

(1990) 03 MAD CK 0020
In the Madras High Court

Thangamani and Another

APPELLANT

Vs

Natesan and Others

RESPONDENT

Date of Decision : 23-03-1990

Acts Referred:

Transfer of Property Act, 1882 — Section 53A

Citation : (1990) 2 LW 37 : (1990) 2 MLJ 32 : (1990) 1 MLJ 388

Hon'ble Judges : E.J. Bellie, J

Bench : Division Bench

Judgement

E.J. Bellie, J.—The defendants are the appellants. They lost their case in both the Courts below. The suit relates to a land, 10.78 acres in

two survey numbers. It originally belonged to one Madanagopal Naidu. The two defendants were tenants under him. The five plaintiffs purchased

the land from Madanagopal. At the time of sale there was standing casuarina trees. The plaintiffs filed two suits (may be because of two survey

numbers, two suits) on the file of District Munsif Court, Sirkali for their half share in the standing casuarina trees. Later on the suits were

compromised as per which the plaintiffs and the defendants entered into a sale agreement Ex.A. 1 dated 10.5.1977. According to this the

defendants agreed to purchase and the plaintiffs agreed to sell the suit property for Rs. 63,000. On the date of agreement the defendants paid a

sum of Rs. 3,000 by way of advance-As regards the balance of Rs. 60,000 it was stipulated that the defendants shall pay it in three equal

instalments of Rs. 20,000 and the first instalment of Rs. 20,000 shall be paid on or before 30.9.1977 and the second instalment of Rs. 2,000 has

to be paid by 30.1.1978 and thereupon the defendants shall obtain from the plaintiffs a sale deed on stamp papers. The third instalment of Rs.

20,000 was to be paid on or before 10.5.1978 and then they should get the sale deed registered. It was further stipulated that in default of payment of the first instalment the defendants shall pay to the plaintiffs a further sum of Rs. 3,000 before the second instalment becomes due and in default in payment of second instalment and getting sale deed signed on stamp papers the defendants should pay the plaintiffs damages for use and occupation of the properties and surrender possession. In case the plaintiffs commit default on their part (it is rather curiously stipulated that) they should pay back twice the amount received by them and execute a registered sale deed. It is further stated in the agreement that the defendants are allowed to continue in possession of the lands along with the standing casuarina trees.

2. The plaintiffs filed the suit alleging that the defendants failed to perform their part of the agreement and therefore they are entitled to take possession from the defendants with past and future mesne profits.

3. The defendants resisted the suit contending that there was no default on their part and on the other hand there was breach committed by the plaintiffs only and they further contended that in any account they are not liable to be evicted because their possession is protected under the Cultivating Tenants Protection Act. They also pleaded that they are entitled to be in possession u/s 53-A of the Transfer of Property Act.

4. The Subordinate Judge who tried the suit on consideration of the issues framed held that the defendants committed default in performance of their part of the contract. He rejected the defendants' contention that they are entitled for protection under the Cultivating Tenants Protection Act.

He further disallowed their plea that they are entitled to be in possession under the principle of part performance as laid down u/s 53-A of the Transfer of Property Act. He therefore held that they are liable to be evicted and decreed accordingly. He also decreed for past and future mesne profits but left it open for fixing the quantum under a separate proceedings.

5. The defendants appealed. The learned District Judge who heard the appeal agreed with the findings of the trial Court and therefore he dismissed the appeal.

6. The concurrent finding of the Courts below that the defendants failed to perform their part of the contract is not seriously disputed here. On

going through the two Judgments I am quite sure that the said concurrent finding is unassailable. The point that is seriously argued by Mr. T.R.

Mani, learned Counsel appearing for the appellants-defendants is that may be the defendants committed default in performance of their part of the

agreement and that the agreement also may say that in the case of such default the plaintiffs will be entitled to get possession of the land, but by

virtue of the protection given to the defendants under the Cultivating Tenants Protection Act, the court cannot pass a decree for possession against

the defendants. It is submitted that the Cultivating Tenants Protection Act confers benefits on the tenants and those benefits are conferred as a

matter of public policy and therefore the tenants themselves cannot contract out of the statutory benefits conferred on them under the Act nor can

they themselves waive those rights.

Per contra Mr. R. Sundaravaradan, learned Counsel appearing for the respondents-plaintiffs contends that no doubt the defendants were

cultivating tenants but in the suits filed against them the parties compromised the disputes between them and in pursuance of that compromise an

agreement of sale Ex.A. 1 was entered into and therein the respective rights and obligations of the parties as regards possession also have been

stated and thus they have substituted themselves a new position of relationship of seller and purchaser between them for their old position of

landlord and tenant relationship and therefore from the date of the said agreement the defendants were no longer tenants and their possession is

referable to the agreement and in their capacity as purchasers and not as tenants and consequently it is not open to them to claim any rights under

the Cultivating Tenants Protection Act. Mr. R. Sundaravaradan further submits that it is the case of surrender of possession to the plaintiffs and

then the plaintiffs permitting the defendants to continue their possession as per the terms of the new agreement and it is not a case of contracting out

of the statutory right or waiving by the defendants.

