

(2016) 11 KL CK 0008

In the High Court Of Kerala

Case No : R.F.A. No. 546 of 2015 ()(Against The Decree And Judgment In Os
1009 of 2012 of Principal Sub Court, Ernakulam Dated 30.06.2015)

Sethulakshmi Bashi

APPELLANT

Vs

Punjab National Bank

RESPONDENT

Date of Decision : 28-11-2016

Acts Referred:

Contract Act, 1872 — Section 20
Specific Relief Act, 1963 — Section 20
Transfer of Property Act, 1882 — Section 105

Citation : (2017) 171 AIC 475 : (2017) 1 CivCC 636 : (2017) 1 CivilLJ 896 :
(2017) 1 ILRKerala 208 : (2016) 4 KerLJ 815 : (2016) 4 KLT 857

Hon'ble Judges : Mr. V. Chitambaresh and Mr. K. Ramakrishnan, JJ.

Bench : Division Bench

Advocate : Sri. Nelson Joseph, Advocate, for the Respondent No. 1; Sri. Madhu Radhakrishnan, Advocate, for the Respondent No. 1; Sri. P. Radhakrishnan, Advocate, for the Respondent No. 1; Sri. M. Narendra Kumar, Sri. D.G. Vipin and Sri. Karol Mathews Sebastian Alenc

Final Decision : Dismissed

Judgement

Chitambaresh, J. - The tenant of a non residential premises seeks renewal of lease by specific performance notwithstanding that the covenant as regards the renewal of lease is uncertain and ambiguous.

2. The tenanted premises is the ground floor of a two storied building having plinth area of 5000 sq. ft. on the Mahatma Gandhi Road, Ernakulam belonging to the appellants and occupied by the respondent bank. The premises was first demised to the respondent by Ext.B1 lease deed (Document No.5029/1981) and the lease was being renewed from time to time and Ext.A1 lease deed (Document No.1097/2003) was the last one executed. Ext.A1 lease deed executed on 5.3.2003 was given retrospective operation with effect from 1.4.2002 as per the terms thereof and the period of the lease expired 10 years after on 31.03.2012. The rent payable was Rs. 51,000/- per month and the

relevant clause in Ext.A1 lease deed relied on in support of the plea for renewal of lease is extracted below:

"1. The period fixed for the lease is 10 (Ten) years commencing from 01.04.2002.

2. The option for continuing the lease must be exercised by the lessee within one month before the expiry of the original term of 10 (Ten) years. If for any reason the lessee fails to notify its option to the lessors it shall be presumed that the bank has exercised its option to remain in possession of the premises and the Lessors agree to execute a fresh lease deed."

(emphasis supplied)

3. The respondent even before the expiry of the period of lease issued Ext.A2 letter dated 25.8.2011 exercising its option to remain in possession agreeing to execute a fresh lease deed. The same was replied to by Ext.A3 letter dated 8.11.2011 issued by the first appellant expressing willingness to execute a fresh lease deed for a period of three years. It was however indicated therein that the rent fixed for the earlier period was meagre and that the same is liable to be enhanced on comparable standards. The respondent thereupon issued Ext.B3 letter dated 21.2.2012 stating that the renewal of the lease for a period of three years only is not acceptable. The respondent emphasised that the lease has to be renewed preferably for a period of 15 years and that there can be a maximum enhancement of 25% in the rental. The letter also cautioned that the negotiation for renewal of the lease has to be concluded at the earliest as sanction for rent with retrospective effect is difficult.

4. The failure to execute a fresh lease deed on revised terms by the respondent prompted the appellants to have a rethinking on the question of renewal of the lease. The first appellant thereafter issued Ext.A4 letter dated 14.3.2012 calling upon the respondent to hand over vacant possession of the tenanted premises. The letter explicitly stated that the respondent will cease to be a tenant from 1.4.2012 onwards and that the covenants in Ext.A1 lease deed will not also be enforceable. The appellants have subsequently instituted proceedings for eviction of the respondent under the Kerala Buildings (Lease and Rent Control) Act, 1965. The Rent Controller has allowed eviction upholding the bona fide need for own occupation set up by the appellants and the issue is pending in appeal with the Appellate Authority. The finding if any on Ext.A1 lease deed by the Rent Controller of limited jurisdiction is insignificant particularly when the order of eviction has not become final. The respondent has in the meanwhile filed the present suit for specific performance of Ext.A1 lease deed in relation to the clause for renewal of lease. The court below has by the impugned judgment decreed the suit directing the appellants to execute a lease deed in favour of the respondent. The same has been directed to be executed on the same terms as contained in Ext.A1 agreement except of course the clause relating to renewal at the expense of the respondent within 30 days. The appellants challenge the decree of the court below on the ground that the terms as regards renewal of the

