IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

THURSDAY, THE 22ND DAY OF JANUARY 2015/2ND MAGHA, 1936

R.C.Rev..No. 8 of 2012

JUDGMENT DATED 31-10-2011 IN RCA 129/2010 OF RENT CONTROL APPELLATE AUTHORITY, KOZHIKODE

ORDER DATED 18-8-2010 IN RCP.NO.99/2004 OF RENT CONTROLLER/ADDITIONAL MUNSIFF COURT - I, KOZHIKODE

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PETITIONER(S)/1ST RESPONDENT/RESPONDENT:
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* 1. KUNNATH BALAKRISHNAN, AGED 58 YEARS,
S/O.LATE NARAYANAN NAIR,
RESIDING AT MELURA AMSOM AND DESOM, KOYILANDI TALUK,
WORKING AT HOTEL VIMAL, MALABAR CHRISTIAN COLLEGE,
CALICUT. (DIED)

* ADDITIONAL P2 TO P7 IMPLEADED.

2. DHANALAKSHMI P., RAJ NIVAS,
THUVAKKOD P.O., CHEMANACHERI (VIA),
KOZHIKODE - 673 304.

3. RANJITH K.B., RAJ NIVAS,
THUVAKKOD P.O., CHEMANACHERI (VIA),
KOZHIKODE - 673 304.

4. SHAJITH K.B., RAJ NIVAS,
THUVAKKOD P.O., CHEMANACHERI (VIA),
KOZHIKODE - 673 304, REPRESENTED BY
HIS POWER OF ATTORNEY HOLDER RANJITH K.B.,
3RD RESPONDENT.

5. VRINDHA SREEJITH, SOUBHAGYAM,
UNITED RESIDENCE COLONY,
ST.VINCENT COLONY, KOZHIKODE - 673 006.

6. KARTHIKA SREEJITH (MINOR), SOUBHAGYAM,
UNITED RESIDENCE COLONY,
ST.VINCENT COLONY, KOZHIKODE - 673 006,
REPRESENTED BY HER NEXT FRIEND AND GUARDIAN,
VRINDHA SREEJITH (5TH PETITIONER).

Msv/

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7. NAVNEETH SREEJITH (MINOR), SOUBHAGYAM,
UNITED RESIDENCE COLONY,
ST.VINCENT COLONY, KOZHIKODE - 673 006,
REPRESENTED BY HER NEXT FRIEND AND GUARDIAN,
VRINDHA SREEJITH (5TH PETITIONER).

* ADDITIONAL P2 TO P7 ARE IMPLEADED THE LEGAL HEIRS OF THE DECEASED P1 AS PER ORDER DTD.13.11.2014 IN IA.2498/2014.

BY ADVS.SRI.VINOD SINGH CHERIYAN
SRI.R.SUDHISH
SMT.M.MANJU
SRI.K.R.RANJITH

RESPONDENT(S):
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1. SHEENATH A., W/O.SASIKUMAR RAJ, 46 YEARS,

2. RAHUL S.RAJ, W/O.SASIKUMAR RAJ, 25 YEARS,

3. ATHIRA S.RAJ, W/O.SASIKUMAR RAJ, 18 YEARS,
ALL RESPONDENTS ARE RESIDING AT KACHERY AMSOM
AND DESOM OF KOZHIKODE TALUK, NOW RESIDING AT
K.S.RESIDENCY, AZHAKENDRA LANE, KALOOR,
KOCHI - 682 017.

BY ADV. SRI.NIRMAL S.

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON 22-01-2015, ALONG WITH RCR. 9/2012 & RCR. 111/2012, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

msv/

ANTONY DOMINIC & ALEXANDER THOMAS, JJ.

R.C.R.Nos.8, 9 & 111 Of 2012

Dated this the 22nd day of January, 2015.

<u>O R D E R</u>

<u>Antony Dominic, J.</u>

R.C.P.No.99/2004 on the file of the Rent Control Court, Kozhikode was filed by late Sasikumar Raj, under Sec. 5(1) of the Rent Control Act seeking fixation of fair rent in respect of the scheduled premises from Rs.350/- per month to Rs.25/- per Sq.ft. The Rent Control Court by its order dated 18.8.2010 disposed of the case enhancing the rent to Rs.1,750/- per month. The tenants and the landlord filed R.C.A.Nos.119 & 129 of 2010 before the Rent Control Appellate Authority challenging the order passed by the Rent Control Court. The Rent Control Appellate Authority disposed of the appeals by its common judgment dated 31.10.2011. By this judgment, R.C.A.No.119/2010 filed by the tenant was dismissed and R.C.A.No.129/2010 was allowed in part fixing the rent at Rs.3,500/- per month. R.C.R.No.8 & 9 of 2012 are filed by the tenants against the judgment in R.C.A.Nos.129 & 119 of 2010 respectively and R.C.R.No.111/2012 is filed by the legal representatives of the original landlord seeking enhancement as prayed for in the Rent Control Petition.

