(1964) 09 MAD CK 0040

In the Madras High Court

Case No : Second Appeal No. 1491 of 1962

N.T.P. Muthuswamy Mudaliar APPELLANT

Vs

Palanivelu and Others RESPONDENT

Date of Decision : 24-09-1964

Acts Referred:

Limitation Act, 1963 — Article 110, 115, 120
Madras Court Fees Act, 1955 — Section 35
Transfer of Property Act, 1882 — Section 111, 116

Citation : (1966) ILR (Mad) 230

Hon'ble Judges : Natesan, J

Bench : Single Bench

Advocate : V.S. Rangaswamy Ayyangar, for the Appellant; T.M. Chinnaiyya Pillai, for the Respondent

Final Decision : Dismissed

Judgement

Natesan, J.—The Defendant who has lost in both the Courts is the Appellant. The Plaintiffs 1 to 5 are the sons of his elder brother

Kandaswami Mudaliar and the 6th Plaintiff is the widow of Kandaswami Mudaliar who died on 29th November 1954. Kandaswami Mudaliar and

the Defendant had become divided even in 1953 and with reference to one item of property, a rice mill, could not be divided by metes and bounds

it is the admitted case of the parties that the mill was leased out for rent to one or other of the brothers in turn for management, the brothers no

doubt having rights in the mill each an undivided half share. Subsequent to their partition in 1953, the Defendant herein entered into possession and

management of the entire mill pursuant to a lease in his favour by the deceased Kandasami Mudaliar. The rental agreement for the lease is

evidenced by exhibit A-1. The lease in question commenced from 1st April 1954 and was for a period of three years expiring with 31st March

1957. The lease provided for an annual rent of Rs. 4,275 being paid by the lessee to the lessor, that is, Kandaswami Mudaliar in two installments

one on the 1st of October and the other on the 1st of April, of each year. The lease deed acknowledges the right of the lessor and the lessee each

to a half share. There is a specific recital in the lease deed that the property had been delivered possession to the lessee from 1st April 1954 and

the lessee covenants on the expiry of the stipulated period to deliver possession of the property to the lessor with the mill in working condition on

1st April 1957. It is clear that prior to this lease, the entire property had been in the management of Kandaswami Mudaliar. In fact, the lease deed

recites that individual No. 1, that is, Kandaswami Mudaliar had been the manager of Jyothi Rice Mill till the end of 31st March 1954 and that the

lessee should get the management transferred to his name. It is not now in dispute before me that rents fell due and the Plaintiffs had to file suits

Original Suit No. 631 of 1955, Original Suit No. 1039 of 1955 and Original Suit No. 136 of 1957 all in the District Munsif''s Court, Erode, for

recovery of the arrears of rent. These suits had been contested. The first two were decreed and the last one was compromised. The rent thus

realized cover like period ending 1st October 1956.

2. When the lease expired with 31st March 1957, the Defendant did not admittedly surrender possession or offer joint possession to the Plaintiffs

the legal representatives of the deceased Kandaswami Mudaliar. Plaintiffs 1 to 5 were minors and were naturally under the care and protection of

their mother, the widow of the deceased the 6th Plaintiff in the case. On the 16th of April 1957, the Defendant issued a notice, exhibit A-2, to the

Plaintiffs. Therein, after referring to the expiry of the lease, it was claimed as follows:

My client is managing your share and his share from 1st. April 1957 in his capacity as co-sharer. At the end of each year, accounts have to be

checked and profit or loss decided and you shall settle the accounts and you are not eligible to claim any rent for the lease property thereafter. You

shall be eligible only to your share in the balance if any of the income from the building, machine, etc., after meeting the expenses and you shall not

have any connection whatever in the business of my client.

