

S. Suresh and Another Vs. Syed Omer and Others

S. Suresh and Another Vs. Syed Omer and Others

SooperKanoon Citation : sooperkanoon.com/433921

Court : Andhra Pradesh

Decided On : Mar-13-2000

Reported in : 2000(2)ALD768; 2000(3)ALT62

Judge : C.V.N. Sastri, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 108(J)

Appeal No. : SA No. 419 of 1999

Appellant : S. Suresh and Another

Respondent : Syed Omer and Others

Advocate for Def. : Mr. D. Prakash Reddy, Additional Advocate-General

Advocate for Pet/Ap. : Mr. A.G. Seetharam, Adv.

Judgement :

ORDER

1. The first defendant and the third defendant, who was brought on record as the legal representative of the deceased-second defendant in the suit, are the appellants in this second appeal. First respondent-plaintiff filed the suit against defendants 1 and 2 for recovery of vacant possession of the suit site after ejecting the defendants therefrom. As the second defendant died during the pendency of the suit, her LRs were brought on record as defendants 3 and 4. The fourth

defendant is arrayed as second respondent in this second appeal.

2. There is not much controversy about the facts of the case. The plaintiff, who is the owner of the suit site ad measuring 1555 sq.yds in Hayatnagar village, leased out the same to the first defendant under lease deed dated 10-12-1979 (marked as Ex.A2) for a period of 10 years initially with an option for the lessee to renew the lease for a further period of 10 years by giving prior notice of not less than six months before the expiry of the lease period. According to the plaintiff, the first defendant sub-let the same to the second defendant, without his knowledge or consent. It is, however, the case of the defendants that the lease was obtained for and on behalf of a partnership firm, of which the defendants 1 and 2 were partners. Before the expiry of the lease period on 8-6-1989, the second defendant gave Ex.A3 notice to the plaintiff purporting to exercise the option of the renewal of lease for a further period of 10 years, to which the plaintiff sent a reply to the second defendant stating that the second defendant was a stranger with whom the plaintiff had no privity of contract, and as such, the second defendant had no right to exercise the option of renewal of the lease. After the expiry of the lease period, the plaintiff filed the suit against both the defendants, after issuing a quit notice dated 16-5-1990 (Ex.A6).

3. The defendants resisted the suit contending that the plaintiff was fully aware that the lease was obtained for the purpose of running a petrol bunk in the suit site in the name and style of M/s. Sri Rama Service Station, a partnership concern, of which defendants 1 and 2 were partners, and that rents were, in fact, paid on behalf of the firm only throughout and the same were accepted without any murmur, and the second defendant, as partner of the firm, duly exercised the option for renewal of the lease for a further period of 10 years and, as such, the lease stood extended and renewed for a further period of 10 years; beyond 10-12-1989, and the suit is, therefore, liable to be dismissed.

4. The trial Court decreed the suit holding that it is not established that the second defendant is a partner of the first defendant, that there is no privity of contract between the second defendant and the plaintiff and, as such, the second defendant has no right to exercise the option of renewal and that the lease is

validly terminated by the plaintiff by issuing a quit notice Ex.A6. Questioning the said judgment and decree of the trial Court, the third defendant only preferred the first appeal before the lower Appellate Court. The first defendant, however, filed an application to transpose him as appellant No.2 in the appeal. The lower Appellate Court, agreeing with the view taken by the trial Court, dismissed the appeal as well as the said application filed by the first defendant. Hence, this second appeal.

5. Mr. J.V. Suryanarayana, learned senior Counsel appearing for the appellants in the second appeal, sought to assail the judgments of the two Courts below by raising the following contentions;

(1) Section 108(j) of the Transfer of Property Act, confers unfettered right on the lessee to assign or transfer his right in the absence of any restriction in the lease deed. There is no such restriction in Ex.A2. So, even assuming that the second defendant was a sub-lessee, she was entitled to exercise the option of renewal of the lease.

(2) The knowledge or consent of the lessor is unnecessary and the absence of privity of contract between the plaintiff and defendant No.2 is totally irrelevant. Both the Courts below therefore, committed an error of law in holding that D2 cannot exercise the option.

