M. Shankaran vs M. Krishnan on 13 December, 2018

Equivalent citations: AIRONLINE 2018 MAD 2120

Author: R. Subbiah

Bench: R. Subbiah, C. Saravanan

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13-12-2018

CORAM:
THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE C. SARAVANAN

Appeal Suit No. 720 of 2002

M. Shankaran .. A

Versus

M. Krishnan .. R

Appeal filed under Section 96 of the Code of Civil Procedure, the Judgment and Decree dated 26.04.2002 passed in O.S. No. 1174 of 2 the file of Principal Subordinate Judge, Coimbatore.

For Appellant : Mr. N. Haja Nazirudeen, Senior Advocate
for Mr. R. Tholgappian

For Respondent : Mr. V. Srikanth
for Mr. H. Manivannan

JUDGMENT

R. SUBBIAH, J This appeal is filed against the Judgment and Decree dated 26.04.2002 passed in O.S. No. 1174 of 2000 on the file of Principal Subordinate Judge, Coimbatore. The said suit was filed by the respondent herein, as plaintiff, for a direction, directing the defendant, who is the appellant herein, to pay a sum of Rs.20,00,000/- together with subsequent interest on Rs.20,00,000/- at 12% per annum till the date of realisation. The suit was decreed by the trial Court and http://www.judis.nic.in therefore the present appeal suit.

2. For the sake of convenience, the parties to this appeal shall be referred to as Plaintiff and defendant, as has been arrayed in the suit before the trial court.

3. The respondent herein, as plaintiff, filed the suit for a direction directing the defendant to pay the sum of Rs.20 lakhs with interest at the rate of 12% per annum from the date of plaint till realisation. According to the plaintiff, he is a businessman running a leading chain of sweet shops in Coimbatore under the name and style of Sri Krishna Sweets. According to the plaintiff, the defendant is the owner of the building bearing Door No.182, Raja Street, Coimbatore. It is his contention that during the year 1997, he approached the defendant to let out the suit property for lease for running a sweet stall. On 23.06.1997, the defendant wrote a letter to the plaintiff expressly agreeing to offer the property owned by him for lease. In the said letter, the defendant demanded a sum of Rs.20 lakhs as advance apart from monthly lease rent of Rs.10,000/- as a condition precedent for granting lease. The Plaintiff also accepted such offer and made payments by means of cheques on various dates from 27.06.1997 onwards and last payment was made by a cheque dated 29.08.1997 bearing Cheque No. 540646 drawn on State Bank of India for Rs.12,00,000/-. In effect, the plaintiff made a total payment of Rs.20 lakhs by means of six cheques, which are morefully tabulated in Para No.4 of the plaint. After making such payment, on 29.08.1997, the plaintiff was put in possession of the leasehold premises. The plaintiff and the defendant also entered into a Memorandum of Understanding on 29.08.1997 in which the various payments made by the plaintiff, on various dates, were incorporated. According to http://www.judis.nic.in the plaintiff, the tenancy is one at will which is morefully set out in clause 6 of The Memorandum of Understanding entered into with the defendant, which reads as follows:-

> "6. The Second party shall have the right to assign and/or sublease the property. However, the lease will be terminated at the end of ten years subject to clause 4, under which the lease can be extended on mutually agreed terms. However, the Second Party shall have the right to terminate the lease at any time by giving 3 months notice in writing."

Above all, the defendant had also written letters to the plaintiff in which he has acknowledged the receipt of the sum of Rs.20 lakhs paid towards lease advance. According to the plaintiff, as per Clause 6 of The Memorandum of Understanding, the plaintiff was granted the right to terminate the lease at any time he wished. In other words, the lease is terminable at the will and wish of the parties to the Memorandum of Understanding. Accordingly, by invoking the terms indicated in Clause 6 of The Memorandum of Understanding, the plaintiff terminated the lease by writing a letter dated 12.02.2000 giving three months notice as stipulated in clause 6 of The Memorandum of Understanding. As per the notice dated 12.02.2000, the lease came to an end even on 10.05.2000. Even though the plaintiff was ready and willing to handover possession of the lease hold premises to the defendant on the same day, the defendant chose to refuse the termination on untenable grounds. According to the plaintiff, the defendant refused the termination of the lease on the ground that the latter part of Clause 6 alone is unilateral in nature and it is not binding on him. Further, the defendant entered into a Memorandum of Understanding which stipulates certain conditions, however, the defendant, having signed the same, is not entitled to contend that Clause 6 alone is not binding on him. The defendant, on receipt of the notice dated 12.02.2000, sent

http://www.judis.nic.in a reply dated 30.03.2000 stating that clause 6 of the Memorandum of Understanding is unilateral and it will not bind him and consequently the termination of the lease is not valid. Hence, the Plaintiff sent a reply dated 27.04.2000 through his counsel calling upon the defendant to refund the advance paid by him. Though the plaintiff terminated the lease in accordance with the terms and conditions which are precedent for such lease, the defendant is unjustly holding the advance amount of Rs.20,00,000/- with a dishonest intention to cheat him. Hence, the plaintiff filed the suit for refund of Rs.20 lakhs from the defendant.

