

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 20TH DAY OF MARCH 2015/29TH PHALGUNA, 1936

RCRev..No. 301 of 2014 ()

**AGAINST THE ORDER/JUDGMENT IN RCA 20/2014 of I ADDL.DISTRICT COURT/RENT
CONTROL APPELLATE AUTHORITY, ERNAKULAM DATED 13-10-2014**

**AGAINST THE ORDER/JUDGMENT IN RCP 102/2012 of III ADDL. MUNSIF'S
COURT/RENT CONTROL COURT, ERNAKULAM DATED 21-12-2012**

REVISION PETITIONER(S)/APPELLANT/RESPONDENT :

**HI-TECH DRIVING SCHOOL (PVT) LTD AGED 53 YEARS
DOOR NO.X/28, THRIKKAKARA MUNICIPALITY
VADACHIRA BUILDING, CIVIL STATION ROAD, KAKKANAD
KOCHI-30, REP.BY MG.DIRECTOR, BABU VARGHESE
S/O. LATE C.K.VARKEY, RESIDING IN FLAT NO.9 G
TRANQUIL TOWERS, KAKKANAD.**

**BY ADVS.SRI.V.T.RAGHUNATH
SMT.C.V.RAJALAKSHMI**

RESPONDENT(S)/RESPONDENT/PETITIONER :

**VASU V.T.
VADACHIRA HOUSE, KAKKANAD, ERNAKULAM DISTRICT-682 030.**

**BY ADV. SRI.R. LAKSHMI NARAYAN CAVEATOR
BY ADV.SMT.R.RANJINI**

**THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON
15.1.2015, THE COURT ON 20-03-2015 PASSED THE FOLLOWING:**

ANTONY DOMINIC & ALEXANDER THOMAS, JJ.

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R.C.Rev.No. 301 of 2014

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Dated this the 20th day of March, 2015

J U D G M E N T

ALEXANDER THOMAS, J.:

This Revision Petition, filed under Sec.20 of the Kerala Buildings (Lease and Rent Control) Act, 1965, is directed against the order dated 13.10.2014 of the Rent Control Appellate Authority, Ernakulam, in R.C.A.No.20/2014, arising out of the order dated 21.12.2013 in Rent Control Petition (R.C.P) No.102/2012 of the Rent Control Court, Ernakulam. The plea of the landlord for eviction of the tenant under Sec.11(3) of the Act for bona fide need for own occupation of the landlord's son's partnership business' office has been allowed as per the impugned rent control proceedings. The unsuccessful tenant has preferred this Revision Petition.

2. On the expiry of the five year lease period on 15.1.2012, the landlord had requested the tenant to vacate the premises on the plea that the tenanted premises are required for the occupation of the tour and travel partnership business of the landlord's son. The case set up in the Rent Control Petition is that the landlord's son's is depending on him for the purpose of the aforementioned accommodation in the petition scheduled building and that neither

the landlord's son nor the son's partner has any other premises to accommodate their business office, which is housed in a rented premises in an unimportant and interior locality. That the petition scheduled building is situated in a highly commercially important locality on the side of the Civil Station Road, Kakkanad, Ernakulam (popularly known as the Infopark Road), which leads to Infopark. That the landlord's son's business is flourishing day by day as it attracts more and more customers and clients and that it is the leading travel service provider in Infopark and other nearby establishments in Cochin city and that it is providing regular transportation service to leading Information Technology (IT) companies like EYME Technologies Pvt. Ltd., L&T ECC, IBS Software, Orion India Systems Pvt. Ltd., Nitta Gelatin India Limited, Surya T.V., National Rural Health Mission, etc. and that it is the official service provider to CEO of Infopark and its services include vehicles operation to the foreign clients, CEOs, executives and employees of the above firms, etc. That operations are managed and operated by highly trained and experienced professional team of executives and its drivers are also well trained and that the firm has in its custody more than 22 vehicles including cars, buses, tempo travellers, etc.

