
(1955) 08 MAD CK 0021
In the Madras High Court

R. Sumudra Vijayam Chettiar

APPELLANT

Vs

Srinivasa Alwar and Others

RESPONDENT

Date of Decision : 25-08-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 8
Transfer of Property Act, 1882 — Section 111(c)

Citation : AIR 1956 Mad 301 : (1956) 69 LW 62 : (1956) 1 MLJ 276

Hon'ble Judges : Rajagopala Ayyangar, J

Bench : Single Bench

Judgement

Rajagopala Ayyangar, J.—The Civil Revision Petition and the Civil Miscellaneous Second Appeal in the alternative have been filed by the second defendant in O.S. No. 40 of 1945 on the file of the District Munsiff's Court of Kumbakonam in the following circumstances. I shall be referring to the 2nd defendant as the appellant in the rest of the judgment.

2. O.S. No. 40 of 1945 was a suit brought by the plaintiff for redemption of a usufructuary mortgage executed in favour of the first defendant, wherein the second defendant, who is the present appellant, was a co-mortgagor. The redemption suit was decreed, the preliminary decree having been passed on 30th April, 1947, and this was confirmed on 16th April, 1948, by the Sub-Court of Kumbakonam on appeal. The 2nd defendant and the plaintiff deposited the mortgage amount of Rs. 1000 in equal moieties on 30th July, 1947, and the first defendant drew the amount from Court on 22nd September, 1948. The present application LA. No. 781 of 1950, is for the purpose of passing a final decree for redemption under Order 34, Rule 8, of the CPC and for directing the first defendant to deliver possession of the mortgaged properties and render accounts in respect of future profits from 22nd September, 1941, until delivery of possession. This application was preferred by the second defendant, who, as stated before, was one of the mortgagors. The complications in the case have arisen out of the fact that subsequent to the usufructuary mortgage in favour of the first defendant, he let the third defendant into possession as a tenant under

him, and it is the obstruction caused by this tenant that has been responsible for the proceedings now before this Court, and the effect of this obstruction on the rights of the parties is the subject-matter for adjudication in the Civil Revision Petition and the Civil Miscellaneous Second Appeal now before me.

3. To continue the narration of the facts immediately after the receipt the mortgage money from Court on 22nd September, 1948, the first defendant issued a notice (Exhibit R. 5) to the third defendant, his tenant, directing him to pay the rent subsequent to 20th September, 1948, to the plaintiff and the 2nd defendant, the appellant here. He also gave another notice, dated 25th September, 1948, (Exhibit R. 1) to the appellant and the plaintiff directing them to receive the rent subsequent to 20th September, 1948, from the third defendant. The third defendant sent a reply (Exhibit R. 6) on 4th October, 1948, disputing the amount of arrears of rent due by him, but not questioning his status as a tenant or his liability to pay rent.

4. After the despatch and receipt of these notices the appellant filed R.C.A. No. 132 of 1950 before the Rent Controller, Kumbakonam, for an order of eviction against the third defendant, the tenant in occupation of the suit property. In this petition he claimed that he was the landlord and the third defendant, the respondent to the petition, was the tenant of the non-residential building which was described in the schedule attached, and that the tenant had not paid any rent to him or to the plaintiff in the suit, who were the persons entitled to receive the rent by virtue of the decree in O.S. No. 40 of 1945. He also stated that the tenant had sub-let the entire building and had further used the building for purposes other than that for which it was leased. On these grounds he prayed for an order for eviction and for his being put in possession of the property, under the orders of the Court. The third defendant resisted that petition on the ground that the application was not maintainable and that without obtaining symbolical delivery against the first defendant no claim for ejectment could be maintained against him. This preliminary objection was upheld by the Rent Controller and the appellant took the matter in appeal to the appellate authority, the Subordinate Judge of Kumbakonam. This appeal was dismissed, the appellate authority also holding the preliminary objection to be well-founded.

