
(2017) 03 KL CK 0021
In the High Court Of Kerala
Case No : R.C.Rev. No. 281 of 2016

Sivarajan

APPELLANT

Vs

Raheela K. Jalal

RESPONDENT

Date of Decision : 27-03-2017

Acts Referred:

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

Citation : (2017) 2 ILRKerala 454 : (2017) 2 KerLJ 429 : (2017) 2 KLT 508

Hon'ble Judges : Mr. C.K. Abdul Rehim and Mrs. Shircy V., JJ.

Bench : Division Bench

Advocate : Sri. K.G. Balasubramanian and Smt. Ambily, Advocates, for the Petitioner; Sri. Rajit, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Shircy V., J.—A practicing lawyer who is having his chamber and residential accommodation in the ground floor of a building is asked to vacate the premises in R.C.P. No. 92/2011 of the Rent Control Court, Thrissur under Section 11(3) and 11(4) (i) of the Kerala Buildings (Lease and Rent Control) Act (hereinafter referred to as the Act). The Rent Control Court allowed eviction as sought for by the landlady. The said order was challenged before the Rent Control Appellate Authority, Thrissur in R.C.A. No. 97/2014. The Appellate Authority confirmed the order of the Rent Control Court. The legality, propriety and correctness of the judgment of the Appellate Authority is under challenge in this revision .

2. Succinctly put, facts necessary for disposal of the case are: The landlady (herein after referred to as the respondent) claims title over tenanted premises as per settlement deed No. 4464/2000 of S.R.O. Ayyanthole. The tenanted premises originally belonged to her parents and they were residing in the building therein. While so, the settlement deed was executed in her favour and thus the property was transferred to her. She had purchased 10 cents of land lying adjacent to the tenanted premises in the year 2004 and constructed a

building therein and shifted the residence of her parents from the tenanted premises to the newly constructed building. Thereafter the tenanted premises was rented out to the tenant(herein after referred to as the revision petitioner) on 1.9.2010 for a monthly rent of Rs.6500/-. Later it came to the knowledge of the respondent that the revision petitioner had sub-leased the tenanted premises to Advocate N.J. Netto, Advocate Santhosh Poduval, Advocate Biju P. Raman and Advocate Sheno Chandran illegally and they are in possession of the building along with him. A registered notice was issued stating contravention of the condition of the lease and called upon to vacate and surrender possession, but he failed to do so. The respondent after her marriage had shifted to Dubai along with her husband. Now she wants to return back to her native place along with her husband and they are intending to start an Engineering Consultancy and Construction Works. As the new building is required for their accommodation and business purpose, her parents are to be accommodated in the tenanted premises . So she requires the revision petitioner to be evicted from the tenanted premises to accommodate her parents . Hence, eviction petition was filed on the ground of sub-lease and bona-fide requirement .

3. This revision petition was strenuously contested by the revision petitioner (tenant). The allegation of subletting was denied. It is contended that actually the Advocates mentioned in the petition are his associates and he is running his office in the premises with his associates practicing before the High Court and Supreme Court, and there is no sub-lease as alleged. So also he has denied the allegation of bona fide need urged and contended that it is only a ruse for eviction.

4. The Rent Control Court ordered eviction on the finding that the need urged by the landlady/Respondent is genuine. So also it is found that the revision petitioner/ tenant has sub-leased the tenanted premises and hence he is also liable to be evicted under Section 11(4)(i) of the Act. The appellate authority confirmed the said findings. Being aggrieved, this revision petition has been preferred.

5. Before the court below the power of attorney holder of the respondent was examined as PW1. As PW2, the Advocate Commissioner was also examined. The tenant himself was examined as RW1. RWs.2 and 3 were also examined. Exts.A1 to A6, Exts. B1 to B3, Ext. X1 and Ext.C1 were also marked.

6. The revision petitioner being an Advocate have raised all the contentions possible to resist the claim raised by the respondent in the revision petition. The first such contention before here is that the respondent is not holding title over the property and she is not having right to file a petition for eviction. So he has denied her title over the property. Though such a contention was not there in the initial stage the respondent /landlady has produced Ext.A1 and proved the same. Her case is that the tenanted premises originally belonged to her parents and they have settled the rights over the property in her favour as per Ext.A1 with their life interest for accommodation and after execution of A1 deed, it was

rented out to the revision petitioner on 1.9.2010 on executing Ext.A2 rent deed. Ext.A1 deed has been proved through the power of attorney holder of the respondent who was examined as PW1. No contra evidence is available on record to hold that the title deed is not a genuine one and she did not derive title over the tenanted premises. Hence, we find that she is the title holder of the property since 31.8.2010, the date of execution of Ext.A1.

