**(1958) 03 MAD CK 0023**

**In the Madras High Court**

The Board of Revenue, Chief Controlling Revenue Auththority APPELLANT

Vs

Simpson and McCanechy, Ltd. RESPONDENT

**Date of Decision :** 03-03-1958

**Acts Referred:**
Transfer of Property Act, 1882 — Section 92, 92(3)

**Citation :** AIR 1958 Mad 508 : (1958) ILR (Mad) 917 : (1958) 71 LW 487 : (1958) 2 MLJ 273

**Hon'ble Judges :** P.V. Rajamannar, C.J

**Bench :** Division Bench

# Judgement

P.V. Rajamannar, C.J.—The question referred to us by the Board of Revenue, Madras, the Chief Controlling Revenue Authority in the

State, is whether the document purporting to be an indenture of lease made on 31st December, 1953, annexed to the letter of reference is a lease

or a mortgage with possession. The material portions of the document which have a bearing on the question which falls for decision are as follows:

Whereas under deed of lease, dated 16th day of January, 1948, executed by the parties hereto and registered in the office of Registrar of

Assurances at Madras, in Book 1, as Document No. 196 of 1948, the hereditament and premises fully described in the schedule hereto was

demised by the lessor to the lessee for a term of five years which expired with the end of January, 1953; whereas, with a view to discharge

subsisting incumbrances on the property the lessor applied to the lessee for an advance of Rs. 75,000 agreeing to secure unto the lessee the due

repayment of the sum, on the property hereunder described by right of subrogation, and also to grant a lease in favour of the lessee and the latter

consented to grant the advance, interest free, subject to terms and conditions, hereunder set out.

Now this Indenture witnesseth:

1. That in consideration of the sum of Rs. 75,000 the receipt whereof on or before the date of these presents, the lessor hereby acknowledges and

from the further payment of the same doth hereby acquit the Lessee, the Lessor doth hereby demise as and by way of lease unto and to the use of

the Lessee, the hereditaments and premises known as ""Badsha Buildings"" bearing No. 22, in Errabalu Ghetty Street, George Town, Madras and

more fully described in the schedule hereto, to be held occupied and enjoyed by the Lessee, under terms and conditions hereinafter provided.

2. That the lease of the premises shall be for a period often years commencing from 1st January, 1954.

3. That during the currency of the Lease, the Lessee shall pay to the Lessor, a sum of Rs. 1,750 (Rapees one thousand seven hundred and fifty

only) as and by way of rent, month after month, the same being payable on or before the 5th day of each calendar month, following that for which

it shall accrue due, the first of such payment commencing with February, 1954.

4. That the Lessee shall be entitled to withhold from and out of the monthly rent payable as aforesaid, a sum of Rs. 750 (Rupees Seven hundred

and fifty only) month after month, during the currency of the lease and appropriate the same against the liquidation of the sum of Rs. 75,000

advanced as aforesaid in hundred monthly instalments during the currency of the lease and after complete adjustment of Rs. 75,000 the lessee shall

pay the agreed rent of Rs. 1,750 per month for the remaining period.

5. That the Lesser hereby agrees that the Lessee shall be subrogated to the rights of the mortgagees under the deeds of mortgage dated 23rd July,

1951, and 27th June, 1953, in favour of M.S. Soundararajan and M. Sudarsanam Ayyangar and Sons, respectively redeemed by the Lessee.

* * *

Provided always and it is hereby agreed that if the monthly rent hereby reserved or any part thereof shall, at any time, remain unpaid for one month

after it had been fallen due and payable or if any of the covenants on the Lessee''s part are not observed or performed, in the manner provided for

herein, then in such event the Lessor may re-enter upon the demised premises or any part thereof, in the name of the whole, and the tenancy become determined, for the unexpired portion of the lease, without prejudice to the Lessor to claim any reparation for the Lessee''s breach and

without prejudice to the rights of the Lessee for the recovery of all or such portion of the advance as may remain unadjusted from the Lessor.

The other terms of the document not set out above contain the usual covenants, as between lessor and lessee.

2. The learned Government Pleader appearing for the referring authority contended that in substance this document is a mortgage with possession,

the sum secured being Rs. 75,000. He relied upon the statement in the preamble that the lessor had agreed to secure unto the lessee the due

repayment of the sum on the property ""hereunder described by right of subrogation"", read with Clause 5 of the document extracted above. In our

opinion Clause 5 read along with the statement in the preamble is evidence only of an agreement such as is contemplated in; Section 92(3) of the

Transfer of Property Act which runs thus:

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee

whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be subrogated.

It was not the case of the learned Government Pleader that an agreement falling under para. 3 of Section 92 would by itself be a mortgage. We are

unable to find in the document any term beyond what is contained in Clause 5 which can be relied upon as evidencing a transfer of property to

Secure an advance.

3. There are also other terms of the document which indicate that the document is really a lease and was not intended to be, and is not, a mortgage

with possession. Clause 4 provides for the discharge of the advance of Rs. 75,000 by monthly appropriations of sums of Rs. 750 for hundred

months. The result contemplated is that at the end of hundred months the entire sum advanced would have been discharged, and as the advance is

stated to be interest free, there will be no amount due from the lessor to the lessee. Nevertheless the lessee is entitled to continue and remain in

possession for the remaining twenty months and is liable to pay the full rental of Rs. 1,750 per month for the said period. The learned Government

Pleader was unable to fit in this term into the concept of a mortgage with possession. There cannot be a mortgage which subsists even after the

discharge of the entire amount advanced under it. The only way in which the learned Government Pleader tried to explain away this provision is by

saying that from that day onwards it would be a lease. There is no warrant either in fact or in law in support of this, argument. In the concluding

portion of the document where provision is made for default in the payment of rent on the part of the lessee, though there is an express declaration

that the termination of the lease by reason of the default would be without prejudice to the rights of the lessee for recovery of such portion of the

advance which remains with the lessor, it is not expressly declared that the whole or portion of the advance remaining due would be secured on the

demised property. It is true that a person in the position of the lessee in this case, who at the request of the mortgagor-lessor has advanced to him

money which has been utilised to redeem the two mortgages, obtains a right to be subrogated to the rights of the mortgagee whose mortgage has

been redeemed, though it is necessary to have that right recognised in an agreement registered. But this consequence is a legal consequence

flowing out of the provisions of the statute and such an agreement, as we have already mentioned, will not ipso facto become a mortgage with or

without possession. In our opinion the document in question is not a mortgage with possession. It purports to be a lease; but we are constrained to

add that it also contains; a separate agreement for subrogation.

4. The learned Government Pleader then tried to raise the question as to the proper duty leviable on the document assuming it be classified as a

lease. That question however, is not the subject matter of the reference and we refuse to go into it.

5. Reference answered accordingly.

 