

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC  
&  
THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

THURSDAY, THE 5TH DAY OF FEBRUARY 2015/16TH MAGHA, 1936

RCRev.No. 285 of 2014 ()

JUDGMENT IN RCA 1/2013 of RENT CONTROL APPELLATE AUTHORITY/DISTRICT  
COURT, MANJERI DATED 20.8.2014

ORDER/JUDGMENT IN RCP 29/2011 of RENT CONTROL COURT/ MUNSIF COURT,  
TIRUR DATED 08-11-2012

REVISION PETITIONER(S)/APPELLANT/2ND RESPONDENT:

M.C.ABDUL GAFOOR,  
S/O.MUHAMMEDKUTTY, MANCHATH CHERULOTTIL  
PUNNATHALA P.O., MALAPPURAM DISTRICT.

BY ADV. SRI.G.S.REGHUNATH

RESPONDENT(S)/RESPONDENT/PETITIONER & 1ST RESPONDENT:

1. K.ABDURAHIMAN,  
S/O.MAMMI, KAINIKKARA HOUSE, THRIKKANDIYUR AMSOM  
ANNARA DESOM, TIRUR TALUK, MANJERI  
MALAPPURAM-676101.
2. MUTHANIKKATT ABDULLA,  
S/O.MOIDEEN MASTER, MUTHANIKKATT HOUSE  
THALAKKADATHUR AMSOM, THARAYIL DESOM, TIRUR TALUK  
MANJERI, MALAPPURAM-676101.

R1 BY ADV. SRI.R.T.PRADEEP

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON  
05-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

“C.R.”

ANTONY DOMINIC & ALEXANDER THOMAS, JJ.

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R.C.R.No.285 of 2014  
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Dated this the 5<sup>th</sup> day of February, 2015

O R D E R

Antony Dominic, J.

1.This revision petition is filed by the second respondent in RCP.29/11 on the file of the Rent Control Court, Tirur, who also unsuccessful before the appellate authority which dismissed RCA.1/13 filed by him.

2.Briefly stated, the case was that the first respondent herein, the landlord, filed RCP.29/11 before the Rent Control Court, Tirur. In that RCP, he contended that by Ext.A43 lease deed dated 2.6.1997, shoprooms bearing Nos.6/533A and 6/553E in KSM Complex of Tirur Municipality were let out to the second respondent herein. According to him, there were arrears of rent and the tenant had also sub-leased the building to the petitioner herein. He also contended that he bonafide needed the building for his own occupation. On the above facts, he sought for eviction of the tenant and the sub-tenant who were impleaded as respondents 1 and 2 in the

petition, urging grounds under sections 11(2)(b), 11(3) and 11(4)(i) of the Kerala Buildings (Lease & Rent Control) Act, 1965, hereinafter, the 'Act', for short.

3. Before the Rent Control Court, the first respondent was examined as PW1 and he produced Exts.A1 to A45. On behalf of the respondents in the RCP, the appellant herein and another person were examined as RWS.1 and 2 and Exts.B1 to B31 were also marked in evidence. Exts.C1 and C2, commission report and plan were also marked. On conclusion of the trial, the Rent Control Court, by its order dated 8.11.2012, allowed eviction sought for by the landlord under section 11(4)(i) and disallowed the eviction sought for under sections 11(2)(b) and 11(3).

4. The petitioner herein, second respondent in the RCP, the sub-tenant, filed appeal as RCA.1/13 before the Rent Control Appellate Authority, Manjeri. In that appeal, the landlord, first respondent herein, filed a cross appeal. The appellate authority disposed of the appeal and the cross appeal by its judgment dated

20.8.2014. In that judgment, following the judgment of this Court in Susheela v. Balakrishnan [2014 (1) KLT 1004], it was held that the cross appeal filed by the landlord was not maintainable and the same was dismissed for that reason. However, relying on Susheela (supra), the appellate authority set aside the order passed by the Rent Control Court on the ground under section (11(2)(b) of the Act. It also confirmed the order passed by the Rent Control Court under section 11(4)(i). In other words, the appeal filed by the sub-tenant was dismissed by the appellate authority and the ground under section 11 (2)(b) was found in favour of the landlord. This revision petition has been filed by the second respondent in the RCP, the sub-tenant.

