

(1990) 08 KL CK 0072
In the High Court Of Kerala
Case No : S.A. No. 595 of 1985

Aboobacker Keyi

APPELLANT

Vs

R.P. Govindan Sons

RESPONDENT

Date of Decision : 29-08-1990

Acts Referred:

Contract Act, 1872 — Section 29
Kerala Land Reforms Act, 1963 — Section 106
Transfer of Property Act, 1882 — Section 107, 53A, 59

Citation : (1990) 2 KLJ 437

Hon'ble Judges : P. Krishnamoorthy, J

Bench : Single Bench

Advocate : P.N.K. Achan and P.N. Ravindran, for the Appellant; V.R. Venkitakrishnan, for the Respondent

Final Decision : Allowed

Judgement

P. Krishnamoorthy, J.—These two appeals by the plaintiff arise out of a suit for recovery of possession of the plaint schedule property. S.A. No. 595/85 is against the judgment in A.S. No. 59/83 and S.A. No. 596/85 is against the judgment in A.S. No. 60/83. The suit is for recovery of possession of the plaint property which was leased out to the defendant for a period of 10 years with effect from 1-11-1970. This is evidenced by a lease deed executed on 13-11-1970 (Ext. A1). The land was demised on lease to the defendant for the construction of a petrol bunk. According to the terms of the lease the defendant was liable to pay a monthly rent of Rs. 350/- for the first five years and Rs. 400/-for the next five years. There is also a covenant providing an option to the tenant to renew the lease for a further term on the expiry of the lease, on terms to be agreed upon at that time. The term expired on 1-11-80. According to the plaintiff, if the defendant wanted to renew the lease, he should" have exercised the option on the expiry of the lease on 1-11-1980. He did not exercise the option and accordingly the defendant is not entitled to continue in possession of the property. Accordingly the plaintiff issued a registered notice dated 17-11-1980

stating that the term had expired, that there was no request for renewal and that the plaintiff is not willing to continue the lease arrangement and demanded surrender of possession by the defendant. The defendant did not surrender and accordingly the plaintiff filed the suit for recovery on 29-11-1980 on the above allegations. The defendant filed a written statement in which it was contended that even before the expiry of the lease the defendant had intimated the plaintiff orally his desire to renew the lease and that he was prepared to execute a renewed lease deed. But as the plaintiff and the defendant were on cordial terms, the plaintiff represented that considering the friendly relationship there need not be a formal document and that a fresh lease can be executed at any convenient time. Accordingly the defendant continued as a lessee. He also contended that he was in possession of the land even before Ext. A1, that he reclaimed the land and has constructed buildings thereon for the purpose of a petrol bunk and that he is entitled to the protection under Sec. 106 of the Kerala Land Reforms Act. It was further contended that he had effected substantial improvements in the property and that the suit without offering the value of improvements is not maintainable in law.

2. The trial court raised the necessary issues and as the defendant claimed protection under Sec. 106 of the Act, that issue was referred to the Land Tribunal. The Land Tribunal returned a finding stating that the defendant is entitled to fixity of tenure under Sec. 106. The trial court also found that the defendant had not renewed the lease by exercising the option as provided in Ext. A1 lease. That court also found that the suit is perfectly maintainable; but accepting the finding of the Land Tribunal that the defendant is entitled to fixity of tenure, the suit was dismissed by the trial court.

3. Against the dismissal of the suit the plaintiff filed an appeal before the lower appellate court which was numbered as A.S. No. 59/83. The defendant also filed an appeal, A.S. No. 60/83 against the finding of the lower court regarding the maintainability of the suit, value of improvements and also whether he is entitled to a renewal or not. These appeals were heard together and the lower appellate court came to the conclusion that the defendant is not entitled to fixity of tenure under Sec. 106 of the Land Reforms Act as there is absolutely no evidence to show that the defendant had constructed any building in the property before 20.5.1967. The appellate court also found that the defendant had properly exercised the option for renewal of the lease. On the question of value of improvements, the lower appellate court held that the defendant is entitled to value of improvements on the basis of a concession made by the plaintiff. It was also held by that court that the suit cannot be entertained without offering the value of improvements to the defendant. On the basis of the above finding the lower appellate court also ultimately confirmed the dismissal of the suit by the trial court. The plaintiff has filed the two appeals challenging the judgment in the two appeals filed before the appellate court. The defendant has filed a Memorandum of Cross Objection challenging the findings against him.

