

Rajesh R.Kartha vs K.A. Ismail on 14 August, 2014

Author: K.Surendra Mohan

Bench: K.Surendra Mohan

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN
&
THE HONOURABLE MRS.JUSTICE MARY JOSEPH

WEDNESDAY, THE 5TH DAY OF AUGUST 2015/14TH SRAVANA, 1937

R C Rev.No. 297 of 2014 ()

AGAINST THE JUDGMENT IN RCA 15/2014 of RENT CONTROL APPELLATE
AUTHORITY,ERNAKULAM DATED 14-08-2014

AGAINST THE ORDER IN RCP 82/2012 of RENT CONTROL COURT, ERNAKULAM
DATED 21-12-2013

REVISION PETITIONER(S)/(RESPONDENT/PATITIONER):

RAJESH R.KARTHA
S/O.LATE DR.R.K.KARTHA, RESIDING AT ANJALI
JUDGES AVENUE CROSS ROAD, KALOOR DESOM
ELAMKULAM VILLAGE, KANAYANNOOR TALUK, ERNAKULAM.

BY ADVS.SRI.DINESH R.SHENOY
SRI.SANIL JOSE

RESPONDENT(S)/(APPELLANTS/RESPONDENTS):

K.A. ISMAIL
M/S.LOVELY CORNER, ERNAKULAM NORTH, OPPOSITE TOWN HALL
BANERJI ROAD, ERNAKULAM, PIN 682018
RESIDING AT HOUSE NO.1172, INDIRA ROAD, PALARIVATTOM

KOCHI-682025.

BY ADV. SRI.GEORGE CHERIAN (SR.)
ADV. SMT.K.S.SANTHI
ADV. SMT.LATHA SUSAN CHERIAN

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON
22-05-2015, ALONG WITH RCR. 316/2014, THE COURT ON 05.08.2015 PASSED
THE FOLLOWING:

K.Surendra Mohan & Mary Joseph, JJ.

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R.C.R.Nos.297 & 316/2014

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Dated this the 5th day of August, 2015.

"CR"

ORDER

Mary Joseph, J.

1.R.C.R.No.297 of 2014 is filed by the respondent in R.C.A.No.15 of 2014, of the Rent Control Appellate Authority, Ernakulam and the petitioner-landlord in R.C.P.No.82/2012 of the Rent Control Court, Ernakulam. The respondent in the Revision Petition is the appellant in the said R.C.A. and respondent-tenant in the Rent Control Petition.

2.R.C.R.No.316 of 2014 is filed by the appellant in R.C.A.No.15 of 2014 of the Rent Control Appellate Authority, Ernakulam and the respondent-tenant in R.C.P.No.82 of 2012 of the Rent Control Court, Ernakulam. The respondent in the R.C.R is the respondent in the said R.C.A. and the petitioner/landlord in the Rent Control Petition.

3.Both the Revision Petitions cited supra are filed challenging the fixation of divergent rates of rent by the authorities below for the petition schedule room under Section 5(1) of the Kerala Buildings (Lease and Rent Control) Act, 1965, which for the sake of convenience would hereinafter be referred to as "the Act". The parties to these revision petitions shall also, for the sake of convenience, be referred to hereinafter in accordance with their original status in the R.C.P as landlord and tenant.

4.It is contended by Sri.Dinesh R.Shenoy, who has put forth the discontentment of the landlord with the judgment R.C.R.Nos.297 & 316/2014 dated 14.08.2014 of the Rent Control Appellate Authority, Ernakulam in R.C.A.No.15/2014 modifying the fair rent of Rs.55 per sq. feet fixed by the Rent Control Court by reducing it to Rs.45 per sq.ft. It is contended at the outset that the Appellate Authority has proceeded on baseless assumptions and surmises to reject the prayer for enhancement of monthly rent at the rate of Rs.100/- per sq.ft., that the Appellate Authority failed to appreciate or apply the principles of law laid down by this Court in Edger Ferus v Abraham Itticheria (2004(4) KLT 767) and which has been upheld by the Apex Court in 2009(4) KLT 673 that the Appellate Authority ought to have considered the best evidence available before it consisting of

the oral testimony of P.W.1, the landlord, P.W.2 the tenant occupying the third room from the tenanted premises in question which form part of a larger building, R.C.R.Nos.297 & 316/2014 namely "Dr.Kartha Complex", Ext.C1, the commission report and Ext.X1 series of rental receipts issued by the landlord in the case in question to P.W.2 and finally that the Rent Control Appellate Authority, Ernakulam ought to have placed reliance on Ext.C1 commission report wherein the locational advantages of the tenanted premises and the prevalence of rent at the rate of Rs.20,000/- per month, for an adjacent room having an area of 160 sq.ft. situated in the building, namely, 'Kartha Complex' of which the petition schedule room is a part, are described.

5.It is contended by Sri.George Cherian, the learned counsel representing the tenant that the authorities below went wrong in holding on the basis of Ext.C1 in disregard of the objection raised by the petitioner that the petition schedule shop room was having an area of 250 sq.ft. in a R.C.R.Nos.297 & 316/2014 circumstance when the rent deed was not forthcoming and the Advocate Commissioner was not examined that the Appellate Authority ought to have considered that the examination of P.W.2 was at the fag end of the trial, to the surprise of the tenant and that on account of the collusion allegedly involved in the evidence let in, the Rent Control Appellate Authority ought not to have relied upon Ext.X1 series of unstamped rental receipts, despite the opposition raised by the opposite side against its marking.

6.Though rival pleas are put forth by the respective counsel as referred supra, the ultimate urge of both of them was for setting aside the judgment of the Rent Control Appellate Authority, Ernakulam in R.C.A.No.15/2014 on the alleged ground of it being vitiated by illegality, impropriety and incorrectness. Sri.Dinesh Shenoy, the learned counsel also canvassed during the course of his R.C.R.Nos.297 & 316/2014 argument to maintain the fair rent at Rs.55/- per sq.ft. as fixed by the Rent Control Court, Ernakulam. According to Sri.George Cherian, even if it is accepted for the sake of argument that the guidelines followed by both the authorities below for fixing the fair rent are valid and binding, then also the evidence on record falls short of fixing Rs.45/- as the fair rent.

