

(1917) 09 MAD CK 0040
In the Madras High Court

Govindasami Pillai

APPELLANT

Vs

Pethapkrumal Chettt, dead, and Another

RESPONDENT

Date of Decision : 18-09-1917

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 96
Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : AIR 1918 Mad 207 : 44 Ind. Cas. 839

Hon'ble Judges : Srinivasa Aiyangar, J; Spencer, J; Krishnan, J

Bench : Full Bench

Judgement

1. The facts are somewhat complicated, but when once they are apprehended it appears to be clear that there is no finding on the point now in dispute. The suit was for rent of certain lands for the years 1910 1911, 1911-1912, and 1912-1913. The defendant's plea was that he was dispossessed of the land by one Ramasami Mooppan who was the real owner and was not, therefore, bound to pay rent after the date of his dispossession to the plaintiff, who is the assignee of his landlord Subramania Josier. As regards the first two years there is a concurrent finding of fact by both the lower Courts that the defendant was not evicted by any body and we accept that finding. As regards the third year which began in March 1912, and ended with March 1913, it is said that evidence clearly proved eviction at least in May 1912 by Ramasami Mooppan. The first Court found it was not proved by the defendant that there was any eviction. In appeal the lower Appellate Court does not find definitely one way or the other. A certain amount of confusion has arisen owing to the history of the title to this property. The lands originally belonged to a Mahratta gentleman, who mortgaged them with possession to Chithambaram Chetty or to a predecessor of his in title. While Chithambaram was in possession as mortgagee, a suit was instituted against him for money by one Srinivasa Aiyangar who got the mortgage right attached before judgment, which he brought to sale in execution after obtaining a decree and purchased it himself. The attachment appears to have been made in 1904. The mortgagee Chithambaram Chetty leased the lands to one Alagiri, who in his turn

leased to Subramania Josier, the landlord of the defendant. After the lease to Alagiri Chithambaram appears to have sold the othi right to Kandasami Mooppan. Ramasami Mooppan had become the owner of the equity of redemption of the Mahratta gentleman and appears to have redeemed Kandaswami, the assignee of the mortgage, and appears to have claimed actual possession of the property from the lessees of Chithambaram on the ground that after redemption by him, there was no subsisting title in the mortgagee Chithambaram to sustain any lease by him. On this claim, Ramaswami Mooppan appears to have obstructed the defendant in cultivating the land and on his complaint his landlord Subramania Josier applied to a Magistrate u/s 145 of the Criminal Procedure Code to protect the possession of his lessee, the defendant. This petition was, however, dismissed in August 1912 on the ground that the property had been delivered to Srinivasa Aiyangar who took certain proceedings in execution as purchaser against Chithambaram, the mortgagee. Ramasami Mooppao claimed the land against Srinivasa Aiyangar, the purchaser. The merits of that claim it is unnecessary to specify now. Ramasami Mooppan's claim was disallowed and he filed a suit to establish his claim. In the meantime the execution-purchaser Srinivasa Aiyangar applied to be placed in possession of the lands as purchaser of the mortgage interest of Chithambaram. That application appears to have been opposed by Subramania Josier, the landlord of the defendant, but Srinivasa Aiyangar was according to the language of the receipt placed in possession in August 1912 (Exhibit V). Whether he was actually placed in physical possession of the land, who was then in possession, whether it was the defendant or Ramasami Mooppan who is said to have obstructed the defendant and taken possession in May 1912 is not found. The Pleader for the appellant contends that the defendant was evicted by Ramasami Mooppan at any rate by the end of May 1912 and that Ramasami Mooppan was the real owner as his title was established against Srinivasa Aiyangar, the purchaser, and if Srinivasa Aiyangar did get possession in August 1912 he got it from Ramasami Mooppan and so far as he the defendant was concerned, when once he was evicted by the real owner, (that is) Ramasami Mooppan, it did not matter to him, whether the real owner was subsequently ejected or not. The respondent's Pleader contends that the defendant was not ejected at all, and if he was ejected by Ramasami Mooppan, Ramasami must be considered to be a trespasser as he had agreed with Subramania Josier to allow him to continue in possession as lessee during the whole period of his lease. Whether this is so or not is again not found. Further it is not found whether as a matter of fact Srinivasa Aiyangar dispossessed any body when he is said to have obtained possession under Exhibit V. It is said he obtained symbolical possession. We must point out that symbolical possession is given only in cases where the party in actual possession is entitled to remain in such possession as in cases of delivery under Order XXI, Rule 96, of the CPC and should not be confounded with cases where a party is entitled to actual possession, but obtains only what is called a paper delivery, (that is), where he gets no possession at all. It is clear from the above statements of facts that there must be a finding on the following points:

(1) Whether the defendant was actually ousted from the lands in May 1912 by Ramasami Mooppan.

