

(1992) 08 MAD CK 0048
In the Madras High Court
Case No : A.S. No. 1049 of 1986

Incorporated and Unincorporated Devaswams, Suchindram	APPELLANT
Vs	
Thomas Aythamattam and 7 others	RESPONDENT

Date of Decision : 28-08-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Transfer of Property Act, 1882 — Section 105, 106, 106, 107, 107

Citation : (1992) 08 MAD CK 0048

Hon'ble Judges : Bellie, J;Abdul Hadi, J

Bench : Division Bench

Advocate : R. Sundaravaradan for M/s. Paul Vasanthakumar, K. Ravichandrababu and T.S. Sivagnanam, for the Appellant; K.V. Subramaniam for Mr. T.R. Rajagopalan, for the Respondent

Judgement

Bellie, J.—The plaintiff is the appellant. It appears the Devaswams of Suchindram owned 100 acres of the land known as Anayadi Estate. According to the plaintiff one H.B. Kohlhoff entered into an arrangement with the plaintiff under which he became entitled to 80 acres in a rent of Rs. 8,000/- per annum for a period of five years ending on 31.3.1969. Later Kohlhoff surrendered 11 acres and retained possession of 69 acres. As per the plaint recitals according to the plaintiff under the said arrangement by the plaintiff with Kohlhoff he was only a license. But it appears Kohlhoff filed a suit O.S. No. 46 of 1969 re-numbered as CS. No. 63 of 1970 (P.S.C.) against the plaintiff for injunction restraining the plaintiff from interfering with his possession, and in that case it was held that Kohlhoff was a tenant and not a licensee as pleaded by the plaintiff. Now in the present appeal in the present suit that finding is not disputed. Thus it is common case now that Kohlhoff was a tenant. It is also not in dispute now that Kohlhoff executed an assignment of his leasehold right in favour of defendants 2 and 3 on 14.5.1981 under Ex. B13. These defendants in turn executed assignment deeds under Exs.B2 to B7 dated 10.3.1983 in favour of defendants 4 to 9. Kohlhoff died on 20.7.1981. It is the plaintiff's case that Kohlhoff himself was not in legal

possession and the assignment deed executed by him is not valid. (First defendant was impleaded as the legal representative of the said Kohlhoff and she died during the pendency of the suit and then her adopted daughter was impleaded as the tenth defendant). Defendants 2 to 9 are in illegal possession and they are therefore trespassers and now they are trying to cut down the trees there. Therefore the suit for possession and for future mesne profits at the rate of Rs. 50,000/- per annum.

2. The suit is contested by defendants 2 to 9. According to these defendants Kohlhoff was lessee for a period of five years from 1..4..1964 to 31..3..1969. Even thereafter he continued as lessee paying rent. Kohlhoff assigned his leasehold right under a registered deed Ex. B13 in favour of defendants 2 and 3 and they in turn executed assignment deeds in favour of defendants 4 to 9 under Exs.B2 to B7 and rightful possession and as such they are not liable to be evicted and pay any mesne profits.

3. On trial of the issues framed on the pleadings and considering the evidence in the case, the trial court after holding that Kohlhoff was a tenant and not merely a licensee as pleaded by the plaintiff, further held that even after the expiry of the lease period on 31.3.1969 Kohlhoff continued as tenant and rent was received from him and thus he was a tenant holding over and that by virtue of the assignment Ex. B13 executed by Kohlhoff in favour of defendants 2 and 3 and further assignment deeds executed by them in favour of defendants 4 to 9 they (defendants 4 to 9) are also tenants and they are in lawful possession. So holding it found that the suit filed on the basis that the defendants are trespassers cannot be maintained. In the result therefore the trial court dismissed the suit.

4. Now in the appeal by the plaintiff it is not disputed that Kohlhoff was a tenant as contended by the defendants which has been accepted by the trial court. It is also not disputed that after the expiry of the lease period Kohlhoff was continuing as a tenant holding over and it is not further disputed that Kohlhoff executed Ex. B13 assignment deed in favour of defendants 2 and 3. Mr. R. Sundaravaradan Learned Counsel appearing for the appellant-plaintiff would however contend that (i) even as assignees from defendants 2 and 3 who got an assignment from Kohlhoff the defendants 4 to 9 cannot claim right to continue in possession of the land inspite of demand by the plaintiff to vacate. He further contends that even if they (defendants 4 to 9) were to be held as tenants the lease being agricultural lease no notice of termination of lease is necessary and as such they have no defence to the suit for eviction.

