(1993) 04 KL CK 0006

In the High Court Of Kerala

Case No : S.A. No. 399 of 1990

Mohammed Kunju Isha Beevi — APPELLANT

Vs

Elayakunju Shahul Hameed — RESPONDENT

Date of Decision : 05-04-1993

Acts Referred:

Evidence Act, 1872 — Section 91
Registration Act, 1908 — Section 17, 2(6), 2(7), 49
Transfer of Property Act, 1882 — Section 106, 107, 116, 53A

Citation : (1993) 04 KL CK 0006

Hon'ble Judges : K. Narayana Kurup, J;K. John Mathew, J

Bench : Division Bench

Advocate : T.P. Kunjuvareed, P.T. Joseph and Mathew G. Vadakkel, for the Appellant; P. Sukumaran Nair and Paravoor B. Suresh Kumar, for the Respondent

Final Decision : Allowed

Judgement

K. John Mathew, J.—Plaintiffs are the Appellants. The suit was for recovery of possession with arrears of rent. According to the Plaintiffs plaint A schedule building belonging to them was leased out to the Defendant on 8.10.1982 on a monthly rent of Rs. 150/- as per Ext. A1 agreement. Plaint B Schedule movables belong to the Defendant. As per Ext. A1 agreement Plaintiffs agreed to purchase B schedule movables for a consideration of Rs. 9,610/-. On Ext. A1 date the Defendant paid Rs. 9,000/- to the Plaintiffs as security for the rent arrangement. After the period of lease the Plaintiffs were ready and willing to repay the advance and purchase B schedule movables on paying the sale consideration. The Defendant did not agree to execute the sale deed in respect of plaint B schedule movables. He was also not willing to surrender vacant possession of A schedule building. Rent was paid only upto 12-9-1985. Due to the damages caused by the Defendant to plaint A schedule building the Plaintiffs have sustained a loss of Rs. 2,000/-. Plaintiffs caused to send Ext. A2 lawyer''s notice dated 8-10-1985 terminating the tenancy. Subsequently the suit was filed.

2. Defendant contended that his father Elayakunju had taken plaint A schedule building on rent from the original owner in 1957. He was conducting, business in the building. B schedule movables were purchased by him for conducting tea-shop in the building. In 1982 when Defendant''s father was laid up Defendant and his brother were conducting the business on his behalf. In October, 1982 Plaintiffs demanded to enhance the rent and to pay a sum of Rs. 10,000/- as advance. They also compelled the Defendant to execute a rent deed in their favour. Since the Defendant was not amenable to this, Plaintiff''s husband and their supporters trespassed into the building and finally they forced the Defendant to sign Ext. A1 agreement. They have also received Rs. 9,000/- from the Defendant. By Ext. A1 no new tenancy was created. Defendant did not agree to sell the plaint B schedule movables. Defendant was forced to execute Ext. A1 as he was put to fear. Defendant''s father was in possession of the building till his death on 21-8-1984. He was paying the enhanced rent also. After the death of Defendant''s father his right in A&B schedule items devolved on all of his legal representatives including the Defendant. Defendant and his brother have been conducting the business for and on behalf of themselves and the other legal representatives. Suit is bad for non-joinder of necessary parties. Ext. A1 agreement is invalid and unenforceable. Defendant has paid rent up to 12th September, 1985. Thereafter Plaintiffs refused to receive the rent. After receiving the notice certain mediators intervened and the Defendant and other agreed to enhance the rent to Rs. 175/- per month.

3. Exts. A1 to A 4 series were produced on behalf of the Plaintiffs. Second was examined as P.W.1. Another witness was examined as P.W.2. The Defendant produced Exts. B1 to 615. Defendant was examined as P.W.1. Another witness was examined as D.W.2. The trial court held that Ext.A1 was a genuine document and that the Defendant alone is the tenant of plaint A schedule building. The trial court further held that the Plaintiffs are not entitled to the relief of specific performance regarding the sale of plaint B schedule movables. The court further held that rent was in arrears from 13-9-1985 onwards. Recovery of arrears of rent on that basis was also allowed. Accordingly the suit was decreed in part and the Plaintiffs were allowed to recover plaint A schedule building on repayment. Rs. 9,000/- paid to them as security. Plaintiffs were also allowed to recover arrears of rent at rate of Rs. 150/- per month.

