

(2002) 08 KL CK 0053

In the High Court Of Kerala

Case No : C.R.P. No's. 1888 and 1930 etc. of 2001

Tellicherry W. Co-operative Society

APPELLANT

Vs

Safiya Beebi Umma

RESPONDENT

Date of Decision : 27-08-2002

Acts Referred:

Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11(3), 11(4), 2(3), 2(6)

Citation : (2002) 08 KL CK 0053

Hon'ble Judges : K. Thankappan, J;J.B. Koshy, J

Bench : Division Bench

Advocate : E.V. Nayanar, V. Rajagopal, K.N. Chathukutty and K.V. Sohan, for the Appellant; T. Krishnanunni, C. Khalid and T.P. Sajid, for the Respondent

Judgement

J.B. Koshy, J.—CRP Nos. 1786, 1888 and 1930/2002 are filed by the respondents in RCP No. 12/95 on the file of the Rent Control Court, Tellicherry. CRP No. 2866/2001 is filed by the landlord who was the petitioner in the above Rent Control Petition.

2. The landlord filed a petition for eviction u/s 11(3), 11(4)(i) and 11(4)(iii) of the Kerala Buildings (Lease and Rent Control) Act, 1965 (hereinafter referred to as "the Act"). According to the landlord, the petition schedule building belongs to her and it was leased out to the first respondent in the Rent Control Petition as per registered kychit on a monthly rent of Rs. 175/- on 13.9.1963. Respondents 2 and 3 in the RCP are the sub tenants and first respondent sub leased portions of the building to them with the consent of the then landlord. Without consent of the landlord first respondent sub leased a portion of the building to 4th respondent. It was also alleged that respondents 1 to 3 are not doing any business in the plaint schedule building, The rent was subsequently enhanced to Rs. 275/-. It is averred that petitioner's son Muhammad Ali is not having any avocation. He wants to start hotel business in the plaint schedule premises. He is depending on the landlord for the said purpose. It is alleged that the first respondent has got another building nearby wherein he conducts business and

he is not using the petition schedule building for any purpose.

3. The first respondent filed a counter statement stating that the rent is only Rs. 220 per month, that the need alleged by the petitioner is not bonafide, that he is mainly depending on the income derived from the business conducting in the plaint schedule premises and that the 4th respondent is unknown to him. He denied sublease to the 4th respondent. He also stated that no other building is available in the locality which is suitable for his purpose.

4. The second and third respondents contended that they are sub-lessees with the consent of the then landlord and they also mainly depend for their livelihood on the income from the business conducting in the petition schedule building, that the need alleged by the petitioner is not bonafide and that the building is not suitable for conducting hotel business. According to the third respondent which is a co-operative society there are 380 members in the society and all the members and their family members are mainly depending on the income derived from the society and that there is no other suitable building in the locality for housing the society. The sub-lease alleged to have been granted to 4th respondent was denied by the second and third respondents also. Fourth respondent did not appear in court. After consideration of the evidence, the Rent Control Court allowed the application u/s 11(3), 11(4)(i) and 11(4)(iii) of the Act. The Rent Control Court found that there is objectionable sub lease to 4th respondent, that the building is required for the bonafide occupation of the petitioner's son who has no other avocation and that the first respondent has got another building for conducting business and virtually he is not conducting any business in this building.

5. On appeal the findings u/s 11(3)(i) and 11(4)(i) were confirmed but the finding u/s 11(4)(iii) was set aside. Against the order of eviction passed u/s 11(3)(i) and 11(4)(i), all the three contesting respondents filed Revision Petitions and the landlord filed a Revision Petition against the finding regarding Section 11 (4)(iii).

6. From the counter statement and evidence it is very clear that the first respondent is the tenant. Ext. A1 deed is very clear to that effect. It is also not disputed that respondents 2 and 3 are sub-tenants under him and those sub leases are not objectionable leases. Their sub leases were mentioned in Ext. A1 itself. It has also come out in evidence that first respondent alone pays rent to the landlord and respondents 2 and 3 pay rent to the first respondent and that is an arrangement between first respondent and them, even though sub-tenancies are consented by the landlord. With regard to the bonafide need of the petitioner's son for conducting a hotel business it is concurrently found by both the courts below that the need is bonafide. The petitioner's son was unemployed and has no avocation. It has also come out in evidence that he is able to mobilise funds to start hotel business. It is true that earlier a petition for eviction was filed but it was not pressed as the petitioner's son had a business in Mysore at that time. He deposed before court that he stopped that business and he had no

