Joseph Severance And Ors vs Benny Mathew And Ors on 23 September, 2005

Equivalent citations: AIRONLINE 2005 SC 1079

Author: Arijit Pasayat

Bench: Arijit Pasayat, C.K. Thakker

```
           CASE NO.:
Appeal (civil)  3818 of 2000

PETITIONER:
JOSEPH SEVERANCE AND ORS.

RESPONDENT:
BENNY MATHEW AND ORS.

DATE OF JUDGMENT: 23/09/2005

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
```

JUDGMENT ARIJIT PASAYAT, J.

Appellants call in question legality of the judgment rendered by a learned Single judge of the Kerala High Court in a Second Appeal filed by the respondents holding that the suit filed by the present appellants as plaintiffs for mandatory injunction as well as for prohibitory injunction was not maintainable.

The suit was filed in the following factual background:

> The plaint schedule property originally belonged to Francis Severance, the father of appellants 1 to 3 and grand-father of appellants 4 and 5. Francis Severance had four children and one of the sons, Joseph Severnce, died in the year 1970. His widow was Hilda Severance. Said Francis Severance died in the year 1966. After the death of Francis Severance the plaint schedule property devolved on appellants 1 to 3. Shri K.V. Mathew, the husband of the 2nd respondent and father of respondents 1 and 3 and the 4th respondent entered into an agreement of licence with appellants and Hilda Severance with respect to the plaint schedule property under which permission was granted to Mathew to construct a cinema theatre for a period of five years. The licence was renewed from time to time and on 11.2.1991 by Ext. A1 agreement, the licence, was renewed for a period of five years. In the meantime Hilda Severance also

died. The condition in Ext. A1 agreement was that on the expiry of five years from 11.2.1991, the licensee had to surrender vacant possession of the plaint schedule property on demolishing the building and the structures thereon. Before the expiry of five years mentioned in Ext. A1 agreement, the licensee, Mathew died on 24.5.1994. After that Ext. A2 notice was sent to respondents which yielded no result. The suit was filed on 12.2.1996.

The trial court as well as the First Appellate Court found that on the death of Mathew the licence came to an end and thereafter the possession of all the four defendants were as trespassers. After finding that their possession was as trespassers both the trial court and the First Appellate Court held that mandatory injunction can be granted as prayed for by the plaintiffs. Though some other points were urged during trial and before the First Appellate Authority, they were decided against the defendants. The main argument before the High Court in Second Appeal was that since they were trespassers the property could be recovered by the plaintiffs only by filing a suit for recovery of possession. The High Court accepted the plea and held that the suit as framed was not maintainable. It was held that where an ex-licensee is in possession the licensor can only seek recovery of possession from him which is the legal remedy whereas the remedy of injunction is an equitable remedy. It was however held that licensee's occupation does not become hostile possession or possession of trespasser the moment the licence comes to an end. But for maintaining a suit against his licensee for mandatory injunction directing him to vacate the property the suit has to be filed without delay and with promptitude. In the instant case it was held that there was considerable delay in bringing the suit for mandatory injunction after the licence came to an end. Mathew (original licensee) died on 24.5.1994 and the suit was filed on 12.2.1996. The High Court held that there was unexplained delay in filing the suit. The notice which was issued was also after about 19 months of the death of the original licensee. Plea of plaintiffs was that they gave time to the defendants to wind up the business and with a view to avoid inconvenience to them and the suit was filed immediately after the expiry of the licence period. The High Court held that since the suit was filed not against the original licensee but against the legal heirs, the delay was abnormal. It was, however, held that though the licensee is the actual occupant but the licensor is the person holding the control or possession of the property through his licensee placing reliance on the decisions of the Calcutta High Court in Sisir Kumar v. Susil Kumar, AIR (1961) Calcutta 229 and of the Patna High Court in Jagadish Chandra v. Basant Kumar, AIR (1963) Patna 308.

Learned counsel in support of the appeal submitted that the High Court's judgment is clearly untenable. Firstly while reversing the findings recorded by the trial court as affirmed by the first Appellate Court the mandatory requirement of formulating substantial question of law was not followed. Even otherwise the High Court did not take note of several Division Bench's judgments of the Kerala High Court which were binding on learned Single Judge. Though he referred to them, his views were clearly

at variance with that of the Division Benches. The explanation offered by the plaintiff as to why the suit was filed on 12.2.1996 has been ignored without reason. No issue was framed by the trial Court about the maintainability or otherwise of the suit and even no evidence was led or plea raised before the trial Court or before the first appellate Court that the suit was not maintainable having been filed after a long period. The claim of the defendants all through was that they were tenants and not trespassers. These vital aspects have been lost sight of by the High Court.

In response, learned counsel for the respondents-defendants submitted that the High Court's judgment does not warrant any interference. A finding of fact has been recorded that the suit was not filed within a reasonable time. Even though the issue was not specifically raised in so many words yet the pleadings and the evidence tendered gave rise to a pure question of law. Even consequential question linked with the main question can be adjudicated. Though it was not specifically stated that the defendants' claim is that of trespassers yet in view of the settled position in law that on expiry of licence the occupant became a trespasser, the High Court has arrived at the correct decision.

It is to be noted that though the High Court reversed the findings recorded by the trial court and the first appellate court no question of law was formulated. This is clearly contrary to the mandate of sub-section (4) of Section 100 of the Code of Civil Procedure, 1908 (in short the `CPC'). Ordinarily in such a circumstance we would have remitted the matter to the High Court to formulate substantial question of law, if any, and decide the matter. But considering the long passage of time and the prayer of the parties the dispute may be resolved in the present appeal. It is also not necessary to remit the matter as the appellants are otherwise entitled to succeed.

