

(1988) 06 MAD CK 0009
In the Madras High Court

M. Suryaprakasha Gupta

APPELLANT

Vs

T.S. Muthuswami Iyer and Others

RESPONDENT

Date of Decision : 20-06-1988

Acts Referred:

Citation : (1988) 2 LW 462 : (1989) 1 MLJ 141

Hon'ble Judges : Mohan, J

Bench : Division Bench

Judgement

Mohan, J.—The plaintiff is the appellant before us. The appeal arises out of O.S.135 of 1974 preferred by him on the original side of this Court. In the plaint as originally filed two prayers were asked for. viz. (i) for an injunction restraining defendants 1, 3 and 4 from selling or dealing with the suit property to the second defendant or his nominee or to any other person except after giving the plaintiff the first option to purchase the same, and (ii) for a specific performance to direct the defendants 1, 3 and 4 to execute and register a pucca lease deed in terms of the agreement to lease dated 21st August, 1970, fixing up rent subject to a maximum increase of Rs. 100 p.m. Though originally the plaintiff prayed for reliefs against defendants 1 and 2, later on an amendment was sought that the prayers might be granted against defendants 3 and 4 as well.

2. Shortly stated, the case of the plaintiff boils down to this. The suit property was leased by the first defendant to the plaintiff. The lease was for establishing a hotel under a lease deed dated 11th March, 1956. Thereafter, the plaintiff obtained sanction from the proper authority for construction of the building and an open-air theatre for making the premises into a first class hotel. On 3rd December, 1961, a lease deed was executed by the first defendant in favour of the plaintiff. For the purpose of running the restaurant and lodging house, the plaintiff incurred heavy expenditure in this regard amounting to Rs. 1,00,000. He took one Mr. Patel in his business, which was run under the name and style of "States Hotel". Since there were difficulties in running the business, there was a stipulation in favour of the second defendant on 13th July, 1970 for a period of

37 months with an option to renew for a period of 11 months. The stipulation came to an end by 15th August, 1974.

3. An agreement was entered into on 21st August, 1970 under Ex.P5 between the plaintiff and the first defendant. Under the terms of the said agreement, the payment of rent was graduated as follows-

From 1-8-1970... Rs. 1750 p.m. From 1-8-1971... Rs. 1850 p.m. From 1-8-1972... Rs. 1950 p.m. From 1-8-1973... Rs. 2050 p.m.

For the period beyond that date, the rent was to be fixed by agreement as per Clause 12 of the lease deed. Therefore, when the plaintiff approached the first defendant for execution of a document of lease for a period beyond 1-8-1974, he was delaying the matter unsuccessfully, and ultimately, he agreed to sell the same, though there was a partition in the family of the first defendant. This offer to purchase the property was given to the plaintiff orally. On 2nd June, 1974 the plaintiff wrote to the first defendant for calling upon the first defendant to execute the lease deed. That was not done. On the same day, the second defendant was called upon to surrender the sub-lease. He also failed to comply with this request. On the contrary, he wanted to by-pass the plaintiff and purchase the property direct from the first defendant. It is under these circumstances, the suit had come to be filed originally for the above reliefs.

4. The amendment became necessary because a partition was said to have taken place between defendants 1,3 and 4, which, according to the plaintiff, would not affect his rights, and consequently the reliefs prayed for originally should be made available as against the other defendants, viz., defendants 3 and 4 as well.

