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Ganesh Vs. Varghese

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Court : Kerala

Decided On : Nov-19-2004

Reported in : 2005(1)KLT282

Judge : K.S. Radhakrishnan and; K. Thankappan, JJ.

Acts : Kerala Buildings (Lease and Rent Control) Act, 1965 - Sections 11(3), 11(4), 18 and 20

Appeal No. : C.R.P. No. 532 of 2002

Appellant : Ganesh

Respondent : Varghese

Advocate for Def. : E. Subramani,; S. Easwaran and; T. Krishnan Unni, Ad

Advocate for Pet/Ap. : V. Giri,; S.K. Ajaya Kumar and; Chacko (Kumili), Adv

Disposition : Revision allowed

Judgement :
ORDER

K.S. Radhakrishnan, J.

1. Landlord is the revision petitioner. Eviction was sought for Under Sections 11(2)(b), 11 (3) and 11 (4)(i) of Act 2 of 1965. Rent Control Court disallowed the

claim Under Sections 11(2)(b) and 11(3) of the Act, but allowed the claim Under Section 11(4)(i) of the Act. Fifth respondent before the Rent Control Court, the alleged sublessee, filed appeal R.C.A. No. 96 of 2001 before the Appellate Authority against the finding rendered Under Section 11(4)(i) of the Act. No appeal was preferred by the landlord against the finding Under Sections 11 (2)(b) and 11 (3) of the Act. Appellate Authority on facts confirmed the finding of the Rent Control Court holding that the original tenant had sublet the premises to fifth respondent, but disallowed the claim placing reliance on the decision of the Apex Court in A.S. Sulochana v. Dharmalingam, (1987) 1 SCC 180, holding that the legal heirs of the tenant cannot be visited with the sin committed by the deceased tenant and hence reversed the decission of the Rent Control Court Under Section 11(4)(i) of the Act.

2. Landlord though did not file an appeal against the finding Under Section 11 (3) raised it as an issue before the Appellate Authority. Rent Control Appellate Authority took the view that even after satisfying the ingredients stipulated in Section 11 (3) and the provisos thereunder landlord must further prove that the claim is bona fide. Appellate Authority further found that the landlord has inherited large extent of properties from his father and being the only son, he would not venture into another business. Further Appellate Authority also noticed that the landlord had failed to state that he has got other buildings and that the landlord has failed to show special reasons why those buildings are insufficient for his requirements. Holding so, finding of the Rent Control Court Under Section 11(3) was confirmed and the Rent Control Petition was dismissed. Landlord is aggrieved by the findings entered by the Appellate Authority in this revision.

3. Counsel appearing for the petitioner Sri Chacko (Kumili) took us elaborately through the pleadings, evidence and the law on the point and argued his case ably. Counsel submitted that Appellate Authority has committed a grave error in rejecting the claim Under Section 11(4)(i) of the Act, placing reliance on the decision of the Apex Court in Sulochana's case, supra, (1987) 1 SCC 180. Counsel pointed out that Sulochana's case was subsequently overruled in Parvinder Singh v. Renu Gautam, (2004) 4 SCC 794. Counsel submitted on facts both the Rent Control Court and the Appellate Authority have concurrently found

that the fifth respondent in the Rent Control Petition is a sublessee and men should not have rejected the petition. Counsel therefore prayed that the revision be allowed applying the principle laid down by the Apex Court in Parvinder Singh's case, supra. Counsel also submitted that the landlord is also entitled to get an order of eviction Under Section 11(3) as well. Counsel submitted that the Rent Control Petition was filed on the plea that the landlord is unemployed and intends to start business in readymade garments in a large scale including manufacture, wholesale and distribution. For the said purpose he bona fide required the tenanted room No. XI/60. Further it is also his case that landlord is in possession of some space in the upstairs of that building. Counsel submitted that since the upstair portion is kept for the same business, the first proviso to Section 11 (3) would not apply and even if it is applied he has shown special reasons. The upstair portion, it is stated, is required for the manufacture and for stocking of garments and the same is not suitable for the display and sale. For the purpose of display and sale the petition schedule room is highly essential and the landlord has no other suitable room or building for that purpose except the scheduled building. Counsel submitted 'that the landlord has got the ability and experience to start such a business in a large scale. Counsel submitted that the mere fact that the father had got independent business and that the son was assisting the father in the business does not mean that the son shall not start his own business or widen the business net work. Receipt of rent from the alleged sub lessee, counsel submitted, is not a ground to hold that there was acquiescence.

