

Damodara Pai Vs. Challamma

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Court : Kerala

Decided On : Jan-14-2003

Reported in : 2003(1)KLT487

Judge : K.S. Radhakrishnan and; J.M. James, JJ.

Acts : Kerala Buildings (Lease and Rent Control) Act, 1965 - Sections 11(4);
Evidence Act - Sections 114

Appeal No. : C.R.P. No. 958 of 1994

Appellant : Damodara Pai

Respondent : Challamma

Advocate for Def. : V.V. Ashokan and; K.I. Mayankutty Mather, Advs.

Advocate for Pet/Ap. : S.K. Brahmanandan, Adv.

Disposition : Revision allowed

Judgement :

J.M. James, J.

1. The landlord is the revision petitioner. His prayer to evict the tenants under Section 11(4)(i) of the Kerala Buildings (Lease and Rent Control) Act, 1965, in short, 'the Act' in R.C.P. No. 44/90 on the file of the Rent Controller, Cochin, was

rejected. He challenged it by filing R.C.A. No. 16/92 before the Rent Control Appellate Authority, Ernakulam. But the Appellate Authority dismissed the appeal. Hence this revision.

2. The landlord rented out the petition schedule building on 1.8.1959 to Chandrasekhara Menon. The rent fixed, after enhancement, was Rs. 100/- per month. The tenant, his mother and his younger brother were residing in the scheduled building. In 1964, the tenant joined Defence Department and served upto 1987. The mother of the tenant was retaining the scheduled building, residing therein and was paying rent on behalf of the tenant. Meanwhile, he got married with the 1st respondent herein. On certain stage, she also joined his company. The tenant died. The mother also died. He got three children. The 1st respondent got shifted to Punnapra at Alappuzha district. They are permanently residing there. Without the knowledge and consent of the landlord, the 1st respondent tenant sublet the petition schedule building, to the 2nd respondent, the younger brother of late original tenant. The contention of the respondents 1 and 2, is that the original tenant took the building for the residence of all the members of that family and not for the residence of the original tenant alone, and therefore, there is no subletting. It is also the contention that the 1st respondent, the wife of the late original tenant is occasionally residing in the petition schedule building, and hence, she being the wife of the original tenant, there is no subletting.

3. P.W. 1 is the landlord. He also marked four documents. R.Ws. 1 and 2 are the respondents 1 and 2, the wife as well as the younger brother of Chandrasekhara Menon. The Rent Controller rejected the prayer of subletting on the ground that there is no evidence to show that there is exclusive transfer of possession of the building by the 1st respondent. The Appellate Authority, though found that the brother of the tenant has not obtained any tenancy right in respect of the petition schedule building but rejected the appeal holding that the younger brother is occupying the scheduled building under the 1st respondent, and thus there is no transfer or sublease in favour of the 2nd respondent.

4. For the convenience of the discussion, we are using the order of the parties as they were arrayed in the petition before the Rent Control Court.

5. The questions that arise for consideration before us, in the facts of this case, are, whether presumption under Section 114(f) of the Indian Evidence Act can be drawn against the 2nd respondent, and whether the possession of the petition schedule building by the younger brother of the deceased original tenant be excluded from the provisions of sublease contemplated under Section 11(4)(i) of the Act.

6. Learned counsel for the tenant filed C.M.P. No. 5339/2002 swearing in the affidavit that the 1st respondent and her children are permanently residing, from 1988 onwards, at Punnappra, Alappuzha district, that her children are settled in different places, that she never visits the petition schedule building, that the voters list of the years 1994 and 2000 show that she is a permanent resident at Punnappra, that the petition schedule building is in the unauthorised possession of the 2nd respondent, that the 2nd respondent acquired the property adjacent to the petition schedule building on 22.8.1992, that he is permanently residing there, that the 2nd respondent got no right over the petition schedule building, that he is possessing the same without the consent and permission of the landlord, that the possession has been legally parted by the 1st respondent in favour of the 2nd respondent because of some underhand understanding, that there is subletting of the building, hence prayed to set aside the findings of the authorities below by allowing this revision.

7. Learned counsel for the respondents contended that the late original tenant took the building on rent for the residence of the entire family members, that even when he was working in Defence Department, the other members of the family were continuing the residence, that after his death, his wife and mother were residing in the building, that the 1st respondent, the wife of the original tenant, is still in occupation of the building, thus there is no subletting, that even if it is found that the wife is residing away from the petition schedule building, as the occupation is by the younger brother of the original tenant, there will not be any subletting, and therefore prayed to dismiss the petition.