2. We heard the counsel for the landlord and the tenant.

3. The learned counsel for the landlord contended that considering the factors indicated by this Court in the decision ***Aboobacker v. Vasu*** [2003 (3) KLT 1029] and ***Edger Ferus v. Abraham Ittycheria*** [2004 (1) KLT 767] and also Ext.A4 produced before the Rent Control Court, fair rent ought to have fixed as prayed for by them. On the other hand, according to the counsel appearing for the tenants, the building is a 150 year old one and without any maintenance. It is also stated that for similar buildings in the locality equivalent rent alone is paid. According to the counsel, Rs.350/- was fixed only in the year 2000 and therefore there was no justification to seek its revision in the year 2004 when the Rent Control Petition was filed. Counsel also contended that there was no business potential in the locality as claimed by the landlord. According to him, therefore the rent fixed by the Rent Control Court and the Appellate Authority were exorbitant and unreasonable.

4. We have considered the submissions made by both sides. Landlord-tenant relationship is undisputed. Sec. 5(1) of the Rent Control Act provides that the Rent Control Court shall on

the application of the tenant or landlord of a building fix a fair rent for such building after holding such enquiry as it thinks fit. In the Division Bench judgment of this Court in ***Aboobacker v. Vasu*** [2003 (3) KLT 1029], this Court had indicated the following principles while fixing fair rent.

> *21. We therefore enunciate the following principles :*
>
> *(1) The claim for payment of any premium by way of pakidi in consideration of grant, renewal or continuance of tenancy is immoral and opposed to public policy and any agreement entered into for payment or receipt of pakidi in consideration of grant, renewal or continuance of tenancy would be unlawful and cannot be enforced through court of law.*
>
> *(2) The construction of buildings and letting them out to the tenants would come within the ambit of business under Art. 19 (1)(g) of the Constitution of India and hence is a fundamental right. Total prohibition in claiming enhanced rent would amount to unreasonable restriction and also would be violative of the fundamental rights of the landlords guaranteed under Art. 21 of the Constitution of India.*
>
> *(3) S. 116 of the Transfer of Property Act if has the effect of imposing any restriction in revision of rent it would amount to unreasonable restriction affecting the fundamental rights guaranteed under Art. 19(1)(g) and to the extent of its inconsistency the said provision would be void under Art. 13(1) of the Constitution of India. Consequently, the judgment in John Zacharia's case, supra (1987 (1) KLT 156) holding that even beyond the period originally stipulated, till evicted under S. 11 of the Kerala Buildings (Lease and Rent Control) Act only the agreed rent alone is payable by the tenant is not good law and to that extent it would stand overruled.*
>
> *(4) Landlord or the tenant as the case may be, can approach the civil court for revision of rent quinquennially unless otherwise prescribed in the agreement between the parties. We also hold even if there is no provision for periodical revision of the rent then the landlord or the tenant can approach the*

> *Civil Court for revision of rent. We hold that the plea of continuous occupation by holding over or the protection as statutory tenant would not be available to the tenant since those rights are subservient by the fundamental rights guaranteed to the landlord under Art. 19(1)(g) and 21 of the Constitution of India.*
>
> *(5) Civil Court would take note of the inflation and resultant reduction in the purchasing power of money, variations in the cost of living index in the area since commencement of the lease, demand for accommodation and availability in the local authority where the building in question is situated, the cost of construction of the building including cost of labour and building materials, capital value of the entire premises in the enjoyment of the tenant inclusive of the value of the land under the actual enjoyment of the tenant whether immediately appurtenant to the building or otherwise, type of construction, locational importance, situation of the tenanted premises, ground floor, first floor etc. and other advantages and amenities, such as access to places of public importance like bus stand, railway station, educational institution, hospitals etc*
>
> *(6) The Civil Court will also take into consideration the prevailing rent in the locality for the same and similar accommodation. The type of construction, the amenities, general or special provided in the building, the open land attached to the building, whether residential or non-residential are also to be borne in mind.*
>
> *(7) Revision or fresh imposition of municipal taxes, cases, rate in respect of other increase in the charge of electricity or water consumption by the tenant and also by the landlord and increase on account of sufficient repairs would also be taken note of by the Civil Court.*
>
> *(8) The Rent Control Court or Rent Control Appellate Authority can while resolving any rent control dispute, examine whether the rent is static and requires revision and in appropriate cases can revise it tentatively subject to the parties approaching the Civil Court for fixation of fair rent, if they so desire.*

