

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Muttusami Ayyar.

PASUPATI (DEFENDANT NO. 2), APPELLANT,

v.

NARAYANA AND ANOTHER (PLAINTIFF AND DEFENDANT
NO. 1), RESPONDENTS.*

Landlord and tenant—Estoppel—Collusion.

The plaintiff in an ejection suit had established in a former suit that land formerly the property of the second defendant's father had been sold under a decree and purchased *benami* for him (the plaintiff), and that a rent agreement in respect of the same lands entered into between the ostensible purchaser and the first defendant had also been entered into by the former on his behalf: and possession had been formally delivered to the plaintiff under process of Court. It now appeared that the second defendant, who contested the validity as against him of the decree under which the land was sold, having withdrawn a suit filed by him to declare the sale invalid as against him after his father's death, had colluded with the first defendant and collected rent from him:

Held, that the second defendant, having come in by collusion with the first defendant, was precluded from denying the plaintiff's title and was liable to the plaintiff for the rent collected by him from the first defendant.

APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in original suit No. 11 of 1884, remanded for trial by order of the High Court in appeal suit No. 89 of 1885.

The plaintiff was the Zamindar of Kurapam. In 1866 Annapa Raju, Zamindar of Pachipenta and father of the second defendant, borrowed Rs. 4,000 and executed to Lakshmayya, sheristadar of the plaintiff, a document mortgaging as security for the debt some villages of the Pachipenta estate.

Default having been made in payment, Lakshmayya sued Annapa Raju in original suit No. 18 of 1869, obtained a decree, brought the villages to sale in execution and became the purchaser.

Lakshmayya died in 1878, leaving a son, Ramamoorthy. Disputes arose between plaintiff and Ramamoorthy, and the plaintiff filed against him original suit No. 22 of 1880 to establish that he and not Lakshmayya (whom he represented as a mere name-lender) was the real purchaser at the Court sale. The suit was

1889.
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* Appeal No. 76 of 1883.

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compromised. Ramamoorthy admitted the plaintiff's claim, and in execution the plaintiff was formally placed in possession of the villages sold: These villages, however, were never separated from the rest of the Pachipenta zamindari, and as part of that zamindari were under attachment by Government for arrears of peishcush until November 1882.

The plaintiff's present case was that the first defendant had for some years been the cultivating tenant of the lands now in suit (admittedly part of the property purchased by Lakshmayya) and that as such he had exchanged pattas and muchalkas with Lakshmayya in 1879. Soon after the lands were released from the Government attachment, the plaintiff called on the first defendant to pay to him the arrears of rent due for fasli 1292 and to exchange pattas and muchalkas with him for fasli 1293. This the first defendant refused to do, and continued to occupy and cultivate the land, paying no rent to the plaintiff and ignoring altogether his title. The plaintiff sought in this suit to recover possession of the land with arrears of rent.

The District Judge passed a decree for the plaintiff rendering defendant No. 2 liable for the amount of the rent for faslis 1292 to 1296.

Defendant No. 2 preferred this appeal.

Mr. *Mitchell* for appellant.

· *Subba Rau* for respondent No. 1.

JUDGMENT.—The plaintiff is the Zamindar of Kurapam, the second defendant (appellant) is the Zamindar of Pachipenta, and the first defendant is the tenant in possession of the land in dispute. In original suit No. 18 of 1869 the plaintiff's sheristadar Lakshmayya obtained a decree upon a bond executed in his name by the second defendant's father, and, in execution of the same, he purchased the land on the 30th May 1876. By right of purchase he was placed in possession under process of Court, and the first defendant executed exhibit K (a kadapa or rent agreement) in his favor, promising to pay Rs. 342 a year as rent. Meanwhile, Lakshmayya died, and the plaintiff instituted original suit No. 22 of 1880 against his son, alleging that the several transactions in the name of Lakshmayya were *benami*, and that they were really concluded on his behalf and for his benefit. His claim was decreed, and, in execution, possession was formally delivered to him under process of Court. The plaintiff's accounts showed that

the first defendant paid Rs. 80 for rent due for 1289. In the meantime, the second defendant brought original suit No. 7 of 1880 to set aside the Court sale on the ground that the transactions entered into by his father were not binding upon him. His father dying meanwhile, he withdrew the suit with permission to sue again. He has, however, brought no suit since, but colluded with the first defendant and collected rent from him for faslis 1292 to 1296. Upon these facts, the Judge considered that the first defendant held possession as the appellant's tenant and that the second defendant could not be permitted to set up the first defendant to defy the plaintiff so as to force him to establish his title not only against the first defendant, but also against himself. He accordingly decided in the plaintiff's favor and directed the second defendant to pay to the plaintiff Rs. 1,482, the rent which he had collected from the first defendant, and costs, leaving him to institute a fresh suit to set aside the Court sale under which the plaintiff claims if he should be so advised to do. It is urged in appeal that the Judge should have determined in this suit whether the Court sale is binding upon the second defendant without referring him to a fresh suit to establish his title. We see no reason to doubt that exhibit K is genuine and that the first defendant held possession under it and as the plaintiff's tenant. We also agree with the Judge that the appellant, after the death of his father, withdrew original suit No. 7 of 1880, and, colluding with the first defendant, contrived to collect rent from him. The only question then is whether the second defendant came in under the first defendant. It appears, after contending that the Court sale was invalid, he took advantage of his father's death, withdrew his suit, and, gaining over the first defendant, contrived to collect rent from him, and thereby enabled him to dispute the landlord's title in this case. This is an act of collusion, and but for it he would not be in a position to say that the plaintiff could not eject him without showing that the Court sale was binding upon him. It lay upon him to set aside the sale by a suit, and if his contention in appeal were to prevail, he would be enabled to better his position by his own wrong. In *Doe d. Bullen v. Mills*(1), it was held that a party obtaining possession of premises held by a tenant by paying £20 to him and claiming them by a title adverse to that

(1) 2 A & E. 17.

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of the lessor could not set up his adverse title against the landlord as a valid defence in an action of ejection. The principle is that he came in by collusion with the tenant who could not deny the landlord's title, and that unless he was also precluded from denying the landlord's title, the tenant would have only to part with the property to another person in order to bring the landlord's right in dispute. Our former order of remand did not preclude the Judge from declining to adjudicate on the question if such adjudication became unnecessary upon the facts found by him. Nor is the refusal to adjudicate on the question for the purposes of this suit a bar to the second defendant seeking to set aside the Court sale by a fresh suit if he should be advised to do so, and if he is not barred on other grounds. The decision of the Judge is right, and we dismiss this appeal with costs.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
 Mr. Justice Muttusami Ayyar.*

GNANASAMBANDA (PETITIONER), APPELLANT.

1890.
 Feb. 18, 24.

v.

VISVALINGA AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code, s. 244—Appeal against order—Nomination by a pandaram under a decree—Revocation of such nomination by the pandaram's successor.

The pandaram of a mutt being empowered under a decree to nominate a person to be the head of a subordinate mutt, subject to the approval of the Subordinate Court, made a nomination and died before the Subordinate Court had come to a determination as to the fitness of his nominee. His successor in office was brought on to the record and revoked his nomination and made a fresh nomination. The Subordinate Court treated the fresh nomination as a nullity and made an order confirming the first. The pandaram appealed against this order :

Held, (1) that an appeal lay against the order complained of ;

(2) that the person, whose nomination had been confirmed, was a necessary party to the appeal ;

(3) that the nomination first made was revocable for good cause, and that the fitness of the person nominated by the appellant should be investigated by the Subordinate Judge.

* Appeal against Order No. 104 of 1880.