

(1964) 03 AP CK 0012

In the Andhra Pradesh High Court

Case No : Second Appeal No. 1 of 1961

Gandavalla Munuswamy

APPELLANT

Vs

Marugu Muniramiah

RESPONDENT

Date of Decision : 16-03-1964

Acts Referred:

Transfer of Property Act, 1882 — Section 108, 111

Citation : AIR 1965 AP 167

Hon'ble Judges : Gopalakrishnan Nair, J

Bench : Single Bench

Advocate : B.V. Subrahmanyam, for the Appellant; K. Ramachandra Rao, for the Respondent

Judgement

(1) This is a plaintiff's Second Appeal directed against the judgment and decree of the learned District Judge, Chittoor who affirmed the decision of the District Munsif, Tirupati. The facts that lead up to this Second Appeal lie in a brief compass. The suit property belonged to Hathiramjee Mutt. That Mutt leased it to the plaintiff. While the plaintiff was thus in possession of the property, he granted a sub lease of the suit site and a house thereon to the defendant under Ex. A. 1 dated 2-10-1957. This sub lease was to expire on 30-9-1958. On 22-5-1958, the house was destroyed by fire. Soon after, the defendant sub-lessee appears to have obtained a permission from the head lessor, namely, the Mutt for constructing a thatched hut on the suit site. On 12-8-1958, the plaintiff purported to take a permanent lease from the Mutt under Ex. B.6. On 29-3-1959, the plaintiff laid the present suit for recovery of possession of the suit site from the defendant and for arrears of rent. This suit was resisted by the defendant on the ground that on the destruction of the house which was leased to him by the plaintiff, the lease between him and the plaintiff became void and that his occupation of the property thereafter was not under the plaintiff but by virtue of the permission granted to him by the head lessor to construct a thatched hut on it. It was further pleaded that on account of the destruction of the house by fire, the lease between the plaintiff and the Mutt also be deemed to

have terminated. Relying in the main on these grounds, the defendant contended that the plaintiff is not entitled to a decree for possession. The learned District Munsif who tried the suit in the first instance expressed the view that by the destruction of the house by fire, the lease between the plaintiff and the Mutt was in no way affected. But he held that by obtaining permission from the Mutt to build a hut on the suit land, the defendant must be held to have treated the lease evidenced by Ex. A.1 as void. Regarding Ex. B.6, which purported to be a permanent lease granted to the plaintiff by the Mutt, he came to the conclusion that it clearly offended the provisions of Section 29 of the Madras Hindu Religious and Charitable Endowments Act, 1939, and was therefore null and void and could not, in consequence, found the claim for possession put forward by the plaintiff. For these reasons, the trial Court declined to grant the relief of possession asked for by the plaintiff. On appeal the learned District Judge affirmed the decision of the trial Court. Hence, this Second Appeal.

(2) The first contention urged by Mr. B. V. Subrahmanyam on behalf of the plaintiff-appellant is that the defendant is bound to surrender to the plaintiff actual possession of the property leased to him under Ex. A 1 and that until he does so, he will continue to fill the character of plaintiff's lessee and the plaintiff will be entitled to recover possession of the property from him. It is also pointed out that by merely obtaining permission from the head lessor to build a thatched hut on the suit property, the defendant cannot be said in law to have put an end to the lease under Ex. A. 1. The other contention advanced is that by purporting to take a permanent lease under Ex. B. 6 from the Mutt, the plaintiff did not become disentitled to recover possession from the defendant who was bound to yield up possession of the property to the plaintiff in view of the relationship of landlord and tenant which subsisted between them under Ex. A.1. It is pressed upon me that as the defendant as lessee was inducted into actual possession by the plaintiff, he was bound, when determination the lease, to restore the possession which he obtained from the plaintiff and that if he did not do so, he would be estopped from disputing the right of the plaintiff to recover possession.

(3) To these arguments presented on behalf of the appellant, Mr. Ramachandra Rao, the learned counsel for the respondent, answers that the plaintiff's right as under-lessor terminated the moment he took a permanent lease under Ex. B. 6 from the head lessor. The taking of this permanent lease involved an implied surrender of the prior lease which the plaintiff had held from the head lessor-Mutt. And this permanent lease is null and void being flagrantly violative of the express and mandatory provisions of Section 29 of the Madras Hindu Religious and Charitable Endowments Act, 1939. Thus, the plaintiff lost his right and title to recover possession of the suit property from the defendant. The only person who could, therefore, seek to evict the defendant is the Mutt. Mr. Ramachandra Rao reinforces these arguments by urging that the permission which the defendant obtained from the Mutt to erect a hut on the suit property unmistakably pointed to the fact that he treated the lease under Ex. A. 1 as void and thereby determined once and for all the relationship of landlord and tenant

between him and the plaintiff. He argues that if a decree for possession of the suit property is now given to the plaintiff, it will amount to permitting a rank stranger to oust the defendant from possession.

