
(1951) 12 MAD CK 0016
In the Madras High Court
Case No : Second Appeal No. 1041 of 1948

M. Gopalakrishna Menon

APPELLANT

Vs

K.P. Vellakutty

RESPONDENT

Date of Decision : 06-12-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 64
Transfer of Property Act, 1882 — Section 111

Citation : AIR 1953 Mad 399 : (1952) 2 MLJ 34

Hon'ble Judges : Subba Rao, J

Bench : Single Bench

Advocate : D.A. Krishna Variar, for the Appellant; N. Sundara Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Subba Rao, J.—The question raised in the second appeal is one of implied surrender of a lease. The plaintiff schedule items of property were

owned by the kanoor tarwad. In the partition, that was effected between the members of the tarwad, the said items were set apart to the share of

Chamukutti Nair. The plaintiff, who was holding the said items under a prior lease, attorned to him. There was an agreement between the plaintiff

and Chamukutti Nair, in and by which the plaintiff was allowed to continue in possession of the properties on a rental of 334 paras of paddy from

1940-31. On 16-2-1943, the plaintiff executed a pattomchit, Ex. P. 1, whereunder the rent payable was fixed at 264 paras of paddy.

Meanwhile, the defendant, who obtained an assignment of the decree obtained against Chamukutti Nair, attached the said properties, brought

them to sale and purchased them on 19-3-1945 and took delivery on 30-8-1945. It may be mentioned that the attachment was prior to the date

of Ex. P. 1. The plaintiff filed O. S. No. 236 of 1945 for recovery of possession of the property from the defendant, mainly on the ground that as

Ex. P. 1 did not come into effect, he would be in possession under his earlier oral lease. The defendant pleaded, *inter alia*, that there was an

implied surrender of the earlier lease by the execution of Ex. P. 1, and, therefore, the plaintiff would not be entitled to possession. The learned

District Munsif held that the implied surrender was not valid, since Ex. P. 1 was not operative, having been created while the attachment was

pending over the properties. In appeal, the learned Subordinate judge took the same view and held that, as Ex. p. 1 was inoperative and invalid,

the respondent should be deemed to be in possession as lessee under the earlier lease. The defendant preferred the above second appeal.

2. The learned counsel for the appellant contended that the execution of Ex. P. 1 operated as an implied surrender and that the fact, that it was

executed after the attachment, would not affect the question as, though the lease was void against all claims enforceable under the attachment, it

was otherwise valid. He also contended that, if it operated as substitution of the earlier lease, the circumstance that subsequently the leasehold

properties were brought to sale and purchased free from the lease deed, would not invalidate the surrender that was already effected.

3. A lease of immovable property may be determined in any of the modes prescribed u/s 111, T. P. Act. The relevant provision of Section 111

reads:

111. A lease of immovable property determines (f) by implied surrender

Illustration to Clause (f) : A lessee accepts from his lessor a new lease of the property leased , to take effect during the continuance of existing

lease. This is an implied surrender of the former lease, and such lease determines thereupon.

4. A leading decision on the scope of an implied surrender is --"Doe d. Egremont V. Courtenay (1848)11 Q.B. 703. The following neat statement

of law on the subject by Coleridge J. may be quoted :

Where the new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender from the acceptance

of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void

and in case of an express surrender so expressed as to show the intention of the parties to make the surrender only in consideration of the grant,

the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional, to be void

in case the grant should be made void.

The said principle was accepted and applied by Farewell L. J. in --"Zick v. London United Tramways", (1908) 2 K.B. 126. In --"Jamini Mohan

v. Debendra Narayan", 71 Ind Cas 976, the Calcutta High Court applied that principle to a case arising u/s 111, T. P. Act. There the facts were :

A Hindu widow granted a permanent lease at a fixed rent to the predecessor-in-interest of the defendant. The reversioner filed the suit to recover

possession on the ground that the lease granted by her was in excess of her authority as a Hindu widow. The defendant raised the plea that, if the

lease ceased to be operative upon the death of the lady, he was entitled to fall back upon another lease, which was in existence, when the

permanent lease was granted by the widow. The question in that case was whether the acceptance of the lease of 26-10-1869 by the predecessor

of the defendant must be taken to be equivalent to an implied surrender of the prior lease. The learned Judges in holding that the lease of 26-10-

1869 did not operate as an implied surrender of the prior lease, made the following observations at page 978:

It is well-settled that an implied condition of surrender by operation of law is that the new lease should be a valid one. Accordingly, a lease which

is void or voidable or which does not pass interest according to the contract of the parties does not operate as a surrender." Much the same view

has been expressed by Collins C. J. and Shephard J. in --"Bamunni v. Kerala Varma Vana Raja", 15 Mad 163. In that case, the "karnavan" of a

Malabar "ko Vila gain" executed a "kuikanom" lease of certain land in 1840 and in 1861 his successor demised the same land to the same tenants

in perpetuity. The next "karnavan" sued in 1889 to recover possession of the land. The learned Judges held that the perpetual lease, as being of an

improvident character, was "ultra vires" and void and, therefore, the execution of that lease would not have the effect of a valid surrender of the

prior lease, The learned Judges stated at page 167 : ""In our judgment, however, any surrender by operation of law that might have ensued on the

taking of the perpetual lease was nullified by the plaintiff's repudiation of the perpetual lease. The surrender must fall to the ground with the transaction on which it is supported." The learned counsel for the appellant attempted to distinguish these cases on the ground that the subsequent leases in both the cases were void from the inception, whereas in the present case, the lease was void only against all claims enforceable under the attachment but otherwise valid. Section 64, C. P. C., which invalidates transfers made after attachment runs as follows:--"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

It is true that, under this section a transfer is not absolutely void, that is, void as against all the world, but void only against all the claims enforceable under the attachment. So too, the permanent lease executed by the widow in --"Jamini Mohan v. Debendra Narayana", 71 Ind Cas 976 and that executed by the "Karnavan" in --"Ramunni v. Kerala Varma Valia Raja", 15 Mad 163. The alienations there were also voidable in the sense that it was open to the reversioner in one case and the succeeding karnavan in the other case to elect to treat them as invalid. The real principle is not whether a transaction is voidable or void, but whether it conveyed any interest according to the contract of the parties. The law implies a condition that the surrender would be invalid, if the transaction, on which the surrender rests, turns out to be void. In the present case, Ex. P. 1 was executed when the attachment by the defendant was subsisting and, therefore, was void as against all claims enforceable under the attachment. The defendant brought the property to sale and purchased it himself. His sale by reason of Section 64, C. P. C., was not subject to the lease created by the original owner subsequent to the attachment. In view of the events that happened. Ex. P. 1 turned out to be a void document and the condition implied, viz., where a new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease, would operate and, therefore, the latter transaction could not effectuate as an implied surrender. There is no force in the learned counsel's argument that if the debt was paid off or the attachment ceased for one reason or other, Ex. P. 1 would have conveyed interest,

for in that case, Ex. p. 1 would have been put into effect and the implied condition would not have been broken. I, therefore, agree with the court

below that there was no implied surrender of the earlier lease and the plaintiff is entitled to a decree for possession.

5. The second appeal fails and is dismissed with costs. No leave.