

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOMAS P.JOSEPH

FRIDAY, THE 6TH FEBRUARY 2009 / 17TH MAGHA 1930

SA.No. 669 of 1997(D)

A.S.NO.128/1994 OF II ADDITIONAL DISTRICT JUDGE, KOZHIKODE.
O.S.NO.792/1988OF ADDITIONAL MUNSIF - II, KOZHIKODE.

APPELLANT(S)/APPELLANT/DEFENDANT:

MANATHANATH KUNHAHAMMED, S/O.PAKKAR KOYA, KARUVANTHURUTHI
AMSOM AND DESOM, P.O.KARUVANTHURUTHI VIA FEROKE, KOZHIKODE
DISTRICT.

BY ADV. SRI.THOMAS ANTONY

RESPONDENT(S)/RESPONDENT/PLAINTIFF:

(*)KIZHAKKE THERUVATHAKATH CHERAMMAL THODIYIL
UNNIMOIDEENKUTTY, S/O.ABDUL KHADER HAJI,
KARUVANTHIRUTHI AMSOM AND DESOM,
P.O.KARUVANTHIRUTHI (VIA) FEROKE, KOZHIKODE DISTRICT
(DIED, LRS IMPEADED)

(*)ADDL.R2 TO R7 IMPEADED:

ADDL.R2. AYISHA BEEVI, W/O.LATE UNNIMOIDEENKUTTY,
KIZHAKKE THERUVATHAKATH CHERAMMAL THODIYIL
HOUSE AT KARUVANTHURUTHY AMSOM AND DESOM,
KARUVANTHURUTHY P.O., FEROKE, KOZHIKODE DISTRICT.

ADDL.R3. BASHEER, S/O.LATE -DO- -DO-

ADDL.R4. RAFEEQU, S/O.-DO- -DO-

ADDL.R5. SUHARA, D/O.-DO- -DO-

ADDL.R6. SHAKEENA, D/O.-DO- -DO-

ADDL.R7. RUJANATH, D/O.-DO- -DO-

(*)ADDL.RESPONDENTS 2 TO 7 IMPEADED AS THE LRS OF SOLE RESPONDENT
AS PER ORDER DATED 24.5.2004 IN IA NO.73/2003)

ADV. SRI.R.RAMADAS FOR R2 TO 7

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 06/02/2009,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

THOMAS P. JOSEPH, J.

S.A.No.669 OF 1997

Dated this the 6th day of February, 2009.

JUDGMENT

The substantial questions of law arising for a decision are whether the termination of the lease for manufacturing purpose by fifteen days' notice is valid and whether, amendment to Section 106 of the Transfer of Property Act, 1882 (for short, "the Act") introduced by the Transfer of Property (Amendment) Act, 2002 (Act 3 of 2003) applied to pending suits and proceedings.

2. Respondent/plaintiff (he died pending this appeal - Additional respondents are his legal representatives) claimed that the schedule property which was allotted to his share as per Ext.A3, partition deed No.1348 of 1964 was leased to the appellant as per an agreement dated 16.1.1982 for a period of five years for construction of small boats and stipulating payment of rent at the rate of Rs.300/- per month. Respondent received Rs.3,600/- as advance as security for the due observance of the terms and conditions of the agreement. Appellant had agreed to pay the monthly rent each month and surrender the land on the expiry of the period of lease. Appellant paid the rent only for 38 months since the date of entrustment. The period of lease expired by 15.1.1987. Respondent issued Ext.A1, notice on 28.10.1987 terminating the tenancy by 15.11.1987 and demanding vacant possession. Appellant did not comply. Hence the suit for recovery of possession, realisation of rent arrears and