8. The landlord deposed his case when he was examined as P.W. 1, R.Ws. 1 and 2 are respondents 1 and 2. We have gone through the deposition of all these three

witnesses. The facts revealed show that the rent deed was executed in favour of late Chandrasekhara Menon. It is also brought out in evidence that he joined the Defence Department, and the building was then occupied by Ms mother. The 2nd respondent was also residing in the building. On she return of the original tenant, he continued the residence in the scheduled building. After his death, his mother resided there. She also died. The children of the original tenant grew up. They got settled in different walks of life. The materials available further show, taking into consideration of the subsequent events, which this Court is legally empowered to take notice of after giving fair opportunity to both sides to raise their respective contentions, that the 1st respondent is permanently residing at Punnapra. The voters list produced clearly show that she along with her children are not at all residing in the petition schedule building and on the other hand the 2nd respondent with his family members are stated as voters in the list. Thus, the argument of the 2nd respondent that the 1st respondent is even now occupying the petition schedule building and the 2nd respondent is only residing in the petition schedule building under the 1st respondent is without any basis.

9. The learned Appellate Authority held that the 2nd respondent is not a sub-lessee but is residing in the building under the 1st respondent, the wife of the late original tenant. We find that the tenancy arrangement was only with Chandrasekhara Menon, the elder brother of the 2nd respondent. His wife and children inherited the tenancy. It is conceded by the learned counsel for the 2nd respondent that the parties being Hindus, the 2nd respondent has got no right to inherit the tenancy of late Chandrasekhara Menon.

10. Section 2(6) defines 'tenant' to mean any person by whom or on whose account rent is payable for a building and includes -

(i) the heir or heirs of a deceased tenant, and

(ii) a person continuing in possession after the termination of the tenancy in his favour, but does not include a Kudikidappukuran as defined in the Kerala Land Reforms Act, 1963 (Kerala Act 1 of 1964), or a person placed in occupation of building by its tenant or a person to whom

In view of the definition of 'tenant' it becomes necessary for us to examine under what right the 2nd respondent is occupying the petition schedule building, as we have already held that he is not occupying the building under the first respondent.

11. Learned counsel for the 2nd respondent contended that the presumption available under Section 114(f) of the Indian Evidence Act, is not applicable to the facts of the case, and therefore, the court cannot presume, in the absence of any evidence regarding the passing of consideration between the tenant and the 2nd respondent, there is any sub-tenancy. For clarity, we reproduce Section 114(f) of the Evidence Act,

'114. Court may presume existence of certain facts. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to be common course of natural events, human conduct and public private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume -

xxx xxx xxx xxx (f) That the common course of business has been followed in particular cases.'

Learned counsel for the 2nd respondent placed reliance in *Ramamoorthy Rao v. Musthapha Rawther* (2002 (3) KLT 685) and argued that only parting of the tenanted premises to a stranger could be presumed as subletting, even in the absence of evidence of passing the consideration and not in respect of the close relations. It was a case in which the landlords filed petition under Sections 11(4)(i) and 11(4)(iii) of the Act. The tenant was conducting stationary business in the petition schedule room. On the guise of Ext. B5 partnership deed, R.W.2, Gopakumar, was conducting the business. The Rent Controller allowed the prayer under Sections 11(4)(i) as well as 11(4)(iii) of the Act. But the appeal filed by the tenant was allowed by the Appellate Authority. That is how the revision reached before the Division Bench of this Court. By discussing the facts, the court found that Exts, B5 was a sham document intended to hide subletting. After holding that

there was parting of the building by the tenant to R.W. 2, the court also found that there was no evidence regarding the passing of the consideration. It was then the Division Bench observed, at para 11 that,

'..... When tenant parts with exclusive possession of business premises to stranger other than close blood relation, in the absence of contrary evidence, passing of consideration can be presumed.'

A careful reading of the Ramamoorthy Rao's case, cited above, only show that the Division Bench while discussing, observed that except close blood relations the facts of passing the consideration could be presumed. But that is only an observation in respect of the facts of that case. It is not a general principle laid down by the court. Therefore, the said observation cannot be taken as a principle of law and generally applied in respect of all other cases.

12. In Kunhikrishnan v. Madhavi (1991 (1) KLT 515), another Division Bench of this Court overruling the decision in Lela v. Ali (1982 KLT 685) held that,

'..... for the purpose of discharging the burden of establishing a prima facie case of subletting, the necessity of proving specifically that, letting was for valuable consideration may arise only in cases where it may not be possible to draw a presumption under Section 114(f) of the Evidence Act.'

13. The question of subletting and also payment of consideration by the subtenant to the tenant for parting possession of the disputed premises came up for consideration by the Apex Court under the Delhi Rent Control Act in Bharat Sales Ltd. v. Life Insurance Corporation of India (AIR 1998 SC 1240). The Rent Controller, as well as the Rent Control Tribunal, allowed the petition for eviction filed by the landlord on the ground of subletting. The same was challenged before the Delhi High Court by the tenant. The same was dismissed. Hence, the matter was taken up before the Apex Court. At paragraph 4 of the judgment, the Division Bench of the Apex Court laid down thus:

'4. Sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another

person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump-sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the Court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let.'

