(1997) 10 KL CK 0039

High Court Of Kerala

Case No: C.R.P. No. 463/97 B

Jayakrishnan, V.K. — APPELLANT

Vs

A.M. Vrinda — RESPONDENT

Date of Decision: Oct. 9, 1997

Acts Referred:

- Kerala Buildings (Lease and Rent Control) Act, 1965 - Section 11(4), 18, 20

Citation: (1997) 2 KLJ 572

Hon'ble Judges: V.V. Kamat, J; K.A. Abdul Gafoor, J

Bench: Division Bench

Advocate: P.V. Surendranath, for the Appellant; N. Subramanian and M.S. Narayanan, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

V.V. Kamat, J.

The proceedings of this petition are u/s 20 of the Kerala Rent Control Act. We are required to deal with differing conclusions by the two fact finding authorities. The trial authority-the Rent Controller (Munsiff), Thalassery, by the order, dated December 23, 1994 in Rent Control Petition No. 8/1994 held in favour of the tenant, as far as the present proceedings are concerned, that the landlady would not be entitled to eviction on the ground of sub-lease u/s 11(4)(i) of the Rent Control Act. The landlady''s appeal before the Rent Control Appellate Authority-the Principal District Judge, Thalassery, by the Rent Control Appeal No. 26/1995 came to be allowed by the judgment dated November 12, 1996 ordering eviction on the ground of sub-letting. We have before us the tenant as the Petitioner.

2. The proceedings before us afford an occasion and opportunity to resort to a process of blending. It is the policy of the State literally to encourage investment by purchasing property and construction of houses. Persons going abroad are

understood by the State to be coming back and this period of coming back has also to be understood in the context of the policies. The experience of others also thinking of going abroad is also to be understood as an extension wherever necessary of the spirit. In other words, the approach is in consonance with the religious Israeli attitude of expecting every citizen of this State to look back to this State as the Biblical land of milk and honey. Even otherwise, to a guest artist of appreciation like me, the greenary throughout the year, personal rapture that is received by landing on the land of this State would be more than sufficient to understand this State as encouraging the citizens to go wherever they want with a frequent and intermittent looking back to this State as a result of the situation of continuous temptation. An exercise of personal choice would certainly be favourable if other difficulties could have been outweighed. The State, as I understand, has an attitude of encouragement to its citizens not only to go beyond the seven seas, but also to look around in other States with a perennial attitude of a sweeping bird keeping an eye on its children. This approach, as we stated at the outset, requires its proper blending with an approach of appreciation of evidence dealing with situations more or less similar, in an attempt to understand as to whether a person who is abroad for a period on six years, may, some years more could be understood to have given a farewell to this State, to be understood as not having any intention of returning any time. Factually only yesterday (G.R.P. 529/1992) we had a factual specimen of the landlord returning after a period of 16 years who persuaded us to give a right of contest because the decisions went against him on the testimony of his holder of power of attorney. Factually after 16 years persons do come because all of them always have a tendency to look back to return to invest major part of their savings in the local soil to build a house for them. Apart from the policy and its consequences, every one would see the properties and houses kept intact with keen interest and affection.

3. The proceedings disturbed us with a sense of incongruity and that is why we thought of resorting to the process of blending. In the impugned judgment the District Judge has reached the conclusion that because the tenant has been away for a period of six years, a subtenancy has been created.

4. Section 20 of the Kerala Building (Lease and Rent Control) Act, 1965 speaks of calling for and examination of the records for the purpose of satisfying as to the legality, regularity and propriety of the orders brought before this Court. Section 18 of the said Act specifically enacts a situation of finality to the decision of the Appellate Authority, to be opened only within the corners of limitation of Section 20 of the Act. In the process of satisfaction with regard to the legality, propriety and regularity, although it is put at the back of the judicial mind that a situation of finality is understood, the situation is not understood as a closed one with regard to the factual aspects under any circumstances. There are certain precedential norms and principles of drawing inferences from the facts on record and the parameters for determination of the factual findings speak of a limited reappraisal of the

evidence. Although a substitution of a different view altogether is not permissible, in a factual peculiarity, particularly in the proceedings before us, the two fact finding authorities have reached diametrically opposite conclusions, an independent probe in consonance with the precedential norms and principles of drawing inferences would reach situation of inevitability. However, if the approach is found to be at tangent with what the State is known for, we would seek justification in placing on record the proper approach of appreciation in the context of the situation.

