Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitor for the appellant : *Douglas Grant.*

Solicitors for the respondent : *Chapman-Walker and Shephard.*

J.V.W.

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## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.*

SIVANARASA REDDI AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), APPELLANTS

*v.*

DORAISAMI REDDI AND ANOTHER (DEFENDANT AND THIRD PLAINTIFF), RESPONDENTS.*

1918. February 14, 15 and 21.

*Co-owner, right of, to appropriate rents collected by him towards his share—Trusts Act (II of 1882), sec. 90.*

A co-owner who has collected as rent more than sufficient to pay the Government peshkash and has paid it, is not entitled to sue another co-owner for contribution to the peshkash.

Section 90 of Trusts Act (II of 1882), referred to.

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR, the Temporary Subordinate Judge of Cuddalore, in Appeal No. 7 of 1915, preferred against the decree of K. L. VENKATA RAO, the Additional District Munsif of Villupuram, in Original Suit No. 15 of 1914.

The facts are given in the first paragraph of the judgment of SADASIVA AYYAR, J. The plaintiffs Nos. 1 and 2, whose suit was dismissed by the lower Appellate Court, preferred this second appeal.

*T. R. Ramachandra Ayyar, T. R. Krishnaswami Ayyar* and *A. Krishnaswami Ayyar* for appellants.

Hon'ble Mr. *T. Ranga Achariyar* and *C. Padmanabha Ayyangar* for respondents.

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* Second Appeal No. 372 of 1917.

SIVANARASA REDDI v. DORAISAMI REDDI. — OLDFIELD, J.

The Court delivered the following JUDGMENT :—

OLDFIELD, J.—First and second plaintiffs, appellants, with third plaintiff sued defendant to recover his share of the peshkash they had paid on the mitta which all own in common, defendant's interest being one-fourth. The defence was that plaintiffs had collected from the tenants sufficient to cover what they paid for defendant in addition to what they were entitled to retain as their own share of the collections ; and the issue between the parties relates to the manner in which the collections should be apportioned, plaintiffs contending that, as co-owners, they are entitled to all they may collect up to a sum equal to three-quarters of the total demand of the estate ; defendant, as his case was put forward in the lower Appellate Court and finally here, that they are entitled to retain only three-quarters of their total actual collections and must hold the balance in trust for him and credit it against the amount they have paid out on his behalf.

Of these methods of calculation, that proposed by plaintiffs is evidently open to the objection, regarded by the lower Appellate Court as *decisive*, that it admits of one side collecting its share of the rents from the solvent tenants and leaves the other to collect at excessive trouble and expense from the insolvent and recalcitrant. But plaintiffs have founded their contention on their alleged right as co-tenants to any enjoyment of the common property, which does not involve their receipt of more than their just share of the profits realizable from it or the ouster of the other co-tenants ; and this is supported by reference to two Indian and two English cases, in which, it is contended, the law applicable to the co-tenants before us is laid down.

The first of these, *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi*(1) no doubt dealt with collection of rents and it was said that

> "not only was the kattalai, as one of the tenants in common, not bound to pay over to the mutt (the other) a moiety of what it received from the ryots, so long as such receipts did not exceed its proper share, but in an action against the kattalai to account for its receipts over and above what it was entitled to, it was for the mutt distinctly to allege and show that the kattalai's receipts did in fact exceed its due share."

(1) (1904) I.L.R., 27 Mad., 465 at p. 477.

But the judgment proceeded

"No averment of that kind having been made and no proof in support of it having been offered, the suit (brought on an agreement, not, as the District Munsif treated it, for an account) necessarily failed."

The circumstances were peculiar and it appears from the record that, not only was the suit not for an account but the kattalai had been tendering pattas and presumably collecting only its half share. With the English authorities referred to including *Kennedy* v. *De Trafford*(1), I deal later. The material fact is that the Court referred to the share of receipts, not of demand; and this is in defendant's favour.

