

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN

&

THE HONOURABLE MRS. JUSTICE MARY JOSEPH

WEDNESDAY, THE 3RD DAY OF JUNE 2015/13TH JYAISHTA, 1937

R C Rev.No. 295 of 2013 ()

AGAINST THE JUDGMENT IN RCA 46/2008 of RENT CONTROL APPELLATE
AUTHORITY, THRISSUR DATED 16-03-2013

AGAINST THE ORDER IN RCP 44/2006 of RENT CONTROL COURT, IRINJALAKUDA
DATED 11-04-2008

REVISION PETITIONER(S)/RESPONDENT/ TENANT:

MUHAMMED IBRAHIM, AGED 54 YEARS
S/O CHERIYEADATHUPARAMBIL MUHAMMED SAINUDHIN
KALLETUMKARA DESOM
TAZHEKKADU VILLAGE, MUKUNDAPURAM TALUK

BY ADV. SRI.T.N.MANOJ

RESPONDENT(S)/APPELLANT/ PETITIONER:

JUSTIN,
S/O CHIRAMMEL EDATHURUTHYKKARAN DEVASSY KUTTY
IRINJALAKUDA VILLAGE AND DESOM
MUKUNDAPURAM TALUK 686502

BY ADV. SRI.G.SREEKUMAR (CHELUR)

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON
03-06-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.SURENDRA MOHAN & MARY JOSEPH, JJ.

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R.C.R No.295 of 2013

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Dated this the 3rd day of June, 2015

ORDER

Surendra Mohan,J.

The tenant is the revision petitioner. The respondent/landlord had filed R.C.P No.44 of 2006 before the Rent Control Court, Irinjalakuda for eviction of the tenant on the ground of bona fide need. According to the landlord, he was a person who had suffered serious injuries in a motor vehicle accident. The injuries have incapacitated him from undertaking strenuous jobs. Therefore, he wanted the tenanted premises for the purpose of starting a stationery business so as to earn a livelihood for himself. The tenant, a tailor, is conducting a tailoring business from the tenanted shop room and also residing in the rooms behind the shop room. The premises consists of four rooms. It is in evidence that, the landlord had filed another Rent Control Petition, R.C.P No.43 of 2006, seeking vacant possession of another shop room. The need put forth in the said petition was that, he needed the said shop room for his residence, he being a

bachelor.

2. The need of the landlord was resisted by the tenant alleging that the same was only a ruse for eviction. According to the petitioner/tenant, the premises were taken on rent by his father from the grand father of the respondent in the year 1955. The entrustment was for the combined purpose of residence as well as carrying on a business. His father had conducted tailoring business from the business, which is being continued by the petitioner after the death of his father. He is residing in the rooms behind, with his family comprising of his wife and children. According to him, the income from the tailoring business is his sole means of livelihood. There were no other suitable rooms available in the locality for shifting his business. The filing of R.C.P No.43 of 2006 was pointed out to me as a factor cutting at the root of the bona fides of the need put forth. Therefore, the tenant sought for dismissal of the Rent Control Petition.

3. The evidence in the case consists of Exts.A1 to A12 documents and the oral testimonies of P.W.1 and P.W.2 on the side of the landlord and Exts.B1 to B5 documents and the oral testimonies of R.W.1 and R.W.2 on the side of the tenant. Report of the Advocate Commissioner, photos and negatives have been

marked as Exts.C1 to C4. On consideration of the evidence on record, the Rent Control Court found that the need put forth by the landlord was not bona fide. On the question of applicability of the second proviso to Section 11(3) of the Act, it was found by the Rent Controller that, the buildings available in the locality were not suitable and not within the reach of the tenant financially. The matter was carried by the landlord in appeal before the Rent Control Appellate Authority, Thrissur, in R.C.A No.46 of 2008. The Rent Control Appellate Authority, on a reappraisal of the evidence, has come to the conclusion that, the need of the landlord was bona fide and that the tenant was not entitled to the benefit of second proviso to Section 11(3) of the Act. The tenant has filed this revision aggrieved by the judgment of the Rent Control Appellate Authority.