5. At about the same time as the application for eviction before the Rent Controller, the appellant filed I.A. No. 781 of 1950 for a decree for possession and mesne profits, from the order in which the present Civil Miscellaneous Second Appeal and the Civil Revision Petition arise. There was delay in the hearing of this application for a final decree by reason of the third defendant being adjudicated an insolvent and the Official Receiver having to be impleaded as a party to the proceedings. By the time this application came on for hearing the petition for eviction had been dismissed by the Rent Controller and the appeal against it by the appellant was pending. The learned District Munsiff, who heard the application LA. No. 781 of 1950 held that the 2nd defendant having accepted the third defendant as a tenant under him by reason of the proceedings

for eviction taken against the latter could not claim to have a decree for mesne profits as against the 1st defendant. On this ground he dismissed the petition in full even in regard to the prayer for final decree for redemption. The appellant took the matter in appeal to the learned Subordinate Judge of Kumbakonam. He allowed the appeal in so far as it related to the prayer for a final decree for redemption; but in regard to the claim for mesne profits he dismissed it. The ground upon which this dismissal was rested was that the appellant was estopped from claiming any mesne profits from the first defendant by reason of certain conduct which is referred to in the judgment. It is from this order of the learned Subordinate Judge that the present Revision Petition and the alternative Civil Miscellaneous Second Appeal have been filed.

6. Two questions arise for consideration. The first is as regards the obligation of a usufructuary mortgagee, who has let a tenant into possession after the execution of the mortgage in his favour to put the mortgagor in actual possession of the property on redemption. It is not disputed that when a mortgagor puts a mortgagee in possession of property under a usufructuary mortgage the former has a right, when he has discharged the mortgage debt, to redelivery of the possession of the property from the mortgagee. The position, however, that is sought to be maintained by learned Counsel for the respondent is that this obligation is fulfilled by the mortgagee issuing a notice to the tenant whom he had inducted into possession to deliver possession to or attorn to the mortgagor, and that he was not concerned to see whether the tenant did so or not. I cannot agree that this is the law. In cases where such tenant attorns to the mortgagor and the mortgagor accepts the attornment there would doubtless be an effective delivery of possession, which would terminate all further liability on the part of the mortgagee; but where there is no attornment either because the mortgagor refuses to accept the person in occupation as his tenant or because though the mortgagor is willing to accept the person in possession as his tenant, the latter refuses to do so, the mortgagor is entitled to insist that khas possession should be delivered to him and not merely such possession as is involved by a mere direction by the mortgagee to his tenant to attorn to the mortgagor. Coming to the facts of the present case if the matter had rested merely with the issue of the notice by the first defendant to the third defendant asking the latter to attorn to and pay rents to the plaintiff and the second defendant and the notices to the second defendant and plaintiff requiring them to look to the third defendant for the payment of rents due on the property, together with the failure on the part of the tenant to attorn to the mortgagors there could be no doubt that the second defendant would have been entitled to an order for mesne profits as against the first defendant. The contention of Mr. Venugopalachari, learned Counsel for the appellant, was that the position was not different from what I have just now set out and that so long as there had been no attornment by the tenant and acceptance by the mortgagor of that tenancy, his right, to proceed against the mortgagee for mesne profits was not extinguished. But what stands in the way of the appellant's contention is the legal effect of the proceedings for eviction

before the Rent Controller initiated by him.

7. The learned Subordinate Judge decided against the appellant on the ground that he was estopped from proceeding against the first defendant by reason of the eviction proceedings. Mr. Venugopalachari submitted that this was erroneous in that the first defendant had suffered no prejudice by reason of the appellant proceeding against the third defendant. I am not inclined to agree with this submission. If the appellant had indicated that he did not propose to recognise the third defendant as his tenant but would proceed only against the first defendant the latter might certainly have taken steps to recover rents as also possession from his tenant so that he might satisfy the claims of the appellant. In the face of the action by the appellant against the third defendant, the first defendant could certainly not himself have proceeded against the latter. Meanwhile the third defendant has become insolvent. In these circumstances I am inclined to agree with the Subordinate Judge that there exists a foundation for raising an estoppel against the appellant.

