

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

MONDAY, THE 14TH DAY OF JUNE 2021 / 24TH JYAISHTA, 1943

RSA NO.145 OF 2017

AS 53/2016 ON THE FILE OF THE FIRST ADDITIONAL DISTRICT COURT,

KOZHIKODE DTD.5.12.2016

O.S.No.314/2013 DTD.23.12.2015 ON THE FILE OF THE PRINCIPAL

MUNSIFF COURT-II, KOZHIKODE.

APPELLANT/APPELLANT/DEFENDANT:

P.M.ARAVINDAN
AGED 52 YEARS, S/O.P.P.R.KURUP, RESIDING AT SARADA
NILAYAM, CHELAVOOR VILLAGE, MAYANAD DESOM,
KOZHIKODE TALUK.

BY ADVS.
SRI.V.V.SURENDRAN
SRI.P.A.HARISH

RESPONDENT/RESPONDENT/PLAINTIFF:

K.P.UDAYAKUMAR,
AGED 48 YEARS, S/O.KRISHNAPOYILIL BALAKRISHNAN,
RESIDING AT UDAYA NIVAS, NELLIKODE AMSOM, KOVOOR
DESOM, KOZHIKODE TALUK, POST MEDICAL COLLEGE,
KOZHIKODE-673008.

BY ADVS.
SRI.S.K.ADHITHYAN
SMT.KEERTHI S. JYOTHI

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
31.3.2021, THE COURT ON 14.6.2021 DELIVERED THE FOLLOWING:

R.S.A.No.145 of 2017

..2..

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JUDGMENT

Dated this the 14th day of June, 2021

This R.S.A. is directed against the judgment and decree in A.S.No.53 of 2016 dated 05.12.2016 on the file of the first Additional District Court, Kozhikode, (hereinafter referred to as 'the first appellate court') confirming the judgment and decree in O.S.No.314/2013 dated 23.12.2015 on the file of the Principal Munsiff's Court-II, Kozhikode (hereinafter referred to as 'the trial court'). The defendant, who was directed to vacate the plaint schedule property by way of a decree for mandatory injunction, was before the first appellate court. The plaintiff before the trial court, who was the respondent before the first appellate court, is the respondent herein. The parties are hereinafter referred to as the plaintiff and

R.S.A.No.145 of 2017

..3..

defendant according to their status in the trial court unless otherwise stated.

2. The plaintiff claims that the plaint schedule property originally belonged to one Choyi @ Damodaran (hereinafter referred to as 'Choyi') from whom he acquired the property as per assignment deed registered as document No.4017/2012 of Chevayur Sub Registry dated 10.12.2012. The defendant was a licensee under Choyi as per agreement dated 30.5.2012, for a monthly license fee of Rs.2,400/-. A sum of Rs.1,25,000/- was received as security deposit. The term of licence expired on 30.4.2013. It was further contended that the licence fee is in arrears from November, 2013. The defendant did not vacate the plaint schedule property after the expiry of the period. Hence, the plaintiff issued a notice calling upon the defendant to vacate the premises. The defendant did not give any reply to the notice. Hence the plaintiff filed the

R.S.A.No.145 of 2017

..4..

suit on 22.5.2013 for a mandatory injunction directing the defendant to vacate the plaint schedule premises.

3. The defendant filed the written statement contending that he was put in possession of the property pursuant to an agreement dated 30.5.2012. It was further contended that he was in possession and enjoyment of the property on the basis of an oral lease between him and Choyi on 01.03.2001 and that he is enjoying the property as a lessee on the basis of the said oral lease. The arrangement was later reduced into an agreement. It was contended that when Choyi required some money, the defendant had advanced a sum of Rs.3,00,000/- to him and an agreement was entered into between the defendant and Choyi on 07.05.2001 whereby he was permitted to retain the plaint schedule property as a tenant till he intends to vacate. The monthly rent was being periodically enhanced. On 30.5.2012, the rent was

R.S.A.No.145 of 2017

..5..

enhanced to Rs.2,400/- per month and the defendant happened to put his signature in a document brought by Choyi wherein he was made to believe that it was a lease agreement to enhance rent. The defendant executed the agreement believing the words of Choyi in view of the relationship between them. The plaintiff is none other than the nephew of Choyi who is aware of the arrangement between the defendant and Choyi. The arrangement between the defendant and Choyi was always as a tenant and the receipts issued to the defendant by Choyi were towards rent paid. The defendant is conducting stationery business in the plaint schedule property which is his only source of livelihood. There are no other suitable buildings available in the locality for rent. The document allegedly executed in favour of the plaintiff is a sham document which has not come into effect. At any rate the plaintiff, who is an

R.S.A.No.145 of 2017

..6..

assignee from Choyi, is bound by the terms and conditions of the entrustment entered into between Choyi and the defendant. The rent happened to be in arrears because Choyi did not come to collect the rent. He further contended that the relationship between the parties is as landlord and tenant and therefore the suit for mandatory injunction is not maintainable.

4. During the trial, the plaintiff was examined as PW1. Exts.A1 to A6 were marked on his side. No oral evidence was adduced by the defendant. However, Exts.B1 and B2 were marked on his side.