3. It is clear from this notice that the Defendant was not willing that the Plaintiffs should associate themselves in the rice mill business to which they

were entitled to. The Defendant specifically seeks to exclude them from the business offering them only accounts at the end of each year. The joint

possession to which they are entitled in law is denied and unilaterally he assumed possession and management on behalf of the other co-sharers

also without reference to them. The Plaintiffs by their reply exhibit B-1 repudiated this claim of the Defendant to exclusively conduct the business. It

was pointed out on their behalf that instead of surrendering possession, the Defendant was straightaway suggesting terms to which they were not

willing to accept. The notice proceeds:

In view of your client''s past conduct and unreasonable and obstructive tactics hitherto adopted by him my client is not prepared to entrust the

whole affairs of the mill in your client''s sole management. My client has no confidence in your client''s bona fides. Therefore my client calls upon

your client to effect immediately a partition of the mill inclusive of both machinery and premises and hand over my client''s share to them failing

which legal steps will be taken to get appropriate remedies in the Court of law. If you run the mill on your account against the wishes of my clients

and their specific directions given under this notice not to do so, your client will be deemed to be a person holding over and he will be liable to pay

heavy damages for running the mill.

4. This reply notice has been issued for the 6th Plaintiff, the mother and guardian of the minor children of Kandaswami Mudaliar. Even in his

evidence the Defendant stated:

Plaintiffs asked me to give them possession of their share. I did not give them possession.

5. It is in these circumstances that this suit has been laid by the Plaintiffs on 22nd January 1959 claiming rent for the balance of the lease period that

is 1st October 1956 till 31st March 1957 and thereafter till 15th November 1959 damages for use and occupation at the same rate as the rent that

was current. The Defendant in his written statement contended inter alia that the Plaintiffs were not entitled to any damages or compensation, that

he was liable to account for his management as co-owner and that he was maintaining regular accounts. He claimed that an account should be taken and valued the relief for accounting at rupees one hundred only u/s 35 of the Madras Court Fees Act. He prayed that a decree for accounts

should be passed. Both the Courts below have negatived the contention of the Defendant that be was only liable to account for his management

and not pay damages for use and occupation or compensation. The Courts below would hold that there is no tenancy as such after 1st April 1957

but as the tenant had not surrendered possession, he will be liable for damages or mesne profits. In the absence of any evidence as to the proper

compensation which the Plaintiffs were entitled to and as exhibit A-1 provided prima facie evidence, the same was accepted for fixing the quantum

of damages due to the Plaintiffs and a decree has accordingly been passed by the trial Court and confirmed by the lower appellate Court.

6. It is stated at the Bar that the Defendant filed a suit Original Suit No. 39 of 1959 on the file of the Sub-Court, Erode, for partition and accounts

and that there was an appeal therefrom, and this Court had remanded, the matter to the lower Court for disposal in the light of the observations in

the judgment. It is stated that the question as to the liability in respect of periods subsequent was raised and this Court observed that the point will

also be considered by the trial Court but no finding was given. Neither the pleadings in the case nor the judgment nor decrees have been exhibited

in these proceedings and if any accounts have to be taken in that suit, the Court will be no doubt have to take note of these proceedings which

have gone on independently and covered the period from 1st April 1957 till 15th March 1959. During the period in question, the Defendant stated

that he has spent monies for common purposes in the improvement of the mills, addition of machinery, etc. Certainly these would go in the

accounting. But so far as the business is concerned, the Defendant had excluded the Plaintiffs from the business and the business has been

conducted by him exclusively without any reference to them. They could not in the circumstances be made liable for any loss in the business, even

as they could not seek a share in the profits he would have made. The loss or profit from the business during the period the Plaintiffs had been

excluded from the rice mill must be that of the Defendant. The learned District Judge has also specifically referred to this aspect of the matter and

has observed that if the Defendant had effected improvements to the mill or spent monies for the proper upkeep of the mill in his capacity as co-sharer, these things could be agitated in the suit which he has filed.

7. The question for consideration, therefore, in this second appeal is whether the Plaintiffs are entitled to compensation or have a right only to claim

accounts. It must be noticed that in the particular circumstances the Defendant may think it profitable to him to account. But the matter has to be

considered as a question of principle. If the business had been very profitable in all probability, the Defendant would have turned round and said

that he had been simply holding over and was bound to pay only damages for use and occupation in terms of the lease. Learned Counsel

appearing for the Defendant referred in this connection to the following observations of the Full Bench in Basavayya v. Guravayya ILR (1952)

Mad. 173, 175 (F.B.):

It is necessary at the outset to distinguish between three different types of cases in which a question of profits or mesne profits might arise : (i) Suits

for ejectment or recovery of possession of immovable property from a person in possession without title, together with a claim for past or past and

future mesne profits, (ii) Suits for partition by one or more tenants-in-common against others with a claim for account of past or past and future

profits, (iii) Suits for partition by a member of a joint Hindu family with a claim for an account from the manager. In the first.

