chettiar v. Jayaraman*, 1996 (2) MLJ 282, wherein it was held that proof of possession

of sufficient funds to carry on business and taking of steps for that purpose, is sufficient for ordering eviction. In *Ammal Pillai and Ors. v.*

Varadarajulu Complex, a partnership Firm, rep. by its partners, 1997 (1) LW 364, it was held that to insist that a denial of title in the written

statement can be taken advantage of only in a subsequent suit, would only lead to unnecessary multiplicity of legal proceedings and therefore, the

landlord was entitled to eviction on the basis of denial of title in the written statement filed by the tenant. In the decision rendered in *T. Palanisamy*

Gounder Vs. A.V.G. Ponnusamy Chettiar and Sons, by partner, *P. Bhoopathy and Others*, , it was held that as per the definition of the Act a

person, who is receiving, or entitled to receive the rent is a landlord and if the tenant disputes the relationship of landlord tenant then, the principles

of estoppel u/s 116 of the Evidence Act would apply and in that case it was held that denial of title was not bona fide and tenants were liable to be

evicted. In *S. Thangappan v. P. Padmavathy*, 2000 (1) MLJ 12 (SC) the Supreme Court held that the definition of landlord in the Act is very wide

and Section 116 of the Evidence Act itself is an embargo on the tenant to deny, the title of his landlord during the continuance of his tenancy and

therefore, a tenant, once inducted as a tenant by the landlord cannot deny his title. In *Mrs. Yashoda Raju v. A. Kuselan*, CDJ 2004 MHC 178, it

was held that a person cannot be permitted to deny the title of the landlord as per u/s 116 of Evidence Act. In *K. Manavalan v. S. Eswari and*

Anr., 2001 (1) TLNJ 261, it was held that when eviction is sought on the ground of subletting and it is denied by the tenant, burden is on the tenant

to prove that there is no subletting. In *M.R. Devaraian v. M. Palani and Anr.*, 1998 TLNJ 72, it was held that when there is no written consent

long use cannot substitute written consent.

15. Subletting: The ground of subletting requires surrender of possession by the tenant in favour of the third party and receipt of rents. But as

regards receipt of rents it has been held by our Court as well as Supreme Court that it is something within the exclusive knowledge of the tenant

and the sub-tenant and it would be impossible for the landlord to prove the receipt of rent, since, the contract when it is entered into without the

consent of the landlord would necessarily be clandestine in nature.

16. In this case, we have to see whether the respondents have shown that the petitioners have given exclusive possession of the petition premises

to the sub-tenants. I have already referred to the extract from the judgment of the Rent Controller in which the Rent Controller has referred to an

admission by P.W.1 that the premises is within the control of the first petitioner. However the certified copy of the evidence of P.W.1, would

clearly show that there is no admission at all what the witness has actually said is This is in direct contradiction to what the Rent Controller has

recorded as an admission by the respondent. The respondent's evidence has already been extracted. So it is clear from the evidence that the third

petitioner is carrying on business in 366, Municipal Office Road, the petition premises. Ex.P-11 is the evidence of R.W.1, the third petitioner; that

the third petitioner carried on business in the petition premises. The appellate authority was not satisfied with the evidence on the side of the

petitioners that there was no subletting. The business carried on by the third petitioner is a separate business. It is only the third petitioner's

business name board that is found in the front of the petition premises. Ex.P-12 is the general sales tax certificate given to the third petitioner, which

shows the place of business as the petition premises. This is of the year 1986 and therefore, there is nothing to show that the first petitioner was in

either actual or constructive possession of the petition premises and the conclusion of the appellate authority from this that there is subletting cannot

be said to be erroneous.

