

(1961) 01 MAD CK 0005
In the Madras High Court

Sri Mungaliyamman Temple and Others	APPELLANT
Vs	
Loganatha Naicker and Others	RESPONDENT

Date of Decision : 02-01-1961

Acts Referred:

Citation : (1962) 1 MLJ 128

Hon'ble Judges : Veeraswami, J

Bench : Single Bench

Judgement

Veeraswami, J.—This Second Appeal by the plaintiffs turns upon a question of limitation. They sued for recovery of possession of the suit

lands which originally formed part of samudayam lands belonging to the Mirasi Pangudars of Acharapakkam village. Both the Courts below have

held that the suit lands by dedication in about 1861, belonged to Sri Mungaliyamman temple of which the plaintiffs are the trustees appointed by the

then Hindu Religious Endowments Boards. This finding is no longer in dispute. The suit was framed as one by a landlord to recover possession

from his tenants and was found by the trial Court to be in time. The lower appellate Court disagreed with that view and approached the question

from the standpoint of whether the plaintiffs had failed to prove possession within 12 years of the suit or whether the defendants had acquired title

by adverse possession. In its opinion, there was no relationship of landlord and tenant between the parties, and the ancestor of the defendants

having been let into possession of the suit lands as a licensee after his death it became, in the hands of his descendants, adverse to the temple. On

that view the lower appellate Court reversed the decree of the trial Court and dismissed the suit as barred by time.

2. In order to appreciate the question of limitation it is necessary to notice the relevant facts. On August 5, 1861, the then samudayamdars of

Acharapakkam let 10 persons of whom Vengu Dasari was one, into possession of certain samudayam lands. The suit lands formed part of them.

An agreement of that date, which was in writing, contained the terms under which they were put in possession. Evidently they were waste lands to

be reclaimed and the executants undertook to cultivate them on payment of theervai due on them to the Government together with thundu theervai

and sudhanthiram at a certain rate to the samudayamdars. The tenants were to appropriate for themselves the net yield or usufruct from the lands.

It was provided that if the samudayamdars required the lands, they would be at liberty to enter upon them in the month of Ani of the year. There

followed another agreement dated 22nd January, 1862, which was executed by Thiruvengada Dasari, son of Vengu Dasari. The preamble and the

recitals referred to the terms and conditions of the earlier agreement and acknowledged the title of the samudayamdars to the suit lands. The

purpose of the second agreement was grant of permission for Thiruvengada Dasari to sink a well on the lands. It was stipulated that he should not

claim from the samudayamdars the cost of sinking the well except at the time of surrendering possession of the lands to the samudayamdars. There

was a further stipulation that on contravention by him of any of the terms of the tenancy, the samudayamdars should be at liberty to enter upon and

take possession of the lands including the well without paying any compensation therefore. It is common ground that the defendants who are the

descendants of Vengu Dasari and Thiruvengada Dasari, had been in possession of the suit lands continuously since 1861. It is in evidence that

between 1915 and 1944 they had been dealing with the lands by executing sales or usufructuary mortgage as between themselves. The patta for

the suit lands stood in the name of the temple till 1943. The settlement register of the year 1878 showed that Patta No. 9 which included the suit

lands, even then stood registered in the name of the temple. The oral evidence was to the effect that the defendants stopped payment of rent to the

temple after 1925. The trial Court had no difficulty in holding that the agreement dated 5th August, 1861, was a lease. On that basis it found that

mere non-payment of rent did not change the relationship between the landlord and tenant and convert the tenant's possession into one adverse to

the landlord and that the suit was therefore in time. But the lower appellate Court equally had no difficulty in thinking

A reading of Exhibits A-1 and A-2 (the said agreement) do not even suggest that there was a lease arrangement. It appears to be a licence rather than a lease. The licence was revocable.

Beyond setting out the main provisions of the two agreements, the lower appellate Court gave no specific reason for its view on the nature of the agreements. The lower appellate Court then stated:

Even if Exhibits A-1 and A-2 are to be construed to be sufficient to create the relationship of landlord and tenant, the suit has not been filed within

12 years of the death of Thiruvengada Dasari. There was no payment of rent at least subsequent to 1925, by any of the defendants creating or

continuing the relationship of landlord and tenant between the predecessors-in-title of the defendants and the villagers on behalf of plaintiff-temple.

It follows even from this that the present suit is not in time.

