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**Court** : Chennai

**Decided On :** Dec-16-1891

**Reported in** : (1892)ILR15Mad111

**Judge** : Subramanya Ayyar, J.

**Appellant** : Vithilinga Padayachi

**Respondent** : Vithilinga Mudali and anr.

**Judgement** :

1. The inam village of Puttoor in the Tanjore district forms the endowment of certain charities founded by one Lakshmana Mudali, deceased, of Madras. The first defendant is the present executor of the said Lakshmana Mudali's estate and the trustee of the said charities.

2. A lease of the village of Puttoor was granted on the 17th April 1883 by the first defendant under an instrument purporting to be for the benefit of the plaintiff and of the second defendant. The parties exchanged registered instruments regarding the lease. It was for a term of nine years from fasli 1293 and the rent reserved was 2,200 calams of paddy per annum, deliverable in two instalments within the year. The lessees had further to pay certain taxes amounting to Rs. 200 annually. The instruments between the parties provided that the lease might be forfeited for non-payment of the rent or the taxes. The plaintiff at once entered into possession under the lease. So far the facts are undisputed.

3. I shall now briefly state the other material allegations of the parties as ascertained from the pleadings or at the trial. Those of the plaintiff are as follows:- The second defendant possessed in reality no interest under the lease; his name was introduced into the transaction merely to secure a benefit to the first defendant, whose daughter by a concubine is married to the second defendant. A fourth share of the profits that the plaintiff might make from the village during the term of the lease was to go to the first defendant, the plaintiff taking the remaining three-quarters. This was the original understanding; but shortly after the lease was granted, the first defendant wanted half the profits instead of a fourth; the plaintiff refused to comply with that demand, and the first defendant, who was bound by law and by the contract to secure quiet possession and enjoyment to the plaintiff, instigated certain inhabitants of the village who had been cultivating the lands before falsely to set up occupancy rights, to disturb his possession and obstruct his enjoyment. In faslis 1295 and 1296 the obstruction became so complete that the plaintiff and his tenants were unable to cultivate any of the lands, which consequently lay waste. The first defendant having thus succeeded in ousting the plaintiff, sent a notice on the 17th May 1887 professing to cancel the lease under the forfeiture clause and openly resumed possession. The damages sustained by the plaintiff are estimated at Rs. 20,500, which he seeks to recover from the first defendant.

4. The material allegations of the first defendant, so far as they are necessary, are these:-The plaintiff's statements summarised in the last paragraph are untrue. The lease was a bona fide transaction, and the first defendant had no manner of connection with the profits. The second defendant was in reality one of the lessees, and the plaintiff cannot sue without joining him. The disturbances and obstructions alleged by the plaintiff were caused by the ill-feeling, which arose between the plaintiff and the inhabitants of the village in consequence of the plaintiff's attempting to raise the rents, his refusing to give lands to cultivate to such of them as declined to accept his terms, his bringing in tenants from other villages, and his having offended them by other imprudent acts. The plaintiff failed to pay the rent and the tax due for fasli 1296; the lease was thereupon lawfully cancelled by notice to the plaintiff and possession of the village taken by the first defendant. Subsequently the first defendant brought Original Suit No. 59 of 1887

against the plaintiff and the second defendant in the Kumbakonam Subordinate Court for the recovery of the above rent and tax, &c.;, and obtained a decree for the same, and the matters raised by plaintiff in the present suit are, therefore, res judicata.

5. The second defendant put in a written statement urging that there was no cause of action against him, and that as Civil Suit No. 187 of 1889 on the file of this Court instituted by the plaintiff in respect of this very matter against the first defendant and second defendant was dismissed for default of appearance on the part of the plaintiff, this suit is not maintainable against him.

6. On the 20th November 1890, BEST, J., passed an order dismissing the suit as against the second defendant.

7. The following issues were recorded:

First.--Is the suit maintainable in the absence of Singaravelu Mudali?