8. But apart from this I am prepared to hold that the initiation of the proceedings before the Rent Controller by the appellant against the third defendant constitutes an election on his part to treat the tenant in possession as his tenant. When notices were issued by the first defendant to the appellant and the third defendant there were two courses open to the former. The first was to require the first defendant to deliver him khas possession of the property refusing to recognise the third defendant. On this footing he could have pursued his remedies against the first defendant and would have been entitled to a decree for mesne profits as against him. There was another different and a wholly inconsistent position which he might have taken up. That was to recognise the tenant in possession as his own tenant. There can be no doubt that if he chose the later course he could not at any later date make any claim against the first defendant in the event say of his finding it difficult or not possible to recover either arrears of rent or possession from his tenant. In the present case, though the appellant was willing to recognise the third defendant as his tenant the latter refused to recognise the appellant as his landlord. The question is whether it is the act or conduct of the appellant that matters or whether the fact that the tenant has refused to attorn makes any difference. In my opinion the conduct or attitude of the tenant is wholly irrelevant. u/s 111(c) of the Transfer of Property Act "a lease of immovable property determines where the interest of the lessor in the property terminates on the happening of any event, by the happening of such an event". In the case of a usufructuary mortgage, as the mortgagee's interest in the property terminates on redemption, a lease granted by him comes to an end at the same time. The lessee then in possession, would, on that event happening become a trespasser and therefore cannot by any act of his own create the relationship of lessor and tenant between himself and the mortgage. In the present case the mortgage has treated the tenant as holding under him and sought relief on that footing in the eviction proceedings. Could he thereafter turn round and assert that the third defendant was not his tenant and claim to

treat the first defendant as continuing in possession and therefore liable to pay him mesne profits by reason of wrongful occupation. I am clearly of the opinion that he cannot and that he is precluded by his election in so doing.

9. Mr. Venugopalachari contended that the effect of the eviction proceedings did not unmistakably evince any intention to treat the third defendant as his tenant. I am, however, unable to agree in this submission in view of the terms of the allegations contained in the application for eviction as well as the grounds put forward in the memo of appeal to the Appellate Authority from the order of the Rent Controller. For instance in ground No. 3 in the appeal grounds the second defendant insisted that the Rent Controller ought to have held "that the petitioner is the landlord and the respondent is a tenant under the Act and as such the petition is sustainable." In my opinion, there is here a clear case of election and the second defendant must be taken by reason of his conduct to have accepted the third defendant as his tenant with the necessary result that he could no longer look to the first defendant for the payment to him of any mesne profits which he now finds unable to recover from the person whom he accepted as his tenant.

10. A further contention was raised by learned Counsel for the appellant that there could be no final election unless the other party had suffered any prejudice and in support of this position he relied on paragraph 229 of *Spencer Bower on Estoppel*. I do not, however, agree with him in regard to what might be termed, true cases of election. Where a man is entitled to one of two inconsistent rights and he has with full knowledge done an unequivocal act indicating his choice of the one he cannot afterwards pursue the other which after the first choice is by reason of the inconsistency no longer open to him. Such cases do not require detriment to the other party as foundation for their application. As Lord Blackburn said in *Scarf v. Jardine* (1882) L.R. 7 A.C. 345 at p. 360, quoting a passage from Coke on Littleton:

Where a man has an option to choose one or other of the two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered.

11. This passage as well as the law contained in it received express approval from Lord Atkin in the House of Lords in *United Australia Ltd. v. Barclay's Bank, Ltd.* L.R. 1941 A.C. 1 at 30 where the learned Lord said:

On the other hand, if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose. Instances are the right of principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the principal: the right of a landlord where forfeiture of a lease has been committed to exact the forfeiture or to treat the former tenant as still tenant and the like. To those cases the

statement of Lord Blackburn in *Scarf v. Jardine* (1882) L.R. 7 A.C . 345 at p. 360, applies "where a man has an option to chose one or other of two inconsistent things when once he has made his election it cannot be retracted."

The first defendant was undoubtedly prejudiced by the election but even if this feature were absent I would hold that there had been an election by proceedings against the tenant notwithstanding that the appellant was unable to obtain a judgment in it and that he cannot thereafter seek to treat the first defendant as in possession and recover mesne profits against him.

12. The Civil Miscellaneous Second Appeal fails and is dismissed with costs. The Civil Revision Petition also is dismissed but in the circumstances without costs.