

(1954) 01 MAD CK 0034

In the Madras High Court

Case No : Tax Revision Case No's. 188 to 190, 193, 194, 199 to 204, 221 to 223, 247 to 249, 256 to 261, 265 and 266 of 1953

S.T. Sultan Ahmed Rowther and Others

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 27-01-1954

Acts Referred:

General Clauses Act, 1897 — Section 3(25)

Registration Act, 1908 — Section 2(6)

Transfer of Property Act, 1882 — Section 3

Citation : AIR 1954 Mad 949 : (1955) ILR (Mad) 159 : (1954) 67 LW 381 : (1954) 2 MLJ 93

Hon'ble Judges : Satyanarayana Rao, J; Rajagopalan, J

Bench : Division Bench

Advocate : M.K. Nambiar and B. Punyakoti Chetti, for the Appellant; Assit. Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Rajagopalan, J.—The question for determination in each of these petitions is whether the assessee is entitled to the benefit of the proviso to Section 2(i), Madras General Sales Tax Act 9 of 1939 (hereinafter referred to as "the Act") and as such entitled to exclude from his turnover the proceeds of the sales of arecanut in the assessment year, that is, whether they were sales by a dealer of "agricultural or horticultural produce grown on land in which he had interest whether as owner, usufructuary mortgagee, tenant or otherwise."

2. That the assessee was a dealer as defined by the Act was never in dispute. The finding of the Appellate Tribunal, which differed from the departmental authorities on that point, was that the cured arecanut sold by the assessee was agricultural or horticultural produce. The correctness of that finding was not challenged, and the arguments before us proceeded on the assumption, that the arecanut sold by the assessee was horticultural produce within the meaning of Section 2(i) of the Act.

The question that remains was whether that arecanut was "grown on any land in which the assessee had an interest whether as owner usufructuary mortgagee, tenant or otherwise." That question was answered in the negative by the Tribunal, and the correctness of that decision was challenged before us by the assessees.

3. In each case the assessee entered into a contract with the owner of the tope, that is, the land which contained arecapalms among others, under Which the assessee became entitled to collect the usufruct of the trees in that tope. The period of the contract was one year, and even when renewed it was only on an annual basis. In many of the cases before us, the contracts were oral and not written, but that in no way affected the determination of the real question at issue, whether the assessee acquired an interest in the land under the terms of his contract.

Mr. Nambiar, the learned counsel for the assessees, invited us to construe the terms of the written contract which the assessees Venkatarama Goundar and Sahib Rowther entered into as fairly typical, and the learned counsel conceded that none of the other assessees could claim he was in a more favourable position.

4. The terms of the contract relevant for our present purpose were:

"This lease deed is in respect of the usufruct.

"The undermentioned tope belonging to you and in your possession and enjoyment, we have accepted to take on lease for a period of one year from 1st Chitrai Vikruthi year to 31st Fanguni month on a rental of Bs. 17000. We have taken possession of the said tope..... after payment regularly of rent, if we commit default in surrendering possession of the tope, (after the expiry of the lease) from the date of default, we have not only to pay damages at the rate of Rs. 22000 per year but you are also authorised to take possession of all the crops on the demised land as well as the land without permission. When we surrender and deliver possession of the tope (on the expiry of the lease) we will do so in your presence or in the presence of persons authorised on your behalf without any detriment to the future crop and after cutting the crops we are entitled to. In respect of the undermentioned tope Sirkar Kandayam (assessment), Veli Mararnathu (repairs to the fence) pruning, turning over the soil, watering, must be borne by you. When there is no water, the obligation to arrange for the flow of water to the tope rests on you and we will depute one person for the same.

"We will be responsible for any kind of damage to the tope, namely, allowing of any cattle to graze, or any damage caused to the trees.... ..or any damage caused to the fence or any kind of damage caused by our negligence. We will not ask for any reduction of rent if rains fail or if there is any deficiency in the growing crops or if any damage or loss has resulted.....