The other Indian decision, *Mahesh Narain* v. *Nowbat Pathak*(2), relied on as supporting plaintiffs, can in my opinion be distinguished. The dispute was between one co-tenant of a quarry and a lessee under another, the lessee's rights being discussed as equivalent to those of his lessor, and it was no doubt held that, as there was no ouster or destruction of the common property, the co-tenant plaintiff, who himself had not attempted or been debarred from any enjoyment of it, was not entitled to an account in the absence of proof that the lessee had taken more than his lessor's just share of the stone. The case however differs from that before us in respect of the manner, in which the profits are claimed and in which they were obtained. Firstly in *Mahesh Narain* v. *Nowbat Pathak*(2), they were claimed directly by the plaintiff, co-tenant, whilst as the judgments show, he was disclaiming any liability to contribute towards the expenses incurred. Here not only has defendant been ready to give and plaintiffs have not refused credit for the proper proportion of the expense incurred by the latter in collection, but also defendant's claim is made in answer to one by plaintiffs to be reimbursed for expenditure, essential to the continuance of the common property in the common ownership, but for which it would have been brought to sale by Government for arrears of peshkash and no profits could have accrued. It is not suggested that contribution is claimed from defendant in respect of any distinct portion of the estate, for which plaintiffs have not collected and he is at liberty to collect, or otherwise than for

(1) (1897) A.C., 180. (2) (1905) I.L.R., 32 Calc., 837.

SIVANARASA REDDI v. DORAISAMI REDDI.

OLDFIELD, J.

his unascertained share in the property as a whole. The second distinction between the present case and *Mahesh Narain* v. *Nowbat Pathak*(1), appears clearly from the quotation from the judgment in one of the English authorities now relied on, *Henderson* v. *Eason*(2), on which the Calcutta decision is based. The claim in *Henderson* v. *Eason*(2), was to an account and share of the profits derived by a co-tenant from common property, of which he was in possession and which he had cultivated directly just as the lessee and the co-tenant lessor had enjoyed the quarry, which was in question in Calcutta, and it was observed that in such cases it is impossible to say that the co-tenant has received more than his just share.

"He takes the whole of the crops, and is he to be accountable for any of the profits, when it is clear, that, if the speculation had been a losing one altogether he could not have called for a moiety of the losses, as he would have been enabled to do, had the land been so cultivated by the mutual agreement of the co-tenants? . . . He receives—in truth the return of his own labour and capital to which his co-tenant has no right."

This ground of decision was as directly available in *Mahesh Narain* v. *Nawbat Pathak*(1), as it is excluded by the facts before us, plaintiffs' acceptance of profits, to the making of which their own exertions or expenditure have not gone, except as regards the latter so far as they claim that defendant was jointly liable for the peshkash with them.

The portion of the judgment in *Henderson* v. *Eason*(2), relating to a state of facts similar to these before us is also relied on because it also is said to support plaintiff's claim, inasmuch as it shows that the English Common Law to be applied in the present case had previously been that, whilst the co-tenancy continued, one co-tenant had no remedy against another, who had received the profits, unless the latter had been expressly appointed the former's bailiff or the former had been ousted. Vide also the extract from Co-Litt. 200 b. in the argument. And it is argued that this view is further supported by *Kennedy* v. *De Trafford*(3), in which LORD HERSCHELL said that a co-tenant collects rents in the right, which he possesses as such, and does

(1) (1905) I.L.R., 32 Calc., 887. (2) (1851) 17 Q.B., 701.
(3) (1897) A.C., 180.

not need any special contract (such as was proved in that case) or any agency express or implied to justify him in collecting. This *dictum* was however relevant only to the question then in issue, whether the co-tenant, who collected the rents, was on that account in a fiduciary relationship with the other co-tenant which would debar him from purchasing the property, when it was sold by a mortgagee. There was no issue and no decision as to his liability to account for any part of his collections or its extent, and there is nothing to affect the conclusion as to the liability in *Henderson* v. *Eason*(1), based on the statute, 4 Anne c. 16, which was held applicable in supersession of the Common Law, to

"cases in which one of two tenants in common of lands leased at a rent payable to both receives the whole or more than his proportionate share according to his interest in the subject of the tenancy," that "he is bailiff only by virtue of his receiving more than his just share, and as soon as he does so, is answerable for only so much as he actually receives."

The statute is dependent on no local or temporary considerations and has been the English Law from prior to the date of its reception in India, as representing justice, equity and good conscience; and, if there were no Indian provision for the case, I should treat it, not the earlier Common Law, as applicable.

It is however argued, it seems to me correctly, that such provision, is available in section 90, Trusts Act (II of 1882) the relevant portion of which provides that,

"where a co-owner, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold for the benefit of all persons so interested the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred in gaining such advantage."

It is unnecessary to decide whether the section was intended to embody the English rule. For it is sufficient that it applies to a co-owner's right existing like defendant's in the present case, but unlike that in question in *Mahesh Narain* v. *Nowbat Pathak*(2), independently of and antecedently to the realizations, which not only his position as co-owner, but also his special exertions or expenditure enable him to make. Here

(1) (1851) 17 Q.B., 701. (2) (1905) I.L.R., 32 Calc., 837.

