
(1915) 03 MAD CK 0007
In the Madras High Court

Syed Ahmad Sahib Shutari

APPELLANT

Vs

The Magnesite Syndicate, Ltd., G. Turner and Others

RESPONDENT

Date of Decision : 18-03-1915

Acts Referred:

Citation : 29 Ind. Cas. 60 : (1915) 2 LW 460

Hon'ble Judges : Seshagiri Aiyar, J;Kumaraswami Sastri, J

Bench : Division Bench

Judgement

1. In this suit the plaintiff complains that the 1st defendant has trespassed on property not included in the lease, and prays for an injunction and for damages. The trespass was denied. The District Munsif found for the plaintiff and awarded damages.

2. In appeal, the District Judge held that as the plaintiff was only one of the tenants-in-common who laid claim to the property, he was not entitled to maintain the suit alone. The Judge personally inspected the locality and on the strength of that inspection found that the property was included in the lease.

3. We are unable to agree with the District Judge. Although there is a difference of opinion regarding the right of one of the tenants-in-common to

eject the lessee from the leased premises, there is no doubt that as against a trespasser any one of the co-owners can maintain an action. Radha

Proshad Wasti v. Esuf 7 C.P 414 : 9 C.L.R. 76; Harendra Narain Singh Chowdhry v. Moran 15 C.P 40; Hira Lal v. Bhairon 5 A.P 602; A.W.N.

(1883) 155 and per Best, J. in Gopalasami v. Periasami Tevar 6 M.L.J. 27. Even in Gopal Ram Mohuri v. Dhakeswar Pershad Narain Singh 35

C.P 807 : 7 C.L.J. 483 which lays down that one of the co-sharers is not entitled

to sue the lessee in ejectment, it is recognised that the case of a trespasser will be different. This principle has been extended to members of a joint Hindu family. See *Paleshri Pratap Narain Singh v. Rudra*

Narain Singh 1 A.L.J. 543 : A.W.W. (1903) 119 : 26 A. 528. We have not been referred to any authority in support of the position taken by - the learned District Judge.

4. The District Judge is equally in error in basing his decision on the knowledge gained by him during the local inspection. The language of Order

XXVI, Rule 9, slightly differs from that of Section 392 of the old Code. Under the Act of 1862, a Commissioner should be appointed only if the

inspection "cannot be conveniently conducted by the Judge in person." Under Rule 9, no such condition is imposed. Even under the old Code, it

was held by the Judicial Committee of the Privy Council that a judgment should not be based solely on the result of the personal inspection by the

Judge. *Kessowji Issur v. G.I.P. Railway Co.* 31 B.P 38 : 6 C.L.J. 5 : 11 C.W.N. 72 : 17 M.L.J. 347 : 4 A.L.J. 461 : 9 Bom. L.B. 671 : 34 I.A.

115 : M.L.T. 435. The same reasoning applies to cases instituted under the new Code. See *Rai Kishori Ghose v. Kumudini Kanta Ghose* 14 Ind.

Cas. 377 : 15 C.L.J. 138. The inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence let in.

He should not, without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question

raised before him. We have no hesitation in holding that the procedure of the learned Judge has seriously prejudiced the appellant.

5. For both these reasons, we must reverse the decree of the District Judge and direct him to dispose of the appeal according to law. Costs will

abide the result.