4. The defendant filed a written statement admitting the receipt of advance amount of Rs.20,00,000/- from the plaintiff. It was also admitted that the plaintiff took the leasehold premises namely ground floor portion of the building on 29.08.1997 and paid the monthly lease amount. According to the defendant, on 29.08.1997, the plaintiff requested the defendant to sign a Memorandum of Understanding so as to enable him to raise funds with the bankers and assured the defendant that the Memorandum of Understanding has no relevancy to the lease entered into with the defendant. Believing the representation of the plaintiff to be true, the defendant signed the Memorandum of Understanding on 29.08.1997 and the terms and conditions contained thereof will not bind him in any manner. This is more so that the Memorandum of Understanding is an unregistered document and it is inadmissible in evidence for want of registration. The defendant also denied the averment of the plaintiff that the tenancy is one at Will. If a lease deed contains clauses in respect of indefinite period and if the lessor has a right to revoke the tenancy then the lease deed does not require registration. In the instant case, the lease has been created for ten years and the right of Will is vested upon the lessee. http://www.judis.nic.in In such case, unless the Memorandum of Understanding is registered, it will not be admissible in evidence. The tenancy between the plaintiff and defendant is oral. Such oral contract has been confirmed by letter dated 23.06.1997 of the defendant. The terms and conditions expressed in the said letter alone decides the nature of lease and contract between the parties. The alleged Memorandum of Understanding is not a bilateral document and it was prepared by the plaintiff unilaterally for his own benefit. Therefore, the terms and conditions imposed in the Memorandum of Understanding has no evidentiary value in deciding the dispute between the plaintiff and the defendant. In effect, the plaintiff is bound to carry on his business in the leasehold premises for a period of ten years as agreed and acknowledged by him in the letter dated 23.06.1987. The plaintiff has no right to terminate the lease in the midway and in such event, the defendant is not duty bound to return back the advance amount within a short period. Believing the acceptance of offer by the plaintiff by letter dated 23.06.1997, this defendant made investments at different source and it is not possible for him to terminate the investments in a short duration, as it will result in incurring loss to the defendant. The quantum of advance and the period of lease offered and agreed by the plaintiff in the letter dated 23.06.1997 will be enforceable and the same is the deciding factor for entering into the lease between the plaintiff and the defendant. In effect, the plaintiff has no right to terminate the lease and demand for refund of the advance amount prior to ten years period stipulated in the lease agreement. The defendant therefore prayed for dismissal of the suit.

5. Before the trial Court, the plaintiff examined himself as PW1 and Exs. P1 to P8 were marked. On behalf of the defendant, the defendant examined http://www.judis.nic.in himself as DW1 but no document was marked. The trial Court, on consideration of the oral and documentary evidence,

decreed the suit as prayed for by the plaintiff with cost. Aggrieved by the judgment and decree dated 26.04.2002, the present Appeal suit is filed by the defendant.

6. The learned Senior Advocate appearing for the appellant/defendant would contend that the plaintiff and the defendant have entered into a Memorandum of Understanding dated 29.08.1997, Ex.A-3 which contains certain conditions governing the lease. During the subsistence of the lease agreement, treating the lease as a tenancy as one at will, the plaintiff invoked the second part of Clause 6 of the Memorandum of Understanding, sent a communication dated 12.02.2000, Ex.A-4 determining the lease and expressed his intention to surrender vacant possession of the demised premises before 10.05.2000. In the letter dated 12.02.2000, the plaintiff not only informed the defendant that he would handover possession of the building on 10.05.2000, but after handing over possession of the leasehold premises, sought for refund of the advance of Rs.20 lakhs paid by him. Since the defendant did not refund the amount, the suit was filed by him for recovery of amount. According to the learned Senior counsel, the plaintiff erroneously claimed as though the tenancy is one at Will which is contrary to the terms and conditions incorporated in the Memorandum of Understanding, Ex.A-3 dated 29.08.1997. The plaintiff has no right to compel the defendant to return back the advance amount midway of the tenancy especially when the defendant, anticipating that the plaintiff would continue the tenancy till the end, had invested the amount paid by him towards advance. If such investments are withdrawn in a short duration, the loss that is likely to accrue to the defendant will be on the higher http://www.judis.nic.in side than the disadvantage that may accrue to the plaintiff in continuing his tenancy. According to the learned Senior counsel, clause 6 of the Memorandum of Understanding confers unilateral termination to the lessee alone and therefore, neither the Memorandum of Understanding nor the letter dated 12.02.2000 sent by the plaintiff will be a binding factor for the lease. The Memorandum of Understanding is not a registered document and for want of registration, the same will not be admissible in evidence and it is void for want of registration under Section 107 of the Transfer of Property Act and Section 17 (1) (d) of The Registration Act and similarly for want of payment of requisite stamp duty, the document is inadmissible under Section 35 of The Indian Stamp Act. Consequently, the terms of lease cannot be looked into for any purpose much less for any collateral purpose under Section 49 (c) of The Registration Act and also for want of requisite stamp duty.

7. The learned Senior counsel for the defendant would contend that the leasehold premises measures 392 square feet of land and as requested by the plaintiff, the defendant let out the premises for lease for running a sweet shop. An offer letter dated 23.06.1997 (Ex.A-1) was issued by the defendant which stipulate the terms and conditions of the lease. The lease was for a period of ten years and the lease rent will be revised and/or increased at the rate of 30% once in three years. The plaintiff paid a sum of Rs.20 lakhs and the receipt of which was acknowledged by the defendant vide Ex.A-2 dated 29.08.1997 and possession of the leasehold premises was handed over to him. On the same day, the Memorandum of Understanding, Ex.A-3 was prepared by the defendant and it was also signed, but the Memorandum of Understanding was not duly stamped and http://www.judis.nic.in registered as required under law. Thus, the real intention of the parties to the lease was to keep the lease intact for ten years. The defendant intended to let out the lease for a long duration and anticipated regular monthly lease amount from the leasehold premises. Even the Memorandum of Understanding contain certain clauses which relate to extension of lease for a

further period as may be mutually agreed between the parties, right to assign/sublet the property, improving the property by resorting to interior decorations, internal partitions, wall ceiling, smoke ducting, air conditioning etc., Thus, it is indicative of the fact that the intention behind leasing out the property is that the plaintiff would continue the business in the leasehold premises for a longer duration with a lock-in period of minimum ten years.

