

Mathai Antony Vs. Abraham

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Court : Kerala

Decided On : Jul-16-2004

Reported in : 2004(3)KLT169

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

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

Appeal No. : C.R.P. No. 1704 of 2001

Appellant : Mathai Antony

Respondent : Abraham

Advocate for Def. : K.S. Hariharaputhran; and George Mathew, Advs.

Advocate for Pet/Ap. : P. George William and; K.J. Eranimose, Advs.

Disposition : Revision dismissed

Judgement :

K.S. Radhakrishnan, J.

1. Tenant is the revision petitioner. Eviction was sought for by respondent landlord under Sections 11(4)(ii) and 11(4)(v) of Act 2 of 1965. Rent Control Court dismissed the petition. On appeal by the landlord Appellate Authority allowed eviction under Section 11(4) (v) of the Act, the legality of which is under challenge

in this revision.

2. The tenanted premises was let out to the respondent on 30.1.81 on a monthly rent of Rs.40/-. Landlord has provided electric connection to the shop room. As per the terms of the rent deed the tenant has to pay rent on the first of every month and also to pay the electricity charges. Rent was kept in arrears, so also the electricity charges to the Board. Due to the non-user of the premises the value and utility of the building was also reduced materially and permanently. Further due to the failure to pay electricity charges the Electricity Board disconnected the supply of electricity and later dismantled the equipments. Landlord had also filed O.S.90/96 for recovery of rent. Later the Kerala Buildings (Lease and Rent Control) Act was made applicable to Thanneermukkom Village, consequently he filed RCP.41/90 under Sections 11(2)(b) and 11(4)(v). The claim under Section 11 (4)(v) was dismissed and under Section 11 (2)(b) was allowed. Later he filed the present petition, RCP.1/96 under Section 11(4) (v) of the Act.

3. Tenant resisted the petition contending that the petition is barred by the principles of resjudicata. Further it was also stated that the tenanted premises is being used for storing cement and other materials and there is no necessity of opening the shop every day. Further it was also stated that the business conducted by the tenant in the tenanted premises is of such a nature that it does not require electricity. Landlord in order to establish his case got himself examined as PW. 1. PW.2 is Electrical Engineer examined on the side of the landlord. PW.3 is a local witness. Landlord produced Ext.A1 to A4 documents. C1 and C2 are Commission Reports. Commissioner was examined as PW.4. Tenant got himself examined as CPW.1. No documentary evidence was adduced on the side of the tenant.

4. The specific case pleaded by the landlord in his petition as well as in his oral evidence was that the tenant ceased to occupy the premises continuously for a period of more than six months prior to the date of filing of the petition without any reasonable cause and that the premises is not being used for the purpose for which it was let out. Landlord submitted intermittent opening of the shop or the mere presence of the tenant in the premises would not show that the tenant is

using the premises. To resolve the controversy it is necessary to examine the scope of Section 11(4)(v). The provision is extracted below for easy reference.

' 11 (4) A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building,--

(v) if the tenant ceases to occupy the building continuously for six months without reasonable cause.'

The word 'occupy' occurring in Section 11(4)(v) has got different meaning in different context. The meaning of the word 'occupy' in the context of Section 11(4)(v) has to be understood in the light of the object and purpose of the Rent Control Act in mind. The rent control legislation is intended to give protection to the tenant, so that there will not be interference with the user of the tenanted premises during the currency of the tenancy. Landlord cannot disturb the possession and enjoyment of the tenanted premises. Legislature has guardedly used the expression 'occupy' in Section 11(4)(v) instead of 'possession'. Occupy in certain context indicates mere physical presence, but in other context actual enjoyment. Occupation includes possession as its primary element, and also includes 'enjoyment'. The word 'occupy' sometimes indicates legal possession in the technical sense; at other times mere physical presence. We have to examine the question whether mere 'physical possession' would satisfy the word 'occupy' within the meaning of Section 11(4)(v) of the Act. In our view mere physical possession of premises would not satisfy the meaning of 'occupation' under Section 11 (4)(v). The word 'possession' means holding of such possession, animus possidendi, means, the intention to exclude other persons. The word 'occupy' has to be given a meaning so as to hold that the tenant is actually using the premises and not mere physical presence or possession. A learned single Judge of this Court in *Abbas v. Sankaran Namboodiri* (1993(1) KLT 76) took the view that the word occupation is used to denote the tenant's actual physical use of the building either by himself or through his agents or employees. The Division Bench of this Court of which one of us is a party (*Radhakrishnan, J.*), in *Rajagopalan v. Gopalan* (2004 (1) KLT SN P.54) interpreting Section 11(4)(v) took the view that occupation in the context of Section 11(4) means only physical occupation, which requires further

explanation. Occupation in the context of Section 11 (4)(v) means actual user. If the landlord could establish that in a given case even if the tenant is in physical possession of the premises, the premises is not being used, that is a good ground for eviction under Section 11(4)(v) of the Act. Section 11(4) uses the words 'put the landlord in possession' and not 'occupation', but 11(4)(v) uses the words 'the tenant ceases to occupy'. In Section 11(4)(v) in the case of landlord the emphasis is on 'possession' but in the case of tenant the emphasis is on 'occupation'. The word 'occupy' has a distinct meaning so far as the Rent Act is concerned when pertains to tenant, that is, possession with user.

