

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 22ND DAY OF DECEMBER 2015/1ST POUSHA, 1937

RSA.No. 1106 of 2012

**AGAINST THE JUDGMENT IN AS 35/2007 OF PRINCIPAL SUB COURT,IRINJALAKUDA
DATED 02-06-2012.**

**AGAINST THE JUDGMENT IN OS 519/2005 OF MUNSIF COURT, CHALAKUDY
DATED 31-01-2007.**
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APPELLANT/RESPONDENT/DEFENDANT:

**DR.KRISHNAN, S/O.KEEZHARA GOPALAN,
KIZHAKKE CHALAKUDY VILLAGE AND DESOM,
MUKUNDAPURAM TALUK.**

**BY ADVS.SRI.SAJU.S.A
SRI.K.C.KIRAN
SMT.P.A.SHEEJA
SMT.MEENA.A.**

RESPONDENT(S)/APPELLANTS/PLAINTIFFS:

- 1. DR.AJAYAKUMAR, S/O.EDATHADAN MANI,
ALLOOR VILLAGE AND DESOM,
MUKUNDAPURAM TALUK - 680683.**
- 2. JOHN, S/O.PUNNELIPARAMBIL THOMAS,
KUZHIKKATTUSSERY DESOM,
THAZHEKKAD VLLAGE,
MUKUNDAPURAM TALUK- 680 683.**

**BY SRI.R.D.SHENOY (SENIOR ADVOCATE)
ADV. SRI.T.N.MANOJ**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 11-12-2015, THE COURT ON 22-12-2015 DELIVERED THE FOLLOWING:**

mbr/

APPENDIX

PETITIONERS' ANNEXURES:

- ANNEXURE 1 :** **A TRUE COPY OF JUDGMENT DATED 20.2.2006 IN
C.M.A.NO.4/2006 ON THE FILE OF THE COURT OF THE
ADDITIONAL SUBORDINATE JUDGE, IRINJALAKUDA.**
- ANNEXURE 2 :** **A TRUE COPY OF THE JUDGMENT DATED 5.6.2006 IN
WP(C)NO.14224/2006 ON THE FILE OF THIS HON'BLE COURT.**

RESPONDENTS' ANNEXURES: **NIL.**

//TRUE COPY//

P.S. TO JUDGE

mbr/

P.B.SURESH KUMAR, J.

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R.S.A.No.1106 of 2012

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Dated this the 22nd day of December, 2015.

J U D G M E N T

The defendant in a suit for injunction is the appellant in this second appeal.

2. The plaint schedule property is a hospital which belongs to the defendant. The defendant is a Doctor by profession. The defendant himself was running the plaint schedule hospital, hereinafter referred to as 'the hospital' for short. According to the plaintiffs, the defendant has let out the hospital to them on a monthly rent of Rs.50,000/- and they are running the hospital from 2.11.2005 on that basis. It is alleged by the plaintiffs that they are running the hospital after renovating the same spending huge amounts as permitted by the defendant. It is also alleged by the plaintiffs that they have executed a lease deed in respect of the hospital in favour of the defendant and handed over same to the defendant with a list of

equipments and other articles of the defendant retained in the hospital by him for the use of the plaintiffs. The case set up by the plaintiffs is that while so, the defendant demanded a sum of Rs.10,00,000/- as advance in addition to the monthly rent agreed to by them and since the plaintiffs were not amenable for the said demand, the defendant has threatened that he will not permit the plaintiffs to run the hospital. The suit was filed, in the circumstances, seeking a decree of permanent prohibitory injunction restraining the defendant from interfering with the peaceful conduct of the hospital by the plaintiffs or evicting the plaintiffs from the hospital by force.

