

Prasannan Vs. Haris

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Court : Kerala

Decided On : Feb-24-2005

Reported in : 2005(2)KLT365

Judge : J.B. Koshy and K.P. Balachandran, JJ.

Acts : Kerala Buildings (Lease and Rent Control) Act, 1965 - Sections 2(6), 11(2), 11(3), 11(17), 20 and 146; Code of Civil Procedure (CPC) - Order 21 - Order 22, Rule 4(2); Madhya Pradesh Accommodation Control Act; Karnataka Rent Control Act; Bombay Rents, Hotel and Lodging House Rates Control Act, 1947; [Hindu Succession Act, 1956](#) - Sections 3

Appeal No. : C.R.P. No. 1965 of 2001

Appellant : Prasannan

Respondent : Haris

Advocate for Def. : C. Khalid,; N. Gopinatha Panicker and; M.K. Sumod, A

Advocate for Pet/Ap. : S.V. Balakrishna Iyer and P.B. Krishnan, Advs.

Disposition : Petition dismissed

Judgement :

J.B. Koshy, J.

1. Can a legatee under the Will claim the status of a tenant if he is also one of the legal heirs, can a heir of the statutory tenant claim all the benefits entitled to the statutory tenants, what are the effect of subsequent events in a Rent Control Petition under the Kerala Buildings (Lease and Rent Control) Act (for short 'the Act') etc. are some of the questions to be decided in this case. Before dealing with the above issues, we may, briefly, narrate the facts. R.C.P. No. 103 of 1986 was filed by the first respondent herein seeking eviction of the petition schedule building contending that no rent was paid from October, 1965, and therefore, tenant is liable to be evicted under Section 11(2)(b) of the Act. It was also contended that first respondent herein was employed in Saudi Arabia and his future in Saudi Arabia was uncertain. Since his employment would be terminated at any time, he wanted to start a garment business in the petition schedule building. He had necessary funds for starting the business and he had no other building for starting the said business. Hence, he sought eviction under Section 11(3) of the Act. The Rent Control Petition was allowed under Section 11(2)(b) on the ground of arrears of rent by order dated 26.8.1987. But, no order of eviction was granted under Section 11(3). In R.C.A. No. 223 of 1989 the Rent Control Appellate Authority confirmed the order. During the pendency of the appeal petition, landlord returned from Saudi Arabia as his services were terminated. He came back permanently to settle down in Kannur. In the affidavit filed before the Appellate Authority, the landlord affirmed as follows:

'My service has already been terminated by the company with effect from 29.2.1986. Pursuant to the termination of my service. I have returned to India on 13.11.1987. The period of my passport is over and I am not holding any passport now. Since I have returned from Jiddah in 1987 I am residing in Cannanore. My visa is cancelled and the period of my passport is over and I have not applied for renewal of the passport. I have decided to spend my life in Cannanore itself. To prove that my service has been terminated I am producing herewith the certificate issued by Administrative Manager, Saddik Mohammed Attar Co. I am also producing my passport which will show that the period of passport is over. In page 10 of the passport it will be seen that my resident permit is cancelled. It is written in Arabic.'

The Appellate Authority did not consider that affidavit also. An LA. was filed before the Appellate Authority producing documents to show that he returned permanently from Saudi Arabia.

2. A revision application was filed as C.R.P. No. 529 of 1992. During the pendency of the revision application, original tenant died and his widow as well as his children (heirs) were impleaded. This Court remanded the matter back. While remanding the matter, a Division Bench of this Court observed as follows:

'9. The circumstances of the situation have left this to be done by us in this proceedings unfortunately after a period of six years thereafter. In our judgment the petitioner landlord deserves this by way of an opportunity to speak for himself with regard to his bona fide need of the situation. There is yet another aspect for which also the situation requires a fresh look altogether. In both the judgments we find that the authorities having dealt with the situation in accordance with all the necessary provisions of Section 11(3) of the Rent Control Act, in accordance with the pleadings of the parties in regard thereto. We find that what has been considered is only the question of bona fide and that too erroneously as we have observed hereinbefore.'

