**Devaki (Died) Vs. Alavi**

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**SooperKanoon Citation** : sooperkanoon.com/717605

**Court** : Kerala

**Decided On :** Dec-21-1978

**Reported in** : AIR1979Ker108

**Judge** : V.P. Gopalan Nambiyar, C.J.,; V. Balakrishna Eradi and; George Vadakkel, JJ.

**Acts** : Transfer of Property Act, 1882 - Sections 106 and 116

**Appeal No.** : A.S.A. No. 11 of 1976

**Appellant** : Devaki (Died)

**Respondent** : Alavi

**Advocate for Def.** : T.R.G. Warrier and; K. Ramakumar, Advs.

**Advocate for Pet/Ap.** : K.S. Parameswaran Nair, Adv.

**Disposition** : Appeal allowed

**Judgement** :

**George Vadakkel, J.**

1. The material question that survives for consideration in this appeal is as to whether the appellant-plaintiff is entitled to recover possession of the leasehold, a building let out for doing business, without proper quit-notice under Section 106 of

the Transfer of Property. Act, 1882 (hereinafter referred to as the Act). The lease was for a term of three months from 1-1-1967. It is also provided in the lease deed. Ext. A1, that after the expiry of the term of three months on demand by the appellant-lessor, the respondent-lessee shall at his expense surrender possession of the leasehold without any objection and without raising any contest. The parties also agreed that if the lessee continues in possession after the term, he shall pay to lessor the stipulated rent of Rs. 15/- per month, during such period. We will quote these relevant clauses:--

'I will vacate the premises at my expense after settling accounts without any dispute or raising objection under law, after three months from 1-1-1967, on demand by you. If I continue in possession of the premises after the period of expiry, the rent will be paid at the above rate for the period in possession.'

2. The appellant sent Ext. A2 lawyer's notice dated 12-7-1971 stating that the tenancy is terminated with effect from 30-7-1971. This notice reached the respondent on 16-7-1971. He sent Ext. A3 reply notice. It is common case that rent till and inclusive of that for June 1971 has been paid and accepted and that rent offered was not accepted by the appellant thereafter. The suit was filed on 23-8-1971.

3. There is no evidence in this case to support the contention raised on behalf of the respondent in the course of the argument before us that the appellant had made an earlier demand for surrender of possession of the leasehold at some time after the expiry of the term of three months. The evidence of P.W. 1, an attestor to Ext. A1 and the husband of the appellant's uncle's daughter, which was relied on by the learned counsel for the respondent is : 'After 3 months the respondent did not surrender possession. I have demanded surrender of possession.' It is not dear as to which demand he refers to : Ext. A2 demand or any other demand for surrender of possession. Even assuming that the reference is to a demand other than Ext. A2 demand, we are unable to treat the demand, made by P.W. 1 as one competently made in the absence of proof of his authority to do so on behalf of the plaintiff-appellant. The respondent as D.W. 1 denies of any such demand for surrender after three months and prior to Ext. A2 notice. According to him the

demand for surrender of the leasehold was for the first time made only by Ext. A2, lawyer's notice. We will therefore proceed to decide this appeal accepting the case advanced on behalf of the appellant that demand for surrender was made only as per Ext. A2 notice.

4. During the continuance of the lease, the lessor is not entitled to recover possession of the property leased. He can recover possession of it only on the determination of the lease. A lease for a term is determined by efflux of time. A lessee remaining in possession of the property after the lease has determined is a tenant at will or a tenant at sufferance depending upon whether his continuance in possession is or is not with the assent of the landlord. A tenancy at sufferance is therefore, obviously, not consensual in character and arises only by implication of law. This term is used to distinguish the quondam tenant who came into possession rightfully but remains in possession wrongfully from a trespasser whose entry into possession as also continuance of possession are wrongful. A tenancy at will is a new tenancy created by a bilateral act of offer and acceptance --lessee's offer of taking a new lease evidenced by the lessee remaining in possession of the property after his term was over and acceptance of that offer by the lessor evidenced by 'a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise'; Bhawanji v. Himatlal (AIR 1972 SC 81&). Under the English law a tenancy at will is deter-minable at the will either of the landlord or of the tenant, and so the expression tenant at will.