"To this effect we have executed this lease deed in respect of the usufruct."

5. Does this contract create any interest in land? We shall reserve for later consideration the further question, whether, even if the assessee acquired an interest in the land under the terms of his contract, that satisfied the requirements of the proviso to Section 2(i) of the Act,

6. In -- "Marshall v. Green", (1875) 1 CPD 35 (A), the Court held that a sale of growing timber to be taken away as soon as possible by the purchaser was not a contract for sale of land, or any interest therein, within the fourth section of the Statute of Frauds. Despite the fact that the principles laid down in this decision have been quoted and followed a number of times in subsequent decisions both in India and in England, it may be desirable to set them out at some length.

Lord Coleridge, C. J. quoted with approval the notes of Sir Edward Baughan Williams on -- "Duppa v. Mayo" (see Wms. Saunders, 1871 Edn. 394):

"The principle of these decisions appears to be this that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an Interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled" that, with respect to emblements or fructus industriales, etc., the corn and other growth of the earth which are produced not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods."

With reference to the contract the learned Chief Justice had to consider in that case he observed:

"Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from my decisions on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees to be taken away immediately was not a sale of an interest in land, but merely for such timber."

At page 42, Brett J. observed:

".....When the subject-matter of the contract is something affixed to land, the question is whether the contract is intended to be for the purchase of the thing affixed only, or of an interest in the land as well as the thing affixedWhere the subject-matter of the contract is growing in, the land at the time of the sale, then if by the contract the thing sold is to be delivered at once by the seller the case is not within the section (Sec. 4 of the Statute of Frauds).

Another case is where, although the thing may have to remain in the ground some time, it is to be delivered by the seller finally, and the purchaser is to have nothing to do with it until it is severed, and that case also is not within the section. Then there comes the class of cases where the purchaser is to take the thing away himself. . In such a case where the things are fructus industriales, then, although they are still to derive benefit from the land after the sales in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not fructus industriales, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section. But if the thing, not being fructus industriales, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself. Here the trees were timber trees, and the purchaser was to take them immediately; therefore, applying the test last mentioned, the contract was not within the fourth section." In -- "Kauri Timber Co. Ltd. v. Commissioner of Taxes", 1913 AC 771 (B), their Lordships had to consider contracts for the purchase of timber with a right to cut and remove the same at any time within the stated period; and their Lordships pointed out that the fact that the lease was for a period of 99 years was the first salient feature of the case. Their Lordships held at p. 776: ".....the transaction under which these timber rights were acquired was not one under which a mere possession of goods by a contract of sale was given to the appellant company, but was one under which they obtained an interest in, and possession of, land. So long as the timber, at the option of the company, remained upon the soil, it derived its sustenance and nutriment from it. The additional growths became "ipso jure" the property of the company. All rights of possession necessary for working the business of cutting or even for preserving uninjured the standing and growing stock of timber were ceded under the leases." At page 779 was the observation: "For the present is a broad case of the natural products of the soil in timber--a crop requiring long continued possession of land until maturity is reached, and the contract with regard to it in the present case raises none of the difficulties springing out of a covenant for immediate severance and realisation. The judgment of Brett J. in -- "(1875) 1 CPD 35 (A)" distinguishes this broad case....."

In -- AIR 1949 311 (Privy Council) the appellants were manufacturers of beedies, and to acquire tendu leaves necessary for their manufacture they obtained short term contracts with the Government and other owners of forests. In consideration of a sum payable in instalments, the privilege to pick and carry away the leaves was granted to them.

At page 311 of the report the relevant clauses of the contract with the Government were set out.. Clause 1 identified the subject-matter of the contract

which was described as "the forest produce sold and purchased under the agreement, as that specified in Sen. I in the contract area." Clause 2 dealt with the quantity of the forest produce "which may now exist or may come into existence in the contract area which the forest contractor may remove from the said area.....during the period from the 5th day of September 1939 to the 30th day of June 1941." In one of the contracts the contractor was allowed to coppice small tendu plants a few months in advance to obtain good leaves and to pillard tendu trees a few months in advance to obtain better bigger leaves.

