

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 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

RRev..No. 87 of 2014 (D)

AGAINST THE JUDGMENT IN RCA 52/2009 of I ADDL. RENT CONTROL APPELLATE
AUTHORITY, THRISSUR DATED 24-07-2013

AGAINST THE ORDER IN RCP 36/2007 of RENT CONTROL COURT,THRISSUR
DATED 20-06-2009

REVISION PETITIONER/APPELLANT/RESPONDENT:

JOHNY,
S/O.PORATHOOR KURIAKOSE, ADATTU VILLAGE
THUNDALAKKAVU DESOM, THRISSUR TALUK
THRISSUR DISTRICT.

BY ADVS. SRI.P.SANTHOSH (PODUVAL)
SMT.R.RAJITHA
SRI.K.D.SREEVISAKH

RESPONDENT/RESPONDENT/PETITIONER:

MUHAMMED,
S/O.KUNJUMUHAMMED MUSALIAR, RAYAMMARAKKAR VEETIL
PAVARATTY VILLAGE, MARATHAYOOR DESOM, CHAVAKKAD TALUK
THRISSUR DISTRICT, 680507.

BY ADV. SRI.BABU KARUKAPADATH
BY ADV. SMT.M.A.VAHEEDA BABU
BY ADV. SRI.K.A.NOUSHAD
BY ADV. SRI.P.U.VINOD KUMAR
BY ADV. SRI.MITHUN BABY JOHN
BY ADV. SRI.J.RAMKUMAR

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON
15-12-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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

R.C.R.No.87 of 2014

Dated this the 15th day of December, 2015

ORDER

P. N. Ravindran, J.

The petitioner is the tenant in R.C.P.No.36 of 2007 on the file of the Rent Control Court, Thrissur, a petition filed by the respondent landlord 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. The landlord had in the petition for eviction averred that the petition schedule room which bears door No.T.C.48/94 of Thrissur Corporation was let out to the tenant on 17.03.2004 on a monthly rent of ₹1,400/- on the terms and stipulations set out in Ext.A1 rent deed. The landlord had further averred that the tenant has kept the rent in arrears from May, 2004, that as on the date of the rent control petition which was instituted on 11.04.2007, rent for 35 months was in due, that he had on several occasions demanded payment of arrears of rent in person and though he had sent Ext.A2 notice dated 12.12.2006, it was returned without acceptance. The landlord had also averred that the tenant has, without his knowledge and consent, sublet the petition

schedule room to Vinayan, S/o Sankaran and thereby violated the terms of the entrustment, that the tenant is presently not in station and that he has given exclusive possession of the petition schedule room to the aforesaid Vinayan for the purpose of running the business. The rent control petition proceeds to state that on coming to know of the objectionable sublease, the landlord went over to the petition schedule room and came to understand that the petition schedule room is in the possession of the aforesaid Vinayan. The landlord had further averred that upon realising the fact that he had come to know of the objectionable sublease, the tenant has on the averment that though he is presently not in station, his father is conducting the business on his behalf, filed O.S.No.2482 of 2005 on the file of the Court of the Munsiff of Thrissur for a decree restraining the landlord from forcibly evicting him from the tenanted premises and that he has in the said suit affirmed the fact that he is presently not in station. It was further averred that though the landlord had on several occasions called upon the tenant to terminate the objectionable sublease and to surrender possession of the tenanted premises to him and had also caused Ext.A2 notice dated 12.12.2006 to be issued, the tenant has without accepting the notice returned it and has not surrendered

possession of the petition schedule room to the landlord. The landlord had further averred that he bona fide needs the petition schedule room to start a workshop of his own. The relevant averments regarding the sublease contained in paragraphs 4 and 5 of the rent control petition are extracted below for ready reference:

“4) കൂടാതെ എതുകക്ഷി വാടക കരാർ നിശ്ചയങ്ങൾക്ക് എതിരായി, ഹർജിക്കാരന്റെ അറിവോ സമ്മതമോ കൂടാതെ ഹർജി പട്ടിക വഹകൾ തൃശൂർ താലൂക്ക് പൂല്ലടി വില്ലേജ് പൂനൂർക്കര ദേശത്ത് വല്ലത്തടം ശങ്കരൻ മകൻ വിനയൻ എന്നവർക്ക് മേൽ വാടകയ്ക്ക് അന്യകൈവശം കൊടുത്തിട്ടുള്ളതും കരാർ നിശ്ചയങ്ങൾ ലംഘിച്ചിട്ടുള്ളതുകൊണ്ടു. എതുകക്ഷി ഇപ്പോൾ സ്ഥലത്തില്ലാത്തതും ഹർജി പട്ടിക വഹകൾ പൂർണ്ണമായും മേൽപറഞ്ഞ വിനയൻ എന്നവർക്ക് ബിസിനസ് ആവശ്യത്തിനായി കൈവശം കൊടുത്തിട്ടുള്ളതുമാണ്. ടി സംഗതികൾ അറിഞ്ഞ് ഹർജിക്കാരൻ ഹർജി പട്ടിക വഹകളിൽ ചെന്നിട്ടുള്ളതും വിനയൻ എന്നവരുടെ കൈവശത്തിലാണ് ഹർജി പട്ടിക വഹകളെന്ന് മനസിലാക്കിയിട്ടുള്ളതുമാണ്. ഹർജിക്കാരൻ പട്ടിക വഹകളിൽ ചെന്ന സംഗതി മനസിലാക്കി, എതുകക്ഷി, ടിയാൻ ഇപ്പോൾ സ്ഥലത്തില്ലെന്നും ടിയാന്റെ പിതാവാണ് ബിസിനസ് നടത്തുന്നതെന്നും, ടിയാനെ ഹർജി പട്ടിക വഹകളിൽനിന്നും ബലമായി ഒഴിപ്പിക്കരുതെന്നും അപേക്ഷിച്ച് തൃശൂർ മുൻസിഫ് കോടതി മുന്പാകെ O.S.2482/05 നമ്പ്രായി അന്യായം ബോധിപ്പിച്ചിട്ടുള്ളതാകുന്നു. ടി അന്യായം എതുകക്ഷിയുടെ മുക്ത്യാർക്കാരൻ എന്ന നിലയിൽ മുരളീധരൻ എന്നയാളാകുന്നു ഫയൽ ചെയ്തിട്ടുള്ളത്. ടി. അന്യായത്തിൽ എതുകക്ഷി ഇപ്പോൾ സ്ഥലത്തില്ല എന്ന സംഗതി സമ്മതിച്ചിട്ടുള്ളതാണ്.

5) ഹർജി പട്ടിക വഹകൾ അന്യകൈവശം കൊടുത്തത് റദ്ദാക്കി പട്ടിക വഹകൾ ഹർജിക്കാരന് തിരികെ കൈവശം തരണമെന്ന് പലതവണ നേരിട്ടും അവസാനമായി 12.12.2006 തീയതി വെച്ചു നോട്ടീസ് മുഖാന്തിരവും അറിയിച്ചുവെങ്കിലും ടിയാൻ ടി നോട്ടീസ് കൈപറ്റാതെ മനപൂർവ്വം മടക്കി അയച്ചിട്ടുള്ളതും ഇന്നേവരെ ഹർജി പട്ടിക വഹകൾ ഒഴിഞ്ഞ് തന്നിട്ടില്ലാത്തതുമാണ്.”

3. Upon receipt of notice, the tenant entered appearance and filed a counter statement dated 19.11.2008 refuting the allegation that he has kept the rent in arrears. The tenant contended that he had not willfully kept the rent in arrears. He had further averred that he is

running a patch work-cum-painting workshop in the petition schedule shop room along with his father and power of attorney; that he had to go to abroad in connection with employment for three years; that in his absence, his father and the power of attorney are running the business on his behalf and that the persons seen in the establishment are his employees. He had also averred that in his absence it was the power of attorney who was paying wages to the workers and was also paying the rent. He had further averred that when rent up to 17.05.2005 was tendered the landlord refused to receive it and thereupon it was sent by money order on 27.05.2005. As regards the allegation that he has sublet the tenanted premises to Vinayan, the tenant had in paragraph 4 of the counter statement averred as follows:

“4) ഹർജി 4-ാം വകുപ്പിൽ പറഞ്ഞിട്ടുള്ള സംഗതികൾ ശരിയല്ലാത്തതും ഈ എതുകക്ഷി ശക്തിയായി നിഷേധിക്കുന്നതുമാണ്. എതുകക്ഷി വാടക കരാർ നിശ്ചയങ്ങൾക്കെതിരായി ഹർജിക്കാരന്റെ അറിവോ സമ്മതമോ കൂടാതെ ഹർജി പട്ടികവഹകൾ തൃശൂർ താലൂക്ക് പുല്ലൂഴി വില്ലേജ് പുതുർക്കരദേശത്ത് വല്ലത്തടം ശങ്കരൻ മകൻ വിനയൻ എന്നിവർക്ക് മേൽ വാടകയ്ക്ക് അന്യകൈവശം കൊടുത്തിട്ടുള്ളതും കരാർ നിശ്ചയങ്ങൾ ലംഘിച്ചിട്ടുള്ളതുമാകുന്നു എന്ന പ്രസ്താവനകൾ ശരിയല്ലാത്തതും ഈ എതുകക്ഷി ശക്തിയായി നിഷേധിക്കുന്നതുമാണ്. മേൽപ്പറഞ്ഞ വിനയൻ ഈ എതുകക്ഷിയുടെ തൊഴിലാളിയാണ്. മേൽപ്പറഞ്ഞ വിനയനെ കൂടാതെ ഉണ്ണിക്കൃഷ്ണൻ, വിത്സൺ, സുനിൽകുമാർ, ഔസേപ്പു മകൻ വിത്സൺ എന്നിവരും ഈ എതുകക്ഷിയും, ജോലിക്കാരായി ഹർജിപട്ടികവഹകളിൽ ജോലിചെയ്യുന്നതാണ്. ഹർജിപട്ടിക മുറിയിലുള്ള എല്ലാ പണിയായുധങ്ങളും മെഷനികളും ഈ എതുകക്ഷിയ്ക്ക് മാത്രമവകാശപ്പെട്ടതാണ്. എതുകക്ഷിയെ ഹർജിക്കാരൻ ഹർജിപട്ടികവഹകളിൽനിന്ന് ബലമായി പുറത്താക്കാൻ ശ്രമിച്ചപ്പോൾ ഹർജിക്കാരനെതിരെ തൃശൂർ മുൻസിഫ് കോടതിയിൽ O.S.2482/05 നമ്പ്രായി അന്യായം ഫയലാക്കിയിരുന്നതും ആയതിലെ I.A.6826/05 നമ്പ് ഹർജിയിൽ നിയമിതനായ കമ്മീഷണർ ഹർജിപട്ടികവഹകൾ 29.07.05 തീയതി തന്നെ പരിശോധിച്ചിട്ടുള്ളതാണ്. അപ്രകാരം ഹർജി പട്ടിക വഹകൾ പരിശോധിക്കുന്നതിന് ടി മുറി താക്കോൽ ഉപയോഗിച്ച് തുറന്നുകാണിച്ചു