4. Before this Court counsel for the appellant-plaintiff challenged the finding of the lower appellate court that the defendant-tenant exercised the option for renewal before the expiry of the lease. He also contended that even if he had exercised the option, that is not sufficient to give him title to continue in possession and prevent the landlord from evicting him after the term is over, unless the parties executed a renewed lease deed agreeing the terms of such a lease. It was also contended by him that at any rate the provision for renewal contained in Ext. A1 is so vague and ambiguous that it is void under Sec. 29 of the Contract Act. Counsel for the respondent-defendant while refuting these contentions also supported the decree of the courts below on the ground that the defendant is entitled to the protection under Sec. 106 of the Land Reforms Act, and contended that the suit is not maintainable without offering the value of improvements which the plaintiff had conceded before the appellate court. I shall consider these contentions one by one.

5. The claim of the defendant that he is entitled to the protection under Sec. 106 of the Land Reforms Act can be accepted only if he is able to satisfy that, he was in possession of the land under a commercial lease and that he constructed buildings for such purpose before 20-5-1967. The case of the defendant is that he obtained the property on an oral lease in 1960 for doing petrol business under the Indian Oil Corporation, for which he constructed a building in 1966. Exts. B1 to B13 are the documents relied on by the defendant in support of his case. On going through Exts. B1 to B13, it is abundantly clear that they related to the kerosene business conducted by the defendant in some other property and not to the business that is being conducted in the plaint property now. There is also absolutely no evidence, as rightly observed by the lower appellate court, to show that the defendant constructed any building in the plaint schedule property before 20-5-67 in order to claim protection under Sec. 106 of the Land Reforms Act. In the light of this unsatisfactory evidence I do not find any reason to disagree with the finding of the lower appellate court that the defendant is not entitled to the protection under Sec. 106 of the Act.

6. But I cannot agree with finding by the lower appellate court that the suit cannot be entertained without offering the value of improvements due to the defendant. There was controversy between the parties as to whether the defendant is entitled to compensation or not. But, at any rate, the plaintiff conceded before the appellate court that he is willing to pay the value of improvements due to the defendant. A suit cannot be dismissed for not offering the value of improvements. If the court finds that the defendant is entitled to value of improvements, it can pass a decree for recovery only subject to payment of value of improvements to the defendant and that is not a ground for holding that the suit is not entertainable without offering the same. In this case, the plaintiff having conceded the right of the defendant, if any decree for eviction is to be passed, that can only be subject to payment of value of improvements, In that view of the matter, I reverse the finding of the lower appellate court that the suit is not maintainable as the value of improvements was not offered.

7. The next question to be considered is as to whether the defendant had properly exercised the option for renewal of Ext. A1 lease. In order to decide this question and the other questions it is necessary to read the lease deed Ext. A1. Ext. A1 though executed on 13-11-70 states that the defendant was put in possession as a lessee with effect from 1-11-70 for a period of 10 years. It is provided therein that the defendant shall instal a petrol bunk in the property and shall pay ground rent at the rate of Rs. 350/- per mensem for the first five years and Rs. 400/- per mensem for the next five years. A plan of the property is also attached to the lease deed. It was further agreed that the defendant shall pay the municipal tax in respect of the property in addition to rent. Defendant was also authorised to reclaim the property and construct a compound wall on the east, south and west of the property. It is provided in the document that if there is any arrears of rent or default in payment of the municipal tax or if the defendant assigns or sub-leases the property to anybody else, the plaintiff shall be entitled to recover possession of the property even before the term expires. There is also a clause for renewal of the lease which is to the following effect :-

(It is further agreed that on the expiry of the term of 10 years the aforesaid "Sons" (defendant) will have an option for a renewal as decided at that time by getting the demise renewed by the second party from the first party and if it is required the second party has to surrender possession to the first party by reconverting the property into its original condition).