4. Advocate Sri.T.N.Manoj appears for the petitioner while Advocate Sri.G.Sreekumar Chelur appears for the respondent/landlord. We have heard the respective counsel at length and perused the records of the case.

5. According to Sri.T.N.Manoj, the Rent Control Court had rightly found that the need put forth by the landlord was not bona fide. With respect to the applicability of the second proviso to

Section 11(2) also the Rent Controller had arrived at the proper conclusion, considering the financial capacity of the tenant. It is contended that, the Rent Control Appellate Authority was carried away by the fact that the tenant was not only carrying on his tailoring business from the premises but was also residing with his family in the rooms behind. Since the purpose of entrustment of the tenanted premises has not been brought out, the tenant's use of the premises for his residence also amounted to violation of the terms of entrustment. Consequently, he was not entitled to the benefit of the second proviso to Section 11(3) of the Act. The said assumption of the Rent Control Appellate Authority, according to the learned counsel, was wrong for the reason that the rent deed was with the respondent/landlord. He had admitted to the said fact when he was examined as P.W.1. Therefore, his omission to produce the same should have been taken note of and an adverse inference, against the non-production thereof drawn. The report of the Advocate Commissioner is referred to, to contend that, though the availability of rooms in the locality has been reported, no details regarding the question as to whether they were available for rent or what was the rent that was being demanded was not reported. It is further contended by the learned counsel that, the

financial capacity of the tenant to pay the rent demanded in respect of modern shop rooms available in the locality was a relevant factor that has been omitted to be considered by the Appellate Authority. The counsel has also placed reliance on the decisions of this Court to contend that such aspects were germane in deciding whether rooms were available in the locality for shifting the business. Since the relevant factors have not been considered by the Appellate Authority, according to the learned counsel, the judgment of the Appellate Authority is wrong and is liable to be set aside.

6. The counsel for the respondent/landlord, on the other hand, pointed out that despite there being evidence on record that the other Rent Control Petition, R.C.P No.43 of 2006, was filed for a different purpose, the Rent Control Court had put the blame on the landlord to conclude that the need put forth was not bona fide. The landlord was also blamed for the previous proceedings instituted by his predecessor in title. Though the said person was his father, it is contended that, he could not be blamed for the said proceedings. The earlier suit instituted by his father was for an injunction against causing damage to the tenanted building. The earlier Rent Control Petition was for arrears of rent. The Rent Control Petition was closed after the rent was paid. It is the

further contention of the learned counsel for the respondent that the commission report shows that rooms are available in the locality. It was therefore for the tenant to have adduced evidence to show why the rooms were not suitable for him to shift his business. The tenant has not adduced any evidence regarding the income derived by him from the business conducted in the tenanted premises nor is there any evidence regarding the rent that is demanded for the premises that are available in the locality. The burden to prove all the above aspects was on the tenant. Since the tenant has not discharged the said burden, according to the learned counsel, the revision is only to be dismissed.

7. A perusal of the order of the Rent Control Court shows that the said court had not considered the bona fides of the need put forth by the landlord in the proper perspective. The Rent Control Court was carried away by the fact that an earlier Original Suit and R.C.P No.28 of 2002 instituted by the father of the respondent/landlord had been dismissed. The property had been conveyed to the respondent/ landlord after the dismissal of the said proceedings. The Rent Control Court also took note of the fact that another Rent Control Petition filed by the landlord was pending. Therefore, the Rent Control Court found that the need put forth

was not bona fide. We are also of the view that the Rent Control Court had not considered the question of bona fides in the proper perspective. The Rent Control Appellate Authority has, therefore, considered the need put forth by the landlord on the basis of the evidence on record. We find that the landlord had suffered serious injuries in a motor vehicle accident that has incapacitated him physically and that the disability continues. The desire of the said landlord to start some business for the purpose of earning a livelihood for himself cannot be found fault with. The earlier proceedings between the landlord's father and the tenant cannot be held against the respondent as rightly found by the Appellate Authority. Therefore, we confirm the findings of the Appellate Authority that the need put forth by the landlord is bona fide.

