APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

SRI RAJA SIMHADRI APPA RAO (PLAINTIFF), APPELLANT,

v.

PRATTIPATI RAMAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1905 July 14, 27.

Misjoinder of parties and causes of action—No misjoinder where one relief merely ancillary—Landlord and tenant—Rights and liabilities of joint lessors and lessors who are tenants in common—Transfer of Property Act IV of 1882, *ss.* 37 *and* 109.

A suit is bad for misjoinder where there is a joinder of two causes of action in each of which, all the defendants are not interested. Where, however, there is really only one cause of action against some defendants and the relief claimed against the other defendants is only ancillary to the relief to be given to the plaintiff in respect of such cause of action, the suit is not bad for misjoinder.

Saminada Pillay v. *Subba Reddiar*, (I.L.R. 1 Mad., 333), distinguished.

Per Sir S. SUBRAHMANIA AYYAR, Offg. C.J.—A tenant in common may have ejectment to the extent of his interest, on proper notice to quit; and the inclusion in such a suit of the other co-sharers, as defendants, is merely the inclusion of persons properly parties to the proceeding and not of litigants against whom a separate claim, having no connection with the ejectment, is made.

Per SANKARAN NAIR, J.—The distinction between the law in England and India as to the rights and liabilities of joint lessors and lessees discussed and explained; as also the rights of lessors who are tenants in common.

Case law, English and Indian, on the subject, considered. Where the relation is created by contract with several joint landlords, according to the English cases, such relation subsists only so long as all of them wish it to continue, while according to the Indian cases it subsists until all of them agree to put an end to it; and such a contract cannot, in the absence of special circumstances, be put an end to by any one of them if they continue to hold as joint tenants. This principle however, will not apply when the suit is for ejectment and partition and all the co-owners are made parties.

The principles embodied in sections 37 and 109 of the Transfer of Property Act ought to be applied in such cases, though they are not expressly declared applicable.

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*Second Appeals Nos. 406 and 407 of 1903, presented against the decrees of J. H. Robertson, Esq., District Judge of Kistna, in Appeal Suits Nos. 531 and 550 of 1902, presented against the decree of M.R.Ry. I. L. Narayana Row Subordinate Judge of Kistna, in Original Suit No. 34 of 1901.

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When the lessor recognises the right of another in the premises demised, all the obligations of the lessee, as to payment of rent and surrender of possession, must, if such obligations be severable, and the lessee will not be prejudiced by such severance, be performed by the lessee between the lessor and such other, in such proportions as may be settled by all the parties concerned, including the lessee. If the matter has to be decided by suit, the lessor, lessee and such other person will be necessary parties.

SUIT by the plaintiff to recover from defendants Nos. 1 and 2, 13 acres 84 cents of land out of 23 acres leased to them as tenants from year to year. Subsequent to the lease, the third defendant brought a suit against the plaintiff to establish his right to the lands leased, and the suit terminated in a compromise decree passed on appeal, by which the third defendant's right to 9 acres 16 cents was recognised. Prior to the compromise, the plaintiff had determined the tenancy of defendants Nos. 1 and 2 by notice. The fourth defendant purchased the rights of the third defendant in the lands.

The plaintiff prayed for a partition of the 23 acres and possession of the 13 acres which should be allotted to his share on such partition, by ejecting defendants Nos. 1 and 2.

The Subordinate Judge held that the suit was bad for misjoinder and passed a decree for partition between the plaintiff and defendants Nos. 3 and 4 dismissing the claim against defendants Nos. 1 and 2.

This decree was confirmed on appeal.

The plaintiff preferred this second appeal.

K. N. Ayya for appellant.

S. Gopalaswami Ayyangar for first, second and fourth respondents.

JUDGMENT.—*In Second Appeal No.* 406 *of* 1903.—Sir S. SUBRAHMANIA AYYAR, Offg. C.J.—The defendants Nos. 1 and 2 were let into possession of 23 acres of land in the plaintiff's zamindari as tenants from year to year. Subsequent to the creation of this tenancy the third defendant set up a claim to the whole land under a previous transaction between the plaintiff and that defendant's father. In a suit which ensued in consequence, there was a compromise decree, according to which, the third defendant was declared entitled to the possession and enjoyment of 9 acres 16 cents and the plaintiff to the remainder. Pending the litigation, and before the compromise, notice to quit was given in respect of the whole of the lands by the plaintiff to the defendants Nos. 1 and 2. With reference to these allegations, the plaintiff prays for

a decree ejecting defendants Nos. 1 and 2 from his share of the lands, viz., 13 acres 84 cents excluding 9 acres 16 cents due to the third defendant, and his transferee the fourth defendant, by actually separating the same in this suit in case it is not done earlier in execution of the razinama decree.

