

(2011) 02 MAD CK 0192
In the Madras High Court
Case No : C.R.P. (PD) No. 2562 of 2010

K. Raheja Development Corporation (KRDC) and K. Raheja Hotels and Estates Pvt Ltd. APPELLANT

Vs

Ferani Hotels (P) Ltd. and K. Raj Trust RESPONDENT

Date of Decision : 02-02-2011

Acts Referred:

Transfer of Property Act, 1882 — Section 105, 5

Citation : (2011) 02 MAD CK 0192

Hon'ble Judges : K. Venkataraman, J

Bench : Single Bench

Advocate : T.V. Ramanujam and R. Muthukumarasamy, s for A.A. Mohan, for the Appellant; P.S. Raman and T.R. Rajagopal, Sr. Counsels for Rank Associates, for the Respondent

Final Decision : Dismissed

Judgement

K. Venkataraman, J.—C.R.P. Nos. 2562 and 2563 of 2010 were filed challenging the fair and final orders dated 26.07.2010 of the learned

Fast Track Judge No. 1, Coimbatore made in C.M.A. Nos. 16 of 2010 and 23 of 2010 respectively.

2. The Plaintiff and the second Defendant in O.S. No. 699 of 2009 are the Petitioners in C.R.P. No. 2562 of 2010. The Plaintiffs in O.S. No. 747

of 2009 are the Petitioners in C.R.P. No. 2563 of 2010. The Defendants 1 and 3 in O.S. No. 699 of 2009 are the Respondents in C.R.P. No.

2562 of 2010. The Defendant in O.S. No. 747 of 2009 is the Respondent in the other revision namely, C.R.P. No. 2563 of 2010.

3. The suit in O.S. No. 699 of 2009 was filed for permanent injunction restraining the Respondent Ferani Hotels Private Limited (First Respondent

in C.R.P. No. 2562 of 2010 and the sole Respondent in the other revision namely,

C.R.P. No. 2563 of 2010) from evicting the Plaintiff from the suit property by force, threat, demolition of office building or in any manner whatsoever except through due process of law.

4. O.S. No. 747 of 2009 was filed for declaration declaring that the Ferani Hotels Private Limited has demolished the superstructure office

building illegally while lease agreement is subsisting and for mandatory injunction to restore the illegally demolished superstructure as it was, within a

time frame and also for permanent injunction from tress-passing into the suit property and construct any building or carry out any activity on suit

property and create any third party rights.

5. I.A. No. 549 of 2009 was filed in O.S. No. 699 of 2009 for interim injunction which was the main prayer in O.S. No. 699 of 2009. After

contest, status quo was ordered. Ferani Hotels Private Limited filed an appeal in C.M.A. No. 16 of 2010.

6. I.A. No. 647 of 2009 was filed in O.S. No. 747 of 2009 for temporary injunction restraining the other side from tress-passing into the suit

property and construct any building or carry out any activities on the suit property and create any third party rights over the said property. By an

order dated 13.04.2010, the learned Second Additional Sub-Judge Coimbatore dismissed the application and C.M.A. No. 23 of 2010 was filed

against the said order.C.M.A. No. 16 of 2010 was allowed and C.M.A. No. 23 of 2010 was dismissed by the learned Fast Track Judge No. 1,

Coimbatore. Thus, challenging the said judgment and decree made in C.M.A. Nos. 16 and 23 of 2010, the present Civil Revision Petitions have

been filed.

7. The learned Senior Counsels appearing for the Petitioners contended that when the lease was subsisting and an interim order was granted,

unlawfully the superstructures were demolished. The Advocate Commissioner has filed a report which will reveal that after an order of injunction

was granted by the Trial Court, the other side has willfully demolished the superstructure.

8. On the other hand, the learned Senior Counsels appearing for the Respondents contended that when the Petitioners abandoned the property

which was leased out to them, there was no other go for the Respondents but to demolish the superstructure for the purpose of putting up a hotel.

That apart, it has been contended by them that it may not be correct to say that the Petitioners alone were in possession of the property but the real fact is that three groups were using the said premises. When three groups were in joint possession and since the Petitioners had abandoned the property, the entire structure was demolished for the purpose of putting up a hotel therein. It was further urged by them that an interim order if granted in favour of the Petitioners, it will stall the entire construction. In such event, in view of the escalation of prices day in and day out, the Respondents will suffer great hardship and loss. It was further urged by them that the Petitioners at best in the event of their success in the suit can ask for construction of a new building for them.

9. I have considered said submissions made by the learned Senior Counsels appearing for the Petitioners and the learned Senior Counsels appearing for the Respondents.

10. The suit in O.S. No. 699 of 2009 was filed for permanent injunction restraining the Defendant No. 1 thereon namely, Ferani Hotels Private Limited from in any manner evicting the Petitioners from the suit property by force, threat, demolition of the office building or in any manner whatsoever except through due process of law. In view of the fact that the demolition was already carried out, it may be contended on the side of the Respondents that nothing survives in the said suit. However, it is contended on the side of the Petitioners that though the building has been demolished, as far as the vacant land is concerned, it cannot be said that the Petitioners were evicted therefrom.

