

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 4TH DAY OF JUNE 2015/14TH JYAISHTA, 1937

RSA.No. 211 of 2015 ()

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AGAINST THE JUDGMENT AND DECREE IN AS NO. 22/2012 of ADDITIONAL DISTRICT  
COURT-I,KOTTAYAM DATED 09-07-2014

AGAINST THE JUDGMENT AND DECREE IN OS NO. 391/2010 of PRINCIPAL MUNSIF  
COURT, KOTTAYAM DATED 07-06-2011

APPELLANT(S)/APPELLANT/DEFENDANT:-

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K.P.MOOSAKUTTY HAJI,AGED 68  
BUILDING NO.KMC VIII/430  
CSI ASCENSION SQUARE BUILDING, COLLECTORATE P.O.  
KOTTAYAM, RESIDING AT PARADISE HOUSE  
COLLECTORATE P.O., KOTTAYAM.

BY ADV. SRI.LIJL.J.VADAKEDOM

RESPONDENT(S)/RESPONDENTS/PLAINTIFFS:-

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1. CSI ASCENSION CHURCH, AGED 57 YEARS  
MUTTAMBALAM VILLAGE, COLLECTORATE P.O.  
KOTTAYAM A PARISH CHURCH OF CSI MADHYA KERALA  
MAHA IDAVAKA A CHRISTIAN RELIGIOUS COMMUNITY  
REPRESENTED BY ITS KAIKARA (1) J JACOB  
(2) JEEJA DILEEP, PIN - 686 002.
  2. REV. THOMAS K OOMMEN,, AGED 63 YEARS  
VICAR OF CSI ASCENSION CHURCH, MUTTAMBALAM VILLAGE  
COLLECTORATE P.O., KOTTAYAM - 686 002.
  3. J.JACOB, S/O.LATE M.C.JACOB,AGED 80 YEARS  
MAZHUKATTU HOUSE  
CHELLIYOZHUKKAM P.O., KOTTAYAM - 686 001.
  4. JEEJA DILIP, W/O.DILIP CHERIAN, AGED 57 YEARS  
PALLATHU HOUSE, MUTTAMBALAM P.O.  
KOTTAYAM - 686 002.

R1 to R4 BY ADV. SRI.JOHN JOSEPH VETTIKAD

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON  
01.04.2015, ALONG WITH RSA. NO.317/2015, THE COURT ON 04-06-2015 DELIVERED THE  
FOLLOWING:

**“C.R.”**

**A.HARIPRASAD, J.**

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**R.S.A. Nos.211 of 2015  
&  
317 of 2015**

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**Dated this the 4<sup>th</sup> day of June, 2015**

**COMMON JUDGMENT**

Common legal questions arise in both these appeals. Hence they are disposed by this unified judgment. In these appeals by two building tenants against a common landlord (a Church), the dispute is centered around the landlord's entitlement to claim eviction of the buildings on a challenged termination of tenancy. Hereinafter, the parties are referred to as the plaintiffs and defendants, as shown in the trial court proceedings. There are certain admitted basic facts. The defendants in the suits are the tenants under the plaintiffs. They occupy separate rooms in a building owned by the first plaintiff - a Church. Although there was a feeble attempt by the plaintiffs to contend at an earlier point of time that the defendants are not tenants, but only licensees, that contention was given up at the trial stage itself. In this Court also, it is admitted that the jural relationship between the defendants and plaintiffs is a landlord-tenant relationship.

2. Yet another fact that the building owned by the plaintiffs is one exempted from the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965, although disputed by the tenants at the initial stage, is practically admitted before the courts below and this Court. What is remaining, as a bone of contention, is the entitlement of the plaintiffs to seek eviction of the defendants from the tenanted premises on the basis of the legal steps taken to terminate the tenancy.