7. According to her she had purchased some property near the tenanted premises and constructed a building in the year 2004 and her parents were shifted to that building. But now she, who is residing with her husband abroad, is intending to return and settle down in the newly constructed building and to start an Engineering Consultancy and Constructions, and so her parents have to be accommodated in the tenanted premises. Hence eviction is sought for. It is interesting to note that, though before the Rent Control Court as well before the Appellate Authority, the revision petitioner did not deny the landlordtenant relationship or raised a contention that Ext.A2 is not a Rent deed, his case before this Court is that no lease has been created between the parties, but it is a license and the Rent Control Court lacks inherent jurisdiction to decide the question agitated before it; and hence the tenant is not liable to be evicted under the proceedings before the Rent Control Court. As mentioned earlier, such a contention do not find a place in the pleadings. The learned counsel for the revision petitioner has contended that since the question raised by him is one pertaining to lack of inherent jurisdiction, the contention raised by the respondent that, the first opportunity was not availed and no such defence can be raised at this stage, is of no merits. It is well settled that parties must get a fair chance of contest and only if the contentions are raised at the right time at the right stage a fair trial is possible. It is also well settled that the foundation of a civil case is pleadings. Absolutely, no such contention had been raised in the first opportunity and now only it is contended that the relationship between the parties is not that of a landlord-tenant. The revision petitioner was fair enough to concede that no evidence was adduced on this aspect, in absence of such a plea. Ext.A2 is the crucial document relied on by the respondent, which is styled as a rent deed. It is well established that when a document is questioned the intention of the parties have to be gathered not from the nomenclature of the document, but from the recitals in the document. Nomenclature of the document cannot decide the intention of the parties and the real purport of the instrument. But when the words used in the document are clear, plain, sensible and there is no ambiguity and the intention of the parties to the document is clearly conveyed, there is no scope for the court to interpret the same in a different manner. Ext.A2 is a document having three pages. The first two pages are hand written, drafted in a stamp paper and the third page is a printed form where the gaps are filled up and attached to the first two sheets. On a mere reading of the first two sheets, it could be seen that it is drafted and styled as a rent deed and there is absolutely no whisper that it is a license arrangement as contended by the revision petitioner. The amount referred as rent is Rs. 6500/- per month and

the term is specifically used as rent and not as license fee. The entire recitals in the first two sheets are as if it is a rent deed and nothing else. But it is true that in the third page, which is a printed form, it has been mentioned that what the revision petitioner has to pay is license fees. We also rely on the propositions laid down in following decisions so as to find out whether the document in question is a rent deed or a licence agreement as contended by the revision petitioner.

8. In *Mangal Amusement Park (P)Ltd. and Another v. State of M.P. and Others* [AIR 2012 SC 3325], the Supreme Court has observed as follows:

""The principle question to be considered is as to whether the document of allotment of land dated 6.5.1994 was in any way a lease or a license. As far as a lease is concerned, Section 105 of the Transfer of Property Act, 1882, defines it as follows:

"105. Lease defined-A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined -

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

As far as a license is concerned, the same is defined under Section 52 of the Indian Easements Act, 1882, as follows -

"52. "License" defined - Where one person grants to another, or to a definite number of other persons, a right to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

From these two definitions it is clear that a lease is not a mere contract but envisages and transfers an interest in the demised property creating a right in favour of the lessee in rem. As against that a license only makes an action lawful which without it would be unlawful, but does not transfer any interest in favour of the licensee in respect of the property.

(emphasis supplied)

It is further observed as follows:-

" (1) To ascertain whether a document creates a license or lease, the substance of the document must be preferred to the form ; (2) the real test is the intention of the parties - whether they intended to create a lease or a license;(3) if the

document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a license; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease."

(emphasis supplied)

9. In *Freemason Lodge v. Raman* (2016 (3) KLT SN 91 (C.No.82), it is held by this court that

"The ordinary rule of interpretation of documents is that the intention of the parties must be discovered, if possible, from the expressions they have used in it. Thus courts below did not make any attempt to discover the intention of the parties from the statements in Ext.B1 sale deed; instead they relied on irrelevant and in immaterial facts disclosed in the evidence of the witnesses."

10. *Velayudhan Nair v. M/s. Young Men's Christian Association* (2016 (2) KHC 640) it is observed as :

"The owner of the building has no control over the conduct of the business in the respective buildings as well. Further, in spite of the fact that the lease period is over, they are allowed to continue in the premises and that also will go to show that the real intention of the parties is only to treat them as landlord and tenant and not as licensor and licensee."