lease in Ext.A1 lease deed are uncertain.

5. We heard Mr. M. Narendra Kumar, Advocate on behalf of the appellants and Mr. P.Radhakrishnan, Advocate on behalf of the respondent.

6. The only point to be considered is as to whether the covenant for renewal of lease is certain and unambiguous and capable of enforcement in law by specific performance. The duration of the lease to be renewed is uncertain and there is no indication as to what are the terms to be included at the time of execution of a fresh lease deed. The respondent contends that the new lease would be for the same period and on the same terms as the original lease except as to the covenant for renewal. Reliance is placed on *Varkey Yohannan v. Narayanan Vasudeva Chakkiyar* (AIR 1955 TC 161) which followed *Secretary of State v. Digambar Nanda* (AIR 1919 Calcutta 620). But it was held in *Aboobacker Keyi v. Govindan Sons* (1990 (2) KLT 551) that there is only an agreement to agree in future or a contract to enter into a contract. The relevant part is extracted hereunder:-

"23.If the terms cannot be made certain by adopting the above process, certainly the contract will be void. In the light of these principles considering the document in question I am of the opinion that the renewal clause in Ext.A1 is void as it is uncertain. An option for renewal is granted to the lessee, the terms of which are to be decided by the parties at the time of renewal. In most of the cases referred to earlier, the ambiguity was only in respect of the rent payable. In some cases, the formula or the machinery to fix a fair rent was provided in the document. But the renewal clause in Ext.A1 is uncertain in every respect. In a lease deed the important element is rent payable. In Ext. A1 it is uncertain, the duration of the lease is uncertain and there is no indication as to what are the terms that are to be included in the renewed lease. It is completely left to be decided by the parties at the time of entering into a renewed lease. In other words, there is only an agreement to agree in future or there is a contract to enter into a contract, which, it is well-settled, is not enforceable at all. The terms of the renewed lease are to be decided afresh by the parties at the time of renewal and no guideline or indication is given in Ext.A1 as to the manner in which the terms have to be settled between the parties."

(emphasis supplied)

The learned single Judge in the above decision has also held that a tenant would be entitled to the benefit of part performance of the contract and resist eviction if he has exercised the option for renewal. Of course that part of the judgment is no longer good law in view of the decision in *State of U.P. and others v. Lalji Tandon and others* ((2004) 1 SCC 1).

7. The Supreme Court in *Lalji Tandon's case* (supra) approved the exposition of law in *Syed Jaleel Zane v. P. Venkata Muralidhar* (AIR 1981 AP 328) wherein Mr. Justice Jeevan Reddy observed as follows:-

"The court always leans against a perpetual lease and hence where there is a clause for renewal subject to the same terms and conditions, it would be construed as giving a right to renewal for the same period as the period of the original lease, but not a right to second or third renewal and so on unless, of course, the language is clear and unambiguous."

(emphasis supplied)

The words - "subject to the same terms and conditions" - are conspicuously absent in the clause pertaining to the renewal of lease in Ext.A1 lease deed in order to bind the parties about the rent or duration.

8. The relevant clause as regards the renewal of lease in Ext.A1 lease deed warrants the execution of a fresh lease deed and not a mere extension of the lease under the existing deed. The difference between the extension of a lease and a renewal of a lease has again been succinctly stated in Lalji Tandon's case (supra) as follows:-

"There is a difference between an extension of lease in accordance with the covenant in that regard contained in the principal lease and renewal of lease, again in accordance with the covenant for renewal contained in the original lease. In the case of extension, it is not necessary to have a fresh lease of deed executed, as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties."