7.As divergent rates of rent have been fixed by the authorities below, evidence on record is necessary to be dealt with in detail by this Court. The evidence let in by the landlord consists of the oral evidence of the landlord as P.W.1, his witness as P.W.2, Exts.A1 and A2, Ext.X1 series and Ext.C1. The tenant has not let in any evidence.

8.The first challenge put forth by Sri.George Cherian during the course of his arguments was with respect to the area of the petition schedule room, which, according to R.C.R.Nos.297 & 316/2014 the landlord, was 265 sq.ft. and the tenant, 125 sq.ft. According to him, both the authorities below went wrong in holding that the petition schedule room is having an area of 250 sq.ft. on the basis of Ext.C1, the report of the Advocate Commissioner, which was marked without his resistance being considered. A scrutiny of the relevant records reveal that objection was filed by the tenant against the facts reported by the Advocate Commissioner in his report. It is urged by the learned counsel that the Advocate Commissioner was not examined by the landlord despite the incorporation of her name in the witness list filed as early as on 10.12.2013 and therefore, the opportunity to cross-examine was denied to him. According to the learned counsel, in the said circumstances, Ext.C1 commission report ought not have been relied upon by the Rent Control Court. It is true, the

R.C.R.Nos.297 & 316/2014 objections filed by the tenant find a place in the case records forwarded to this court from the Rent Control Court. We could not notice any falsity in the statement of the counsel that the Commission report was marked as Ext.C1 without examining the Advocate Commissioner. In the above circumstances, it is pertinent to have a look at the legal principles enunciated in Order 26 Rule 10 which is reproduced hereunder for convenient reference:

"Procedure of Commissioner:- (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit.- The report of the Commissioner and the evidence taken by him (But not the evidence without the report) shall be evidence in the suit and shall form part of the record, but the Court or, with the permission of the Court any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the R.C.R.Nos.297 & 316/2014 manner in which he has made the investigation. (3) Commissioner may be examined in person.-Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."

9. Therefore, sub-Rule (2) of Rule 10 of Order XXVI envisages that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. But, it is left open for the court or either of the parties to a lis after getting permission of the court to examine the commissioner personally in open court regarding any of the matters reported to by the latter in his report or the manner in which the investigation has been conducted by him. Upon perusal of the records of the case obtained from the Rent Control Court, we are convinced that the commission report was objected to by the tenant in writing. It is the argument of Sri.George Cherian that R.C.R.Nos.297 & 316/2014 despite the objection raised by the tenant, the landlord abstained himself from taking measures to examine the Advocate Commissioner, and thereby opportunity was denied to the former to cross-examine him. According to him, such being the circumstances, Ext.C1 ought not to have been relied upon by the authorities below to arrive at the finding regarding the area of the petition schedule premises as 250 sq.ft. We also could not find fault with the Rent Control Court placing reliance upon Ext.C1 for the twin reasons. Firstly, the commission was not an ex- parte one. Secondly, the tenant has not availed of his entitlement under Order 26 Rule 10(2) to examine the Advocate Commissioner to elicit explanation on the matters of resistance. If the tenant applied for examination of the Advocate Commissioner under sub- rule (2) of Rule 10 of Order 26, the court would not have R.C.R.Nos.297 & 316/2014 any other option than to grant him permission to examine the Advocate Commissioner. In such a circumstance, it is contemplated in the provision referred to supra itself that the reliability of the report in evidence would be subject to the outcome of the facts elicited in the cross- examination. In the case on hand, the tenant, having not applied for getting permission to exercise the statutorily provided right of examination of Advocate Commissioner, cannot now be heard to say before this Court exercising the powers of revision that the Rent Control Court went wrong in arriving at 250 sq. ft. as the area of the tenanted premises solely on the basis of Ext.C1. The argument of Sri.George Cherian is untenable for the above reason

and the authorities below cannot be found fault with in taking such a stand.

10.The second point of argument to which our attention was R.C.R.Nos.297 & 316/2014 drawn by Sri.George Cherian, the learned counsel representing the tenant, was pertaining to the 13 numbers of unstamped rental receipts marked in R.C.P.No.82 of 2012 as Ext.X1 series and relied upon by the authorities below. According to him, our interference is warranted in the matter. It is contended, those rental receipts are allegedly issued by the landlord (petitioner in RCP) to P.W.2, who is allegedly another tenant in occupation of a room adjacent to the tenanted shop-room in question and forming part of the larger building, Dr. Kartha complex belonging to the former. According to the counsel, the Rent Control Court, Ernakulam has committed a grave error in marking the rental receipts after taking notice of its' non-bearing of stamps. It is also contended that the court should not have relied on those while deciding the issue on hand.

R.C.R.Nos.297 & 316/2014

11.It is clear on a glance at Ext.X1 series that those do not bear stamps. The endorsement on the docket of the respective documents show that the Rent Control Court has noticed the error at the initial stage of its' reception, but overlooked that while marking it. It is also not indicated from the materials available with the case records whether penalty was imposed and paid. Such an argument was also not forthcoming from Sri.Dinesh Shenoy, the learned counsel representing the landlord. It is the argument of Sri.George Cherian that, in the event of non-production of the rental agreement by P.W.2 despite his admission in the box that it is available with him, the Rent Control Court ought not have relied upon it in the matter of fixation of fair rent. It is contended by him that the said circumstance is a sufficient ground warranting this Court's intervention.

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12.In view of the arguments, we feel it appropriate to have a look at the law that governs the question. Chapter IV of the Kerala Stamp Act, 1959 provides for the way in which the instruments not duly stamped are to be dealt with. As per Section 33 contained therein, a duty is cast upon every person who has the authority to receive evidence and every person in charge of a public office before whom an unstamped instrument is usually produced, to impound the same and sub-section (2) of Section 33 contains the procedure to be followed with and it is quoted hereunder for convenient reference.

"For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in the State when such instrument was executed or first executed."

