

(2011) 02 MAD CK 0195

In the Madras High Court

Case No : S.A. No"s. 758 of 2009 and M.P. No. 1 of 2009

G. Rengarajan @ Ravi

APPELLANT

Vs

K.N.S. Gopal, G. Lakshmi and Janardhanam

RESPONDENT

Date of Decision : 03-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 100
Easements Act, 1882 — Section 52, 60
Specific Relief Act, 1963 — Section 38
Transfer of Property Act, 1882 — Section 105

Citation : (2011) 02 MAD CK 0195

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : A.S. Narasimhan, for the Appellant; T.V. Ramanujam for T.V. Krishnamachari, for R1 and R2, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—The Defendant-G. Rengarajan in O.S. Nos. 7975 and 7974 of 2005 filed the S.A. Nos. 758, 759 and 760 of 2009

inveighing the common judgment and decrees 31.12.2008 passed by the Principal City Civil Court, Chennai, in A.S. Nos. 420, 421, 481 of 2005

confirming the common judgment and decrees dated 20.6.2008 passed by the III Asst. City Civil Court, Chennai, in O.S. Nos. 7975, 7974 and

7975 of 2005, which were filed by the Respondents herein seeking mandatory injunctions and damages as against the said Rengarajan/Appellant

herein and S.A. No. 757 of 2009 is filed by the said G. Rengarajan, who is the Plaintiff in O.S. No. 4687 of 2005, inveighing the common

judgment and decrees dated 31.12.2008 passed by the Principal City Court, Chennai in A.S. No. 496 of 2008 confirming the common judgment

and decrees dated 20.6.2008 passed by the III Asst. City Civil Court, Chennai, in O.S. No. 4687 of 2005, which was filed seeking prohibitory

injunction as against the Respondents herein.

2. The parties, for the sake of convenience, are referred to here under according to their litigative status and ranking before the trial Court.

3. The factual matrix absolutely necessary and germane for the disposal of these second appeals would run thus:

(a) The Plaintiff in O.S. No. 4687 of 2005, being the Appellant herein, filed the suit seeking prohibitory injunction, so as to prevent K.N.S. Gopal,

Mrs. Lakshmi and Janardhanan-the Defendants therein from evicting him from the suit property, otherwise than in accordance with law.

(b) However, K.N.S. Gopal/D1 in the said suit O.S. No. 4687 of 2005 filed the suit O.S. No. 7974 of 2005 in respect of a car parking area.

(c) Whereas, Lakshmi/D2 in the said suit O.S. No. 4687 of 2005 filed the suit O.S. No. 7975 of 2005 in respect of two portions in a building as

against the said Rengarajan seeking the following reliefs:

a) to pass a judgment and decree against the Defendant to remove the things and leave the schedule mentioned property as vacant and hand over

the vacant possession of the same within a time fixed by this Court;

ii) to direct the Defendants to pay Rs. 24,000 (Rupees twenty four thousand only) towards past damages for wrongful use and occupation for the

period from 1.8.2005 till the date of filing of suit; and

iii) to direct the Defendant to pay the future damages to the Plaintiff a sum of Rs. 6000 per month towards from the date of plaint till the date

Defendant removes the things and leave the schedule mentioned property and hand over vacant possession of the same.

(d) Written statements were filed by the respective Defendants and the suits were resisted. Whereupon joint trial was conducted.

(e) During trial, the Respondent in S.A. No. 758 of 2009 (Plaintiff in O.S. No. 7975 of 2005) examined herself as P.W.1 along with P.W.2(the

Plaintiff in O.S. No. 7974 of 2005) and marked Exs.A1 to A10. The Appellant herein (Defendant in O.S. Nos. 7974 and 7975 of 2005)

examined himself as D.W.1 and marked Exs.B1 to B7.

(f) Ultimately the trial Court dismissed the suit O.S. No. 4687 of 2005 filed by Rengarajan-the Appellant herein and decreed the suits O.S. Nos.

7974 and 7975 of 2005 filed by K.N.S. Gopal and Lakshmi-the Respondents herein, granting mandatory injunction but the prayers for damages were dismissed.

(g) Being aggrieved by and dissatisfied with the common judgment and decrees of the trial Court, the said Rengarajan filed three appeals, namely,

A.S. Nos. 420, 421 and 496 of 2008 and the said Lakshmi and K.N.S. Gopal also filed two appeals, namely, A.S. Nos. 481 and 482 of 2008,

respectively, as against the rejection of the prayer for damages in favour of them.