4. Counsel appearing for respondents 1 to 4 before the Rent Control Court Sri Krishnan Unni, raised a preliminary objection stating that the Appellate Authority was not justified in framing an issue on the claim Under Section 11(3) with out the landlord filing an appeal Under Section 18 of the Act. Counsel submitted having failed to file an appeal Under Section 18 of the Act before the Appellate, Authority landlord should not have been allowed to raise such an issue Under Section 20 of the Act. Counsel also tried to distinguish the decision of the Apex Court in Firm Sagarmal Vishnu Bhagwan v. Gauri Shankar, (1988) 4 SCC 791, and tried to explain the decision of a Division Bench of this Court in Santha v. 1st Addl. District Judge, 1994 (1) KLT .516. Counsel submitted, so far as this case is concerned, landlord has failed to file an appeal before the Appellate Authority, consequently

he is not entitled to raise the plea Under Section 11(3) in revision. Counsel submitted on merits also landlord is not entitled to get an order of eviction Under Section 11(3) of the Act.

5. Counsel also submitted that the Appellate Authority has committed an error in holding that the fifth respondent is the sublessee. Counsel pointed out that original lease was in favour of Varkey, the father of fifth respondent. Brothers contributed to the business under the name and style Pottas group of concerns with Varkey, being the father of the fifth respondent. Further, it was stated, Ext. P1 was executed by Ittan Pillai on behalf of the partnership business. On behalf of the partnership firm if the fifth respondent is doing the business it cannot be characterised as a business conducted by a sublessee. Counsel therefore attacked the finding of the Rent Control Court and the Appellate Authority that the fifth respondent is a sublessee. In any view counsel submitted that no relief could be granted Under Section 11(3) or Under Section 11(4)(i) of the Act. Counsel appeared for the fifth respondent, the alleged sublessee, Sri E. Subramoni also supported the contention raised by Sri Krishnan Unni.

6. We may first examine whether the Appellate Authority is justified in raising an issue Under Section 11(3) in a case where landlord had failed to file an appeal on the adverse finding rendered by the Rent Control Court. Rent Control Court has ordered eviction Under Section 11(4)(i) of the Act. So far as the landlord is concerned, he is already armed with an order of eviction and there is no purpose in further litigating the matter even if the Rent Control Court has rejected one of the grounds raised by him for evicting the tenant. Landlord will always be hopeful that the order which is in his favour would be upheld and in a given case if the tenant is not preferring an appeal Under Section 18 of the Act against the order of eviction, the question of filing appeal by the landlord does not arise since he is already armed with an order of eviction. It is not the law, once tenant has filed an appeal aggrieved by the order of eviction landlord shall also file an appeal or cross appeal challenging all the findings rendered against him even if the order of eviction is in his favour. In appeal if the Appellate Authority is likely to disagree with the order of eviction it is always open to the landlord to attack the findings against him on other grounds and try to sustain the order of eviction on the basis

of evidence already on record. Landlord is not raising any new ground or adducing fresh evidence but only attacking the findings on the basis of available evidence on record. Though Order .XLI Rule 22 of the Code of Civil Procedure is not specifically applicable to appeals Under Section 18 or to revisions Under Section 20 of the Act, the principle contained therein would always apply for Courts to do complete justice between the parties. Order XLI Rule 22 entitles the party not only to support the finding appealed against but also to state that the finding against him in the Court below in respect of any issue ought to have been in his favour. Such a contention is being raised on the basis of the pleadings already raised and also by the oral and documentary evidence already adduced. We are therefore in complete agreement with the principle laid down by the Division Bench of this Court in Santha v. 1st Addl. District Judge, 1994 (1) KLT 516. We therefore hold even without filing an appeal Under Section 18 of the Act before the Appellate Authority, he can still challenge the findings adverse to him in the appeal and later in a revision preferred Under Section 20 of the Act.

