

Thimmarayappa Vs. Narayanappa and ors.

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Court : Karnataka

Decided On : Jan-13-1953

Reported in : AIR1954Kant89; AIR1954Mys89; ILR1953KAR578;
(1955)33MysLJ4

Judge : Vasudevamurthy, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 105; [Easements Act, 1882](#) - Sections 52, 60, 61, 63 and 64; Mysore City Municipalities Act - Sections 41, 41(7), 251, 252 and 252(2); [Code of Civil Procedure \(CPC\), 1908](#) - Order 41, Rule 33; Limitation Act; Court-fees Act; Specific Relief Act, 1877 - Sections 21; Indian Contract Act - Sections 65

Appeal No. : Second Appeal No. 602 of 1950-51

Appellant : Thimmarayappa

Respondent : Narayanappa and ors.

Advocate for Def. : N.S. Narayana Rao and ;R. Rangiah, Adv.

Advocate for Pet/Ap. : E. Kanakasabapathy, Adv.

Judgement :

Vasudevamurthy, J

1. The appellant was the plaintiff in the Court of the First Munsif of Bangalore. He brought a suit for a permanent injunction restraining the Bangalore City Municipality, either by itself or through its servants from issuing permits or making leases in favour of anybody else to vend fruits in the Kalasipalyam Bus stand, Bangalore City, so long as the lease in his favour subsisted and was not otherwise legally terminated. The Municipality had, it was alleged, granted a lease in his favour by an agreement dated 9-12-1948 conferring upon him the sole and exclusive right to vend fruits in the entire area known as Kalasipalyam Bus Stand on a monthly rental of Rs. 32/-; notwithstanding that grant the Municipality is said to have given licences to other people to similarly vend fruits in that area before the arrangement in his own favour was properly terminated. That suit was filed on 26-9-1949 but subsequently on 6-3-1950 the plaintiff filed with the permission of the Court an amended plaint. As a result of that amendment defendants two to seven, who had been issued permits by the Municipality, were impleaded on the ground that from and after 20-9-1949 the Market Superintendent, Bangalore City, had under instructions from the Bangalore City Municipality, issued permits in favour of defendants two to seven. The Municipality (Defendant one) filed a written statement which cannot be said to be either very clear or put in proper legal language. But in the main the plea was that the Municipality had put an end to the arrangement with the Plaintiff with effect from 1-6-49 and he had been duly notified about it and could have no grievance. Defendant one further denied the rights of the Plaintiff to the permanent injunction. The other defendants also contested the suit. They pleaded that there was no monopoly given to the plaintiff by Defendant one. There was no valid lease at all in favour of the Plaintiff as the Municipal Council had not sanctioned any such lease in favour of the plaintiff and the agreement purporting to grant such a lease could not bind defendant one. Defendant one was therefore competent to permit anyone else to vend articles in the said stand. The arrangement was merely in the nature of a permission or licence and was not a lease and was terminable at will and had been properly terminated. The suit as brought was not maintainable and an injunction could not be issued in favour of the plaintiff.

2. The learned Munsiff, who tried the suit, held that the arrangement entered into between the plaintiff and defendant one under Ex. III was not beyond what was

decided to be granted by the Municipal Council and that it was in the nature, of a lease and not merely a licence. That arrangement had not been validly terminated and the action of defendant one in issuing permits to others during the currency of that arrangement infringed the lease-hold rights of the plaintiff. He accordingly made a decree in favour of the plaintiff as prayed for. Strangely the Municipality did not appeal against this judgment; and it is explained by the present counsel for the Municipality that there was some delay in getting copies and that the Municipality later on felt that as the other defendants had appealed, the Municipality also could take advantage of the same. Defendants two to seven however, preferred an appeal in the Court of the District Judge, Bangalore, and the ' Municipality which by then came to be the Corporation of the City of Bangalore was impleaded as Respondent 2. The appeal came to be heard by the Additional Subordinate Judge, Bangalore, who reversed the Munsiffs decision and dismissed the plaintiffs suit. The plaintiff has come up in Second Appeal.

3. The appeal has been argued fully and at considerable length by Counsel who appeared for the appellant as well as for the Corporation and for defendants 2 to 7. I do not see any reason, however, to interfere with the Judgment of the lower Appellate Court.