Lord Greene, who delivered the judgment of the Board, pointed out:

"The contracts grant no interest in land and no interest in the trees or plants themselves. They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which, of course, implies the right to appropriate them as their own property..... The contracts are short term contracts. The picking of the leaves under them has to start at once, or practically at once, and to proceed continuously. It is true that the rights under the contracts are exclusive, but in such a case as this that is a matter which appears to their Lordships to be of no significance." Their Lordships observed at page 528: "Under the contracts it is the tendu leaves and, nothing but the tendu leaves that are acquired. It is not the right to pick the leaves or to go on the land for the purpose--those rights are merely ancillary to the real purpose of the contracts, and if not expressed would be implied by law in the sale of a growing crop."

Their Lordships referred to -- "1913 AC 771 (B)" and after pointing out that the leases in that case were for 99 years, they observed:

"In the case of the purchase of the standing timber what was acquired was an interest in land."

Lord Oreene recorded: .

"The two cases can, in their Lordships' opinion, in no sense be regarded as comparable. If the tendu leaves had been stored in a merchant's godown & the appellants have bought the right to go and fetch them and so reduce them into their possession and ownership, it could scarcely have been suggested that the purchase price was capital expenditure. Their Lordships see no ground in principle or reason for differentiating the present case from that supposed."

That was consistent with the principle laid down in -- "(1875) 1 CPD 35 (A)" that "the land has to be considered as a mere warehouse of the thing sold and the contract is for goods."

7. The principles laid down in AIR 1949 311 (Privy Council) were followed and applied in -- K.T.M.T.M. Abdul Kayoom and Another Vs. Commr. of Income Tax, Madras, by a Full Bench of this Court, to which Judgment both of us were parties. It may not be necessary to set out the facts of that case for our present purposes.

8. We have already pointed out that the principles approved of in -- "(1875) 1 CPD 35 (A)" have been consistently followed by this Court. In -- "Seeni Chettiar v. Santhanathan Chettiar", 20 Mad 58 (E), the contract was for a period of a little over four years to cut and enjoy etc. the grass, korai karuvela nuts etc. from the tank bed. The contract was unregistered. The Full Bench held that under the provisions of the Registration Act 3 of 1887 the unregistered instrument purported to convey an interest in Immovable property and was inadmissible in evidence. Collins C. J. observed at pages 63-64:

"It appears to me that there can be no doubt but that the yadast does convey an interest in Immovable property; the contrary proposition is not arguable. It has long been settled that an agreement for the sale and purchase of growing grass, growing timber or underwood, or growing fruit, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land."

Subramania Aiyar J. pointed out that the contract did not amount to a lease. At page 65 he observed:

"It follows, therefore, that the plaintiff did not part with such possession of the tank as he had and "that the first defendants obtained merely a right of access to the place for the reasonable enjoyment of what he was entitled to under the contract. Further, even if by a stretch of language the first defendant were to be considered to have acquired a right to some sort of possession of the tank bed, it is quite clear that such right was not exclusive, or, in the language of Lord Hartherley, it was not unattended by a simultaneous right of any other person in respect of the same subject-matter, --"Cory v. Bristow". (1877) 2 AC 262 (F). My conclusion, therefore, is that the transaction was not a lease."

At page 66 the learned Judge stated;

"Taking all the provisions of the document together, I think there was here more than a sale of mere standing timber and that, in the words of Sir Edward Vaughan Williams quoted with approval in -- "(1875) 1 CPD 35 (A)" cited for the plaintiff it was contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afford-ed by the land". The fact that the comparatively long period of little more than four years was granted to the defendant for cutting and removing the trees is, to my mind, strongly in favour of the above view. I am therefore of opinion that the document in question did create an interest in immoveatale property....."