7. We have already indicated that both the Rent Control Court and the Appellate Authority have concurrently found that fifth respondent before the Rent Control Court is the sublessee. Ext. A1 is the registered lease deed executed on 11.9.1976 a fact which has been conceded by the parties. Ext. A1 has been executed in favour of one Ittan Pillai, brother of the sublessee, husband of the first respondent and father of respondents 2 to 4. Respondents 1 to 4 before the Rent Control Court admittedly are the legal heirs of Ittan Pillai and fifth respondent is only the brother of Ittan Pillai. Ittan Pillai died on 26.4.1994, before the filing of the Rent Control Petition. Therefore tenancy rights devolved on his legal heirs and not on his brother, the fifth respondent. Landlord noticed the presence of the fifth respondent, brother of Ittan Pillai and not his legal heirs. The landlord therefore issued lawyer notice on 27.6.1998 for terminating the sublease. Though reply notice was sent on 10.9.1998 sub tenant was not evicted which led to the filing of the Rent Control Petition. Ext. A1 is the registered document which specifically states that Ittan Pillai had taken the building on rent. There is nothing to show that the building was taken on rent by the partnership firm of which fifth respondent the alleged sublessee was a partner. Various expressions used in Ext. A1 itself would indicate that rent deed was executed by Ittan Pillai in his individual capacity and

not for and on behalf of the partnership firm. Further Ittan Pillai has personally undertaken in Ext. A1 that he would not sublease the premises to any one.

Further Ext. B6 partnership deed would not show that fourth respondent who is one of the legal heirs of Ittan Pillai had retired from the partnership and the alleged sublessee, the fifth respondent, continued the business, Ext.B7 is the copy of the partnership deed in respect of Pottas Departmental Stores. Ext.A5 is copy of the assessment register of Muvattupuzha municipality for the period 1983-1988 which would show that during the period Pottas Textiles was functioning in the room and Ext. A5 assessment register of the year 1989-1994 would show that Pottas Departmental Stores is functioning in the rented premises.' The fact that the sublessee is the Managing Partner of Pottas Departmental Store functioning in the tenanted premises is not in dispute. Facts would evidently show that none of the legal heirs of Ittan Pillai has got any interest in the partnership firm which is being now run by the fifth respondent, brother of Ittan Pillai. If it is the case of the fifth respondent that the partnership was in existence before the execution of Ext. A1 and he had continued the business conducted by the father Varkey it is for him to establish the same. Assuming that partnership firm was conducting the business, Ext. A1 extinguishes those rights since that is a registered document. Ext. A1 registered deed refers to Ittan Pillai as the tenant. We have already indicated that as per Ext. A1 building was leased out to Ittan Pillai and not to the partnership firm or to any of the legal heirs of Varkey. In such circumstances we are in agreement with the Rent Control Court and the Appellate Authority that the fifth respondent is a sublessee. We have already indicated that the Appellate Authority after having found that fifth respondent is a sublessee, dismissed the plea of the landlord on the ground that the sin was committed by the original tenant and not by the legal heirs of Ittan Pillai.

8. In Sulochana's case the Apex Court held that the offending subletting must be by the tenant sought to be evicted himself and not by his predecessor and it was held that subletting by late father of the tenant cannot be put against the son. This view was overruled by the Apex Court in Parvinder Singh's case. (supra) A three Judges Bench of the Apex Court in K.Ganesh Shetty v. Sri A.K. Jayarama Shekaand and Ors., (2004) 6 Supreme 415, affirmed its earlier decision in

Parvinder Singh's case, and held as follows:

