

(1938) 10 MAD CK 0027
In the Madras High Court

Parvata Satyanarayanamurthy and Others	APPELLANT
Vs	
Sri Rajah Saheb Maharbabu-i-Doshan Sri Rajah Rao Venkata Kumara Mahipathi Surya Rao Bahadur Guru, Sardar, Rajahmundry Circar and Maharajah of Pithapur	RESPONDENT

Date of Decision : 28-10-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Limitation Act, 1963 — Section 14

Citation : AIR 1939 Mad 724 : (1939) 50 LW 139 : (1939) 2 MLJ 329

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This is a batch of 28 appeals which arise out of suits filed by the Maharajah of Pithapuram the respondent herein

against his tenants the defendants for recovery of arrears of rent for occupation of lands in various villages which originally formed part of what was

known as Thotapalli estate to which the plaintiff claimed title by a purchase by his predecessor-in-title. The arrears of rent were claimed from faslis

1332 to 1343. The liability to pay rent was not disputed but most of the suits were resisted mainly on the ground of limitation and some were

resisted on the ground that they were barred by Order 2, Rule 2, Civil Procedure Code. In answer to the plea of limitation the plaintiff relied on

Section 14 of the Limitation Act on the ground that a prior litigation against the same tenants in Civil Court saved limitation. In answer to the plea

raised by Order 2, Rule 2, the plaintiff also relied on the pendency of the prior litigation in respect of the claims which are sought to be defeated by

this technical plea. The Deputy Collector upheld the plea of the defendants as to limitation but overruled the plea as to Order 2, Rule 2 and gave

decrees on that basis, but the learned District Judge differed from the Deputy Collector on the question of limitation in its entirety. Against his

judgment the tenants have preferred these appeals.

2. The material facts are few and are not in dispute. That the plaintiff owned the several villages wherein the lands in the occupation of the tenants

were situate was not disputed but the tenants disputed the right of the landlord to the ownership of the soil of the lands, their case being they are

tenants owning kudivaram right in the lands. The plaintiff's case was that he was the owner of both the warams and that he was entitled to evict the

tenants from occupation of the lands after due notice to quit. He therefore issued notices to quit between 1921 and 1923 and filed suits in the Civil

Court. Most of the suits were for ejectment. He combined in the same suits with the relief for ejectment reliefs for past profits and future profits; in

some of them he claimed also past rents and future profits. Some of the suits were only for mesne profits though in some of them he claimed rent

also in the alternative. In a few of the suits he claimed only rent. The tenants resisted the various claims. So far as the claim for ejectment was

concerned, the tenants' plea was that the landlord had no right to eject as they were the owners of kudivaram right and therefore had occupancy

rights. This plea was also available for them to resist the claim for mesne profits. So far as the claim for rent was concerned, their plea was that the

Civil Court had no jurisdiction to entertain suits for rent. Most of the suits were launched about 1925 excepting certain suits for rent which were

filed as and when the right to recover them were about to be barred. The litigation lasted for nearly ten years and it was finally decided by the High

Court that the tenants had the kudivaram right and the plaintiff was not entitled to eject them. As the lands in the occupation of the several tenants

formed part of an estate within the meaning of the Estates Land Act the Civil Court would have no jurisdiction to award relief on the basis of a

subsisting relationship between landlord and tenant. Therefore the Court directed the plaintiffs in the various suits to be returned to the plaintiff for

presentation to the proper Court. The various plaintiffs were accordingly taken from the Civil Courts and " presented on the very same day in the

Revenue Courts. In presenting the plaintiffs to the Revenue Courts the plaintiff in some suits amended them by claiming also rent for faslis subsequent

to the fasli in respect whereof claims were preferred in the Civil Court; in some cases he claimed interest which was omitted to be asked for in the Civil Court; but the amendments in some cases were not made on the day on which the complaints were presented in the Revenue Court but on a later date when the complaints were returned for some formal amendment by the Revenue Courts and before they were re-presented again in the same Court.

3. The plea of limitation was presented in the lower Court and is again repeated before me thus: the claim for rent for the faslis for which mesne profits were claimed in the Civil Court is barred not having been filed within three years from the date when the said rents accrued. Section 14 of the Limitation Act would not save the said claims from being barred by limitation because the cause of action for a suit for rent is not the same as the cause of action for a suit for mesne profits; in any event, Section 14 would not save the claims in some of the suits being barred by limitation in so far as they relate to rents for faslis subsequent to those in respect whereof claims were made in Civil Court and which were claimed by way of amendment on the date of re-presentation of the complaints in the Revenue Court.