Second.--Is the suit not maintainable in whole or in part by reason of the decree in Original Suit No. 59 of 1887 on the file of the Subordinate Court of Kumbakonam?

Third--Was the first defendant justified in cancelling the lease?

Fourth.--To what damages, if any, is plaintiff entitled?

Fifth.--Is the defendant personally liable for such damages, if any?

8. Mr. Brown, in opening the first defendant's case, commented on the inconsistent manner in which the plaintiff's case was presented. From paragraphs 4 and 8 and the prayer of the plaint it clearly appears that the plaintiff intended to rely on a covenant for quiet enjoyment, and that he treated the suit as one for breach of contract. Later on, however, the plaintiff informed the Court that he sued the first defendant not as executor, but in his personal capacity. Mr. Brown argues that this is in effect an admission that the suit is not one for breach of contract. Though the first defendant traversed the allegation about the covenant for quiet enjoyment, no express issue was raised by the plaintiff on the point. But on the other hand, if the plaintiff was understood to have abandoned the case on the footing of a breach of

contract, that ought to have been made clearer upon the record and the plaint amended accordingly; for if the plaintiff is to be taken as suing the first defendant solely on the ground of a wrongful eviction by him, it may be open to doubt whether the reliefs which the plaintiff seeks are the appropriate ones. The trial has, however, proceeded on the assumption that the issues recorded cover the real questions arising in the case, and I shall deal with them as they stand.

9. First issue--On the face of the lease the plaintiff and the second defendant are co-lessees. Primd facie, therefore, both must be parties to this litigation. The plaintiff, alleging that the second defendant had in reality no interest in the matter, sued the first defendant alone without making the second defendant a party. But the latter was made a party by the order of the Court. His contention that the dismissal of Civil Suit No. 187 of 1887 was fatal to the maintenance of this suit prevailed, and the suit was dismissed so far as the second defendant was concerned by the order of the 20th November 1890. Now it is argued for the first defendant that in consequence of that order this case must proceed as if the second defendant had never been made a party, and that the plaintiff's claim must fail on the ground of non-joinder of a necessary plaintiff. I do not agree with this argument. Assuming, as the first defendant contends, that the second defendant had an interest in the lease, plaintiff is in no view entitled to recover anything from the second defendant except it be costs. As one entitled with the plaintiff to sue, but refusing to join, the second defendant could only have been made a defendant so that all persons interested might be before the Court. This was expressly done, and I cannot see how the subsequent order relied on can alter the fact.

10. It is next contended for the first defendant that, even if my view as stated above be correct, the suit cannot be maintained without the second defendant being arrayed as co-plaintiff. According to the Indian practice it is sufficient that persons having the interest that the second defendant is alleged by the first defendant to possess are made defendants. Ranna Pisharody v. Narayanan Somayajipad I.L.R. 3 Mad. 234 It is unnecessary, therefore, to consider the English authorities cited by Mr. Brown in support of his argument (Dicey on Parties, pp. 104-110 and cases there cited).

11. Upon the view I take of this legal objection, I must decide the first issue against the first defendant, even if I should come upon the evidence in the case to the conclusion that the second defendant is a co-lessee; I therefore refrain from discussing the evidence upon this feature of the transaction, which reveals its questionable character. That it is a questionable transaction is clear whether the evidence for the plaintiff or the evidence for the defendant be accepted. The plaintiff's case is that at the time of the lease, which, I consider, was granted on favourable terms, the lessee agreed to give the lessor, a trustee, one-fourth of the profits during the whole term as an inducement to his granting the lease. On the other hand the second defendant as the first defendant's witness admits that the plaintiff offered him a share in the profits to make the first defendant give the lease, and that the latter did, in consequence, grant the lease with the full knowledge that the profits were to go to the second defendant, his own son-in-law then living with him as a member of his family, and with the knowledge that second defendant was to take no trouble whatever in connection with the management of the property demised.

