

**(2002) 03 MAD CK 0219**  
**In the Madras High Court**  
**Case No : A.S. No. 186 of 1986**

|                                         |            |
|-----------------------------------------|------------|
| Arulmigu Dhandayuthapaniswami Thirukkoi | APPELLANT  |
| Vs                                      |            |
| K. Rama Iyer (died) and K.R. Hariharan  | RESPONDENT |

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**Date of Decision :** 13-03-2002

**Acts Referred:**

Tamil Nadu Hindu Religious and Charitable Endowments (Amendment) Act, 1951 —  
Section 23  
Transfer of Property Act, 1882 — Section 106, 111, 116

**Citation :** (2002) 03 MAD CK 0219

**Hon'ble Judges :** Prabha Sridevan, J

**Bench :** Single Bench

**Advocate :** D. Rajendran, for the Appellant; A.S.Kailasan and Associates, for the Respondent

**Final Decision :** Allowed

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## Judgement

Prabha Sridevan,J.

1. The appellant wants possession of the suit property. From 1963, the respondent was permitted to run a canteen in the appellant's property. The permission was extended from time to time. The super structure on the suit property was renovated and expanded. The last such extension was given on 1.11.1976 permitting the respondent to remain there till 31.10.1978. The appellant issued a registered notice on 27.10.1978 calling upon the respondent to vacate the suit premises on or before 31.10.1978. The respondent filed an application to the Commissioner, H.R & C.E praying for extension of period to continue in the suit property. The petition was dismissed, but time was granted to the respondent to continue in possession till 31.10.1979. This order remains unchallenged. On 31.8.1979, the appellant again issued a notice directing the respondent to vacate the premises by 31.10.1979. The respondent filed O.S.968/79 claiming that he was a statutory tenant. The appellant denied this status. However, the appellant pleaded that regardless of the character of

possession, be it licence or lease, the right of possession came to an end on 31.10.1979. This is the plaint in brief. The suit was filed.

2. According to the respondent the arrangement between the parties was a lease and not license. The rent was periodically increased. On the last occasion when the rent was fixed, it was agreed that his possession would not be disturbed for five years. Thereafter only at the instance of the Executive Officer, the application was filed under the provisions of H.R. & C.E. Act for continuation of the period of lease. The Commissioner dismissed the petition. But his rights as a statutory tenant still subsist. The Commissioner's order is merely recommendatory. After the expiry of the lease period, he continues to be a tenant holding over. He is a statutory tenant and the suit is not maintainable without terminating the tenancy u/s 106 of the Transfer of Property Act(hereinafter referred to as "the Act"). The alleged notice is not valid. The suit must be dismissed. This is the respondent's defence.

3. Documents were marked. Neither party adduced oral evidence. The trial Court held that the arrangement was lease and the notice was not in accordance with Section 106 of the Act and dismissed the suit.

4. Mr.Rajendran, learned counsel for the appellant submitted that the appellant had issued notice which would satisfy the requirements of Section 106 of the Act and the appellant ought not to have been non suited. He referred to the various documents. Ex.B1 dated 11.10.1972 is the document showing that the suit property was given on lease from 1.11.1972 to 30.10.1975. By Ex.B4, the appellant communicated to the defendant that the lease period came to an end on 30.10.1975 and that the respondent ought to deliver vacant possession of the suit property. Then extension was given from 1.11.1975 to 31.10.1976 under Ex.B5. By Ex.A4 the appellant informed the respondent that the period came to an end on 31.10.1978 and called upon the respondent to deliver vacant possession by 31.10.1978. In reply, the respondent sent Ex.B.9 dated 31.10.1978 referring to Ex.A4 and requesting extension of time for a further three years. Then the respondent approached the Commissioner, H.R & C.E for extension. By the proceedings of the Commissioner Ex.A3, time was given till 31.10.1979 only. On 31.8.1979, the appellant issued a registered notice stating that the period expires on 31.10.1979 calling upon the respondent to vacate the premises. The learned counsel would submit that the month of tenancy began on 1st of November as seen from the above exhibits. Therefore, this notice calling upon him to vacate the premises, giving more than 15 days notice, but ending with the month of tenancy must be construed as a valid notice and a decree ought to have been granted. It was submitted that in any event the respondent was not entitled to a notice, since the period had expired.

