

(1926) 01 MAD CK 0047
In the Madras High Court

T. Kuppusamy Pillai

APPELLANT

Vs

S. Mahommad Kasim Sahib and Others

RESPONDENT

Date of Decision : 08-01-1926

Acts Referred:

Transfer of Property Act, 1882 — Section 116

Citation : AIR 1926 Mad 566

Hon'ble Judges : Odgers, J

Bench : Division Bench

Judgement

Odgers, J.—This is a case in which it is important to look at the plaint. The plaintiff entered into a lease with Defendants 1 and 2 in 1907. These two persons are said to have since become in-solvents and are not represented in second appeal. In 1913 Defendants 1 and 2 sub-leased to the 3rd defendant. The plaint sets out that Defendants 1 and 2 were in enjoyment of the plaintiff's property as tenants and that the 3rd defendant is in enjoyment of the premises as a partner of Defendants 1 and 2. It may at once be said that this case of partnership was given up in both the lower Courts and was not pressed before me here. The plaint then goes on to ask for "losses on account of rent from January 1916 to 15th December 1918" when the plaintiff sold the property to a stranger Paragraph? of the plaint runs as follows:

The plaintiff claims relief in this suit for losses on account of rent and for damages for use and occupation at Rs. 50 per month.

2. The material issue settled in the case is: Is the plaintiff entitled to collect the rent of the suit building?

3. It is now contended before me that the plaintiff is entitled to succeed as against the 3rd defendant on any one of the several grounds, (1) as a tenant of the plaintiff u/s 116 of the Transfer of Property Act ; (2) as a trespasser on the premises of the plaintiff and therefore liable for damages for use and occupation, I have set out the only paragraph in the plaint in which damages for use and

occupation are referred to except the prayer and there are no introductory averments whatever showing how the plaintiff would be entitled to damages for use and occupation against one or more of the defendants. The plaintiff, no doubt, had a cause of action against the 3rd defendant, but the question is whether on the plaint as framed he could be granted any relief. The District Munsif held that he could on the ground that the 3rd defendant after the notice Ex. B (1) which will be referred to in detail in a moment made himself directly responsible for the rent and continued in possession. The District Judge held that there was no contract express or implied by the 3rd defendant to become the tenant of the plaintiff and to pay rent. As stated above the 3rd defendant is joined clearly in the plaint as a partner of Defendants 1 and 2. The suit is not one in ejectment and he was nowhere treated as a trespasser. Therefore any damages for use and occupation against him as trespasser are out of question. Can any damages for use and occupation or by way of rent be awarded against him as a tenant? That the plaintiff knew that the 3rd defendant was a sub-lessee is clear. No objection was raised to the sub-lease and the possession of the 3rd defendant is said to have been more than once admitted by the plaintiff. Now, the plaintiff terminated the lease to Defendants 1 and 2 by a notice. He sent Ex. B (1) to the 3rd defendant specifically as subtenant enclosing the notice he had addressed to Defendants 1 and 2 terminating their tenancy. Exhibit B (1) demands that the 3rd defendant should vacate the premises within a month of the receipt of the notice and concludes:

In default of so vacating I write this, with a pure mind, that Rs. 75 per month will be collected for the said tenancy along with the costs of Court." To this the 3rd defendant gave no reply and continued in possession. Now, it is said that the concluding words of Ex. B (1) bring the case within Section 116 of the Transfer of Property Act and that the lessor has by them "otherwise assented" to 3rd defendant's continuing in possession. It is clear from *Meghji Valabydhas v. Deyjlai and Co.* AIR 1924 Bom. 322 that it is for the lessor to do some act, receive rent or otherwise to give consent and not for the lessee to do anything under the Transfer of Property Act. I have been referred to a case in *Dugal v. Macarthy* [1893] 1 Q.B. 733 in the Court of appeal which is said to resemble the present case in that there the tenants held over and when the landlord wrote demanding a quarter's rent in advance they did not answer the letter but remained in possession. The Master of Rolls says:

The evidence appears to me clearly to show that the landlord consented to their so remaining in possession as tenants ; and that he treated them as tenants from year to year on the terms of the previous tenancy.

4. The whole question here is whether from the terms of Ex. B (1) it can be said that the landlord consented to 3rd defendant remaining in possession as his tenant in direct privity with him. It seems to me it cannot. The terms are that he should go out or Rs. 75 will be collected together with the costs of Court. That does not look like an amicable consent to either the tenant's holding over or to

the recognition of a new tenancy on the part of a former sub-lessee. The 3rd defendant has paid no money up to this date and the landlord has taken no steps till 1919 when this suit was filed.

5. Another contention is that even though the 3rd defendant has been recognized as sub-tenant remaining in possession after the determination of the lease he must be liable for reasonable damages for so remaining in possession on the authority of old English cases like that of a man who takes a bun from a railway refreshment room or of a man to whom wine is delivered without an order and who receives it and consumes it. That no doubt might be another good cause of action for the plaintiff had it been foreshadowed in his plaint, or had an issue been taken about it below. One must say with some sympathy, for the plaintiff that there was no doubt he had a remedy against this 3rd defendant but either he was badly advised or his remedy has been misconceived; and in my opinion, on his plaint he is not entitled to succeed as against the 3rd defendant. It may be that when he first launched the case the 3rd defendant occupied, a very minor place in his consideration and that the subsequent insolvency of Defendants 1 and 2 caused him to turn to and try to recover from the 3rd defendant. But on the state of the pleadings and the issues and the shape in which the case was originally put I am clearly of opinion that he cannot succeed in doing so.

6. The second appeal must therefore be dismissed with costs.