(2) If he was, whether Ramasami Mooppan had a title paramount to that of Subramania Josier, the landlord of the defendant. The effect of the alleged agreement Exhibit C must also be considered.

(3) If the defendant was not evicted by Ramasami Mooppan, was he evicted in August 1912 by Srinvasa Aiyangar by reason of the delivery evidenced by the receipt Exhibit V? And if he was so evicted, had Srinivasa Aiyangar a paramount title?

(4) Did the defendant remain in possession without being evicted by anybody during the year 1912--1913?

2. The finding must be on the evidence on the record, except as to issue (2) on which any adjudication between Srinivasa Aiyangar and Ramasami Mooppan may be admitted. Finding is to be returned before the 17th July 1917 and seven days are allowed for objections.

3. In compliance with the order contained in the above judgment, the Subordinate Judge of Tanjore submitted the following

FINDINGS.

1. The four issues remitted to this Court for finding are:

I. Whether the defendant was actually ousted from the lands in May 1912 by Ramaswami Mooppan?

II. If he was, whether Ramaswami Mooppan had a title paramount to that of Subramania Josier, the landlord of the defendant?

III. If the defendant was not evicted by Ramasami Mooppan, was he evicted in August 1912 by Srinivasa Aiyangar by reason of the delivery evidenced by the receipt Exhibit V? and if he was so evicted, had Srinivasa Aiyangar a paramount title?

IV. Did the defendant remain in possession without being evicted by any body during the year 1912-1913?

2. The findings were directed to be on the evidence on record, except as to issue No. 2 in which any adjudication between Srinivasa Aiyangar and Ramaswami Mooppan was allowed to be received. The defendant produced a number of documents under that provision and Exhibits X to XIII were filed as they alone related to adjudication between Srinivasa Aiyangar and Ramaswami Mooppan.

3. Chidambara Chetti leased the lands while he was in possession as usufructuary mortgagee to Alagiri Chetti in 1905 and the latter is said to have leased the same to Subramania Josier in 1907. Subramania Josier leased to the defendant's father Perumilu Pillai for 3 years under Exhibit A, dated 2nd March

1910. Although the documents relating to the leases to Alagiri and Josier are not filed, it appears that the former obtained a lease for 10 years from 1905 and that the latter obtained his lease for 8 years under a registered deed, dated 10th August 1907 (vide, Exhibits IV and C). The lease would, therefor.", expire in April 1915.

4. The plaintiff derived his interest from Josier on 21st March 1911. A mistake has been made by the first Court and also my predecessor in reading this document as one of transfer of lease. It appears to be a transfer of debt in favour of the plaintiff, because the assignee merely gets the right to recover the rent due under the lease Exhibit A and nothing more.

5. The date of the sale of the equity of redemption in Original Suit No. 372 of 1906 under which Muthayya Chetti the decree-holder purchased it is not in evidence, but Ramaswami Mooppan purchased it from him on 21st April 1911. The agreement Exhibit C was made on 29th May 1911 between Subramania Josier and Ramaswami Mooppan, under which the latter agreed that Josier should enjoy his lease-hold for the remaining 4 years according to the lease in his favour and deliver it to Ramaswami Mooppan on 13th April 1915. The sale of the mortgage interest of Chidambara Chetti in favour of Kandaswami Mooppan was on 25th September 1910. Ramaswami Mooppan purchased this interest on 2nd September 1911. Upon the strength of it he filed a claim petition in Original Suit No. 234 of 1904 on the 30th of September 1911, which was dismissed on 11th October 1911 on the ground that the attachment was in 1904 and the claim was made late. There was no investigation. The purchase under the Court sale in Original Suit No. 324 of 1904 which followed upon this was on 6th December 1911. Immediately Ramaswami Mooppan filed his suit, Original Suit No. 6 of 1912, on the 18th December 1911. In April 1912 Ramaswami Mooppan and Subramania Josier were parties to some obstruction proceedings in respect to the delivery of property as per this sale (see Exhibits VIa and VIb). The obstruction was evidently overruled, because delivery was made to Srinivasa Aiyangar on "3rd August 1912 (Exhibit V).

