

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN

&

THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

OP (RC) .No. 105 of 2015 (O)

AGAINST R.C.P.NO.9 OF 2014 ON THE FILE OF THE RENT CONTROL
COURT, ALATHUR.

PETITIONER/RESPONDENT:

K.I.GEEVAR AGED 30 YEARS
S/O IYPE, KOLADI HOUSE, 10.115
PALAYAM, VADAKKENCHERY PO, ALATHUR TALUK
PALAKKAD DISTRICT

BY ADV. SRI.JOHN JOSEPH (ROY)

RESPONDENTS/PETITIONER:

V.K.SELVAN, AGED 42 YEARS,
S/O KRISHNAN, 1/720 KIZHAKKENCHERY GRAMAM
KIZHAKKENCHERY PO, ALATHUR TALUK
PALAKKAD DISTRICT 678 010

R BY ADV. SRI.MAHESH V.MENON

THIS OP (RENT CONTROL) HAVING BEEN FINALLY HEARD ON
16-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (RC) .No. 105 of 2015 (O)

APPENDIX

PETITIONER(S) ' EXHIBITS

EXT.P1: TRUE COPY OF THE AFFIDAVIT AND PETITION FILED BY THE
PETITIONER BEFORE THE RENT CONTROL COURT, ALATHUR.

EXT.P2: TRUE COPY OF THE MEDICAL CERTIFICATE DT. 4/6/15
PRODUCED ALONG WITH EXT. P1 PETITION.

EXT.P3: TRUE COPY OF THE ORDER DT. 20/7/15 IN RCP NO. 9/14 OF
RENT CONTROL COURT ALATHUR.

RESPONDENT(S) ' EXHIBITS: NIL

TRUE COPY

P.A. TO JUDGE.

kp/-

P.N.RAVINDRAN & BABU MATHEW P. JOSEPH, JJ.

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O.P.(RC). No. 105 of 2015

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Dated this the 16th day of October, 2015

JUDGMENT

P.N.Ravindran, J.

The petitioner is the tenant in R.C.P.No.9 of 2014 on the file of the Rent Control Court, Alathur. The respondent is the landlord therein. The respondent landlord instituted R.C.P.No.9 of 2014 on 12.8.2014 praying for an order of eviction under sections 11(2)(b), 11(3) and 11(4)(i) of the Kerala Buildings (Lease and Rent Control) Act, 1965, hereinafter referred to as 'the Act' for short.

2. Upon receipt of notice, the tenant entered appearance and filed a counter statement opposing the prayer for eviction. Inter alia, he also denied and disputed the title of landlord and contended that there is no landlord tenant relationship between the parties. R.C.P.No.9 of 2014 was included in the list on 4.6.2015. On that day, the petitioner in the rent control petition was examined as PW1 and Exts.A1 to A8 and Ext.C1 report submitted by the Advocate Commissioner were marked and the case was adjourned for further evidence to 6.6.2015. On that day a witness to Ext.A5 rent deed produced by the landlord was examined as PW2. After PW2 was examined, evidence on the side of the landlord was closed and the rent

control petition was adjourned to 8.6.2015 for the evidence of the tenant. On 8.6.2015, the tenant was absent. His counsel thereupon reported no instructions. The name of the tenant was called and he was set ex-parte. Learned counsel appearing for the landlord was heard and the rent control petition was adjourned to 9.6.2015 for orders. On 9.6.2015, the rent control court passed an order of eviction under sections 11(2)(b), 11(3) and 11(4)(i) of the Act.

3. Within the period of limitation prescribed for the purpose viz; thirty days, the tenant filed an application under order IX Rule 13 of the Code of Civil Procedure praying that the order of eviction passed on 9.6.2015 after setting him ex-parte on 8.6.2015 may be set aside and the rent control petition taken up for trial and disposal. The aforesaid application was filed on 7.7.2015. The court below declined to number the application on the ground that the rent control petition was allowed on the merits and therefore, a petition under order IX Rule 13 of the Code of Civil Procedure is not maintainable. Consequently the unnumbered application to set aside the ex-parte order of eviction was returned to the tenant's counsel on 10.7.2015.

4. Learned counsel for the tenant thereupon made the following endorsement on the said unnumbered application and re-presented it on 14.7.2017.

"Even though the RCP is allowed on merit, the order

passed by this court is not by O.17. R.2. The order passed by the court is an ex-parte order as reported in AIR 1995 ALL 22. Hence the petition is maintainable hence re-submitted. For Hg it may call on bench."

5. The rent control court thereupon directed notice on the said application to be given to the other side, viz; the learned counsel appearing for the landlord and to call the petition on 18.7.2015. A copy of the petition had even earlier been served on the counsel appearing for the landlord. On 18.7.2015 the application was adjourned to 20.7.2015 and on that day it was heard and dismissed by the following order:

"Heard. It is seen that order in RCP 9/2014 was pronounced on merit. Hence, petitioner's remedy is to file appeal or revision as the case may be. Accordingly petition is returned."

The said order is under challenge in this original petition filed under Article 227 of the Constitution of India.

