

**(2010) 02 MAD CK 0035**  
**In the Madras High Court**  
**Case No : C.S. No. 582 of 2006**

Lakshmi Subrahmanyam, Padmini Balagopal, Dr. Nanditha Krishna (rep. by their Power of Attorney holder Mr. A.T. Krishnakumar) and A.T. Krishnakumar APPELLANT

Vs

Indian Oil Corporation Ltd. and ICICI Bank RESPONDENT

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**Date of Decision :** 16-02-2010

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 80  
Madras City Tenants Protection Act, 1922 — Section 1, 1(3), 11, 12, 13  
Presidency Small Cause Courts Act, 1882 — Section 41  
Transfer of Property Act, 1882 — Section 113

**Citation :** (2010) 02 MAD CK 0035

**Hon'ble Judges :** G. Rajasuria, J

**Bench :** Single Bench

**Advocate :** K. Ramu, for the Appellant; T. Rajagopalan for Anand Abdul and Vinodh Associates for D1 and D2, for the Respondent

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## Judgement

G. Rajasuria, J.—This is a suit for obtaining delivery of vacant possession and for recovery of a sum of Rs. 24,00,000/- as damages for use

and occupation of the suit property and for other incidental reliefs.

2. Broadly but briefly, narratively but precisely, the case of the plaintiff as stood expositied from the plaint could be portrayed thus:

The immovable property described in the schedule of the plaint belongs to the plaintiffs and their propositus viz., C.R. Pattabhiraman leased it out

in favour of the defendants several decades ago and lastly, on 14.08.1985 the lease was renewed by stipulating that the lease shall be for 20 years.

The said original lessor C.R. Pattabhiraman died intestate on 19.06.2001 leaving behind the plaintiffs" as his only legal heirs. The defendants have

been operating a retail petrol out let in the suit property. As per the clause in the

said lease deed referred to supra, long before the expiry of the lease period of 20 years, the plaintiffs" by their letter dated 24.03.2004 expressed their desire not to renew the lease for another period of 20 years or for the extension of the lease period any further. They also issued one other notice. There were subsequent correspondences between them as the defendants expressed their desire to purchase the suit property; but that did not get fructified. Ultimately the plaintiffs" made their view amply clear that they were not willing for renewal of the lease and they wanted the possession of the suit property. The attempt on the part of the defendants to thrust the rents on the plaintiffs after the expiry of the lease period was resisted by the plaintiffs and at no point of time, they agreed to the continuance of the defendants" tenancy in the premises. Hence, the suit seeking the following reliefs:

for a direction (i) directing the defendants to quit and deliver peacefully vacant possession of the suit schedule described property to the plaintiffs;

(ii) directing the first defendant to pay past mesne profits towards damages for use and occupation in a sum of Rs. 24,00,000/- from the date of

the suit to the plaintiffs together with interest thereon at 18% p.a., (iii) directing the first defendant to pay future mesne profits of Rs. 2,00,000/- per

month or at such other rate as this Hon"ble Court may fix from the date of plaint till the date of delivery of vacant possession of the suit schedule

described property to the plaintiffs together with interest thereon at 18% p.a and (iv) for costs.

3. Per contra, refuting and remonstrating, impugning and gain saying the allegations/averments in the plaint, the defendants filed their written

statement, the gist and kernel of them would run thus:

The defendants have been paying the rent regularly without any default. Initially the lease period was for 10 years commencing from 27.03.1965

and lastly it was renewed as per the lease deed dated 14.08.1985 (registered document No. 769/1985) w.e.f 01.04.1985 for a period of 20

years, expiring by 31.03.2005 with the option for automatic renewal of the lease for a further period of 20 years. The defendants erected Petrol

and High Speed Diesel Oil Pump Retail Out let and constructed a building also on the said area, from out of the defendants" own funds. The

defendants requested the plaintiffs" to renew the lease for 20 more years as per

the terms and conditions contemplated in the said registered sale deed. However in utter disregard of the same, the plaintiffs" refused to renew the lease for 20 more years. The proposal to purchase the property did not get fructified because of the plaintiffs" conduct only. The plaintiffs" have not terminated the tenancy of the defendants, but they have chosen to describe the defendants as trespassers. The defendants are entitled to the benefits under the Madras City Tenants Protection Act (hereinafter referred to as "the Act"). The suit is not maintainable and as per Section 9 of the said Act, they are entitled to purchase the said property for the price to be fixed by this Court. The acts of the plaintiffs" initially in accepting the proposal of the defendants" for purchasing the property subsequent to the termination notice would constitute waiver of the termination notice by the plaintiffs" as per Section 113 of the Transfer of Property Act;

Accordingly, he prayed for the dismissal of the suit.

4. Based on the pleadings my learned predecessor framed the following issues:

1. Are not the plaintiffs entitled to the relief of recovery of possession of the suit property?
2. Are the plaintiffs estopped from seeking recovery of possession of suit property, in view of the offer, before suit?
3. Are the plaintiffs entitled to mesne profits as claimed in the suit?
4. Whether the termination notice dated 24.03.2004 is deemed to be waived u/s 113 of the Transfer of Property Act in view of subsequent act of the plaintiffs?

5. To what relief, are the parties, entitled?

5. The gist and kernel of the additional written statement filed by D1 and D2 would run thus:

Indian Oil Corporation Limited is a tenant in respect of the schedule property within the meaning of the Madras City Tenants Protection Act and it

is entitled to notice u/s 11 of the said Act, before the landlord filing any suit, but in this case, no such notice was given. In fact, the plaintiffs also has

not offered compensation for the building erected by the Indian Oil Corporation over the said property. Even if there is any clause in the agreement

contrary to the statutory provisions, such a clause can have no binding effect on

the parties.

Accordingly, the Indian Oil Corporation prays for dismissal of the suit.

6. The summation and summarisation of the averments in the reply statement filed by the plaintiffs would run thus:

The defendants are not entitled to any benefits under the Madras City Tenants' Protection Act for the reason that D1 and D2 have not been in

actual physical possession of the suit property ever since prior to 1985, but they had put M/s Kamadhenu Co-operative Society in physical

possession of the suit property. The third defendant is in physical possession of a small portion of 150sq.ft. in the suit property, by running their

ATM therein as a sub lessee of D1 and D2. The defendants have forfeited their right, if any, under the said Act by virtue of their conduct by

accepting the termination notice and in coming forward to purchase the suit property from the plaintiffs and that the plaintiffs refused to extend the

lease also. After issuance of notice terminating the lease in favour of the defendants, the plaintiffs did not accept any rent. However, the defendants

filed suit C.S. No. 45 of 2008 for specific performance for renewal of lease and that too after admitting the termination of lease. As such, the lease

got validly terminated by 31.03.2005.

