
(2015) 03 KL CK 0062
In the High Court Of Kerala
Case No : R.C. Rev. No. 23 of 2012

Kadappamannil Rathnaprabha

APPELLANT

Vs

M. Kuttyali Haji and Others

RESPONDENT

Date of Decision : 10-03-2015

Acts Referred:

Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11(4)(i), 14(1), 14(1)(b), 20

Citation : (2015) 1 RCR(Rent) 443

Hon'ble Judges : Alexander Thomas, J.;Antony Dominic, J.

Bench : Division Bench

Advocate : P.V. Kunhikrishnan and Hanson P. Mathew, for the Appellant

Final Decision : Dismissed

Judgement

Alexander Thomas, J.—This Revision Petition instituted by the landlady under Sec. 20 of the Kerala Buildings (Lease and Rent Control) Act, 1965, is directed against the order dated 10.8.2009 passed by the Rent Control Appellate Authority, Kozhikode, in Rent Control Appeal (R.C.A.)No. 57/2007 arising out of the order dated 26.3.2007 in Rent Control Petition (R.C.P). No. 80/2006 on the file of the Rent Control Court, Kozhikode. The Revision Petitioner herein claimed that she and other co-owners were given rights over the petition scheduled tenanted premises and other properties, on the basis of the settlement deed executed by their mother in the year 2000. That respondents 1 and 2 in the R.C.P. were the tenants under her predecessor in interest as per kychit dated 1.4.1983 for a monthly rent of Rs. 1,000/- and that the tenants did not have any right to do any repair or create any sub lease as per the terms of the kycit and that after execution of the settlement deed, the tenants attorned to the petitioner and other landlords and that respondents 1 and 2 in the R.C.P. (who are respondents 1 and 2 in this Revision Petition as well as in the RCP). That respondents 1 and 2, who were earlier conducting a hotel under the name and style, "Hotel Shalimar" in those premises had sublet the building to the 3rd

respondent, who is now in the exclusive possession of the tenanted premises and is now conducting the business of the hotel in that building, etc. The Rent Control Petition was instituted for eviction of the respondents under Sec. 11(4)(i) of the Act for subletting the tenanted premises. Though the respondents had challenged the title, the Rent Control Court as per the order dated 26.3.2007 found that there was no challenge against the settlement deed by the respondents and that in view of the execution of the settlement deed, attornment is effected automatically by the operation of law and that mere reservation in the settlement deed enabling the mother of the petitioners to collect rent during her life time, will not affect the title of the petitioner or other co-owners in respect of the petitioner and thus the said issue regarding title was found in favour of the petitioner.

2. As regards the main issue of subletting, the Rent Control Court found that the presence of the 3rd respondent in the tenanted premises was found during the inspection by the Advocate Commissioner appointed in an earlier suit and that court was of the considered opinion that the presence of the 3rd respondent in the cash counter of the hotel was clearly indicative of the fact that respondents 1 and 2 had given him exclusive possession of the building to run the hotel and that such presence of the 3rd respondent, who is stated to be a cook of respondents 1 and 2, has not been otherwise explained properly by the respondents and that respondents 1 and 2 were also found absent on the day on which the Commissioner had inspected the hotel premises and that there was no satisfactory explanation from respondents 1 and 2 to justify their absence by adducing convincing evidence in that behalf. Respondents 1 and 2 had taken up a case that they were not present on that day due to illness and that RW-1 had gone to Coimbatore for consulting an ophthalmologist (eye hospital) and that no documentary evidence was adduced to convincingly establish these aspects, except the oral testimony and that without any corroborating evidence based on documents, it is unbelievable that both respondents 1 and RW-1 were found absent on that day, whereas 3rd respondent, who was stated to be the only cook in the hotel, was found in the cash counter of the said hotel along with his son, etc. On this basis, the Rent Control Court held that the petitioner/landlady has proved the case of subletting against the respondents and thus allowed the plea for eviction under Sec. 11(4)(i) of the Act.