That it is highly necessary for the landlord's son's business establishment to have a prestigious office for his business concern in an important and commercially attractive locality, which should have easy access to the executives of its customers and clients and that modern office and infrastructural requirements including furnished cabins for executives, computer rooms, modern telecommunication facilities, accounting wing, cafeteria, enquiry counters, space for display system and boards, etc. are essential ingredients necessary for running the business. More importantly, it is specifically pleaded that required parking facilities for some of the vehicles, for the inspection of the clients, is a vital requirement, which should be attached to such an office. It is thus pleaded that the petition scheduled building, which is having an area of 920 sq.ft. is more suitable for accommodating such an office and that in view of its high commercial importance, there cannot be any better choice than the petition scheduled building, for shifting the business office of the petitioner's son's partnership firm. Moreover, it is averred that the shifting of the office premises to petition scheduled building will be very convenient to the petitioner's son, as he is residing along with the petitioner in the house, which is

situated just behind the petition scheduled building. According to PW-1 (landlord's son), the landlord, who was about 80 years old at the time of the examination of witnesses in December, 2013, was not in a position to come to the court for deposition on account of his advanced age and ill-health. In these circumstances, the landlord's son tendered evidence as PW-1 in this case. PW-1 has given detailed evidence regarding the activities of his partnership business firm and the compelling needs for shifting his business office from the present rented premises to the petition scheduled building owned by his father. Both the courts below have concurrently found, on meticulous evaluation of the evidence of PW-1, that the need projected by him is for a bona fide and honest purpose and that it is not a ruse for eviction of the tenant.

3. It is true that the need projected in the Rent Control Petition is not for the own occupation of the landlord or solely for the dependent of the landlord, but the need projected is for accommodating the business office of a firm, in which the landlord's son is a partner. The Division Bench of this Court in the case *Panduranga Prabhu v. Muhammed Kunhi* reported in 1994 (2) KLT 1043, para 5, has categorically held that there is no merit in the

contention raised on behalf of the tenant that the landlord cannot seek eviction under Sec.11(3) for accommodating a partnership business, in which a member of his family depending on him is a partner and that the wording of sub-section 3 of Sec.11 would not justify a restricted meaning as suggested by the learned counsel for the revision petitioner/tenant therein. In the case *Jameela v. Moosa* reported in 1981 KLT 791, this Court has approved the position that it is open to the landlord to seek eviction for the purpose of accommodating a business in which the landlord is carrying on a partnership business with other partners. A Full Bench decision of the Madras High Court in *M.Aishath Najiya v. M/s.Lalchand Kewalram and others* reported in AIR 1990 Madras 36, has held that petition for eviction filed under Sec.10(3)(a)(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act to accommodate the partnership firm, in which the member of the landlord's family is a partner along with strangers would be maintainable if the member of the landlord's family in the partnership is directly and substantially involved in the partnership business considering the extent of his interest in the business or the part he plays, i.e., as an active partner and not merely a sleeping partner. In the case

Krishnan Nair and others v. Ghouse Basha reported in (1987) 4 SCC 404, the Apex Court held that partnership is a compendious way of describing those who constitute a firm under Sec.4 of the Partnership Act and that if a person carries on a business along with other partners and it was the other partner who actually carried on the business, then the position perhaps would have been entirely different and so also, if they were sleeping partners that would have been different. The Supreme Court held therein that as the sons and members of the family of the landlord, who were carrying on the business, the contention of the tenant that the application for eviction filed under Sec.10(3)(a)(iii) of the Tamil Nadu Act was liable to be dismissed solely on the ground that the landlord has chosen to file the application to accommodate a partnership firm, in which his sons and strangers are partners, cannot be accepted. Having regard to the past conduct of the sons of the landlord and having regard to the shares, the Apex Court found therein that as sons and members of the family of the landlords were carrying on the business, will be entitled to the benefit of eviction.

4. In the instant case, the evidence on record clearly discloses that the landlord's son was an active partner of the

partnership firm in question consisting of him and another partner and that he was pro-actively involved in the management and conduct of all the business operations of the tour and travel business undertaken by the partnership firm in question and that their need projected to shift from the present rented premises to the petition scheduled building owned by his father, was not for oblique motives or as a ruse for eviction, but was for the bona fide and honest purpose of housing the business office in the premises owned by his father, which is located in a highly commercially important nerve centre located near the Civil Station, Kakkanadu, Ernakulam, leading to the Infopark. The need projected is for augmenting their resources and for housing all their offices and other personnel to the premises, which is located in a impressive locality, for the easy access of the executives and staff of the various Information Technology companies, who are their clients and customers. Another important need projected is that the requisite parking facilities for the vehicles for the easy inspection of the clients, is another vital requirement, which should be attached to such an office. The need projected is for an office premises of around 900 sq.ft. or so and it has come out in evidence that the

