

Abdul Khader Vs. Ali

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Court : Kerala

Decided On : Oct-05-2002

Reported in : 2003(1)KLT546

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. 1780 of 2002

Appellant : Abdul Khader

Respondent : Ali

Advocate for Def. : K. Divakaran Nair, Adv.

Advocate for Pet/Ap. : K.P. Sreekumar and; V. Rajendran (Perumbavoor), Adv.

Judgement :

ORDER

K.S. Radhakrishnan, J.

1. Revision petitioner, the alleged sub lessee, was the second counter petitioner before the Rent Control Court. Eviction was sought for against the counter petitioners under Sections 11 (2)(b) and 11 (4)(i) of the Kerala Buildings (Lease and Rent Control) Act (in short 'the Act'). Rent Control Court dismissed the petition

holding that ground of subletting was not established. On appeal by the landlord, Appellate Authority reversed the finding of the Rent Control Court and allowed eviction under Section 11(4)(i).

2. For the disposal of this case, we will refer to the parties according to their status before the Rent Control Court. The landlord submitted that the petition schedule building was rented out to the first counter petitioner on a monthly rent of Rs. 700/- as per the rent deed, Ext. A1 dated 7.2.1994. Petitioner landlord stated that the first counter petitioner was conducting a wholesale business in rice and later conducted business in coir, coir mattress and gunny bags etc. Rent deed prohibited sub lease. Petitioner came to know that the first counter petitioner had subleased the building to the second counter petitioner on receipt of a copy of the plaint in O.S. No. 350. of 1998 of the Munsiff s Court, Alwaye and an order of prohibitory injunction restraining him from forcefully evicting the second counter petitioner from the petition schedule building.

3. Petitioner then sent a registered notice dated 30.6.1998 to the first counter petitioner for terminating the sub lease with a copy to the second counter petitioner. The second counter petitioner replied on 31.7.1998 denying sublease and stated that the shop building was leased out to him by the landlord himself. Further it was also stated that the second counter is conducting a stationery shop investing huge amount in the business. The landlord then approached the Rent Control Court for eviction under Section 11(2)(b) and 11(4)(i) of the Act. Landlord placed reliance on Ext. A1 to prove the tenancy relationship between him and the first counter petitioner. P.W. 2 was examined to prove Ext A1 document. Landlord got himself examined as P.W. 1. Apart from Exts. A1, A2 and A3, A8(a) and A8(b) were also produced.

4. First counter petitioner filed objections denying sublease. He stated that while he was conducting business he fell ill, consequently allowed the second counter petitioner to run the business. Second counter petitioner has no right over the tenanted premises and that the first counter petitioner is really the tenant. Counter statement was filed by the second counter petitioner. It was alleged that the petition was filed by the landlord in collusion with the first counter petitioner so as

to evict the second counter petitioner. It was alleged that Ext. A1 is a fabricated document created to show that there was landlord tenant relationship between the petitioner and the first counter petitioner. Further it was stated that there is no lessor lessee relationship between the counter petitioners. Tenanted premises was taken out on oral lease by the second counter petitioner from the petitioner landlord in March 1994 for conducting business in stationery items. When the building was taken on rent, monthly rent was fixed at Rs.600/- which was enhanced to Rs. 1,250/-. Further it was stated that the landlord is staying very close to the petition schedule building has been a regular visitor to the shop building. Landlord demanded exorbitant rent which the second counter petitioner could not afford which led to me filing of the present petition in collusion with the first counter petitioner describing him as a sub lessee. It was stated that the second counter petitioner had paid off the rent in full personally to the landlord who is staying very close to the tenanted premises. First counter petitioner is happened to be a close relation of the petitioner landlord and they created Ext. A1 so as to oust the second counter petitioner. In order to establish his case second counter petitioner produced Exts. B1 to B10 documents and got himself examined as RW.

