

(2006) 08 KAR CK 0077

In the Karnataka High Court

Case No : Regular Second Appeal No. 388 of 1999

Monappa Kottari (since deceased by his LRs. Vinoda and Others

APPELLANT

Vs

David Pinto and Muriel Pinto

RESPONDENT

Date of Decision : 24-08-2006

Acts Referred:

Transfer of Property Act, 1882 — Section 10, 105, 111 (d)

Citation : (2006) 08 KAR CK 0077

Hon'ble Judges : Mohan Shantanagoudar, J

Bench : Single Bench

Advocate : Padmanabha Mahale, for C.R. Goulay, for the Appellant; N.K. Ramesh, for R1 and A. Keshava Bhat, for R2, for the Respondent

Final Decision : Dismissed

Judgement

Mohan Shantanagoudar, J.—The Legal Representatives of the first defendant in OS No. 868/1990 have filed this second appeal.

2. The first respondent herein was the plaintiff and the second respondent herein was the second defendant in the said suit. Defendant No. 2 is the mother, of Plaintiff. The plaintiff filed a suit for declaration that he and second defendant have got subsisting Sub Moolgeni & moolgeni rights respectively and that these pre-existing rights are not extinguished by the act of first defendant purchasing the rights of Moolgar, He has also sought for a decree for future means profits and other incidental reliefs. The Trial Court decreed the suit and the first appellate Court confirmed the same.

3. Certain undisputed facts of the case are as under:

One Anthu Hengsu was the owner and Moolgar of the property in question which is a residential house with backyard. Earlier the property was situated in village limits. Presently, the house and the land are within city limits of Mangalore, in view of expansion of city. She sold the property in favour of Nampalli Ram Rao

on 18.4.1902. After the death of Nampalli Ram Rao, his son Subban Shiva Rao inherited Moolgar's rights. The said Subban Shiva Rao sold Moolgar's rights over the property on 27.3.1986 in favour of Monappa Kottari (defendant No. 15 by virtue of the sale deed Ex.D-1.

Original Moolgar Smt. Anthu Hengsu, leased the property permanently to Anthojuvan Rodrigues on 13.6.1889 and consequently, said Rodrigues became the Moolgenidar. The said Moolgeni rights were subsequently transferred from one person to another person on five occasions. Ultimately they were transferred in favour of Kasturba Medical Collage Trust on 30.9.1962 as per Ex.P-20. Said Kasturba Medical College Trust transferred the Moolgeni rights again in favour of Muriel Pinto (defendant No. 2) on 16.8.1998, as could be seen from Ex.D-16. Thus from that date onwards, defendant No. 2 is the Moolgenidar.

Likewise, the property was subleased by Moolgenidars from time to time and ultimately came in the hands of Mr. Lawrence. When Mr. Lawrence was the Sub-Moolgenidar, the property was put to auction sale by Court and the grand father of the plaintiff i.e. father of defendant No. 2 namely John Francis purchased the property in court sale on 20.3.1953 as per Ex.P-21. By settlement, (Ex-P1) the property came to defendant No. 2, the daughter of John Francis on 13.8.1962. As could be seen from Ex.P-4 dated 9.4.1934, in the partition among the children of defendant No. 2, the property fell to the share of plaintiff and consequently he acquired sub Moolgenidar's rights with affect from, 9.4.1984.

In the mean while, John Francis (earlier Sub-Moolgenidar) i.e. grandfather of the plaintiff and father of second defendant leased the property in favour of the 1st defendant's father namely Koraga Kottari on a monthly lease. After the death of Koraga Kottari, the said ordinary lease continued with the 1st defendant namely Monappa Kottari. Thus Monappa Kottari is in possession as an ordinary tenant. The plaintiff herein being the Sub-Moolgenidar filed HRC No. 170/1985 for evicting 1st defendant as the property in question is a house property. During the pendency of the said HRC proceedings, the 1st defendant purchased Moolgar's rights from Moolgar Sri N. Subban Shiva Rao on 27.3.1986 under Ex.D-1. In the said HRC No. 170/1985, the plaintiff herein filed an application to refer the matter to the Civil Court to resolve the dispute relating to the complicated question of ownership. Consequently, the Rent Control Court ordered that the parties shall approach the Civil Court for adjudication of the dispute relating to ownership. Hence, the proceedings, in HRC No. 170/1585 were dropped. In view of the same, the present suit is filed. The aforesaid facts are not in dispute.