3. Sri M. Natesan, the learned Counsel for the appellants, contested the view of the lower appellate Court that the said agreements amounted to a

licence and not a lease. The learned Counsel also urged that the lower appellate Court erred in approaching the question of limitation from the

angle of adverse possession on the part of the defendants or whether the plaintiffs were in possession within 12 years of the suit. Now the

distinction between lease and a licence is well defined and settled. Transfer of the right to enjoy immovable property is the main characteristic of a

lease. In the case of a licence there is no such transfer. It is in the nature of a privilege personal to the grantee to do something in or upon the

immovable property in the possession of the grantor. The lessee's possession to the exclusion of the lessor, therefore, prima facie points to a lease

and not to a licence. There may, however, be circumstances present which may outweigh that view and indicate a licence, for whether it is the one

or the other is essentially a matter of intention. If authority is required, it is enough to refer to *Associated Hotels of India v. R.N. Kapoor* (1960)

S.C.J. 453, in which the Supreme Court set out the following propositions as well established for finding out whether a given transaction is a lease

or a licence:

(1) To ascertain whether a document creates a licence or lease, the substance of

the document must be preferred to the form; (2) the real test is the intention of the parties whether they intend to create a lease or a licence; (3) if the document creates an interest in the property it is a lease; but if it only permits another to make use of the property of which the legal possession continues with the owner it is a licence, and (4) if under the document a party got exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

Applying the above tests, it seems to me that the said agreements in this case clearly establish the transaction to be a lease and not a licence.

Cultivation was the purpose for which the ancestors of the defendants was let into possession of the suit lands. To start with, they were waste lands

which required to be reclaimed and made fit for cultivation. Having regard to these facts, and the fact that actually the plaintiff-temple reserved no

control over or possession of the lands, the defendants' possession was evidently exclusive. That the defendants' ancestors sunk a well on the

lands, though with the permission of the samudayamdars, is a further indication that what the defendants enjoyed over the suit lands was not a mere

privilege but involved a transfer of a right to use the lands themselves. They were, as already mentioned originally samudayam lands and there was

no apparent reason for the samudayamdars to have retained possession with them while they let the defendants reclaim and cultivate them. Further

the payment of thundu theervai and swatantaram are additional circumstances which support the view that what was intended was a lease.

4. Indeed Sri K.S. Ramamurthi, the learned Counsel for the respondents did not very properly dispute the above position. It would, therefore,

follow that the suit is clearly governed by Article 139 and not any other Article of the Limitation Act. So the starting point would be the time when

the tenancy was determined and not the date of dispossession or discontinuance or when possession became adverse. Apparently, realising this,

the learned Counsel for the respondents contended that the tenancy in this case was one at will and it terminated on the death of the original lessee

Vengu Dasari or his son Thiruvengada Dasari many years ago. In support of his contention, the learned Counsel invited my attention to certain

authorities to show what a tenancy at will was and when it terminated but I do

not think it necessary to refer to them. In my opinion, there is nothing in the two agreements already mentioned which compels me to hold the lease to be one at will. It is no doubt true, as contended by the learned Counsel for the respondents, that the agreement dated 5th August, 1861, provided for termination of the lease whenever the lessors required the lands. But the termination could not take effect forthwith but only from, the month of Ani in a year. Moreover, the lease was for the reclamation of the lands and cultivation. It seems to me that no such agricultural lease can normally be at will. Such a precarious tenure seems to be hardly consistent with the requirements of agricultural operations. In my opinion, the lease in this case was clearly not one at will which could be said to have come to an end on the death of Vengu Dasari or Thiruvengada Dasari.

5. There is no evidence that the temple or its trustees determined the lease at anytime or before 12 years of the suit. That being the case, the suit should be held to be in time under Article 139 of the Limitation Act. The lower appellate Court found that the defendants had acquired prescriptive title by being in adverse possession of the suit lands over the statutory period. It also thought that the suit was out of time because the plaintiffs had not established their possession of the suit lands within 12 years of the suit. Neither of the approaches made by the lower appellate Court to the question of limitation can be supported. When the suit falls squarely under Article 139 of the Limitation Act, there is no room to apply to it any other Article of the Limitation Act. Neither the plaintiff's possession within 12 years of the suit nor adverse possession claimed by the defendants is, therefore, relevant to this case. That apart, it is well settled that mere stoppage by the lessee of payment of rent does not ipso facto convert his possession into one adverse to the lessor. As long as the relationship of landlord and tenant continues, no question of adverse possession can arise between them. But, as I said, his suit is governed by Article 139 of the Limitation Act and the starting point for the purpose of that Article is the date when the tenancy is determined. There is no such determination at all in the instant case.

6. The Second Appeal is allowed and the decree of the trial Court is restored with costs of the plaintiffs throughout.