8. The learned Senior counsel for the defendant would contend that the plaintiff invoked Clause 6 of the unregistered Memorandum of Understanding and sought for refund of the advance amount by determining the lease. The defendant repudiated the premature termination of lease prior to the expiry of the agreed initial lease period as improper and being arbitrary. In fact, the plaintiff, in his deposition, as PW1, had accepted that the period of ten years was incorporated considering the huge investments made or to be made and in the event of business becoming non-profitable, the premises could be vacated. While so, the plaintiff did not assign any specific reason for premature termination of the lease in Ex.A-4 or Ex.A-7 or in the pleadings and merely asserted that three months notice has been served on the defendant expressing his intention to terminate the lease. On the other hand, during the pendency of the suit, the plaintiff carried on the business which would indicate that the plaintiff is carrying on a profitable business. Even though the http://www.judis.nic.in plaintiff has deposed that due to bomb blast in the locality there was a slump in the business, he has not produced any evidence to prove the same. On the other hand, the defendant, during his examination as DW1, has specifically stated that the Memorandum of Understanding was entered into only for income tax purpose and the clauses contained in the Memorandum of Understanding, particularly Clause 6, will not bind him. From the circumstances surrounding the transaction between the plaintiff and the defendant, it could be reasonably inferred that clause 6 of the Memorandum of Understanding provide for unilateral right of termination of lease conferred upon the lessee alone, but not on the lessor, is legally unenforceable besides being contrary to the intention in entering into the lease. In this context, the learned Senior counsel relied on the decisions of the Honourable Supreme Court in (i) (Hindu Public and another vs. Rajdhani Puja Samithee and others) reported in AIR 1999 Supreme Court 964 and (ii) (Smt Gangabai vs. Smt. Chhabubai) reported in AIR 1982 Supreme Court 20 to contend that the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying the terms.

9. The learned Senior counsel for the defendant also relied on the decision of the Honourable Supreme Court in the case of (Roop Kumar vs. Mohan Thedani) reported in (2003) 6 Supreme Court Cases 595 to urge that it is impermissible for a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. In http://www.judis.nic.in such event, oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

10. According to the learned Senior counsel for the defendant, Ex.A-3, Memorandum of Understanding being an unregistered document, is inadmissible in evidence in terms of Section 49

of The Registration Act and Section 35 of The Stamp Act. In such event, both the plaintiff and the defendant have to only rely upon the letters in Ex.A-1 and Ex.A-2 and the preliminary recitals found in Ex.A-3, Memorandum of Understanding in order to infer the intention in executing such document by the parties.

11. The learned Senior counsel for the defendant would further contend that admittedly, under Ex.A-3, Memorandum of Understanding, the period of lease is mentioned as ten years and it has to be compulsorily registered as required under Section 107 of The Transfer of Property Act and under Section 17 (1) (d) of The Registration Act. Ex.A-3 is not duly stamped and therefore it cannot be received in evidence under Section 35 of the Indian Stamp Act. In fact Ex.A-3, Memorandum of Understanding was received by the trial court itself in evidence only subject to objection. However, the trial Court has hastily come to a conclusion that Ex.A-3, Memorandum of Understanding will prevail over the oral evidence and as per Clause 6, the plaintiff is entitled to terminate the lease ignoring the fact that Ex.A-3 is an unregistered document and it will not confer any right to the plaintiff to determine the tenancy. By placing reliance on Section 107 of The Transfer of Property Act, it was contended that all other leases of movable property may be http://www.judis.nic.in made either by a registered instrument or by an oral agreement accompanied by delivery of possession. Therefore, the principle of tenancy at will can no longer be invoked as a defence to the plea of non-registration of the instrument. Even otherwise, Section 35 of The Indian Stamp Act operates as a bar for admitting Ex.A-3, Memorandum of Understanding in evidence. Even if Ex.A-3 is held to be admissible in evidence, despite it's non-registration, it can be looked into only for collateral purpose as per Section 49 (c) of The Registration Act only if the stamp duty and penalty is paid under Section 35 of The Registration Act.

12. The learned Senior counsel further advanced his argument by stating that the plaintiff has chosen to determine the lease and the same is covered under Section 111 (h) of the Transfer of Property Act. It is not the case of the plaintiff in his pleadings before the trial Court that the lease was determined either by express surrender under Section 111 (e) or by implied surrender under Section 111 (f) of The Transfer of Property Act. Further, Section 108 (q) of The Transfer of Property Act casts a statutory obligation upon the plaintiff by providing that on the determination of the lease, he is bound to put the defendant/lessor in to possession of the property. But in this case, the plaintiff did not vacate and put the defendant in possession of the lease hold premises, but merely offered to handover possession upon refund of the advance amount, thus, making it as a conditional offer. Such an option is not available to the plaintiff to determine the lease under law and the only course open to him is to vacate and handover possession first and then seek to enforce his right to get refund of the advance amount. The fact remains that the plaintiff is in possession of the lease hold premises even as on date and carrying on business. According to the learned Senior counsel for the http://www.judis.nic.in appellant/defendant, the statutory obligation is cast on the respondent/tenant under Section 108 (q) of The Transfer of Property Act to put the defendant/owner in possession of the suit property without any pre-condition. The plaintiff/tenant ought to have vacated the property and handed over the keys to the defendant. In the alternative, the plaintiff could have vacated the leased property and left it open so as to enable the appellant/defendant to take possession of the suit property. In the event of the defendant/owner refusing to acknowledge possession of the suit property, the plaintiff could have deposited the keys

into the Court by filing an application for appointment of Advocate Commissioner. In all the above situations, vacating the property is essential for putting the appellant/defendant in possession. Mere expression of intention, willingness or readiness to vacate/handover possession will not amount to complying with the requirements embodied under Section 108 (q) of The Transfer of Property Act. The plaintiff must have physically vacated the premises if his intention was to handover vacant possession to the defendant. In the absence of the above, the plaintiff cannot claim himself to be a tenant at sufferance or tenant holding over without handing over the possession of the leasehold premises, as offered by him. The contentions urged on behalf of the plaintiff before the trial Court or on the basis of implied surrender, creation of charge, tenancy by holding over, which are all abstract propositions not found on the pleadings on facts or in law. On the one hand, the plaintiff claims that he is ready to handover vacant possession upon refund of the advance amount and on the other hand, he is carrying on the business for the past 17 years. In fact, for non-payment of the lease amount during the pendency of the litigation, the defendant has filed Rent Control Original Petition on the ground of wilful default in payment of rent but it was dismissed against which Civil Revision Petition is http://www.judis.nic.in pending before this Court. The learned Senior counsel for the defendant therefore prayed for setting aside the Judgment and Decree passed by the trial Court and to allow this appeal.