കൊടുത്തത് എതുകക്ഷിയുടെ അപ്പനായ മുക്താർക്കാരനാണ്. ഹർജി പട്ടിക പൂർണ്ണമായും വിനയൻ എന്നിവർക്ക് ബിസിനസ്സ് ആവശ്യത്തിനായി കൈവശം കൊടുത്തിട്ടുള്ളതാണ് എന്ന പ്രസ്താവനയ്ക്ക് യാതൊരു അടിസ്ഥാനവുമില്ലാത്തതും ഈ എതുകക്ഷി ശക്തിയായി നിഷേധിക്കുന്നതുമാണ്. ഹർജി പട്ടികമുറി ഈ എതുകക്ഷി അന്യകൈവശം കൊടുക്കുകയോ കീഴ് വാടകയ്ക്കു കൊടുക്കുകയോ ചെയ്തിട്ടില്ല. തൻമൂലം തന്നെ ഹർജി പട്ടികമുറി ഹർജിക്കാരന് ഒഴിഞ്ഞു കൈവശം കൊടുക്കണമെന്നുള്ള ഹർജി 5-ാം വകുപ്പിലെ പ്രസ്താവനകൾ അനുവദിക്കാൻ പാടില്ലാത്തതും ഈ എതുകക്ഷി നിഷേധിക്കുന്നതുമാണ്. ഹർജി 5-ാം വകുപ്പിൽ പറഞ്ഞപ്രകാരം യാതൊരു നോട്ടീസും ഈ എതുകക്ഷിക്ക് ലഭിച്ചിട്ടില്ലാത്തതാണ്. യാതൊരു നോട്ടീസും ഈ എതുകക്ഷി മടക്കി അയച്ചിട്ടില്ലാത്തതാണ്. ഈ എതുകക്ഷി സ്ഥലത്തില്ലായെന്ന സംഗതി മനസ്സിലാക്കി ഈ എതുകക്ഷിയുടെ താമസസ്ഥലത്തേക്കു നോട്ടീസ് അയച്ച് സൂത്രത്തിൽ ഹർജിപട്ടിക മുറി ഒഴിപ്പിച്ചെടുക്കുന്നതിനാണ് ഹർജിക്കാരൻ ശ്രമിച്ചുവരുന്നത്. മറിച്ചുള്ള ഹർജി 5-ാം വകുപ്പിലെ പ്രസ്താവനകൾ ശരിയല്ലാത്തതും ഈ എതുകക്ഷി നിഷേധിക്കുന്നതുമാണ്.”

4. He had in paragraph 4 of the counter statement filed by him specifically denied and disputed the allegation in the rent control petition that he has sublet the petition schedule room to Vinayan. It was contended that Vinayan is only his employee; that besides Vinayan, Unnikrishnan, S/o Pazhanchery Kunjappan, Wilson, S/o Thoduparambil Varghese, Sunilkumar, S/o Melitte Ramakrishnan, and Wilson, S/o Ouseph are his employees; that the equipment and machinery in the petition schedule shop belong to him; that when the landlord took steps to forcibly evict him, he had filed O.S.No.2482 of 2005 in the Court of the Munsiff of Thrissur; that in that suit, he had filed I.A.No.6826 of 2005 for the appointment of an advocate commissioner; that the advocate commissioner appointed in that suit inspected the petition schedule room on 29-07-2005 and submitted a

report wherein inter alia it is stated that the father of tenant had the key of the lock with him. He also contended that he has not received the notice referred to in paragraph 5 of the rent control petition and that on realising that the tenant is not in station, the landlord had caused a notice to be issued to his residential address for the purpose of creating grounds to evict him from the petition schedule room. He also denied and disputed the bona fide need put forward by the landlord.

5. Before the rent control court, the landlord examined himself as PW1 and produced and marked Exts.A1 to A4. The tenant examined himself as RW1, the advocate commissioner appointed in O.S.No.2482 of 2005 on the file of the Court of the Munsiff of Thrissur as RW2 and Vinayan, the alleged sub-lessee as RW3. He also produced and marked Exts.B1 to B4. The rent control court after considering the rival contentions framed the following points for consideration:

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1. Whether there is any arrears of rent and the petitioner is entitled to get eviction u/s 11(2)(b) of the Kerala Buildings (Lease and Rent) Control Act?
 2. Whether petitioner bona fide require the petition schedule property for his own use and occupation as alleged?
 3. Whether the petitioner is entitled to get eviction u/s 11 (3) of the Kerala Buildings (Lease and Rent) Control Act?

4. Whether the respondent subleased the petition schedule room as alleged and whether the petitioner is entitled to get eviction under 11(4)(i) of the Kerala Buildings (Lease and Rent) Control Act?

5. Relief and costs?"

6. On point No.1, the rent control court held that though the tenant had in the counter statement averred that during the pendency of the rent control petition, rent up to and inclusive of 17.05.2005 was paid, no evidence regarding such payment is forthcoming and therefore, the mere fact that the tenant had during the pendency of the rent control petition paid the sum of ₹64,400/- towards arrears is not a reason to hold that the entire rent that was in arrears has been paid. The rent control court held that it can thus be safely concluded that the tenant has kept the rent in arrears from May, 2004 as alleged by the landlord. The rent control court thereafter proceeded to consider the question whether the need put forward by the landlord is bona fide and held relying on the evidence, oral and documentary available in the case, that the need put forward is not bona fide. The rent control court also held that in that view of the matter, it is not necessary for it to consider the question whether the tenant is entitled to the protection of the second proviso to section 11(3) of the Act. The rent control court thereafter proceeded to enter a finding that the