3. In the Rent Control Appeal preferred by R1 and R2 in RCP, the appellate court also found the issue of title in favour of the landlord. However, on a detailed and meticulous appreciation of all the aspects of the evidence, the appellate authority came to the considered conclusion that the landlady could not discharge her burden of proof in establishing that the tenants/respondents 1 and 2 had sublet the hotel premises to the 3rd respondent. On this basis, the appellate authority as per the impugned order rendered on 10.8.2009, reversed the finding of the Rent Control Court regarding subletting and had thus set aside the order of the Rent Control Court and ordered that the RCA is allowed.

4. As both the courts below have concurrently found the issue of title in favour of the landlady and as the said issue has not been reagitated in any manner by the respondents, we are only concerned with the legality and correctness of the finding of the appellate authority that the plea of subletting under Sec. 11(4)(i) of the Act has not been proved by the landlady.

5. The main contention of the petitioner herein in the above said rent control proceedings was that respondents 1 and 2 had sublet the petition scheduled tenanted premises to the 3rd respondent without the consent and knowledge of the landlady and in violation of the conditions imposed in Ext. A-1 kychit that the scheduled premises were sublet to the 3rd respondent for high rent for conducting hotel business therein and that notice was sent on 28.1.2014 requiring the respondents to terminate the subletting. It is seen that Ext. A-2 notice was received by the 1st respondent on 19.2.2004 as discernible from Ext. A-3 and the Rent Control Petition was filed on 5.3.2004, before the expiry of the 30 days" time limit referred to in the first proviso to Sec. 11(4)(i) of the Act. Respondents 1 and 2 in their counter statement denied the allegation of subletting and contended that no person other than them had ever conducted the hotel business in those premises. That they had never accepted any rent or security from any person including the 3rd respondent and that the 3rd respondent was only an employee working in the hotel as a cook and that he had voluntarily retired from the employment of respondents 1 and 2 on 29.2.2004.

6. The main evidence relied on against the tenants is on the basis of Ext. A-7 Commission Report filed in Original Suit, O.S.895/2003 instituted before the civil court concerned, in which, the petitioner herein is the plaintiff. Respondents 1 and 2 herein were not made defendants in that suit and two other persons were impleaded as defendants 1 and 2 in the said suit filed by the petitioner on the plea that the said two persons were the tenants in the petition scheduled building and the 3rd defendant therein happened to be the 3rd respondent herein. The site inspection was conducted by the Advocate Commissioner on 4.12.2003. The petitioner"s case is that the said commission report was filed within the stipulated time before the civil court. But it is submitted by the respondents" counsel that Ext. A-7 herein, bearing date 16.12.2003, was actually filed before the civil court only on 2.8.2007 and that the present R.C.P. was disposed of on 29.3.2007 and that at the time when Ext. A-7 herein was filed and marked in the R.C.P. proceedings, the said commission report was actually not on the file of the civil court, which had ordered appointment of that Advocate Commissioner in that Original Suit. The Advocate Commissioner had tendered evidence as PW-2 before the Rent Control Court on 17.3.2007. True that the Advocate Commissioner has reported that respondent No. 1 and RW-1 were not present at the time of the site inspection of the hotel premises on 4.12.2003 and that the 3rd respondent and his son were found in the cash counter. It was fairly conceded by the respondents 1 and 2 that they were not present at the time of the above commission inspection and that RW-1 had gone to eye hospital in Coimbatore on that day along with the 1st respondent herein. RW-1 is the