The lower Courts directed a partition by metes and bounds of the land between defendants Nos. 3 and 4 on the one hand and the plaintiff on the other, and dismissed the claim against defendants Nos. 1 and 2 on the ground that it involved a misjoinder of causes of action. The question is whether this dismissal is right. The case of *Saminada Pillai* v. *Subba Reddiar*(1) on which much reliance was placed on behalf of defendants Nos. 1 and 2 is clearly distinguishable. There, certain members of a *Joint Hindu family* sued their co-parceners for a partition and combined with it a further claim to eject tenants who held the land under the family. There was thus a joinder of two causes of action, in each of which, all the defendants were not interested. Such, however, is not the case here. There being already an executable decree for partition between the plaintiff and the third defendant, the actual division as between them is a matter for execution of the decree, and no longer a cause of action for a suit. The present suit cannot, therefore, be rightly viewed as combining one cause of action against defendants Nos. 3 and 4 in which defendants Nos. 1 and 2, have no interest with another to eject the latter in which defendants Nos. 3 and 4 are likewise uninterested. As admittedly, an actual division of the share of the third defendant in execution, and delivery of it to him have not been effected, and as such division is essential to the ejectment of defendants Nos. 1 and 2 which is the relief to which the plaintiff is entitled, assuming his case to be otherwise well founded, it follows that the inclusion of the third and fourth defendants in this suit is merely as that of persons properly parties to the proceeding in the circumstances of the case, and not as litigants against whom a separate claim having no necessary connection with the ejectment of defendants Nos. 1 and 2 is made. The error of the lower Courts was in failing to perceive that the actual division was merely ancillary to the relief to be given to the plaintiff in respect of the only cause of action involved in the suit, and in treating it as if it were a relief to be

(1) I.L.R., 1 Mad., 393.

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granted in a perfectly independent claim for partition as between the plaintiff and defendants Nos. 3 and 4.

In the view I take of the case, the dismissal complained of must be held to be wrong, inasmuch as the plaintiff will be entitled to eject defendants Nos. 1 and 2 from his portion of the lands on his showing that the tenancy as between him and those defendants has been duly determined. For, the effect of the compromise decree was to make the plaintiff and third defendant tenants-in-common so long as the 23 acres of land remained undivided; and it is settled, that a *tenant-in-common* may have ejectment to the extent of his interest on proper notice to quit. See *Cutting* v. *Derby*(1) and *Doe d on the demise of David Whayman and another* v. *Chaplin*(2).

The decrees of the lower Courts, therefore, in so far as they are against the appellant must, I think, be set aside, and the suit remanded to the Court of First Instance for disposal on the merits. The costs will abide and follow the result.

SANKARAN NAIR, J.—According to the English cases where there is a joint lease by joint tenants, any one of them may determine the tenancy so far as he is concerned. They proceed on the ground that, though the lease may have been granted by all, yet, in law, each leases only his own share or portion of the entire estate as he is interested only to the extent of his share though the property is undivided, and he can, therefore, put an end to the tenancy created by him even without the concurrence of the others, as it cannot depend upon another when such tenancy is to be determined (*Doe d on the demise of David Whayman* v. *Chaplin*(2).

In that case three out of the four joint tenants who alone gave notice determining the tenancy, were held entitled to recover three-fourths of the estate. The remaining trustee, it was found, had disapproved of the notice, and it was not necessary to decide anything as to the fourth share as the Court was only granting a new trial.

The full effect of such notice was considered in a subsequent case, and it was then decided that, though upon a joint lease by joint tenants, each in law leases only his own share according to the case above cited, yet any one of the joint tenants may

(1) 1776, 2 W. Bl., 1077. (2) 3 Taunton, 119, 120.

determine the entire tenancy on behalf of all, even though not authorized by the rest, and the lessee has accordingly to surrender possession not only of the share of the joint tenant who gives the notice but of the entire property. The reason is stated to be "that the tenant holds of each the share of each so long as he and each shall please, but that he holds the *whole* of *all* so long as he and *all* shall please." If the tenant is compelled to surrender only a portion, it might be a hardship on him as he might not be willing to continue to hold the rest; and if, therefore, he is to have the right of treating the tenancy as to the whole estate determined on such notice, the same right must be recognised to subsist in the other joint tenants. *Doed Aslin* v. *Summerset*(1). That was an action on the joint demise of James Aslin and John Finch who were executors and joint demisees under a will. The notice to quit was signed by John Finch only, on behalf of himself and the rest, and it was held that such notice determined the tenancy as to both. This was followed in *Doe. d Kindersley* v. *Hughes* (2) and *Alford* v. *Vickery* (3).