'The sole question which arises for decision in these appeals is whether the High Court was justified in refusing to evict the tenant and the sub-tenants deserved to be treated with mercy. The High Court drew support from the decision of this Court in A.S. Sulochana v. Dharmalingam, (1987) 1 SCC 180, according to which if the sub-tenancy was created by a tenant and the tenant had died then the legal heirs of the tenant and the sub-tenants could not be evicted 'for the sin committed by the deceased tenant'. The view of the law so taken in A.S. Sulochana 's case, stands overruled. (see Parvinder Singh v. Renu Gautam (Supra). The sub-tenancy was created in 1978 without the consent of the tenant. The finding as to creation of sub-tenancy has been recorded by the learned District Judge on appreciation of evidence within his jurisdiction and has been upheld by the High Court. We find no reason to interfere with that finding of fact. The legal consequences must therefore follow. The landlord has successfully made out a ground for eviction and the tenant must be evicted along with the subtenants'.

In Ganesh Shet's case, (2004) 6 Supreme 415, we notice no reference was made to the earlier decision of the Apex Court in Imdad Ali v. Keshav Chand, (2003) 4 SCC 635. It is clear from the principla laid down in Indad case, (2003) 4 SCC 635, Parvinder Singh's case, (supra) and Ganesh Shet's case, (2004) 6 Supreme 415, that the Apex Court is not approving the dictum laid down in Sulochana's case, (1987) 1 SCC 180. In Imdad Ali v. Keshav Chand, (2003) 4 SCC 635, the Apex Court also did not find favour with the general observation made in Sulochana's case, supra, and held as follows:

'It matters not whether such default is made by the original tenant or by his successor inasmuch as the successor-in-interest of the original tenant continues to be a tenant within the meaning of the provisions thereof. By reason of death of the original tenant, a new tenancy is not created. A successor-in-interest of a tenant holds his tenancy right subject to rights and obligations of his predecessor. He does not and cannot claim a higher right than his predecessor. It is now well settled that a person by reason of inheritance or assignment does not deserve any better title than his predecessor, and, thus, the right which the original tenant did

not possess cannot be passed on to his successor'.

Sulochana's case has been overruled in Parvinder Singh's case and later quoted with approval by a three Judges Bench of the Apex Court in Ganesh Shet's case, (2004) 6 Supreme 415. Landlord is therefore entitled to succeed on point of law. The finding of the Appellate Authority that since the objectionable sublease was by the original tenant and not by respondents 1 to 4 and hence they cannot be visited with the sin committed by the original tenant cannot be sustained. In such circumstances, we are inclined to sustain the finding of the Rent Control Court Under Section 11(4)(i) of the Act and reverse that of the Appellate Authority and order eviction Under Section 11(4)(i) of the Act.

9. Counsel appearing for the tenant further submitted that even if the fifth respondent is the alleged sublessee, landlord has recognised him as the tenant by accepting rent from him. According to him, tenant was paying rent under Ext. X1 series and Ext.X2 series. Exts. B2 to B4 receipts issued by Muvattupuzha Municipality were pressed into service by the tenant to show that rent was received by P. Warkey, father of the landlord. Landlord took the view that Ext.Xl series and Ext. X2 series were signed in the capacity of Managing Partner of Pottas Departmental Store. Mere presence of the fifth respondent as brother of Ittan Pillai did not cast any doubt in the mind of the landlord. The fact that legal heirs of Ittan Pillai had retired-from the partnership on reconstitution itself is a fact which is within the knowledge of the legal heirs of Ittan Pillai and the fifth respondent. Mere fact that rent has been received at the instance of the petitioner by his father does not mean that he had recognised the sublessee as his tenant. We are of the view, acceptance of rent by the landlord from the sublessee is not a ground to hold that the landlord has recognized the sublessee as the tenant. In this connection we may refer to the decision of the Apex Court in Ram Saran v. Pyarelal and Anr., AIR 1996 SC 2361. A Division Bench of this Court in Ahammed Kabeer v. Salma Beevi, 1992 (1) KLT 735, also took the same view. Reference was also made to the decision of the Apex Court in P.John Chandy and & Co. Pvt. Ltd. v. John P. Thomas, (2002) 5 SCC 90. The Apex Court in that case held that from the mere fact that landlord started accepting rent no inference of authorised sub tenancy can be drawn nor inference of implied consent and the landlord was

not estopped from seeking eviction on the ground of unauthorised subletting. Therefore no adverse inference can be drawn against the landlord on the mere fact that he had received rent from the alleged sublessee.