17. It has been held in *Rajbir Kaur and Another Vs. S. Chokesiri and Co.*, as follows:

If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transactions is found

unacceptable in the particular facts and circumstances of the case, it may not be impermissible for the Court to draw an inference that the

transaction was entered into with monetary consideration in mind. It is open to

the respondent to rebut this. Such transactions of subletting in the guise of licences are in their very nature, clandestine arrangements between the tenant and the sub-tenant and there cannot be direct evidence got. It is not, unoften, a matter for legitimate inference. The burden of making good a case of subletting is, of course, on the appellants. The burden of establishing facts and contentions which support the party's case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party bearing the legal burden, shifts according as the weight of the evidence adduced by the party during the trial. In the circumstances of the case, we think, that, appellants having been forced by the Courts below to have established exclusive possession of the ice cream vendor of a part of the demised premises and the explanation of the transaction offered by the respondent having been found by the Courts below to be unsatisfactory and unacceptable, it was not impermissible for the Courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary considerations. There is no explanation forthcoming from the respondent appropriate to the situation as found.

18. Further, in *M/s. Delhi Stationers and Printers Vs. Rajendra Kumar*, the Apex Court has held as follows:

Under Section 13(1)(e) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (hereinafter referred to as the "the Act"), the tenant is liable to be evicted, if he has assigned, sublet or otherwise parted with the possession of the whole or any part of the premises without, the permission of the landlord. Subletting means transfer of an exclusive right to enjoy the property in favour of the third party and the said right might be in lieu of payment of some compensation or rent. Parting of the legal possession means possession with the right to include and also a right to exclude others. Mere occupation is not sufficient to infer either sub-tenancy or parting, with possession.

19. This is not a case similar to one decision *Petroleum Workers' Union, represented by the General Secretary v. A. Mohamed & Co., Madras*,

1966 (1) MLJ 356, relied upon by the petitioner, where it was held that conferring a privilege to use a part of the demised premises by another when the lessee retains legal possession of the premises, will not amount to subletting. In that case, it was held that when there is a right of concurrent user there is no parting with possession. Whereas in the case on hand, right from the year 1986, it has been only the third respondent, who has been in possession.

20. As observed in Akbar Ali and 4 others Vs. Donian Rodrigo and another, :

Rent Control Laws -- Object of legislation -- Approach to be adopted by authorities while adjudicating eviction petitions -- Rent Control Act is meant to benefit both landlord and tenant -- Act protects tenant from unjust eviction -- However this does not mean that legitimate request of landlord to recover possession should be turned down -- Rent Control authorities should not place unwarranted rigidity while considering request of landlord for eviction -- Landlord is not bound to prove his case beyond all reasonable doubts -- Rigorous test of proof applicable to criminal proceedings cannot be applied to eviction petitions -- Act does not intent to place handicap upon landlord -- Adopting such rigid approach without considering genuine need of landlord for eviction on ground on demolition and re-construction leads to miscarriage and justice.

21. Therefore when the respondents have shown that a person who is not a tenant is in occupation of the premises and the tenant has divested himself of all control over the premises, the only conclusion that can be drawn is that there is subletting, since as seen from the judgments of the Apex Court cited supra Rajbir Kaur and Another Vs. S. Chokesiri and Co., and M/s. Delhi Stationers and Printers Vs. Rajendra Kumar, , the actual payment of consideration cannot be proved by landlord, who naturally will not have any knowledge of the said transaction.

22. Owners' Occupation: As regards owners' use and occupation, the appellate authority took note of Ex.B-7, which is the certificate given to the respondent's son and from this exhibit it was clear that the business was being carried on in another premises. It is not the case of the petitioners that the place of business mentioned in Ex.B-7 is the respondents own building. On the other hand, the evidence of P.W.1 is to the effect that apart from the petition premises they have no other building; that property is required

for his son Sasikumar's business. The sales tax certificate is marked as Ex.B-7. The tenants would submit that since Ex.P-7 is of the year 1994, which is subsequent to the petition that cannot be relied upon. This objection cannot be accepted. The respondents came to Court with a case of requirement of own use in 1993. The person who wants to carry on business cannot be expected to wait till the tenants are evicted. The fact that, the business was commenced in the year 1994 itself shows the bona fides of the requirements. The conclusion of the appellate authority in this regard also cannot be interfered with.

23. Denial of title: The learned counsel for the petitioners submitted that the petition ought to have included the ground of denial of title and any denial in the counter or a subsequent event cannot be taken note of by the Courts and eviction cannot be ordered on the basis of such subsequent event.

