

(1934) 02 MAD CK 0008
In the Madras High Court

K. Gnanadesikam Pillai and Others

APPELLANT

Vs

Antony Benathu Boopalarayar

RESPONDENT

Date of Decision : 14-02-1934

Acts Referred:

Transfer of Property Act, 1882 — Section 116

Citation : AIR 1934 Mad 458 : (1935) ILR (Mad) 75 : 155 Ind. Cas. 838 :
(1934) 40 LW 246

Hon'ble Judges : Sundaram Chetty, J

Bench : Division Bench

Judgement

Sundaram Chetty, J.—This appeal arises out of a suit filed by the plaintiff for the recovery of a Bum of Rs. 8,981-14-8 alleged to be due

under a registered lease-deed dated 19th January 1911 and executed by defendant 1, under which there was an agreement to pay an annual rent

of Rs. 368-8-0. Properties comprised in the lease-deed were mortgaged by defendant 1 with possession to the plaintiff under a mortgage-deed

dated 18th January 1911 for Rs. 2,500. The mortgage-deed and the lease-deed have been filed as Exs. A and E respectively. The suit is for the

recovery of the arrears of rent due under the aforesaid lease-deed and the charge created under Ex. E is also sought to be enforced. According to

the contention of defendant 1, the usufructuary mortgage was for a term of two years and the lease granted by the mortgagee was also for the

same period of two years, and that at the end of that term, he surrendered possession to the plaintiff, as he did not pay either the arrears of rent or

the mortgage amount. His case is that the plaintiff himself was in actual enjoyment of the properties since then. There is also the plea of limitation.

One of the questions for consideration is whether the lease in question evidenced

by Ex. E must be deemed to have been granted for a term of years only or for an indefinite term. On this point, we have to construe the terms of Exs. A and E. It is clear that the usufructuary mortgage deed and the lease deed are parts of the same transaction. Ex. A recites in clear terms that the other right is to be for a period of two years, on the expiry of which term defendant 1 should redeem the mortgage by paying a sum of Rs. 2,500. Instead of actually taking possession of the mortgaged pro-parties, the plaintiff granted a lease of the same to the mortgagor under Ex. E. In this lease deed, the cent fixed for each year is Rs. 368-8-0 which defendant 1 as lessee had to pay up to the time of redeeming the othi.

2. He agreed to pay rent every year by 19th January. Then there is the collateral agreement by way of mortgage, under which the properties mentioned in the schedule were offered as security for the payment of rent due under the lease deed. Ex. E is virtually a combination of a lease and a mortgage. It is true that, in the lease deed, there is no specific mention of the term of the lease, but we have to read both these documents together in order to understand the true intention of the parties. When the parties chose to fix a period of two years for the enjoyment of the properties by the mortgagee and for the redemption of the mortgage by the mortgagor, it is not unlikely that the lease was also intended to be for the same period as that of the mortgage. It seems to us that the term in the lease deed, that the rent is payable up to the time of the redemption of the othi should be understood as the time contemplated or fixed for redemption in the mortgage deed itself. Some argument was based upon the circumstance that the lease deed bears a stamp of Rs. 4. It is urged that if the lease is for a term of two years only, a stamp of Rs. 2 would be sufficient, but if it is a lease for an indefinite term, then a stamp for Rs. 4 would be necessary as per Clauses 3 and 4 of Article 35, Stamp Act. In this view, the learned Subordinate Judge treats the lease evidenced by Ex. E as one for an indefinite term. But we think that that is not the necessary inference to be drawn from the fact that the lease deed bears stamp of Rs. 4 as we have already said that Ex. E is a combination of a lease and a mortgage.

3. If the lease is for two years, the total rent payable would be between Rs. 700

and 800. If for the payment of this sum a collateral security of immovable property is also given, the document has to be viewed as a simple mortgage. When it is to be taken both as a lease and as a mortgage, it must bear the Stamp which is leviable in the case of a mortgage, which requires a higher stamp duty. It is possible that a stamp of Rs. 4 was used as, the document evidenced at simple mortgage also as stated above, Furthermore, even if there is some ambiguity as to the period of the lease really intended by the parties in the recitals in Ex. E, the evidence given by the plaintiff himself leaves no room to doubt what the real intention of the parties was. Even in his chief-examination, he admits that 2 years term was inserted to fit in with the period of the othi. And in his cross-examination, he would say that defendant 1 asked for the lease to last for the term of the othi, and that the talk was for 2 years from the beginning. He denies that there was any agreement for one year's lease.

4. On the other hand, he says that defendant 1 himself insisted on the lease being for 2 years. In the face of these admissions, the present contention raised on behalf of the plaintiff that the lease was intended for an indefinite term so as to last till the actual repayment of the mortgage amount cannot be accepted as correct. If the lease evidenced by Ex. E was for a fixed term of two years only, that lease must be deemed to have determined on the expiration of that period. If the lessee (defendant 1) continued to be in possession of the properties even after the determination of the lease by efflux of time, in what capacity was he in possession like that? Either he must have been a tenant holding over or a trespasser. u/s 116, T.P. Act, if a lessee remains in possession after the determination of the lease and the lessor accepts rent from the lessee or otherwise assents to his continuance in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year in the case of the lease of immovable property for agricultural or manufacturing purposes. According to the case of the plaintiff, there was a payment of Rs. 1,000 by defendant 1 in 1916 towards the rent due under the lease. If this is true, we can hold that the lessor assented to the lessee continuing the possession even after the determination of the lease. It is alleged in the plaint that the plaintiff granted receipt to defendant 1 at the time of this payment. Even in the notice issued to defendant 1 (Ex. F-1), reference was made

to this payment but no reply was sent by defendant 1 to that notice. Even in a suit subsequently filed by the plaintiff for the recovery of a sum of money due on an. other simple mortgage-deed executed by defendant 1, reservation of his right to sue for arrears of rent due under the lease was made.