9. The contract in - "Mammikutti v. Puzhakkal Edom", 29 Mad 353 (G), was for removal of standing trees for a period of six years. The court held that the document did not create a mortgage or charge on Immovable property. It was no more than an exclusive licence to cut trees. The learned Judges referred to -- "20 Mad 53 (E)" and held that the contract in question did not amount to a lease.

At page 357 the learned Judge observed:

"The former -- "20 Mad 53 (E)" conveyed to the grantee not only the right to cut trees but also the grass, korai, gum etc., on the bank and bed of the tank on which the trees stood. The latter -- "29 Mad 353 (G)" merely gave the right to cut and remove the trees, certain classes of trees being excepted. The latter also contained express provisions that the licensee or grantee should have the right to cut down the trees alone and no right whatever in the land...."

The question whether the document created an interest in "immovable property" under the provisions of the Registration Act did not arise for consideration in -- "29 Mad 353 (G)". It should follow that an interest in immovable-property, as that term has been defined by the Registration Act, cannot always be equated to an interest in land.

10. Natesa Gramani Vs. Tangavelu Gramani, "; -- The Commissioner of Income Tax Vs. Yagappa Nadar, and -- "Venugopala Filial v. Thiruna-vukkarasu". AIR 1949 Mad 148 (J) dealt with contracts for tapping trees for toddy. In -- The Commissioner of Income Tax Vs. Yagappa Nadar, " the question for consideration was whether the amount realised by the sale of toddy by the person who under the contract had obtained the right to tap the trees for toddy, was agricultural income within the meaning of the Indian Income Tax Act.

The learned Judges pointed out:

"It is contended here that the petitioner is the lessee of the trees but admittedly not of the land on which they stood. It is very doubtful whether it is possible to have lease of the trees without the land on which they stand.....

No interest in land has been transferred here and it would appear that what the petitioner has obtained is a mere license to tap the trees and draw the juice."

11. In -- Natesa Gramani Vs. Tangavelu Gramani, the document stated that the lessee had "taken for lease, for two years..... .for enjoyment of toddy, palmyra fruit, etc." The question for determination was whether the instrument was a lease of Immovable uroperty within the meaning of Section 17(1)(b), Indian Registration Act.

The Court held that it did not amount to a lease of Immovable property, and that the interest conveyed by the document was not, for the purposes of Registration Act, an interest in Immovable property. That decision turned upon the definition of moveable property in the Registration Act of 1871 which included juice in trees. White C. J. observed;

"The instrument in question in the present case only gives the right to take toddy and fruit for two years. No doubt any licence under which a person is entitled to take toddy in a sense creates an interest in land since without land there would be no tree and without tree there would be no toddy..... But having regard to the definition to which I have referred it seems to me the right view is that the

instrument in question is not a lease of Immovable property and that the interest conveyed by the document is not for the purposes of the Registration Act, an interest in Immovable property."

Oldfield J. referred to -- "(1875) 1 CPD 35 (A)" and the test postulated therein,-- "the nutriment afforded by the land" and observed:

"This benefit, however, is not in my opinion such an interest in land as Section 17(3)(b), Registration Act contemplates. For it involves only a stipulation that the trees are to remain available during the currency of the contract for the use specified in it, not any limitation on the transferor's enjoyment of the land as such."

In--"AIR 1949 Mad 148 (J)", the contract, Which was for a period of three years, provided:

"You shall yourself with your men and at your expense do all acts of the bettering or improving the vacant land in the said garden or baling out water etc. and keep the garden in good condition..... I shall deliver possession to you of your garden in the condition in which you delivered possession to me. To this effect is the agreement of rent in respect of toddy yield of cocoanut trees executed by me with my consent. I have nothing to do with the land. Only the toddy."