11. In this connection, the learned Senior Counsels appearing for the Petitioners relied on the decision reported in, T. Lakshmipathi and Ors. v. P.

Nithyananda Reddy and Ors. (2003) 5 Supreme Court Cases 150 Paragraphs 20 to 23 which was emphasized is usefully extracted here under:

20. The tenancy cannot be said to have been determined by attracting applicability of the doctrine of frustration consequent upon demolishing of the tenancy premises. Doctrine of frustration belongs to the realm of law of contracts; it does not apply to a transaction where not only a privity of contact but a privity of estate has also been created inasmuch as lease is the transfer of an interest in immovable property within the meaning of

Section 5 of the Transfer of Property Act (wherein the phrase "the transfer of

property"" has been defined), read with Section 105, which defines a lease of immovable property as a transfer of a right to enjoy such property. (See observations of this Court in this regard in *Raja Dhruv Dev Chand v. Raja Harmohinder Singh*). It is neither the case of the Appellants nor of Respondents 2 and 3 that the subject-matter of lease was the building and the building alone, excluding land whereon the building forming the subject-matter of tenancy stood at the time of creation of lease.

21. In *Woodfall's Laws of Landlord and Tenant* (28th Edn., Vol. 1) the relevant law is so stated: ""Where the lessee covenants to pay rent as stated period (without any exception in case of fire), he is bound to pay it, though the house be burnt down; for the land remains, and he might have provided to the contrary by express stipulation, if both parties had so intended. And this rule applies, although the lessee's covenant to repair contain an exception in case of fire. Similarly, an action for use and occupation still lies in respect of the whole period of the tenancy notwithstanding the destruction of the premises by fire.

In a lease of land with buildings upon it the destruction of even the entirety of the buildings does not affect the continuance of the lease or of the lessee's liabilities under it, unless so provided by express contract.

A demise must have a subject-matter, either corporeal or incorporeal. If the subject-matter is destroyed entirely, it is submitted that the lease comes automatically to an end, for there is no longer any demise. The mere destruction of a building on land is not total destruction of the subject-matter of a lease of the land and building, so the demise continues. But if by some convulsion of nature the very site ceases to exist, by being swallowed up altogether or buried in the depths of the sea, it seems clear that any lease of the property must come to an end.

22. A lease of a house or of a shop is a lease not only of the superstructure but also of its site. It would be different if not only the site but also the land beneath ceases to exist by an act of nature. In the present case the Appellants who are the successors of the tenancy right have demolished the superstructure but the land beneath continues to exist. The entire tenancy premises have not been lost. Moreover, the Appellants cannot be permitted to take shelter behind their own act prejudicial to the interest of Respondent 1 under whom Respondents 2 and 3 were holding as

tenants and then inducted the Appellants.

23. In *D.G. Gose & Co. (Agents) (P) Ltd. v. State of Kerala* while dealing with Entry 49 of List II of the Seventh Schedule of the Constitution,

making a reference to Oxford English Dictionary, this Court has held that the site of the building is a component part of the building and therefore

inheres in it the concept or ordinary meaning of the expression "building". Referring to *Corpn. Of the City of Victoria v. Bishop of Vancouver*

Island it was held (at SCC p.425, para 22) that the word "building" must receive its natural and ordinary meaning as "including the fabric of which it

is composed, the ground upon which its walls stand and the ground embraced within those walls.

It was also contended in view of the subsequent suit for the relief set out earlier, the Petitioner can very well contend that they are entitled for

restoration of the illegal demolished superstructure as it was and also entitled to maintain the second suit.

12. The learned Senior Counsels appearing for the Petitioners relied on the report of the Advocate Commissioner and contended that even the

report shows that after the interim order was passed by the Trial Court, the Respondents demolished the superstructure.

13. The learned Senior Counsels appearing for the Respondents relied on the order dated 15.10.2009, made in Application No. 41 of 2009, of

the learned Arbitrator Justice.B.N. Srikrishna, to show that the learned Arbitrator found that the Petitioners are not in possession of the property.

Paragraph 7 of the order made thereunder is usefully extracted here under:

7. Having considered the arguments of both sides, the Tribunal is of the opinion that, even assuming all averments made in the Application to be

true, no relief can be granted to the Applicants in the absence of satisfactory material showing that the Applicants are in possession of the property.

Further, Ferani being the materially affected party, cannot be subjected to any order of this Tribunal as it is not a party to the arbitral proceedings;

nor can Ferani be made a party, because Ferani is not a party to the arbitration agreement.

However in the final conclusion of the order, it is said

All observations made in this Order are purely prima-facie, intended for disposal of the application and shall in no way prejudice the rights and

contentions of the parties in any other proceedings.

14. The question that arises for consideration now at this stage is whether the Petitioners are entitled to an interim order till the pendency of the suit

referred to above. Admittedly, an order of status quo was granted in O.S. No. 699 of 2009 by the learned Trial Judge in I.A. No. 549 of 2009 on

02.03.2010. Thereafter, the Respondent questioning the said order have filed C.M.A. No. 16 of 2010. As far as the injunction that has been

sought for in O.S. No. 747 of 2009 is concerned, it was dismissed by the learned Trial Judge by its order dated 13.04.2010. The Petitioners have

filed C.M.A. No. 23 of 2010 questioning the same.