4. I shall first deal with the question of limitation regarding suits for rent in cases where mesne profits were claimed in the prior litigation. It is conceded on behalf of the plaintiff that but for Section 14 of the Limitation Act the claims would be barred by limitation. The question therefore is whether Section 14 saves them. Section 14 of the Limitation Act runs thus: In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal against the defendant, can be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

5. The three essentials therefore requisite for the application of this section are (1) identity of the cause of action, (2) good faith of the plaintiff, and (3) the absence of jurisdiction or other cause of a like nature in the Court which entertained the prior litigation. The defendants do not dispute either the good faith or the absence of jurisdiction of the Court with reference to the

prior litigation. But what is disputed is that there is no identity of cause of action. The question is, is this contention tenable? It has therefore to be seen what was the substance of the claim in the prior litigation.

The case of the plaintiff was that he was the owner of both the melwaram and kudivaram rights, that the defendants were in occupation under

terminable leases, that he gave them notice to quit, that they were in unlawful occupation of the land and were bound to surrender possession and

also pay mesne profits for such wrongful possession until the day on which they surrender possession. I shall give herein extracts from a plaint in

one of the suits, namely, O.S. No. 267 of 1925 a suit out of which S.A. No. 345 arises, to show how the plaintiff outlined his claim. Paragraphs 6

and 7 of the said plaint run thus:

6. Though notice to quit was given to the defendant on 30th December, 1921, for vacating the land by the end of fasli 1331 and delivering

possession thereof to the plaintiff, the defendant did not quit but cultivated for fasli 1332 also and enjoyed the produce. Notice was again given on

30th May, 1923, demanding quitting and delivering possession of the lands by the end of fasli 1332 and claiming Rs. 1,163-0-0 as damages for

unlawful cultivation for fasli 1332. Though thus demanded by the plaintiff the defendant cultivated the land for fasli 1333, 1334 and enjoyed the

produce. The plaintiff is in all manner entitled to eject the defendant from the suit lands, to recover damages for faslis 1332, 1333, 1334 for

unlawfully cultivating them without the plaintiff's permission and to recover future damages in the same manner till the lands are put in plaintiff's

possession.

7. The cause of action arose on the 1st July, 1922, when defendant began to unlawfully cultivate the lands mentioned in the schedule in the village

of Sankhavaram within your Hon"ble Court's jurisdiction. Cause of action arose on 13th January, 1923, 1924, 1925 when profits as damages for

faslis 1332, 1333, 1334 were appropriated.

6. The claim as will be seen was distinctly for possession and damages on the basis of unlawful occupation. The claim in the present case is based

on the ground of subsisting relationship between landlord and tenant and for recovery of rent on that basis Therefore in my opinion the claim for

rent is not founded on the same cause of action as the claim for mesne profits.

Both are founded on distinct causes of action. A claim for rent is founded upon a subsisting relationship between the landlord and tenant either based on a tenure or on contract. The claim for mesne profits is not based on such relationship but essentially on trespass. In a decision of mine reported in *Ramiah v. Thathiah* AIR 1937 Mad. 849 I have explained the scope of an action for mesne profits citing a passage from Salmond on Torts. As the learned author points out:

The claim for mesne profits was always in form a claim for damages for a continuing trespass upon the land. Such a claim was based upon and rendered possible by the doctrine of trespass by relation.

7. It is founded on the theory of re-entry on termination of the lease. After the service of notice to quit it must be taken that the landlord has determined the lease and has made his election in the cases in question to enter upon the land. The claim for profits prior to the filing of the suits in the prior litigation was therefore founded upon an unlawful occupation. In fact in some of the complaints it will be seen he claimed double the amount of the rent as damages. So far as profits claimed subsequent to the date of the suit for ejectment were concerned, there can be no question of the nature of the claim. Cole in his book on Ejectment at page 635 explains the position thus:

By issuing and serving a writ in ejectment the claimant elects to treat the defendants as trespassers on and from the date mentioned in the writ; and he cannot afterwards sue them as tenants for rent and for use and occupation subsequent to that day. The only remedy for subsequent occupation is by an action of trespass for mesne profits.