It was further observed as follows:

'..... The proceedings stand remitted as R.C.P. No. 103/86 to the Court of the Rent Controller, Cannanore, for decision according to law, afresh in view of the above observations, with regard to the ground of eviction.'

Both parties were allowed to file additional evidence and pleadings.

3. After remand, the landlord was examined as P.W.2 and marked Exts.A5 to A10. Exts.A1 to A4 documents were marked in the original proceedings. Revision Petitioner was again examined and marked Exts.B1 to B5 documents. He also examined R.W.2 after remand. Exts.C1 to C3 documents are Commissioner's Report and plan. The Rent Controller found that the landlord has established the bona fide need for own occupation, but, refused eviction finding that tenant is entitled to protection under the second proviso to Section 11(3) of the Act.

Tenant's plea of getting protection under Section 11(17) was rejected. The landlord filed appeal. Cross objection was filed by the tenant. The Appellate Authority allowed the appeal filed by the landlord. While agreeing with the Rent Control Court that bona fide need of the landlord was proved and tenant is not entitled to the benefit of Section 11(17), it was held that legal representative, even though can prosecute the claim, cannot take the defences which were not available for the original tenant in view of Order XXII, Rule 4, Sub-rule (2) of the Code of Civil Procedure. Under the Rent Control Act, Section 146 and Order XXI of CPC are applicable to the rent control proceedings also, and therefore, impleaded parties as legal representatives of the tenant cannot take up the defences which were not available to the original tenant and original tenant was not entitled to the protection under the second proviso to Section 11(2) and hence eviction was ordered under Section 11(3) of the Act. Against this, this revision application was filed by the petitioner who was impleaded as the 6th respondent, one of the sons of the original tenant.

4. First question to be considered is whether a statutory tenant has heritable interest in the leased premises. Answer to the question is found in the statute itself. The word 'tenant' has been defined under Section 2(6) of the Act as follows:

'(6) 'tenant' means 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,.....'

Provisions of the Act show that the word 'tenant' includes the legal heirs of deceased tenant. Apex Court in *Damadilal and Ors. v. Parashram and Ors.* (AIR 1976 SC 2229) held that statutory tenant has heritable interest in the premises. Apex Court was considering the question under M.P. Accommodation Control Act where there was no specific provision like Section 2(6) of Kerala Act. Same view is taken by the Apex Court in *Gantusa H. Baddu v. Meerabai G. Pai and Ors.* ((2000) 4 SCC 586) while considering Karnataka Rent Control Act. In view of Section 2(6),

on the death of the statutory tenant, his legal heirs stepped into his shoes and legal heirs will become statutory tenants. In this connection, we also refer to the Division Bench judgment of this Court in *George Peter v. T.K. Sali and Anr.* (ILR 1999 (1) Ker. 529).

5. The next question to be considered is who is a legal heir and whether a legatee under the Will is a 'heir' so as to claim protection of statutory tenant under the Act, Apex Court in *Vasant Pratap Pandit v. Dr. Anant Trimbak Sabnis* ((1994) 3 SCC 481) while considering the question under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 held that, considering the context of the object and scheme of the Act, intention of the legislation is not to give right to the legatee of the will. Apex Court held as follows:

'If the word 'heir' is to be interpreted to include a 'legatee' even a stranger may have to be inducted as a tenant for there is no embargo upon a stranger being a legatee.'

In *Karthiayani v. Anandan* (2004 (2) KLT 575), it was held by a Division Bench of this Court while considering Kerala Act that 'unless the statute specifically includes a testamentary heir we have to interpret the word 'heir' in its popular sense' and a legatee under a testamentary dispossession cannot claim the status of a statutory tenant and 'the expression 'heir' has to be tested in accordance with the personal law of the tenant.' In Kerala Rent Act, the expression 'heir' is not defined. Hence, natural meaning has to be adopted to that word. The word 'heir' is defined under Section 3(f) of the [Hindu Succession Act, 1956](#) as, follows:

'(f) 'heir' means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;'

