

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.03.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T.ASHA

C.R.P.(NPD).No.3118 of 2018

and

C.M.P.No.17955 of 2018

R.Mathiyalagan

.. Petitioner

vs.

1. Peter Nelson

2.Mable Nelson

.. Respondents

PRAYER: Civil Revision Petition filed under Section 115 of Civil Procedure Code against the fair and decretal order passed in EA No. 4 of 2017 in EP No. 598 of 2017 in RCOP No. 388 of 2016, on the file of the XIII Small cause court dated 06.07.2018.

For Petitioner : Mr.P.Srinivasan

For Respondents : Mr.Sashidar Sivakumar
for Mr.S.Rajasekar, caveator counsel
for R1 & R2

ORDER

The above Civil Revision Petition is filed challenging the order passed in E.A.No.4 of 2017 in E.P.No.598 of 2017 in R.C.O.P.No.388 of 2016, on the file of the XIII Small Cause Judge, Chennai.

2. The brief dates and events preceding the filing of this Civil Revision Petition is given below for an easy understanding of the facts of the case:

(i) The respondents/landlords had filed R.C.O.P.No.388 of 2016 on the file of the learned XIII Small Cause Judge, Chennai for eviction of the revision petitioner/tenant on the ground of willful default for the period 01.07.2015 to 29.02.2016 (and default continues to date).

(ii) On 31.08.2016, the revision petitioner/tenant filed the counter. Thereafter, there is no appearance on the side of the revision petitioner/tenant. On 28.02.2017, the revision petitioner/tenant was set ex-parte and the learned Rent Controller was pleased to pass an ex-parte order. The revision petitioner/tenant filed M.P.No.241 of 2017 to set aside the ex-parte decree.

(iii) Once again, there is no appearance on behalf of the revision petitioner/tenant. On 23.08.2017, the rent control petition is allowed and eviction was ordered granting two months time to the revision petitioner/tenant to vacate and handover the vacant possession to the respondents/landlords.

(iv) On November 2017, E.P.No.598 of 2017 in R.C.O.P.No.388 of 2016 was filed by the respondents/landlords for delivery of the possession under Section 18 of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. On 09.01.2018, E.A.No.4 of 2018 was filed in E.P.No.598 of 2017 by the revision petitioner/tenant under Section 47 of the Code of Civil Procedure to set aside the decree in R.C.O.P.No.388 of 2016. Subsequently, on 06.07.2018, E.A.No.4 of 2018 was dismissed.

3. The contention of the revision petitioner/tenant is that, he is not a lessee in respect of the property, but that, he is only a licensee and therefore, the provisions of the Rent Control Act would not apply in the present case. The 'Leave & Licence Agreement', dated 13.02.2015, has been produced on the side of the revision petitioner/tenant to buttress his contentions. It is to be noted that, as on date, there is a total rental arrears of Rs.17,10,000/-, after giving credit to the advance amount of Rs.3,00,000/-.

4. Mr.P.Srinivasan, learned counsel appearing for the revision petitioner/tenant would argue that, the very fact that the revision petitioner/tenant and the respondents/landlords have entered into a 'Leave & Licence Agreement' would clearly show that, the intention of the parties was only to create licence and not lease. Once the

document in which he has entered into possession of the property is licence, the only remedy which is available to the respondents/landlords is to file a suit after following the procedures prescribed under the Transfer of Property Act.

5. In support of his contentions, the learned counsel for the revision petitioner/tenant relied on the following Judgment of the Hon'ble Supreme Court in the case of **AJUDH RAJ AND OTHERS VS. MOTI** reported in 1991 3 SCC 136 and submitted that, when an eviction is passed by the Court, without jurisdiction, the said Judgment has to be treated as nullity and it is non-existent in the eye of law and therefore, execution proceedings levied on the basis of the said Judgment is not maintainable.

6. The next Judgment relied upon by the revision petitioner/tenant is **BALVANT.N VISWAMITRA AND OTHERS VS. YADAV SADASHIV MULE (DEAD) THROUGH LRS. AND OTHERS** reported in 2004 8 SCC 706, wherein, it is stated that, the question of jurisdiction can be raised in any stage of the proceedings, since, the issue of lack of inherent jurisdiction goes to the root of the matter and strikes at the very authority of the Court passing the decree.

7. It is also the contention of the learned counsel appearing

for the revision petitioner/tenant that, since, the agreement entered into between the parties is a 'Leave & Licence Agreement', the Rent Control Act would not apply to the proceedings and the order passed by the Rent Controller is null and void and therefore, the decree being a nullity, the execution proceedings are also nullity.

8. Per contra, Mr.Sashidar Sivakumar, learned counsel appearing on behalf of the respondents/landlords would submit that, though the nomenclature of the deed is a 'Leave & Licence agreement', the substance/contents of the agreement would clearly demonstrate that, it is nothing but a lease. The terms of the said agreement contains all the clauses which are required in the case of a lease, namely, the possession being handed over, the revision petitioner/tenant paying rental advance, exclusive possession being given to the lessee, the fetter being placed on the lessee from either subletting or assigning the property to any third party and for refunding the rental advance at the time of eviction of the property, deducting therefrom their charges towards damages, arrears etc.

