

IN THE HIGH COURT OF KERALAAT ERNAKULAM

PRESENT:

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

MONDAY, THE 2ND DAY OF FEBRUARY 2015/13TH MAGHA, 1936

RCRev..No. 275 of 2012 ()

AGAINST THE ORDER/JUDGMENT IN RCA 69/2007 of ADDITIONAL DISTRICT COURT,
IRINJALAKUDA DATED 25-06-2012

AGAINST THE ORDER/JUDGMENT IN RCP 25/2006 of MUNSIFF COURT(RENT
CONTROL COURT), CHALAKUDY DATED 14-09-2007

PETITIONER(S)/RESPONDENT/PETITIONER:

SEBASTIAN THOMAS
AGED 42, S/O. THOMAS, VELUKKUNNEN HOUSE
THIDANAD DESOM, KONDOOR VILLAGE, ARUVITHARA.P.O
PIN CODE - 686 122.

BY ADVS.SRI.P.N.RAMAKRISHNAN NAIR
SRI.P.VISWANATHAN

RESPONDENT(S)/APPELLANT/RESPONDENT:

THOMAS
AGED 47, S/O. DEVASSY, NETTIKADAN HOUSE
MELOOR DESOM, MELLOOR VILLAGE, MUKUNDAPURAM TALUK
MELOOR.P.O, PIN CODE - 680 311.

R BY ADV. SRI.SHEEJO CHACKO
R BY ADV. SRI.SANGEETH C. SUBRAMANIAN
R BY ADV. SRI.P.JINISH PAUL

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON
02-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ANTONY DOMINIC & ALEXANDER THOMAS, JJ.

R.C.Rev.No.275 of 2012

Dated this the 2nd day of February, 2015

O R D E R

Antony Dominic, J.

1. Petitioner is a Dentist by profession. He filed RCP.No.25/06 on the files of the Rent Control Court, Chalakkudy seeking eviction of the respondent tenant from the petition scheduled room, bearing No.XX/442 of Chalakkudy Municipality, urging ground under section 11(3) of the Kerala Buildings (Lease and Rent Control) Act. The Rent Control Court, by its order dated 14.9.2007, allowed the petition. The respondent tenant challenged the order before the Rent Control Appellate Authority, Irinjalakkuda in RCA.69/07. The appellate authority, by judgment dated 25.6.2012, allowed the revision and the order of eviction passed by the Rent Control Court was set aside. It is aggrieved by this order, the landlord has filed this revision petition.

2. We heard counsel for the petitioner and the learned counsel appearing for the respondent.

3. Reading of the order passed by the Rent Control Court shows that the landlord claimed ownership over the schedule property on the basis of Ext.A1, a settlement deed executed by his mother-in-law in his favour. One of the contentions raised by the tenant was that Ext.A1 was a sham document. According to the tenant, the executant of Ext.A1, the mother-in-law of the petitioner, had earlier filed a rent control petition under section 11(2)(b) for his eviction and the said petition was withdrawn at a later stage. It is also stated that subsequently, the then landlady had filed O.S.193/02 for recovery of money allegedly due towards the defaulted rent and that suit was also dismissed. It is further stated that in this background, realising that she would be unable to evict the tenant from the petition scheduled premises, Ext.A1 was executed by the landlady and that therefore, the said document is a sham one. The order passed by the Rent Control Court shows that after considering the document in the light of the other oral and documentary evidence, the Court rejected the said contention.

4. However, the appellate court set aside the aforesaid finding of the Rent Control Court, concluding that Ext.A1 is created only to get eviction and that therefore, the document does not reveal the bonafide need justifying an order under section 11(3). The appellate court proceeded to examine the claim of the tenant for the benefit of the second proviso to section 11(3). However, that claim was turned down by the appellate court. It is this judgment which is under challenge before us.

5. Reading of the order passed by the appellate court shows that in order to arrive at its conclusions regarding Ext.A1 document, the appellate court placed reliance on the judgment of this Court in Joseph v. George Ittoop [2002(3) KLT 909]. Thereafter, the appellate court held that since two cases were unsuccessfully filed by the erstwhile landlady, the subsequent transfer of property in 2004 to her son-in-law and filing of the eviction petition in 2005 would amply indicate that all these efforts were made for obtaining an order of eviction. It is

primarily based on this premise, the appellate court came to the conclusion that Ext.A1 is created only to get an order of eviction.