damages for use and occupation from 16.11.1987 onwards. Appellant resisted the suit contending that the respondent and his elder brother had granted to him the land referred to in the plaint schedule on 15.9.1962 under an oral lease for manufacturing purpose (construction of small boats) stipulating the monthly rent payable by him at Rs.25/- per month and receiving Rs.100/- by way of advance. Pursuant to that lease he constructed a shed in the said land and has been using it for construction of small boats. Later, as insisted by the respondent an agreement was executed in the year 1982 stipulating the rent payable at Rs.300/- per month. He is a commercial lessee of the land entitled to the protection of Section 106 of the Kerala Land Reforms Act. He also contended that Ext.A1, notice terminating the tenancy is not in accordance with the law. Accepting the request of the appellant, the issue regarding commercial lease was referred to the Land Tribunal for decision. The Land Tribunal found that no commercial lease is involved and answered the reference accordingly (Ext.B1 is the order of the Land Tribunal). Learned Munsiff accepted the finding, rejected the other contentions raised by the appellant and decreed the suit as prayed for. Appellant preferred A.S.No.128 of 1994 before the learned District Judge. The contentions raised by the appellant before the learned District Judge did not succeed. The appeal was dismissed. Hence, this Second Appeal.

3. Though, in the courts below appellant had sought protection under Sec. 106 of the Kerala Land Reforms Act, that contention is not pressed before me. Learned counsel for appellant contends that Ext.A1, notice dated 28.10.1987 terminating the tenancy with 15 days notice by 15.11.1987 is invalid as it does not conform to the requirement of Sec. 106(1) of the Act. According to the learned counsel it is the admitted case of the respondent as seen from the averment in the plaint that the lease is for five years for manufacturing purpose and hence the lease could be validly terminated only by six months' notice expiring with the end of the year of the tenancy. Even if it is assumed that appellant is a tenant holding over the premises, it is contended that since the lease is for manufacturing purpose and no contract to the contrary is pleaded or proved by the respondent, the lease must be deemed to be from year to year, terminable only as aforesaid. In response, learned counsel for the additional respondents contended that in the absence of specific contention in the written statement as to how the notice is invalid, appellant cannot challenge the validity of Ext.A1, notice. It is also contended that since the agreement of lease though reduced into writing is unregistered, that instrument cannot create a lease for five years. But it is admitted by the appellant that he has been put in possession of the premises on agreement to pay monthly rent. According to the learned counsel, appellant is a tenant holding over. The agreement to pay monthly rent and its payment every month till

15.3.1985 amounted to a contract to the contrary as stated in Sec. 106(1) of the Act. Hence the lease must be deemed to be from month to month terminable by fifteen days' notice expiring with the end of the month of tenancy. The lease was created on 16.1.1982. Hence it is contended that Ext.A1, notice dated 28.10.1987 terminating the lease by 15.11.1987 is valid.

4. Learned counsel for additional respondents referred me to the decision of the Supreme Court in **Dharam Pal v. Harbans Singh [(2006) 9 SCC 216]**. It is held in that case that a mere contention that "the notice is illegal, null and void and ineffective upon the right of the defendant" is not sufficient. It was observed thus -

".....Law is well settled that an objection as to the invalidity or insufficiency of notice under Section 106 of the Transfer of Property Act should be specifically raised in the written statement failing which it will be deemed to have been waived. In the present case, the only objection taken in the written statement is that the notice issued by the plaintiff was "illegal, null and void and ineffective upon the right of the defendant". The thrust of the plea raised by the defendant-appellant in his written statement was that the notice was issued by the person who did not

have the authority from the landlord to give the notice. The plea so taken has been found devoid of merit by the High Court and the courts below. The plea that the notice was insufficient in the sense that it did not give 15 clear days to the tenant to vacate or that the notice did not terminate the tenancy with the expiry of the month of the tenancy, has not been taken in the written statement.

Obviously for want of specific plea in the written statement, the trial court has not framed any issue reflecting an objection to the validity or sufficiency of notice. the plea in the manner in which it is sought to be urged before us. The plea as to insufficiency of notice should be deemed to have been waived by the appellant and cannot be allowed to be urged at this stage.”