4. Mr. Kanakasabapathy, learned Counsel for the appellant, contents that the rights in favour of the Plaintiff under Ex. III is really in the nature of a lease and not a mere licence. He represents that though it is termed an agreement in the opening paragraph it has referred to the agreement to 'lease' the schedule land in accordance with the resolution of the Municipality dated 2-12-1048. A monthly 'rent' payable by the 5th of each month has been provided and there is a provision that a 'schedule' has been given in which the land known as Kalasipalyam Bus Stand has been described, and it has been further provided that the plaintiff will not 'sub-let' it to others or use it for any purpose other than vending fruits. The agreement is also on a stamp paper of the value of Rs. 3-12-0 which is the proper stamp for a lease deed and not a mere agreement, and there is a specific provision in para, three of it that the Municipality reserves the right to resume it if the plaintiff committed any act in violation of the agreement. He urges that the last provision shows that the Municipality could have resumed the land or taken

possession only for any default on the part of the plaintiff. As against this, it is contended for the respondents that there is no conveyance of the land in question and that what is granted under Ex. 3 is merely the right to vend fruits in accordance with Ex. 8, the resolution dated 2-12-1948, of the Municipal Council which in turn accepted the recommendation of the Chairman of the Managing Committee that the plaintiff may be permitted to do so on a monthly rent of Rs. 32/-. I am inclined to agree with the respondents' contentions in this matter.

5. A lease of immoveable property has been defined as a transfer of a right to enjoy such property made for a certain time express or implied or in perpetuity. In -- '51 Mys H. C. R. 47 (A)', it has been held that the term 'lease' imports that exclusive possession is given to the transferee of the premises conveyed, while licence on the other hand, is permission to do some act which without permission it would be unlawful to do. In that case an arrangement between the parties to raise' casuarina trees by one of them on a piece of land belonging to one of them with a view to dividing the proceeds between them, was held not to amount to a lease. The distinction between a lease and a licence it was observed depended upon whether sole and exclusive possession is given to the transferee and if no such exclusive possession was given, and if the transferor still retained control over the land, it would amount to a licence and not a lease. The entire area of the large piece of Municipal land included in the boundaries given in the schedule known as Kalasipalyam Bus Stand with numerous constructions on it including a restaurant was certainly not delivered over to the possession of the Plaintiff. The Municipality and the public generally and other persons who had interest in the restaurant were free to move about in the area and the Municipality apparently retained full control over the land and its use and enjoyment in spite of the arrangement. The Plaintiff applied as per Ex. X requesting the grant of 'a lease right for vending fruits' in the Bus Stand and' offered to pay a rent of Rs. 32/- per month. That application was considered by the Market Superintendent who made a report as per Ex. 9 to the Managing Committee recommending that the Plaintiff may be permitted to vend fruits in the Bus Stand on that rent. His recommendation was accepted by the Managing Committee and they forwarded their opinion to the Municipal Council who at a meeting held on 2-12-1948 passed a resolution accepting the Man aging Committee's suggestion. Thereafter, Ex. 3 came to be

executed. In Ex. 3, a specific reference has been made to the resolution of the Municipal Council of 2-12-1948; it has been recited in Ex. 3 that by that resolution the Municipality had agreed to lease the schedule land to the plaintiff. This was clearly incorrect. The resolution was that the plaintiff should be permitted to vend fruits and not that the land should be granted to him on lease. It is rather unfortunate that this mistake should have occurred and that has given rise to all this litigation. But there is no doubt that the Plaintiff must have been fully aware of the exact implications of the Municipal Council granting his application to vend fruits on a monthly rental in the Bus Stand. It must therefore be held that Ex. 3 merely evidences a licence and not a lease.

6. There is no stipulation in Ex. 3 that the Plaintiff should have the monopoly of vending fruits in the Bus Stand or that the Municipality had no right to issue similar licences to others. The Plaintiff has come to Court with a specific-plea that he was granted such monopoly rights and has let in no evidence apart from Ex. 3 in favour of such a claim. If the arrangement is not a lease but a licence, under Sections 60 and 61, Easements Act, the same may be revoked at any time by the grantor either expressly or by implication unless it is coupled with a transfer of property and such transfer is in force or the licensee acting upon the licence has executed a work of a permanent character and incurred expenses in the execution. Where such a licence is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property and even where a licence has been granted for a consideration & the licensee without any fault of his own, is evicted by the grantor before he has fully enjoyed under the licence the right for which he contracted he is entitled to recover compensation from the grantor; see -- 'Dominion of India v. R. B. Sohan Lal' AIR 1950 EP 40 (B). There is no provision either in Sections 60 61 63, or 64 for the issue of any notice, much less for giving any specified time as in the case of leases before a licence can be revoked. Mr. Kanakasabapathy has cited --- 'Amimullah v. Emperor' : AIR1928 All95 , for the position that a Municipality is not outside the provisions of the Transfer of Property Act and that, if it has granted a lease, notice must be given before the same can be terminated. There is no doubt it is so. In -- 'Mohamed Rowther v. Tinnevely Municipal Council' AIR 1938 Mad 746 (D), also cited by him the right to collect the fees of slaughter

