

PETITIONER:
ANTHONY

Vs.

RESPONDENT:
KC ITTOOP AND SONS AND OTHERS

DATE OF JUDGMENT: 01/07/2000

BENCH:
D.P.Mohapatro, K.T.Thomas, R.C.Lahoti

JUDGMENT:

J U D G M E N T Thomas J. A dispute which constantly caused many litigations to prolong in the past (whether a lease could be made by an unregistered instrument when such deed is compulsorily registerable) has once again been raised and that dispute has lengthened the longevity of this litigation through a chequered career. The successor of the party who was mainly responsible for not registering the instrument has now been benefited of it as the impugned judgment gave a decree for eviction of the person who was admittedly inducted into possession of the building by the former. Though appellant claimed protection under the provisions of the Rent Control legislation the High Court discountenanced it on the premise that the document executed by the parties regarding the transaction is void under law. The simple question now is whether appellant can claim protection as a tenant under Kerala Buildings (Lease and Rent Control) Act 1965 (for short the Rent Act).

Facts, mostly undisputed, are the following: The building which is the subject matter of this litigation is described as a shed which originally belonged to a family the senior member of which inducted the appellant in possession thereof as per a lease deed dated 4.1.1974 which was ostensibly meant for a period of five years. The monthly rent of the building has been fixed at Rs.140/-. Appellant paid rent of the building at the said rate till October 1974. Sometime during this period ownership of the building happened to be allotted to a female member of the family (Devaki) as per a partition effected between its members. Thereafter rent of the building was paid by the appellant to the aforesaid Devaki. Subsequently ownership of the building was transferred by Devaki to the respondent who filed the suit as plaintiff (for the sake of convenience respondent can be referred to as the plaintiff). The trial court decreed the suit by repelling the contention of the appellant that the suit was not maintainable as he is protected from eviction under the provisions of the Rent Act. The trial court found that the appellant is not a tenant as the lease was void on account of non-registration of the lease-deed. In the first appeal filed by the appellant a District Judge held that in spite of non-registration of the instrument there was a valid tenancy of the building and hence appellant could not be evicted except in accordance with the provisions of the Rent Act.

In a second appeal filed by the respondent a single judge of the High Court of Kerala set aside the judgment of

the District Court and remanded the first appeal to that court by holding that the plaintiff was inducted into possession under a void lease and hence the court should consider whether, independent of this lease the defendant was in possession as a lessee from month to month. Learned single judge pointed out that since it is a question of fact the same has to be decided on the evidence on record. After the remand the District Court entered upon a finding that despite the defect of non-registration of the instrument the facts and circumstances of this case and the evidence discussed above could clearly show that the parties intended to create a lease. The District Judge further held that appellant is the tenant as defined in the Rent Act and hence the plaintiff is not entitled to a decree in this case and his remedy is to apply before the Rent Control Court.

When the matter went up to the High Court again in a second appeal a learned single judge did not agree with the approach made by the District Judge after remand and the following observations, *inter alia*, have been made by the High Court:

It has to be noted that if the conclusion of this court on the earlier occasion were that payment and acceptance of rent pursuant to the void contract itself would bring about the relationship of landlord and tenant between the parties protected under the Kerala Buildings (Lease and Rent Control) Act this court would have certainly dismissed the suit filed by the plaintiff by so finding and would not have remanded the appeal to the lower appellate court in the manner in which it was done. The lower appellate court has ignored this aspect while purporting to record a finding that the first defendant would be a tenant protected by the Kerala Buildings (Lease and Rent Control) Act even if he had paid rent only under the void lease. The said approach by the appellate court appears to me to be totally unsustainable.. I am therefore constrained to set aside the finding of the lower appellate court that the first defendant is a tenant protected by the Kerala Buildings (Lease and Rent Control) Act. I hold that the first defendant has not proved that independent of the void lease, a relationship of landlord and tenant has come into existence between the parties. In view of this finding, the plaintiffs will be entitled to a decree for recovery of possession of the plaint schedule property.

In this appeal by special leave a bench of two judges heard this matter and after noticing a conflict of opinions expressed by benches of equal strength it was felt that this appeal should be decided by a larger bench.

In spite of the chequered career of the litigation the only question which has now bogged down to be decided is whether the suit building is held by the appellant under a lease or not. The word tenant is defined in Section 2(6) of the Rent Act as any person by whom or on whose account rent is payable for a building. Landlord is defined as including the person who is receiving or is entitled to receive the rent of a building. Now the definition of building must be booked into. In clause (i) it is defined as any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes. In the above context the word let has only one meaning and that is to demise on lease.

The above three definitions unmistakably point to the necessity for a building to be covered by a lease under law in order to bring such building within the purview of the Rent Act. If there is no lease of a building the Rent Act has no application. Thus what is important now is to know whether there has been a lease of the building in question. If the appellant is a lessee of the building, it is not disputed before us that jurisdiction of the civil court would stand evacuated and the plaintiff has to approach the Rent Control Court if he is desirous of getting an order of eviction on any one of the grounds recognised in the Rent Act.

The lease-deed relied on by the plaintiff was intended to be operative for a period of five years. It is an unregistered instrument. Hence such an instrument cannot create a lease on account of three pronged statutory inhibitions. The first interdict is contained in the first paragraph of Section 107 of the Transfer of Property Act, 1882 (for short the TP Act) which reads thus:

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

(Emphasis supplied) (emphasis supplied) The second inhibition can be discerned from Section 17(1) of the Registration Act 1908 and it reads thus: (only the material portion) Documents of which registration is compulsory. -(1) the following documents shall be registered if the property to which they relate is situate 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.