1. First counter petitioner has not given any oral evidence and did not pursue the matter further.

5. We heard counsel on either side at length.

6. Sri. K.P. Sreekumar, counsel appearing for the second counter petitioner - revision petitioner herein, submitted that the Appellate authority has committed a grave error in finding that there was sub lease of the schedule shop room. Counsel submitted there is no material to show that there was landlord tenant relationship between the petitioner and the first counter petitioner and that first counter petitioner had ever subleased the building to the second counter petitioner. Counsel also placed reliance on the decision of the Apex Court in Resham Singh v. Ragbir Singh (1999 (7) SCC 263). Reference was also made to the decision of the Rajasthan High Court in Raghuvar Dayal v. Hargovind and Anr. (AIR 1958 Rajasthan 287) and also the decision of the Bombay High Court in Ratanlal Ghelabhai v. Amarsing Rubsing (AIR 1929 Bombay 467). Counsel submitted that since landlord failed to establish the landlord tenant relationship between him and

the first counter petitioner, second counter petitioner has to be treated either as a tenant or as a trespasser.

7. Sri. K. Divakaran Nair, counsel appearing for the landlord, on the other hand submitted that Appellate Authority was justified in taking the view that the ground of sublease has been established and consequently eviction ordered under Section 11(4)(i) has to be sustained.

8. Before examining the rival contentions on either side, we may examine the scope of Section 11 (4)(i) of the Act, which we extract below for easy reference.

(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 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.

Provided that an application under this clause shall not be made for the first time in respect of one and the same tenancy unless the landlord has sent a registered notice to the tenant intimating the contravention of the said condition of the lease and the tenant has failed to terminate the transfer or the sublease, as the case may be, within thirty days of the receipt of the notice or the refusal thereof.

Scope of the above provision came up for consideration before a Bench of this court in *Arumukhan v. Rajasekharan* (1999 (3) KLT 502). The court held that initial burden to prove a transfer of possession or subletting, is of course, on the landlord. The Apex Court in *Kala and Anr. v. Madho Parshad Vaidya* (1998 (6) SCC 573) and *Benjamin Premanand Rawade v. Anil Joseph Rawade* (1998 (9) SCC 688) held that the onus to prove subletting is on the landlord and if he establishes parting of the possession in favour of a third party, the onus would shift to the tenant to explain. In *Devikumar v. Swaranlata* (1996 (1) SCC 25) and in *Resham Singh's case supra* (1999 (7) SCC 263) the Apex Court while dealing with the provisions of the E.P. Urban Rent Restriction Act, 1949 held that the conclusion on the question of subletting is a conclusion on a question of law

derived from the findings on the materials on record so as to transfer of exclusive possession as to the said transfer of possession being for consideration. In a recent decision in *Shama Prashant Raje v. Ganpatrao and Ors.* (2000 (7) SCC 522) the Apex Court on a survey of several decisions reiterated that to establish subletting two ingredients must be proved. Landlord has to prove that in between the tenant and sub tenant there is a relationship of lessee and lessor and that the possession of the premise in question was parted with exclusively by the tenant in favour of the sub tenant. For example, if the landlord establishes that A was his tenant and further establishes that instead of A, B was in occupation or he was conducting a business in the premises, the burden shifts to the tenant A to explain the nature of B's occupation and to establish on what basis B was put in possession. It is only if the landlord discharges the burden to prove exclusive transfer or possession and that the said transfer or possession being for consideration, the burden shifts to the sub lessee to show that he is in possession of the premises and disprove the case, of sublessee.

9. We may first examine whether petitioner had established landlord-tenant relationship between him and the first counter petitioner. Petitioner-landlord placed reliance on Ext. A1 rent deed. To prove Ext. A1 petitioner-landlord himself was examined as P.W. 1. P.W. 2, witness to Ext. A1 was also examined. Both of them deposed that it was the first counter petitioner who had written the rent deed, Ext. A1. First counter petitioner never thought of mounting the witness box. No steps have been taken by the petitioner-landlord to examine the first counter petitioner so as to prove Ext. A1 rent deed. Oral evidence of P. Ws. 1 and 2 would categorically show P.W. 2, alleged witness to Ext. A1 is a close associate of the petitioner. Facts also would indicate that first counter petitioner, alleged tenant is also a close relative of the landlord. Landlord's sister's son has married first counter petitioner's daughter. Marriage was prior to the execution of Ext. A1 document. Ext. A1 was alleged to have been executed on 17.2.1994. Petition schedule building is situated at Alwaye. Both the landlord and the first counter petitioner are also residing at Alwaye, but the stamp paper was obtained from Kothamangalam, a place which is 35 kilometres away from Alwaye. On a question put to the landlord he stated that the same was procured by P.W. 2 who is his close associate when he went to Kothamangalam in connection with some

