

P. M. C. Kunhiraman Nair

Vs

C. R. Naganatha Iyer and others

Civil Appeal No. 2460 (N) of 1977

(Dr. A. S. Anand, S. C. Agarwal JJ)

15.05.1992

JUDGEMENT

S. C. AGRAWAL, J.:-

1. This appeal is directed against the judgment and decree dated March 10, 1977 of the High Court of Kerala. It arises out of a suit filed by respondents Nos. 1 to 6 against the appellant and respondent No. 7 for redemption and recovery of possession of property consisting of 25 cents of land in Valiyaveetuparamba in Nagaram Amson, District Kozhikode, and the buildings and the machinery of the Flour Mill standing on the said land.

2. The land and the buildings belong in Jenm to the Vettath Tarwad who leased out the same in or about 1939 to Sivarma Iyer, respondent No. 2 on a rent of Rs. 40/- per mensem. Late C. N. Rama Iyer, father of respondents Nos. 1 to 5 and husband of respondent No. 6 started a flour mill known as 'Sivaram Mills' on the said premises in or about 1940 and for that purpose, he installed an engine and necessary plant and machinery and also made some further constructions over the land. C. N. Rama Iyer died on May 21, 1953 and after his death, respondents Nos. 1 to 5 entered into an agreement with the appellant on February 7, 1954 whereunder the appellant advanced Rupees 4,500/- to respondents Nos. 1 to 5 and respondents Nos. 1 to 5 agreed to entrust the appellant with the management of the mill for a period of one year from March 5, 1954 on a monthly payment of Rs. 300/- out of which Rs. 125/- to be appropriated every month towards the advance given. Respondents Nos. 1 to 5 could not entrust the management of Mill to the appellant on or before March 5, 1954 and they could do so only in the middle of April, 1954 and on April 13, 1954, a fresh agreement (Ex. B2) modifying the terms of the previous agreement was entered into between respondents Nos. 1 to 5 and the appellant. Under the said agreement dated April 13, 1954 a further sum of Rs. 1,900/- (in addition to the sum of Rs. 4,500/-) was advanced by the appellant to respondents Nos. 1 to 5 and it was agreed by respondents 1 to 5 that the total sum of Rs. 6,400/- which had been advanced by the appellant to respondents Nos. 1 to 5 will not bear any interest from the date of the said agreement and that the appellant shall run the mill for one year and after the stipulated period, respondents Nos. 1 to 5 would get the possession of the mill back from the appellant. It was also agreed that a sum of Rs. 40/- is the rent of the building where the mill is situate and current charges for each month of the electric lights of the mill should be paid by the appellant to respondents Nos. 1 to 5 and a sum of Rs. 100/- per month would be paid by the appellant as rent for the mill, out of which a sum of Rs. 50/- shall be adjusted by the appellant towards Rs. 6,400/- paid in advance and the balance amount of Rs. 50/- be paid to respondents Nos. 1 to 5 every month. It was also agreed that on the expiry of the period of one year, respondents Nos. 1 to 5 would get back the possession of the mill after paying the balance amount of Rs. 5,800/- to the appellant. Before the expiry of the period of one year fixed under the agreement dated April 13,

