VEERA-RAGHAVA AYYAR v. MUGA SAIT.

SESHAGIRI AYYAR, J.

I do not consider it necessary to deal with the question which has been considered by both the learned Judges at some length whether the use of the word "may" in section 44 is not equivalent to conferring powers to enquire into the competency of the judgment passed by a foreign Court. If the British Courts have a discretion, what is to the limit of its exercise? Are these Courts to enquire into the merits to ascertain whether the judgment was a just one? If section 44 is not controlled by section 13, I do not think the use of the word "may" will give the British Courts power to deal with the jurisdiction of the Courts of Native States: nor am I prepared to hold that the use of the word "may," instead of "shall", was intended to subject section 44 to the limitations contained in section 13.

My conclusion is that the Courts of British India are competent to decide before issuing execution whether the Courts of a Native State had jurisdiction to pass the judgment which is sought to be enforced by them. I agree with the order proposed by the learned Chief Justice.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Hannay.

1914, October 6 and 13.

MADAR SAHIB AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

KADER MOIDEEN SAHIB AND SIX OTHERS (PLAINTIFFS NOS. 1 TO 7), RESPONDENTS.*

Joint property—Co-owners—Purchase of an undivided moiety—Occupation of the other moiety in virtue of a lease deed—Subsequent holding over—Limitation Act (IX of 1908), arts. 110, 115 and 120—Article applicable.

Articles 110 and 115 of the Limitation Act presuppose the existence of a contract, express or implied; where there is no such contract or any relationship of landlord and tenant subsisting between the parties or no holding over as tenant, but when the relationship is referable to rights as co-owners, a suit for recovery of the moiety of a house and rent for a period of six years is governed by article 120 of the Limitation Act.

Robert Watson & Co., Ld. v. *Ram Chand Dutt* (1896) I.L.R., 23 Calc., 790, applied.

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* Second Appeal No. 123 of 1913.

Quære.—Whether the fiction of tenancy by sufferance should be kept up after the passing of the Transfer of Property Act.

Subhraveti Ramiah v. *Gundala Ramanna* (1910) 1 M.W.N., 145, referred to.

MADAR v. KADER MOIDEEN.

SECOND APPEAL against the decree of K. SRINIVASA RAO, the Subordinate Judge of Coimbatore, in Appeal No. 105 of 1911, preferred against the decree of R. V. KRISHNAN, the Acting District Munsif of Erode, in Original Suit No. 1883 of 1909.

The facts of the case appear from the judgment of AYLING, J.

T. R. Venkatarama Sastriyar for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *A. Viswanatha Ayyar* for the respondents Nos. 1, 2 and 4.

AYLING AND HANNAY, JJ.

JUDGMENT.—The plaintiffs and defendants are co-owners of the suit-house. The defendants in 1896 bought an undivided moiety of the house from the father of plaintiffs Nos. 1 to 7, and later in the same year executed a lease to him in respect of the other moiety for a period of three years. That lease expired in 1899 and since that time the defendants have been in possession of the whole house without executing any fresh lease to the plaintiffs or paying them rent. The plaintiffs' suit is for possession of their half of the house after partition and for recovery of arrears of rent and rent subsequent to suit. They have succeeded in both the lower Courts and have been given a decree for partition and possession of a moiety of the house and for rent for six years before suit under article 120 of the Limitation Act. The only question for determination in this second appeal is whether the lower Courts were right in according arrears of rent for six years. For the appellants it is contended that either article 110 or 115 should have been applied and that the claim for the period prior to three years before suit is barred.

The lower Courts in applying article 120 have followed the decision in *Robert Watson & Co., Ld.* v. *Ram Chand Dutt*(1). It is argued for the appellants that that case is distinguishable from the present on the facts, because on the facts there found, there was no contract between the parties so as to bring the case within either article 110 or 115 of the Limitation Act, whereas in the present case there was a lease between the parties, and an implied contract to pay rent after expiry of that

(1) (1896) I.L.R., 23 Calc., 799.

