

APPELLATE CIVIL.

Before Mr. Justice Wallis.

KUPPU KONAN AND ANOTHER (DEFENDANTS), PETITIONERS,

v.

THIRUGNANA SAMMANDAM PILLAI (PLAINTIFF),

RESPONDENT.*

1908.
April 16,
May 1.

Evidence Act, Act I of 1872, s 116—Estoppel of tenant—Where deed executed in the name of the benamidar, the real owner is the landlord within the meaning of the section—Action on deed not maintainable by benamidar.

Where a deed is executed by a tenant in favour of a person, *benami* for another, the real owner and not the *benamidar* is the landlord whose title the tenant is estopped from denying under section 116 of the Evidence Act. In a suit by such *benamidar* for rent, the tenant can deny his right to sue on the ground that he is not the person entitled.

A *benamidar*, as such, has not right to sue unless he can show a legal right to sue under the general law.

Kuthaperumal Rajali v. Secretary of State for India, I.L.R., 30 Mad., 345), followed.

CLAIM for Rs. 78-12-0, value of 45 kalams of paddy being the rent due for the first instalment under a deed executed on 13th August 1906 to the plaintiff by the defendants for one year in respect of certain lands belonging to the plaintiff.

The defendants denied the plaintiff's title to the land and contended that the land had belonged to the plaintiff's wife under a will of her father; that the deed was *benami* for plaintiff's wife who died within two weeks after the deed; that, subsequently Kandasamy and two others who were entitled to the property after her death as her heirs had taken away the produce after giving the defendant his *waram*.

The second point framed by the Sub-Judge for decision was—

“Are defendants not estopped from denying the title of the plaintiff—their lessor.”

* Civil Revision Petition No. 481 of 1907, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. V. K. Desikachariar, Subordinate Judge of Nagapatam, in Small Causes Suit No. 124 of 1907

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On this point the Subordinate Judge decided as follows:—

“In my opinion, the defendant is estopped from denying that plaintiff had title to lease out the suit lands at the beginning of the tenancy under section 116 of the Evidence Act. The point is well discussed and thrashed out at 1031 to 1034 of the Third Edition of Ameer Ali and Woodroff's ‘Law of Evidence’ and the learned authors of this treatise incline to the view that the tenant will be estopped from disputing the landlord's title, even though he had no title whatever. At page 1033 in the foot notes, they observe as follows”:—

“It is to be noted that the first mentioned case (20 W.R., 352) (1871) was decided prior to this Act and proceeded on the ground that the technical doctrine of estoppel was not applicable to this country. But that doctrine has been sanctioned by the present section, and according to the principle upon which it rests, the question of the lessor's title is wholly foreign to a suit instituted against the lessee for rent.” * * * “The principle, however, laid down in *Douzelle v. Kedarnath Chakrabutty* (20 W.R., 352) was reaffirmed in *Mussamut Indurbuttee Koer v. Shaikh Mahboob Ali Ticcadar* (24 W.R., 44).”

“In a later case (1894) reported in I.L.R., 19 Bombay 133, it was held that the tenant could not deny the landlord's title. In the 24 W.R. case, section 116 of the Evidence Act has not been referred to and considered at all, and in my opinion, this considerably weakens the value of the decision in favour of tenants. The 20 W. R. case was decided before the Act came into force. It does not appear that these two cases had been followed in any later cases. The 19 Bombay case is directly in conflict with the W.R. cases. The learned commentators aforesaid hold the view that the question of the lessor's title is foreign to a suit for rent or in ejectment against a lessee. I am not prepared, therefore, to treat these W. R. cases as of binding authority. The learned pleader for the defendants cited the case of *Usman Koya v. Chidria Mookkonsa Akoth* reported in 15 Madras Law Journal, 368, in support of his contention, but I am of opinion that it helps the plaintiff's contention more than that of the defendants. It enunciates the general rule of estoppel that a tenant is estopped from disputing the title of the landlord who has let him into possession, and further lays down that a tenant cannot set up a *ius tertii*, in a third person (having a title paramount) unless

during the period of the tenancy there has been an ouster by the person having the title paramount so as to determine the original lessor's right at the date of the lease. Defendants do not set up the title paramount to the original male owner's estate, but they set up the title of the legal heirs of Subbammal—the alleged real owner—as her representatives. Moreover, they do not allege any ouster by such third persons having the title paramount. The written statement seems to show an attornment by the defendants to Subbammal's legal heirs and landlords and adjustment of rent claimed. Hence this decision is inapplicable to the defendants' contention, and, as I observed already, it favours the plaintiff's contention more than that of the defendants. I would accordingly find that defendants are estopped from disputing the plaintiff's title to the lands sued for and that the plea of benami cannot be raised by them in this suit for rent."

