
(1956) 03 MAD CK 0016
In the Madras High Court

Meenakshi Amma

APPELLANT

Vs

Kizhakke Valath Narayani and Others

RESPONDENT

Date of Decision : 09-03-1956

Acts Referred:

Transfer of Property Act, 1882 — Section 111(f)

Citation : (1956) 2 MLJ 235

Hon'ble Judges : Ramaswami, J

Bench : Single Bench

Judgement

Ramaswami, J.—These are two connected appeals arising from the decrees and judgment of the learned Subordinate Judge of Ottapalam in

A.S. Nos 97 and 98 of 1950 modifying the decrees and judgment of the learned District Munsif of Chowghat, in O.S. Nos. 299 and 127 of 1949.

2. The facts are : Exhibit B-2 is a copy of the pattamchit executed by the defendants' predecessor Itteeri in favour of the then Karnavan of the

plaintiffs family and a junior member. That document recites that the properties were already in the possession of Itteeri as a lessee and that he was

taking Verumpattam lease with the liability to pay an annual rent of 4572 paras of paddy Exhibit B-3 is a possessory mortgage deed executed by

the Karnavan and a junior member of the plaintiffs' tarwad to Itteeri's son Velu in respect of the properties. It recites that the properties were

possessory mortgaged to Velu for a sum of Rs. 250 It also recites that the properties were in the possession of Velu as a tenant The document

finally states that out of the pattam of 45 paras and 3 3/4 narayams of paddy, 35 paras might be appropriated by Velu towards the interest on the

mortgage amount and that the balance of 10 paras 3 3/4 narayams should be paid to the mortgagors. The term of the mortgage was one year.

After that period the mortgagee was to surrender possession of the properties. Provision was also made for setting off the amount due from the mortgagee against the mortgage amount at the time when possession had to be surrendered. These are undisputed facts On the mortgagors seeking to redeem the property, because by operation of Madras Act IV of 1938 as subsequently modified by Act XXIII of 1948, the mortgage had become extinguished, they were met with the contention that delivery of possession could not be given because the fact of a tenant's taking a mortgage of land comprised in his holding from his landlord does not of itself extinguish the tenancy by merging the rights of the tenant in those of the mortgagee and the effect of such a mortgage on the tenants' rights would be merely that they would be in abeyance and that when the landlord redeemed the mortgage, the parties would revert to their former position, and the landlord would not be entitled to get possession of the land except by ejecting the tenant in due course of law. In other words, it is clear that the mortgagors want to evict these defendants and take possession of the property and the defendants are setting up fixity of tenure in order to defeat that claim of the plaintiffs.

3 Both the lower Courts accepted this contention of the defendants which is based upon the judgment of the Allahabad High Court in Kallu v.

Diwan I.L.R.(1902) All. 437.

4. The defeated mortgagors prefer these appeals on the ground that the prior leases got terminated with the mortgage and that the lessee's interest merged in the mortgage right at its acquisition as a large and superior interest, and secondly that on accepting the mortgage there was an implied

surrender of the leasehold. This contention is based upon a recent decision of the Travancore-Cochin High Court in Velu v. Lakshmi AIR 1953

T.C. 584.

5. Therefore, the short point for determination before me is whether the contention of the defendants which has been accepted by the lower Courts or the contention put forward before me by the plaintiffs is correct.

6. I have no hesitation in accepting the contention of the plaintiffs advanced before me based upon the decision in Velu v. Lakshmi AIR 1953 T.C.

584. It is a case almost identical with the facts of the present case. In fact it is one of the rare instances where the learned advocate has been able

