
(1974) 11 MAD CK 0012

In the Madras High Court

Case No : App. No's. 498 and 499 of 1970

Khivraj Chordia and Others

APPELLANT

Vs

Esso Standard Eastern Inc.

RESPONDENT

Date of Decision : 29-11-1974

Acts Referred:

Contract Act, 1872 — Section 29
Specific Relief Act, 1963 — Section 10

Citation : AIR 1975 Mad 374 : (1975) 88 LW 470 : (1975) 2 MLJ 65

Hon'ble Judges : Ratnavel Pandian, J; Ramaprasada Rao, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ramaprasada Rao, J.—The plaintiffs in O. S. No. 2434 of 1969 and the defendants in O. S. No. 98 of 1970 on the file of the City Civil

Court, Madras, are the appellants in both the appeals. The appellants shall be hereinafter referred to as Khivraj Chordia. The respondents in both

the appeals are Esso Standard Eastern Inc. hereinafter referred to as Esso. They were the defendants in O. S. 2484 of 1969 and the plaintiffs in

O. S. 98 of 1970, Khivraj filed a suit for recovery of vacant possession of the suit site from Esso on the foot that the period of lease granted to

them under Ex. A. 1, dated 16-1-1959, has expired by efflux of time and that Esso was no longer entitled either under law or by contract to

remain in possession of the suit site in the absence of a renewal of the lease as contemplated therein. The prior correspondence between the parties

such as Exs. A.2 to A.7, discloses the mind of Khivraj Chordia to obtain vacant possession of the site, which Esso resisted on the ground that

under the terms of the lease deed Ex, A.1 and in particular under Clause 3 (d) of

the same, they were entitled to be in possession of the same, and that they were not liable to be evicted. In answer to the suit for possession, Esso filed a replicatory suit O. S. 98 of 1970 seeking for specific performance of the contract to renew the lease under the terms of Ex. A.1 for a further period of 10 years commencing from 7-2-1969. Esso's main contention is that Clause 3 "(d)" of the lease reflects "certain" terms, which would compel Khivraj Chordia to cause a renewal of the lease in accordance with the tenor of the terms therein and the mere circumstance that Khivraj and Esso would not mutually agree of a just rent to be paid by Esso during the extended period of the lease sought to be demised would not compel them to surrender vacant possession, Thus, Khivraj Chordia's suit for eviction was countered by a suit for specific performance by Esso. These two suits were tried together and a common judgment was rendered by the court below, who framed the following issues for trial: O. S. 2434 of 1969:

1. Whether the plaintiffs are entitled to recover vacant possession of the suit property from the defendant?
2. Whether the plaintiffs are estopped from claiming possession of the demised premises except in accordance with the terms of the lease agreement dated 16-1-1959?
3. Whether Clause 3 (d) of the lease deed by and under which the option to renew is sought to be exercised is vague, inoperative and Unenforceable?
4. To what relief, if any, are the plaintiffs entitled?

O. S. No. 98 of 1970

1. Whether the clause for renewal in the lease deed is void and inoperative due to vagueness?
 2. Whether the defendants are liable to grant a renewal of the lease as claimed by the plaintiffs and if so what are the terms on which the renewal is to be granted?
 3. Whether the clause for renewal cannot be enforced for want of mutuality?
 4. What relief are the parties entitled to?
2. The learned Judge after interpreting the particular recital and covenant in Ex. A. 1, came to the conclusion that the suit for possession filed by

Khivraj Chordia deserved a dismissal and that therefore of the Esso for specific performance merited a decree. In the result, he dismissed O. S.

No. 2434 of 1969 and decree O. S. 98 of 1970, declaring that a rent of Rs. 2000 per month is the fair and reasonable rent, which in the

circumstances, Esso should pay to Khivraj Chordia and directed the latter to specifically perform the contract of lease by entering into lease with

Esso for a period of ten years commencing from 1-2-1969 in respect of the suit site and made it clear that the other terms and conditions, other

than Clause 3 (d) as contained in Ex. A. 1, should be incorporated in the new lease deed to be executed as between the parties. He decreed the

suit for specific performance with costs, but dismissed the suit for eviction without costs. As against this, the present two appeals have been filed.

