

Sadasivan Chettiar Vs. Rajendran

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Court : Kerala

Decided On : Jan-06-2005

Reported in : 2005(1)KLT653

Judge : M. Ramachandran and; V. Ramkumar, JJ.

Acts : Kerala Buildings (Lease and Rent Control) Act, 1965 - Sections 11(4) and 22; Kerala Buildings (Lease and Rent Control) Rules, 1979 - Rule 10; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rules 4(3) and 9(2) - Order 41, Rule 22; [Limitation Act, 1963](#) - Sections 5; ;Evidence Act, 1963 - Sections 114

Appeal No. : C.R.P. No. 704 of 2000 and Cross Objection

Appellant : Sadasivan Chettiar

Respondent : Rajendran

Advocate for Def. : M.C. Sen,; Krishnakumar Mangot,; N. Manu Raj,;

Advocate for Pet/Ap. : P.N.K. Achan, Sr. Adv. and; K. Mohana Kannan, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

V. Ramkumar, J.

1. In this revision filed under Section 20 of the Kerala Building (Lease and Rent Control) Act, 1965 (hereinafter referred to as 'the Act' for short), the petitioner/landlord who is the manager of the Kanyaka Parameswari Devaswom, Arakurussi, Mannarkad, challenges the judgment dt. 22.12.1999 of the Rent Control Appellate Authority, Palakkad, dismissing the Rent Control Petition for eviction.

2. Since the provisions of the Act had not been extended to the area in question, the petitioner/Devaswom had originally filed a suit for eviction as O.S. No. 641/1966 before the Munsiff's Court, Perinthalmanna. The said suit was decreed and confirmed in appeal filed as A.S. No. 47/1975 before the District Court, Palakkad, as per Ext.A5 judgment dt. 19.12.1975 and further confirmed in second appeal by this Court in S.A. No. 290/1975 as per Ext.A19 judgment dt. 13.11.1978. In the meanwhile, the Act was extended to the area in question and therefore this Court had affirmed the decision of the lower appellate Court to the effect that the plaintiff/Devaswom would be entitled to actual possession only on making out a ground for eviction under Section 11 of the Act. Accordingly, the petitioner Devaswom filed R.C.P. No. 3/1991 before the Rent Control Court, Mannarkad.

3. Eviction of the four respondents to the Rent Control Petition was sought on the ground of bona fide own occupation under Section 11(3), sub-letting under Section 11(4)(i), destructive user under Section 11 (4)(ii), tenants having acquired possession of other alternative building under Section 11 (4)(iii), reconstruction under Section 11 (4)(iv) and additional accommodation under Section 11 (8) of the Act. The Rent Control Court, after hearing both sides, framed five points for consideration and they consisted of only three grounds for eviction viz., bona fide own occupation under Section 11 (3), sub-letting under Section 11 (4)(i) and destructive user of the premises by the tenant under Section 11 (4)(ii) of the Act. During the pendency of the Rent Control Petition, the 1st respondent died and his widow and children were impleaded as supplemental respondents 5 to 11 as per the order passed in I.A. No. 240/1992. After trial, the Rent Control Court as per order dt. 11.6.1996 disallowed eviction claimed under Section 11 (4)(ii) of the Act, but ordered eviction on the other two grounds, after holding that the tenant is not entitled to the protection of the second proviso to Section 11 (3) of the Act. The

subletting, which was found, was by the 1st respondent in favour of respondents 2 to 4 who are the children of the deceased brother of the 1st respondent.

4. Aggrieved by the order of eviction passed by the Rent Control Court, respondents 2 to 4 to R.C.P. No. 3/91 preferred an appeal as R.C.A. No. 46/96 before the Rent Control Appellate Authority. As per judgment dt. 2.12.1999 the Appellate Authority allowed the appeal and reversed the order for eviction passed by the Rent Control Court under Section 11 (3) and Section 11 (4)(i) and dismissed the Rent Control Petition in toto. It is aggrieved by the said judgment that the petitioner/landlord has filed this revision. Aggrieved by the finding of the lower appellate Authority that there was no abatement of the Rent Control Petition due to the death of the 1st respondent to the R.C.P. and due to the belated impleadment of his legal representatives, respondents 1 to 5 in this revision representing the alleged sub-lessees have also preferred a memorandum of cross-objections challenging the said appellate finding.