13. Per contra, the learned counsel appearing for the plaintiff would contend that the defendant, through his letter dated 23.06.1997, Ex.A-1 offered his property for lease. As per the offer, the defendant demanded a sum of Rs.20 lakhs as lease advance, which will be refunded on termination of lease apart from Rs.10,000/- per month as lease rent. The period of lease was ten years with a right to the plaintiff/lessee to terminate the lease by giving three months. Accordingly, the plaintiff paid a sum of Rs.20 lakhs as lease advance and it was also acknowledged by the defendant through his letter dated 29.08.1997, Ex.A-2. As far as the terms and conditions of the lease, it was reduced in the form of a Memorandum of Understanding dated 29.08.1997, Ex.A-3 and after execution of Ex.A-3, the plaintiff took possession of the lease premises. When the plaintiff was carrying on the business in the leasehold premises, he decided to vacate the premises and to handover possession to the defendant/lessor. Accordingly, the plaintiff sent a letter dated 12.02.2000, Ex.A-4 expressing his intention to quit and deliver vacant possession of the leasehold premises to the defendant on or before 10th May 2000 and requested the defendant to refund the advance amount of Rs.20 lakhs. In other words, by the letter under Ex.A-4, the plaintiff has given three months notice, as required under clause 6 of the Memorandum of Understanding, Ex.A-3. On receipt of the letter dated 12.02.2000, the defendant sent a reply dated 30.03.2000, Ex.A-6 stating that as per clause 4 of the Memorandum of Understanding the period of lease was for ten years from 01.09.1997 and that the http://www.judis.nic.in lease has to be terminated only upon completion of ten years period. It was also stated by the defendant that the plaintiff has no right to terminate the tenancy before completion of ten years. The plaintiff sent a reply dated 27.04.2000, Ex.A-7 reiterating that the tenancy was one at Will and the termination of the lease is valid. According to the learned counsel for the respondent/plaintiff by reason of such an attitude on the part of the defendant in refusing to refund the advance lease amount on the ground that the plaintiff has no right to terminate the tenancy prematurely, after waiting for three months from the date of issuing Ex.P4, notice dated 12.02.2000, the suit was filed for recovery of the advance sale amount of Rs.20 lakhs, which the plaintiff paid at the time of commencement of the lease.

14. The learned counsel for the plaintiff would further contend that the defendant not only refused to refund the advance sale amount, but refused to take back the vacant possession of the premises, when it was offered by the plaintiff. However, in the written statement, the defendant contended that the Memorandum of Understanding, Ex.A-3 dated 29.08.1997 was not registered and it is not admissible in evidence. The defendant also raised a defence that the clauses stipulated in the unregistered Memorandum of Understanding will not bind him in any manner. The specific defence taken by the defendant is that the tenancy was oral and that the terms stipulated under the Memorandum of Understanding, Ex.A-3 will not bind him in any manner as it was not duly stamped and registered. The defendant also contended that the plaintiff has no right to terminate the lease as per letter dated 12.02.2000, Ex.A-4 and the plaintiff has to occupy the leasehold premises for the full period of ten years as agreed between him and the plaintiff. According to the counsel for the plaintiff, the defendant has disputed the right of the http://www.judis.nic.in plaintiff to terminate the tenancy, however, did not deny the fact that the plaintiff offered to surrender the vacant possession of the leasehold premises. Thus, it was the defendant who was reluctant to take back the possession of the leasehold premises when offered by the plaintiff. Even in the cross-examination, the defendant admitted that he is aware of the Memorandum of Understanding, Ex.A-3 dated 29.08.1997 and its content thereof. The defendant has also admitted that he is aware of the Memorandum of Understanding and signed the same knowing fully well its contents. Having regard to the above, the trial Court held that the termination of lease by the plaintiff is proper and it will bind the defendant. The trial Court also pointed out that clause 4 of the lease deed stipulate the period of lease as ten years and that the parties to the lease can determine the lease by giving three months notice in advance, however, the defendant wants to take advantage of one portion of clause 6 and denies the other portion as unenforceable.

15. The learned counsel for the respondent/plaintiff would further contend that the plaintiff cannot be compelled to carry on the business upto the entire period of ten years stipulated in the Memorandum of Understanding, Ex.A-2. The plaintiff has filed the suit only for recovery of money and if at all the defendant intended to enforce any right through the letter, Ex.A-1 dated 23.06.1997 or Clause 4 of Memorandum of Understanding, Ex.A-3, he ought to have filed a separate suit to enforce the oral agreement or lease for ten years, if any, thereby compelling the plaintiff to continue as tenant in the suit property for ten years. No such endeavour was made by the defendant, hence, certainly he cannot defend the suit filed by the plaintiff on the ground that the plaintiff has to continue the lease for the entire period of ten years and the premature termination is invalid. http://www.judis.nic.in

16. The learned counsel for the respondent/plaintiff would contend that Section 14(1)(c) of The Specific Relief Act provides that a contract, which is determinable in nature, cannot be specifically enforced. The contract between the plaintiff and the defendant in this case is determinable at Will and therefore, the Plaintiff had a right to determine the tenancy in terms of the Memorandum of Understanding, Ex.A-3 or in terms of Section 106 of The Transfer of Property Act. In such circumstances, the plaintiff cannot be compelled to continue the tenancy by depriving his right to determine the tenancy and compelling him to continue in occupation of the leasehold premises for the entire period of ten years is untenable. When the termination of the tenancy by the plaintiff is valid, the decree and judgment of the trial Court is in accordance with law and it does not require

any interference by this Court.

