KAMMARAN NAMBIAR v. CHINDAN NAMBIAR.

The plaintiff preferred this appeal.

Ryru Nambiar for appellant.

Respondents were not represented.

JUDGMENT.—We do not agree with the Judge that, if the clause for forfeiture of the perpetual lease is enforceable, plaintiff is only entitled to a decree on refund of the consideration paid by the tenant at the time of obtaining the lease. Exhibit A contains no provision for such repayment, and an obligation to refund cannot be inferred from the clause for forfeiture.

In the case of a kanom referred to by the Judge, what is forfeited is the right to retain possession for the full period of twelve years, the liability to repay the debt being in no way affected. Whereas in the case of a lease the consideration paid for it is exhausted by the grant of the lease, and the tenant's forfeiture of the lease cannot operate to convert the original consideration into a debt.

This is the only point that has been argued for appellant, and respondents have not appeared.

We, therefore, allow this appeal and setting aside the decrees of the Lower Courts so far as they disallow plaintiff's claim to possession of the land, we decree that defendants do surrender the land to plaintiff and pay his costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1894. September 27. October 2.

ALAGAPPA CHETTI (PLAINTIFF), APPELLANT,

v.

VELLIAN CHETTI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Partnership—Suit by one member of an undivided Hindu family—Non-joinder of other persons interested in a family business.

In 1887 the plaintiff appointed the defendant to serve for three years as manager of a business in Moulmein, which was the business of the undivided Hindu family to which the plaintiff belonged. In 1893 the plaintiff, without joining the other members of his family, sued the defendant for damages for breach of the contract of service :

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* Appeal No. 65 of 1894.

ALAGAPPA CHETTI *v.* VELLIAN CHETTI.

Held (1) that the suit was not maintainable in the absence from the record of the other partners in the business;

(2) tha under the circumstances, the name of the plaintiff in the cause-title could not be taken as designating his partners also;

(3) that by reason of the fact that the amendment might deprive the defendants of the defence of limitation and of the other circumstances in the case, the plaintiff should not be allowed on appeal to amend the plaint by bringing his partners on to the record.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in original suit No. 4 of 1893.

This was a suit brought by the plaintiff to recover from defendant No. 1 and his son the sum of Rs. 15,495 as damages sustained by reason of the first defendant's misconduct as agent for a business carried on at Moulmein under the name of Pana Ravanna Mana Ana Alagappa Chettiar.

It appeared that the first defendant had been appointed by the plaintiff to the management of the business in question on 19th January 1887 and had then signed a document, designated in the plaint as a salary chit, by which he undertook to serve the business for a period of three years. The defendants pleaded, *inter alia*, that the plaintiff, being a member of the undivided Hindu family to which the business in question belonged, was not entitled to maintain the suit in his sole name. Preliminary issues were framed with reference to this plea, and it was found that the constitution of the firm was as alleged by the defendants, and the above plea was upheld. The suit having been thereupon dismissed, the plaintiff preferred this appeal.

Subramanya Ayyar, *Ranga Ramanujachariar* and *Desikachariar* for appellant.

Mr. *R. F. Grant* for respondent No. 1.

Sivasami Ayyar for respondent No. 2.

JUDGMENT.—It appears from the plaint that the first defendant Vellian was, on the 19th January 1887, engaged by the plaintiff to carry on his business in Moulmein for a period of three years, and that, accordingly, he did act as the plaintiff's agent till the 17th December 1889, when he left Moulmein. It is charged against the first defendant that during the period of his agency he acted in contravention of the plaintiff's orders, and that, on his return to this country, he refused to render proper accounts. The plaint was presented on the 14th January 1893.

On the 14th August 1893 the defendants put in separate

written statements, in both of which it is objected that the suit is bad for non-joinder of parties, because the plaintiff is only one of several members of a Hindu family carrying on business in partnership together. On the same day, the 14th August, certain preliminary issues were adjusted with reference to this objection. By the first of them the question of fact is raised whether "(as alleged in the plaint) the plaintiff is sole owner of the firm "P. R. M. A. in Moulmein or whether such firm has other partners "or belongs to a family which has other members." On the 2nd November certain persons describing themselves as members of the family of the plaintiff Alagappa put in petition stating that Alagappa was the manager of the family business, and that the first defendant was by him alone appointed agent, and asking that the plaintiff might be permitted to proceed against the defendants.

On the 14th November the plaintiff himself filed a petition praying that, if the Court holds the other members of his undivided family should also be parties, they might "also be described as plaintiffs." On the same day the trial of the preliminary issues took place. The plaintiff Alagappa was examined as a witness. He at once admitted that he was not the sole owner of the firm, but that five persons in all named by him and members of his family were interested in it. The witness proves the execution by the first defendant Vellian of the document (A) called a salary chit and explains that the letters P. R. M. A. appearing in that paper before his name Alagappa are not his own initials, but stand for the firm's name.

On the evidence the Judge held that the plaintiff was not competent to maintain the suit in his own name only. He further, with reference to the petition presented on the same day but after he had expressed an opinion adverse to the plaintiff, refused to allow any addition of new parties. The suit was accordingly dismissed. The appeal was supported on alternative grounds. It was argued that the plaintiff Alagappa was competent to maintain the suit in his own name, or in the alternative that the designation of the plaintiff in the cause-title was sufficient to denote all the persons interested in the firm. There can be no doubt that as a general rule all the members of a partnership firm ought to be joined as plaintiffs in a suit brought in respect of transactions with the partnership. It makes no difference that the persons, carrying on business together, were also members of a Hindu family—*Kalidas*

ALAGAPPA CHETTI *v.* VELLIAN CHETTI.