3. Heard the learned counsel for the defendants and the plaintiffs.

4. Averments in the plaint show that the first plaintiff Church is the owner of the building described in the schedules to the plaints. The plaintiffs have made non committal statements in the plaints that the defendants are occupying the building as per two separate, but identical, agreements styled as leave and licence deed (Ext.A4 in both cases). In both the appeals, it is the contention of the plaintiffs that as per separate registered notices, the tenancies in favour of the defendants had been terminated. Exts.A5 and A8 are the statutory notices marked in both the cases. It is a common feature in both cases that Ext.A5 notice dated 03.03.2010 suffered from material defects. There was a typographical error regarding the date of termination of tenancy. Instead of terminating the tenancy on 01.07.2010, it was typewritten as 01.06.2010. Hence Ext.A8 registered notice was caused to be issued said to be in continuation

of Ext.A5 for correcting the mistake. The plaintiffs contended that the tenancies remained terminated on account of these notices and the defendants are tenants at sufferance thereafter. Hence, they are liable to be evicted through a process of law.

5. The contentions in the written statement in both these cases are almost identical. Even though an attempt was made by the defendants to dispute the title of the plaintiffs, the courts below repelled those contentions finding that the tenants are estopped from denying title of the landlord. This finding is legally sound because the admitted jural relationship between the parties is a landlord and tenant relationship. Defendants attacked the legality and sustainability of notices issued by the plaintiffs for the termination of tenancies. The defendants contended that going by the agreed terms and conditions in Ext.A4 leave and licence deeds, the notices are insufficient and they are incompetent to terminate the leases. Hence, the plaintiffs are not entitled to get any relief as claimed in the plaints.

6. The substantial questions of law framed, after perusing the records and hearing the learned counsel, are as mentioned hereunder:

(i) When a clause exists in the lease agreement requiring one month's notice for termination of the lease, whether the courts below are correct in holding that Exts.A5 and A8 notices, admittedly covering a lesser period, have terminated the leases?

(ii) Whether the terms and conditions in Ext.A4 leave and licence deed are “contract to the contrary” as specified in Section 106(1) of the Transfer of Property Act, 1882 (in short, “TP Act”)?

(iii) Whether the courts below erred in holding that the stipulation in Section 106(3) TP Act is applicable to this case without considering the terms in Ext.A4?

(iv) If the defendants are tenants holding over, can they contend that all the stipulations in Ext.A4 will be deemed to be imported into an implied lease by holding over?

7. For better clarity of thought, the relevant provisions in the TP Act should be considered:

***“S.106. Duration of certain leases in absence of written contract or local usage.-(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.*”**

(2) *Notwithstanding anything contained in other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.*

(3) *A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.*

(4) *Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.”*

**“S.116. Effect of holding over.-** *If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under*

*lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, 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.”*

8. Now I shall extract the relevant portion of Ext.A4 leave and licence deed. It is to be borne-in-mind that wherever the expression 'licence' occurs in Ext.A4, one will have to read it as 'lease' and 'licensee or licensor' as 'lessee or lessor', as the case may be, since the parties admit the transaction to be a lease. The term of lease is for a period of 11 months. That is evident from the following clause in Ext.A4:

*“Whereas the Licensee (sic) is allowed to conduct ..... in the scheduled room hereunder on the terms and conditions set forth herein for a period of eleven months from the 1<sup>st</sup> August 2009 as mutually agreed.”*

Clause 3 in Ext.A4 reads as follows:

*“The license (sic) hereby granted to the licensee (sic) shall be revocable at the option of the Licensor (sic) by issue of one month notice without assigning any reasons whatsoever.”*

This exactly is the vexed clause in the deed. Learned counsel for the appellants/defendants submitted that the plaintiffs failed to fulfill their legal obligations mentioned in Ext.A4 for terminating the tenancy and, therefore,

are not entitled to claim eviction by a legal process. Per contra, learned counsel for the plaintiffs would contend that the notices, viz., Exts.A5 and A8 are legally proper and sufficient to terminate the tenancy in accordance with the stipulations in Ext.A4.

