

(2010) 11 KL CK 0374
In the High Court Of Kerala
Case No : R.C.R. No. 3 of 2005

Thandayankandy Lakshmi and Others	APPELLANT
Vs	
K.K. Rahmath and Another	RESPONDENT

Date of Decision : 26-11-2010

Acts Referred:

Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11(2), 11(4), 20

Citation : (2011) 1 ILR (Ker) 803

Hon'ble Judges : Pius C. Kuriakose, J;P.S. Gopinathan, J

Bench : Division Bench

Advocate : Rajan P. Kaliyath, for the Appellant; M. Sasindran, for 1st Respondent, A. Mohamed Mustaque and Sri Kauser Edappagath for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

Pius C. Kuriakose, J.—The tenants, being the legal heirs of deceased original tenant, are in revision. They were sought to be evicted on the grounds of arrears of rent u/s 11(2), subletting u/s 11(4)(i) and reconstruction u/s 11 (4)(iv) of Act 2/65. It is conceded by both sides that the grounds of arrears of rent and reconstruction do not survive and it is only the ground of subletting which survives. We, therefore, in this revision, are concerned only with the ground u/s 11(4)(i).

2. The petition schedule building is not an independent building. It is a small part of a line building, going by the sketch which was placed before us by Sri Rajan P. Kalliath, learned Counsel appearing for the revision Petitioners. The adjoining portions of this line building belong to the revision Petitioner/tenant. In the adjacent portion, a hotel by name "Crown hotel" is being conducted and the work area, store area etc. of the above hotel is accommodated in the adjoining portions. The allegation of the landlady in the context of the ground u/s 11(4)(i) was that the petition schedule building has been sublet or transferred by the tenants to one Yoosuff, who is the second Respondent in the R.C.R. The

allegation specifically was that it is Yoosuff who is actually conducting "Crown hotel" and the petition schedule building which is a kitchen area is used by Yoosuff as the kitchen of "Crown hotel". It is contended in the rent control petition that in spite of statutory termination notice issued under the proviso to Section 11(4)(i), the sublease was not terminated.

3. The tenants' specific defence to the ground of sublease was that the second Respondent is not a sublessee or transferee. It was contended that the second Respondent does not have any possession even of the petition schedule building. It was further contended that though the second Respondent was initially permitted to make use of the schedule building as the kitchen of the hotel on a licence arrangement, even before the statutory termination notice was received by the tenant, the tenants had initiated proceedings for evicting Sri Yoosuff. Therefore, it was contended that the petition for eviction on the ground of subletting is not maintainable in law. The Rent Control Court conducted a detailed enquiry in which the evidence consisted of Exts. A-1 and A-2, B-1 to B-4, and C-1 and C-2. The oral evidence consisted of that of P.W. 1 who was the manager of the land lady. Significantly, no counter oral evidence was adduced on the side of the revision Petitioners or the second Respondent, the alleged sublessee. The Rent Control Court, on evaluating the evidence on record, came to the conclusion that the eviction ground u/s 11(4)(i) is not established in the case. According to the Rent Control Court, Ext. B-1 agreement will show that the arrangement between the tenant and the alleged subtenant is that of licence. Taking the view that there is no evidence to show transfer of possession or subletting, the learned Rent Controller declined order u/s 11(4)(i). The Appellate Authority made a thorough reappraisal of the entire evidence and would reverse the finding of the Rent Control Court and came to the conclusion that there is objectionable transfer of possession of the schedule building by the tenant in favour of the alleged sub lessee and that such transfer of possession was not terminated within the statutory period mentioned in the notice. In that view of the matter, the Appellate Authority ordered eviction on the ground u/s 11(4)(i), allowing the appeal.