to hand over to me a decision on all fours with the appeals under consideration. In that case the facts were: Kidangaserry Tharanananellur Illom, the jenmi, leased on verumpattom an item of land to Kurunhikkattail Manickan and another item to Manali Makkotha. During the subsistence of these leases the lessor in the year 1080 executed an usufructuary mortgage and in 1092 a purankadam deed to Manickan's son and heir Raman. These were possessory mortgage and purankadam which formed the basis of the suit.... In 1081 Makkotha attorned to Raman. After obtaining the purankadam Raman apportioned an amount of Rs. 50 from out of the mortgage money of Rs. 200 and a further advance of Rs. 50 for the purankadam upon the item in Makkotha's possession as lessee and assigned that part of his rights to Makkotha. The illom assigned its right over both the items to the plaintiff in the suit in 1120. Meanwhile the rights of Makkotha had by several transfers and transmissions devolved upon Kallath Kochu-raman. Kochuraman surrendered the property to the plaintiff. Having thus obtained possession of one of the items on payment of the proportionate part of the mortgage and purankadam amounts, he brought the suit for redemption of the other hem on payment of the balance amount and claiming khas possession though the mortgagee was not inducted into possession along with the mortgagee on the allegation that the antecedent lease terminated with the mortgage, whereafter the relationship between the parties was merely one of mortgagor and mortgagee and not of lessor and lessee. The defence was that the lease did not terminate with but survived the mortgage whose redemption would have the effect of only freeing the property from the encumbrance thereunder leaving the lessee in possession thereof as such. The question that arose for consideration was as regards the effect of the mortgage transaction upon the pre-existing lease. The learned Judge, Subramania Iyer, J., discussed the contentions of the appellants before him from two points of view to which I have, already made reference viz., that firstly, the lessee's interest got merged in the mortgage right at its acquisition as a large and superior interest and secondly, that on accepting the possessory mortgage there was an implied surrender of the leasehold. The learned Judge construed Section 111, Clause (f) of the Transfer of Property Act and found that the principle underlying it was that whenever a certain relationship exists between two parties in respect of a subject-matter if the two sets of

relationships cannot co-exist as being inconsistent and incompatible, that is to say, if the latter can come into effect only on termination of the earlier

that would be deemed to have been terminated in order to enable the latter to operate. Therefore, the acceptance by the lessee, who takes a

possessory mortgage of his leasehold from the lessor, of the obligation to surrender the property on redemption by payment of the mortgage

money necessarily implies the non-existence of his rights to possession of the property as lessee. There is therefore an implied surrender of the

lease with the execution and acceptance of the possessory mortgage. It is unnecessary for me to discuss this matter further because I respectfully

adopt the reasoning of the learned Judge and hold that in a case of this nature first of all the lessee's interest gets merged in the mortgage right at its

acquisition as a large and superior interest and secondly, that on accepting the possessory mortgage there is an implied surrender of the leasehold.

7. Then turning to the Allahabad decision, which incidentally has not been noticed in the aforesaid decision cited just now, I respectfully prefer not

to follow this decision for the following reasons. The facts of that case were: The Court of first instance (Munsiff of Kairana) found that the

mortgaged land was identical with that which the defendants asserted to be their tenancy, and therefore gave the plaintiff a decree for redemption,

though not for possession. The plaintiff appealed, and the lower appellate Court (Additional Subordinate Judge of Saharanpur) modified the

decree of the first Court by decreeing possession in favour of the plaintiff. The tenants in that case were found to be no more than non-occupancy

tenants and it was held by that lower appellate Court that by accepting the mortgage they had by their own act changed the nature of their

possession from that of tenants to that of mortgagees. There was an appeal to the High Court and it was heard in the first instance by Banerji, J.

The relevant portion of the judgment of Banerji, J., is as follows:

I take the lower appellate Court to hold that when the defendants took a mortgage of the land of which they had been non-occupancy tenants, they

gave up the tenancy and became mortgagees, and thus ceased to be tenants. There can be no doubt on the findings that the defendants had at the

date of the mortgage no right of occupancy in respect of the mortgaged land. It is also noticeable that the mortgage deed does not purport to

mortgage the zamindari rights of the mortgagor maintaining the tenancy rights of the mortgagees. It is not the defendants' case that they were both

mortgagees and tenants. From these circumstances it may be rightly inferred, and that I take to be the inference at which the lower appellate

Court has arrived, that the defendants ceased to be the tenants of the plaintiff, and took a mortgage of the land of which they were tenants. That

being so, no question of the acquisition of a right of occupancy or of the existence of a tenancy arises, and the mortgagor is entitled to possession

of the land which he mortgaged to the defendants under the usufructuary mortgage in question. This case is different from that of a mortgage, which

included land in which the mortgagee had a right of occupancy before the mortgage. I dismiss the appeal with costs.