(3) The Courts below erred in their view that the lease was obtained by the first defendant in his individual capacity and not on behalf of the firm. As a matter of fact, the partnership came into existence prior to the lease and the same is borne out by the partnership deed dated 8-12-1979, which was filed in the Appellate Court as additional evidence. The Appellate Court erred in not receiving the same into evidence.

(4) Finally, the Appellate Court failed to properly frame the points that arise for consideration or to deal with the various points that were raised and argued before it.

6. On the other hand, Mr. D. Prakash Reddy, learned Additional Advocate General appearing for the first respondent-plaintiff, has contended that the specific case set

up by the defendants in their written statements was that the second defendant was a partner of the first defendant, but not a sub-tenant, and as both the Courts below concurrently found against the defendants on the said issue it is not open to the defendants to invoke the aid of Section 108(j) of the Transfer of Property Act. He alternatively contended that even assuming that they are partners of a firm, as the lease was obtained by the first defendant in his individual capacity but not on behalf of the firm, the second defendant had no right to exercise the option of renewal of the lease, as there was no privity of contract between her and the plaintiff. Learned Counsel for the respondent, finally, submitted that in any case, since the further period of 10 years has also expired during the pendency of the proceedings, the defendants have no right to continue in the possession of the suit land, and the second appeal is devoid of merit.

7. The mutual rights and obligations of the parties are governed by the terms and conditions of the lease deed dated 10-12-1979, which was entered into between the plaintiff as lessor and the first defendant as lessee. There is no indication whatsoever in the lease deed that the lease was obtained by the first defendant for and on behalf of the partnership firm. The lease deed clearly shows that the lease was taken by the first defendant in his individual capacity only. Both the Courts below were, therefore, right in holding that the lease was obtained by the first defendant in his individual capacity only, but not for and on behalf of the firm. In the lease deed, it is mentioned that the terms Lessor and Lessee shall mean and include whenever the context so requires their respective heirs, executors, administrators, and assigns. Clause (7) of the lease deed provides that the lessee shall have the option to renew the lease for a further period of 10 years on the same terms and conditions as are contained in the lease deed, including the renewal clause, provided, the lessee gives prior notice in writing of not less than six months before the expiry of the lease period or of the extended lease period and subject to his paying and increase of Rs.200/-(Rupees two hundred only) per month over the existing rent for the extended period of the lease. Clause (8) stipulates that at the end of the lease period or the extended period of lease, the lessee shall be bound to vacate and deliver possession of the land and the lessee shall be entitled to remove such structures or fixtures or materials belonging to the lessee. There is no express term in the lease deed prohibiting the lessee from

sub-letting the property or from assigning the leasehold interest in favour of a third party.

8. In the quit notice Ex.A6 as also in the plaint, it is stated that the plaintiff understands that the lessee i.e., the first defendant had given the suit property in sub-lease in favour of the second defendant claiming her to be his partner to circumvent the terms of the lease. In the written statements filed by them, the defendants have specifically denied the allegation that the second defendant was a sub-tenant of the first defendant and it was asserted that the defendants 1 and 2 entered into a partnership for the purpose of running a retail outlet of the Indian Oil Corporation in the suit site under the name and style of M/s. Sri Rama Service Station. However, on a consideration of the entire material on record, both the Courts below negated the said plea of the defendants and found as a fact that the first defendant obtained the lease only in his individual capacity and there was no privity of contract between the plaintiff and the second defendant. Though the trial Court has observed in its judgment that in the absence of a lease by partnership firm, the running of petrol outlet by D2 and D3 amounts to subletting, the Appellate Court rested its judgment solely on the finding that there was no privity of contract between the plaintiff and the second defendant and, as such, the second defendant had no right to exercise the option of renewal of the lease.

9. It is the contention of the learned Counsel for the appellants that the above view taken by the Courts below is erroneous and unsustainable as it is contrary to Section 108(j) of the Transfer of Property Act, which provides that in the absence of a contract or local usage to the contrary, the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. It is also provided in the said clause that nothing in the said clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee.