6. Having considered the case pleaded by both sides, what we find is that on earlier two occasions, the erstwhile landlady has filed a rent control petition under section 11(2) and a suit for recovery of amount towards arrears of rent from the tenant. It was thereafter that she executed Ext.A1 settlement deed in favour of the petitioner, her son-in-law. It is also true that in the next year itself, the petitioner had filed the rent control petition urging his bonafide need. The question is whether these facts, by themselves, would lead to an irresistible view that Ext.A1 is a sham document as concluded by the appellate authority. In our view, this finding of the appellate authority is plainly against the dictum laid down by the Apex Court in the judgment in V.M.Salim v. Fathima Muhammed & Others [2006 (3) KLT 813], where, considering an almost identical fact

situation and referring to its own earlier judgment, the Apex Court held thus:

"8. A document will be 'sham' if it ostensibly creates rights/obligations, which are not intended to be acted upon by the parties to the deed, and is executed in pursuance of a secret arrangement, with the ulterior motive of securing an undisclosed advantage to the owner (or executant as the case may be). It involves collusion between the parties to the document to achieve an illegal objective. Therefore, if anyone wants to establish that a sale transaction was sham and collusive, he ought to plead and prove a secret arrangement between the vendor and the purchaser, that the sale was nominal and that no right, title or interest passed or intended to pass to the purchaser under the sale, and the deed was executed with the sole intention of securing the eviction of the tenants or securing some other benefit to the vendor. Where direct evidence of such secret arrangement is not available, it may be possible to establish the sham nature of a document by some clinching circumstantial evidence. This may be done by showing that no sale consideration was paid to the vendor though shown to have been paid and that the expenses relating to stamp duty and registration of the sale-deed were incurred by the vendor himself. It may also be established by proving that even after the sale, the vendor himself was recovering the rents and paying the

property taxes and exercising all rights of an owner. No such evidence has been led in this case. On the other hand, the Respondents merely relied on the following three circumstances in support of their contention that the transaction was sham and collusive: (a) the premises sold is a portion of a larger building; (b) that the price was meagre; and (c) the previous owner had earlier failed in his attempt to evict the respondents. They pointed out that the first proviso to S.11(3) of the Act mandates the Rent Control Court not to direct eviction on the ground of landlord's bona fide need for own occupation, if the landlord has another building of his own in his possession in the same city, except for special reasons. The contention of the Respondents was that since the erstwhile owner could not evict the respondents, he having other buildings in the city, the shop was shown as sold to the appellant, who did not own any other building, under a sham document, so as to evict the Respondents, for the benefit of the previous owner Ranjith. But the very circumstances mentioned by the respondents to contend that the transaction is sham, can actually be valid reasons for an owner to sell the premises. If the rental income from a property is very low, and the owner is not in a position either to get vacant possession or increase the rents, he may out of frustration or absence of an alternative, decide to dispose of such property at whatever price it may fetch, and use the sale price for some

other useful purpose. Therefore, if an owner sells a property for a modest price as in this case, on account of the meagre returns therefrom and inability to either evict the tenant or increase the income therefrom, that by itself cannot lead to a presumption that the sale transaction is sham.

9. We may next consider the decision in *Devi Dass's* case (*supra*) relied on by the respondents. In *Devi Dass*, the case was remanded, as the Appellate Authority and the High Court had not considered at all the contention of the tenant that the sale was sham. But in this case, the trial court and the appellate court have considered the evidence on the question whether the transaction was sham and recorded a finding thereon. Further, the decision in *Devi Dass's* case was rendered on facts, where apparently the tenant had not accepted the purchaser as his landlord by attornment. In this case the respondents/tenants attorned to the new landlord (Appellant) and we are paying the rents to him. It is now well-settled that where on being informed of the sale of the premises by the vendor/purchaser, the tenant acknowledges the purchaser as his landlord, and pays the rents to him, he cannot thereafter be heard to say that the sale in favour of his landlord is sham. The only exception to this principle, is where the derivative title of the purchaser-landlord is challenged by the tenant by pleading and proving that when he attorned, he was

labouring under a mistake or ignorance as to material facts affecting title of the new landlord (See: *Tej Bhan Madan v. II Addl. District Judge* ((1988) 3 SCC 137) and *Subhash Chandra v. Mohammad Sharif*, (1990) 1 SCC 252). We may refer to the classic statement from *Spencer Bower and Turner on Estoppel by Representation* (Third Edition) on this issue:

"Where a tenant, with full knowledge of the facts, either expressly in writing, or impliedly by acts, such as the payment of rent, attorns tenant to a person other than his original landlord or one who is claiming the estate or interest of such original landlord by assignment, succession, or otherwise, he is ordinarily estopped from questioning the title of the person to whom he has so attorned. But, here too, it is open to the party sought to be estopped to explain away the attornment, and so escape the estoppel to which he would otherwise be subject, by proof that, when he so attorned, he was labouring under mistake or ignorance as to material facts affecting the title of the person to whom he attorned, particularly if such error or ignorance was due to the fraud of that person."

The following observation of this Court in *Lingala Kondala Rao v. Vootukuri Narayana Rao* ((2003) 1 SCC 672) is also apposite:

"In an eviction suit between the landlord and

the tenant the motive behind execution of the document conferring title on the landlord cannot be allowed to be gone into so long as the document has been executed and registered in accordance with law and the transaction is otherwise legal."

In this case, there was no pleading or proof by tenants to bring themselves within the exception to the general principle of Estoppel."

7. Therefore, we are unable to sustain the finding of the rent control appellate authority that the document Ext.A1 was created only for getting the tenant evicted and that therefore, no bonafide need is made out.

8. The only question that remains is whether the landlord had succeeded in establishing a case of bonafide need under section 11(b) of the Act. Going by the pleadings of the landlord, admittedly he is a Dentist who is practicing in Erattupetta in Kottayam district. The bonafide need urged by him in the rent control petition is that he wants vacant possession of the petition scheduled room for starting a super

speciality dental clinic by making use of the adjacent room also. The tenant has no case that the petitioner landlord has any other room in his possession in the locality. The financial capacity of the landlord is undisputed. It is also come out in evidence that the landlord is now conducting a Dental Clinic in a rented premises at Erattupetta. These would, therefore, show that the landlord is a person qualified to establish a dental clinic and he also has the financial capacity. If such a person has taken a decision to establish a super speciality dental clinic in his premises, that requirement of the landlord cannot be described as not a bonafide one. In such circumstances, we do not see any reason to conclude that the need urged by the landlord is not a bonafide one. Therefore, the only way for the tenant is to claim the benefit of the provisos to section 11(3).

9. In so far as the claim of the tenant under the provisos to section 11(3) is concerned, from the order of the rent control appellate authority itself,

it is seen that the tenant has pleaded the benefit of the second proviso and the appellate authority has declined to accept that case set up by the tenant. This means that the tenant is not entitled to claim the benefit of the provisos to section 11(3) also.

10. In the aforesaid circumstances, we are not inclined to uphold the order passed by the appellate authority in its judgment in RCA.69/07. Accordingly, the judgment of the Rent Control Appellate Authority, Irinjalakkuda in RCA.69/07 is set aside and the order passed by the Rent Control Court, Chalakkudy in RCP.25/06 is restored.

11. At this stage, counsel for the respondent sought for a reasonable time to surrender vacant possession of the petition scheduled property to the landlord. On this request also the petitioner was heard. Having regard to the assertion made and also considering the fact that the premises was used by the tenant for dry cleaning business, we allow the tenant six months' time from today to surrender

vacant possession. This shall be subject to the condition that the tenant shall file an affidavit before the Rent Control Court with an unconditional undertaking to surrender the premises to the landlord on the expiry of the six months' period and also on his paying rent without fail. Such affidavit shall be filed within a period of two weeks from today.

The revision is allowed as above.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
ALEXANDER THOMAS, Judge.

k kb.

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PS TO JUDGE