The learned Chief Justice observed at p. 149:

"On a plain reading of the document, it is clear that the rights which the defendant obtained thereunder were (1) the right to enjoy the toddy yield from the trees, and (2) the right to enter upon the land for the said purpose. It is quite clear that the defendant did not obtain any right in and to the land. He was not entitled to the exclusive possession of the land as such The defendant cannot, therefore, be held to be a lessee of the garden as such. So far as the land was concerned, he was only a licensee and his right to enter upon the land and to use the land was only so long as he had the right to enjoy the toddy yield from the trees."

The learned Chief Justice, however, held with reference to the provisions of Section 3, Transfer of Property Act, read with the definition of Immovable property in Section 3(25), General Clauses Act, that the right to tap cocoanut trees and obtain, toddy was in the nature of Immovable property because it was a benefit which arose out of land; the contract in question which did not amount to a- lease of the garden as such, that is, the land, still amounted to a lease of Immovable property as that term had been defined in the Transfer of Property Act. The learned Chief Justice referred to -- "(1875) 1 CPD 35 (A)"; -- "20 Mad 58 (E)" and -- Natesa Gramani Vs. Tangavelu Gramani, ", but probably there was no occasion to refer to -- The Commissioner of Income Tax Vs. Yagappa Nadar, , where no question arose whether, even if the document did not convey interest in the land, it conveyed interest in Immovable property as defined either by the Registration Act or by the Transfer of Property Act.

12. In each of the three cases, it was held that the right to tap toddy did not bring the transaction within the scope of a lease of the land itself. From the point of view of the Income Tax Act, that right created no interest in the land, -- The Commissioner of Income Tax Vs. Yagappa Nadar, ". From the point or the Registration Act, it created no interest in Immovable property, -- Natesa Gramani Vs. Tangavelu Gramani, ". From the point of view of the Transfer of Property Act, it created an interest in Immovable property, though it did not amount to a lease of the land as such.

13. The question at issue before us, whether the contract created any interest in land, cannot obviously be decided on the basis of the definition of Immovable property or moveable property in the Registration Act or in the Transfer of Property Act. What Section 2 (i) of the General Sales-tax Act requires is "interest in land" and not "interest in Immovable property". The definition of Immovable property in the General Clauses Act therefore cannot be made applicable in construing the expression "land" in Section 2 (i), General Sales Tax Act. Freed from the limitation imposed by the statutory definitions of Immovable property in the Indian Registration Act and in the Transfer of Property Act, we have to decide the question, whether the contract before us created any interest in land on the general principles enunciated in -- "(1875) 1 CPD 35 (A)" and consistently followed thereafter.

14. Though the document averred that the, assesseees had taken possession of the tope, and though the assesseees undertook to deliver possession of the tope at the end of the period of the contract, those stipulations by themselves cannot convert the contract into a lease of the tope, that is, of the land, as such.

A similar recital in the contract considered in -- "AIR 1949 Mad 148 (J)" in no way affected the finding, that the contract did not amount to a lease of the garden as such. The document commenced with the recital "This lease deed is in respect of the usufruct", and that was repeated in the final sentence "To this effect we have executed this lease deed in respect of the usufruct". The period of contract was only one year. All the horticultural operations had to be carried out under the terms of the contract by the owner of the tope.

Adapting the language of the learned Chief Justice in -- "AIR 1949 Mad 148 (J)" we can say, on a plain reading of the document it is clear that the rights which the assesseees obtained therein were (1) the right to enjoy the usufruct, principally arecanuts of the trees and (2) the right to enter upon the land for the said purpose. It is quite clear that the assesseees did not obtain any right in and to the land. They were not entitled to the exclusive possession of the land as such. In so far as the land was concerned, the ussesseees were only licensees and their right to enter upon the land and to use the land was only so long as they had the right to enjoy the usufruct from the trees.

15. Did the contract convey any interest in the land, even if it did not amount to a lease of the land, is the next question.