5. On an appreciation of the materials on record, the trial court granted a decree for mandatory injunction directing the defendant to remove his goods and articles from the plaint schedule building within a period of thirty days. The defendant preferred an appeal before the first appellate court. By the judgment and decree in

R.S.A.No.145 of 2017

..7..

A.S.No.53/2016, on a re-appreciation of the materials on record, the first appellate court dismissed the appeal granting the defendant a month's time to vacate the premises. Hence, this appeal.

6. When this case came up for admission on 15.2.2017, this Court admitted the appeal on the following substantial questions of law:-

(i) If it is proved that the defendant is not in possession of the property on the basis of the suit document (Ext.A2) was the courts below justified in granting a decree on the basis of said document?

(ii) Assuming that Ext.A2 is a license agreement, in the absence of a specific recital in the said document that the same is executed after obtaining vacant possession of the property pursuant to previous arrangement, will the previous arrangement revive on the termination of the present arrangement?

7. Sri.V.V.Surendran, the learned counsel for the appellant contended that the appellant was put in

R.S.A.No.145 of 2017

..8..

possession of the plaint schedule property as per the agreement dated 30.5.2012. It was contended that he was in possession of the property in the year 2001 on the basis of the lease arrangement between him and the former owner of the property, namely, Choyi. According to the learned counsel, the defendant is a lessee and can be evicted only in accordance with the provisions contemplated under the Kerala Building (Lease and Rent Control) Act, 1965. As far as Ext.A2 agreement is concerned, it was contended that he happened to execute the said document on the basis of a misrepresentation on the part of the former owner of the property that the said agreement is a renewal agreement to enhance rent. In the cross-examination, the defendant admitted that he has been in possession of the suit property since 2001. Thus, it was contended that the successive licence arrangements are of no consequences and the trial court erroneously

R.S.A.No.145 of 2017

..9..

granted a decree for mandatory injunction directing the defendant to surrender the plaint schedule property. The first appellate court confirmed the judgment and decree of the trial court mechanically, it has been contended.

8. On the other hand, the learned counsel for the respondent/plaintiff contended that the defendant is in possession of the property as a licensee in continuation of his predecessor-in-interest. According to the learned counsel for the plaintiff, the term of license expired on 30.4.2013 and the plaintiff issued a notice to the defendant through his Lawyer on 23.4.2013 to vacate the plaint schedule property. It is his case that the defendant has not paid the licence fee payable from November, 2012 to April, 2013 whereby he has committed the breach of terms of contract.

9. Heard Sri.V.V.Surendran, the learned counsel for the appellant and Sri.S.K.Adhithyan, the learned counsel

R.S.A.No.145 of 2017

..10..

for the respondent.

10. The plaint schedule building originally belonged to one Choyi. PW1 would say that the plaint schedule building was purchased by him from Choyi by virtue of Ext.A6 document bearing No.4017/12 of SRO, Chevayoor. The main contention of the defendant is that Ext.A6 is a sham document. Consequently, it was contended that Ext.A6 has not come into effect. In fact, the plaintiff has not disputed the title of his landlord Choyi. According to him, he continued as a tenant of the plaint schedule property under Choyi. Having raised such a contention he is legally precluded from denying the title of the landlord as contemplated under Section 116 of the Evidence Act. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such

R.S.A.No.145 of 2017

..11..

immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given. Ext.A6 document by Choyi in favour of the plaintiff is not disputed by the defendant. Even though the defendant contended that Ext.A6 cannot be acted upon, no reliable evidence was adduced to support the same. Hence, the trial court and the first appellate court rightly entered a finding that the plaintiff is the owner of the plaint schedule building.

11. The main contention of the defendant is that he is a lessee of the plaint schedule shop room by virtue of Ext.A2 licence agreement entered into between the predecessor-in-interest and the defendant on 30.05.2012. The plaintiff maintained that Choyi permitted the defendant to make use of the plaint schedule building

R.S.A.No.145 of 2017

..12..

temporarily as a licensee for a period of 11 months by virtue of Ext.A2 on condition of the defendant undertaking to comply with the terms of the licence. Admittedly, the amount stipulated was Rs.2,400/- per month. According to the defendant, the term of licence was expired on 30.4.2013.

12. One of the contentions taken by the defendant is that the plaint schedule building was entrusted with him by way of an oral entrustment by Choyi. According to him, he has been conducting business in the plaint schedule shop room since 1.3.2001. According to the defendant, at the time of oral entrustment on 01.03.2001, the defendant had paid Rs.1,25,000/- to Choyi as security. He also stated that, when Choyi was in need of money as demanded by Choyi, the defendant paid Rs.3,00,000/- as advance rent. Choyi agreed to repay the said amount at the time of vacating the room by the defendant at his will

R.S.A.No.145 of 2017

..13..

with interest at the rate of 12%.