(emphasis supplied)

The relevant clause in Ext. A1 lease deed insists on the execution of a fresh lease deed which implies that the parties intended to have a renewal and not an extension of the lease.

9. Ext.A1 lease deed does not explicitly state that the lease has to be renewed subject to the same terms and conditions as to the original lease giving an option to the parties to vary. The rate of rent or the duration of the lease are uncertain which are to be worked out at the time of execution of a fresh lease deed which is mandatory. The parties intended to have a renewal of the lease by the execution of a fresh lease deed and not a mere extension of the lease under the existing lease deed. No formula or machinery is provided in Ext.A1 lease deed in order to decipher the rate of rent or the duration of lease to be incorporated in the fresh lease deed. There is only "an agreement to agree in future" or "a contract to enter into a contract" in Ext.A1 lease deed as regards the renewal of the lease. Moreover the rental of the commercial buildings in the neighbourhood have soared high in the recent past as explicit from the correspondence exchanged between the parties.

10. It would be unsafe to grant a decree for specific performance of the covenant

to renew the lease found in Ext.A1 lease deed when the terms are ambiguous and not precise. The jurisdiction to decree specific performance is discretionary and it is trite law that the court is not bound to grant such relief merely because it is lawful to do so. We are fortified in this view by the decision in *Viseshar Yadav v. Govind Swami* (AIR 2006 Chhattisgarh 149) wherein it has inter alia been held as follows:-

"12. Therefore, in a case for specific performance of contract, a greater degree of certainty is required and it demands a clear, definite and precise understanding of all the terms, they must be exactly ascertained before their performance can be enforced. It also needs a high quality of certainty than what is needed in an action at law for damages etc. as the jurisdiction which vested with the Court is discretionary and the Courts are not bound to grant such relief merely because it is lawful to do so, the only guiding factor is that the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by Court of appeal."

The upshot of the discussion is that the impugned decree for specific performance of the covenant for renewal of the lease in Ext.A1 lease deed is liable to be set aside and we do so.

The Regular First Appeal is allowed. No costs.

Ramakrishnan, J - I have the privilege of going through the judgment of my brother Justice Mr. Chitambaresh, who had elaborately dealt with the facts and legal aspects. Though I am slightly differing on certain aspects, but I am concurring with the ultimate finding of my brother Justice Mr. Chitambaresh for the following reason.

12. It is seen from Ext.A1 lease deed by which the present litigation arose, there is a renewal clause provided which reads as follows:-

"The option for continuing the lease must be exercised by the lessee within one month before the expiry of the original term of 10 (Ten) years. If for any reason the lessee fails to notify its option to the lessors it shall be presumed that the bank has exercised its option to remain in possession of the premises and the Lessors agreed to execute a fresh lease deed".

13. So it is clear from the clause that it is not an extension of lease but an renewal of lease at the option of the lessee. It is also seen from the clause that even if the lessee fails to exercise option within the time, there is a presumption in favour of the lessee that they had exercised its option and they are to remain in possession of the premises and the lessors agreed to execute a fresh lease deed. In fact there is no option given to the lessors to terminate the lease if the lessee did not exercise option. It is an one sided condition gives benefit to the lessee alone whereby whether they exercised the option or not, they can continue to be in possession of the lease premises and the lessors have to execute a fresh lease deed in their favour.

14. By virtue of precedents reported in *Aboobacker Keyi v. Govindan and Sons* (1990 (2) KLT 551); *Varkey Yohannan v. Narayanan Vasudeva Chakkiyar* (AIR 1955 Travancore Cochin 161); *Secretary of State v. Digambar Nanda* (AIR 1919 Calcutta 620) and *State of U.P and Others v. Lalji Tandon and others* ((2004) 1 SCC page 1), it is clear that the clauses of this nature in the lease deed cannot be said to be uncertain in terms rendering the document void in view of Section 29 of the Contract Act. It is also held in these decisions that in such cases it can be presumed that the lessee is entitled to be in possession on the same terms and conditions of the original lease.

