

Sameera Vs. M.C.Mammootty

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Court : Kerala

Decided On : Nov-20-2013

Judge : Honourable Mr.Justice T.R.Ramachandran Nair

Appellant : Sameera

Respondent : M.C.Mammootty

Advocate for Pet/Ap. : Shri. Abdul Latiff

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR & THE HONOURABLE MR. JUSTICE B.KEMAL PASHA WEDNESDAY, THE 20TH DAY OF NOVEMBER 2013 29TH KARTHIKA, 1935 RCRcv..No. 277 of 2013 () ----- RCA102008 of THE RENT CONTROL APPELLATE AUTHORITY (DISTRICT COURT) KALPETTA, WAYANAD. RCP42004 of RENT CONTROLLER (MUN SIFF MAGISTRATE) COURT, MANANTHAVADY. REVISION PETITIONER(S)/(RESPONDENTS 2 TO 11) RESPONDENTS 2 TO 11: -----

1. SAMEERA, D/O.K.M.ABU & SAINABA, MEETHAL, CHANDROTH P.O.PARAL, KODIYERI, THALASSERY, KANNUR DISTRICT.

2. JIYAS, S/O.K.M.ABU & SAINABA, MEETHAL, CHANDROTH P.O.PARAL, KODIYERI, THALASSERY, KANNUR DISTRICT.

3. SHAJAHAN, S/O.K.M.ABU & SAINABA, MEETHAL, CHANDROTH P.O.PARAL, KODIYERI, THALASSERY, KANNUR DISTRICT.

4. FASEENA, D/O.K.M.ABU & SAINABA, MEETHAL, CHANDROTH P.O.PARAL, KODIYERI, THALASSERY, KANNUR DISTRICT.

5. SHAMEENA, D/O.K.M.ABU & SAINABA, MEETHAL, CHANDROTH P.O.PARAL, KODIYERI, THALASSERY, KANNUR DISTRICT.

6. KACHU @ KADEESA, W/O.K.M.ABU, JASFAR MANZIL, VETTUMMAL EAST KADIRUR P.O., THALASSERY, KANNUR DISTRICT.

7. SAJITHA, D/O.K.M.ABU, JASFAR MANZIL, VETTUMMAL EAST KADIRUR P.O., THALASSERY, KANNUR DISTRICT.

8. ASLAM, S/O.K.M.ABU, JASFAR MANZIL, VETTUMMAL EAST KADIRUR P.O., THALASSERY, KANNUR DISTRICT.

9. JASFAR, S/O.K.M.ABU, JASFAR MANZIL, VETTUMMAL EAST KADIRUR P.O., THALASSERY, KANNUR DISTRICT. BY ADV. SRI.T.M.ABDUL LATHEEF
tss RCRv..No. 277 of 2013 RESPONDENT(S)/(APPELLANT & 2ND
RESPONDENT/PETITIONER & 2ND RESPONDENT):

1. M.C.MAMMOOTTY, S/O.ABDUL RAHIMAN, BUSINESS, KODYERI AMSOM DESOM, THALASSERY TALUK, KANNUR.670 645.

2. JOSE, C.O.PHARMACY, P.O.MANANTHAVADY. 670 645. R1 BY ADV. SRI.MATHEW KURIAKOSE(CAVEATOR) THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON0711/2013, THE COURT ON2011/2013 PASSED THE FOLLOWING: tss TRUE COPY P.A. TO JUDGE tss T.R.RAMACHANDRAN NAIR & B. KEMAL PASHA, JJ.

----- R.C.R. No. 277 of 2013 -----
----- DATEDTHIS THE20H DAYOF NOVEMBER, 2013 -----

ORDER

Ramachandran Nair, J.

The petitioners are the legal representatives of the original tenant, against whom the first respondent filed an application for eviction under Sections 11(2)(b), 11(3), 11(4)(i), 11(4)(ii) and 11(8) of the Kerala Buildings (Lease & Rent Control) Act, 1965 (for short 'the Act'). The Rent Control Court disallowed eviction and in appeal filed by the landlord, eviction is ordered under Sections 11(3) and 11(4)(ii) of the Act. The remaining grounds have been disallowed by the Appellate Authority.

2. In the application for eviction filed by the first respondent herein, the bonafide need pleaded is for the occupation of his son, Shri Noushad who proposes to start a ready made garments shop in the said building. It was pleaded that he has acquired sufficient knowledge and experience in the said business and he is financially capable to start the business also and that the said Noushad is depending upon the landlord for the petition schedule building. It was also averred that they have no other vacant buildings to RCR No.277/2013 -2- start the said business. The allegation made under Section 11(4)(ii) of the Act is that the tenant is using the building in such a manner as to reduce its value and utility materially and permanently and the material alterations have substantially affected its nature and utility.