The plaintiffs therefore pray for decreeing the suit as prayed for.

7. Based on the above, I framed the following additional issues:

(1) Whether the suit is bad for want of a statutory notice u/s 11 of the Madras City Tenants Protection Act by the plaintiffs in favour of the

defendants and in the absence of pleadings, whether this issue is capable of being framed legally and considered?

(2) Whether Ex.P2-the pre suit notice could be taken as statutory notice issued u/s 11 of the Madras City Tenants Protection Act?

(3) Whether the Kamadhenu Co-operative Society and the ICICI are in physical possession of the suit property and if so, whether the defendants

are entitled to the benefits of the Madras City Tenants' Protection Act?

8. Issue No. 4 and Additional issue Nos.1 to 3 are taken together for discussion, as they are inter linked and inter woven with one another.

9. Tour d'horizon of the learned Counsel for the plaintiffs, placing reliance on the pleadings and documents would run thus:

(a) The defendants 1 and 2 took on lease the suit property described in the schedule of the plaint from the ancestor of the plaintiffs several decades

ago and on 14.08.1985, the said lease was renewed for a period of twenty years. The said renewal as found set out in the plaint refers to a fresh

lease only for twenty years which got expired by 31.03.2005.

(b) The defendants 1 and 2 are not entitled to any protection under the Madras City Tenants Protection Act in view of the fact, that D1 and D2

are not in actual physical possession of the suit property, but the said Kamadhenu Co-operative Society is in actual physical possession of the suit

property and doing business in conducting retail petrol outlet and that in a portion of the suit property, D3 is running ATM as a sub-tenant of D1

and D2.

(c) The defendants 1 and 2 therefore cannot be termed as tenants within the meaning of Sub-section 4 of Section 2 of the Madras City Tenants

Protection Act and consequently, they are not entitled to any notice u/s 11 of the said Act and consequently, Section 9 of the Act has no

application. Alternatively, it can also be taken that the Ex.P2-Notice which was issued on 24th March 2004, even a year before the expiry of

twenty years lease period by 31.03.2005, as one issued u/s 11 of the Act. The lease deed also contains stipulation that the defendants 1 and 2

would remove the building put up by them without claiming any compensation.

Accordingly, the learned Counsel for the plaintiffs prays for decreeing the suit.

10. The summation and summarisation of the arguments as put forth by the learned Senior Counsel for the defendants 1 and 2 would run thus:

(a) The first defendant/Indian Oil Corporation being a tenant within the meaning of the said Act is entitled to the benefits contemplated under it.

(b) No notice u/s 11 of the Act was given offering compensation.

(c) There could be no estoppel against law.

(d) Admittedly, as per the plaint averments, the lease entered into several decades ago, continued without any interruption and there is no whisper

about fresh lease. The object of the Act is to confer benefits on the tenant who had put up structure on the land. In the event of the plaintiffs giving

proper Section 11 notice and filing a suit afresh, the tenant would file a proper application u/s 9 of the Act.

Accordingly, the learned Senior Counsel for the defendants 1 and 2 prayed for the dismissal of the suit.

11. Indubitably and indisputably, unarguably and unassailably, Ex.P1, the agreement dated 14th August 1985, emerged between the propositus of

the plaintiffs and the first defendant and that would highlight and spotlight the fact that for a period of twenty years the lease was agreed so as to

enable D1 to run a retail petrol outlet and Clause (j) of it runs as under:

(j) The lessees shall at the expiration or sooner determination of the said term yield up and deliver peaceful and vacant possession of the demised

premises and in the event of any installation, erection, alteration or substitution having been made thereon or underneath the surface restore the

same to their original state and condition in which the same has been demised. All buildings structures, installations fittings, fixtures and erections of

whatsoever kind and nature whether in, upon or underneath the demised premises shall during the said term and at the expiry thereof entirely

belong to and revert to the Lessees who shall be entitled to take away the same provided that the demised premises are restored in their original

state and condition and subject only to the lessor's lien over the erection for any amount due to the lessor by the lessees.

(emphasis supplied)

Provided always and IT is hereby agreed and declared that if the rent hereby reserved or any part thereof shall be in arrears for a period to three

months after becoming payable and after being demanded or if the lessee shall commit breach or foil or neglect to perform or observe any of the

covenants, conditions or agreements herein contained and on the part of the lessees to be observed and performed or if the Lessees shall go

into liquidation whether voluntarily or compulsorily then in any of the above cases it shall be lawful for the lessor at any time thereafter to re-enter

upon the said premises or any part thereof in the name of the whole and to take action to repossess and enjoy as in all their former estate and

interest provided always and IT is agreed and declared that the power of re-entry hereinbefore contained shall not be exercised unless and until the

lessor shall have given to the lessees a notice in writing of his intention to re-enter and of the specific breach or breaches of the covenants in respect

of which the re-entry is intended to be made and default shall have been made

by the lessees in remedying such breach or breaches within a reasonable time being however not less than three months after the giving of such notice provided always and IT is agreed and declared that at the expiration of the said term of 20 years this lease will be automatically and without any further act of any of the parties here to be renewed for a further term of 20 years from the expiration of the said term hereby granted unless the lessor or the lessees shall prior to the expiration of the last mentioned term give to the other party on calendar month's previous notice in writing of their intention not to take any renewed lease. The renewed lease will be on such terms as may be agreed upon then.

The said clause would highlight that the tenant agreed not to claim any compensation regarding the superstructure. It is an admitted fact that the landlords, viz., the plaintiffs, issued notice Ex.P2 dated 24th March 2004 calling upon the first defendant to vacate the premises by the end of 31.03.2005, so to say on the expiry of twenty years lease period. This notice, according to the learned Counsel for the plaintiffs even for argument

sake is taken that the said Act is applicable in favour of the first defendant, it would amount to a notice u/s 11 of the Madras City Tenants'

Protection Act; nonetheless it is not specifically mentioned therein, it is one u/s 11 of the Act. The learned Counsel also would submit that in view

of the fact that u/s 9 of the Act there is no application within one month from the date of receipt of the suit summons, the first defendant is having no

right to claim any right u/s 9 of it. However, the learned Counsel for the plaintiffs would make it clear that such an argument on the part of the

plaintiffs is only by way of alternis visibus and that the plaintiffs are not in any way accepting that D1 is entitled to any benefit or protection under

the Act.

