

Raghavan Vs. Sreedhara Panicker

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SooperKanoon Citation : sooperkanoon.com/723034

Court : Kerala

Decided On : Nov-27-2000

Reported in : AIR2001Ker203

Judge : Mr. P.K. Balasubramanyan and; Mr. T.M. Hassan Pillai, JJ.

Acts : Kerala Buildings (Lease & Rent control) Act, 1965 - Sections 11(4), 20 and 21; Transfer of Property Act - Sections 108;

Appeal No. : C.R.P. No. 1132 of 1992

Appellant : Raghavan

Respondent : Sreedhara Panicker

Advocate for Def. : O. Ramachandran Nambiar, Adv.

Advocate for Pet/Ap. : A.P. Chandrasekharan, Adv.

Judgement :

ORDER

P.K. Balasubramanyan, J.

1. The petitioner in R.C.P. No. 158 of 1985 on the file of the Rent Control Court, Kozhikode, being the landlord of a building, is the petitioner in this Revision filed under S. 20 of the Kerala Buildings (Lease & Rent Control) Act. The landlord

sought eviction of the legal representatives of the tenant, one Kelappa Panicker, from the petition schedule building on the allegation that the building has been sublet by them to respondent No. 3 before the Rent Control Court Kelappa Panicker, the predecessor of respondents 1,2 and 4 to 8, was an Astrologer. He died in the year 1973. Respondent No. 3, before the Rent Control Court, according to him, had learnt astrology from Kelappa Panicker, the original tenant. His case was that he was practising the profession of that of an Astrologer alongwith Kelappa Panicker in the petition schedule building even during the life time of Kelappa Panicker. After the death of Kelappa Panicker and hence there was no sub-letting which would justify an order for eviction under S. 11(4)(i) of the Act. The Rent Control Court found that the case of being associated with Kelappa Panicker, set up by respondent No.3, had not been established. It also found that the case of partnership with heirs of Kelappa Panicker set up by respondent No. 3 has also not been established. But the Rent Control Court refused eviction to the landlord under S. 11(4)(i) of the Act, essentially on the ground that the landlord must have been aware of the presence of respondent No. 3 in the premises, since he was practising the profession of that of an Astrologer in the petition schedule building and from that, it could be inferred that the landlord had consented to the sublease. The Appellate Authority also found that the case of respondent No. 3 before the Rent Control Court that he was practising the profession of that of an Astrologer with Kelappa Panicker and subsequent to the death of Kelappa Panicker, he had entered into a partnership with the heirs of Kelappa Panicker, has not been established. The Appellate Authority also took the view that the landlord must have been aware of the presence of respondent No. 3 in the petition schedule building even while Kelappa Panicker was alive and thereafter and from this, it followed that no order for eviction under S. 11(4)(i) of the Act could be passed, since the landlord must be taken to have consented tot he sub lease. Thus, the Appellate Authority also refused eviction inspite of finding the sub lease, pleaded by the landlord.

2. Thus, inspite of finding that the exclusive possession has been transferred to respondent No. 3 before the Rent Control Court by the original tenant, Kelappa Panicker, the Appellate Authority has denied an order for eviction to the landlord by applying a theory of acquiescence on the part of the landlord to the exclusive

user of the building by respondent No.3. The Rent Control Court and the Appellate Authority have drawn inspiration from a decision of this Court in *Kalyanasundaram Pillai v. Ramamoorthy* (1985 KLT 922). In that decision it was held that, long silence on the part of a landlord is a strong corroborative circumstance in support of the contention of the tenant that there was consent to the sub letting. It was stated that if the subletting had been without the landlord's consent, it could be presumed that the landlord would not have been slow in instituting the proceeding for eviction as soon as he came to know it. It is submitted by learned counsel for the landlord that the decision relied on by the authorities below is based on a misunderstanding of the scope of S. 11(4)(i) of the Act and required to be reconsidered since the question, how far a theory of acquiescence can be invoked in the context of S. 11(4)(i) of the Act, has not been properly considered in that decision.

3. S. 11(4)(i) of the Act provides that a tenant is liable to be evicted if, after the commencement of the Act, the tenant, without the consent of the landlord, transfers his right under the lease or sublets the entire building or any portion thereof, if the lease does not confer on him the right to do so. The two circumstances in which a subletting by a tenant does not lead to an order for eviction under S. 11(4)(i) of the Act, are the circumstance where the lease or the instrument of lease confers on him the right to do so and the circumstance where the subletting is made with the consent of the landlord. According to us, in a case where the lease does not authorise the tenant to sublet, the consent of the landlord contemplated by the section is a consent obtained prior to the subletting or a consent for the subletting. The Section speaks of a transfer of the right under the lease or subletting without the consent of the landlord as a ground for eviction.