MADAR v. KADER MOIDEEN. — AYLING AND HANNAY, JJ.

lease. In support of the contention that the defendants in this case are in the position of tenants holding over and as such liable for rent at the rate reserved in the lease of 1896, *Leigh* v. *Dickeson*(1) is cited and the judgment of COTTON, L.J., and LINDLEY, J., appear to support that view. That also was a case where one tenant-in-common had possession of a house by virtue of a lease from the other tenant-in-common and the fact that there was such a lease was evidently the basis of the conclusion that the lessee tenant-in-common was bound to pay rent at the rate reserved, though the lease had expired and notwithstanding the existence of the tenancy in common.

In this case, as in the English case above referred to, the defendants may be said to have continued in possession of the house as tenants on sufferance from the expiry of the lease in 1899 as there is nothing to show that the plaintiffs assented to their remaining in possession as lessees (their possession might in the circumstances be referable to their rights as co-owners) and it is not the plaintiffs' case that any rent was paid. But as pointed out in the decision in *Subhraveti Ramiah* v. *Gundala Ramanna*(2) it is doubtful whether in this country the fiction of tenancy by sufferance should be kept up after the Transfer of Property Act.

In these circumstances the decision of the question whether article 110, 115 or 120 is to be applied to this case depends in our opinion on the answer to the question whether the relationship between the parties after the expiry of the lease in 1899 was based on a contract, express or implied. Articles 110 and 115 both presuppose the existence of such a contract. If the suit is in reality a suit for rent or for damages for use and occupation then article 110 or 115 may apply, but if not then the remaining article 120 would be properly applied.

In this connection, the respondents rely upon sections 111 and 116 of the Transfer of Property Act. Under section 111, the lease of 1896 was determined by efflux of time in 1899, and as the plaintiffs did not accept rent from the defendants after that or otherwise assent to the defendants continuing in possession as lessees, it cannot be said that there was any renewal of the lease as provided in section 116 of the Transfer of Property Act.

(1) (1884) L.R., 15 Q.B.D., 60. (2) (1910) 1 M.W.N., 145.

In these circumstances and having regard to the fact that the defendants are co-owners of the suit-house, we think there is much force in the contention for the respondents that they cannot be regarded as tenants holding over or that there was any relationship of landlord and tenant subsisting between them and the appellants subsequent to 1899 so as to bring the case within either article 110 or 115. The respondents' possession after 1899 may reasonably be referred to their rights as co-owners and in that view the decision in *Robert Watson & Co., Ld.*, v. *Ram Chand Dutt*(1) was in our opinion rightly applied to the case notwithstanding the difference in the facts which has been referred to above.

The decree of the lower Court is confirmed and this Second Appeal is dismissed with costs.

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar.

Re DHARMALINGA MUDALY AND FIFTEEN OTHERS (ACCUSED), PETITIONERS.*

1914. October 9 and 15.

Indian Penal Code (Act XLV of 1860), ss. 147, 426 and 447—Obstruction to public way by building a wall—Pulling down the wall in bona fide exercise of the right of public way, no offence.

The complainant built a wall obstructing a public way. Immediately after this, the accused, who were members of the public, in the bona fide exercise of their right of way, pulled down the wall:

Held, that the accused were not guilty either of rioting or of mischief or of criminal trespass (sections, 147, 426 and 447 of the Indian Penal Code).

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the order of P. C. DUTT, the District Magistrate of North Arcot, in Criminal Revision Case No. 19 of 1914, preferred against the order of T. S. VENKATRAMAYYA, the Second-class Magistrate of Arkonam, in Calendar Cases Nos. 78 and 79 of 1914.

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(1) (1896) I.L.R., 23 Calc., 799.

* Criminal Revision Case No. 457 of 1914 (Criminal Revision Proceedings No. 385 of 1914).