

(1998) 03 MAD CK 0012

In the Madras High Court

Case No : S.A. No. 1153 of 1984 and C.M.P. No's. 3947 and 3948 of 1985, 7989 and 7990 of 1993

M. Narayana Aiyangar (died) and others

APPELLANT

Vs

M. Chinnaswamy (died)

RESPONDENT

Date of Decision : 31-03-1998

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : (1998) 03 MAD CK 0012

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : P. Bagyalakshmi, for the Appellant;

Judgement

K. Sampath, J.—The legal representatives of plaintiffs 1 and 2 and plaintiffs 3 to 8 are the appellants. The plaintiffs filed suit in O.S. No.

266/79 before the District Munsif against one Chinnaswamy for a permanent injunction or in [he alternative for recovery of possession averring as

follows:

The coconut topes set out in the plaint schedule belong to the plaintiffs absolutely. They had given a licence to the defendant Chinnaswamy for

plucking the coconuts. The licence was liable to be terminated at any time. On 15.12.78, the plaintiffs terminated the licence and called upon the

defendant to surrender possession. The plaintiffs also informed the defendant that on and from Thai 1979, the defendant should not pluck coconuts

in the coconut topes. They also issued notice under Ex. A-4 dated 16.1.79 and Ex. A-6 dated 7.2.79 terminating the licence. Even after such

termination, the defendant entered the coconut topes and attempted to cause damage in an unauthorized way, plucking 500 coconuts worth Rs.

390/- and removed them. There was a reply under the original of Ex. B-1 dated 14.2.79 on behalf of the defendant that the defendant was

cultivating the suit land and that he was entitled to the benefits of the Cultivating Tenants Protection Act. The said averment was a false one.

Notwithstanding the protest on the part of the plaintiffs on 19.2.79, the defendant put up a hut in the suit property with the assistance of his

henchmen. In case the Court should find that the defendant had possession of the site also, a decree should be passed for recovery of possession

in favour of the plaintiffs. A permanent injunction was also necessary restraining the defendant from entering upon the suit property and plucking the

coconuts. Alternatively, there should be a decree for possession in favour of the plaintiffs and for damages for a sum of Rs. 300/- and future mesne

profits.

2. The suit was resisted by the defendant contending inter alia as follows:

The suit was barred for non-joinder of necessary parties. The fifth plaintiff's father Shesha Iyengar had married two wives and the son and the

daughter of Shesha Iyengar, and they had not been made parties to the suit. Muthu Iyengar, father of plaintiffs 1 to 3 had given the suit coconut

topes and the suit land to the defendant about 35 years prior to the suit for an yearly rent of Rs. 40/-. This arrangement was agreed and the

defendant had been cultivating vegetables in the suit land. The lease amount was being increased periodically and during five years, pending the

suit, the rent had been increased to Rs. 120/- per year. The defendant was not a mere licensee but a lessee entitled to the benefits of the Tamil

Nadu Cultivating Tenants Protection Act. The other allegations in the plaint as if he had caused damages to the coconut topes and removed the

coconuts and that he was liable to pay the damages were false. He had sent the lease amount of Rs. 120/- for the year 1979 along with the reply

notice. The suit was therefore liable to be dismissed.

3. The trial Court framed the necessary issues and on an appreciation of oral and documentary evidence and the materials on record found that the

defendant had not established that he raised vegetables in the suit land, that he was a lessee, that notice u/s 106 of the Transfer of Property Act

was mandatory and the same had not been given and the suit was liable to be dismissed. In coming to that conclusion, the trial Court relied on the

following Judgments: (1) P. Venugopala Pillai Vs. V. Thirunavukkarasu and Others, , (2) Sultan Ahmed Rowther v. State of Madras, (1954) 5

S.T.C. 166, (3) Renga Iyengar v. Sivasamipandaram, (1977) 2 M.L.J. 265 : 90 L.W. 560 and (4) State of Tamil Nadu Vs. C. Vadiappan,

4. The trial Court distinguished the two decisions, namely, A. Govindaswami Vanniar v. Tmt. S. Mahalakshmi Ammal, (1963) 2 M.L.J. 137 = 76

L.W. 378 and Venkatachalapathy Odayar Vs. Rajalakshmi Ammal, . By his judgment and decree dated 31.8.1982, the learned District Munsif

dismissed the suit. The appeal A.S. No. 27/1983 filed by the plaintiffs before the Second Additional District Judge's Court, Tiruchirappalli, was

also dismissed by judgment and decree dated 24.2.1984 concurring with the decision of the trial Court. Aggrieved, the present Second Appeal

has been filed. At the time of admission, the following substantial question of law was framed for decision in the Second Appeal:

Whether the Courts below are right in holding that the mere collection of usufructs from coconut tope will amount to a lease and therefore

governed by the provisions of the Cultivating Tenants Protection Act?

