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Kunhibi Vs. Sherin

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Court : Kerala

Decided On : Feb-10-2010

Reported in : 2010(2)KLT315

Judge : Thomas P. Joseph, J.

Acts : Kerala Buildings (Lease and Rent Control) Act, 1965 - Sections 2(1), 18(5) and 20; ;Code of Civil Procedure (CPC) - Section 115; ;Rent Control Act; ;Tamil Nadu Building (Lease and Rent Control) Act, 1960 - Section 2(2); ;Code of Civil Procedure (CPC) - Section 115; ;Travancore-Cochin Building (Lease and Rent Control) Order, 1950; ;Constitution of India - Article 227

Appeal No. : S.A. No. 328 of 1996

Appellant : Kunhibi

Respondent : Sherin

Advocate for Def. : T.G. Rajendran, Adv.

Advocate for Pet/Ap. : M.C. Sen, Sr. Adv.,; G. Unnikrishnan,; M.P. Sreekrishnan

Disposition : Appeal dismissed

Judgement :

Thomas P. Joseph, J.

1. Does a composite lease of building and land come within the purview of the Kerala Buildings (Lease and Rent Control) Act, 1965 (for short, 'Act 2 of 1965')?. That is one of the substantial questions of law I am called upon to decide in this appeal. Short facts, frills and embroideries excluded and necessary for decision of this appeal are: A small building with measurement of 10 x 8 ft (80 Sq. ft) described as office building and vacant land measuring 35 x 75 ft (2625 Sq.ft) on which it is situate and belonging to the predecessor-in-interest of appellants was let out to the respondent as per Ext.A1, Kaiehit dated 4.2.1971 for three months for a monthly rent of Rs. 500/- for running a petrol pump. The tenancy continued on the same terms and conditions stated in Ext.A1 even after expiry of the said period. Respondent filed R.C.R. No. 97 of 1972 in the Rent Control Court against appellants for fixation of fair rent. Appellants filed O.S. No. 38 of 1975 in the civil court for realisation of rent arrears. Respondent contended that his liability is only to pay the fair rent. O.S. No. 38 of 1975 was decreed. R.C.P. No. 97 of 1972 was dismissed holding that as it is a lease of land and not building and hence the Rent Control Court had no jurisdiction to fix fair rent. The appeal and revision arising therefrom also ended in dismissal. The unrelenting respondent, at a time when a second revision (from the order of District Judge in revision under Section 20 of Act 2 of 1965) was maintainable in this Court under Section 115 of the Code of Civil Procedure (for short 'the Code') filed C.R.P. No. 2382 of 1979. He also challenged judgment and decree in O.S. No. 38 of 1975 in this Court in A.S. No. 182 of 1978. While so, parties thought it fit to bury their disputes and entered into a settlement. As per that settlement respondent agreed to pay rent at the contract rate and both parties agreed to withdraw their respective lis. Based on that settlement this Court by Ext.A17, order dated 17.1.1980 disposed of A.S. No. 182 of 1978 and CRP. No. 2362 of 1979. The undertaking of respondent to withdraw R.C.P. No. 97 of 1972 was recorded. Appellants were permitted to withdraw O.S. No. 38 of 1975. Things went well for sometime. Respondent was running the petrol pump in the tenanted premises using the small building as office. In 1985 appellants terminated the tenancy and filed O.S. No. 213 of 1985 for recovery of possession of the tenanted premises with rent arrears. Anticipating the possible contention of respondent, appellants pleaded that claim of respondent for protection of Act 2 of 1965 is barred by res judicata in view of the decision in

R.C.P. No. 97 of 1972. Respondent shot back contending that he is a tenant entitled to the protection of Act 2 of 1965, eviction can be ordered only as per provisions of the said Act and hence the suit for recovery of possession is not maintainable. He claimed that as the previous disputes were resolved by settlement and the respective Us were withdrawn the decision in R.C.P. No. 97 of 1972 cannot operate as res judicata. Trial Court accepted the plea of respondent and held that respondent is entitled to the protection of Act 2 of 1965. Trial Court gave the appellants a respite -a decree for recovery of rent arrears as they claimed. First appellate court has confirmed decision of the Trial Court and dismissed the appeal. Hence this second appeal at the instance of appellants/plaintiffs. Apart from the applicability of Act 2 of 1965 to a composite lease of building and land the following substantial questions also are framed for a decision.