(underlining is mine)

The first party to the document is the plaintiff and the second party is the defendant. According to the defendant he has exercised the option to renew the lease as provided in Ext. A1 and therefore he is not liable to be evicted. The question to be decided is as to whether the defendant properly exercised the option in order to claim the benefit of the renewal clause. The lease commenced on 1-11-1970 and was to expire on 31-10-80. The contention of the plaintiff is that the defendant exercised his option to renew the lease only by his reply notice Ext. B15 dated 30.11.80 which is nearly a month after the expiry of the term and after the filing of the suit. The defendant's case is that even before the expiry of the period he had contacted the plaintiff and expressed his intention to renew the lease and continue in possession. The defendant in his evidence as D.W. 1 stated that he personally contacted the plaintiff and that the plaintiff had agreed to renew the lease. He has also stated that as the plaintiff had agreed to renew the lease, he did not send a request for renewal in writing. The question is as to whether the case set up by the defendant has to be accepted or not. On appreciation of the evidence of D.W. 1 and P.W. 1 the lower appellate court came to the conclusion that the defendant had properly exercised the option. Plaintiff when examined as P.W. 1 had admitted that the defendant contacted him even before the expiry of the lease. His evidence as P.W. 1 is a total denial of the right of renewal and his stand was that he was not willing to renew the lease even if the defendant had requested for the same. On going through the evidence of

DW. 1 and PW.1 I am satisfied that the case of the defendant that he had requested the plaintiff orally for a renewal of the lease even before the term expired has to be accepted. Moreover, on appreciation of the evidence the appellate court has also come to the same conclusion and on this question of fact I do not find any ground to differ from the finding of the appellate court. There is no provision in Ext. A1 that the request for renewal has to be made by a written notice. In the absence of such a provision. I am of the view that even an oral request by the defendant is sufficient to give him a right of renewal, if he is otherwise entitled to the same. In view of my finding that the defendant orally expressed his desire to renew the lease even before the expiry of the term, it is not necessary for me to consider the question as to whether the request for renewal as per Ext. B15, after the expiry of the term, is sufficient or not. I agree with the lower appellate court that the defendant had properly exercised his option to renew the lease.

8. The further question to be considered is as to what is the effect of the exercise of option by the tenant. Is the mere exercise of option sufficient to give him title to continue in possession and prevent the landlord from ejecting him after the term is over? Counsel for the appellant-plaintiff projected his right to eject the tenant-defendant in this manner namely, i) the mere exercise of option for renewal alone is not sufficient to give the tenant a legal title to continue in possession, unless a new lease arrangement is entered into between the parties by settling the terms of the new lease as provided for in Ext. A1. If any other legal requirements are to be complied with for effectively bringing into existence such a lease-say registration of the lease deed depending upon the term-unless and until that is done, no lease can come into existence and the defendant cannot resist eviction; ii) the terms of the agreement for renewal contained in Ext. A1 are vague and uncertain that it is void under Sec. 29 of the Contract Act.

9. After hearing counsel in the first instance, my first impression was that in case the landlord refuses to renew the lease in spite of such a right in favour of the tenant, the only method to be adopted by the tenant is to file a suit for specific performance to enforce the covenant for renewal and obtain a lease deed executed through court in order to resist eviction by obtaining the title of a lessee. On the second point also I was not able to come to a conclusion as to whether the renewal clause was void for uncertainty. But on a further probe into the matter by me, I felt, on the basis of weighty authorities by various High Courts and certain English decisions, that a re-thinking of the matter is necessary and accordingly re-posted the case and heard counsel for both sides with particular reference to the decisions which I came across after the former hearing was over. Now I am convinced that a tenant already in possession with a covenant for renewal in his favour can resist his eviction by the landlord without filing a suit for specific performance if he has validly exercised the option and if the suit for specific performance of the agreement for renewal is not barred by limitation on the date of landlord's suit, on the equitable principles of part performance recognised under the Transfer of Property Act. A right to renewal of

a lease is a valuable right available to the tenant, which it is well settled, runs with" the land, and cannot be defeated by the unilateral refusal of the landlord at his pleasure. Now I shall discuss the authorities on the matter on the basis of which I came to the above conclusion.

10. The earliest decision is the one reported in *Karri Veerareddi v. Kurri Bapireddi* (ILR 29 Madras 336). It was observed therein as follows :

A contract of sale followed by delivery of possession does not, when there is no registered sale, create any interest in the property agreed to be sold and cannot, even if enforceable at date of suit or decree, be pleaded in defence to an action for ejectment by one having better title to recover.

It was further observed by Subrahmania Ayyar J. (one of the learned Judges) as follows:-

But even as the law stands in this respect, the defendant could have saved himself from all difficulty had he made the claim for specific performance the subject of a separate suit pending this action in ejectment, for, then, the disposal of the latter might have been postponed until the result of the other suit was known or the two actions dealt with together and decided with reference to the success or failure of the claim for specific performance.

