
(1910) 11 MAD CK 0008
In the Madras High Court

Syed Ajam Sahib

APPELLANT

Vs

Madura Sree Meenatchi Sundareswarar Devastanam

RESPONDENT

Date of Decision : 03-11-1910

Acts Referred:

Transfer of Property Act, 1882 — Section 105, 107

Citation : (1912) ILR (Mad) 95 : (1911) 21 MLJ 202

Hon'ble Judges : Krishnaswami Aiyar, J; Charles Arnold White, J; Ayling, J

Bench : Full Bench

Judgement

Charles Arnold White, Kt., C.J.—The first question which has been referred to us is whether the registered instrument referred to in Section

107 of the Transfer of Property Act must be signed by the lessor. Section 9 of the Transfer of Property Act provides that a transfer of property

may be made without writing in every case in which a writing is not expressly required by law. Section 107 provides that a lease to which the

section applies can be made only by a registered instrument. This, I take it, is an express provision that lease to which the section applies must be

in writing. Section 105 defines a lease of Immovable property as a transfer of a right to enjoy such property. I do not think that Section 107 can be

relied on as enacting, either expressly or by implication, that a lease must be executed by the lessor. Can Section 105 be relied on for this

purpose? I think not. By Section 105 a lease is a transfer of a right to enjoy property. I do not think, for the purposes of the question before us,

any distinction can be drawn between a transfer of a Tight to enjoy property (Section 105) and a transfer of property (Section 9). When writing is

not necessary the law requires no specific formal act for the purposes of a transfer. When writing is necessary the only specific formal act required

by Section 107 is registration. The Transfer of Property Act contains express provision that in the case of a mortgage (Section 59) the registered instrument must be signed by the mortgagor, in the case of a gift (Section 123) by the donor and in the case of a transfer of an actionable claim by the transferor (Section 130). Section 107 contains no such provision. As regards Sections 59 and 123 it may be that the provision for attestation required special mention of the signature of the mortgagor or donor (see the judgment in *Turof Sahib v. Esuf Sahib* ILR (1907) M. 322. In Section 130, however, where special provision is made for the signature of the transferor, there is no provision for attestation.

2. Then is there anything in the Registration Act which expressly or by implication enacts that a lease which requires registration must be executed by the lessor?

3. I think the effect of Section 4 of the Transfer of Property Act is correctly stated in the judgment in *Kaki Subbanadri v. Muthu Rangayya* ILR

(1909) M. 532. u/s 17(d) of the Registration Act a lease, to which the paragraph applies, and which for the purposes of the Registration Act

includes a counterpart (Section 3), must be registered. u/s 107 of the Transfer of Property Act a lease, to which that section applies, must be

registered. But although we cannot import into Section 107 the definition of "lease" contained in the Registration Act see by way of analogy

Vairananda Nadar v. Miyakan Rowther ILR (1897) M. 109 it does not follow that an instrument signed by the lessee cannot be a lease for the purposes of Section 107.

4. The provisions of Sections 34 and 35 of the Registration Act as to "persons executing" throw no light on the question as they merely lay down

the procedure in cases where an instrument is presented for registration.

5. Section 58 of the Registration Act prescribes the particulars which are to be endorsed on a document admitted to registration which includes the

signature of the person admitting the execution of the document. It may be that the proper inference to be drawn from this section is that an

instrument which purports to be a lease executed by the lessor cannot be admitted for registration unless it is signed by the lessor. But it does not

follow that an instrument executed and signed by the lessee and registered may not be a "lease" for the purposes of Section 107.

6. Then as to the authorities, Turof Sahib v. Esuf Sahib ILR (1907) M. 322, is a direct authority against the view that signature by the lessor is not

necessary. This case was followed in Nilmanand Sirkar v. Boul Das 14 C.W.N. 73. The reference to Section 107 at the end of the judgment in

Turof Sahib v. Esuf Sahib ILR (1907) M. 322 as to the signature of the lessor being required is an obvious slip which does not affect the reasoning

on which the judgment is based, but with all respect I venture to dissent from that decision.

7. In Kaki Subbanadri v. Muthu Rangayya ILR (1909) M. 532 the learned Judges accepted the decision in Turof Sahib v. Esuf Sahib ILR (1909)

M. 532 but they did not discuss it. In Sheo Karan Singh v. Maharajah Parbhu Narain Singh ILR (1909) A. 276 a Full Bench of the Allahabad

High Court would seem to have been in doubt as to the correctness of the earlier decisions of that court that the signature of the lessor was

necessary, as they declined to express any opinion on the question.