(h) The appellate Court heard all the five appeals and disposed them accepting the plea of K.N.S. Gopal and Lakshmi and rejecting the prayer of

G. Rengarajan @ Ravi in the matters concerned.

4. Being aggrieved by and dissatisfied with the said common judgment and decrees, the said Rengarajan filed these four second appeals,

contending inter alia thus:

(i) The Courts below fell into error in not treating the said G. Rengarajan @ Ravi as a tenant in the suit properties and that he was not a mere

licensee, occupying them.

(ii) There was business transactions between the Plaintiff and the Defendants and a partnership also emerged between them. However, ignoring all

those facts, the said G. Rengarajan-the Appellant herein was treated only as a permissive occupier and on the strength of the alleged cancellation

notice, mandatory injunctions were granted as against him for removing his belongings from the premises concerned, referred to supra.

5. The following substantial questions of law are found suggested in the memorandum of grounds of second appeals as under:

1. When the building in occupation of the Appellant is covered by the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960

can the Civil Court entertain a suit for Recovery of possession on the ground that the Appellant is permissive occupant due to non reply to a notice

by giving a go-by to the pleadings.

2. In the absence of any material evidence available before the Court except the self evidence of the Respondents, whether the First appellate

Court is right in confirming the judgment of the trial Court on the basis of mere location of the property and its details regarding alleged mesne

profits.

3. When the suit property is O.S. No. 7974h of 2005 is in occupation of partnership can there be a decree for possession against individual who is

a partner in that firm without impleading the firm.

4. When the suit is for recovery of possession in effect, under the guise of permissive occupation a mandatory injunction can be granted by

depriving the State of its Revenue contrary to the Provisions of Tamil Nadu Act XIV of 1955?

6. At the outset itself I would like to fumigate my mind with the following decisions of the Honourable Apex Court:

(i) Hero Vinoth (minor) Vs. Seshammal, , certain excerpts from its would run thus;

(ii) Kashmir Singh Vs. Harnam Singh and Another, .

(iii) 2009 1 L.W.1 - State Bank of India and Ors. v. S.N. Goya:

7. A plain reading of the above precedents would reveal and demonstrate that u/s 100 of the Code of Civil Procedure, Second Appeal cannot be

entertained, unless substantial question of law is involved in the matter.

8. Both sides have been heard on merits.

9. The learned Counsel for the Appellant would put forth and set forth his arguments thus:

(a) The concepts "licence" and "lease" have not been properly appreciated and understood by the Courts below and quite antithetical to the

following decisions of the Honourable Apex Court, reported in (i) C.M. Beena and Another Vs. P.N. Ramachandra Rao, ; and (ii) R.M.

Sundaram @ Meenakshi Sundaram and another Vs. The Correspondent, National Elementary School, Pundarigakulam, Vadakarai,

Nagapattinam, ., the Courts below held as though the Appellant herein was the licensee and whereupon mandatory injunctions were granted as

against him.

(b) Certain excerpts from C.M. Beena and Another Vs. P.N. Ramachandra Rao, , would run thus;

8. ...""Lease"" is defined in Section 105 of the Transfer of Property Act, 1882 while ""licence"" is defined in Section 52 of the Indian Easements Act,

1882. Generally speaking, the difference between a ""lease"" and ""licence"" is to be determined by finding out the real intention of the parties as

decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful (see *Associated Hotels of India Ltd. v. R.N. Kapoor* 1). The decided cases on the point are legion. For our purpose it would suffice to refer to a recent decision of this Court in *Corpn. of Calicut v. K. Sreenivasan*.

9. A few principles are well settled. User of the terms like "lease" or "licence", "lessor" or "licensor", "rent" or "licence fee" is not by itself decisive of the nature of the right created by the document. An effort should be made to find out whether the deed confers a right to possess exclusively coupled with transfer of a right to enjoy the property or what has been parted with is merely a right to use the property while the possession is retained by the owner. The conduct of the parties before and after the creation of relationship is of relevance for finding out their intention.