10. In support of his contention that a lessee can unilaterally exercise the option of renewal or extension of the lease and the consent of the lessor is not required for the same, the learned Counsel for the appellants has relied upon the following decisions.

In *Baker v. Merckel*, 1960 (1) AER 668, it was held that the exercise of the option (of surrender or extension of tenancy) was not a consensual matter.

'Notices of this kind... are documents of a technical nature, technical for this reason, that if they are in proper form they have of their own force without any consent by the recipient the effect of bringing the demise to an end. They are not consensual documents...'

'The words are equally applicable to a notice of extension. The extension caused by the exercise of the option was not dependent on the lessor's consent'.

This decision, in my view, is however not directly in point. The question for consideration in the instant case is whether an alleged partner of the lessee can exercise the option.

In *Appa Rau v. Subbarma*, ILR 13 Mad. 62, it is held that a lease of an agricultural land, in the absence of any agreement or local usage to the contrary, is an assignable interest.

In *Badri Narain Jha v. Rameshwar Dayal*, : [1951]2SCR153 , it is held that there is a privity of the estate between the tenant and the landlord in the whole of the leasehold and he is liable for all the covenants running with the land.

In *W.H. King v. Republic of India*, : 1952 CriLJ836 , the distinction between an assignment on the one hand and relinquishment or surrender on the other, is pointed out. In the case of an assignment, the assignor continues to be liable to the landlord for the performance of his obligations under the tenancy and this liability is contractual, while the assignee becomes liable by reason of privity of estate. The consent of the landlord to an assignment is not necessary, in the absence of a contract or local usage to the contrary.

Nava Kishore Das v. Modem Mohan Das, AIR 1924 Cal. 346, it is held that the covenant for renewal of lease of land being a covenant running with the land the assignee of the leasehold is perfectly competent to enforce its terms.

Radha Kamal v. Puri Municipality, : AIR1954 Ori110 , a Division Bench of the Orissa High Court considered the question whether the covenant stipulating for the renewal of the lease is one running with the land or is independent of it. It is held:

'A covenant entered into between a lessor and a lessee is primarily binding as between the two personally. But upon an assignment either of the reversion or of the terms, it may also be binding on the grantee of the reversion or the assignee of the terms; and similarly, the benefit of a covenant may pass to these parties respectively. There may be covenants for the benefit of the lessor, or there may be a burden on the lessee. Whether a covenant runs with the land would depend partly on the nature and partly on the form of the covenant.

It is said to run with the land if it directly concerns the land as, for example, covenant to pay rent to repair houses already built, to insure against fire, to use premises as dwelling houses only, or to manure the land if it is an agricultural land; and such covenants will bind the assigns. If the covenant is one by the lessor for the benefit of the lessee and directly touches or concerns the land it runs with the land in favour of the assign. See - 'Simpson v. Clayton, (1833) 8 LJCP 59 (A). An option to renew the lease runs with the land and the leasehold interest, and so both the lessors' and the lessees' successors-in-title are bound'.

11. The above cited authorities, cannot however render any assistance to the appellants in the instant case inasmuch as the specific plea of the defendants was that the second defendant was not a subtenant or assignee of the first defendant but she was only a partner. Even assuming that she was a partner, since the lease was obtained by the first defendant in his individual capacity only but not on behalf of the firm, the second defendant as partner of the firm has no right to exercise the option of renewal of the lease. In any case, as the further period of 10 years also has lapsed during the pendency of the proceedings. I am of the view that the above exercise is merely academic and is unnecessary on the facts of this case.

12. In this view of the matter, I do not find any merit in the second appeal and it is accordingly dismissed with costs. After the judgment was pronounced, the learned Counsel for the appellants sought leave to go in appeal to the Supreme Court. I do not, however, find any such substantial question of law, which requires the matter to be examined by the Supreme Court. Leave is, therefore, refused. The appellants are, however, granted four weeks time from today to vacate and handover the vacant possession of the suit property to the plaintiff.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com