(1999) 09 KL CK 0054

High Court Of Kerala

Case No: C.R.P. No. 2036 of 1991

Raveendran		APPELLANT
	Vs	
Sukumara Pillai		RESPONDENT

Date of Decision: Sept. 28, 1999

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115
- Kerala Buildings (Lease and Rent Control) Act, 1965 - Section 11(2)(b), 11(3), 11(3), 20

Citation: (1999) 2 KLJ 770

Hon'ble Judges: R. Rajendra Babu, J; K.K. Usha, J

Bench: Division Bench

Advocate: S. Venkitasubramonia Ayyar, for the Appellant; V.L. Shenoy, for the Respondent

Final Decision: Allowed

Judgement

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R. Rajendra Babu, J.

This revision is at the instance of the appellant/tenant in R.C.A. 23/1989 on the file of the Rent Control Appellate Authority, Alappuzha. The landlord-respondent filed R.C.P. 1/1986 before the Rent Control Court, Alappuzha claiming recovery of the tenanted building u/s. 11(2)(b) and 11(3) of the Kerala Buildings (Lease and Rent Control) Act, for short the Act. The Rent Control Court allowed recovery both u/s.11(2)(b) and 11(3) of the Act. The appeal filed by the tenant was R.C.A. 23/1989 before the Appellate Authority, Alappuzha, was dismissed upholding the order of the Rent Control Court. Aggrieved by the above order, the tenant has come up before this court in revision u/s. 20 of the Act. The landlord filed R.C.P. 1/1986 for recovery of the building u/s. 11(2)(b) alleging that the tenant had defaulted in paying the rent from April 1985 onwards at the rate of Rs. 50/- per month and that he bona fide heeded the building for his residence along with the members of his family after making necessary modifications to the building and that he had no other

building or property of his own. The tenant revision petitioner filed objection denying the landlord tenant relationship between the respondent and the revision petitioner and contended that he was not a defaulter in paying the rent and the claim for own occupation, set up by the revision petitioner was without any bona fides. He further contended that he was solely depending for his livelihood on the income derived from the business of teashop conducted the petition schedule building and no other suitable building were available in the locality for carrying on his business of teashop.

2. The petitioner was examined as P.W.1 and Exts. A1 to A9 were marked on the landlord''s side. The tenant was examined as CPW1 and two witnesses as CPWs.2 and 3 and Exts.B1 to B5 documents were also marked on his side.

3. The learned counsel for the revision petitioner and the respondent were heard.

4. The respondent/landlord filed R.C.P.1/1986 before the Rent Control Court, Alappuzha, for getting recovery of the building alleging that the tenant defaulted in paying the rent at the rate of Rs.50/- per mensum from April 1985 onwards and that he needed the building for his own residential purpose after effecting suitable modifications to the building. One of the contentions raised by the tenant was that there was no landlord-tenant relationship. His case was that the building was taken on rent from Raghavan Pillai, brother of the revision petitioner, on 7-3-1978 and at the expiry of the period of lease, the said Raghavan Pillai obtained certain signed stamp papers from him and later a rent deed was created in favour of the respondent utilising those stamp papers. The Rent Control Court as well as the Rent Control Appellate Authority had considered the rival contentions and the evidence and concurrently found that Ext.A1 was a genuine document and there was landlord-tenant relationship between the respondent and the revision petitioner and that the tenant had defaulted in paying the rent and hence the tenant was liable to be evicted u/s.11(2)(b) of the Act. The above finding was not challenged in this revision.