SIVANARASA REDD v. DORAISAMI REDDI.

OLDFIELD, J.

defendant, as the plaint admits and the claim made involves, is a co-owner; and it is not disputed that he is, apart from plaintiff's collection of the rents, entitled to a proportionate share in them. The co-owner, who collects them, can in the absence of arrangement with the others, do so only as their representative, this appearing from the fact that if he attempts to recover by suit, he is bound to join those others either as plaintiffs or defendants, the court being able to protect their interests at the execution stage by an order under Order XXI, rule 15; *Nepal Chandra Ghose* v. *Mohendra Nath Roy Choudhury*(1), and *Pramada Nath Roy* v. *Ramani Kanta Roy*(2). The terms of the section being fulfilled, plaintiffs under it must account to defendant for the advantage they have gained in the shape of the excess over their own proportionate shares in the collection.

No other ground of appeal being argued, this entails concurrence in the Lower Appellate Court's decision. The Second Appeal is dismissed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiffs Nos. 1 and 2 are the appellants. They and the third plaintiff own a three-fourth share in a mitta and the defendant owns the remaining one-fourth share. The lands in the mitta are enjoyed by tenants and the plaintiffs' share of the net rents (after deducting costs of collection) is a $\frac{3}{4}$ fraction and the defendant's the remaining $\frac{1}{4}$th fraction. Both the plaintiffs and the defendant are jointly liable for the peshkash due to Government. The plaintiffs paid more than their three-fourth share of the peshkash due for faslis 1319 and 1320 and the defendant paid much less than his one-fourth share and hence the plaintiffs brought the suit for the recovery of the excess (over three-fourth share) paid by them. The defendant contended (among other defences) that the plaintiffs have collected and enjoyed more than their three-fourth share of the rents due by the tenants and that if accounts are taken, nothing would be found due to the plaintiffs. The District Judge passed an order on the 27th January 1915 calling for a finding from the lower Court, the material portions of the order being as follows :—

"The defendant claims in issue 3 that the rents collected by the plaintiffs should be set off against their demand. The lower

(1) (1904) I.L.R., 31 Calc., 707.
(2) (1908) I.L.R., 35 Calc., 331 (P.C.).

Court has held that so long as the plaintiffs have not collected more than their share of the whole rental, they are not accountable to the defendant. I think that the correct view is that the plaintiffs are accountable for a proportionate amount *on each patta.*" (Italics are mine.) "With joint holders, it would never do for one to be allowed to collect his fraction of the total rent from the solvent tenants leaving it to his fellows to collect their dues from the other tenants. Each landholder is entitled to a *proportionate amount of each tenant who contracts with the landholders jointly.* It is, therefore, necessary in this case to have a statement of accounts showing what has been paid by each pattadar or tenant to each landholder from the beginning of fasli 1318 up to date of plaint together with the expenses incurred by each landholder for collection. Accordingly, I remand this case for submission of such an account." It is not very clear from this remand order whether the District Judge thought (*a*) that after totalling the collections from all the tenants holding under several pattas, it should be ascertained whether the total amount exceeded three-fourths of the *total demand* from all the holdings in the village and plaintiffs should account for the balance to the defendant or (*b*) whether the plaintiffs should account for one-fourth of *the total collections* made by the plaintiffs to the defendant or (*c*) whether they should account to the defendant whenever they had collected more than *three-fourths of the demand due on any patta* for the excess over that three-fourths on that patta though their total collections from all the holdings might be less than three-fourths of the demand on all the holdings or might be less than even three-fourths of the total amounts due by the tenants from whom they made collections. From the way, however, in which the accounts were afterwards taken by the District Munsif and by the Commissioner appointed by him without protest, it appears that all the parties understood that the District Judge held that out of the net collections made by the plaintiffs in each fasli from all the tenants, they should account for one-fourth share to the defendant while the defendant in his turn should account for three-fourths of his net collections (that is, collections after deducting expenses of collection) to the plaintiffs and that the accounts should be taken in the above manner. When accounts were taken as above it was found that a sum of Rs. 134 and odd was due by the plaintiffs themselves to the defendant,

SIVANARASA REDDI v. DORAISAMI REDDI. — SADASIVA AYYAR, J.