4. AS aforesaid, both the courts decreed the suit holding that there is no merger of interest of the Moolgenidar and sub-moolgenidar with the interest of Moolgar. Consequently, both the courts below have held that the sale deed Ex,D-1 executed in favour of the defendant No. 1 by the original Moolgar N. Subban Shiva Rao will not affect either Moolgeni right of defendant No. 2 (D-2) or sub Moolgeni right of plaintiff over the property in question.

5. Learned Advocates" appearing on behalf of both the sides have taken ma through the entire material on record and the law on the point.

6. Sri Padmanabna Mahala, learned Senior Advocate appearing on behalf of the appellants submitted that in view of purchase by the defendant No. 1 of the Moolgar's right over the property, the interests of lessee as well as lessor have become vested at the same time in one person in respect of the whole property and that therefore defendant No. 1 becomes absolute owner of the property; consequently the rights of the plaintiff as well as defendant No. 2 are lost and are merged in the ownership rights of Defendant No. 1. Hs places reliance upon the Section 111(d) of the Transfer of Property Act and the judgment of the Hon"ble Apex Court in the case of Pramod Kumar Jaiswal and Others Vs. Bibi Husn Bano and Others, in support of his contention.

7. On the other hand, Sri A. Keshava Bhat and Sri N.K. Ramesh, learned Advocates appearing on behalf of the respondents, placed reliance upon the Judgment of the Hon"ble Apex Court in the case of Raghuram Rao and Ors. v. KRTC P. Kathtas and Ors. reported in 2002 Sar (CIVIL) 225 and opposed the contention of the appellant by submitting that the sale in favour of the defendant No. 1 is subject to the Moolgeni rights and sub-moolgeni right of defendant No. 2 and plaintiff respectively. According to them, the Moolgeni rights and sub-moolgeni rights which are vested with the defendant No. 2 and plaintiff respectively will not vanish or merge with moolgar's rights by virtue of the sale deed executed by Moolgar in favour of defendant No. 1.

8. In view of the rival contentions of the parties, the following substantial questions of law arise for consideration in this appeal:

(a) Whether the 1st defendant has become the absolute owner of the suit schedule property in view of the purchase of Moolgar's right?

(b) Whether the sale dead. Ex.D-1 in favour of 1st defendant dated 27.3.1986 executed by Moolgar namely Sri Subban Shivarao is subject to the Moolgeni and Sub-Moolgeni rights of defendant No. 2 and the plaintiff respectively?"

9. To understand the questions involved in this matter, in ray considered opinion, it would be beneficial to know what "Moolgeni", "Moolgar", "Moolgenidar" and "sub-moolgenidar" are.

Learned author Sri. J.H.A. Mascarenhas in his book titled as the Law of Land Tenures in Kanara has observed that:

Mulgeni (Moolgeni) is a permanent tenancy and the person who lessee the property is called as Mulgar (Moolgar) and the lessee will foe called as mulgenidar (Moolgenidar) . This type of lease is prevailing only in Kanara District (Now the said District is divided into South Canara and Udupi Districts). The mulgenidars become the second class of proprietors from whom nobody can deprive of their right of possession except their own act of gift or sale. A mulgenidar is a tenant holding a perpetual lease, not removable so long as he

pays rent and so long as he does not violate the stipulations of the lease entailing forfeiture. Mulgeni is also known as Kayamgeni or permanent lease. Mulgenidars (permanent tenants) have a perpetual and indefeasible right to occupy the land so long as they pay the rent, which is sometimes nominal. The mulgeni tenure is a permanent heritable tenure alienable in some cases by the conditions of the mulgeni chit but in all cases perpetual, though subject to forfeiture for non payment of rents.

10. The mulgeni tenancy is also defined in the statute i.e. Madras Mulgeni Rent Enhancement Act. It is relevant to mention here itself that erstwhile Kanara district was under the administration of Madras State earlier. Thus aforesaid enactment applied to Kanara district also, where the parties hail from.

11. Section 3(3) of the Madras Mulgeni Rent Enhancement Act defines "Mulgeni tenure" as under:

The mulgeni tenure means a holding of land in perpetuity on a fixed rent, whether in money or kind or both, and includes tenures of the description known as "kayamgeni", "nigdigeni" and "sub-mulgeni".

The aforesaid definition makes it clear that sub-mulgeni is also almost equal to mulgeni and the same is also permanent and heritable.

12. Section 3(4) of the said Act defines "Mulgar" as under:

Mulgar means the owner of land held under mulgeni tenure, his heirs, representatives, assigns, and includes a mulgendidar who has granted a mulgeni lease to a sub-mulgenidar or sub-tenant, his heirs, representatives and assigns.