business. Landlord has stated in the petition that first counter petitioner was conducting wholesale business in rice under Ext. A1 document. Permit and licence are necessary for conducting wholesale business in rice. No evidence whatsoever has been adduced either by the landlord or by the first counter petitioner to show that first counter petitioner was conducting wholesale business in rice in the tenanted premises on the basis of Ext. A1. We have already indicated first counter petitioner is a close relative of the landlord who evaded the witness box. Facts would altogether show that Ext. A1 is a creation of the landlord in collusion with the first counter petitioner, his close relative and P.W. 2 his close associate. In view of the aforementioned facts, we are inclined to take the view that there is no landlord tenant relationship between the petitioner and the first counter petitioner.

10. Landlord has to further establish that in between the tenant and sub tenant there is a relationship of lessee and lessor and that possession of the building was parted with exclusively by the tenant in favour of the sub tenant for consideration. In the Rent Control Petition the petitioner - landlord has asserted that first counter petitioner had subleased the building to the second counter petitioner. But in the oral evidence P.W. 1 has stated as follows:

The landlord therefore failed to adduce any evidence to show that sub lessee was in exclusive possession of the property and that between the sub tenant and tenant there was relationship of lessee and lessor and that possession of the premises was parted with by the tenant in favour of the sub tenant exclusively for consideration.

11. Second counter petitioner has strongly denied the lessee and lessor relationship between him and the first counter petitioner. To establish sub lease under Section 11(4)(i) of the Act burden is on the landlord to show that there existed lessee and lessor relationship between the first counter petitioner and the second counter petitioner. Assuming that the burden was discharged in this case, then the burden shifts to the tenant to disprove the same. In the instant case, we have already indicated that the tenant did not give any oral evidence or contested the matter. We therefore hold that the first counter petitioner had failed to prove any lessor-lessee relationship between him and the second counter petitioner.

12. We have found that landlord has failed to satisfy the ingredients for seeking eviction and has not discharged the burden of proving the ingredients of sublease under Section 11(4)(i) of the Act. The first counter petitioner, the alleged tenant, also did not establish the relationship with the second counter petitioner. We may now examine the case put up by the second counter petitioner that there was landlord and tenant relationship between the petitioner and him. Second counter petitioner has stated that petition schedule building was taken on rent in March 1994 on the basis of an oral agreement on a monthly rent of Rs. 600/-. Landlord is staying adjacent to the petition schedule building. The furnishing and maintenance work of the petition scheduled room was carried out by him by spending huge amount. Monthly rent of the petition scheduled room was enhanced on different occasions and the present rate of rent is Rs. 1,250/-. Landlord is in possession of other rooms adjacent to the petition schedule room. He demanded exorbitant amount of rent which the second counter petitioner could not afford to pay. Second counter petitioner instituted O.S. No. 350 of 1998 before the Munsiff's Court, Aluva when the petitioner landlord attempted forcible eviction. The stand of the second counter petitioner is that he was put in possession of the shop building on oral lease and that almost all the shop rooms of the petitioner have been given on oral lease. The deposition of P.W. 1 would indicate that fact. We extract his oral evidence for reference.

The above mentioned evidence itself would indicate that the landlord has got other shop rooms of his own let out by him on oral lease. No rent deed in respect of any other shop was produced by the landlord. Therefore the plea of the second counter petitioner that the landlord has the practice of letting out shop rooms on oral lease is established. The second counter petitioner has produced Ext. B3 series profession tax receipts. Facts would also indicate that the tenanted building is in the possession of the second counter petitioner during the relevant period. The landlord has also failed to produce any evidence for payment of rent by the first counter petitioner to the landlord all these years. We may also point out that second counter petitioner had already deposited an amount of Rs. 31,270/- towards rent arrears and the same was received by the landlord. No deposit has been made by the first counter petitioner in favour of landlord. Aforementioned facts would positively show that the second counter petitioner is either a tenant

under the petitioner or else he could be characterised as a trespasser. There is absolutely no evidence in this case to show that second counter petitioner was sub lessee under the first counter petitioner. In view of the aforementioned circumstances, we are inclined to allow this revision and set aside the order of the Appellate Authority. Civil Revision Petition is disposed of as above.

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