5. The learned counsel relied on M/s. Sugesan and Co., Pvt. Ltd. Vs. Pachaiyappa's Trust and Scheduled Public Trust and Endowments and another, where the Division Bench of this Court held that when the lease period expired by efflux of time, the tenant became a trespasser after the expiry of lease and

there was no necessity to serve notice u/s 106 of Act, and to T.B. Nath and others Vs. Hindustan Petroleum Corporation Ltd. and another, where it was held that the moment a statutory renewal gets exhausted or stands terminated validly, no fresh notice need be given.

6. The learned counsel for the respondent on the other hand would submit that when the appellant has denied the landlord-tenant relationship, it is not possible to treat the notice as one u/s 106 of the Act. A notice under S. 106 of the Act presupposes a tenancy. He would submit that while defendant can take conflicting stands it was not open to the plaintiff to do so. He would also submit that the two decisions do not come to the aid of the appellant since one was a case where there was no plea that the defendant was a tenant holding over unlike the case on hand and the other arose under the ESSO (Acquisition of Undertaking in India) Act, 1974 which provides for statutory renewal. Therefore, that would not apply to this case.

7. The finding that the contract between the parties is a lease and not a licence has not been seriously challenged. This finding is confirmed. The next question is whether notice issued by the appellant is a valid notice to quit and whether the appellant is bound to give notice to recover possession.

8. In Mangilal Vs. Suganchand Rathi, , it was held that S. 106 of the Act was intended to confer a facility on the tenant and so a construction which would deprive the tenant of the facility of having the minimum period of 15 days within which to vacate is not permissible. In that case two notices were given. The first one was not valid since it did not give notice of 15 clear days. The second one which was the basis of the suit actually gave more than 15 days notice. This was accepted.

9. In AIR 1918 P C 102, the Judicial Committee observed that

"while the notices to quit, though not, strictly accurate or consistent in the statements embodied in them they may still be good and effective in law, that the test of sufficiency is not what they would mean to a stranger, but what they would mean to the tenants presumably conversant with all these facts and circumstances and further that they are to be construed not with a desire to find faults in them which would render them defective, but to be construed as *ut res magis valeat quam pereat*."

The notice to quit must indicate the intention to determine the tenancy and also the time when possession should be handed over. In the instant case, Ex.B11 notice is as follows:

Sir, Sub: Dhandapani Nilayam - Canteen - Adivaram - Palani - Expiry of period of licence. Ref: Your petition to the Commissioner, under Sec.23 of the H.R. & C.E. Act and the proceeding of the Commissioner No.84278/78-A3 dated 21.8.79.\* \* \* \* \* The right to use the premises given to you on licence to run a Canteen and for no other purpose expires on 31.10.79 as per the order of the Commissioner

in Ref.No.84278/78-A3 dated 21.8.79.

So you are hereby called upon to vacate and surrender your right by 31.10.79.

Sd/- M.Suriyaraj, Executive Officer. 10. Therefore, it has been clearly indicated that the right of possession expires on 31.10.1979 and the appellant was called upon to vacate and surrender on that date. The appellant gave the respondent more than the statutory minimum of 15 clear days" notice ending with the month of tenancy. Therefore, Ex.B.11 is a valid notice to quit subject to the other objections raised by the respondent.

