

(1954) 07 KL CK 0006

In the High Court Of Kerala

Case No : Second Appeal No"s. 507 and 610 of 1950

Chacko Chacko

APPELLANT

Vs

Varghese Varghese

RESPONDENT

Date of Decision : 02-07-1954

Acts Referred:

Court Fees Act, 1870 — Section 4

Citation : AIR 1954 Ker 167

Hon'ble Judges : Kumara Pillai, J

Bench : Single Bench

Advocate : N.K. Narayana Pillai in S.A. No. 507 of 1950, for the Appellant; M.P. Verghese in S.A. No. 507 of 1950, for the Respondent

Judgement

Kumara Pillai, J.—These Second appeals arise out of a lease suit. In S.A. No. 507 of 1950 plaintiff is the appellant, and in S.A. No. 610 of 1950 defendant is the appellant. According to the plaint allegations, in execution of the decree in O.S. No. 56 of 1108 of the Kanjirappalli Munsiff's Court obtained by him against the defendant, plaintiff purchased the plaint property and obtained delivery of possession of it through court on 19-7-1112, and he leased it to one Verghese Mathew for nine years on 24-7-1114. Plaintiff alleges that Verghese Mathew gave a sub-lease for one year to the defendant on 2-8-1114 and that the latter got possession of the property in pursuance of the said sub-lease. On 10-12-1116 Verghese Mathew gave to the plaintiff a release of the lease taken by him, and in 1117 on the strength of that release plaintiff brought the suit which has given rise to these second appeals for recovery of possession of the property from the defendant with arrears of rent and future mesne profits from date of suit.

The rent payable under the sub-lease was B. Rs. 60/- per year. Plaintiff claimed in the plaint arrears of rent at this rate from 2-8-1114 to 9-4-1117. From the latter date till date of suit he claimed arrears of rent at the rate of Rs. 1000/- per year. The enhanced claim was made on the ground that on 9-4-1117 he had sent a registered notice to the defendant demanding surrender of possession of the

property and payment of future rent at the rate of Rs. 1000/- per year if the defendant did not surrender possession of the property and continued to remain in possession. The property is a rubber estate, and the plaintiff alleges that the income from it has gone up considerably after the sub-lease was granted on 2-8-1114. According to him, the income from the property would be far greater than Rs. 1000/- per year.

The defendant denied the lease as well as the sub-lease, and contended that the plaintiff had no right to the property and was not entitled to recover possession of it from him. After filing the suit the plaintiff applied for the appointment of a receiver for the plaint property. Defendant resisted that application also, but the trial court allowed it; and on 9-10-1120 the receiver appointed by that court took possession of the property from the defendant. The receiver has also deposited in court the profits taken by him after 9-10-1120. Repelling the defendant's contentions in the suit the trial court gave a decree to the plaintiff allowing him to recover possession of the property with arrears of rent as claimed in the plaint and future mesne profits from date of suit till 9-10-1120 at Rs. 1000/- per year. In respect of the period from 9-10-1120 till date of recovery of possession by the plaintiff, the trial court allowed him to recover the net profits realised by the receiver.

From the decree of the trial Court the defendant took an appeal to the District Court of Kottayam, & the Temporary Second Judge of that court confirmed the trial court's decree and dismissed the appeal except in regard to the enhanced rent from 9-4-1117 and the mesne profits from date of suit claimed by the plaintiff. The learned Judge held that the plaintiff was entitled to get only B Rs. 60/- per year as rent even after 9-4-1117 and that after the institution of the suit also the plaintiff was entitled to recover only rent at this rate and not mesne profits as claimed by him. Consequently he directed that the excess amount collected by the receiver should be paid back to the defendant. Against the portion of the lower appellate court's-decree disallowing his claim for enhanced rent and mesne profits after the date of suit plaintiff has filed S.A. No. 507 of 1950, and against the portion of the decree allowing the plaintiff to recover possession of the property with arrears of and future rent the defendant has filed S.A. No. 610 of 1950.

