Tresa Vs. Joseph

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Court : Kerala

Decided On : Sep-29-2005

Reported in : 2005(4)KLT435

Judge : R. Bhaskaran and; K.T. Sankaran, JJ.

Acts : Kerala Buildings (Lease and Rent Control) Act, 1965 - Sections 2(3), 2(6), 11(2), 11(3) and 11(4) and 21; ;Kerala Buildings (Lease and Rent Control) Act, 1961 - Sections 11(4); ;Kerala Buildings (Lease and Rent Control) Act 1959 - Sections 11(4); ;Transfer of Property Act - Sections 116

Appeal No. : C.R.P. No. 304 of 2002

Appellant : Tresa

Respondent : Joseph

Advocate for Def. : Varghese C. Kuriakose and; Jacob Sebastian, Advs.

Advocate for Pet/Ap. : S. Sreekumar, Adv.

Judgement :
ORDER

K.T. Sankaran, J.

1. The landlords are the revision petitioners. They filed the Rent Control Petition under Sections 11(2)(b), 11(3) and 11(4)(i) of the Kerala Buildings (Lease and Rent Control) Act (hereinafter referred to as 'the Act'). The Rent Control Court dismissed the Rent Control Petition on all grounds. On appeal, the decision of the Rent Control Court was confirmed by the Appellate Authority.

2. The building belonged to late Alexander the predecessor in interest of the petitioners. The building was leased out to the first respondent. Whether there was any rent deed is not clear and no party has produced any rent deed.

3. According to the petitioners, the monthly rent fixed was Rs. 250/-. It was agreed that the tenant shall not sub-lease the building without the consent of the landlord. Rent was kept in arrears from 1.1.1988 onwards. The first respondent sub-let the building without the knowledge or consent of the landlord to the second respondent. Ext. A2 lawyer notice dated 7.12.1992 was issued to the first respondent demanding arrears of rent and termination of sub-lease. The notice was returned unclaimed as evidenced by Ext. Al. It was alleged that the petitioners bona fide require the building for own occupation to start a firewood shop and for sale of matted cudjons, bamboo etc.

4. The second respondent got himself impleaded in the Rent Control Petition. The first respondent contended that the rental arrangement commenced in May 1978 as per an oral lease. There was no prohibition regarding creation of sub-lease. The monthly rent was Rs. 120/-, which was enhanced to Rs. 250/- per month. Rent was not kept in arrears. The first respondent was running a saw mill under the name and style 'Palathingal Saw Mill' in the building. The business fell into heavy loss and the first respondent found it impossible to run the business. An agreement was entered into between the first respondent and the second respondent whereby the second respondent agreed to run the business and share the profits with the first respondent. On 12.4.1989, late Alexander, the landlord, granted permission to sub-let the building to any person of the first respondent's choice for a period of one year, as per Ext. B1 letter. That permission continued and was extended indefinitely which subsisted till the death of Alexander on 15.4.1991. It was contended that since the sub-lease was made with the

knowledge and consent of the landlord, the petition is not maintainable under Section 11(4)(i) of the Act. The bona fide need was also disputed by the first respondent. The second respondent raised similar contentions as raised by the first respondent.

5. The genuineness of Ext .B1 letter was disputed by the petitioners. They filed I.A. No. 796 of 1995 before the Rent Control Court to subject Ext. B1 for examination and comparison of the signature therein with the admitted signature of Alexander, by the Director of Forensic Science Laboratory, Thiruvananthapuram. The application was opposed by the first respondent. The Rent Control Court dismissed the application holding thus:

'The learned Counsel for petitioner submitted that another document admittedly signed by the landlord is produced before Court for comparison. In that case the court can very well compare the signature and arrive at a conclusion. If the court can form an opinion by comparison with the admitted document I hold that the document need not be sent to the expert for examination. The trial of the case has not started so far. Therefore, at this stage I find that the document need not be sent for examination. The petitioner can move the court as and when it becomes necessary.'

