

(1936) 10 MAD CK 0053
In the Madras High Court

Udaya Pratapa Singh and Others

APPELLANT

Vs

Gourachendra Dyano Sumanto and Others

RESPONDENT

Date of Decision : 19-10-1936

Acts Referred:

Citation : AIR 1937 Mad 656 : (1937) 45 LW 387

Hon'ble Judges : Pandrang Row, J

Bench : Division Bench

Judgement

Pandrang Row, J.—These are appeals from the decrees of the Subordinate Judge of Berhampore dated 21st December 1931 in A.S. Nos. 74, 77 and 122 of 1929. These decrees in effect dismissed two of the three suits instituted by the Zamindar of Sherugada and in the third suit the Subordinate Judge's decree allowed only a very small portion of the claim and dismissed the rest of it. The trial Court had passed decrees in all the three suits in favour of the plaintiff. It may be mentioned in this connexion that the original plaintiff died before the appeals were preferred to the Subordinate Judge and his legal representatives were brought on record in the lower appellate Court. The suits were in substance for recovery of rent reserved under certain leases or in the alternative for recovery of damages for use and occupation. The leases were of the kind described as mustajari leases and the amount of Tent due thereunder is referred to as the mustajari Gutta.

2. According to the practice followed in the zamindari, the right to recover the rent due to the Zamindar by the ryots, namely rajabhagam, was sold by auction and it is stated that the defendants are the persons whose bids at such auctions were accepted. The bidding at such auction and the acceptance of the bids are alleged to constitute the mustajari leases in question. The trial Court was of opinion that the alleged plaint leases are not really leases but only ordinary contracts and did not therefore require registration. It found however that the contracts were really for three years and that the defendants were dispossessed after one year even in the absence of any reservation of the power to revoke.

That Court therefore found that the plaintiff himself having backed out of the contract had no right to expect performance from the other side, and that the plaintiff in filing the suit for recovery of damages is blowing hot and cold in the same breath. It found accordingly that the plaintiff had forfeited his right to recover damages, but, curiously enough, awarded damages, the reason given being that the defendants were also equally repudiating the contract and pleading that the contract had never been given effect to. In the result, instead of disallowing the plaintiff's claim to damages it reduced it by a comparatively small amount. The decree passed in O.S. No. 137 of 1928 was for Rs. 1,900, the decree passed in Order Section No. 138 of 1928 was for over Rs. 2,100 and the decree passed in the third suit was for a little over Rupees 1,000. In appeal however the learned Subordinate Judge found that the leases alleged in the plaint are leases but that they are not valid or enforceable because the law required them to be registered, the subject of the lease being Immovable property.

3. As regards the alternative claim to damages for use and occupation, he was of opinion that one of the conditions which must be fulfilled before a claim for damages for use and occupation could be permitted was that the defendant must have been in possession intending to occupy it as a tenant and that in the absence of a registered lease, the lessee could have had no right to recover the rent payable by the occupancy tenants, and it was impossible to say that a lessee In the case of a mustajari lease is even in constructive possession of the holdings. A further argument based on the doctrine of part performance was also dismissed as untenable. Another alternative argument based on the plaintiff's right to sue for accounts on the basis of an agency was also dismissed on the ground that the suits had not been framed on that basis and there had been no trial on those lines and that no application had been made for amendment of the plaint on that footing. The result was, as stated above, the decrees in two of the suits were set aside altogether and the decree amount in the third suit was reduced considerably, only that portion of the claim being allowed which was covered by a registered lease from the predecessor of the plaintiff.

4. In the present appeals, which were argued together, it has not been contended that what was leased was not Immovable property or that the leases did not require registration, though the finding of the lower appellate Court on these points is attacked in the grounds of appeal. In view of this, it is not necessary to deal with these points at any length. The authorities on the point as to what is Immovable property are collected on pp. 15 and 17 of Mulla's Transfer of Property Act, Edn. 2. What was leased was the right to collect the rents due by the zamindari tenants or ryots to the zamindar. That rent is certainly a benefit to arise in future out of land and it is an interest in land. It is sufficient to refer to *Mangalaswami v. Subbiah Pillai* (1911) 34 Mad 64 and in particular to the statement of law on the subject at p. 66 which has been approved by their Lordships of the Judicial Committee in a very recent case, namely, in AIR 1936 230 (Privy Council) . It is clear that if what was leased was Immovable property

and the lease was for three years, it must be registered before it can be regarded as valid. The subject of the lease is not land itself and the object of it is not agricultural. The lease is therefore not agricultural. There can be no doubt therefore that the leases relied upon by the plaintiff in these suits are not valid or enforceable because they have not been created by an instrument in writing registered as required by law. So far as this part of the case is concerned, there is no dispute.