avocation for about six years. The evidence was analysed and accepted by both the courts below and the finding regarding bonafide requirement entered by both the courts below concurrently, cannot be reversed in a revision u/s 20 of the Act. The building in question was a vast building, a "pandikasala". An argument was advanced before this Court that PW1, while examining, admitted that he initially wanted to start a hotel business with seating capacity for 50 persons and therefore the entire premises was not necessary. Therefore it is submitted that the requirement of the landlord is not for the entire premises and hence the need itself is not bonafide. We cannot also forget that a hotel require not only sufficient seats to accommodate the customers. It must have kitchen, toilet, arrangements for storing food grains, fire wood and accommodation for workers etc.

7. In the counter statement filed by all the three respondents it is not stated that the entire premises is not required for the hotel business proposed to be conducted and that only a portion is enough. No such contention was raised in the objection filed. No such issue was framed. No specific evidence was adduced to what is the actual requirement and which portion of the building is required for conducting the business etc. even though some questions in this regard were put to PW1 in cross-examination. There are no such pleadings. It was submitted that in the decision reported in Rehman Jeo Wangnoo Vs. Ram Chand and Others, that part of the building necessary for the landlord's need was ordered to be evicted. The Apex Court was considering in that case the proviso to Section 11(1)(h) of the Act. It held as follows:

".....We are satisfied that the proviso aforesaid mandates the court to consider whether partial eviction as contemplated therein should be ordered or the entire holding should be directed to be evicted. This aspect, therefore, requires judicial exploration after giving opportunity to both sides to lead evidence in this behalf."

There is no such proviso u/s 11(3). In fact if the bonafide requirement of the premises is proved a splitting up of the tenancy is not contemplated under the Kerala Act and there is no provision under the Act for granting partial eviction of the premises.

8. The decision in Satwant Kaur Vs. Dhund Singh, was also cited for contending that part of the petition schedule building can be ordered to be vacated and that the entire premises need not be vacated. There the only question considered by the Court was as to which portion has to be directed to be vacated. The landlord claimed vacation of the front portion but the High Court directed back portion to be vacated. The landlord approached the Supreme Court claiming vacation of the front portion of the premises. After considering the fact that the appellant was doing business in battery and back portion is sufficient for him to do that business and the front portion abuts the market road is more convenient to the respondent. The Court also found that entire building is in the middle of a market. In that fact the court held that there is no necessity to ask the tenant to vacate the front portion instead of the back portion. Here in this case landlord

wants the entire building covered by a single lease deed Ext. Al. Further, in this case apart from the tenant there are three sub-tenants. As to which of the sub-tenants or tenant himself has to be vacated, there is no evidence. Besides, on the facts of this case and Kerala Act, the Court cannot also order part of the building covered by single lease to be vacated since one cannot distinguish their needs.

9. An identical matter was considered by a Division Bench of this Court in *Fathima v. Saidali Bafakhy* 2001(2) KLT 857 Building in that case was also a pandikasala, a big building. Part of the building was separately occupied by unauthorised sub lessees for a long period and similar contention was raised. In this case there are two authorised sub leases and one unauthorised sub lease. That is the only difference. Justice P.K. Balasubramanyan (as he then was) held as follows:

"5. The main contention raised on behalf of the tenant was that the building in question was a big building, a "pandikasala" and the landlord had not specified the magnitude of the business PW.1 proposed to start in the petition schedule building and the landlords had not shown that it was necessary to get an order for eviction of the entire building, including the various portions in the possession of the sub-tenants. We find that this argument is not acceptable. Firstly, the landlords had given evidence of the business that was proposed to be started in the petition schedule building and going by the nature of the business set up, obviously, space would be required for storing the food grains and for carrying on the business. Secondly, the subject matter of the lease to the tenant was the entire building and it is not open to the landlords to seek eviction of portions of that building while applying for eviction u/s 11(3) of the Act. The landlords were also not in possession of any part of the building and hence could not also resort to Section 11(8) of the Act. The landlords do not recognise the subtenancies created by the tenant. The landlords are therefore, not obliged to treat the portions held by the various sub-tenants as separate buildings coming within the definition of a building in the Act and to seek eviction of some portions only. This is a case where the landlords had either to be given an order for eviction of the entire building that was the subject matter of the lease, if they satisfied the court that the need set up by them was bonafide or denied an order for eviction in respect of the entire building if the court was not satisfied that the need set up by them was bonafide. The Appellate Authority in our view, was therefore, justified in holding that the claim for eviction u/s 11(3) of the Act could not be thrown out on the ground that the landlords have not established the need for each part or portion of the petition schedule building held separately by the sub-tenants. On the scheme of the Act, there does not appear to be any scope for insistence on such a requirement on the part of the landlord being established."

