

Kerala High Court

Sebi Joseph vs The Ernakulam District Postal ... on 19 October, 2007

IN THE HIGH COURT OF KERALA AT ERNAKULAM

RSA No. 776 of 2007()

1. SEBI JOSEPH, S/O.LATE N.V.JOSEPH,  
... Petitioner

Vs

1. THE ERNAKULAM DISTRICT POSTAL TELECOM  
... Respondent

For Petitioner :SRI.GEORGE ZACHARIAH ERUTHICKEL

For Respondent :SRI.R.LAKSHMI NARAYAN(CAVEATOR)

The Hon'ble MR. Justice M.SASIDHARAN NAMBIAR

Dated :19/10/2007

O R D E R

M.SASIDHARAN NAMBIAR, J.

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R.S.A.No. 776 OF 2007

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DATED THIS THE 19th DAY OF OCTOBER, 2007

JUDGMENT

Defendant in O.S.773 of 2003 before Additional Munsiff Court, Ernakulam is the appellant. Plaintiff is the respondent. Respondent instituted the suit seeking recovery of possession of plaint schedule building. Building belongs to respondent Co- operative Society which is exempted under the provisions of Kerala Building Lease and Rent Control Act as per notification S.R.O 1225/79, published in the gazette dated 5.10.1979. The plaint schedule building was obtained on rent by

Joseph, father of appellant. On his death, appellant continuing possession of the building paid rent to respondent society. Respondent sent a notice, copy of which was produced as Ext.A4, terminating the tenancy and demanding surrender of possession. Appellant did not surrender. Therefore suit was instituted. Appellant resisted the suit contending that respondent is not exempted from the provisions of Kerala Buildings (Lease and Rent Control) Act and he received a notice sent by respondent demanding vacant possession and though notice was issued under the provisions of Transfer of Property Act, a resolution was passed by respondent to take possession before the expiry of notice and it is illegal. It was also contended that the notice is not in compliance with the mandatory provisions of Section 106 of Transfer of Property Act. It was therefore contended that respondent is not entitled to the decree sought for.

2. Learned Munsiff, on the evidence of PWs 1 and 2, DW1 and Exts.A1 to A6, granted a decree directing appellant to surrender vacant possession of the building within three months. Appellant challenged the decree and judgment before District Court, Ernakulam in A.S.348 of 2005. Learned Additional District Judge, on reappraisal of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellant and learned counsel appearing for respondent, who appeared by filing a caveat were heard.

4. The argument of learned counsel appearing for appellant is that there is no valid termination of tenancy as provided under Section 106 of Transfer of Property Act. It was argued that the allegation in the plaint was that a registered notice demanding vacant possession was issued on 12.12.2002 and it was received by appellant on 13.12.2002 and the period of tenancy expired 27.12.2002 and Ext.A4 was produced later which is not in conformity with the pleadings as the said notice demands surrender of possession within 30 days and therefore Ext.A4 is not the notice which was sent to the appellant. It was also argued that even though Ext.A4, copy of the notice was subsequently produced, plaint was not amended and therefore as per the plaint, tenancy was terminated on 27.12.2002 and therefore Ext.A4 should not have been relied on by the courts below. Relying on the decision of Apex Court in *Ranade V. Union of India*(1964 SC 24) and High Court of Karnataka in *S.S.Yelimeli V. Chanabasappa*(AIR 1979 Karnataka 52), it was argued that when there is a contradiction between pleading and evidence, evidence cannot be looked into and evidence contrary to the pleading are to be eschewed and without proper amendment of the plaint Ext.A4 is not a valid notice. Learned counsel argued that in such circumstances, the decree granted is unsustainable.

5. Learned counsel appearing for respondent argued that what was pleaded in the plaint was that a notice demanding surrender of possession was issued on 12.12.2002 and as per the notice, the tenancy was determined by 15 days notice and that is why it was stated that tenancy expired on 27.12.2002 and there is no pleading that surrender of possession was demanded on 27.12.2002 and Ext.A4 is the copy of the notice sent by respondent and received by appellant. It was also argued that if Ext.A4 is not the copy of the notice sent, appellant could have produced the original notice received by him and there is no conflict between the pleading and evidence and as tenancy was validly terminated, decree is sustainable.

6. Ext.A4 was produced by respondent as the copy of the notice sent to appellant as pleaded in the plaint. If that was not the notice, appellant could have produced the original notice admittedly received on 13.12.2002, as it should be with the appellant. Even at the time of evidence, there was no case that the original notice sent by respondent and received by appellant was not available with him to be produced before the court or that Ext.A4 is not the copy of the notice received. In such circumstances, appellant cannot be heard to contend that Ext.A4 is not the copy of the notice sent by respondent and received by appellant. Therefore courts below were justified in relying on Ext.A4, as copy of the notice sent by respondent before the institution of the suit.

7. Then the question is whether there is a conflict in the pleading and evidence as canvassed by learned counsel appearing for appellant. If there is a pleading that the tenancy was terminated and surrender of vacant possession of the building was demanded on 27.12.2002, argument of learned counsel could have been accepted. What was pleaded was only that period of notice expired on 27.12.2002. Ext.A4 shows that notice was sent on 12.12.2002 terminating the tenancy within 15 days from that date. It is in such circumstances, it was pleaded that the period of notice ended on 27.12.2002. Therefore I do not find any substantial question of law involved in the appeal. Ext.A4 notice was sent on 12.12.2002. It was admittedly received on 13.12.2002. Under Ext.A4 tenancy was terminated with fifteen days notice and appellant was asked to hand over possession within one month from the date of receipt of the notice. Still suit was filed only on 11.4.2003. Hence it is a valid notice.

8. Being a Co-operative society in view of the notification issued under Section 25, whereunder provisions of Kerala Buildings (Lease and Rent Control )Act is exempted, appellant is not entitled to claim the benefit of the said Act. I find no substantial question of law involved in the appeal. It is dismissed. In the circumstances of the case, appellant is granted six months time from today to surrender vacant possession of the building provided he pays the rent payable.

M.SASIDHARAN NAMBIAR, JUDGE lgk/-