11. Next, we shall examine the respondent's right to a notice u/s 106 of Act. When he realised, his right to remain in possession was nearing its end, the respondent filed a petition u/s 23 of the Hindu Religious and Charitable Endowment Act seeking permission to continue in the premises paying the rent of Rs.1250/- per month. Though in his written statement, he had pleaded that "it was specifically agreed to between the parties that this defendant would not be disturbed and the lease amount also will not be increased for a further period of five years", his stand in this petition is different. Here, the respondent had stated that he thought , he would be allowed to continue in the building for five years at the above rent. A clear and mutual understanding between the parties for extension of the lease is one thing and a presumption by one party without any basis that he would be granted an extension is quite another. There is no evidence there was any such understanding that the lease period would be extended. It shall be noted that what the respondent was requesting was only an extension of the lease. He was fully aware that the lease period had expired, because he was informed by Ex.A4 that

"Fj;jif VL 31/8/1978 njjpa[ld; KotilfpwJ]/"

To this, the respondent wrote Ex.B9 stating that he was given to understand that the rent fixation committee had recommended an extension of three years and therefore, he should be permitted to do so. Even in his own written statement, he had averred that "After the expiry of the lease, this defendant continues to be a tenant holding over." In Ex.A3 too, there is a reference to the expiry of period of lease on 31.10.1978. Therefore, there was no doubt in anyone's mind that the lease came to an end on 31.10.1978. An extension of time was granted upto 31.10.1979 only. The words of the order are extracted:

" However, in view of his prayer, he is allowed to run the canteen in the above premises upto 31.10.79 only, after which the petitioner is requested to hand over possession of the building to the temple."

Therefore, all the materials show that the lease period came to an end on 31-10-1978 and then, at his request it was extended not by the appellant but by the order Ex.A.3 and that too till 31-10-1979 only.

12. The appellant's case is that it was at the respondent's request that the Commissioner, H.R. & C.E had granted extension of time till 31.10.1979. The

respondent's counsel denied that it was so and submitted that the words extracted above cannot be construed to mean that the respondent had made any such request or that he had unconditionally undertaken to vacate the premises on 31.10.1979. It is not known if permission was granted only at the request of the respondent since no oral evidence was let in by the plaintiff or the defendant. However, what is certain, is that, the respondent faced with the expiry of lease on 31.10.1978, prayed for continuance by filing a petition. Though the petition was dismissed, in effect, the order amounted to an extension of the period of lease by one year. Therefore, by the order Ex.A3, the respondent was informed that though the expiry of lease was unchanged, he could continue in possession till 31.10.1979.

13. M/s. Sugesan and Co., Pvt. Ltd. Vs. Pachaiyappa's Trust and Scheduled Public Trust and Endowments and another, :clearly applies to this case. The learned Judges have referred to AIR 1981 SC 1550 (SHANTI DEVI vs. AMAL KUMAR) where it was held that where lease is for a definite term, it expires by efflux of time u/s 111(a) of the T.P Act and that the tenant became a trespasser after the expiry of the period of lease and there was no necessity to serve notice on him. In AIR 1981 SC 1550, the Supreme Court held thus:

"Before deciding the validity of notice under S. 106, the Court should first decide whether S. 106 is applicable or not. It cannot assume that the lease was from month to month. Thus where a lease is for a fixed term, the Court cannot take the pleadings of the parties for determining the nature of the lease. Parties cannot by their pleadings alter the intrinsic character of lease."

In that case, the Supreme Court held that in the absence of any allegation that he was a tenant holding over, within the meaning of Section 116 of the Act, the matter falls to be governed by Section 111(a) of the Act. So unless the respondent proves he is a tenant holding over, he is not entitled to notice.

14. In order that a lease shall be deemed to continue in favour of the lessee, it is necessary to show that he remained in possession of the premises demised after the termination of the lease granted to him and the lessor had expressly or by necessary implication assented to his continued possession. Apart from stating the he is a tenant holding over, the respondent has not made any effort to prove that even after 31.10.1978, the appellant assented to his continuance in possession. The learned counsel for the respondent submitted suits were filed by the appellant subsequently after issuing notices again and this would show that, if the lease had expired with the notice issued under Ex.B11, there was no necessity to issue a second notice. This showed he was a tenant holding over. Mere reference to alleged subsequent events cannot help the respondent when there is no evidence of the same.

