

(2008) 12 KAR CK 0030

In the Karnataka High Court

Case No : House Rent Revision Petition No. 111 of 2007

Mr. Charles Rego

APPELLANT

Vs

Father Muller's Charitable Institute

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Karnataka Rent Control Act, 1961 — Section 21 (1), 21 (1) (a)

Citation : (2009) ILR (Kar) 487 : (2009) 4 KarLJ 702

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : A. Keshava Bhat, for the Appellant; Pundikai Ishwara Bhat, for the Respondent

Judgement

Anand Byrareddy, J.—Heard the Counsel for the petitioner and the respondent.

The facts of the case are that the petitioner is the owner of the schedule property described in Schedule-A and Schedule-B to the eviction petition. It is contended (hat the property originally belonged to the maternal grand-father of the petitioner. His grand-lather had granted the same on moolageni to one Joseph Pinto, under a registered deed dated 13.9.2001, which has been produced as Ex.P-1 before the trial court. In terms of the said deed, the property could not be transferred by the lessee without the written consent of the moolagar or the owner.

2. Joseph Pinto had sold the moolageni right to Ms. Lilly Theresa Machado and Antony Salvadore Machado, with the consent of the owner, in terms of Ex.P-2, a registered 6ced dated 5.10.1928. Lilly Theresa Machado had released her rights in favour of Antony Salvadore Machado as per Ex.P-3 on 23.5.1930, again with the consent of the owner. Antony Salvadore Machado, in turn, sold his moolageni under a registered deed dated 21.9.1945, which is marked as Ex.P.4 in favour of the first respondent in this petition. This was again with the consent of the owner. It is not in dispute that in each of these transfers, (he transferee would become the moolageni tenant under the original owner and the transferor would

be directed of his right, on such transfer.

3. It transpires that the first respondent has subleased a portion of the property, which is described in Schedule B, to the second respondent, through a registered Volla moolageni deed, dated 19.9.1964, produced as Ex.P-5. The second respondent, in turn, has transferred it to the third respondent as per Ex.P-6. The third respondent, in turn, has transferred it to the fourth respondent. The sub-lease by the first respondent and the subsequent transactions, referred to above, were without the consent of the moolagar, or the owner.

4. It is further contended that from the year 1977, rent or moolageni had not been paid and therefore, it is in this background that an eviction petition u/s 21(1)(a) and (1) of the Karnataka Rent Control Act, 1961 (hereinafter referred to as "the 1961 Act" for brevity) came to be instituted.

5. The petition was contested by the first respondent who had filed statement of objections. The other respondents, though represented, had not filed any pleadings. The defence of the first respondent was to the effect that in terms of Ex.R-1, the moolagar had granted permission to divide the property and to sell the leasehold rights to third-parties. It is under the strength of the said Ex.R-1, that the property was sub-let to third parties.

6. The first respondent, however, did not tender any evidence in support of the contention. The petitioner having tendered evidence before the trial Court, he was cross-examined and upon consideration of the material evidence, the trial court ordered eviction on both the grounds. The respondent had challenged the same by way of a revision petition before the District Judge, who has reversed the order of eviction. It is this which is under challenge.

7. The Counsel for the petitioner would contend that the order of eviction has been set aside by the Court of the District Judge on the ground that sub-lessees were not impleaded, which is contrary to the requirement in law particularly, Section 34 of the Karnataka Rent Act, 1999 (hereinafter referred to as "the 1999 Act" for brevity). The reasoning of the Court that the transferors in terms of Exs.P-2, P-3 and P-4, were necessary parties is not tenable especially, when their right stood extinguished on such transfer.

8. Insofar as one Lucy Quito who is said to have purchased or is the sub-lessee of 23 cents of the schedule property is concerned, she is also not a necessary party, since a sub-tenant is not a necessary party to an eviction petition. In any event, this was not a ground on which the eviction petition could have been rejected in respect of Schedule B property.

9. The further reasoning of the District Judge that the subsequent sub-leases were with the consent of the original Moolagar under Ex.R-1 is incorrect. Permission granted under Ex.R-1 was in respect of sale of the moolageni right which is not the same as permission to create a volla moolageni or a sub-lease. This is a cardinal error committed by the District Judge in proceeding on the

wrong presumption that there was permission afforded to the first respondent to sub-let the property.