5. For the purposes of this petition we are concerned only with the ground u/s 11(4)(i) of the Kerala Building (Lease and Rent Control) Act and in that connection to find out whether the tenant (Respondent No. 1) has transferred his right in regard to the tenanted premises without the consent of the landlady. In this context the case before the Rent Controller (R.C.P. No. 6/1994) states that the first Respondent was conducting a tailoring shop in the petition schedule building. He left India and employed abroad as a tailor. He has no right to create a sub-lease and contrary thereto the scheduled shop building is entrusted to Respondent No. 2 and it is Respondent No. 2 who is in exclusive possession of the building and is conducting tailoring shop on his own in his right being in exclusive possession. There is no question of consent. This occasioned the issuance of a registered lawyer''s notice on November 21, 1993 asking for possession. The notice was acknowledged by Respondent No. 2, although addressed to the 1st Respondent in his personal name.

6. The counter case is that earlier there were many other proceedings against Respondent No. 1 and all of them were dismissed by the court. It is averred that the 1st Respondent had been in possession even before the Petitioner-landlady got concerned with the building in question. It is stated that thereafter there was an execution of a kychit (an agreement) stating stipulation of rent of Rs. 60 per month from May 1987. This was for a period of 11 months up to November, 1990. It is urged that the suit shop building is the only source of livelihood of Respondent No. 1 with reference to the work conducted therein. It is further averred that though Respondent No. 1 had gone to foreign country temporarily, no job is obtained there. There is no sub-letting and there is no question of exclusive possession; but 2nd Respondent is conducting tailoring work for and on behalf of Respondent No. 1. Respondent No. 2 is none other than the nephew of Respondent No. 1.

7. The Rent Controller has considered the rival pleadings in the light of the evidence on record. The discussion is to be found in paragraph No. 7 in the context.

8. It is observed in the process of narration of facts that when the former petition (R.C.P. 77/1991) between the parties was initiated, the Petitioner-landlady had not put forward the contention of sub-lease by Respondent No. 1 in favour of Respondent No. 2. It is also observed that in spite of the contention that Respondent No. 1 had gone to foreign country about six years back, the ground of sub-lease was not taken in the former petition since Respondent No. 2 conveyed that Respondent No. 1 would return soon. Although the relationship between Respondent No. 1 and

Respondent No. 2 was vehemently disputed, the Rent Controller referring to the prior deposition (Ext. A-1) has observed in this connection in the following manner:

In that he has categorically stated that he is the nephew of first Respondent herein and he is doing work in the shop of the first Respondent herein who is his uncle and he is doing work for 5 or 6 years. It is also stated by him that he will pay the amount deducting his remuneration (coolie) to the wife of his uncle who is the first Respondent herein. This former petition was filed on the ground of bona fide need.

9. The Rent Controller has also referred to the evidence of R.W. 1 (Respondent No. 2) stating that he was doing work for and on behalf of his uncle (Respondent No. 1 herein) and he will be given coolie by the wife of Respondent No.1 and the Respondent No. 1 is not having any permanent or convenient job in the foreign country and he is to return any time. The Rent Controller has considered this aspect by way of an explanation for not urging the ground of sublease in the former petition. The reasoning proceeds further to observe that the evidence to the effect that 2nd Respondent is doing tailoring work for and on behalf of his uncle (R-1) and the said contention does not appear to be disputed in the former petition when the 2nd Respondent was examined therein.

10. The Rent Controller proceeded to record a fact finding situation that it is obligatory on the landlady to establish the situation of sublease to indicate the necessary factors. The Rent Controller did not find a satisfying situation and ultimately the conclusion was reached that the circumstances and evidence adduced in the matter of the contention of Respondent No. 2 that he is doing the work on behalf of Respondent No. 1 would be probable and the sublease was not found to be established by satisfactory evidence or sufficient circumstances.

11. In essence the Rent Controller considered the relationship as probable, considering the functioning of Respondent No. 2 to be for and on behalf of Respondent No. 1 and not in his own right, and also considered the situation that the contention of sublease was not taken up earlier on the assumption, though accepted on the basis of the representation of Respondent No. 2 that Respondent No. 1 may return any time.

12. The Rent Control Appellate Authority dealt with the contention of the Appellant-landlady before it and the sublease was the only question to be considered by the appellate authority.

13. The Appellate Authority considered the submissions. It was argued that there was clear evidence to show that the tenant was working in Gulf countries from 1985 onwards and even when he was in India, the business was being conducted by Respondent No. 2 and therefore, it was argued, it was for the tenant to speak about the exact arrangement between himself and Respondent No. 2. The Appellate Authority also considered the submission that even in a situation of close relationship between Respondents 1 and 2, that alone could not be a ground to

negative the case of subletting. It was urged before the Appellate Authority that exclusive possession of a son also could be considered as amounting to subletting. It was submitted that exclusive possession is the determining factor.

14. The appellate authority before proceeding to deal with the vital question, after referring to the controversy about the relationship, proceeded categorically on the assumption that Respondent No. 2 who is in possession and conduct of the business is the sister''s son of Respondent No. 1.

