

(2002) 04 KL CK 0039**High Court Of Kerala****Case No:** C.R.P. No. 1056 of 1999

Mohammedkutty

APPELLANT

Vs

Janaki

RESPONDENT

Date of Decision: April 2, 2002**Acts Referred:**

- Kerala Buildings (Lease and Rent Control) Act, 1965 - Section 11(3)

Citation: (2002) 2 KLJ 491**Hon'ble Judges:** K.S. Radhakrishnan, J; K.A. Mohamed Shafi, J**Bench:** Division Bench**Advocate:** V. Chitambaresh, for the Appellant; A.P. Chandrasekharan, for the Respondent**Final Decision:** Dismissed**Judgement**

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K.S. Radhakrishnan, J.

Tenant is the revision petitioner. Eviction was sought u/s 11(3) of Act 2 of 1965. Rent Control Court ordered eviction u/s 11(3) of the Act which was confirmed by the Appellate Authority. Aggrieved by the same this revision petition has been preferred.

2. Tenant is in occupation of the building from 1976 onwards and is conducting tailoring business in that building. Landlord wanted vacant possession for conducting a jewellery shop. Landlord and his children have already got two or three jewellery shops. On the side of the landlord 9th petitioner got himself examined as PW1. Tenant was examined as RW1 and Accommodation Controller was examined as RW2. On the side of the landlord Exts. A1 to A4 were marked. Exts. R1 to R3 were marked on the side of the tenant. Ext. C1 is the commission report. Ext. XI is the Accommodation Register maintained by the Tahsildar, Ottappalam. On the basis of the oral and documentary evidence both the authorities below have concurrently found that the landlord has established the bona fide need u/s 11(3) of

the Act.

3. Counsel on either side have confined their argument to the second proviso to Section 11(3) only. We therefore need examine only that contention. The first limb of the second proviso has also been established by the tenant. The question is whether he could establish the second limb of the second proviso to Section 11(3). Both the courts below have concurrently found that tenant had failed to establish the second limb of the second proviso.

4. Counsel appearing for the tenant submitted that tenant cannot be called upon to prove negative that no other suitable building is available in the locality to carry on his trade or business. The availability of suitable building in the locality according to the tenant is for the landlord to prove. PW1 gave evidence to the effect that vacant rooms are available on the side of the railway station road and also in front of court premises. Ext. A2 is the notice produced by the landlord which is seen to have been published by K.P. Syed Haji to the effect that in Priyanka Shopping in R.S. Road rooms are available on rent. Landlord has also deposed that rooms are available in Chandran Building Complex which is situated 50 metres away from the petition schedule building and also in Vengeri Appan Complex, situated 75 metres away from the tenanted premises. Accommodation Controller was examined as RW2. He deposed that six rooms are lying vacant on the side of the road leading to court and there is a board exhibited "rooms for rent". Counsel appearing for the tenant placed reliance on Ext. XI register and submitted that the register would not show rooms are lying vacant. In our view, landlord has discharged the burden showing availability of suitable building at Priyanka Shopping Complex, Chandran Building Complex and Vengeri Appan Complex etc. It is for the tenant to establish that in those buildings rooms are not available and even though rooms are available those are not suitable to carry on his trade or business.

5. Counsel appearing for the tenant placed much reliance on the decision of a learned Single Judge of this Court reported in Varkey v. Roman Pillai 1981 KLT 213. Reliance was also placed on the decision in Sadanandan v. Kunheen 1991(2) KLT 628 and Krishnankunju Raveendran v. Sukumara Pillai 1999 (3) KLT 373. Reliance was also placed on paragraph 17 of the decision in Krishnankunju Raveendran's case, *supra*, which is extracted below.

"The provision in the second proviso to Section 11(5) "there is no other suitable buildings available in the locality for such person to carry on such trade or business" would make it clear that the vacant building should be one suitable for carrying on the business that the tenant was carrying on in the petition schedule building and also that the building should be available to the tenant.

A building constructed at a very high cost with modern facilities suitable for running a star hotel or similar business need not or may not be a building suitable for running a petty teashop and may not be within the reach of the tenant. The landlord

also may not let out such a building to a tenant for running a petty tea shop or for a meagre rent. The vacant building in the locality should be one within the reach of the tenant. If the vacant building will be available only on payment of huge deposits and on very high rent, then it may not be said that a suitable building was available in the locality where the tenant can carry on his trade or business. The vacant building should be within his financial reach. For the simple reason that there was some vacant buildings in the locality the tenant cannot be denied of the above protection under the second proviso to Section 11(3) of the Act."