3. A. S. No. 498 of 1970 is a regular appeal against the judgment and decree in O. S. 98 of 1970 and A. S. 499 of 1970 is the appeal against the

judgment and decree of the court below in O. S. 2434 of 1969.

4. Mr. V. Thiruvengkatachari, appearing for Khivraj Chordia, after referring to Clause 3 (d) or Ex. A. 1, which is the only clause, which has to be

interpreted in these appeals, contends that the covenant for renewal is conditioned by the fixation of a rent, which is to be mutually agreed to

between the parties having due regard to the rents prevailing in the same locality and that such a condition is an uncertain one within the meaning of

Section 29 of the Indian Contract Act and as all contracts, which are uncertain or whose terms cannot be made certain, are void in the eye of law,

the decree for specific performance asked for by Esso ought not to be granted and the relief for eviction prayed by Khivraj ought to have been

given by the court below. Mr. Dulipsing, appearing for Esso on the other hand, would say that Clause 3 (d) is not so very ambiguous or

ambulatory so as to make the covenant projected therein as an uncertain one or a condition which could not be made certain by exercise of a

reasonable mind to find out the real intention between the parties. According to him the clause as to fixation of rent provides the yardstick by which

a just rent could be agreed to between the parties and as the means to achieve that end is also contained in the said clause, it could be made

certain by an easy process and as Khivraj was avoiding the adoption of such an agreed process to arrive at the equitable rent, he was avoiding the

performance of the contract and that, therefore, the Esso's suit for specific performance has rightly been decreed.

5. It is in the light of the above respective contentions, the subject-matter has to be viewed and adjudicated upon.

6. It is not in dispute that on 16-1-1959 the Standard Vacuum Oil Co (the predecessors of Esso) entered into a lease deed with the Madras Club,

which was again the predecessor-in-interest of Khivraj Chordia, in so far as the suit property is concerned, where-under Esso was permitted to

occupy the suit property, which was a piece and parcel of land measuring about 150" x 100" on Mount Road, for a period of 10 years paying the

agreed rent of Rs, 1250 per month. Inter alia, the lease deed contained a clause for renewal of the lease. This Clause 3 (d) runs as follows:

That the leandlord will on the written request of the tenant made 2 calendar months before the expiry of the term hereby created and if there shall

not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the tenant hereinbefore contained

grant to it a lease of the demised premises for the further term of ten years from the expiration of the said term containing like covenants and

provisos as are herein contained and at a rent to be mutually agreed between the parties hereto due regard being paid to rents then prevailing in the

same locality,

7. While interpreting the tenor, text, intention and the meaning of this clause, controversies arose between the parties. It is fundamental that

notwithstanding the restrictions and qualifications imposed by operation of technical rules, a liberal construction of written documents is to be

made, because of: the simplicity of the laity, and with a view to carry out the intention of the parties, and uphold the document. It is also well

established that words used in written instruments ought to be made subservient, not contrary to the intention of the parties. Taking Ex. A.1 as a

whole and placing ourselves in the armchair of the respective parties at the time when the original lease deed was forged as between themselves, it

would not be difficult for us to cut through the cobweb of expression, and find the real intention between the parties. When the clause for renewal

was incorporated in the lease deed, the parties expected and agreed as between themselves that such a clause should ordinarily be given effect to.

If the *modus operandi* for achieving the ultimate result of renewing the lease is clear and explicit and if the working rule agreed to is capable of

being made certain and under the guidelines prescribed in the written instrument (in particular, under clause 3 (d) of Ex, A.1) substantial justice

could be advanced by implementing the true intent of the parties, then the courts ought not to be chary to avoid the instrument on one or the other

rule of technicality, As law and application of law is always understood as me dictate of reason and it cannot be wanting ip dispensing justice, it is

necessary, in such circumstances, to find the real import of the situation by the use of the prescribed yardstick under the contract itself and render

justice to the parties. The well-known maxim is *Aequum yet bonum est lex legum*, which means that which is equal and good is the law of laws. It

is in this framework of such well-accepted legal and equitable principles, the rights and liabilities of the parties in this litigation have to be adjudged.