9. Having admitted the jural relationship between the plaintiffs and defendants as landlords and tenants, it has to be deduced that the defendants, after the efflux of time stipulated in Ext.A4, continues in possession of the leasehold either as tenants at will or as tenants at sufferance. Plaintiffs would contend that the term of leases have been determined by efflux of time. After determination of lease by efflux of time, a lessee remaining in possession of the property can either be 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. Tenancy at will is defined in Halsbury's Laws of England (3<sup>rd</sup> Edition, Vol.23 page 505) and it can be safely adopted to interpret the concepts innate in TP Act as well. It reads thus:

*“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 lease at will must in law be at the will of*

*both parties. As in other tenancies, a tenancy at will arises by contract binding both landlord and tenant, and the contract may be express or implied."*

Law relating to the said aspects had been lucidly stated by a Full Bench of this Court in **Devaki v. Alavi (1979 KLT 67)**. It is extracted hereunder:

*"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'.*

10. Facts not in dispute in the cases would reveal that the defendants are tenants under the plaintiffs and their tenancy was created by Ext.A4 documents in each case. Tenancy in respect of one of the defendants started on 25.07.2009 and the same in respect of the other defendant started on 23.06.2009. In both cases, the period of tenancy was upto 30.06.2010. On 06.07.2010, the plaintiffs issued Ext.A8 notices with a view to terminate the tenancies with effect from 01.08.2010. Admittedly, the earlier notices (Ext.A5 in both cases) were defective. Therefore, Ext.A8 notices were issued, said to be in continuation of Ext.A5 notices. If we take Ext.A8 notice alone, it cannot be held to be a valid notice because as per Ext.A4 one month's notice is required for termination of the tenancies. Undisputedly, Ext.A5 notices do not show the correct date of termination of tenancy. If they are insufficient to terminate the leases, the tenants (defendants) after the period of lease will be holding over is unchallengeable. Section 108(q) TP Act mandates that on determination of the lease, the lessee is bound to put the lessor into possession of the property. Provisions in Section 106 TP Act provides for a situation under which despite determination of the lease, if the lessee continues in possession, a new lease may come into existence (see **Kaikhushru v. Bai Jarbai (AIR 1949 FC 124)**). On a careful reading of Section 116 TP Act, it is clear that two things are necessary for its application: (i) the lessee

should be in possession after the termination of lease and (ii) the lessor or his representative should accept rent or otherwise assent to his continuing in possession. Use of the words “otherwise assents” in Section 116 TP Act is of great importance. It suggests that acceptance of rent by the landlord has been treated as a form of his giving assent to the tenant's continuance in possession. It also suggests that the assent of the landlord in tenant's continuance in possession can be inferred from other express or implied acts on the part of the landlord. The basis of Section 116 TP Act is that normally the landlord is entitled to file a suit for ejectment where he does not accept the rent after issuance of notice to quit. His acceptance of rent is an unequivocal act referable only to his desire to assent to the tenant's continuance in possession. It is beyond challenge that the principle of holding over in Section 116 TP Act comes into play only after determination of the lease.

11. From the facts and circumstances, it is evident that after the expiry of the term fixed, the tenants are holding over as tenants at will. This proposition cannot be doubted in view of the settled legal pronouncements. Certainly they are not tenants at sufferance because the terms in Ext.A4 do not make the continuance of the tenants in the premises not one consensual in character.

12. Learned counsel for the defendants submitted that a tenant holding over is entitled to get a proper notice to quit. It is also contended

that the notices in these cases are legally insufficient to terminate the tenancies. Per contra, learned counsel for the plaintiffs contended that the tenants holding over cannot claim all the rights and privileges of a regular tenant. Further, notices in these cases are legally correct and by receipt of the same, the tenancies have come to an end. It is also contended by the learned counsel that the defendants cannot be head to say, on the basis of Ext.A4, that they are entitled to get one month's notice since the term of lease had already been expired by the time the suits were filed. To support this contention, reliance is placed on Section 106(3) TP Act. Learned counsel vehemently argued that a notice under Sub-section (1) of the above Section shall not be deemed to be invalid merely because the period mentioned therein fell short of the period specified therein, where a suit or proceeding is filed after the expiry of the period mentioned in Sub-section (1) to Section 106 TP Act. This provision was added by way of substitution of the original Section 106 TP Act by Transfer of property (Amendment) Act, 2002. It came into force on 31.12.2002. The questions, therefore, are whether the notices are in conformity with the statutory provisions in Section 106 TP Act and whether the tenants holding over can demand a notice under the Section. On a reading of Section 106 TP Act as it now exists, it can be seen that the amendment applies to all the present as well as future proceedings. The predominant view appears to be that "suit or proceeding" in the Section would include appeals, revisions, etc. and hence

at no stage of litigation, can the technical pleas, which were available under the unamended Section 106 TP Act, be raised.