4. In this revision, various grounds have been raised assailing the judgment of the Appellate Authority. Very extensive submissions were addressed by Sri Rajan R. Kalliath, learned Counsel appearing for the revision Petitioners. All the submissions were opposed by Sri Surendran, learned Counsel appearing for the first Respondent. Sri Rajan R. Kalliath would draw our attention to the judgment of the Rent Control Appellate Authority and argue that the learned Appellate Authority has not at all applied its mind on the crucial questions which arose for consideration in the appeal. According to the learned Counsel, the crucial question which arose is whether there has been transfer of possession or subletting. Admittedly, subletting is not established. Then, the only question is whether unauthorised transfer of possession is established. Learned Counsel submitted that mere occupation which a licensee has over the licensed premises will not be juridical possession. The same will be only permissive occupation

which will not constitute the ground for eviction u/s 11(4)(i). Learned Counsel submitted that even before the statutory termination notice was received by the tenant, the tenant had initiated regular proceedings before the civil court seeking a mandatory injunction commanding the alleged sub lessee to vacate. Thus, it will be seen that the tenant had done all that he could, to terminate the sublease or transfer. Learned Counsel also pointed out that during the pendency of these proceedings, the alleged sub lessee was actually ejected from the building. That being so, according to the learned Counsel, it should have been found by the Appellate Authority that at any rate, that the sublease was terminated within 30 days and hence the order of eviction should not have been passed. Sri Rajan P. Kalliath would fortify his submissions by citing various decisions, such as the judgment of the Honourable Supreme Court in *M/s. Delhi Stationers and Printers Vs. Rajendra Kumar*, a decision of this Court in *Lela v. Ali* 1982 KLT 685, decision of a Division Bench of this Court in *Karshaka Union v. Bahuleyan* 1996 (2) KLT 747 and also a judgment of another Division Bench of this Court in *Pankajam v. Radha Nedumgadi* 2004 (1) KLT 14 to which one of us (Pius Kuriakose, J.) was also party. The short submission of the learned Counsel for the Respondent /land lady was that there is no warrant for interference with the judgment of the Appellate Authority, which is a well-reasoned one within the contours of Section 20 of Act 2 of 1965.

5. We have carefully gone through the decisions cited at the bar and reminded ourselves of the ratio emerging from them. It is clear on a reading of the statutory provisions u/s 11(4)(i) that in order that eviction ground as per Section 11(4)(i) is established, what is necessary is that the landlord establishes either objectionable sublease or objectionable transfer of possession of the entire building or a portion thereof. Going by the sketch placed before us by Sri Rajan P. Kalliath, one thing is clear. Access to the petition schedule building is possible only through the other portions of the building where "Crown Hotel" is being conducted. It is not disputed that "Crown Hotel" was being conducted by Yoosuff, whatever was the arrangements made between the tenants and Yoosuff-- lease or partnership. There is no case for the tenant that apart from the petition schedule premises there is any other kitchen area in "Crown Hotel". In short, it is practically admitted or has become evident from the uncontroverted oral evidence given by P.W. 1 the manager of the land lady that the petition schedule building is being used as the kitchen of "Crown Hotel". The question which now arises is whether it can be said that the alleged sub lessee did not have "possession" of the petition schedule building. We have no difficulty in concluding that when a hotel is being conducted by the alleged sub lessee and when the petition schedule building is being used as the kitchen of that hotel, the alleged sub lessee will have possession of the kitchen building in the sense that the alleged sub lessee cannot be summarily ejected from the kitchen portion and that he has absolute physical control over the same. The case of the tenant also is that they had to initiate successive proceedings by way of suit for mandatory injunction to eject the alleged sub lessee. According to us, the very admission

that the suits were instituted by the tenant for ejecting the sub lessee, whether it be on the strength of a mandatory injunction decree or a decree for recovery of possession, will show that the alleged sub lessee was having possession and absolute physical control of the schedule premises.

6. Now the question is whether because the tenant had initiated proceedings for ejecting the alleged sub lessee from the petition schedule building even before the service of statutory termination notice under the proviso to Section 11(4)(i) on him, it can be accepted that the tenant had terminated the sublease. In the present case, in continuation of the proceedings initiated for ejecting the alleged sublease, the sub lessee has been finally ejected also, but during the pendency of the proceedings. The above question, in our view, can be answered only in the negative, i.e. favour of the land lady.