respondent/tenant has not proved the ingredients of both the limbs of the second proviso to section 11(3) of the Act. The rent control court thereafter considered the question whether the tenant has sublet the petition schedule room as alleged in the rent control petition and held, relying on the circumstance that the telephone number of Vinayan, examined as RW3 finds a place in the visiting card of the establishment that he has over all control of the business run in the petition schedule building and that the tenant has sublet the petition schedule building to RW3. An order of eviction under sections 11(2)(b) and 11(4)(i) of the Act was accordingly passed on 20.06.2009. Challenging that order, the tenant filed R.C.A.No.52 of 2009 on the file of the Rent Control Appellate Authority, Thrissur. By judgment delivered on 24.07.2013, the rent control appellate authority concurred with the findings of the rent control court and dismissed the appeal. The tenant has, aggrieved thereby, filed this revision petition under section 20 of the Act.

7. We heard Sri.Santhosh P. Poduval, learned counsel appearing for the petitioner and Sri.Babu Karukapadath, learned counsel appearing for the respondent. Sri.Santhosh P. Poduval, learned counsel appearing for the petitioner contended that the tenant had nearly two years prior to the institution of the rent control petition, to

be exact on 27.07.2005, instituted O.S.No.2482 of 2005 in the Court of the Munsiff of Thrissur praying for a decree restraining the landlord from forcibly evicting him from the petition schedule room; that such a suit was instituted on the apprehension that taking advantage of the tenant's absence from India, the landlord threatened to forcibly evict the tenant for the purpose of obtaining vacant possession of the petition schedule room and to let it out to others. Learned counsel submitted that in the said suit, which was instituted by the tenant through his power of attorney and in which, his father had joined as the second plaintiff, the tenant had averred that he has authorised his power of attorney Muraleedharan who has signed the plaint on his behalf to run the business; that his father is also associated with the running of the establishment; that in the said suit, on application filed by the plaintiff, an advocate commissioner was appointed; that Ext.B2 report dated 01.08.2005 submitted by the advocate commissioner discloses that Unnikrishnan, S/o Pazhancherry Kunjappan, Sunilkumar, S/o Melitte Ramakrishnan, Vinayan, S/o Vallathadam Sankaran, Wilson, S/o Thoduparambil Varghese, Wilson, S/o Ouseph, are the persons employed in the establishment functioning under the name and style "Johny Spray Painting, Mechanic, Patch work, Electrician

etc.”; that the said report also discloses that the father of the tenant was in possession of key of the lock used to lock the main door of the building; that the said report conclusively establishes the fact that Vinayan is only an employee of the tenant and that in such circumstances, merely for the reason that the commissioner appointed in the instant rent control petition had seen a visiting card bearing the phone number of Vinayan it cannot be concluded that the tenant has sublet the petition schedule room to Vinayan. Learned counsel contended that the mere presence of Vinayan in the premises will not ipso facto lead to the conclusion that there has been a subletting, that the fact that Vinayan is an employee of the tenant is borne out by Ext.B2 commission report as also the testimony tendered by Vinayan who was examined as RW3 and in such circumstances, merely for the reason that the tenant has not produced documents to prove that the licence to run the business stands in his name or registers and reports to prove that Vinayan is his employee, is not a reason to come to the conclusion that there has been a sublease of the petition schedule room to Vinayan. Learned counsel contended that in such circumstances, the impugned judgment/order to the extent they hold that there has been sublease of the petition schedule room to Vinayan

are liable to be set aside. Learned counsel submitted that as on 17.05.2005 there was no rent to be paid; that the arrears of rent that was due as on the date of the notice was liquidated with the payment of the sum of ₹64,400/- and as no amount was due as on the date of disposal of the rent control petition, the rent control court erred in passing an order of eviction under section 11(2)(b) of the Act. Learned counsel also placed reliance on the decision of the Apex Court in **Chinnamma v. Gopalan [1995 (2) KLT 755]** in support of his contentions in that regard.

