

(1977) 04 MAD CK 0025
In the Madras High Court
Case No : S.C.P. No. 13 of 1977

Kochuman Mathew and Another

APPELLANT

Vs

T.N.K. Estates

RESPONDENT

Date of Decision : 20-04-1977

Acts Referred:

Constitution of India, 1950 — Article 133
Transfer of Property Act, 1882 — Section 115

Citation : AIR 1978 Mad 168

Hon'ble Judges : Ramaprasada Rao, O.C.J.;Suryamurthy, J

Bench : Division Bench

Advocate : S. Govind Swaminathan, for M.A. Rajagopalan, for the Appellant;
V.K. Thiruvengkatachari, for R. Vaidyanathan and K. Alagumalai, for the
Respondent

Final Decision : Allowed

Judgement

Ramaprasada Rao, Offg. C.J.

1. The defendants-respondents in Appeal No. 185 of 1970 on the file of this Court seek leave under Article 133 of the Constitution of India, to

prefer an appeal to the Supreme Court against the judgment and decree of this Court rendered therein. The relevant facts are The plaintiffs, who

owned a rubber estate of an extensive area, leased out the same to one English and Scottish Joint Co-operative Wholesale Society Ltd., London,

and the period of the demise was from 1940 and ending with 1988. The English Society continued in possession of the demised property but

subject to the covenant that they had an option to surrender the demised lands during the course of the period of the lease. It transpires that almost

contemporaneously with the beginning of the lease, the English Society (hereinafter referred to as the head lessee) leased out the property to the

defendants (hereinafter referred to as the under lessees) for the very same period. Under the lease deed which governed the relationship of head

lessee and the under-lessee, it was provided --

In the event of the lessor surrendering to the head lessor the lands demised under the head lessee for any reason whatsoever, the lessee shall also

surrender the leased lands to the lessor but not otherwise, and the lessees shall, in addition, pay all rents, avagasams, Government dues and interest

etc., till the end of that year and also perform and observe all covenants and conditions as hereinbefore provided and shall not be entitled to

remove and carry away all or any buildings, machinery, plant or other improvements then existing and also they shall not be entitled to claim

compensation for the same. In this case they shall execute a deed of surrender at their cost.

The reference to the lessor in the above covenant is to the head-lessee and the reference to the lessee is to the under-lessee. It is common ground

that on 25-3-1960 the head lessee surrendered the demised property to the owners, and it appears that they got a benefit out of it. On the basis of

the covenant as above, the original lessor (the owners) sought for possession of the demised property by virtue of the clause excerpted above. The

defence was that clause 14 was not a valid and enforceable covenant and that on the basis of it a suit for possession would not lie but only a suit

for specific performance. The learned Subordinate Judge dismissed the suit on the ground that there was no actual surrender and that the covenant

could only be enforced by the head lessee and not by the plaintiffs as owners. The owners took up the matter in appeal, and the argument of Mr.

V. K. Thiruvengkatachari, which found favour with a Division Bench of this Court, was to the effect that, when the head lessee surrendered the

lease, the lessor (the owner) under the later part of Section 115 of the T. P. Act could seek for possession, without filing a suit for specific

performance. The learned Judge accepted the argument as perfectly logical and as being unanswerable, in the end, therefore, they allowed the

appeal in part, but remanded the subject-matter for evaluation of the improvements, if any, made by the under-lessee, and for the ascertainment of

mesne profits. In that sense the appeal was allowed in part.

2. Initially the decree that was drafted could not spell out the intention of the

learned Judges clearly. Therefore it was amended on the application of the parties. While amending the decree, the learned Judges made it clear that Issues 1, 2 and 3 framed in the original action had been fully decided and were no longer open for trial on remand by this Court. They further explained that Issues 4 and 5 alone shall be adjudicated upon further on remand. In the result, they made the following observation --

The result is that the decree in Appeal 185 of 1970 is clarified by directing the trial of Issues 4 and 5 and Issues 6 and 8 in the light of the observations and directions given by this Court. Issues 1, 2 and 3 have been decided by this Court and are not triable by the trial Court.

Issues 1, 2 and 3 in the trial Court were as follows --

1. Whether the deed of surrender dated 23-5-1960 by the English and Scottish Joint Co-operative Wholesale Society in favour of Raja Shanker

Royal is not valid ?

2. Whether the plaintiffs are not entitled to invoke the provisions of Clause 14 of the deed of sub-lease dated 9-8-1946 ?

3. Whether the plaintiffs are not entitled to the benefit of and enforce the provisions incorporated in clause 14 of the Sub-lease agreement dated 9-8-1946 ?