11. In *Goplan Nair v. Kunhan Menon* (ILR Mad. 300) there was a clause in an instrument of kanom to the following effect:- "you shall obtain a renewed demise on the expiration of every twelve years and thus hold properties" and the corresponding kychit contained a clause: "I shall obtain a renewed demise on the expiration of every twelve years and shall hold the lands. In spite of such a clause no such renewal was made by a registered instrument although the demise paid the renewal fee. In a suit by the owner to redeem the kanom the Madras High Court held that a kanom is an anomalous mortgage, and, as a mortgage, requires registration u/s 59 of the Transfer of Property Act and that possession under an agreement for a mortgage cannot be relied on in the absence of a registered instrument.

12. In *Thayingoli Valiya Kalyani Vs. Vayarodathil Parkum Thayingoli Krishnan Nambiar (dead) and Others*, the question as to what is the remedy of a tenant in whose favour there is an agreement of renewal in existence was considered by their Lordships. It was observed therein as follows:

With reference to this argument it has to be observed that while the tenant's (defendant's) possession by itself, though coupled with an agreement to renew, would not be a complete defence to a suit for possession by a person in the position of the plaintiff in the circumstances, yet as was pointed out by one of the learned Judges in the full Bench case in *K. Veerareddi v. K. Bapireddi* (ILR 29 Madras 336), where the right of the defendant to enforce specific performance of the agreement in his favour had not become barred by limitation, it would be open to him to apply to the court to have the suit for ejectment stayed, and in

the meantime he could file in his turn a suit for specific performance of the agreement, and after having got a duly registered document, he could file the same in the first suit and thus completely sustain the plea that the plaintiff is not entitled to the relief asked.

13. From the aforesaid decision it is clear that the court proceeded on the basis that a person though in possession and even if he has an agreement of sale or renewal in his favour cannot resist a suit for possession by the owner or the landlord, as the case may be, without filing a suit for specific performance and getting a sale deed or lease deed registered in accordance with the relevant provision of the Transfer of Property Act and the Registration Act. In these decisions it was also held that the equitable principle of part performance which was recognised in England cannot be applied to India where the matter is governed by the clear provisions in the Registration Act and the Transfer of Property Act. But it has to be remembered that these decisions were in suits instituted prior to 1929 before the introduction of Sec. 53A in the Transfer of Property Act and as held by the Judicial committee in various cases the equity of part performance could not prevail in India so as to set at naught express statutory provisions regarding registration contained both in the Transfer of Property Act and the Registration Act. The position to be considered is as to whether a tenant in possession can resist eviction on the principles laid down in Sec. 53A of the Transfer of Property Act, when, there is an agreement in his favour in the shape of a renewal clause. Though this was not specifically mentioned as such in a later decision of the Punjab High Court *Jai-Rani v. Hari Singh* (AIR 1967 Punjab 159) this principle has been accepted and it was held that even without a suit for specific performance a tenant can resist eviction if he is continuing in possession when there is a valid renewal clause. It was observed in that decision as follows:

If a person entitled to obtain possession by a suit for specific performance is already in possession of the property and is sought to be ejected by the other party to the covenant which is suggested to be specifically enforceable it may not be fair to direct the person in possession to file a suit for enforcing his rights and denying him the liberty of claiming to continue in possession as a defence a suit for ejectment in exercise of the same right.

The aforesaid dictum laid down by the Punjab High Court was approved by a later Division Bench of the Madras High Court in *Khivral Choidia v. E.S. Eastern Inc.* (AIR 1975 Madras 374). From the Punjab and Madras decisions referred to above it is patently clear that a person who is continuing in possession and is entitled to obtain possession by a suit for specific performance can resist the claim of possession by a landlord by holding the renewal clause and valid exercise of the option as a shield to protect his possession.