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excess of his share where there is no objection. Parke B., laid down in Henderson v. Eason (1851) 21 Q.B. (N.S.) 82 thus at page 84:

...If one tenant-in-common occupied and took the whole profits, the other had no remedy against him while the tenancy-in-common continued,

unless he was put out of possession, when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety,

and the other accepted that appointment in which case an action of account would lie as against the bailiff as in the case of the owner of the entirety

of an estate.

8. In the present case the Plaintiffs have not accepted the continuance in possession by the Defendant and, therefore, no question of calling upon

him to account arises as a bailiee or manager on their behalf. A co-tenant lawfully and in exclusive possession can only be made liable to

compensate the other co-tenant and not render accounts and share the profits :

Vide Midnapore Zamindary. Company Ltd. v. Naresh Narayan

Roy ILR (1924) Cal. 631 (P.C.) where at page 635 it is observed:

Where lands in India are so held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husband like

manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in

respect of such exclusive use of the lands.

9. The Appellant in the present case offers to account for the profits. Take for instance the case where a co-tenant in exclusive possession has

used his skill and energy and made huge profits while his co-tenant stood by. Is the former to be obliged to share the profits he made by bestowing

his skill and energy and ploughing on the business his own capital? Again a co-tenant in exclusive possession without reference to the other may

embark upon speculative ventures and risky dealings or resort to unfair trade practices resulting in complete ruin and loss. Can he escape his

exclusive liability for the losses which he incurred without reference to the other by claiming that as a co-tenant his liability is only to account and

have an account taken? We are not concerned with cases where by mutual understanding, implied or explicit, between the co-tenants, one of them

is in possession and enjoyment with liability to account for the profit or loss. The general principles governing co-sharers must strictly be applicable

to the instant case.

10. In Madar v. Kader Mohideen ILR (1914) mad. 54 the Defendants owned an undivided moiety of the house along with the father of the

Plaintiff in that suit and became lessees of the other half for a period of three years. After the expiry of the lease they continued in possession of the

whole house without executing any fresh lease to the Plaintiffs or paying them any rent. The Plaintiffs filed the suit for possession of the half share in

the house after partition and for recovery of arrears of rent and rent subsequent to suit. A decree was given to them for partition and possession as

well as rent for a period of six years. The question that was raised was as to the period for which rent could be decreed and whether Article 110

or 115 or 120 of the Limitation Act would apply. This Court held that Article 110 or 115 both pre-supposed the existence of a contract, that as

u/s 111 of the Transfer of Property Act, the lease in question was determined by efflux of time in 1899 and that as the Plaintiffs did not accept rent

from the Defendants after that or otherwise assent to the Defendant continuing in possession as lessees, it could not be said that there was any

renewal of the lease as provided in Section 116 of the Transfer of Property Act, that in the circumstances the Defendants could not be regarded as

tenants holding over or that there was any relationship of landlord and tenant subsisting between them to bring the case within either Article 110 or

115. The decree of the Courts below awarding rent for six years before suit applying Article 120 of the Limitation Act was upheld. There is no

discussion in that case as to whether the amount decreed can properly be termed as rent. Reference is made therein to decision in Leigh v.

Dickeson (1884) L.R. 15 Q.B.D. 60. That was a case where a tenant in common continuing in possession of the entire house after the expiry of

the lease from the other tenant in common was held bound to pay rent at the rate reserved notwithstanding the existence of the tenancy in common.

11. In my opinion the correct principle applicable in a case of this kind is found in Freeman''s Co-tenancy and Partition. In the second edition of

this classic at page 345 it is stated thus:

One co-tenant may lease of the other, and his agreement to pay rent is valid and enforceable against him but as he has a right to be in possession

independent of the lease, he will not, after its expiration, be deemed to hold possession under the lease, unless there are facts and circumstances

from which such holding may be inferred, in addition to the retention of possession. He is not bound to surrender possession of the entire premises,

but may exonerate himself from liability by offering to let his co-tenant into possession with him at the expiration of the lease.