12. It is therefore, just and necessary to analyse at the first instance, as to whether the Act is applicable in favour of the first defendant. For

determining the same, it has to be found out as to whether Ex.P1 could be termed as a fresh lease or continuation of the old lease.

13. The plaint averments in paragraph 3 would read thus:

The plaintiffs state that the suit schedule described property originally belonged to Late C.R. Pattabhiraman, father of the Plaintiffs 1 and 2 and

grand father of Plaintiffs 3 and 4. The said Late C.R. Pattabhiraman leased out

the Schedule described property to the defendants for several decades by means of lease deeds as such, the last of the lease deed executed by Late C.R. Pattabhiraman was dated 14.08.1985 for a period of 20 years upto 31.03.2005, in and by which the monthly lease rent was fixed initially at Rs. 4000/- pm., with periodic rise in rent and thus the first defendant was liable to pay a sum of Rs. 5,290/- pm., for a period of 10.04.2000 to 31.03.2005, ie., till the expiry of lease.

The learned Senior Counsel for D1 and D2, placing reliance on the aforesaid excerpt, would delineate and set forth that Ex.P1 did not create a fresh lease, but only a renewal of lease and there were also no variations in the terms and conditions of the lease.

14. However, the learned Counsel for the plaintiffs would submit thus:

(a) The nomenclature "renewal" or "fresh" does not matter, but the substance should be looked into.

(b) Whenever a fresh lease deed emerges, even if it is termed as renewal lease, it should be taken as commencement of a fresh lease as per law.

(c) Simply because D1 continued in possession as a tenant for a pretty long time even anterior to emerging of Ex.P1, it would not in any way enure

to the benefit of the plaintiffs to claim that he is a tenant under the said Act.

(d) In the wake of Ex.P1 dated 14.08.1985, the lease should be construed only as a fresh lease not attracting the provisions of the Madras City

Tenants Protection Act, because as per the Amendment Act (II of 1980) only lease or tenancy emerged anterior to the cut off date, ie.,

03.03.1980 alone can be taken as lease/tenancy covered by the said Act.

(e) As per the said Act, fresh tenancies commenced after the cut off date, ie. 03.03.1980 in the city of Madras within which the suit property is

situated, would not be covered by it.

(f) Here, Ex.P1 the fresh lease deed emerged on 14.08.1985, long after the cut of date and as such D1 is not entitled to claim any benefit under

the said Act.

15. Whereas, the learned Senior Counsel for the defendants 1 and 2 would submit that such a lease referred to under Ex.P1 cannot be termed as

fresh lease and it is only in continuation of the lease which emerged several decades anterior to the emergence of Ex.P1. At this juncture, it is just

and necessary to refer to the decisions emerged in this regard.

16. The learned Counsel for the plaintiffs cited the decisions of the Hon''ble Apex Court and other various High Courts. I would like to place

reliance on the Hon''ble Apex Court's decisions, among the bunch of decisions cited on the side of the plaintiffs, because the following two

Hon''ble Apex Court's judgments are squarely covering the point in issue.

(i) Delhi Development Authority Vs. Durga Chand Kaushish, , an excerpt from it would run thus:

7. If the plaintiff was not entitled initially to a lease of 90 years for the rent agreed upon but the rent was liable to be increased within that period, as

appeared to be the real case of the defendants in the High Court, there was no question of grant of a fresh lease. A renewal of a lease is really the

grant of a fresh lease. It is called a ""renewal"" simply because it postulates the existence of a prior lease which generally provides for renewals as of

right. In all other respects, it is really a fresh lease.

(ii) Hardesh Ores Pvt. Ltd. Vs. Hede and Company, , certain excerpts from it would run thus:

29. It was also urged relying upon the decision of this Court in Ambica Quarry Works v. State of Gujarat that the grant of renewal is a fresh grant

and must be consistent with law. The respondents relied on the decision of this Court in Provash Chandra Dalui v. Biswanath Banerjee wherein this

Court considered the difference between ""extension"" and ""renewal"" of a lease. This Court observed thus:

(SCC p.496 para 14)

14. It is pertinent to note that the word used is "extension" and not "renewal". To extend means to enlarge, expand, lengthen, prolong, to carry out

further than its original limit. Extension, according to Black's Law Dictionary, means enlargement of the main body; addition to something smaller

than that to which it is attached; to lengthen or prolong. Thus extension ordinarily implies the continued existence of something to be extended. The

distinction between "extension" and "renewal" is chiefly that in the case of renewal, a new lease is required, while in case of extension the same

lease continues in force during additional period by the performance of the stipulated act.

31. Having regard to these decisions we must hold that in order to give effect to

the renewal of a lease, a document has to be executed evidencing the renewal of the agreement or lease, as the case may be, and there is no concept of automatic renewal of lease by mere exercise of option by the lessee. It is, therefore, not possible to accept the submission urged on behalf of the appellant-plaintiffs that by mere exercise of option claiming renewal, the lease stood renewed automatically and there was no need for executing a document evidencing renewal of lease.

39. As notice earlier, the law is well settled that the renewal of an agreement or lease required execution of a document in accordance with law

evidencing the renewal. The grant of renewal is also a fresh grant.

A perusal of those judgments would unassailably and unarguably, highlight and spotlight the fact that once fresh lease deed emerges between the parties, it would amount to fresh commencement of lease.

17. The learned Counsel for the plaintiffs placing reliance on the decision of the Division Bench of this Court reported in 1937 MWN 1315

Ranganatham Chetty and Ors. v. M. Ethirajulu Naidu, which was confirmed by the decision of the Privy Council reported in The Indian Law

Reports 1940 page 172, would develop his argument that a fresh lease deed entered into between the landlord and the tenant incorporating the

increased rent would tantamount to fresh lease and such a lease cannot be taken as continuation of the earlier lease for the purpose of the Madras

City Tenants Protection Act.