(4) I do not think the contentions advanced on behalf of the respondent are good or sufficient to repel the plaintiff's claim for possession. I shall first deal with the contention that by purporting to take a permanent lease under Ex. B. 6 from the Mutt, the plaintiff must be deemed to have impliedly surrendered the previous lease which he had admittedly held under the Mutt. The crucial circumstances to bear in mind in this connection is that the permanent lease purported to be granted under Ex. B.6 was null and void in view of the explicit and mandatory provisions of Section 29 of the Madras Hindu Religious and Charitable Endowments Act, 1939. The question is whether this void lease had the effect of bringing about an implied surrender and consequent determination of the previous valid lease which was admittedly subsisting at the time of Ex. B.6 and which would have been current even today but for the alleged legal effect caused by the interposition of Ex. B. 6. In my judgment this question has to be answered in favour of the plaintiff-appellant.

(5) An express surrender effectuates the clear and unambiguous intention of the lessee to "surrender and yield up" his lease-hold to the lessor. It is therefore a matter of intention of the parties and not a matter of implication of the law. But in an implied surrender, an intention to surrender is not expressed. It is inferred by the law. An implied surrender is an act of the law and takes place independently of, and in some cases even in spite of, the intention of the parties. The law infers such surrender from the act and conduct of the parties. "Thus it is properly applied to cases where the owner of a particular estate has been party to some act having some other object than that of a surrender, but which object cannot be effected whilst the particular estate continues, and the validity of which act he is by law estopped from disputing." (See *Lyon v. Reed* (1844) 13 M& W 285 and *Bessell v. Landsberg*, (1845) 7 QB 638 .

(6) A familiar instance of a surrender by operation of law is when the tenant takes a new lease from the landlord to commence during the term of the old lease. Here the tenant does not express his intention to surrender and determine the old lease. But by his taking a new lease, the law infers a termination of the existing lease. The reason that the landlord has no power to grant the new lease except upon the footing that the old lease is surrendered; and the tenant, being a party to the grant of the new lease, is estopped from denying the surrender. This is how surrender by operation of the law comes about. It is essential to such surrender that the new lease should be valid and take effect at once as a lease. No implied surrender can therefore arise on the acceptance by the tenant of a new lease which is void. The implied surrender will be taken to be subject to an implied condition that the surrender is to be void, if the new lease happens to be void. The law is laid down by Coleridge, J. in *Doe d. Earl of Egremont v. Courtenay* (1948) 11 QB 702 .

"that where the new lease does nor pass an interest according to the contract, the acceptance of it will not operate a surrender of the former lease; that, in the case of a surrender implied by law from the acceptance of new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void, and that, in case of an express surrender, so expressed as to shew the mention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void in case the grant should be made void."

In *Easton v. Penny* (1892) 67 LT 290 at p. 293, Romer, J. observed that "the rule as to implied surrender of an old by a new lease does not apply when the new lease is void or voidable." In *Knight v. Williams* (1909) 1 Ch 256 Cozens-Hardy J. distinguished a surrender by operation of law from an actual surrender by deed in the following words:

"The acceptance of a new lease operates as an implied surrender "by operation of law" of the old lease within the meaning of Section 3 of the Statutes of Frauds, but such surrender differs from an actual surrender by deed; it is not absolute; it is subject to an implied condition that the new lease is good, and if this is not so the old lease remains in force."

In *Zick v. London Union Tramways Ltd.* (1908) 2 KB 126 the facts were - that on 15-3-`965. one F., as agent for the mortgagees in possession of certain premises, let them to one S for a term of three years which was to expire on March 14, 1908. On 15-5-1905 the defendants served a "notice to treat" for the purchase of premises in question on the lessor's agent. The effect of this notice was that the lessor could no new interest in the premises so as to throw any fresh burden on the defendants. S, without any knowledge of the "notice to treat" sold to the plaintiff in January 1906 his furniture and effects on the premises and agreed to hold the premises in trust for him. In pursuance of this, the plaintiff entered on the premises in February 1906. Afterwards, in order that the plaintiff should have not only the beneficial but also the legal possession of premises. S informed F that he desired to transfer to the plaintiff the unexpired portion of his tenancy. But the lessor suggested the surrender of the existing tenancy and the grant of a fresh lease to the plaintiff for a term of 3 years. Accordingly a new lease was taken by the plaintiff for a period of three years to expire on 14-2-1909. The lessor was incompetent to grant this new lease because of the "notice to treat" which had previously been served on him. In other words, the new lease was invalid lease could in law work as implied surrender of the old lease. The Court of Appeal held that it could not. The President and the other two Lords Justices in separate but concurrent judgments held that the new lease which was invalid", although accepted by the plaintiff, did not operate to bring about an implied surrender of the old lease and that therefore the old lease must be regarded as subsisting. In *Barclays bank Ltd. v. Stasek*, 1957 Ch. 28, after a brief review of the case law, the following principle

is deduced :

"The principle is that if a new lease is not effective but would, if it were effective, produce a surrender, then, by reason of the fact that the new lease is not effective, there is not an effective surrender."