6. The main contention raised in the instant original petition is that though the rent control court has in the order of eviction passed by it on 9.6.2015 discussed the issues in the case and considered the evidence and decided the case on the merits, it is not a disposal under Order XVII Rule 3 of the Code of Civil Procedure but a disposal under Order XVII Rule 2 and therefore, an application under Order IX Rule 13 of the Code of Civil Procedure is maintainable. It is contended that the

observation made by the rent control court that only an appeal or revision would lie and not a petition to set aside the ex-parte order of eviction, is unsustainable in law and is liable to be set aside.

7. We heard Sri. John Joseph, learned counsel appearing for the petitioner. We have also gone through the impugned orders and the original of the unnumbered application which was returned to the tenant's counsel pursuant the impugned order. It is discernible from the materials before us that evidence on the side of the landlord was recorded on 4.6.2015 when he was examined as PW1 and Exts.A1 to A8 and Ext.C1 report submitted by the Advocate Commissioner were marked. The rent control petition was thereupon adjourned to 6.6.2015 for further evidence of the landlord. On that day, an attesting witness to Ext.A5 was examined as PW2. Thereupon, evidence on the side of the landlord was closed and the rent control petition was adjourned to 8.6.2015 for the respondent's (tenant's) evidence. On 8.6.2015, the tenant was not present. His counsel thereupon reported 'no instructions'. The tenant's name was called and he was set ex-parte and the rent control petition was heard and adjourned to 9.6.2015 for orders. On that day, an order of eviction as prayed for, was passed.

8. It is evident from the materials before us that the trial of the rent control petition was not adjourned to 8.6.2015 on the request of

the tenant. However, it cannot be disputed that the rent control petition was adjourned to 8.6.2015 for the evidence of the tenant. He was admittedly not present on that day. Such being the situation, clause (a) of rule 3 of Order XVII of the Code of Civil Procedure can have no application. As the tenant was absent, the rent control court could have proceeded only under Rule 2 of Order XVII of the Code of Civil Procedure. Rule 2 of Order XVII permits the trial court to either proceed to dispose of the case in any of the modes contemplated by Order IX of the Code of Civil Procedure or make such other order as it thinks fit. The Explanation to Rule 2 of Order XVII Code of Civil Procedure stipulates that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion, proceed with the case as if such party were present.

9. In the instant case, evidence on the side of the tenant has not been recorded. The rent control petition was posted on 8.6.2015 for the tenant's evidence. The landlord's evidence was over on 6.6.2015. Though the adjournment of the rent control petition from 6.6.2015 to 8.6.2015 was for recording the evidence of the tenant, as he was not present in person, the rent control court could not have proceeded to dispose of the case under Order XVII Rule 3. It could

have proceeded to dispose of the rent control petition only under Order XVII Rule 2 of the Code of Civil Procedure. Rule 2 of Order XVII applies only where the parties or any of them fail to appear. Even in such a situation, in view of the Explanation to Rule 2 of Order XVII of the Code of Civil Procedure, it is only where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on the day to which the hearing of the suit is adjourned, the court is empowered to proceed with the case as if such party were present. In the instant case, the evidence on the side of the tenant or a substantial portion of the evidence on the side of the tenant had not been recorded. Consequently, the Explanation to Rule 2 of Order XVII has no application.

10. In such circumstances, notwithstanding the fact that the disposal purports to be on the merits in the sense that the rent control court has in the order passed by it on 9.6.2015 discussed the issues in the case, considered the evidence and decided the case on the merits, it will not be a disposal under Rule 3 Order XVII of the Code of Civil Procedure as the pre-requisites for the applicability of Rule 3 are not satisfied in the instant case. The Explanation to Rule 2 of Order XVII of the Code of Civil Procedure also does not apply to the instant case. Such being the situation, we are of the considered opinion that the

order of eviction passed by the rent control court on 9.6.2015 can only be taken as an ex-parte order of eviction. Consequently, we hold that the unnumbered application filed by the tenant under Order IX Rule 13 of the Code of Civil Procedure which was ordered to be returned by the rent control court by order passed on 20.7.2015 was maintainable and was wrongly returned by the rent control court.

11. We accordingly allow the original petition, set aside the order passed by the Rent Control Court, Alathur on 20.7.2015 on the unnumbered application filed by the tenant in R.C.P.No.9 of 2014 on 7.7.2015 under Oder IX Rule 13 of the Code of Civil Procedure to have the order of eviction passed on 9.6.2015 set aside and direct the Rent Control Court, Alathur to entertain the said application, if the original thereof is re-presented within two weeks from today, as one filed within time and to proceed to dispose it of on the merits after affording the landlord an opportunity to file objections to the said application. The rent control court shall endeavour to dispose of the said application within two months from the date on which it is re-presented by the tenant. The tenant shall, in order to enable the rent control court to act as directed above, produce a certified copy of this judgment along with the unnumbered petition. We make it clear that we have not expressed any opinion on the merits of the contentions raised by the tenant in the application to have the ex-parte order of eviction set

aside and that it is for the rent control court to take a decision in the matter, having regard to the pleadings and the materials before it. We also deem it appropriate to direct that until the application to set aside the ex-parte order of eviction is heard and disposed of, in the event of it being re-presented within the time limit of two weeks stipulated above, further proceedings in execution of the order of eviction passed by the Rent Control Court, Alathur in R.C.P.No.9 of 2014, shall be kept in abeyance.

**P.N.RAVINDRAN
JUDGE**

**BABU MATHEW P. JOSEPH
JUDGE**

kp/-