5. The argument on behalf of the appellant has been therefore concentrated on the alternative claim for damages for use and occupation. In this connexion it is desirable to notice what the plaintiff allegations are. The allegations are that the villages were given on lease to the defendants and that the defendants obtained possession of the villages, and even the claim to damages for use and occupation is based on the ground that the villages have been kept by the defendants in their use and occupation and enjoyment. There is however a statement in the plaintiff to the effect that the defendants have been collecting *rajabagam*, etc., from the *ryots* of the said villages and have been enjoying the same. It is in my opinion only this allegation in the plaintiff which can afford any basis for the claim to damages for use and occupation, for it has been found by both the Courts below--and the point has not been disputed here--that as a matter of fact the defendants did not get possession of the villages themselves or of the holdings therein. The only possession which the defendants are said to have obtained is by way of enjoyment of the right to collect rent which was given to them. This alleged enjoyment of the right to collect rent was denied by the defendants who contended that they did not collect anything from the *ryots*. Unfortunately, no separate issue was framed on this question as to whether any rent had been collected from the *ryots* by the defendants in pursuance of the so. called leases granted to them by the zamindar, if so, what the amount of such collections was. Issue 2, namely, whether the defendants enjoyed the suit village in the suit year, has not been considered in this aspect and the finding of the trial Court simply was that the lease was really a contract and that the plaintiff acted upon it for one year in pursuance of the contract. In any case, there is no clear finding on the question of actual collection of rents by the defendants and no attempt was made to ascertain the amount of such collections.

6. In these second appeals what has been argued is that the lower appellate Court's view that no damages for use and occupation can be claimed in cases like the present because in the absence of a registered lease the *mustajari* lessee can have no right to recover the rent payable by the tenants, is wrong and that enjoyment by way of actual collection of rents should have been deemed to be equivalent to use and occupation of the property that was leased. On the other hand, it is contended that a claim to damages for use and occupation will lie only where the premises or the subject matter of lease is in the nature of land which is capable of actual physical use and occupation and cannot apply where the property is of an incorporeal nature like the right to collect rent. This is a question which seems to be devoid of authority; in any case no Indian authority

has been brought to my notice which deals with this point except the solitary reference to a Digest which is found in the lower appellate Court's judgment. No report of the case which is relied upon in the Digest is available and it is therefore impossible to say what the authority is for the statement in the Digest. The case is said to have been reported in *Jang Bahadur Singh v. Eshan Ali* (1902) 5 OC 222, but that report is not available. As regards the English authorities, the actual authorities have not been brought to my notice but only passages from recognized text books to the effect that the right to recover compensation for use and occupation is not confined to land or houses or the like but will extend to hereditaments, corporeal or incorporeal, such for example, as the right of shooting, hunting, mining with liberty to dig, tithes, etc.

7. It is possible to find some rule or principle justifying the grant of damages for use and occupation even in cases of incorporeal property where some physical right with respect to land also goes with the incorporeal right assigned or leased, such for instance as in the case of a right of shooting or fishing, the grant of which also implies the physical right to go on the land and be upon it. The present case is however not one of that kind because the right to collect rent does not necessarily involve a right even to enter upon the holdings in respect of which the rent is due. It is not clear whether the right to collect rent which was given, included the right to distrain for rent. No doubt if the right to distrain had been given, there would have been a right to enter upon land. It is impossible to say in these suits what other right besides the right to collect rent was impliedly conveyed to the person to whom that right was granted. As a matter of fact, the claim to damages rests not on any grant but on the mere relationship of landlord and tenant and actual use and occupation of property, in this case the property being the right to collect rent. It may be that cases relating to tithes would have shed more light on the subject but no reference has been made to such cases. The right to recover damages for use and occupation is derived or based on the English law.

8. There is no case brought to my notice in which a claim to damages for use and occupation in respect of incorporeal property was recognized before the Act of 1737 (2 George II, Ch. 19) which specifically refers not merely to land but also to tenements and hereditaments held or occupied by the defendant. It cannot be said that this particular statute also applies to this country because the common law has certainly been held applicable. The rent was, according to common law originally, regarded as something attached to and issuing out of the land and as a tenement, and rent could only be recovered by real action at first. It was only in modern times that rent was recognized or regarded as a payment due in virtue of a contract to pay for the use of land, and indeed an action for debt did not lie in respect of rent reserved on a freehold estate, till Queen Anne's time, that is to say, till about 1709. The action for damages for use and occupation which assumed the form of an action of *assumpsit* was itself a development of the action of trespass on the case, and partook originally of its delictual character. So far as incorporeal property was concerned, it was the settled rule of Common

law, and it is still a rule of English law, that rent could not be reserved out of an incorporeal thing. The rule was laid down so long ago as in Butt's case (1600) to the effect that a contract cannot charge such a thing with rent which is not chargeable by the law; neither can rent be granted or reserved of any estate of freehold out of any other hereditament which is not manurable, either in possession, reversion, or by possibility, but is heretamentum incorporeum. In an assize they cannot be put in view, nor can distress be taken in them.