1954, the plaintiffs respondents Nos. 1 to 5 entered into an agreement (Ex. B3) dated March 22, 1955 with one T. M. Rama Iyer (who happened to be the father-in-law of respondent No. 2). In the said agreement, reference has been made to the agreement dated April 13, 1954 with the appellant and it was stated that a sum of Rs. 5,600/- is to be paid as balance amount to the appellant after adjusting the sum of Rs. 800/- which has already been paid to him. It was further stated that a sum of Rs. 5,072/- and annas 2 was payable to T. M. Rama Iyer towards the arrears of rent for the building belonging to the said T. M. Rama Iyer, which has been taken on rent by respondents Nos. 1 to 5 and that since there was difficulty for respondents Nos. 1 to 5 to clear the said liability, they have decided to assign the Company (named 'Sivaram Mills and Co.') to T. M. Rama Iyer for a consideration of Rs. 10,672/- and annas 2, out of which Rs. 5,072/- and annas 2 had been adjusted and from the balance amount due to them the sum of Rs. 5,600/- due to be paid to the appellant may be paid to him. In the said agreement, it was also stated that the said T.M. Rama Iyer on paying the amount due to the appellant after the stipulated period could take up the management by himself, pay the rent of the building, conduct the business and if necessary to file a suit against the appellant and get the company vacated and do anything as per his will and pleasure. In the said agreement, respondents Nos.1 to 5 further agreed that either after his taking the possession of the company or whenever demanded by T. M. Rama Iyer, they would execute the sale deed and get the same registered. On December 11, 1956, the said T. M. Rama Iyer executed a Deed of Assignment (Ex. B4) in favour of the appellant and, his younger brother, Gopalan Nair, whereby he assigned the Sivaram Oil Mill and Flour Mill to the appellant and his younger brother on a sale consideration of Rs. 8,000/-. The sum of Rs. 6,000/- that was payable to the appellant inclusive of interest was adjusted against the said consideration and the balance amount of Rs. 2,000/- was paid by the appellant to the said T. M. Rama Iyer. In the said document, it was stated that after execution of the agreement dated March 22, 1955, T. M. Rama Iyer had taken the building where the mills are situated on a monthly rent of Rs. 75 / - for a period of one year from Vettathu Tharavad under an oral agreement. In the said document, it was further mentioned that the appellant and his younger brother had the liberty to manage the mills, to enter into rental agreements with the Jenmi of the building by paying the rent directly, to effect alienation etc. as per their wishes and he (T. M. Rama Iyer) would not have any right or liability hereafter. In the said document, it is also mentioned that the rent receipts for the rent paid to the Jenmi were being handed over with the document.

3. Respondents Nos. 1, 3 and 5 filed a suit (O.S. No. 3 of 1964) against respondents Nos. 2,4 and 6 as well as against the appellant and T. M. Rama Iyer. In the said suit, the plaintiffs, while seeking partition and separate possession of their shares in the suit properties, had also prayed for possession of the oil and flour mills and had asserted that the agreement dated March 22, 1955 executed by respondents Nos. 1 to 5 in favour of T. M. Rama Iyer was a sham transaction and no rights were conferred on T. M. Rama Iyer under the said agreement. T. M. Rama Iyer, who was defendant No. 1 in the said suit, died during the pendency of the suit. In the suit all disputes between the plaintiffs (respondents Nos. 1, 3 and 5) and defendants Nos. 2 to 4 (respondents Nos. 2, 4 and 6) and the legal representatives of T. M. Rama Iyer were settled out of court and the only dispute requiring adjudication was that relating to the property in question in these proceedings which was claimed by the appellant as the assignee from R. M. Rama Iyer. The said suit was dismissed by the Additional Sub-Judge, Kozhikode by judgment (Ex. A1) dated January 25, 1968. It was held that the agreement dated March 22, 1955 was not sham, nominal and void and it operates as an outright sale of plant and machinery. It was, however, held that the tenancy right of the plaintiffs had not been affected by either the agreement dated March 22, 1954 or the Deed of Assignment dated- December 11, 1956 and that the plaintiffs would be entitled to possession of the site and buildings in which the plant and machinery were installed. It was further held that the appellant had been inducted into possession of

the site and buildings by virtue of the agreement dated April 13, 1954, and that the appellant would be entitled to continue in possession of the same until the right created in his favour as per agreement dated April 13, 1954 was extinguished. Respondents 1 to 6 filed an appeal (A. S. No. 129/68) in the High Court against the said judgment and decree of the Additional Sub-Judge. The said appeal was dismissed by the High Court by its judgment dated April 6, 1973. The High Court found that according to the averments in the plaint what was conveyed under the agreement dated March 22, 1955 was only the oil mill and it was not the case of the plaintiffs that immovable property was conveyed under the said agreement and that in view of the pleadings, there was no scope for considering whether any immovable property had been transferred and, therefore, no question of registration of the document arose.