'A tenancy at will is a tenancy under which the tenant is in possession, and which is determinable at the will of either landlord or tenant; and although upon its creation it is expressed to be at the will of the landlord only or at the will of the tenant only, yet the law implies that it shall be at the will of the other party also; for every tenancy at will must in law be at the will of both parties (a). Like other tenancies, a tenancy at will arises by contract binding both lessor and lessee (b), and the contract may be express (c) or implied. (Hill and Fedman's Law of Landlord and Tenant, 15th Edn. -- p. 35).

'A lessee who, with the consent of the lessor, remains in possession after his lease has expired, by effluxion of time and othewise than in reliance of some statutory

provision protecting him from eviction, is tenant at will until some other interest is created, until, for instance, the tenancy is turned into a yearly tenancy by payment of rent. (Ibid).

'A tenancy at will is where lands or tenements are let by one man to another, to hold at the will of the lessor; in this case the lessee is called tenant at will, because he has no certain or sure estate; for the lessor may put him out at any time he pleases. Either party may at any time determine a strict tenancy at will, although expressed to be held at the will of the lessor only, and the landlord may determine it by a demand of possession or otherwise without a previous formal notice.' (Woodfall on Landlord and Tenant -- Twenty-sixth Edition. Para 739, pp. 306-307).

5. Section 116 of the Act is the law in India governing tenancy by holding over. Thereunder, 'in the absence of an agreement to the contrary' the lease stands 'renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106' of the Act; that is to say, in the case of an agricultural or a manufacturing lease, it shall stand renewed as one from year to year terminable by six months' notice expiring with the end of a year of the tenancy, and in any other case, as one from month to month terminable with fifteen days' notice expiring with the end of a month of the tenancy. Turning to Section 106 of the Act, it will be seen that a tenancy of deemed or implied duration, yearly or monthly as the case may be, depending upon the purpose for which the property is leased, agricultural and manufacturing or any other, determinable by six months' notice expiring with a year of the tenancy or fifteen days' notice expiring with a month of the tenancy respectively, arises thereunder, however, subject to any contract or local usage to the contrary. Mark, both the statutory renewal under Section 116 of the Act, and the statutory deeming of duration under Section 106 are subject to any agreement or contract to the contrary between the parties. A contract as regards the term of the tenancy, necessarily, in view of Section 111(a) of the Act, does away with the need for statutory notice to terminate such tenancy. So also, if the lessor and the lessee, by mutual consent create a tenancy at will terminable at the will of either the landlord or the tenant, the contract in that behalf between them, which obviously is incon-' sistent with a tenancy of deemed duration arising under Section 106 of the Act and

a renewed tenancy arising under Section 116 of the Act, would be binding on them and the terms thereof would govern their jural relationship of lessor and lessee. There is nothing objectionable in their entering into such a contract beforehand, prior to the expiry of a current lease for a term or even at the time of the creation of a lease for a term, stipulating the nature of tenancy that is to arise in the event of the lessee continuing in possession of the property after the expiry of the term. As to when to form a contract and what, its terms ought to be, are matters falling within the autonomous realm of freedom of contract, and are to be tested only by rules governing contracts. That this is so was recognized by this Court in, Subramonia Iyer v. Madhavi Amma (1963 Ker LT 1009) : (AIR 1964 Ker 218) where Mathew J. (of this Court as he then was) speaking, for the Bench said (at p. 220 of AIR) :--

'Section 116 of the Transfer of Property Act would imply that it is only if a tenant remains in possession after the expiry of the tenancy that the tenant can be said to hold over. In such a case if the landlord accepts the rent or otherwise assents to the tenant continuing in possession a case of tenancy by holding over will arise. But according to Ext. A1, the tenancy could be determined after the expiry of the period of 3 years only by a demand by the landlord. So long as there is no case that that demand was made the tenant must be deemed to be in possession under the terms of the tenancy created by Ext. Al. As that tenancy has not been determined the tenant was not really holding over but was in possession by virtue of the tenancy at will created by that document.'

(para 9 at p. 1012-1013).

The relevant clause in the lease deed that was construed in that case is extracted earlier in the judgment, and being similar to the stipulations in Ext. A1 lease deed with which we are concerned in this case, we will for easy reference read it here :--

'Ext. Al specified a term of three years and then it went on to say :

'When demanded after three years, after settling all accounts on the lease and receiving the price of the shop building, the land along with the building and other improvements thereon will be handed over after executing the release deed

('Ozhimuri') at my expense.'