3. Mr. Govind Swaminathan has come up with this application for leave to appeal to the Supreme Court under Article 133 of the Constitution of

India. His case is that, inasmuch as a portion of the matters in issue has become final in the eye of law and as the order of remand has specifically

circumscribed the further trial of certain issues, and as the subject-matter raises questions of law of general importance and since they are

substantial in nature, leave has to be granted. Opposing the grant of leave, Mr. Thiruvengkatachari for the owners submits, firstly, that no substantial

question of law is involved in this case, as it is very rare to provide in an under lease a covenant like the one in question. Secondly he submits that it

is open to the defendants-petitioners to canvass the correctness of the conclusions of the Court after a final decision is reached on remand and

after an appeal is filed there from and decided by this Court. Thirdly, he would say that, as no appeal against an order of remand is provided to the

Supreme Court, and as the subject is not yet over, no leave should be granted. Fourthly, he would submit that it is not necessary to file a suit for

specific performance to obtain possession and that a suit for possession straightway would lie. Lastly, he would say that there is a Bench decision

of this Court rendered by two learned Judges, who have since retired from the Court and that, as there is no other precedent available to the

contrary, this Bench should rather agree with that opinion and should not grant leave on one or other of the grounds contemplated in Article 133 of

the Constitution.

4. Whether a particular case poses a substantial question of law is essentially a matter which depends upon the merits of each case. What is a

substantial question of law, would, of course, depend upon the facts and circumstances which arise in a particular situation and it would be

hazardous to iron jacket an elastic expression, such as a "substantial question of law" within certain set norms and principles. That a substantial

question of law does arise in the instant case is seen from the fact that the appellants have raised an important plea which is based upon Section

115 of the T. P. Act. Section 115 of the T. P. Act consists of two parts and it deals with the effect of surrender and forfeiture on under leases. The

section runs as follows --

The surrender, express or implied, of a lease of Immovable property does not prejudice an under-lease of the property or any part thereof

previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original

lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by and the contracts binding on, the under-lessee

shall be respectively payable to and enforceable by the lessor.

We are now concerned with the latter part of the section which says "unless the surrender is made for the purpose of obtaining a new lease, the

rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor." The argument of

Mr. Govind Swaminathan, learned counsel for the petitioner, is that the respondents have a right to enforce the covenant, but not to seek redress

as if it is automatically enforceable. It is in this sense that the plea of limitation was raised. The learned Judges would not countenance this

argument. But the question in the instant case is whether a suit for possession simpliciter could be filed without regard to the letter and spirit of the

latter part of Section 115 of the T. P. Act. This certainly raises a substantial question of law of general importance.

5. Another argument is that it is unusual to provide for such a covenant like the one extracted above in instruments creating under-leases. This may

be so, but that, by itself, could not be a ground to refuse leave, if in a given case the question for determination is what is the scope and extent of

the rights and obligations which arise as a result of such a covenant ? This again is a matter which raises an important and rather a substantial

question of law.

6. Mr. V. K. Thiruvenkatachari would say that it is still open to the petitioners to agitate the correctness of the findings on Issues 1, 2 and 3 after a

decision is rendered by the trial Court on remand and when the matter comes up for appeal again before this Court, and thereafter. It is very

doubtful whether in the circumstances of the case, such a course is available to the petitioner. When their attention was drawn to the fact that the

decree originally drafted was not clear, the learned Judges clarified it in the manner already stated. They observed that Issues 1, 2 and 3 have been

decided by this Court and are not triable by the trial Court. In view of this specific observation it can reasonably be presumed that, in so far as

Issues 1, 2 and 3 are concerned, the suit is not alive and everything relating to them has been adjudicated upon. Even adopting the language of the

Supreme Court in *Sardar Syedna Taher Saifuddin Saheb Vs. The State of Bombay*, , we are of the view that the specific decision and conclusion

arrived at by the learned Judges was not on a preliminary point and, as is obvious a decree had already been passed by them in relation to the

three issues as above. AIR 1933 58 (Privy Council) which is oft quoted, is an authority for the proposition that no appeal lies against an order of

remand. The Supreme Court in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, has also observed that Section 105(2), Civil

P. C. can have no application to appeals to the Supreme Court, since no such appeal lies to the Supreme Court against an order of remand. But in

the instant case, we are of the view that, though the suit formally and technically can be said to be alive, certain material issues affecting the rights of

parties have been finally decided and in that sense the request of the petitioners for grant of leave under Article 133 of the Constitution is justified.

7. Another contention of Mr. Thiruvengkatachari is that we should rather agree with the conclusion of another Division Bench, since there is no contrary opinion available in the shape of precedent on such matters. Far from assisting learned counsel, we are of the view that it is one of the formidable grounds on which we should grant leave, provided that the other requirements of Article 133 of the Constitution are satisfied.

8. Article 133 of the Constitution lays down certain norms for the grant of leave to appeal to the Supreme Court, namely, that the case should involve a substantial question of law of general importance and that in the opinion of the High Court the question needs to be decided by the Supreme Court. We have already expressed ourselves that on the question of limitation and on the frame of the suit, a substantial question of law of general importance has arisen. In our opinion, and in the absence of authoritative precedent on the subject, it is desirable that the question arising herein be decided by the Supreme Court. Leave granted.