
(1991) 04 MAD CK 0012
In the Madras High Court

Ponnuswamy and Others

APPELLANT

Vs

Sachidanandam Pillai (decd.) and Others

RESPONDENT

Date of Decision : 30-04-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Tamil Nadu Cultivating Tenants Protection Act, 1955 — Section 3(1)

Citation : (1992) 2 LW 134 : (1992) 1 MLJ 157

Hon'ble Judges : Abdul Hadi, J

Bench : Division Bench

Judgement

Abdul Hadi, J.—These two appeals are by the same two persons Ponnusamy and Rasu who are defendants in O.S. No. 1014 of 1978, on

the file of Sub-Judge, Tiruchirapalli (against which A.S. No. 588 of 1981 arises) and plaintiffs in O.S. No. 662 of 1980 on the file of Sub-Judge,

Tiruchirapalli (against which A.S. No. 445 of 1983 arises). The sole plaintiff in O.S. No. 1014 of 1978 namely, Sachidananda Pillai is the sole

respondent in A.S. No. 588 of 1981 and the 4th respondent in the other appeal A.S.No.446 of 1983. He died pending the appeals and his L. Rs.

have been brought on record. The suit O.S.No.1014 of 1978 if for specific performance of Ex.A-7, the deed of surrender of tenancy-right,

executed by the first defendant Ponnusamy on. 23.9.1978, whereby the said Ponnusamy after receiving a consideration of Rs. 10,000 surrenders

his right of tenancy over the suit land in favour of the plaintiff Sachidananda Pillai, who subsequently becomes the owner of the suit property under

sale deeds ExA-1, dated 9.4.1979, Ex. A-2, dated 9.4.1979 and Ex.A-3, dated 30.1.1980 from the respective previous owners of the suit

property who are defendants 1 to 3 in the Suit No. 662 of 1980 and respondents

1 to 3 in A.S.No.446 of 1983. Though the abovesaid sale

deeds Exs. A-1 to A-3 came into being, a little later, after Ex.A-7, Ex.A-7 itself recites that the plaintiff, even on the date of Ex. A-7, had agreed to

purchase the suit property from the abovesaid owners.

2. The other suit O.S. No. 662 of 1980 is filed by the appellants about 2 years after the former suit O.S. No. 1014 of 1978, and prays for an

injunction against the said former owners of the suit property and the abovesaid Sachidanandam Pillai, the subsequent purchaser. The defence plea

in O.S.No.1014 of 1978, is that the said Ex.A-7 was not executed voluntarily and there was no free consent in execution of the same. The other

defence is that the 2nd defendant Rasu alone is the cultivating tenant of the said land and not the first defendant, as contended by the plaintiff

Sachidanandam Pillai. The further defence is that the execution of Ex.A-7 is opposed to public policy and hence also Ex.A-7 is not valid. The same

pleas are also raised as the plaint allegations in O.S.No.662 of 1980. In this suit, the defendants 1 to 3, the erstwhile owners of the suit property,

remained ex parte and the pleas of the 4th defendant-Sachidanandam Pillai are almost the same as the plaint allegations in O.S.No.1014 of 1978.

In the above circumstances, both the suits were taken up together by the court below and a common judgment dated 26.8.1980 has been passed.

The Court below has found that the said Ponnusamy alone was the cultivating tenant of the suit land and not Rasu. It is also found that Ex.A-7 was

executed voluntarily by the said Ponnusamy. Further the court below has also found that the execution of Ex.A-7 is not opposed to public policy.

So holding, the court below has granted the decree for specific performance and separate possession, against the defendants with costs. But it has

negatived the claim for mesne profits made in O.S.No.1014 of 1978. Thus O.S.No.1014 of 1978 has been decreed. Consequently O.S.No.662

of 1980 was dismissed with costs. Hence the present appeals by the said Ponnusamy and Rasu.

3. Before me also the learned Counsel for the appellants, Ponnusamy and Rasu, argued on the same lines as it was done in the court below.

However he could not very much seriously argue two of the above said points namely that Rasu alone was the cultivating tenant and that Ex.A-7

was not entered into voluntarily by Ponnusamy. The findings of the court below

regarding these two points can be in no way said to be erroneous.