husband of the 2nd respondent Fathibi. The evidence given by RW-1 would show that the 2nd respondent, who is his wife, had never involved in the conduct of the hotel business and that the hotel business was being run by the 1st respondent and RW-1. The appellate court found that the version given by RW-1 is believable and credible. The main objection against the acceptability of RW-1's evidence taken by the Rent Control Court is that apart from his oral testimony regarding the alleged journey to Coimbatore, which explains his absence, no documentary evidence has been let in to prove the said version regarding the consultation with the eye hospital at Coimbatore, etc. It is to be noted that the commission inspection was conducted as early as on 4.12.2003 and the said commission was appointed not in the R.C.P., but in the Original Suit earlier filed, in which respondents 1 and 2 herein were not made parties. So, respondent No. 1 and RW-1 cannot be disbelieved merely for not letting in documentary evidence regarding the consultation with the eye hospital at Coimbatore, done in December, 2003. So the appellate court cannot be found fault for accepting the evidence given by RW-1 on behalf of respondents 1 and 2, as credible and believable version. It is also to be noted that the aforementioned O.S.895/2003 was dismissed on 30.11.2007 and the appeal suit arising therefrom (A.S. No. 52/2008 on the file of the III Additional Sub Court, Kozhikode) was also later dismissed.

7. The presence of respondent No. 3 and his son, viz. C.P. Mani, at the cash counter during the commission inspection on 4.12.2003 coupled with the aforestated absence of respondents 1 and 2 and RW-1 in the hotel premises on that day has been taken as the major ground by the Rent Control Court to accept the plea of subletting. The specific evidence given on behalf of respondents 1 and 2 is that respondent No. 3 is a cook in the service of the hotel run by respondents 1 and 2, who had later voluntarily retired from their service on 29.2.2004. As the justification for the absence of respondent No. 1 and RW-1 has been found to be acceptable by the appellate court, the mere fact that respondent No. 3 was found in the cash counter on that day, by itself will not amount to a proof to a substantial degree that the exclusive possession of the hotel premises was given by respondents 1 and 2 to respondent No. 3. It has come out in evidence that respondent No. 3's son, C.P. Mani was also an employee of the hotel.

8. Though PW-2 (Advocate Commissioner) has stated that he had enquired about the business in the petition scheduled property, from certain shop owners, it has been admitted by him that the said shops do not find a place in the sketch attached to Ext. A-7 series. Therefore, the appellate court found that there was no credible evidence from PW-2 as to any effort made by him to ascertain as to who was actually running the hotel at the time of inspection.

9. It has come out in evidence of RW-1 that the 1st respondent is a chronic asthma patient and therefore he is unable to come to the court and tender evidence. It has also come out in evidence of RW-1 that the 2nd respondent

(who is the wife of RW-1), being a lady, was never directly attending to the responsibilities in the hotel business and that her responsibilities were being carried out by RW-1. Therefore, there has been proper explanation as to why the 1st and 2nd respondents did not personally give evidence in the court and evidence on their behalf has been tendered by RW-1.

10. Though PW-1 (petitioner herein) asserted that at the time of the commission inspection, the 3rd respondent had told her that he had taken the petition scheduled building on sub-lease for conducting hotel business, etc., the appellate court found this to be totally unbelievable and bereft of any credibility. PW-2, Advocate Commissioner as well as PW-1's husband were present when PW-2 (Advocate Commissioner) had made the site inspection. The evidence of PW-2 and Ext. A-7 series are totally silent with regard to any such statement said to have been made by the 3rd respondent to PW-2. The appellate court also found that PW-2, at the time of site inspection, did not ask any question to the 3rd respondent, his son or other persons present in the hotel premises, as to who was actually running the hotel and the report of the Advocate Commissioner is silent as to whether there was any business or not in the petition schedule property at the time when the Advocate Commissioner had made site inspection. The appellate court also found that the Advocate Commissioner had not made any enquiries with the neighbouring shops or the persons in the immediate vicinity of the hotel as to who was actually running the hotel business and that the shop owners, who were contacted by the Advocate Commissioner, are persons whose shops are not included in the sketch attached to Ext. A-7 series. It is in these circumstances that the appellate court found that the version of PW-1 and PW-2 will not in any way substantially prove the case of subletting put forward by the petitioner. The appellate court also found that the very fact that the revision petitioner had impleaded as defendants 1 and 2 in O.S. No. 895/2003, two persons other than respondents 1 and 2 herein, would show that she was absolutely ignorant as to who were actually the tenants or occupants of the petition schedule building. PW-1 has admitted that respondents 1 and 2 are now taking the profits from the hotel business in the petition schedule tenanted premises. Accordingly, it was held by the appellate court that the mere fact that respondent No. 1 and RW-1 were absent on the day of the commissioner inspection and that respondent No. 3 and his son, C.P. Mani, were found in the cash counter of the hotel on that day, will not amount to the petitioner discharging the burden to prove the case of subletting. On an appreciation of the totality of the facts and circumstances of this case, the appellate court is right in holding that something substantially more should have been proved by the revision petitioner, before the court could have safely relied on their case of subletting. Without the landlord discharging her burden of proof regarding the case of subletting, the case of subletting need not be accepted. Moreover, it is not as if there was no proper relationship between the tenants and respondent No. 3 and that their mere presence was unexplainable and that this could prima facie lead to an inference of subletting, etc. In the instant case, it has come out