petition scheduled building is located in the ground floor of the building in question. It has also come out in evidence that the other rooms owned by the landlord, which had subsequently vacated, were located in the first floor of the building, one having around 2000 sq.ft and another having an extent of 425 sq.ft. As the requirement of the landlord's son is to have not only the office premises but also to have parking facilities for the vehicles for the easy inspection and access for the clients and customers, which is attached to such an office, such a requirement can be met only by a room located in the ground floor of the building. Another premises owned by the landlord in the ground floor, which got vacant was having only an area of 215 sq.ft. Therefore, obviously, the petitioner's son's requirements will not be met by the aforementioned premises having area of only 425 sq.ft and 215 sq.ft. respectively and moreover, the landlord cannot be compelled to utilise the premises of having an area of around 2000 sq.ft, when requirement is only for an area of around 900-1000 sq.ft. More details regarding the other vacant premises will be dealt with in the discussion under the question regarding the first proviso to Sec.11 (3) of the Act.

5. Another objection taken by the tenant is that the landlord has not been able to prove that the consent of the other partner of the landlord's son has been obtained for shifting their office premises to the petition scheduled building. PW-1, who is the landlord's son, has given cogent and clear evidence regarding the requirement of the partnership business to shift to the petition scheduled building and there are no reasons to disbelieve the version of PW-1 that his partnership firm is really interested to shift their office to the premises owned by his father. Admittedly, the present premises, in which the son's partnership business is housed, is in a rented building and is in a relatively interior place compared to the petition scheduled building. Therefore, the version of PW-1 that his partnership firm wants to shift their office premises from a rented building to a premises owned by his father, is all the more credible and believable. In the light of the various aspects mentioned hereinabove, we are of the considered opinion that the courts below cannot be found fault with any manner for coming to the concurrent finding that the need projected on behalf of the landlord's son for housing his partnership firm's office premises in the petition scheduled building, is a bona fide and honest purpose

and that the claim for eviction under Sec.11(3) on this basis, is allowable.

6. It is also to be noted that the Division Bench of this Court in the case *Urmese J.Valooran v. Padma* reported in 2014 (4) KLT 765, has held that as Sec.11(3) of the Act clearly mentions that eviction can be granted for own occupation or for the occupation of any member of his family, it means that the dependant is permitted to occupy and landlord retains the ultimate control of the possession of the tenanted premises after eviction. That the occupation of the landlord or of his dependant as contemplated under Sec.11(3) of the Act, can be for himself or his dependent or through a partnership firm in which the dependant is a partner and the need of the dependant can be the need of the partnership firm, in which the dependant of the landlord is a partner. It has been held therein that, in law, a partnership is a relationship between persons who have agreed to share profits of the business carried on by all or anyone of them acting for all and the test of determination as to the occupation in such a situation is the real and actual involvement of the dependent in the business and this has to be decided with reference to the pleadings and evidence. That if the need is not

projected for the exclusive occupation by the firm, independent of the dependant, there is nothing wrong in seeking eviction for the dependant, which may benefit the firm as well and it has to be noted that partnership is only a compendious mode of persons, who have agreed to carry on business in partnership and thus, it is always open to the dependant to form the partnership for running a business and it is for the landlord or the dependant to decide the nature and structure of the business proposed by them and so long as the need set up is not a camouflage or clandestine arrangement to transfer possession of the building to a third party, such arrangement between the dependant and the landlord need not be doubted, etc.

7. The revision petitioner/tenant has not been able to let in any evidence even to prima facie establish that the partnership arrangement between the petitioner's son and other partner is only a camouflage or clandestine arrangement to transfer the possession of the building to a stranger and that it is so done as a hideous method to evict the tenant and to give possession to such a stranger, etc. From the evidence let in on behalf of the landlord it is clear that the partnership business of the landlord's son is having

well established business to cater to the needs of the travel arrangements to various leading Information Technology companies in the Infopark area and other nearby areas and that the need to shift its office premises from the present tenanted building to the premises owned by the father of one of the partners is a only for a bona fide and honest business purpose.