All the heirs who are entitled to succession in Clause (1) of the schedule were impleaded and 6th additional respondent, one of the heirs, filed the revision application. Therefore, even if the Will produced is not genuine or not proved and subsequently created for the purpose of the case as contended by the landlord, all the legal heirs were impleaded in the proceedings and it was also affirmed by all legal heirs that all of them have no objection in continuing the revision petitioner as

the tenant and conduct business in the petition schedule building. In *Pushpa Rani and Ors. v. Bhagwanti Devi and Anr.* (AIR 1994 SC 774) the Apex Court held that on the death of original tenant one of the heirs continuing in occupation of and carrying on business in the premises because other heirs surrender the rights, he can prosecute the case. However, once an order of eviction is passed against him, it cannot be challenged by other heirs at the time of eviction. In this case, other heirs surrendered their rights to the petitioner, and therefore, revision petitioner stepped into the shoes of the tenant not as a legatee; but, as a natural heir.

6. Next question to be considered is whether a 'heir' of the statutory tenant, on his death, can claim all the benefits and protections that are available to the tenant in the petition schedule building as per the statutory provisions. Answer to the above question is beyond controversy. A Constitution Bench of the Supreme Court while overruling the decision in *Ganpat Ladha v. Shashikant Vishnu Shinde* (AIR 1978 SC 955) held in *Smt. Gian Devi Anand v. Jeevan Kumar and Ors.* (AIR 1985 SC 796) that heirs of statutory tenants are entitled to the same protection against eviction as afforded to a tenant under the Act. The Apex Court held as follows:

'..... The termination of the contractual tenancy in view of the definition of tenant in the Act does not bring about any change in the status and legal position of the tenant, unless there are contrary provisions in the Act; and, the tenant notwithstanding the termination of tenancy does enjoy an estate or interest in the tenanted premises. This interest or estate which the tenant under the Act despite termination of the contractual tenancy continues to enjoy creates a heritable interest in the absence of any provision to the contrary.'

Thereafter, the Court held that in the absence of any statutory restrictions, 'the right of the statutory tenant would devolve on all the heirs of the 'so called statutory tenant' on his death and the heirs of such tenant would in law step into his position.' The definition of 'tenant' in the Kerala Act makes no room for doubt in this regard and the tenant and heirs of the statutory tenant can also claim all the benefits available to the original tenant and observations of the Appellate Authority in this case that since they are impleaded only as legal representatives and they cannot take any defence which is not available to the deceased tenant as they

assume the character of legal representative as provided under Order XXII, Rule 4. Sub-rule (2.) of C.P.C. is not tenable. The impleaded tenant also can take up the appropriate defences if available under the Act.

7. Next question to be considered is what is the effect of subsequent events in a Rent Control Petition when claim for eviction is based on bona fide need. The matter is now settled by various decisions of the Apex Court. Normally, 'crucial date' is the date of filing of application for eviction when the tenant is faced with the liability of being evicted from the premises as held by the Apex Court in *Kamaleshwar Prasad v. Pradumangu Agarwal* ((1997) 4 SCC 413). In *Hasmat Raj and Anr. v. Raghunath Prasad* ((1981) 3 SCC 103), the Apex Court held that in a proceeding for the ejection of a tenant on the ground of personal request, the request must continue to exist till the matter is finally decided in the appeal or revision. In *Gaya Prasad v. Pradeep Srivastava* ((2001) 2 SCC 804). Apex Court held that if there is undue delay, subsequent events need not be considered unless it overshadow the genuineness. In *Kalavathi v. Haji Ismail* (2001 (2) KLT SN Case No. 97), the Apex Court observed that when the litigation lingers on for years certain factual developments are bound to take place and all such developments are not necessarily relevant for adjudication of the case. But, if bona fide need is pleaded, subsequent events should be looked into for proper adjudication with reference to pleadings in the case. The issue is summarised by the Apex Court in *Kedar Nath Agrawal and Anr. v. Dhanrajji Devi and Anr.* (2004 AIR SCW 5789) as follows:

'The basic rule is that the rights of the parties should be determined on the basis of institution of the suit or proceeding and the suit/action should be tried at all stages on the cause of action as it existed at the commencement of the suit/action. This, however, does not mean that events happening after institution of a suit/proceeding, cannot be considered at all. It is the power and duty of the Court to consider changed circumstances. A Court of Law may take into account subsequent events inter alia in the following circumstances; (i) The relief claimed originally has by reason of subsequent change of circumstances become inappropriate; or (ii) It is necessary to take notice of subsequent events in order to shorten litigation; or (iii) It is necessary to do so in order to do complete justice

between the parties,'

In this case, it was contended by the landlord in the original pleading itself that he is employed in Saudi Arabia as his job is not permanent, he wants to start a business. During the pendency of the proceedings, he lost his job. He produced passport and other documents to show that he came back permanently from Saudi Arabia. Therefore, his actual return from Saudi Arabia only show that his original plea is bona fide. It only supports the original pleading. Even, if a person is employed elsewhere, he may bona fide wish to start a business considering the earnings or likelihood of termination of employment and he need not resign the job and wait till the eviction proceedings are over. His intention was mentioned in the original pleadings itself. His actual return from Saudi Arabia is only an additional factor to prove his bona fides and that was correctly taken into account by the Courts. As far as the tenant is concerned, the original tenant died and all the legal heirs were impleaded actually. In this case, death of the original tenant is a vital circumstance to take note of. All the legal heirs stepped into the shoes of the tenant. All other legal heirs allowed the revision petitioner to continue as tenant. The fact that landlord returned from Saudi Arabia and revision petitioner stepped into the shoe of the tenant are matters that has to be taken note off. How far subsequent events have to be considered in the matter of protection available to the tenant under the second proviso to Section 11(3) can be considered separately.

8. Last question to be considered is whether the protection of second proviso to Section 11 (3) is available to the present tenant, that is, the revision petitioner. The burden is on the tenant to prove that he is entitled to the benefit of second proviso. A perusal of the second proviso to Section 11 (3) shows that it carves out an exception to the rule that the landlord can evict a tenant for bona fide need. It provides a protection to the tenant despite a finding that the need of the landlord is bona fide. To claim the above protection, the necessary facts, which have to be proved, before the Court are:

(1) That the tenant is dependent on the income derived from the trade or business carried on in the building in dispute for his livelihood; and

(2) That there is no other suitable building available in the locality for such person to carry on the trade or business he is engaged in.

The consistent view of this Court is that it is the burden of the tenant to prove both the above ingredients to establish that he is entitled to get the above benefit. (See Kochappan Pillai v. Chellappan (1976 KLT 1), Gouthami v. Indira Kunjamma (1994 (2) KLJ 201) Krishnankunju Reveendran v. Sukumara Pillai, 1999 (3) KLT 313) and Varghese Eapen v. Varghese (2001 (2) KLT 263)). A Full Bench of this Court has considered the matter in detail in Francis v. Sreedevi Varassiar (2003 (2) KLT 230 (FB)) and held that:

'22. In view of the above, it appears fair to say that the second proviso carves out an exception to the rule embodied in Section 11(3). The burden of proving the relevant facts lies on the tenant. The tenant has to prove that he is dependent on the income from the trade or business being carried on by him in the premises in dispute for his livelihood. He is to further prove that a suitable alternative accommodation is not available. While adjudging the suitability of the alternative accommodation, the Court shall not insist upon a mathematical equivalence of the area of rent. The only thing that the Court has to see is that the tenant should be able to carry on his existing activity in the new premises. The area may even be less. Still further, the rent should be almost equal to that which the premises in dispute would fetch at the relevant time. Truly, it is not possible to visualise all situations. It may happen that a building as old as that occupied by the tenant is not available. The rent for the new building is likely to be higher. In such situation, the Court shall be entitled to consider - Can the tenant pay the higher rent? Can he do his business in a lesser area? The mere fact that the rate of rent is higher shall not be enough. The relief shall be denied to the landlord only when it is found that the tenant cannot under any circumstances pay for or carry on his business in the new premises.'

Therefore, it is the duty of the tenant to prove that ingredients of second proviso to Section 11(3) are satisfied in this case. Clear guidelines are given in the above Full Bench decision regarding the manner in which the tenant should prove the above ingredients. Therefore, we are not repeating the same.