9. The learned counsel for the respondents/landlords would argue that, on a reading of the terms of the agreement, it is natural to arrive at the conclusion that, the same is nothing but a lease deed. To substantiate his contention, he has relied on the decision of the Hon'ble

Supreme Court in the case of **Associated Hotels of India Ltd. vs. R.N. Kapoor** reported in **AIR 1959 SC 1262**, wherein, the learned Judges have discussed the difference between the lease and licence and infact, the Hon'ble Supreme Court has held that, it is not the form of the deed but the contents which would lead us to the inevitable conclusion that, the agreement is one for a lease or a licence, irrespective of the nomenclature by which it may be called, the agreement would still only be a lease. The learned Judges have also laid down the following propositions to distinguish lease and license.

“(1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties – whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant.”

10. Ultimately, the learned Judges have held that, where the tenant has been given exclusive possession, independent from the control and management of the landlord, then, the arrangement is a

lease and not a licence.

11. Heard the learned counsel appearing on both sides and perused the papers available on records.

12. A reading of the 'Leave & Licence Agreement' shows that the revision petitioner/tenant has been put in possession of the entire premises for a period of seven months commencing from 13.02.2015 to 12.09.2015. The agreement further states that, a sum of Rs.45,000/- per month (Rupees Forty Five Thousand Only) should be paid by the respondents/landlords for the use of the premises and an advance of Rs.3,00,000/- (Rupees Three lakhs only) as interest free security deposit should also be paid by the revision petitioner/tenant. The said security deposit is repayable by the respondents/landlords, when the revision petitioner/tenant hands over the possession of the premises to the respondents/landlords, on the expiry or termination of the licence, after deducting any outstanding claim therefrom. The property tax is payable by the lessor and the usage of the property has also been clearly mentioned in the agreement that, the property should be used only for the purpose of residence of himself and the members of his family and the fetter is placed on sub-lease as well as assigning the agreement to any third party and the premises has to be maintained in a proper condition. These clauses undoubtedly, are the conditions

that are only prescribed for a lease deed. The fact that the possession has been handed over exclusively to the revision petitioner/tenant, clearly establishes that, the parties had intended the agreement to be a lease and not a licence.

13. The conduct of the revision petitioner/tenant should also be taken note of. He has entered appearance in the Rent Control proceedings by filing counter. Thereafter, revision petitioner/tenant has remained ex-parte. After filing an application for setting aside the ex-parte order, once again, he has remained ex-parte and finally, the order of eviction has been passed by the learned Rent Controller. Then the revision petitioner/tenant has taken a defence under Section 47 of Civil Procedure Code that, the arrangement between the parties is for a licence and not a lease.

14. Relying upon the Judgment of the of the Hon'ble Supreme Court in the case of **Associated Hotels of India Ltd. vs. R.N. Kapoor** reported in AIR 1959 SC 1262 (*narrated supra*) , this Court is of the considered view that, there is no infirmity in the order passed by the learned XIII Small Cause Judge, Chennai in E.A.No.4 of 2018.

15. In view of the above, the Civil Revision Petition stands

dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

14.03.2019

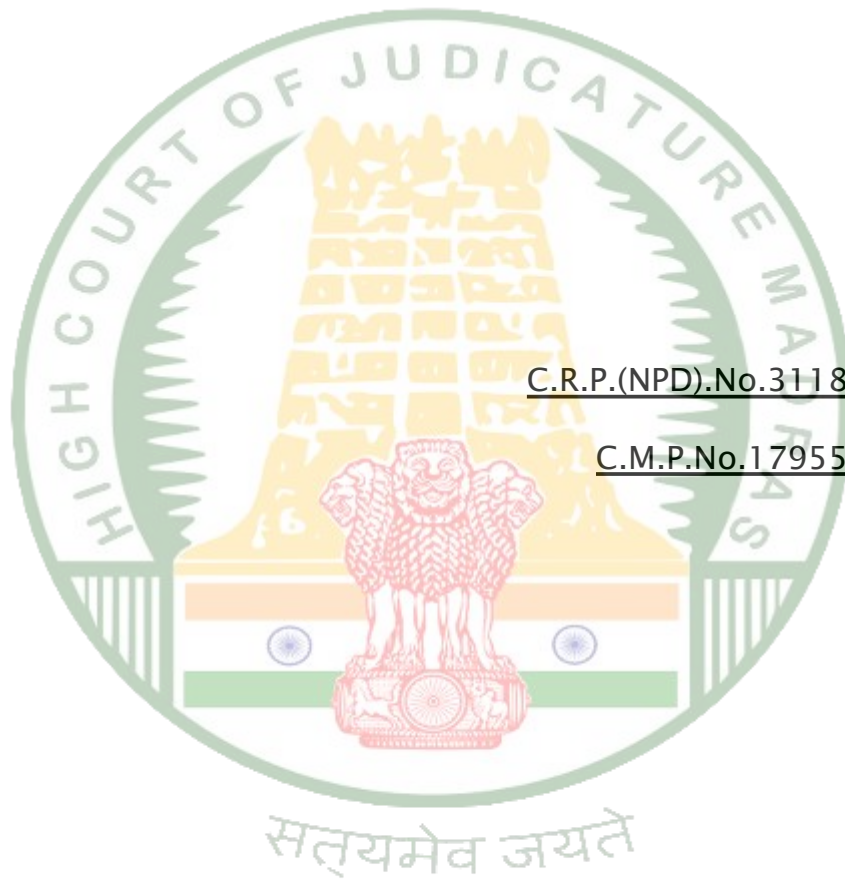
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Speaking / Non speaking order
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To

The XIII Judge,
Small Causes Court,
Chennai.



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