12. In the present case the Defendant has admittedly not offered to let the Plaintiffs into possession with him on the expiry of the lease period. The

difficulty of holding joint possession of the mills is quite a different matter. It is a matter of mutual adjustment and arrangement and on failure to

arrive at a suitable formula and work the mills in conjunction, other remedies are open to the parties. But the Defendant has no right to assume

exclusive possession by his own unilateral act and offer to account to his co-tenants giving them no rights in the management of the common

property.

13. The liability of the co-tenant continuing in possession of the whole property after the expiry of the lease is thus set out in Freeman''s Co-

tenancy and Partition at page 383 thus:

If a lessee is also a co-tenant at the termination of his lease, and, on that account, is entitled to remain in possession, he cannot be proceeded

against under the act in reference to unlawful detainers, and thereby compelled to surrender the entire possession. Acts giving double rent against a

tenant holding over, after notice to quit have been held to apply to a co-tenant who, subsequent to the expiration of a lease from his companion,

refused to let the latter into possession. But the co-tenant continuing in sole possession after the termination of the lease from his companion is not

liable for rents, unless he does some act to prevent the latter from joining in the occupation. But where one obtains possession under a lease from

the other, he must, at the termination of the lease, surrender the possession which he acquired by it. If an action for an unlawful detainer is brought

against him, he cannot successfully resist it by showing that the title was at the leasing, and still is vested in himself and his lessor as tenants in

common.

14. The aforesaid passage completely answers the contentions on behalf of the Appellant that on the expiry of the lease, he had reverted to his

position as a co-tenant and was in lawful possession as a co-tenant. An argument has been advanced that the co-tenancy in this case is not

confined merely to landed or immovable properties but there are movables also. Freeman observes at page 330 in paragraph 250 thus:

The right to take possession of the subject of the co-tenancy, whether it be of real or personal state, seems to be conceded to every co-tenant,

...No doubt the same rule is applicable to the retaking of a chattel from the co-tenant who happens to have it in his possession. But a co-tenant has

no right to take or to retain possession under circumstances which would not justify such taking or detention if he were sole owner. Hence, if he

takes a lease of his co-tenant who is in sole possession and thereby is enabled to enter upon the premises, he must surrender the possession at the

termination of his lease. If he refuse, he may be removed by an action for an unlawful detainer.

15. In the present case it is the admitted case of the parties that the Defendant

was put into possession by the father of the Plaintiffs 1 to 5 under

the lease. In fact, Kandaswami Mudaliar, the father had possession of the entire lease and the whole property he had placed in possession of the

Defendant pursuant to the lease arrangement.

16. It follows, therefore, that the Defendant is bound to compensate the Plaintiffs for not surrendering possession of the mills which they were

entitled to on the expiry of the period of tenancy and effectively excluding them from their participation in the enjoyment of the mills. The Courts

below have properly in the absence of other evidence adopted the rental value as fixed in the lease agreement exhibit A-1 for fixing the amount of

compensation. In this case it is needless to discuss the fine distinction between damages or compensation or mesne profits for wrongful occupation

by the Defendant for the period subsequent to 31st March 1957, as I am not awarding interest for the amounts found payable as compensation

after the period of the lease.

17. The Plaintiff will no doubt be entitled to the interest on the arrears of rent for the period from 1st October 1956 to 31st March 1957 as

provided for in the lease deed itself. But this is not a case for awarding any interest in respect of compensation payable for the subsequent periods.

The lease expired on 31st March 1957. Notices had passed between the parties immediately thereafter. But the present suit was filed only on

22nd January 1959. It is stated that the Defendant filed the other suit for partition and accounts shortly thereafter on 15th April 1959. The decree

in the circumstances would be modifier by substituting for the figure Rs. 9,618-12-0 the figure Rs. 9,009-9-0. The Defendant has not in the

present proceeding disputed his liability for rent for the remaining period of the lease. Taking this fact also into consideration, this is eminently a fit

case where the parties must bear their respective costs throughout.

18. In the result, subject to the above modification in the decree, the second appeal fails and is dismissed.

No leave.