9. It was argued by the landlord that the original tenant was unable to prove this plea as he was having other business and he did not produce the account books of other three business he was having to prove that he is mainly depending upon the income from the business in the petition schedule building for his livelihood. But, this Court in the C.R.P. remanded the matter for reconsideration of the matter for a 'fresh look' considering the return of the landlord from Saudi Arabia. After remand, landlord was examined as P.W.2 and revision petitioner also again gave additional evidence. According to the revision petitioner, just like the landlord, he is also entitled to plead the subsequent events which was vital to the issue. We have already held that subsequent event of petitioner becoming the tenant after the death of the original tenant is a factor to be considered. But, whether all subsequent events after filing of the petition especially when the proceedings are pending for a long time in Court is the question to be considered on the facts of each case.

10. It was argued on behalf of the revision petitioner that the language of section shows that Rent Control Court shall not give any direction to vacate the premises if the tenant is depending mainly on the income derived from the business conducted in the petition schedule building for his livelihood if no other suitable building is available in the locality. Hence, it was contended that it is enough to prove that both limbs of second proviso to Section 11(3) are in existence at the time of filing the petition or at the time of order of eviction. In other words, if, at the time of order of eviction, suitable building should be available to shift the business. Court shall not grant order of eviction, if first limb of the second proviso is satisfied. It is argued on behalf of the landlord that when notice for eviction or at least notice on the petition is received, it is for the tenant to find out alternate suitable accommodation in the locality to do the business. Therefore, as far as protection under the second proviso, the facts as on the date of filing of the petition alone need be considered. The matter was considered in detail by a Division Bench of this Court in Kochappan Pillai v. Chellappan (1976 KLT 1). The Division Bench observed as follows at paragraph 11:

'As proviso is apart of the section itself the words 'direction to a tenant to put the landlord in possession' occurring in the second proviso to Section 11(3) should

mean the same direction that is referred to in the principal enacting provision in Section 11(3). Under Section 11(3) application for an order for eviction is contemplated based on the circumstances which exist on the date of the filing of the application and not on the date of its disposal. The landlord is not expected to file application in anticipation of change of circumstances in his favour by the time the application is disposed of. As the conditions mentioned in Section 11(3) have to exist on the date of the application to make the provisions of Section 11(3) applicable, to resist such an application based on the provisions of the second proviso which is a part of Section 11(3) the facts referred to in that proviso must also exist on that date. Consequently the point of time material for determining availability of other suitable building is the date of the application under Section 11(3) and not the date of the order for eviction. Any other interpretation is likely to lead to injustice. Ordinarily an application under Section 11(3) takes a long time for disposal and by the time it is finally disposed of in revision several years would have passed after the filing of the application. In the instant case itself although the application under Section 11(3) was filed on August 19, 1963 it is being finally disposed of only now, more than 12 years after. There may have been several alternative suitable buildings in the locality for the tenant to shift in 1963 but not one now. In such a case the fault for not having shifted in 1963 to one of the alternative buildings is of the tenant and not of the landlord.'

Same view was expressed by another Division Bench of this Court in *Chacko v. Lakshmi* (1997 (1) KLT 12). We are of the opinion that this is a matter to be considered based on facts of each case, nature of subsequent events, pleading of the parties, time lag to dispose of the petition for eviction etc. and a straight jacket formula cannot be given. While moulding the relief, Court can consider subsequent events also if they are very fundamental. In *D.K. Soni v. P.K. Mukerjee and Ors.* ((1988) 1 SCC 29), the Apex Court held that unless the Statute expressly prohibited, cautious recognition of subsequent events to mould the relief should be taken note off. As far as the facts of this case is concerned, we have seen that bona fide need existed at the time of filing the petition and it continues till now also. In the original pleading itself, it was contended by the landlord that there is no job security in Saudi Arabia and he wants to come back to set up a business in the petition schedule building. Subsequent event of his return from Saudi Arabia only