14. In a later Madras case reported in *Rasiklal M. Mehta and Another Vs. The Hindustan Photo Films Manufacturing Company Ltd.*, the question as to the effect of a mere exercise of option for renewal came up for consideration before a

learned Single Judge. In that suit the defendant by a registered lease dated 22-4-64 had taken possession of the premises belonging to the plaintiffs for a period of three years till 31-12-66. The lease deed contained a covenant for renewal at the option of the lessee for a further period of three years on the same condition as contained in the original lease deed. Before the expiry of the period the defendant exercised the option to renew the lease for a further period of three years and the plaintiffs assented to the same. But before the extended period of three years was over, the defendant vacated the premises on 30-4-68 and handed over possession of the premises to the plaintiffs therein. Thereafter the plaintiffs filed the suit claiming damages for alleged breach of contract said to have been committed by the defendant in leaving the premises before the term of the lease was over. The plaintiffs filed the suit for damages suffered by loss of rent due to the unauthorised vacating of the building by the defendant. It was contended by the defendant in that suit that the original lease deed was by a registered instrument and that the renewed lease also being for a further term of three years, unless there was a registered document embodying the new lease, in law there could not be any lease and that the defendant was not entitled to pay any damages to the plaintiffs. In that context the learned Single Judge considered the question as to the effect of a mere exercise of option and held that a mere exercise of an option will not be sufficient to create a new lease unless the new lease is brought into existence after satisfying the other legal requirements necessary for the coming into force of a lease arrangement under the Transfer of Property Act or under the Registration Act. In those circumstances, the learned Judge held as follows :

Once the option is exercised either by the lessor or by the lessee, a valid lease as such does not come into existence unless a registered document is executed, if the renewed lease in question satisfied the requirements of S. 107, T.P. Act. After all, the option conferred either on the lessee or on the lessor is more or less in the nature of a preemption and neither the conferment of such option itself nor the exercise thereof automatically or of its own force brings into existence a new lease irrespective of other statutory provisions regarding the form procedure or the modalities by which alone such a lease can be brought into existence. Therefore, once a renewed lease comes within the scope of Section 107 such a lease can be made only by a registered instrument. This is because it is a new lease that comes into existence as a result of the exercise of option for renewal and that too by the bilateral acts of the parties. Consequently, the new lease is made within the scope of the expression occurring in Section 107 of the T.P. Act and therefore it has to be only by a registered instrument.

Counsel for the appellant-plaintiff laid great stress on this decision and contended that mere exercise of option by the tenant by itself will not be sufficient to create a new lease and that unless the parties entered into a new arrangement after satisfying the legal requirements necessary to create a new lease, the defendant is not entitled to continue in possession. No doubt, in the aforementioned decision it is held so. But on the facts of that case the position

obtained therein is entirely different from that of the present case. No question of equitable principle of part performance arose in that case, for the tenant had admittedly vacated the premises and he was not trying to defend his possession on the basis of the equitable principle of part performance. That was a suit by the landlord for damages for breach of contract and it was in that context that Ismail J. observed that unless and until a lease deed as contemplated under law is executed there cannot be a lease. But the position here is clearly different wherein the tenant is continuing in possession and is defending his possession on the basis of the equitable principle of part performance, relying on the renewal clause in his favour and the exercise of option available to him. In that view of the matter, I am clearly of the opinion that the Madras decision reported in AIR 1976 Madras 194 will not be applicable to the facts of this case. I agree with the dictum laid down by the Division Bench of Punjab High Court referred to earlier, which was approved in AIR 1975 Madras 374, and hold that a tenant who is continuing in possession after his initial term is over can defend his possession on the basis of the renewal clause contained in the lease deed, if he had validly exercised option and the covenant for renewal is otherwise enforceable in law.

15. The further question to be considered is as to whether the covenant for renewal in this case is enforceable in law. A lessee in possession of the property is entitled to defend his possession on the basis of renewal clause in the lease deed only if the renewal clause is specifically enforceable by him. The court can give protection to such a defendant only if the renewal Clause is enforceable in law. In other words, the terms of the renewed lease must be certain or it must be possible to make it certain from the terms contained in the renewal clause. It must be possible to ascertain the terms necessary to constitute a transfer with reasonable certainty. If a contract is uncertain, it is certainly void under Sec. 29 of the Contract Act. Under Sec. 53A of the Transfer of Property Act also it must be possible to ascertain the terms necessary to create a lease with reasonable certainty. It is in this context that the question as to whether the renewal clause in Ext. A1 is void for uncertainty is to be considered. I am aware of the principle laid down by Lord Denning MR in (1970) 1 All E.R. 870 at 874 : "The courts are always loath to hold a condition bad for uncertainty. They will give it a reasonable interpretation whenever possible."

Lord Pearson said as follows :-

As Lord Denning MR has said, the courts are always loath to hold a clause invalid for uncertainty if a reasonable meaning can be given to it...