5. We heard senior advocate Sri. P.N.K. Achan appearing for the revision petitioner, Adv. Sri. M.C. Sen appearing for respondents 1 to 5 who represent the alleged sub-lessees and Adv. Sri. M. Krishnakumar appearing for respondents 6 to 12, who are the legal representatives of the original 1st respondent to the Rent Control Petition.

6. Adv. Sri. P.N. Kachan, the learned counsel appearing for the revision petitioner, made the following submissions before us in support of the revision: The memorandum of cross-objection is not maintainable and is misconceived. It is true that the 1st respondent, who was the lessee under Ext.A4 entrustment dt. 17.5.1957, died on 27.2.1992 pending the R.C.P. It is also true that I.A. No. 240/1992 for impleading his legal heirs as supplemental respondents 5 to 11 was filed only on 27.3.1992. No doubt, as per R.10 of the Kerala Buildings (Lease and Rent Control) Rules, 1979, as it stood then, the time for impleading the legal heirs was only 15 days which expired on 14.3.1992. But the aforesaid interlocutory application for impleadment was not opposed by respondents 2 to 4 to the Rent Control Petition or by supplemental respondents 5 to 11 who were subsequently impleaded. The alleged illegality in allowing the said I.A. No. 240/1992 and the

question of abatement of the R.C.P. were raised for the first time only when the matter was taken up in appeal before the Rent Control Appellate Authority. Section 22 of the Act makes the provisions of O.22 C.P.C. applicable to proceedings under the Act only as far as possible. After the decision rendered in 1993(2) KLT 313 - Pankajakshy Amma v. Sarojam, Section 5 of the Limitation Act is applicable in the matter of impleadment. So, the Rent Control Court was well within its authority in allowing I.A. No. 240/92 filed for impleading the legal representatives of the deceased 1st respondent. The delay of 15 days in filing the said application must be presumed to have been condoned and the abatement set aside, particularly when there was no objection filed to the said application either by respondents 2 to 4 or by the persons who were impleaded as the legal representatives. Where the impleading petition is not filed within time, the delay in filing the same can be condoned under Section 5 of the Limitation Act. The finding recorded by the lower appellate Authority in this behalf does not call for any interference. However, the finding of the lower appellate Authority on the merits is unsustainable. The appellate finding that there was no subletting is clearly wrong. The petition schedule building is a thatched shed at Mannarkad wherein this 1st respondent/tenant was put in possession as per Ext.A4 entrustment dt. 17.9.1957. There is a covenant in Ext.A4 by the 1st respondent that he will not sublet or induct any other person in the tenanted premises. The consent for the sub-letting or transfer envisaged by Section 11 (4)(i) of the Act is a clear-cut and express consent and not an implied consent inferable from acquiescence or long silence on the part of the landlord (vide Raghavan v. Sreedhara Panicker (2001 (1) KLT 772) and John Chandy & Co. (P) Ltd. v. John P. Thomas (2002 (2) KLT 220 (SC))). Hence the decisions of this Court reported in 1982 KLT 685 - Lela v. Ali and 1985 KLT 522 --Kalyanasundaram Pillai v. Ramamoorthy and that of the Supreme Court in a case arising out of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 and reported in AIR 1987 SC 242 - A.S. Sulochana v. Dharmalingam, are no more relevant. The 1st respondent has not been able to prove any express consent to sublet the premises to respondents 2 to 4. It is true that respondents 2 to 4 in the R.C.P. are the children of Shanmughan, the late brother of Krishnappan Mudali(1strespondent). But transfer of possession of the premises to the tenant's brother has been held to be objectionable (Bhairab Chandra v. Ranadhir Chandra

((1988) 1 SCC 383)). Merely because there is close relationship between the tenant and the alleged sub-lessee, the existence of a sub-lease cannot be ruled out (vide 2002 (1) KLT 487 - Damodara Pai v. Chellamma and 2004 (1) KLJ 357 -- Vialaparambil Gopi v. CPO Mohammed Basheer). Even in the earlier suit filed as O.S. No. 641/1966, the 1st respondent had admitted that the petition schedule shop room is in the possession of respondents 2 to 4. When, instead of the 1st respondent tenant, respondents 2 to 4 are in possession of the tenanted premises, it is for the tenant to explain the jural relationship between the tenant and the persons found to be in actual possession of the premises (Sreepathi Potti v. Venkitasubramania Iyer (1976 KLT 286)), failing which an inference of transfer of possession or sub-letting is inescapable. Where transfer of exclusive possession to another person is established, the Court may: legitimately draw a presumption under Section 114(f) of the Evidence Act that the transfer of possession was for valuable consideration (vide Kunhikrishnan v. Madhavi (1991 (1) KLT 515) and Damodara Pai v. Chellamma (2003 (1) KLT 487)). It is significant to note that the appeal before the lower appellate Authority was filed not by the tenant but by the sub-lessees who are respondents 2 to 4 in the R.C.P. That appeal was not maintainable (vide Balan v. Zainaba (1988 (1) KLT 695)). The rejection by the Appellate Authority of the claim for bonafide own occupation under Section 11(3) of the Act is also unsustainable.