3. The defendant resisted the suit contending, among others, that since he was unable to run the hospital owing to ill health, on a request made by the plaintiffs, the plaintiffs were permitted to run the hospital on a licence arrangement for a monthly licence fee of Rs.1.5 lakhs from 4.11.2005. According to the defendant, the understanding between the parties was that a licence agreement will be executed between them on 12.11.2005. According to the defendant, on 12.11.2005, the plaintiffs approached the defendant and requested him to reduce the licence fee from Rs.1.5 lakhs to Rs.1,00,000/- which was not

acceptable to the defendant. In the written statement filed by the defendant, he has categorically denied the averment in the plaint that the lease deed executed by the plaintiffs in favour of the defendant has been handed over to the defendant. According to the defendant, the document relied on by the plaintiffs as the copy of the lease deed alleged to have been entrusted to the defendant is a unilateral document created by the plaintiffs. It is also alleged by the defendant in the written statement that the plaintiffs have committed breach of the terms of the licence arrangement between the parties and that therefore the plaintiffs are liable to return the hospital to the defendant. The defendant has raised a counter claim also in the written statement filed by him seeking a decree of mandatory injunction directing the plaintiffs to return the hospital to him.

4. The trial court found that the plaintiffs have not established that there was lease arrangement between the parties. The trial court also found that in the absence of any evidence to establish any lease arrangement between the parties, the arrangement can only be one of licence and since the plaintiffs have not paid any amount to the defendant either as rent or as licence fee, the defendant is entitled to the decree

of mandatory injunction sought by way of counter claim in the suit. Consequently, the trial court dismissed the suit and decreed the counter claim. The plaintiffs took up the matter in appeal. The appellate court found on facts that the transaction between the parties was a lease as claimed by the plaintiffs. Consequently, the appellate court reversed the decision of the trial court and decreed the suit and dismissed the counter claim. The defendant who is aggrieved by the decision of the appellate court has thus come up in this second appeal.

5. Heard the learned Senior Counsel for the defendant as also the learned Senior Counsel for the plaintiffs.

6. The learned Senior Counsel for the defendant contended that there is absolutely no material on record for the appellate court to reverse the finding of the trial court that the transaction was a licence arrangement. In other words, according to the learned counsel for the defendant, the finding rendered by the appellate court that the transaction was a lease is perverse.

7. Per contra, the learned Senior Counsel for the plaintiffs contended that the appellate court being the final court on facts, its decision cannot be interfered with on a reappraisal of

the evidence. According to the learned Senior Counsel, the finding rendered by the appellate court that the arrangement between the parties was a lease arrangement cannot be held to be perverse and therefore the same cannot be interfered with by this Court in a second appeal filed under Section 100 of the Code of Civil Procedure. On merits, the learned Senior Counsel for the plaintiffs contended that the materials on record would indicate beyond doubt that the plaintiffs were put in exclusive possession of the plaint schedule hospital by the defendant and the same alone is sufficient for the Court to infer that the transaction was a lease arrangement. The learned Senior Counsel relied on the decision of the Apex Court in **Delta International Ltd. v. Shyam Sundar Ganeriwalla** (AIR 1999 SC 2607) in support of the said contention.

8. In the light of the rival submissions made at the Bar, the following question was formulated for decision in the second appeal.

Is not the finding by the appellate court that the transaction between the plaintiffs and the defendant in respect of the plaint schedule hospital is a lease perverse?

9. As noticed above, the plaintiffs relied on Ext.A1 photocopy of the lease deed alleged to have been executed by the plaintiffs in favour of the defendant to establish their case that the transaction was a lease. The defendant does not admit that any such document has been executed by the plaintiffs in his favour. Further, Ext.A1 is not a document signed by the defendant. It is a document signed by the plaintiffs only. Even assuming that such a document has been handed over by the plaintiffs to the defendant, there is nothing on record to indicate that the same was acted upon by the defendant. Had there been a payment and receipt in accordance with the said document, the court could have presumed that the same was acted upon by the defendant. True, the plaintiffs are admittedly running the hospital from 4.11.2005 as permitted by the defendant. The question, therefore, is as to whether the said circumstances can be relied on to hold that Ext.A1 lease agreement has been acted upon by the defendant. As noted above, the specific case of the defendant is that the plaintiffs were permitted to run the hospital from 4.11.2005 on their undertaking that a licence agreement will be executed on 12.11.2005 and that the plaintiffs have not executed the licence agreement as undertook by them. It is seen