Where the lessors are tenants in common the same principle would seem to apply and any one of them may determine the tenancy as to the others also. See Woodfall's 'Landlord and Tenant,' P. 369, Cole on 'Ejectment,' p. 44 and *Ebrahim Pir Mahomed* v. *Cursetje Sorabji de vitre*(4) where the English law was applied on the original side to a suit to which a Hindu, a Mahomedan and a Parsi, were parties.

It has also been decided that one tenant in common has a right to recover possession of his undivided moiety without the other tenant in common. He will then be in possession with the lessee of the other moiety. See *Cutting* v. *Derby*(5), and the cases cited in note (U) to that case. Thus, according to the English decisions, the Subordinate Judge is wrong in holding that the plaintiff, as a joint tenant or tenant-in-common, is not entitled to eject defendants Nos. 1 and 2 from his share of the property on the ground that he and the fourth defendant have respectively an undivided right, as he puts it, in every inch of the whole plot. But his view seems to derive considerable support from the Indian decisions.

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(1) 1 B. & Ad. 135.
(2) 7 M. & W., 141.
(3) 1 C. & M., 283.
(4) I.L.R., 11 Bom., 644.
(5) 1776, 2 W. Bl., 1077.

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The difference is referred to in the case in *Alford* v. *Vickery*(1) where the Judge had to apply the English law.

The Calcutta and the Bombay High Courts hold that, where a tenant has been put into possession of property on behalf of all the sharers he may not be turned out except with the consent of all: *Krishnarav Jahagirdar* v. *Govind Trimbak* (2), *Balaji Bhikaji Pinge* v. *Gopal Bin Rajhu Kuli*(3), *Radha Proshadwasti* v. *Esuf*(4), and *Harendra Narain Singh Chowdhry* v. *Moran*(5) (where the result of a series of cases commencing with 16 W.R., p. 138 is given); though clearly when the tenancy has been determined by notice given by all, some of the co-sharers may recover their share (*Dwarka Nath Rai* v. *Kali Chunder Rai*(6). The same view seems to be accepted in *Krishnama* v. *Gangaran* (7), where it was held that the plaintiff, the purchaser of four out of seven shares in a village, was not entitled to tender pattas under the Rent Recovery Act for the proportionate rent payable to him.

The decision in *Parameswaran* v. *Shangaran* (8) that one joint trustee cannot determine a tenancy and eject, which was followed in *Savitri Antarjanam* v. *Raman Nambudri* (9), apparently proceeds on the same ground, though the learned Judges treat the case as one of temple management.

The difference between the English and the Indian cases appears to be that where there is a relation created by contract with several joint landlords, according to the English cases, that relation subsists, only so long as all of them wish it to continue, while, according to the Indian cases, it subsists until *all* of them agree to put an end to it; and it is not competent to any one of them to determine a contract which is entire, unless there are any special circumstances in the case, like collusion between a tenant and one of the lessors, etc.

To allow a co-owner to recover an undivided share would, in many cases, be a hardship to a tenant who might not be willing to continue in possession of a portion of the property or as a tenant in common with such co owner. On the other hand to allow him

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(1) 1 C. & M. 283.
(2) 12 B.H C.R., 85.
(3) I.L.R., 3 Bom., 23.
(4) I.L.R., 7 Calc., 414 at p. 417.
(5) I. L. R., 15 Calc., 40 at p. 46.
(6) I. L.R., 13 Calc., 75 at p. 77.
(7) I.L.R., 5 Mad., 229 at p. 230.
(8) I.L.R., 14 Mad., 490.
(9) I.L.R., 24 Mad., 296.

to recover the entire property would be unjust to the others who may not wish the tenant to be turned out of their shares.

In this state of authorities and for the above reasons I hesitate to follow the English law. But I consider it unnecessary to decide that question as I am of opinion that the cases cited above have no application to this case.

In the English cases the action was to recover their undivided shares by one or more co-owners in the absence of the other sharers. The suit before us is also for partition and all the co-owners are parties to the suit.

Further, according to the plaintiff, the lands were leased to defendants Nos. 1 and 2 solely by the plaintiff, and the third defendant, whose interest has now passed to the fourth defendant, was subsequently recognized as a co-sharer by a transaction to which the defendants Nos. 1 and 2, the tenants in possession, were not parties.

It is not the case of a joint lease by joint tenants, and the rule that in such cases each leases his own share and can therefore put an end to it cannot apply to the case before us. For the same reason the tenant cannot be assumed to be contracting with each co-owner to the extent of his interest only, in the property, and it is clear that it is the intention of the parties to the lease, that must be enforced.

