

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN

&

THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

TUESDAY, THE 6TH DAY OF OCTOBER 2015/14TH ASWINA, 1937

RCRev..No. 243 of 2015 ()

AGAINST THE ORDER/JUDGMENT IN RCA 70/2014 of RENT CONTROL APPELLATE
AUTHORITY/ADDL. DISTRICT JUDGE IV, KOZHIKODE DATED 18-06-2015

AGAINST THE ORDER/JUDGMENT IN RCP 7/2011 of RENT CONTROLLER/MUNSIF
PERAMBARA DATED 28-02-2014

REVISION PETITIONER(S) /APPELLANT/RESPONDENT:

M.T.KURIAKOSE AGED 53 YEARS
S/O.THOMAS, RESIDING AT MAPPILAKUNNEL HOUSE
CHANGORATH AMSOM, AVADUKKA DESOM, KOYILANDY
KOZHIKODE.

BY ADVS.SRI.V.V.SURENDRAN
SRI.P.A.HARISH

RESPONDENT (S) /RESPONDENT/PETITIONER:

C.P.SHAIJU
S/O.KUNHIKRISHNAN, RESIDING AT AMBADI
NADATHALAKKAL THAZHE, P.O.PERAMBRA, ERAVATTOOR AMSOM
KIZHINJANNIAM DESOM, KOYILANDY TALUK
KOZHIKODE-673525.

THIS RENT CONTROL REVISION HAVING COME UP FOR ADMISSION ON
06-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**P.N. Ravindran &
Babu Mathew P. Joseph, JJ.**

R.C.R. No.243 of 2015

Dated this the 6th October, 2015

ORDER

P.N. Ravindran, J.

The petitioner is the tenant in R.C.P.No.7 of 2011 on the file of the Rent Control Court, Perambra. The sole respondent is the landlord therein. The respondent/landlord instituted R.C.P.No.7 of 2011 praying for an order of eviction under section 11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965 (hereinafter referred to as 'the Act' for short) on the ground that he bonafide needs the petition schedule shop room for running an electrical shop. He contended that though he has completed the I.T.I. course, he is not having any job or avocation. The tenant opposed the application by filing written objections. He contended that the bonafide need put-forward is not true or genuine, that the landlord does not have any experience or skill for conducting the proposed business and that he has another shop room in his possession. The tenant also contended that he is entitled to the protection of the

second limb of the second proviso to section 11(3) of the Act.

2. In the rent control court, the landlord examined himself as PW1 and produced and marked Exts.A1 and A2. The tenant examined himself as RW1. On application filed by the landlord, an Advocate Commissioner was appointed to inspect the petition schedule building and also to enquire about other buildings in the locality, for the purpose of ascertaining the availability of other alternate accommodation. The report submitted by the Advocate Commissioner was marked as Ext.C1 and the plan accompanying it, as Ext.C2.

3. The rent control court considered the rival contentions and the materials on record and held that the need put forward is bonafide. The contention of the tenant that he is entitled to the protection of the second limb of the second proviso to section 11(3) of the Act, was repelled. An order of eviction was accordingly passed. The tenant carried the matter in appeal by filing R.C.A. No.70 of 2014 on the file of the Rent Control Appellate Authority, Kozhikode. The appellate authority held that though the tenant has proved the ingredients of the

first limb of the second proviso to section 11(3) of the Act, he has not succeeded in proving the ingredients of the second limb of the second proviso to section 11(3) of the Act. The appellate authority also held that the need put-forward is bonafide. The appeal was accordingly dismissed by judgment delivered on 18.6.2015. Hence, this revision petition.

4. We heard Shri P.A. Harish, learned counsel appearing for the petitioner. Learned counsel for the petitioner submitted that it is the state of affairs that obtained as on the date of institution of the rent control petition that has to be taken into account for the purpose of deciding the question whether the tenant is entitled to the protection of the second limb of the second proviso to section 11(3) of the Act, that in the instant case, the landlord examined as PW1, has admitted that the buildings pointed out by the Advocate Commissioner in Ext.C1 report were not in existence as on the date of institution of the rent control petition and therefore, as the buildings now pointed out as alternate accommodation were not available when the rent control petition was

filed, an order of eviction could not have been passed. Reliance was placed on the decision of the Division Bench of this court in **Prasannan v. Haris** (2005 (2) KLT 365) in support of the said contention.

5. Shorn of details, the substance of the contention raised by the learned counsel for the petitioner is that as the buildings now pointed out by the Advocate Commissioner in Ext.C1 report are buildings which had come into existence after the rent control petition was filed, the availability of such buildings cannot be a reason to hold that the tenant is not entitled to the protection of the second limb of the second proviso to section 11(3) of the Act.