5. Now, we will take up the second contention first. Both sides before us admit that the lease in question is agricultural lease. Mr. Sundaravaradan would submit on behalf of the appellant plaintiff that in the Transfer of Property Act Chapter V deals with immoveable property, and as per S.117 in that chapter no notice of termination in respect of a tenancy of agricultural lease is necessary. S.117 reads thus:

117. Exemption of leases for agricultural purposes None of the provisions of this Chapter apply to leases for agricultural purpose, except in so far as the State Government may, by notification published in the Official Gazette, declare all or any of such provisions to be so applicable in the case of all or any such leases, together with or subject to those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

A reading of this section shows that the provisions of Ss.105 to 116 of the Transfer of Property Act of which S. 111 deals with, among other things, termination of lease by giving notice, are not applicable to leases for agricultural purposes except in certain circumstances stated in that section. It is nobody's case that any of these circumstances as exceptions exists. Therefore a plain reading on S.117 would clearly show that notice of termination in respect of lease for agricultural purposes is not necessary.

In this connection Mr. Sundaravaradan cited a decision of the Supreme Court in *Namdeo Lokman Lodhi Vs. Narmadabai and Others*, wherein, in my view, it has been clearly held that Ss.105 to 116 of the Transfer of Property Act will not be applicable to agricultural leases. It appears a Full Bench of Madras High Court in *Katragadda Brahmayya, minor by mother and guardian Katragadda Jagadamba and Others Vs. Katragadda Balatripura Sundaramma and Others*, had held that in spite of S.117, considering that Ss.105 to 116 are based on the principles of reason and equity, they must be held to be applicable to agricultural leases also. The Supreme Court has referred to this Judgment and then it has held that the principles laid down in that case is wrong. The Supreme Court has said in paragraph 25 of its Judgment thus:

In our judgment, therefore, the statement in this decision that Ss.105 to 116, T.P. Act are founded upon principles of reason and equity cannot be accepted either as correct or precise.

Mr. K.V. Subramaniam, Learned Counsel appearing for the respondents defendants would however contend that the Supreme Court did not differ from the rule laid down in the said Madras Full Bench decision, and in support of this contention he cited a decision of a single Judge in *Renga Iyengar v. Sivaswami Pandaram alias Sivasami Pillai* 1977 2 M.L.J. 265 : 90 L.W. 559. The learned single Judge in his judgment, as regards the Supreme Court decision, has merely stated to the effect that the said decision of the Supreme Court has not overruled or dissented from the said Full Bench decision of this Court, and nothing further is stated. Then the learned single Judge proceeds to state to the effect that when a tenant is in possession on the basis of a lease for an indefinite period he is entitled to assume that he can continue in possession so long as he pays rent and therefore the provisions (in the Act) for notice to determine the lease being based on the principles of justice, equity and good conscience, that

provision must be applied in the case of agricultural lease also. I am with respect, unable to agree with the ruling of the learned single Judge. I have quoted above the relevant portion of the Judgment of the Supreme Court and that makes it very clear that the provisions in Ss.105 to 116 are not applicable to agricultural leases in view of S. 117 and the Full Bench decision of the Madras High Court is not correct. The learned Single Judge has not stated anything beyond that the Supreme Court decision has not over-ruled or dissented from the decision of the Full Bench decision of this Court.

Mr. Subramaniam would in support of his submission read the next sentence following the above-said sentence of the Supreme Court extracted above which is as follows:-

Of course, to the extent that those Sections of the Act give statutory recognition to principles of justice, equity and good conscience they are applicable also to cases not governed by the Act.

But a careful reading of this sentence along with the sentences preceding it would make it clear that this sentence would refer to those Sections in the Act other than Ss.105 to 116.