4. In the appeal filed by the Defendant the learned Additional District Judge held that Ext. A.1 was not admissible in evidence since it was an unregistered document. Plaintiffs had not challenged the decree of the trial court refusing specific performance of the agreement for sale of plaint B schedule items. The Appellate Court allowed the appeal and dismissed the suit. The Second Appeal is directed against the said judgment and decree.

5. Our learned brother Chettur Sankaran Nair, J. by his order dated 15th June, 1992 referred the Second Appeal to a Bench of two Judges. Accordingly the appeal is now before us.

6. In the nature of the contentions the following points arise for consideration: (1) Whether the finding of the Appellate Court that Ext. A1 can be used only for proving the nature of the transaction and since there is no pleading and evidence to prove the terms and commencement of the prior tenancy the suit is liable to be dismissed, is correct. (2) What is the order to the passed?

7. Point Nos. (1) & (2): Learned Counsel for the Plaintiffs-Appellants submitted that a reading of Ext. A1 along with the evidence of P.W.2 will show that Ext. A1 was only an agreement pursuant to a settlement and not a lease deed. Learned Counsel pointed out that the nomenclature of the documents shows that it is only an agreement and not a lease deed. In clause 15 of Ext. A1 it is specifically stated that as per the agreement arrived at between the parties through the intervention of the mediators 5 copies of this agreement were prepared, out of which one copy was to be kept by the Plaintiffs, one copy by the Defendant and one copy each by the three mediators who have also signed in the document as mediators. P.W. 2 is one of the alleged mediators. He gave evidence to the effect that he along with two others mediated in the dispute between the Plaintiffs and the Defendant, as a result of which Ext. A1 agreement was entered into. All the three mediators kept one copy each of Ext. A.1. Before signing Ext. A1 the document was read aloud in the presence of Plaintiffs and Defendant. The contention that Ext. A1 is only an agreement arrived at by the mediation of P.W. 2, and others and not a lease deed requiring registration, was not urged in the trial court or in the first appeal. That may be because the Defendant did not put forward any contention in his written statement or at the evidence stage that Ext. A1 was inadmissible in evidence due to its non-registration. That contention appears to have been urged only at the time of arguments before the trial court. According to the learned Counsel for the Plaintiffs that was the reason why this contention was not raised till now. Under the circumstances of this case, we are of the view that the Plaintiffs cannot be permitted to urge this contention at this stage.

8. The suit was for eviction from plaint A schedule property which consists of three shop rooms and a verandah. The arrangement between the parties is governed by the provisions in Ext. A1, according to the averments in the plaint. Plaintiffs'' father was the original owner of this property. In 1950 he let it out to the Defendant''s father under an oral lease. After the Plaintiffs'' father''s death the three Plaintiffs became the owners of the property and they were collecting the rent. Defendant''s father had two wives. The Defendant is the only son through the first wife. As per Ext.A1 the monthly rent was Rs. 150/-. Defendant''s father became an invalid in 1982 January and died on 21.8.1984. Plaintiffs case is that Defendant''s father orally assigned his right over the property to the Defendant and even during Defendant''s father''s life time the Defendant was exclusively conducting the tea-shop business (Shini Hotel) in plaint A Schedule property. According to the Plaintiffs they wanted a record for this oral arrangement and they approached P. W.2. and two other mediators. On their Mediation it was agreed that Defendant will continue as the tenant on a

monthly rent of Rs. 150/-. As per the agreement the Defendant paid Rs. 9,000/- as advance. A period of two years was fixed for the tenancy, after which on demand the Defendant was to surrender the property. It was also agreed that the Plaintiffs will purchase the furniture and other utensils in the building for Rs. 9,610/-. All of the furniture and utensils was appended to Ext.A.1. Ext. A.1 dated 8-10-1982 was executed incorporating these terms. It may be observed that on Ext.A1 date Defendant''s father was alive. He died only in 1984. The Defendant was paying the rent up to 12-9-1985 viz. for about three years after Ext. A1. The lease was terminated by Ext. A2 notice and the suit was filed on 21.11.1985.