4. While the said appeal was pending before the High Court, respondents Nos. 1 to 6 filed the suit giving rise to this appeal in the Court of Munsif, Kozhikode wherein it was prayed that the possession of the suit property may be restored to the plaintiffs-respondents by way of redemption and that the plaintiffs-respondents were willing to pay any amount that is found payable by them to the appellant. The said suit is based on the footing that the earlier suit was resisted by the appellant on the ground that he was in possession of and management of the business of the Mill as possessory mortgagee thereof and the same had found favour with the court. The plaintiffs-respondents have, however, pleaded that since the appellant has continued in possession and Management of the property even after the expiry of the term, no amount is likely to be payable on settlement of accounts. Respondent No. 7 was impleaded as defendant in the said suit on the ground that the appellant had leased the mill to him. The said suit was contested by the appellant. In the said suit, a decree for possession of the suit property excluding the plant and machinery was passed in favour of the plaintiffs-respondents by the Additional Munsiff, Kozhikode-I by his judgment dated June 22, 1972. The appeal filed by the appellant against the judgment and decree of the Additional Munsif was dismissed by the District Judge, Kozhikode by judgment dated November 20, 1976 and the second appeal filed by the appellant was also dismissed by the learned single Judge of the High Court by judgment dated March 10, 1977.

5. The High Court was of the view that the appellant could not come forward with a case that there was relationship of landlord and tenant between the plaintiffs-respondents and him and he could not be evicted from the suit property since he is entitled to protection of the Kerala Building (Lease and Rent Control) Act. In this regard, the High Court, after referring to the judgment of the Additional Sub-Judge in the earlier suit (O. S. No. 3 of 1964), has observed that in that suit the appellant did not put forward the case that as per the agreement (Ex. B2) dated April 13, 1954 there was a relationship of landlord and tenant between plaintiffs-respondents and him and the case of the appellant in that suit was that the plaintiffs-respondents could get the possession of the property only on extinguishment of the charge created by the said agreement. The High Court held that in the circumstances the appellant could not be permitted to plead in this suit what he did not plead in the earlier suit. According to the High Court, the consideration paid for the movables under Deed of Assignment (Ex. B4) dated December 11, 1956 would not make the appellant, the tenant of the property. The High Court was of the view that the appellant could not be allowed to put forward inconsistent pleas to the detriment of the opposite side. The High Court was also of the view that since there was a lease for running a business, it could not be said that the appellant is a tenant of a building and is entitled to the protection of the Kerala Building (Lease and Rent Control) Act.

6. In support of this appeal, Shri Wariyar, the learned Counsel for the appellant, has submitted that the High Court was in error in relying upon the observations contained in the judgment of the trial Court in a previous suit (O.S. No. 3 of 1964) inasmuch as after the decision of the High Court in

appeal (A.S. No. 129/68), the said judgment of the trial Court had merged in the judgment of the High Court dated April 6, 1973 and that is the only judgment which is operative and that the said judgment of the High Court shows that the only question which was considered by the High Court was whether the agreement (Ex. B3) dated March 22, 1955 was inoperative on account of non-registration. According to Shri Wariyar, the High Court has held that the said agreement did not require registration inasmuch as it related to transfer of movable property, namely, the oil mill and that the effect of the said judgment of the High Court is that the plaintiffs-respondents are precluded from claiming possession of the oil mill. The only question that remains is whether the plaintiffs-respondents can claim possession of the land and building in which the mill is installed and that involves the question as to whether plaintiffs-respondents, who were originally the lessee of the land and building, had a subsisting right in the same on the date of filing of the subsequent suit by them. Shri Wariyar has urged that the plaintiffs-respondents ceased to have any subsisting right in the property as a lessee in view of the agreement (Ex. B3) dated March 22, 1955 which shows that there was an implied surrender by the plaintiffs-respondents of their leasehold right in the property in favour of T. M. Rama Iyer which fact is further established by Deed of Assignment (Ex. B4) dated December 11, 1956 executed by T. M. Rama Iyer in favour of the appellant and his younger brother which indicates that a fresh lease had been created by the landlord in favour of T. M. Rama Iyer and T. M. Rama Iyer had surrendered his leasehold rights in favour of the appellant.