Later, the petitioners filed I. A.No. 1900 of 1997 for sending Ext.B 1 for comparison by an expert. That application was dismissed by the Rent Control Court by the order dated 15.10.1998, holding that the same prayer was rejected as per the order in I.A.No. 796 of 1995 and that there is no change of circumstances. The authorities below have not compared the admitted signature of Alexander with the signature in Ext.B 1. We do not think that it is necessary to get the opinion of an expert to decide the question whether Ext.B 1 was executed by late Alexander. We proceed on the basis that Ext.B1 was executed by late Alexander.

6. The Rent Control Court as well as the Appellate Authority held that the sub-lease was with the consent and permission of Alexander. This finding was arrived at on the basis of the documents Exts.B4 to B7, B11 to B14, B18 to B22, B31 to B36 and Ext.B38 which would show that the second respondent was in possession of the building. The authorities below also relied on Exts. B2 and B3

note books containing the signatures of Alexander for receipt of rent. The authorities below also held that no further request was made by the petitioners for comparison of the disputed signature in Ext. B 1 after the trial. On the finding that there was no objectionable sub-lease, it was held that the petitioners are not entitled to get an order of eviction under Section 11 (4)(i) of the Act. The authorities below found that the petitioners are not entitled to get an order under Section 11(2)(b) as no statutory notice was issued to the second respondent. The prayer for eviction under Section 11(3) was declined on the finding of fact that the bona fide need is not established. We are of the view that the authorities below were right in dismissing the petition under Section 11 (3) and no grounds are made out for interference in Revision.

7. Ext.B1 reads thus:

The question is whether this letter would take the case out of Section 11(4)(i). Section 11(4)(i) of the Act reads as follows:

'11. Eviction of tenants:--

(4) ...

(i) if the tenant after the commencement of this Act, without the consent of the landlord, transfers his right under the lease or sub-lets the entire building the or any portion thereof if the lease does not confer on him any right to do so:

Before the 1965 Act, Section 11(4)(i) in Act 29 of 1961 was as follows:

'(i) if the tenant after the commencement of this Act, 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 any right to do so: or'.

In the Kerala Buildings (Lease and Rent Control) Act 1959, Act 18 of 1959, Section 11(4)(i) was as follows:

'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.

(i) if the tenant has without the consent of the landlord transferred his right under the lease or sublet the entire building or any portion thereof, if the lease does not confer on him any right to do so or the landlord has not consented to such subletting: or'

Section 11(4)(i) of the present Act consists of two parts; one relating to the transfer of the tenant's rights under the lease and the other relating to the sub-lease. Transfer of the tenant's right if made without the consent of the landlord. Section 11(4)(i) would be attracted. If the tenant sub-lets the entire building or any portion thereof, if the lease does not confer on him any right to do so. then also Section 11(4)(i) is attracted. The expression 'without the consent of the landlord' relates only to the transfer of right under the lease; it does not apply to the sub-lease. As regards sub-lease to be not objectionable, the lease must confer on the tenant a right to do so. A consent letter issued by the landlord after the lease does not entitle the tenant to sub-let so as to avoid the application of Section 11(4)(i) of the Act. Even if consent is granted by the landlord after the lease, the landlord is entitled to apply under Section 11(4)(i), if the lease does not confer on the tenant a right to sub-let. If the consent given by the landlord to sub-let is in the form of a subsequent lease, certainly it would be conferment of power on the lessee to sublease as mentioned in Section 11(4)(i). A letter like Ext. B1 does not amount to a lease conferring a right on the tenant to sub-let. Ext. B1 has no characteristics of a lease. Therefore, it cannot be said that the lease confers a right on the tenant to sub-lease. A sub-lease and transfer of right of the tenant are distinct and different. In the case of sub-lease, the landlord has no privity of contract with the sub-lessee. The sub-lessee has no privity of contract only with the lessee. The explanation to Section 2(3) of the Act provides that a tenant who sub-lets shall be deemed to be a landlord within the meaning of the Act in relation to the sub-tenant. The definition of 'tenant' in Section 2(6) of the Act excludes 'a person placed in occupation of a building by its tenant' from the purview of the definition of 'tenant'. In the case of transfer of right of the tenant with the consent of the landlord, there would be privity of contract between the landlord and the transferee. In the case of transfer of lease, the original lessee does not retain any right in the leasehold. In the case of sub-lease, the original lessee retains his rights as a tenant and allows the sub-tenant to occupy the premises. A distinction between the transfer of right