17. The learned counsel for the plaintiff would specifically contended that the plaintiff had established through Ex.A-4, letter dated 12.02.2000 that the termination is valid. The second limb of Clause 6 of The Memorandum of Understanding confers a right to the plaintiff to terminate the lease by giving three months notice and accordingly, the plaintiff issued the notice dated 12.02.2000, Ex.A4 three months in advance. Of course, any lease relating to immovable property for more than ten years require registration in terms of Section 107 of The Transfer of Property Act. In this case, Ex.A-3, Memorandum of Understanding was not registered and thereby bringing it within the fold of Section 106 of The Transfer of Property Act. As per Section 106 of The Transfer of Property Act, any lease of immovable property for more than one year entered through an unregistered http://www.judis.nic.in agreement would still be construed as a lease but not for the period mentioned thereof but by operation of law and it would be a lease from month to month, Even in the absence of Memorandum of Understanding, Ex.A-3, the law recognises the lease between the plaintiff and defendant as one from month to month and it can be terminated by giving 15 days notice as per Section 106 of The Transfer of Property Act. In this context, reference was made to the decision of the Honourable Supreme Court in the case of (Delhi Motor Company and another vs. A. Basrukar (dead) by his legal representatives and others) reported in AIR 1968 Supreme Court 794 wherein it was held in para No.4 and 5 as follows:-

> "4. ..... Even these submissions were made on the basis that the terms of the lease have to be ascertained from the three documents Exts. P1, P2 and P3, which were relied upon by the firm to claim the relief in the suit, it appears to us that, if these documents are properly interpreted an inference necessarily follows that the lease, if any, brought into existence by these documents was certainly for a period exceeding one year. Since reliance was placed on these documents on behalf of the firm to urge that there was a completed lease, learned counsel for the firm was aked to point out the provision which fixed the rent payable in respect of the leased property. The only provision, on which he relied to show that rent had, in fact, been agreed upon and fixed was para No.1 of exhibit P.3 which contains notes on agreement dated 22.02.1950....
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> 5. Learned counsel tried to urge that since in these documents no definite period for the lease was mentioned, we should hold that Section 106 of the Transfer of Property Act was applicable and the lease being in respect of immovable property, for purposes other than agricultural or manufacturing must be deemed to be a lease from month to month. We are unable to accept this submission, because, none of the documents, on which reliance has been placed on behalf of the firm to prove the lease, contains any clause indicating that the tenancy was to be from month to month or the rent was payable monthly. In fact, the indication from para 1 of Ext.P3 quoted above is that the rent was to be payable annually, so that the contract itself seems to give an indication that it was to be a lease from year to year and annual rent was payable. These circumstances, however, are immaterial because we have already indicated earlier our finding that this lease ws at least for a minimum period of 15 months and,

> consequently, Section 107 of the Transfer of Property Act becomes applicable irrespective of the http://www.judis.nic.in question whether it was a lease from month to month or from year to year. The High Court was therefore, quite correct in holding that on the basis of the lease the reliefs claimed by the firm could not be granted to it.

18. Thus, by placing reliance on the aforesaid decisions, it was contended by the learned counsel for the plaintiff that any instrument of lease of immovable property for more than one year has to be compulsorily registered and in the absence of registration, it shall still be construed as a lease as one for month to month.

19. The learned counsel for the plaintiff also placed reliance on Section 111 (h) of The Transfer of Property Act which provides that for determination of tenancy at the instance of the tenant, there need not be actual delivery of possession. Therefore, the plaintiff/tenant is not expected to effect actual delivery of possession as a condition precedent for determining the tenancy. The defendant having refused to take possession as early as in May 2000, cannot now contend that possession has not been handed over by the plaintiff. It is suffice for the plaintiff to express his intention to quit and deliver vacant possession as enshrined under Section 111 (h) of The Transfer of Property Act. Therefore, according to the counsel for the plaintiff, Section 108 (q) of The Transfer of Property Act cannot be read in isolation and it has to be read along with Section 111 (h) of The Transfer of Property Act. In this context, reliance was made to the decision of the Honourable Supreme Court in the case of (Calcutta Credit Corporation Limited and another versus Happy Homes (Private) Limited) reported in AIR 1968 SC 471 wherein it was held that when the intention to quit is clear and explicit, it is suffice for the purpose of law to determine the tenancy. In order to determine the tenancy at the instance of tenant, there need not be actual delivery possession before tenancy is http://www.judis.nic.in effectively determined.

20. The learned counsel for the plaintiff would further advance his argument by stating that the defendant having pleaded that the lease agreement is oral, is not legally entitled to claim that the duration of the lease is for ten years and that the plaintiff should remain occupied in the leasehold premises for the entire lease period of ten years. Such a plea of the defendant is unsustainable in law in the light of the express proviso contained under Section 107 of The Transfer of Property Act. As per Section 107 of The Transfer of Property Act, any lease of immovable property for more than one year can only be made by a registered instrument. The plea of the defendant that the lease of ten years came into being pursuant to an oral agreement cannot be sustained in the eye of law. Such a defense fails in the teeth of the provisions contained in Section 107 of The Transfer of Property Act. If at all the defendant wanted to enforce any alleged right, which he claims through the offer letter/Ex.A-1 dated 23.06.1997 or through Clause 4 of The Memorandum of Understanding (Ex.A-3), he ought to have filed a separate suit to enforce the said oral agreement of lease for ten years, if any, thereby compelling the plaintiff to continue as tenant in the suit property for ten years. The conduct of the defendant in refusing to take delivery of the leasehold premises on the one hand and demanding the plaintiff to continue in possession of the leasehold premises for the entire period of ten years on the basis of an oral agreement deserves only to be rejected. The trial Court taking note of the above aspects has rightly decreed the suit which calls for no interference by this Court.