The third interdict is contained in Section 49 of the Registration Act which speaks about the fatal consequence of non-compliance of Section 17 thereof. Section 49 reads thus: 49. Effect of non-registration of documents required to be registered.- No document required by Section 17 [or by any provision of the TP 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 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.]"

No endeavour was made by the counsel to obviate the said interdict with the help of the exemptions contained in the proviso.

The resultant position is insurmountable that so far as the instrument of lease is concerned there is no scope for holding that appellant is a lessee by virtue of the said instrument. The court is disabled from using the instrument as evidence and hence it goes out of consideration in this case, hook, line and sinker (vide Smt. Shantabai vs. State of Bombay: AIR 1958 SC 532; Satish Chand Makhan vs. Govardhan Das Byas, (1984) 1 SCC 369 and Bajaj Auto Limited vs. Behari Lal Kohli AIR 1989 SC 1806).

But the above finding does not exhaust the scope of the issue whether appellant is a lessee of the building. A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created. What is mentioned in the three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created. The first paragraph has been extracted above and it deals with the mode of creating the particular kinds of leases mentioned therein. The third paragraph can be read along with the above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein. All other leases, if created, necessarily fall within the ambit of the second paragraph. Thus, dehors the instrument parties can create a lease as envisaged in the second paragraph of Section 107 which reads thus:

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than through such deed.

When it is admitted by both sides that appellant was inducted into the possession of the building by the owner thereof and that appellant was paying monthly rent or had agreed to pay rent in respect of the building, the legal character of appellants possession has to be attributed to a jural relationship between the parties. Such a jural relationship, on the fact situation of this case, cannot be placed anything different from that of lessor and lessee falling within the purview of the second paragraph of Section 107 of the TP Act extracted above. From the pleadings of the parties there is no possibility for holding that the nature of possession of the appellant in respect of the building is anything other than as a lessee.

Shri P.Krishnamoorthy learned Senior Counsel contended that a lease need not necessarily be the corollary of such a situation as possession of the appellant could as well be permissive. We are unable to agree with the submission on the fact situation of this case that the appellants possession of the building can be one of mere permissive nature without any right or liabilities attached to it. When it is admitted that legal possession of the building has been transferred to the appellant there is no scope for countenancing even a case of licence. A transfer of right in the building for enjoyment, of which the consideration of payment of monthly rent has been fixed, can reasonably be presumed. Since the lease could not fall within the first paragraph of Section 107 it could not have been for a period exceeding one year. The further presumption is that the lease would fall within the ambit of residuary second paragraph of Section 107 of the TP Act.

Taking a different view would be contrary to the reality when parties clearly intended to create a lease though the document which they executed had not gone into the processes of registration. That lacuna had affected the validity of the document, but what had happened between the parties in respect of the property became a reality. Non registration of the document had caused only two consequences. One is that no lease exceeding one year was created. Second is that the instrument became useless so far as creation of the lease is concerned. Nonetheless the presumption that a lease not exceeding one year stood created by conduct of parties remains un-rebutted.

Shri P. Krishnamoorthy learned counsel cited certain decisions to support his contention that the court did not treat similar transactions as lease. In HS Rikhy vs. New Delhi Municipal Corporation: 1962 (3) SCR 604, a contention made by a party to the suit that he had a right under the local Rent Control Act was negatived on the ground that there was no landlord-tenant relationship between the parties. In that decision this court did not accept the contention that the word letting which was contemplated in the particular Rent Control Act included not merely a transfer to a tenant but also to a licensee, or that the word rent precluded the landlord from pleading that there was no relation of landlord and tenant between the parties. The finding made in that case against the plea of landlord was based on the premise that the transfer was not made by the Municipal Committee in accordance with the law and hence there was no transfer at all. That decision has no application to the points involved in the present case.

In Technicians Studio Pvt. Ltd. vs. Lila Ghosh (1977) 4 SCC 324 a two judge bench considered the effect of a compromise decree which mentioned that the defendant would become a direct tenant on a monthly rent of Rs.1, 000 and the lease would be for a period of sixteen years. But compromise decree was not registered nor did the parties execute a lease- deed pursuant thereto. The contention in that case was two fold. First was that by payment and acceptance of rent during the period of sixteen years the monthly tenancy has been created. Second was that the compromise decree can be treated as evidence of part payment under Section 53A of the TP Act. This court noted that the High Court has found in agreement with the finding of the subordinate courts that payment of rent and acceptance of

the same did not create any tenancy. The said fact finding was not disturbed by this court in that particular case. However, their lordships observed therein that whether the relationship of landlord and tenant exists between the parties depends on whether the parties intended to create a tenancy and the intention has to be gathered from the facts and circumstances of the case; it is possible to find on facts of a given case that payments made by transferee in possession were really not in terms of the contract but independent of it and this might justify an inference of tenancy in his favour. The question is ultimately one of fact.

In *Biswabani Pvt. Ltd. vs. Santosh Kumar Dutta*: (1980) 1 SCR 650 a two judge bench of this court found that though a second lease-deed executed between the parties (on the expiry of the period mentioned in the first lease-deed) is void for want of registration, the tenant would continue to be protected under the relevant Rent Control Act because on the expiry of the period of first lease the tenant had acquired the right of a statutory tenant.

None of the observations made in the above decision is in conflict with the view expressed by us above. Appellant occupied the building as a tenant and he paid rent to the landlord and continued as such. Hence with the coming into force of Rent Act he became a statutory tenant whose eviction can be considered only when an application is moved in that behalf before the Rent Control Court concerned. We, therefore, allow this appeal and set aside the impugned judgment of the High Court. The suit filed by the respondent will stand dismissed without prejudice to the right of the respondent to move under the provision of the Rent Act.