12. Second issue--The main question in the present suit is whether the first defendant was justified in cancelling the lease. He says he was entitled to act upon the forfeiture clause as the plaintiff and the second defendant had neglected to pay the rent and the tax due for fasli 1296. The plaintiff's case on the other hand is that he had been unlawfully evicted and kept out of possession during that fasli by the first defendant, that the latter was consequently not entitled to treat the rent, etc., for that period as in arrears, and the first defendant's action in cancelling the lease is, therefore, invalid. This contention on the part of the plaintiff is based on the rule that eviction of the lessee by the lessor from the whole or any part of the premises demised creates a suspension of the entire rent during the continuance of the eviction, until the tenant reenters and resumes possession,--Morrisonv. Chaduick (7 G.B., 266). The material question, therefore, to be determined is whether the plaintiff had been evicted by the first defendant as alleged by him. This was, in my opinion, decided against the plaintiff in Original Suit No. 59 of 1887, wherein the first defendant sued and obtained a decree for the very samerent,etc.,against the plaintiff and the second defendant. The third issue and the finding thereon (Exhibits VII and VIII) in that suit were, no doubt, expressed in

somewhat different words, but it is clear that the point in issue was really as stated by me. It is contended for the first defendant that that adjudication bars this suit,--Ananta Balacharya v. Damodhar Makund I.L.R. 13 Bom. 25 This raises a question on which the authorities are not quite agreed. In Bholabhai v. Adesang I.L.R. 9 Bom. 75 West and Nanabhai Haridas, JJ., held that the decision of a District Court in appeal in a suit for loss than Rs. 500 was not binding on the same or any other Court in a subsequent suit for more than Rs. 500 in which the identical question was raised between the parties, because they are entitled to prefer a second appeal to the High Court in the subsequent suit, whilst no such appeal lay in the first suit. This case was recently followed by Sir Charles Sergent, C.J., and Telang, J., in Govind Bin Lakshman Shet v. Dhondbarav Bin Ganbarav Tambye I.L.R. 15 Bom. 104 In Singarachariar v. Krishnasami, Second Appeal No. 1200 of 1887 unreported Wilkinson, J., came to a different conclusion, whilst Kernan, J., adopted the view which is to be explained on the principle referred to by WEST, J., in the latter part of the second paragraph on page 80. Bholabhai v. Adesang I.L.R. 9 Bom. 75 was not brought to the notice of Wilkinson, J., and the latter decision of the Chief Justice and Telang, J., was subsequent.

13. The Bombay rulings seem to me necessarily to involve the proposition, which, for the purpose of the point I am now considering, may be shortly stated thus. In appealable cases, a decision to be res judicata must have been given in a previous suit which the parties, according to the ordinary procedure, were entitled to take, as to fact and law, ultimately to the same (or corresponding) appellate tribunal to which the subsequent litigation, wherein the decision is relied on as conclusive, could be carried. If the rule thus deduced is correct, the first defendant's contention as to res judicata is unsustainable, as the suit in the Subordinate Court was for less than Rs. 5,000 and only an appeal upon questions of law lay to the High Court; whereas the present claim is for a sum over Rs. 5,000 and admits of an appeal on the facts also. Mr. Brown argues that, as the Subordinate Court could entertain a suit for more than Rs. 5,000, it was competent, within the meaning of Section 13, Civil Procedure Code, to entertain the present suit and that the letter of the law requires nothing more. But Section 13 of the Civil Procedure Code is not exhaustive. Moreover the decisions on the Section relating to res judicata in the successive Civil Procedure Codes show that

