

(2007) 10 KL CK 0061

In the High Court Of Kerala

Case No : CRP No's. 681 and 1213 of 2002 (B)

V.K. Santha and Others

APPELLANT

Vs

Puthalath Ayissakunhi and V.K. Girish

RESPONDENT

Date of Decision : 03-10-2007

Acts Referred:

Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11(2), 11(3), 11(4), 20

Citation : (2007) 10 KL CK 0061

Hon'ble Judges : K. Balakrishnan Nair, J; Harun-Ul-Rashid, J

Bench : Division Bench

Advocate : T.A. Ramadasan, for the Appellant; R.K. Muraleedharan, for the Respondent

Final Decision : Dismissed

Judgement

Harun-Ul-Rashid, J.—The above revision petitions are filed against the judgment dated 24.11.2001 in RCA No. 104/1996 on the file of the Rent Control Appellate Authority, Thalassery CRP 681/2002 was filed by the legal heirs of the 1st counter petitioner/tenant and CRP 1213/2002 by the 2nd counter petitioner in RCP No. 244/1993 on the file of the Rent Control Court, Kannur. The 1st respondent in both the revision petitions is the landlady. The parties are hereafter referred to as the landlady, the tenant and the sub-lessee respectively.

2. The landlady filed RCP 244/1993 under Sections 11(2)(b), 11(3) and 11 (4)(i) of the Kerala Buildings (Lease and Rent Control) Act (for short, the Act). The brief facts leading to the filing of the RCP is as follows: The 1st counter petitioner in the RCP, who is the tenant, died pending the rent control proceedings and his legal representatives are impleaded as counter petitioners 3 to 13 in the RCP. The petition schedule shop room was taken on rent by the deceased 1st counter petitioner from one Moideenkunhi as per a registered lease deed dated 7.8.1958 and presently the room is being occupied by his legal heirs. On the death of the said Moideenkunhi, the legal heirs of Moideenkunhi including the landlady partitioned his properties as per a registered partition deed dated 22.11.1991.

The petition schedule building was allotted to the share of the landlady in partition. The rate of rent at the time of the filing of the RCP was Rs. 30/- per month. The 2nd counter petitioner, who is the 2nd respondent herein, is said to be the sub-tenant to whom the deceased 1st counter petitioner had sub-let a portion of the petition schedule shop room.

3. According to the landlady, the tenant has paid rent only upto and inclusive of 30.9.1991 and the rent thereafter was kept in arrears. The petitioner alleged that she bona fide needs the shop room for her son Johar to start a business therein. Her son is presently abroad, but he is not having any permanent job there. Her son wanted to return to his native place and he wants to start a grocery shop of his own in the petition schedule shop room. It was also averred in the petition that the landlady wanted his presence at the native place since she is an aged lady. Her son Johar is not having any permanent job abroad, he was doing some manual work. So, her son thought of returning to his native place and start a business of his own for his livelihood. Her son Johar is a dependent on the landlady and she has no other building to give to her son for starting business. The landlady further averred that the 1st counter petitioner in the RCP, without the knowledge and consent of the landlady, has sub-let a portion of the petition schedule shop room to the 2nd counter petitioner who is conducting some business there. In spite of the registered notice issued to the 1st counter petitioner, he has not cared to terminate the sub-lease. The 1st respondent has unauthorisedly sub-let a portion of the room to the sub-tenant and therefore the lease is objectionable and therefore eviction is sought on the ground of sub-lease as well. On these averments the RCP was filed seeking eviction on various grounds.

4. The 1st counter petitioner filed objections to the RCP denying the averments seeking eviction. According to him, he has not wilfully kept the rent in arrears after September 1991, that he tendered the rent to the landlady, but she did not accept it and that was how the rent happened to be kept in arrears. Regarding the claim for eviction on the ground of sub-lease, it was contended that the 2nd counter petitioner is not a sub-tenant and that the 1st counter petitioner has not sub-let any portion of the shop room to the 2nd counter petitioner. As regards the presence of the 2nd counter petitioner in the shop room, it was stated that he was permitted to occupy a portion of the room for his rubber seal business and that he gave such a permission to the 2nd counter petitioner thinking that it would be harmless. According to him, the transaction is not a sub-lease, but only a permission to start a business in a portion of the room.

5. According to the tenant, the eviction sought on the ground of bona fide need is not a bona fide act, that the landlady's son Johar is well employed abroad, that he is financially well off and that the bona fide need set up is only a ruse for eviction. It was further alleged that the landlady has other vacant rooms in her possession in which her son Johar can start a business if he so wants. He also claimed the benefit of the protection under the 2nd proviso to Section 11(3) of

the Act.