When the law laid down by the Legislature in S.117 of the Transfer of Property Act is very clear that the provisions relating to requirement of notice for termination of tenancy under Ss.106 and 116 are not applicable to agricultural leases, it is indeed beyond my comprehension as to how it can be said that nevertheless under the principles of equity and good conscience the said provisions shall be made available to agricultural leases also.

In a later Judgment of another single Judge in *Sri Vedapuriswaraswami, Thiru Vadhi Kudi By its Trustee S. Srinivasan, Thiruvaiyaru v. P.A. Abdul Hameed and others* 1981 94 L.W. 471 it has been unequivocally laid down that,

In the absence of the notification referred to in S.117 it has to be taken that Ss.106, 107 and 111, which occur in Chapter V of the Act will not govern agricultural leases in this case. Therefore, the non-issue of a valid and proper notice either under S.106 or under S.111 of the Act, will not stand in the way of the landlord seeking to recover possession of the properties from the tenant.

I am therefore very clearly of the view that by virtue of S.117 of the Transfer of Property Act in respect of agricultural leases no notice of termination as required under Ss.106 and 111 is necessary. As such as defendants who are only assignee from the lessee, even if they are to be treated as or equated with lessees or tenants in this ejectment suit, they have no defence to resist it.

It is also argued that the defendants are cultivating tenants and as such they are entitled to the benefits of the Tamil Nadu Cultivating Tenants Protection Act and hence they are not liable to be evicted. But there is absolutely no plea to this effect by the defendants. They have merely stated that by virtue of assignments they are tenants, and they have never stated that they are cultivating tenants.

6. It is true that the plaintiff has filed the suit against the defendants pleading that they are trespassers and not as tenants. But for this reason alone, even if as tenants the defendants are liable to be evicted, it cannot be said that the suit is liable to be dismissed as the trial court viewed. Here it is relevant to quote the observation of the Supreme Court in *Srinivas Ram Kumar Vs. Mahabir Prasad and Others*,

A plaintiff may rely upon different rights alternatively and there is nothing in the C.P.C. to prevent a party from making two or more inconsistent acts of allegations and claiming relief thereunder in the alternative. Ordinarily, 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 defendants own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these 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.

It is manifest from the above observation of the Supreme Court that even though the plaintiff has filed the suit against the defendants pleading that they are trespassers but they are really tenants as contended by them, and even if as tenants they are liable to be evicted by the landlord, the suit cannot be dismissed, and proper remedy shall be granted. Thus the defendants have no defence to resist the suit for eviction.

7. In this view of mine do not think it necessary to go into the first point raised by the Learned Counsel for the appellant plaintiff.

8. As regards the question of future mesne profits claimed, this will be referred to separate proceedings under Order 20 Rule 12C-P.C.

9. In the result, in the above terms the appeal is allowed, the Judgment and Decree of the trial court are set aside, and the suit is decreed. There will be no order as to costs.

Abdul Hadi, J.

10. I have had the benefit of going through the judgment of my senior brother Bellie, J. Though I agree with him in the final conclusion reached by him in decreeing the suit, I give different reasons and also make the following observations in connection with S. 117 of the Transfer of Property Act and its applicability to the suit agricultural lease, particularly in the light of the observations made by the Supreme Court in *Namdeo Lokman Lodhi Vs.*

Narmadabai and Others, relating to the Full Bench decision of this Court in Katragadda Brahmayya, minor by mother and guardian Katragadda Jagadamba and Others Vs. Katragadda Balatripura Sundaramma and Others,

11. I am unable to subscribe to the view of my learned brother that the above referred to Namdeo Lokman Lodhi Vs. Narmadabai and Others, has held that the principle laid down in the above referred to AIR 1948 Madras 275 is wrong. After referring to the statement of the said Full Bench that although S. 106 of the Transfer of Property Act does not apply to lease for agricultural purposes, by virtue of S. 117 of the Act, nevertheless the rules in S. 106 and in other Sections (Ss. 105 to 116) in Chapter V of the Act are founded upon reason and equity and they are the principles of English Law and should be adopted as statement of law in India, applicable to agricultural cases, the Supreme Court no doubt observes as follows:

In our opinion, the above statement is again formulated in too wide a language. S. 105 gives a statutory definition of the word lease. It enunciates no principle of equity. The relation to lessor and lessee is one of contract and in (sic) Abridgment a lease is defined as a contract between the lessor and the lessee for the possession and profits of land on the one side and recompense by rent or other consideration on the other. The statute has given a more comprehensive definition of the term. S. 107 makes registration of a lease compulsory. This section again does not concern itself with the principle of justice or equity. S. 108(j) enacts that the lesser may transfer absolutely by way of mortgage or sub-lease the whole or any part of his interest in the property and any transferee of such interest or part may again transfer the law in India and England on this subject is not the same and it cannot be said that this sub Section on acts or (sic) any general principle of equity. Parts of Ss. 109, 110, 111 in contain mere rules of procedure or rules of a technical matter. These certainly cannot be said to be based on any principle of equity. In our judgment, therefore, the statement in this decision that Ss. 105 to 116. T.P. Act are founded upon principles of reason and equity cannot be accepted either as correct or (sic) course to the extent that those sections of the Act give (sic), recognition to principles of justice, equity and good (sic) science they are applicable also so cases not (sic) in Act.

(Emphasis supplied)

12. Earlier in the said judgment, the Supreme Court also observes at page 231 as follows:-

In the first instance it may be observed that it is erroneous to suppose that every provision in the Transfer of Property Act and every amendment effected is necessarily based on principles of justice, equity and good conscience. It has been seen in every case whether the particular provision of the Act relied upon restates a known rule of equity or whether it is merely a new rule laid down by the legislature without reference to any rule of equity and what is the true nature and character of the rules.

(Emphasis supplied)

13. Thus, according to the Supreme Court, the above said Ss.105 and 107 and 108(j) do not enunciate any principle of justice of equity along with reference to Ss.109, 110, 111, the Supreme Court only observes that parts of those sections contain mere rules of procedure and cannot be said to be based on any principles of equity. Further the Supreme Court generally observes that those parts of the above said Ss.105 to 116 which give statutory recognition to principles of justice, equity and good conscience, are applicable to cases not governed by the Act, So, to that extent the above said statement made by the Full Bench of this Court is indeed correct, according to the Supreme Court. Further, according to the Supreme Court in every case, it has to be seen whether the particular provision relied on restates a known rule of equity or whether it is merely a legislative enactment without reference to any rule of equity and what is the truth, nature and character of the rule.

14. The Supreme Court, on the facts before it, dealt with the question whether S.111(g) of the Transfer of Property Act (which provided for a notice to the lessee in writing of the lessor's intention to determine the lease, as a preliminary to a suit for ejectment based on any of the three kinds of forfeiture spoken to in S.111(g) is based on any principle of justice, equity or good conscience. It answered the said question in the negative. It did not specifically advert to S.111(h) or S.106 of the Transfer of Property Act and say whether said provisions do or do not enunciate any principle of equity.

15. On the other hand it is this question specifically that was before the above said Full Bench of this Court S.111(h) states that a lease is determined on the expiration of a notice to determine the lease duly given by one party to the lease to the other. The term duly given would necessarily refer to S.106 of the Act, whereby, inter alia it is provided that in the absence of a contract or usage to the contrary, a lease of immovable property for agricultural purposes shall be deemed to be a lease from year to year or terminable on the part of either the lessor or the lessee by six months notice expiring with the end of a year of the tenant. S.117 of the Transfer of Property Act provides that none of the provisions of Chapter V (Ss.105 to 116) shall apply to leases for agricultural purposes except in so far as the State Government may, by notification published in the Official Gazette, declare all or any of such provisions to be so applicable in the case of all or any of such leases. In the light of the above said provisions, the above said Full Bench of this Court, dealing with the case of agricultural lease, has held thus:-

Whilst that section does not, apply to leases for agricultural purposes, by virtue of S.117 of the Act, nevertheless, it has been observed and laid down in a series of decisions of this Court that the rules in S.106 and in the other Ss.105 to 116) in Chap. V of the Act are founded upon reason and equity they are the principles of English law and should be adopted as statement of the law in India applicable to agricultural leases vide *Vasudevan Nambudripad v. Valia Chathu Achan* 24