15. It is seen from the evidence that the lessee in this case had exercised their option to continue within time and thereafter there was bargaining between them regarding the rate of rent and period of lease. Even the lessee wanted more time than the time which they are entitled if the same terms and conditions are extended and they are also prepared to vary from the terms and conditions and the negotiation was not successful. These aspects has been considered by my brother Justice Mr. Chitambaresh in his judgment. So it is clear from the discussion that though there was such a clause, parties never intended to proceed on that basis but they are even prepared to vary from their conditions to arrive at a consensus regarding the terms and conditions on which the renewal lease deed can be executed. So under such circumstances, it cannot be said that the lessors should have anticipated that in case the lessee exercised their option for renewal, they can continue on the same terms and conditions and there will be an expectation in them that there will be discussion on this aspects regarding the period of renewal and rate of rent and other terms and conditions on which the lease deed will have to be executed.

16. It is settled law that even if the contract is enforceable and lawful one, even then the plaintiff is not entitled to get a decree for specific performance as it is a discretionary relief which can be granted by the court in terms of Section 20 of the Specif Relief Act. Section 20 of the Specific Relief Act reads as follows:-

Section 20. Discretion as to decreeing specific performance.- (1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstance under which the contract was entered into are such that the contract, though not voidable gives the plaintiff an unfair advantage, over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve

no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1:- Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b).

Explanation 2:- The question whether the performance of a contract would involve hardship on the defendant within the meaning of Clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances, existing at the time of the contract.

(3) The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The Court shall not refuse to any party specific performance of a contract, merely on the ground that the contract is not enforceable at the instance of the other party.

17. So it is clear from the above that if the court is satisfied that granting of specific performance would result in hardship to the defendant which he would not have anticipated at the time of entering into the contract and it is inequitable to enforce the specific performance then court can deny a decree for specific performance. By virtue of explanation (1) of to Sub Section 2 of Section 20, mere inadequate consideration or the terms of the contract is onerous to the defendant alone is not sufficient to come to the conclusion that it may cause hardship as provided under Clause (a) and Clause (b) of Section 20(2) of Specific Relief Act.

18. In this case there is no term fixed and rate of rent was also not fixed for the renewal. It is seen from the dictum in the decisions cited above if the terms are not uncertain, from the conduct it can be presumed that the parties have intended to continue the lease on the same terms and conditions. That may go to show that the plaintiff can continue to be in possession of the building for another ten years from the expiry of the period of lease mentioned in the document on the same terms and conditions. This could not have been expected by the defendants at the time when the lease deed was executed. In the case of an agreement to sell of the property, parties are fixing the consideration payable for the property with open eyes. So in such circumstances it cannot be said that inadequate consideration on a later stage is not a ground for denying specific performance. But in the case of lease that is not the position. Every prospective landlord will have an anticipation to get enhanced rate of rent on a future date if

renewal will have to be granted. Further he will be having a legitimate expectation that he is entitled to get enhanced rent at the rate at which other buildings of similar nature are getting in the locality as well. If the clause causes restriction in this right of the landlord, then it cannot be said that it is lawful to enforce the same against the landlord to compel him to execute the lease deed on the same terms and conditions by granting a decree for specific performance. This will put the landlord in an inequitable position and the tenant in an advantage position over the landlord. If the court feels that it is inequitable and disadvantage for the landlord when compared to the hardship caused to him on account of implementing the clause, then the court is entitled to deny the specific performance.

19. Further if such a interpretation is made for the clause the landlord may not be able to sue for eviction under the Kerala Buildings (Lease and Rent Control) Act for a further period of ten years more in view of Section 11(9) of the said Act. This is also an unlawful restriction on the right of the landlord to get his property evicted from the tenant even if he wants the building for his bona fide need. So under such circumstances comparing the hardship caused to the landlords/defendants, this court feels that it will be inequitable to grant specific performance in favour of the plaintiff as they will be put to more advantages position than what was expected by them. These aspects were not considered by the court below while exercising the discretion under Section 20 of the Specific Relief Act before granting a decree for specific performance in favour of the plaintiff. So under such circumstances this court feels that decision of the court below granting a decree for specific performance in favour of the plaintiff is liable to be set aside and the suit is liable to be dismissed.