There was no specific plea taken by the defendants that the suit should be one for recovery of possession and the suit for injunction is not maintainable. In fact, before the trial court and the first appellate Court the stress was on something else i.e. the effect of Section 60(b) of the Indian Easements Act, 1882 (in short the `Easements Act') and the alleged non-maintainability of the suit on the ground of non-joinder of necessary parties. Before the High Court the plea was taken for the first time that the suit was not maintainable being one for mandatory injunction and for prohibitory injunction and not one for recovery. Strictly speaking the question is not a substantial question of law, but one whose adjudication would depend upon factual adjudication of the issue relating to reasonableness of time. The correct position in law is that the licensee may be the actual occupant but the licensor is the person having control or possession of the property through his licensee even after the termination of the licence. Licensee may have to continue to be in occupation of the premises for sometime to wind up the business, if any. In such a case licensee cannot be treated as a trespasser. It would depend upon the facts of the particular case. But there may be cases where after termination or revocation of the licence the licensor does not take prompt action to evict licensee from the premises. In such an event the ex-licensee

may be treated as a trespasser and the licensee will have to sue for recovery of possession. There can be no doubt that there is a need for the licensor to be vigilant. A licensee's occupation does not become hostile possession or the possession of a trespasser the moment the licence comes to an end. The licensor has to file the suit with promptitude and if it is shown that within reasonable time a suit for mandatory injunction has been filed with a prayer to direct the licensee to vacate the premises the suit will be maintainable.

It is to be noted that in the instant case the High Court has nowhere held that the explanation, as offered by the plaintiffs, was not acceptable. Without so holding, the High Court only took note of the period after which the suit was filed.

The basic issue is whether the suit was filed within a "reasonable time".

As observed in Veerayee Ammal v. Seeni Ammal, [2002] 1 SCC 134, it is "looking at all the circumstances of the case; a "reasonable time" under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than `directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea".

According to Advanced law Lexicon by P. Ramanatha Aiyar 3rd Edition, 2005 reasonable time means as follows:

"That is a reasonable time that preserves to each party the rights and advantages he possesses and protects each party from losses that he ought not to suffer.

"Reasonable Time" is defined to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case.

If it is proper to attempt any definition of the words "reasonable time", as applied to completion of a contract, the distinction given by Chief Baron Pollock may be suggested, namely, that a "reasonable time" means as soon as circumstances will permit.

In determining what is a reasonable time or an unreasonable time, regard is to be had to the nature of the instrument, the usage or trade or business, if any, with respect to such instrument, and the fact of the particular case.

The reasonable time which a passenger is entitled to alighting from a train is such time as is usually required by passengers in getting off and on the train in safety at the particular station in question.

> A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than "directly" such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.
>
> Reasonable time always depends on the circumstances of the case. (Kinney) It is unreasonable for a person who has borrowed ornaments for use in a ceremony to detain them after the ceremony has been completed and the owner has demanded their return. (AIR 1930 Oudh 395).
>
> The expression "reasonable time" means so much time as is necessary under the circumstances to do conveniently what the contract or duty requires should be done in a particular case".

At this juncture, it would be appropriate to take note of the view expressed by this Court in several cases.

In Firm Sriniwas Ram Kumar v. Mahabir Prasad and Ors., AIR (1951) SC 177 it was noted as follows :

> "As regards the other point, however, we are of the opinion that the decision of the trial court was right and that the High Court took an undoubtedly rigid and technical view in reversing this part of the decree of the subordinate judge. It is true that it was no part of the plaintiff's case as made in the plaint that the sum of Rs. 80,000 was advanced by way of loan to the defendant's second party. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the Court to give him relief on that basis. The rule undoubtedly is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot

possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant it may not be proper to drive the plaintiff, to a separate suit. As an illustration of this principle, reference may be made to the pronouncement of judicial committee in Mohan Manucha v. Manzoor Ahmad, 70 IA 1AIR 30 (1943) PC 29. This appeal arose out of a suit commenced by the plaintiff- appellant to enforce a mortgage security. The plea of the defendant was that the mortgage was void. This plea was given effect by both the lower courts as well as by the Privy council. But the Privy Council held that it was open in such circumstances to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under Section 65 of the Contract Act. Although no such alternative claim was made in the plaint, the Privy Council allowed it to be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit. It may be noted that this relief was allowed to the appellants even though the appeal was heard ex party in the absence of the respondent."

In Sant Lal Jain v. Avtar Singh, [1985] 2 SCC 332 in paragraph 7 & 8 of the judgment it was observed 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 in possession of the property to which he may be found to be entitled. Therefore, we are of the opinion that the appellant should not 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 though 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 a 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."

The explanation offered by the plaintiffs is plausible. The defendants did not specifically raise any plea that the time taken was unreasonable. No evidence was led. No specific plea was raised before the trial Court and first appellate Court. The question of reasonable time was to be factually adjudicated. For the first time in the Second Appeal the dispute essentially founded on factual foundation could not have been raised.

In view of what has been stated by this Court in Firm Sriniwas case (supra) and Sant Lal's case (supra), the inevitable conclusion is that the High Court's judgment is not sustainable. Accordingly the judgment of the High Court is set aside.

The appeal is allowed without any order as to costs.