Mad. 17 Gangamma v. Bommakka 33 Mad. 253, Apparao v. Subbamma 13 Mad. 60, Nanjappa Goundan Vs. Rangaswami Goundan, and (sic) Thirumalareddi Inna Reddi and Another Vs. Gade Gopireddi and Another, . The first of those decisions was pronounced by a Full Bench, the second and third by Benches and the last two are each decisions by single Judges

16. No doubt, in the above said decision the Supreme Court also observed as follows:-

Now so far as S.111(g) of the Act is concerned, the insistence therein that the notice should be given in writing is intrinsic evidence of the fact that the formality is merely statutory and it cannot trace its origin to any rule of equity. Equity does not concern itself with mere forms or modes of procedure. If the purpose of the rule as to notice is to indicate the intention of the lessor to determine the lease and to avail himself of the tenant's breach of covenant it could as effectively be achieved by an oral intimation as by a written one without in any way disturbing the mind of Chancery Judge. The requirement as to written notice provided in the section, therefore, cannot be said to be based on any general rule of equity.

(Emphasis supplied).

17. But in S.106 of the Transfer of Property Act of which the present case is also concerned, there is no requirement for a written notice. Further, even from the abovesaid observation of the Supreme Court, it can be concluded that at least on oral intimation or notice of the intention of the lessor to determine the lease is necessary, to satisfy the principle of equity.

18. The above interpretation of the abovesaid Supreme Court decision is also found in Ranga Iyengar v. S. Pandaram AIR 1977 Mad. 367 : 1977 2 M.L.J. 265 which specifically dealt with the present question whether a notice under S.106 of the Transfer of Property Act was necessary for leases for agricultural purposes. While answering the said question in the affirmative, the learned Judge who decided the said case, after quoting the relevant observations of the Supreme Court in Hiralal and Others Vs. Badkulal and Others, also observes as follows:

Thus the Supreme Court did not hold that the principles of none of the provisions of Ss.105 to 116 of the T.P. Act could be invoked in case of agricultural leases. But, on the other hand, if a provision of the section in the T.P. Act is considered as a statutory recognition of the principles of justice, equity and good conscience that would have to be held applicable to the cases of agricultural leases also.

The decision of the Supreme Court in Namdeo Lokman Lodhi Vs. Narmadabai and Others, had not overruled or dissented from the decisions of this Court in this regard. The only further question that has to be decided in this case is whether S.111(h) of the T.P. Act is applicable to such agricultural lease.

19. Therefore, in the above circumstances, I am also unable to subscribe to the view of my senior brother that the ruling of the learned Single Judge in the

abovesaid 1977 2 M.L.J. 265, is not correct.

20. No doubt, in the later judgment (referred to by my senior brother also) of another single Judge of this Court in *Sri Vedapuriswaraswami, Thiru Vadhi Kadi By its Trustee S. Srinivasan, Thiruvaiyaru v. P.A. Abdul Hameed and others* (1981) 94 L.W. 471 it is held that in the absence of the notification referred to in S.117, Chapter V of the Transfer of Property Act will not cover agricultural lease and that the non issue of a notice under S.106 or S.111 will not stand in the way of the landlord seeking to recover possession from the lessee. But that decision does not refer to abovesaid Supreme Court decision or a Full Bench decision. It only came to the conclusion purely on what is contained in S.117 and on the fact that there was no notification referred to there.

21. So, I hold that a notice is necessary in the present case. Then, coming to the facts in the present case, I find paragraph 17 of the plaint says ultimately a suit notice was issued on 24.3.1984 but it was of no avail and that hence this suit. I also find that as against this allegation in paragraph 17 of the plaint, paragraph 14, of the written statement of defendants 2 to 9 admits the said allegation as follows:-

Notice was served on these defendants as claimed in paragraph 17 of the plaint.

(1st defendant, the wife and legal representative of the original lessee Kohlhoff died pending suit and her L.R., the 10th defendant remained ex parte even in the court below).