the Legislature did not find it quite easy to make the language of that Section precise and comprehensive at the same time. It is sufficient to refer to one decision on each in support of this statement. In Krishna Behari Roy v. Brojeswari Chowdranee L.R. 2 IndAp 283 the Privy Council held that the words 'cause of action' in Section 2 of Act VIII of 1859 cannot be taken in its literal and most restricted sense. The same tribunal ruled in Misir Raghobardial v. Rajah Sheo Baksh Singh L.R. 9 IndAp 197 that the words 'Court of competent jurisdiction' in Section 13 of Act X of 1877 meant a Court which had jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive. In Bababhat v. Narharbhat I.L.R. 13 Bom. 224 the Bombay High Court construed the same term 'Court of competent jurisdiction' in explanation VI, Section 13 of the present code as including a foreign competent Court. Dr. Whitley Stokes, who had much to do with the preparation of the codes of 1877 and 1882, refers to the matter dealt with by Section 13 as 'a subject of which the importance in a country inhabited by a litigious population is only equalled by the difficulty of dealing with it clearly, concisely and accurately in a legislative enactment'--Volume II, Anglo-Indian Codes, p. 392.

14. These considerations being kept in view, the interpretation suggested on behalf of the first defendant cannot, I think, be insisted on when it leads to results so manifestly opposed to reason as pointed out by West, J. In one place he puts the matter thus: Moreover for the purpose of establishing a prior decision as res judicata, we must look to the whole series of possible proceedings up to the highest available ordinary tribunal, otherwise as we have seen, the anomaly must arise of the highest Court being bound by a prior decision in the lowest Court in a case too paltry for an appeal.' The passage from Savigny, cited in support of this view, is quoted by WEST, J., in Anusuyabai v. Sakharam Pandurang I.L.R. 7 Bom. 466 and is as follows:-'Everything that should have the authority of res judicata is and ought to be subject to appeal.' This being so, it follows that that element of res judicata on which the whole of the present discussion turns, viz., concurrence of jurisdiction, must exist not only as to the Original Court, but also as to the appellate tribunals and their powers in the respective suits. That the necessity for this complete concurrence of jurisdiction in appeal also was distinctly persent to the Privy Council when it laid down the law in terms very similar to those of

Section 13 of the Civil Procedure Code is clear from the observation of their Lordships.' It is true that there is an appeal from the Munsif's decision, but that upon the facts would lie to the District Court, and not to the High Court,' Misir Raghobardial v. Rajah Sheo Baksh Singh L.R. 9 IndAp 197 Mr. Brown cites Krishna Behari Roy v. Brojeswari Chowdranee L.R. 2 IndAp 283 but the point now raised was not taken there, whereas, in the later case of Misir Raghobardial v. Rajah Sheo Baksh Singh L.R. 9 IndAp 197 just referred to that aspect of the matter with which the present question is closely connected was fully considered. The great impropriety of binding the higher Court in a case of considerable magnitude by the decision of a lower Court presided over by a Judge of presumably inferior qualifications was strongly pointed out, and the argument based on one of the maxims on which the doctrine of res judicata rests was met by the remark that 'although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to he too stringent in preventing a litigant from proving the truth of his case.'

15. It has been said that the conclusion of the Bombay High Court would itself in some cases lead to anomalous results. This is not, however, quite clear to me. But supposing it to be otherwise, I should still hold that the balance of advantages is in favour of that conclusion and I accordingly venture to adopt it.

16. Third issue--As I have already noticed a covenant for quiet enjoyment is relied on in the plaint. It is not now contended that there was any express contract, but apart from the Transfer of Property Act, which it is conceded does not apply, there is no doubt that the law implies a covenant of the description in question. By such covenant for quiet enjoyment, however, 'the lessee is to enjoy his lease against the lawful entry, eviction or interruption of any man, but not against the tortious entries, evictions or interruptions and the reason for the law is solid and clear, because against the tortious acts the lessee has his proper remedy against the wrong-doers.' [Woodfall's Landlord and Tenant, 14th edition, page 695, see also Douzelle v. Girdharee Singh 23 W.R. 121.] The case for the plaintiff is that the persons that actually ousted him had no occupancy rights, but set up a false claim, their entry therefore was, according to him, unlawful and the first defendant cannot, as lessor, be made liable on the covenant in law. If, however, the first

defendant had instigated his former tenants to set up an unfounded claim and thereby ousted the plaintiff, he would be liable as a wrong-doer. It is thus clear that in one view the plaintiff cannot here derive any advantage from the implied covenant and that in the other view no question of covenant arises.