7. We find considerable force in the aforesaid submissions of Shri Wariyar.

8. After the decision of the High Court dated April 6, 1973 in A. S. 129 of 1968 the judgment of the Additional Subordinate Judge stood merged in the judgment of the High Court. The judgment of the High Court shows that the earlier suit was confined to the oil mill only, treating it as movable property independent of the property. Since the said suit did not relate to the land and building in which the oil mill is installed the said suit and the plea raised by the appellant in that suit can have no bearing in the present suit relating to possession of the land and building. The learned Judge of the High Court, with due respect, was not right in negating the plea raised by the appellant that he is in possession of the property as a tenant on the view that the appellant did not raise this plea in the earlier suit and he could not be allowed to put forward inconsistent pleas. Since the question with regard to possession of the land and building arises in the present suit only it was permissible for the appellant to raise the plea that the plaintiffs have no subsisting leasehold interest in the suit property and that the appellant is in possession of the same as a tenant of the owner of the said property.

9. As to whether the plaintiffs had a subsisting leasehold interest in the property involves the question whether they had surrendered the said rights. The case of the appellant is that the plaintiffs had impliedly surrendered their leasehold rights when they executed the agreement (Ex. B3) dated March 22, 1955 and thereafter a fresh tenancy was created in favour of T. M. Rama Iyer which was assigned by T. M. Rama Iyer in favour of the appellant.

10. Under clause (f) of S. 111 of the Transfer of Property Act, 1908, implied surrender is a mode for determination of a lease of immovable property. In English Law, delivery of possession by the tenant to a landlord and his acceptance of possession effects a surrender by operation of law. It is also called implied surrender in contradistinction to express surrender which must be either by deed or in writing. It has been held that directing the occupier to acknowledge the landlord as his landlord, i.e., to attorn to the landlord, is a sufficient delivery of possession by the tenant to the landlord. It has also been held that receipt of rent from a person in possession may be evidence of the landlord's acceptance of him as tenant, whether he is a stranger, or whether he was already in possession as sub-tenant. (See: Halsbury's Laws of England, 4th Edn., Vol. 27, paras 444, 445, 446

and 450; and Note (1) to para 446.) Under the illustration to clause (f) of S. 111 of the Transfer of Property Act, there would be an implied surrender of the former lease if a lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the existing lease. The said illustration is, however, not exhaustive of the cases in which there may be an implied surrender of the lease. Just as under the English Law, there can be an implied surrender under the law of transfer of property in India, if the lessor grants a new lease to a third person with the assent of the lessee under the existing lease who delivers the possession to such person or where the lessee directs his sub-tenant to pay the rent directly to a lessor. (See: Konijeti Venkayya v. Thammana Peda Venkata Subbarao, AIR 1957 Andh Pra 619 at pp. 624 and 625; and Noratmal v. Mohanlal, AIR 1966 Raj 89, at pp. 90 and 91).

11. Reference may, therefore, be made to the relevant-clauses in the agreement (Ex. B3) dated March 22, 1955 and the Deed of Assignment (Ex. B4), December 11, 1956 on which reliance has been placed by Shri Wariyar, In the agreement (Ex. B3) dated March 22, 1955, executed by respondents Nos. 1 to 5 in favour of T. M. Rama Iyer, it is stated:

"(4) We will not have any responsibility or objection for your paying the amount due to Kunhiraman Nair after the stipulated period and to take up the management by yourself, pay the rent of the building, conduct the business and if necessary to file a suit against Kunhiraman Nair and get the Company vacated; and to do anything as per your will and pleasure.

(5) The Company is not charged by any other liability except the loan mentioned above. The gift deed given to us and the copy of the agreement with Kunhiraman Nair are hereby given to you. Either after your taking possession of the Company or whenever you make demand we shall execute sale deed and get the same registered."