(i) Is not the finding of courts below regarding application of res judicata contrary to law?

(ii) Does Ext.A17, order of this Court in C.R.P. No. 2362 of 1979 impair, in law the finality of Ext.A13 order accrued by reason of Section 18(5) of the Act?

2. Sri. M.C. Sen, learned Senior Advocate appearing for appellants raised the following arguments:

Ext.A1, kaichit dated 4.2.1971 is not a lease of 'building' together with the land appurtenant to it as described in Section 2(1) of Act 2 of 1965. Instead, it is a lease of land over which a small structure, when compared to the extent of land negligible in extent also stood and hence the lease cannot come within the purview of Act 2 of 1965. Construction given by the courts below to Ext.A1 is erroneous. Even if Ext.A1 is taken as a composite lease of building and land, it could not come within the purview of Act 2 of 1965 in the facts and circumstances of the case considering the dominant intention of the parties as could be revealed from Ext.A1. Reliance is placed on the decisions in Nanu Nair v. Krishnan Nair 1957 KLT 286, Thressia v. Saraswathi Anuna 1960 Kar LJ 258 and Tata Oil Mills Co. Ltd. v. Abraham Mathew 1985 KLT 116. According to the learned Senior Advocate decision of the Supreme court in Suryakumar Govindjee v.

Krishnammmal and Ors. : (1990) 4 SCC 343 relied on by the courts below has no application to the facts of the case. At any rate plea of respondent that the lease as per Ext.A1 attracted application of Act 2 of 1965 and hence the civil court has no jurisdiction is barred by res judicata in view of the decision in R.C.P. No. 97 of 1972. Learned Senior Advocate would contend that this Court had no jurisdiction under Section 115 of the Code to entertain a second revision against Ext.A13, order of learned District Judge in revision under Section 20 of Act 2 of 1965, this Court could not have entertained C.R.P. No. 2362 of 1979 and hence could not also have accepted settlement reached between the parties. Ext.A17, order passed by this Court in A.S. No. 182 of 1978 and C.R.P.. No. 2362 of 1979, hence, to the extent it concerned C.R.P. No. 2362 of 1979 has no legal effect and cannot affect finality of Ext.A13, order of the learned District Judge in revision. Hence Ext.A13, order operated as res judicata against the respondent. At any rate finding in Ext.A13 that the lease as per Ext.A1 is not of a building as defined in Section 2(1) of the Act operated as res judicata. Learned Senior Advocate has placed reliance on the decisions in Aundal Ammal v. Sadasivan Pillai 1987 (1) KLT 53 (SC) and Jetha Bai & Sons v. Sunderdas Rathenai 1988 (1) KLT 386.

3. Sri. Rajendran, learned Counsel for respondent would content that Ext.A1, kaichit creates a lease of building and land which is absolutely necessary for beneficial enjoyment of the respondent considering the purpose of lease and hence it attracted application of Act 2 of 1965 as rightly found by the courts below on a correct interpretation of Ext.A1. According to the learned Counsel various clauses in Ext.A1 eloquently indicate that parties to it gave prominence to the building while entering into the lease arrangement. Learned Counsel argues that in view of the decision in Suryakumar (supra) conclusion inescapable is that civil court has no jurisdiction to entertain a suit for eviction of respondent. Learned Counsel also argues that at the time this Court entertained and disposed of C.R.P. No. 2362 of 1979 the law as decided by the Full Bench of this Court in Ouseph Vareed v. Mary 1968 KLT 583 was that a second revision under Section 115 of the Code was maintainable from the order of the District Judge in revision under Section 20 of Act 2 of 1965. Hence there was no jurisdictional error in this Court accepting the settlement and disposing of R.C.P. No. 97 of 1979 as per Ext.A17 order. As such there is no final decision in R.C.P. No. 97 of 1972 attracting bar of

res judicata.