The learned Counsel for the appellants then proceeds to argue that Ex.A-7 is opposed to public policy, in view of Tamil Nadu Cultivating Tenants

Protection Act, which gives protection against eviction of cultivating tenants. The contention is that Ponnusamy cannot contract out of statute. The

learned Counsel points out that the preamble to the said Act says that the Act is ""for protection from eviction of cultivating tenants."" He also drew

my attention to Section 3(1) of the Act which runs as follows:

Subject to the next succeeding Sub-sections, no cultivating tenant shall be evicted from his holding or any part thereof, by or at the instance of his

landlord, whether in execution of a decree or order of a court or otherwise.

So, according to him, contrary to the abovesaid enactment, if the tenant executed Ex.A-7, the very execution itself is opposed to public policy. He

also drew my attention to three decisions namely, Subbiah Gounder v. Rami Gounder (1957)1 M.L.J.18 Murlidhar Aggarwal and Another Vs.

State of Uttar Pradesh and Others, , and Naveen Chandra v. VI Additional District Sessions Judge, Meerut AIR 1983 All. 116. These decisions

did not arise under Tamil Nadu Cultivating Tenants Protection Act. But they arose under the relevant Rent Control Acts. In these decisions, it was

no doubt held that no eviction could be ordered from the relevant buildings in question merely on the ground that the tenant therein had agreed to

surrender his rights of tenancy therein.

4. But, this argument of the learned Counsel for the appellants cannot be accepted. Neither the abovesaid provisions of the Tamil Nadu Cultivating

Tenants Protection Act nor the abovesaid decisions would apply to the present case. These decisions arose out of petitions filed for eviction of the

tenants of respective buildings. The relevant enactments therein, specifically say that eviction could be granted under the said respective enactments

only on the grounds specified therein and the rent controller or the other relevant authority under the above said Rent Control Acts, must satisfy

himself before granting eviction that any one of the grounds specified therein exists. So eviction cannot be granted merely because a tenant has

agreed to vacate or surrender his tenancy rights. Those decisions cannot be applied to the present case which does not arise on a petition for

eviction under Tamil Nadu Cultivating Tenants Protection Act. The present O.S.

No. 1014 of 1978 is a suit for specific performance of Ex. A-7

and so those decisions cannot be applied to the present case. The term used in the above said preamble to the Tamil Nadu Cultivating Tenants

Protection Act or Section 3(1) therein, is ""eviction"", but what is sought for in the present case is not ""eviction"". This term ""eviction"" has been also

interpreted by a Division Bench of this Court in the decision reported in Kuppammal v. Vellingiri 70 L.W. 11, wherein in the context of an

application, u/s 4 of the above said Act, for restoration of possession, sought for by the cultivating tenant against the landlord, their Lordships have

observed as follows:

We consider that ""eviction"" as used in Section 3(1) and Section 4(2) is an eviction of this character and that in cases where the tenant surrenders

possession voluntarily without being compelled to do so by any act or conduct on the part of the landlord, there is no eviction....It is sufficient for

our purpose to say that there would be no eviction when a tenant voluntarily and willingly surrenders possession of the land to the landlord. So far

as the present case is concerned, the admitted facts and the finding of the Revenue Divisional Officer are that the surrender was for consideration

and was a result of a bargain freely and voluntarily entered into between parties. In the circumstances there was no eviction of the 1st respondent

from the holding which he formerly held. In view of our construction of Section 4(1), that it contemplates restoration to possession only of

cultivating tenants who were in possession of their holdings on 1st December, 1953, but who ceased to be in possession at the date of the

commencement of the Act by reasons of an eviction as specified in the several provisions, which we have already pointed out, it follows that the

1st respondent was not entitled to an order for restoration to possession under the provisions of Section 4.

Applying the same meaning to the above word ""eviction"" I also find that no ""eviction"" as such has been sought for in O.S.No.1014 of 1978.