9. The Defendant contended that Ext. A1 agreement was executed by exerting force on the Defendant. Defendant has signed on all pages of Ext. A1. He has also written his name before signing on the first page and last but one page. Defendant had paid Rs. 9,000/- to the Plaintiffs as advance on Ext. A1 date. Defendant admits that the rate of rent mentioned in Ext.A1 is correct. These circumstances show that the Defendant voluntarily executed Ext.A1. over and above this the evidence of P.W.2 that EXt.A1 was signed under ;the mediation of himself and two others and that he and other mediators were given a copy each of Ext. A1 support this view. The trial court held that Ext.A1 is genuine document. It would appear that in the appeal the genuineness of Ext. A1 was not challenged. In the nature of the evidence adduced in this case, we hold that Ext. A1 is a genuine document.

10. Then the question is whether the document was compulsorily registrable. Learned Counsel for the Plaintiffs submitted that Ext. A1 only spells out an earlier oral arrangement of lease and therefore, it is not compulsorily registrable. Since this contention was not raised before the trial court or in appeal, we are of the view that the Plaintiffs are not entitled to raise such a ground in this Second Appeal. In that view it is not necessary to discuss the following authorities relied on by the learned Counsel for the Plaintiffs. Kashinathsa Yamosa Kabadi, etc. Vs. Narsingsa Bhaskarsa Kabadi, etc., , Kale and Others Vs. Deputy Director of Consolidation and Others, , Sultan Singh v. Ratan Singh AIR 1983 All. 66 & Ashok Kapur (HUF) v. I.T.O., New Delhi (1985) 18 T.L.R. 307 (Del. Trib).

11. u/s 17 (d) of the Registration Act Ext. A1 is compulsorily registrable since it is a lease agreement for a period exceeding one year. A lease agreement is also included in the definition of lease contained in Section 2 (7) of the Registration Act. u/s 2 (6) land and building are also included in the definition of immovable property. No doubt, Ext.A1 contains two parts viz. A lease agreement as well as an agreement to purchase the furniture and utensils in the plaint schedule room. The agreement to purchase the movables does not require registration. However, the lease agreement in respect of immovable property for a period exceeding one year was compulsorily registrable.

12. Therefore, the effect of non-registration of Ext. A.1 requires to be considered Section 49 of the Registration Act is as follows:

49. No document required by Section 17 or by any provision of the Transfer of Property Act 1882, to be registered shall-

(a) affect any immoveable 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 immoveable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a suit for specific performance under Chap. II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.

Under Clause (a) of Section 49 a document which is required to be registered shall not affect any immoveable property comprised therein unless it had been registered. The word ''affect'' takes in all transactions which may produce an effect upon or produce a material influence upon immoveable property. See in this connection Saraswatamma v. Paddayya AIR 1923, Mad. 297. Reading Section 17 of the Registration Act and Section 91 of the Evidence Act along with Section 49 of the Registration the word ''affect'' will have to be taken as expressing the meaning ''purporting'' or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest vested or contingent," It is well settled that even though an agreement could not create any such right for the reason that the agreement was unregistered, it can be admitted and taken as evidence of collateral facts or purposes like character of possession. (See Rana Vidya Bhusham Singh and Anr. v. Rati Ram (1969) 1 SCWR 341)

13. According to the learned Counsel for the Plaintiffs, since the Defendant paid rent after the execution of Ext. A1, a relationship of landlord and tenant came into existence and the lease from month to month and to be inferred. This contention seems to be correct in view of the following dictum of the Supreme Court in Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, ;

14. The Privy Council in Arif v. Jadunath (1931) 58 Ind. App. 91 (PC) in terms held that if an indenture of lease is compulsorily registrable u/s 107 of the Transfer of Property Act, such a lease can only be made by a registered instrument and if not so made, is void altogether. However, if from such a person in possession under a void lease the landlord accepts rent as held in Ram Kumar Das''s case, an inference of tenancy would follow. Mulla in Transfer of Property Act, 6th Edn., at p. 680 had observed that an oral agreement accompanied by delivery of possession, if for more than one year is valid, by delivery of possession, for the first year, and thereafter the lessee continuing in possession

with the assent of the lessor becomes a tenant by holding over u/s 116 of the Transfer of Property Act. Such a lease being created by operation of law is binding even though the provisions of Section 107 have not been complied with. It is also noted at p. 681 that though an unregistered lease is void as a permanent lease, it can be deemed to be a monthly lease terminable by 15 days'' notice.