13. In opposition to the arguments of the learned counsel for the plaintiffs, learned counsel for the defendants placed reliance on two Full Bench decisions of this Court. Firstly, I shall refer to **Ittipennu Amma Devaki Amma v. Krishna Kammathi Ramachandra Kammathi (1955 KLT 173)**. True, the facts are different in this case. Plaintiff therein was the son of a possessory mortgagee in respect of certain properties belonged to the tarwad of defendants 1 to 19. On the date of possessory mortgage the tarwad took the properties back on lease from the mortgagee and executed a document embodying the terms of lease. The lease was for one year and a definite rent was stipulated. Subsequently there was a partition in the tarwad. The mortgaged properties and also the mortgage amounts including the arrears of rent were divided and allotted to certain members. The mortgagee-landlord was not a party to any of the documents between the defendants. He filed a suit for delivery of possession of plaint schedule properties with arrears of rent and future profits. The lessees were found to be holding over the tenanted properties after expiry of the lease. In that context, the Full Bench of this Court observed that all stipulations contained in the expired lease deed will be deemed to be imported into an implied lease by holding over unless they are altogether unconnected with the transaction of lease. Another Full

Bench decision of this Court in **Jacob Philip v. State Bank of Travancore & Others (1972 KLT 914)** is also cited by the learned counsel for the defendants. There also the facts situations are different. The question raised therein was whether a notice to quit was necessary when the tenant was holding over in a lease for a term of one year and with a provision that if the lessee defaulted rent for two consecutive months, he shall be liable to surrender the leasehold and the landlord to have a right to evict. The undermentioned observations of the Full Bench are useful for our purpose:

*“The clause providing for liability to surrender and right to evict, if rent for two consecutive months is defaulted, was a clear contract to the contrary. We cannot accept the appellant's contention that this clause would have operation only during the currency of the lease. Ext. P3 lease gets renewed statutorily from year to year, with the result, that this term is also statutorily incorporated into the tenancy by holding over. Being so. there is no need for a notice to quit, and the two months' consecutive default in payment of rent: itself affords a cause of action for eviction.”*

14. Although the Full Bench held that the tenant was not entitled to get a notice to quit, the relevant ratio of the decision is that the terms of the lease get incorporated into the statutorily renewed tenancy by holding over. Hence, it cannot be contended that the tenant by holding over is not

entitled to revival of the stipulations in the expired lease unless they are altogether unconnected with the transaction of the lease.

15. Now the question is whether the provision to give one month's notice in Ext.A4 operates as "contract to the contrary"? Section 106 TP Act starts with words "in the absence of a contract or local law or usage to the contrary". These words have great implication in the subsequent portions of the Section. Ext.A4 created month to month tenancies is not in dispute. Ext.A4 shows that the tenants are entitled to get one month's notice. Certainly this is a contract to the contrary because Section 106 TP Act requires only fifteen days notice in a month to month tenancy. It is well settled that the terms of the contract will have to be considered by the courts to come to an independent conclusion whether the contract of tenancy is a contract which will exclude the compliance of Section 106 TP Act (see **Varghese v. Sivarama Pillai (1986 KLT 39)**). In the cases on hand, it is definite that Ext.A8 notices are not sufficient in the eye of law to terminate the tenancies as they are for a period shorter than one month stipulated in Ext.A4. I have already seen that the tenants by holding over are entitled to notices to quit as the stipulations in Ext.A4 get renewed in the case of tenancies by holding over by operation of law because such stipulations are not unconnected with the transaction of lease. Therefore, I am of the definite view that the tenancies in both the cases are not terminated by Exts.A5 and A8 notices. I am fortified by the observations

made by the learned single Judge in **Arifa Beevi & Others v. Gopalan Ramesan (1990 (2) KLT 426)**. It is indisputable that an agreement by a tenant to surrender the property may create a corresponding right to the landlord to claim eviction. But, in any case the clause would act as a contract to the contrary. Therefore, the stipulations in Ext.A4 in both cases certainly create a contract to the contrary requiring the landlords to issue notices for termination of tenancies in spite of the fact that the tenants are holding over.