8. Clause 3 (d) read in the context in which it appears *ex facie* reflects the clear and unequivocal mind of the parties that Khivraj should grant a

lease of the demise property for a period of ten years from the expiration of the first term under similar covenants and provisos contained therein

provided that Esso should make a request to that effect two calendar months before the expiry of the first term. Thereafter, conjunctively the most

disputed clause is introduced. The rent payable by Esso for the extended period shall be mutually agreed upon between the parties hereto, due

regard being had to rents then prevailing ip the same locality. The mandate which could be culled out from the last facet of the covenant is that the

parties shall mutually agree for the payment and acceptance of the rent, which rent has to be fixed with reference to the rents prevailing in the

locality. It cannot be said that the rents prevailing in the locality for similar properties cannot be found or deciphered. It cannot equally be said that

after such an enquiry into the reasonable rent. It would be impossible for the parries to agree upon that just resultant of that enquiry as the rent

payable by one to the other. If the covenant is attacked on the ground that it is uncertain, then it should be *ex facie* uncertain or it is incapable of

being made certain. As the measure to be adopted for the fixation of a rent is indicated in the special covenant under consideration then only

aspect, which would arise for consideration, would be, whether the said yardstick or measure is so very ambiguous, ambulatory and uncertain that

no possible result can be achieved by the adoption of such prescribed means as agreed to between the parties. It cannot be said in the instant case

that it would be impossible or difficult to the rent, which ultimately could be justly characterised as the fair rent payable by Esso after due adoption

of the means prescribed under the clause. As the legitimate adoption of the formula can lead to a just result, we are of the view that there is no

ambiguity in "Clause 3 (d) and, in any event, it cannot be said that the agreement between the parties cannot be made certain by invoking the

agreed process in the very clause.

9. Mr. V. K. Thiruvengkatachari. relying on Section 29 of the Indian Contract Act, which runs-

Agreements, the meaning of which is not certain, or capable of being made certain, are void.""

says that the covenant in Clause 3 (d) of Ex. A.1 is not capable of being made certain. After prefacing his argument that a resort to English law is

not justified for deciding question arising on an Indian statute, unless it is such that it cannot be reasonably understood without such assistance

(vide-- State of West Bengal Vs. B.K. Mondal and Sons, the learned counsel referred to the well-known maxim *id certum est quod certum reddi*

potest which means that is sufficiently certain which can be made certain and says that there is no sufficient hypothesis or guideline in Clause 3 (d)

of Ex. A, 1 to arrive at a certain rent, which is to be paid by Esso to Khivraj Chordia for the extended period. Strong reliance is placed upon the

decisions in Kovuru Kalappa Devara Vs. Kumar Krishna Mitter and Another, and Hitkarini Sabha Vs. Corporation of the City and Another, , and

Hemchandra Chowdry v. Ajudya Bala Chowdry AIR 1969 Guja 43.

10. In Kovuru Kalappa Devara Vs. Kumar Krishna Mitter and Another, , a Division Bench of our court, with reference to Section 29 of the

Contract Act interpreted the provision in an agreement "to pay a certain sum after deductions as would be agreed upon", The learned Judges held

that the expression "after deductions as would be agreed upon" rendered the document vague and that the claim was unenforceable because of

Section 29 of the Contract Act. That was a case where the agreement did not provide for the working method by which the deductions could be

agreed upon. The word "deductions" was left as vague as it could ever be. It was

in those circumstances. King J. speaking for the Bench, said that the court was not called upon to decide between conflicting claims put in by both sides as to the meaning of a document, since it was so vaguely expressed. In AIR 11361 M P 324, the clause which came up for consideration was in these terms. In that case the lease deed contained a covenant of renewal entitling the lessee for it "on such terms and conditions as may be agreed" The learned Judges interpreting the said clause held that the clause was uncertain and vague and cannot be the basis of a valid contract for renewal of the lease. In that very decision, the learned Judges expressed this as follows-

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.