18. The learned Senior Counsel for D1 and D2 would try to highlight that even though the said Privy council decision was followed by this Court,

the Hon"ble Judges subsequently distinguished the said decision on factual basis. A mere perusal of the decisions cited on the side of the

defendants 1 and 2 and certain excerpts from them extracted supra would highlight that the decision of the Privy Council was adhered to and over

and above that the decision of the Hon"ble Apex Court referred to supra by the plaintiffs leaves no doubt in the mind of the Court relating to the

fact as to what would constitute fresh lease.

19. However, on the side of D1 and D2, the learned Senior counsel cited the following decisions:

(i) Nayar Varada Pillai Vs. Ghulam Dastagir and Others, an excerpt from it would run thus:

The only point that has been made in appeal by the landlord is that this case falls within the principle of the decision of the Privy Council reported in

Ranganadham Chettiar v. Ethirajulu Naidu. It was held in that case that inspite of the physical continuity of tenancy, the execution of a particular

rent deed in 1923 in the Privy Council case which has no parallel in this case, and that is that the tenancy created by the lease of 1923 was at an

increased rate of rent from that payable previously. In the present case the rate of rent has remained the same both before and after the execution

of the lease deed in 1924. It seems to me that if there had been no difference in the terms of the two leases which were being considered by their

Lordships of the Privy Council, the decision would not have been with the first lease. There is no oral evidence in this case as to the precise terms

upon which the tenancy of the first defendant originated. We have the important fact that the rent was the same. The other terms of the tenancy

except those which the Act invalidates are of minor importance, and I think I may fairly presume that those terms suffered no change or

modification in 1924. It seems to me that if there is any question here of burden of proof it lies upon the plaintiff and not upon the first defendant. In

the natural meaning of the word, the first defendant's tenancy obviously began before the Act came into force, and it is upon the plaintiff, in my

opinion, that the burden lies to show that what occurred in 1924 was the creation of a new tenancy. He cannot merely show this by falling back

upon a decision of principle upon distinguishable facts. On these grounds I am of opinion that the learned City Civil Judge was right in dismissing

the plaintiff's suit.

In the result, the appeal fails and is dismissed with costs, one set.

(ii) 1961 (2) MLJ 107 A. Ganesa Mudaliar v. Chellammal, an excerpt from it would run thus:

From a reading of the decisions of King, J., in Nayar Varada Pillai v. Ghulam Dastagir and of Somasundaram J. in C.C.C.A. No. 107 of 1950 it is

clear that if the tenancy was on the same terms the tenant would have the benefit of the Act though a fresh lease deed was executed after the

commencement of the Act. If there are any variations, it will be a new tenancy and the tenant will not be entitled to the benefits of the Act. I

respectfully agree with the above two decisions. The Act confers the benefit on

tenants holding over at the commencement of Act. It could not have been the intention of the Legislature to exclude tenants who continue on the land on the same conditions after executing the fresh lease deed. In this case, as already observed, the statement of the tenant that he was continuing the tenancy on the same terms as before has not been challenged. The burden is on the landlord to prove that there has been a variation of the terms of the tenancy, but the landlord has not discharged that burden. In the circumstances, I hold that the tenant is entitled to the benefit of the Act. The petition is therefore allowed. No costs.

(iii) 1964 LW 522 S.A. Rahim v. B. Kanniah Prasad, an excerpt from it would run thus:

This application was contested by the landlord alleging that by reason of the increase in rent in June 1961, a fresh lease must be held to have come into existence on that date and that the Madras City Tenants Protection Act could not apply to such a case. But the respondent asserted that the old lease continued in force notwithstanding the increase of rent and as that lease was prior to the amendment of the Act, he was entitled to purchase the land. Both the Courts below have rejected the landlord's contention holding that the lease of the land was prior to the year 1955 and as the tenant had put up a building thereon he would be entitled to the benefit granted u/s 9 of the Act.

These cases only establish that the question whether an earlier lease had been superseded by a new one is a question of fact to be decided in all the circumstances of the case. The mere fact that the rent payable under the old lease had either been increased or reduced by consent of parties cannot necessarily imply that the original relationship of landlord and tenant had been put an end to and a fresh one established. It will be noticed that the Madras City Tenants Protection Act itself permits increase or reduction of rent and to apply to the Court for that purpose. It must be open to the parties even without going to Court to obtain an alteration in rent by agreement between the parties. The fact that by reason of such an agreement the original rent stipulated had been altered cannot necessarily mean that a fresh tenancy had come into existence between the parties.

The conclusion reached by the lower Courts that the lease of land in the instant case was prior to 1955 and that the building had been put up even

before that year is correct. The respondent will be entitled to buy the land.

(iv) 1968 LW 325 V. Natesa Naicker v. P. Arumugha Naicker, certain excerpts from it would run thus:

The Judicial Committee in affirming the decision of this Court observed at page 176 thus:

There Lordships are of opinion that latter part of the definition of ""Tenant"" in Section 2(4) refers to persons who without a tenancy title continue in possession after the termination of the tenancy, and that the benefit of the remaining sections including Section 12, on which the appellants sought to rely, cannot be of avail to the appellants unless and until they have shown that the tenancy here in question was created before the commencement of the Act within the meaning of Section 1(3).

Dealing with the argument that the lease of 1923 was merely a continuation of the earlier lease, there having been an earlier verbal agreement even before the expiry of the earlier lease for a fresh lease for ten years, their Lordships observed at page 177 thus:

But their Lordships are clearly of opinion that, though the physical possession was continuous, the possession from 1st October 1922 was attributable to a new tenancy, which was formally embodied in the lease, dated 1st February, 1923, the increased rent thereby provided having been paid by them from 1st October 1922, in terms of the verbal agreement for a lease. Their Lordships, accordingly, concur in the view of both the Courts below, that the tenancy here in question was not created before the commencement of the Act, and that the Act, does not apply.