10. The Counsel for the petitioner would place reliance on a passage from the book - "The Law of Land Tenures in Kanara" by J.H.A. Mascarenhas which reads thus:

A mulgenidar is a tenant holding a perpetual lease, not removable so long as he pays his rent and so long as he does not violate the stipulations of the lease "Estoppel by conduct". (Culled out from Wilson's Glossary Page 354). And further "...A mulgeni tenancy is a tenancy forever at a fixed rent. This species of tenure is as good as a freehold. " and "...The mulgeni tenure is a permanent heritable tenure alienable in some cases by the conditions of the mulgeni but in all cases perpetual, though subject to forfeiture under certain circumstances." "...Mulgeni tenants have a perpetual and indefeasible right to occupy the land so long, as they pay the rent which is sometimes nominal".

11. He also relies on the case of A. Thandavaraya Chetty Vs. The District Khadi and Village Industries Officer and Another, whereby this Court has quoted an extract from the Standing Orders of the Board of Revenue of Madras, (1955 Edition) as follows:

A mulgenidar is a lessee of the registered holder. The lease is called mulgeni and the registered holder's right null. A mulgenidar has a perpetual lease and is not removable by the registered holder so long as he pays rent regularly to him and does not break any of the conditions of the lease.

12. And in a Full Bench decision of this Court in Sri Ramakrishna Theatre Limited v. General Investments and Commercial Corporation Limited AIR 1993 Kar 90, it was laid down while interpreting the effect of Sub-section (1) of Section 21 of the Act, that the landlord should have a vested right to recover possession and that right cannot be held to vest in him during the period of a term lease, unless there is something in the lease deed which provides for the determination of the lease. In such a situation, even after the determination of the lease in the manner stated in the lease, the recovery of possession will have to be made only by recourse to Section 21(1).

13. The above view has been upheld by the Supreme Court in Laxmidas Bapudas Darbar and Another Vs. Smt. Rudravva and Others, .

14. The Supreme Court, in Raghuram Rao v. Eric P. Mathias and Ors. 2001 Scar (Civil) 225, after quoting with approval the observation of the High Court of Bombay, has held as follows:

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

These authorities show clearly that the mulgenis were only tenants, although 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 law 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 does 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 restrictions.

Lastly, it is not suggested that the law has, either by Statute or judicial decision, defined the mulgeni tenure.

Under these circumstances it would be impossible we think, to hold that restriction against alienation is so 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.

- and has adopted the same in answering (he question whether in case of perpetual lease, the condition not to alienate the property would be illegal and void and has answered the same as follows:

17. For appreciating these contentions, we would first refer to Section 10 of the T.P. Act which, inter alia, provides that "where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him." The Section does not carve out any exception with regard to perpetual or permanent lease. It applies to permanent or temporary lease. In view of the specific exception carved out in case of lease, in our view, there is no substance in the contention of the learned Counsel for the appellant that the condition which restrains the lessee from alienating leasehold property is in any way is illegal or void.

And therefore, the Counsel would submit that the impugned order be set aside and the eviction order be confirmed.

15. The Counsel for the respondent, on the other hand, would contend that the provisions of the Karnataka Rent Control Act, 1961 was not at all applicable insofar as the eviction proceedings are concerned. In this regard, the Counsel would seek, to place reliance on Section 23 of the 1961 Act, which provides that it shall not be lawful, after coming into operation of Part-V of the Act, for any tenant to sub-let the whole or any part of the premises let to him, but nothing in the Section would apply to a tenant having a right to enjoy any premises in

perpetuity.

Secondly, it is contended that the transfers made by the first respondent were of the year 1964 and in subsequent years. Section 21(1)(f) could have been pressed into service only in respect of properties sub-let before the coming into force of Part-V. It is also not in dispute that on facts, the owner having granted permission in terms of Ex.R-1, there is no ground for eviction, as it cannot be termed unlawful. And further, notwithstanding the contentions in the statement of objections, to the contrary, an extent of 9 cents of the schedule property has not been sub-let to any third party and the same has been reserved as a right of way and therefore, respondent-1 is deemed to continue in occupation, in which event, the ground of unlawful sub-letting of the entire extent of the property is not available.

16. It is further contended that Lancy Quilo, is one of the sublessees under respondent - 1, who is in possession of the property. Even if it could be accepted that the earlier transferors were not necessary parties, a sub-lessee, who is in possession, is a proper and necessary party and therefore, failure to implead her as a party in the proceedings renders the eviction order void and nonest.

17. It is further contended that in the authorities cited, it is nowhere indicated that a volla moolageni or a sub-lease is prohibited. On the other hand, it is very much permissible and therefore, the several volla moolagenies having been conferred under registered documents, there is no illegality.

18. The Counsel places reliance on the decision in *Laxmidas Bapudas Darbar and Another Vs. Smt. Rudravva and Others*, to contend that the lease being a perpetual one, eviction proceedings could not be instituted as laid down therein, to the effect that eviction proceedings could not be initiated during the currency of a term lease and eviction proceedings are not capable of being initiated in the present case on hand under the 1961 Act and the very proceedings ought to have been rejected.