6. The 2nd counter petitioner who is the alleged sub-tenant filed a counter statement stating that he is not a sub-tenant or a licensee as alleged by the landlady. His case is that he has been occupying a portion of the room with the original tenant, and that the room was originally taken by his father Kunhiraman on lease from the petitioner's predecessor Moideenkunhi. According to him, on the death of his father Kunhiraman, he started to occupy the room as a tenant and thus he has been continuing in the shop room as a tenant.

7. The parties adduced evidence before the Rent Control Court. On the landlady's side, four witnesses are examined including the landlady and her son Johar. Exts. A1 to A8 are also marked on her side. Two witnesses are examined on the side of the respondent and Exts. B1 to B9 are marked. Exts. C1 and C2 are also marked as court exhibits. On an appreciation of the oral and documentary evidence, the Rent Control Court found that the 1st counter petitioner has kept the rent in arrears without excuse, the 2nd counter petitioner has been continuing in the petition schedule shop room as a licensee and not as a sub-tenant and that the petitioner has failed to prove that she bona fide needs the shop room for her son to start a business of his own. Accordingly, the Rent Controller passed orders in the rent control proceedings allowing the prayer for eviction u/s 11(2)(b) and disallowed the prayer u/s 11(3) and 11(4)(i) of the Act.

8. The Rent Controller's order declining eviction u/s 11(3) and 11(4)(i) was the subject matter of appeal in RCA 104/1996. The Rent Control Appellate Authority, on a consideration of the facts and evidence in detail, passed the impugned order allowing the appeal and reversed the order passed by the Rent Control Court disallowing eviction on the ground of bona fide need and sub-letting. The Appellate Authority ordered eviction u/s 11(3) and 11(4)(i) of the Act. Aggrieved by the decision of the Rent Control Appellate Authority, the tenant filed CRP 681/2002 and the alleged sub-tenant filed CRP 1213/2002.

9. The bona fide need alleged by the landlady is that she needs the building for her son Johar to start a grocery business of his own. The landlady gave evidence as PW.1 and her son Johar as PW.2. Both the witnesses are consistent in their evidence regarding the purpose for which the room is required. The landlady testified that her son does not have a permanent job abroad, that he is not satisfied with the work of manual labour there and therefore he wants to start a business of his own at his native place. She also testified that if her son is in the native place, she, who is aged, will have the advantage of his help. The Appellate Authority held that the presence of her son by her side is something which every mother would desire. The Appellate Authority also held that on a scrutiny of the evidence of PWs.1 and 2, the averments in the RCP and Ext.A3 notice, it is satisfied that the testimonies of PWs.1 and 2 are substantially consistent with the case set up by the landlady. The Appellate Authority also noticed the fact proved by evidence that at the time of filing of the petition, PW.2 was in Qattar and he was employed there as a manual labourer, that he was unable to obtain any

attractive job there and, therefore, he returned to his native place. The Appellate Authority also noticed the fact that it was with the intention to start a business in the native place that the landlady filed the suit for eviction, but by the time PW.2 came back, the petition schedule room was not available for starting the business; therefore, he was compelled to leave India again to Abudabi. However, by the time the eviction proceedings came up for evidence, PW.2 came back to India. PW.2 has given evidence that in Abudabi he was working as a male servant, but even that job is not permanent, that at the time of filing of the petition, he was employed in Qattar as a manual labourer. According to PW.2, in the present circumstance he has to work as a male servant, but he is not happy with the said job and, therefore, he again came back during the pendency of the RCP. The Appellate Authority on an appreciation of the above circumstances came to the conclusion that the need set up by the landlady is a bona fide need. The Appellate Authority also came to the conclusion that there is nothing to show that PW.2 has got a permanent job in Abudabi and that it is quite natural that any person belonging to a good family will have some delicacy to work as a male servant. The Appellate Authority on an elaborate discussion on this point came to the conclusion that the finding of the Rent Control Court on this point was not arrived at on a proper appreciation of the evidence tendered by the landlady and her son and, therefore, the findings are not correct. The Appellate Authority entered the finding on an appreciation of the evidence of the landlady and P.W.2 that they are genuinely in need of the petition schedule shop room. This finding of fact entered into on an elaborate discussion of the evidence on record is not liable to be interfered with in revision u/s 20 of the Act. We are in perfect agreement with the findings entered by the Appellate Authority.