No doubt, it look from the facts of the case set out by the Judicial Committee as if subsequent to the oral agreement, the then existing building had been demolished and fresh substantial superstructure erected in terms of the new agreement. A reading of the judgment shows that this has not in the least affected the decision in the case. Their Lordships emphasise the fact that the Act is applicable only to tenancies of lands created before the commencement of the Act and that there could be a fresh tenancy after the Act even if the possession was continuous. From the argument before the Judicial Committee set out in Ranganathan Chetti v. Ethirajuly Naidu (1), it is seen that the attention of their Lordships was drawn to the decision of Pandrang Row J. In Thayarammal v. Junus Chettiar (2), in support of

the proposition that the second lease affected the right of the tenant under the first and that was a contracting out of the Act, which was prohibited. After this decision of the Judicial Committee in unambiguous terms holding that the expression "tenant" in the several provisions of the Act, conferring right and benefits to the tenant refer only to the tenant as defined u/s 1(iii) and recognizing validity of the fresh contract of tenancy after the Act, by a tenant under the Act, the contention is no longer open that a fresh lease after the Act, should be considered as a contract falling u/s 12 to strike down terms therein taking away the benefits conferred on a tenant under the Act. It must be taken as settled law that to claim the benefits of the Act, the occupant when he makes the claim must be a tenant continuing in occupation under a tenancy created before the Act or holding over after the expiration of a tenancy created before the Act.

(v) Sri Agatheeswarar Prasanna Venkatesa Perumal Devasthanam Vs. M. Narasimhan, , an excerpt from it would run thus:

9. Thus the legal position is clear that Section 11 of the Act is mandatory and its non compliance will result in the dismissal of the suit but that the notice contemplated by Section 11 can be waived by the tenant little by express words or by implied conduct. That the tenant for whose benefit Section 11 had been introduced in the Act can waive the benefit of the section is clear not only from the decisions referred to above but also from the decision of the Privy Council in Vellayan Chettiar v. The Province of Madras, where while construing the scope of Section 80, Civil Procedure Code, which contains a similar prohibition the Privy Council held that suit cannot be instituted without following the provisions of Section 80 but the notice u/s 80 could be waived if the authority concerned thinks fit to do so as it is for his protection that the notice is required and if in a particular case he does not require that protection and says so he can lawfully waive his right and that there is no inconsistency between the proposition that the provisions of this section are mandatory and must be enforced by the Court and that they may be waived by the authority for whose benefit they are provided. The Court also observed that where the plaintiffs contend that the defendants have waived their right to the notice or alternatively, the estopped from saying that they did not, the burden lies on the plaintiffs to establish the facts upon which they rely for raising the

implication or creating the estoppel.

10. From the above discussion it is seen that Section 11 of the Act is mandatory and suit filed without the requisite notice u/s 11 is liable to be

dismissed but that the notice can be waived by the defendant either expressly or impliedly by his conduct and that the burden of proving that the

defendant has either expressly or by implication waived the said notice is on the plaintiff. The question is whether the defendant in this case by his

conduct in filing an application u/s 9 can be taken to have waived the notice u/s 11 so as to enable the plaintiff to maintain the suit notwithstanding

the non-compliance with the provisions of Section 11.

11. In *Vedachala Naicker v. Duraiswami Mudaliar*, it was held that the filing of an application by the tenant u/s 9 of the Act amounts to a waiver

by the tenant of the benefit conferred on him u/s 11. The said decision is based on the decision of the Privy Council in *Vellayan Chettiar v. The*

Government of Madras, which has already been referred to, laying down that the defect of non-compliance with the requirements of Section 80,

Civil Procedure Code, were eschewed by reason of the waiver of the notice by the defendant for whose benefit the section was enacted. In

*Natesa Naicker v. Vedagiri*, this Court held that the filing of an application u/s 9 by the tenant would itself amount to waiver of notice u/s 11.

Therefore the question is whether the filing of an application u/s 9 by the defendant in this case will amount to waiver of notice u/s 11. It is well-

established that waiver is a question of fact and ought to be pleaded and proved in every case. No doubt the filing of an application u/s 9 without

any demur as regards the non-compliance with Section 11 would amount to waiver of notice as the tenant's conduct in not raising the objection

relating to notice. Taking advantage of the filing of the suit by the plaintiff the filing of an application u/s 9 by the defendant would amount to a

conduct from which the waiver of notice can be inferred. But in this case the defendant has filed a written statement questioning the plaintiff's right

to institute the suit and the jurisdiction of the Court to entertain the suit without a proper notice u/s 11. He has filed an application u/s 9 by way of

abundant caution as he was not sure whether his objection regarding the maintainability of the suit based on the non-compliance with Section 11

will be accepted by the Court or not. In the written statement he has specifically

stated that he is filing an application u/s 9 by way of abundant caution. He has not given up his benefit u/s 11 in the written statement either impliedly or expressly but specifically prays that the suit be dismissed for non-compliance with Section 11. Therefore the filing of an application, in this case u/s 9 of the Act which is preceded by the filing of a written statement questioning the maintainability of the suit without a proper notice u/s 11. We have to therefore hold that in this case there has been no waiver of the benefit of Section 11 by the defendant at any time. In this view the ultimate decision of the lower appellate Court that there is no waiver of the notice u/s 11 by the defendant is accepted as correct.

(vi). 100 LW 1176 T.N. Noor Mohammed v. S.V. Govindarajan, an excerpt from it would run thus:

The Tamil Nadu City Tenants Protection Act, 1921 is a piece of legislation of socialistic nature. It is intended to protect the tenants. It gives them two substantial rights. One is the payment of compensation for ejectment as per Section 3 of the Act in respect of the value of any building or trees and any improvements which have been brought about in respect of any building erected, any tree planted or any improvement made by the tenant.

Another right even much more valuable, the right for the tenant to apply to the Court for an order that the landlord be directed to sell for a price to be fixed by the Court in whole or part of extent of the land specified in the application as per Section 9 of the Act, in order to enable the tenant to exercise such right Section 11 of the Act provides as follows:

No suit in ejectment or applications u/s 41 of the Presidency Small Causes Courts Act, 1882, shall be instituted or presented against a tenant until the expiration of three months next after notice in writing has been given to him requiring him to surrender possession of the land and building and offering to pay compensation for the building and trees, if any, and stating the amount thereof.

This provision of law is intended to put the tenant on notice about his rights u/s 3 as well as Section 9 of the Tamil Nadu City Tenants' Protection Act 1922. Further Section 13 of the Tamil Nadu City Tenants' Protection Act provides as follows:

In its application to the City of Madras and to any (Municipal town), (township) or village to which this Act is extended) the Transfer of Property

Act 1882 shall to the extent necessary to give effect to the provisions of this Act, be deemed to have been repealed or modified.