Aforementioned dictum was subsequently explained by another Division Bench in Xavier v. Krishnakumari, 2000 (3) KLT 809. The Court held as follows:

"Whatever that be, the fact that the tenants will be forced to pay the rent that is commensurate with the rent now prevalent in the locality, is not a ground to deny the landlord an order for eviction u/s 11 (3) of the Act on the ground that no suitable building is available to the tenant in the locality. The Rent Control Act does not contemplate that the landlord and the tenant should be pinned down to the state of things as they were on the date of the letting. What the court is called upon is to see whether on paying the current going rate of rent, any other building in the locality is available for the tenant to shift his business. It cannot be expected that a tenant would now get a building on the rent that he originally agreed to pay to his landlord, in the same locality and in the same town. Rents have gone up. He will have to pay the prevalent rent in the locality consistent with the economic situation now obtaining. Therefore, the argument in that behalf raised by counsel for the tenants cannot be accepted. We do not see any thing in the decision of this Court in Krishnankunju Raveendran v. Sukumara Pillai 1999 (3) KLT 373 which compels us to take a different view. The use of the expression suitable building can only mean suitable for his needs. It cannot be understood as a building for which the tenant need pay rent only at the rate that was prevailing twenty or thirty years ago. It will be an unrealistic interpretation of the statute. If the above decision has laid down any such proposition, with respect, we must say that we cannot find our way to agree with the same".

6. We may examine the scope of the second proviso to Section 11 (3) which we extract below for easy reference.

"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 and there is no other suitable building available in the locality for such person to carry on such trade or business."

Landlord could prove the existence of vacant buildings in the locality. If it is established, tenant can show that the building though available is not suitable to carry on the trade or business conducted by him in the tenanted premises. The

reasoning of the Division Bench in Krishnankunju Raveendran's case, *supra*, was that suppose a tenant is carrying on a petty tea shop and landlord could establish availability of a building in a prime location of the city, petty shop owner would not be in a position to take that building on rent. Further, according to the Division Bench the vacant building should be within the financial reach of the tenant. The Bench felt the mere fact that rooms are available as such is not a ground to deny the protection available to the tenant.

7. We are of the view that the availability of building in the locality and its suitability are all matters of evidence. The Rent Control Court has to decide each individual case on its merits. A Division Bench of this Court in *Sadanandan v. Kuncheen* 1991 (2) KLT 628 held that since the proviso works as an exemption the person who desires to get the exemption has to prove the ingredients of the proviso and to that extent there cannot be any doubt. However, being a negative aspect and that too, the availability of a suitable building in the locality, the nature and quantum of evidence that has to be proved by the tenant may, in appropriate cases, be confined to a positive affirmation by the tenant before the Court that no suitable buildings is available in the locality. Burden then shifts to the landlord since he can positively prove the fact that buildings are available. The expression "suitable buildings available in the locality to carry on trade or business" assumes importance to understand the meaning of the second proviso. Building must be suitable to carry on the business or trade which is being conducted in the tenanted premises. Once it is established that building is available, the available building is to be suitable to carry on the business or trade conducted in the tenanted premises. But once suitability and availability is established, it is the look out of the tenant to negotiate with the prospective landlord and obtain possession. Tenant cannot plead payment of high rent and security amount to the prospective landlord as a defence to defeat the bona fide need established by the landlord u/s 11(3). In other words, payment of high rent and security amount by the tenant to the prospective landlord has no inter relationship with the bona fide need established u/s 11(3); nor the Rent Control Court is expected to determine the plea of the tenant that even though suitable buildings are available they are out of reach after negotiation with the prospective landlord. Naturally tenant is expected to pay the current market rent prevalent. Prospective landlord may fix the rent taking into consideration a variety of facts, cost of construction, land value, importance of the locality etc. before letting out the building. No tenant can expect a building with the same rent which is currently being paid by him for the tenanted premises. In other words, those are all matters for the tenant to negotiate with the prospective landlord and not the concern of the landlord who had already established his bona fide need u/s 11(3).

8. In this case both the courts have concurrently found that tenant is not entitled to protection under the second proviso to Section 11(3). We therefore find no reason to disturb the said finding. However, tenant is given three months' time to vacate the premises.