15. Proceeding further on the above basis, the learned Judge considered the situation of the tenant permanently shifting his residence to another place leaving the tenanted premises completely in favour of his brother, without the consent of the landlord to be a ground for eviction. The learned Judge also considered the situation of the tenant''s son given in adoption to another family and carrying on business in the premises in question would he understood to be in exclusive possession as a result of alleged subletting. The learned Judge has drawn strength with regard to these propositions from the decisions cited. Bhairab Chandra Nandan Vs. Ranadhir Chandra Dutta, , Duli Chand v. Jagmender Dass (1990) (1) R.C.J. 1 S.C. The learned Judge, proceeding on the basis of acceptance of relationship and the fact that Respondent No. 2 is doing tailoring business for and on behalf of Respondent No. 1., has proceeded to consider the situation as to whether it may or may not amount to subletting. The reasoning proceeds further to state that in ordinary cases, transfer of the exclusive possession is prima facie evidence of subtenancy, although instances contrary may negative the intention to create subletting. The learned Judge proceeded further to show a situation showing the occupation of an exclusive character creating a situation for the tenant for rebuttal thereof. If exclusive possession is established, it is observed that it may lead to a presumption of the situation as regards its valuable consideration as a condition of transfer. Placing the position of law again with the help of the decisions cited Kunhikrishnan v. Madhavi 1991 (1) KLT 515, K.A. Abdul Salam Vs. The District Judge and other, , Abdul Rehiman Kunju v. R.C.R. Authority 1991 (2) KLT 600 it is observed that establishment of certain situations in the nature of pre-conditioning would entail consequences expecting the tenant to say something in rebuttal.

16. The learned Judge in the process of application of the above principles has put in the forefront of consideration that the tenant (R-1) did not go to the box and adduce any evidence. It is observed that admittedly he is in Gulf countries from 1989 onwards. He went to Gulf countries on a temporary basis and it is referred from the evidence that he is not able to get any permanent job. The learned Judge has observed this as a situation rather very difficult to believe that a person who left India in the year 1989 and permanently residing in Gulf countries for more than 6 years is remaining there without a job. The learned Judge accepted this basis of residence from 1989 in the Gull countries for working as a tailor and remaining without a job. As against this, then, the learned Judge proceeded to consider the

evidence at the other end. Referring to the evidence of Respondent No. 2 (R.W. 1) to the effect that he is entrusting the entire income from the business conducted in the premises with the wife of Respondent No. 1, the learned Judge observed that it is not possible to accept the same. In regard to this it would be more appropriate to reproduce the reasoning of the learned Judge which is as follows:

According to him he is entrusting the entire income from the business conducted in the premises with the wife of the 1st Respondent. In chief examination itself R.W. 1 had admitted that even when the 1st Respondent comes to India he (R.W. 1) is doing the business. In cross-examination he had admitted that he does not know what exactly is the income derived from the business. According to him he is not maintaining any account but the 1st Respondent''s wife is maintaining the account. He had also deposed that she is paying wages to him. In certain weeks, he will be paid Rs. 200, and other weeks he will be paid Rs. 100. But R.W. 1 had deposed that he is not examining the wife of the 1st Respondent. He had also admitted that there is no document to show that he is doing the business for and on behalf of the 1st Respondent.

17. The learned Judge has then also proceeded to consider the factual material that Respondent No. 1 was in India at the time of signing the counter. Reference is also to the evidence of R.W. 1 that 1st Respondent is in the habit of coming to India occasionally and still the business is being conducted by Respondent No. 2. The learned Judge found that these vital aspects were not considered by the Rent Controller. In the matter of the earlier proceedings and in regard thereto there being no ground of eviction based on subletting, the learned Judge held that the explanation offered in that connection that Respondent No. 2 stated to them that Respondent No. 1 was likely to come any time was a valid explanation.

18. It is in the nature of the above situation of the two authorities taking divergent views, we considered it to be more than appropriate to be appraised with the record ourselves. The depositions, particularly English translations thereof, were made available to us. Even the deposition (Ext. A-1) in the prior proceedings was also made available to us. We have been taken through the depositions and the learned Counsel for the parties made strenuous submissions in regard thereto. Re-examination of the material on record would necessarily be neatly wedded to the questions to be answered in the context of the situation relating to the ground of eviction. In the process, we will have to determine as to whether the 1st Respondent who left in 1989 could be understood and stated to have left for good. We will also have to determine on the basis of the material on record as to whether Respondent No. 2 was in possession of the suit premises in his own right all by himself. We will have to determine on the basis of the material on record as to whether the possession of Respondent No. 2 is in the nature of creation of interest in the property of the suit building in accordance with the principles of Transfer of Property Act in the matter of creation of lease. This will have to be determined on

the basis of the material on record.