3. The landlord had taken out a commission, who filed Exts.C1 report and C2 plan. The evidence of the landlord consists of the testimony of P.W.1, the landlord, P.W.2, his son Shri Noushad and another person was also examined as P.W.3. The tenants have examined R.Ws.1 to 3. The Commissioner has been examined as C.W.1.

4. With regard to the findings rendered by the Appellate Authority, learned counsel for the petitioners, Shri T.M. Abdul Latiff submitted that the bonafide need pleaded by the landlord is not a genuine one. His son Shri Nousad is already conducting business known as 'Saleela Textiles' and 'Zia Collections' and he is having good income from the said business. Therefore, the plea raised by the landlord that he wants to provide a business to his son who is dependent upon him, is not correct. Learned counsel read through the evidence of the witnesses in that regard. It is submitted that the Appellate Authority should have considered the said RCR

No.277/2013 -3- aspect in the right perspective and the view taken is perverse. He relied upon the decision of the Apex Court in Kizhakkayil Suhara v. Manhantavida Aboobacker (D) by Lrs. (2001 (2) RCR490, to advance his arguments.

5. As regards the allegation that material alterations have been made which have reduced the utility and value of the building materially and permanently, the learned counsel for the petitioners is relying upon the judgment of the Apex Court in G. Reghunathan v. K.V. Varghese {(2005) 7 SCC317. It is submitted that the fact that floor level has been reduced, cannot be treated as a permanent alteration. The same can be easily restored also. It has not resulted in reducing the utility of the room. It is therefore submitted that Section 11(4)(ii) of the Act is not attracted. Learned counsel, in this context, referred to the evidence in the case and submitted that the finding on this aspect by the Appellate Authority is also perverse warranting interference.

6. Learned counsel for the first respondent, Shri Mathew Kuriakose, submitted that the business, viz. 'Saleela Textiles' is being run by the father and the son is also entrusted with the conduct of the same, because of old RCR No.277/2013 -4- age of the father which has been explained by him in the cross examination. Apart from the same, learned counsel submitted that the same is also being conducted in a rented building and therefore the idea of the landlord to provide a business to his son, that too in his own building can only be said to be a genuine one. It cannot be said that the son of the landlord cannot do any new item of business, as they are already in the business line. It is submitted that going by the deposition of P.W.1, it can be seen that all his sons are having separate business at different places and therefore the statement made by the landlord that his son Shri Nousad also wants to establish a business of his own for eking out his livelihood is only a genuine one. The son is dependent on the father for the building which alone will attract the provision under Section 11(3) of the Act. As regards the alterations made, learned counsel submitted that Ext.C1 will show that the floor area of the building has been dug up, that too without any permission of the landlord. It is a work of a permanent character and the petitioners cannot be heard to say that the same can be restored easily. The work thus effected will squarely attract the grounds for eviction under Section 11(4)(ii) of the Act. RCR No.277/2013 -5- 7.

First we will come to the bonafide need pleaded and the sufficiency of the evidence to establish it. In the chief affidavit filed by the landlord, it has been explained in para 4 that the tenants have to be evicted for enabling the son to conduct a business in ready made garments. He is dependent upon the landlord for the building and to establish a separate business to earn income of his own. It is also stated that he has got sufficient experience in that line as well as the financial capacity. Great stress is made by the learned counsel for the petitioners on the statement made by the landlord in cross examination that the son is conducting a textile shop known as 'Saleela Textiles'.

8. We have gone through the cross examination of P.W.1. He has stated that he is a heart patient and he has been conducting 'Saleela Textiles' and that he is not involved in the day today business now and will be in the shop occasionally. The son is entrusted with the conduct of the business now. There is one employee in that shop. He has stated that the son has no other occupation or income and he is paying Rs.3,000/- per month to him. He has got seven children, out of which three are daughters. One son is in Behrain and two of his sons are conducting business in furniture in Thalassery RCR No.277/2013 -6- Municipal town. Another son has got plastic shop in Thalassery. The son Noushad is married and is having two children. The landlord is residing in Mahi in Pondicherry State. Shri Noushad is residing in Mananthavady itself. Lower down, he has further stated that a new shop is proposed to be opened since the income from 'Saleela Textiles' is not sufficient and that his son should have an independent business also. He has also stated that he is paying rent for the room wherein 'Saleela Textiles' is functioning and his son and himself are having only residential buildings in Mananthavady. One Kadavath Khadeesa is the landlord of the building where 'Saleela Textiles' is being conducted and he has been the tenant from 1985 and is paying Rs.600/- as rent.