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

11(4)(i). If the tenant after the commencement of this Act, without the consent of the landlord, transfers his right under the lease or sublets the entire building or any portion thereof if the lease does not confer on him any right to do so:

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

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 sublease as the case may be, within thirty days of the receipt of the notice or the refusal thereof.

7. It is very clear to our mind that the expression "to terminate the transfer or the sublease" used in the proviso to Section 11(4)(i) means full and effectual termination of sublease or transfer in the sense that the alleged sub-lessee or transferee is sent away from the building. In the instant case, admittedly, the alleged sub-lessee could be ejected actually only during the pendency of this proceedings. This means that the Rent Control Petition instituted on the basis that sublease or transfer is not terminated in spite of statutory notice was perfectly maintainable. None of the decisions cited at the bar by Sri Rajan P. Kalliath will be of assistance to the revision Petitioners. The judgment of this Court in *Lela v. Ali and Ors.* (supra) is only to the effect that any eviction petition on the ground of subletting instituted before the expiry of 30 days of receipt of statutory termination notice will have to be rejected as premature. In the instant case, the Rent Control Petition was instituted after 30 days of service of statutory termination notice. The question is whether the sublease was transferred or terminated within the period. We have already found that the same was not. The

judgment of the Division Bench in *Karshaka Union v. Bahuleyan* 1996 (2) KLT 747 only lays down that in order to constitute sublease or transfer, there must be transfer of an exclusive right to enjoy the property. We are convinced on the facts of the present case that the exclusive right to enjoy the petition schedule property was transferred and that such right was enjoyed by the alleged sublessee by using the same exclusively as the kitchen of the "Crown Hotel". The judgment of this Court in *Pankajam v. Radha Nedumgadi* (supra) certainly lays down that mere physical possession may not amount to juristical possession; but the above decision further lays down that when physical possession is transferred, it is for the tenant to show as to what is the nature of the possession-whether it is permissive or juristical possession. In this case, there is absolutely, no counter oral evidence to the oral evidence adduced by P.W. 1 to the effect that there is transfer of possession. The judgment of the Supreme Court in *M/s. Delhi Stationers and Printers Vs. Rajendra Kumar*, is also distinguishable on facts. That was a case where two brothers-in-law were in possession of adjacent rooms. There was kitchen facility only in the room occupied the tenant Petitioner before the Apex Court. He permitted his brother-in-law the occupant of the other room to make use of the kitchen. The Supreme Court held that merely because the brother-in-law has been permitted to make use of the kitchen, the same will not amount to subletting or transfer of possession and the same will be only permission. The above decision has absolutely no application to the present case.

8. The result of this discussion is that the revision petition fails. It is accordingly dismissed.

The learned Counsel Sri Rajan P. Kalliath requested for grant of a long period for surrender of the petition schedule premises. But Sri Surendran, the learned Counsel for the Respondent/landlord stoutly opposed the request. We notice that the Rent Control Petition was instituted way back in 1993 and ordinarily, granting time will not be justified. However, in response to the fervent submissions made by Sri Rajan P. Kalliath, we are inclined to grant time to surrender possession of the petition schedule premises till 15-6-2011, subject to the following conditions:

The first revision Petitioner, representing herself and all the revision Petitioners, shall file an affidavit before the execution court or Rent Control Court as the case may be, within three weeks from today, undertaking to vacate the premises on or before 30-6-2011. It will be undertaken through the same affidavit that the revision Petitioners will pay occupational charges for the building at the rate of ` 300 (Rupees three hundred) per month with effect from 15-12-2010, till the date of actual surrender. It will also be undertaken through the same affidavit that arrears of rent, if any, will be discharged within one month. We make it clear that the revision Petitioners will be entitled to get the benefit of time granted by this judgment only if they file the affidavit within time and honour the undertakings without fail.