

JOSEPH SEVERANCE AND ORS.

v.

BENNY MATHEW AND ORS.

SEPTEMBER 23, 2005

[ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

Code of Civil Procedure, 1908:

Section 100(4)—Second appeal—Substantial question of law—Formulation of—High Court reversed the findings of Courts below without formulating any substantial question of law—Correctness of—Held: This is contrary to the mandate of S. 100(4)—Ordinarily, the matter would have been remitted to the High Court for formulating the substantial question of law and deciding the matter afresh—However, considering the long passage of time the matter decided by Supreme Court.

Order 39—Suit for mandatory injunction and prohibitory injunction—Delay in filing the suit—Maintainability of—Plaintiff and defendant entered into an agreement of licence with respect to suit property—Permission granted to licensee to construct a cinema theatre for a period of five years—Licence renewed from time to time—On 11.2.1991 licence renewed for five years with the condition that on expiry of five years, licensee to surrender vacant possession of suit property on demolishing the building—However, before expiry of five years licensee died on 24.5.1994—Notice sent to defendants to vacate suit property—Suit filed on 12.2.1996—Trial court as well as First Appellate Court found that on the death of the licensee the licence came to an end and thereafter possession of the defendants was as trespassers—Mandatory injunction granted—However, before High Court, in second appeal, for the first time, the defendant took the plea that the plaintiff could only seek recovery of possession and not injunction—High Court allowed the plea and held the suit as framed was not maintainable—It was also held that there was considerable delay in filing the suit—Correctness of—Held: The defendant did not raise any specific plea before the trial court and first appellate court that the suit should be one for recovery of possession and that the suit for injunction was not maintainable—The plea raised was not a substantial question of law—Further, the High Court did not hold that the

A *explanation offered by the plaintiff regarding the delay in filing the suit was not acceptable—It only took note of period after which suit was filed—Defendant also did not raise any plea before the courts below that time taken was unreasonable—For the first time, in second appeal, the dispute founded on factual foundation could not be raised—Hence, High Court's judgment set aside.*

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Words & Phrases:

"Reasonable time"—Meaning of.

C The appellant entered into an agreement of licence with the respondent with respect to the plaint schedule property under which permission was granted to the respondent to construct a cinema theatre for a period of five years. The licence was renewed from time to time and on 11.2.1991 the licence was renewed for five years with the condition that the licensee had to surrender vacant possession of the plaint schedule property on demolishing the building and the structures thereon. However, before the expiry of five years the licensee died on 24.5.1994. The notice sent to the respondent yielded no results. Therefore, a suit for mandatory injunction as well as prohibitory injunction was filed.

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E The trial court as well as the First Appellate Court found that on the death of the licensee the licence came to an end and thereafter the possession of the defendants was as trespassers. Therefore, mandatory injunction as prayed for by the appellants was granted.

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F Before the High Court, in second appeal, the respondent, for the first time, took the plea that since the respondents were trespassers the suit property could be recovered only by filing a suit for recovery of possession. The High Court, without formulating the substantial question of law as laid down in Section 100(4) of the Code of Civil Procedure, 1908, accepted the plea and held that the suit as framed was not maintainable. The High Court also held that there was considerable delay in filing the suit. Hence the appeal.

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G Allowing the appeal, the Court

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H HELD: 1. 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 Section 100(4) of the Code of Civil Procedure, 1908. Ordinarily in such circumstances the matter would have been remitted to the High Court to formulate the substantial question of law,

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if any, and decide the matter. But considering the long passage of time the dispute is being resolved in this appeal. [434-F, G-H] A

2. There is 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 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 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 maybe 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 the 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. [434-H; 435-A-F] B C D E F

3. 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.

[435-F-F] G

4. The explanation offered by the plaintiffs is plausible. The defendants did not specifically raise any plea that the time taken was reasonable. 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 Second Appeal, the dispute essentially H

A founded on factual foundation could not have been raised. [439-C-D]

Veerayee Ammal v. Seeni Ammal, [2002] 1 SCC 134, *Firm Srinivas Ram Kumar v. Mahabir Prasad*, AIR (1951) SC 177 and *Sant Lal Jain v. Avtar Singh*, [1985] 2 SCC 332, relied on.

B *Sisir Kumar v. Susil Kumar*, AIR (1961) Cal. 229 and *Jagadish Chandra v. Basant Kumar*, AIR (1963) Pat. 308, referred to.

Mohan Manucha v. Manzoor Ahmad, 70 IA 1 AIR 30 1943 PC 29, cited.

P. Ramanatha Aiyar: "Advanced Law Lexicon" 3rd Edn., 2005, referred to.

C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3818 of 2000.

From the Judgment and Order dated 12.1.2000 of the Kerala High Court in S.A. No. 62 of 1999-G.

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T.L.V. Iyer, S. Balakrishnan, S.N. Jha, Gopalakrishnan R. and Subramonium Prasad for the Appellants.

Mathai M. Paikeday, Anupam Mishra, Jenis and P.I. Jose for the Respondents.

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The Judgment of the Court was delivered by

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.

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The suit was filed in the following factual background:

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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 Severance, 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

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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

A 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.

B 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.

E 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.

G 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.

H 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. A
 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 B
 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 C
 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 D
 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 E
 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. F
 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 G
 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 H

A 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:

B "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.

C 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.

D 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.

E 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.

F 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.

G Reasonable time always depends on the circumstances of the case. (Kinney)

H 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). A

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". B

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

In *Firm Srinivas 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 C
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A 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*
B 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
C 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
D 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:

E “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
F 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
G denied relief merely because he had couched the plaint in the form of
a suit for mandatory injunction.

H 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 Srinivas* 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.

V.S.S.

Appeal allowed.