Thus the mulgar is a original owner of the land who leased the property at the first instance. Mulgenidar is also treated as Mulgar by the Sub-Mulgenidar, in case if Mulgenidar leases the land in favour of Sub-Mulgenidar.

13. u/s 3(5) the said Act, the "Mulgenidar" is defined as under:

Mulgenidar means a tenant of the land held under mulgeni tenure, his heirs, representatives, assigns, and includes a mortgagee in possession from such tenant or from his heirs, representatives or assigns.

14. From the aforementioned, it is clear that the mulgeni is a recognised type of lease and it is permanent in nature. The Mulgar/owner cannot evict the mulgenidar at any time except in the case of non payment of rent, if the Mulgeni chit provides for the same. The mulgar's right is only to collect rents from the mulgenidar. Mulgenidar in turn has right to enjoy the property or to sublease the same to sub-mulgenidar. In case if mulgenidar sub-leases the property in favour of sub mulgenidar, the said sub-mulgenidar also cannot be evicted by the mulgar except where the rent is not paid as agreed upon. In other words, the mulgenidars or sub-mulgenidars will enjoy the property permanently subject to payment of rent to the mulgar. Such a peculiar lease is prevailing only in Kanara District.

15. The apex court in the case of 2002 SAR (CIVIL) 225 while deciding the matter relating to Mulgeni lease has observed as hereunder:

13. At the outset, for the nature of mulgeni lease, we would refer to the decision in *Vyankatraya bin Ramakrishnapa v. Shivrambhat bin Nagabhat* (1883) 7 Bom 256 wherein the High Court of Bombay considered the same and held as under:

In the minute of the revenue Board (see p.28 of a book, Exhibit A, in the suit of *Vykunta Bapuji v. The government of Bombay* 12 Bom. HC Rep. APP.1, better known as the Kanara case] it is said; The exclusive rights to the hereditary possession and usufruct of the soil is in Kanara termed *varga*, meaning separate independent property in the land, and seems originally, as in Malabar, to have been vested in the military tribe of the Nayrs, the first and at one time, the exclusive mulia is are land lords of that province; for, except to unclaimed waste, and to estates escheated from want of heirs, it does not appear that the Government in Kanara at any time possessed, or even pretended to the smallest right to property in the land. The Nayrs had under them a number of inferior rayats called *genis* or tenants to whom they rented out the portions of their lands which they did not cultivate by means of hired labourers or slaves. The *genis* or tenants were of two distinct classes the *mulgenis* or permanent tenants and the *chaligenis* or temporary tenants. The *mulgeni* are permanent tenants of Kanara were a class of people unknown to Malabar, who on condition of the payment of a specified invariable tent to the muli or landlord and his successors, obtained from him, a perpetual grant of a certain portion of land to be held by them and their heirs forever. This right could not be sold by the *mulgeni* or his heirs, but it might be mortgaged by them, and so long as the stipulated rant continued to be duly paid, he and his descendants inherited this land like any other part of their hereditary property. This class of people therefore, may be considered rather as subordinate landlords than, as tenants of the soil, more especially as though many of them cultivated, their lands by means of hired labourers or slaves, others sub-rented them to the *chaligenis* or temporary tenants.

14. The Court in that case traced the history of mulgeni tenure and observed thus:

These authorities show clearly that the *mulgeni* were only tenants, as though tenants in perpetuity, holding under their superior landlords the *mulgars*, whose estate like that of tenants in fee simple in England, would appear to have been the highest estates in the land known to the land in Kanara; and further, that although originally *mulgeni* tenants were not restricted by the terms of their leases from alienation, the practice had grown up how soon it dogs not appear, but at any rate by the beginning of the present century - of leasing the land in perpetuity at a fixed rent coupled with such and other restriction.

Lastly, it is not suggested that the law has either by statute or judiciary decision defined the *mulgeni* tenure.

Under these circumstances, it would be impossible, we think to hold that the

restriction against alienation is 30 repugnant to the mulgeni tenure in the contemplation of law that a clause to that effect must be held to be void. But it was said that such a clause in a permanent lease makes the land forever inalienable and is, therefore, void on the ground of public policy. That view, however, would not appear to have been taken by the framers of the transfer of property Act for we find that by Section 105 it recognizes leases in perpetuity and that Section 10 which forbids a clause against alienation in general, makes an exception in the case of leases where it is introduced for the benefit of the lessor.

