
(1939) 02 MAD CK 0041
In the Madras High Court

James C.P. Fernandez and Another

APPELLANT

Vs

Ramakrishna Marthoba Rao Kesbekar and Others

RESPONDENT

Date of Decision : 20-02-1939

Acts Referred:

Transfer of Property Act, 1882 — Section 36

Citation : AIR 1940 Mad 21 : (1939) 50 LW 608

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This second appeal arises out of a suit for recovery of rent and also for recovery of possession of the suit property

in the occupation of the defendants as mulgeni tenants under the plaintiff. The suit properties formed a portion of the estate called Kudru which was

granted on mulgeni in favour of three persons by a deed dated 13th April 1842. Within half a century from the date of the grant both the muli right

and the tenant right became split up and came to be enjoyed by a number of persons. One-seventh portion of the muli right became vested in the

present, plaintiff and one Fernandez, the plaintiff, being entitled to six-sevenths thereof and Fernandez being entitled to the remaining one-seventh.

Fernandez was also a mulgeni tenant in respect of the six-seventh share under the plaintiff. Fernandez died leaving a will and appointing defendant

1 as sole executor. Defendant 1 after obtaining probate of the will distributed the estate among the devisees under a deed of partition, Ex. 1, dated

22nd April 1931. He also sold portions of the estate to defendants 3 to 6. From the date of the partition the mulgeni right has been enjoyed by

defendants 1 to 6, defendants 5 and 6 holding their portion jointly. The plaintiff claimed a certain amount for cesses and a certain amount as

enhanced rent. So far as the actual amounts claimed in respect of these are concerned, there does not seem to be much of a serious contest and

the findings of both the lower Courts in this behalf have not been challenged. The learned District Munsif appointed a commissioner to apportion

and report about the rent. On receipt of the report he held that defendants 1 to 6 were not jointly liable for the rent but were liable separately

according to the extent of the land owned by them and in their possession. He accordingly passed a decree directing defendants 1 to 4 separately

and defendants 5 and 6 jointly to pay the amount of rent stated in the memo affixed to the decree. On appeal, the learned Subordinate Judge

modified the decree holding that defendants 4 to 6 were severally liable but defendants 1 to 3 were jointly liable for the entire balance due.

Defendants 1 to 3 have preferred this appeal and the plaintiff has preferred a memorandum of objections.

2. The contention of defendants is that they are severally liable to pay the rent and the contention of the plaintiff is that all the defendants are jointly

liable and that both the learned District Munsif and the learned Subordinate Judge were in error in apportioning the rent. The contention of Mr.

Shenoi is that Fernandez was the sole tenant, and the fact that his property came to be vested in a number of persons either by inheritance or by

partition among his legal representatives and their alienees from them would not affect their joint liability to pay rent because the liability is one and

indivisible. On the other hand, the contention of Mr. Thayagarajan is that an assignee of a lease is entitled to ask for apportionment of rent and that

the view taken by both the lower Courts is sound. Apart from any question of law, for over 90 years since the date of the original mulgeni lease

both the muli right and the mulgeni right have been enjoyed by various persons. Not only was the right to receive the rent apportioned among the

persons entitled to the muli right but also the rent that was being paid by the tenants to the various mulgars who became possessed of a fractional

interest in the muli right was being apportioned. It can therefore be said that the principle of apportionment has become an incident of the tenancy.

As a question of law, Sundara Iyer J. in *Kunnisow v. Chathu* AIR (1916) Mad. 768, took the view that the principle of Section 36, T.P. Act,

would also apply to the case of an assignee of a lessee claiming apportionment of rent. At p. 90 he observed thus:

If the assignment be of a portion only of the premises included in a lease, it is settled law that the assignee is not liable for more than the proportionate rent due on what is comprised in his assignment.

3. This principle was followed in *Rash Behari Mandal and Others Vs. Hemanta Kumar Ghose and Others*, . To what extent this principle should

be applied it is unnecessary to consider having regard to the history of the present mulgeni tenancy. I am therefore of the opinion that the learned

District Munsif was right in apportioning the rent in the manner he has done. The learned Subordinate Judge modified the decree of the District

Munsif on the ground that defendant 1 was in possession of the holding for the benefit of himself and defendants 2 and 3. This is a mistake.

Defendant 1 was only in possession up to the date of the partition that is 22nd April 1931. Till that date the learned District Munsif has accordingly

made defendant 1 liable. After that date the property came to be enjoyed severally. The learned Subordinate Judge was not therefore right in

granting a joint and several decree against defendants 1 to 3 after that date. I therefore reverse the decree of the learned Subordinate Judge and

restore that of the learned District Munsif. I direct each party to bear his own costs in the appeal and in the memorandum of objections. Leave to

appeal refused.