Therefore, in respect of all properties to which the Act applies no suit can be instituted on the basis of the provisions of the Transfer of Property

Act. On the contrary the suit should be instituted only after giving notice in writing as prescribed by Section 11 of the Act. This provision is a

mandatory one as it may be seen from the opening phrase of the Section 11 and the suit which has been instituted without complying with the

formality prescribed by that section is a nullity and, therefore, any decree passed in that suit is also a nullity.

(vii). 1998 (3) LW 369 Estate of M. Venktesa Sarma, Represented by Executrix Miss V. Rama Devi (Deceased) and V. Kousalaya v. A.N.

Rajalakshi And 9 Ors. an excerpt from it would run thus:

15. The first decision relied on by Mr. N.R. Chandran is the one reported in Rahmat Bi Saheba and Others Vs. R. Krishna Doss Lala, . In that

case, a single Judge of this Court held that in cases where the City Tenants Protection Act applied, notice u/s 11 was a condition precedent for

filing the suit, that notice to all joint tenants and their assignees was essential and that any defect could not be cured by impleading them as

defendants subsequently.

20. All the decisions referred to stood for the proposition that Section 11 notice was mandatory. All the decisions presuppose the existence of the

landlord-tenants relationship, which unfortunately is absent in the instant case.

The line of decisions would demonstrate and display, evince and expatiate that if there is mere enhancement of rent, it would not amount to a fresh

lease, but on the other hand, if there are changes in the terms and conditions it would amount to a fresh lease. The learned Senior counsel for D1

and D2 would point out that except Ex.P1, the latest lease deed, the earlier lease deeds have not been filed so as to point out that Ex.P1 contains

terms and conditions which are different from the terms and conditions contained in the earlier deed.

20. The learned Counsel for the plaintiffs would submit that indisputably and admittedly, enhancement of rent is contemplated in the fresh lease

deed, Ex.P1, and that the terms and conditions in the lease deed also would be to the effect that D1/tenant would vacate the premises after

removal of the building without claiming any compensation.

21. In my considered opinion, from the very fact of the lease deed, Ex.P1, emerged on 14.08.1985 containing enhanced rent and also the Clause

(j) therein as extracted supra, would oust the application of the Act. In a suit of this nature, when D1 being a public corporation and if really there

are no variations in the terms and conditions, it should have filed even the earlier lease deeds and pointed out that between the terms and conditions

in Ex.P1 and the terms and conditions in the earlier ones there are no variations, but that was not done so. However, in the wake of clear cut

decisions of the Hon'ble Apex Court reported in Delhi Development Authority Vs. Durga Chand Kaushish, and Hardesh Ores Pvt. Ltd. Vs. Hede

and Company, , that whenever there is a fresh lease deed, it should be taken as a fresh lease, irrespective of the nomenclature as "renewal", no

more elaboration in that aspect is required. As such, in this view of the matter, the lease as per Ex.P1 between the plaintiffs and D1, should be

taken as one which emerged subsequent to the cut off date, 03.03.1980 as contemplated in the amendment Act. Hence, D1 cannot be termed as a

tenant entitled to benefit under the said Act.

22. The learned Senior counsel for D1 and D2 would cite the decision of this Court reported in R. Chandramouleeswaran and Others Vs. P.

Vasudevan and Others, an excerpt from it would run thus:

15. The trial Court has decreed the suit. The first appellate Court made a reversal of the judgment, stating that in the instant case, Notice u/s 11 of

the Act should have been issued, which is a mandatory one and there was no waiver of notice by filing application u/s 9 of the Act. For that, the

learned Subordinate Judge followed the Bench decision, as referred to above. It is made clear that this Court cannot have any quarrel over the said

judgment. The only question is whether the said judgment could be applied to the present facts of the case and this Court is of the considered

opinion that it is highly difficult. When the question of application of the said judgment would arise, the first defendant has to show himself as a

tenant under the City Tenants Protection Act. If he is unable to show the same, no question of application of the decision would arise. In a given

case, where no notice is given u/s 11 of the City Tenants Protection Act, it is a well-settled proposition of law that even if application u/s 9 of the

Act, claiming benefit, has not been filed, the defendant can claim the benefit on legal positions that non-issuance of notice was fatal to the plaintiff's

case. But this is applicable to the case where the defendant is able to show himself as a tenant, as contemplated under the provisions of the City

Tenants Protection Act.

(emphasis supplied)

A mere perusal of the said judgment would clearly demonstrate that once D1 could not be termed as a tenant within the meaning of Act, the tenant

is not entitled to any benefits under the said Act.

23. The learned Senior Counsel for D1 and D2 would submit that the tenancy was not terminated as per the Madras City Tenants Protection Act

by issuing notice u/s 11. In view of the fact that the said Act itself is not applicable, the question of issuing notice u/s 11 of the Act does not arise

and the plea based on Section 9 of the Act is not tenable. However, for comprehensively deciding the matter, the other aspects of the case also

are discussed and decided as under:

As correctly pointed out by the learned Counsel for the plaintiffs, Ex.P2, the notice dated 24th March 2004 would unambiguously and clearly

highlight that nearly a year's notice was given by the plaintiffs to D1 and the defendants 1 and 2 cannot be heard to say that they are aggrieved by

the statutory notice. Even under the Transfer of Property Act, a year's notice given anterior to the date of termination would be taken as sufficient

notice. Without mincing words in Ex.P2, the plaintiffs issued notice calling upon the defendants to vacate the premises by the end of twenty year's

which expired by 31.03.2005.

24. The argument as put forth on the side of the plaintiffs is that D1 is not an ordinary Corporation, but it is one having intellectual wherewithal and

legal backings to know things in proper perspective and while so, such a Corporation with its wide open eyes agreed for the terms and conditions

in ExP1. By virtue of Clause (j) of Ex.P1, D1 clearly and categorically expatiated and made itself clear that it is not entitled to any benefit under the

Act.

25. I could see considerable force in the submission made by the learned Counsel for the plaintiffs. D1 being a Big Corporation would not have so

easily agreed for such a condition to vacate the premises without claiming any compensation, if really D1 was a tenant contemplated under the Act.

It is therefore clear that at the time of emergence of Ex.P1 itself, D1 had clear idea that it was not entitled to any benefit under the Act and had

there been any such intention on the part of the tenant, then such a clause would not have been got incorporated quite antithetical to the provisions of the Act.