8. The further contention of the tenant that the non-examination of the landlord as a witness in this case is fatal to the case of the landlord is also unsustainable. It has come out in evidence that the landlord was about 80 years of age at the time of the deposition of PW-1 and that due to ill-health he was not in a position to come to the court to mount the box. Moreover, it has been held in the case J.C.R. Trading (P) Ltd. v. Varghese, reported in 2009(1) KLT 963, that where the need projected is for own occupation by dependent family member of the landlord, it is sufficient that the dependant who is a member of the family of the landlord for whose occupation, the rent control petition has been filed, gives evidence as a witness in the Rent Control Petition and that the dependant, who is prospective occupant of the building, is equally competent to justify not only regarding his need to occupy

the building, but also regarding the need projected by the landlord to accommodate the dependant in the building. Hence the courts below are right in concluding that the contention of the tenant regarding the non-examination of the landlord, is untenable, etc.

9. The next issue to be considered is as to whether the tenant can seek the benefit of the first proviso to Sec.11(3) of the Act. Sec.11(3) and its first proviso read as follows:

“Sec.11(3) 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 he bona fide needs the building for his own occupation or for the occupation by any member of his family dependent on him.

Provided that the Rent Control Court shall not give any such direction if the landlord has another building of his own in his possession in the same city, town or village except where the Rent Control Court is satisfied that for special reasons, in any particular case it will be just and proper to do so.”

10. Construing the scope and ambit of the first proviso to Sec.11(3) vis-a-vis the content of main operative portion of Sec.11 (3), a Division Bench of this Court in the case Kunju v.Fathima reported in 2014 (3) KLT 563, has dealt with the issue as to whether special reasons for non-occupation of the vacant premises should have been necessarily disclosed in the Rent Control Petition or whether such non-disclosure is fatal to the plea of the landlord, in view of the first proviso to Sec.11(3) of the Act. The Division Bench in para 10 of Kunju's case supra held that it cannot be understood

from the first proviso to Sec. 11(3) of the Act that the landlord need plead the particulars of all the premises under their ownership and possession to claim an order of eviction. That the proviso only recites that the Rent Control Court shall not order eviction, if the landlord has another building of his own in his possession, without satisfying the special reasons for not occupying the vacant premises. The function of the proviso is to except something out of the main operative portion contained in the enactment or qualify something so enacted, which, but for the proviso, would come within the purview of the enactment. It was thus held that the scope of the first proviso to Sec. 11(3) of the Act, in the circumstances, is to be understood in the context of the provision in Sec.11(3) of the Act. It was thus held therein that Sec.11(3) of the Act, confers authority on the Rent Control Court to pass an order directing the tenant to put the landlord in possession of the building, if he bona fide needs the building for his occupation and the first proviso carves out an exception to the authority of the Rent Control Court to order eviction, when the landlord has another building of his own in his possession and there are no special reasons for not occupying the same for the proposed need. It was thus held that a combined reading of the provision contained in the operative portion of Sec.11(3) and

the first proviso thereto would indicate beyond doubt that it is only when it is established that the landlord has another building of his own in his possession for occupation for the proposed need, he need satisfy the Rent Control Court the special reasons for not occupying the said premises. (emphasis supplied). It was held that in other words, to non-suit the landlord, the vacant building should be of such a character, which would meet the requirements of the landlord (emphasis supplied). It was held by the Division Bench in Kunju's case supra that any other interpretation of the proviso would lead to absurdity and cannot be accepted.

11. It is now well established that the burden is on the tenant to prove that he is entitled to the benefit of the first proviso to Sec.11(3) of the Act. Hence, the burden of proof is on the tenant to establish not only that the landlord has got vacant possession of another building owned by him in the same city, town or village as the case may be, but also that such vacant building should be of such a character which would meet the requirements of the landlord. It is only when the tenant pleads and proves not only that the landlord has obtained vacant possession of another building owned by him in the same city, town or village as the case may be at the time when the need arose or at the time of the filing the Rent Control Petition, but also that such vacant building would meet the