13.The records make it clear that the rental receipts have R.C.R.Nos.297 & 316/2014 been marked and admitted in evidence through P.W.2 during his examination without the factum of its' non-bearing of stamps being adverted to by the Rent Control Court. It is pertinent to note that the learned counsel appearing for the tenant in the Rent Control Court has also failed to raise opposition

on the ground while marking it. In this connection, we accept the dictum laid down by this Court in *George v. Subordinate Judge* (1976 K.L.T. 700). The facts of the case reveal a circumstance where an insufficiently stamped document happened to be admitted by the trial court and directions are issued subsequently to the party who produced the same to pay the required stamp duty and fine. The court held:-

"After admitting an instrument, which is either not stamped or not sufficiently stamped in evidence nothing can be done in the matter of impounding by that court."

R.C.R.Nos.297 & 316/2014

14. When opposition was raised by the opposite party while tendering an unstamped instrument in evidence and it was marked "subject to objection" it has a clear indication that the objection was not judicially determined or in other words, the court has not applied its mind as to its admissibility in evidence and a conclusion is impossible that the trial court has admitted the document in evidence on endorsing the marking upon it. Only after considering the objections with a judicial mind and upon admitting the document in evidence that its admissibility would become unquestionable. In the case on hand, it is worthy of noting that the marking of Ext.X1 series was not subject to objection.

15. The legal principle contained in Section 35 of the Kerala Stamp Act also is relevant in the context and it is quoted hereunder for convenience.

R.C.R.Nos.297 & 316/2014 "35. Admission of instrument where not to be questioned.-- Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 59, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

16. Therefore, a document can be said to be admitted in evidence only when it is formally proved and tendered in evidence and marked after affixing the necessary endorsement on it under Order 13 Rule 4 of the Code of Civil Procedure. Once admitted, as provided in Section 34 of the Kerala Stamp Act, its admission could only be questioned by a Court of the category referred to in Section 59 of the Kerala Stamp Act if that Court is of opinion that it is insufficiently stamped, such Court may determine the stamp duty payable and require the person in possession of the document to produce it for the purpose of impounding. Section 59 is also quoted for R.C.R.Nos.297 & 316/2014 convenient reference as follows:-

"59. Revision of certain decisions of courts regarding the sufficiency of stamps.--(1) When any Court in the exercise of its Civil or Revenue jurisdiction or any criminal court in any proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898, makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under Section 34, the Court to which appeals lie from, or references are made by, such first mentioned Court may, of its own motion or on the application of the Collector, take

such order into consideration. (2) If such court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under Section 34, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced. (3) When any declaration has been recorded under sub-

section (2), the court recording the same shall send a copy thereof to the Collector and, where the instrument to which it relates has been impounded or is otherwise in the possession of such court, shall also send him such R.C.R.Nos.297 & 316/2014 instrument.

(4) The Collector may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under Section 41, or Section 42, prosecute any person for any offence against the stamp-law which the Collector considers him to have committed in respect of such instrument. Provided that--

(a) No such prosecution shall be instituted where the amount (including duty and penalty) which, according to the determination of such court, was payable in respect of the instrument under Section 34, is paid to the Collector, unless he thinks that the offence was committed with an intention of evading payment of the proper duty;

(b) except for the purpose of such prosecution, no declaration made under this section shall affect the validity of any order admitting any instrument in evidence, or of any certificate granted under Section 41."

17. Therefore, prior to admitting an insufficiently stamped document produced, only one opportunity is given to the opposite party to object to. As per Section 59 of the Kerala Stamp Act, the further opportunity to challenge will be on the District Collector/State but only subject to R.C.R.Nos.297 & 316/2014 the directions of the Appellate Court to take appropriate action. The power can be exercised by the Appellate Court only when the court below has passed an order admitting the unstamped instrument in evidence.

18. In the case on hand, the unstamped rental receipts, 13 in numbers have been duly marked and admitted in evidence without any objection being raised against its admissibility on the reason that those bear no stamps. At the tenant's instance, the Rent Control Court's order of enhancement of rent was appealed against, but the Rent Control Appellate Authority failed to exercise the power of revision vested in it under Section 59 of the Kerala Stamp Act, 1959. Therefore, in view of the mandate of Section 35 of the said Act, the admissibility of the rental receipts already admitted in evidence as Ext.X1 series cannot be questioned before this Court, which now is in R.C.R.Nos.297 & 316/2014 seisin of the matter, being the revisional authority. To conclude, the authorities below were absolutely not in error in dealing with the matter and the argument advanced against the reliability of those documents is untenable.

19. The next argument advanced by the learned counsel for the tenant was with respect to the reliance placed by the authorities below on the testimony of P.W.2. According to him, P.W.2 was examined at the fag end of the trial without his name being incorporated in the witness list filed on October, 2013. According to him, the authorities below went wrong in not appreciating that aspect though they were apprised of that in time. According to him, the landlord was permitted to let such evidence on record and in the circumstances a colour of collusion cannot be ruled out. To strengthen his argument further the learned R.C.R.Nos.297 & 316/2014 counsel has drawn our attention to the evidence of P.W.2 and addressed that the rental agreement by virtue of which the tenanted premises was let out to P.W.2 by the landlord in the case on hand is not produced despite his positive response to the question put by the tenant's counsel in cross-examination regarding its availability that, it will be produced. It is true the rental agreement is the apt and proper document to speak about the rent agreed among the parties to be paid in respect of the tenanted premises and it is the bounden duty of the landlord to produce the original with him to substantiate the same, especially when collusion is alleged. Admittedly, according to P.W.2, the rental agreement is available with him, but he failed to place that on record. The landlord could have very well taken measures to procure its production, but he failed. Instead, Ext.X1 R.C.R.Nos.297 & 316/2014 series was brought in. P.W.2 has also a case in the box that he was not insisted to produce that by his landlord, who is none other than the landlord in the case on hand, lest, that would have been produced by him. Anyway, the rental agreement, the appropriate document on the basis of which the tenanted premises has been let out to P.W.2 is not available before the Rent Control Court. These aspects to a certain extent lend support to the address by the tenant that the evidence let in by P.W.2 was the outcome of the collusion between the landlord and P.W.2. Being an authority sitting in revision, there is limitation for us to interfere. The Apex Court has also reminded us through the dictum laid down in Hindustan Petroleum Corporation Ltd. V Dildahar Singh (2014(4) KLT