The learned counsel for the plaintiff therefore prayed for dismissal of the appeal.

21. We have given our anxious consideration to the rival submissions http://www.judis.nic.in made by the counsel for both sides and perused the material records. On the basis of the arguments advanced by the counsel for both sides, the following points arise for determination in this appeal and they are

(i) Whether the plaintiff can be compelled to continue the lease for a period of ten years when it was pleaded by the defendant that the contract between him and the plaintiff is an oral contract?

(ii) Whether the termination of the lease by the plaintiff is valid in the eye of law?

(iii) Whether the non-registration of Memorandum of Understanding, Ex.A-3 dated 29.06.1997 will have a bearing on the plaintiff in claiming refund of the advance lease amount from the defendant?

22. Point No. (i): Before dealing with the merit or otherwise of the contentions urged on behalf of both sides, certain admitted facts are required to be elucidated. The defendant is the owner of the premises in question. The defendant offered to let out the premises owned by him on lease to the plaintiff by writing a letter dated 23.06.1997, Ex.A-1. As per the offer made, the plaintiff/tenant has to pay a sum of Rs.20 lakhs as lease advance and also pay Rs.10,000/- per month towards lease rent. It was also agreed that the lease will be for a period of ten years. The plaintiff, accepting the offer so made by the defendant, has paid a sum of Rs.20 lakhs to the defendant which he acknowledged under Ex.A-2 receipt dated 29.08.1997. On the same date, Ex.A-3, Memorandum of Understanding dated 29.08.1997 was entered into between the plaintiff and the defendant which contains certain clauses. Admittedly, the Memorandum of Understanding was not registered and it was an unregistered instrument. The Plaintiff, after carrying on business for a period of three years in the leasehold premises, sent a letter dated 12.02.2000, Ex.A-4 expressing his intention to terminate the lease on or before 10.05.2000 and demanded the defendant to refund the advance amount of Rs.20 http://www.judis.nic.in lakhs received from him. The Plaintiff also came forward to surrender the vacant possession of the leasehold premises and requested the defendant to take possession of the same. The defendant refused to take possession of the lease hold premises and insisted the plaintiff to continue the lease until the completion of ten years. It is in these circumstances, the plaintiff has filed the suit for a direction to direct the defendant to repay the sum of Rs.20 lakhs, which he had paid towards lease advance.

23. It is the contention of the appellant/defendant that the real intention between the parties to the lease is to continue the tenancy for a period of atleast ten years. which could be seen from the Memorandum of Understanding, Ex.A-3. Considering the nature and purpose of the business to be carried on by the plaintiff, the defendant intended and expressly stated that the plaintiff can carry on the lease for a period of ten years as per clause 4 of Memorandum of Understanding. However, the plaintiff prematurely determined the tenancy for which he has no right. It is also the specific contention of the defendant that such premature termination by the plaintiff would not only defeat and frustrate the intention with which the lease came to be executed besides it is contrary to Clause 6 of the Memorandum of Understanding, Ex.A-3. In the light of the above stand taken by the

defendant, it is once again necessary to look into Clauses 4 and 6 of the unregistered Memorandum of Understanding, Ex.A-3 dated 29.08.1997 entered into between the plaintiff and the defendant, which reads as follows:-

> "4. The lease is for a period of 10 years, commencing from 1st September 1997. However, it can be extended for further period on the mutually agreed terms and conditions."
>
> "6. The Second party shall have the right to assign and/or http://www.judis.nic.in sublease the property. However, the lease will be terminated at the end of ten years subject to clause 4, under which the lease can be extended on mutually agreed terms. However, the Second Party shall have the right to terminate the lease at any time by giving 3 months notice in writing."

24. According to the learned Senior counsel for the defendant, Clause 6 of the Memorandum of Understanding clearly indicates that the plaintiff/tenant can assign or sublease the demised premises to any third party during the subsistence of the lease, meaning thereby, he can continue the lease by himself or put an assignor or any other person by sub lease until the completion of the entire lease period of ten years, as contained in clause 4 of The Memorandum of Understanding. According to the learned Senior counsel for the defendant, Clause 6 has to therefore be read in its entirety to understand the intention of the parties to continue the lease for the full ten years and the latter part of Clause 6 which empowers the plaintiff to determine the tenancy by giving three months notice, would mean that the plaintiff can express his intention to determine the tenancy three months prior to the completion of ten years, if he has no intention to get the lease extended for a further period beyond ten years, as has been contemplated under clause 4 of the Memorandum of understanding. Thus, the contract between the plaintiff and the defendant is determinable three months prior to the full period of ten years and not before, which cannot be enforced by the plaintiff by filing the present suit as it is barred by Section 14 (1) (c) of The Specific Relief Act, as per which, a contract which in its nature determinable, cannot be specifically enforced.

25. We are not inclined to accept such a submission of the learned Senior counsel for the defendant/appellant. It is an universally accepted principle that a lease in respect of immovable property must be for a specified period and if the http://www.judis.nic.in period of lease exceeds one year, such lease deed must be registered. In the absence of registration, the period specified in the lease deed cannot be taken into account or relied on and such lease will tantamount to an oral lease. In any event, even in the absence of registration of an agreement of lease entered into between the parties, it can be reasonably presumed that the lease is on a month to month basis, as has been contemplated under Section 106 of The Transfer of Property Act. At the same time, a lease pertaining to immovable property can be determined or rescinded by any one of the parties to the lease by intimating the other party about his intention to discontinue the lease well before the period stipulated in the lease or at any time during the subsistence of the lease. Such a right to determine the lease need not be expressly stated in the lease agreement as it is an implied right of one of the parties to the lease to determine or rescind the lease without assigning any reason. For determining the lease, a party to the lease must express his intention to discontinue within a reasonable period so