proved the bona fides of his original pleading and it is not against the original pleading. At the time when the case was filed, the then tenant had three business and it was not proved or established that he was mainly depending on the income from the business in the petition schedule building for his livelihood. On 31.5.1991, LA. No. 684 of 1991 was filed by the landlord in R.C.C. No. 223 of 1989 stating that his service is terminated and he also produced documents on that day to establish that he has returned to the native place permanently. Even at that time, original tenant was alive. Even if that is considered as a crucial date as the subsequent event noticed by the Court, at that time also, tenant was not able to prove that he was mainly depending on the income derived from the business in the petition schedule building for his livelihood. Therefore, at the time when he received the notice of the petition or when the matter was pending before the Rent Control Court or before the Appellate Authority or when he received the copy of the petition containing the plea that the landlord returned from Saudi Arabia, tenant was not entitled to get the benefit under the second proviso. Only during the pendency of the revision petition, C.R.P. No. 525 of 1992, that is, on 3.11.1994, original tenant died. It was contended on behalf of the landlord that the right of the tenant when eviction is sought for bona fide need is fixed under the proviso to Section 11(3) and it cannot be uprooted by supervening circumstances on the principles laid down by the Apex Court in *Rameshwar and Ors. v. Jot Ram and Ors.* (AIR 1976 SC 49).

11. Now, assuming that, the relevant data is the date of order of eviction, we will consider the question whether the present tenant is entitled to protection even after the death of the original tenant on the basis of the evidence adduced after remand taking all subsequent events. Second proviso to Section 11(3) has two limbs and it is the duty of the tenant to prove that both limbs are satisfied as held by the Full Bench of this Court in *Francis v. Sreedevi Varassiar* (supra). The second proviso chalks out an exemption to the rule empowering 11(3). Here, the burden of proof lies on the tenant to show that he is entitled to exemption. While adjudging the suitability of the alternate accommodation the Court shall not insist on a mathematical equivalence of the area or rent. The area may be little lesser or rent may be higher depending the present will have to be paid. It was not proved that he has not produced the balance sheet or profit and loss account of the

business run in the premises. Whether the business was carried on profit is a necessary element to consider whether he was depending mainly on the income for carrying on the business. If that was not a profit-making business, it cannot be contended that he was depending mainly on the income derived from the business for his livelihood. Whether he was getting any income from the business or whether he was paying any income tax etc. are not on record. As held in *Scoria Kuncheria v. Rita* (1999 (2) 4 KLT SN 2), the account books maintained by the tenant is the best evidence to prove that he is depending upon the income from the business in the petition schedule building. If it is not proved, he must suffer an adverse inference. After the matter, was remanded, present revision petitioner tenant was examined. It was after the death of his father. In cross-examination, he deposed as follows:

'..... I have not produced any document to show that I am eking out my livelihood from the income derived from the business done in the petition schedule building.'

Mere assertion in the chief examination is not enough. It is true that the Appellate Authority did not consider these points on the assumption that the legal heir of the tenant has got only the right of a legal representative in a suit. Under Section 20 of the Act, the revisional Court can consider the evidence for finding out the legality and propriety of the matter and the Rent Control Petition was filed in 1986 and almost two decades are over. Therefore, there is no need for remanding the matter for that purpose. From the evidence available, it is seen that the revision petitioner/tenant has not discharged the burden that he was depending mainly on the income derived from the business conducting in the petition schedule building for his livelihood.

12. Since first limb is not proved, there is no necessity to consider whether alternate suitable building is available in the locality for shifting the business of the tenant. The landlord has adduced evidence to show that there are vacant buildings and relied on Exts.A8 to A10 series of assessment receipts of the Municipality to show that during 1995 to 2000 suitable buildings were available in the same locality. The Rent Control Court was of the opinion that material point of time is the filing of the petition. It held as follows:

'Ext.A8 to A10 relates to the period 1995 to 2000. This petition is filed in the year 1986. So in the light of the above ruling it is pertinent to note that the availability of the building must be as on the date of application under Section 11(3).'