24. Reliance was placed on the decision already cited supra J.J. Lal Pvt. Ltd. and Ors. v. M. R. Murali and Anr., 2002 (1) CTC 487. In this case, eviction was sought for on the ground of wilful default. The Rent Controller dismissed the petition. On appeal, the appellate authority framed two issues. One regarding wilful default and other regarding denial of title and the petition was dismissed on the ground that there was no wilful default and the denial of title was bona fide. On revision the High Court ordered eviction on both grounds. On, appeal to Supreme Court it was held that there was no wilful default and the denial of title was a plea raised by the landlord from the counter filed by the tenant and if subsequent events are to be taken note of based on facts, resort must be had to amendment of pleadings and in absence of amendment of pleadings, the landlords plea for eviction of tenant on the ground of denial of title must be rejected.

25. In this case, it is true that in the petition the respondents did not raise the question of denial of tile, but the Rent Controller order clearly shows that the matter was argued. It is clear from the following sentence:

The Rent Controller found that the petition u/s 9(5) of the Act was filed because the petitioners had a doubt whether the Hindu Nadar

Devasthanam was a co-owner of the property. In appeal, ground No. 10 reads as follows:

The learned Rent Controller ought to have, consider that putting title on a third

party for the schedule building by the tenant who obtained the possession only from appellants/petitioners is mala fide. On that grounds alone the eviction petition might allowed.

Therefore, at the appeal stage, the landlord clearly prayed for eviction also on the ground of denial of title. The appellate authority went into the question and found that the denial was not bona fide. In the circumstances, the petitioners cannot be heard to say that the appellate authority ought not to have gone into the question of denial of title without resorting to amendment of pleadings.

26. In a similar case Majati Subbarao Vs. P.V.K. Krishna Rao (Deceased) by Lrs., , the Supreme Court held as follows:

Though normally the respondent should have applied for amendment of his plaint and incorporated the ground of denial of title therein in order to get relief on that ground which had arisen after the eviction petition was filed, but in this case the trial Court, namely, the Rent Controller, framed an issue as to whether the tenant's denial of the landlord's title to the schedule property including the said premises was bona fide. The parties went to trial on this clear issue and the appellant had full knowledge of the ground alleged against him. It was open to him to have objected to the framing of this issue on the ground that it was not alleged in the eviction petition that the appellant had denied the title of the respondent and that the denial of title was bona fide. If he had done that the respondent could have well applied for an amendment of the eviction petition to incorporate that ground. Having failed to raise that contention at that stage it is not open now to the appellant to say that the eviction decree could not be passed against him as the ground of denial of title was not pleaded in the eviction petition

27. In the present case, it is not as if the Hindu Nadar Devasthanam claimed that it was the owner of the petition premises and not the respondents. All that it claimed was that they also had a share in the property being co-owners. That alone was their plea. Considering the definition of "landlord" under the Act, which is as follows:

"landlord" includes the person who is receiving or is entitled to receive the rent of a building, whether on his own account or on behalf of another or on behalf of himself and others or as an agent, trustee, executor, administrator,

receiver or guardian or who would so receive the rent or be entitled to receive the rent if the building were let to a tenant; and in view of the fact that the respondents have entered into the petition premises as tenant only under the petitioners, the application u/s 9(5) of the Act cannot be said to be on account of genuine doubt as to who is the landlord. As stated earlier, the Devasthanom only claimed that it was a co-owner along with the respondents and admittedly, the suit filed by the Devasthanom was subsequently withdrawn. Therefore, the right of the respondents to receive rents was never in dispute. This is the only criteria to bring a person under the definition of a landlord as per the Act. The conclusion of the appellate authority relying on the judgment 5. Thangaswamy v. K. Vinayakamurthy, 1996 (2) MLJ 322, that the petitioners laid themselves open for eviction on the ground of denial of title, also does not warrant interference.

For the foregoing reasons, this CRP deserves dismissal and accordingly is dismissed. Consequently, connected CMP is closed.