

(1915) 12 MAD CK 0001
In the Madras High Court

Syed Ahmad Sahib Shuttari

APPELLANT

Vs

Magnesite Syndicate, Ltd., by their Agent and Manager, Mr.
G. Turner, and Others

RESPONDENT

Date of Decision : 16-12-1915

Acts Referred:

Transfer of Property Act, 1882 — Section 109, 37

Citation : 32 Ind. Cas. 512

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

Bench : Division Bench

Judgement

1. The plaintiff and defendants Nos. 2 to 8 own undivided shares in the property in dispute. Plaintiff is entitled to a 150/480 share. Defendants

Nos. 2 to 8 are entitled to the remaining share. On the 26th January 1899, they jointly gave a lease of the entire property to Mr. G.G. Arbuthnot

for 30 years. The present 1st defendant is the successor-in-title of the said lessee. The lease was for quarrying magnesite and chalk. It made the

rent due thereunder payable in certain proportions individually to the plaintiff and defendants Nos. 2 to 8. It provided for the keeping of accounts

for the weightment of the magnesite and chalk in the presence of the lessors and the lessee, and contained provisions for re-entry and for the

forfeiture of the lease on certain contingencies. The plaintiff complains of the breach of three covenants (see paragraph 5 of the plaint) and prays

that it may be declared that the lease had terminated, and for possession of either the entire property or the share of the plaintiff. The 1st defendant

denied that he failed to fulfil any of the conditions. He admits in paragraph 18 of his written statement that a certain sum of money is still due to the

plaintiff. The other defendants remained ex parte.

2. The Munsif upheld the plaintiff's contention and decreed possession of the plaintiff's share. The District Judge on appeal has reversed that judgment.

3. The first question argued by Mr. T. Rangachariar for the appellant is that the District Judge's view that one only of the lessors is not competent

to maintain a suit in ejectment is not the law in this Presidency. In the case of Sri Raja Simhadri Appa Rao v. Prattipati Ramayya 29 M.k 29 and in

the case of Korapalu v. Narayana 20 Ind. Cas. 930 this High Court held that one of the several tenants-in-common can sue to recover possession

of his share from the joint lessee. The case of Ebrahim Pir Mahomed v. Cursetji Sorabji He Vitre 11 B.k 644 takes the same view. On the other

hand, the Calcutta High Court in a long course of decisions maintains the position that all the co-owners must sue together. Having regard to this

conflict of authorities, and to the guarded language used by Mr. Justice Sankaran Nair in Sri Raja Simhadri Appa Rao v. Prattipathi Ramayya 29

M.k 29, we had the question fully argued before us It was contended that under the English Law, it is open to a tenant-in-common to sue for the

recovery of his share of the land demised and that there is nothing in the Statute Law of this country which restricts such a right. The view

maintained by jurists that "joint tenants are seized per my et per tout (by the half, or moiety, and by all)" has been commented upon in the note to

Murray v. Hall. (1849) 7 C.B. 441 and its limitations have been explained. It is said in English books that the right to bring separate suits is due to

the conception that it is a concession to the lessee that he should be allowed to take a joint lease, and that by the mere fact of joining in the lease,

the several owners are not debarred from enforcing their individual rights. It is not necessary to cite all the English authorities which recognise the

rights of a tenant-in-common to sue to recover his share of the holding demised. They are collected together in Cole on Ejectment, page 286. See

also Williams on the Law of Ejectment, page 194. Freeman in his book on Co-tenancy and Partition points out the distinction in this respect

between joint tenants, tenants-in-common or co-parceners. See Sections 329, 330, 331 and 341. The general rule is stated to be, "whenever the

title of the co-tenants, as in case of joint tenancy and co-parcenary, is joint, the action must also be joint; and whenever, as in tenancy-in-common

such tenant is deemed to possess a separate and distinct estate, the remedy of each must be distinctly and separately pursued."" An exception even in the case of several tenants has been maintained from the earliest times to the effect that where the thing to be recovered in a real or mixed action is entire, there, of necessity, tenants-in-common must join."" That is the reason for the distinction in this respect between actions for the recovery of real and of personal property.

4. There can be no doubt that the rights possessed by the members of a Muhammadan family in an intestates estate are that of tenants-in-common.

As was pointed out by the Judicial Committee of the, Privy Council, there is no presumption of joint tenancy in this country except in the case of

co-parceners under the Hindu Law [Jogeswar Narain Deo v. Rama Chandra Dutt 23 I.A. 37. Therefore, unless there is something in the

conditions of this country which warrants a departure from the principles applicable to tenants-in-common both in England and in America, we

must hold that the plaintiff is entitled to sue for his share. On the other hand we find that the rule of law as obtains in England is accepted by the

Legislature in this country in Sections 37 and 109 of the Transfer of Property Act. The view of the Calcutta High Court that the English decisions

do not apply to India may be traceable to the suggestion thrown out by Mr. Justice Rampini in the course of the argument in the case of Gopal