5. We heard the counsel for the petitioner and the learned counsel appearing for the first respondent landlord. Despite service of notice, there was no appearance or representation for the 2<sup>nd</sup> respondent, the tenant.

6.The first contention raised by the learned counsel for the petitioner is that the judgment of the appellate authority, setting aside the order of the Rent Control Court under section 11(2)(b), is illegal. According to him, when the cross appeal filed by the landlord was held to be not maintainable, the appellate authority could not have reversed the findings of the Rent Control Court in favour of the tenant under section 11(2)(b) of the Act. However, this contention of the learned counsel for the petitioner was contradicted by the counsel for the first respondent appellant by pointing out that the competence of the appellate authority to examine the correctness of the order passed by the Rent Control Court, even in the absence of an appeal by the landlord, has been recognised by this Court in the judgment in *Susheela (supra)*.

7.As we have already stated, the RCP was filed under sections 11(2)(b), 11(3) and 11(4)(i) of the Act and eviction was ordered only under section 11(4)(i). It is true that the landlord did not file any appeal against the judgment of the Rent Control Court and

his cross appeal was found to be not maintainable. However, before the appellate authority, he contested the findings of the Rent Control Court under section 11(2)(b) and it was upholding his contention, the appellate authority reversed the findings of the Rent Control Court under section 11(2)(b). The question that is raised is whether this was permissible in the absence of an appeal filed by the landlord.

8. In our view, this contention stands fully answered by the Division Bench judgment of this Court in Ganesh v. Varghese [2005(1) KLT 282]. That was a case where the landlord sought eviction of the tenant by filing a petition before the Rent Control Court under sections 11(2)(b), 11(3) and 11(4)(i). The Rent Control Court disallowed the claim under sections 11(2)(b) and 11(3) but allowed eviction under section 11(4)(i) of the Act. The tenant filed an appeal before the appellate authority and in that appeal, the landlord contended that the findings of the Rent Control Court under section 11(3) was illegal. The contention of the landlord was rejected and the findings of the Rent Control Court was confirmed.

Challenging the order of the appellate authority, the landlord filed revision before this Court. The Division Bench, in the judgment referred to above, upheld the contention of the landlord under section 11(3) and ordered eviction. The question whether the landlord could have, in the absence of an appeal filed by him, raised the correctness of the findings of the Rent Control court in an appeal filed by the tenant and whether such a landlord could have filed a further revision before this Court, were considered and answered by this Court by holding thus:

"6. We may first examine whether the Appellate Authority is justified in raising an issue under S.11(3) in a case where landlord had failed to file an appeal on the adverse finding rendered by the Rent Control Court. Rent Control Court had ordered eviction under S.11(4)(i) of the Act. So far as the landlord is concerned, he is already armed with an order of eviction and there is no purpose in further litigating the matter even if the Rent Control Court has rejected one of the grounds raised by him for evicting the tenant. Landlord will always be hopeful that the order which is in his favour would be upheld and in a given case if the tenant is not preferring an appeal under S.18 of the Act against the order of

eviction, the question of filing appeal by the landlord does not arise since he is already armed with an order of eviction. It is not the law, once tenant has filed an appeal aggrieved by the order of eviction landlord shall also file an appeal or cross appeal challenging all the findings rendered against him even if the order of eviction is in his favour. In appeal if the Appellate Authority is likely to disagree with the order of eviction it is always open to the landlord to attack the findings against him on other grounds and try to sustain the order of eviction on the basis of evidence already on record. Landlord is not raising any new ground or adducing fresh evidence but only attacking the findings on the basis of available evidence on record. Though O.XLI R.22 of the Code of Civil Procedure is not specifically applicable to appeals under S.18 or to revisions under S.20 of the Act, the principle contained therein would always apply for Courts to do complete justice between the parties. O.XLI R.22 entitles the party not only to support the finding appealed against but also to state that the finding against him in the Court below in respect of any issue ought to have been in his favour. Such a contention is being raised on the basis of the pleadings already raised and also by the oral and documentary evidence already adduced. We are therefore in complete agreement with the principle laid down by the Division Bench of this Court in **Santha v. 1<sup>st</sup> Addl. District Judge**, 1994(1) KLT 516. We