5. The first defendant, in his written statement, contended that the alleged agreement dated 11th March, 1956 was only a licence and that it was not a lease. Contrary to the agreement between the parties, the plaintiff had put up structures, which resulted in certain litigations between the parties. As a matter of fact, the plaintiff fell into arrears which necessitated certain rent control proceedings to be taken against the plaintiff. They resulted in eviction. That was ultimately compromised. But inspite of it, he fell into arrears, so much so it became necessary to terminate the tenancy in H.R.C. No. 1957 of 1970. Pending eviction, the plaintiff allowed one Gupta to demolish the suit property and put up construction. Plaintiff also objected the first defendant sub-letting the premises, and it was under these circumstances, the plaintiff and the first defendant entered into an agreement on 21st August, 1970. It is true upto 1st August, 1974, the plaintiff could remain on the property as lessee but beyond 1st August, 1974, he could not claim the benefit of lease because no rent was further fixed between the parties. Clause 12 of the agreement is vague and therefore, the agreement is not enforceable by means of specific performance. Besides the alleged right to preemption to purchase the property was only oral and the same is denied. In any event, inasmuch as the partition has taken place, in the family of the first defendant, the plaintiff will not be entitled to any relief.

6. Defendants 3 and 4 also filed similar written statements.

7. The second defendant trying to support his sub-lease stated that on 11th June, 1974, he agreed to purchase the suit property from defendants 1,3 and 4. Therefore, his rights cannot be affected, by means of the suit. It is incorrect to urge that there was any collusion between the second defendant on the one hand and the other defendants on the other. His agreement for sale was bona fide. He had no knowledge of the agreement between the plaintiff and the first defendant with regard to the execution of lease or option to purchase the property. The suit was liable to be dismissed.

8. On the above pleadings, the following issues were framed for trial:

(1) Is the alleged oral agreement to give the plaintiff the first option to purchase the property true, valid and binding on any or all of the defendants?

(2) Whether the execution of lease for an indefinite period is contemplated by the agreement to lease dated 21-8-1970 as alleged by the plaintiff?

(3)(a) Is the alleged agreement by the first defendant to execute and register a pucca lease deed for an indefinite period true, valid and binding on the defendants?

(b) Is the plaintiff entitled to specific performance of the agreement?

(4) Whether the first defendant had any authority to enter into the agreements alleged, if true, on behalf of the defendants 3 and 4?

(5) To what relief, if any, is the plaintiff, entitled?

9. The learned Judge, Balasubramanyam, J., on issue No. 1 came to the conclusion that the oral agreement to purchase the property was untrue. On issues Nos. 2 and 3, the learned Judge concluded that Clause 12 of the agreement was vague and therefore, the agreement was void for uncertainty and consequently the plaintiff would not be entitled for specific performance. On issue No. 4, he found the agreement was not enforceable. In the result, the suit was dismissed. Hence the appeal.

10. Before us, Mr. M. Raghavan, learned Counsel for the plaintiff-appellant would give up the right to purchase the property forming subject matter of issue No. 1, and he concentrates only on the relief of specific performance. According to him, it is incorrect to have held that merely because Ex.P5 has not been registered, it is unenforceable in law.

11. The finding of the learned Judge that because no rent has been fixed under Ex.P5, and therefore, it is not enforceable in a court of law again cannot be supported. It is well open to the court to fix the rent where parties have not agreed to. The authorities stated in this regard are *Deer v. Bowden*, (1981) 1 All.E.R. 1070 and then again *Brown v. Gould* (1971) All.E.R. 1506. As a matter of fact, a Division Bench of this Court in *Khivraj Chordia and Others Vs. Esso*

Standard Eastern Inc., . has taken the view that with regard to specific performance of a lease where the rent was to be fixed by mutual agreement, the court could fix the reasonable or the fair rent.

12. Mr. V.R. Bhiksheswaran, learned Counsel for one of the respondents, in opposition to this, urges that having regard to the ruling in *United Plantation and Industries v. Tata Tea Ltd.* (1985) T.N.L.J. 135. this is not a case which the rent alone has remained to be fixed. As a matter of fact, the duration and the terms of the lease have to be fixed. All these cannot be brought about unless there was consensus ad idem between the parties and the Court cannot take the role of one party or the other and bring about a contract. He also cites *Damodhar Tukaram Mangalmurti and Others Vs. The State of Bombay*, . and relies on the passage occurring at page 642. What exactly is required to be found out in each case is the intention of the parties. If there was intention of the parties to oust the jurisdiction of the Court, then matters are to be decided by mutual agreement. The Court cannot interfere. On the contrary, if the matter is left to an arbitrator for decision as to what should be the reasonable or fair rent, then, of course, it will be well open to the Court to fix the reasonable rent.

