

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramonia Ayyar.

1895.
March 6.

SOMASUNDARAM AYYAR AND OTHERS (PLAINTIFFS),
APPELLANTS,

v.

FISCHER (DEFENDANT No. 1), RESPONDENT.*

Vendor and purchaser—Covenant by a benamidar—Covenant for quiet enjoyment.

Land forming part of a zamindari was brought to sale in execution of a decree and was purchased by A *benami* for the zamindari. After the zamindari's death B, her son and supposed heir, together with A, sold the land under a conveyance, which contained a joint covenant to remove any hindrance in the vendee's enjoyment of the land. Persons claiming under the lawful successor of the deceased zamindari obtained an ejectment decree against the representatives of the vendee, then deceased, and they were permitted to retain possession only on a payment made to the decree-holders. They now sued A and B for the amount of the purchase money paid on the conveyance and the costs incurred in the ejectment suit:

Held, that the plaintiffs were entitled to the decree sought by them against A, notwithstanding that he was a *benamidar* merely.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 151 of 1893, affirming the decree of Venkataranga Ayyar, Subordinate Judge of Madura (East), in original suit No. 62 of 1891.

In 1874 the father of the plaintiffs obtained a lease for ten years of one-fourth of the village of Sattukudi from the zamindari of Sivaganga. Before the expiry of the lease the property was brought to sale in execution of a decree against the lessor, on whose behalf it was bought in by the present defendant No. 1 for Rs. 2,500. Subsequently in 1877 the lessee purchased the land for Rs. 2,000 from defendant No. 1 and the son and supposed heir of the lessor then deceased. The conveyance contained a covenant by the vendors in the following terms:—"Should there be any hindrance in your enjoying the said premises, we shall settle and remove such hindrance." In 1889 persons claiming under the lawful successor of the lessor obtained an ejectment decree against the present plaintiffs, their father having meanwhile died. The matter was compromised by a payment of Rs. 3,500 to the decree-

* Second Appeal No. 1512 of 1894.

holders, who thereupon entered up satisfaction of the decree. The plaintiffs now sued defendant No. 1 and the other vendor to recover with interest the purchase money and the amount of costs incurred in the ejectment suit. The lower Courts held that the first defendant, as being a benamidar merely, was not liable to satisfy the plaintiffs' claim, and a decree was passed against the other defendant alone.

The plaintiffs preferred this second appeal.

Krishnasami Ayyar for appellants.

Mr. *H. G. Wedderburn*, Mr. *Parthasaradhi Ayyangar* and *Rungachariar* for respondent.

JUDGMENT.—The only question is as to the liability of the first defendant jointly with the second defendant, against whom a decree has been given. The judgment of the lower Courts exonerating the first defendant proceeds on the ground that he was merely a benamidar as far as the property sold to plaintiffs' father was concerned.

The real question is whether, even assuming the first defendant to have been merely a benamidar as to the property, he is not liable on the covenant mentioned in C, which is in the following words:—"Should there be any hindrance in your enjoying the same, we shall settle and remove such hindrance." This is an express covenant by both the defendants, which cannot be affected by the benami character of the first defendant who is equally liable thereunder with the second.

It is contended on behalf of respondent that, being a benamidar, there was no consideration for the promise made by him. The consideration was clearly the purchase of the property by the plaintiffs' father.

In this view we do not consider it necessary to dwell upon the letter A and the proceedings taken by respondent on the promissory note which was given in first defendant's name by plaintiffs' father for the consideration amount.

It is next contended that there was no breach of covenant, in that appellant was not actually evicted, and our attention is called to *Howard v. Maitland*(1). The observations of the Master of the Rolls in that case tend in the opposite direction, for he says:—"If anybody had brought an action against the plaintiff and recovered

(1) 11, Q.B.D., 695.

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judgment, I am not prepared to say that that alone might not have been a disturbance within the covenant.”

In the present case a decree was obtained and proceedings taken in execution, and it was only on paying a sum of Rs. 3,500 to the decree-holder that plaintiffs were allowed to retain possession of the property. There was therefore such hindrance as was contemplated in the covenant.

In allowance of this appeal we modify the decree of the lower Courts by making first defendant jointly liable with the second for the amount decreed.

Appellants are entitled to their costs in this Court and in the lower Appellate Court.

APPELLATE CIVIL.

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

THOLAPPALA CHARLU (PLAINTIFF), APPELLANT,

v.

VENKATA CHARLU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 11—Right to hereditary office of guru.

The plaintiff as Anagundi Raja guru claimed to be entitled, and now sued for a declaration of his title, to the hereditary office of priest of Samayacharam. The defendants claimed the office and had collected voluntary contributions in the character of the holders of such office. The office was not connected with any particular temple; no specific pecuniary benefit was attached to it, and the alleged duties of the office were to exercise spiritual and moral supervision over persons wearing a certain caste mark in a certain tract of country:

Held, that the suit was not cognizable by a Civil Court.

SECOND APPEAL against the decree of L. Moore, District Judge of Bellary, in appeal suit No. 170 of 1891 reversing the decree of C. Ranga Rau, District Munsif of Naraindevarakerry, in original suit No. 33 of 1889.

Suit to establish plaintiff's claim to a hereditary office, the nature of which is stated sufficiently for the purpose of this report in the judgment of the High Court. The District Munsif passed a decree for plaintiff, which was reversed on appeal by the District

* Second Appeal No. 321 of 1894.

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March 18.
April 25, 30.