therefore hold even without filing an appeal under S.18 of the Act before the Appellate Authority, he can still challenge the findings adverse to him in the appeal and later in a revision preferred under S.20 of the Act."

This judgment has been followed in *Susheela* (supra). In the light of the above, the aforesaid contention raised by the counsel for the petitioner is only to be rejected.

9. Alternatively, learned counsel also contended that the tenant has already paid an advance of ₹7,50,000/- and that in the light of the principles laid down by the Apex Court, the landlord cannot retain such huge amount and that this amount being repayable to the tenant is liable to be adjusted towards rent arrears, if any. This contention, as we have already noticed, is raised relying on the judgments of the Apex Court in Modern Hotel, Gudur v. K.Radhakrishnaiah [(1989) 2 SCC 686] and Reghunathan v. Varghese [2005 (4) KLT 147]. *Modern Hotel* (supra) was a case arising under the Andhra Pradesh Buildings (Lease, Rent & Eviction) Control Act, 1960. Section 7(2) of the said Act

provided that where the fair rent of a building has not been fixed, the landlord shall not, after the commencement of the Act, claim, receive or stipulate for the payment of any premium or other like sum in addition to the agreed rent. However, as per the proviso to this section, the landlord could receive or stipulate for the payment of an amount not exceeding one month's rent by way of advance. It was taking note of this statutory provision that the Apex Court took the view that money received as advance by the landlord from the tenant, in excess of what was provided under section 7(2), becomes payable to the tenant immediately and that amount of arrears of rent being smaller than the advance amount held by the landlord on account of the tenant, there was no default in payment of rent and eviction order is not justified. It is this judgment which is followed in Reghunathan (supra). In so far as Kerala Buildings (Lease & Rent Control) Act, 1965 is concerned, similar provision is contained in section 8 of the Act and in the light of the judgment of this Court in Isac Ninan v. State of Kerala [1995 KLT 848], this section no longer survives in the statute. This,

therefore, means that the Kerala Act does not contain any provision similar to section 7 of the Andhra Pradesh Act in the context of which judgment in Modern Hotel (supra) was rendered by the Apex Court. If that be so, this argument raised by the learned counsel also cannot be accepted.

10. What remains now is the order passed by the Rent Control Court under section 11(4)(i) of the Act. Section 11(4)(i) provides that a landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building, if the tenant after the commencement of this Act, without the consent of the landlord, transfers his right under the lease or sub-lets the entire building or any portion thereof if the lease does not confer on him any right to do so. As per the proviso to this sub-section, an application under section 11(4)(i) shall not be made for the first time in respect of one and the same tenancy unless the landlord has sent a registered notice to the tenant intimating the contravention of the said condition of the lease and the tenant has failed to terminate the

transfer or the sublease, as the case may be, within thirty days of the receipt of the notice or the refusal thereof.

11. In paragraph 4 of the RCP filed by the first respondent landlord, it was specifically pleaded that the lease was granted to the second respondent herein for his business purposes and that the second respondent, violating the terms of the lease, without the knowledge or permission of the landlord, sublet the premises to the petitioner and that the petitioner herein is in possession of the room and is carrying on business in the schedule premises. It was on this basis, the landlord urged the grounds under section 11(4)(i). This contention of the landlord was refuted by the respondents in the RCP. In the common objection filed, they contended that the building was taken on lease in 1997 by the respondents in the RCP and Sri. Abdul Gafoor, son of the first respondent tenant and that on that basis, since 1997, a business was being carried on, on the strength of a trade licence obtained by the son of the first respondent tenant. They also contended