2. So far as S.A. No. 610 of 1950 is concerned the findings of the courts below are concurrent. Ext. J is the copy of the delivery kychit in O.S. 56 of 1108 and Exts. A(1) and B are respectively the lease deed of 24-7-1114 and the sub-lease of 2-8-1114 relied upon by the plaintiff. According to the defendant there was no actual delivery of possession in O.S. No. 56 of 1108 and Exts. A(1) and B are not genuine documents. The courts below have concurrently found that there was real delivery of possession in O.S. No. 56 of 1108, that Exts. A(1) and B are genuine, and that the defendant got possession of property under those lease deeds. Absolutely nothing has been made out for disturbing these concurrent findings of fact. S.A. 610 of 1950 therefore fails and has to be dismissed with

costs.

3. In S.A. No. 507 of 1950 it is urged on behalf of the plaintiff that he had sent a registered notice to the defendant on 9-4-1117 demanding surrender of the property and payment of future rent at the rate of Rs. 1000/- per year if the defendant did not surrender possession of the property and continued to hold it. The defendant refused to accept this notice, and it has been produced as Ext. N in the case. Ext. N is a notice to quit coupled with a demand for enhanced rent. The demand is very clear and definite in it. The receiver's report shows that the property would easily fetch a rent of Rs. 1000/- per year. It cannot, therefore, be disputed that the plaintiff had a right to get enhanced rent at the rate of Rs. 1000/- per year from 9-4-1117. But it is not on the ground that he had no such right that the lower court disallowed his claim for enhanced rent. The claim was refused because he had not paid court fee on the claim for the enhanced rent.

In the plaint the suit was valued on the basis that the annual rent was only B Rs. 60/- per year. The defendant contended that the court-fee paid was insufficient, and in spite of that contention the plaintiff did not seek to amend the suit valuation and pay court-fee on the enhanced rent claimed by him. The decision of the lower appellate court in regard to the claim for enhanced rent from 9-4-1117 to date of suit was, therefore, right; and in view of the plaintiff's omission to amend the suit valuation and pay court-fee on the enhanced rent in spite of the defendant's contention regarding court-fee, I am unable to accede to the prayer that a decree may be given to the plaintiff for claiming enhanced rent on payment of the necessary court-fee in this court.

4. The omission to pay court-fee on the claim for enhanced rent is, however, no ground for refusing mesne profits from date of suit at the rate claimed by the plaintiff. For claiming future mesne profits it was not necessary to pay any court-fee at all in the trial court. The period of Ext. B sub-lease was over long before the institution of the suit and the defendant was continuing in possession of the property in spite of the plaintiff's notice asking him to quit. The defendant's contention in the suit was an utter denial of the landlord's rights. In these circumstances the defendant was undoubtedly in wrongful possession of the property, and he is clearly liable for mesne profits from date of suit till the date of his dispossession by the receiver. Plaintiff claims mesne profits for this period only at the rate of Rs. 1000/- per year. In view of the receiver's report and the amounts collected by him, this claim can by no means be considered to be excessive.

5. As mesne profits of the period after the receiver took possession of the property plaintiff claims the net amount collected by the receiver. It was contended by the respondent in this court that the receiver was holding the property for and on behalf of both the parties in the suit, that the plaintiff is, therefore, entitled to get from the amounts collected by the receiver only the rent payable under Ext. B or at the worst the enhanced rent claimed in Ext. N notice, and that the balance collected by the receiver should be paid back to the

defendant.

In support of this contention the respondent's counsel relied upon a statement of law in the 12th Edition of Kerr on Receivers page 152. That statement reads:

A receiver is an officer appointed to collect the rents and profits of real estate, or the income or capital of personal estate, upon the title of the parties to the action the rights of those parties are not affected by the order, but it operates as an injunction to prevent them from receiving the subject-matter of the order, or from dealing with it to the prejudice of other parties to the action.

No doubt this proposition of law is good. But the respondent's contention overlooks the fact that the defendant has no title to the property. The period of the sub-lease was over on the date of suit and by denying the landlord's title he had also forfeited his rights as a lessee. The party entitled to be in possession of the property during the period the receiver was in possession, was, therefore, the plaintiff and not the defendant. The title to the property also was in the plaintiff and not in the defendant. The receiver holds the property for the ultimate benefit of the successful party to the suit and subject to whatever rights other parties may have according to the decision of the court. In this case it has been found that the plaintiff is the person who is entitled to the property. The person who had the right to be in possession of the property during the period the receiver was in possession, was also the plaintiff. In the circumstances, the plaintiff is entitled to get the whole of the net profits collected by the receiver.