The limitations on the test formulated in --"(1875) 1 CPD 35 (A)", that wherever, at the time of the contract, it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land, were fully explained by Lord Coleridge C. J. and Brett J. in that decision.

That test was satisfied in--"1913 AC 171 (B)", because the period of the contract was 99 years, and the additional growth during that period, as their Lordships pointed out, became "ipso jure" the property of the lessee.

In AIR 1949 311 (Privy Council) with reference to the tendi- leaves which the lessee had the right to collect, their Lordships held in the words of --" (1875) 1 CPD 35 (A)".

"the land is to be considered as a mere warehouse of the things sold and the contract was for goods."

16. In our opinion the present case falls within the scope of the rule in AIR 1949 311 (Privy Council) . The arecanut tope was just analogous to a warehouse wherefrom the arecanut could be removed by the assessees during the period of their contract, a short term contract of one year. The fact, that there were three or four pickings during that period of one year, in no way affected the real position of the assessees. It would not make it any better than the position of the assessee in AIR 1949 311 (Privy Council) where the process of picking commenced immediately after the contract and proceeded continuously during the period of the contract. The assessees acquired a right only to remove the usufruct. They acquired no interest in the land. They acquired no interest in the trees. Both those rights the owners retained to the exclusion of the assessees.

As pointed out by Oldfield J. in -- Natesa Gramani Vs. Tangavelu Gramani, " it involved only a stipulation that trees were to remain available during the currency of the contract for the use specified in it, not any limitation on the transferor's enjoyment of the land as such. It follows that the assessees acquired no real interest in any benefit arising out of the land during the period of the contract,--one year. No doubt as pointed out by White C. J. In -- " AIR 1914 Mad 363 (H)", any licence under which a person is entitled to take toddy in a sense creates an interest in land since without land there would be no tree and without tree there would be no toddy. The very fact that the assessee is merely a licensee, as far as the land, and in this case as far as the trees also were concerned, should suffice to negative any claim, that the remote interest which the assessee could claim in the land itself is an "interest in the land" to make the contract itself for an interest in land. Certainly it is not an interest in land which Section 2 (i) of the Act prescribed.

17. The proviso to Section 2(i) prescribes:

"Provided that the proceeds of the sale by a person of agricultural or horticultural

produce grown on any land in which he has an interest "whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover."

It was never claimed by the assesseees that the arecanut, horticultural produce, was grown by the assesseees. It was certainly grown on land. But of that land the assesseees were neither owners, nor usufructuary mortgagees; nor were they tenants. We have already pointed that the contract in question did not amount to a lease of the land itself.

The question that remains is, did the assesseees acquire an interest in the land "otherwise" within the meaning of Section 2 (i)?

The learned counsel for the assesseees contended that the expression "otherwise" should be construed independently of the other requirements, ownership, usufructuary mortgage, or tenancy, & that any kind of interest would be sufficient to bring the dealer within the scope of the proviso. We are unable to accept that contention. It seems obvious to us that the expression "otherwise", after enumerating the three classes of interest, should be construed on the application of the principle of "ejusdem generis". The one feature that runs through the three classes of interest specified, ownership, usufructuary mortgage or tenancy, is the right to the exclusive possession of the land. Any interest to be brought within the scope of the term "otherwise" in Section 2 (i) of the Act must satisfy that generic requirement, the right to exclusive possession of the land itself. All that the assesseees got under the contract was only an exclusive right to the usufruct, and that, in our opinion, can by no stretch of language be deemed to be an interest in land within the meaning of Section 2 (i) of the Act.

18. The Appellate Tribunal was right in holding that the assesseees in this case were not entitled to exclude from the turnover the sale proceeds of arecanuts, because the assesseees had no- interest in the land on which the arecanuts were grown.

19. These petitions fail and are dismissed with costs in T. R. C. Nos. 188, 190, 193, 200, 202, 221, 247, 256, 259, 265--Rs. 250 in each. No order as to costs in the other T. R. Cs.