

The result is that this appeal is allowed and the application made by the respondent dismissed with costs in both Courts.

FLETCHER J. I agree.

Appeal allowed.

N. G.

Attorney for the appellant : *K. K. Dutt.*

Attorneys for the respondents : *Chatterji & Co.*

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RAMESH
CHANDRA
MITTER

v.

JOGINI
MOHAN
CHATTERJI.

ORIGINAL CIVIL.

Before Rankin J.

D. E. D. J. EZRA

v.

J. E. GUBBAY.*

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April 14.

Possession—Resistance to delivery of possession to decree-holder—Claim to be in possession of the property as a tenant under the judgment-debtor—Sub-tenant—Civil Procedure Code, 1908, O. XXI, rr. 97, 99—Parties.

On the 7th July 1919 the plaintiff instituted a suit against his lessee for the recovery of possession of certain premises upon the determination of the term by forfeiture for breach of conditions in the lease. In that suit the plaintiff did not join as defendant, the respondent who was admittedly in possession of the said premises as under-tenant of the lessee. On the 18th December 1919, an order was made for the recovery of possession in the said suit by which the lessee was given time until the 29th February, 1920, to make over possession. This not being done, an order, dated the 12th March 1920, was obtained by the plaintiff directing the Sheriff to put him into possession. The Sheriff on the 8th April, 1920, was obstructed in the execution of this order by the respondent and the plaintiff thereupon made this application before the sitting Judge in Chambers complaining of such obstruction under Order XXI, r. 97. The respondent was summoned to appear to answer the said complaint :—

Held, that the application must be dismissed and the plaintiff must be left to his remedy by suit against the respondent.

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An action for possession based upon forfeiture of a term should, for practical reasons, be brought against all persons in possession (including constructive possession) at the date of the suit : not that the suit is necessarily defective otherwise, but because the decree will be difficult to enforce under the Code.

APPLICATION in Chambers.

This was an application before the sitting Judge in Chambers under O. XXI, r. 97, of the Civil Procedure Code, 1908, on the part of the decree-holder in Suit No. 1754 of 1919 complaining of resistance by a Mrs. Wallace of No. 5, Lindsay Street, to the officer charged with the execution of the warrant of possession issued in the said suit and summoning her to appear before the Judge to answer the said complaint.

The material facts of the case appear from the following affidavit of Geoffrey Lacy Scott of No. 32, Dalhousie Square, Calcutta, an assistant in the firm of Messrs. Orr, Dignam & Co., the plaintiff's attorneys, who had the conduct and management of the said suit:

“ 2. That the said suit was filed on the 7th July, 1919, by the plaintiff and in his said plaint he alleged *inter alia* that inasmuch as the defendant had sub-let the premises in suit in breach of his covenant not to assign or sub-let without the plaintiff's consent, the plaintiff was by the terms of the lease entitled to re-enter the said premises and that thereupon the lease should absolutely determine and the plaintiff further prayed that the defendant should be ejected from the said premises and make over possession to the plaintiff of the same.

3. That the said suit came on for hearing on the 18th day of December, 1919, before the Hon'ble Mr. Justice C. C. Ghose and during the course of the hearing, it was stated in evidence that a certain Mrs. Wallace was in possession of the said premises as sub-tenant of the defendant and in violation of the defendant's covenant not to assign or under-let without consent.

4. That the said suit was on the 18th day of December, 1919, decreed in favour of the plaintiff and the defendant was ordered to make over possession of the said premises by the 29th day of February last

5. That as possession was not made over by the defendant to the plaintiff in pursuance of the Court's order in that behalf, the plaintiff issued

execution and on the 12th day of March, 1920, the plaintiff obtained an order from this Hon'ble Court for the Sheriff of Calcutta to make over possession of the said premises to the plaintiff in accordance with the provisions contained in Order XXI, rule 97, of the Code of Civil Procedure.

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6. That the said order of the 12th March, 1920, was lodged with the Sheriff on the 22nd March, 1920.

7. That I have been informed by Edgar Roseboon, one of the Sheriff's officers, and verily believe that in accordance with the directions contained in the said order of the 12th March, 1920, he attended on the 8th day of April, 1920, at the premises No. 5, Lindsay Street, but was unable to execute the said order as he was resisted from so doing by a Mr. Chew, the manager of the said Mrs. Wallace, in the presence of the said Mrs. Wallace who was standing with her manager when he resisted him from executing the said order.

8. That inasmuch as the Sheriff's officer has been resisted in the execution of the Court's order, the plaintiff has been advised to apply to the Court under the provisions of Order XXI, rule 97, for a notice to issue calling upon the said Mrs. Wallace to show cause for the reason of her resistance.

9. That I have been advised and therefore submit that inasmuch as the said Mrs. Wallace is admittedly a sub-tenant of the defendant whose lease has been forfeited by the decree of the Court, that the said Mrs. Wallace is bound by the said decree and bound to make over possession to the plaintiff.

10. I believe the said Mrs. Wallace is a hotel and restaurant keeper and that she has ample accommodation for herself in her hotel and that she is resisting making over possession to the plaintiff in order to harass him."

The respondent did not file any affidavit but claimed to be in possession of the said premises, as a matter of fact, on her own account, and contended that the order for possession obtained by the plaintiff in the said suit could not be enforced against her in a summary procedure under Order XXI of the Civil Procedure Code, 1908.

Mr. A. A. Avetoom, for the plaintiff.

Mr. L. P. E. Pugh, for the respondent.

