

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. SURENDRA MOHAN
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH

WEDNESDAY, THE 17TH DAY OF JUNE 2015/27TH JYAISHTA, 1937

R.C.Rev. No. 124 of 2015 ()

AGAINST THE JUDGMENT IN RCA 148/2011 of RENT CONTROL APPELLATE
AUTHORITY, ERNAKULAM DATED 12-02-2015

AGAINST THE ORDER IN RCP 82/2010 of RENT CONTROL COURT, ERNAKULAM
DATED 11-11-2011

REVISION PETITIONER(S)/APPLANT IN RCA 148/2011 AND PETITIONER IN RCP 82/2010:

1. M/S.RAO & COMPANY
40/3044, BROADWAY, ERNAKULAM
COCHIN-682031 REPRESENTED BY ITS MANAGING
PARTNER SRI.D.DINARKARA RAO.
2. SRI.D.DINARKARA RAO(DIED)
MANAGING PARTNER, M/S.RAO & COMPANY40/3044, BROADWAY
ERNAKULAM, COCHIN-682031.
3. PRASANTH RAO (LEGAL REPRESENTATIVE) AGED 33 YEARS
S/O.PRABHAKAR RAO, PARTNER, M/S.RAO & COMPANY40/3044
BROADWAY, ERNAKULAM, COCHIN-682031
4. SRI.PRABHAKAR RAO
PARTNER, M/S.RAO & COMPANY40/3044, BROADWAY
ERNAKULAM, COCHIN-682031.

BY ADV. SRI.A.DINESH RAO

RESPONDENT(S)/PETITIONERS:

1. BAIJU P.JOSE
PANACKAL HOUSE, KOLLAMPARAMBIL LANE, KALOOR
KOCHI-682017.
2. DR.DENNIS P.JOSE
S/O.JOSE, PANACKAL HOUSE, KOLLAMPARAMBIL LANE
KALOOR, KOCHI-682017.
3. OMANA C.C., AGED 73 YEARS
W/O.JOSE, PANACKAL HOUSE, KOLLAMPARAMBIL LANE
KALOOR, KOCHI-682017.
4. GEORGE, AGED 42 YEARS
S/O.JOSE, PANACKAL HOUSE, KOLLAMPARAMBIL LANE
KALOOR, KOCHI-682017.

R2 BY ADV. SRI.TOM K.THOMAS

THIS RENT CONTROL REVISION HAVING COME UP FOR ADMISSION ON
17-06-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

'C.R'

K.SURENDRA MOHAN & MARY JOSEPH, JJ.

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R.C.R No.124 of 2015

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Dated this the 17th day of June, 2015

ORDER

Surendra Mohan,J.

The tenants in R.C.P No.82 of 2010 of the Rent Control Court, Ernakulam are the revision petitioners herein. The respondents/ landlords had filed the Rent Control Petition seeking eviction under Section 11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965 (hereinafter referred to as 'the Act', for short). The tenanted shop room was obtained by the petitioners as per Ext.B1 in the year 1960. They had purchased the business of M/s Eckandy Asoo. Pursuant to the purchase, they were put in possession of the tenanted shop room, with the consent of the then landlord, Sri.Joonas Haji Ummer Sait. The tenants attorned to the landlord and was paying rent in respect of the premises to him. The rent was Rs.200/- per month. In 1972, the landlord transferred the ownership of the

tenanted shop room in favour of his daughter. Thereafter, the rent was being paid to the daughter. In the year 1979, the tenanted shop room was purchased by the 4th respondent along with 1st respondent and father of the 2nd respondent, who is the husband of the 3rd respondent. The tenants thereafter started paying rent to the said respondents. It was in the above circumstances that the Rent Control Petition was filed on the ground of bona fide need for own occupation. The revision petitioners claimed permanent tenancy in respect of the premises and contended that the question could be considered only by a competent Civil Court. The issue was considered by the Rent Control Court and found against the petitioners. Though the petitioners challenged the order of the Rent Control Court in R.C.A No.148 of 2011 before the Rent Control Appellate Authority, Ernakulam, the Appellate Authority has confirmed the findings of the Rent Control Court. This revision is against the said judgment. On the side of the tenants, Ext.B1 document was marked and the second revision petitioner was examined as R.W.1.

2. According to Sri.Dinesh Rao, learned counsel appearing for the petitioners, a perusal of Ext.B1 shows that the petitioners had purchased the business of M/s Eckandy Asoo on 23.05.1960. It is also stated therein that, they had obtained possession of the tenanted shop room with the consent of the then landlord. The case of R.W.1 in the box is that he had paid an amount of Rs.10,000/- at the time of taking possession of the shop room. It is also stated that, the original landlord had assured that the tenants could continue in possession as long as they wanted, paying the rent regularly and without any default. Therefore, it is contended that, a perpetual lease had been created. The counsel referred to Section 105 of the Transfer of Property Act, 1882 to contend that, the said provision permitted the creation of a lease in perpetuity. It is the specific contention of the counsel for the petitioner that, a perpetual lease does not attract the prohibition contained in Section 107 of the Transfer of Property Act that a lease of immovable property could be created only by a registered document. Since both the authorities

below have proceeded on the premise that a lease of immovable property could be created only by a registered document, it is contended that the reasoning is wrong and liable to be set aside. The counsel has a further contention that, it is not necessary for the tenants under Section 11(1) of the Act to adduce proof beyond reasonable doubt, regarding the contention raised against the landlord/tenant relationship. The jurisdiction of the Rent Control Court was merely to examine whether the contention of the tenants or the denial of title was bona fide or not. He therefore, sought for an interference in revision with the judgment of the Appellate Authority.