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The Subordinate Judge decreed for plaintiffs.

Defendants moved the High Court under section 25 of the Small Cause Court Act.

T. Natesa Ayyar for petitioner.

T. R. Venkatarama Sastri for respondent.

JUDGMENT.—The plaintiff sues to recover rent under a fent deed executed in his favour by the defendants. The defendants plead that the deed was benami for the plaintiff's wife, to whom the land belonged, and stated that she died a fortnight after the execution of the deed and her heirs have received the waram rent due under the deed. There was evidence that the lands belonged to the plaintiff's wife and at the close of the defendants' evidence the plaintiff's wakil admitted that the plaintiff was holding the lands as guardian of his wife. The Subordinate Judge, however, held that this question could not be gone into, as the defendants are estopped from denying the title of their landlord the plaintiff. Section 116 of the Indian Evidence Act reproducing the law in England provides that no tenant of immoveable property shall, during the continuation of the tenancy, be permitted to deny that the landlord of such tenant, had, at the beginning of the tenancy, a title to such immoveable property. The question then is whether the real owner or the benamidar is to be regarded as the landlord for the purposes of the section. In my opinion the real owner rather than the benamidar must be regarded as the landlord for the purposes of the section which

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therefore does not apply to the present case. Under these circumstances the question of the plaintiff's right to sue must be decided in accordance with the principles laid down in the recent case of *Kuthaperumal Rajai v. The Secretary of State for India* (1) and the plaintiff having admitted that he is a *benamidar* and not having shown any legal right to sue under the general law, the decree of the Subordinate Judge must be set aside. As the plaintiff says he is the heir and representative of his wife and so entitled to maintain the suit, the case must be sent back for decision on this ground, permission being given to him to amend the plaint if necessary. Fresh evidence may be taken. Costs will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Munro.

1908.
May 1, 6.

THE ARBUTHNOT'S INDUSTRIALS (LTD.), (THE LEGAL REPRESENTATIVES OF MESSRS. ARBUTHNOT & Co.), FIFTH COUNTER-PETITIONERS), APPELLANTS IN APPEAL AGAINST ORDER No. 174 of 1907,

v.

MUTHU CHETTIAR AND OTHERS (PETITIONERS' DECREE-HOLDERS), RESPONDENTS IN THE ABOVE,

MUTHU CHETTIAR AND OTHERS (PETITIONERS' DECREE-HOLDERS AND DEFENDANTS NOS. 1, 2, 3 AND 5), APPELLANTS IN APPEAL AGAINST ORDER No. 201 of 1907,

v.

PATRICK MACFAYDEN (DECEASED), SIR GEORGE ARBUTHNOT AND OTHERS (JUDGMENT-DEBTORS—PLAINTIFFS AND FOURTH DEFENDANTS), RESPONDENTS IN THE ABOVE.*
Civil Procedure Code, Act XIV of 1882, ss. 234, 372—Legal representative, execution against—Transferee, after money decree against a company, if such company's properties with liabilities, cannot be proceeded against as a legal representative.

B sued A & Co., the proprietors of a rice mill, for moneys due in respect of contracts connected with the said mill and obtained a money decree

(1) I.L.R., 30 Mad., 245.

* Civil Miscellaneous Appeals Nos. 174 of 1907, and 201 of 1907, presented against the orders of M. R. Ry. V. Visvanatha Ayyar, Subordinate Judge of Negapatam, dated 12th April 1907 and 23rd August 1904, respectively, in Execution Petitions Nos. 271 of 1906 and 92 of 1907 in Original Suits Nos. 45 and 47 of 1904, respectively.