4. It is not disputed that parties hereto settled their disputes in A.S. No. 182 of 1978 and C.R.P. No. 2362 of 1979 and accepting that settlement this Court disposed of those cases vide Ext.A17, order dated 17.1.1980. As per the settlement parties agreed to withdraw their respective Us. Hence if Ext.A17, order of this Court is accepted, it could not be said that the contentious issues in A.S. No. 182 of 1978 and C.R.P.. No. 2362 of 1979 were heard and finally decided by this Court and hence the bar of res judicata would not apply. As on the date of Ext.A17, position of law was as held in Ouseph Vareed v. Mary (supra) that from the order of District Judge in revision under Section 20 of Act 2 of 1965, this Court could entertain a revision under Section 115 of the Code. Conceded, none of the parties challenged Ext.A17, order and that has become final. It is later that the Supreme Court in Aundal Animal v. Sadasivan Piliai (supra) held that a second revision would not lie to the High Court under Section 115 of the Code. That decision was followed in Jetha Bai & Sons v. Sunderdas Rathenai (supra). But the said decisions cannot have the effect of nullifying decisions already rendered basing on the decision in Ouseph Vareed v. Mary (supra) and which became final. The decisions already rendered and which became final would stand notwithstanding the decision in Aundal Animal's case (supra). This position is made clear in Kuriakose v. Varkey 1987 (1) KLT 345 and Sigma Agencies (P) Ltd. v. P.V. Thomas and Ors. 1990 (2) KLT 454.

5. Even if it is assumed that this Court could not have as on the relevant day entertained a second revision under Section 115 of the Code, I am not persuaded to think that this Court was powerless to decide upon the legality, regularity and propriety of the order of the District Judge in revision under Section 20 of Act 2 of 1965 or to give accord to the settlement reached between the parties in the second revision. As a court invested with judicial superintendence over the subordinate courts under Article 227 of the Constitution of India it was well within the power and competence of this Court to see whether the courts below exercised a jurisdiction which it did not have, failed to exercise the jurisdiction it did have or exercised the jurisdiction in a wrong manner. It is relevant to note that in Aundal Animal's case (supra) while holding that a second revision from the order

of District Judge in revision is not maintainable under Section 115 of the Code, the Supreme Court was not referring to or overruling the power of judicial superintendence of the High Court over judgments/orders of the subordinate courts under Article 227 of the Constitution as is clear from the observations in para.23 of that decision. In Sigma Agencies (P) Ltd. (supra) it was held that this Court could exercise power over the subject matter and parties under Article 227 of the Constitution, if not under Section 115 of the Code and that an order made by the High Court even without jurisdiction unless set aside cannot be considered void. To say that a party to the proceeding has no right to convert a proceeding under Section 115 of the Code into one under Article 227 of the Constitution is different from the power of judicial superintendence of this Court under that Article and to interfere in appropriate cases. Hence even if it is assumed that C.R.P. No. 2362 of 1979 was not maintainable in this Court under Section 115 of the Code it is not as if this Court lacked power to decide whether the subordinate court while dismissing R.C.P. No. 97 of 1972 acted legally and whether the interpretation given to Ext.A1 was in accordance with the principles regarding construction of documents. It cannot therefore be contended that Ext.A17, order of this Court is without jurisdiction and does not have the effect of nullifying the effect of Ext.A13, order passed by the District Judge in revision that the lease as per Ext.A1 did not attract the provisions of Act 2 of 1965. In the light of Ext.A17, order appellants cannot contend that plea of respondent that the civil court has no jurisdiction to entertain a suit for eviction in the nature of lease created as per Ext.A1 is barred by res judicata.

