

(1924) 01 MAD CK 0052
In the Madras High Court

Gopala Kuduva and Others

APPELLANT

Vs

Sheikh Muhammad Hamza Sahib and Others

RESPONDENT

Date of Decision : 30-01-1924

Acts Referred:

Citation : AIR 1924 Mad 776 : 84 Ind. Cas. 625 : (1924) 19 LW 545

Hon'ble Judges : Spencer, O.C.J.;Kumarasawmi Sastri, J

Bench : Division Bench

Judgement

Spencer, Officiating C.J.

1. The principal question for decision in this second appeal is whether the sale-deed dated 18th April 1916, Ex. B, executed by defendants Nos. 1 to 7 in favour of the 8th defendant worked a forfeiture of the one-third share of the properties held by these defendants and others upon a mulgeni lease of 1864, Ex. A. Ex. B purports to be an outright sale, the vendors declaring "We have given up all our rights and interest in the said property and placed the property which is in our possession in your possession now." There is also a clause of divestment: "Neither we nor our representatives have any right, interest, or power, or claim, etc., in the said property." Under Ex. A the lessee undertook that he would not alienate the said land in any way and there was a covenant: "In default I shall be liable to surrender the said land to you immediately."

2. The District Munsif and the District Judge held that the plaintiffs were not entitled to recover the property on the ground that there was a lease of the same property in favour of defendants Nos. 1, 2, 5 and 6, executed by the vendees. As possession did not pass to the alienee, the District Judge considered that there was no forfeiture. We cannot agree with this view. Under Ex. B the legal possession was clearly alienated. Actual possession is not the test of alienation. For it would have been possible for the lessees under the mulgeni lease deed of 18th April 1916 to have done some act which would according to its terms forfeit their right in favour of the vendees and in that manner the entire right to this property might change hands. The word used in Ex. A is "Paraswathinam," which

is equivalent to the English word alienation or, in other words, giving control to a stranger. As the lease deed prohibits alienation "in any manner," it cannot be seriously argued that this outright sale did not come within the terms of that prohibition.

3. On behalf of defendants Nos. 11 and 12 it is argued that they are not bound by the acts of defendants Nos. 1 and 7. These defendants are persons in whose father's favour the conditional sale-deed, Ex. III, was executed in 1901. They are bound by fresh acts of alienation made by the tenants, under whom they held under their conditional sale. We held in Second Appeal No. 483 of 1913 that the plaintiff had waived his right to object to that conditional sale. The District Judge was mistaken in holding that the plaintiffs were bound by the conditional sale, if he meant by that that they had lost their right to evict. In the previous litigation it was only decided that the plaintiffs had waived their right to evict the tenants on account of that particular breach of the condition of the lease. Subsequent acts of alienation will give rise to a fresh cause of action. See *Parameshri v. Vittappa Shanbaga* 26 M.P 157 : 12 M.L.J. 189 and *Great Western Railway Co. v. Smith* (1976) 2 Ch. D. 235 : 45 L.J. Ch. 235 : 34 L.T. 267 : 24 W.R. 443 is an authority for holding that, if there is a lessee who has created an under-lease or any other legal interest, if the lease is forfeited, then the under-lessee loses his estate as well as the lessee himself. The authorities are collected in *For on Landlord and Tenant* at page 632.

4. The District Judge's observation that, if the 11th defendant died before the appeal was presented, his legal representatives could not be brought on the record is unintelligible. As all the parties are now before us we are able to adjudicate on the rights of all concerned.

5. An objection has further been taken that the plaintiffs have no right to sue for recovery of possession of the portion of the property in possession of the defendants without suing for the whole land as it stood before the partition. In para 5 of the plaint the plaintiffs have recognised the partition which was one of the subjects of the decision in Second Appeal No. 483 of 1913, and this objection was not taken in the Trial Court and cannot be heard now.

6. The second appeal is allowed. The decrees of the lower Courts are set aside and the plaintiffs will have a decree for possession as prayed for, on payment of improvements as given in the District Munsifs decree with costs throughout.

Kumaraswami Sastri, J.

7. I agree with my Lord.