under the lease and sub-lease is maintained in the wording of Section 11(4)(i) and different ingredients are to be satisfied to the application or non-application of Section 11(4)(i) in the case of transfer of lease and sub-lease. There is no case for the respondents that the lease specifically confers any right on the tenant to sub-let. There is no case for the respondents that there was a transfer of the right of the first respondent lessee to the second respondent with the consent of the landlord. Ext. B 1 cannot be treated as a consent to a transfer of the right of the first respondent. Ext. B1 would only apply to a sub-lease. Since Ext. B 1 is not a lease, it does not amount to a conferment of power on the first respondent to create sub-lease so as not to attract Section 11(4)(i).

8. That a sub-lease to be outside the purview of Section 11(4)(i) the lease must confer on the tenant a right to sub-let is clear from Section 21 as well. Section 21 reads thus:

'21. Order under the Act to be binding on sub-tenants:--

Any order for the eviction of a tenant passed under this Act shall be binding on all subtenants under such tenant, whether they were parties to the proceedings or not, provided that such order was not obtained by fraud or collusion. In cases where sub-letting is allowed under the original agreement of tenancy the sub-tenant shall be made a party to the proceedings if he had given notice of the sub-tenancy to the landlord.'

If the original agreement of tenancy confers power on the lessee to sub-let, even then a Rent Control Petition could be maintained against the lessee and sub-lessee on any of the grounds under the Act except Section 11(4)(i). The only difference is that if the sub-letting is allowed under the original agreement, the sub-tenant shall be made a party to the proceedings and if the sub-letting is not allowed under the original agreement of tenancy the sub-lessee need not be made a party to the proceedings. Section 21 can be taken as an aid to interpret Section 11(4)(i). Section 11(4)(i) when read with Section 21, it is clear that the sub-letting to be one which does not attract Section 11 (4)(i), should be a sub-lease by a lessee where the lease confers a right on him to sub-let.

9. The omission of the words 'or the landlord has not consented to such subletting' in Section 11 (4)(i) of the 1959 Act, while enacting the 1965 Act is certainly significant. The legislature, by that omission, intended to protect the sub-tenant from eviction only in cases where the lease confers a right to create a sub-lease.

10. Ext. B 1 does not mention to whom the building could be sub-let by the tenant. It could be to any one. The condition stipulated in Ext. B 1 is that it shall be only for a period of one year. There is no evidence to support the contention of the respondents that the permission granted under Ext. B 1 was extended to be operative till the death of Alexander. The courts below have not arrived at any such finding also. Since the permission granted under Ext. B 1 expired on 11.4.1990, the first respondent cannot contend that the sub-lease is with the consent of the landlord and that the lease confers on him a right to sub-lease. A person inducted as per the permission granted under Ext. B 1 cannot claim the right to hold over so as to bind the landlord. The Kerala Buildings (Lease and Rent Control) Act is a special statute governing and regulating tenancy and sub-tenancy. The provisions of the Act supersede the general law of tenancy. Though Section 2(6)(ii) of the Act recognises the principle of holding over, by , including in the definition of tenant 'a person continuing in possession after the termination of the tenancy in his favour', it excludes 'a person placed in occupation of a building, by its tenant'. Section 2(6)(ii) of the Act is incompatible with Section 116 of the Transfer of Property Act and therefore the Act supersedes the general law of tenancy, in the matter of holding over. (See Ram Saran v. Pyare Lal and Anr. : [1996]1SCR501). Therefore, the second respondent cannot claim any right to be in possession on the basis of Ext. B 1. The second respondent cannot claim immunity from eviction as well.

11. Ext. B 16 agreement dated 19.11.1991 shows that the first respondent transferred all his rights in 'Palathingal Saw Mill' to the second respondent for a consideration of Rs. 50,000/-. This agreement came into existence after the death of Alexander, the predecessor in interest of the petitioners. Ext. B 18 is not referable to the consent under Ext. B 1. Even if Ext. B 16 amounts to transfer of the whole right of the first respondent in the premises to the second respondent, it cannot be said that it was with the consent of the landlord as no such consent is

pleaded or proved. No such consent is given under Ext. B 1. Ext. B 16 makes the case of sharing of profits between the first respondent and the second respondent improbable, at least after the execution of Ext. B 18. Ext. B 16 shows that the first respondent retains no rights in the business. Therefore, the first respondent cannot claim any right under the lease and resist the petition for eviction.