10. Landlord may be eking his livelihood from the rental income derived from the tenanted premises. Payment of rent by the alleged sub tenant and the issuance of receipt thereof by the landlord by itself would not defeat the rights of the landlord in seeking eviction under the Rent Control Act. Noticing that the tenant has already sublet the premises to the sublessee if the landlord is not receiving rent in many of the cases the landlord will be the loser. Delay in disposal of rent control proceedings at various stages is well known. Even after the culmination of rent control proceedings, for realisation of rent the only remedy is to file a civil suit against the tenant or the sub tenant, as the case may be. This itself would be time consuming and expensive. We have therefore no hesitation to hold that receipt of rent by the landlord during the currency of sublease by itself from the alleged sublessee is not a ground to hold that he is not entitled to seek eviction Under Section 11 (4)(i) of the Act. In such an event, in our view, there is no question of waiver of estoppel or acquiescence.

11. We may now examine whether the reasoning of the Courts below in rejecting the claim of the landlord Under Section 11(3) is legal or not. We have gone through the evidence in the case. It is the specific case of the landlord that he wanted to start independent business of his own. He is in occupation of the upstair portion of the tenanted premises where he intends to put up manufacturing unit, display and sale and for that purposes he required the tenanted premises. Since he wanted to start display and sale of the items he required the entire premises. True that he let out small portion in the ground floor of the Indian Coffee House which is hardly sufficient for his requirement. Letting out of the premises to Indian Coffee House is much prior to the filing of the Rent Control Petition. Further since the landlord requires the tenanted portion also for his business the question of application of the first proviso does not arise. Rent Control Court and the Appellate Authority have committed error in holding that the petitioner's father has got large volume of business and that the petitioner being the sole son he is disabled from starting another business. Facts would indicate that landlord's father was having

various kinds of business and therefore there is no reason why the petitioner son shall not start other kinds of business in which he has got interest. One of the areas of his interest is garment business. Reference may be made to the decision of the Apex Court in Akhileswar Kinan v. Muslaqum, (2003) 1 SCC 462. Mere fact that he had inherited the business of his father does not mean that he shall not start any other types of business.

12. The Appellate Authority has rightly noticed that landlord's father was a successful businessman having multi farious business activities. That itself would indicate that his son also can indulge in multi farious business activities. The reasoning of the Appellate Authority that since he is the sole son of the father he shall not start any other type of business, in our view, is perverse.

13. The Appellate Authority also took the view that the claim is not bona fide. The reasoning of the Appellate Authority even after entering a finding that the need is bona fide still the landlord has to withstand the test of Section 11(10) is not a correct proposition of law, so held by this Court in Aboobacker v. Sahithya P.S. Sangham Ltd., 2004 (2) KLT 947. We have already held that once the bona fide need is established and that the tenant is not successful in establishing the first and Second provisos, the landlord cannot be non suited on the ground that the claim is not bona fide. The expression 'claim' used in Section 11(10) is nothing but the ground mentioned inSection 11 (3), that is, bona fide need. The Rent Control Court already found that the tenant is not entitled to the benefit of the Second proviso. So also the Appellate Authority.

14. In such circumstances, we are inclined to allow this revision and order eviction Under Sections 11(3) and 1 1(4)(i) of the Act. Considering the facts and circumstances of this case, the tenant is given time upto 31.3.2005 for vacating the premises on condition that he should file an undertaking in the form of an affidavit before the Rent Control Court within one month from today stating that he would vacate the premises within the aforesaid period and would pay arrears of rent, if any, and future rent, failing which it would be open to the landlord to execute the order.

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