Kevaldas v. *Nathu Bhagvan*(1) and cases cited. The proposition that the manager of a Hindu family can sue without joining those interested with him is one which cannot be supported and no authority was cited in support of it save a *dictum* in *Arunachala* v. *Vythialinga*(2). There can be no doubt, in the present case, that the employment of Vellian as agent was an employment in the business of the firm and that the contract was made by Alagappa on behalf of the firm. The appellant's vakil, however, endeavoured to convince us that Alagappa, though acting for the firm made the contract in his own name under such circumstances as to entitle him to sue alone. The case of *Agacio* v. *Forbes*(3). was cited, and it was urged that similarly here Alagappa was entitled to sue alone. In *Agacio* v. *Forbes*(3) it is true that the contract made in Hongkong between the plaintiff and the defendant was made for the benefit of the plaintiff's firm ; but the consideration for it, namely, the forbearance by the plaintiff from proceedings threatened against third parties, was a consideration moving from the plaintiff alone, for he alone was in Hongkong representing his firm which carried on business in Valparaiso.

If, instead of being a partner, Agacio had been a mere agent of a foreign principal, the case would have come within the principle recognized in section 230 (1) of the Contract Act. And in considering the question of parties to an action, the case of partners and that of agent and principal stand on the same footing, the question in either case being with whom was the contract made in point of law, *Lindley on Partnership*, 3rd edition, page 487. For these reasons we think that the authority cited is not applicable. In the present case there is nothing to shew that the right of suing on the contract was restricted to the plaintiff—*Lucas* v. *De la Cour*(4). On the contrary it appears on the face of the salary chit that the retainer is by the firm and not by Alagappa in his individual capacity. It follows that the general rule above stated requiring the joinder of all the partners must apply. See *Lindley on Partnership*, 3rd edition, pages 486 and 489.

This being so, we are asked to read the name of the plaintiff given in the cause-title as designating not Alagappa only but his

(1) I.L.R., 7 Bom., 217.
(2) I.L.R., 6 Mad., 27.
(3) 14 Moore's P.C., 160.
(4) 1 M. & S., 249.

partners or coparceners. It seems to us impossible in the circumstances of the present case to say that there is a mere misdescription as was held to be the case in *Kasturchand Bahiravdas* v. *Sagarmal Shriram*(1). It is abundantly clear that the plaint was not read by the plaintiff's Vakil in the manner in which we are now asked to read it, for otherwise the Pleader would not have gone to trial on the issue raised by the Judge with regard to the question whether the plaintiff had other partners. It is contended that the Pleader misconstrued the plaint, but the mistake is by no means obvious, and we must assume that the party is duly represented by his Pleader.

We are clearly of opinion that the defect is one which only could be cured by the addition of the persons who along with Alagappa constitute the plaintiff's firm or family. It remains then to consider the question whether even at this stage those persons ought to be brought on the record. No formal application to that effect was made in the Court below nor is any such application made before us. On the respondent's behalf it is said that the required amendment ought not now to be made, because any claim against Vellian by the partners of Alagappa would be barred by the Statute of Limitation. Even on the 14th August when the informal application was made on behalf of those persons such suit would equally have been barred. On the other hand the plaintiff had elected to go to trial without offering to amend and therefore ought to be left to the consequence—*Dular Chand* v. *Balram Das*(2).

The case of *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer*(3) was cited in support of the contention that the possibility of the bar of limitation afforded a reason for allowing an amendment. That case is, however, plainly distinguishable from the present and from *Weldon* v. *Neal*(4). In *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer*(3) the mistake made consisted not in the non-joinder of parties or the omission of any statement of claim, but in the joinder of parties who ought not to have been joined. In the result the cause was remitted for trial on the issues touching the liability of the defendant Rutta Koer on the bond in respect of which

(1) I.L.R., 17 Bom., 413.
(2) I.L.R., 1 All., 453.
(3) 11 M.I.A., 468, 486.
(4) 19 Q.B.D., 394.

ALAGAPPA CHETTI v. VELLIAN CHETTI.

the suit had been brought. It is not necessary to consider what would be the consequence if the other partners were joined as to which point several cases were cited—*Kalidas Kevaldas* v. *Nathu Bhagvan*(1), *Narayana Chetti* v. *Sivaraman Chetti*(2).

In our opinion the amendment which, as has been observed, was never asked for in this Court or in the Court below ought not now to be made.

If by the amendment the defendants were deprived of the defence of limitation, then according to the view taken in *Weldon* v. *Neal*(3) and followed in this Court in *Mallikarjuna* v. *Pullayya*(4) the amendment ought not to be allowed. On the other hand if the amendment must, by the operation of section 22 of the Limitation Act, lead to the dismissal of the suit, then it would clearly be useless.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1894. April 17, 18.

MOIDIN KUTTI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

BEEVI KUTTI UMMAH AND OTHERS (DEFENDANTS NOS. 1 TO 41 AND 43 TO 45), RESPONDENTS.*

Malabar law—Compromise of doubtful claims by adult members of a tarwad—Suit by junior members to rescind the compromise—Limitation Act—Act XV of 1877, *s.* 7.

In 1878 the senior members of a Malabar tarwad, in *bonâ fide* compromise of certain doubtful claims, executed an instrument conveying away certain land of the tarwad. In 1891 certain junior members of that tarwad, including several minors, sued to recover possession of the land in question. Others of the junior members of the tarwad had attained majority more than three years before the suit and had not impugned the validity of the conveyance; these persons were joined as defendants. None of the plaintiffs had attained majority in 1878:

Held, that the suit was barred by limitation.

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(1) I.L.R., 7 Bom., 217.
(2) Appeal No. 31 of 1887, unreported.
(3) 19 Q.B.D., 394.
(4) I.L.R. 16, Mad, 319.

* Appeal No. 21 of 1893.