**(2013) 03 KL CK 0146**

**High Court Of Kerala**

**Case No:** Regular Second Appeal No. 1174 of 2012

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| Escotel Mobile Communications Limited | | APPELLANT |
| | Vs | |
| Pulukkool Ramani | | RESPONDENT |

**Date of Decision:** March 26, 2013

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 106, 16

**Citation:** (2013) 4 RCR(Civil) 604 : (2013) 1 RCR(Rent) 648

**Hon'ble Judges:** Thomas P. Joseph, J

**Bench:** Single Bench

**Advocate:** P.N. Ramakrishnan Nair and Sri P. Viswanathan, for the Appellant; V. Ramkumar Nambiar, for the Respondent

**Final Decision:** Disposed Off

**Judgement**

Thomas P. Joseph, J.
Admit. Following substantial question of law is framed for a decision.

Whether courts below are justified in not holding that the lease was terminated properly under Sec. 106 of Transfer of Property Act (for short "the Act")?

2. In view of the decision I propose to take in the second appeal, since the parties had not adduced oral evidence and since copy of relevant documents are given to me for perusal, it is not necessary to call for records of the case.

3. It is not disputed that appellant/defendant and respondent/plaintiff executed a lease agreement on 01.08.2000 as per which the suit property belonging to the respondent was entrusted with petitioner for a period often years. The period of lease expired by 30.06.2010. It is admitted that rent fixed was Rs. 5,000/- per month. Respondent received Rs. 75,000/- by way of interest-free security deposit to be returned to the petitioner on successful termination of the lease arrangement.

Clause 4(i) of the agreement provided that it is open to the petitioner to terminate the lease on giving three calendar months notice in advance to the respondent.

4. It is the case of respondent/plaintiff that on 23.08.2002 appellant sent a notice stating that it wishes to terminate the lease agreement and requesting to return the security amount after adjusting Rs. 7,500/- being rent payable for August, 2002 and half the rent payable for September, 2002. According to the appellant, it terminated the lease w.e.f. 15.08.2002. Respondent alleged that termination is not in accordance with Clause 4(i) of the agreement, it is invalid, undated and that petitioner is continued to be in possession of premises. Respondent prayed for a decree for mandatory injunction to direct petitioner remove all structures from the suit property and restore it to the position as on the date of lease agreement.

5. Petitioner while resisting the suit contended that it has successfully invoked Clause 4(i) of the lease agreement and that since 15.08.2002 it has no interest in the property. Appellant claimed that as per agreement between the parties respondent is entitled to adjust Rs. 30,000/-, for removal of articles remaining in the suit property and less the said sum of Rs. 30,000/- appellant is entitled to get back Rs. 45,000/- with interest. Accordingly, a counter claim was raised which was suitably answered by the respondent. Trial court found that since there is no valid termination of lease agreement at the instance of the appellant, lease continued and hence respondent is not entitled to the mandatory injunction prayed for. The suit was consequently dismissed. The counter claim also ended in a dismissal.

6. Respondent did not challenge dismissal of the suit while appellant challenged dismissal of counter claim in A.S. No. 190 of 2006 of the Additional District Court, Thalasery. That appeal was dismissed. Hence the second appeal with the substantial question I have framed above for a decision.

7. Learned counsel for the appellant contends that the view taken by the courts below regarding termination of lease at the instance of appellant is wrong. It is contended that even if it is assumed that the period mentioned in the notice dated 23.08.2002 falls short of the period required by Clause 4(i) of the lease agreement, on completion of the period of three months from 23.08.2002, there is a proper termination of the lease. Thereafter, appellant has nothing to do with the suit property as is evident from the conduct of respondent in not asking for recovery of possession or eviction of appellant from the suit property. Learned counsel has placed reliance on the decision in Nopany Investments (P) Ltd. Vs. Santokh Singh (HUF), : 2008(1) R.C.R. (Rent) 6 : 2007(6) Recent Apex Judgments (R.A.J.) 567 : (2008(2) SCC 728) and Shri R. Adhakrishan Temple Trust Maithan, Agra Vs. M/s. Hindco Rotatron Pvt. Ltd. and Others, . Learned counsel argued that assuming that three months notice is required for valid termination of tenancy by virtue of Clause 4(i) of the lease agreement and therefore appellant is liable to pay rent for the said period of three months also, less the sum of Rs. 15,000/- ( Rs. 5000 x 3) payable as rent for the said three months appellant is entitled to get Rs. 30,000/- after adjusting Rs.

30,000/- required for removal of the articles. Learned counsel has requested for a decree for that amount.

