APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

KORAPALU AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

1913. July 16 and 24.

v.

NARAYANA *alias* NARANAPPAYA (PLAINTIFF), RESPONDENT.*

Lessor and lessee—Forfeiture for non-payment of rent—Joint lessors—Separation of their ownership in the lands—Receipt by one of the joint lessors of his share of rent from the lessee—Right of the other joint-lessor to enforce the forfeiture—No act done by the lessor previous to the institution of the suit to determine the lease—Election previous to suit not necessary—Waiver—Transfer of Property Act (IV of 1882), sec. III, cl. (g)—Right of re-entry under the old English Common law.

One of several joint lessors who had become separately entitled to his share of the lands leased, is entitled to enforce the forfeiture clause in the lease-deed separately as regards his share of the lands.

Sri Raja Simhadri Appa Rao v. *Prattipati Ramayya* (1906) I.L.R., 29 Mad., 29, followed.

Gopal Ram Mohuri v. *Dhakeswar Pershad Narain* (1908) I.L.R., 35 Calc., 807, dissented from.

Mere breach by the lessee of a covenant involving forfeiture contained in a lease of lands executed for agricultural purposes, gives a sufficient cause of action to the lessor to bring the suit in ejectment, and it is not necessary that the lessor should do some act showing his intention to determine the lease before he brings his suit in ejectment.

Venkatramana Bhatta v. *Gundaraya* (1908) I.L.R., 31 Mad., 403, distinguished.

Padmanabhayya v. *Ranga* (1911) I.L.R., 34 Mad., 161, followed.

Per SADASIVA AYYAR, J.—As the breach of the condition gives rise to a cause of action at once, there is strictly no question of election between two different rights but there is only an election whether the lessor is to retain the right created by the breach or to give up the right. The retention requires no definite physical act while the waiver does.

APPEAL against the decree of D. RAGHAVANDRA RAO, the Subordinate Judge of South Canara, in Appeal No. 384 of 1910, preferred against the decree of C. D. J. PINTO, the District Munsif of Karkal, in Original Suit No. 394 of 1909.

The material facts appear from the judgment of SADASIVA AYYAR, J.

B. Sitarama Rao for the appellants.

* Second Appeal No. 1593 of 1912.

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K. Yagnyanarayana Adiga for the respondent.

SADASIVA AYYAR, J.—The defendants Nos. 2 and 3 are the appellants. The plaintiff owns one half of certain lands. The sixth and seventh defendants own the other half under an alienation by the fifth defendant, who was the former owner of that other half. The defendants, appellants, were mulgeni tenants under a lease executed by the plaintiff and the fifth defendant jointly in 1889. The lease deed contained a forfeiture clause for non-payment of rent. The plaintiff gave notice in July 1909 to the defendants to give up the lands as they had incurred forfeiture by non-payment of rent, and the suit was brought in September 1909 by the plaintiff on behalf of himself and the fifth defendant whose aliences are the defendants Nos. 6 and 7 to eject the defendants Nos. 2 and 3 from the entire lands. The lower Appellate Court decreed the suit so far as the plaintiff's half share was concerned on the following grounds:—

(*a*) Though the original letting of 1889 was jointly made by the plaintiff and the fifth defendant, the plaintiff had become separately entitled to one half of the lands and was entitled to enforce the forfeiture clause separately as regards his half share.

(*b*) As regards the contention of the defendants 2 and 3 that under section 111 (*g*) of the Transfer of Property Act, where the lessee breaks the condition which provides that on such breach the lessor may re-enter the lessor must do some act showing his intention to determine the lease before the lease is determined under such forfeiture clause, the plaintiff's notice of July 1909 had the legal effect of the doing of some act showing the intention to determine the lease required by section 111 (*g*).

The defendants Nos. 2 and 3 contend before us:

(*a*) that the original lease of 1889 could not be split up so as to enable the plaintiff alone to do an act expressing his intention to take advantage of the forfeiture clause as regards his half share.

(*b*) That the notice of 1889, if properly construed, does not indicate a present intention on the plaintiff's part to determine the tenancy in accordance with the forfeiture clause but only a contingent future intention.

As regards joint lessors the judgments pronounced in *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya*(1) contain very

(1) (1906) I.L.R., 29 Mad., 29.

instructive observations. There the plaintiff and the third defendant were joint owners of certain lands but afterwards became by a partition decree common owners of the said lands. Sir SUBRAHMANYA AYYAR, J., held that the plaintiff (tenant in common) may have ejectment as against the lessees of the land to the extent of the plaintiff's interest and he relied upon the English cases of *Cutting* v. *Derby*(1) and *Doed. Whayman* v. *Chaplin*(2). SANKARAN NAIR, J., relying on certain Indian cases, hesitated to follow the English law as regards the right of a tenant in common to eject the common lessee from the former's particular share of the leased lands. But he considered it unnecessary to give a final opinion on that question as, on other grounds, he concurred in the conclusion of Sir SUBRHAMANYA AYYAR, J. He held that, under the principles of law enbodied in sections 37 and 109 of the Transfer of Property Act, a joint owner who has by division become the owner of a specific share is entitled to enforce separately all the rights appertaining to the particular land which fell to his share, as against the lessee just as if he had given a separate lease of his own share alone originally to the lessee. SANKARAN NAIR, J., in effect held that even though sections 37 and 109 may not directly apply to agricultural leases in the Madras Presidency the principles embodied in those sections ought to be followed by Indian Courts.