13. The learned Advocate General appearing for respondents 5 to 9, refers to paragraph 4 of the affidavit and urges that this is a case in which the plaintiff has suffered an order of eviction for nonpayment of rent u/s 11(4) of the Madras Buildings (Lease and Rent Control) Act. In these circumstances, irrespective of the enforceability of the leases, he is liable to be non-suited.

14. In reply to this contention Mr. Raghavan, learned Counsel for the plaintiff would rely on (sic) AIR 1952 S.C.1440 1965 S.C.440, and then say that the order u/s 11(4) of the Madras Buildings (Lease and Rent Control) Act would not amount to eviction of the tenant.

15. Having regard to the above, three questions are required to be decided by us. (1) Whether the suit agreement fails for want of registration? (2) Whether Ex.P.5 agreement is vague and uncertain and thereby becomes unenforceable? and (3) What is the effect of partition in the family of the first defendant?

16. No doubt Ex.P.5, has not been registered, and the learned Judge in summing up his finding has come to the conclusion that having regard to the reliefs claimed for specific performance of the contract of lease under Ex.P.5, he cannot avail of such relief in view of want of registration of the lease under Ex.P5. We are afraid that this finding cannot be supported. Section 49 of the Registration Act and its proviso lays down in no uncertain terms as follows-

49. No document required by Section 47 (or by any provision of Transfer of Property Act 1882) to be registered shall

(a) affect any immovable property comprised therein or

(b) Confer any power to adopt; or

(c) be received as evidence of any transaction affecting such property or conferring such power. Unless it has been registered;

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 to be registered may be received as evidence of a contract in a suit for a specific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of part performance of a contract for the purpose of Section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument)

Therefore, though the document requires registration, having regard to the terms of the proviso, it could well be the foundation for the relief in favour of the plaintiff. Therefore, the first of the questions is answered in favour of the appellant-plaintiff.

17. Coming to the second one, we find Clause (i) of Ex.P5 of the agreement reads as follows:

The tenant shall pay a rent of Rs. 1,750 p.m. from 1st August 1970, a rent of Rs. 1,850 p.m. from 1st August, 1971 a sum of Rs. 1,950 p.m. from 1st August, 1972 and a sum of Rs. 2050 p.m. from 1st August, 1973 for the premises No. 61, Kutcheri Road, Madras-4, in his occupation. The rent for the period later than 1st August, 1974, shall be paid by agreement.

Therefore crucially this clause shows that the rent for the period later than 1st August, 1974 shall be paid by agreement. Clause 12 again states that the tenant agrees to execute a formal lease deed containing the above terms and conditions later. Therefore, one thing is certain. Prior to 1-8-1974, the rent was graduated as Rs. 1750 p.m., from 1-8-1970 and this goes upto Rs. 2050 from 1-8-1973. But the crucial question is after 1-8-1974, what is the position? Undoubtedly, the rent, is pointed out by the learned Judge, himself, is one of the essential elements of a lease, and where therefore, it is left open, can the Courts interpose itself and then fix the rent between the parties? The argument of Mr. Raghavan is that the failure to fix the rent between the parties would not stand in the way of plaintiff-appellant obtaining a decree for specific performance, because the quantum of rent alone remains to be fixed, and with regard to the other terms, there is no uncertainty. On a fair construction of the various terms of Ex.P5, we are of the view that the question of rent for the suit period viz, beyond 1-8-1974, was clearly a subject matter of the agreement between the parties. Equally we are of the view that the rent was not to be fixed, as the rent was to be fixed by mutual agreement and it was not to be left open to be decided by any third party or even by the court. In this connection, it is worthwhile stating that no court can ever bring about a contract between the parties, which agreement, the parties themselves have not contemplated. As rightly urged by the respondents, it is by reason of the consensus ad idem between the parties, the agreement is capable of enforcement in a Court of law by way of specific performance. However,

reliance is placed on *Deer v. Bowden* (1981) 1 All.E.R. 1970. A careful reading of the case clearly shows that this was not a case for specific performance, but for fixation of rent between the parties. We extract the following.