We would usefully read the following passages also from that decision:--(at p. 219 of AIR)

'It is clear that neither the landlord nor the tenant could have terminated the tenancy within the 3 years specified in Ext. A1. To that extent there can be no dispute that the tenancy created under Ext. A1 was a tenancy for a period certain. Thereafter, if the tenant continued in possession, we think that he was holding the property as a tenant at will. The clause in Ext. A1 that the tenant was to surrender possession of the property on demand by the landlord would indicate that the tenant if he continued in possession after the period fixed in Ext. A1 would be a tenant at will who could be evicted at any time at the will of the landlord. Therefore, it is not correct to say that the tenancv created by Ext. A1 is a tenancy for a period certain. As we understand it, the tenancy was one for a period certain and thereafter a tenancy at will.' (Para 6 at p. 1011).

We are in respectful agreement with the exposition of law as aforesaid in Subramonia Iyer v. Madhavi Amma (1963 Ker LT 1009) : (AIR 1964 Ker 218) and we affirm the same.

6. 'Notice under this section (Section 106 of the Act) is not necessary, and a mere demand will suffice if the lease is on condition that the land demised should be surrendered whenever required.' (Mulla's Transfer of Property Act, Setalvad's (Sixth) Edition, p. 663). The proposition of law stated above is beyond challenge, in so far as parties are free to create a tenancy at will sim-plictter by mutual consent., and a stipulation to the effect that the lessee shall surrender possession of the property leased on demand made in that behalf by the lessor, is nothing but a stipulation that the lease is determinable at the will of the lessor, and a 'contract to the contrary' as envisaged by Section 106 of the Act, Ext. A1 in this case is a composite document creating a lease for a specified term of three months during which period neither party can except by a bilateral act terminate the lease, followed by a tenancy at will simpliciter not amounting to a renewed tenancy by holding over under Section 116 of the Act, and therefore, neither of the two sections. Sections 106 and 116 of the Act, is a bar to a suit for recovery of

possession of the property leased nor is any notice under Section 106 of the Act required to determine the tenancy. A tenancy at will stands determined by any demand for surrender of possession of the property made by the landlord and such demand may be the one contained in the plaint. By Ext. A2 lawyer's notice the lease was determined with effect from 30-7-1971 and the landlord-appellant demanded surrender of possession of the property as on that date. The landlord-appellant therefore was entitled to sue for recovery of possession of the property from and after that date,

7. The statement of law extracted in the beginning of the preceding paragraph is supported by the decision of Munro and Sankaran Nair JJ. rendered as early as in Kelu v. Mamad Kutti 1&10 Mad WN 794, wherein the above said learned Judges said:

'Seeing that in Exhibit 4 there is an express provision to surrender on demand we think there is a contract to the contrary within the meaning of Section 106 of the Transfer of Property Act.'

In Mukat Singh v. Misra Parma Ram (AIR 1924 All 726), the Allahabad High Court held likewise:--

'.....and in view of the evidence, which goes to show that the defendants had agreed to vacate the house when the plaintiffs wanted, Section 106 cannot be made applicable and the omission to give the notice cannot be regarded as fatal to the present suit'.

These passages were quoted with approval and followed by the Madras High Court in Moosa Kutty v. Thekke (AIR 1928 Mad 687) wherein it was held that in view of the fact that one of the terms of tenancy was that the property should be surrendered when required, no notice was necessary in order to enable the plaintiff to maintain a suit in ejectment.

8. In Keshavlal v. Bai Ajawali (AIR 1953 Sau 119) the view has been taken that a provision in the rent note 'that the tenant is to deliver vacant possession to the landlord without delay when at whatever time the landlord makes a demand for

vacating the leased portion, merely means that the tenancy is not for a fixed term, but does not amount to contract to the contrary to which the provisions of Section 106 of the Transfer of Property Act are subject'. With respect, in view of what is stated hereinbefore, we are unable to subscribe to such a view.