5. Further, there is also a direct decision applicable to the facts of the present case. In Thangamani and Another Vs. Natesan and Others, , Bellie,

J, has held as follows:

True the defendants (appellants were cultivating tenants but it cannot be said that it is not open to them to surrender possession to the plaintiffs-

landlords even if they (defendants) wanted to do so considering the benefits they would get by that. Contracting out or waiving the statutory

rights....It is clear that the defendants are in possession under the agreement and they are not in possession as cultivating tenants. For surrender of

possession physical delivery is not always necessary, it can be by implication also.

So in the present case also after executing Ex.A-7, Ponnusamy, the first defendant in O.S. No. 1014 of 1978 is no longer a cultivating tenant. So

also the execution of Ex.A-7 cannot be said to be against public policy.

6. But, the learned Counsel for the appellants rightly contends that there cannot be specific performance against the second defendant Rasu since

he did not execute Ex.A-7. But the court below has granted decree for specific performance even against the said Rasu. That is not correct. The

learned Counsel for the appellants further argues that even possession decree cannot be given against Rasu. But, this contention is not correct

because the court below has held that only the first defendant Ponnusamy was the cultivating tenant and not the said Rasu. That means, the latter

has no right to remain in possession of the suit property and so possession decree could be given against Rasu the second defendant.

7. Then the learned Counsel for the respondents in A.S. No. 588 of 1981 argues that the court below erred in having held that the plaintiff in O.S.

No. 1014 of 1978 is not entitled to mesne profits. The court below has simply observed in para 25 of its judgment that the plaintiff is not entitled to

the mesne profits which is not contemplated under Ex.A-7. No further reason has been given for negating mesne profits. Ex.A-7 cannot be

expected to provide for mesne profits, since, if possession is given pursuant to Ex.A-7 immediately thereafter, the question of mesne profits would

not arise at all. Certainly if the appellants have not given possession pursuant to Ex.A-7, their possession after executing Ex.A-7 will be unlawful

and so the court below should have held that the plaintiff in O.S.No.1014 of 1978 is entitled to future mesne profits i.e, from the date of the suit.

But, the learned Counsel for the appellants argues that this relief cannot be given in this appeal AS.No.588 of 1981 since there is no cross

objection by the respondents. In this Appeal No. 588 of 1981, the learned Counsel for the respondents submits that the respondents filed cross

objection in 1982 itself, but, actually, no such cross objection is placed before

me. The counsel for the appellant also submits that he has not received any notice of such cross objection. However, the learned Counsel for the respondents argues, relying on Order 41, Rule 33, C.P.C., that even without cross objection, the relief regarding mesne profits can be given in favour of the respondents in this Appeal No. 588 of 1981,O.41,

Rule 33 runs as follows:

The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection (and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

Provided that the Appellate Court shall not make any order u/s 35-A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order.

The learned Counsel for the respondents brought to my notice Hashmatrai and Another Vs. Tarachand and Others, , Ramasami Nadar v.

Pathummal (1990) 2 L.W. 263 , Koksingh Vs. Smt. Deokabai, , in support of his contention. All these decisions indeed support his contentions.

To illustrate, in Ramasami Nadar v. Pathummal (1990) 2 L. W. 263, the plaintiff claimed a decree with reference to 65 cents. But, the trial court gave a decree only with reference to 48 cents. The defendants preferred an appeal but, the appellate court dismissed the appeal. However it gave a decree to the plaintiff, on the basis of Order 41, Rule 33, C.P.C., for the balance of 17 cents also even though no cross objection was filed by the plaintiff.

8. Therefore, I hold that the plaintiff is entitled to mesne profits. No doubt, the quantum of the same has to be ascertained by separate enquiry in

the trial Court. As and when the said quantum is ascertained necessary adjustments should be made for the amounts paid already by the defendants to the plaintiff while the appeal was pending.

9. Accordingly the judgment and decree of the court below in O.S. No. 1014 of 1978 is modified as follows: Decree for specific performance is

granted only against the first defendant Ponnusamy. However decree of possession is against both the defendants Ponnusamy and Rasu. It is also

held that the first defendant Ponnusamy is liable to pay mesne profits to the plaintiff from the date of the suit upto the date of delivery of possession.

The plaintiff will also be entitled to costs against both the defendants. The appeal A.S.No.588 of 1981 is therefore dismissed with costs.

Consequently A.S. No. 446 of 1983 is also dismissed with costs.