26. By way of adding fuel to the fire, the facts would further speak as against D1 in view of the clear evidence available on record that D1 virtually

was not in actual physical possession of the suit property as on the date of emergence of Ex.P1, and one Kamadhenu Co-operative Society has

been running petrol outlet in the suit property. Exs.P17 to Ex.P26 are the receipts issued by Kamadhenu Co-operative Petrol Bunk in the process

of selling petrol by being in the suit property and that clearly display and evidence that D1 is not in actual physical possession of the suit property

so as to get any benefit under the Act. In fact, the third plaintiff examined herself as P.W.1 and after she having been recalled, those exhibits were

marked through her to prove convincingly that D1 has not been in physical possession of the suit property. The cross examination of P.W.1 in no

way enures to the benefit of the defendants so as to support their case. It is therefore clear that there is supine admission on the part of D1 that D1

is not in actual physical possession of the suit property. The oral evidence of D.W.1, the Senior Sales Manager of the first defendant in no way

torpedoes the case of the plaintiffs in any manner and it is quite obvious in view of my discussion supra. It is also an admitted fact that D3 is running

ATM in a portion of the suit property as a sub tenant. Hence, in these circumstances, none of the sections 3, 9 and 11 could be pressed into

service by the defendants 1 and 2 as against the plaintiffs for getting any benefits under the said Act.

27. At this juncture, it is just and proper to refer to the definition of "tenant" as found set out in Sub-section 4 of Section 2 of the Act, which is

extracted hereunder:

2(4) "Tenant" in relation to any land

(i) means a person liable to pay rent in respect of such land, under a tenancy agreement express or implied, and

(ii) includes --

(a) any such person as is referred to in Sub-clause

(i) who is continuous in possession of the land after the determination of the tenancy agreement.

(b) any person who was a tenant in respect of such land under a tenancy agreement to which this Act is applicable under Sub-section (3) of

section 1 and who or any of his predecessors in interest had erected any building on such land and who is continuous in actual physical possession of

such land and building, notwithstanding that

28. The unreported decision of the Hon'ble Apex Court rendered in Civil Appeal No(s). 5903 of 2006 etc. Bharat Petroleum Corporation Ltd. v.

Nirmala and Anr. is relied on by the learned Counsel for the plaintiffs, an excerpt from it would run thus:

7. As regards Sub-clause (b) of Section 2(4), we do not agree with the contention of Mr. Nariman. On a plain reading of Sub-clause (b) we

notice that it uses the words "actual physical possession". Had the word "possession" alone been used in Clause (b), as has been done in Clause

(a), the legal position may have been different. However, the words "actual physical possession" are strong and emphatic. That means that the

factual state of affairs has to be seen, not the legal or deemed state of affairs. There is no doubt that the appellant had handed over possession to

his licensee/agent who was in actual physical possession of the suit premises. When a Statute uses strong and emphatic words, we cannot twist or

give a strained interpretation to the said words. The literal rule of interpretation is the first rule of interpretation which means that if the meaning of a

Statute is plain and clear then it should not be given a twisted or strained meaning. We will be giving a strained and artificial interpretation to the

words "actual physical possession" if we say that the appellant is deemed to be in actual physical possession. We cannot give such an

interpretation to Sub-clause (b) of Section 2(4) of the Act particularly since Clause (a) only uses the words "possession" and not "actual physical

possession". Hence, we reject the contention of Mr. R.F. Nariman, learned Counsel appearing for the appellant and hold that the appellant was

not in actual physical possession.

29. The learned Counsel for the plaintiffs relied on the decision of the Hon'ble

Apex Court reported in S.R. Radhakrishnan and Others Vs.

Neelamegam, , certain excerpts from it would run thus:

8. Further it is settled law that one does not become a tenant by mere payment of rent even if that be so, simply because Defendants 2 and 3

continued to be in possession of the suit premises, it does not follow that they were in occupation thereof as tenants. They had no right whatsoever

with respect to the suit premises.

10. We have already quoted the relevant portion of Section 9. As noticed earlier, it is mandatory for an application u/s 9 that the applicant should

be a tenant in possession of the suit premises.

11. Whether Defendant I could maintain such an application? Defendant I was, admittedly, not in possession of the suit premises and he had also

ceased to be a tenant of the premises. Therefore, he had no right to file an application u/s 9 of the Act.

12. The learned Counsel for the appellants finally argued that the Tamil Nadu City Tenants Protection Act, 1921 is a socially beneficial piece of

legislation meant for protection of the interests of tenants and its provisions should be liberally construed so as to advance the object of the Act.

This should be liberally construed so as to advance the object of the Act. This argument in the context of facts on record is totally misconceived.

Liberal interpretation does not mean that benefit can be given contrary to the basis provisions of the Act or in violation of the statutory provision. It

has been pointed out above that the appellants did not satisfy the basic ingredients of Section 9 and therefore, they are not entitled to invoke the

said provision for their benefit.

13. As already noted, Section 9 read with Section 3 of the Act makes it imperative that the tenants should be in possession of the premises with

respect to which the right to purchase is sought to be exercised. If a tenant is not to hand over possession of the suit premises to the landlord at the

time of ejectment, there is no question of payment of any compensation to him u/s 3 of the Act. If he is not entitled to compensation u/s 3 of the

Act he cannot invoke Section 9 of the Act. Actual physical possession is essential in the context of relevant provisions of the Act. In fact in P.

Ananthakrishnan Nair v. Dr G. Ramakrishnan (though cited by the learned Counsel for the applicant) it was held by this Court that the premises

must be in personal occupation of the tenant before he could exercise the right u/s 9 of the Act. It was also observed by this Court that: (SCC pp.437-38, paras 10-11)

Section 9 confers an additional statutory right on a tenant against whom suit for ejectment is filed to exercise an option to purchase the demised

land through the medium of court on fulfillment of conditions specified therein. It is not an absolute right, as the court has discretion to grant or

refuse the relief for the purchase of the land. The tenant has not vested right in the property, instead it is a privilege granted to him by the statute

which is equitable in nature. The policy underlying Section 9 is directed to safeguard the eviction of those tenants who may have constructed

superstructure on the demised land, so that they may continue to occupy the same for the purposes of their residence or business.

From these observations it follows that actual physical possession of the demised premises of the tenant is the sine qua non of an application u/s 9.