The renewal clause in Ext. A1 is to the effect that the defendant will have an option for renewal as decided at the time of renewal. The question is whether such an agreement can be enforced or not.

16. Various cases have arisen in which similar clauses have been interpreted by the English and Indian Courts on various occasions. In *King's Motors v. Lax* (1969) 3 All E.R. 665 = (1970) 1 W.L.R. 426, a lease deed contained a renewal

clause to the following effect : "at such rental as may be agreed". The court held that there was no formula or machinery for fixing the rent and as such the clause is void for uncertainty. In *Brown v. Gould* (1971) 2 All E.R. 1505 the lease gave an option to the tenant for renewal for a further term of 21 years "at a rent to be fixed having regard to the market value of the premises at the time of exercising this option taking into account to the advantage of the Tenant any increased value of such premises attributable to structural improvements made by the Tenant during the currency of this present lease". It was contended in that case that as the clause provided for no machinery for fixing the rent, it is void for uncertainty. After construing the clause the court held that the option was valid and enforceable on the ground that though there was no machinery to fix the rent, the formula for fixing the same was mentioned in the renewal clause, and applying the formula the court will be in a position to fix the rent that is payable by the tenant. In that case the Court considered three types of options and following *King's Motors* case held that if the option is for renewal simply at a rent to be agreed there being no formula for quantifying the rent, the option will prima facie be void, "as being a mere contract to make a contract, or, perhaps more properly, as being an agreement to make a contract, or a contract dependent upon the making of an agreement". The second type of option is where the rent has to be fixed at some stated formula and the third case is where the renewal clause provides both the formula and the machinery for fixing the rent. The court further held that in the latter two cases it can certainly step in and fix the rent according to the formula or by the machinery provided for in the document and make the terms certain. But where neither any formula nor any machinery is prescribed in the document to fix the rent or other terms of the lease, it is void.

17. Coming to the Indian decisions, the earliest decision is that of the Madras High Court in *Secretary of State for India Vs. Volkart Brothers*, wherein the renewal clause was "upon such terms and conditions as shall be judged reasonable". At the first instance two learned Judges differed on the interpretation of the clause, Venkatasubba Rao J. holding that the clause is not void for uncertainty whereas Krishnan J. holding that the clause is void for uncertainty. The matter was referred to Coutts-Trotter C.J. and the learned Chief Justice agreed with the view expressed by Venkatasubba Rao J. The learned Judge observed as follows:

The stipulation is not that the parties might fix such rent as they chose, but they are enjoined to fix a reasonable rent. It is an ordinary function of the court to decide what is reasonable. In sale of goods, for instance, the Court is called on to decide what is reasonable time. Then again what is reasonable care or what is reasonable enquiry, these are questions which the Court is often invited to decide. I find no difficulty in regard to a contract which leaves the parties to fix a reasonable rent. If they will not agree upon a reasonable rent, the Court will intervene and fix it. In *New Beerbhoon Coal Co. v. Bularam Mhata* (1880) 5 Cal. 932 their Lordships of the Privy Council held a contract to grant a patta at a proper rate, was not void for uncertainty, as upon a proper enquiry the court

would be able to determine a proper and reasonable rent.

(Underlining is mine)

18. In *Hitkarini Sabha Vs. Corporation of the City and Another*, the renewal clause was to the following effect : "on such terms and conditions as may be agreed upon." It was observed therein as follows:

The lease deed in this case was executed on 31.8.1940 and was for a period of thirty years. It was therefore to remain in force for 15 years more after the date of acquisition. There is a renewal clause which has been already quoted above. The lessee is entitled for renewal "on such terms and conditions as may be agreed to between the parties". It appears to us that the clause is uncertain and vague and does not form a valid contract for renewal of the lease. Normally in a covenant for renewal there is an express agreement that the lease would be continued on the same terms and conditions subject to a reservation that the rent may be enhanced under certain circumstances.

In the instant case, all the terms and conditions" have been left to the agreement of parties which may not take place at all. Although a renewal is contemplated, no terms on which it can be granted have been fixed between the parties. Under Sec. 29 of the Indian Contract Act such a contract cannot be enforced. It has been held in *Ramasami v. Rajagopala*, ILR 11 Mad 200 that a lease whereby a tenant agreed to pay whatever rent the landlord might fix was void for uncertainty

A similar question came up for consideration in *Damodhar Tukaram Mangalmurti and Others Vs. The State of Bombay*, wherein the renewal was "subject to such fair and equitable enhancement as the lessor shall determine". Considering the question as to whether the contract is void for uncertainty, their Lordships held:

"Fair" and "equitable mean fair and equitable in fact, and not what the lessor subjectively considered to be fair and equitable. The words "fair" and "equitable" both mean "just or unbiased". If the intention was to leave the enhancement to the subjective determination of the lessor, the clause would have more aptly said-"such enhancement as the lessor shall determine". We consider that the words "fair and equitable" must be given their due meaning and proper effect.