as to enable the other party to make alternative arrangement or to enter into a lease agreement with any other person who is interested to take the leasehold premises inter alia to put the leasehold premises for the optimum use. Thus, one of the parties to the lease cannot be compelled to continue the tenancy upto the fullest term indicated in the lease deed. At the best, the period, if any, indicated in a contract can be discretionary and not mandatory. The intention to discontinue the tenancy may be for varied reasons, including unfavourable business condition or unforeseen circumstances or otherwise and a lessee who could not continue the lease for any reason cannot be made to stay or occupy the leasehold premises much to his detriment, till the entire period of lease gets expired. If the argument of the learned Senior counsel for the defendant is accepted, a lessee or lessor cannot determine http://www.judis.nic.in the contract during the subsistence of the lease even if there are unforeseen circumstances or unfavourable business condition which are due to circumstances beyond one's control and that is the reason why a lease can be terminated by putting the other party to the lease on notice well in advance so that the other party cannot be struck by surprise about the intention of the other party to determine the lease. In this context, useful reference can be made to the decision of the Honourable Supreme Court in (Anthony vs. K.C. Ittoop and sons and others) reported in 2000 (6) Supreme Court Cases 394 wherein it was held as follows:-

> "8. The lease deed relied on by the plaintiff was intended to be operative for a period of five years. It is an unregistered instrument. Hence such an instrument cannot create a lease on account of three-pronged statutory inhibitions. The first interdict is contained in the first paragraph of Section 107 of The Transfer of Property Act, 1982....
>
> 11. The resultant position is insurmountable that so far as the instrument of lease is concerned, there is no scope for holding that the appellant is a lessee by virtue of the said instrument. The Court is disabled from using the instrument as evidence and hence it goes out of consideration in this case...."

26. For the same proposition, reliance could be made to the decision relied on by the learned counsel for the plaintiff in the case of (Park Street Properties Private Limited vs. Dipak Kumar Singh and another) reported in (2016) 9 Supreme Court Cases 268 wherein it was held as follows:-

> "19. It is also a well-settled position of law that in the absence of a registered instrument, the Courts are not precluded from determining the factum of tenancy from the other evidence on record as well as the conduct of the parties. "

27. It is evident from the above decisions that it is well settled proposition of law that even in the absence of an agreement between the lessor or lessee, law http://www.judis.nic.in recognises that such a lease between the parties is from month to month and such lease can be determined by giving 15 days notice in advance as per Section 106 of The Transfer of Property Act. In such view of the matter, we are of the view that the contract is determinable at the instance of the plaintiff/tenant, however, the plaintiff was made to enforce the contract due to the attitude of the defendant in refusing to take delivery of the vacant possession of the leasehold premises when offered by the plaintiff. In such a situation, the argument advanced on behalf of the defendant that the plaintiff

merely expressed his intention to quit but did not actually deliver possession cannot be countenanced. Accordingly, by taking recourse to unregistered Memorandum of Understanding, the plaintiff cannot be compelled to remain in possession of the leasehold premises for a term beyond the plaintiff's necessity. Accordingly, we answer question No.1 in favour of the plaintiff and against the defendant.

28. Point Nos. (ii) and (iii):- During the subsistence of the lease, after remaining in possession of the leasehold premises for about three years, the plaintiff sent a letter dated 12.02.2000, Ex.A-4 expressing his intention to quit and deliver vacant possession of the lease hold premises on or before 10.05.2000 by giving three months notice. On receipt of the notice dated 12.02.2000, Ex.A-4, the defendant sent a letter dated 30.03.2000, Ex.A-6 refusing to take delivery of vacant possession of the lease hold premises, thereby indirectly, made the plaintiff to remain in occupation of the leasehold premises. In this context, it is useful to refer to Section 106, 107, 108 and 111 of The Transfer of Property Act, which reads as follows:-

> "106. Duration of Certain leases in absence of written http://www.judis.nic.in contract or local usage:- (1) In the absence of a contract or local law or usage to the contrary, 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 less or lessee, by fifteen days notice.
>
> (2) Notwithstanding anything contained in any 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.
>
> 107. Leases how made:- A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Where a lease of immovable property is made by a registered instrument, such instrument, or, where there are more instruments than one, each such instrument shall be executed by both the

lessor and the lessee.

Provided that the State Government may from time to time, by notification in the official gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

108. Rights and liabilities of lessor and lessee:- In the absence of a contract or localusage to the contrary, the lessor and the leasee of immovable property as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next followed, or each of them as are applicable to the property leased.

.. .. ..

.. .. ..

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

111. Determination of lease:- A lease of immovable property determines:-

http://www.judis.nic.in (a) by efflux of the time limited thereby;

(b) where such time is limited conditionally on the happening of some event - by the happening of such event

(c) where the interest of the lessor in the propert

terminates on, or his power to dispose of the same extends only to, the happening of any event - by the happening of such event

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right

(e) by express surrender; that is to say, in case the lessee yields up the interest under the lease to the lessor, by mutual agreement between them.

(f) by implied surrender
(g) by forfeiture that is to say, (1) in case the l

breaks an express condition which provides that on breach thereof, the lessor may re-enter or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself or (3) the lessor is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of

such event and in any of these cases, the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other."

29. In the present case, admittedly, the lease entered into between the plaintiff and defendant under Ex.A-3, Memorandum of Understanding dated 29.06.1997 was not registered. Even according to the defendant, the terms and conditions incorporated under Ex.A-3 cannot be relied on by the plaintiff inasmuch as it was not registered and therefore the contract must be construed to be one of an oral contract. In this context, reference can be made to Section 49 of The Registration Act which deals with effect of non-registration of documents required to be registered which reads as follows:-

"49. Effect of non-registration of documents required to be registered - No document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall--

(a) affect any immovable property comprised therein or http://www.judis.nic.in (b) confer any power to adopt; or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered documents.