7. We are afraid that we cannot accept the above submissions made in support of this revision. The parties will hereafter be referred to according to their rank before the Rent Control Court. We will first take up for consideration the question of abatement consequent on the death of the 1st respondent tenant. Respondents 1 to 5 herein, in their memorandum of cross-objection, have challenged the finding entered by the lower appellate Court in this behalf. The 1st respondent tenant admittedly died on 27.2.1992. Respondents 2 to 4 who were the alleged sub-lessees were not his legal representatives. As per Rule 10 of the Kerala Buildings (Lease and Rent Control) Rules, 1979, as it stood then, the time for impleading the legal representatives of a deceased person was 15 days. By virtue of Section 22 of the Act, the provisions of Order 22 C.P.C., as far as possible, are applicable to the proceedings under the Act. So, the provisions of Order 22 C.P.C. regarding abatement, setting aside abatement, condoning the delay by invoking Section 5 of

the [Limitation Act, 1963](#) etc. are also applicable (see *Pankajakshy Amma v. Sarojam* (1993 (2) KLT 313)). The learned counsel for the revision petitioner is not quite right in submitting that if the petition to implead the legal representatives of the deceased party is not filed within the period of 15 days limited by Rule 10 of the Rules, a belated petition for impleadment with a petition to condone the delay can be filed. The consequence of non-impleadment of the legal representatives within 15 days of the date of death of the 1st respondent was, by the force of Order 22 Rule 4(3) C.P.C., abatement of the R.C.P. as against the 1st respondent. Such abatement of the R.C.P. took place by operation of law and no order of the Court was necessary for the R.C.P. to abate (see *Madan Naik v. Hansubala Devi* (AIR 1983 SC 676)). When once the case abates, the remedy is to get the abatement set aside by resort to Order 22 Rule 9(2) C.P.C. While abatement of a case takes place automatically by efflux of time and without any order of the Court, setting aside of abatement requires an order of Court (see AIR 1983 SC 676 supra). The delay, if any, can occur only in the filing of the petition under Order 22 Rule 9(2) for setting aside the abatement and not in filing the impleading petition. In the present case the only petition filed by the petitioner landlord was I.A. No. 240/1992 for impleading the widow and children of the 1st respondent as supplemental respondents 5 to 11. The said petition was filed on 27.3.1992 i.e. 15 days after the time fixed by law. By that time on 14.3.1992 itself the R.C.P. had abated by operation of law. The filing of I. A. No. 240/92 was like attempting to infuse life into a dead body. There is no dispute that even though one more petition as I.A. No. 241/1992 for amendment of the cause title for carrying out the impleadment, was also filed, the same was struck off the file as unnecessary. Although the revision petitioner would untenably contend that a petition for impleadment with a petition to condone the delay in filing the same could be filed, the fact remains that even a petition to condone the delay was not filed. More importantly, no petition under Order 22 Rule 9(2) C.P.C. to set aside the abatement of the R.C.P. has so far been filed. It is trite law that where the case has abated for non-impleadment of the legal representative, even the Court has no inherent power to implead the legal representatives (see *Union of India v. Ram Charon* (AIR 1964 SC 215)). If so, any finding or adjudication on merits in the R.C.P. which had already abated, is no finding or adjudication in the eye of law

(vide AIR 1983 SC 676 supra). The lower appellate Court which in paragraph 17 of the judgment rejected the contention of respondents 1 to 4 that the entrustment of the premises was not to the 1st respondent alone but for the family consisting of respondents 2 to 4 also, was clearly in error in holding in paragraph 11 of the judgment that since respondents 2 to 4 were already on the party array, there was substantial representation of the 1st respondent's interest. The lower appellate Authority lost sight of its own finding in paragraph 9 that an application for setting aside the abatement was necessary, that no such application had been filed nor any sufficient cause for setting aside abatement was also shown and that the landlord's argument that the impleadment should be treated as one made after setting aside the abatement, cannot be accepted. There is no dispute that none among respondents 2 to 4 is a legal representative of deceased 1st respondent. Respondents 2 to 4 are the children of Shanmughan, the deceased brother of the 1st respondent. When the widow and children of the 1st respondent were alive and were subsequently impleaded as supplemental respondents 5 to 11 beyond the period of limitation, Respondents 2 to 4 could not have represented the estate of the 1st respondent. However, since the Rent Control Court had ordered eviction, it could be challenged by respondents 2 to 4 as well, since they were adversely affected by such order for eviction particularly when the common ground of respondents 1 to 4 was that the entrustment of the shop room in question was for and on behalf of the family consisting of respondents 1 to 4.