8. It would seem to be the law of England that signature is not necessary in the case of a lease under seal. But instruments under seal are unknown

in this country and I do not think the English law affords us much assistance. The question has to be decided with reference to the provisions of the

Transfer of Property Act and the Registration Act.

9. Although I at first found the proposition that there could be a lease enforceable against the lessor which had not been signed by him somewhat

startling, after consideration of the provisions of the Transfer of Property Act and the Registration Act, I have come to the conclusion that there can

be in cases where - and I desire to limit my judgment to this - there is a registered instrument in writing signed by the lessee which has been

accepted by the lessor and which purports to transfer a right to enjoy Immovable property.

10. I think the answer to the first question which has been referred to us should be in the negative. As regards the second question, it seems to me

that if a registered instrument signed by the lessee and accepted by the lessor is not a lease, the mere fact that the instrument is signed by the lessee

does not preclude him from denying his liability thereunder.

Krishnaswami Aiyar J.

11. This reference raises the important question "whether the registered

instrument referred to in Section 107 of the Transfer of Property Act must be signed by the lessor"" or, in other words, whether, to constitute a valid lease in writing, the signature of the lessor appended to the writing is a necessary pre-requisite. This question has been answered in the affirmative in *Turof Sahib v. Esuf Sahib* ILR (1907) M. 322, *Kaki Subbanajdri v. Muthu Rangayya* ILR (1909) M. 532, *Nand Lal v. Hanuman Das* ILR (1904) A. 368 (by Blair J. only); *Kashi Gir v. Jogendra Nath Ghose* ILR (1904) A. 136, *Beni v. Puran Das* ILR (1904) A. 190 and *Nilmanand Sarkar v. Boul Das* 14 C.W.N. 73. In the City Civil Court Appeal No. 1 of 1909 the learned Chief Justice and myself reserved our opinion on the point. The Full Bench of the Allahabad High Court did likewise in *Sheo Karan Singh v. Maharaja Parbhu Narain Singh* ILR (1909) A. 273. In *Thambi alias Chinnasawmi Padayachi Vs. Avayambal*, I raised a doubt as to the correctness of the decisions in *Turof Sahib v. Esuf Sahib* ILR (1907) M. 322, and *Kaki Subbanadri v. Muthu Rangayya* ILR (1909) M. 532, while Sir Ralph Benson, J., adhered to the view which he had expressed in those cases. There is a considerable weight of authority in favour of the view already taken by this Court. But after careful consideration of the question in the light of the elaborate arguments addressed to us, I feel bound to express my dissent from that view.

12. Now a lease of Immovable property, whether before or after the Transfer of Property Act, is a transfer of a right to enjoy such property. In

Volume II of Blackstone's Commentaries, p. 317, a lease is defined as ""a conveyance by which a person, having an estate in hereditaments,

transfers a portion of his interest therein to another, usually in consideration of a certain periodical rent or other recompense."" In Woodfall's

Landlord and Tenant (18th edition), p. 143, we have the following definition. ""A lease is a conveyance by way of demise of lands or tenements, for

a less term than the party conveying himself has in the premises. A lease is usually made in consideration of rent, or some other annual recompense

rendered to the party conveying the premises - who is called the lessor or landlord - by the party to whom they are conveyed or let, who is called

the lessee or tenant."" Section 105 of the Transfer of Property Act defines a lease in terms closely similar to the foregoing definition. It is ""a transfer

of a right to enjoy Immovable property made for a certain time in consideration

of price or of money, share of crops, service or any other thing of value. The transferor is called the lessor, the transferee is called the lessee." I have omitted in the above quotation some words unnecessary for my present purpose. The idea of a transfer from one person to another is present in the conception of a lease whether before or after the Transfer of Property Act. So far as Section 105 goes there is no suggestion of the form of the transfer and no question of signature of the transferor can arise under that section, no writing itself being hinted at in the section. Before the passing of the Transfer of Property Act, a lease of immovable property could be brought into existence in this country by an oral arrangement or by writing setting out the terms of the tenancy and signed by the tenant or lessee only as much as by a similar writing signed by the lessor only and registered in accordance with the provisions of the Registration Act where registration is made compulsory. The fact that a lease is a transfer or that there is a transferor and a transferee who are parties to the transaction was not deemed sufficient to require that where the transfer was effected by a writing it should be signed by the transferor. Section 3 of the Registration Act, Clause 1, which provides that "a lease includes a counterpart, kabuliyat, an undertaking to cultivate or occupy and an agreement to lease," largely helped to create the view that a writing signed by the tenant only and containing the terms of the tenancy was a transfer of the right to enjoy, not merely for the purpose of the Registration Act, but also for the constitution of the jural relation of lessor and lessee. The enactment of Section 105 of the Transfer of Property Act, which has introduced no new jural conception of what constitutes a lease, cannot by itself affect the law as to the creation of leases by writings signed only by the tenant. In Sheppard's Touchstone, the following statement is made as regards deeds in general before the Statute of Frauds: "And by all this that hath been said, it appeareth, that the putting to or subscribing of the party's name or mark to the deed he is to seal, is not essential; for a deed may be good, albeit the party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and delivered," 7th edition, page 60. See also Williams' Real Property (20th edition), page 154. In his Landlord and Tenant, page 218, Woodfall says : "It is a point on which authorities are at variance, whether the Statute of Frauds requires leases by deed to be