11. Applying the above proposition of law in the facts of the case on record what we could gather from the document is that the intention of the parties was to create a landlord-tenant relationship and the contention raised by the revision petitioner in the revision petition is only to deny the relationship so as to resist the petition for eviction somehow or other.

12. The revision petitioner who was examined as RW1 had also fairly admitted in court that Ext.A2 is a rent deed. Ext.B1 is a document produced by him before the court evidencing payment of monthly rent. In the first page itself it has been specifically endorsed that on 1st October, 2010, i.e. immediately on the next month of taking the building on rent, an amount of Rs.6500/- had been paid as rent and Rs.200/- as water charges for the month of September, 2010. Payment of rent for the remaining months also, had been endorsed in Ext.B1. The endorsement is so specific that the receipt of Rs.6500/- is the rent and Rs. 200/- is the water charges, paid as agreed to between the parties by Ext.A2 deed. This book evidencing receipt of rent by the respondent was produced and proved by the revision petitioner himself. There is absolutely no endorsement to the effect that the receipt of Rs.6500/- is licence fees. The evidence established the fact that the respondent has no possession over the tenanted premises after the execution of Ext.A2 and no restriction regarding the user of the building is imposed. When the evidence available on record is evaluated, it could be seen

that the respondent established the fact that Ext.A2 is a lease deed and the relationship between the parties is that of, landlord tenant and nothing else. Under these circumstances we are fully justified in concluding that the intention of the parties was to create a lease arrangement and Ext.A2 is not a licence agreement as contended, but it is nothing but a rent deed.

13. Now the question to be looked into is whether there is any scope for interference by exercising the revisional power under section 20 of the Act in the order of eviction of the rent Control court under Section 11(3) and 11 (4) (i), which was confirmed by the Rent Control appellate Authority. The revisional power is limited and narrow and hence the scope of this provision is limited to the enquiry about the legality ,propriety and regularity of the order.

14. The definite case of the respondent is that though the ground floor of the building was let out to the revision petitioner for his residence as well to run his Advocate's chamber, he has sub-let the building to some other Advocates without her knowledge and consent and hence he is liable to be evicted from the premises. On the other hand the revision petitioner has contended that there was absolutely no sub-letting as alleged by the respondent and actually those Advocates are his associates and so their names are exhibited in the name board, but there was no sub-letting as alleged by the respondent and hence not liable to be evicted under 11(4) (i) of the Act.

15. Section 11(4) of the Act is reproduced here under for convenience of reference:

11 (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 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. Provided that an application under this clause shall not be made for the first time in respect of one and the same tenancy unless the landlord has sent a registered notice to the tenant intimating the contravention of the said condition of the lease and the tenant has failed to terminate the transfer or the sub-lease as the case may be, within thirty days of the receipt of the notice or the refusal thereof.

Explanation - Where on the partition of a joint family or of the rights of co-tenants or on the dissolution of a firm, the right of the joint family or the co-tenants or the firm under a lease is vested in a member of the joint family, or a co-tenant or a partner, as the case may be, whether by act of parties or otherwise, no transfer by the tenant of his right under the lease shall be deemed to have taken place within the meaning of this clause; or

(ii) to (v) xx xx xx

16. It is to be noted that the pre-requisite for eviction under Section 11 (4) (i) of the Act, are (1) There must be sub-letting without the consent and knowledge of