8. It is true that the Memorandum of Cross Objection filed by respondents 1 to 5 herein is preferred in a Civil Revision Petition filed under Section 20 of the Act. But, it is well settled that eventhough there are in-built limitations on the revisional jurisdiction, such jurisdiction is part of the general appellate jurisdiction of the superior Court (see Shankar Ramachandra Abhayankar v. Krishnaji Dattaraya Bapat (AIR 1970 SC 1 and 1987 (2) KLT 848 F.B.). Even if Rule 22 of O.41 C.P.C. does not in terms apply in the case of a revision, the principles thereof ought to apply to enable the respondents to challenge the wrong finding recorded by the lower appellate Authority in the matter of abatement of the R.C.P. especially when the final decision in the appeal was wholly in favour of the respondents who got the order of eviction on both grounds reversed.

9. In the light of our finding regarding the abatement of the R.C.P., an examination of the merits of the case is really not warranted. However, both sides argued elaborately on the merits of the case and therefore we do not refrain from considering the same. Now coming to the merits of the case, we are in complete agreement with the findings entered by the lower appellate Authority with regard to the claim of sub-letting as well as bonafide own occupation.

10. Transfer by a tenant of his rights under the lease can be by way of sale or lease or mortgage or gift or by any other mode covered by the provisions of the Transfer of Property Act, 1882. If such transfer is by way of lease, it amounts to sub-letting attracting the latter part of Section 11(4)(i) of the Act and if such transfer is one otherwise than by way of a lease or sub-letting, then the earlier part of Section 11(4)(i) of the Act is attracted, provided the lease does not confer any such right on the tenant and the transfer made by him is without the consent of the landlord. The decision of the Apex Court in *John Chandy v. John P. Thomas* (2002 (2) KLT 220) has elucidated the expressions 'if the lease does not confer on him the right to do so' occurring in Section 11 (4)(i) of the Act. In the case of a transfer by way of gift or absolute sale, with the consent of the landlord, the donee or the vendee, as the case may be, may or may not step into the shoes of the original tenant, depending on the terms of the contract, although by virtue of the provision in Section 108(j) of the Transfer of Property Act, 1882, the tenant may not, nevertheless, be absolved from his liability to pay rent to the landlord or from his liability to handover vacant possession of the premises to the landlord on the termination of the lease which are the statutory obligations of the tenant covered by Cls.(l), (m), (q) etc. of Section 108 of the Transfer of Property Act. In the case of sub-letting by the tenant, with the consent of the landlord, the under-lessee does not step into the shoes of the tenant so as to establish a privity of contract between him and the landlord because he is only a lessee under the tenant and his duty to pay the rent is only towards the tenant who is his landlord and not towards the head-landlord. In all these cases of transfer with consent, as between the landlord and the transferee of the tenant, there is only privity of estate and there is no privity of contract. But the moment the landlord accepts rent from such transferee or otherwise recognises such transferee either as envisaged by Section 116 of the Transfer of Property Act or otherwise and releases the tenant from his

obligations, a privity of contract may also spring into existence between the head-landlord and the tenant's transferee (see *Karunakaran Nair v. Sekharan Nair* (1982 KLT 727)). But where the sub-letting or transfer of rights under the lease by the tenant is without the consent of the landlord, there is no privity of contract between the landlord and the sub-lessee or transferee, as the case may be, and there exists only a privity of estate as between them unless the landlord recognises such sub-lessee or transferee and releases the tenant from his statutory and contractual obligations.

