

**Chacko Vs. Thomas**

**Chacko Vs. Thomas**

**SooperKanoon Citation :** [sooperkanoon.com/732040](http://sooperkanoon.com/732040)

**Court :** Kerala

**Decided On :** Aug-29-2003

**Reported in :** 2004(3)KLT202

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

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

**Appeal No. :** C.R.P. No. 2401 of 2001

**Appellant :** Chacko

**Respondent :** Thomas

**Advocate for Def. :** V. Giri, S.K. Brahmanandan; and S.B. Premachandra Prabhu, Adv.

**Advocate for Pet/Ap. :** M. Chathukutty Nambiar,;K.P. Renjini; and K.R. Dayal, Adv.

**Judgement :**

ORDER

**K.S. Radhakrishnan, J.**

1. Revision petitioners are the tenants. Second revision petitioner is stated to be the proprietrix of M/s. Velukaran Stores and the first petitioner who is the brother of

the respondent-landlord is managing the same.

2. For disposal of this case we may refer to the parties according to their status in the Rent Control Petition. Petition for eviction was preferred by the landlord under Section 11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965. Title of the disputed premises is not disputed. Petitioner had obtained the petition schedule premises as per sale deed No.4786 of 1995 of the Sub Registry Office, Ernakulam. Request was made to the tenants to vacate the premises since he wanted to start a departmental store. Petitioner has no business of his own apart from Matha Metal Agencies of which he is a partner. He has no other source of income. Therefore he wanted to start a business of his own to augment his income.

3. Tenant resisted the petition contending that the need is not bonafide. Further it is also stated that the landlord has got other rental income and therefore there is no necessity for starting business of his own. The attempt of the landlord is only a ruse to evict the tenant. Tenant also claimed the benefit of the provisos to Section 11(3) as well. In order to establish the contention landlord got himself examined as PW1. Second respondent tenant was examined as RW1. RWs.2 and 3 were also examined. On the side of the petitioner, Exts.A1 to A7 were marked and on the side of the respondent Exts.B1 to B12 documents were marked. Ext. C1 is the Commission Report.

4. Rent Control Court as well as the Appellate Authority concurrently found that the need urged by the landlord is bona fide. With regard to the first limb of the second proviso to Section 11(3) of the Act, Rent Control Court found that second respondent is mainly depending upon the income derived from the business conducted in the tenanted premises for her livelihood. However, tenants could not establish non availability of suitable building and consequently benefit of the second proviso was denied to the tenant and ordered eviction. Appellate Authority however found that the tenant had not established the first limb of the second proviso as well. With regard to the second limb of the second proviso, Appellate Authority also confirmed the finding of the Rent Control Court and ordered eviction.

5. Counsel appearing for the revision petitioners Sri. M.C. Nambiar contended that both the Courts have committed error in holding that the need is genuine. Counsel also submitted that in any view of the matter, tenant is entitled to get the benefit of the second proviso to Section 11(3) of the Act. Counsel appearing for the respondent on the other hand contended that there is no reason to interfere with the orders passed by the Rent Control Court as well as the Appellate Authority while exercising the revisional jurisdiction under Section 20 of the Act. Counsel on either side tried to establish their contentions.

6. Bona fide need urged by the landlord is to conduct departmental store later described as super market. Area of the petition schedule room and the adjacent room together would come to 406 sq.ft. If the space of both the shop rooms is better utilised landlord could start departmental store or super market according to his standard. Mere fact that the present, building has got area of 116 sq.ft. is not a reason to hold that need is not bona fide. Mere fact that he is getting other rental income is no reason why he shall not start a business of his own to augment income. We therefore fully agree that the need urged by the landlord is bona fide.