houses and fish bazaars was held to amount to a profit arising out of land & therefore fell within the definition of Immoveable property as given in Section 3, Clause (25) of the General Clauses Act. There the rents or profits were clearly attributable to the shops or bazaars and it was not a mere right to vend things within an open area. He has referred to -- 'O. G. Ganguly v. Kamalpat Singh' : AIR1947 Cal236 where it has been observed that the border line between a licence and a lease is often exceedingly thin and that even the use of expressions such as 'temporary accommodation' and 'compensation' instead of tenancy & rent is inconclusive of the circumstance whether the arrangement amounts to a lease. In -- 'Indal v. Debi' AIR 1926 Nag 174 (F), there was an agreement to pay some grain periodically to the owner of a piece of land on account of damage to be caused to his land by the defendants using it to take their carts and cattle over it and that was construed as a lease mainly on the ground that the right was heritable and irrevocable, and it can have no application to the present case. It is a question of fact in each case whether a particular arrangement amounts to a lease or licence and other cases can merely be a guide in such interpretation. As already pointed out the proper interpretation to be put on Ex. 3 is that it is a licence and not a lease.

7. In this connection, it has been urged for the respondents that Ex. 3 cannot be enforced if it is to be deemed as a lease of immoveable property; such a lease can only be granted by the Municipal Council under Section 41, Mysore City Municipalities Act; that in this case, the resolution Ex. 3 was only to the effect that the plaintiff should be permitted to vend fruits in the Bus Stand and any agreement that could be entered into with him thereafter by the Commissioner could only be in terms of that resolution and the Commissioner had no power to enter into an arrangement of lease with the plaintiff. Exhibit III is also, it is urged, not in accordance with the requirements of Sections 251 and 252 of that Act. under Section 251 (c) no contract for the purchase, sale, lease, mortgage, or other transfer of immoveable property shall be entered into by the Municipal Commissioner except with the approval or sanction of the Municipal Council; and under Section 252(2) read with Section 41(7) such a contract should be in writing and signed by the President and attested by two other Councillors and sealed by the Municipality. These formalities not having been observed in this case, it is

urged that the agreement Ex. 3 is void; and for that position reliance is placed on -- '28 Mys C. C. R. 119 (G)', which supports it. It is, however, urged for the appellant that the later case in -- '8 Mys LJ 412 (H)', would govern this case. But it is seen that in the latter case the defendant had enjoyed the benefit of the contract and collected tolls which the Municipality would have collected but for the contract with the defendant, and it was held that he was liable under Section 65, Contract Act to pay the balance of the rent due to the Municipality. The question of directly enforcing the terms of the contract did not therefore really arise in that case, and in fact it is observed at p. 418 of the report, that they were not concerned with a case where the contract was still executory and there was no need to consider the question whether non-compliance with the statutory formalities of the Municipal Act would prevent either party from enforcing performance against the other of such contract.

8. The next contention of Mr. Kanakasabapathy is that an injunction had been granted against the Municipality by the Munsiff and as the Municipality had not appealed that decree had become final; and the present Respondents one to six who claim under the Municipality respondent seven could not by filing an appeal of their own before the District Judge, get over or nullify the effect of the decree against the Municipal Council. This contention no doubt at first sight appears to be somewhat formidable against the Municipality & defendants two to seven. But it has to be observed that the lower Appellate Court had powers even in such a case under Order 41, Rule 33, C. P. C. to pass any decree or make any order which ought to have been passed or made by the trial Court and the power could be exercised by the lower appellate Court in favour of or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection. Moreover, defendants two to seven were impleaded in the case by reason of the grant of permits in their favour before the plaintiff filed his amended plaint; and if the Municipality had so granted permits before the date when the suit must be deemed to have been filed against those defendants any decision which may be passed in the suit against the Municipality would not be binding on these defendants also as by that time the Municipality had already parted with certain rights in their favour. In fact on behalf of defendants 2 to 7, it was rather strongly argued that if the Municipality for instance had colluded with the plaintiff & not

chosen even to defend the suit nevertheless defendants two to seven, who are grantees of certain rights, could on their own rights seek to defend the same. The respondents have also pointed out that in the appeal memo before this Court the appellant has taken no such ground and this, it is urged, shows that he himself thought that there was not much force in this contention.

