Supreme Court of India
H.V. Rajan vs C.N. Gopal And Ors. on 9 August, 1974
Equivalent citations: AIR 1975 SC 261, (1975) 4 SCC 302, 1974 (6) UJ 494 SC
Author: R Jaganmohan
Bench: A Alagiriswami, M Beg, P J Reddy
JUDGMENT Jaganmohan, Reddy, J.

1. The first respondent gave on lease to the appellant his cinema theatre known as "Sivananda Theatre" which was later known as "Moviland Theatre" by a registered lease deed dated September 2, 1946. Earlier, this same theatre was leased to respondent 2 on December 29, 1941, for five years commencing from March 1, 1942 ending with February 28, 1947. Clause 14 of the lease deed provided :

After the expiry of the period of five years fixed under this lease, the lessees shall have the option and liberty to renew or extend the lease for another period of 5 years but subject only to such terms and conditions as may be mutually agreed upon.

On may 2, 1946, counsel for respondent 1 on instructions issued a notice intimating respondent 2 that as the lease will expire at the end of February 1947 he should "take such action as may be necessary to give effect to the same and deliver possession". Respondent 2 was also informed that under Clause 3 of the lease deed he will cease to pay rent six months prior to the above date of termination of the tenancy in adjustment of the advance paid by him. Respondent 2 replied on May 13, 1946, that he wished to exercise his option to renew the lease for a further period of five years. In continuation of this letter the lawyer of respondent 2 again wrote to the lawyer of the 1st respondent on September 16, 1946 that according to the present lease the terms and conditions of the fresh lease for 5 years to come into effect in pursuance of the right of option are to be and mutually agreed upon. The letter went on to point out :

Of course, the main point is about the rent; and our client was expecting your client to propose the terms and waited so long. He has not yet heard from your client in the matter. Our client learns that your client is creating some self serving evidence in connection with the lease of the property: that apart our client is prepared to pay the reasonable rent subject to the modification in consideration of the heavy out-lay he has invested in converting and equipping your clients' building to make it suitable for Cinema Theatre.

2. It will be noticed that after the registered lease in favour of the appellant was executed, respondent 2 was calling on respondent 1 to propose fresh terms for renewal, particularly in respect of the rent etc. In reply to the notice of September 16, 1946, issued on behalf of respondent 2, the Advocate of respondent 1 replied on September 25, 1946 that his client wishes to repeat that the lease will terminate on due date, that it is not open to renewal as desired by respondent 2, and that his client should vacate the premises and deliver possession: The next day a comprehensive notice was given by the lawyers of respondent 1 to respondent 2 pointing out that the original lease was with the States Engineering Company, and respondent 1 had no notice that the Company was dissolved. In view of what was said it was contended that the agreement to lease which was with the

Company stood dissolved, and accordingly respondent 1 does not recognise respondent 2 as a partner of the Company or having any other rights and benefits. In these circumstances the Advocate of respondent 1 informed that it is impossible to enter into a fresh lease with respondent 2 for the reasons stated therein, i.e. for misbehavior, non-payment of rent, for neglecting to look after the property, for encroachments etc The Advocate for respondent 2 was also specifically informed by paragraph 16 of the notice that "the theatre has already been leased to Mr. H.V. Rajan who is to be put into possession of the property on the 1st of March 1947". Further correspondence ensued and ultimately on March 3, 1947, respondent 1 filed a suit being O.S. No. 112 of 1946 on the file of the Subordinate Judge, Bangalore, for eviction of respondent 2, for delivery of possession and for payment of arrears of rent with interest aggregating to Rs. 520/- together with costs, interest, mesne profits etc. To this suit plaintiff/appellant was not a party. While the suit was pending, the Mysore House Rent and Accommodation Control Order, 1948, was promulgated on July 1, 1948, which was made applicable to cinemas. Under the above order, non-payment of rent was also one of the grounds for eviction. On March 31, 1949, the suit of respondent 1 was decreed and the Court directed the eviction of respondent 2 on the ground of termination of the lease and for non payment of rent for which it gave a decree with interest,

3. Respondent 2 & respondent 1 filed separate appeals in the High Court being Appeals Nos. 217 of 1948-49 and 50 of 1949 50 respectively. When these appeals were pending, respondent 1 executed a registered lease deed on August 16, 1950 in favour of respondent 2 purporting to be under a compromise. This lease deed was for 10 years in the first instance with an option to extend it for 5 years and thereafter for another 5 years, on a monthly rental of Rs. 1800/- Apart form this rent, respondent 2 was also to pay Rs. 45,650/at the rate of Rs. 1100/- p.m. from March 1, 1947 to August 16, 1950.

