

Satheesan Vs. Abdul Rahiman

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Court : Kerala

Decided On : Aug-14-2003

Reported in : 2003(3)KLT1119

Judge : K.S. Radhakrishnan and; Pius C. Kuriakose, JJ.

Acts : Kerala Buildings (Lease and Rent Control) Act, 1965 - Sections 11(2) and 11(3)

Appeal No. : R.C.R. No. 60 of 2003

Appellant : Satheesan

Respondent : Abdul Rahiman

Advocate for Def. : R. Lakshmi Narayan and; R. Ranjini, Adv.

Advocate for Pet/Ap. : K. Ramakumar, Adv.

Disposition : Revision petition dismissed

Judgement :

ORDER

K.S. Radhakrishnan, J.

1. Tenants are the revision petitioners. R.C.P. No. 176 of 1998 was filed by respondents 1 to 4 herein for eviction of the tenants under Sections 11(2)(b) and

11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965. Rent Control Court allowed eviction under Section 11(3) of the Act. Referring to the first limb of the second proviso to Section 11(3), it was held that tenant is eking his livelihood from the income derived from the business conducted in the tenanted premises. Tenant was however found not entitled to the benefit of the second limb of the second proviso to Section 11 (3). Matter was taken up in appeal by the tenant by filing R.C.A. No. 104 of 2001. Appellate Authority confirmed the finding of the Rent Control Court and dismissed the appeal. Tenant took up the matter before this court in C.R.P. No. 920 of 2002. A Division Bench of this court while disposing of the revision petition, held as follows:

'We see no ground to interfere with the finding as to bonafide and with regard to application of first proviso as we have held that the building said to have been in possession of the landlords is not suitable for the intended business. Therefore, finding under the first proviso to Section 11(3) requires no interference in a revisional proceeding.'

The Bench however remanded the matter back to the Appellate Authority for reconsideration of the finding on the second proviso to Section 11 (3). Appellate Authority has passed the impugned order dated 30.05.2003 and held that the tenants have failed to discharge the burden under the second proviso to Section 11(3) of the Act and consequently order of the Rent Control Court granting eviction was upheld under Section 11(3) of the Act. Aggrieved by the same tenants have filed this revision petition.

2. Sri. K. Ramakumar, counsel appearing for the revision petitioners, contended that since the Rent Control Court as well as the Appellate Authority found that tenants are eking livelihood from the income derived from the business conducted in the tenanted premises, this court in revisional jurisdiction is not justified in upsetting that finding. Counsel also submitted that there was no challenge as such against the said finding by the landlord. Counsel submitted that in effect in the remand order this court only directed the Appellate Authority to examine the finding on the second limb of the second proviso to Section 11(3). We find it difficult to accept the contention of the counsel. In the remand order, Division

Bench of this court, after discussing both the limbs of the second proviso to Section 11(3), felt that the Appellate Authority has to examine both the limbs of the second proviso to Section 11(3). Petitioners are bound by the remand order. Therefore, Appellate Authority is justified in examining both the limbs of the second proviso to Section 11(3). Further the finding that the building is bonafide required by the landlord has also become final by the order of the Division Bench of this court in C.R.P. No. 920 of 2002, and that the question directed to be considered by the Appellate Authority was whether the tenants are entitled to the benefit of both the limbs of the second proviso to Section 11(3) of the Act. We are therefore concerned only with the question whether tenants have discharged the burden under the second proviso to Section 11(3).

3. With regard to the said question, we may refer to essential facts. We will refer to the parties according to their status in the rent control petition. Petition schedule building bearing C.C.Nos. 40/6925 and 40/6926 was rented out to the tenants on a monthly rent of Rs.900/-. The building is situated on the side of M.G. Road, Ernakulam where tenants are conducting hotel by name 'Padma Cafe'. The building is bonafide required by petitioners 2, 3 and 4 who do not have any business or employment of their own and decided to start a business in stationery and plastic wares and for their own occupation. First petitioner is doing business in stationery and has the financial capacity to invest large amounts to conduct business in the scheduled building. Tenants resisted the petition contending that there is no bonafides in the plea. It was stated that the landlord is having other building in the locality. The attempt is only a ruse to evict the tenants. We have already indicated, the finding that the building is bonafide required by the landlord has become final. So also the finding that the landlord has no other suitable building of his own to conduct business. It is well settled by catena of decisions of this court that the burden is on the tenant to prove both the ingredients of the second proviso to Section 11(3). We may refer to the second proviso for easy reference.