16. To oppose this line of thinking, learned counsel for the plaintiffs placed reliance on **Metal Press Works, Calcutta v. G.M.Cotton Press Co. (AIR 1976 AP 205)**. It is contended that the Andhra Pradesh High Court has held that mere holding over by the lessee after termination of the lease period does not create a tenancy of any kind and he may be a tenant on sufferance. The propositions therein do not go in tune with the authoritative and binding pronouncements by the Full Benches of this Court. Therefore, I am not persuaded to accept this contention of the plaintiffs.

17. Another question is whether the plaintiffs can take the benefit of the present Section 106 TP Act, which has done away with the rigidity in the unamended Section regarding the notice to quit?. In the substituted Section 106 TP Act (new provision), there is a striking feature that the notice need not expire with the end of a month of tenancy as required

earlier. Now Section 106 (1) TP Act only says that there must be fifteen days notice for terminating a month to month tenancy. Sub-section (3) to that Section further says that a notice under Sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified in Sub-section (1), where a suit or proceeding is filed after the expiry of fifteen days mentioned in that Sub-section. Learned counsel for the plaintiffs therefore contended that Ext.A8 notices were issued on 06.07.2010 and the suit was filed only on 10.08.2010. Therefore, the period of one month has elapsed from the date of notice to the date of institution of the suit. According to the learned counsel, there is no legal infirmity in the quit notice for the above reasons.

18. Learned counsel for the defendants contended that as the notices for terminating tenancies were inherently incompetent, the plaintiffs cannot claim any benefit under the new Section 106 TP Act.

19. To appreciate this contention, certain facts will have to be considered. Admittedly Ext.A5 notices were issued for terminating tenancies with effect from 01.07.2010. The defendants were directed to give vacant possession of the buildings on 01.07.2010. Exts.A6 and A7 in both cases are the postal receipts and acknowledgement cards respectively. Plaintiffs have candidly admitted that there were mistakes in Ext.A5 notices. Hence they caused Ext.A8 notices to be issued. Case of the plaintiffs is that the same should be treated either as a correction notice

or a fresh notice under Section 106 TP Act. Ext.A9 evidences the issuance of Ext.A8 notices. Ext.A8 notices were issued only on 06.07.2010 is not a contentious fact. The trial court rightly found that Ext.A8 notices cannot be treated as correction notices since the same were issued only on 06.07.2010 for terminating the tenancies with effect from 01.07.2010. In other words the notices were issued only on a date after the date intended for termination of tenancy. If we consider Ext.A8 notices as fresh notices under Section 106 TP Act, admittedly they are against the agreed terms in Ext.A4. For these two reasons the plaintiffs cannot contend that they are entitled to the benefit under Section 106(3) TP Act. As I have already seen that the defendants, who are tenants holding over the premises, are entitled to get notice under Section 106 TP Act for the termination in accordance with the contract to the contrary contained in Ext.A4. By no stretch of reasoning it can be seen that Exts.A5 and A8 notices conformed to the standards prescribed in the existing provisions in Section 106 TP Act and the stipulations in Ext.A4. The rigidity of Section 106 TP Act, as it originally stood, was relaxed for avoiding untenable contentions regarding the date of termination of tenancy. However, that cannot be capitalized by a landlord when the notice itself is defective and falls short of the standards prescribed by the legal provision. The stipulation in Ext.A4 that tenancy can be terminated by the landlord by issuing a month's notice has not been complied with in this case by sending Exts.A5 and A8. Therefore, I find

that the plaintiffs are not entitled to get the benefit of Section 106(3) TP Act.

20. The upshot of the discussion is that Exts.A5 and A8 notices do not legally terminate the tenancies in favour of the defendants. Stipulation of issuance of one month's notice in Ext.A4 is a contract to the contrary mentioned in Section 106 TP Act. The defendants, who are tenants holding over, are entitled to get a notice under Section 106 TP Act in view of the terms and conditions in Ext.A4 and all the conditions in Ext.A4 which are connected with the transactions of lease are incorporated in the statutorily renewed tenancy by holding over.

In the result, the appeals are allowed. The judgment and decree passed by the courts below are set aside. The suits are dismissed. There is no order as to costs.

All pending interlocutory applications will stand closed.

**A. HARIPRASAD, JUDGE.**

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