13. On the other hand, the main contention raised by the learned counsel for the plaintiff is that Exts.B1 and B2 are fabricated and concocted documents. Execution and passing of consideration thereunder are denied. The fact that an agreement was entered into between Choyi and defendant on 07.05.2001 incorporating the advance rent is denied. Under the circumstances, the burden is on the part of the defendant to prove Exts.B1 and B2 before the court. The defendant did not adduce any oral evidence in support of his case. He was not examined as a witness. Exts.B1 and B2 are not proved. Absolutely no evidence was adduced by the defendant to prove execution of Exts.B1 and B2 by Choyi as contended by him. At the same time, the plaintiff mounted the box and adduced evidence to prove that Exts.B1 and B2 were not executed by Choyi. In view of the reliable evidence adduced by the

R.S.A.No.145 of 2017

..14..

plaintiff in support of the case, the trial court entered a finding that the defendant who is a party to the suit has failed to adduce evidence before the trial court that Exts.B1 and B2 were executed by Choyi. In view of the circumstances, the trial court relied on **Vidhyadhar v. Mankikrao & another** [AIR 1999 SC 1441] and held that the case set up by him is not true to facts. On a perusal of the facts and circumstances involved, it is clear that the trial court has drawn adverse inference against the defendant in accordance with the evidence adduced in the case. The first appellate court agreed with the said finding.

14. In the written statement filed the defendant has not denied the execution of Ext.A2 agreement. His only contention is that he signed Ext.A2 agreement believing them to be an agreement to enhance rent. His belief is not proved by adducing oral evidence before the court. There is nothing on record to indicate that he is entitled to the

R.S.A.No.145 of 2017

..15..

benefit of Act 2 of 1965 as a tenant in the plaint schedule building. The defendant, in fact, failed to prove the oral lease between Choyi, the successor of the plaintiff and the defendant. Under the circumstances, the only inference which could be drawn is that the defendant was allowed to occupy the premises by Choyi as a licensee. In continuation of the same, immediately after execution of the sale deed in favour of the plaintiff, the defendant executed licence agreement in favour of the plaintiff. It is also very difficult to believe that the defendant who was a business man in the plaint schedule shop room put his signature in Exts.A1 and A2 without knowing its contents. Exts.A1 and A2 are pure and simple licence agreements. The licence in favour of the defendant was terminated by issuing notice on 23.4.2013 as the period of license was already over on 30.4.2013. Legally, the plaintiff is entitled to terminate the license with effect from 30.4.2013. The

R.S.A.No.145 of 2017

..16..

defendant received the notice. After the termination of the licence, the licensee is under an obligation to surrender his possession to the owner. The plaintiff had purchased the property as per a valid sale deed. The sale deed has come into effect. He is now the owner of the property. An identical position has been considered by the Apex Court in **Sant Lal Jain v. Avtar Singh** [(1985)2 SCC 332]:[AIR 1985 SC 857] as follows:-

"7. In the present case it has not been shown to us that the appellant had come to the Court with the suit for mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. Therefore, we are of the opinion that the appellant should not

R.S.A.No.145 of 2017

..17..

*be denied relief merely because he had couched the
plaint in the form of a suit for mandatory injunction.
8. The respondent was a licensee, and he must
be deemed to be always a licensee. It is not open
to him, during the subsistence of the licence or in
the suit for recovery of possession of the property
instituted after the revocation of the licence to set
up title to the property in himself or anyone else. It
is his plain duty to surrender possession of the
property as a licensee and seek his remedy
separately in case he has acquired title to the
property subsequently through some other person.
He need not do so if he has acquired title to the
property from the licensor or from someone else
lawfully claiming under him, in which case there
would be clear merger. The respondent has not
surrendered possession of the property to the
appellant even after the termination of the licence
and the institution of the suit. The appellant is,
therefore, entitled to recover possession of the
property. We accordingly allow the appeal with
costs throughout and direct the respondent to
deliver possession of the property to the appellant
forthwith failing which it will be open to the
appellant to execute the decree and obtain
possession.”*

R.S.A.No.145 of 2017

..18..

15. In the case on hand, Exts.A1 and A2 are license agreement. The original oral lease alleged between Choyi and defendant has not been proved. Exts.B1 and B2 are also not proved. Under the circumstances, it is not necessary on the part of the plaintiff to allege and prove that after obtaining vacant possession of the property pursuant to previous arrangement, Ext.A2 license agreement was executed. As a licensee, the defendant has no interest in the building and its possession cannot exclude the rightful owner of the property. Merely because other modes of eviction are available to the plaintiff, the remedy by way of mandatory injunction cannot be denied. The owner of immovable property on termination of the license is entitled to maintain a suit for mandatory injunction against the licensee to vacate the property. In **Rajappan v. Veeraraghava Iyer** [1969 KLT 811], a learned Single Judge of this Court held that, when the

R.S.A.No.145 of 2017

..19..

owner of immovable property terminates a licence, he can sue for mandatory injunction directing the licensee to vacate the property without praying for possession since the licensee's possession cannot in the eye of law exclude the owner's possession. The substantial questions of law formulated by this Court have been answered as above.

In view of the foregoing conclusions, there is no merit in this R.S.A and hence the same is dismissed without costs.

Sd/-

**N.ANIL KUMAR,
JUDGE**

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