the landlord, (2) registered notice to the tenant must be sent by the landlord and if the sub-lessee has not been evicted from the building within thirty days, the tenant can be evicted from the premises through process of law. Certainly, in such a proceedings the landlord need to prove positively that there is sub-lease. It is a fact that normally it will not be possible to prove by adducing definite and concrete evidence to the effect that the sub-lessee has paid rent to the tenant, as that will be a secret affair between them. So the landlord has to prove that there is unauthorised transfer of possession and the sub-lessee is holding exclusive possession of the premises or a portion of the tenanted premises on the date of the petition. Here, in order to prove that fact, the respondent is mainly relying on the commission report. The commissioner who inspected the property has reported that in the board the names of Advocate P.S. Sivarajan (revision petitioner) Advocate. Shenoj Chandran and Advocate. Santhosh Poduval are exhibited in front of the tenanted premises. It is also reported that in the board the name of Advocate Santhosh Poduval is mentioned as Advocate, High Court of Kerala. According to the learned counsel for the respondent it would indicate that he is not an associate of the revision petitioner, but a lawyer having independent practise, who runs his office as a sub-tenant of the revision petitioner. So in short, the argument advanced by respondent is that the building has been let out to the Advocates whose names have been exhibited in the board and so there is clear evidence of subtenancy by the original tenant. Of-course the commissioner has specifically reported that two boards have been exhibited in the building and one is "Thrissur Law Firm" and the other one is with the names of Advocates mentioned above. She has reported that the front portion of the building is used as an Advocates' office and the remaining portion is used for the residential purpose. According to learned counsel for the respondent, the names of Advocates displayed in the board especially as "Kerala High Court" with the name of Adv. Santhosh Poduval would show that he is an Advocate practicing before the Kerala High Court and the revision petitioner, who is a practicing lawyer in the courts at Thrissur, has let out the room to others to conduct their office without her consent. It is significant that, normally an Advocate, who is a Senior will display the names of his juniors or associates also in the name board and that will be exhibited in front of the office. The commissioner has not reported that the names of the Advocates are exhibited in three separate boards. She has not reported that she found them in exclusive possession of any portion of the office used as Advocates' office. So it could only be concluded that the revision petitioner was carrying on his profession with associates in the building and the names of the persons appeared in the board are not having any exclusive possession in the premises to have independent practise, so as to presume that they are tenants under the revision petitioner. It is common knowledge that Advocate and associates used to work together and in such offices their names will appear in one board or in separate boards, and exhibiting a board with his name as well the names of his associates by an Advocate is not sufficient to conclude that he has sub-let his tenanted premises. It is not unusual that many Advocates practise law as associates or juniors to a particular lawyer

and share one room / building and at the same time have separate practise. That does not mean that there is sub-lease. The crucial point to be decided is whether rent is being collected by the tenant from others so as to run their office. If rent is being collected by one particular person more particularly by the tenant from others, then that can be considered as a sub-tenancy by the main tenant. In such a case there must also be evidence to prove that they are also having exclusive possession of the room or a portion of the room so as to run the office. Here, the Advocate commissioner has not reported so, and the evidence adduced will not show that the Advocates (whose names are displayed in the name board) are having independent or exclusive possession in the room. So these group of Advocates can only be treated as Associates of the Advocate/revision petitioner and not independent lawyers having separate office and exclusive possession over the room, or portion of any room to pursue their practise. The mere exhibition of the names in the name board are not at all sufficient to conclude that they are independently practicing by having separate office functioning as sub-tenant under the original tenant. The finding of the learned appellate authority that the non production of joint vakalath, non production of documents to prove sharing of income, receipt of income etc. would indicate that they are not associates working under one lawyer, are not appealing to us so as to find sub-tenancy. It appears that the trial court as well the appellate authority went wrong in shifting the burden of proof regarding sublease on the revision petitioner. Certainly, it is for landlord to prove that there is sub-tenancy by adducing positive evidence. Vakalath once filed will be in the court concerned. Still the appellate authority finds fault with the revision petitioner for the non - production of vakalath, if any. So also the observation made by the learned appellate authority to conclude that there is sub-tenancy, that the name boards of the advocates indicate that they are practicing before the Hon'ble Supreme Court of India and High court of Kerala and running office in the office of the revision petitioner as tenants, is a proposition difficult to be confirmed. Any Advocate who practise as an associate is free to take independent brief as well to exhibit his/her name by including his/her name in the name board with whom he associates or by separate boards with the name of the court he/she is practicing or the field he/she is specialised. But what is to be proved to establish a subtenancy is "exclusive possession of the sub-tenant, valuable consideration to transfer possession by the sub-tenant to the head-tenant, transfer of possession without the consent of the landlord, the presence of the sub-lessee in the premises with whom the landlord have no jural relationship, transfer of an exclusive right by the tenant to enjoy the property and parting of legal possession". Such being the case, we find it difficult to conclude that the tenant has subleased the premises to any one especially to the persons whose names are displayed in the board and exhibited in the tenanted premises. It is only to be inferred that the revision petitioner is running his office with his associates. So we have no hesitation to conclude that the respondent has not succeeded in proving that there was sub-lease by the revision petitioner to others without her knowledge or consent so as to entitle her to get an order of eviction under 11 (4)

(i) of the Act .

17. The respondent/landlady sought eviction for her bona fide need of making arrangement for the residence of her parents in the tenanted premises so as to make it convenient for her to shift her residence with her husband from Gulf where she is residing presently.

18. For proper appreciation it is apposite to refer to Section 11(3) of the Act which reads as under:-

11(3) A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building if he bona fide needs the building for his own occupation or for the occupation by any member of his family dependent on him:

Provided that the Rent Control Court shall not give any such direction if the landlord has another building of his own in his possession in the same city, town or village except where the Rent Control court is satisfied that for special reasons, in any particular case it will be just and proper to do so.