4. On August 21, 1950, after the lease was executed in favour of respondent 2, respondent 1 purported to cancel the lease in favour of the appellant and deposited Rs, 18,000/- in the appellant's Bank account on the same date, which, however, was returned by the appellant to the first respondent by cheque on September 4, 1950 On November 14, 1950, the respondent and the second respondent withdrew their appeals pursuant to compromise petition filed in the Court. Appellant then filed the suit out of which this appeal arises on November 27, 1950 for specific performance of the agreement of lease dated September 2, 1946, for possession, for damages, for mesne profits and for interest and costs. Defendant 2 filed a written statement to say that his lease got extended upto March 1, 1952, as he had exercised his option and that the agreement between the appellant and respondent 1 became impossible of specific performance.

5. Before the suit came to be tried, the Mysore Rent Control Act, 1951, came into force and on July 30, 1953, the District Judge dismissed the suit. An appeal was filed in the High Court against that judgment which while dismissing it in all respects allowed it on November, 27, 1959, partly by directing the first respondent to return the amount of Rs. 18,000/- received by him as advance with interest at 6% per annum from September 2, 1946, till date of payment. Against that judgment this appeal is by certificate granted on November 6, 1962. But before the certificate was granted, on December 31, 1961 the Mysore Rent Control Act, 1961 came into force whereunder by virtue of Section 31 buildings with monthly rent exceeding Rs. 500/- were not governed by the Act. There is,

therefore, now no impediment in the way of the appellant obtaining relief in this Court if he is otherwise entitled to.

6. It is not necessary for us to examine what impediments existed from time to time since the filing of the suit by reason of the changes in the Rent Control law, because what we are concerned is whether relief can now be given when that impediment can no longer bar the Court from granting a decree In Mohanlal Chunilal Kothari v. Tribhuvan Haribhai Tamboli has been held that a Court can take into account the present position and mould its relief. Now the only question is whether any relief can be given to the appellant. It is not denied before us, nor was it denied before the High Court, that the lease in favour of the appellant was a demise in presenti, that is Exhibit D is an agreement of lease and not an agreement to lease. Curiously enough though the High Court accepted this position in the earlier stages of its judgment, in the (sic) ??? er part it seems to have overlooked what it had stated earlier and treated (sic) ??? lease as if it was an agreement to lease. On this basis it applied the doctrine illustration as barring any remedy for the enforcement of Exhibit D. It said to para 5 :

In the Court below, there was some controversy as regards the true character of Exhibit D. But in this Court all the parties are agreed which we think is the true position in law, that Exhibit D is an "agreement of lease" and not an "agreement to lease". In other words as per Exhibit D, there was a demise in presenti. The fact that the property demised was to be delivered to the possession of the lessee at a subsequent date is irrelevant for the purpose of determining whether the agreement on question represents a lease or not. See, Narayan Chetty and Anr. v. Muthaiah Servai and Ors. 35 Mad. 63 (F.B.); Sultanali Mulla Rassoji v. Tyeb Pir Mahomed AIR 1930 Bom. 210; Ramjoo Mahomed v. Haridas Mullick and Ors. . As per Section 105 of the Transfer of Property Act, delivery of possession of the property demised is not a condition precedent for coming into operation of a lease. In view of Exhibit D the plaintiff had obtained an interest in the property leased and he was entitled to sue for possession of the same on his own right, if there were no other legal impediments. That being so, the suit for specific performance is misconceived, even if it is maintainable. The proper relief was to sue for possession and the plaintiff has done so in this case Hence it is unnecessary to consider the desirability of granting a decree for specific performance. Similarly the second defendant's plea that the compromise entered into between him and the first defendant, Exhibit T and U (in the course of the appeals against the decree in Original Suit No. 112 of 1946-47) bar the plaintiff's claim for possession is equally unsustainable. The plaintiff is not a party to the compromise in question. Any compromise entered into between the first and the second defendant cannot affect the rights of the plaintiff His rights which have accrued to him on 1-3-1947 will have to be examined in their own merits unaffected by Exhibits T and U.