signed. The preponderance of authority seems to be in favour of the signature not being necessary." In the 4th edition of Foa's Law of Landlord

and Tenant, page 10, the learned author writes "nor does its provision" (of the Statute of Frauds) "requiring a party's signature extend to leases

under seal." This was the view taken in *Avehne v, Whisson* (1842) 61 R.R. 662 S.C. 4 Man. & G. 80 notwithstanding the doubt expressed in

Cooch v. Goodman (1842) 11 L.J.Q.B. 225. In *Taunton v. Pepler* (1820) 56 E.R. 1055, Sir John Leach, V.C., said : "There is no authority for

saying that a release to be effectual must be signed as well as sealed and delivered." Deeds are unknown to "this country. If the signature of the

lessor was not essential to constitute a valid lease in England, there is no reason to suppose that it was in this country before the Transfer of

Property Act. The question, however, is whether Section 107 of the Act has made any change in this respect. It does not expressly say, as

Sections 59 and 123 do, that the signature of the lessor is necessary. But under the section, apart from the cases in which an oral agreement

accompanied by delivery of possession is sufficient, a lease must be by a registered instrument. Does the mention of a registered instrument

necessitate the signature of the lessor to the writing? A *Kabuliyat* or a *Muchilika* signed by the lessee is as much an instrument as a *patta* or *cowle*

executed by the lessor and, so far as the registration law is concerned, there is no difficulty in getting any of them registered. Indeed, an undertaking

to cultivate or occupy for a term certain at a particular rent would be a lease under the Registration Act and registrable under that law. Unless,

therefore, there is anything in the language of Section 107 which requires the signature of the lessor to constitute a valid lease, it may well be held

that a writing signed by the lessee only and accepted by the lessor is sufficient to constitute the transfer known to the law as a lease. Apart,

however, from there being nothing in the section which requires the signature of the lessor, the last sentence in Section 4 of the Transfer of Property

Act, namely, that Section 107 shall be read as supplemental to the Indian Registration Act, seems to me a strong argument the other way. This

clause was introduced by the amending Act III of 1885. The object of the amendment was not merely to make this and the other sections referred

to in that clause supplemental to Section 17 of the Registration Act III of 1877, making registration compulsory in the cases specified therein, but

supplemental to the entire Act so as to make it part and parcel of the Registration Act itself. Section 3 of the Registration Act III of 1877, Clause 1, must therefore be read with Section 107 of the Transfer of Property Act. Now the question may arise whether Section 107 is not governed by the definition of lease in Section 105 of the Act and whether that should not be regarded as inconsistent with the provision in Section 3, Clause 1, of the Registration Act. There are no words in the Transfer of Property Act repealing the provision in Section 3, Clause 1, of the Registration Act of 1877. There can be no implied repeal if Section 105 of the Transfer of Property Act and Section 3, Clause 1, of the Registration Act of 1877 can stand together. It seems to me that there is no difficulty whatever in reading the two provisions together without affecting Section 3, Clause 1, of the Registration Act, except perhaps as regards the part saying that an agreement to lease is itself a lease. This clause of the Registration Act of 1877 has been re-enacted without any change in the Registration Act of 1908 as Section 2, Clause 7. Section 105 of the Transfer of Property Act deals with the character of the legal relation and not with its mode of creation. Section 107 of the Transfer of Property Act and Section 2, Clause 7, of the Registration Act deal with certain formal requirements. That seems to my mind to be the reason why Section 107 as well as the similar provisions of Sections 54, 59 and 123 are to be read as supplemental to the Registration Act and not S105, I am therefore inclined to hold that, although optional registration has been done away with u/s 107 except in Provinces where the Local Governments have issued notifications under the proviso, that Section does not affect the creation of leases by writings signed only by the lessee and answering the requirements of Section 2, Clause 7. Such writings might amount to transfer u/s 105 of the Transfer of Property Act as they could before the enactment of that section. The case of sales is not quite parallel, merely because the signature J of the vendor is not mentioned in Section 54, for there is no provision in the Registration Act about sales as in the case of leases.