4. On a proper reading of the provision, it is clear that the subletting should be with consent, to escape the consequences envisaged by that provision. In other words, the consent must precede the subletting. It has to be noted that a sub tenant is not a tenant as defined in the Act and the sub tenant gets no protection under the Act. This position is further emphasised by S. 21 of the Act. It has even been held that even a sub tenant let in with the consent of the landlord only gets immunity from eviction under S. 11(4)(i) of the Act is not entitled to raise any other claim under

the Act. (See *Kammath v. Chandran*, 1989 (1) KLT 473 - 1989 (1) KLJ 292 and *Varghese Ittoop v. Ibrahim*, 1991 (2) KLT 394 = 1991 (2) KLJ 444). From the context also, it is clear that the subletting to escape the tentacles of S. 11(4)(i) of the Act should be one authorised by the lease or in the alternative, made with the consent of the landlord. Hence, it is not possible to import the theory of implied consent or acquiescence while dealing with a claim under S. 11(4)(i) of the Act.

5. It was held by the Supreme Court in *K.K. Krishnan v. M.K. Vijaya Raghavan* (AIR 1980 SC 1756) that notwithstanding the right available to a tenant under S. 108(j) of the Transfer of Property Act, a tenant would be liable to be evicted under S. 11(4)(i) of the Act even if there is not express prohibition in the lease deed regarding subletting and unless the lease deed itself specifically authorises a subletting. In *Janab M.P. Azad v. Fathim Sarohimi Suresh & Ors.* (1983 (1) RCJ 249) this Court held that a subletting or the assignment of a lease has to be treated as objectionable, unless the lease deed itself contains a term, permitting the subletting or the assignment. The Supreme Court in *Gappulal v. Thakurji Shriji Dwarkadheeshji & Anr.* (AIR 1969 SC 1291) held that the permission of a landlord for a subletting is not established from the mere fact that the landlord raised the rent, after the subletting. In *Hiralal Kapur v. Prabhu Choudhury* (AIR 1988 SC 852), the Supreme Court held that even in a case where, after subletting of a portion by the tenant, rent was being received by the landlord by way of two cheques, one drawn by the tenant and the other, by the sub tenant coupled with the fact that the landlord was aware that certain activities of the sub tenant was being carried on in a part of the premises, was not sufficient to establish that the landlord had accepted the sub tenant as a tenant in respect of the portion used by the sub tenant. In *Pulin Behari Lal v. Mahadeb Dutta & Ors.* ((1993) 2 SCC 629), the Supreme Court indicated that an inference of giving up of a right under a statute would not be easily drawn by invoking the theory of acquiescence in such cases. The Supreme Court held that mere knowledge of subletting and/or acceptance of rent, in the absence of proof of conscious relinquishment of right to eviction, would not amount to waiver by a landlord. To establish waiver of benefit conferred by provision of statute, conscious relinquishment of such benefit has to be proved. In *Ram Saran v. Pyare Lal & Anr.* (AIR 1996 SC 2361), the Supreme Court held that the Rent Act is a special statute governing and regulating tenancy

and sub tenancy. The provisions in this special statute supersede the general law of tenancy if the provisions of the special statute are incompatible with the general law of tenancy. Mere knowledge of the landlord about the occupation of the tenanted premises by a person other than the tenant and acceptance of rent for the tenanted premises tendered by the tenant in the name of the sub tenant will not create a sub tenancy unless induction of the sub tenant is made with the written consent of the landlord. Of course, in our Act, a written consent is not insisted upon. But, in the context of S.11(4)(i) of the Act and the insistence on the existence of an authorisation in the lease, for the subletting which is the other saving provision in favour of the tenant, it is certainly clear that the consent contemplated by S. 11(4)(i) of the Act is a consent to the subletting before the subletting and mere knowledge, inaction or the receipt of rent by the landlord even after somebody else is let into the building, would not lead to the loss of the right of the landlord under S. 11(4)(i) of the Act to evict the tenant. On a true interpretation of S. 11(4)(i) of the Act in the light of the decisions referred to above, we must hold that the view expressed in Kalyanasundaram's case (1985 KLT 922) cannot be accepted as correct. The said decision does not lay down the correct law.