In interpreting the clause their Lordships further held that the meaning of the clause was to the effect that the lessor must first determine what it considers to be fair and equitable enhancement; but if in fact it was not so, it was open to the lessee to ask the Court to determine what was fair and equitable enhancement. On a proper construction of the clause the intention was not to oust the jurisdiction of the Court and make the determination of the enhancement by the lessor final and binding on the lessee. It was further held that the determination of the further enhancement by the lessor would not be final and it would be open to the Court to determine what is fair and equitable enhancement.

19. In *H.V. Rajan v. C.N. Gopal* (AIR 1961 Mysore 29) the renewal clause was to

the following effect:

After the expiry of the period of 5 years fixed under this lease the lessees shall have the option of 5 years but subject only to such terms and conditions as may be mutually agreed upon.

Interpreting that clause Hegde J., as he then was, held as follows:-

We think that the parties to Ext. L did attach some meaning to that clause. What then is its import? One way of reading this clause is that the parties had agreed to renew the lease, for a further period of five years in accordance with the original terms, unless otherwise modified by mutual agreement. The relevant portion of clause the says: "the lessees shall have the option of five years but subject only to such terms and conditions as may be mutually agreed upon." An agreement to renew the lease without more must be deemed to be an agreement to renew as per the original terms.

This appears to us to be a reasonable interpretation to be placed on clause 14 of Ext. L. Even if we agree, with the plaintiff's contention that the renewal provided is dependant on the agreement between the parties on other terms, on the basis of decided cases, we have no hesitation in reading that clause as providing for an agreement between the parties on terms reasonable. If the parties are at variance as to those terms then the Courts will step in. See *Robinson v. Thames Mead Park Estate Ltd.* (1947) 1 Ch 334, *Foley v. Classique Coaches Ltd.*, (1934) 2 KB 1; *Kilas and Co. Ltd., Acros Ltd.*, 1932 147 LT 503; *Jardine, Skinner and Co. v. Rani Surat Sundari Debi*, 5 Ind App 164 (PC); *Maharaja Bahadur Sir Prodyot Coomar Tagore Vs. Maynuddin Mia and Others*, .

Authorities on this point can be multiplied. But we see no necessity for it.

20. All these decisions were considered by a Division Bench of the Madras High Court in *Khivraj Chordia v. E.S. Eastern Inc.* (AIR 1975 Mad. 374). In that case the lease in question was renewable on the same terms and conditions with the reservation that the rent was "to be mutually agreed between the parties thereto, due regard being paid to rents then prevailing in the same locality". Construing the above clause the Court held:

In determining objections founded on the alleged uncertainty of a term in a contract the test is not whether the term is in itself certain but whether it is capable of being made certain.

Their Lordships further held that if the parties were not in a position to agree on the prevailing rent the court would determine the matter.

21. The question as to the tests for determining whether a similar clause is void for uncertainty or not was succinctly stated by a Division Bench of this Court in the decision reported in *N.S.S. v. Palat* (1966 KLT 644). *Krishnamoorthy Iyer J.* observed as follows;-

If there is no statement in the contract regarding the price to be paid the law

allows a standard of reasonableness. Accordingly a fair or reasonable price is recoverable on the basis of term to be implied in the contract. But when the terms of a contract exclude that a reasonable or a fair market price was intended by the parties, it is not possible to imply such a term. A contract to sell at a fair price or at a fair valuation or to let out property for a reasonable rent or a fair or a proper rent is specifically enforceable on the principle *certum est quod certum reddi potest* (that is certain which can be made certain). Even if a contract is vague in language, if it is capable of being made certain, it can be enforced. S. 29 of the Contract Act enunciates this principle; and it is open to the court to enforce the contract with the terms so ascertained. In *Secretary of State for India in Council v. Volkart Brothers* (ILR 50 Madras 595) it was held that a clause for renewal of a lease "upon such terms and conditions as should be judged reasonable" was not void for uncertainty. In *The New Beerbhom Coal Company v. Bularam Mahata* (ILR 5 Cal. 932) their Lordships of the Judicial Committee were of the view that where there is no express stipulation as to the price payable in a contract to sell land specific performance can be granted on the basis of the reasonable price of the land to be ascertained by the court. In *Foley v. Classique Coaches Limited* (1934 2 KB. 1 at P. 13) Maugham L.J., observed;

it is indisputable that unless all the material terms of the contract are agreed there is no binding obligation. An agreement to agree in the future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it