8. Per contra, Sri.Babu Karukapadath, learned counsel appearing for the respondent submitted that the tenant has no case that he was in physical possession of the petition schedule building on the date of institution of the rent control petition, that he has admitted in Ext.B1 plaint which was instituted in the year 2005 that he is not in India, that he has not produced any material to show that Vinayan is his employee or that the licence to run the establishment stands in his name and therefore, no exception can be taken to the finding entered by the rent control court and affirmed by the appellate authority that the tenant has failed to properly explain the presence of Vinayan in the tenanted premises. Inviting our attention to the decisions of this court

in **Kalyani Bharathan v. Abdul Muthalif [2005 (1) KLT 880]**, **Vipinachandran v. Xavier [2005 (4) KLT 850]**, **Jacob v. Pradeep Naik [2009 (2) KLT 262]** and **Liji Agencies v. Raghunath [2012 (1) KHC 604 (DB)]**, learned counsel contended that as the tenant has not produced any evidence to prove that the jural relationship between him and Vinayan is that of employer-employee and it has come out in evidence that Vinayan is running the establishment, the rent control court and the appellate authority were perfectly justified in drawing an inference that the petitioner/tenant has sublet the tenanted premises to Vinayan. Learned counsel contended that as the tenant did not terminate the sublease within 30 days from the date of Ext.A2 notice and that the rent control petition was filed after the expiry of the notice period of 30 days, the tenant cannot be heard to contend that the landlord had acquiesced to the sublease or consented to the sublease. Inviting our attention to the decision of the Apex Court in **John Chandy & Co. (P) Ltd. v. John P. Thomas [2002 (2) KLT 220 (SC)]**, learned counsel contended that mere inaction on the part of the landlord will not constitute implied consent and that there has to be a positive action on the part of the landlord giving authority to the tenant to sublet the premises.

9. We have considered the submissions made at the Bar by learned counsel appearing on either side. We have also gone through the pleadings and the materials on record. The landlord had in the rent control petition averred that the tenant has not paid rent from May 2004 onwards. The contention of the tenant was that he was regularly paying the rent, that the landlord refused to receive the rent when it was tendered on 17.05.2005, that he therefore sent the rent by money order, but the landlord refused to receive the rent sent by money order and thereafter, he stopped paying the rent. The tenant however, failed to prove the plea put forward by him. In such circumstances, we are of the opinion that no exception can be taken to the finding entered by the rent control court and upheld by the appellate authority that the tenant has kept the rent in arrears. We therefore find no good grounds to interfere with the order of eviction passed by the rent control control court and upheld by the appellate authority under section 11(2)(b) of the Act.

10. We shall next consider the question whether the order of eviction passed by the rent control court and confirmed by the appellate authority under section 11(4)(i) of the Act is liable to be interfered with. The specific case set out by the landlord in the rent

control petition is that the tenant has sublet the petition schedule room to Vinayan, S/o Sankaran. The landlord had in Ext.A2 notice dated 12.12.2006 alleged that the tenant has sublet the petition schedule room to Vinayan. The averments in paragraph 4 of the rent control petition are also to the same effect. The landlord had further averred in paragraph 4 of the rent control petition that on coming to know of the sublease, he had gone over to the petition schedule room and realising that the landlord has come to know of the sublease, the tenant filed O.S.No.2482 of 2005 in the Court of the Munsiff of Thrissur. It is evident from the averments in paragraph 4 of the rent control petition that even according to the landlord, the alleged sublease was some time in the year 2005. The fact that the tenant had gone abroad in the year 2005 is not in dispute. Ext.B1 plaint also discloses that it was while the tenant was abroad that O.S.No.2482 of 2005 was instituted in the Court of the Munsiff of Thrissur through his power of attorney Muraleedharan with his father as the second plaintiff praying for a permanent prohibitory injunction restraining the landlord from forcibly evicting him from the petition schedule room. O.S.No.2482 of 2005 was instituted on 27.07.2005. In that suit, the plaintiffs filed I.A.No.6826 of 2005 for the appointment of an advocate

commissioner to inspect the tenanted premises. That application was allowed and RW2 was appointed as the advocate commissioner. He inspected the tenanted premises on 29.07.2005. After such inspection, he submitted Ext.B2 report dated 01.08.2005. He has in that report inter-alia stated as follows:

“.....അന്യായ പട്ടിക മുറിയുടെ മുകളിൽ മേൽക്കൂരയോട് ചേർന്ന് ഒരു ബോർഡിൽ “ജോണി സ്പ്രെഡെയിന്റിങ്ങ്, മെക്കാനിക്, പാച്ച് വർക്ക്, ഇലക്ട്രീഷ്യൻ etc. ഫോൺ 9847292864” എന്ന് എഴുതിയിട്ടുള്ളതാണ്.”

He had also reported that at the time of inspection, Unnikrishnan, S/o Pazhanchery Kunjappan, Wilson, S/o Thoduparambil Varghese, Sunilkumar, S/o Melitte Ramakrishnan, and Wilson, S/o Ouseph were working in the establishment. He had also given the addresses of the said workers. He had further stated that the key of the lock used to lock the main door was with the tenant's father Kuriakose. He had also furnished a list of machinery and equipment available in the workshop. In the rent control court also, an advocate commissioner was appointed on application filed by the landlord. Though the report submitted by the advocate commissioner appointed by the rent control court is not marked, it discloses that the advocate commissioner appointed by the rent control court had inspected the tenanted premises on 08.06.2007, more than two years after the inspection by the advocate commissioner appointed in the suit. The said advocate

commissioner has reported that he saw motor cars given for repairs lying in the establishment and that paint, patch work and electric works were being conducted there. As per warrant of the appointment, the advocate commissioner appointed by the rent control court was directed to submit a report as regards the person who was running the workshop in the tenanted premises. The advocate commissioner has in his report stated that the tenant was not available in the premises and when he enquired with the four employees about the tenant, they told him that he is abroad. The advocate commissioner appointed by the rent control court has in his report given the name of the employees working in the establishment. They are Vinayan, Wilson, Sunilkumar and Unnikrishnan. He had also reported that at the time of inspection, he found several visiting cards wherein besides the name of the establishment, namely "Joy Auto Garage, Chungam, Ayyanthole", the mobile phone number of Vinayan is also given. It is relying on the aforesaid solitary circumstance that the rent control court as well as the appellate authority have come to the conclusion that the tenant has sublet the petition schedule room to Vinayan. There is no material whatsoever to show that Vinayan is the proprietor of the establishment under the name and style "Joy Auto Garage". There is also no material

to show that Vinayan was in exclusive possession of the petition schedule room in the absence of the tenant from India. Vinayan was examined as RW3 and his testimony is to the effect that he is only an employee of the workshop. Though he had deposed that Johny (the tenant) does not regularly come to the establishment, he had not deposed that the tenant never used to come to the establishment whenever he was back in India on leave. Though he was cross-examined at length, nothing was brought out to discredit his testimony or to establish the fact that he is in exclusive possession of the tenanted premises. The deposition of Vinayan examined as RW3 would show that he is only an employee of the establishment. In the instant case, the presence of Vinayan in the premises is borne out by Ext.B2 report dated 01.08.2005. It was only on 12.12.2006 that the landlord caused Ext.A2 notice to be issued. It was sent to the tenant's residential address knowing fully well that he is not in India. It is also pertinent to note in this context that Ext.A2 notice was not sent to the tenant's residential address as given in Ext.A1 rent deed, but as admitted by the landlord, to the tenant's family house, which is different from his place of residence. Though it is not necessary that there should be actual physical service of notice on the tenant, the

conduct of the landlord in sending Ext.A2 notice to an address other than the residential or business address of the tenant is a strong circumstance which would indicate that the landlord was taking advantage of the tenant's absence from India for the purpose of alleging that he has sublet the petition schedule building to Vinayan. Ext.B2 commissioner's report makes it abundantly clear that Vinayan was only one among the five employees working in the establishment at the time of inspection by the advocate commissioner. It is merely for the reason that Vinayan's phone number is shown in the visiting cards lying in the petition schedule room, that the rent control court has entered a finding that Vinayan is having overall control of the establishment. In coming to such conclusion, the rent control court ignored the testimony tendered by Vinayan who was examined as RW3 as also the report submitted by the advocate commissioner appointed by the rent control court to the effect that Vinayan is only one of employees working in the establishment. Such being the situation, as the landlord has not prima facie discharged the burden of proving the fact that someone other than the tenant is in actual physical possession of the tenanted premises or that there has been a transfer of the right under the lease, we are not persuaded to hold that the