15. In 2001 AIR SCW 2739 (KEWAL CHANDHIMANI Vs. S.K. SEN) Supreme Court has dealt with the concept of tenant holding over and tenant at sufferance as follows:

"...incidentally, the act of holding over in any event after the expiration of the term does not necessarily create tenancy of any kind; if the lessee remains in possession after the determination of the term and for all practical purposes, he becomes a tenant at sufferance. This Court in R.V. Bhupal Prasad Vs. State of Andhra Pradesh and others, : R.V. Bhupal Prasad Vs. State of Andhra Pradesh and others, had the occasion to deal with this concept of tenancy at sufferance. In paragraph 8 of the report, this Court observed:--

"8.Tenant at sufferance is one who comes into possession of land by lawful title, but who holds it by wrong after the termination of the term or expiry of the lease by efflux of time. The tenant at sufferance is, therefore, one who wrongfully continues in possession after the extinction of a lawful title. There is little difference between him and a trespasser. In Mulla's Transfer of Property Act (7th Edn.) at Page 633, the position of tenancy at sufferance has been stated thus; A tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has been determined, without the consent of the person entitled..... The expression "holding over" is used in the sense of retaining possession. A distinction should be drawn between a tenant continuing in possession after the determination of the lease, without the consent of the landlord and a tenant doing so with the landlord's consent. The former is called a tenant by sufferance in the language of the English law and the latter class of tenants is called a tenant holding over or a tenant at will. The lessee holding over with the consent of the lessor is in a better position than a mere tenant at will. The tenancy on sufferance is converted into a tenancy at will by the assent of the landlord, but the relationship of the landlord and tenant is not established until the rent was paid and accepted. The assent of the landlord to the continuance of the tenancy after the determination of the tenancy would create a new tenancy..."

It follows that the tenant in occupation after the expiry of lease without the landlord's consent is no better than a trespasser and therefore, he is not entitled to notice. In the absence of any material to show the assent of the appellant for his continuance, the respondent cannot claim to be a tenant "holding over".

16. It was urged that the appellant, having maintained that the respondent was only a licensee cannot claim that the notice is one u/s 106 of the Act. But it is seen that in the plaint, the appellant had stated that whatever may be the nature of possession, the respondent was bound to hand over the same on 31.10.1978. The right of the respondent to remain in possession expired on 31.10.1978 itself which is the date of the expiry of lease. He was permitted to continue not by consensus between the parties, but by virtue of the pendency of the proceedings under Ex.A3. The effect of all the materials placed before the Court must be considered as a whole.

17. In 1990 (2) Law Weekly 274 (MADHAVAN Vs. KANNAMMAL) this Court held:

"It is true that it is not open to a plaintiff to abandon his own case and claim relief on the basis of the defendant's case. That principle can be invoked only in cases where the plaintiff having failed to prove the case with which he approached the Court seeks to rely on the pleading of the defendant to secure a relief and not to cases like the present one where the plaintiff prays for relief on the basis of facts established by the record in the case even though they are at variance with his pleading. .... It cannot be disputed that the Courts of law has power to grant decrees which would be warranted by the facts of the case when such facts have been established by indisputable records even if they were not exactly pleaded by the parties. It will be unjust to dismiss the suits on a technicality and drive the plaintiffs to fresh suits....."

18. In this case the appellant claimed that there was no lease but only a licence; yet a notice was given terminating the lease ending with the month of tenancy. The respondent said that there was no lease but only a licence. The Court accepted that. On the tenants' own admission lease had expired. Even assuming that the lease has not expired, as held in Mangilal Vs. Suganchand Rathi, the facility which the respondent is entitled to, is a notice u/s 106 of the Act. He has been given this. In fact, he was given notice of more than the 15 clear days demanded by Section 106 of the Act. The notice also passes the test of sufficiency laid in AIR 1918 PC 102 since the respondent knew the nature and implication of the notice. The appellant is not drawing sustenance from the respondent's pleadings. The case rests on the appellant's own documents. It would be unjust to drive the appellant to a fresh suit. In any case the respondent cannot complain, having received a proper notice u/s 106 of the Act to which he has no semblance of a right. He has also continued in possession for over two decades after the notice to quit.

19. The judgment and decree of the lower Court is set aside. The appeal is allowed, with costs. CMP No.12113 of 1985 and CMP Nos. 17077 to 17079 of 1999 are closed.