But, for the application of first limb, Rent Control Court considered the position after the death of the original tenant in November, 1994 and legal heirs were impleaded only in 1996. It cannot be contended by the tenant that crucial date for application of first limb is the date of order of eviction and second limb is the date of filing the petition. The petition was filed in 1986. In 1986, the original tenant was not able to prove that he was entitled to the benefit of second proviso to Section 11(3) as he has got other business and he was not depending mainly on the income from this business. It is the case of the tenant that subsequent event as on the date of order shall be considered. The original tenant died and his legal heir, present tenant, became the tenant only in 1997, and therefore. Exts.A8 to A10 cannot be discarded because the assessment registers of Kannur Municipality belongs to the years 1996 to 2000. According to the rent control court, even if new buildings are available, rents will be too exorbitant etc. cannot be taken as a ground. Exts.C2 and C3 are the plans and Ext.C1 is the Commission Report. In cross-examination after remand he deposed as follows:

'.... I enquired with one Kunhraman who is a property broker. Kunhraman is alive. On the southern side of the petition schedule building, facing station road is Old Madras Hotel. There a new building has come up and vacant buildings are available in that building. A multi-storeyed building is constructed in the Bharathi Hotel site.'

That also shows that alternate rooms are available. According to the Rent Control Court, it was not proved by the landlord that they are not suitable to the tenant. It is not necessary that alternate accommodation available should be exactly similar with the same plinth area. The Rent Control Court held as follows:

'The petitioner-landlord has not been able to prove by any concrete evidence that there are other vacant buildings available in that locality which would suit the requirements of the respondent. Under these circumstances I find that though there is some evidence to show that there are other vacant buildings available in

that locality there is no evidence to show that there are other buildings available in that locality to suit the needs of the respondents or to shift the entire business to a new premises.'

It shows that the Rent Control Court cast the burden on the landlord to prove that the tenant is not entitled to the benefit of second proviso to Section 11(3). It is settled law that the burden is on the tenant to prove that alternate buildings are not available and even if alternate buildings are available, it is not suitable for him. In any event, only after satisfying the first limb, second limb need be considered and we have already held that it is not proved that he is mainly depending upon the income derived from the business in the petition schedule building for his livelihood, and therefore, second proviso to Section 11(3) is not applicable.

13. Last question to be considered is whether the tenant is entitled to the benefit of Section 11(17) of the Act. For getting the benefit under Section 11(17), one has to be in possession of the building before 1940 as a tenant. It has come out in evidence that in 1963 Bata Shoe Company Limited was the tenant in the petition schedule building and the original tenant came into possession only after 1963. Further, no documentary or admissible evidence was adduced by the tenant to show that even the original tenant was in continuous occupation of the building before 1940, Production of a calendar without any details cannot establish that, he was in continuous occupation of the building from a date anterior to 1940 till the date of the petition. Further, in *Narayanan v. Shalima* (2003 (2) KLT 317 (FB)), a Full Bench of this Court held that protection under Section 11(17) can be claimed only by a tenant who was in possession of the building on or before 1940 and it cannot be claimed by his legal heir who succeeded the original tenant after 1940 as it is a personal right. It was concurrently found on the basis of evidence that even the original tenant was not in possession of the building in 1940, and therefore, the tenant is not entitled to the benefit of Section 11(17).

In the above circumstances, we hold that the bona fide need is proved and the revision petitioner/tenant was not able to prove that he is entitled to the benefit of second proviso to Section 11(3). All the ingredients for ordering eviction under Section 11(3) are satisfied. The tenant was also not able to prove that he is

entitled to protection under Section 11(17).

In the above circumstances, we are not interfering with the order of eviction passed by the Appellate Authority.

We note that petitioner and his predecessor were in occupation in the building and were conducting business in the building for about four decades and an immediate eviction will cause problem. In the above circumstances, we grant six months' time to the revision petitioner/tenant for vacating the premises on condition that he will file an affidavit within one month from today before the Rent Control Court undertaking:

- (1) that he will hand over vacant possession of the building on or before the expiry of six months from the date of this judgment;
- (2) that he will continue to pay the rent till he vacates the premises; and
- (3) that he will not induct any third parties to the building.

The Revision Petition is dismissed subject to the above observations.

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