19. With regard to the first aspect to determine as to whether Respondent No. 1 could be understood to have left for good, we have already laid our emphasis to look at the situation. Day in and day out times without number persons are encouraged to go. It is also necessary to take the stock of the situation with regard to the material in the context. The material on record shows that he was without a job. Obviously as a tailor Respondent No. 1 had no scope for a Government job or a job of a permanent nature. He left as a tailor and in the circumstances in search of a job. The material on record shows that he had come back and there is documentary material in support thereof on his signing the counter on this land. On facts it is not possible to see having no intention whatsoever to return, especially when his wife and children had not accompanied him even for a day.

20. We would like to refer to the evidence in the context of the above aspect after recording our reactions as Stated earlier. If the deposition in Ext. A-1 is referred to, keeping in mind that it is produced on record by the landlady herself, may be for a different purpose, it is seen that Respondent No. 2 stated on oath that he was working in the shop of Respondent No. 1 for 5-6 years. He was looking after the shop and the money was entrusted to the wife of Respondent No. 1 after taking his remuneration. It is also found from the said evidence that there is no other livelihood for his uncle (R-1) and his family and then though the uncle went aboard in Gulf, he had not obtained a job and he might return at any time. There is no dent to these aspects.

21. The evidence of Respondent No. 2 (R.W. 1) would place on record certain other factors also by way of a reiteration to some extent. The evidence is recorded on December 16, 1994 and it is stated that Respondent No. 1 was in the Gulf countries and he had not obtained employment. It is added that the income from the shop is the only livelihood of Respondent No. 1 and his family and there is no question of any sublease. The witness (R.W. 2) was managing the business for and on behalf of his uncle (R-1). It is specifically deposed by the witness on oath that he was entrusting the income from the business to the wife of Respondent No. 1. It is added that Respondent No. 1 would return from Gulf any moment as he has not obtained a job there.

22. In fact the cross-examination of this witness shows the process of completion of his case in the examination in chief. Questions would expect better discretion. In answer to the question "From 1989 onwards the building is in your possession?", his answer is in the following manner:

I am conducting the shop on behalf of Jayakrishnan. It is not possible to say what is the daily income from the shop. I am not keeping any accounts.

Even thereafter the process of completion is taken further up and the answer is recorded that the wife of Mr. Jayakrishnan will keep account and he has been given

different wages on different days. These factors are well established in the context of the question to be considered.

23. In fact the evidence of P.W. 1 the husband of the landlady also has elements of completion. The said witness has clearly stated that at the time of the purchase of the suit building shop, it was already occupied by Respondent No. 1 and after purchase there was a renewal by a new kychit fixing the rent at Rs. 60. Not content with that, the witness has stated in clear terms:

Second Respondent is conducting the trade Tailoring work is being done there.

In addition thereto we find that it is more than specific and that again in the cross-examination that the payments of rent were made by Respondent No. 2 for and on behalf of Respondent No. 1 Jayakrishnan. Not content with that, it is again brought in the cross-examination that Respondent No. 2 Sunil Kumar was examined on behalf of Respondent No. 1.

24. The material on record spells out clear situations of preponderance of probabilities that Respondent No. 1 could not be understood to have left for good and there was a reasonable possibility of his returning back to his own family and State. The material on record also shows that he has left leaving his wife and children to wait for him. It also shows that Respondent No. 2 was looking after the shop premises and the conduct of business not in his own right in any manner. On facts his possession could not be understood to be of an exclusive character, but possession of a person connected with the premises for and on behalf of someone. There is no reason to discard the testimony of Respondent No. 2 that he was conducting the business for and on behalf of Respondent No. 1, in a situation where his wife and children were kept behind. This is not an uncommon experience of persons who are encouraged to leave the land of the State for fortune. Even if wife and children accompany, as stated at the outset, they always have their eyes and attention to their motherland.

25. In our judgment the approach of the Appellate Authority is based on the assessment of the evidence in a casual manner without keeping in mind the precedential norms and principles of drawing inferences from proved facts in the light of obvious situations showing their display all around in the context of movements of persons and their dealings with the properties. If this State is understood in the matter of encouragement, it will be a situation of incongruency if the court without drawing the necessary strength therefrom see the persons going abroad as having left the State for good and for all the time, which is not the situation. This is especially in a case where even others who have no connection axe more than attracted because of the natural gifts of the State. In our judgment the Rent Control Authority has arrived at a correct conclusion which requires reinforcement, a job which was left to us and we have done and performed as above.

For the above reasons the petition succeeds and the result is that the impugned judgment of the Rent Control Appellate Authority gets quashed and set aside and in its place the conclusion of the Rent Control Court that the Petitioner-landlady is not entitled to eviction on the ground of sub-lease u/s 11(4)(i) of the Rent Control Act is confirmed.