10. The Appellate Authority also examined the contention of the contesting counter petitioners that the landlady is in possession of a room in which her son can start a business of his own. The Appellate Authority examined this question and found that one room belonging to the landlady is not vacant and it is being occupied by PW.4 as tenant. The Appellate Authority also held that merely because a room is shown as vacant in the building tax assessment register, which is prepared for a period of five years, it cannot be said that the room is actually lying vacant. The Appellate Authority examined the evidence on record and, based on the evidence of PW.4 and Ext. A8 lease deed, held that the said room is occupied by PW.4 as a tenant and the same is not available as a vacant room. It also held that even if the room is available, there is no evidence to show that the said room is reasonably sufficient and convenient for the proposed business and also held that the business in grocery cannot be conducted in the said room which is not, in fact, located in the town, but at the side of a by-lane, though not much away from the town.

11. Regarding the protection under the second proviso to Section 11(3), both the authorities below concurrently found on facts that the tenant failed to prove that he is entitled to the benefit of the second proviso. The Appellate Authority came to the conclusion that the tenant has failed to prove that alternate

accommodation is not available. It also noticed the fact that the tenant has not conducted any enquiry regarding the availability of alternate building and that the evidence shows that other alternate rooms are available in Kannur town. The Appellate Authority also noticed the fact that the tenant in cross-examination has stated that new buildings and rooms are available at a distance of just 200 metres from the plaint schedule building, that many new buildings have been opened within one year and that he did not conduct any effective enquiry regarding the availability of alternate accommodation. The Appellate Authority also concluded that the evidence of RW.1 proves that other buildings and rooms are available in Kannur town to shift his business, if necessary.

12. It is an admitted fact that a portion of the petition schedule shop room is in the occupation of the 2nd counter petitioner. It is also an admitted fact that the landlady had not, at any time, permitted the 2nd counter petitioner to occupy a portion of the shop room. In fact, the case set up by the 1st counter petitioner is that he himself had permitted the 2nd counter petitioner to occupy a portion of the room for doing business. The 2nd counter petitioner, who is the alleged sub-tenant, pleaded and contended that he is in occupation of the portion of the shop room as an independent tenant. He has no case that he is a licensee or a sub-lessee under the 1st counter petitioner; but his occupation is only permissive, as permitted by the 1st counter petitioner. The Appellate Authority held that though the 2nd counter petitioner was examined as a witness, he has miserably failed to prove the independent tenancy set up by him, that Ext. A1 lease deed executed by the 1st counter petitioner in favour of the predecessor-in-interest of the landlady shows otherwise that the room was, in fact, rented out to the 1st counter petitioner.

13. The fact that a portion of the petition schedule shop room is being occupied by the 2nd counter petitioner is an admitted fact. In such circumstances the burden to prove that the 2nd counter petitioner is not a sub-tenant or that the 1st counter petitioner has not sub-let a portion of the room to the 2nd counter petitioner is heavily on the tenant. Neither the 1st counter petitioner nor the 2nd counter petitioner has adduced any satisfactory evidence to prove the nature of the transaction in which the 2nd counter petitioner is allowed to occupy a portion of the room. The Appellate Authority on evidence found that counter petitioners 1 and 2 have miserably failed to prove their case set up that the 2nd counter petitioner is a licensee or that he is an independent tenant. In the above circumstances the finding of the Appellate Authority that the 2nd counter petitioner has been continuing as a sub-tenant and that the deceased 1st counter petitioner had sub-let a portion of the room to the 2nd counter petitioner stands proved, is a finding of fact and no grounds are made out for interference with the same by this Court u/s 20 of the Act.

14. The revision petitioners have also raised a contention that eviction u/s 11(4) (i) of the Act is barred by res judicata by reason of the decision in Ext. B1 case. This question was elaborately considered by the Appellate Authority and on facts

held that the respondents cannot at all be heard to contend that this eviction proceedings are barred by res judicata by reason of Ext. B1 order.

15. In the light of the discussions and findings entered as stated above, we are of the view that the petitioners in the respective CRPs. have not made a case for interference u/s 20 of the Act. Therefore, the above CRPs. are dismissed confirming the order passed by the Appellate Authority.

16. The learned Counsel for the revision petitioners in CRP 681/2002 requested this Court to grant reasonable time for vacating the shop room. Considering the request, six months" time is granted for vacating the premises on condition that the petitioners file an affidavit in the form of an undertaking before the Execution Court to vacate the petition schedule room within six months from today. The revision petitioners shall also undertake to pay the rent every month including arrears of rent till the date of vacating the shop room. The undertaking shall be filed within a period of three weeks from today.