7. While discussing the question whether the appellant is entitled to damages the doctrine of frustration is applied which can only be applied if the contract is an executory contract & not one which has created a demise in presenti. In this context the learned Judges observed :

...there is little doubt that the change made in the Mysore House Rent and Accommodation Control Orders and Acts has struck at the root of the contract embodied in Exhibit-D. This change could not have been in the contemplation of the parties at the time when they entered into the agreement. For

all practical purposes, it is clear that it is impossible for the 1st defendant to evict the 2nd defendant within any reasonable time. Accommodation Controls are still in force and no one knows how long they will be continued. Hence the agreement between the parties though lawfully entered into and was in the course of operation, has been prematurely determined owing to the occurrence of an intervening event or changed circumstance so fundamental as to be regarded by law both as striking at the root of the agreement and is entirely beyond what was contemplated by the parties, when they entered into the agreement. This intervening circumstance operates to bring the agreement to an end as regards both the parties and apart from their volition.

In view of our decision that the agreement between the plaintiff and the 1st defendant, has become frustrated it is unnecessary (sic) ??? to get into the question of damages. But since the parties have a(sic) ??? this matter before us at some length, we think it appropria(sic) ??? pronounce on the same.

It was further observed :

Now that it has been held that the contract under Exhibit is void, the 1st defendant is bound to return the money advanced. (sic) ??? is also liable to pay reasonable interest thereon.

If these passages give an impression that the learned Judges had treated Exhibit D as executory agreement incapable of specific performance because of frustration, that view cannot be regarded as correct. In our view on a correct it "repetition of the lease, Exhibit D is a demise in presenti and on the basis (sic) ??? appellant would have been entitled to mesne profits because on the day w(sic) ??? possession could have been given, the second respondent with full notice of (sic) ??? lease in favour of the appellant and with the knowledge that respondent (sic) ??? had not renewed it continued in possession. It is not as if the later impedim(sic) ??? created by the Rent Control Act precludes the first respondent from agitating his appeal as he was bound to in order to give effect to the demise granted (sic) ??? him to the appellant. As we have seen, one of the grounds for directing evicti(sic) ??? was non-payment of rent which is also a ground for eviction of a tenant unc(sic) ??? the Rent Control Act. Instead of defending the appeal filed by the second respondent and pursuing his own appeal, the first respondent entered into a fresh lease with the second respondent for a period of ten years with option to renew it for five years and then for another five years. Thereafter he filed a compromise in those appeals and got those appeals dismissed. It may be noted that the compromise was not based on the exercise of the option under the old lease. It is strenuously contended that the conduct of both the first and the second respondents was certainly not bona fide. Be that as it may, in this case we need not be concerned with any of these aspects because even under the fresh lease executed by the first respondent in favour of the second respondent in the year 1950, the period of 20 years expired in 1970 after which the second respondent has no right to possession under that lease deed. The Mysore Rent Control Act of 1960 has removed any impediments for giving effect to the lease in favour of the appellant and to-day this Court is not precluded from putting the appellant in posseion. It is, however, contended by the learned Advocate for the second respondent that the appellant's lease itself has expired, and therefore he cannot ask for any remedy in this Court. This submission is based on the provisions of Section 110 of the Transfer of Property Act which sets out the period from which a lease of immovable property commences. The section, however, is

inapplicable on the facts and circumstances of this case, because Clause 2 of the lease read with Clause 4 clearly indicates that the period of the lease was to commence from the date of possession. In Clause 2 it is stated :

This rent shall be payable with effect from the date on which possession of the theatre is made over to the tenant by the landlord, who shall, if necessary, take such steps as may be required to obtain and deliver possession to the tenant as soon as possible.

Clause 4 provides :

That the period of lease shall be 10 years at the 1st instance with the option to the tenant to continue for a further period of 5 years on the same terms as regards rents, etc., herein mentioned. In the event of the tenant exercising his option to continue which shall be by written notice issued, and served on the land-lord six months prior to the expiration of the period of tenancy as stipulated above. The tenant shall pay one year's rent in advance for the extended period of 5 years and this advance shall be refunded to the tenant in the same manner as provided for in para 3 above.

8. The period of lease for ten years under Clause 4 should begin from a particular point of time which point of time cannot by any stretch of the argument be the date on which the lease was executed because Clause 2 notes the fact that the landlord is not in possession of the premises and has to put the appellant (tenant) in possession as soon as the lease was executed. Hence Clause 2 states that the landlord should take such steps as may be required to obtain and deliver possess on to the tenant (appellant) as soon as possible, which makes the giving of possession to the appellant the starting point of the lease. In other words for the purposes of Clause 4 the starting point of the lease for determining the period of 10 years is the obtaining of possession of the theatre. In any view of the matter the appellant is entitled to possession.

9. Accordingly we allow the appeal, reverse the judgment and decree of the Trial Court and the first appellate court. The appellant will be put in possession under the terms of Exhibit D on payment of Rs. 18,000/- stipulated under the said Exhibit to the first respondent. The appellant will have his costs in this Court from the respondents.