9. P.W.2 is Shri Noushad. According to him, he has gained experience by conducting 'Saleela Textiles' and has been assisting his brother in Thalassery. By attending the business of his brother also, he has gained experience. He is depending upon his father for the petition schedule building and neither in his name nor in his father's name other vacant buildings are there. He has also stated

that the father is assisting him for his livelihood. RCR No.277/2013 -7- 10. According to Shri Abdul Latiff, learned counsel for the petitioners, the son is having one more business, viz. 'Zia Collections' which is clear from the answers given in the cross examination of P.W.1. Therefore, it is not a case where as pleaded by the landlord that the son is not having any other avocation in life. In the decision relied upon by Shri Abdul Latiff, viz. Kizhakkayil Suhara's case (2001 (2) RCR490, in para 5 the Apex Court has noted the statutory scheme under Section 11(3) of the Act. It was held that "where the landlord bonafide needs the building not for his own occupation but for occupation of a member of his family, it must be shown that such a member of his family is dependent on him." According to Shri Abdul Latiff, the son Shri Noushad is not dependent on the father even now. Therefore, the plea raised is clearly a ruse for eviction.

11. We have considered the reasoning adopted by the Appellate Authority from para 34 onwards of the judgment on the bonafide need pleaded. It was held by the Appellate Authority in para 35, after analysing the evidence, that even though the son is conducting business in a tenanted building, his financial dependency is not that is specified in the section. The fact that he is dependent upon the landlord for the building, is RCR No.277/2013 -8- important. His son is not having a business premises of his own. The other children are at Thalassery and are conducting their own business and the son Shri Noushad who is residing at Mananthavady is now pulling on his family with the income he is getting from the business conducted by him and also by the financial aid provided by the landlord. The other building occupied by the son is a residential building which cannot therefore attract the first proviso to Section 11(3) of the Act.

12. The question is whether the view taken is so perverse warranting interference. The pleadings and evidence will show that the landlord has pleaded forth a bonafide need, viz. to provide a business for his son, Shri Noushad like the one he has provided to the other children. It cannot be said that such a desire of the father can be termed as unfounded. The father is a heart patient and 'Saleela Textiles' was being run by him and he is now not attending it daily. Shri Noushad is looking after the same now. It is clear from the evidence that the same is also in a tenanted premises and there is only one employee there. The other business

stated to be conducted by the son is 'Zia Collections' which is also in a rented building. Merely because the landlord and his son are conducting other business, the same RCR No.277/2013 -9- cannot be a bar for starting a business in readymade garments in the own building. The tenant cannot dictate that the landlord and his son should be satisfied with the business now they are conducting. It has been held by this Court in Abdul Rub v. Jobby Tharian (2003 (3) KLT733 as follows: "Law does not insist that a landlord having other sources of income shall not carry on other income earning activity or venture to start a new trade or business. What is relevant is only the question whether the need put forward is bona fide. It is neither for the courts nor for the opposite party to examine whether there is proper exercise of wisdom by the landlord in choosing one avocation of life or other, for earning income." Therefore, on that score the arguments of the learned counsel for the petitioners cannot be accepted.

13. The second thing is that the business now being conducted are in rented buildings and no other building is owned or occupied by the landlord or his son. There is no convincing evidence that they are having other vacant buildings of their own for conducting the proposed business of the son. In that view of the matter, the need projected for his son Shri Noushad to start an independent business of his own like that of other sons RCR No.277/2013 -10- in their own building, cannot be said to be not a bonafide need. On an assessment of evidence, it can be safely concluded that the proposal to have a business of their own in the petition schedule building is a genuine bonafide need and we reject the contention of the learned counsel for the petitioners.

14. Even though the tenants/revision petitioners had claimed the benefit of the second proviso to Section 11(3) of the Act, the Appellate Authority has found that the tenants are not entitled for the benefit of the said proviso. It has been held that the tenants have failed to prove that they are depending upon entirely on the income derived from the petition schedule room and about the non-availability of other sufficient accommodation to shift the business. We have perused the contentions of the parties and the evidence in the matter and are of the view that the said finding rendered by the Appellate Authority does not deserve any interference.

15. Now we will come to the ground under Section 11(4)(ii) of the Act. Para 5 of the report of the Commissioner, viz. Ext.C1 shows the measurement of the room. The room is situated in the ground floor of the RCR No.277/2013 -11- building and is the second room from the east. With regard to the alterations made, it is stated that the floor has been dug by 51 cm. at a distance of 93 cm. from the side walls and at a distance of 1.15 metres from the door of the rear room. Now two steps have been provided to enter the room in question. It appears that these works have been executed within a period of two or three years and the flooring is given by red oxide. The opinion of the Commissioner is that since the dug up portion is 93 cm. away from the side walls, it may not affect the structure. But it has reduced the utility of the inside area of the room. The Commissioner, in para 6 of the report, has noted certain vacant buildings in the locality.