Cutting v. *Derby* (1) already cited, no doubt, is a case where the demise was by an owner who devised the rent and reversion to two tenants in common, one of whom was allowed to recover his undivided moiety, but in that case, the lease expired on a certain day, and the tenancy was not determined by notice though there was notice given. The case is simliar to the Calcutta decisions, see *Dwarka Nath Rai* v. *Kali Chunder Rai* (2) and *Harendra Narain Singh Chowdhry* v. *Moran* (3) where a trespasser, it has been held, may be turned out by a co-owner, though one who entered as a tenant under all the co-owners may not be so turned out.

The rule of decision contained in sections 37 and 109 of the Transfer of Property Act, though they have not been declared applicable, ought, in my opinion, to be followed in the absence of any decisions of this High Court to the contrary. When the

(1) 1776 2 W. Bl., 1077. (2) I.L.R., 18 Calc., 75 at p. 77.
(3) I.L.R., 15 Calc., 40 at p. 46.

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plaintiff recognised the rights of the third defendant to a share of the property, then the tenants were bound to pay to each of the owners his proportionate share of the rent. What the proportionate rent is can only be determined by the plaintiff, the lessor, third defendant, who may be regarded as the transferee, and the tenants, the first and second defendants If the apportionment is not amicably adjusted, it can only be done by a suit to which they all are parties. See section 109 and *Lootfulhuck* v. *Gopee Chunder Mojoomdar*(1), *Ishwar Chunder Dutt* v. *Ramkrishna Dass*(2), *Zamindar of Ramnad* v. *Rimamany Ammal*(3) and that is the proper course to follow.

The tenants, defendants Nos. 1 and 2, are also bound on the determination of the tenancy to put the plaintiff in possession of only so much of the property as he has not transferred, and is bound to surrender to the third defendant or fourth defendant, his successor, the portion transferred by the plaintiff. They are not bound to perform the various obligations imposed on them as lessees, wholly in favour of either the plaintiff, or the fourth defendant, if such obligation is capable of severance, and such performance will not be to their prejudice. The rent payable and the property to be surrendered, unless all the parties agree, can be only ascertained in a suit to which all the lessors and the lessees are parties as in the case of apportionment of rent referred to in section 109, Transfer of Property Act.

The present suit is precisely of that nature. I see therefore no misjoinder of causes of action or of parties. The plaintiff prays for the surrender by defendants Nos. 1 and 2 of that portion of the property leased, of which he still continues to be the owner, and which has not been transferred to the fourth defendant, and for arrears of rent.

The fourth defendant is a necessary party to the suit to ascertain by partition the part transferred. The decision in *Saminada Pillai* v. *Subba Reddiar*(4) is clearly distinguishable as pointed out by the learned Chief Justice.

The ryots in that case were unnecessary parties, treating the suit as one for partition, and regarding it as a suit in ejectment, the case of each ryot was distinct from that of every other ryot

(1) I.L.R., 5 Calc., 941.
(2) I.L.R., 5 Calc., 902.
(3) I.L.R., 2 Mad., 234.
(4) I.L.R., 1 Mad., 333.

In the case before us partition is necessary to dispossess defendants Nos. 1 and 2 and 1 award delivery of possession to the plaintiff.

The decrees of the lower Courts must, therefore, be set aside in so far as they are against the appellant, and the suit remanded to the Court of First Instance for disposal on the merits.

Costs will abide and follow the result.

Second Appeal No. 407 *of* 1903.—This second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmnia Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.

VANMIKALINGA MUDALI (FIFTH DEFENDANT), APPELLANT,

v.

CHIDAMBARA CHETTY AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 4 AND 6 TO 8 AND SIXTH DEFENDANT'S REPRESENTATIVES) RESPONDENTS.*

1905. July, 24. August 8.

Mortgagee, paying prior incumbrancer after sale, right of—Transfer of Property Act IV of 1882, *s.* 89—*Effect of order absolute for sale.*

It is settled law that, in the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immovable property, as for instance, the owner of the equity of redemption or a puisne mortgagee, goes to discharge an anterior encumbrance affecting it, the presumption is that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it; and this rule will apply in favour of a person who, after the sale of the properties in execution of a decree on the anterior mortgage, advances money on the security of such properties to enable the judgment-debtor, to set aside such a sale under section 310-A of the Code of Civil Procedure.

Gokaldas Gopaldas v. *Puranmal Premsukhdas*, (I.L.R., 10 Calc., 1035), referred to and followed.

The provisions of section 89 of the Transfer of Property Act have reference to the execution of a mortgage decree and ought not, in reason to be so construed as to render the application of this principle impossible in cases where

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* Second Appeals Nos. 346 and 347 of 1903, presented against the decrees of F.D.P. Oldfield, Esq., Acting District Judge of Tanjore in appeal Suits Nos. 316 and 317 of 1901, presented against the decree of M.R.Ry. T. Swami Ayyar, District Munsif of Tiruvalur, in Original Suits Nos. 16 and 70 of 1900 respectively.