requirements of the landlord, that the landlord can be called upon to establish that there are special reasons for not occupying such vacant building. In the instant case, both the courts below have concurrently found that the tenant could not establish that the landlord or his son (PW-1) has obtained vacant possession of any other building owned by them. PW-1 has clearly stated in his evidence that his father obtained vacant possession of the premises coming to about 2000 sq.ft. in the area occupied by M/s.KSFE about two years prior to the institution of the Rent Control Petition and that the same was given to M/s.Muthoot Financing Company Ltd. thereafter and that the above said M/s.Muthoot Financing Company had thus vacated another premises of the landlord having an area of about 425 sq.ft, which was let out to another concern running a beauty parlour. It is common ground that the need projected in the Rent Control Petition is stated to have arisen in January, 2012 at the time of expiry of the five year lease period of the petition scheduled building and the R.C.P. is filed in July 2012. Both the courts below have held that the tenant could not adduce any evidence to prove that M/s.Kerala State Financial Enterprises had vacated the aforementioned premises in the first floor after the need of PW-1

had arisen in January 2012. On this basis, both the courts below have held that the tenant has not been able to establish the claim for the benefit of the first proviso to Sec.11(3) of the Act. The learned counsel for the respondent has relied on the decisions of the Supreme Court in the cases as in Kundan Lal Rallaram v. Custodian Evacuee Property, Bombay, reported in 1961 KHC 686 and Gopal Krishnaji Ketkar v. Mohammed Haji Latif and others reported in AIR 1968 SC 1413, to contend that even if the burden of proof is on one party and but if the best evidence is admittedly with the opposite party, and if such best evidence in possession of that party is withheld from producing before the court by that party, then an adverse inference can be drawn as against the party who withheld such evidence that he had withheld from producing such evidence as it would have been unfavourable to him, etc. The learned counsel for the tenant contends that it is admitted by PW1 (landlord's son) that in his cross examination that the documents relating to the vacating of the other premises by M/s.KSFE and its consequent occupation by M/s.Muthoot Financing Company Limited, etc., were available with the landlord and therefore since he has not produced such documents to show the time at which the

said premises were vacated by the former company and later occupied by the latter company, an adverse inference should be drawn against the landlord that the other premises in question were got vacant possession at the time when the need arose in January 2012, as suggested by the tenant. Per contra, the learned counsel for the landlord would contend that the aforementioned two decisions of the Apex Court are not applicable to the facts and circumstances in this case and those two judgments of the Apex Court were rendered by three Judges Bench and that adverse inference cannot be drawn against the landlord in the facts of this case in view of the principles delineated by a Four Judge Bench decision of the Apex Court in Mahant Shri Srinivas Ramanuj Das v. Surjanarayan Das and another, reported in AIR 1967 SC 256.

12. Before we deal with this contention it is to be noted that the tenant has to cogently plead and prove not only that vacant possession of the other premises was obtained at the time of the need arose or at the time when the Rent Control Petition was filed, but also that such vacant building would meet the requirements of the landlord or dependant as the case may be, as envisaged in the first proviso to Sec.11(3). In the pleadings in the Rent Control

Petition as well as in the evidence of PW-1 it is cogently established that vital requirement of the landlord's son's business is for the requisite parking facilities for the vehicles in question for the immediate inspection and access of the clients, which should be attached to such office and that it is a necessity as far as the running of their tour and travel business is concerned. It has also come out in evidence that the requirement of the landlord's son's business is for a space of area of around 900-1000 sq.ft. for their office premises. In the counter statement dated 1.10.2012 filed by the tenant in the R.C.P, it is pleaded that the landlord got vacant possession of another premises having an area of about 1200 sq.ft. in the first floor of the building a few months prior to the filing of the petition and that the said premises were vacated by the M/s.KSFE. In this regard it is further averred in para 9 of the counter statement as follows: "... if the bona fide need alleged is true, the petitioner could have provided that premises for the office of the business of his son, at least as a temporary arrangement...". The tenant has no pleading anywhere in the counter statement that the said premises can satisfy the regular requirements of the tour and travel business of the landlord's son. The only plea of the tenant is that the said other vacant area could have provided the premises of the business office,

at least as a temporary arrangement. So the tenant has clearly admitted in his pleadings that the premises vacated by M/s.KSFE in the first floor, could be utilised by the landlord's son's business only as a temporary arrangement and thus it is clearly, but implicitly admitted that the said premises cannot meet the regular requirements of the landlord's son's business. This should be seen in the light of the fact that the regular requirements of their travel business to have a parking facility for the vehicles to facilitate immediate access and easy inspection by the customers, is to be attached to the office premises. This could be fulfilled only in a premises situated in the ground floor of the building.