Thus the defendants, while admitting that the said suit was served on them, did not take exception at all to the nature or the contents of the said notice. In other words, they do not say that the said notice is not valid as being not in accordance with law or principles of justice, equity and good conscience. No doubt, the only notice marked by the plaintiff is Ex. A1 dated 30.3.1984 addressed to the first defendant alone. But that notice may not have relevance in so far as defendants 2 to 9 are concerned who choose to admit the notice that was sent to them on 24.3.1984 as alleged in paragraph 17 of the plaint. When defendants 2 to 9 have not alleged anything further stating that the notice that was spoken to in paragraph 17 of the plaint is not in accordance with law or justice equity and good conscience, we have to take it that a proper notice, in accordance with law as well as the principles of justice, equity and good conscience was given by the plaintiff to defendants 2 to 9. At any rate, since after making the above said admission in paragraph 14 of the written statement, the said defendants did not raise the plea that the said notice was not in accordance with law or principles of justice, equity and good conscience at least it can be inferred that they waived their right to a notice from the lessor in accordance with law or principles of justice, equity and good conscience. Even where there is no notice, of any kind at all, from the lesser to the lessee, decisions have held that the conduct of the lessee may show that he has waived his right to a notice under the abovesaid S.111(h) read with S.106, T.P. Act and

that those sections will not be a bar for the lessor to take legal action and (sic) the lessee, and get possession. To illustrate, in AIR 1971 Delhi 107 in the case of Batoo Mal (sic) Rameshwar Nath Division Bench of the Delhi High Court held as follows:-

It is for these reasons that we are inclined to the view that the failure of the tenants to raise the objection regarding the non compliance with S.106 of the Transfer of Property Act at an early stage of the litigation would amount to a waiver of the plea by them. It would depend upon the facts and circumstances of each case when the conduct of the tenant would amount to such a waiver. The greater the delay on the part of the tenant in raising such a plea the greater the probability of his conduct amounting to waiver. This Court has consistently taken the view that the failure of the tenant to raise such a plea before the Controller would amount to a waiver of such a plea and, therefore, the plea cannot be raised for the first time in the first appeal much less in the second appeal. (Vide 1969 Ren CR 54 (Delhi), Inder Singh v. Nanak Chand 1969 Ren CR 54 (Delhi, and 1967 DLT 704.

In "Vellayan Chettiar v. Govt. of the Province of Madras AIR 1947 PC. 197 : 60 L.W. 630 (P.C.) it was held competent to the Secretary of the State to waive notice under S.80 Civil P.C. and he was held to have been estopped by his conduct from pleading the want of notice at a later stage of the trial. Thus, where the Secretary of the State took objection to the sufficiency of the notice in his written statement but raised no issue on the point when issues were settled and took no objection during the trial, the court held that another defendant was not competent to raise this issue at later stage as the Secretary of the State had waived the notice. A fortiori the requirement of the notice under S.106 of the Transfer of Property Act can be waived and it was waived in the present case.

Further, in the case of Ram Pratap v. Birla Cotton Spg, & Wvg, Mills AIR 1973 Del 127 the earlier Delhi decision was followed observing thus:-

The appellant having allowed the time to pass and contested the petition for our years is estopped at a late stage from resiling from his conduct by raising the objection that notice under S.106 of the Transfer of Property Act had not been served. Since the appellant had failed to raise this objection at an early stage of the litigation, the Rent Control Tribunal was justified in concluding that the plea of want of notice had been waived by the appellant.

22. The net result is that I agree with the conclusion reached by my senior brother though for different reasons, and decree the suit for possession. In so far as the prayer for future mesne profits also hold that future mesne profits from the date of the suit, should be given to the plaintiff, since, even though defendants 2 to 9 could be treated as lessees till suit notice was received by them, they could be treated from the date they received the suit notice but refused to give back possession, only as persons in unlawful possession of the suit land. This aspect of mesne profits is necessarily to be considered in a

separate proceeding in the trial court under O.20, R.12 of the C.P.C., as directed by my learned senior brother also. The net result is the appeal is allowed, the judgment and decree of the trial court are set aside and the suit is decreed as indicated above. No costs.