8. In *Birch v. Wright* (1786) 178 E.R. 1148, Buller.J., observes at page 234 thus:

For the action for use and occupation is founded on contract; and unless there were a contract either express or implied, the action could not be maintained.

9. Again dealing with a cause of action in ejectment, he observes as follows:

The action for use and occupation, and the ejectment, when applied to the same time, are totally inconsistent; for in one the plaintiff says the defendant is his tenant, and therefore he must pay him rent; in the other he says he is no longer his tenant, and therefore he must deliver up the

possession. He cannot do both. The plaintiff's Counsel admits that an action would lie for the mesne profits; it is of course after ejectment, and

may be maintained without proving any title. The ejectment is the suit in which the defendant is considered as a trespasser....

10. In *Birch v. Wright* (1786) ITR 378 : 99 E.R. 1148 it was held that though the landlord filed a suit in ejectment he might maintain an action for

use and occupation against the defendant tenant for all that is due and unpaid as rent up to the date of his issuing a writ for ejectment, because in

that case it was only by suing for ejectment he was held to have declared his election to treat the lease as at an end and the defendant a trespasser.

Until then the defendant must be deemed to have been treated by the landlord as his tenant. But in the cases in question from the time notice to quit

had been given the plaintiff elected to treat the defendants as trespassers and founded his cause of action thereon. The tenants resisted the

landlord's claim setting up a title to the soil and there was no question of any holding over with the implied permission of the landlord, the plaintiff,

so as to sustain an action for use and occupation. As stated in *Woodfall's Landlord and Tenant*, 23rd Edition, at pages 685 and 686:

A lessee, or his assignee, who holds over after his term or tenancy has expired or been duly determined, is liable for subsequent use and

occupation, provided the landlord has acted so as to raise a presumption of a continued tenancy, and not an intention to treat the tenant as a mere

trespasser.

10. The prior suits were therefore based on trespass and the present suits as already stated by me are founded on a subsisting tenure, that is, a

subsisting relation of landlord and tenant. Several cases have been cited at the bar but there is no case which directly deals with the question. Some

of the cases on which Mr. Viyanna relied only go to show that pendency of suit for possession does not save limitation for a suit for rent. The only

cases which have some bearing on the matter are the cases reported in *Sheriff v. Dina Nath Mookerjee* I.L.R.(885) 12 Cal. 258 and *Rameshwar*

v. Naka Singh AIR 1933 Rang. 106. In *Sheriff v. Dina Nath Mookerjee* I.L.R. (1885) 12 Cal. 258 a suit was brought for recovery of arrears of

rent from Pous 1281 (December, 1874) to Chaitro 1288 (March, 1882). The question was whether the claim for 1281 and 1288 was barred by

limitation. It would admittedly be barred but the bar was sought to be got over by relying on a prior litigation. The prior litigation was that in 1284

the landlord brought a suit to set aside the putni and in 1285 obtained a decree declaring the putni invalid and giving them possession with mesne

profits. But the decree was reversed in appeal in 1288. It was held that the prior litigation would not save the claim from being barred by limitation.

The learned Judge observed thus:

There was no period during which the tenancy ceased to exist We cannot extend the time of suit on the ground that he brought a suit improperly on

the allegation that the relationship of landlord and tenant between him and the tenant did not exist.

11. In *Rameshwar v. Naka Singh* AIR 1933 Ramg. 106 it was held, that where a plaintiff failed in a suit to recover rent on the basis of a subsisting

lease on the ground that the plaintiff failed to prove his tenancy, a later suit against the same defendant claiming compensation for use and

occupation of the land would not be barred by *res judicata*. Baguley, J., took the view that the two suits were founded on mutually exclusive

causes of action and when the plaintiff had sued on one of them and failed, he would be entitled to sue on the other contrary cause of action.