(underline supplied)

According to the learned counsel for additional respondents Ext.A2, reply notice dated 10.11.1987 keeps silent about the alleged invalidity of Ext.A1, notice and in the written statement there is no specific contention raised except a vague statement that the notice (Ext.A1) is not in accordance with the law. But in this case on the basis of the contention raised in the written statement, an issue

regarding the validity of termination of the lease was raised by the learned Munsiff, the parties went to trial on that issue, addressed arguments and the appellant was permitted to urge that contention in the first appellate court also. Unlike the facts of this case, the Supreme Court was considering a case where for lack of proper plea in that regard the trial court did not even raise an issue regarding the validity of termination of lease and a contention in that regard was attempted to be raised in the Supreme Court. In the factual situation of this case the argument that the appellant cannot raise the contention regarding validity of the termination of the lease has to be rejected.

5 . The lease in this case was created for a period of five years as per an unregistered agreement dated 16.1.1982. Section 107 of the Act states that:

“A lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument”.

(underline supplied)

Section 17(1) of the Registration Act, 1908 is as under:

“Documents of which registration is compulsory-(1) The following documents shall be registered if the property to which they relate is situated in a district in which, and if they have been executed on or after the date on which,

Act No.XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent.”

Section 49 of the Registration Act states:

“49. Effect of non-registration of documents required to be registered - No document required by S.17 (or by any provision of the T.P.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 specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of S.53A of the Transfer of Property Act, 1882 or as evidence of any collateral transaction not

required to be effected by registered instrument).”

In view of the above provisions the unregistered instrument dated 16.1.1982 could not create a lease from year to year or for any period exceeding one year or even reserving a yearly rent. But it is admitted by the appellant that he was put into possession of the schedule property as a lessee on an agreement to pay monthly rent. He does not dispute that he had paid the rent every month upto 15.3.1985 (his claim is that he paid the rent upto and inclusive of May, 1985 and produced Ext.B2, rent receipt dated 30.4.1982). Even when the lessee is inducted into possession as per an unregistered lease, it is possible to say when the lessee paid the rent and it is accepted by the landlord that it is a tenancy by holding over. Mulla on “The Transfer of Property Act”, 7th Edition at page 771 states that

“an oral lease for more than one year, if accompanied by delivery of possession is valid for one year and the lessee continuing in possession thereafter with the assent of the lessor becomes a tenant by holding over”.

In **Biswabani Pvt. Ltd v. Santhosh Kumar (AIR 1980 SC 226)** the tenant was validly inducted into the premises for a specific period. The renewal lease was found to be void. The Supreme Court observed:

“.....Even if it is assumed that the tenant was put in possession for the first time

under a lease which turned out to be void, as he came into possession of the premises with the consent of the landlords and paid rent from month to month an inference of tenancy could be drawn and the duration of the tenancy in such circumstances had to be deemed to be from month to month.....”

In Mohammed Kunju Isha Beevi v. Elayakunju Shahul Hameed (1993 (2) KLT 631) the lease was for a period exceeding one year created as per an unregistered agreement. Following the decision in Biswabani Pvt. Ltd. v. Santosh Kumar, it was held that

“.....even though Ext.A1 is a void lease the 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 under S.116 of the Transfer of Property Act even though the provisions of S.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.”

Appellant therefore, notwithstanding that he was inducted into suit property under a void lease agreement has to be treated as a tenant holding over, under Sec. 116 of the Act.

6. What then, is the duration of that lease and how is it to be terminated? Section 106(1) of the Act states:

“In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.”

The Section contains two parts, the former part dealing with lease for agricultural or manufacturing purposes which shall be deemed to be from year to year terminable by six months' notice and the latter part dealing with lease for other purposes which shall be deemed to be from month to month terminable from the part of either parties by 15 days' notice. It is not specifically averred in the plaint that the tenancy is from month to month but the plaint refers to the agreement between the parties fixing the monthly rent and the liability of appellant to pay that rent every month. The provision for payment of monthly rent can spell out a contract to the contrary regarding the duration of the lease.