8. Alternatively on instruction learned counsel for appellant submitted that in case appellant is fled from responsibility to pay rent from the date of valid termination of tenancy, appellant is prepared to forego its claim for refund of any amount as per the counter claim provided, appellant is not saddled with responsibility to remove the articles found in the suit property.

9. Learned counsel for respondent has contended that in so far as notice issued by the appellant terminating tenancy is not valid, it must be taken that the tenancy continues. According to the learned counsel, there was no agreement between parties as per which respondent undertook responsibility to remove the articles. It is argued that in the circumstances, notwithstanding that trial court dismissed the suit, appellant cannot claim any amount from the respondent.

10. Ext.A1 is the undated notice (admittedly sent to the respondent on 23.08.2002) wherein appellant, in unambiguous terms informed the respondent that in exercise of the power conferred on it under Clause 4(i) of the lease agreement, appellant wishes to terminate the lease agreement w.e.f. 15.08.2002. It is not very much in dispute that the undated notice (Ext.A1) reached the respondent on 24.08.2002. Though not produced or exhibited in evidence, learned counsel for the respondent has given me a copy of the lease agreement dated 01.08.2000. Clause 4(i) states that tenancy shall be determinable at the option of lessee (appellant herein) by giving the lessor (respondent) three months calender notice in writing.

11. It follows that Ext.A1, notice falls short of the period required for valid termination of the lease. Then the question is whether for the said reason alone, it could be said that appellant continues to be a tenant of the premises? In Nopany Investments (P) Ltd. v. Santokh Singh (supra), in paragraph 22, it is held that "in any view of the matter it is well settled that filing of eviction of suit under the general law itself is a notice to quit". In Shri Radhakrishan Temple Trust Maithan v. Hindco Rotatron (P) Ltd. (supra) the Delhi High Court has taken the view that even a summon in a suit for eviction could be treated as amounting to termination of the lease arrangement. In the present case, by Ext.A1 notice though it falls short of the period referred to in Clause 4(i) of the lease agreement, appellant has, in unambiguous terms expressed its intention to terminate the lease. Therefore, assuming that the period of notice mentioned in Ext.A1 is not in accordance with Clause 4(i) of the agreement, on the expiry of three months from 24.08.2002 on which day Ext.A1 was served on the respondent, I am inclined to think that there is a valid termination of the lease arrangement at the instance of appellant. Hence from 24.11.2002 onwards, appellant has ceased to be a tenant of the premises.

12. The principle of holding over under Sec. 16 of the Act could not be imported to the facts of this case since appellant/lessee expressed its intention to discontinue

the lease arrangement which I said should, be treated as effective from 24.11.2002.

13. I must also referred to the conduct of respondent notwithstanding Ext.A1, notice. It is relevant to note that while respondent wanted the appellant to remove the materials from the suit property, she has not asked for eviction of the appellant. The report of the Advocate Commissioner would show that appellant was nowhere in the premises at the time the Advocate Commissioner inspected the property. Instead, son of the respondent was present with Advocate Commissioner in the suit property. These circumstances also would show that after 24.11.2002 appellant had no possession or occupation of the suit property. For these reasons, I am to interfere with the finding of the courts below that there was no valid termination of the lease at the instance of appellant and that the lease arrangement continued even thereafter.

14. What remains is the claim of appellant for recovery of amount as per the counter claim. I submitted that on instruction learned counsel for the appellant in fairness submitted that appellant is not pursuing its claim for refund of any amount as prayed for in the counter claim provided appellant is fled from responsibility to pay rent arrears as if tenancy is not terminated.

15. While appreciating that concession, I must notice that appellant has a contention that there was an agreement between parties as per which respondent was to remove the articles from the suit property for which a sum of Rs. 30,000/- was to be adjusted.

16. Having regard to the facts and circumstances, I am inclined to think that this controversy could be put an end finding that since 24.08.2002 appellant has no right, interest or possession of the suit property and holding that (though alternatively) as conceded by the appellant, it is not entitled to claim any amount as prayed for in the counter claim but leaving it open to the respondent to remove the articles found in the suit property at her expense. The substantial question of law framed is answered as above.

Resultantly, this second appeal is disposed of as under:-

1) It is found that since 24.11.2002 appellant has no right, interest or possession of the suit property, there being a valid termination of the lease on that day.

2) Submission made by the learned counsel for the appellant on instruction that appellant is not pursuing its prayer in the counter claim is recorded. As such dismissal of counter claim for the above reason does not call for interference.

3) It is open to the respondent to remove the articles found in the suit property at her expense.

4) Parties shall suffer their cost throughout.