5. At the time of filing the petition the landlord was employed in the Defence Service. It was alleged in the petition that as he had served the Defence Service for more than 20 years, he was eligible for voluntary retirement and he wanted to retire from the service and to stay with his family at his native place so that he can look after the welfare of his family. Ext.A5 is a certificate issued by the General Manager of the Ordnance Factory, Where respondent was working during 1986, Showing that the respondent had served the Defence Service for more that 20 years and was eligible for voluntary retirement with pensionary benefits at the time of issue of the certificate. When the landlord was examined as P.W.1, he had given evidence that he would retire from service as and when he got vacant possession of the petition schedule building. The learned counsel for the revision petitioner argued that as the landlord was employed in the Defence Service, he had no immediate need for getting recovery of the building and the family of the landlord was permanently

settled in Cherthala in the family house of his wife. It is settled law that the need set up need not be a current urgent one. It is enough if it is reasonably likely to arise in the near future (see Madhavan v. Ramachandran, 1970 KLT SN 18). In Kunhamma v. Usha (1991 (2) KLT 772) this court held that the petition filed by the landlady requiring the building for own occupation after the retirement of her husband from the military service cannot be rejected on the ground that the need was not in existence on the date of filing the petition. In the present case the landlord was ready to get voluntary retirement as and when the building was got vacated and on that ground it cannot be said that the landlord was not having the need to get recovery of the building at the time of filing the petition and hence the above argument advanced by the learned counsel for the tenant cannot be accepted.

6. The learned counsel for the respondent argued that the landlord had already retired from service on superannuation on 31-12-1988 and he is staying at present in the family house of his wife and he intends to have his residence in his own building. It is in evidence that the landlord has no other building of his own. It is the case of the landlord that he wants to stay in the petition schedule building effecting necessary modifications and reconstructions making it suitable for his residence with family. The tenant is using the building for running his teashop and he raised a contention that it is not suitable for residential purposes. The definite case set up by the landlord is that he wants to effect necessary alternations and reconstructions in the building so as to convert it to a residential building and to reside there with his family. It is for the landlord to decide what modifications he has to make in the building and the tenant cannot say that it is not suitable for residential purposes. There is no prohibition that the building used by the tenant for his business purpose cannot be used by the landlord for his residential purpose after making necessary alternations in the building. The above contention raised by the tenant also is devoid of merits and cannot be accepted.

7. The learned counsel appearing for the tenant argued that the landlord is now residing with his family in the family house of his wife at Cherthala and that the landlord had invested huge amounts for the reconstruction of the building. It was further argued that the landlord does not bona fide intend to shift his residence to the petition schedule building and had he any such intention, he ought not have reconstructed the family house of his wife at Cherthala investing huge amounts. P.W. 1 admitted that he had invested some money for the reconstruction of the family house of his wife at Cherthala. That does not in any way affect the bona in the claim of the landlord to have his own house for his residence. As the landlord could not get recovery of the building even though he filed the application in 1986, he had to invest some amount for the reconstruction of the family house of his wife where his wife and children were staying. It is quite unreasonable to doubt the bona fides in the need set up by the landlord in getting recovery of the building for the reason that he invested some amount in reconstructing the family house of his wife. The above argument advanced by the learned counsel for the revision petitioner also

cannot be accepted. Hence we find no reasons to interfere with the concurrent finding of the courts below that the claim of the landlord to get recovery u/s. 11(3) of the Act was bona fide.

8. The main argument advanced by the learned counsel for the tenant (revision petitioner) was that the tenant was depending for his livelihood solely on the income derived from the teashop business conducted in the petition scheduled building and no other suitable buildings were available in the locality to carry on his above business and thereby the tenant was entitled to the protection of the 2nd provision to Sec. 11(3) of the Act. It is settled law that the tenant who relies on the protection of the 2nd proviso has to prove all the facts mentioned in the proviso has to prove all the facts mentioned in the proviso (relied on 1976 KLT 1 and 1994 (2) KLT 201). The learned counsel for the tenant argued that even though both the rent control court and the appellate authority found that the tenant was depending mainly on the income derived from the business carried on in the petition schedule building, the evidence let in by the tenant regarding the non-availability of the suitable building was not considered by the rent control court as well as the appellate authority.