3. Advocate Sri.Tom K.Thomas, who appears for the respondents, opposes the contentions of the learned counsel for the petitioner. It is pointed out by the counsel that, R.W.1 has no consistent case in the box when he was examined as a witness. He had fairly admitted that the rent in respect of the premises was being paid from month to month. He has also admitted that he had no claim of permanent tenancy. With respect to the proper construction

to be put on Section 107 of the Transfer of Property Act, the contention of the counsel is that any lease of immovable property exceeding a period of one year could be created only by way of a registered document. An oral lease was permissible only in respect of leases that do not exceed the period of one year. According to the counsel, the authorities below have considered the matter in the proper perspective and no interference in revision is warranted.

4. Heard. The facts of the case are not in dispute. It is not disputed that, the tenants have been in possession of the premises ever since 23.05.1960, conducting business therein. They had purchased the business from Ms/Eckandy Asoo as per Ext.B1. However, it is pointed out that the said document mentions the transfer to have been made with the consent of the landlord. The said issue cannot be disputed at this length of time for the reason that, the tenants have been continuing in occupation for the past more than 55 years and the landlords have been receiving the rent in respect of the premises. The claim of the tenants is that, what had been created was a lease in perpetuity. Both sides admit that, there

is no written document evidencing the terms of lease. The original landlord Sri.Joonas Haji Ummer Sait, is no more. R.W.1, as per his affidavit, is aged 96 years. Though he has stated initially that, he was claiming permanent tenancy in respect of the premises, in cross, his case is that he is not claiming permanent tenancy. However, he is definite that he has been paying rent for the premises from month to month. Therefore, the situation is such that, there is no evidence available regarding the terms of the lease on the basis of which the petitioners were put in possession except the evidence of R.W.1. The question therefore to be considered is whether the claim that is put forward can be accepted as bona fide or not.

5. As already noticed by us above, the contention of the petitioner is that Section 105 of the Transfer of Property Act permits the creation of a lease "in perpetuity". There cannot be any dispute regarding the above proposition. The dispute, however, is with respect to the construction to be placed on Section 107 of the Transfer of Property Act. Section 107 is reproduced hereunder for convenience of reference.

“107. Leases how made.- A lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument.

[All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

[Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee.]

Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.]

As per the above provision, a lease of immovable property

- (i) from year to year, or
- ii) for any term exceeding one year, or
- iii) reserving a yearly rent

can be made only by a registered deed.

6. The provision further provides that all other lease of immovable properties may be made either by a registered instrument or by oral agreement accompanied by delivery of

possession. The contention of the learned counsel for the petitioner is that, a perpetual lease does not come within any of the categories of leases made mention of in Section 107. Therefore, in view of the subsequent clauses, a lease in perpetuity is permissible to be created orally.

7. The above contention cannot be accepted for the reason that Section 107 contemplates three categories of leases namely, a lease from year to year, a lease for any term exceeding one year or a lease reserving yearly rent. A lease in perpetuity is a lease for a term exceeding one year. Therefore, a lease in perpetuity clearly comes within the second category enumerated in Section 107. Since a lease in perpetuity comes within the prohibition enacted by the first clause, the second clause can have no application to the said category of lease. The proper construction to be placed on the second clause is that the same can apply only to leases for terms that do not exceed one year.

8. Counsel for the respondent has placed reliance on the decision of the Apex court in Samir Mukherjee v. Davinder K. Bajaj

and Others (2001 KHC 1107). The Supreme Court has considered the scope of Section 107 in paragraphs 6 and 7 of the said decision, as follows:

“6. S.107 prescribes the procedure for execution of a lease between the parties. Under the first paragraph of this section a lease of immovable property from year to year or for any term exceeding one year or reserving yearly rent can be made only by registered instrument and remaining classes of leases are governed by the second paragraph that is to say all other leases of immovable property can be made either by registered instrument or by oral agreement accompanied by delivery of possession.

7. In the case in hand we are concerned with an oral lease which is hit by the first paragraph of S.107 of the Transfer of Property Act. Under S.107 parties have an option to enter into a lease in respect of an immovable property either for a term less than a year or from year to year, for any term exceeding one year or reserving a yearly rent. If they decide upon having a lease in respect of any immovable property from year to year or for any term exceeding one year, or reserving yearly rent, such a lease has to be only by a registered instrument. In absence of a registered instrument no valid lease from year to year or for a term exceeding one year or reserving a yearly rent can be created. If the lease is not a valid lease within the meaning of the opening words of S.106 the rule of construction embodied therein would not be attracted. The above is the legal position on a harmonious reading of both the sections.”

9. In view of the above binding dictum, it is clear that a lease

in perpetuity cannot be created by an oral arrangement. Since no lease in perpetuity could be created orally, the contention that the tenants are protected by a lease in perpetuity cannot be accepted. Any such contention that is not tenable under law cannot be termed as bona fide. Therefore, the finding of the authorities below that the contentions lacks bona fides is sustained.

For the above reasons we find no grounds to admit this revision or to interfere with the judgment of the Appellate Court. The revision is accordingly dismissed.

Sd/-
K.SURENDRA MOHAN, JUDGE

Sd/-
MARY JOSEPH, JUDGE

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