10. Given the facts and circumstances of a case, particularly when there is a written document executed between the parties, question arises as to what are the tests which would enable pronouncing upon the nature of relationship between the parties. Evans & Smith state in *The Law of Landlord and Tenant* (4th Edn.)-

A lease, because it confers an estate in land, is much more than a mere personal or contractual agreement for the occupation of a freeholder's land by a tenant. A lease, whether fixed-term or periodic, confers a right in property, enabling the tenant to exclude all third parties, including the landlord, from possession, for the duration of the lease, in return for which a rent or periodical payment is reserved out of the land. A contractual licence confers no more than a permission on the occupier to do some act on the owner's land which would otherwise constitute a trespass. If exclusive possession is not conferred by an agreement, it is a licence. ... [T]he fundamental difference between a tenant and a licensee is that a tenant, who has exclusive possession, has an estate in land, as opposed to a

personal permission to occupy. If, however, the owner of land proves that he never intended to accept the occupier as tenant, then the fact that the occupier pays regular sums for his occupation does not make the occupier a tenant."" (at p.33)

11. In Hill & Redman: Law of Landlord and Tenant (17th Edn., Vol. 1) a more detailed discussion also laying down the determinative tests, is to be found stated as follows:

It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should be granted the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without being entitled to exclusive possession must operate as a licence and not as a lease.

In R.M. Sundaram @ Meenakshi Sundaram and another Vs. The Correspondent, National Elementary School, Pundarigakulam, Vadakarai, Nagapattinam, , certain excerpts would run thus:

36. I have already extracted the relief sought for in the plaint. It is in the nature of a mandatory injunction and the Plaintiff assumes that he is in possession. Once it is held that the relationship is not that of a licensor and licensee, Plaintiff, will have to terminate the lease and recover possession. There is no termination of lease. Again, the relief of mandatory injunction is governed by Section 38 of the Specific Relief Act. In the case of a lease, there is no obligation on the part of the lessee to vacate the premises. The rights and duties of a lease are governed by the provisions of Transfer of Property Act and where Rent Control Act is applicable the provision therein will have to be applied. The relief prayed for being a decree for mandatory injunction also, therefore, cannot be granted.

37. Learned Counsel for the Appellant submitted that even though the relief sought for is in the nature of a mandatory injunction, the purpose of the suit is to recover the property and the Court is competent to grant relief in appropriate cases. I agree with the submission that the Court could grant the relief if the Plaintiff is found to be eligible to get that relief. If it is a case of lease without termination, such a relief cannot be granted. In the case, the area where the building is situated is governed by the provisions of Rent Control Act also. No relief of mandatory injunction can be granted in

view of the provisions of Rent Control Act also. Question No. 1 is therefore found against the Appellant.

Placing reliance on the above excerpts, the learned Counsel for the Appellant would submit that it is not a case where the said Rengarajan-the

Appellant herein occupied those premises as a stranger, but he admittedly happened to be the brother of Lakshmi/D2 in O.S. No. 4687 of 2005

(Plaintiff in O.S. No. 7975 of 2005) and K.N.S. Gopal happened to be the husband of the said Lakshmi. The partnership which emerged between

Rengarajan and Lakshmi still subsists and only as a quid pro quo of the services being rendered by the said Rengarajan, he was permitted to

occupy the premises and in such a case, even before settling the various issues that are pending between the two, the question of either Lakshmi or

her husband K.N.S. Gopal trying to evict Rengarajan from the premises would not arise under one pretext or other.

(c) The said Rengarajan has been in occupation of the premises from 1999 and as holus-bolus, he cannot be unilaterally asked by the said Lakshmi

and K.N.S. Gopal to vacate the premises as though he is only a licensee.

(d) The prayer for awarding of damages towards the use and occupation is a mis-conceived one and the first appellate Court, quite antithetical to

the well settled proposition of law simply, ordered such damages to be paid by the Appellant herein in favour of K.N.S. Gopal and Lakshmi.

Accordingly, the learned Counsel for the Appellant prays for setting aside the Judgments and decrees of the Courts below and for the dismissal of

the suits O.S. Nos. 7974 and 7975 of 2005 filed by K.N.S. Gopal and Lakshmi and for decreeing the suit O.S. No. 4687 of 2005 filed by the

Appellant-Rengarajan.

10. By way of torpedoing and pulverising the arguments as put forth and set forth on the side of the Appellant, the learned Senior counsel for the

Respondents would advance his arguments, the gist and kernal of them would run thus:

(a) The Courts below, placing reliance on the oral and documentary evidence, appropriately and oppositely held that the status of Rengarajan-the

Appellant herein was not that of a tenant, but only that of a licensee, based on licences granted by Lakshmi and K.N.S. Gopal, which were duly

cancelled by issuing Ex.A3 dated 25.6.2005 and as such recognising the said

cancellation notice, the mandatory injunctions were granted as against the said Rengarajan-the Appellant herein, warranting no interference in second appeal.