7. After hearing the arguments of both sides it is quite clear to me that the arguments of Mr. R. Sundaravaradan on behalf of the respondents-

plaintiffs is the correct position of law. True, the defendants-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 by the tenant himself in respect of possession is giving up of one's rights conferred under a statute to his benefit. But surrender of possession is different. Surrender of possession is voluntarily vacating. When the tenant voluntarily vacates it is not contracting himself out or waiving his statutory rights. In the present case it must be remembered that there were suits filed against the defendants while they were tenants and as an outcome of compromise between the parties in those suits the suit agreement Ex.A. 1 came to be entered into and as per the recital in this agreement the defendants have been allowed to continue in possession from the date of agreement and in case they fail to perform their obligations under the contract they must surrender possession. It is also provided for recovery of damages from them for their unlawful use and occupation if they do not vacate. It is clear from these that the defendants are in possession under the agreement and they are not in possession as continuing tenants. It is manifest from the words in the agreement, that the defendants' possession as tenants have come to an end and their possession from that day begins under the agreement. It must be remembered that it is nobody's case that even after the agreement the defendants paid any rent to say that in spite of the agreement they continued to be tenants. For surrender of possession physical delivery is not always necessary; it can be by implications also. u/s 111(f) of the Transfer of Property Act a lease of immovable property can be determined by implied surrender also.

From the above discussions I hold that the defendants though they continue in possession even after the agreement they have surrendered their possession as tenants impliedly and their present possession is only by virtue of the contract of the agreement as purchasers. Therefore there is no merit in the contention that the tenants cannot contract out themselves or waive the statutory rights and therefore the defendants must be held to be in possession of the property only as tenants and hence they are entitled to the benefits under the Cultivating Tenants Protection Act.

8. Mr. R. Sundaravaradan, learned Counsel for the respondents-plaintiffs in support of his contention relied on *Annamalai Goundan v.*

Venkalasami Naidu and Ors. (1959 I M.L.J. 301 in which after the expiry of the

period of lease a registered agreement was entered into between the parties where by the lease properties were to be sold to the lessee. Balance of sale consideration was tendered but the landlord improperly declined to accept the same and sale deed was not executed. An application for eviction was made by the landlord under the Tamil Nadu Cultivating Tenants Protection Act 25 of 1955. It was held that the moment possession is taken or continued under the contract of sale the original relationship of landlord and tenant ceases to exist and the landlord cannot take advantage of the provisions of the Act 25 of 1955 to file an application for eviction. The principle laid down in this case is that once landlord and tenant enter into an agreement of sale the original relationship of landlord and tenant ceases. However Mr. T.R. Mani, learned Counsel for the appellants-defendants contends that in this Judgment the lease period was already over and it was then the agreement for sale was executed and therefore the new relationship was created. Further it is the landlord who has filed the suit taking advantage of the provisions of the Cultivating Tenants Protection Act. Even after the expiry of the period of lease under the provisions of the Cultivating Tenants Protection Act the tenants will have the right to continue in possession. Whatever may be the position in this instant case, as mentioned above, the inherent evidence in Ex.A. 1 agreement of sale clearly shows that on the date of agreement possession was surrendered by the tenants and from then on they were in possession under the terms of the agreement.

9. Another decision cited by the learned Counsel is C. Palanisami Chetti Vs. Muruganna Gounder, . In this the plaintiff filed a suit for specific performance of an agreement of sale Ex.A. 8 executed in his favour by the first defendant agreeing to sell an agricultural land. Pending the agreement the first defendant sold that land under Ex.A. 1 to the second defendant who was a tenant of that land. It was contended by the second defendant that he was entitled to be in possession as a tenant and was entitled to the protection and benefits of the Tamil Nadu Cultivating Tenants Protection Act. 5. Padmanabhan, J. held that from the date of Ex.A. 1 sale deed the second defendant's possession ceased to be that of a tenant and the relationship of landlord and tenant, if any, that existed on that date ceased to be in force. In the circumstances, from the date of Ex.A. 1,

the possession of the second defendant could be traced only to Ex.A. 1 sale deed. Hence it would not be open to the second defendant to fall

back upon his possession as a tenant. But Mr. T.R. Mani, learned Counsel would submit that in this decision since the property has been sold to

the tenant the tenancy got merged in the sale and the tenant became the absolute owner of the land and therefore no question of continuing as a

tenant arises. I find some force in this argument of the learned Counsel and this decision may not be applicable to our case.