8. There was a Letters Patent Appeal and the leading judgment was delivered by Blair, J., the other Judge being Aikman, J. Blair, J., purported to

follow an unreported judgment of Burkitt, J., which fortunately for us has been reproduced at page 491. On a reference to that judgment we find

that Burkitt, J., dealt with only a case of occupancy ryot before taking a mortgage and after taking a mortgage. Therefore, Burkitt, J., began with

the opening words:

In my opinion the decision of the Additional Judge in this case cannot be supported. I entirely dissent from the novel and extraordinary doctrine laid

down by the Additional Judge that, if an occupancy tenant lends money to his landlord and takes from his landlord a mortgage of an area of land,

which includes his own occupancy holding, he thereupon ceases to be an occupancy tenant under some novel doctrine of merger, apparently

invented for this case. If this doctrine were affirmed, the result would be that the occupancy tenant referred to would be in a much worse position

after his possession as mortgagee had ceased than before. For according to the Additional Judge he would have ceased to be an occupancy

tenant. I cannot assent to this doctrine. I see no reason why in such a case the occupancy tenure should be forfeited, and it is the first time that I

have heard such a doctrine mooted.

9. On the other hand, the case before Blair and Aikman, JJ., was only the case of a non-occupancy ryot, before taking the mortgage, which makes

all the difference in the world. Blair, J., gets over it with this rather bald

statement:

In our opinion the ruling in that case is absolutely sound law, and governs cases of tenancy of a less durable character than an occupancy right.

10. In support of this proposition, which in no way follows from the judgment of Burkitt, J., there is neither discussion nor citation. This is the only

sentence to be found in the judgment of Blair, J., in support of a proposition which does not flow from the decision of Burkitt, J. Turning to the

judgment of Aikman, J., he observed:

The lower appellate Court and our learned colleague came to the conclusion that the effect of the mortgage was to put an end finally to the

defendant's tenancy. In my opinion that is a conclusion which is not warrant by law.

11. Which law does not warrant it, has not been indicated. Lower down he observes:

The effect of the mortgage was to suspend for the time being the relationship of landholder and tenant between the parties. When the mortgage is

redeemed, the parties are relegated to the position which they occupied immediately before the mortgage was executed.

12. I could understand his reasoning if it relates to a occupancy tenancy because in such a case the mortgage could suspend the operation of the

occupancy tenancy itself and after the mortgage debt is extinguished, the man would be relegated to the previous unextinguished vested non-

evictable position of an occupancy tenant whose fixity of tenure can only be terminated by relinquishment or by sale of the holding for arrears of

rent (to mention two instances). In the case of a non-occupancy tenant when the mortgage gets extinguished, what is the relation back of this non-

occupancy tenant? He will be relegated to nothing because he was only a verumpattomdar having no fixity of tenure. Zero back to Zero rules out

abeyance. On account of the fact that we do not know the rights of non-occupancy tenants in Saharanpur area in 1902 it is not possible for us to

follow Justice Aikman's penultimate sentence ""they were at all events agricultural tenants who had certain rights including the right to retain

possession of their holding until ousted in due course of law."" All that we know is that the verumpattomdar in Kerala has no such rights. That is

why I have said the relegation can only be to Zero rights. I respectfully,

therefore, consider that this judgment of the Allahabad High Court should not be followed in preference to that of the Travancore-Cochin Court's judgment which has decided a controversy of precisely identical nature, apart from the fact that the learned Judge of the Travancore-Cochin High Court dealt with native knowledge of verumpattam tenure and Malabar usufructuary mortgage, because these controversies both before that Court as well as this Court arise from the same Kerala area.

13. In the result, I reverse the decrees and judgments of both the lower Courts and find under the points for determination in both these appeals as

follows: viz., that the plaintiffs-appellants are entitled to get actual possession of the properties, that they are entitled to get mesne profits after the

extinguishment of the usufructuary mortgage up to the date of delivery of possession at 45 ½ paras of paddy per annum shown as the amount

going towards the reduction of the principal and interest representing the income from the property, for which the defendants would be liable to

account to the plaintiffs. These appeals, in the result, are allowed with half costs throughout. Vakil's fee to be taxed only in one appeal. No leave.

This case having been set down for being mentioned this day the Court delivered the following

JUDGMENT

14. The mesne profits payable will be divided equally between the two plaintiff at 22 ½ paras in each case.