5. The Rent Control Court in order to determine whether a tenant has ceased to occupy the premises can follow various tests. The Rent Control Court has to address itself the question whether the tenant was actually using the premises even if he is in physical possession. The Rent Control Court has to examine whether the attempt of the tenant is only to hold on to the premises without using it. The mere presence or the intermittent opening of the premises is not the sure test. Several factors would go into the mind of the Rent Control Court to determine as to whether the tenant is using the premises. We may in this connection refer to a decision of the, Apex Court in Ram Dass v. Davinder ((2004) 3 SCC 684) wherein the Apex Court was dealing with Section 13(2)(v) of the Haryana Urban (Control of Rent and Eviction) Act, 1973. Apex Court examined the meaning of the expressions 'possession' and 'occupy' and held as follows:

'The terms 'possession' and 'occupy' are in common parlance used interchangeably. However, in law, possession over a property may amount to holding it as an owner but to occupy is to keep possession of by being present in it. The rent control legislations are the outcome of paucity of accommodations. Most of the rent control legislations, in force in different States, expect the tenant to occupy the tenancy premises. If he himself ceases to occupy and parts with possession in favour of someone else, it provides a ground for eviction. Similarly, some legislations provide it as a ground of eviction if the tenant has just ceased to occupy the tenancy premises though he may have continued to retain possession thereof. The scheme of the Haryana Act is also to insist on the tenant remaining in occupation of the premises. Consistently with what has been mutually agreed

upon, the tenant is expected to make useful use of the property and subject the tenancy premises to any permissible and useful activity by actually being there. To the landlord's plea of the tenant having ceased to occupy the premises it is no answer that the tenant has a right to possess the tenancy premises and he has continued in juridical possession thereof. The Act protects the tenants from eviction and enacts specifically the grounds on the availability whereof the tenant may be directed to be evicted. It is for the landlord to make out a ground for eviction. The burden of proof lies on him. However, the onus remains shifting. Once the landlord has been able to show that the tenancy premises were not being used for the purpose for which they were let out and the tenant has discontinued such activities in the tenancy premises as would have required the tenant's actually being in the premises, the ground for eviction is made out. The availability of a reasonable cause for ceasing to occupy the premises would obviously be within the knowledge and, at times, within the exclusive knowledge of the tenant. Once the premises have been shown by evidence to be not in occupation of the tenant, the pleading of the landlord that such non-user is without reasonable cause has the effect of putting the tenant on notice to plead and prove the availability of reasonable cause for ceasing to occupy the tenancy premises.'

Apex Court held it is for the landlord to prima facie establish that the tenant has ceased to occupy the premises continuously for a period of more than six months. Once the landlord establishes that the tenant has ceased to occupy, it is for the tenant to establish that he is using the premises by adducing evidence of its user. The mere presence in the premises or the intermittent opening of the tenanted premises may not suffice. If the tenant is not using the premises he can show reasonable cause.

6. We may indicate so far as this case-is concerned the landlord has categorically stated in the petition that the tenant is not using the premises. Landlord has pointed out that electricity was disconnected and later dismantled. Landlord was examined as PW.2 to establish the said fact. PW.2, Electrical Engineer has specifically stated that current charges with respect to consumer No.3325 is in arrears upto September, 1987 and is in disconnection from October, 1987 and that the electric connection was dismantled on 6.8.1998 after notice due to non-

payment of arrears of current charges. It is the specific case of the landlord that it is for the tenant to pay current charges. PW.3 is a local witness. He has testified in support of the case of the landlord. According to him the tenanted premises kept locked for six months. A commission was taken out. Commissioner in his report and oral evidence has specifically stated that he has visited the premises five times, i.e. on 4.1.96, 5.1.96, 6.1.96, 12.1.96 and 20.1.1996. All those occasions the shop remained kept locked. Commissioner has noted that the window frames were in a dilapidated stage. He has noticed termitariums and cob webs inside the room. The front side folding door was found full of termites in full thickness and a doom without bulb was also found in the middle of the room. Commissioner has observed that for about 2 years the premises has not been put to use. The evidence adduced by the landlord would positively show that the building was not in use for more than six months continuously prior to the date of filing of the Rent Control Petition. On the side of the tenant, apart from his interested testimony no independent evidence was adduced either oral or documentary. In our view tenant has failed to discharge the onus. Consequently we are inclined to hold that the tenant ceased to occupy the premises within the meaning of Section 11(4)(v) of the Act.

Revision therefore lacks merits and the same would stand dismissed.

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