[The arguments of counsel for the purpose of this report are sufficiently stated in the judgment.]

Cur. adv. vult.

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RANKIN J. This suit was instituted on the 7th July, 1919, by lessor against lessee for recovery of possession of certain premises upon the determination of the term by forfeiture for breach of conditions in the lease. The suit was contested by the lessee unsuccessfully and an order for recovery of possession was made on 18th December, 1919, by which the lessee was given until the 29th February, 1920, to make over possession. This not being done, an order dated 12th March, 1920, was obtained by the lessor directing the Sheriff to put him into possession. The Sheriff on the 8th April, 1920, was obstructed in the execution of this order by a Mrs. Wallace who is respondent to the present application made by the lessor before me as the Judge in Chambers.

Mr. Pugh who appears for Mrs. Wallace admits that his client holds as a tenant under the defendant in the suit. He does not file any affidavit on her behalf; but he says that she was in possession as under-tenant before the suit was instituted, and he indicates a desire to contend or at least a willingness to allege (on what grounds I do not know) that the suit was collusive. Mr. Avetoom, for the lessor, contends that though not a party to the suit, Mrs. Wallace is bound by the decree whether her tenancy began before or after action brought: that she is in law a privy though not a party, and her under-tenancy has determined by the forfeiture of the lease.

It is not absolutely necessary to join as defendants all persons in possession: in some circumstances it may be wrong and oppressive so to do: *Geen v. Herring* (1). The risk taken by omitting to join any such person is the risk that after decree he may set up a right to possession, independently of the lease which has become forfeited, whether by equity against

(1) [1905] 1 K. B. 152.

the lessor or by other adverse title. This, however, is the extent of the risk and apart from the Code I should have no difficulty in enforcing this decree against Mrs. Wallace, her estate or interest having come to an end with the forfeiture of the lease [*Minet v. Johnson* (1)] and there being no tittle of evidence before me as to the action having been collusive.

There is nothing, however, in the least paradoxical in the suggestion that in order to get an effective right to actual possession through the Sheriff, a plaintiff must make all persons defendants who were in possession at the date of his suit. This used to be the law in England and there may well be special reasons in favour of insisting on this rule in India. I have to see what the Code provides.

Mr. Pugh's first point is that the respondent comes within rule 36 of Order XXI and that the plaintiff has wrongly obtained the order of 12th March, 1920, under rule 35. I do not think there is anything wrong with the order. The rules in question are simply directed to the form of possession which the Court will give to a plaintiff. The rights established by any decree are established *inter partes* and are always liable to be denied by strangers claiming an interest; but if the plaintiff has obtained a decree on the footing of which he is entitled to actual possession and not merely to the form of possession appropriate to a reversion expectant upon another's occupancy right, an order made under rule 35 is not bad or void. The question is simply whether that order can be enforced against the person objecting to its operation. The answer to this question must, I think, be given as far as any summary procedure is concerned by looking first to rules 97, 98 and 99 of the same order. Rule 98 deals with two cases, viz., where the obstruction is occasioned

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(1) (1890) 63 L. T. 507.

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without just cause (1) by the judgment-debtor, (2) by some other person at his instigation. Rule 99 likewise deals with two cases of claimants in good faith: (1) persons claiming on their own account, (2) persons claiming on account of some person other than the judgment-debtor.

Now, I am certainly not satisfied that the respondent was acting at the instigation of the lessee-defendant against whom the decree was passed. I cannot therefore act under rule 98.

As regards rule 99 if "claiming in good faith to be in possession" means "claiming in good faith to have a right to be in possession," I am not satisfied in the least of the respondent's good faith. In the absence of any affidavit by her and knowing that she holds under the lessee, I think the suggestion that the suit was collusive points rather to bad faith than good. If, however, the words cited are satisfied by her being able to say truly that she is in possession as a matter of fact, I have no doubt of this nor is it contested; it is indeed admitted that she was in possession as an under-tenant in December, 1919, at the time of the trial.

Now in my opinion rule 101, which deals with exactly the same class of person as rule 99, but deals with that class after and not before dispossession by the Sheriff, shows that the latter meaning of the words in rule 99 is the correct one. The Court has only to be satisfied that the respondent was in possession on her own account and it will restore her even after dispossession.

The only question which remains, so far as I can see, is whether this construction must be abandoned on the ground that it gives no meaning to the final words of the first clause of rule 35. In view of rule 102 and of the fact that persons taking an interest *pendente lite* are persons "bound by the decree" this

objection falls to the ground. No doubt the draftsmanship of the order is defective even as regards them, for such persons are not necessarily within rule 98 since they do not always act at the instigation of the "judgment-debtor". This trouble, however, does not arise at present.

The result is that, in my view, an action for possession based upon forfeiture of a term should for practical reasons be brought against all persons in possession [including constructive possession, which seems to be covered by rule 99, *Mancharan v. Fakirchand* (1)], at the date of the suit: not that the suit is necessarily defective otherwise but because the decree will be difficult to enforce under the Code.

Unless, therefore, Mr. Avetoom desires to contend that the respondent's tenancy began after the suit was instituted, I must make an order under rule 99 dismissing the plaintiff's application, and must leave him to his remedy by a suit against the respondent. Mr. Avetoom disclaiming this desire I make the order under rule 99 with costs.

A. P. B.

Application dismissed.

Attorneys for the plaintiff: *Orr, Dignam & Co.*

Attorneys for the respondent: *Morgan & Co.*

(1) (1901) I. L. R 25 Bom. 478,

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