Following the above reasons, contention in this regard raised by the respondent in the R.C.P. has to be rejected.

10. We have already held that concurrent findings of the courts below that the

need of the landlord's son to start a hotel business is a bonafide need cannot be disturbed. It has also come out in evidence that the landlord's son can get sufficient finance from his brothers who are employed in USA and he has no other building to start the business. It was also found on evidence that the tenant is not entitled to the benefit of the second proviso to Section 11(3). In fact, it was proved that the first respondent has got other premises and first respondent was not able to prove by any evidence that he was depending upon the income from the petition schedule building for his livelihood. It is also well settled that the protection of the second proviso to Section 11(3) can be claimed only by the tenants and not by the sub-tenants. The matter is well settled by the decision in *A.V. Kammath v. Chandran* 1989 (1) KLT 473 Even though sub-tenancy was consented by the landlord, the sub-tenants were paying rent to the first respondent tenant only and first respondent is the tenant as far as landlord is concerned. We also in this connection refer to Section 2(3) which defines the term landlord:

"2(3). 'landlord' includes the person who is receiving or is entitled to receive the rent of the 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.

Explanation:- A tenant who sub-lets shall be deemed to be a landlord within the meaning of this Act in relation to the sub-tenant".

In view of the Explanation first respondent is landlord with respect to sub-tenants. The word "tenant" is defined in Section 2(6) to mean a person by whom or on whose account rent is payable for a building. Here liability to pay rent to the landlord is with the first respondent and as far as landlord is concerned he is the tenant.

11. We also agree with the findings of the appellate authority regarding application of second proviso to Section 11(3) which is as follows:

"First respondent also contended that respondents 1 to 3 have claimed protection under second proviso to Section 11(3) of the Act. It is well settled that the tenant alone can claim the protection under the said proviso as the sub tenants cannot claim protection. In 1989 (1) KLT 473 our Hon'ble High Court held that since the definition of tenant u/s 2(6) does not make any distinction between sub tenant who occupy the building with the consent of the landlord and those coming into possession without the consent of the landlord, it cannot be said that the former category of sub tenants are entitled to all protections that are available to the tenants under the Act. Therefore in the light of the said decision of our High Court the protection claimed by the admitted sub tenants 2 and 3 need not be considered and they are not entitled to the protection as envisaged in second proviso to Section 11(3) of the Act. Lower Court has also not considered the protection claimed by the sub-tenant basing on the decision

supra."

We see no ground to differ from the above observation. Apart from the above, second and third respondents were not able to prove that they are entitled to the benefit of second proviso to Section 11(3). Second respondent did not produce any accounts or evidence to show that is the income earned by him from the business conducted in the above building so as to claim that he is mainly depending upon the income derived from the business conducted in the scheduled building. According to the landlord, he is not doing any business in the building. As far as the third respondent society is concerned, it was deposed by RW.3, President of the Society, that members weave the cloths at their houses and at the time of deposing there was no stock in the petition schedule building. Even otherwise, being a registered co-operative society, third respondent cannot claim protection of second proviso to Section 11(3) as held in Palakkad District Co-op. Bank v. Mohammed Kaleem 1996 (1) KLT 247

12. We also extract Section 21 of the Act, which is relevant, as follows:

"31. Order under the Act to be binding on sub-tenants:- Any order for the eviction of a tenant passed under this Act shall be binding on all sub-tenants under such tenant, whether they were parties to the proceedings or not, provided that such order was not obtained by fraud or collusion. In cases where sub-letting is allowed under the original agreement of tenancy the sub-tenant shall be made a party to the proceedings if he had given notice of the sub-tenancy to the landlord."