11. Transfer, whether by way of sub-letting or otherwise, has to be inevitably established by the landlord if his claim under Section 11 (4)(i) of the Act is to succeed. Being a transfer, consideration for the transfer is a *sine qua non* for the same since every transfer is a contract. An inference of transfer including sub-letting cannot necessarily follow from the mere fact that somebody other than the tenant is found in possession of the tenanted premises. If it is a lease for residential purpose, there can be a host of reasons as to why at a given point of time or duration, the tenant is absent in the premises and a member of his family or a near relative or even a stranger on his behalf might be found in the premises with the knowledge, consent or request of the tenant. Such instances do not necessarily spell out any transfer of rights under the lease or sub-letting within the meaning of this provision. Likewise, in the case of a commercial lease, it may be the manager or agent or an employee of the tenant who may be found in actual possession of the premises where, however, the tenant might retain an active role in the business carried on in the premises. These are all instances where it is capable for the tenant to offer satisfactory explanation for the possession of the premises by a person other than the tenant. If in such circumstances, the Court were to find sub-letting or a transfer of his rights under the lease by the tenant, it would undoubtedly be a rash finding. But there may be situations where the tenant altogether vanishes from the scene or transplants himself or his business to some other premises and somebody (which may even include a close relation of the tenant) is found in exclusive possession of the premises and/or in respect of the business carried on therein under such circumstances as to exclude even the tenant from enjoying the premises or the business carried on therein. Those are situations which call for an explanation from the tenant because the arrangement

under which a stranger to the contract of tenancy happens to be in exclusive possession of the premises and/or the business carried on therein is something which is within the exclusive knowledge of the tenant. It is in such situations that, in the absence of a satisfactory explanation forthcoming from the tenant, Courts come to legitimate inferences of objectionable transfers with consideration by calling to their aid Section 114 of the Evidence Act, 1963 and other enabling devices. The distinction between factual possession and legal possession in certain situations may help the Court to arrive at the right conclusion. But, it is unsafe to lay down as an abstract proposition of law that an inference of transfer of rights under the lease by the tenant can straightaway be drawn from the mere act of parting with possession of the premises by the tenant. Courts also come across clever devices by way of subterfuges conceived of by certain tenants with a view to camouflage the real arrangements between them and their devisees. The question whether the former or latter part of Section 11(4)(i) of the Act has been attracted in a given case or not, largely depends on the evidence in each case. In this case we do not propose to examine the submission by Sri. M.C. Seri that there is some apparent conflict in the views taken in 1996 (2) KLT 747 - Karshaka Union v. Bahuleyan, 2003 (1) KLT 546 - Abdul Khader v. Ali etc. on the one hand and 2004 (1) KLJ 357 - Vialaparambil Gopi v. CPO Mohammed Basheer (2004 (1) KLT SN 11 = 2004 (1) KLJ 164 - Pankajam v. Radha Nedungadi and 2004(1) KLT 195 Mini v. Leela, on the other hand.

12. There are averments in the very petition for eviction, which are destructive of the claim under Section 11(4)(i) of the Act. Towards the end of paragraph 1 of the R.C.P. this is what is pleaded by the landlord:

There is an unequivocal admission that the 1st respondent is continuously keeping possession of the premises ever since Ext. A4 rent bond executed by him. Again in paragraph 4 of the R.C.P. the landlord has pleaded as follows:

The landlord has in unmistakable terms pleaded that in spite of the decree for possession, the 1st respondent, instead of handing over possession of the premises, is even now keeping possession of the petition schedule premises. There are other fatal admissions in the oral evidence of PW.1, the Manager of the

petitioner Devaswom. Under these circumstances the lower appellate Court was fully justified in disallowing eviction under Section 11(4)(i) of the Act.

13. Equally misconceived is the claim for bona fide own occupation of the premises. What has been pleaded in paragraph 5 of the R.C.P. is that the petitioner bona fide requires the petition schedule premises for constructing a new building at the tenanted site and letting out the same on higher rent for the purpose of augmenting the income of the petitioner. In other words, the need pleaded is not for the own occupation of petitioner Devaswom. The Appellate Authority has rightly held that the claim in this regard is nothing but a ruse to evict the tenant. The findings entered in this regard are based on the evidence before Court and there is no illegality, irregularity or impropriety in those findings so as to warrant interference.

The result of the foregoing discussion is that this revision which is devoid of merit is liable to be dismissed and we do so but without costs confirming the judgment of the lower appellate Authority disallowing eviction under Sections 11(3) and 11(4)(i) of the Act. The cross objection is allowed holding that consequent on the death of the 1st respondent tenant, the Rent Control Petition had abated due to the failure to implead his legal representatives in time and the abatement has never been got set aside by filing any petition in that regard. The parties shall bear their respective costs in the revision as well as in the cross-objection.