17. Mr. Brown next argued that the acts on the part of the people in the village, relied on by the plaintiff, did not in law amount to an eviction. It cannot be denied and, I believe, it is not denied, that in the fasli in question the plaintiff and his tenants were, in consequence of the objection of the former tenants, utterly unable to cultivate any of the wet lands, which were the most valuable part of the property demised, and a great portion of the dry lands. The Magistrate, by an order (Exhibit H) under the Criminal Procedure Code, upheld the possession of those that set up occupancy rights. Upon this state of the facts, I would have no hesitation in holding that there was an eviction sufficient to create, according to Morrison v. Chadwick 7 C.B. 266 already referred to, a suspension of the rent, etc., for the non-payment of which the first defendant proceeded to determine the lease, should I find that the first defendant instigated the people that turned out the plaintiff to do so.

18. The question I have now to consider is that of the first defendant's responsibility for the acts of the people of the village. The evidence, on behalf of the plaintiff on the point, is almost purely oral and I distrust it, as it is inconsistent with the conduct of the parties and against the probabilities of the case.

19. [After a discussion of the evidence, His Lordship recorded a finding on the third issue in favour of the defendant observing, 'I come to the conclusion that the plaintiff brought the troubles on himself by demanding more rent and by his unconciliatory conduct towards the raiyats of the village and that the first defendant was in no way responsible for them.' The judgment proceeded as follows:]

20. As to the damages neither party has produced any accounts. The evidence as to the profits that the plaintiff is likely to have made if he had had undisturbed possession is oral and there is in reality no conflict between the evidence for the plaintiff and that for the defendant; both sets of witnesses give only rough estimates. I have already said that, in my opinion, the lease was granted on

favourable terms. I think the annual profits may be fairly taken at Rs. 1,000 a year. As to the Rs. 2,500 appropriated by the first defendant towards the rent of fasli 1295 at the express request of the plaintiff, I do not understand how the plaintiff is entitled to a refund thereof.

21. The remaining item is Rs. 4,000 claimed as costs incurred by the plaintiff in connection with criminal complaints and civil suits. I hold that the plaintiff is not entitled to claim this by way of damages. Khaja Mahomed Isakhan v. Baboo Kisho Lal 6 B.L.R. App. 44 Apart from this, I think the plaintiff has failed to establish that he spent this large amount as alleged by him. Exhibit K is quite unreliable. The plaintiff swore, in the examination in chief, that he was personally aware that the account was kept in the course of business from 1883 to 1885, but when his attention was drawn in cross-examination to the water mark, dated 1885 in the sheets of paper of which the book consists, he admitted that he first knew of this book only a short time before this plaint was filed. There is no other satisfactory evidence about this matter, For this 3/4 share, I would give the plaintiff Rs. 5,000 on account of the profits, if he were entitled to damages, but, in consequence of the conclusion at which I have arrived as to the cancelment of the lease, I must hold he is not entitled to recover any amount.

22. I find, on the first issue, that the suit is sustainable; on the second issue that the suit is not unmaintainable either in whole or in part by the decree in O.S. No. 59 of 1887 of the Subordinate Court at Kumbakonum, on the third issue, that the first defendant was justified in cancelling the lease and on the fourth issue Rs. 5,000 is the amount I would award to the plaintiff if he were entitled to recover any damages, but that he is not entitled to any. I record no finding on the fifth issue.

23. The result is that the plaintiff's suit is dismissed with costs.

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