13. So, even if the adverse inference is drawn that vacant possession of these other premises were obtained in January–March 2012, as suggested by the tenant, still the tenant had the burden of proof by letting out cogent and clear evidence to establish that these other premises would meet the requirements of the landlord's son's business. No evidence whatsoever has been let in by the tenant to prove that these three other premises would meet the necessary requirements of the landlord's son. Though the pleading of the tenant in the counter statement is that the premises vacated

by the KSFE is 1200 sq.ft., it has clearly come out in evidence of PW1 that the area of the said premises is around 2000 sq.ft. The tenant (RW-1) has deposed before the court that the area of the said premises is 1850 sq.ft. Ext.C-2 additional commission report dated 3.12.2013 states that the total area of the said premises is about 1800 sq.ft. In the present Rent Control Revision Petition, the tenant clearly admits in para 2 thereof that the area of the said premises is 2000 sq.ft. The requirement for the landlord's son's business as projected in the Rent Control Petition and in the evidence is for an area of about 900-1000 sq.ft. In para 2 of the Rent Control Revision, it is clearly stated by the tenant that as per the admission of PW-1 in the cross examination he needs only 1000 sq.ft. Firstly when one of the vital requirements of the landlords son's business is for having parking area of their vehicles, which should be attached to the office premises, such requirement can be met only by a vacant premises in the ground floor and not in the first floor. It is not for the tenant to arrogate himself to the position to sit in judgment over the niceties of requirements of the landlord's dependant's business. The said requirement has been held to be only for a bona fide and honest purpose for the smooth and

efficient running and augmentation of the business concern of the landlord's son. Even if the vacant possession of the premises in the first floor were obtained, as suggested by the tenant, the two premises in the first floor will not meet the specific business requirements of the landlord's son. That apart, when the requirement of the landlord's dependant is only for an area of around 900-1000 sq.ft. of area, the Rent Control Courts, at the instance of the tenant, cannot compel the landlord to utilise another area having about twice the required area, solely to enable the tenant to enjoy the benefit of the first proviso to Sec.11(3). The tenant has not adduced any evidence to show that the area in the first floor having about 2000 sq.ft. had necessary separate entrances and that the premises could be partitioned so that the balance area after meeting the requirements of the landlord's son's business, could be independently rented out by the landlord to some other tenant. So the tenant has miserably failed to let in evidence to show that the other area having about 2000 sq.ft. situated in the first floor of the building would meet with the due requirements of the landlord's son. It has come out in Ext.C-2 commission report that the other premises in the first floor, which

was later occupied by the beauty parlour, is only having an area of about 425 sq.ft. Apart from the fact that this premises is situated in the first floor, it cannot meet the area of requirements of the landlord's son's business as projected need is around 900-1000 sq.ft. It has also come out evidence through Ext.C-2 commission report that the other premises situated in the ground floor, which is now occupied by the photostat shop is having an area of only about 215 sq.ft. This cannot meet the requirements of the business purpose of the landlord's son. Therefore, we are of the considered opinion that the tenant has miserably failed to prove that the other vacant rooms could meet with the due requirements of the landlord's son's business.

14. It is to be noted that the specific assertion of the landlord's son (PW-1) is that the vacant possession of the two premises in the first floor of the building was obtained about two years prior to the filing of the Rent Control Petition and not 2-3 months prior to the filing of the Rent Control Petition, as suggested by the tenant. Except on the basis of oral testimony, the tenant has not in any way controverted the aforementioned assertion of the landlord's son. In the Four Judges' Bench decision of the Supreme

Court in Mahant Shri Srinivas Ramanuj Das v. Surjanarayan Das and another reported in AIR 1967 SC 256, it has been held in para 28 as follows:

“28. The oral evidence about the foundation of the Math or about the various acquisitions of property by purchase or by gift is nil. Whatever a witness has deposed has not been on the basis of his personal knowledge. This is natural when the Math was founded about two hundred years ago and when most of the acquisitions had taken place long ago. The best person to speak, though not from personal knowledge, could have been the Mahant himself. He can base his knowledge on the documents about the history of the Math and the acquisition of the properties. Such documents must naturally be in the custody of the Mahant. The Mahant has not come in the witness box. All the documents have not been produced. In fact it is the plaintiff alone who produced a number of documents but he had picked and chosen from among the documents in his possession. Some documents which could have thrown some light on the question under determination have not been produced. It is true that the defendant–respondent also did not call upon the plaintiff–appellant to produce the documents whose existence was admitted by one or the other witness of the plaintiff and that, therefore, strictly speaking, no inference adverse to the plaintiff can be drawn from his non–producing the list of documents. The Court may not be in a position to conclude from such omission that those documents would have directly established the case for the respondent. But it can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the respondent's case.”