9. This Court expressed its agreement with the view expressed in the Saurashtra decision aforesaid in the decision of a learned single Judge of this Court in Abdul Hameed Rawther v. Balakrishna Pillai (1966 Ker LT 765). However, that decision as a whole has been reversed on appeal by a Division Bench of this Court by its decision in Abdul Hameed Rawther v. Balakrishna Pillai 1968 Ker LT 865 : (AIR 1970 Ker 40). The provision in the lease deed considered in those cases did not contain any stipulation for surrender of possession on demand by the lessor. The relevant provision that came up for examination is extracted at p. 866 (of Ker LT) : (at p. 41 of AIR) of the Division Bench decision. The lease considered in those cases was for a term of one year and the lease deed contained a provision that the lessee shall on the expiry of the term surrender possession. The term expired on 28-9-1962. The lessee remained in possession thereafter paying rent as re-agreed to in the lease deed till September 1963, He defaulted payment of rent thereafter. The Division Bench held that it was a case of holding over under Section 116 of the Act, and with respect, rightly so. It was further held that the view taken by the learned single Judge that Section 116 did not apply to a lease which was for a fixed period and that in such a case the question of determination of lease, was by notice as required by Section 106 did not arise, was wrong. As a matter of fact no question arose in the above cases as to whether there is a contract to the contrary as envisaged by Sections 106 and 116 of the Act, and the observation of the learned single Judge in Abdul Hameed Rawther v. Balakrishna Pillai (1966 Ker LT 765) that the principle stated in the Saurashtra decision is correct is only an obiter dictum which was not necessary for the decision of the case. The Division Bench has not adverted to the Saurashtra decision. We have already said that we are not in agreement with the above view. These decisions are not of any assistance to the respondent.

10. In Philip v. State Bank of Travan-core 1972 Ker LT .914 : (AIR 1973 Ker 51) (FB), relied on by the learned counsel for the respondent this court was invited to

examine the question whether the provision for surrender on demand made after the term runs out would be a term of the 'tenancy by holding over' arose after the expiry of the term. The contention was that it would be, and it would constitute a sufficient contract to the contrary to exclude the. statutory notice required under Section 106 of the Act. This Court noticed that in Bapayya v. Venkataratnam (AIR 1953 Mad 884) and in Moothorakutty v. Ayissa Bi (1963 Ker LJ 556) and also in Abdul Hamid Rawther v. Balakrishna Pillai 1968 Ker LT 865: (AIR 1970 Ker 40) a contrary view has been taken, and two of the learned Judges on the Full Bench (Nambiyar J. as he then was and Viswanatha Iyer J.) expressed their doubt whether the decision in Bapayya v. Venkataratnam (AIR 1953 Mad 884) is not in direct conflict with the prior decisions of that Court in Kelu v. Mamed Kutti, 1910 Mad WN 794, and Moosakutty v. Thekke (AIR 1928 Mad 687) adverted to by us earlier in this judgment. However, the Full Bench did not express any final opinion on that question, and left the matter open. We may, incidentally point out that there was no provision for surrender on demand in the lease deeds considered in Moothorakutty v. Ayissa Bi, (1963 Ker LJ 556) and Abdul Hameed Rawther v. Balakrishna Pillai (1968 Ker LT 865) : (AIR 1970 Ker 40), and that the latter decision did not refer to the Bapayya case. We are unable to subscribe to the view contended for on behalf of the respondent that the State Bank of Travancore case lays down a divergent principle. The question mooted therein is not the one that is raised herein besides, the Full Bench in the State Bank of Travancore case left open the question raised therein.

11. There was some discussion at the bar centering round the contention raised on behalf of the respondent that the tenancy at will that followed the tenancy for three months was determined by the demand for surrender stated to have been made by P. W. 1 at some time prior to the issue of Ext. A2 notice, that thereafter a statutorily renewed tenancy by holding over arose, and the term for surrender of possession on demand cannot be imported to this tenancy by holding over by applying the rule in Bapayya's case and same cases cited before us which follow that case. We have earlier in this judgment (in paragraph 3) found against the factual basis of the contention, and, therefore, we feel that we are not called upon to examine the rule in Bapayya's case at any great length, though, however, we may say that we also share the doubt. expressed by Nambiyar J. as he then was

and Viswanatha Iyer J. in the State Bank of Travancore case whether that rule is not in conflict with the earlier decisions of the Madras High Court in Kelu v. Mamad Kutti 1910 Mad WN 794 and Moosa Kutty v. Thekke (AIR 1928 Mad 687). We make it clear that we have not pronounced thereon.

12. In view of what is said hereinbefore the appellant is entitled to succeed. We allow this appeal and setting aside the judgment and decree of this Court in S. A. No. 332 of 1975 restore those of the trial court as affirmed by the learned Subordinate Judge on appeal. The parties shall suffer their costs in this appeal and second appeal.