According to him one was based on contract and the other was based on tort. Mr. K. Subramanyam on behalf of the learned Advocate-General

relied very strongly on two cases (1) a decision of Devadoss, J., reported in *Vabalareddi Mallayya v. Narayana Gajapathiraju* (1924) 86 I.C. 13

and (2) a decision of the division Bench in *Mullai Thayammal v. Subbayyan Pillai* (1922) 16 L.W. 802. In *Vabalareddi Mallayya v. Narayana*

Gajapathiraju (1924) 86 I.C. 13 there was an alternative claim for rent. Therefore the learned Judge held that Section 14 of the Limitation Act

would save the subsequent suit from being barred by limitation. The learned Judge remarked thus:

Inasmuch as the plaintiff did claim rent in the previous suit on the ground that the appellants were bound to pay rent, I think the cause of action in

the previous suit was not different from the cause of action in this suit.

12. The learned Judge did not say that the cause of action for mesne profits is the same as the cause of action for rent. In *Mullai Thayammal v.*

Subbayyan Pillai (1922) 16 L.W. 802 Sadasiva Aiyar, J., made the following

observation at page 806 which is very strongly relied on by Mr.

Subrahmanyam:

The last contention was that the learned Judge ought to have awarded at least the rent due from 1910 up to the date of the suit. I think that this is a

reasonable contention because even on the footing that there was no proper notice to quit, the mere fact that a claim as for mesne profits was

made is not a sufficient ground for not allowing what is clearly due as rent in the alternative after amendment of the plaint, if necessary.

13. In that case the action was in ejectment against certain persons on the basis that they were tenants in occupation of the land till 1910 and that

notice to quit was given to them when they became trespassers after refusing to comply with the notice to quit. The defence was that the tenants

had occupancy rights by virtue of S.6 of the Estates Land Act. The finding of the lower Court was that the tenants did obtain occupancy rights.

Therefore without going into the other issues the lower Court dismissed the suit. On appeal their Lordships remanded the case on some of the

issues and one of the issues on which finding was called for, was what were the arrears of rent payable? The learned Judges held that the tenants

had acquired occupancy rights, and gave a decree on the basis of arrears of rent. It is not possible to understand on what basis they gave a decree

for arrears of rent because once it was found that the holdings formed part of an estate the Civil Court had no jurisdiction to deal with a claim for

arrears of rent. Having regard to the eminence of the Counsel who appeared in that case I am inclined to think that it was almost a decree by

consent without the necessity of resorting to further proceedings; or else it is legally not possible to sustain the decree in the face of the distinct

provisions of the Estates Land Act. However I cannot take it as an authority for the position that a suit for recovery of mesne profits can be

considered as a suit for rent and that both are founded on the same cause of action. I am therefore of the opinion that the condition of the identity

of cause of action is wanting in these cases and therefore such of the suits in which there was no claim for rent in the prior litigation either

independently or in the alternative must be held to be barred by limitation. In this view the question whether the claim for rent for subsequent faslis

added on the date of the re-presentation of the plaints in the Revenue Court is

barred by limitation would not arise. However, as the question was argued, I shall deal with it. It is now well settled that where a plaint is presented in a Court which has no jurisdiction and it is re-presented after return by that Court in a Court which has jurisdiction, the presentation in the latter Court must be deemed to be the date of its institution in the said Court. The proceedings in the former Court are of no avail and the proceedings in the latter cannot be treated as a continuation of the proceedings in the former Court - vide *Ramduitt Ramkissendass v. E.D. Sassoon & Co.* (1929) 56 M.L.J. 614 : 1929 L.R. 56 IndAp 128 ILR 56 Cal. 1048 (P.C.) and *Hirachand Succaram v. G.I.P. Railway Co., Bombay* I.L.R.(1928) 52 Bom. 548. By applying this principle it was held that the plaintiff should amend the plaint so as to include all intermediate transactions between the date of the first presentation and the date of the presentation to the competent Court. The date on which the plaints were re-presented must be the date on which such a claim should be deemed to have been made; it was on that date fresh court-fee would have been paid and accepted by the Court. I therefore hold that the rents for subsequent faslis of course excluding those which accrued within three years prior to the date of the amendment would certainly be barred by limitation. But the claims for interest in suits for rent which are saved by Section 14 of the Limitation Act would not be barred even though they were not made on the date of the presentation of the plaints in the Revenue Court but were done on the date of the re-presentation in the said Court. u/s 61 of the Madras Estates Land Act, an arrear of rent shall bear interest at the rate of one half per cent per mensem from the date on which the arrear fell due until it is liquidated. So, whether the plaintiff claims interest or not, the Court is bound to award interest. It is immaterial when the claims were made. There are certain suits in which, in the prior litigation suits for rents were claimed in the alternative. Therefore those suits cannot be said to be barred by limitation; also those suits in which for the period for which rent was claimed in the prior litigation for faslis prior to the institution of the suit would not be barred by limitation. In all the suits claim for rents which accrued within three years prior to the date of presentation of the plaint in the Revenue Court would not be barred and no appeals were preferred in regard to the said claim.