9. The learned counsel for the respondent-landlord argued that the rent control court as well as the appellate authority had concurrently found that the tenant was not entitled to the benefit of the second proviso to Sec. 11(3) of the Act and that being a pure finding on fact, there cannot be a re-appraisal of the evidence for entering a different finding by the revisional court exercising powers u/s. 20 of the Act. The learned counsel placed reliance on the decision of the Supreme Court in Ram Narain Arora Vs. Asha Rani and Others, . That was a case where the landlord filed a petition for recovery of the tenanted building for his residence with the members of his family dependant on him. It was further alleged that he had no other reasonably suitable alternate accommodation. The tenant contended that the landlord had another alternate accommodation and that fact had not been disclosed in the petition. The rent control court entered a finding that the ground floor of the house where the landlord was residing with the members of the family was too short of accommodating all members and if the landlord had no other suitable residential accommodation, he should be entitled to an eviction order. But the rent control court further found that the landlord had suppressed about the availability of alternate accommodation with mala fide intention to evict the tenant. The landlord took up the matter before the High Court of Delhi. The High Court agreed with the finding of the rent control court regarding the bona fide need of the landlord; but found that the landlord could not be said to have other reasonably suitable accommodation and therefore the non-disclosure thereof could not be fatal to the petition and on that basis allowed the petition filed by the landlord. The tenant took up the matter before the Supreme Court. The above appeal was dismissed by the Supreme Court upholding the order of the High Court. There the scope of revision u/s. 25-B(8) proviso of the Delhi Rent Control Act was considered

by the Supreme Court and held:

It is no doubt true that the scope of revision petition under S. 25-B proviso of the Delhi Rent Control Act is very limited one, but even so in examining the legality or propriety of the proceedings before the Rent Controller, the High Court could examine the facts available in order to find out whether he had correctly or on firm legal basis approached the matters on record to decide the case. Pure findings of fact may not be open to be interfered with, but if in a given case the finding of fact is given on a wrong premise of law, certainly it would be open to the revisional court to interfere with such a matter. Thus, where the petition for eviction on ground of bonafide need of landlord came to be dismissed by the Rent Controller on ground that the nondisclosure of the fact as to availability of other reasonably suitable accommodation was fatal and the High Court in revision re-examined the question of availability of alternative accommodation and came to the conclusion that the accommodation in question was not reasonably suitable accommodation and, therefore, non-disclosure thereof was not fatal, the revisional court could not be said to have interfered with justification.

In Sarla Ahuja Vs. United India Insurance Company Limited, also the Supreme Court considered the scope of revisional jurisdiction of the High Court under the Delhi Rent Control Act and held:

No doubt even while exercising revisional jurisdiction, a reapprisal of evidence can be made, but that should be for the limited purpose to ascertain whether the conclusion arrived at by the fact finding court is wholly unreasonable.

The power under Sec. 20 of the Kerala Buildings (Lease and Rent Control) Act also is limited. It was considered by the Division Bench of this court in Sadanandan v. Kunheen, 1991 (2) KLT 628):

The power under Sec. 20 is a limited power. The power is given to enable the court to satisfy itself as to the legality, regularity or propriety of the order challenged in revision. Certainly from the language used in Sec. 20 of the Act power is little wider than the power under Sec. 115 C.P.C. It does not totally forelosure re-assessment of the evidence. A re-appraisal of the evidence is possible for a limited purpose to ascertain the legality, regularity or propriety of the order impugned. The power under Sec. 20 of the Act can be exercised only if the conclusions arrived at by the appellate authority can be characterised as "wholly unreasonable or perverse" that no tribunal could arrive at such a conclusion on the evidence in record. Of course if the finding is recorded on surmises or conjectures or on materials not before the court or on baseless assumptions certainly this court will exercise its power to rectify that finding exercising its power under Sec. 20 of the Act.

Thus it is clear that the revisional court can consider the evidence for the limited purpose of ascertaining whether the finding of the courts below was wholly unreasonable or perverse. In fact the case of the revision petitioner/tenant was that

the evidence let in by him was not at all considered by both the courts below and it was not a case for reapprisal of the evidence. In view of the decisions cited supra, the evidence will have to be considered for the limited purpose of ascertaining whether the finding of the courts below was wholly unreasonable or perverse, and if so, the revisional court can interfere with the above finding.

10. Both the rent control court as well as the appellate authority concurrently found that the tenant was depending for his livelihood mainly on the income derived from the business of teashop conducted by him in the petition schedule building. In fact, the above finding was not challenged by the landlord.