12. In the Deed of Assignment (Ex. B4) dated December 11, 1956 executed by T. M. Rama Iyer in favour of the appellant and his younger brother, it is stated:

"(2) After this for the purpose of clearing of the loan liability to you; the mill etc. started by the abovesaid Naganatha Iyer and others was given to me as per the agreement dated the 22nd of March, 1955. They belong to me and I have on oral agreement taken the building where the mills situate on a monthly rent of Rs. 75 / - for a period of 1 year from the Vettathu Tharavad which is the jenmi of the same.

(3) I have decided to assign the Oil Mill and Flour Mill described in the schedule below to you. The sale consideration is fixed at Rs. 8,000/- inclusive of Rs. 100/- given by me as advance to the jenmi. Of this Rupees 8,000/- the sum of Rs. 6,000/- due to you inclusive of interest is adjusted and after deducting the same, the balance amount of Rs. 2,000/- due to me is paid and the entire sale consideration has been paid to me in full satisfaction in the abovesaid 2 counts and I have handed over to you the mills described in the schedule with all the equipments and all the other rights pertaining to the same. You have derived the same and hereafter you are at liberty to manage the mills by yourself; to enter into rental agreements with the Jenmi of the building by paying the rent directly, to effect alienation etc. as per your wishes. I will not have any right, question or liability hereafter. I have made you believe and hereby certify that the properties are not charged by any loan liability or alienation and none except myself have any right over the same. The abovesaid agreement, the gift deed obtained by Naganatha Iyer and others and the rent receipts

for having paid rent to the Jenmi are hereby given."

13. From the aforesaid clauses, it would appear that by executing the agreement (Ex. B3) dated March 22, 1955, respondents Nos. 1 to 5 surrendered their interest in favour of T. M. Rama Iyer inasmuch as in clause 4 of the said agreement that they clearly stated that plaintiffs-respondents. will not have any responsibility or objection for T. M. Rama Iyer paying the amount due to the appellant after the stipulated period and take up the management by himself and pay the rent of the building and conduct its business. By empowering T. M. Rama Iyer to pay the rent of the building respondents Nos. 1 to 5 were impliedly surrendering their leasehold interest in the premises in favour of T. M. Rama Iyer. This is borne out by the Deed of Assignment (Ex. B4) dated December 11, 1956 wherein in clause 2, T. M. Rama Iyer had stated "I have on oral agreement taken the building where the mills situate on a monthly rent of Rs. 75/- for a period of one year-from Vettathu Tharavad which is the jenmi of the same". The original rent for the property as let out to respondent No. 2 was Rs. 40/- per month. The fact that after execution of the agreement dated March 22, 1955, T. M. Rama Iyer entered into another agreement with the landlord on a higher monthly rent of Rs. 75/- would show that a fresh lease was created by the landlord in favour of T. M. Rama Iyer and the earlier lease in favour of respondent No. 2 stood determined by implied surrender. In clause 3 of the Deed of Assignment (Ex. B4) dated December 11, 1956, T. M. Rama Iyer has empowered the appellant "to enter into rental agreements with the Jenmi of the building by paying, the rent directly to effect alienation". This shows that T. M. Rama Iyer had impliedly surrendered his leasehold rights by agreeing that the appellant could enter into rental agreements with the landlord by paying the rent directly. The case of the appellant is that ever since the execution of the Deed of Assignment (Ex. B4) dated December 11, 1956, rent is being paid by him to the landlord directly. It is not the case of the plaintiffs-respondents that they had paid the rent for the premises to the landlord after March 22, 1955. In these circumstances, we are of the opinion that the plaintiffs-respondents, by executing the agreement (Ex. B3) dated March 22, 1955, had impliedly surrendered their leasehold rights in the suit property in favour of T. M. Rama Iyer and on the date of the filing of the present suit they had no subsisting leasehold interest in the same. The suit for the recovery of the possession of the suit property filed by them on the basis that the plaintiffs-respondents are the lessees thereof was, therefore, not maintainable and is liable to be dismissed.

14. The appeal is consequently allowed, the judgment and decree of the High Court of Kerala dated March 10, 1977 in S. No. 1206/76-E is set aside and O. S. No. 636/68 filed by respondents Nos. 1 to 6 against the appellant is dismissed. There will be no order as to costs.

Appeal allowed.

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