(emphasis supplied)

Therefore, it has been held by the Supreme Court in the aforementioned decision that where the defendant–respondent also did not call upon the plaintiff–appellant to produce the documents whose existence was admitted by one or the other witness of the plaintiff, then no inference adverse to the plaintiff can be drawn from his non–producing the list of documents and the court may

not be in a position to conclude from such omission that those documents could have directly established the case of the respondent. But the court has to take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the respondent's case. In the instant case, it has been found by both the courts below that though PW-1 has admitted that there are documents to show the vacating of the premises by M/s.KSFE and its later occupation by M/s.Muthoot Financing Company Ltd., the tenant has not cared to request the court to call upon the landlord to produce those documents in the court. Therefore, merely on account of the fact that PW-1 has admitted about the existence of these documents, no adverse inference can be straightaway drawn merely on account of the non-production of such documents. In this case, it is also to be seen that the tenant could have easily taken steps to call upon the landlord to produce those documents. An Advocate Commission was appointed by the court at the instance of the landlord and as per the order in I.A.No.2352/2013 filed in the above RCP, Ext.C-1 commission report dated 9.9.2013 was filed before the court with notice to both sides on the points sought therein. Later another

inspection was conducted by the Advocate commission on 12.11.2013, based on the work memo submitted by the respondent in the R.C.P. (tenant) and point No.2 in the work memo was submitted by the tenant, which led Ext.C-2 report, was to inspect the premises occupied by M/s.Muthoot Financing Company. The tenant sought only to ascertain the area of the premises now occupied by M/s.Muthoot Financing Company. Point No.3 of that memo was only for ascertaining the area of the premises now occupied by the beauty parlour. The tenant could have easily requested the Advocate Commissioner, if necessary, after due permission from the court, to ascertain from M/s.Muthoot Financing Company, as to when they had occupied the said premises and as to when they had vacated the premises, which was later let out to the beauty parlour and also to ascertain from the beauty parlour as to when they had occupied the present premises, etc. Nothing prevented the tenant from ascertaining these aspects either from the said Commission or by seeking appointment of another Advocate Commissioner to know these details and also to ascertain as to when M/s.KSFE had vacated the premises, etc. So also, the tenant could have easily called upon the landlord to produce the

documents relating to the vacating of the premises by M/s.KSFE and the occupying of the premises by M/s.Muthoot Financing Company and by the beauty parlour, etc. The tenant could have easily made requisite applications before the Rent Control Court to summon these documents and witnesses, if necessary, from those companies/firms. When the tenant had sought an additional commission inspection by filing a work memo to that effect, by insisting to ascertain only the area of the premises and not the other crucial relevant aspects regarding the time when the other premises were vacated and occupied, etc., the tenant cannot point any accusing fingers against the landlord. This is to be examined in the light of the crucial aspect that the tenant has been occupying the premises since January, 2007 onwards and he or his staff would have been very much aware about the details of the other tenants occupying the same building like M/s.KSFE, M/s.Muthoot Financing Company, beauty parlour, etc. and that if he was very sure that the premises in question was got vacated only 2-3 months prior to the filing of the RCP, certainly he would have requested the Advocate Commission to ascertain the details at least at the time of the additional inspection conducted by the commission at the behest of

the tenant. Therefore, the mere admission of the existence of the documents in question by the landlord and its mere non-production by the landlord cannot raise any adverse inference as against the landlord in the facts and circumstances established in this case. Moreover, as already held herein above, even if it is assumed that such an adverse inference could be drawn against the landlord, the tenant has not proved the aspect that the vacant rooms could meet the vital requirements of the landlord's son's business. Therefore, we have no hesitation to hold that both the courts below were fully right in concluding that the tenant has failed to establish the benefit of the first proviso to Sec.11(3) of the Act.