(b) Indubitably and indisputably, admittedly and unarguably, no fee or rent was collected from the said Rengarajan by G. Lakshmi or K.N.S.

Gopal and it would be too late in the day on the part of Rengarajan to contend that simply because he was allegedly assisting K.N.S. Gopal and

Lakshmi in their business, he assumed the status of a tenant, which cannot be countenanced as per law.

(c) Without wasting time or allowing the said Rengarajan to lay roots in the premises as a trespasser, soon after, so to say, within three months

after the cancellation of licences, the two suits were filed and thereby, the cases of the said Lakshmi and K.N.S. Gopal are well within the

parameters as found set out in the decision of the Honourable Apex Court reported in Joseph Severance and Others Vs. Benny Mathew and

Others, , certain excerpts from it would run thus:

7. There was no specific plea taken by the Defendants that the suit should be one for recovery of possession and the suit for injunction is not

maintainable. In fact, before the trial court and the first appellate court the stress was on something else i.e. the effect of Section 60(b) of the

Easements Act, 1882 (in short ""the Easements Act"") and the alleged non-maintainability of the suit on the ground of non-joinder of necessary

parties. Before the High Court the plea was taken for the first time that the suit was not maintainable being one for mandatory injunction and for

prohibitory injunction and not one for recovery. Strictly speaking, the question is not a substantial question of law, but one whose adjudication

would depend upon factual adjudication of the issue relating to reasonableness of time. The correct position in law is that the licensee may be the

actual occupant but the licensor is the person having control or possession of the property through his licensee even after the termination of the

licence. The licensee may have to continue to be in occupation of the premises for sometime to wind up the business, if any. In such a case the

licensee cannot be treated as a trespasser. It would depend upon the facts of the particular case. But there may be cases where after termination or

revocation of the licence the licensor does not take prompt action to evict the

licensee from the premises. In such an event the ex-licensee may be treated as a trespasser and the licensee will have to sue for recovery of possession. There can be no doubt that there is a need for the licensor to be vigilant. A licensee's occupation does not become hostile possession or the possession of a trespasser the moment the licence comes to an end.

The licensor has to file the suit with promptitude and if it is shown that within reasonable time a suit for mandatory injunction has been filed with a prayer to direct the licensee to vacate the premises, the suit will be maintainable.

8. It is to be noted that in the instant case the High Court has nowhere held that the explanation, as offered by the Plaintiffs, was not acceptable.

Without so holding, the High Court only took note of the period after which the suit was filed.

9. The basic issue is whether the suit was filed within a "reasonable time".

10. As observed in *Veerayee Ammal v. Seen Ammal*³, (SCC p.141, para 13) it is looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as

is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than "directly";

such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the

attending circumstances; all these convey more or less the same idea (vide P. Ramanatha Aiyar's *The Law Lexicon*).

.....

14. In *Sant Lal Jain v. Avtar Singh*⁷ in paras 7 and 8 of the judgment, it was observed as follows: (SCC pp.336-37)

7. In the present case it has not been shown to us that the Appellant had come to the Court with the suit for mandatory injunction after any

considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt

should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble

and expense. The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the

Plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. Therefore, we are of the opinion that the

Appellant should not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction.

8. The Respondent was a licensee, and he must be deemed to be always a licensee. It is not open to him, during the subsistence of the licence or in

the suit for recovery of possession of the property instituted after the revocation of the licence to set up title to the property in himself or anyone

else. It is his plain duty to surrender possession of the property as a licensee and seek his remedy separately in case he has acquired title to the

property subsequently through some other person. He need not do so if he has acquired title to the property from the licensor or from someone

else lawfully claiming under him, in which case there would be clear merger. The Respondent has not surrendered possession of the property to the

Appellant even after the termination of the licence and the institution of the suit. The Appellant is, therefore, entitled to recover possession of the

property. We accordingly allow the appeal with costs throughout and direct the Respondent to deliver possession of the property to the Appellant

forthwith failing which it will be open to the Appellant to execute the decree and obtain possession.

15. The explanation offered by the Plaintiffs is plausible. The Defendants did not specifically raise any plea that the time taken was unreasonable.

No evidence was led. No specific plea was raised before the trial court and first appellate court. The question of reasonable time was to be

factually adjudicated. For the first time in the second appeal the dispute essentially founded on factual foundation could not have been raised.

Accordingly, the learned Counsel for the Respondents would pray for dismissal of the second appeals.