Although such contention was not specifically taken in the lower counts, since the construction of a document is a pure question of law, it can be taken in this Second Appeal. See M. Kesava Gounder v. D.C. Rajan AIR 1976 Mad. 102.

14. An unregistered document will not avail to create, declare, assign, limit or extinguish any right, title or interest in or to the immoveable property comprised in the document. Therefore, u/s 49 (a) of the Registration Act such a document will be ineffectual to achieve the purpose for which it was brought into being. Section 49 (c) prohibits the reception of such a document as evidence of any transaction affecting the immovable property comprised in it. However, Section 49 (c) does not prohibit the reception of any other evidence of the transaction. u/s 91 of the Evidence Act, no evidence shall be given in proof of the terms of such a contract when the terms of the contract have been reduced to the form of a document, except the document itself or secondary evidence is admissible under the provisions of the Evidence Act. Thus if the unregistered document is not to be relied upon and if the terms of the disposition of the property embodied in that document are not sought to be proved by other evidence, the bar of Section 49 (c) of the Registration Act and Section 91 of the Evidence Act will not apply. Only oral evidence in proof of the terms of the contract is prohibited u/s 91 of the Evidence Act. The existence as a fact of the contract is not prohibited. See in this connection Kanamathareddi Kanna Reddy Vs. Kanamatha Reddy Venkata Reddy, & N. Seetharamaih v. N. Ramakrishnaih are clear. See also Venkatagiri Zamindar v. Raghava ILR (9) 1886 Mad. 142 & Gangayya and Another Vs. S. Mandan Chand Samdaria and Others, .

15. In the written statement the Defendant has admitted the payment of Rs. 9000/- to the Plaintiffs. It is also admitted that the rate of rent was Rs. 150/- per month. The only contention was that Ext. A1 was executed by threatening the Defendant and that all the legal representatives of deceased Elayakunju inherited his leasehold right. It is also admitted that the Defendant paid rent to the Plaintiffs at the rate of Rs. 150/- up to 1.2-9-1985. As D.W.1 the Defendant admitted the rate of rent as well as the payment of rent up to 12-9-1985. Therefore, the date which the rent was defaulted is also not in dispute.

16. In K.C. Lttop & sons v. Antony 1986 KLT 567 the question that was considered was whether an unregistered rent deed can be relied on to establish the relationship existing between the parties. In that case this Court held that no lease can come into existence on the strength of that unregistered lease deed. However, it was further held that independent of that unregistered document the person in possession can lead evidence which may justify an inference of tenancy

from month to month and that it is a question of fact to be decided on the materials available. We do not think that the said judgment will be of any assistance to the Defendant. See also Ram Kumar Das Vs. Jagadish Chandra Deb Dhabal Deb and Another, , Hitkarini Sabha, Jabalpur Vs. The Corporation of the City of Jabalpur and Others, & Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, .

17. Thus as held in Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, even though Ext. A1 is a void lease that Defendant who is in possession under that void lease paid rent and the landlords accepted the rent upto 12-9-1985. On the reasoning in the said case we hold that the Defendant became a tenant by holding over u/s 116 of the Transfer of Property Act even though the provisions of Section 107 of the T.P. Act have not been complied with and that it can be deemed to be a monthly lease terminable by 15 days notice. .

18. The further contention on behalf of the Defendant is that there is no valid termination of the lease. According to the learned Counsel the date of commencement of the lease is not proved and therefore; Ext.A2 notice will not amount to a valid termination of the lease. In this connection reliance was placed on Madhvan Vydiar v. Janaki 1973 KLT 490 & Niranjan Pal and Another Vs. Chaitanyalal Ghosh and Another, we have already held that Ext. A1 will not create a lease and no right will flow from that document. However, we have held that a month tenancy has to be deemed to have come into existence.