14. I shall now deal with the contention based on Order 2, Rule 2, Civil Procedure Code. The question arises thus: With reference to some

holdings at an interval of three years the plaintiff instituted suits for rent in the Civil Court because if he failed to do so, they would be barred by

limitation. The plaints in those suits were returned for presentation to a proper Court after the termination of the litigation in the High Court and re-

presented in the Revenue Court. Therefore Section 14 of the Limitation Act would save them from the bar of limitation. The plea that is advanced

is not limitation but one based on Order 2, Rule 2, Criminal Procedure Code. It is put thus: as the date of presentation in the Revenue Court is the

date of the institution of the suit in that Court, the plaint must comprise a claim for all arrears of rent up to the date of presentation because under

the proviso to Order 2, Rule 2, Criminal Procedure Code, successive claims arising under the same cause of action shall be deemed to constitute

but one cause of action.

15. Therefore, as the plaintiff has not presented any plaint including all the claims of arrears of rent, the only course open to the plaintiff is to elect

which of the suits he will proceed with and the rest of the suits must be dismissed. To put it concretely, if the claim is in respect of fasli 1323 to fasli

1328 both inclusive and the plaint in one suit comprises only claims for arrears of rent for faslis 1323, 1324 and 1325 and the plaint in another suit

comprises the claim for arrears of rent for faslis 1326, 1327 and 1328, the plaint must elect which of the suits he will proceed with, as one or the

other must be held to be barred by Order 2, Rule 2. Both the Courts have taken the view that Order 2, Rule 2 will not apply to cases where the

plaints have been returned for presentation to the proper Court by a Court not having jurisdiction to try the claims in those plaints. But this view is

attacked as unsound by Mr. Viyanna. The question is whether the plea is tenable. Under Order 2, Rule. 2, Civil Procedure Code, it is necessary

that the plaintiff should have omitted to sue in respect of, or intentionally relinquished any portion of his claim. The omission to sue may be

accidental or deliberate. The question is, is there such an omission in this case? What is contended is the omission to add in either of the plaints

filed in the Civil Court and re-presented in the Revenue Court the claims for the earlier or subsequent faslis as the case may be. But as per the

order directing the return of the plaints and for presentation to the proper Court the plaintiff had to present the same plaints in the Revenue Court.

As pointed out by Sankaran Nair, J., in *S. Visweswara Sarma Vs. Dr. T.M. Nair and Another*, , the object of "the return of a plaint for

presentation to a proper Court is to enable the plaintiff to present that document without paying the stamp over again." Else he would not get credit

for the court-fee already paid. The plaintiff was therefore obliged to present all the plaints in the Revenue Court. When he presented them, he must

be deemed to have claimed for all the faslis up to the date of the presentation. The plaints were presented simultaneously and they must be taken

together and treated as one document with the proper court-fee though it was affixed on separate pieces of paper. The fact that the Court has

numbered the suits separately or that the plaintiff omitted to ask the Court to treat it as one suit and give it one number does not amount to an

omission to sue or relinquishment of any portion of the claim within the meaning of Order 2, Rule 2, Civil Procedure Code. I am therefore of the

opinion that Order 2, Rule 2, Civil Procedure Code, would not operate as a bar. I accordingly overrule this contention.

16. The result is that S.A. Nos. 345, 434, 432, 451, 435, 433 and 474 of 1936 must be allowed. S.A. Nos. 431, 346, 347, 436 and 488 must

also be allowed. The rest of the appeals must be dismissed.

17. Leave to appeal is refused.

18. These second appeals having been posted to be spoken to this day, the Court delivered the following

JUDGMENT

1. In regard to S.A. Nos. 345, 346, 347, 431, 432, 433, 434, 435, 436, 451, 474 and 488 the appellant will get his cost from the respondent. In

the rest of the appeals the appellant will pay costs to the respondent. So far as the costs in the two lower Courts are concerned, each party will

bear his own costs.