30. It is evident that Section 49 of The Registration Act bars the reception of any document, which was not registered, in evidence. In this case, the appellant/defendant relies on Ex.A-3, Memorandum of Understanding and contend that it was not registered and therefore, it cannot be admitted in evidence. In fact, Ex.A-3, Memorandum of Understanding was marked before the trial court subject to objection by the appellant/defendant. However, the defendant relies on clause 4 and 6 of the Memorandum of Understanding, Ex.A-3 to contend that the plaintiff has no right to determine the tenancy and he should continue the lease for the entire period specified therein. Thus, the defendant cannot approbate and reprobate as regards the Memorandum of Understanding, Ex.A-3. Admittedly, when Ex.A-3 was not registered and the period stipulated in clause 4 thereof indicates that the lease will be for a period of ten years, it is inadmissible in evidence. Therefore, the contract between the plaintiff and the defendant will partake the character of an oral contract. This is more so that the defendant admits the receipt of lease advance of Rs.20 lakhs and also did not dispute that the plaintiff paid the lease rent of Rs.10,000/- every month during the subsistence of lease atleast till the plaintiff issued Ex.A-4 notice dated 12.02.2000 determining the lease and calling upon the defendant to refund the advance amount of Rs.20 lakhs. Therefore, http://www.judis.nic.in as discussed above, a party to a lease of an immovable property has an implied right to determine the tenancy by giving advance intimation within a reasonable period. In

fact, Section 106 of The Transfer of Property deals with the consequences that may flow when the lease of immovable property is not registered. As per Section 106 (3) and (4), in case the contract is oral, a party to such a contract must issue a notice in writing or serve such notice in person expressing his intention to determine the contract. In this case, the plaintiff has issued the notice dated 12.02.2000, Ex.A4 expressing his intention to determine the tenancy on or before 10.05.2000, giving three months prior notice of his intention to quit. The receipt of the notice dated 12.02.2000, Ex.A-4 was also acknowledged by the defendant and he also sent a reply dated 30.03.2000, Ex.A-5, of course, refusing to determine the lease before the expiry of it's term of ten years. Thus, the notice dated 12.02.2000, Ex.A4 sent by the plaintiff is in consonance with Section 106 (3) and (4) of The Transfer of Property Act and therefore, we hold that the termination of lease by the plaintiff through notice dated 12.02.2000, Ex.A-4 is valid and it will bind the defendant in all respects. Even if Ex.A-3, Memorandum of Understanding is kept aside from consideration, the intention behind the parties could be inferred from the other documentary evidence. In effect, the non- registration of Memorandum of Understanding will not preclude the plaintiff from seeking the relief of refund of advance amount especially when the receipt of such amount was admitted by the defendant. The defendant refused to determine the lease by offering a strange explanation that the amount so received from the plaintiff towards lease advance has been put on investments and the investments cannot be withdrawn or terminated prematurely. Merely because the defendant has invested the lease advance amount in financial institution or otherwise, it cannot be a ground to refuse to take back possession of the leasehold premises http://www.judis.nic.in when it was offered by the plaintiff. Thus, we hold that the non-registration of Ex.A- 3, Memorandum of Understanding will not have a bearing on the plaintiff in claiming refund of the advance lease amount from the defendant, when the termination of the lease is held to be valid. Accordingly, we answer Point No. (ii) and (iii) also in favour of the plaintiff and against the defendant.

31. Yet another submission made by the learned Senior Counsel for the appellant/defendant is that as per Section 108 (q) of The Transfer of Property Act, before determining the lease, the lessee/tenant is bound by law to handover vacant possession of the demised premises. Such a submission made by the learned Senior Counsel for the appellant cannot be accepted. Section 111 (h) of The Transfer of Property Act says "on the expiration of a notice to determine the lease or to quit or of intention to quit, the property leased duly given by one party to the other". Section 108 (q) of The Transfer of Property Act relied on by the learned Senior Counsel for the appellant/defendant cannot be read in isolation and it has to be read along with Section 111 (h) of The Transfer of Property Act which require the tenant to express his intention to quit. Thus, in our opinion it is sufficient for the tenant to express his intention to quit before determining the lease and the tenant is not required to deliver actual physical possession of the property. The argument of the learned Senior counsel for the appellant is therefore rejected.

32. Before parting with, it has to be necessarily observed that even though the plaintiff had issued notice dated 12.02.2000, Ex.A-4 expressing his intention to quit and deliver vacant possession of the leasehold premises on or before 10.05.2000, the defendant refused to take delivery of the possession and it led to the plaintiff filing the instant suit to direct the defendant to refund the advance http://www.judis.nic.in amount of Rs.20 lakhs, which he paid to the defendant. After filing the suit, the plaintiff continued to remain in possession of the suit property. Even though the suit

was decreed, the plaintiff is admittedly in possession of the leasehold premises even during the pendency of this appeal at the instance of the defendant. In fact, across the bar, it was brought to the notice of this Court that the defendant has taken recourse to the provisions contained under The Tamil Nadu Buildings (Lease and Rent Control) Act and had filed a Rent Control Original Petition for non- payment of the lease amount during the pendency of the present appeal, and on its dismissal, he has filed a Civil Revision Petition before this Court and it is stated to be pending. Having regard to the above facts, even though we confirm the decree and judgment of the trial Court, taking note of the events that had taken place during the subsistence of the present appeal, we observe that the defendant is entitled to adjust the lease rent payable by the plaintiff for his use and occupation of the demised premises, from the date on which it has become due till the date of surrendering vacant possession of the leasehold premises.

33. In the result, we confirm the Judgment and Decree dated 26.04.2002 passed in O.S. No. 1174 of 2000 on the file of Principal Subordinate Judge, Coimbatore. The Appeal Suit fails and it is dismissed. No costs.

(R.P.S.J.,)

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Index : Yes

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The Principal Subordinate Judge, Coimbatore.

R. SUBBIAH, J
and
C. SARAVANAN, J

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