11. The real dispute is whether the tenant had discharged the burden in establishing that no suitable buildings were there in the locality to carry on his trade or business. A Division Bench of this court in Kochappan Pillai v. Chellappan (1976 KLT 1) held that the point of time material for determining the availability of other suitable building is the date of application and not the date of the order for eviction. The non-availability of suitable accommodation in the locality is a negative fact to be proved by the tenant. The nature of evidence that a tenant has to let in has been considered by the Division Bench in 1976 KLT 1 (supra). There it was held:

In order to consider burden of proof, it is to the affirmative in substance and not form that one has to look. A grammatical negative need not necessarily be a legal negative also. Thus a legal affirmative may sometimes be negative in form involving proof of the negative. The use in the second proviso to Sec. 11(3) of the Act of the words "there is no other suitable building" indicates that it is not proof of availability but proof of just the opposite that is insisted on. At first blush it may appear that there would be practical difficulty to prove it, being negative in form. But really it is not so. It is capable of easy and positive proof by examination of the Accommodation Controller or such other effective means.

12. In Sadanandan v. Kunheen (1991 (2) 628) it was held that even a positive affirmation by the tenant before court about the non-availability of any suitable building in the locality, which was not successfully challenged in cross-examination would be sufficient to discharge the burden bestowed on the tenant. There it was held:

That there is no suitable building in the locality is a negative fact which has to be proved for attracting the proviso. In fact since the proviso works as an exemption, the person who desires to get the exemption has to prove the integrants of the proviso and to that extent there cannot be any doubt. But 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 building is available in the locality not successfully challenged in cross-examination. Then the burden shifts to the landlord since he can positively prove the fact that

buildings/building are/is available.

13. We will now consider whether the tenant has discharged the burden bestowed on him. The tenant was examined as CPW 1, the Secretary of the Merchants Association as CPW2, and the Accommodation Controller as CPW.3. The learned counsel for the revision petitioner argued that the courts below had not considered the evidence let in by CPWs.2 and 3 and found against the tenant holding the view that the tenant admitted about the availability of a vacant building when he was giving evidence as CPW. 1. He further argued that the non-availability of any suitable accommodation in the locality was established by the evidence of CPWs. 1 to 3 and both the rent control court and the appellate authority had gone wrong in finding that there was a building hardly 100 metres away from the petition schedule building at the time of filing the petition. The courts below had entered the above finding solely on the basis of a so called admission made by the tenant when he was examined before court as CPW.1. A question was put to CPW.1 by the learned counsel for the landlord, as to whether a building belonging to one Balachandran was lying vacant at the time of filing the petition. The tenant answered in the affirmative and further said that the above building was taken by another tenant. It would be convenient to extract the above question and answer:
The above answer of the tenant would make it clear that the building belonging to Balachandran was not available to the tenant for shifting his business; but it was taken on rent by somebody else. No questions were put to CPW.1 about the suitability of the above room for being used as a teashop. The above answer given by the tenant would not amount to an admission regarding the availability of a suitable building for carrying on the business of the tenant. The finding of the rent control court on the above aspect is as follows:

The express admission of CPW 1 during his cross-examination that shop rooms are available in the locality at the time of filing the petition itself is sufficient to hold that the buildings were available in the locality at the time of filing the petition. Hence the counter petitioner is not entitled to the benefit under the 2nd proviso to Sect 11(3) of the above said Act.

(sic) as adopted by the learned appellate authority and the finding

According to me, in view of the admission made by the tenant in his cross-examination that vacant rooms were available in the locality, he cannot be heard to say that he is entitled to the protection of the second proviso to Sec. 11(3). In the light of the above discussion, there is hardly any ground for interfering with the finding regarding the existence of a bona fide need of the landlord.

Thus it is clear that the above finding was made only on the basis of the so-called admission by the tenant and the evidence let in by CPWs. 2 and 3 regarding the non-availability of a building in the locality was not considered by both the courts below.