13. As regards the cases, the first observation that occurs to me is that no reference is made in any of them, except in *Kaki Subbanadri v. Muthu Rangayya* ILR (1909) M. 532 to the provision contained in the last clause of Section 4 of the Transfer of Property Act. What the learned Judges

who were parties to those decisions would have said, if their attention had been drawn to that provision, I am unable to say. In the latter case Mr.

Justice Miller, who was not a party to the decision in *Turof Sahib v. Esuf Sahib* ILR (1907) M. 322, considered himself bound by that decision.

The learned Judges who decided that case further say that Section 4 of the Transfer of Property Act "cannot mean that an instrument which is not

referred to in Section 107 of the Transfer of Property Act becomes compulsorily registrable because it falls within the definition of a lease in S3 of

the Registration Act." Now, with great respect, that seems to me to be arguing in a circle. Why is not the undertaking to cultivate or occupy which

amounts to a lease u/s 2, Clause 7, of the Registration Act referred to by the term lease in Section 107 when it is required to be read as

supplemental to the Registration Act, and why should Section 107 be read as supplemental only to Section 17(d) of the Registration Act, and not

to the whole Act itself including Section 2, Clause 7? As already remarked, the case in *Turof Sahib v. Esuf Sahib* ILR (1907) M. 322 makes no

reference to the last clause of Section 4 of the Transfer of Property Act. And this omission detracts considerably from the weight of its authority.

That case appears to assume that it is part of the idea of a transfer that not merely is the transferor a party to the transaction, but that the words "of

transfer" would have no operation but for the signature of the transferor. I do not think that there is any warrant for this assumption. It is again said

that "sales and leases by registered instrument necessarily bear the signatures of the vendor or lessor u/s 58 of the Registration Act." There appears

to me to be no foundation for this statement about the signature of the lessor. The signature of every person admitting the execution of the

document is certainly required under Clause (a) of Sub-section 1. But that requirement is sufficiently complied with by the signature of the lessee

who executes the writing containing the undertaking to cultivate or occupy. Again, the learned Judges say at page 324 of the report: "The section

now before us (107?), as already pointed out, requires, that the transfer shall be in writing and signed by the lessor. The last statement about the

signature of the lessor appears to me an obvious mistake. For the reasons above given, I am unable to regard the decision in *Turof Sahib v. Esuf*

Sahib ILR (1907) M. 322 and part of the reasoning on which the decision in *Kaki Subbanadn v. Muthu Rangayya* ILR (1909) M. 532 is based as

correct. My answer to the first question referred is in the negative.

14. If my answer to the first question is right, the lessee who signs the instrument is clearly liable. But if I am wrong on the first point, and there is no

lease created by the instrument, the question of the liability of the signatory to the instrument will depend upon the existence of consideration for his

undertaking to pay. If a lease was the consideration it has failed because no valid instrument has been executed by the owner of the property. If the

defendant has obtained possession of the property he would be liable as for use and occupation and his covenant to pay would be evidence of the

measure of his liability. If no possession has been obtained, it is clear that the signatory to the instrument is not liable merely because he has

covenanted to pay. It has, however, been suggested that the writing may be used as evidence of an oral agreement to lease and that such an

agreement accompanied by delivery of possession would itself operate as a lease. The case of *Walsh v. Lonsdale* (1882) L.R. 21 Ch. D. 9

supports this view. That case has been accepted as laying down the law correctly in later cases - *Lowther v. Heaver* (1889) L.R. 41 Ch. D. 248

and *Manchester Brewery Co. v. Coombs* (1901) 2 Ch. 608. But I do not think that view is consistent with Section 107 of the Transfer of

Property Act which requires a registered instrument for the creation of a valid lease except in the limited class of cases (of which the present case is

not one) where an oral agreement accompanied by delivery of possession is sufficient. It may be that an agreement to lease specifically enforceable

which is followed by delivery of possession is a good defence to a suit in ejectment - See *Bibi Jawahir Kumari v. Chatterput Singh* (1905) 2

C.L.J. 343 and *Singheeram Poddar v. Bhagbet Chander Nundi* (1910) Cri.L.J. 543 - but it is another thing to attempt to give effect to it as a lease

in the face of Sections 105 and 107 of the Transfer of Property Act. It seems to me, therefore that the defendant is not liable except on footing of

use and occupation. I would answer the second question accordingly.

Ayling J.

15. I agree in holding that the answer to the first question referred should be in the negative. On this view, the second question appears

unnecessary; but if an answer is required, I concur in that given in the judgment of the learned Chief Justice.