Subsequently, in the judgment in ***Edger Ferus v. Abraham Ittycheria*** [2004 (1) KLT 767], while allowing the review of judgment in ***Issac Ninan v. State of Kerala*** [1995 (2) KLT 848], this Court reiterated principles laid down in Aboobacker's case (supra) and it was held in paragraphs 13 & 14 thus:

> *13. The object of the Kerala Buildings (Lease and Rent Control) Act is to regulate the leasing of buildings to control the rent of such buildings in the State of Kerala. The Act is neither a pro-tenant or pro-landlord piece of legislation but intended to create obligations to both. S. 2(3) defines the landlord as the person who is receiving or is entitled to receive the rent. S. 2(6) defines the expression "tenant" as any person by whom or on whose account rent is payable for a building. S. 9 enables the tenant to obtain receipts for payment of rent or advance duly signed by the landlord or his authorised agent. The expression "rent" is not defined in the Act. Rent is the consideration in lieu of enjoyment of property payable upon accrual of periodical liability. The word advance is also not defined in the Act. Advance means "advance of rent" which is intended to protect the landlord from a tenant who may run into arrears and will have to be evicted from the premise without recovering the arrears of rent. Advance is also intended to indemnify the landlord against any damage or loss which might have been caused to the building by the tenant during the subsistence of the tenancy. Advance of rent is liable to be refunded at the time of vacating the premises.*
>
> *14. A landlord as defined in S. 2(3) and the tenant is defined under S. 2(6) of Act 2 of 1965 are not legally entitled to receive or pay pakidi. Tenant is not obliged to pay pakidi and the landlord is not authorised to receive the said amount. Pakidi is normally not refundable and in practice may pass on to prospective tenant. Payment of huge amount towards pakidi has virtually defeated the object and purpose of the second limb of the second proviso to S. 11(3). Under the second limb of the second proviso to S. 11(3), tenant is not bound to vacate the premises if suitable buildings are not available in the locality for the tenant to carry on his trade or business. We cannot shut our eyes to the ground realities that generally the tenant would get suitable building only if the tenant could afford to pay huge amount by way of rent and pakidi which many of the tenants could ill-afford to pay. Quite often the tenant would also find it difficult to discharge the burden of proof cast on him to establish the non-availability of*

> *other suitable building due to huge demand of rent as well as pakidi since pakidi is always an unaccounted advance.*

A reading of these principles would show that Rent Control Court while fixing the fair rent would take note of the inflation and resultant reduction in the purchasing power of money, variations in the cost of living index in the area since commencement of the lease, demand for accommodation, and availability in the local authority where the building in question is situated. It is also stated that the cost of construction of the building including cost of labour and building materials, capital value of the entire premises in the enjoyment of the tenant inclusive of the value of the land under the actual enjoyment of the tenant whether immediately appurtenant to the building or otherwise, type of construction, locational importance, situation of the tenanted premises, ground floor, first floor etc. and other advantages and amenities, such as access to places of public importance would also be guiding factors prevailing rent in the locality which also has to be borne in mind.

5. Before the Rent Control Court, father of the original petitioner was examined as PW1. Though the tenant was not examined, on his behalf, RWs 1 & 2 were examined. Exts.A1 to A4 and Exts.B1 to B10 series were also marked.

6. On the basis of the evidence thus adduced, Rent Control Court has found that the petition schedule building is situated by the side of Calicut-Kannur National Highway and near to Malabar Christian College. It is recorded as the admission of RW1 that educational institution viz, Providence Junior School, Providence Girls' High School and another Higher Secondary School attached to Malabar Christian College are situated near to the petition schedule building. It is also stated that Indian Medical Association hall is situated very near to it and that there are lot of buildings including residential buildings in the vicinity. Existence of several commercial shops in the neighbourhood is also admitted by RW1. As far as the exact location of the building in question is concerned, the Rent Control Court has referred to the admission made by RW1 that the building is situated near Gandhi Road, National Highway junction. On the basis of the evidence thus recorded, the Rent Control Court has come to the conclusion that the area in which the petition