Ram Mohuri v. Dhakeswar Pershad Narain Singh 35 C.k 807 that under the Bengal Tenancy Act a fractional share-holder is not entitled to

maintain an action in ejectment against the joint lessee. So far as we are aware, this principle is not recognised in the tenancy legislation of this

Presidency. Nor has our attention been drawn by Counsel to any provision to that effect. Mr. Chamier tried to distinguish the Madras decisions on

the ground that they are within the strict letter of Sections 37 and 109 of the Transfer of Property Act, as in both the cases there was a transfer of

the lessor's interests since the demise. We fail to see on what principle the transferee can acquire a better title to sue for the share sold to him than

the transferor himself. Our conclusion is, a tenant-in-common is entitled in this Presidency to sue for his share of the property demised, where a

forfeiture has been incurred. Of course this right must be found in the terms of the contract. Mr. Chamier contended that Exhibit A contemplates a

joint action. The canon of construction regarding forfeiture has not been uniform. Lord Ellenborough said in *Goodtitle, Lessee of Charles Luxmore*

v. *Saville* 16 East 87: ""In the construction of covenants of this sort they are neither entitled to favour or disfavour, whether they are to create a

forfeiture or to continue an estate; but we are to put the fair construction upon them., according to the apparent intention of the contracting parties.

Lord Tenterden in *Doe d Davis v. Elsam* (1828) Mood. & Mal. 189, emphasises that position. He says: I do not think provisoes of this sort are to

be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be

construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view

of cases of this sort, the provisoes ought to be construed according to the fair and obvious construction, without favour to either side."" On the

other hand, many other eminent Judges have held that a proviso for re-entry ought to be construed strictly *Doe d Anglesea v. Rug ley* (1884) 6

Q.B. 107. In this country, the Legislature inclines in favour of holding provisions as penal even when a definite sum is mentioned as payable in

cases of the breach. The aim of law generally is in favour of giving relief against forfeiture. We think the safer course will be to act on the principle

that penal provisions providing for re-entry should be strictly construed. Even in this view, we are unable to hold that Exhibit A provides for the

institution of a joint action where there has been an infraction of individual rights. The document has been drawn up by English solicitors and the

whole scheme of it suggests that the English doctrine of separate action was in the contemplation of those who drafted the lease-deed. We are,

therefore, forced to the conclusion that the general right of individual action is not taken away by the terms of this contract. See the decision in

Balambhat Ravjibhat Joshi v. Vinayak Ganputrao Patwardhan 10 Ind. Cas. 746.

5. There is one other consideration which confirms our view that the forfeiture should be enforced if it had been incurred. Under the English

Conveyancing Acts of 1881 and 1892, which were passed with the object of affording relief against forfeiture, one of the exceptions relates to

Covenants in a mining lease to allow the lessor to have access to, or inspect books, accounts, records, weighing machines or other things, or to

enter or inspect the mine or workings.

6. In the Indian Mines Act (Act VIII of 1901) there is no provision either in favour of or against forfeiture. The principle of the English rule must,

therefore, ordinarily apply. The reason of the rule is apparently that in a mining lease, the interests of the Government are also in jeopardy.

Consequently, it is not a matter depending entirely upon the rights of the actual parties to the contract. For this reason also, we must hold that the

forfeiture cannot be ordinarily relieved against.

7. On the merits, we are not satisfied with the way the facts have been dealt with by the lower Appellate Court. In the view the learned Judge took

of the law, there was no necessity for giving clear and definite findings on the questions of fact involved in the case. As we differ from him on the

question of law, it is desirable that the District Judge should be asked to submit revised findings upon the question whether the plaintiff has proved

that there has been a forfeiture of the covenants in the lease as alleged by him. He must return findings on issues 1, 2 and 3 on the evidence on

record and also upon the further question to what relief the plaintiff is entitled within six weeks from this date.

8. The District Judge has also held that the suit as brought must be construed as one for partition and that the District Munsif had no jurisdiction to

entertain it. The relief claimed is to eject the 1st defendant and to such a suit Section 7, clause XI (sic) cc), of the Court Fees Act applies. The suit

must be held to have been rightly valued and that it was properly instituted in the Court of the District Munsif.

9. In compliance with the order contained in the above judgment, the District Judge of Salem submitted findings on the following issues:

I. Whether the first defendant has made default in the payment of rents and royalties due to the plaintiff or not?

II. Whether due notices of weighment have been given by the first defendant to the plaintiff or not?

III. Whether correct accounts have been maintained by the first defendant as required by paragraphs 8 and 10 of the suit lease or not?

X. To what relief is the plaintiff entitled?

10. He found on the first issue that the defendant did not make default, in the payment of royalties and rent due, and on the second issue that the

defendant did not give notice of weighment to the plaintiff and on the third issue that no proper accounts were maintained and that the defendant was not entitled to be relieved against forfeiture.

11. This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following.

JUDGMENT

12. We accept the findings, reverse the decree of the District Judge and modify the decree of the District Munsif by adding a direction for partition and delivery of the share of the plaintiff. The respondents will pay the costs of the appellant in this and in the lower Appellate Court.