6. The next question is whether the lease as per Ext.A1 attracted application of Act 2 of 1965 and ousted jurisdiction of the Civil Court. Ext.A1 states:

(As I have this day taken on lease on behalf of the said company the building and vacant land belonging to you and described in the schedule hereunder for a rent of Rs. 500/- per month for the purpose of conducting a petrol pump 'etc'.)

(emphasis supplied)

The schedule of Ext.A1 is as under:

(The middle portion of western part of northern paramba and the office building measuring E.W-8.0, S.N-10.0 ft.

(emphasis supplied)

The extent of land involved is 2625 sq.ft (4.50 cents) while area of the building is 80 sq.ft. According to the learned Senior Advocate, dominant intention of the parties was lease out the land on which there happened to be a small structure and considering the area of the structure and extent of land, it is possible to hold that it is a lease of land. Learned Senior Advocate with the aid of authorities (supra) argues that only a lease of building and not land would come under Section 2(1) of Act 2 of 1965.

7. The preamble to Act 2 of 1965 states that the enactment is made as 'it is expedient to regulate the leasing of buildings and to control the rent of such buildings in the State of Kerala'. Section 2(1) of Act 2 of 1965 defines 'building' as:

any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes and includes:

a) the garden, grounds, wells, tanks and structures, if any, appurtenant to such building, hut or part of such building or hut, and let out or to be let along with such building or hut;

(b)...

(c)....

The expression 'building' in Act 2 of 1965 takes in the garden, grounds, wells, tanks and structures if any appurtenant to such building.

Esher M.R. in Moir v. Williams 1892 (1) QB 264 explained what is a 'building'. According to the learned Judge what a 'building' is, must always be a question of degree and circumstances. Its ordinary and usual meaning is, 'a block of brick or stone work covered in by a roof. Corporation of the City of Victoria v. Bishop of Vancouver AIR 1921 PC 240 describes 'building' as 'a thing composing of the fabric of the building and the ground that the fabric rests upon and encloses...'

In T.K. Sivarajan v. Official Receiver, Quilon 1953 KLT 110 lease was of a garden land, 35 cents in extent with certain buildings and structures thereon. Question arose whether the lease attracted definition of 'building' in the Travancore-Cochin Building (Lease and Rent Control) Order, 1950 (as per definition 'building' in that Order included 'the garden, grounds and out houses, if any appurtenant to such building'). This Court took the view that as per that definition the primary and essential test to be satisfied is that there should be a letting out of a building or hut or part of the same separately for residential or non-residential purposes. If there has been such a separate letting out of a building or hut or part of the same for residential or non-residential purposes, then the garden, grounds and out houses if any appurtenant to such building or hut would also be deemed to be included in the lease or rental arrangement. The lease was found to be of garden land where there were certain structures and hence out of the purview of the said Order. In Nanu Nair v. Krishnan Nair (supra) this Court held that the question whether a lease is of building with land appurtenant or is a lease of land with a building appertaining thereto is a question of fact depending on various circumstances. That was a case of lease of 1.50 acres of agricultural land with a building attached to it. The lease was held to be not of building but of the land. Thressia v. Saraswathi Amma (supra) also was a case of lease of land with a building on it. This Court took the view that to bring within the scope of Rent Control Act it must essentially be a lease of building. In Tata Oil Mills Co Ltd. (supra) 74 1/2 cents of land (29450 sq.ft) was leased out for drying copra. There was a building (1920 sq.ft) on it. On the finding that what was demised was only the land (yard) for drying copra on which there was a building it was held to be a lease out of the purview of Act 2 of 1965.

8. In Abbot's law Dictionary the word 'appurtenant' is stated as meaning 'belonging to another thing as principal as hamlet to another village; gardens to a home; that which passes as incident to the principal thing, a thing used with, and related to, or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant; that which belongs to something else, an adjunct; an appendage'. In Trim v. Sturminster, Rural Council 1938 (2) KB 508 and Methuen Campbell v. Walfers 1979 (1) All. E.R. 606 it is held that the word 'appurtenance' had never been extended to include land as meaning

corpora! hereditament which does not itself fall within the curtilage of the yard of the house itself, i.e., not within the parcel of demise of the house. But that is the primary meaning of the word 'appurtenant'. That word can have a secondary meaning also. In Stroud's Judicial Dictionary, Second Edn; at page 109 it is stated,

But the word 'appurtenant' may be used in a secondary sense as equivalent to such phrase as 'usually enjoyed with'.