that in July, 2010, with the knowledge and consent of the landlord, along with certain others, they constituted a partnership firm by name 'M.A.Traders' and that the petitioner herein, the second respondent in the RCP, was the Managing Partner of the said firm. It was stated that since the constitution of the firm, the firm was carrying on the business in the premises in question. In other words, the contention raised by the respondents in the RCP was that though, initially, the business was being carried on by a proprietary concern, since 2010, the business has been converted into a partnership and that the second respondent, the alleged sub-tenant, was the Managing Partner of the firm. It was also their case that the constitution of the firm and the business carried on by the firm were with the knowledge and consent of the landlord.

12.However, from the orders passed by the Rent Control Court and the appellate authority, it can be seen that apart from the above oral claim made by the respondents in the RCP, no documentary evidence whatsoever has been produced by them to show that the

firm was carrying on business in the tenanted premises. The business that was carried on in the tenanted premises was a provision store. Therefore, if as a matter of fact, since 2010, the firm was carrying on business, respondents could have produced several documents evidencing their claim. However, no documents were produced which suggests that if such documents were produced, the documents would have been against them. It was therefore that the Rent Control Court and the appellate authority declined to accept the case of the respondents in their objection that the firm was carrying on the business since 2010.

13. The fact that the petitioner herein, the sub-tenant, is carrying on business (though, according to the second respondent tenant, as Managing Partner of the firm) is admitted by the tenant also. This, therefore, shows that it is the petitioner herein who is in occupation of the tenanted premises. This clearly establishes the case of sub-lease and therefore, the conclusion of the Rent Control Court and the appellate authority that the first respondent

landlord has established a case of sub-lease, is unassailable. It that be so, the order under section 11(4)(i) on that ground cannot be impugned.

14.However, referring to section 11(10), counsel for the petitioner contended that there was no bonafides in the petition filed. It is true that section 11 (10) of the Act provides that the Rent Control Court shall, if it is satisfied that the claim of the landlord under section 11(4) is bonafide, make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Rent Control Court and if the court is not so satisfied, it shall make an order rejecting the application. Counsel contended that in 2010, the landlord and his wife had obtained a loan from the State Bank of India, Tirur branch in the name of M.A.Traders, the firm constituted by the tenant, the sub-tenant and others and that when came to know of the same, a complaint was lodged with the bank and as a result, the landlord and his wife had to clear the liability immediately. It was stated that since then, their relationship got strained and it was

thereafter that the petition itself was filed. According to him, therefore, the petition lacks bonafides which is the essential requirement for an order of eviction in view of section 11(10).

15. However, counsel for the landlord seeks to clarify the factual position by stating that the landlord's wife was carrying on a business in the name 'M.A.Traders' and it was for that proprietary concern, the loan was availed. It was stated that when the tenant and the sub-tenant made a complaint, the bank made enquiries and on being satisfied that there were no irregularities in the matter, did not take any punitive action against them.

16. Irrespective of the factual controversy, in our view, the bonafides provided in section 11(10) is the bonafides of the claim made by the landlord. The claim in so far as this case is concerned is the claim for eviction under the provisions of the Act. The allegation raised by the sub-tenant cannot create a shadow of doubt about the bonafides of the landlord in so far as the claim made by him is concerned.

Even otherwise, the bonafides provided in section 11 (10) has application only with reference to section 11(4)(iv) as clarified by a learned Judge of this Court in the Judgment in Krishnan v. Vijayaraghavan [1977 KLT 1013], where, it was held thus:

"10. These authorities, which are binding on me, can apply only if S.11 (10) applies to the present case. Each case has to be decided on its own facts. This case, according to me, can be easily distinguished from the cases referred to above. While doing so, I cannot close my eyes to the fact that S.11 (10) takes within its ambit the whold of sub-s. (4) of S.11. I will have to adopt a harmonious construction of the different sections in the Act in dealing with the section. It is significant to note that the ground of arrears of rent is not included in S.11(10) of the Act. The difficulty arises since S.11(10) take in S.11(4) of the Act which sub-section has five sub clauses. The question that arises is as to what is meant by the claim being bona fide when a landlord proves and satisfactorily establishes the grounds mentioned in S 11(4)(i), (ii), (iii) and (v). If S.11(10) is to be applied to clauses (i), (ii), (iii) or (v) of S.11(4), then it will lead to very unhappy results. What the Legislature intended by enacting S.11(10) including the entire S.11 (4) can only be to include S.11(4) (iv) and not the other clauses of that sub-section. This is the only possible construction that can be given to S 11(10). I do not know whether I will be justified in saying that S.11(10) as a whole is a surplusage because in petitions under S 11(3), 11(4)(iv), 11(7) and 11(8) the

ingredient of bona fide has necessarily to be proved. The order for eviction can be made only if the concerned authority is satisfied that the claim is bona fide. Perhaps, under these circumstances, S.11 (10) could have been avoided. But since this section remains on the statute book, I have to explain it in a reasonable and harmonious manner. To say that the Legislature intended only to include S.11(4)(iv) in S.11 (10) as was contended by the respondent's counsel, may perhaps expose me to the charge of judicial legislation. I very strongly feel that the Legislature could have only meant S.11(4) (iv) when it included S.11(4) in S.11(10). However, on the section as it now stands I would hold that when a landlord establishes the ground of sub-letting as also the grounds under S.11(4) (ii), (iii) and (v) to the satisfaction of the Court, that by itself is proof that the claim is bona fide I would rest my conclusion on this construction and meet the requirement of S.11(10).

Therefore, this contention also cannot be accepted.

17. The counsel then contended that the statutory notice required under the proviso to section 11(4)(i) was not served on the tenant and that therefore, the application was not maintainable. This contention is raised on the basis that no notice was served on the tenant. However, from the records, we find that Ext.A1 notices were sent by the landlord to the tenant and sub-tenant and in so far as the tenant is concerned, who alone is entitled to a notice as per

the provisos to section 11(4)(i), the address shown is the address of the tenant, as available in Ext.A43 lease deed. However, that notice was returned by the postal authorities with the endorsement 'addressee left India'. It is also an admitted fact that the tenant is stationed abroad and is engaged in business there. When the address in the notice is the same as shown in the lease deed and notice sent by the landlord to that address is returned by the postal authorities, there cannot be a complaint that there was non-compliance of the requirement of the proviso to section 11(4)(i). Even otherwise, we do not think that the sub-tenant who alone has filed this revision, can urge this contention or that he can seek any relief on this technical plea because the landlord has not filed any appeal or revision against the order passed under section 11(4)(i) by the Rent Control Court. Therefore this contention also cannot be accepted.

18. In the aforesaid circumstances, the revision now filed by the sub-tenant is devoid of merit and is also to be dismissed and we do so.

19. At this stage, counsel for the revision petitioner submitted that irrespective of the validity of his contentions, it is a fact that a large business is being conducted in the tenanted premises and he should be given a reasonable time to vacate the premises.

20. We heard the counsel for the first respondent landlord also on this request. Though the counsel for the first respondent landlord opposed the prayer, still, having regard to the fact that there is a business establishment functioning in the premises in question, we have to recognise the reality that the establishment cannot be shifted overnight and that sufficient time has to be given. Therefore, we allow six months' time from today to the revision petitioner to surrender vacant possession of the tenanted premises to the landlord. However, this shall be subject to the condition that within three weeks from today, the petitioner and the second respondent shall file affidavits before the Rent Control Court unconditionally undertaking to surrender vacant possession of the premises to the

landlord on the expiry of six months' time allowed to them. This shall also be subject to the condition that the rent shall be paid without default.

Revision petition is dismissed.

Sd/-  
ANTONY DOMINIC, Judge.

Sd/-  
ALEXANDER THOMAS, Judge.

k kb.