22. From the principles laid down in the aforesaid decisions it is clear that in order to claim the benefit of equitable principle of part performance, it is essential that the terms of the agreement between the parties must be reasonably certain or if it is not certain at least it must be possible for the Court to make it certain by applying the formula or machinery provided for in the document. If the terms cannot be made certain by adopting the above process, certainly the contract will be void. In the light of these principles considering the document in question I am of the opinion that the renewal clause in Ext A1 is void as it is uncertain. An option for renewal is granted to the lessee, the terms of which are to be decided by the parties at the time of renewal. In most of the cases referred to earlier, the ambiguity was only in respect of the rent payable. In some cases, the formula or the machinery to fix a fair rent was provided in the document. But the renewal clause in Ext. A1 is uncertain in every respect. In a lease deed the important element is the rent payable. In Ext. A1 it is uncertain, the duration of the lease is uncertain and there is no indication as to what are the terms that are to be included in the renewed lease. It is completely left to be decided by the parties at the time of entering into a renewed lease. In other words, there is only an agreement to agree in future or there is a contract to enter into a contract, which, it is well - settled, is not enforceable at all. The terms of the renewed lease are to be decided afresh by the parties at the time of renewal and no guideline or indication is given in Ext. A1 as to the manner in which the terms have to be settled between the parties. Before giving the benefit

of the equitable principle of part performance to the lessee, the court must be satisfied that there was an agreement between the parties, the terms of which are certain and unambiguous. As the renewal clause in Ext. A1 is void for uncertainty the defendant is not entitled to continue in possession and is bound to surrender possession of the property inspite of the fact that he has validly exercised the option for renewal provided for in Ext. A1.

23. If the defendant is liable to surrender the land, then the further question to be decided is as to what is the mesne profits payable by him to the plaintiff. The prayer in the plaint is to direct the defendant to pay damages for the use and occupation of the plaint property at such rate per month as the Court may determine, from 1st November, 1980. In this case, admittedly, the defendant is entitled to value of improvements. The plaintiff has not adduced any evidence that anything more than that is provided for in Ext. A1 will be the mesne profits. In these circumstances. I feel that it is just to make the defendant liable only to pay the amount fixed in Ext. A1 lease deed as the mesne profits which he is liable to pay to the plaintiff from the date of suit. The amount payable under Ext. A1 for the last five years is Rs. 400/- per month and I fix the same rate as the mesne profits payable by the defendant from the date of suit.

24. I have to confess that the questions involved in the case are not free from difficulty. But I have no compunction in passing the decree which I propose to pass in view of the fact that, as a matter of fact, the defendant has enjoyed the right of renewal by being in possession of the property (due to the pendency of the suit in the three courts) for another term, after the expiry of Ext. A1 lease. Even assuming that the defendant was entitled to a renewal, the renewed term will expire by 31-10-1990. It is settled law that save in exceptional cases, normally a tenant will be entitled to only one renewal. In other words, he will be entitled only for another term of 10 years after the expiry of Ext. A1 lease. That admittedly will be over by 31-10-1990. See *Yohannan v. Vasudevan* (1955 Tra-Co. 161). It is not necessary for me to conclusively express any opinion on this question as it does not arise for consideration at this stage; but I am stating this only for my satisfaction in passing a decree for eviction, even if another view is possible on the interpretation of Ext. A1. In the result, I set aside the judgments and decrees of the courts below and grant a decree to the plaintiff allowing him to recover the plaint schedule property from the defendant on his paying the value of improvements due to the defendant which shall be determined by the execution court. The plaintiff will also be entitled to realise mesne profits at the rate of Rs. 400/-per month from the defendant from the date of suit till the date of recovery of the plaint schedule property.

The appeals are allowed, the Cross objection is dismissed and the suit is decreed as mentioned above. The parties shall bear their costs throughout.