The Madras High Court in J.H. Irani and Ors. v. T.S.Pl.P. Chidambaran Chettiar and Ors. AIR 1953 Mad. 650 after referring to Bayley v. Great Western Railway 1885 (26) Ch.D. 434 and Thomas v. Owen 1888 (20) QBD 225 has taken the view that the word 'appurtenance' has a secondary meaning as equivalent to 'usually occupied'. Raghava Rao, J, held

In my opinion the word 'appurtenant' occurring in the definition of 'building' in the Act with which we are concerned is used in the broad, secondary and non technical sense of 'relating to', usually enjoyed or occupied with and 'adjoining' just noticed by me. The idea of the legislature seems to be that if grounds appurtenant to the building in this sense are let along with the building they should stand attracted to the operation of the Act. That the grounds should also be let along with the building would not be a matter of specific provision in the definition of the statute, if the primary or legal sense of the word 'appurtenant' were intended, as in that case anything appurtenant to another in that sense would pass with it under the demise whether specially let or not along with it...

In Saraswathi Bai v. The State of Madras, represented by the Collector of Tirunelveli and Anr. AIR 1958 Mad. 74 the same Court held that 'appurtenant to a holding' implied 'a part of the holding' or 'part and parcel of the holding' or 'forming part of the holding'. According to the Bombay High Court, Sakeena and Ors. v. Kusumbi and Ors. : AIR 1983 Bom. 384 'land appurtenant' means land necessary for the beneficial enjoyment of the building and which forms part of such building. In Suryakumar's case (supra) the Supreme Court held that the expression, 'appurtenant to such building' cannot be restricted to land which in the given circumstances, a court may consider necessary or imperative for its enjoyment. It should be construed as comprehending the land which the parties considered

appropriate to let along with the building. Thus, land 'appurtenant' when given its broad, secondary and non-technical sense would mean that parcel of land which is necessary for beneficial enjoyment of the building and which parties considered appropriate to let along with the building. Such parcel of land would come within the inclusive definition of 'building' in Section 2(1) of Act 2 of 1965.

9. In T.K. Sivarajan v. Official Receiver, Quilon 1953 KLT 110 and Thressia v. Saraswathi Amma 1960 Kar LJ 258 this Court stated that in deciding whether jurisdiction of the rent control court is involved, consideration should be the main and sole object of the transaction and whether the lease relates to a building. Tata Oil Mills Co. Ltd. v. Abraham Mathew (supra) was a case where land measuring 29450 square feet was given on lease for drying copra. That land included a structure having dimension of 1920 square feet as well. The finding in that case is that it was a lease of land (and not of building or lease of land and building) though, there happened to be structures on the land which was the subject matter of lease. It was in the above circumstance that this Court held in Tata Oil Mills Co Ltd. v. Abraham Mathew that the civil court alone had jurisdiction to entertain the suit. On the other hand, heavy reliance is made by learned Counsel for respondent on the decision of Apex Court in Surayakumar' case (supra). The meaning of the expression 'building' appearing in Section 2(2)(a) of the Tamil Nadu Building (Lease and Rent Control) Act, 1960 was considered. After an exhaustive consideration of all the relevant decisions including T.K. Sivarenjan v. Official Receiver, Quilon (supra) the Supreme Court has laid down the guidelines to decide whether the lease invited jurisdiction of the civil court or rent control court. That was a case where lease was of land together with a 'Kaichalai (a small structure). The Supreme Court considered the effect of composite lease of land and building.