In **Jewan Singh v. Mandalal (AIR 1955 Assam 102)** a Division Bench of that court held that the mode in which the rent is expressly payable affords a presumption that the tenancy is of a character corresponding to the nature of the monthly or the annual payment. Similar view was taken by a Single Judge of the Allahabad High Court in **Binda Din v. Shrimati Pran Dei (1968 Allahabad Law Journal 721)**. In that case it was held that ordinarily in the case of a tenancy for manufacturing purposes, it should be held to be a tenancy from year to year terminable by six months' notice but there was nothing in law to prevent the parties from coming to an agreement between themselves under which irrespective of the nature of the tenancy they treated the tenancy as a monthly tenancy. The tenancy was found to be from month to month on account of the fact that stipulation was for payment of monthly rent, paid by the tenant and received by the landlord although the tenancy was for manufacturing purpose. In **Mohammed Kunju Isha Beevi v. Elayakunju Shahul Hameed (referred supra)** though the lease was for a period exceeding one year as per the agreement which was found to be void for want of registration, the defendant who was in possession under that void lease paid the rent and the landlord accepted the same. Hence on the reasoning of the decision in Biswabani Pvt. Ltd.'s case (referred supra), the defendant was found to be a tenant holding over under Sec. 116 of the Act. It was held that it could be deemed to be a monthly lease terminable by 15 days' notice. In this case, the period of five

years was fixed under a void lease agreement which is ineffective. Appellant admittedly was inducted into the premises as a lessee with liability to pay the monthly rent and at any rate he paid the monthly rent upto 15.3.1985. The period of lease fixed as per the unregistered instrument expired at any rate by 15.1.1987. There is no case or evidence that thereafter the lease was renewed for any period exceeding one year. These circumstances are sufficient to show a contract to the contrary as referred to in the first part of Sec. 106(1) of the Act that the lease was from month to month though it was for manufacturing purpose. Therefore, Ext.A1, notice dated 28.10.1987 terminating the tenancy with 15 days' notice is valid.

7. The second question arising for a decision is whether the amendment to Sec. 106 of the Act introduced by Act 3 of 2003 which got assent of the President of India on 31.12.2002 would apply to pending suits and proceedings. Sub-sec. (3) introduced by Act 3 of 2003 and which is relevant in this case states:

“A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.”

(underline supplied)

In this case Ext.A1, notice was issued on 28.10.1987, served on the appellant on 29.10.1987 and terminated the tenancy by 15.11.1987. Appellant was called upon to vacate the premises on such termination. Learned counsel for additional respondents contends that even if six months' notice was required for the valid termination of the lease under Sec. 106(1) of the Act, that six months' period expired by 14.4.1988 (from Ext.A1, notice dated 28.10.1987). The suit was filed only on 14.9.1988 much after the expiry of the said period of six months.

8. Learned counsel for appellant made a forceful submission that the amendment cannot affect the rights of the parties which is already crystalised. According to the learned counsel, amendment of substantive law cannot be given retrospective effect unless it is so provided expressly or by necessary implication. Learned counsel would draw support from the decisions in **Janardhan Reddy v. The State (AIR 1951 SC 124)**, **Namdeo v. Narmadabai (AIR 1953 SC 228)**, **K.S.Paripoornan v. State of Kerala (AIR 1995 SC 1012)** and **C.Gupta v. Glaxo-smithkline Pharmaceuticals Ltd. [(2007)7 SCC 171]**. Learned counsel contends that no retrospectivity is given to Sub-sec. (3) of Sec. 106 of the Act either expressly or impliedly.

9. Amendment of substantive law in the absence of express words or necessary implication cannot be given retrospective application. Where vested rights are affected by any statutory provision, such provision must normally be

construed as prospective in its operation. But it is not as if the Legislature is not competent to take away even vested rights by means of retrospective legislation. It is therefore to be ascertained whether Act 3 of 2003 applied to pending suits and proceedings.

10. The Law Commission of India in its 181st Report dated 9th May, 2002 on the need to amend Sec.106 of the Act said :

“.....the purpose of the provision in Section 106 is to terminate the relationship of lessor and lessee before the lessor sues for possession. He has no right of entry till the tenancy is disrupted. Further, the idea is that every lessee must have some reasonable notice before he is asked to vacate the premises.