The principle is well settled that a document or transaction which is ab initio void has no existence in the eye of law. If so, a new lease which is ab initio although granted during the currency of an old lease cannot operate in law an implied surrender of that lease. It follows that on principle as well as authority the contention that the permanent lease under Ex. B.6 which was ab initio void had the legal effect of determining the old lease on the theory of implied surrender, cannot be upheld.

(7) The next contention that the destruction by fire of the house which along with the suit site was leased by the plaintiff to the defendant under Ex. A . 1, rendered the lease void also appears to be unsustainable. No doubt, u/s 108(e) of the Transfer of Property Act the defendant-lessee, could if he so desired, have treated the lease as void on account of the destruction of the house by fire. But that is different from saying that the destruction of the house ipso facto determined the lease. In the case on hand, the defendant did not in any manner intimate to the plaintiff his intention to treat the lease under Ex. A 1 as void. But the argument is that an intention to treat the lease as void must be inferred from the circumstance that the defendant approached the head lessor-Mutt and obtained permission from it to erect a hut on the suit land. I am afraid this is a very devious and much too indirect a way of expressing a lessee's intention to treat a lease as void u/s 108(e) of the Transfer of Property Act. In my opinion, such an indirect and, what is more ambiguous course of action on the part of a lessee cannot be regarded as sufficient for conveying to the lessor his intention to treat the lease as void u/s 108(e). The lessee must directly and categorically express to the lessor his intention to treat the lease as void. Otherwise, it will be legitimate for the lessor to regard the lease as subsisting. There is nothing in Section 108(e) of the Transfer of Property Act which compels a lessee to treat a lease as void. It is optional with him to do so or to refrain from doing so. This aspect of the matter makes it all the more necessary that an unambiguous declaration of the lessee's intention to treat the lease as void must be communicated to the lessor. The lessor would not otherwise be able to take appropriate steps on the footing that the lease has come to an end and he is therefore at liberty to deal with the property as he chooses. What is even more important is that a mere declaration of intention to treat the lease as void is not sufficient. The lessee must also yield up possession of the property to the lessor as required by the provision of the section 108(q) of the Transfer of Property Act. He cannot continue in possession and yet declare that he has treated the lease as void. That would obviously be an inconsistent and impermissible position to adopt. So long as a lessee has not surrendered to his lessor the possession which he obtained from the latter at the time of the lease, he cannot rid himself of his

obligations under the lease. His holding to the possession into which he was inducted by his lessor will estop him from disputing the right of his lessor to evict him and to recover possession from him. In the present case, the defendant did not surrender possession to the plaintiff. The defendant cannot, therefore, be heard to deny the plaintiff's right to recover possession. By merely obtaining a permission from the head lessor to erect a hut on the suit property, the defendant could not improve his position. A permission of this kind is far removed from the obtaining of a lease from the head lessor. The construction of a hut by the defendant on the suit property is not necessarily inconsistent with his treating the sub-lease granted to him by the plaintiff as subsisting. Thus, it is difficult to say in this case that the defendant effectively determined the lease he took from the plaintiff, and even if it be assumed that he did so, he cannot still be allowed to continue on the property of which he did not surrender possession to the plaintiff as he was bound to do so as a lessee who was inducted into possession of the property by the plaintiff lessor.

(8) I must also observe here that by arming himself with a permission from the head lessor to erect a hut on the suit property, the defendant cannot affect the rights of the under-lessor, plaintiff. The law does not countenance an attempt by an under-tenant to squeeze the under lessor altogether out of the property by entering into some sort of arrangement with the head lessor behind the back of the under-lessor.

(9) It is lastly contended on behalf of the respondent that the destruction by fire of the house on the property which was leased by the plaintiff to the defendant under Ex. A. 1 put an end to the lease taken by the plaintiff from the Mutt. "As I already stated a lease is not automatically determined on the destruction by fire or irresistible force of a substantial portion of the property leased. It is a matter of option with the lessee to get rid of the lease or not. He could treat it as void if he so desired. But the law does not compel him to do so. In the instant case, there is nothing to show that the plaintiff ever treated the lease which he took from the Mutt as void on account of the loss of the house by fire. Indeed, he could not have done so because the lease to him was not of the house but only of the land. It is therefore idle to contend that at law or in fact the lease taken by the plaintiff from the Mutt came to an end.

(10) In view of the foregoing, I do not consider the decision of the Courts below to be correct. It is therefore set aside and this Second Appeal is allowed. In the somewhat peculiar circumstances of this case, I do not make any order as to costs. No leave.

(11) Mr. Ramachandra Rao for the respondent asks that a direction be made in the decree for payment of compensation to his client in respect of the hut constructed by him on the suit property. I do not think this request can be acceded to, because the appellant-plaintiff cannot be said to be liable in law to pay the value of improvements or compensation to the defendant .

(12) Mr. Ramachandra Rao then asks that he may be permitted to remove the hut erected by him. I do not think any permission is necessary for this, because under the law he is entitled to remove the hut, without impairing the site on which it is erected.

(13) In view of this, I do not think any modification of the judgment already made is called for.

(14) Appeal allowed.