10. In the case of composite lease of land and building a question may arise whether the lease is one of land though there is a small building or hut on it which does not really figure in the transaction or is it a lease of building in which the lease of land is incidental or, it is a lease of land and building regardless of their respective dimensions. There may be cases where there is a joint lease of land and building without there being any considerations sufficient to justify spelling out

an intention to give primacy to the land or building. In such situations it is not the dominant purpose of lease which should guide the court in deciding whether lease is of land or building but consideration as to whether the parties intended that the building and land should go together or whether the lessor could have intended to let out the land without the building. In the case of such composite lease for composite purpose, it is difficult to break up the integrity of lease as one of land alone or of building alone. Such leases come within the purview of the Rent Control Act. Where, what the parties had in mind was only the lease of land although there were certain small structures on the land which were not demolished or kept out of the lease but were also let out, the Rent Control Act would not apply'). In the case before the Supreme Court (Suryakumar's case) it was a lease of vacant land (3600 sq.ft) together with a tiled kaichalai (600 sq.ft). It was held,

Having regard to all these circumstances the correct inference appears to be that what the lessor intended was a lease of both the land and building. The land was to be put to use for a petrol pump, so far as the building was concerned. The lessee was at liberty to use it as he liked but he had to maintain it in good condition and return it at the ends of the lease. This was a composite lease with a composite purpose. It is difficult to break up the integrity of the lease as one of land alone or of building alone. In these circumstances we think this letting would come in within the scope of the Rent Control Act, for the reasons already stated.

(emphasis supplied)

Hence composite lease of building and land for a composite purpose where it is difficult to break up integrity of the lease as one of lease of land or of building would come within the scope of Act 2 of 1965.

11. Ext.A1 grants lease of the 'office building and vacant land' for conducting a petrol pump 'etc'. The building and vacant site were let out for the same purpose - conducting the petrol pump. As the building is described in the Schedule to Ext.A1 as 'office building' when Ext.A1 states that lease of building and vacant land is for conducting petrol pump 'etc' it is certain that the building was let out for use as office of the company and other purposes which is essential for conducting the

petrol pump. Rent fixed for the building and vacant land jointly is Rs. 500/- per month. It is not possible to break up integrity of the lease granted under Ext.A1. What is relevant for consideration is what the parties intended by the lease as per Ext.A1. Here, it is a composite lease of office building and vacant land for conducting the petrol pump. Necessarily the building and land were let out for convenient enjoyment of the purpose of lease, i.e., to run the petrol pump. There is clear indication in Ext.A1 that the building formed an important and integral part of the lease as is clear from the directions in Ext.A1 that on the expiry of period of lease, respondent was to vacate the building and the vacant land and that during the period of lease respondent shall not have right to assign the building and the land or, effect repairs on the building. It is also stated in Ext.A1 that if on account of any negligence or other act of respondent any damage is caused to the building respondent will be liable for the resultant loss to the appellants. Having regard to the object of the lease in mind it is possible to hold that the building with the vacant land which formed essential part of the building were let out to the respondent for the purpose stated in Ext.A1. It is a composite lease of building and sand for a composite purpose. It is difficult to break up the integrity of the lease as one of land alone or of building alone and hence is a lease of 'building' as defined in Section 2(1) of Act 2 of 1965. The word 'appurtenant' occurring in Section 2(1) of Act 2 of 1965 has to be given its secondary, broad and non-technical meaning as 'relating to', 'usually enjoyed or occupied with' and 'adjoining' and comprehending the land which the parties considered appropriate to let along with the building. Giving that meaning to the word 'appurtenant', there is no difficulty to hold in the light of Ext.A1 that the building and vacant land was intended by the parties to be occupied and enjoyed for the purpose of letting. Considering that intention of the parties, that along with the building vacant land was also let out in my view made no difference and did not take the lease outside the scope of the Act. Courts below have rightly held that the civil court had no jurisdiction to entertain the suit to the extent it concerned prayer for eviction. The substantial questions of law framed in this regard are answered as above. It followed that appellants cannot succeed in the second appeal.

Resultantly the second appeal fails. It is dismissed without any order as to cost.

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