Since there was a subsisting lease and it was conceded that some rent was payable in default of agreement, the court could, despite the absence of an arbitration clause, imply a term to fill the gap in the lease where there was no agreement on the new rent, in order to give business efficacy to the lease, and, since the parties clearly intended that a fair rent should be fixed by agreement on the rent reviews, the court would imply a term that in the absence of agreement the rent payable during the second five years should be fair market rent excluding the tenant's improvements.

The next case relied on by Mr. Raghavan is *Brown v. Could and Ors.* (1971) 2 All.E.R. 1505. That was a case of lease and an option for renewal at a rent to be fixed having regard to the market value of the premises at the time of exercising option. Under these circumstances, the question was whether there was no machinery for fixing rent, and whether the lease deed was void. It was held:

The option was valid and enforceable for the following reasons-(i) unless driven to it, the court was reluctant to hold void for uncertainty any provision that was intended to have legal effect, in the present case, it was accepted that the opinion was intended to have business efficacy.

(ii) although it was not open to parties to make an agreement conferring on the court a jurisdiction which it would otherwise face, the court was not precluded, in the absence of other machinery agreed on by the parties for the purpose from resolving a dispute as to the rent to be made payable under a lease if the parties disagreed as to the quantum resulting from the application of a proper formula to the facts of the case.

(iii) although the words of the clause could have been more precise, it had not been shown that it was void for uncertainty in either of the two main ways in which this Court could be done; the clause could not be said to be devoid of any meaning nor had it been demonstrated that there was a wide variety of meanings which could fairly be put on the provision so that it was impossible to say which of them was intended; the question was not whether the clause was proof against wilful misinterpretation; it was sufficient that some one generally seeking to discover its meaning was able to do so.

Here again, it is easily distinguishable because at the time of option the rent is to be fixed in accordance with the market value of the premises. But that is not the case here. The rent is to be fixed here by agreement.

18. Now we come to *Varadarajulu Naidu Vs. Revenue Divisional Officer, Tirukoilur*, . A Division Bench consisting of Ramaprasada Rao, J (as he then was) and Ratnavel Pandian, J. (as he then was), held-

The lease in question was renewable on the same terms and conditions with the

reservation that the rent was "to be mutually agreed between the parties hereto, due regard being paid to the rents then prevailing in the same locality. It was disputed whether the agreement was specifically enforceable or it was void u/s 29 of the Contract Act, the rent clause being vague;

Held: that the mandate of the covenant is that the parties shall mutually agree for the payment and acceptance of the rent which has to be fixed with reference to the rent prevailing in the locality. It cannot be said that such rent cannot be found or it would be impossible for the parties to agree upon the just rent so found.

In determining objections founded on the alleged uncertainty of a term in a contract the test is not whether the term is in itself certain but whether it is capable of being made certain. *Id certum est quod teddi certum protest* (That is sufficiency certain which can be made certain).

The renewal clause in the present lease means that the parties should examine the date relating to the prevailing rent and agree upon a fair rent. If the parties are unable to agree or violently differ, then the court would determine the matter.

Therefore, here again, the renewal clause was very different than what is contemplated in Clause 1 of Ex.P5. As rightly urged by Mr. Bhiksheswaran, learned Counsel for the respondents, this is not a case of rent alone which remains to be fixed. How long is that a period of lease; what are the terms of the lease are vague and indefinite. In *Damodhar Tukaram Mangalmurti and Others Vs. The State of Bombay*, their Lordships of the Supreme Court held as follows:

We think that the clause should be read as a whole and every effort should be made to give effect to all the words used therein. The relevant portion of the clause states-"such fair and equitable enhancement as the lessor shall determine." If the construction is that whatever the lessor determines as fair and equitable enhancement must be treated as binding on the lessee, then the words "fair and equitable" are not given the meaning and sense which they have according to the ordinary acceptance of these words. "Fair" and equitable" mean fair and equitable in fact, and not what the lessor subjectively considered to be fair and equitable. The words "fair" and equitable" both mean "just or unbiased" (See the Concise Oxford dictionary 4th Edn.p.426 and 402). If the intention was to leave the enhancement to the subjective determination of the lessor (emphasis supplied by us) 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 word "such...as the lessor shall determine." It is indeed true that these words constitute an adjective clause is merely this: the lessor must first determine what it considered to be fair and equitable enhancement; but if in fact it is not so, it 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. We think that the conclusion at which Mudholkar, J. arrived on this point was correct, though not exactly for the reasons given by him.

Therefore, if the intention was to leave the enhancement to the subjective determination of the parties, how can the court interpose itself? Certainly not. That exactly is the position.

19. We will now turn our attention to the argument advanced on behalf of the respondents 5 to 9. In paragraph 4 of the plaint in C.S. No. 619 of 1988, is stated by the present appellant-plaintiff that an order of eviction was passed pursuant to the order dated 3-9-1979 in the said Section 11(4) application. Then again, paragraph 6 reads as follows:

The plaintiff submits that when the O.S.A. No. 16 of 1979 was posted before this Honourable Court, the respondents in the appeal namely Muthuswami Iyer and others undertook before this Honourable Court not to execute the order of eviction passed in H.R.C. No. 1093 of 1979 until disposal of O.S.A. No. 16 of 1979. The plaintiff submits that as on date the O.S.A. is still pending on the file of the High Court of Madras and the undertaking given by the then landlords is still valid and binding and is in force till date.

Therefore, the plaintiff has suffered an order of eviction. u/s 11(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act, the power of the Rent Controller has been delineated as under:

11. Payment or deposit of rent during the pendency of proceedings for eviction

(1)... (2)... (3)...

4. If any tenant fails to pay or deposit the rent as aforesaid, the Controller or the Appellate Authority as the case may be, shall unless the tenant shows sufficient cause to the contrary, to stop all further proceedings and make an order directing the tenant to put the landlord in possession of the building.

Such a right of the landlord being put in possession is not found in the Delhi Rent Control Act. That makes a distinction as to render V.N. Vasudeva Vs. Seth Kirorimal Luhariwala, in applicable to the facts of this case. That again is an added hurdle to be put against the plaintiff.

20. Thus, we answer this question that not only because of Ex.P5 are vague and uncertain, but also because of the order of the Rent Controller u/s 11(4) of the Act which came to be ultimately concluded by this Court by Ratnam, J., in Suryaprakasa Gupta v. Muthuswami Iyer and Ors., C.R.P. No. 7600 1981, the appellant-plaintiff will not be entitled to specific performance.

21. Turning to question No. 3, undoubtedly the learned Judge has pointed out, on 4-7-1974, when the plaint came to be filed, the cause title described the first defendant as T.S. Muthuswami Iyer. The words "for himself and managing

member of the family consisting of himself and his sons" had been scored out. Equally there are several scorings in paragraph 2 and paragraph 3. Therefore, the plaintiff was aware that the first defendant was not representing the family. If therefore, there was a partition, which partition is concluded by the learned Judge on appreciation of evidence since even on 18-5-1974, the first defendant informed the plaintiff that there was a complete partition which was subject matter of conversation as mentioned in Ex.P8, it is well nigh impossible for the plaintiff to deny the partition. Again when those persons are not parties, no specific relief can be asked for and the partition in the family of the first defendant would put an end to the right of the plaintiff even if he had any.

22. For all these reasons, we find no difficulty in upholding the dismissal of the suit. Accordingly, we dismiss the appeal. However, since the appellant was allowed to sue as an indigent person, we make no order as to costs. The Court fee payable on the memorandum of appeal shall be paid by the appellant.