9. In this connection reliance has been placed for the appellant on -- 'Chandrika Bakhsh v. Indar Bikram Singh' AIR 1916 P. C. 14 (I), and -- 'Motilal Kanji & Co. v. Natvarlal M. Jhaveri' AIR 1932 Bom 78 (J). In the first case it was admitted by the defendant concerned, and found by the Sub-Judge, that the contesting defendant had no title of his own to protect and was a mere 'impertinent intervener' in another person's affair. It was therefore held by their Lordships of the Privy Council that he could not have maintained an appeal before the Judicial Commissioner to whom he had appealed. In the latter case which was one arising under the Companies' Act the appellant's interests were in no way affected by the order of the lower Court and therefore it was rightly held that he had no right to appeal against the decision. That can certainly not be said of defendants two to seven who have rights of their own to defend and a real stake in the litigation. In this court it has been held that, though powers under Order 41, Rule 33, C. P.C. should be cautiously applied, e.g. in cases where but for the recourse to it the ends of justice would be defeated and the rule should not be allowed to be invoked in favour of a litigant so as to enable him to effect the provisions of other statutes such as Limitation Act, Court-fees Act and other provisions of the Code of Civil Procedure, recourse to which may have given him requisite relief, still such powers could properly be invoked to do justice between the parties; See '31 Mys. C. C. R. 218 (K) and -- 'Rangachar v. Srinivasa Rangachar', 45 Mys. H. C. R. 450 (L). If in the circumstances of this case it is found that an injunction, not to grant licences, could not have been made in favour of the plaintiff against the Municipality much less against defendants two to seven it is difficult to accept the argument for the appellant that the injunction could be retained as against the Municipality while cancelling the same so far as it affects defendants two to seven. Defendants two to seven who were clearly affected by the decree of the Munsiff appealed in time and the Municipality was also impleaded in the appeal. I think it is not an unreasonable contention on their part that since already an appeal had been filed

by defendants two to seven they felt that the appellate Court could grant suitable relief to all parties concerned in that appeal alone under the provisions of Order 41, Rule 33.

10. It is next contended for the appellant that Ex. 3 is not a bare licence but one coupled with a grant of rights in land; and reliance is placed on -- 'Arpan Ali v.- Jnanendra Kumar' : AIR1945 Cal413 . It is urged that the appellant's rights subsisted until even the alleged licence was revoked in a proper way and that in the present case it has been terminated arbitrarily. Clause (3) of Ex. 3 specially provides that the arrangement was to subsist so long as the plaintiff was paying rents regularly, and it is urged there is not even a suggestion that he failed to perform this or any other terms binding on him. Exhibit 3, in my opinion, is merely in the nature of a mere right to vend fruits, i.e. a bare licence. It is not accompanied by any transfer of immoveable property or grant of any rights therein. The plaintiff has not effected any improvements or constructions on the property or stored any goods. It is urged that the licence has been granted for a consideration, viz., payment of rent. But even then the licensee is entitled to recover compensation from the grantor and cannot obtain an injunction enabling him to continue to enjoy the rights for which he has contracted.

11. For the respondents it has also been contended that this is not a proper case in which an injunction could be issued. Reference has been made to Sections 21(d) and (g), Specific Relief Act. It is urged that the present is a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date. If the appellant's contention is to be accepted it is argued Ex. 3 is to be in the nature of a permanent arrangement & a kind of grant in perpetuity of a right to vend fruits in this area. By way of answer, it is represented for the appellant that what the plaintiff is seeking in this case is that he should be allowed to continue to enjoy the rights granted in his favour by defendant one till it is properly terminated in accordance with law and that it is not a right in perpetuity that he is claiming. It is not necessary to consider this point in the view I have taken that Ex. 3 does not represent an enforceable contract of lease but a licence. There is, however, considerable force in the argument for the Respondents that the present document being a contract which

is in its nature revocable it cannot be specifically enforced by the Court by the issue of a permanent injunction.

12. In the result, the judgment and decree of the lower Appellate Court are confirmed and this appeal is dismissed with costs. (Advocate's Fee Rs. 25/-)

13. Appeal dismissed.

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