182) about the realm within which the powers of revision would be exercised. The relevant paragraph is R.C.R.Nos.297 & 316/2014 reproduced for reference:

"45. We hold, as we must, that none of the above Rent Control Acts entitle the High Court to interfere with the findings of fact recorded by the First Appellate Authority because on re-appreciation of the evidence, its view is different from the Court/Authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/Authority below is according to law and does not suffer from any error of law. A finding of fact recorded by Court/Authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned

decision or the order, the High Court shall not exercise its power as an R.C.R.Nos.297 & 316/2014 appellate power to re-appreciate or re-assess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity."

20. The finding of the authorities below on the matters on which elaborate discussion is already had by us supra being based on sound principles of law and appreciation of evidence in its correct perspective. Therefore, in view of the dictum cited supra, interference by this Court on those aspects is absolutely unwarranted.

21. Upon perusal of the order of the Rent Control Court, Ernakulam and the judgment of the Rent Control Appellate Authority, Ernakulam, it could be gathered that both the authorities have fixed the fair rent divergently by enhancing it, placing reliance on the evidence on record R.C.R.Nos.297 & 316/2014 indicative of the locational and commercial importance of the locality where the tenanted premises on hand is situated. The approach of both the authorities below was in favour of the landlord, but there is divergence in the rate of fair rent fixed. In the circumstances, the evidence on record need to be re-evaluated in the light of the arguments advanced by the rival parties to these revisions.

22. Prior to adverting to the evidence let in by the parties in the case on hand, it would be relevant to have a look at the parameters laid down by a Division Bench of this Court in *Edger Ferus v Abraham Itticheria* (2004(1) KLT 767), which have also been upheld by the Apex court (2009 (4) K.L.T. 673). The guidelines enumerated therein are not exhaustive. Those are some among the parameters meant to be looked into by the courts R.C.R.Nos.297 & 316/2014 empowered by 'the Act' to deal with the question of fixation of fair rent. The parameters are quoted hereunder:

".....7. Rent Control Court while fixing fair rent could take note of the inflation and resultant reduction in the purchasing power of money, variations in the cost of living index in the area since commencement of the lease, demand for accommodation and availability of the buildings in the locality.

8. The cost of construction of the building including cost of labour and building materials, capital value of the entire premises in the enjoyment of the tenant inclusive of the value of the land under the actual enjoyment of the tenant whether immediately appurtenant to the building or otherwise, type of construction, locational importance, situations of the tenanted premises, ground floor, first floor etc. and other advantages and amenities, such as access to places of public importance like bus stand, Railway station, educational institution, hospitals etc. would also be guiding factors.

9. The Rent Control Court will also take into consideration the prevailing rent in the locality for the same and similar accommodation. The type of construction, the amenities, general or special provided R.C.R.Nos.297 & 316/2014 in the building, the open land attached to the building, whether residential or non-residential are also to be borne in mind.

10. Annual rental value of the building at the time of filing the application for fair rent may also be taken as a guiding factor along with others.

11. Revision or fresh imposition of municipal taxes, cess, rate in respect of other increase in the charge of electricity or water consumption by the tenant and also by the landlord and increase on account of sufficient repairs would also be taken note of by the Rent Control Court.

12. The Rent Control Court can while resolving any rent control dispute on an application either by the landlord or tenant examine whether the rent is static and requires revision and fix fair rent accordingly permitting the parties to adduce evidence."

23.The parameters cited supra are directives to the authorities who are shouldered with the power to fix fair rent and they are expected to exercise the discretion from within that sphere. Or in other words, the fixation of fair rent should be on sound reasoning and based on R.C.R.Nos.297 & 316/2014 satisfactory and sufficient authoritative materials indicative of the aforesaid parameters.

24.Before adverting to the evidence on record, it is apposite to have a discussion on the pleas of the landlord in the Rent Control Petition.

25.The landlord had pleaded several factors in paragraph 4 and 5 of the Rent Control Petition to apprise the court that the tenanted premises was situated in an area of high locational and commercial importance. The relevant paragraphs are quoted hereunder for reference:

"4)The petition schedule building situate in the ground floor of a multi storied building namely Dr.Kartha Complex. The said building situate in the junction where Paramara Road joins Banerji Road. On the southern side of the said building is Banerji Road and on the western side is Paramara Road. The said building has got direct access from the aforesaid two public roads. The land on which the said building situates is located in a commercial area where so many commercial buildings dealing with various items are R.C.R.Nos.297 & 316/2014 located. The multi storied building Dr.Kartha Complex of which the building let out to the respondent forms part also accommodates various commercial as well as other establishments. There are various banks and commercial institutions, educational institutions, hotels, clinics, petrol and diesel pumps, shopping centres etc. in the vicinity of the said building. The bus stops situate very adjacent to the said building. There are various public utility services in the locality where the building is located.

The North Railway station is hardly 250 metres away from the said building. Kaloor junction and Kacheripady junction, which are two important commercially potential areas, are in the vicinity of the said building.

5).....Since commencement of the lease arrangement, there is inflation and resultant reduction in the purchasing power of money, increase in the cost of living index, cost of construction of the building, high demand for accommodation and availability in the local authority where the building situate. The importance of the area where the building situate, the capital value of the building, presence of places of public importance in the vicinity of the petition schedule building including the prevalent rate of rent of the buildings in the locality and revision of R.C.R.Nos.297 & 316/2014 municipal taxes and other statutory duties etc., make the building let out to the respondent, a commercially potent one. The aforesaid amenities attached to the building let out to the respondent warrants re-fixation of the monthly rent."