burden of proving the jural relationship between the tenant and Vinayan namely, employer-employee relationship stood shifted to the tenant. It is only if the landlord is able to prima facie show that there has been transfer of possession of the right under the lease or that the tenant has sublet the tenanted premises contrary to the stipulations in the lease deed, that the burden of proving the jural relationship between the tenant and the person in possession shifts to the tenant. In the instant case, it is evident from the chronology of the events commencing from the date of institution of the suit by the tenant that the landlord was really taking advantage of his absence from India to come forward with a plea that he has sublet the petition schedule premises. The tenant had in O.S.No.2482 of 2005 specifically averred that his power of attorney Muraleedharan has been authorised to run the establishment along with his father, the second plaintiff therein. Paragraph No.1 of Ext.B1 plaint contains a specific averment to that effect. The landlord has not, for reason best known to him, produced the written statement, if any, filed by him in that suit. From the materials presently on record, we are of the considered opinion that the landlord has not been able to prove that the tenant has sublet the petition schedule room or transferred his right under the lease to

Vinayan. The rent control court and the appellate authority have come to such a finding merely for the reason that the advocate commissioner has reported that the visiting card of the establishment bears the mobile phone number of Vinayan. The said report also contains a statement that Vinayan is one of the four employees of the establishment. Vinayan who was examined as RW3 has deposed that he is only the foreman of the mechanical section. The tenant's father is not a mechanic and he is not skilled in any trade. In such circumstances, if for running the establishment, in the visiting card, the phone number of one of the workers employed under the tenant is shown, that by itself cannot, in our opinion, be a reason to hold that there has been subletting of the tenanted premises or a transfer of the right under the lease to that person. Though it was contended before us that the failure of the tenant to produce the licence to run the establishment and the relevant registers and records which he is bound to maintain under the Kerala Shops and Commercial Establishments Act and other related laws is a circumstance justifying the drawal of an adverse inference against him, such an adverse inference, in our opinion, can be drawn only in a case where the landlord has discharged the primary burden of proving that the tenant

has transferred his possession under the lease or sublet the tenanted premises to another by adducing cogent evidence in that regard. As stated earlier, the mere presence of Vinayan in the petition schedule room will not, in any way, suggest or indicate that he has exclusive possession of the petition schedule building or control over the business being run there. The evidence on record does not, in our opinion, support such a finding. The finding entered by the rent control court and upheld by the appellate authority that there has been a sublease of the petition schedule building, cannot, in our opinion, be sustained in the light of the evidence on record. Such a finding can certainly be interfered with by this court as held by a Constitution Bench of the Apex Court in **Hindustan Petroleum Corporation Ltd. v. Dilbahar Singh [2014 (4) KLT 182 (SC)]**. The Apex Court has in the aforesaid decision held as follows:

“.....A finding of fact recorded by Court/Authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper.”

We accordingly hold that the landlord in the instant case, has not proved that the tenant has sublet the tenanted premises so as to entitle him to an order of eviction under section 11(4)(i) of the Act.

For the reasons stated above we allow the rent control revision in part and set aside the order of eviction passed by the rent control court and upheld by the appellate authority under section 11(4)(i) of the Act. The order of eviction passed by the rent control court and upheld by the appellate authority under section 11(2)(b) of the Act shall stand. We also deem it appropriate to grant to the tenant one month's time from the date of receipt of a copy of this judgment to deposit the entire arrears of rent and to have the order of eviction passed under section 11(2)(b) of the Act vacated by making an application as contemplated under section 11(2)(c) thereof. The parties shall bear their respective costs.

Sd/-
P. N. RAVINDRAN
JUDGE

Sd/-
BABU MATHEW P. JOSEPH
JUDGE

kns/-

//TRUE COPY//

P.A. TO JUDGE