7. We have already indicated both the Courts have found that suitable buildings are available in the locality. PW1 has given evidence before Court to show that sufficient buildings are available in the locality for shifting the business conducted in the tenanted premises. Second respondent was examined as RW1. She stated that even though buildings are available those are not within her reach and thus she claims protection under the second proviso to Section 11(3) of the Act. Counsel placed reliance on the decision of a Full Bench of this Court in Francis v. Sreedevi Varassiar, 2003 (2) KLT 230. Especially the second proposition laid down in paragraph 43 of the judgment. Proposition 2 in paragraph 43 is as follows:

'2. While adjudicating the suitability of the alternative accommodation, the Court shall not insist on a mathematical equivalence of the area or rent. The only thing that the court has to see is that the tenant should be able to carry on his existing activity in the new premises. The area may even be less. Still further, the rent should be almost equal to that which the premises in dispute would fetch at the relevant time. It may happen that a building as old as that occupied by the tenant

is not available. The rent for the new building is likely to be higher. In such a situation, the Court shall be entitled to consider -- Can't the tenant pay the higher rent at all? Can he do his business in a lesser area? The mere fact that the rate of rent is higher shall not be enough. 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'.

Counsel for the tenant also placed reliance on the evidence of R.W.3, a broker, who stated that for getting a building on rent at Ernakulam one has to pay rent varying from Rs.15/- to Rs.35/- per Sq.ft. in the ground floor and a minimum pakidi deposit of Rs.5 lakhs. Counsel for the tenant, Sri. M.C. Nambiar, submitted that going by the evidence of R.Ws. 1 and 3 it is clear that tenant cannot afford the rent payable for the building' in the nearby locality. The monthly rent for the present premises is also Rs.600/-. Going by the Full Bench decision in Francis's case, supra, 2003 (2) KLT 230, burden of proving relevant facts embodied in the second proviso to Section 11(3) is on the tenant. In order to get the benefit of the second limb of the second proviso to Section 11 (3), tenant has to disclose his entire source of income. Tenant has to disclose his financial capacity. Tenant has to prove the current rent which would be payable for the building in the nearby locality. Only if tenant could establish that he is incapable of meeting such exorbitant rent from the business conducted in the tenanted premises or from other sources he could discharge the burden under the second proviso to Section 11(3). If a tenant is conducting large volume of business and making considerable amount of business income he could afford to pay higher rent. There may also be cases where the tenants are not doing business successfully and eking his livelihood only from the income derived in the business conducted in the tenanted premises. They may have no other source of income to get the new building available in the locality. We are of the view, only if sufficient materials are placed before Court, Court will be in a position to examine whether tenant is capable of meeting the requirements under the second proviso to Section 11(3). The Full Bench opined that relief should 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. We are of the view in this case tenant has not furnished sufficient materials for the Court to determine as to whether tenant is in a position to pay the

higher rent or not. In such circumstances we are of the view tenant has not succeeded in establishing the case so as to get the benefit under the second proviso to Section 11(3).

8. We have already indicated that tenant has not succeeded in showing the income from the tenanted premises. Receipts produced are insufficient to ascertain the monthly income and the volume of business carried on in the tenanted premises. Evidence would indicate that wife is the proprietrix and in fact the business is being conducted by her husband. Husband was not examined. Facts would also indicate that husband has got other income. In instant case though the building is taken on rent in the name of the wife, husband is managing the business. That would show tenant who is the wife is depending on her husband for her livelihood. First limb of the second proviso to Section 11(3) says that the Court shall not give any direction to the tenant to put the landlord in possession, if the tenant is depending mainly on the income derived from the tenanted premises for his livelihood. In the instant case it is established that the tenant has got other source of income and the tenant is not depending mainly on the income derived from the business conducted in the tenanted premises. The benefit of the first limb of the second proviso is not available to the tenant. In this case income of the husband has not been disclosed. Evidence would indicate that he has got other income. Therefore it cannot be said that the tenant is depending for her livelihood mainly on the income derived from the business conducted in the tenanted premises. In such circumstances we find no reason to interfere with the reasoning of the Rent Control Court as well as the appellate authority. However, we are inclined to grant time upto 31.12.2003 to the tenant to vacate the premises provided the tenant files an undertaking before the Rent Control Court within one month from today that he would pay the arrears of rent and future rent and put the landlord in possession on or before 31.12.2003.