26.It is pertinent to note that the landlord as P.W.1 has sworn those matters in the proof affidavit filed by him in lieu of chief examination and despite the lengthy cross- examination with which he was subjected to nothing adverse could be elicited by the tenant. P.W.2 is the tenant of the landlord in question occupying the third room from the tenanted premises situated in 'Dr.Kartha Complex'. He has stated in the box in categorical terms that the premises in his occupation was taken on lease by him in the year 2011 for a monthly rent of Rs.12,000/-. Ext.X1 series of rental receipts (13 in numbers) admitted in evidence lend support to the oral evidence tendered by P.W.2 and nothing was elicited in his cross examination R.C.R.Nos.297 & 316/2014 liable to discredit him. In Ext.C1, the Advocate Commissioner has reported on the basis of the information obtained during inspection of the tenanted premises that the shop room was let out to P.W.2 by the landlord for Rs.12,000/-. The Advocate Commissioner has also reported in paragraphs 1 and 3 of Ext.C1, the commercial potentiality and importance of the area where the petition schedule building is situated in the following words:-

"1.The shop is situated near the bus stop. From the said bus stop just turned to the plaint scheduled room. The extended portion separated from the foot path of the road and the drainage by a small separating wall. That portion also tiled.

3. The locality seems to be of very high commercial potentiality due to junction point of Paramara road and Banerji Road, the famous North Town Hall situated just opposite of said shop and 300 meter away North Railway station."

27.Therefore, testimony of P.W.1 and Ext.C1 convincingly R.C.R.Nos.297 & 316/2014 establish that the tenanted premises in question forms part of a larger building namely 'Dr.Kartha Complex' situated in one of the most commercially and locationally important area of the Kochi city. The special locational advantages with which the tenanted premises was blessed with are also brought on record by the landlord by mounting the box and also by taking out a commission.

28.The evidence let in also shows that the tenanted premises is situated at the ground floor of a larger building namely 'Dr.Kartha Complex' and it has the added advantage of frontage of two

famous thoroughfares of the Kochi City namely Banerjee Road and Paramara Road. The fact that the tenanted premises is situated near to the prestigious Kerala High Court building, North Town Hall and North Railway Station also add colour to the importance of the area. Nothing stands in the way of this Court taking R.C.R.Nos.297 & 316/2014 judicial notice that the tenanted premises is surrounded by important institutions like Church, Temple, educational institutions like Schools and Colleges. The authorities below have taken note of and appreciated all those factors while fixing the rate of rent.

29.The contention regarding the old nature of 'Dr.Kartha Complex" of which the tenanted premises forms a part was taken by the tenant in its objection filed at the initial stage itself. It is contended in the objection that the tenanted premises was let out to him in the year 1984. It is also contended that 'Dr.Kartha Complex' was a construction during the period 1978-1979. There is absolutely no denial or dispute from the landlord of the said contention of the tenant. The only dispute of the landlord is not with respect to the oldage of the building but only with regard to the oldest nature of the building R.C.R.Nos.297 & 316/2014 and that is evident from his statement:

"yC^5a{" M^7fJ /xUa" I]A" f:K f5G_?N^fCKa IyE^W Vx_O\o."

30.The Advocate Commissioner has also reported in Ext.C1 on the basis of the information obtained from the tenant's son that the tenanted premises was taken on rent in the year 1984, which factum was neither controverted nor disproved by the landlord. The rental agreement is also not forthcoming in evidence. Therefore, there is absolutely no reason to doubt the version of the tenant that the tenanted premises is part of a building of not less than 36 years old. Neither the oral evidence of P.W.1 nor that of P.W.2 or Ext.C1 would direct us to form a conclusion that improvements or infra-structures of the modern nature have been extended to the tenanted R.C.R.Nos.297 & 316/2014 premises so as to increase its commercial potentiality, during the years of its occupation and enjoyment by the tenant. In the said circumstances, this Court finds absolutely no error in the conclusion drawn by the authorities below, on the basis of the evidence available that the building was an old one.

31.The overall analysis of the evidence on record makes it clear that the relatively old age of the building and the abstinence of the landlord from making improvements, facilities or amenities to the tenanted premises are the other factors pleaded and proved by the tenant to impress the court that the tenanted premises do not adapt to the requirements of a modern man or bear the facilities and amenities available in a newly constructed building.

32.A plea of flooding of the tenanted premises with rain water on account of the lifting of the road level due to R.C.R.Nos.297 & 316/2014 repeated tarring is shown as a reason by the learned counsel for the tenant liable to attenuate the importance of the tenanted premises. With regard to the contention of the tenant in his objection that the building 'Kartha Complex' is situated at a lower level from the foot path is admitted by the landlord, but, he categorically denied the rest of the contentions that the tenanted premises being situated in the ground floor would be flooded in rainy season. The tenant has also failed in adducing any independent positive evidence in that regard. Admittedly, even according to the landlord, the road has been tarred repeatedly but that has not led

to the raising of the road level. It is pertinent to notice that despite raising of these contentions, the tenant did not let in any evidence in support thereof. He has not even mounted the box to let in oral evidence. Though a commission was taken up by R.C.R.Nos.297 & 316/2014 the landlord after serving notice upon him, he failed to take measures to substantiate the contented facts by availing the services of the Advocate Commissioner. Therefore, the tenant by any stretch of imagination could be benefited by reiterating the argument on that aspect, before us. Therefore, we could not see any merit in the counsel's argument that the authorities below have lost sight of those aspects while forming its opinion as to the fair rent to be fixed.

33.Our attention was also drawn by Sri.George Cherian to the fact that the bus stop which was available in front of the tenanted premises was shifted to some other place on account of the ongoing construction work of Metro Rail and the North Overbridge and for the said reason the commercial potentiality of the tenanted premises has been considerably reduced. According to him, parking space is R.C.R.Nos.297 & 316/2014 lacking for the tenanted premises in question and that factor also tend to attenuate the commercial importance.