in evidence that respondent No. 3 was a cook employed by respondents 1 and 2 in their hotel and that his son, C.P. Mani, was also an employee of that hotel. So also, the appellate court found that the mere non-inclusion of the name of respondent No. 3 in Ext. B-3 report prepared by the Assistant Labour Officer on 15.1.2004, will not be fatal to the case of the tenants. The above said finding of the appellate court also cannot be said to be perverse or unreasonable. It is also to be noted that Ext. A-7 commission report prepared by PW-2 (Advocate Commissioner) is not on the basis of an Advocate Commission appointed in these rent control proceedings. But the said commission was appointed in the aforementioned Original Suit, wherein both the suit and its Appeal Suit were dismissed. In the said suit, respondents 1 and 2 herein were not impleaded as defendants and that the specific case of the plaintiff therein (revision petitioner herein) was that two other persons were the tenants and so obviously the allegation of subletting must have been directed only as against those defendants in that suit, who were not respondents 1 and 2 herein. Therefore, the approach of the appellate court in not giving much evidentiary weight to the said Advocate Commissioner report, cannot be found fault with. The petitioner could have easily taken out a commission in these rent control proceedings and undoubtedly, the petitioner has not chosen to lead any such evidence. In this context, it is apposite to note that the Division Bench of this Court in the case Kalyani Bharathan Vs. Abdul Muthalif, , has observed that no landlord, who alleges subletting or non-user of the tenanted premises by the tenant, can expect to prove the same by taking out a commission after notice to the tenant. This is because in such a contingency the tenant can very well stage-manage the situation and temporarily cause disappearance of the objectionable contravention by him and that in this view of the matter, the Division Bench held that though the report of the Advocate Commissioner was an ex-parte Commission, the said report assumes great importance. Therefore, the petitioner at the initial stage itself in the RCP could have pressed for ex parte commission so as to ascertain the correctness of her allegation regarding the subletting and then followed up with another Commission, with due notice to the opposite side. Therefore, on an overall appreciation of the totality of the facts and circumstances of the case, the conclusion of the appellate court that the petitioner landlady has not discharged her burden of proof regarding the crucial plea of subletting, is reasonable and proper and at any rate, cannot be made amenable to the revisionary jurisdiction of this Court. In this context, it would be apposite to refer to the legal position on this aspect of the matter.

11. It may be noted that Sec. 11(4)(i) of the Kerala Buildings (Lease and Rent Control) Act, 1965 provides as follows:

"(4) A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building-

(i) if the tenant after the commencement after the commencement of this Act, without the consent of the landlord, transfers his right under the lease or sub-

lets the entire building or any portion thereof, if the lease does not confer on him any right to do so." 12. In the case *Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh*, , the Apex Court held that when eviction is sought on the ground of subletting, the onus to prove subletting is on the landlord and that if the landlord prima facie shows that the third party is in exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence. This legal position has been reiterated by the Apex Court in the decisions as in the case *Smt. Krishnawati Vs. Shri Hans Raj*, , etc.