schedule building is situated is an important commercial area in Calicut city. It is true that the building is a two storied tiled roof building and is an old one and that having regard to the fact that the width of the footpath is only 4 ft., it is not possible to park vehicle in front of the building. In so far as the case that the building was not being maintained by the landlord is concerned, the Rent Control Court has recorded the admission of RW1 that he never demanded the landlord in writing to make necessary maintenance to the building. Going by the evidence on record, the ground floor of the building room itself has an area of 1100 sq. ft. and it was this area which was used for the hotel. The first floor of the building consists of three rooms and the total area is measured by the commissioner and it is found to be 335 sq.ft. While the first floor was being utilised for accommodating the employees of the hotel, there is also an open space in the front side of the building, the area of which is shown as 225 sq. ft, and this space was being utilised for storage of firewood. Thus, the total area of the building under the occupation of the tenant was found to be 1660 sq. ft. and these facts are fully supported by the report of the commissioner which has been marked as Ext.C1. The Rent Control Court has taken note from the report of the commissioner that the rent of the stationary shop of one Basheer situated on the side of the petition schedule building was Rs.1,000/- per month and that also was an old tiled roof shop room having an area of 110 sq.ft.

7. The Rent Control Court has also referred to the case of the petitioner that the shop of M/s. Legoons Cool Bar is situated 150 metres away from the petition schedule building and the tenant of the building is paying Rs.750/- per month for 400 sq.ft. Similarly, M/s. Digital World Computer Centre is also located in an old tiled roof building having an area of 800 sq. ft. and rent paid is Rs.2,300/- per month. It is true that the Rent Control Court also made reference to a shop by name Saji Times, where the rent paid is Rs.100/- for the last 15 years. Similarly, the court has also found from the report of the advocate commissioner that M/s. Vijaya Book Depot and M/s. Athira Books are paying rent @ Rs.162/- and Rs.100/- respectively. However, in so far as these three tenants are concerned, the area under their occupation are not disclosed.

8. In the light of these documents, the Rent Control Court found that the request of the landlord for fixation of fair rent was justified. But, however, it is stated that in view of the

age of the building, the claim made by the landlord is exorbitant and accordingly, the Rent Control Court has fixed Rs.1,750/- as reasonable. It is applying the very same standard, the Appellate Authority has revised this rent and fixed the rent at Rs.3,500/-. In this context, it should be stated that if the fair rent fixed by the Rent Control Court works out to 1.05 ps per sq.ft., whereas the rent fixed by the Appellate Authority works out to Rs.2.50/- per sq.ft.

9. Having considered the submissions made by both sides and in the light of the evidence and findings of the lower authorities, we are of the view that the rent fixed by the courts below are without reference to Ext.A4. Ext.A4 is the order passed by the Rent Control Court, Kozhikode in R.C.P.No.48/2004. Schedule to the petition shows that the building number of the municipal building was 3/546 which is same as that of the scheduled building herein. This therefore shows that the building which was the subject matter of the order dated 13.10.2014 in R.C.P.No.48/2004 is situated adjacent to the scheduled building. That was also a case where the building was old and with tiled roof. In that case, after considering all the relevant facts, the Rent Control Court has

fixed rent @ Rs.5 per sq.ft. and on that basis it was held that the landlord will be entitled to Rs.720/- per month.

10. Considering the fact that the order in R.C.P.No.48/2004 referred to above is the adjacent one and the building is also a similar one, we see no reason why the Rent Control Court and Appellate Authority should have excluded from its consideration the order passed by the Rent Control Court and fixed substantially low rent. We therefore are inclined to hold that the landlords are entitled to rent @ Rs.5 per sq.ft as allowed by the Rent Control Court in R.C.P.No.48/2004.

11. However, learned counsel for the tenants brought to our notice that a portion of the land and building has already been acquired for widening of Gandhi Road and that substantial part of the building has been demolished. According to him, on account of this development, rent has to be reduced. In our view, such acquisition which took place during 2013, cannot in any manner defeat the right of the landlord for fixation of fair rent in 2004 when the Rent Control Petition was filed. Therefore, if on account of the acquisition and demolition of a part of the building, the tenant is entitled to any reduction of the rent or modification of fair rent fixed, the remedy available to the tenant

is to move the Rent Control Court invoking the remedy under Sec. 5(5) of the Rent Control Act. Therefore, we leave open that remedy to the tenants.

In the result, R.C.R.Nos.8 & 9 of 2010 filed by the tenants are dismissed. R.C.R.No.111/2012 filed by the landlord is disposed of fixing fair rent of the petition schedule premises at Rs.5 per sq.ft. Landlord will be entitled to Rs.8,300/- (1660 sq.ft x 5) from 2.7.2004. Orders passed by the Rent Control Court and the Appellate Authority are modified to the above extent.

Sd/-
ANTONY DOMINIC,
Judge.

Sd/-
ALEXANDER THOMAS,
Judge.

Bkn/-

// True copy //

P.A to Judge.