34.It is pertinent to note from the order of the Rent Control Court and the judgment of the Rent Control Appellate Authority that both the authorities have concurred in taking the view that parking space and bus stop facility are lacking for the tenanted premises. The relevant part in the order of the Rent Control Court leading to the fixation of fair rent at the rate of Rs.55 per Sq.ft. is quoted for reference to ascertain how the evidence before it was appreciated by the Rent Controller:-

"14. When the evidence of PW2 and Exts.X1 series are taken into account, the rate of rent of the room of PW2 seems to be Rs.75/- per square feet. PW2 stated that, the rent was fixed in 2011. But as admitted by PW1, recently the construction of the Metro Rail is going on near to the petition schedule R.C.R.Nos.297 & 316/2014 building. The evidence of PW1 and PW2 as a whole reveals that, recently the bus stop has been shifted to another place. It is only a matter of inference that, major construction projects near to a building complex will have it's own consequences and adverse impacts on the conveniences, amenities and commercial importance of the locality. Naturally that may result in the profitability of the business also. It is conceivable from the evidence that during rainy season, though temporarily, drain water used to enter into the building. That also may affect the amenities in the building. When all the above facts, age of the building, rate of inflation, fall in money value etc. are considered, I feel that, Rs.55/- can be fixed as the fair value of the building with effect from April 2012 onwards with 15% enhancement of the existing monthly rent quinquennially. So the aggregate monthly rent for 250 Sq.ft @ Rs.55/- may come to Rs.13,750/-."

35.The Rent Control Appellate Authority in paragraph 13 of its judgment has considered this aspect in the following lines:-

"13. PW1 is the respondent, PW2 is a tenant in the nearby R.C.R.Nos.297 & 316/2014 room which also forms part of the same building. Although PW1 denied, PW2

admitted that the bus stop near the petition schedule building was shifted to another place and that no parking facility has been available in the area. PW2 also agreed to the suggestion that the petition schedule building is the oldest building in the locality. It shows that the petition schedule building has a disadvantage of its oldage and of non-availability of parking space. When the bus stop in front was moved to another place, assemblage of the people in front is considerably reduced. That also is a factor affecting commercial potentiality of the building. In fact, these aspects were taken into consideration by the trial court. However, considering the evidence of PW2 and Ext.X1 series, the trial court found that Rs.75/- per sq. feet was being paid to a nearby room as rent and therefore Rs.55/- per sq. feet should be the fair rent of the petition schedule building. "

R.C.R.Nos.297 & 316/2014

36.It is pertinent to note now whether the authorities below have appreciated the evidence in its proper perspective. The relevant portion of P.W.1's testimony on the context is:

"&\aU LXm Xmx^a_g\Am gI^5aK LXa5Z YV<_MG_5 f5G_?J_fa fDAaUVJm L^HV<_ gy^A_\^Cm H_VJ^ym.e%U_f? bus shelter)I^O_xaKa.e metro Rail fa H_VN^CUaN^O_ bus stop %U_?aKm N^x_O_G_g\o? (Q)e'gM^Ja" I?_E^ym UV" 5?Oaf?eside W DfKO^Cm.(A). 5?Nay_Oaf? 5ay:nm N^y_Og\o IaD_O LXm Xmgx^Mm?efD^Ga I?_E^y^Cm.e& bus stop IxN^x gy^A_W 5ay:na N^y_O^Cm XmE_D_ f:OnaKfDKa IyE^W Vx_O\o."

37.The relevant portion of deposition of P.W.2, wherein this context is referred is quoted hereunder.

"4..fa 5?Nay_Oaf? NaX UVJ^O_xaKa NaOm North bus stop.e'gM^Z NaX UVJ\o.fa 5?Nay_Oaf? Ix_XxJm UI_ I^VAm f:On^X R.C.R.Nos.297 & 316/2014 Xl5xcN_\o.eIxN^xgy^A_fa 'xaUVUa" no-parking area &Cm."

38.In re-examination it was spoken by P.W.2 ".fa 5?Oaf? NaO_W Townhall M^7Jm parking yard)Im."

39.It is also pertinent at this juncture to read his testimony "Lovely Corner W H_Km 3-^ NfJ shutter &Cm .fa 5?."

40.In Ext.C1, the report of the Advocate Commissioner, the location of the tenanted premises is described in paragraph 1 as follows:

"The plaint schedule room is facing towards west of Paramara road and south to Banerji road of the ground floor of the Dr.Kartha's complex. The petition scheduled room is known as Lovely Corner."

41.Further in the same paragraph description continues to the effect R.C.R.Nos.297 & 316/2014 "1.The shop is situated near the bus stop. From the said bus stop just turned to the plaint scheduled room. The extended portion separated from the foot path of the road and the drainage by a small separating wall. That portion also tiled."

42.It is further reported by the Advocate Commissioner in Ext.C1:

"The shop is situated near the bus stop.

From the bus stop just turned to the plaint scheduled room."

43.Moreover, Ext.C1, the report of the Advocate Commissioner is crucial on the point when it states:

"The site is situated near roads crossing junction, North over bridge, Railway Station, Bus stop and Paramara temple."

44.These factors remain uncontroverted also. The tenant did R.C.R.Nos.297 & 316/2014 not let in oral evidence of his own in support of the plea. P.W.1 in the box during cross-examination has taken the stand of total denial. P.W.2, his witness who is a tenant of the third room from the tenanted premises since 2011 has let in oral evidence that the bus stop available in front of his shop was shifted therefrom. But, the place whereto it was shifted was not spoken by P.W.2.

45.Now coming to the evidence on record, P.W.2 has undisputedly stated in the box in response to a specific question put by the learned counsel for tenant during cross examination that parking space is available for two wheelers and that the bus stop in front of the tenanted premises leased out to him by P.W.1, which is part of 'Dr.Kartha Complex' has been shifted from its front side to a nearby side. P.W.2 has never spoken that the bus stop has been shifted to a far-off place owing to the R.C.R.Nos.297 & 316/2014 construction of Metro Rail and the North Overbridge. It is also pertinent to note at this juncture that the shop room occupied by P.W.2 is the third room from the tenanted premises in question.