16. The argument of the learned counsel for the petitioners is that the alteration, if any, is only temporary and the same is done only for doing the business properly and to reduce the floor level to that of the road level and there is no reduction to the value and utility materially and permanently. It is submitted that the floor level can be easily restored by the landlord and therefore the finding rendered by the Appellate Authority is not correct.

17. Learned counsel for the first respondent submitted that the matter has to be viewed from the standpoint of the landlord who has not permitted RCR No.277/2013 -12- the tenant to execute any work of alteration with respect of the building. In that context learned counsel relied upon the following decisions: Mohanan v. Muhiyudheen (2010 (1) KLT512, Iritti Co-operative Hospital Society Ltd. v. Damodaran (2010 (3) KLT823 and Sajith Bhaliga v. Paul (2013 (2) KLT287).

18. We have considered the rival submissions. The finding by the Appellate Authority on the above aspect is clear from para 24 onwards. After considering the evidence of P.W.1 and R.W.1 and the report of the Commissioner as per Ext.C1, the Appellate Authority took the view that the ground under Section 11(4)(ii) of the Act is substantiated and the contrary view of the Rent Controller is not correct.

19. In respect of the alterations made, it can be seen that it is of permanent character, since the floor area has been dug up by 51 cm. This has been done after leaving 93 cm. from the two side walls and two steps have been provided also. Going by the report of the Commissioner, the inside portion of the room has been reduced also. Therefore, clearly the utility of the room has been reduced materially and permanently. RCR No.277/2013 -13- 20. Then the question is whether the plea raised by the learned counsel for the petitioners that the floor level can be easily restored, can have any impact on the said aspect. In the decision relied upon by the learned counsel for the petitioners, viz. G. Reghunathan's case {(2005) 7 SCC317 the tenant took the building for conducting a gold and silver jewellery shop. He removed a door and three windows from the walls of the room and closed up those openings. He cut off the rafters in the front to a length of two feet, and lowered the level of the floor by one foot. Two pillars were erected touching the walls and fixed a rolling shutter in front of the shop. The question whether the same will attract Section 11(4)(ii) of the Act, was considered by the Apex Court. After referring to the statutory scheme and the reported decisions in the matter, in para 12 it was held that the two requirements were disjunctive. It was enough to satisfy either one of them. In para 13, the Apex Court has discussed the evidence and rendered the following finding: "From the above, it is clear that the question depends on the facts of the case. The nature of the building, the purpose of the letting, the terms of the contract and the nature of interference with the structure by the tenant, are all relevant. RCR No.277/2013 - 14- The destruction or damage has to be adjudged from the standpoint of the landlord. Let us look at the facts in the present case. The building is 75 years old. According to the tenant, it is 80 years old. The difference is not of any significance. It is the northern room in a building consisting of a number of rooms. It is let out for 15 years for jewellery trade. The term has, of course, not come into effect for want of registration of the deed. The door in the western wall has been bricked up. The windows on the northern, western and southern walls have also been bricked up. Obviously, the bricked up portions can be removed and the doors and windows restored without weakening the structure. But more importantly, the level of the floor was lowered, the rafters cut, two concrete pillars erected and a rolling shutter fixed. The lowering of the floor and tampering with the roof, is of some

significance. They could lead to impairment of the value or utility of the building, materially and permanently. That again has to be judged in the light of the surrounding circumstances. But a rolling shutter has been fixed. That provides more security to the premises. The height of the floor can be restored without impairment to the structure. Here, we find that the landlord has not even pleaded that the alterations made by the tenant have destroyed or reduced the value or utility of the building materially and permanently. No doubt, he has stated so in his evidence. But RCR No.277/2013 -15- the tenant has stated that, considering that it was a jewellery business that was being started, these things had to be done. Securing of the premises was essential. He had given to the landlord Rs.85,000/- as security to be returned, when he vacated the building. The value of the building, if at all, has only been enhanced. In this state of the record, it is not possible to infer that the acts of the tenant have materially and permanently destroyed or reduced the value or utility of the building. The age of the building cannot be ignored. The purpose of the letting cannot be ignored." It will show that the building is 75 years old. With regard to the lowering of the room and tampering with the roof, it was held that it could lead to impairment of the value or utility of the building materially and permanently. After noticing that a rolling shutter has been fixed which provides more security to the premises, it was held that the height of the floor can be restored without impairment to the structure. The case of the tenants that the works have been executed as a security measure, since jewellery business was being conducted, was accepted.