(Emphasis supplied by me)

16. The observations of the Bombay High Court in case of Vyankatraya bin Ramakrishnappa cited supra are accepted by the apex court in the case of Raghuram Rao and Ors. v. Eric P. Mathias and Ors. in 2002 SAR (CIVIL) 225. Thus, it is clear from the aforesaid judgment that, mulgenidar or sub-mulgenidar may be considered rather as subordinate landlords than the tenants of the soil. They enjoy properties permanently as, owners thereof in as much as the owner has no right to evict mulgenidar or sub-mulgenidar. However, mulgar has right to collect rents if the rents are not paid regularly by the mulgenidar. The mulgar has every right of reentry by forfeiting the tenancy in case of non-payment of rent if the Mulgeni chit or document provided for the same.

17. In view of the above, it is clear that the right of the mulgenidar or sub-mulgenidar cannot be extinguished except in case of violation of the conditions of mulgeni relating to payment of rent. Thus, if anybody purchases the right of mulgar, the same will always be subject to the right of mulgenidar or sub-mulgenidar. The rights of mulgenidar or sub-mulgenidar are the intervening rights, in the case on hand, between the rights of mulgar and defendant No. 1 (ordinary tenant-turned Mulgar).

18. Both the courts below, on evaluation of material on record, have rightly held that defendant No. 1 is in possession of the property as an ordinary monthly tenant. He is neither mulgenidar or sub-mulgenidar. Defendant No. 1 is only a monthly tenant under sub-mulgenidar i.e. the plaintiff. In such a situation, if defendant No. 1 has purchased the mulgar's right, he has stepped into the shoes of mulgar. He is conferred with all the rights of the mulgar. But, at the same time, he cannot acquire the rights of muldgenidar or sub-mulgenidar. The sale deed in favour of defendant No. 1 is subject to the rights of the plaintiff and defendant No. 2, who are the sub-mulgenidar and mulgenidar respectively. In view of the specific dictum laid down by the Apex Court in the case of Raghuram Rao, the decision in case of Pramod Kumar Jaiswal reported in AIR 2005 3C 2857 relied upon by the appellant may not be helpful to the appellant. The Apex Court, in the case of Pramod Kumar has held that the ownership of property, which is subject matter of tenancy is certainly a larger estate than the tenancy itself and naturally larger than the sub-tenancy. If the sub-tenant acquires the entire interest of the owner in the whole of the estate, the sub-tenancy merges into

ownership and the estate of Sub-tenant stands enlarged into that of a full owner. It has further observed that, the situation would have been different if the sub-tenant would not have acquired the entire estate of the owner or the ownership interest in the entire estate forming subject matter of sub-lease. A merger is prevented if there is an intermediate estate outstanding with another at the relevant time. In the case on hand, defendant No. 1 being a monthly tenant has not acquired the entire interest of the owner in the whole estate under the sale deed Ex.D-1, taut ho has acquired the interest of mulgar only, as the interest: of the mulgenidar and sub-mulgenidar have remained vested in defendant No. 2 and plaintiff respectively. As the said, intermediate rights are not sold or surrendered by the plaintiff or defendant No. 2, it cannot be said that the defendant No. 1 has purchased the entire interest of the owner in the whole estate. As a matter of fact the Judgment of Apex Court in the case of Pramod Kumar helps the case of respondents. In view the above, it is clear that the interest of mulgenidar and sub-mulgenidar have not merged with the interest of the mulgar and consequently, defendant No. 1 cannot be said to be the full owner of the property. He has merely became Mulgar by virtue of the sale deed Ex.D-1. The merger of entire estate absolutely with defendant No. 1 is prevented by the existence of intermediate estate of Mulgenidar and Sub-Mulgenidar outstanding with defendant No. 2 and plaintiff. u/s 111(d) of Transfer of Property Act, the lease will be determined only in the case of vesting of the interests of the lessee and the lessor in the whole of the property at the same time in one person in the same right. But in the present case, interests of lessee and lessor in the whole of the property are not vested with defendant No. 1. But the intermediate rights are subsisting. Hence both the courts below, on evaluation of the material on record, have rightly concluded that defendant No. 1 has not become the full and absolute owner and the sale deed in favour of defendant No. 1 by the mulgar is subject to the rights of the mulgenidar and sub-mulgenidar, i.e., defendant No. 2 and the plaintiff respectively. I agree with the findings of the both the courts below.

For the aforesaid mentioned reasons, the questions of law raised in this appeal are answered as under:

- a) Defendant No. 1 is not the absolute and full owner of the suit schedule property in view of the purchase of mulgar's rights. He became Mulgar by virtue of the sale deed Ex.D-1.
- b) The sale deed executed by the mulgar in favour of defendant No. 1 is subject to the rights of the mulgenidar and sub-mulgenidar i.e., defendant No. 2 and the plaintiff respectively.

The appeal is dismissed accordingly.