46.The analysis of the evidence on record makes it clear that, the tenant has thoroughly failed to adduce convincing evidence that the facilities of parking space and bus stop were not available to the tenanted premises. But, the authorities below have appreciated the evidence on record in the wrong perspective to conclude that the tenant was successful in establishing that the commercial potentiality of the tenanted premises has been diminished considerably due to lack of parking space and bus stop near to the tenanted premises in question.

47.Therefore, we have no hesitation to state that the authorities below have appreciated the evidence on record R.C.R.Nos.297 & 316/2014 in its wrong perspective. Both the authorities below have laid considerable importance to the factum of deterioration of commercial potentiality of the locality on account of the shifting of bus stop and the non- availability of the parking space due to the ongoing construction work of Metro Rail and North Overbridge, which was totally a misconception of the evidence on record.

48. On a re-appreciation of the totality of the evidence on record in that connection, it could be gathered that space is available near the tenanted premises at its western side for parking of two wheelers and therefore, it is improper for the tenant to state that the customers find it difficult to attend the shop.

49. Therefore, the only conclusion possible from the evidence referred supra was that the tenanted premises is R.C.R.Nos.297 & 316/2014 situated very near to the bus stop. Therefore, it is clear from the evidence that the bus stop which was originally available just in front of the premises let out to P.W.2 has been shifted to a place near to the tenanted premises in question occupied by P.W.1. Therefore, the tenant's attempt to establish that the commercial potentiality of the tenanted premises has been deteriorated due to shifting of bus stop and taking over of space for parking vehicles by the ongoing construction works has turned futile.

50. There is every reason for us to conclude that, the oral evidence let on record by P.W.1, P.W.2 and Ext.C1, satisfactorily establish the commercial importance of the locality where the tenanted premises is situated. The several factors to which our attention was adverted to by the tenant, if established by cogent and satisfactory evidence, undoubtedly would have directed us to draw a R.C.R.Nos.297 & 316/2014 conclusion that the commercial viability of the area has been reduced. But in view of the foregoing discussions, we are forced to take a stand that the tenant was unsuccessful in establishing those pleaded factors, having the trend to attenuate the importance. It is also beyond the scope of imagination of a prudent man that the construction works of the Metro Rail and the North Overbridge would reduce the commercial potentiality of the locality. The claim of P.W.1 that the tenanted premises is situated in the heart of Kochi city with the prestigious institutions like the High Court of Kerala, Town Hall and the North Railway Station functioning around in reasonable distance would be diminished. No doubt, those could only bring in tremendous improvements in the areas and achievements to the people engaged in various business activities in and around the R.C.R.Nos.297 & 316/2014 area. It is also pertinent to note that the business which the tenant was conducting in the tenanted premises is only sale of mobile phones and its accessories. Normally, in business of the nature, customers to a larger extent, would be people maintaining acquaintance with the shop owner. Chances are rare for strangers or passersby to visit the shop for buying mobile or its accessories.

51. Therefore, the tenant has thoroughly failed to establish that the parking facility available there originally was taken away on account of the construction work of Metro Rail and the North Overbridge. One important aspect to be noted at this juncture is that with all these limitations projected in the form of contentions that the tenant is sticking on to the tenanted premises and conducting the business for approximately about 36 years.

52. According to the landlord, the tenanted premises was let R.C.R.Nos.297 & 316/2014 out to the tenant in the year 1984 for a rent of Rs.500/- and it was enhanced to Rs.1,500/- in the year 2006. The rent has remained static since then and in the circumstances, it was sought to be enhanced by the landlord by preferring R.C.P No.82/2012. The Rent Control Petition in question was filed by the landlord claiming enhancement of rent after a time span of 7 years. The evidence makes it clear that the tenanted premises was let out in the year 1984 and it is part of a larger building namely 'Dr.

Kartha Complex', which admittedly was constructed during the period 1978-1979. The building therefore, is approximately 34 - 35 years old and admittedly, even according to the landlord no improvements have been effected by him ever since. Though the tenant claims to have effected improvements to add facilities to the building, evidence to that effect is R.C.R.Nos.297 & 316/2014 not forthcoming except Ext.C1 wherein the 'tiled' nature of the floor has been reported. But, whether it was there originally or else, it was fixed later cannot be ascertained from the evidence now on record. No evidence has also been let in to show that the ongoing construction of Metro Rail and the North Overbridge has impacted in reducing the locational and commercial importance of the tenanted premises. Though the testimony of P.W.2 and Ext.X1 series show that a room near to the tenanted premises and located in the very same larger building of which the tenanted premises is a part, fetches, monthly rent of Rs.12,000/- and Ext.C1 shows that another tenanted premises situated adjacent to the one on hand fetches Rs.20,000/- as monthly rent, no materials are forthcoming to establish the common amenities or facilities available to the said two premises to consider identical rent. The R.C.R.Nos.297 & 316/2014 Advocate Commissioner has also omitted to take note of those aspects in Ext.C1.

53.A prudent man cannot lose sight of the improvements that have taken place during the years till date. The Rent Control Court has adverted to all the factors relied upon by the landlord and to which its attention was drawn and granted enhancement to the tune of Rs.55 per Sq.ft. against the landlord's claim of Rs.72 per Sq.ft. by its order dated 21.12.2013.

54.The question that is now left for our consideration is whether the finding of the Appellate Authority fixing the fair rent of the building in question at Rs.11,250/- (45 x 215) per mensom calculating the same at Rs.45 per Sq.ft is sustainable.

55.We would notice an observation by the Rent Control Appellate Authority in its judgment that evidence of other R.C.R.Nos.297 & 316/2014 tenants of the premises near and adjacent to the tenanted premises in question has not been brought in by the landlord in question and that is fatal. The relevant portion is contained in paragraph 16 of the judgment and is quoted hereunder for reference:

"The evidence let in by the respondent is the oral testimonies of himself and P.W.2 and Ext.X1 series. So many other tenanted premises are there nearby. No such person has been examined. As pointed out above, evidence of P.W.2 and Ext.X1 series cannot be the sole criteria to fix fair rent of the petition schedule building. From the available evidence a meticulous calculation of the fair rent of the petition schedule building, is not possible. On taking into account the factors, such as locational importance of the petition schedule building, possible commercial viability of the building, inflation and resultant reduction in the purchasing power of money, variation in the cost of living index in the area after commencement of the lease and the like factors, I am of the view that the rent fixed by the trial court is somewhat high. It is also relevant in this context that the present rent is Rs.1,500/- and there must be some relativity to the R.C.R.Nos.297 & 316/2014 present rent while fixing the fair rent. Accordingly, I hold that the fair rent of the petition schedule building

shall be Rs.45/- per sq.ft. The point is answered accordingly."