15. The learned counsel for the revision petitioner (tenant) has also relied on the decision of the Division Bench of this Court in the case Janatha Drugs v. Maithri Construction, reported in 2007 (4) KLT 625. We note that the Rent Control Court therein on the facts of Janatha Drugs' case supra found that the landlords therein had in their possession a more suitable premises than the scheduled tenanted premises while instituting the proceedings for eviction. In the light of those aspects, we are of the clear opinion that the decision in Janatha Drugs' case supra is not applicable to

the facts and circumstances emerging in the instant case.

16. The next issue is as to the entitlement of the tenant to claim the protection of second proviso to Sec.11(3) of the Act, which reads as follows:

“Sec.11(3)....

xxxx

Provided further that the Rent Control Court shall not give any direction to a tenant to put the landlord in possession, if such tenant is depending for his livelihood mainly on the income derived from any trade or business carried on in such building and there is no other suitable building available in the locality for such person to carry on such trade or business:”

17. It is by now too well established that the burden of proof is entirely on the tenant to prove both the limbs of second proviso to Sec.11(3). The tenant (RW-1) has clearly deposed in evidence that the company in which he is a director is the tenant in this case and that the company is an income tax assessee, which has duly submitted their returns before the Income Tax authorities. However, both the courts below have found that the tenant has not produced any statement of accounts to show their income. No evidence has been adduced to show that the tenant is depending for livelihood mainly on the income derived from the business carried on in the tenanted premises. Further, as regards the second limb of the second proviso, no evidence has even been let in by the tenant to show that they have conducted due and diligent enquiries to

ascertain as to the availability or otherwise of other suitable buildings in any around the locality concerned for relocating their business premises. On the other hand, the landlord has asserted that as the area in question is near to the Civil Station, Kakkanadu, Ernakulam, leading to the Infopark, there are many alternate accommodations easily available for the tenant. Be that as it may, both the courts below have concurrently found that the tenant has not let in any cogent evidence to establish the ingredients of both the limbs of the second proviso to Sec.11(3) of the Act. It is also to be noted that the revision petitioner has admitted that it is a private limited company, in which, RW-1 and his wife are the directors. It has been held in the case A.V.M. Ltd. v. Dr.Sunil P.Shenoy, reported in 1995 (2) KLT 5, that the protection available under the second proviso to Sec.11(3) of the Act cannot be claimed by a tenant who is a limited company.

18. In view of these aspects, both the courts below cannot be found fault for coming to the considered conclusion that the tenant is not entitled to the benefit of first and second proviso of Sec.11(3) of the Act.

19. On an overall appreciation of the facts and

circumstances emerging in this case, based on the evidence on record, we have no hesitation to hold that the broad findings and conclusions of both the courts below regarding the plea under Sec.11(3) of the Act and the questions regarding the first and second provisos to the above provision are in accordance with law and are not amenable for any interference under the revisory jurisdiction conferred on this Court as per Sec.20 of the Act.

20. The revision petitioner (tenant) has not made any submissions regarding the findings of the courts below on the issue of the counter claim made by the tenant for fixation of fair rent. However, on a perusal of the impugned judgments, we find no grounds to interfere with the finding of the courts below that the said counter claim is not maintainable. It is by now well established that the provisions of the Rent Control Act do not empower the Rent Control Court to entertain a counter claim. It is for the aggrieved party concerned to institute independent proceedings for fixation of fair rent as envisaged in Sec. 5(1) of the Act. Therefore, the findings of the courts below on this issue are also in accordance with law and do not call for any revisory interference.

21. However, taking note of the fact that the revision petitioner has been conducting their business in the petition

scheduled building since January 2007, we are of the considered opinion that the tenant should be given reasonable time to surrender vacant possession of the building to the landlord. Accordingly, we grant six months from today to the revision petitioner to surrender vacant possession of the petition scheduled building to the landlord. This will be subject to the condition that within two weeks from today, the revision petitioner shall file an affidavit before the Rent Control Court/execution court, unconditionally undertaking therein that the revision petitioner shall surrender vacant possession of the petition scheduled building to the landlord within the aforementioned time limit. This will also be subject to further condition that the revision petitioner shall clear off all the arrears of rent, if any, within two weeks from today and shall continue to pay monthly rent due to the landlord. If the revision petitioner violates any of the aforesaid conditions, then the respondent landlord will be at liberty to pursue execution proceedings.

With these observations, we dismiss the Revision Petition.

Sd/-

ANTONY DOMINIC, JUDGE

Sd/-

ALEXANDER THOMAS, JUDGE

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///True copy///

P.S. to Judge