14. As stated above, the 1st respondent as well as her children are not at all in occupation of the petition schedule building. On the other hand, the 2nd respondent is admittedly in occupation of the premises. The contention that the 1st respondent is still in occupation of the building is proved to be unacceptable. In view of the principles of law discussed above, we are of the opinion that there is a clandestine arrangement between the 1st respondent and the 2nd respondent, because of which the former had parted with possession of the petition schedule building to the 2nd respondent. Therefore, we reject the argument of the learned counsel for the 2nd respondent that the Court cannot take the presumption under

Section 114(f) of the Indian Evidence Act against the 2nd respondent.

15. Another argument of the learned counsel for the 2nd respondent is that the 2nd respondent being the brother of the original tenant, there cannot be any subletting of the petition schedule premises by the 1st respondent. Learned counsel for the landlord placed reliance on *S.A. Vengadamma v. Jitendra P. Vora* ((1997) 11 SCC 334) and argued that brother cannot succeed to be the legal heir of the tenant and he is only a person placed in occupation of the building by the 1st respondent, and therefore, he is not a tenant at all. Thus, counsel argued, there is clear subletting. The above authority discussed the provisions of Karnataka Rent Control Act. The point that came up before the Apex Court is whether the brother of the tenant/respondent was, by himself, a tenant, allegedly being a member of the family of the respondent. 'Brother' was not included in the definition of the word 'family' under the Karnataka Rent Control Act. Dealing with the facts of the case, the Apex Court hold thus:

'..... When the tenant-respondent himself had vacated the premises and had gone to live elsewhere, it does not lie in his mouth to say that in leaving his brother behind in the tenanted premises, he has left behind a member of his family, unless, of course, he could have successfully pleaded that the tenancy at the inception was obtained by a joint family of which the brother was a member. This plea, even though raised, has not been accepted by the courts below.'

The Apex Court, in the above case, allowed the civil appeal by reversing the findings of the Karnataka High Court and granted eviction against both the brothers, who were in occupation of the premises, on the ground of subletting also, apart from the ground of bonafide need, which was found in favour of the landlord by the courts below.

16. In the case at hand, the wife and children of the original tenant are no more in occupation of the petition schedule building. They are permanently settled at Punnapra, Alleppey District. From the facts of this case we also found that the tenancy arrangement was with the late Chandrasekhara Menon, the husband of the 1st respondent. The rent deed was executed not in the joint name of the family members, but only in the name of the late Chandrasekhara Menon. Therefore, we

are of the view that the 2nd respondent is a person placed in occupation of the building by the 1st respondent, and therefore, he is not a tenant. In view of the principles of law discussed above, we also hold that he is in possession of the petition schedule building as a subtenant under the 1st respondent. The appellate authority found that the 1st respondent is residing away from the petition schedule building, but disallowed the prayer of the landlord on the ground of subletting only for the reason that the 2nd respondent being the younger brother of the original tenant, there will not be any subletting. We fully disagree with the above finding of the Appellate Authority on this point.

17. In *Krishnawati v. Hans Raj* (AIR 1974 SC 280), while determining the question whether the appellant sublet the premises to Sohan Singh, with whom she was living as husband and wife, the Apex Court observed thus:

'..... The negative answer given to it by the Rent Courts is merely the factual common sense inference which did not call for the application of any principle of law.'

In *Resham Singh v. Raghbir Singh* (AIR 1999 SC 3087) the Apex Court held that under the provisions of the East Punjab Urban Rent Restriction Act (3 of 1949) the High Court has got powers under Sub-section (5) of Section 15 of the said Act to satisfy itself as to whether the question of subletting, which is a question of law, was properly decided by the courts below, the Rent Controller and the appellate authority found that there was subletting. The High Court set aside both the judgments by allowing the revision, holding that there was no subletting and there was no rent arrears due. That was challenged before the Apex Court. The contention that subletting was a question of fact was repelled and the Apex Court held that it is a question of law, and therefore, the High Court has got power to examine the same. While considering the facts of *Krishnawati's* case and *Resham Singh's* case (cited *supra*), we are of the view that this Court has got the power under the provisions of the Act to examine whether the courts below had applied properly the principles of law while considering the question of subletting. The 2nd respondent not being a tenant, and he not being a legal heir of the late Chandrasekhara Menon, because of the clandestine arrangement with the 1st

respondent, the 2nd respondent is in occupation of the building as a sub-tenant. Therefore, we further hold that the courts below had gone wrong in dismissing the petition under Section 11(4)(i) of the Act. Thus, there is an error apparent on the face of the records and the decisions of the courts below are not legal. Hence, the judgments of both the courts below are only to be set aside. We do so.

In the result, this revision is allowed. The order of the Rent Controller, as well as the judgment of the Appellate Authority, are set aside. R.C.P. No. 44/1990 on the file of the Rent Controller, Cochin is allowed under Section 11(4)(i) of the Act. The respondents shall surrender the petition schedule building to the landlord within 30 days from the date of this order, failing which the landlord is entitled to get the order executed through the court of law. However, in the circumstances of the case, we direct the parties to bear their respective costs.

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