5. If the main plea of defendant 1 that he surrendered possession at the end of the two years term is not believed, then there is nothing improbable in the plaintiff's story that in 1916 a sum of Rs. 1,000 was paid to him towards rent. We shall deal with the question of the alleged surrender presently. The plaintiff has sworn to the truth of the alleged payment in his evidence and this fact is not even denied by defendant 1 in the witness-box. The learned Subordinate Judge has believed the evidence of the plaintiff and we see no reason to disagree with his finding. If so, defendant 1's continuance of possession after the expiration of the original term of two years must be taken to be that of a tenant holding over. Coming now to the question, whether, as a matter of fact, defendant 1 did surrender possession at the end of two years, there is only oral evidence on both sides. (After discussing the evidence the judgment concluded). We therefore do not think fit to disturb the finding of the lower Court that the defendant 1 had been in possession of the properties in question even after the expiration of the original; term of two years. Now, a further question arises whether the plaintiff is entitled to recover arrears of rent for the whole period as claimed in the plaint. This claim is for more than 12 years before the date of the suit. The claim would not be barred by limitation, if the mortgage or charge created under Ex. E enures for the benefit of the whole of the claim, and if the payment of Rs. 1,000 towards principal and interest mentioned in the lease deed is also true. As we have already stated, defendant 1 must be deemed to be a tenant holding over, subsequent to the expiration of two years from the date of Ex. E. If so, a tenancy from year to year is created by operation of law. In the absence of an agreement to the contrary, we can take it that the same terms of the lease for the fixed period of two years also hold good for the fresh tenancy from year to year. It is argued on behalf of the respondent, that the charge, created under Ex. E for payment of rent should "also hold good "for the entire amount of rent due as arrears, since the creation of the fresh

tenancy from year to year.

6. This involves a consideration of the question what really are the terms of the lease as such, and what are outside the scope of the lease

transaction and are simply collateral to it. As we read the document, Ex. E, we find that it evidences a grant of lease of Immovable property,

whereby an annual rent is fixed and such rent is also to carry interest. The other part of the document evidences a mortgage created by defendant 1

as security for the payment of rent due under the lease deed. The decision of, a Division Bench of this Court, reported in Kutti Umma Vs.

Madhava Menon and Another, seems to be a direct authority, against the contention, put forward on behalf of the respondent. In that case, there

was a Verumpattam lease for one year executed by the mortgagor to the mortgagee which, after fixing the amount of rent, provided for payment of

interest, in case of default in the payment of rent on the due date, and it was a registered instrument. As regards the clause whereby the charge was

created, the learned Judges were of opinion that the clause was not a term of the lease, as a lease, which could be deemed to be imported into the

terms on which the lessee was allowed to hold over. In this view, they held that the claim for arrears of rent beyond the three years before the date

of the suit was, barred by limitation. In the present case, all that we can say is, that the mortgage created under Ex. E can only be enforced for the

recovery of rent due for the term of two years. After the determination of that lease, when the tenancy from year to year was created, it is not

possible to carry over this collateral security which is certainly no part of the lease transaction, so as to enable the plaintiff to claim the arrears of

rent for the whole of the, subsequent period, as if that mortgage was also created for the rent due subsequent to the transformation of the tenancy

into one from year to year.

7. The test is not whether the particular clause in Ex. E is or is not repugnant to the terms of the leaflet on the other hand, the true test is whether

this clause can really be deemed to be any part of the terms which constituted the transaction of the lease itself. In a recent decision reported in

Dasarathi Kumar Vs. Sarat Chandra Ghose and Another, , it was held that a stipulation in the original lease that at the expiration of the term, the

lessee should give up possession without notice, could not/be imported into the

new tenancy created by holding over and the acceptance of rent.

The principle of that decision is in consonance with the view we have expressed. If the mortgage created under Ex. B is of no avail to the plaintiff

for the recovery of rent due subsequent to the, expiration of the term of two years, he can only recover the rent due, for three years prior to date of

suit according to ordinary law. The plaintiff is therefore entitled only to the arrears of rent at the rate of Rs. 368-8-0 per annum for three years

before date of suit, together with the interest at 12 per cent, per annum on the amount of each year's rent from the date when it falls due, i.e., from

19th January 1924, 19th January 1925 and 19th January 1926 up to date of suit. In modification of the decree of the lower Court, a decree will be

passed in plaintiff's favour for the aforesaid amount, viz., Rs. 1,312-12-6 together with interest at 6 per cent, from the date of suit till realization,

recoverable from out of the family properties in the hands of defendants 2 to 4. In the peculiar circumstances of this "case, we think fit to direct the

parties to bear their own costs throughout.