No special protection is given to authorised sub-tenants. But on the ground of sub-leasing eviction cannot be ordered if the sub-lessees are authorised and in case, they are allowed under the agreement they also shall be made parties. In view of Ext. A1 deed mentioning respondents 2 and 3 as sub-lessees, all of them were made parties in this case. Apart from that, no other protections are given to the sub-tenants under the Act.

13. In view of the above circumstances we confirm the order passed concurrently by the authorities below u/s 11(3).

14. The next point to be considered is the eviction ordered u/s 11(4)(i) of the Act. The main contention raised by the tenants is that the 4th respondent is a fictitious person and first respondent had not sub-leased the premises to the 4th respondent. Exts. A7 to A11 are the extract of annual list of places for which licence is required for the years 1991-92, 1992-93, 1993-94, 1994-95, 1995-96 respectively, In these extracts the premises in question is shown as in the possession of V.P. Moosa (4th respondent) who is the licensee. The extract of the property tax assessment register for the year 1969-70, Ext. A13, shows that the premises is in the possession of one P.P. Mammooty. Extracts of A25, A26, A27, A28 shows that V.P. Moosa is the tenant of the landlord. Therefore Exts. A7 to A11, A13 and A25 to A28 support the case of the landlord that the 4th respondent was in possession of a portion of the building rented out to first respondent. The

consistent case of the first respondent was that those documents were produced by influencing the municipal officials but apart from the wild allegations, no evidence was produced to show that those documents were manipulated by influence. RW1 "while examining very clearly stated that he did not permit anybody to conduct cool drinks business within the petition schedule building. He did not depose that Moosa is not conducting cool drinks business in the plaint "schedule building and that was an indirect admission, as held by the Rent Control Authority, to show the presence of 4th respondent. The notice issued from this Court was also accepted by the 4th respondent and a vakalath was filed, even though the advocate was absent today. Considering the evidence both the courts below found that there is objectionable sub-lease to 4th respondent. The above finding of fact is based on evidence and in any-event no grounds are urged to set aside concurrent finding of the courts below in a revision proceeding u/s 20 of the Act.

15. It was contended by respondents 2 and 3 in the RCP that even if there is unauthorised sub-lease they are not parties and therefore they should not be penalised for sub-leasing the premises by the first respondent. They also cited the decision of the Supreme Court in A.S. Sulochana Vs. C. Dharmalingam, . There the Court found that for 18 years there was no objection, that sub-tenant was openly in occupation of the rented premises during the said period, that exact arrangement with the father original landlord was not known and it was not clear whether there was a consent earlier by the original landlord. Apart from that, it was also held that since the present tenants were not parties to the creation of sub-tenancy, they are not the violators and penal provision of eviction on the ground of sub-lease cannot be ordered. Here the sub-leasing is done by first respondent who is the real tenant and he is still alive and order of eviction passed against the first respondent will be binding on the other sub-tenants also. Sub-tenants were also parties as provided in Section 21 of the Act.

16. Section 11 (4)(i) reads as follows:

"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."

It is seen that if part of the rented premises is sub-leased without consent, the entire premises can be vacated u/s 11(4)(ii) of the Kerala Act. In this connection we refer to the decision of a Division Bench reported in Ramakrishnan v.

Sankaranarayanan 1998 (2) KLT SN 49 wherein it was held that even if the subletting is only of a portion of the building, the landlord gets the right to evict the tenant "from the whole building let to him. (See also Kadersha v. Venkitasami, 1987 KLT 260.

17. It is submitted by first respondent that he is storing the materials for his provision business in the plaint schedule building and an immediate eviction will cause difficulties to him. Considering the facts and circumstances pleaded, we are of the opinion that if the first respondent-tenant files an affidavit before the court below that he will hand over vacant possession of the building on or before 31.3.2002 and will continue to pay the admitted rent till he vacates the premises, the order of eviction shall not be executed before 31.3.2002.

18. According to landlord findings u/s 11(4Xiii) of the Rent Control Court should not have been reversed by the Appellate Authority. It was found that the first respondent has got a pucca building in the adjacent place and he is doing business in that place.. But appellate court did not order eviction on that ground only because that building was occupied on the date of filing of the petition.

19. In view of the confirmation of the orders passed by the Courts below, we are not considering the contentions raised in CRP 2866/2001 filed by the landlord.

All the Civil Revision Petitions are disposed of with the above observations.