Having referred to such a normal situation, the learned Judges observed that as all the terms and conditions under which the rent has to be fixed

have been left to the agreement of parties which may not take place at all they held that the clause for renewal was unenforceable because of its

uncertainty. Here again we find that there was no measure by which the parties intended to work out their respective rights and obligations but left

it to be arrived at on a future agreement which might or might not take place. That is not the case in the appeals under consideration. The decisions

cited by the learned counsel or the appellants obviously make a marked distinction between the line of cases where the parties fixed the measure

by which they could agree to a particular thing being done and which would be the sine qua non for the renewal of a lease and the other cases

where no such guidelines or hypotheses were fixed but such an agreement as to rent etc. for the extended period was left uncertain, besides being

vague. Only in the former cases and not in the latter it appears to us that Section 29 would be inapplicable. We have already made it clear that it

would be the duty of courts to interpret liberally written instruments with reference to the intention of parties and far from avoiding an instrument,

should attempt to further the intention of the parties by adopting the instrument and thus doing substantial justice between the parties.

11. Countering the above contentions, Mr. Dulip Singh stresses on the language of Section 29 of the Act and on the strength of decided cases,

urges that the clause under consideration is one, which could be worked to certainty and thus made certain and even if the process to reach the

end requires the aid of court for the its determination, it cannot be said that the renewal clause has to be ignored and held to be void on the ground

of uncertainty. He also rightly invited our attention to the fact that the suit for specific performance laid by him is the proper course to be adopted.

In fact, his contention is that the suit for specific performance, which was filed as an answer to the suit in ejectment, was only by way of abundant

caution and that he was entitled to raise such rights inhered in Esso as a defence in the suit for ejectment. He relied upon the observations of the

Punjab High Court in *Jairam v. Hanging* AIR 1907 P&H 159, with which we are in respectful agreement. The court said-

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 in a suit for ejectment in exercise of the same

right.

As, according to the learned counsel the rights projected under Clause 3 (d) of Ex, A. 1, are enforceable and are not to be ignored as void for

being uncertain, the suit for specific performance has been well laid. We agree with this contention. But the more important point is, whether the

covenants in the renewal clause are such that it could be made certain by the adoption of the working rule indicated therein.

12. In *New Beerbhoom Coal Co. v. Bularam Mahata* (1879) 7 Ind App 107= ILR (1860) Cal 932 the court was interpreting a clause, which is,

though not in pan materia, very similar to the clause in the instant case. There, the relevant portion of the clause read as follows-

If you take possession, according to your requirements, of extra land over and above this patta, we shall settle such land with you at a proper

rate, Thereat we shall make no objection,"

Interpreting this clause, their Lordships expressed the view-

They cannot think that in the present ease the court, upon a proper enquiry, would have been unable to determine it. There might have been

considerable difficulty in fixing the rate, but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the

amount of damages which a man has sustained under particular circumstances. These, are difficulties which the court is bound to overcome." This

case is an authority for the proposition that a contract to grant a patta at a proper rate was not void for uncertainty, as upon a proper enquiry, the

court would be in a position to determine what is a proper and reasonable rent.

13. In *Sree Sankarachariswamiar v. Varada Pillai* ILR (1904) Mad 332, there was a clause in a patta, which provided that in the event of the

tenant raising wet cultivation on dry land with Sircar water, he should pay increased rent according to the rent of the neighbouring wet lands. A

Division Bench of our court held that such a clause was not bad for indefiniteness. Subramania Ayyar J. speaking for the Bench expressed that in

such cases the courts had to decide the question as to what is fair and proper and said:--

And it is scarcely necessary to say that in determining objections founded on the alleged uncertainty of a term in a contract, the test to be applied

would be not whether the term is in itself certain but whether it is capable of being made certain. *Id certum est quod reddi cerium potest*.

14. *Secretary of State for India Vs. Volkar Brother*, is the nearest case on the point. In that case, a difference of opinion was expressed as

between Krishnan J. and Venkatasubba Rao J. and on a reference u/s 98 C. P. C. Couth Trotter C. J. agreed with Venkatasubba Rao J. and held

that the covenant for renewal in that ease was not uncertain. The relevant portion of the clause read: "'Upon such terms and conditions as shall be

judged reasonable'". Krishnan J, while recording his note of dissent with Venkatasubba Rao J. would observe-

No doubt where there is a term to pay a "reasonable rent or a "fair" or a "proper" rate or to hold on" usual terms and conditions the contract

could be made certain by taking evidence and it could therefore be enforced.

But, however, he was inclined to hold that the clause "'upon such terms and conditions as shall be judged reasonable'", was bad for unncertainty.