15. It is the case of the Petitioners that after an interim order was granted by the Trial Court, the demolition work was carried out, thereby the

Petitioners have been illegally dispossessed. This fact is disputed by the other side. A person who takes law into his own hands and who violates

the orders passed by the Courts of law cannot be shown any sympathy. But, whether the Petitioners have been dispossessed illegally as contended

by them or whether they have abandoned the property as contended by the Respondents are matters that have to be considered on taking

evidence at the time of Trial. At the time of trial, both the parties can let in oral and documentary evidence to substantiate their respective case.

Any finding that will be rendered in these revisions, by this Court, will affect either the Petitioners or the Respondents. Only thing that has to be

considered is whether the Respondents has to be prevented from putting up construction. In such circumstances, two things have to be borne in

mind namely, whether prima-facie case is made out by the Petitioners and whether the balance of convenience is in favour of the Petitioners.

16. As far as the claim and counter claim made by the Petitioners as well as the Respondents, as stated already the same has to be decided at the

time of trial. As far as the balance of convenience is concerned, it has to be seen that in the event of the Respondents putting up construction in the

suit property, the Petitioners in the event of their success in the suit can be compensated either in terms of money or the Respondent can be

directed to put the Petitioners in possession of the property which is workable at that point of time. But, on the other hand, if the Respondents are

prevented from putting up the construction and later on if the suit is dismissed,

due to the escalation of prices in putting up the construction, the Respondents will suffer great hardship. Now, at this stage it cannot be inferred how long it will take for the disposal of the suit. Even, after the disposal of the suit, appeal and further appeal may be available for both the parties. Thus, atleast for a couple of years, the Respondents may not be in a position to put up the construction. If those aspects are taken into account, I am of the considered view that there need be no necessity for the Petitioners to have an interim order in their favour.

17. In this connection, the learned Senior counsels appearing for the Respondents relied on the judgment reported in, *Narendra Kante v.*

Anuradha Kante and Ors. (2010) 2 Supreme Court Cases 77 Paragraphs 28 and 29 of the said judgment are usefully extracted here under:

28. Now, coming to the question of balance of convenience and inconvenience and irreparable loss and injury, it has to be kept in mind that

Respondent 10 has already acquired rights in respect of the share of Respondents 8 and 9 to the suit property and in the event an interim order is

passed preventing development of the portion of the property acquired by him, he would suffer irreparable loss and injury since he would not be

able to utilize the property till the suit is disposed of, which could take several years at the original stage, and, thereafter, several more years at the

appellate stages.

29. The Appellant herein has been sufficiently protected by the order of the High Court impugned in this appeal. While Respondent 10 has been

permitted to carry out construction activities over the disputed land, he has been restrained from alienating or transferring the property or from

creating any third-party right therein during the pendency of the suit.

The above referred judgment makes it very clear that if an interim order is passed preventing development of the property, it will cause irreparable

loss and injury, since it would not be possible for him to utilize the property till the suit is disposed of which takes several years.

18. In *Colgate Palmolive (India) Limited v. Hindustan Lever Limited*, 1999 M.L.J., (Supp.) 8 (S.C), it was held thus:

The basic consideration in the matter of grant of interlocutory injunction is non-expression of opinion as to the merits of the matter by the Court

since the issue of grant of injunction, usually, is at the earliest possible stage so

far as the time frame is concerned. The other considerations which ought to weight the Court hearing the application or petition for grant of injunction are as below:

(i) extent of damages being an adequate remedy; (ii) protect the Plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the Defendant by reason thereof; (iii) The Court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others; (iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case the relief being kept flexible; (v) the issue to be looked from the point of view as to whether on refusal of the injunction, the Plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case; (vi) balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant, and (viii) whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise.

19. In *Multichannel (India) Limited v. Kavitalaya Productions*, (1998) 2 C.T.C. 689, a Division Bench of this Court held that the Court has to consider: (1) whether there is any disputed question to be tried in the suit; (2) whether the Court's interference is necessary to protect party from species of injury; (3) whether comparative hardship can be compensated by way of damages.

20. The above referred judgments will indicate that refusal of injunction, if could be compensated otherwise, and comparative hardship can be compensated by way of damages, interim order can be refused. In the case on hand, as stated already the Petitioners can be compensated in terms of money and also the Respondents can be directed to allot a portion of the property after construction. In fact, Mr. P.S. Raman, the learned Senior Counsel appearing for one of the Respondents submitted that the Petitioner may ask for allotment of a portion of the constructed area in the event of their success in the suit.

21. In fine, these revisions stands dismissed. However, the Court below is directed to dispose of the suits un-influenced by the orders passed by

the Court below as well as by this Court. That apart, the learned 1st Additional Subordinate Judge, Coimbatore is directed to dispose of both the suits viz., O.S. No. 699 of 2009 and O.S. No. 747 of 2009 at the earliest and in any event on or before 30.07.2011. Consequently, connected miscellaneous petitions are closed. However, no orders as to costs.