12. What is the jural relationship between respondents 1 and 2 is especially within their knowledge and it is to be established by them. The first respondent has not given oral evidence. The second respondent, who was examined as RW1 stated in evidence that he does not know anything about Ext.B1 and that he has only the information as given by the first respondent. When Ext.B1 was shown to the second respondent (RW1) and asked as to who had written that document, he stated that he does not know. The first respondent was bound to adduce evidence in the case, in the nature of the contentions raised by the petitioners/The genuineness of Ext.B 1 is disputed by the petitioners. The second respondent is not a party to Ext.B1 and he does not know anything about Ext.B1. Therefore, the evidence of the first respondent would have been the most material evidence. But he failed to adduce evidence. An adverse inference is liable to be drawn against the first respondent for not adducing any evidence. We are fortified by the decision of the Supreme Court in Iswar Bhai C. Patel alias Bachu Bhai Patel v. Harihar Behera and Anr. : [1999]1SCR1097 in taking this view.

13. The authorities below relied on Exts. B2 and B3 to hold that rent was received by the landlord from the second respondent. Mere acceptance of rent from the sub-tenant does not stop the landlord from claiming eviction on the ground of sub-letting. (See Ram Saran v. Pyare Lal and Anr. : [1996]1SCR501 and Raghavan v. Sreedhara Panicker (2000 (1) KLT 772)). Ext.B3 is for the period before Ext.B1 and therefore, it is not relevant at all. Ext.B2 covers the periods from February 1984 to March 1991. There is a seal of Palathingal Saw Mill affixed on the inside cover of Ext.B2 book. At the page commencing from March 1989, the seal of Kanjirathingal Saw Mill is affixed at the top of the page. The entries thereafter do not disclose that the rent was received from the second respondent. RW1 has stated in evidence that he was running Kanjirathingal Saw Mill at Vyttila. Therefore, mere presence of the seal of Kanjirathingal Saw Mill in Ext.B2 would

not lead to the conclusion that Alexander was receiving rent from the second respondent. Genuineness of Exts.B2 and B3 is also disputed by the petitioners. The signatures of Alexander in Ext.B 1 and at the relevant pages in Exts.B2 and B3 are not proved. The occupation of the building by the second respondent by itself is not very relevant for the purpose of considering the ground under Section 11(4)(i). The question is whether the respondents are liable to be evicted under Section 11(4)(i) of the Act and whether the ingredients of Section 11(4)(i) are satisfied. We are of the view that the authorities below were not right in holding that the petitioners have not established the ground under Section 11(4)(i) of the Act. We hold that the petitioners are entitled to get an order of eviction under Section 11(4)(i) of the Act.

14. In so far as the ground under Section 11(2)(b) is concerned, the authorities below held that the petitioners are not entitled to an order since no notice was issued to the second respondent. This finding was arrived at on the basis that the sub-lease was a valid one as permitted by the landlord. Notice was sent to the first respondent which was returned as unclaimed. This is sufficient notice in the eye of law. Since we have held that the respondents cannot claim immunity from eviction under Section 11(4)(i), necessarily we have to hold that second respondent is not entitled to get notice and that the petitioners are entitled to claim eviction on the basis of arrears of rent as well.

The Civil Revision Petition is thus allowed in part and the order of the Rent Control Court and the judgment of the Appellate Authority are set aside in respect of . the grounds under Section 11 (2)(b) and 11(4)(i). The Rent Control Petition shall stand allowed under Section 11(2)(b) and 11(4)(i) of the Act. The dismissal of the Rent Control Petition under Section 11(3) is confirmed. However, taking into account the fact that the second respondent is running a saw mill for several years, we are of the view that it is only reasonable to grant six months' time to the respondents to vacate the premises, on condition of each of the respondents shall file affidavit before the Rent Control Court, within one month from today, undertaking to vacate the building on or before the expiry of six months and deposit arrears of rent within one month and continue to deposit an amount equal to the monthly rent on or before the due date till the building is vacated.