9. Of course it does not mean that because no rent could issue from incorporeal things they could not be let. That rule could be and was evaded by the process of making a contract to pay for the use and occupation of incorporeal things, and this contract was enforceable by an action of debt, and later on by an action of assumpsit. Nevertheless, this action did not lie unless there was actual delivery of possession, or, to employ the word then in use, unless there was seisin. Though the rule was that incorporeal things did not lie in livery but in grant, nevertheless seisin, in the shape of attornment by the tenant, was regarded as necessary to complete the grant in the case of, for instance, a transfer of rent: See Coke in Brediman's case (1607). The grantee of a rent to complete his title must get seisin; for, then he was protected by the assize of novel disseisin or the quod permittat. Indeed there can be no doubt that the basis of the rule which allowed an action of assumpsit in the case of a claim to damages for use and occupation was actual entry on the premises. In the absence of such entry no such claim could be allowed. This point is in my opinion not open to doubt, viz., that, whatever the reason for the rule may be, historical or otherwise, the rule has always been that there can be no claim to damages for use and occupation unless there has been use and occupation made possible by entry on the premises.

10. The question therefore is whether in a case where the premises consists of incorporeal Immovable property such as right to collect the rent due in respect of tenants' holdings in a Zamindari village there can never be use and occupation I do not see why enjoyment by way of actual collection of rent from the tenants should not be regarded as use and occupation. That is the only kind of possession that the Immovable property in question is capable of, and if such possession has been enjoyed or taken, that is to say, where the rents have been actually collected, there is no reason why the person who collected them should not be deemed to have been in use and occupation of the Immovable property in question.

11. It is no doubt a case of first impression but I think there is nothing in law to exclude altogether a right to recover damages for use and occupation even in respect of Immovable property which is not capable of physical occupation like land or houses. It must at the same time be remembered that where owing to the nature of the Immovable property, there can be no possession except by way of actual enjoyment and to the extent of the enjoyment the occupation and user must be limited only to the actual enjoyment; in other words, it is only where the

rent has been actually collected and to the extent the rent has been collected that the defendants can be said to have had enjoyment, or use and occupation of the Immovable property. The case is somewhat similar to a case in which a person who has been granted an invalid lease of several items of property gets actual possession only of some of them; in such a case the claim to damages for use and occupation would be confined to those items of which he actually got possession and could not possibly include items of which he did not get possession. So also in the present case the plaintiff's claim on the ground that defendants have actually collected rents from the ryots must be limited to the amounts actually so collected from the defendants and the damages, which are due to him for use and occupation, must be limited to the actual amounts so collected by the defendants from the ryots. In other words, the amount collected actually by the defendants is the measure of damages in this case.

12. It follows therefore that the view of the learned Subordinate Judge that no claim to damages for use and occupation can be maintained in cases like the present is wrong, and that he was not right in dismissing the claim to damages for use and occupation entirely without going into the question of the extent of such user and occupation and the quantum of damages. It is possible and indeed it is very probable that the lower appellate Court will not be in a position to determine this question in the state of the evidence in this case. It does not appear as if the parties knew exactly what they had to prove and it does not appear that there is enough evidence in the suits on which it would be possible to base a finding as to the actual amount collected by the defendants in the suits as rent from the ryots. For this state of affairs the plaintiff is largely to blame, because the burden lay upon him to prove both user and occupation and the quantum of damages, viewing his claim as being one to damages for use and occupation. The other basis of the claim, viz., the mustajari lease, has been found to be invalid, and it is possible, that the paucity of evidence on his side to support the alternative claim to damages for use and occupation is due to the fact that he relied mainly on the lease.

13. In these circumstances, I am of opinion that the only feasible course to adopt with due regard to justice is to set aside the decrees of both the Courts below in all the three suits and to direct the trial Court to try the suits afresh after raising proper issues in the suits in the light of the observations contained in this judgment and giving reasonable opportunity to both parties to adduce additional evidence. In the circumstances of the case I direct that the parties do bear their own costs in this Court and in the Court below and that the costs incurred in the trial Court up to date by the defendants be paid by the plaintiff irrespective of the result of the suits. Future costs in the trial Court should be provided for in the revised decree of the trial Court. The court-fees paid in the memoranda of these appeals should be refunded to the appellants. Leave to appeal is granted to the respondents.