

**(1959) 10 KL CK 0042**  
**In the High Court Of Kerala**  
**Case No : S. A. No. 182 of 1959**

Anandavalii Amma and Others

APPELLANT

Vs

Ammukutti Amma

RESPONDENT

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**Date of Decision :** 20-10-1959

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 2  
Transfer of Property Act, 1882 — Section 106, 111

**Citation :** (1959) KLJ 1275

**Hon'ble Judges :** S. Velu Pillai, J

**Bench :** Single Bench

**Advocate :** S. Neelakanta Iyer and K.S. Rajamony, for the Appellant; T.R. Achutha Warriar, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Velu Pillai, J.—This is an appeal by defendants 1 to 3, against a decree for the recovery of possession of a building with arrears of rent. The first contention, that the defendants had not been given sufficient opportunity to adduce their evidence, has not been substantiated, and is overruled. The second contention, which was pressed before me, was, that there is no averment in the plaint, that a notice-to-quit as prescribed by Section 106 of the Transfer of Property Act was issued, and therefore the decree for the recovery of possession cannot be sustained. This objection to the suit was not pleaded in the written statement, but was pressed in appeal from the decree before the District Judge and was over-ruled by him, on the ground, that the defendants having agreed in the course of the execution proceedings to surrender possession of the building after a specified period, and time having been granted to them for the purpose, they are estopped from taking this objection. This reasoning of the learned Judge is unsustainable, because the right of the defendants to appeal against the decree cannot be affected thereby, though they may be precluded from objecting to the delivery of possession in the course of execution.

2. The tenancy, though denied by the defendants, was found to be proved by the two courts below, and may be deemed to be a tenancy from month to month. Section 106 of the Transfer of Property Act provides, that in the absence of a contract to the contrary, fifteen days' notice-to-quit is necessary to determine the tenancy. It is indisputable, that in a suit for the eviction of a tenant, the plaintiff has to set up and prove, first, that there is a tenancy, and secondly, that the tenancy had been determined in some manner known to law. In the present case, there is no question that a tenancy was set up and proved by the plaintiff. The determination of the tenancy is conditioned primarily by the terms of the tenancy. In the first paragraph of the plaint, it was alleged, that the contract between the parties was, that in the event of default in the payment of rent for one month, the lessor is entitled to enter possession of the building; in paragraph 2, default in the payment of rent for several months was set up. When demand was made for the payment of arrears, the second defendant also agreed to the original terms of the tenancy, and to be made liable in the event of default. In paragraph 4 of the plaint, it was stated, that the defendants had committed default in the payment of rent from the 1st of December, 1957, and paragraph 5 wound up the allegations, stating, that on account of default in the payment of rent, the plaintiff called upon the defendants to surrender possession, but that they did not comply with the demand. The question is, whether these averments do not amount to a plea, that the tenancy had been determined. The relevant part of Section of the Transfer of Property Act reads as follows:

A lease of immovable property determines:

(b) where such time is limited conditionally on the happening of some event--by the happening of such event.

It seems to me, that a plea of determination of the tenancy, in terms of clause (6) of Section 111 of the Transfer of Property Act, can be spelled from the allegations in the plaint summarised above.

3. But it was contended, that there is no finding on this question; this is so, and for a very obvious reason. As indicated, the defendants' case was, that they are not the tenants of the building; though they generally denied the allegations in paragraph 1 of the plaint, they did not deny specifically, the terms of the tenancy set out in it. If as I hold, the allegations in the plaint were complete, and disclose a cause of action, under the provisions of Order VIII, Rule 2, C.P.C. it was for the defendant to plead "all matters, which show the suit not to be maintainable". The defendants cannot now be heard to complain of the lack of a finding by the courts below. It remains to consider whether, on the terms of the tenancy, a notice-to-quit is necessary u/s 106 of the Transfer of Property Act. Clearly, a term of the tenancy, that it is determinable on the commission of default in the payment of rent, must be held to be a contract to the contrary, within the meaning of the above Section. No case, exactly on all fours with the present, was brought to my notice; however, in *Monindra Nath Chowdhuri v. Radha Prosanno*

Gon, 47 Indian Cases 19, a provision in a lease, enabling the landlord to resume possession on payment of the value of a building which was to be erected by the tenant, that is, the happening of a contingency, was held to be such a contract to the contrary. I therefore hold, that a stipulation, that the tenancy is determinable, on default of payment of rent for one month, is a contract to the contrary, within the meaning of Section 106 of the Transfer of Property Act, and therefore dispenses with the necessity of a notice-to-quit.

On the above grounds, this Second Appeal fails and is dismissed with costs.