19. Admittedly the Defendant received Ext.A2 notice. In The Calcutta Credit Corporation Ltd., and Another Vs. Happy Homes (P) Ltd., the Supreme Court held that the party serving the notice will be estopped from denying the validity of defective notice u/s 106 of the T.P. Act. In Mulla''s T.P. Act, 7th Edn. 671 the learned author after referring to the Calcutta Credit Corporation case, observed as follows:

It is submitted that the same principle would apply if the recipient of the notice having accepted and acted upon a defective not ice seeks to contend that it is invalid provided, of course, that the party serving the notice can show that he has acted upon such notice and materially altered his position to his prejudice.

In para. 13 of the written statement the Defendant contended that on receipt of the notice certain mediators intervened and on their mediation rent was increased to Rs. 175/- per month. It was for that reason that no reply was sent to Ext.A2 notice.

Even from the statements in the written statement it is clear that the Defendant took some action pursuant to Ext.A2 notice which means that the Defendant acted upon the notice. See in this connection Gur Prasad v. Hansraj AIR (33) 1946 Oudh 144, where it was held that a lessee holding under unregistered rent deed is merely a tenant at will and no notice is necessary to determine tenancy.

20. It may also be observed that the Plaintiffs'' case is that the plaint schedule

building was leased out to the Defendant on a monthly rental of Rs. 150/- on 8-10-1982 and that the period of tenancy was 2 years. It was also alleged that there was an agreement between the Plaintiffs and the Defendant that the Defendant shall surrender vacant possession of the building within one year after the expiry of the aforesaid term of two years. Ext.A2 notice was sent on 8-10-1985 terminating tenancy on 8-11-1985. We have already found that the Defendant was a monthly tenant under the Plaintiffs. The term of two years expired on 8-10-1984. That being so, the notice evidenced by Ext.A2 cannot be said to be invalid, as it was sent after the expiry of the term of the tenancy. So also the notice is not invalid since the tenancy was terminated by the end of the month of tenancy providing more than 15 clear days for vacating the plaint schedule building as envisaged u/s 106 of the T.P. Act. Therefore, even on merits the contention that the notice is invalid has to be rejected.

21. We confirm the finding of the trial court that the notice to quit is valid.

22. Then the only remaining question is whether all the legal representatives of the Defendant''s father ought to have been impleaded in the suit. Although Ext. A1 is inadmissible in proving the creation of a lease arrangement between the Plaintiffs and the Defendant, it can be considered to prove the jural relationship between the Plaintiffs and the Defendant. Ext.A1 was executed during the lifetime of Defendant''s father. From the circumstance it is highly probable that Defendant''s father had transferred his rights in the business and in the building to the. Defendant. The circumstance that profession tax and licence fee for the business were continued to be paid in the name of Defendant''s father, will only show that the Defendant did not take steps to effect change of the names in the registers of the local authority and continued to pay the tax in the name of his father. We have already found that Ext. A1 is not bad on account of threat or coercion alleged to have been exerted by the Plaintiffs on the Defendant. Ext.A2 notice sent on behalf of the Plaintiffs to the Defendant was not replied by him. In case he had a case that the leasehold right vested in all the legal representatives of his deceased father, it was only probable that he would have informed the Plaintiffs about that by sending a reply. The names of the other legal heirs would also have been informed to the Plaintiffs. Even in the written statement their names are not mentioned. None of them have paid any rent. It was under these circumstances that the trial Court held that there was an implied surrender of tenancy to other heirs, even if the contention of the Defendant that the lease devolved on all the legal representatives is accepted. The advance amount of Rs. 9,000/- was admittedly paid by the Defendant alone. The rent was also being paid by the Defendant alone. See in this connection Bundoo v. Akbar Ali 1978 All.L.J. 215 & Smt. Madhubala Vs. Smt. Budhiya and Another, . Therefore, we confirm the finding of the trial Court that the suit is not bad for non joinder of parties.

23. The learned District Judge only considered the question of non-registration of Ext.A-1 and the other points raised by the parties.

In the result the judgment and decree of the lower appellate Court are set aside and the judgment and decree of the trial Court are restored. The appeal is allowed as above with costs.