Provided further that the Rent Control Court shall not give any direction to a tenant to put the landlord in possession, if such tenant is depending for his livelihood mainly on the income derived from any trade or business carried on in such building and there is no other suitable building available in the locality for such person to carry on such trade or business:

Provided further that no landlord whose right to recover possession arises under an instrument of transfer inter vivos shall be entitled to apply to be put in possession until the expiry of one year from the date of the instrument:

Provided further that if a landlord after obtaining an order to be put in possession transfers his rights in respect of the building to another person, the transferee shall not be entitled to be put in possession unless he proves that the bona fide needs the building for his own occupation or for the occupation by any member of his family dependent on him."

19. According to her, she is intending to shift her residence to her native place with her husband and they want to start an independent business of engineering consultancy and construction works in the residential building where her parents are now residing. According to her, before her marriage itself her parents had constructed the residential building in the 10 cents of property lying adjacent to the tenanted premises. When she was married she left along with her husband to Gulf and her parents continued their residence in the newly constructed building in the 10 cents. According to her at the time of lease itself, the understanding with the Revision Petitioner was to shift their accommodation to the tenanted premises as and when they require the building and he has to vacate the premises. Her power of attorney holder as PW1 has reiterated the said requirement before the Court. He was subjected to thorough cross examination, but nothing has been brought out to disbelieve his version, though the revision

petitioner disputes the bona fide need and dependency pleaded by the respondent. Under Section 11(3) when the bona fide need is urged by the landlord/landlady the defence available to the tenant is, (1) he or she has to prove that the landlord does not need the building bona fide and he is depending on the business of trade carried out in the tenanted premises and no other suitable buildings are available in the premises. Here, the Revision Petitioner has no case that the respondent has any other building in the town or city for her bona fide requirement. Primary burden to prove that the landlord is in possession of another building of his own, is definitely on the tenant and once it is shown, the burden shifts to the landlord, who has to establish special reasons. Here, there is no such contention and hence it is not required for the respondent to prove special reasons to seek eviction of the tenanted premises. It is also evident that the 1st floor of the building is in the possession of different tenants and the landlord/ respondent is entitled to choose the building suitable for her purpose.

20. So the question to be looked into is whether the Revision Petition is entitled to get protection under the second proviso to Section 11(3) of the Act. In order to constitute this proviso two conditions should prevail. The first one is that the revision petitioner is depending upon the livelihood i.e., on the income derived from his profession. Here the building was taken on lease by the Revision Petitioner for his accommodation as well to run his office. He has produced copies of the income-tax returns for the years 2011-12, 2012-13 to prove the income he derived from his profession. It is not that material being the particular nature of the profession engaged by the revision petitioner to prove that he is depending on his profession for his livelihood, particularly when the respondent has no case that he is engaged with any other job or he is not a practicing lawyer. But his definite case is that no suitable buildings are available in the locality to shift his residence and office. It is pertinent to note that the onus to prove the aforesaid issue is definitely upon the revision petitioner, but there was no attempt on his side to establish the same. On the other hand, the Commissioner taken up by the respondent would report about the buildings available near the tenanted building as well near the court premises at Ayanthole. So, if the Revision Petitioner genuinely wants to shift his accommodation and office, definitely buildings are available for the same. His mere assertion that no suitable buildings are available in the locality is not sufficient for shifting the burden of proof. Since he could not discharge his burden he is not entitled to get the protection under the 2nd proviso to Section 11(3). So in short, the requirement of the respondent is established as a genuine and bona fide need and not a pretext to get the tenanted premises. In view of the discussions made above, we find absolutely no justifiable reason to conclude that there is any illegality, irregularity or impropriety in the finding under challenge that the revision petitioner is liable to be evicted under section 11(3) of the Act.

21. In the result the Revision Petition is allowed in part, by setting aside the

order of eviction passed by the Rent Controller under Section 11(4)(i) of the Act. But the order of eviction passed under Section 11(3) of the Act; which is confirmed by the Appellate Authority is hereby confirmed.

22. Though we found absolutely no merits in the revision petition, that the revision petitioner is liable to be evicted under section 11(3) of the Act, we feel it just and proper to grant reasonable time to the revision petitioner / tenant to vacate the premises subject to the following conditions:

i) The tenant/revision petitioner shall file an affidavit before the Rent Control Court within a month from today unconditionally undertaking to vacate the premises within a period of six months from today.

ii) The tenant shall pay/deposit the upto date arrears of rent within one month from today and shall continue to pay the rent/occupation charges at the agreed rate, till the date of vacating of the premises.

iii) If the tenant commits breach of any of the conditions mentioned above, the relief granted to him as per this order will stand vacated. The Revision Petition is disposed of accordingly.