11. The learned Senior counsel also would voluntarily make an extempore submission to the effect that the said Lakshmi and K.N.S. Gopal are

not claiming pre-suit damages for use and occupation, so to say the damages from the date of cancellation of licences till the filing of the suit, as

awarded by the first appellate Court; however, they reserve their right to file necessary application under Order 20 Rule 12 of C.P.C., so as to get

the damages quantified, which accrued during the pendency of the suits and till the mandatory injunctions are either complied with or enforced, as

per law.

12. Hence, in these factual circumstances, I need not decide anything relating to the claim of damages till the filing of the suit, as it has been given

up by the Respondents concerned. The right of the owners of the premises, who licenced them out to Rengarajan, to recover damages from him,

cannot be found fault with. But for Rengarajan's failure to remove his belongings from the premises, those owners of the premises might have

earned profit by putting those premises to beneficial use at their own volition and discretion. As such, they are entitled to claim damages pendente

lite and also till the said Rengarajan complying with the mandatory injunction or enforced as against him. Accordingly, the said Lakshmi and

K.N.S. Gopal are entitled to file necessary application before the trial Court to get quantified the aforesaid damages.

13. The only point to be considered is as to whether the finding of the Courts below that the said Rengarajan was only a "licensee" and that his

licences were cancelled, warrant interference by virtue of Section 100 of C.P.C., or not.

14. To the risk of repetition and pleonasm, but without being tautologous, I would like to point out that unless there is any perversity or illegality in

the findings given by the Courts below, the question of entertaining a second appeal formulating any substantial question of law in that regard would

not arise.

15. A mere perusal of the Judgments cited on the side of the learned Counsel for the Appellant/Rengarajan would reveal that if consensus ad idem

between Rengarajan and K.N.S. Gopal and Lakshmi was to the effect that Rengarajan should occupy the premises exclusively as a "licensee", the

question of treating him as tenant would not arise. The Courts below gave factual finding that there is nothing to indicate that Rengarajan was

occupying the premises as a tenant and in such a case, normally as against such finding of fact, nothing more is required and this Court has to

simply confirm such finding without any interference, unless there is any perversity or illegality in such finding.

16. However, in view of the learned Counsel for the Appellant/Rengarajan strenuously argued, by drawing the attention of this Court to the various

evidentiary aspects of the case, I would like to go into that also, in the interest of justice.

17. Nowhere it is found exemplified or demonstrated that the said Rengarajan was permitted to occupy the premises for any fee or rent. It is in fact admittedly the case of Rengarajan himself that because he was rendering services as a partner and also as a close relative of K.N.S. Gopal and Lakshmi, his services should be treated as equivalent to that of a rent and by that it could be construed that for rent he was occupying the premises. Apparently and axiomatically, pellucidly and palpably, no judgment has been cited, so as to buttress and fortify the contention of the Appellant. The onus of proof is on Rengarajan to prove the plea put forth by him. There is no shard or shred, iota or miniscule extent of evidence to buttress and fortify his plea that his services were agreed to be treated as rent for his occupying the premises.

18. No doubt, a rent could be in cash or kind. But I am of the considered view that even as per the narration of facts on the side of Rengarajan, it cannot be concluded that, as alleged by him, the services rendered by the said Rengarajan should be taken as quid pro quo, equivalent to rent, so as to attract the concept "lease". The decisions cited by him, referred to supra, would indicate and highlight that there should be transfer of interest in the immovable property in favour of Rengarajan then only he would be in a position to claim the status of a tenant. But in this case, absolutely there is no such evidence to point out that there was such exclusive transfer of interest in the two portions of the immovable property in favour of Rengarajan-the Appellant herein, so as to attract the concept "lease" in his favour. The decisions of both the Courts below are purely based on the finding of facts, warranting no interference, as correctly highlighted on the side of the Respondents.

19. Hence, I am of the considered view that no substantial question of law regarding the finding of fact rendered by the Courts below would arise.

Accordingly, these second appeals are dismissed, however, with a modification, in view of the endorsement made by the learned Senior counsel

for the Respondents, that the pre-suit damages awarded by the first appellate Court shall stand set aside. I make it clear that it is open for the

Respondents (Plaintiffs in O.S. Nos. 7974 and 7975 of 2005) to file necessary application to get the damages quantified as per law before the trial

Court for the period between the date of filing of the suits till the mandatory injunctions are complied with by Rengarajan or the mandatory

injunctions are enforced. However, there is no order as to costs. Consequently, connected miscellaneous petitions are dismissed.