6. We have considered the submissions made at the Bar by the learned counsel appearing for the petitioner. We have also gone through the impugned judgment/order, as also the so called admission stated to have been made by PW1. The landlord had, in the rent control petition, averred in paragraph 7 thereof that a large number of rooms are lying vacant in Perambra town. The tenant had, in his counter

statement, denied the said averment in paragraph 5 thereof. The Advocate Commissioner appointed, on application filed by the landlord, has in Ext.C1 report stated that the landlord had pointed out about 15 shop rooms and that in some of the shop rooms a notice to the effect that rooms are available for rent, as also the phone number of the person to be contacted were set out. The tenant examined as RW1 had, when cross-examined, admitted that he had not made any enquiry about the availability of the rooms referred to by the Advocate Commissioner in Ext.C1 report. The landlord had, in the affidavit dated 7.1.2014 sworn to by him in lieu of chief examination, reiterated the case set out by him in the petition for eviction that a large number of vacant rooms are available in Perambra town. When he was cross examined on that aspect, he had deposed as follows:

“ആ ഭാഗത്ത് കുടുതൽ പീടിക മുറികൾ ഒഴിഞ്ഞ് കിടപ്പുണ്ട്? ഉണ്ട്. പുതുതായി ധാരാളം വന്നിട്ടുണ്ട്. വന്നത് ഹർജി ബോധിപ്പിച്ചതിന് ശേഷമാണ്. ആയതിൽ ഉടമസ്ഥന്റെ പേരോ പീടിക മുറിയുടെ number ഓ കാണിക്കുന്നതിന് എന്തെങ്കിലും തടസ്സം ഉണ്ടായിരുന്നോ? പണി പൂർത്തിയാക്കാത്തതുകൊണ്ടാണ് ഹർജിയിൽ പറയാതിരുന്നത്. ഒഴിഞ്ഞ മുറികൾ ഞാൻ commissioner ന് കാണിച്ച് കൊടുത്തിട്ടില്ല.”

It is relying on the aforesaid portion of the deposition of the landlord

examined as PW1 that the learned counsel for the petitioner contends that the alternate buildings pointed out by the Advocate Commissioner and referred to by the landlord had come into existence only after the rent control petition was filed and therefore, the availability of the said buildings cannot be a reason to deny the protection of the second limb of the second proviso to section 11(3) of the Act to the tenant.

7. It is now well settled by a series of decisions of this court that the burden of proving the ingredients of both the limbs of the second proviso to section 11(3) of the Act, is on the tenant. The tenant in the instant case, has not chosen to examine the Accommodation Controller or adduced any evidence to prove his contention in paragraph 5 of the written statement that no other suitable vacant rooms are available in the locality. The tenant could have, in our opinion, requested the Advocate Commissioner appointed on application filed by the landlord, to ascertain the availability of vacant rooms in Perambra town. For reasons best known to him, he did not make such a request to the Advocate Commissioner. Though the landlord's father had pointed out

to the Advocate Commissioner the availability of 15 rooms and the report discloses that all those rooms were found locked, the tenant examined as RW1 has admitted that he had not made any enquiry regarding the availability of other vacant rooms in Perambra town. It is thus, evident from the materials on record that the tenant has not discharged the burden of proving the non availability of other suitable buildings in the locality. However, learned counsel for the petitioner contends, relying upon the decision of the Division Bench of this court in **Prasannan v. Haris** (2005 (2) KLT 365) that the availability of other suitable alternate accommodation has to be as on the date of the petition for eviction and as the landlord has admitted the fact that the other buildings had come up only after the rent control petition was filed, the tenant should not be denied the benefit of the second limb of the second proviso to section 11(3) of the Act. In our opinion, the said contention is plainly untenable. This court has not in **Prasannan's case** (2005 (2) KLT 365), held that if the other alternate buildings are new buildings that have been put up during the pendency of the petition

for eviction, the availability of such buildings should not be taken into account. All that was held therein was that the state of affairs as on the date of filing of the petition for eviction will have to be taken into account, though subsequent events which have a bearing and impact on the rights of parties can be looked into if they are crucial and relevant. The Division Bench also held that the burden is on the tenant to prove the ingredients of the second proviso to section 11(3) of the Act.

8. As stated earlier, apart from vaguely denying the landlord's contention that other suitable buildings are available in Perambra town, the tenant has not taken steps to prove the non-availability of other suitable buildings in the locality. The burden was on him and him alone to prove the facts required to claim the protection of the second proviso to section 11(3) of the Act. As he has not discharged the burden and nothing stands in the way of the landlord from pointing out the new buildings which have come up more or less simultaneous with the filing of the rent control petition or immediately thereafter, it cannot be held that even if vacant rooms are available as on the date of

disposal of the rent control petition or immediately prior to it, such availability should not be taken into account for the purpose of deciding whether the tenant is entitled to the protection of the second proviso to section 11(3) of the Act.

The impugned judgment/order do not, in our opinion, suffer from any infirmity or illegality. The revision petition fails and is accordingly dismissed.

(P.N. Ravindran, Judge.)

(Babu Mathew P. Joseph, Judge.)

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