'Provided further that the Rent Control Court shall not give any direction to a tenant to put the landlord in possession, if such tenant is depending for his livelihood mainly on the income derived from any trade or business carried on in such

building and there is no other suitable building available in the locality for such person to carry on such trade or business.'

This Court in *Thomas v. Joseph* (1986 KLT 392) and *Muhammed v. Pathukutty Umma* (1992 (2) KLT 736) has held that notwithstanding the proof of bonafide, need landlord are not entitled to evict the tenant unless the ingredients of the second proviso are found against the tenant. Tenant has to prove that he has no other source of income and that he is solely depending on the income derived from the business carried on in the building for his livelihood. It is not enough that the tenant proves that he is depending upon the income derived from the business conducted in the building, he has to further prove that there is no other suitable building available in the locality for him to carry on such trade or business.

4. We may first examine whether in this case tenant has discharged the burden of showing that he is eking his livelihood on the income derived from the business conducted in the tenanted premises. PW. 1 who is one of the landlords examined submitted in cross-examination that tenants are conducting lodge by name Devi Lodge. R.W.I tenant admitted in his chief examination that he was a partner of Devi Lodge till 1996. It was also stated that he is an income-tax assessee. It has also come out in evidence that they are maintaining sales-tax register. It is admitted in his evidence that he is maintaining accounts. In the absence of proof of his income from his business and his involvement in the Devi Lodge, we are of the view, tenant has not succeeded in establishing that he is depending for his livelihood mainly on the income derived from the business conducted in the scheduled building. We therefore agree with the view of the Appellate Authority that tenant is not entitled to get the benefit of the first limb of the second proviso to Section 11(3) of the Act.

5. We may now examine whether tenant had discharged the burden of showing that there is no other suitable building available in the locality for him to carry on his trade or business. It is well settled that burden is on the tenant to prove that there is no Vacant building available in the locality. Reference was made to the decision in *Krishnakunju v. Raveendran* (1999 (3) KLT 373). We find landlord has stated in Ext. A1 about the availability of other buildings in the locality. In the reply

notice, . Ext. A2, there is no specific denial by the tenant. It is stated in Ext. A2 as follows:

'As stated in your notice, the availability of other building sites in the locality was enquired into. The only ground floor building available just opposite is not available on rent. They are going to sell the same for a price of Rs. Eight Thousand per square feet. The two other places available are on first and second floors. They require modification and that comes to lakhs. They demand ten lakhs as security and Rs. 15/- as rent per square feet. Your clients are well aware of the financial position of my client and those are not plausible as far as he is concerned.'

PW. 1 one of the landlords stated in chief examination that there are other buildings in the locality, just opposite to Yashoram Trust at Kacheripady belonging to one Youseff and the building in which Ceylon Refreshments in Jews Street, on the south of M.G.Road junction are available for running the business. Tenant in his evidence stated that he had made enquires with M.G. square building and Sreeram Constructions Building at Banerji Road. He stated that except these buildings he did not enquire anywhere else. It can be seen from the evidence that enquires were made only one year prior to the examination. He was examined on 15.02.2001 and the petition, was filed on 23.07.1999. It is evident that he has not made enquiries either at the time of filing of the rent control petition or later when the landlord has pointed out availability of other buildings. It has come out in evidence that tenant has not enquired about the availability of those buildings. Further it was stated that another person had taken a building on rent which is having a plinth area of 8,000 sq. ft. at Madhava Pharmacy junction and started business under the style 'Josco Jewellery'. All these facts would indicate that tenant had not made any genuine effort to know the availability of buildings and consequently not succeeded in establishing that buildings were not available at the time of filing of the rent control petition or at the time of giving direction by the rent control court to hand over possession. Incidentally we may also consider whether the tenant has discharged the burden of showing the non-availability of building at the time of filing of the rent control petition or when the rent control court passed the order. A Division Bench of this court in Kochappan Pillai v. Chellappan (1976 KLT 1) has held as follows:

'As proviso is a part 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 othersuitable building is the date of the application under Section 11(3) and not the date of the order for eviction.'