6. On the 1st June 1912 Subramania Josier applied u/s 145 of the Criminal Procedure Code against Ramaswami Mooppan complaining of disturbance of possession and for establishing him in possession of the property free from interference of Ramaswami Mooppan. Ramasawmi Mooppan on the other hand applied to the Court in Execution Appeal No. 1088 of 1912 in Original Suit No. 234 of 1904 that his possession may not be disturbed by Srinivasa Aiyangar, the purchaser in Original Suit No. 234 of 1904, pending disposal of the suit Original Suit No. 6 of 1912 (Exhibits II). The petition to the Criminal Court was dismissed on 31st August 1912 on the representation of the petitioner Subramania Josier that the properties had gone into the possession of a third party under a Civil Court sale. The delivery receipt Exhibit V shows that Srinivasa Aiyangar obtained delivery of possession on 23rd August 1912.

7. Ramaswami Mooppan failed to obtain a decree (in Original Suit No. 6 of 1912)

in his favour in the first and second Courts, but their Lordships of the High Court set aside those judgments and remanded the suit for disposal on the other issues which were raised in the case. The contention of Ramaswami Mooppan in that suit was that the attachment (in Original Suit No. 234 of 1904) made in 1904 was invalid and had ceased to exist when Chidambara Chetti transferred his interest in the mortgage to Kandaswami Mooppan in 1910. Their Lordships held that the attachment was invalid as not having been made u/s 268 of the old Civil Procedure Code, and a payment to the mortgagee or his representative by the person who held the equity of redemption was not in contravention of any attachment validly subsisting.

8. The further trial was held by the District Munsif of Tiruvadi who raised an other question, that the validity of the attachment did not invalidate the subsequent sale held upon it and that the bona fides and validity of the transfer to Kandaswami Mooppan should be decided before the Court sale in favour of Srinivasa Aiyangar could be held null and void as against Ramaswami Mooppan, the assignee from Kanda-swami Mooppan. He held that the transfer was not void or in fraud of creditors and upheld the plaintiff's contention in the revised judgment in Original Suit No. 6 of 1912 (Exhibit XII). That decision was confirmed in appeal by the Sub-Court of Kumbakonam (Exhibit XIII). The position, therefore, is that Ramaswami Mooppan became the owner of the property free of all incumbrances on the 2nd September 1911.

9. The case of the defendant in the present suit is that Ramaswami Mooppan disturbed his possession in 1911. The evidence of D.W. No. 1, Ramaswami Mooppan, shows that the sub-lessees of defendant obstructed him when he went to take possession in Purattasi of 1911, that Sundarappayyar (co-owner with or agent of Subramania Josier) also claimed title and obstructed him and that they carried away the crops. But in the Masi following he took possession of the land and defendant or his father did not enjoy it afterwards. He raised Cumbu in Vaikasi of 1912 and harvested the crops. His surety Govinda Mooppan raised it and it was harvested in the presence of the Police Inspector. Evidently this refers to the possession proceedings which took place about that time. D. Ws. Nos. 2 and 3 state that from Chitrai 1912 Ramaswami Mooppan was in possession and that though Subramania Josier claimed from the cultivator Govinda Mooppan, he did not get any share of the crops. P. Ws. Nos. 2 and 3 also admit that from Chitra 1913 Ramaswami Mooppan was in possession.

10. From the several judicial proceedings referred to above it is clear that Ramaswami Mooppan would have no locus standi if he had not possession. He gave security and had delivery to Srinivasa Aiyangar stayed. It is unlikely that he would not have taken possession in order to substantiate the case which he was then fighting against Srinivasa Aiyangar. He had no doubt undertaken under Exhibit C in May 1911 that he would fellow Subramania Josier to continue in possession till the expiry of the term of the lease in his favour and it was argued on plaintiff's behalf that it is unlikely that he would have broken his agreement

so soon after. It was pointed out that defendant's case was that Ramaswami Mooppan trespassed upon the land in Purattasi 1911 and dispossessed defendant and that there is a change of case now about dispossession in Chitrai 1912. The explanation about the change of case is found in the evidence of Ramaswami Mooppan as D. W. No. 1. As to his breaking the agreement so shortly after it was made, a reference to the dates of the proceedings recited above clearly shows the motive and renders his action in taking the matter into his own hands, instead of leaving Subramania Josier to fight out Srinivasa Aiyangar and perhaps to jeopardise his interests, quite intelligible. When he made the agreement Exhibit C Srinivasa Aiyangar was not in the field. So long as it was a matter between himself and the tenant Subramania Josier, Ramaswami Mooppan might have been quite willing to continue the lease, because in putting an end to the lease there may be questions of re-payment of premium and so forth and Ramaswami Mooppan actually appears to have paid Rs. 400 for certain improvements effected by Subramania Josier. But when Srinivasa Aiyangar came forward with his claim under an old attachment of, 1904, which if substantiated would render invalid the transfer of mortgage by Chidambara Chetti in favour of Kandasami Mooppan, he could not be expected to sit idle and let Subramania Josier continue in possession throwing suspicion on the sale to himself by leaving room for the argument that Ramaswami Mooppan was not even in possession of the land, as he ought to be if he was a real purchaser.