8. The second question that arises for consideration is whether the tenant is entitled to the benefit of proviso to Section 11(3) of the Act. The counsel for the petitioner has placed reliance on the decision in **Navu v Chinnayyan Chettiar (2003(2) KLT 283)** to point out that, even where a place is used for the combined purpose of residence and business, the benefit of the second proviso could be afforded. The counsel has also placed reliance on the Full Bench decision of this Court in **Francis v Sreedevi**

Varassiar (2003(2) KLT 230). In the said decision, the conclusions have been summarised in paragraph 43 of the judgment. Serial numbers 1 and 2 of the said paragraph are to the following effect.

“43. In view of the above, it is held that:

1. The second proviso carves out an exception to the rule embodied in S.11(3). The burden of proving the relevant facts lies on the tenant. The tenant has to prove that he is dependent on the income from the trade or business being carried on by him in the premises in dispute for his livelihood. He is to further prove that a suitable alternative accommodation is not available.
2. While adjudging 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.”

9. The above dictum has been considered and explained by this Court in a later decision, **Chacko v Thomas (2004(3) KLT 202)**. K.S.Radhakrishnan, J, (as he then was), speaking before the bench, has in paragraph 7 of the judgment held as follows:

“ 7. 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 S.11(3) is on the tenant. In order to get the benefit of the second limb of the second proviso to S.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 S.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 S.11(3).”

10. What emerges from the above is that, in so far as the burden of proof regarding the second proviso to Section 11(3) of the Act is concerned, it is for the tenant to prove both the limbs of the proviso. Therefore, it is for the tenant to prove that he is depending solely on the income derived from the business that is being carried on from the tenanted premises and also that no suitable buildings are available in the locality for shifting his business. A perusal of the evidence in this case shows that, the tenant has not discharged the said burden. There is absolutely no evidence in this case regarding the income that is derived by him from the business carried on in the tenanted premises. According to the learned counsel for the petitioner, the business being a small one, it cannot be expected to have the support of documents by which the income could be proved. What the counsel for the tenant has submitted is that, the income was just sufficient for himself and his family to live. It cannot be said that the statement is sufficient to discharge the burden on the tenant to prove the first limb of the second proviso to Section 11(3) of the Act.

11. With respect to the second limb of proviso, the Advocate Commissioner has reported that there are rooms available in the

locality. He has also reported regarding the existence of signboards intimating that rooms were available for sale or rent. The tenant has no case that he has made enquiries regarding the rent that was being demanded. There is absolutely no evidence regarding the rent of the premises that are available in the locality. Therefore, it has to be held that the tenant is not entitled to the benefit of the second proviso to Section 11(3) of the Act. Counsel for the respondent has placed reliance on the decision in **Kalliani Amma v Sarojini Amma (2004(2) KLT 976)** to contend that the Rent Control Court is not expected to make an enquiry whether the business of the tenant shifted to another premises would generate the same income that he is earning from the tenanted premises. We do not venture to consider the same since the said question does not arise.

For the above reasons, this Rent Control Revision is ordered as follows:

- i) The Rent Control Revision is dismissed.
- ii) The petitioner/tenant is granted time up to 31.12.2015 to surrender vacant possession of the premises to the landlord on condition that he files an affidavit before the Rent Control Court, Irinjalakuda in R.C.P No.44 of 2006, undertaking to surrenders vacant possession

of the premises to the landlord on or before 31.12.2015 and continues to pay the rent in respect of the premises without any delay or default until he surrenders vacant possession of the premises. It is made clear that in the event of default being committed by the tenant in complying with any of the above conditions, he shall forfeit the benefit of these directions.

Sd/-

K.SURENDRA MOHAN, JUDGE

Sd/-

MARY JOSEPH, JUDGE

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P.A to Judge