14. The tenant, when examined as CPW.1, had categorically stated that no vacant buildings were there in the locality suitable for running a teashop. The above version of CPW. 1 that no suitable buildings were available in the locality for carrying on his teashop business was not seriously challenged even though certain questions were put to him regarding certain vacant rooms. Even though the existence of certain vacant buildings were put to CPW.1, it was not put to him that the above buildings were suitable for running a tea shop business. In fact, there was no evidence to show that those rooms, even if were vacant, were suitable for conducting the tea shop business which the petitioner was conducting in the petition schedule building and were available to the tenant.

15. CPW.2 is the Secretary of the Merchants Association of Punnapra Panchayat. His evidence would reveal that the tenant made an application before the association for arranging a suitable accommodation for shifting his teashop business and accordingly he made enquiries regarding the availability of suitable vacant buildings in the locality. His version was that there was no suitable building available in the locality for shifting the teashop business of the petitioner. During cross-examination he admitted that there were a few vacant buildings, but he stated that those buildings were not available to the revision petitioner. CPW. 3 was the accommodation controller. His evidence would show that he had not received any report regarding the availability of any vacant building and the vacancy would be noted in the register only when it was reported by the owners of shops or buildings or by the village officer. His evidence also would show that no vacant buildings were available. Thus the tenant had taken all measures to establish that no suitable buildings were available in the locality and thereby discharged the burden bestowed on him. The rent control court as well as the appellate authority discarded the evidence of CPW.3, the accommodation controller, without assigning any valid or proper reasons. It was held in 1976 KLT 1 (supra) that the examination of the accommodation controller would be sufficient to discharge the burden cast upon the tenant in establishing the non-availability of suitable buildings in the locality. But ignoring the tenor of the above decision of this court, the evidence let in by CPW.3 was lightly brushed aside by the rent control court as well as the appellate authority. Moreover, the decision in 1991 (2) KLT 628 (supra) also was not considered by both the courts below in deciding the matter and both the courts below were carried away by the alleged admission made by the tenant. Even if the alleged admission made by CPW.1 is accepted, the protection of the second proviso to Sec. 11(3) cannot be denied to the tenant. The provision in the second proviso to Sec. 11(3) "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. In Varkey v. Raman Pillai (1981 KLT 213), a learned single Judge of this court held:

In deciding the suitability of a building for the purpose of carrying on the business or trade of the tenant, the rent that the tenant has to pay for the building is an important consideration. If the rent that the tenant is required to pay for the building is exorbitant and beyond his means, or if the tenant is called upon to pay a huge sum by way of advance, which is beyond his capacity to pay, it may not be proper to insist that he should take it on lease and surrender the one that he was occupying.

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 available to the tenant as it 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 teashop 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 one suitable for the business the tenant was carrying on and it should be within his financial reach. For the simple reason that there were some vacant buildings in the locality the tenant cannot be denied of the above protection under the 2nd proviso to Sec. 11 (3) of the Act. When once the tenant had proved by examination the Secretary of Merchants'' Association and the Accommodation Controller (CPWs.2 and 3) that no suitable buildings were available in the locality, then it was for the landlord to establish that suitable buildings were available in the locality. There is absolutely no evidence to show that the building belonging to Balachandran was one suitable for conducting a teashop and that was within the reach of the tenant''s financial ability. In the absence of any such evidence, much reliance cannot be placed on the above so-called admission made by the tenant. The rent control court as well as the appellate authority had not considered the above aspects and ignored the established principles of law regarding the burden of proof. The tenant had discharged the burden as contemplated by law. The approach made by the rent control court and the appellate authority was wholly unreasonable and perverse and hence this court is entitled to interfere in revision. The tenant had discharged his burden in establishing that no suitable building was available in the locality for carrying on the trade or business of the tenant and hence he was entitled to the protection under the 2nd proviso to Sec. 11 (3) of the Act. The finding of both the courts below are hence liable to be set aside.

In the result this civil revision petition is allowed. The order of the rent control court and the rent control appellate authority that the tenant was not entitled to the protection of the 2nd proviso to Sec. 11 (3) of the Act is set aside and the tenant is found entitled to the protection of the 2nd proviso to Sec. 11(3) of the Act. R.C.P. 1/1986 on the file of the Rent Control Court, Alappuzha, shall stand dismissed. No costs.