Thus taking the view of either Sir SUBRAHMANYA AYYAR, J., or of SANKARAN NAIR, J., it is clear the Calcutta cases [see the latest case of *Gopaul Ram Mohuri* v. *Dhakeswar Pershad Narain*(3)], which are not binding upon us and which were relied upon by the appellant's vakil are opposed to the decision of this High Court in *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya*(4), and I prefer to follow *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya*(4).

Going to the other question whether the principle embodied in section 111 (*g*) of the Transfer of Property Act should be followed in such cases, in other words, whether the mere breach by the lessee of the covenant of forfeiture gives a sufficient cause of action to the lessor to bring the suit in ejectment, or whether it is further necessary that the lessor should do some

(1) (1776) 2 W.B.L., 1077. (2) (1810) 3 Taunt, 120; s.c. 128 E.R., 49.
(3) (1908) I.L.R., 35 Calc., 807. (4) (1906) I.L.R., 29 Mad., 29.

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act showing his intention to determine the lease before he brings the suit in ejectment, it was held in *Venkatramana Bhatta* v. *Gundaraya*(1), that there should be a separate act done prior to the institution of the suit showing such an intention, that such separate act alone can determine the lease and that the mere bringing of the suit is not such an act. *Venkatramana Bhatta* v. *Gundaraya*(1), assumed that the Transfer of Property Act was applicable to the facts of that case. But in *Padmanabhaya* v. *Ranga*(2), it was pointed out that the Transfer of Property Act did not govern the lease in question in *Venkatramana Bhatta* v. *Gundaraya*(1), and that this fact was overlooked in that case. *Padmanabhaya* v. *Ranga*(2), definitely held that, where the lease is not governed by the Transfer of Property Act, a landlord can maintain his suit for ejectment on forfeiture by the tenant without the landlord's having done any prior act evincing his intention to determine the lease. *Padmanabhaya* v. *Ranga*(2), was followed in *Ramakrishna* v. *Baburaya*(3), by the learned WHITE, C.J., and SANKARAN NAIR, J., again distinguishing *Venkatramana Bhatta* v. *Gundaraya*(1), on the ground that it was not brought to the notice of the Judges who decided that case that the lease in question was not governed by the Transfer of Property Act. The provision in section 111 of the Transfer of Property Act (about a further act being necessary besides the breach of the covenant in the forfeiture clause before a suit could be brought) was probably a relic brought over into that Indian Statute from the antiquated technicality of the old English Common Law which required the formality of re-entry by the lessor of the leased lands before the lease could be determined for breach of covenant; but this formality is unnecessary in the case of leases not governed by the Transfer of Property Act. As said in *Padmanabhaya* v. *Ranga*(2), the forfeiture is complete "when the breach of the condition or the denial of the title occurs. But as it is left to the lessor's option to take advantage of it or not the election was not a condition precedent to the right of action but the institution of the action was simply a mode of manifesting the election." I would put it even more strongly by saying that, as the breach of the condition gives rise to a cause of action at

(1) (1908) I.L.R., 31 Mad., 403. (2) (1911) I.L.R., 34 Mad., 161.
(3) (1912) 23 M.L.J., 715

once, there is strictly no question of *election between two different rights*, but there is only an election whether the lessor is to retain the right created or to give up the right. The retention requires no definite physical act while the waiver does. The word 'election' is not the appropriate word to use as regards the bringing of the action based on the right created in the plaintiff by the forfeiture. The word 'election' should be used only where the lessor has elected by an act to waive the right created by the tenant's default. There are not two alternative elections, the one giving rise to a right and the other not giving rise to that right but only one election to waive the right created.

I therefore think that no act was at all necessary on the part of the plaintiff to take advantage, as regards his share of the lands, of the forfeiture clause in the lease deed. On this view it is unnecessary to consider the other contention raised by the appellant that the acts relied upon by the plaintiff, namely, the notice to the first defendant in July 1909 and the acceptance of the sodi chit are not acts showing an intention to determine the lease. In the result, the Second Appeal fails and is dismissed with costs.

TYABJI, J.—I am also of opinion that in this case the plaintiff may enforce the forfeiture clause of the lease with respect to his moiety of the land, notwithstanding that those who are entitled to the other moiety have waived the right to enforce the forfeiture clause by receiving their moiety of the rent.

The Transfer of Property Act is not directly applicable; and it seems to me that the principle underlying section 111 of that Act ought not to be applied with stringency in a case like the present where the lessee is prompt in taking steps which leave no room for doubt as to whether he intends to enforce the forfeiture. I take it that, apart from the historical reasons to which my learned brother has alluded and which do not apply in India, the rule introduced in section 111 is now upheld in order to prevent a tenant from being subjected to such doubts. That reason for upholding the rule is not present in this case. I would therefore dismiss the appeal with costs.