Venkatasubba Rao J., on the other hand, relying on the decision in ILR (1880) Cal 932, said that with a little effort on the part of the Court, the

bargain between the parties could be made certain. This view found favour with

Courts Trotter C. J. In the words of the learned Chief Justice ""if all that is left at large is something readily determinable on the materials afforded by the contract, then the court is not precluded from interfering because something is left open.

15. To a similar effect is the ratio in H. V. Rajan v. C. N. Gopal AIR 1961 Mys 29. The relevant clause there was that the lessees shall have the option of five years but subject only to such terms and conditions as may be mutually agreed upon. Hegde J, as he then was, spoke for the Bench and said that the courts will be reluctant to ignore that clause on the ground that it is vague unless on a reasonable construction no meaning can be attached to it. He went on to say-

Even if we agree with the plaintiff's contention that the renewal provided is dependent 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"".

He also relied on the dicta of the Privy Council in ILR (1880) Cal 932.

16. Finally, the Supreme Court in Damodhar Tukaram Mangalmurti and Others Vs. The State of Bombay, , considered a covenant in a renewal

clause reading "subject to such fair and equitable enhancement as lessor shall determine". Though prima facie the lessor had the option to

determine the rent, yet the Supreme Court after accepting the principles laid down by the Privy Council as above and of our Full Bench in

Secretary of State for India Vs. Volkart Brothers, held that the Court had jurisdiction in case of difference of opinion to fix what is fair and equitable

rent. In that connection, the Supreme Court said-

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,

The question then asked is--what meaning is to be given to the words "such as the lessor shall determine". It is indeed true that these words

constitute an adjectival clause to the expression ""fair and equitable enhancement", but we consider that the meaning of the adjectival clause is

merely this: the lessor must first determine what it considers to be fair and equitable enhancement; but if in fact it is not so, it is open to the lessee to

ask the court to determine what is fair and equitable enhancement. We do not think that on a proper construction of the clause, the intention was to

oust the jurisdiction of the court and make the determination of the enhancement by the lessor final and binding on the lessee.

It is, therefore, fairly clear that if a clause similar to the one provided in clause 3 of Ex. A.1, is provided by the parties as the effective condition

precedent for obtaining renewal, then it is but fair that such a clause ought not to be lightly brushed aside on the ground that the parties are

incapable of working out the result therefrom. We could take notice of the deep fluctuations in rent and in the value of building and building

materials as between 1959 and 1969. Owing to the just expectation of a rise in such rents or price or due to the normal economic fluctuations with

which such matters are intricately mixed up the parties provided for a clause for the fixation of rent on the basis of the prevailing" rent in the locality

at the end of the first period. This covenant is the result of prudence and reason and obviously provided for after noticing the economics of living.

Ita scriptum est is the first principle of interpretation of documents. But to this, a necessary corollary is always annexed with a rider compelling

parties or courts, if they are called upon to interpret an instrument, to bear in mind not only the script of the instrument, but also the sententia, that is

the intention of the parties, as inhered in the instrument itself. If this principle is borne in mind, then it is easy for us to decide what is the legal

content and effect of the renewal clause under consideration. That means that the parties should, in the first instance, examine the necessary data

relating to the prevailing rent in the locality and on such hypothesis mutually agree upon a fair or just rent. If in spite of the availability of such

material, the parties are unable to agree or violently differ in the matter of arriving at an agreed solution, then, it is clear from decided and very high

authorities that courts are not helpless to determine the rent on the basis of material produced by the parties and cut the Gordian knot. The arms of

court could be extended in such circumstances to solve the apparent difficulty or a created difficulty and determine matters. It is in this context that

the learned City Civil judge has so determined the fair, just and proper rent payable by Esso to Khivraj Chordia. The rate of rent of Rs. 2000 per

month as fixed by the court below as the fair and reasonable rent payable by Esso to Khivraj Chordia to obtain a renewal of the lease in respect of the suit site has not even been challenged before us.

17. In the above circumstances, the suit for specific performance has been rightly decreed and the suit in ejectment dismissed. The result is that both the appeals fail and they are dismissed, but in the peculiar circumstances of the case, there will be no order as to costs.