6. The respondent's counsel contended that the second appeal in respect of the mesne profits was not maintainable as the plaintiff has not paid the necessary court-fee in the memorandum of appeal for the claim in respect of the mesne profits after the institution of the suit. The appellant's reply to this contention was that no court-fee is payable on the claim in the memorandum of appeal for the mesne profits after the date of suit. In view of S. 4 of the Court-fees Act of 1125, the position taken up by the appellant's counsel does not appear to me to be sound. Section 4 reads as follows:

The amount of fee payable under this Act on a memorandum of appeal or of objections on appeal under O. 40, R. 21 of the Travancore Civil P.C. or under O. 41 , R. 22, Cochin Civil P.C. shall be calculated as if it was a suit under the provisions of the preceding section for the reliefs claimed under the memorandum of appeal or of objection.

Plaintiff had claimed in the plaint future mesne profits from date of suit. That claim was disallowed by the lower appellate court, and therefore the claim in the memorandum of second appeal was for mesne profits from date of suit to the date of the institution of the second appeal and future mesne profits alter the institution of the second appeal. For purposes of payment of court-fee, the claim in the appeal memorandum for the mesne profits from date of suit to the date of the institution of the second appeal has to be treated under S. 4 of the Court-fees Act as a suit for past mesne profits. On the memorandum of the second

appeal "ad valorem" fee has, therefore, to be levied according to Sch. I of the Court-fees Act on the additional amount claimed by the plaintiff as mesne profits from the date of suit to the date of the institution of the second appeal. For the mesne profits after the date of the institution of the second appeal no court-fee need be paid.

The same view has been taken by a Full Bench decision of the Travancore High Court - "In re Velayudhan Pillai Thanu Pillai", 19 Trav LJ 1158 (A). Section 5 of the Court-fees Act of 1087 corresponds to S. 4 of the Court-fees Act of 1125. In the case of 19 Trav LJ 1158 (A), it was held:

As the law relating to court-fee now stands under the Court-fees Regulation VI of 1087, a memorandum of objections relating to the mesne profits from date of plaint to date of decree is taxable with "ad valorem" fee in view of the provisions in Ss. 5 and 9 of the Regulation.

Just as a suit is taxable for the relief which is claimed as due to the plaintiff on the date of the plaint, an appeal should be regarded as taxable on the relief claimed in it as due on the date of the appeal.

The second appeal need not, however, be dismissed for the defect in payment of the court-fee. It is open to this court to give a decree to the plaintiff for the mesne profits claimed by him subject to the condition that he will be allowed to realise the additional amount only on payment of the necessary court-fee. I would, therefore, allow the plaintiff to receive as mesne profits of the plaint property the net profits collected by the receiver from 9-10-1120 to the date of recovery of possession of the property by him (plaintiff).

7. In the result S.A. No. 610 of 1950 is dismissed with costs, and S.A. No. 507 of 1950 is allowed to the following extent. Instead of the future pattom of B. Rs. 60/- per year for the period after the institution of the suit decreed to him by the lower appellate court, plaintiff is allowed to recover from the defendant mesne profits from the date of suit to 8-10-1120 at the rate of Rs. 1000/- per year and to receive as mesne profits from 9-10-1120 to date of recovery of possession by him (plaintiff) the net profits collected by the receiver. Plaintiff will get one-half of his costs in the lower appellate court from the defendant.

Plaintiff will be allowed to realise the excess amount he is entitled to get as per the decree of this court only on payment of "ad valorem" court-fee payable on the difference between the amount he is entitled to get under the decree of the lower appellate court as pattom from the date of suit to the date of the institution of the second appeal and the amount he is entitled to get as mesne profits under the decree of this court from the date of suit till the date of the institution of the second appeal. The decree of the lower appellate court in A.S. No. 257 of 1123 is modified to the above extent and confirmed in other respects. In S.A. No. 507 of 1950 parties will suffer their costs incurred in this court.