11. On the 1st issue, therefore, I find, that Ramaswami Mooppan actually dispossessed the defendant in May 1912.

12. On the 2nd issue, I find that Ramaswami Mooppan had a title paramount to that of the landlord of the defendant, because in him had become vested in September 1911 both the usufructuary mortgage and its equity of redemption.

13. Turning now to the effect of the agreement Exhibit O upon this title, I have to point out that it is an agreement entered into between Subramania Josier and Ramaswami Mooppan. Plaintiff became a transferee in March 1911, while this agreement was made in May 1911 to enure beyond the period of defendant's interest. The defendant or his father was not a party to this agreement. There was, therefore, no privity of contract between the two and I cannot see how defendant can claim the benefit of that agreement. It rested on defendant to show that he was ousted by a person having a paramount title and Exhibit C is put forward in answer by the plaintiff to depreciate it. If he is not bound by the agreement I cannot see how he could claim benefit under it.

14. It was suggested by the defendant's Vakil in argument that when the paramount title was proved, it mattered little whether the holder of such title actually dispossessed the defendant or not, because an incumbrance created by the usufructuary mortgagee had come to an end when the mortgage was redeemed. Leases created by him would not stand on any higher footing. It may be that a tenant will have the right to emblements or there may be an apportionment of the rent, but apart from such rights and liabilities specially

created by the law for the current agricultural year, the tenant holding over was at the best but a trespasser who would be liable to pay the mesne profits to the person who was entitled in ownership Subramania Josier's title to recover rent terminated with the redemption and, therefore, the assignee of Josier could be in no better position. It is unnecessary to say anything about this argument, because I have found that Ramaswami Mooppan did as a matter of fact take possession of the land from the tenant. I refer to this argument only because the Vakil further argued that Exhibit C was inoperative or ineffective, because it was entered into by Ramaswami Mooppan at a time when he was not the owner of the mortgage rights. He was only the owner of the equity of redemption and had, therefore, no title to immediate possession. Any agreement entered into by him in respect of future possession was, therefore, invalid. I am unable to accept this argument because the owner of the equity of redemption, as he is called, is in reality the owner of the land. The mortgage is only a subsidiary interest and subordinate to ownership. The owner could always enter into agreements with tenants in possession holding under precarious titles so as to confirm them in their possession at his pleasure. Moreover, even if Ramaswami Mooppan was not full owner capable of giving effect to the agreement into which he entered, it is clear that when the estate came into possession he would be bound by such agreement. The argument, moreover, contains a fallacy that the agreement was not to have future effect. Ramaswami Mooppan could not have entered into any agreement about present possession but only about the future and what he did was, therefore, perfectly valid. 1, therefore, find on the 2nd issue that Ramaswami Mooppan had a paramount title.

15. The Vakil for defendant informed me that he did not press issues Nos. 3 and 4, that it was not his case that he was dispossessed by Srinivasa Aiyangar and that no findings need, therefore, be recorded upon them.

JUDGMENT

1. This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

2. On the findings now returned the decrees of the lower Courts must be modified. It is argued, however, that the finding that Ramaswami Mooppan had a title paramount is not correct, because it is alleged that he having obtained the equity of redemption took an assignment of the usufructuary mortgage right from the mortgagee and as such assignee he was bound by the lease in respondent's assignor's favour which had been created by the mortgagee prior to the assignment of the mortgage itself. This argument depends entirely on the position that Ramaswami Mooppan was an assignee; but this is not clear. The appellant states that he, the Mooppan, redeemed the mortgage and thus became the full owner, in which case, of course, the lease created by the mortgagee will not bind the Mooppan. Respondent has raised this question for the first time now; as the facts are not clear in his favour, we cannot allow him to take it. If he

had intended to rely on the point he should have laid a proper foundation for it by proving the necessary facts at the proper time.

3. Accepting the findings, the decree of the lower Court must be modified by substituting Rs. 1,152-4-0 and interest on it for Rs. 2,041-8 0 and interest on it. Parties will pay and receive proportionate costs throughout.