5. Pending Second appeal, plaintiffs 1 and 2 died and their legal representatives have come on record as appellants 9 to 12. The defendant also

died, pending Second Appeal and his legal representatives have been brought on record as respondents 2 and 3.

6. Though the respondents have been served, they have not chosen to appear and contest the Second Appeal. The learned Counsel for the

appellants submitted that the Courts below have concurrently found that the defendant had not established that he was cultivating vegetables in the

suit land besides collecting the usufructs. When such a finding had been reached by the Courts below, they ought to have further held that what

was given was only a licence, that the licence had been validly terminated and the plaintiffs were entitled to recovery of possession, damages for

use and occupation in respect of the suit land. In support of the said submission, the learned Counsel relied on a number of decisions, the latest and

the last of them being the Judgment of P. Sathasivam, J. in Senniappa Nadar v. T.R. Sarojini Ammal and another, (1996) 2 M.L.J. 500 = 1996-1-

L.W.291,

7. In Board of Revenue and Others Vs. A.M. Ansari and Others, while dealing

with the distinction between a lease and a licence, the Supreme

Court relied on *Kauri Timber Co. Ltd. v. Commissioner of Taxes*, 1913 A.C. 776 in which Lord Shaw observed that

in order that an agreement can be said to partake of the character of lease, it is necessary that the grantee should have obtained an interest in and

possession of land. If the contract does not create an interest in land then to use the words of Lord Coleridge, C.J. in *Marshall v. Green*, (1875) 1

CPD 35, the land would be considered as a mere warehouse of the thing sold and the contract would be a contract for goods,

and summarized the result of Lord Denning's discussion in *Errington v. Errington*, (1952) 1 All E.R. 149:

The result of all these cases is that, although a person who is let into exclusive possession is, prima facie, to be considered to be a tenant,

nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.

And as observed by Somervell, L.J. in *Cobb v. Lane*, (1952) 1 All E.R. 1199:

..... the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties.

And also by Denning, L.J. in the same case

The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the

occupier should have a personal privilege with no interest in the land?

And ultimately the Supreme Court approved the above dictum that it is always a question of intention of the parties, which is to be inferred from

the circumstances of each case and one should look only to the substance and not the form.

8. The Supreme Court in that case also referred to *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, and relied on the ratio laid down in that case

regarding the distinction between a lease and a licence.

9. Thus the intention of the parties is the ultimate test to find out as to what was given by the owner. It is already found that the defendant had not

made out a case that there was an oral agreement between him and the father of plaintiffs 1 to 3, that he could also raise crops in the suit land. This

is a factual finding which sitting under Second Appeal, it is not possible to interfere with. Even if the respondents have appeared and contested, this

factual finding would not have been disturbed. Consequently the finding that what was permitted was only the right to pluck coconuts from the

trees in the topes stands and by no stretch of imagination could it be said that there was a lease created in respect of the suit land.

10. P. Sathasivam, J. in Senniappa Nadar's case, already referred to has noticed a number of decisions on the question and held that the right to

collect usufructs from the coconut trees is a licence and not a lease. In the course of his judgment, the learned Judge has referred to the decisions,

taking a contrary view and ultimately followed the decisions rendered by Bellie, J. in *V. Natarajan v. Veerabadra Udayar and another*, 1990-1

L.W. 186 and *Manx Thevar v. R.M. Venkatachalam* 1992-2 L.W. 234. Having held that the defendant had not established that he had a right to

cultivate the lands in the suit land and having further held that he had not established that he raised vegetables, the Courts below made a mistake in

holding that what was given to the defendant was a lease and that he was entitled to the benefits of the Cultivating Tenants Protection Act and

therefore the remedy if any of the plaintiff was to proceed under the relevant sections under the said Act.

11. In coming to that conclusion, the Courts below relied on the judgment of Mohan, J. as he then was, in *State of Tamil Nadu Vs. C. Vadiappan*,

in that case, the learned Judge relied on the judgment of Ranga Iyengar Vs. Sivaswami Pandaram, wherein V. Ramaswami, J. as he then was held:

Since in this case the lease was not a lease of the land but it was a lease of the right to cut and remove coconuts from the trees standing on

immovable property, it is a lease of immovable property, itself and as held by this court it is also an agricultural lease.

and also the decision of the Allahabad High Court in *Shiv Dayal Vs. Putto Lal and Others* wherein it was held that a mortgage of a fruit bearing

tree is a mortgage of immovable property and held that what was granted was a lease and not a licence. In *A. Govindaswami Vanniar v. Smt. S.*

Mahalakshmi Ammal and others, (1963) 2 M.L.J. 137 - 76 L.W. 378; the matter arose in the following manner:

The document (yearly lease of coconut topes) makes it clear that the right created under the deed was only in respect of the trees. The preamble

as well as the schedule indicate that the agreement entitled the party to the deed only to collect the produce from the trees. The clause in the

agreement that the person would be entitled to repair the land as so to render it useful for obtaining the produce would seem to imply that no

interest in land was created, for if such a right or interest was intended to be created under the document there was no necessity for this clause at

all. The privilege to till the soil was confined only to three of the five topes mentioned in the document. More significant clause was an undertaking

on the part of the lessee not to cultivate any other crop on the land. What was granted was the usufruct of the trees coupled with a license to use

the land and not any lease of the land. The lessee is not a "cultivating tenant" under the Cultivating Tenants Protection Act.

As there could be an agricultural operation only if two things co-existed, namely, basic and subsequent operations the mere existence of the latter

alone would not make the operation an agricultural one. That does not mean that both sets of operation should be done by the same individual or

within a specified period of time. There can be an agricultural tease in regard to coconut trees planted already and existing on the land at the time

the lessee takes the property on lease.

The right of the lessee was to enjoy only the coconut yield from the trees which derived their nutriment from the land. It may be that such a benefit

amounts to an interest in immovable property. But that is not the same thing as saying that there has been a transfer of the land itself.

12. In *Murugesan v. Sundarlal*, (1981) 2 M.L.J. 179 = 94 L.W. 298, V. Balasubramanian, J. referred to *Arumugha Vettian v. Angamuthu Nattar*,

(1965) 1 M.L.J. 170 = 77 L.W. 745 and *Renga Iyengar v. Sivaswami Pandaram* (supra) and on the facts and circumstances of the case dealt with

by him, the learned Judge held that the person who had taken the property had clearly declared that he had no right of possession whatever in the

land on which the coconut topes stood and that the subject matter of lease in his favour was strictly limited to the enjoyment of the usufruct from

the coconut trees, in consideration of payment of rent at a certain rate, the learned Judge held:

Where, therefore, the lease only impinges on the usufruct of the trees standing on the land and where, as in this case, land is severely excluded

from the ambit of the subject-matter of the lease, then, it would not be proper to regard the lessee as a cultivating tenant within the meaning of the

Act.

13. In *Sivachidamba Ram Vs. Annamalai Mudaliar and Another*, as he then was, held as follows:

In the present case, the controversy between the parties cannot be solved by merely giving the finding as to whether the demise was of the

usufructs alone or of the land also. There ought to be a probe into the further question as to whether the plaintiff fulfils the character of a cultivating

tenant under the Act and an answer found therefore on factual materials. For this, the Court will also find out as to whether the land was

transferred for cultivation, namely, the use of the land for purposes of agriculture or horticulture and as to whether the plaintiff contributed his own

physical labour or that of any member of the family in the cultivation of the land.

14. So far as the present case is concerned, the decision of Mohan, J. in *Saravanan's* case, already referred to is clearly distinguishable and the

ratio of the decision in *Senniappa Nadar v. T.R. Sarojini Ammal and another*, (supra) by Sathasivam, J. alone will apply. I respectfully follow the

decision and hold that what was given to the defendant by Muthu Iyengar, father of plaintiffs 1 to 3 was only a licence to pluck coconuts and not

any right to cultivate the lands. When once it is held that it was a licence, it follows that no notice u/s 106 of the Transfer of Property Act would be

necessary.

15. In view of the discussion above, the decision of the Courts below holding that the suit was not maintainable, and that the suit was barred for

not complying with the mandatory requirements of Section 106 of the Transfer of Property Act, has to be set aside. Consequently, the substantial

question of law is answered in favour of the appellants and the Second Appeal will stand allowed. The judgments and decrees of the Courts below

are set aside and the suit in O.S. No. 266 of 1979 on the file of the District Munsif Court, Thuraiyur, will stand decreed. However, there will be no

order as to costs. It is brought to my notice by the learned Counsel for the appellant that pending Second Appeal, there was a direction by this

Court in a Civil Miscellaneous Petition to the defendants to deposit a particular sum of money as a condition for stay, that this condition was not

complied with and that therefore the appellants had taken possession of the suit property. Consequently all the C.M.Ps are closed.

On the matter being posted for "being mentioned", it is represented by the learned Counsel for the appellants that notwithstanding the non-compliance of the conditional order by the respondents, the appellants had not taken possession, and that therefore, the alternative relief prayed for in the suit viz., recovery of possession may be granted. The representation is accepted and in modification of the order already passed in the Second Appeal, there will be a decree for recovery of possession in O.S. No. 266 of 1979 on the file of the District Munsif, Turaiyur.