If these were the purposes behind Section 106 but in fact, the lessee had by the date of suit or the date of dismissal of suit years later, more than the period specified in the statute, it is nothing but injustice to the lessor if he is compelled to file a fresh suit. Any procedure that leads to multiplicity of court cases must be avoided.”

As to the applicability of the amendment to pending proceedings the Law Commission said:

“.....we are also recommending that the proposed amendments be applied to pending proceedings.

We hope that, once these amendments are brought into force, unnecessary rounds of litigation will be avoided and justice will be done to the plaintiff who had issued the notice, be he the lessor or lessee.”

(underline supplied).

The Government accepted the recommendation contained in the Report and enacted Act 3 of 2003.

11. Section 3 of Act 3 of 2003 states:

“3. Transitory provisions.- The provisions of S.106 of the principal Act, as amended by S.2, shall apply to -

(a) all notices in pursuance of which any suit or proceeding is pending at the commencement of this Act; and

(b) all notices which have been issued before the commencement of this Act, but where no suit or proceeding has been filed before such commencement.”

(underline supplied)

Objects and reasons for amendment to Sec. 106 of the Act are stated in the Bill. It is as follows:

“Section 106 of the Transfer of Property Act, 1882, inter alia, provides that the lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, which may be terminated either by the lessor or the lessee by six months' notice expiring with the end of the year of the tenancy; and a lease of the immovable property for any other purpose shall be deemed to be a lease from month to month, which may be terminated either by the lessor or lessee by fifteen days' notice expiring by the

end of the month of the tenancy. The legal position, which has also been reiterated by the Supreme Court in Mangilal v. Sugan Chand AIR 1965 SC 101, 104, is that while computing the period of notice the day on which the notice is served is required to be excluded. The Law Commission of India in its 181st Report on Amendment to section 106 of the Transfer of Property Act, 1882 has examined the working of this section and found that a number of suits have been filed in ignorance of this legal position and these suits have been dismissed on this lone technicality. Such a position leads to serving of a fresh notice and filing of a fresh suit which amounts not only to serious injustice but also to multiplicity of litigations despite the fact that the defendant had more time available to him than the prescribed period of notice by the date when the suit is filed to evict him or even by the date of judgment dismissing the suit.

Hence, it is proposed that the period of notice shall commence from the date of its receipt and the amendment shall apply to the pending suits or proceedings and notices issued before the commencement of the proposed amendment.

The Bill seeks to achieve the
aforesaid object.”

(underline supplied)

Commending on the said Object and reasons in “The Transfer of Property Act”
by B.B.Mitra, 18th edition at page 989 the author says:

“ the transitory provision itself makes it
quite clear that not only in pending suits but
even in those cases where notices had
already been issued in terms of the old law,
the provisions of the new sec.106 shall apply.
The transitory provision cannot work adversely
to the interest of the lessor but it may affect
the interest of the defendant-lessee because it
may no more be possible for the lessee to
take the plea that the impugned notice is bad
as it did not expire with the end of a year or
month of the tenancy”.

(underline supplied)

The transitory provisions make the amendment to Sec.106 of the Act applicable to suits and proceedings pending at the commencement of Act 3 of 2003. An appeal is a continuation of the suit. This appeal was pending in this Court at the commencement of Act 3 of 2003. Hence Sec.106(3) of the Act introduced by Act 3 of 2003 applied with all its vigour to Ext.A1, notice dated 28.10.1987 and the suit filed pursuant to that notice. Sub-sec. (3) of Sec.106 takes care of the alleged inadequacy for Ext.A1, notice which the appellant has been complaining about all these years though he was not at all affected or prejudiced by the alleged inadequacy as the suit was filed after five months of the date on which according to him the lease could be validly terminated.

A litigation which was initiated two decades back comes to an end.

Appeal is dismissed.

THOMAS P.JOSEPH,
Judge.

cks

SA No. 669/1997

20

Thomas P. Joseph, J.

S.A.No.669 of 1997

Judgment

6th February, 2009.