21. In the above case, restoration of the floor was indicated only to the extent of dug up portion of the floor so as to erect two pillars and a RCR No.277/2013 -16- rolling shutter. It was not a case where the entire inside portion of the room was dug up and floor level was reduced. Therefore, the reliance placed on the same to contend that in this case also restoration can be easily made by the landlord, cannot help the petitioners. Several circumstances discussed in the judgment have led to the conclusion above in para 13.

22. In the decision of this Court in Mohanan's case (2010 (1) KLT512 it was held that "the value or utility of the building is to be considered in the point of view of the landlords and stipulations in the lease deed restraining the tenants from making

additional constructions, is binding on the tenants." That was a case where there was a demolition of the compound wall and it was held that the demolition of the compound wall will definitely affect the value and utility of the land. With regard to the question whether it is of a permanent nature, the Division Bench in para 12 has held that "as far as an immovable property is concerned, destruction of its compound wall and removal of its gate thereby closing its access, is a permanent alteration. Merely because the structures removed from the property can be restored in an easy manner, it cannot be said that the alterations are not permanent. As distinguished from temporary alterations RCR No.277/2013 -17- destruction of any structure can be viewed only as permanent in nature for the purpose of considering a ground for eviction under Section 11(4(ii) of the Act. The question to be considered in this context is as to whether the destruction is permanent and not whether the structure can be restored. If the latter view is taken as the criteria, it will have to be found that anything which is destroyed can be reconstructed. Therefore, it is clear that while evaluating the nature of permanency of the alterations the question to be considered is not as to whether it can be restored, but as to whether it is a permanent destruction". Therefore, the Bench was of the view that merely because the structures can be restored, it cannot be said that the alterations are not permanent.

23. In Iritti Co-operative Hospital Society Ltd.'s case (2010 (3) KLT823), in para 10 it has been held as follows: "..... Value and utility of a tenanted building for the purpose of S.11(4)(ii) are aspects to be considered through the perspective of the landlord. A material alteration made by the tenant unauthorisedly may be advantageous to the tenant or to several others who may occupy the building for various purposes. But if the landlord wanted to utilise or retain the RCR No.277/2013 -18- building in its original form, his complaint regarding alteration of the building may in a given case be valid enough for establishing ground under S.11(4)(ii)." 24. In Sajith Bhaliga's case (2013 (2) KLT287) a Division Bench of this Court wherein one of us (B. Kemal Pasha, J.) was a party, had occasion to consider the effect of Section 11(4)(ii) of the Act and has held as follows in para 11: "It is for the landlord to decide as to how should his building look like, how should be its front elevation, what should be the roof of it, etc. When the tenant defaces the building, alters its front elevation, or alters its roof by making

constructions of permanent nature, without the consent of the landlord, it will certainly invite the ground under S.11(4)(ii) of the Act, provided such acts of the tenant destroys the value or utility of the building materially and permanently in the landlord's point of view. In such cases it has to be viewed from the landlord's point of view and not from the angle of the tenant in order to appreciate whether such alteration materially and permanently destroys the value or utility of the building."

25. In the light of the above legal principles, we are of the view that the alterations made herein will attract the ground under Section 11(4)(ii) of RCR No.277/2013 - 19- the Act. Merely because the floor level can be restored, it cannot be said that the alterations made are not of permanent character or that it has not reduced its value and utility. The tenants have no plea that they have got any permission in accordance with any of the terms of the rent deed or have obtained the same from the landlord at the time of execution of the work. Therefore, this aspect will have to be considered from the stand point of the landlord. Hence, we are of the view that the Appellate Authority was right in ordering eviction on that ground.

26. For all these reasons, we dismiss the revision petition confirming the judgment of the Appellate Authority. The tenants are granted time upto 31.5.2014 to vacate the petition schedule premises on the following conditions: i) The entire arrears of rent as on today will be paid/deposited within one month. If such deposit is made, the same will be disbursed to the first respondent; ii) An affidavit will be filed by the petitioners before the Rent Control Court within one month from today, undertaking to vacate the premises within the time stipulated by this Court. RCR No.277/2013 -20- iii) The petitioner will continue to pay at the same monthly rate for the use and occupation of the building till vacant peaceful possession is handed over to the first respondent; iv) If the above conditions are not satisfied, the petitioners will not get the benefit of this order. No costs. (T.R.RAMACHANDRAN NAIR, JUDGE) (B. KEMAL PASHA, JUDGE) kav/

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