that the suit has been instituted on 17.11.2005 itself. If, as a matter of fact, the plaintiffs were permitted to run the hospital from 4.11.2005 as per the terms of Ext.A1 lease deed as claimed by the plaintiffs, there would not have been any reason for the plaintiffs to institute the suit within fifteen days from the date of commencement of the lease. The reason stated by the plaintiffs that after the commencement of the hospital, the defendant demanded money towards advance cannot be believed, for, there was no impediment for the defendant to insist such a payment prior to the transaction. As such, it cannot be inferred that Ext.A1 document has been acted upon by the defendant, if at all the same was executed and handed over by the plaintiffs. The nature of the transaction between the parties, in the circumstances, is to be determined de hors Ext.A1 agreement.

10. It is trite that in a dispute of this nature, what is to be seen by the court is as to the intention of the parties at the time of entering into the transaction. It was held by the Apex Court in **Associated Hotels of India Ltd. v. R. N. Kapoor** (AIR 1959 SC 1262) that the court has to see whether the parties intended to create a lease or a licence. If the document creates an interest in the property, it is a lease. But, if it only permit

another to make use of the property of which the legal possession continues with the owner, it is a licence. In the absence of a written document, the intention is to be gathered from other evidence available on record. [See **Delta International Ltd. v. Shyam Sundar Ganeriwalla** (supra)].

Coming to the facts of the case, it is seen that the suit property as described in the plaint is not the immovable property or the building constructed therein. Instead, the suit property is described in the plaint as the building bearing No.402 of Chalakudy Municipality wherein the plaintiffs are running "Safal Hospital" with the movables therein. As noted above, the case of the plaintiffs is that a lease has been created in respect of the suit property as per the terms of Ext.A1 agreement. As such, Ext.A1 can be certainly looked into, de hors its nomenclature, for the purpose of understanding the case of the plaintiffs. It is evident from Ext.A1 that the transaction was for the purpose of enabling the plaintiffs to run the Hospital which was previously run by the defendant, on a monthly rent of Rs.50,000/-. It is on account of the said reason, the defendant had handed over to the plaintiffs, the equipments and accessories used by him in the hospital also to the plaintiffs. As per the terms of the said

document, the plaintiffs are obliged to maintain the equipments and accessories of the defendant which were entrusted to them, at their expenses. Ext.A1 also recites that after the expiry of the term of the arrangement, the hospital and the equipments entrusted to the plaintiffs are to be returned to the defendant. A close reading of the recitals in Ext.A1 would indicate that there was no intention at all for the defendant to create an interest in the specific immovable property in favour of the plaintiffs and the intention was only to permit the plaintiffs to run the hospital which was previously run by the defendant on a monthly payment. It seems that since the defendant has admitted that he has handed over the hospital to the plaintiffs, the appellate court inferred that the plaintiffs are put in exclusive possession of the hospital and therefore, the transaction is a lease. A close reading of the impugned judgment does not indicate that the appellate court has given any other reason for arriving at the aforesaid conclusion. The transaction, in the circumstances, can be characterised only as a licence. The finding of the appellate court that the transaction between the parties in respect of the hospital is a lease, in the facts and circumstances, is perverse. The question of law formulated for decision is thus answered in

favour of the defendant.

In the result, the second appeal is allowed, the impugned decision of the lower appellate court is set aside and the decision of the trial court is restored. All the interlocutory applications in the appeal are closed.

Sd/-
P.B.SURESH KUMAR,
JUDGE.

Kvs/-

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PA TO JUDGE.