13. In the case *Jagan Nath (Deceased) through Lrs. Vs. Chander Bhan and Others*, , the Supreme Court while dealing with the situation contemplated under Sec. 14(1)(b) of the Delhi Rent Control Act, 1958, providing for eviction on the ground of subletting, held as follows:

"6. The question for consideration is whether the mischief contemplated under Section 14(1)(b) of the Act has been committed as the tenant had sublet, assigned, or otherwise parted with the possession of the whole or part of the premises without obtaining the consent in writing of the landlord. There is no dispute that there was no consent in writing of the landlord in this case. There is also no evidence that there has been any subletting or assignment. The only ground perhaps upon which the landlord was seeking eviction was parting with possession. It is well settled that parting with possession meant giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant; user by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to possession there is no parting with possession in terms of clause (b) of Section 14(1) of the Act. Even though the father had retired from the business and the sons had been looking after the business, in the facts of this case, it cannot be said that the father had divested himself of the legal right to be in possession. If the father has a right to displace the possession of the occupants, i.e., his sons, it cannot be said that the tenant had parted with possession" 14. In *Gopal Saran Vs. Satyanarayana*, , the Apex Court held on the question as to whether the tenant has assigned, sublet or otherwise parted with the possession of the whole or any part of the premises without the permission of the landlord as envisaged in the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, as follows:

"16..... Sub-letting means transfer of an exclusive right to enjoy the property in favour of the third party. In this connection, reference may be made to the decision of this Court in *Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others*, where it was held that to constitute a sub-letting, there must be a parting of legal possession, i.e., possession with the right to include and also right to exclude others and whether in a particular case there was sub-letting

was substantially a question of fact. In that case, a reference was made at page 77 of the report to the Treatise of Foa on Landlord and Tenant, 6th edn., at page 323, for the proposition that:

"The mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not, so long as he retains the legal possession himself, a breach of covenant." In paragraph 17 of the report, it was observed that parting of the legal possession means possession with the right to include and also right to exclude others. In the last mentioned case, the observations of the Madras High Court in Gundalapalli Rangamannar Chetty Vs. Desu Rangiah and Others, were approved by this Court in which the legal position in Jackson v. Simons [(1923) 1 Ch 373] were relied upon. The Madras High Court had also relied on a judgment of Scrutton L.J. in Chaplin v. Smith [(1926) 1 KB 198] at page 211 of the report where it was said:

"He did not assign, nor did he underlet. He was constantly on the premises himself and kept the key of them. He did business of his own as well as business of the company. In my view he allowed the company to use the premises while he himself remained in possession of them." This position was also accepted in Vishwa Nath and Another Vs. Chaman Lal Khanna and Another, wherein it was observed that parting with possession is understood as parting with legal possession by one in favour of the other by giving him an exclusive possession to the ouster of the grantor. If the grantor had retained legal possession with him it was not a case of parting with possession."

Therefore, to establish sub-lease or sub-letting, two ingredients have to be clearly proved; firstly that the sub-tenant must have exclusive right of possession or interests in the premises or part of the premises in question and secondly, the right must be in lieu of payment of some compensation or rent.

15. In the case Smt. Krishnawati Vs. Shri Hans Raj, , the Supreme Court has held as follows:

"6..... [T]he onus to prove subletting is on the landlord..... if the landlord prima facie shows that the occupant was in exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence." 16. In Nirmal Kanta (Dead) through Lrs. Vs. Ashok Kumar and Another, , the Supreme Court held that what constitutes sub-letting is that a sub-tenancy or sub-letting when the tenant inducts a third party stranger to the landlord into the tenanted accommodation and parts with possession thereof wholly or in part in favour of such third party and puts him in exclusive possession thereof and that the lessor/landlord seeking eviction of a lessee or tenant alleging creation of a sub-tenancy has to prove such allegation by producing proper evidence to that effect and once it is proved that the lessee/tenant has parted with exclusive possession of the demised premises for a monetary consideration, the creation of sub-tenancy and/or the allegation of sub-letting stands established.