19. By way of reply, the Counsel for the petitioner would submit that in terms of Section 70 of the 1999 Act, Section 27(2)(a) and (b), which are the corresponding provisions to Section 21(1)(a) and (1) of the 1961 Act would apply and it is incorrect to state that the 1961 Act or the 1999 Act did not apply to the premises. Ex.P-1, which is the original lease-deed executed by the petitioner's ancestor clearly spells out that no transfer of moolageni can be effected without the written consent of the owner. This having been violated, in that, there was never any permission granted to create a sublease, even in terms of Ex.R-1, it was only a permission to sell or transfer absolutely the leasehold right held by respondent-1. There was violation of the express terms of the lease and hence, even in respect of a perpetual lease, eviction proceedings could be initiated on any of the grounds contemplated u/s 21(1) of the 1961 Act, corresponding Section 27(2) of the 1999 Act. The trial court has also held that the respondent - 1 was in arrears of rent and the same not having been paid,

there is no ground on which (he eviction order could have been set aside insofar as the arrears of rent is concerned.

The contention that Lancy Quilo is not a party to the proceedings and therefore, the petition was not maintainable is also not a contention that can be sustained, as there was no permission granted for the transfer in her favour and therefore, she was not a necessary party to the proceedings. In fact, the 1999 Act has not recognised such sub-letting without the consent of the landlord. And therefore, the Counsel would submit that the petition be allowed.

20. On a consideration of the above rival contentions, from the authorities referred to as to the nature of a moolageni, it may be said that it is a tenancy in perpetuity at a fixed rent. It is as good as an absolute holding as long as rent is paid and there is no violation of any other condition imposed. In the instant case, one of the conditions imposed in terms of Ex.P-1, which is the original deed under which the moolageni was created, is that the right could not be transferred without the consent of the owner or the moolagar. There are subsequent transfers which were with the consent of the inoolagar. It is for the first time (hat respondent-1 had sought permission to divide the properties in parcels and to sell the right in favour of several third parties which is said to have been granted as shown in Ex.R-1. It is clear that permission was not sought to cerate a volla moolageni or a sub-tenancy and the permission sought for was to sell or transfer the right of tenancy absolutely in favour of several others. The creation of subtenancy, on the other hand, in favour of several respondents was, therefore, illegal and in violation of the express condition imposed under the deed creating die tenancy.

21. Insofar as the contention that 1961 Act or the 1999 Act did not apply to the premises cannot be accepted. Reference to Section 23 is irrelevant. Section 23 of the 1961 Act prohibits sub-letting while holding that it would not apply to tenancies in perpetuity. It merely imposes a fine on any person who contravenes the provisions of the Section. The same cannot be read to contend that the sub-leases created would not be illegal since the lease was one in perpetuity.

22. The further contention that Section 21(1)(f) did not apply, if the sub-tenancy was created subsequent to Part-V coming into force, even if there was any substance in such contention, with the 1999 Act being made applicable to the premises, the wording and tenor of Sub-clause (b) of Section 27(2) is wide enough to encompass the property within the mischief of the Section and therefore, there is no infirmity. It is also clear that insofar as the creation of sub-tenancy in favour of one Lancy Quilo was apparently without the permission of the petitioner and hence would not bind the petitioner. The absence of the said party to the proceedings is not fatal. The reasoning of the court of the District Judge that the erstwhile transferors of the properly, from time to time, ought to have been made parties is not tenable. And the further contention that the lease being a perpetual lease, eviction proceedings could not have been brought is also not a complete statement.

23. Having regard to (he legal position as expounded by the Supreme Court, while affirming a decision of this court in Sri Ramakrishna Theatres Limited v. General Investments and Commercial Corporation Limited and Ors. AIR 1993 Kar. 90, in that, if there is violation of a condition of the lease deed, eviction proceedings could certainly be brought under the provisions of the Rent Act, but the grounds available would only be those enumerated under the relevant provisions. Hence, it cannot be said (hat (he eviction proceedings could not have been brought. The incidental contention that the respondent - 1 had not sub-let an extent of 9 cents of land, as the same is reserved as a right of way, is wholly immaterial as respondent -1 would lose right over the entire extent even if the respondent has violated the condition in respect of a portion of the premises leased.

24. Therefore, the petition succeeds. The order of the court of the District Judge passed in revision is set aside. The order of eviction is confirmed. The respondents shall quit and deliver vacant possession of the property to the petitioner within a period of three months and shall also be liable to pay the arrears of rent due upto the date of vacation of the premises. The respondents shall quit and deliver vacant possession of the premises on or before 18th March 2009.