A different view has been taken by a learned Single Judge of this Court in *Varkey v. Raman Pillai* (1981 KLT 213), after referring to the decision in *Kochappan Pillai's case* (1976 KLT 1). Learned Single Judge also referred to the decision in *Venkateswarlu v. Motor and General Traders* (AIR 1975 S.C. 1409). The apex court in *Om Prakash Gupta v. Ranbir B. Goyal* (2002 (2) S.C.C 256), while dealing with the provisions of the Haryana Urban Development Authority Act, 1977 examined the question as to whether subsequent events could be taken into consideration, and held as follows:

'The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (Hi) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so

that the opposite party is not taken by surprise.'

Further the court held as follows:

'Such subsequent event may be one purely of law or founded on facts. In the former case, the court may take judicial notice of the event and before acting thereon put the parties on notice of how the change in law is going to affect the rights and obligations of the parties and modify or mould the course of litigation or the relief so as to bring it in conformity with the law. In the latter case, the party relying on the subsequent event, which consists of facts not beyond pale of controversy either as to their existence or in their impact, is expected to have resort to amendment of pleadings under Order 6 Rule 17 CPC. Such subsequent event, the court may permit being introduced into the pleadings by way of amendment as it would be necessary to do so for the purpose of determining real questions in controversy between the parties.'

When we analyse the second proviso to Section 11(3), we are of the view, Section 11(3) as well as the second proviso thereof has to be harmoniously construed. Subsequent events as well as the changed circumstances would shorten the litigation and do complete justice between the parties. We are of the view, the possible interpretation was that the availability of suitable buildings in the locality would be ascertained by the rent control court not only at the time of rent control petition but also at the time of passing an order on the petition by the court. In the instant case, availability of building was pointed out by the landlord at the time of filing of the rent control petition and also subsequently in his oral evidence. Tenant had not discharged the burden of showing non-availability of buildings.

6. Counsel appearing for the tenant Sri. K. Ramakumar placed considerable reliance on the findings of the Full Bench of this court in Francis v. Sreedevi Varassiar (2003 (2) KLT 230), especially paragraph 43 of the said judgment. Counsel submitted that the court has got a duty to see that the tenant should be able to carry on his existing activity in the new premises and the rent should be almost equal to that which the premises in dispute would fetch at the relevant time. In this case facts would reveal that the tenant had not made any effort to adduce evidence about the non availability of buildings in the locality, while the landlord

has pointed out that buildings are available at Kacheripadi and also at Jews Street. Tenant has also not established that the available buildings are unsuitable for his business. Tenant has also not furnished any material with regard to the rent of those premises which are available and the rent that would fetch for the tenanted premises at the relevant time. In the absence of any material before the court as to the rent prevalent in the locality and also the rent that would fetch at the relevant time for the tenanted premises it would not be possible for the court to examine whether the tenant would be in a position to pay the prevalent rent. Burden is always on the tenant to establish these facts. Full Bench has declared that 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. In the absence of any evidence in this case it would not be possible for the court to determine that the tenant would be able to carry on his existing activity in the new premises by paying the prevalent rent. Under such circumstances the contention raised by the tenant is rejected. In such circumstances, we are in agreement with the Rent Control Court as well as the Appellate Authority that tenant was not successful in establishing the non availability of the building so as to get the benefit of the second limb of the second proviso to Section 11(3) of the Act. In such circumstances, we find no reason to take a different view from that of the Appellate Authority. The revision petition is accordingly dismissed. However, tenant is given time upto 31.12.2003 to vacate the premises on condition that he should file an undertaking before the trial court within one month from today that he would pay upto date rent, future rent and vacate the building within the time granted.