17. It is thus now too well established that the initial burden of proving subletting is on the landlady for which she has to adduce strong credible prima facie evidence regarding induction of third party stranger to the demised premises and parting of exclusive possession in that regard to such stranger, etc. It is only after such initial burden has been satisfactorily discharged by the landlord that a third party, other than the tenant was in exclusive possession of the premises, a presumption of subletting could be raised, that would amount to proof unless rebutted and it is only thereupon the tenant will have the burden to rebut the same. In view of the aforestated discussion, we have no hesitation to hold that the evidence and materials let in by the landlady cannot be said to be satisfactory evidence to establish the case of induction of third party stranger to the tenanted premises and handing over of such exclusive possession of those premises to such stranger, in the facts and circumstances of this case. The evidence let in by the petitioner herein is at best very thin and tenuous and cannot be said to have satisfactorily discharged the requisite burden of the landlady in proving the question of subletting as stated hereinabove.

18. The learned counsel for the petitioner has relied on the decision of the Division Bench of this Court in Vipinachandran Vs. Xavier, , which, in turn had relied on the decision of the Apex Court in the case M/s. Bharat Sales Ltd. Vs. Life Insurance Corporation of India, , to canvass the position that the landlord cannot be called upon to establish the clandestine arrangements between the tenant and the subtenant and that the landlord is only expected to establish the mere presence of the alleged subtenant in the premises, with whom the landlord has no jural relationship and that the burden is entirely on the tenant to establish that there was no subletting. We note that in the aforementioned decision of the Division Bench in Vipinachandran's case cited supra, notice sent to the tenant was returned with the endorsement "addressee out of India" and the notice sent to the alleged sub-lessee was received by that person. From the facts and circumstances of that case, it was found that the tenant in that case had no control over the business since he was out of India and that the business was actually conducted by the alleged subtenant therein and it was in those circumstances that the Division Bench held that the issue of subletting is satisfactorily proved and that the claim of eviction is allowable under Sec. 11(4) (i) of the Act. The facts in the instant case are substantially different from the facts and circumstances in Vipinachandran's case supra. In the instant case, it is not as if there was no proper relationship between the tenants and the 3rd respondent or that the presence of the 3rd respondent was not properly explainable, etc. It was found by the appellate court, after due appreciation of evidence, that the 3rd respondent herein was a cook in the service of the hotel employed by respondents 1 and 2 and that the other person, who was found in the cash counter on the day of commissioner's inspection, was his son, who was also an employee of the hotel and that on the day of the commission inspection, respondent No. 1 and RW-1 had to go Coimbatore for consulting a eye hospital. More crucially, it is also to be noted that the commission inspection was pursuant

to an Advocate Commissioner appointed not in the R.C.P. proceedings, but in an earlier suit, in which respondents 1 and 2 were not made parties and the specific plea of the revision petitioner herein in that suit was that two persons, other than respondents 1 and 2 herein, were the tenants in question, etc. Therefore, we have no hesitation to hold that the evidence let in this case will not constitute sufficient evidence on the part of the landlady to discharge her burden to prove the issue of subletting, in the facts and circumstances of this case.

19. There are many other detailed and minute aspects of the matter, which have been meticulously discussed and analysed by the appellate court and we are of the considered opinion that it is not necessary for us to enter into such minute details, in a revisionary jurisdiction. But after going through the totality of all aspects of the matter, we are of the considered opinion that the findings of the appellate court on all those matters cannot be said to be perverse or unreasonable.

20. Resultantly, we have no hesitation to hold that no grounds are made out for revisionary interference with the impugned order passed by the appellate court in this case. Accordingly, the Revision Petition stands dismissed. There shall be no order as to costs.