56.It is true while fixing the fair rent of Rs.55/- per sq.ft. the Rent Control Court was carried away by a misconception of the oral evidence let in by P.W.1, P.W.2 and Ext.C1, the commission report on certain aspects. The said authority has also failed to notice while relying upon Ext.X1 series that materials to have a comparative study of the nature and amenities attached to the tenanted premises in question and that let out to P.W.2, are clearly lacking.

57.It is true, the tenants of adjacent tenanted premises, though so many are situated around, were not examined. But, the tenant of the premises situated in the immediate proximity and part of the very same larger building of which the tenanted premises in question is also a part was R.C.R.Nos.297 & 316/2014 examined and in view of the dictum in *Midland Traders (M/s.) and others v Miriam Elias and others* (2010 (3) KHC 778) placed for reliance before us, it is the apt and appropriate evidence for the authority to be relied upon. The dictum in the decision cited supra is, therefore, quoted for reference:

"Evidence regarding the rent fetched by the upper floors of the very same building will have more relevance in fixing fair rent."

58.Viewed in the context, the room tenanted to P.W.2, of which Ext.X1 series are related to is the third room from the tenanted premises in question and is situated in the same larger building, 'Dr.Kartha Complex'. There is nothing wrong in relying upon Ext.X1 series of rental receipts pertaining to that tenanted premises as one of the parameters in the matter of fixation of fair rent for the R.C.R.Nos.297 & 316/2014 tenanted premises in question. The Rent Control Court, Ernakulam has also acted accordingly. The Rent Control Appellate Authority's view that rather than the materials relating to a room adjacent to the tenanted premises in the same larger area, that of a tenanted premises of an adjacent building would be more appropriate to be considered is incorrect in view of *Midland's* case. In our view, both the authorities below have failed to note that evidence was not before them to have a comparative study of the tenanted premises in the case in question and that let out to P.W.2. The oral evidence of P.W.2 only show that the premises was let out to him in the year 2011. No evidence has been let in to convince us of the facilities and amenities available to the premises let out to P.W.2. The question mooted now is whether in the absence of evidence as to the common features available R.C.R.Nos.297 & 316/2014 to the adjacent rooms, could that be basis for fixing rent in respect of the tenanted premises in question which admittedly of the landlord, has never been modified or renovated ever since it's letting out. In the absence of materials to show identical features and amenities available for the tenanted premises, in our view the rent of adjacent rooms of the same building or rooms of adjacent building cannot be relied upon by the authorities as was done in this case. Materials should be available before the court to have a comparative study of the nature and the facilities associated with the tenanted premises of which fair rent is sought to be fixed and the tenanted room situated adjacent, the rent of which is sought to be relied upon as basis. In the absence of materials of the nature available, it is improper for the Court exercising the authority of fixation of fair rent to act upon as was R.C.R.Nos.297 & 316/2014 done by the authorities below in the case in question. It is the duty of the landlord to establish those aspects while relying upon rental arrangements in respect of adjacent rooms of the same building or

rooms of adjacent building.

59.Evidence available on record indicate that the larger building of which the tenanted premises is a part is situated in an important area. A prudent man could only view the ongoing construction of Metro Rail and Overbridge as ascending steps towards progress and developments. In view of the above discussion, what could be gathered was that without appreciating some relevant pieces of evidence and ignoring certain other pieces of evidence on record that the Appellate Authority has arrived at the fair rent for the tenanted premises. Therefore, on a balancing of the evidence on record, the fixing of fair rent as Rs.55/- by the Rent Control Court in R.C.R.Nos.297 & 316/2014 R.C.P No.82/2012 is proper and the reduction of the fair rent to Rs.45/- by the Rent Control Appellate Authority, Ernakulam in R.C.A No.15/2014 appears to us to be the outcome of an improper appreciation of the available evidence. Therefore, we feel it appropriate to set aside the judgment of the Rent Control Appellate Authority in R.C.A No.15/2014. In the set of evidence of which elaborate discussion is already had, it would be appropriate to enhance the rate of rent from Rs.45/- per Sq. ft. The learned counsel for the landlord has also canvassed at length during the course of his argument to maintain Rs.55/- per Sq.ft. the rent fixed by the Rent Control Court, Ernakulam. In the light of the lengthy discussion we had, we also find it appropriate to fix Rs.55/- as the fair rent of the tenanted premises.

60.In view of the progress likely to accrue to the business in R.C.R.Nos.297 & 316/2014 the locality on account of the construction of the Metro Rail and the tremendous developments in Kochi City taking place day to day, a quinquennial enhancement of rent at the rate of 15% is also reasonable and accordingly we fix so.

In the result,

- 1) R.C.R No.316/2014 is dismissed and R.C.R No.297/2014 is allowed.
- 2) The impugned judgment dated 14/8/2014 of Rent Control Appellate Authority in R.C.A No.15/2014 is set aside.
- 3) The rate of rent of the tenanted premises is fixed at Rs.55/- per Sq.ft.
with effect from the date of R.C.P dated 23/12/2012 thereby the monthly rent payable is enhanced from R.C.R.Nos.297 & 316/2014 Rs.1500/- to Rs.13000/- with 15% quinquennial enhancement.
- 4) The tenant is directed to pay the entire arrears of rent till date at the monthly rate fixed herein within one month from the date of this order and shall continue to pay the same each month without failure.
- 5) It is open to the landlord to resort to execution proceedings to get the rent at the re-fixed rate realized in the event of the tenant's default to pay the same.

K. Surendra Mohan, Judge.

Mary Joseph, Judge.

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