10. In *Kamlabai and Others Vs. Mangilal Dulichand Mantri*, the landlord filed an application under Clauses 13(3)(i), (ii)(iii) and (iv) of the C.P. &

Berar Letting of Houses and Rent Control Order, 1959 for permission to issue notice detaching the respondent's lease of the petition premises

on the grounds of eviction mentioned in the application. In that a compromise was entered into and that compromise was produced in the Court

and the Rent Controller filed the same. In that compromise petition the respondent-tenant expressly admitted the claim of the applicant-landlord

for termination of tenancy and surrendering the tenancy rights and undertook to vacate the premises on or before March 31, 1974. But as

undertaken the tenant did not vacate and there were numerous subsequent proceedings. During one stage of the execution of eviction order passed

it was contended by the tenant that the decree was a nullity since no permission to terminate the tenancy was obtained as required in the Act. It

was contended for the landlord that since the tenant has consented to a decree and obtained time for vacation he has surrendered possession and

therefore no permission for terminating tenancy is necessary. The Supreme Court accepted the contention of the landlord that the decree which

was to be executed is not a decree for eviction on the basis of determination of the lease by the landlord but is a decree passed on the basis of the

lease having been determined by the tenant himself by surrender. The Supreme Court further held that "in fact Clause 13 contemplates a permission

for determination of the lease but where the tenant agrees to determine the lease himself by mutual consent the question of permission does not

arise". The Supreme Court has also quoted its another decision rendered earlier in *Shah Mathuradas Maganlal and Co. Vs. Nagappa*

Shankarappa Malage and Others, wherein it has been held that

implied surrender by operation of law occurs by the creation of a new relationship, or by relinquishment of possession. If the lessee accepts a new lease that in itself is a surrender. Surrender can also be implied from the consent of the parties or from such facts as the relinquishment of possession by the lessee and taking over possession by the lessor.

it is further held that

It is thus clear that when the parties surrendered the tenancy and substituted it by a fresh arrangement merely because physically the possession was not handed over is not of much consequence.

From this decision of the Supreme Court it is very clear that tenancy can be terminated by surrender of possession by the tenant himself and for the surrender the property need not be physically handed over and the surrender can be implied from the circumstances in the case. This being the case in a surrender of possession by the tenant no question of any contracting himself of his rights or waiver of his rights under any statute arises.

The Supreme Court has also held to the effect that when a lease is already determined as a result of surrender such surrender cannot be assailed as being contrary to public policy just to bypass the statutory provisions.

11. Mr. T.R. Mani, learned Counsel for the appellants-defendants cited the following authorities in support of his contention in the case.

12. "Kallu and Anr. v. Diwan ILR 24 All. 487 is a case in which the lessee executed a mortgage in favour of the landlord. There it was held that the lease is only kept in abeyance and will again revert on the termination of the mortgage. Certainly this decision will not be applicable to the facts of our case.

13. In S.F. Munuswami Gounder and Others Vs. Erusa Gounder, it was held that u/s 53-A of the Transfer of Property Act possession of the transferee can be protected even in the absence of grant of title. But such protection can be sought for depending upon the facts of each case. In our case the defendants have undertaken under the agreement to surrender possession in case they commit default of the terms of the agreement.

14. In S. Duraisami Nadar Vs. Nagammal, , G. Ramanujam, J. has held that a sale agreement does not create any interest in the immovable property and therefore the tenancy right will not be altered. That is true. But in our case from the terms of the agreement we have found above that

the tenant has surrendered possession and therefore no question of altering any tenancy right arises.

15. In *Murlidhar Aggarwal and Another Vs. State of Uttar Pradesh and Others*, , Section 3(1) of the U.P. (Temporary) Control of Rent and

Eviction Act, 1947 prohibiting the institution of suit by the landlord against the tenant without the permission of the District Magistrate is held to be

based on public policy and it is intended to protect the weaker sections of the community with a view to ultimately protect the interests of the

community in general by creating equality of bargaining power, and the tenant could not have waived the benefit of the provision. But this does not

apply to the case where the tenant voluntarily surrenders possession.

16. *Boddana Ramudu and Ors. v. Sasapu Sanyasi Naidu and Anr.* (1941) 2 M.L.J. 638 : AIR 1941 Mad. 97 is a case in which the tenant in

ignorance of his right agreed to deliver his possession after the expiry of the term of mortgage. It was held that the tenant is not estopped from

denying the landlord's right to claim possession. Such is not the facts in the instant case.

17. Similar is the case in *Varada Bongar Raju Vs. Kirthali Avatharam and Others*, . Similar points as in the above cases were laid down in the

following citations relied on by the learned Counsel for the appellants-defendants;

(1) *Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co.*, : (2) *AIR India Vs. Nergesh Meerza and Others*, : and (3) *Shalimar Tar Products*

Ltd. Vs. H.C. Sharma and Others, . These decisions, for the reasons stated above, will not be of assistance to the appellants-defendants.

18. In the result, therefore, the concurrent Judgments of the Courts below are confirmed and the second appeal is dismissed with costs.