In P. Ananthakrishnan case as per concurrent findings of fact on record the tenant had discontinued his business in the suit premises and only a

small portion thereof had been retained by him for keeping the account books etc. of the erstwhile business. Rest of the land and the superstructure

standing thereon had been in occupation of the sub-tenants since long. Thus the tenant was not in actual occupation of most part of the demised

premises. Therefore, it was held that it would be unreasonable to direct the landlord to sell the land to the tenants.

14. Our attention was invited to various decisions of the Madras High Court taking the same view i.e. Actual physical possession of the demised

premises is essential to maintain an application u/s 9 of the Act.

It is therefore crystal clear that D1 cannot be termed as one continuing in actual physical possession of the suit property and correspondingly, D1 is

not entitled to any benefit under the Act. Even for argument sake it is taken that the said Act is applicable in this case relating to R1, the Hon''ble

Apex Court also made it clear, that once the lessee/agent or dealer of D1 is in possession of the property, the possession of D1 cannot be taken as

one that of actual physical possession of the property and correspondingly, such alleged deemed or constructive possession cannot be taken as

actual physical possession within the meaning of Sub-section 4 of Section 2 of

the said Act.

30. Exs.P8 and P13, the copy of the letters sent by P.W.3 to the plaintiffs would clearly evince that D1 and D2 were directed not to pay rent after

the termination of tenancy. At no point of time after issuance of the termination notice the plaintiffs are proven to have received any rent from the

defendants and as such, it will not lie in the mouth of D1 and D2 to contend that the termination notice was waived by the plaintiffs. Even the

subsequent correspondences relating to proposed sale of the suit property by the plaintiffs in favour of the defendants as evinced by Exs.P3 to P13

would no way support the contention of the defendants that there was waiver of termination notice within the meaning of Section 113 of the

Transfer of Property Act.

31. What the Court could understand from those correspondences is that the plaintiffs did not waive the termination notice Ex.P2, as even in

Ex.P13, the Court could come across the fact that such correspondences were without prejudice to the right of the plaintiffs to evict the

defendants.

32. Accordingly, Issue No. 4 is decided to the effect that the termination notice Ex.P2, dated 24th March 2004 cannot be taken as one waived

within the meaning of Section 113 of the Transfer of Property Act.

(ii) Additional Issue No. 1 is decided to the effect that the suit is not bad for want of a statutory notice u/s 11 of the Madras City Tenants

Protection Act, in view of the finding that D1 is not at all to be treated as a tenant as per the provisions of the said Act.

(iii) Additional Issue No. 2 is decided to the effect that even alternatively Ex.P2 notice could be taken as one issued u/s 11 of the Act.

(iv) Additional Issue No. 3 is decided to the effect that Kamadhenu Co-operative Society and the ICICI are in actual physical possession of the

suit property and not D1 and hence, even on that ground D1 is not entitled to any compensation and also any benefit under the Act.

(v) In view of the my discussion supra, Issue Nos.1 and 5 are decided to the effect that the plaintiffs are entitled for recovery of vacant possession

of the suit property free from structure from the defendants and it is open for D1 and D2 to remove the superstructure and take it.

Issue No. 3:

33. The prayer (b) in paragraph No. 15 of the plaint would be by way of claiming Rs. 24,00,000/- (Rupees twenty four lakhs only) obviously

quantifying the past mesne profits with 18% interest which accrued during 01.04.2005 to 31.03.2006.

34. I have to point out that while adducing evidence, P.W.1 has simply averred that the defendants have to pay a sum of rupees two lakhs per

month towards future mesne profits and towards past mesne profits the defendants have to pay totally a sum of Rs. 24,00,000/- In the chief

examination affidavit also, at paragraph Nos.16, 17 and 19, averments are found set out relating to the value of the suit property and also the

potential rent which would fetch etc.

35. In paragraph 16 of the chief examination affidavit of P.W.1, the damages for use and occupation from 01.04.2005 till 31.03.2006 was

quantified in a sum of Rs. 18,00,000/- (Rupees eighteen lakhs only) at the rate of Rs. 1,50,000/- (Rupees one lakh fifty thousand only) per month.

However, the defendants disputed the same during cross examination of P.W.1. Among the documents which were marked during trial, nothing

has been brought to the knowledge of this Court to highlight as to how this Court could grant towards past mesne profits a sum of Rs. 18,00,000/-

(Rupees eighteen lakhs only) as claimed in the chief examination of P.W.1 or Rs. 24,00,000/- (Rupees twenty four lakhs only) as claimed in the

plaint. Unless there is clinching evidence, this Court cannot quantify the past damages for use and occupation of the premises and award either Rs.

24,00,000/- or past mesne profits of Rs. 18,00,000/-.

36. No doubt, as revealed by Ex.P13, the defendant was depositing only a meagre sum of Rs. 5,290/- per month allegedly in the Indian Bank,

Eldams Road, Chennai. The plaintiffs did not accept it, but one fact is clear that as per Ex.P1, the lease deed, the rent payable lastly as per the said

deed was only Rs. 5,290/- per month. From 01.04.2005 till the date of filing of the suit, i.e. 24.04.2006, this Court, in the absence of evidence

could award damages for use and occupation only at the same rate on par with the rent previously paid per month and I would like to make it clear

that regarding the future damages for use and occupation is concerned, the plaintiffs are at liberty to file necessary application and adduce evidence

so as to get quantified the quantum payable by the defendants to the plaintiffs.

Accordingly, Issue No. 3 is decided.

37. In view of the discussions supra, Issue No. 2 is decided to the effect that the plaintiffs are not estopped from seeking recovery of possession in

view of the fact that they had correspondences for sale earlier with D1 and D2.

38. In result, the suit is decreed as under with costs:

(i) The plaintiffs are entitled to recover vacant possession of the suit property and the defendants are directed to hand over vacant possession of

the suit property after removal of the superstructures thereon.

(ii) The defendants 1 and 2 are directed to pay jointly and severally the sum of Rs. 5,290/- (Rupees five thousand two hundred and ninety only)

per month from 01.04.2005 till 24.04.2006 towards past damages for use and occupation of the suit property.

(iii) The defendants are also directed to pay jointly and severally the cost of the suit in favour of the plaintiffs.

(iv) The plaintiffs are at liberty to file a separate application to get quantified the quantum of future damages for use and occupation payable by the

defendants to the plaintiffs from the date of suit till the date of delivery of possession of the suit property.