and hence the Subordinate Judge (to whom the appeal had been transferred after remand) dismissed the plaintiffs' suit with costs. The second of the grounds in the memorandum of Second Appeal before us is as follows :—" It having been admitted and proved that the plaintiffs did not collect more than their share of the rent from the ryots and they paid not only the peshkash due by them but also that due by the defendant, the lower Court should have held that the plaintiffs are entitled to contribution and the suit should have been decreed." It is not clear whether the expression "plaintiffs' share of the rent" found in this second ground of the appeal memorandum means (*a*) *plaintiffs' share of the total annual demand from all the ryots or* (*b*) whether it means plaintiffs' share of the total demands due by those tenants alone from whom they made collections, or (*c*) the plaintiffs' share of the demand on each particular holding from the tenant of which they made collections. In the course of the argument Mr. T. R. Ramachandra Ayyar for the appellants contended that, as the plaintiffs' total collections were not alleged by the defendant to have exceeded three-fourths of the total demand from all the ryots, the plaintiffs were not in law bound to account for one-fourth share of the net sum so collected by the plaintiffs as decided against them by the lower appellate Court in the remand order which decision was adopted by the Commissioner in taking the accounts.

In support of this proposition of law, the learned vakil relied on the observations in certain English cases and on the *dicta* found in *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi*(1) and *Mahesh Narain* v. *Nowbat Pathak*(2). A few more facts might be stated here to appreciate the relative positions of the parties. The defendant and the plaintiffs Nos. 2 and 3 were willing in January 1910 to have the first plaintiff recognized as the 'manager' of the whole mitta estate and registered by the Collector as 'the senior joint owner' so that he might be recognized as proprietor under Act II of 1894 to exercise the powers of appointment of village officers, of reporting against them, of punishing them and so on. As manager the first plaintiff alone issued pattas to the tenants in faslis 1319 and 1320. And this could have been done only on behalf of all the four joint

(1) (1904) I.L.R., 27 Mad., 465. (2) (1905) I.L.R., 32 Calc., 837.

proprietors. As regards arrears not collected from the tenants, all the three plaintiffs and the defendant filed suits jointly in the Revenue Court for such arrears due for faslis 1320, 1321 and 1322 and most of the suits have been decreed in favour of all the four jointly. The first plaintiff says in his evidence: "Under ordinary circumstances, all the four mittadars should share equally profit and loss. The profit or loss can be ascertained only after payment of peshkash." Each of the four mittadars seems to own the kudivaram also in some of the lands in the estate and usually the rent due by each of the four mittadars as a ryot of these lands (to the four mittadars jointly as landlords) is not actually collected, but each debits the rents due by him in the account of collections which he gives to the common karnam (see evidence of the karnam, plaintiff's second witness). Where attachments or other proceedings have to be taken and expenses incurred, the net collections alone are considered as received by the proprietor who has incurred the cost of such collections. On the above facts, it is clear to my mind that the justice and equity of the case is in favour of the view taken by the lower appellate Court that every one of the co-owners must be deemed to collect on behalf of all, every rupee he obtains as net collection from any tenants, that the net amount must, therefore, be brought into the common account and that each co-sharer is entitled to his fraction in that amount in proportion to his share. After I prepared my judgment up to this point, I had the advantage of a perusal of the judgment just now pronounced by my learned brother and as I entirely concur with him in his discussion of, and conclusions on, the English and Indian precedents, I think it unnecessary to myself refer to them or detail them. Where there is no risk, no question of adventure or enterprise, no question of the employment of real and appreciable labour or skill or capital or industry in the obtaining of pecuniary profits from the common property by one co-sharer, the reason of the decisions quoted by the appellant does not apply and even if there are old English decisions in which wide language is used as to the irresponsibility of a co-sharer to his other co-sharers under all circumstances, it should be remembered that the rights and liabilities of joint owners, joint debtors, and joint creditors were looked at sometimes under the English common law in a too technical manner not quite consistent with

SIVANARASA REDDI v. DORAISAMI REDDI.

SADASIVA AYYAR, J.

plain equity and justice and I am not prepared to follow such old decisions, especially after the English statute of Anne was passed evidently in order to get rid of some at least of the said technicalities based upon the old forms of action. Of course where one co-sharer obtains the amenities of mere comforts, conveniences or residential advantage or of mere user and occupation without an adverse *animus* against the other co-owners he cannot be treated as bound to account to his other co-sharers as if he had obtained the common premises for the rent to which they could have been let to a stranger.

In cases other than those in which the co-sharer *expressly intended to collect for his own share alone, made a demand on tenants for his own share alone as in* Nallayappa Pillai v. Ambalavana Pandara Sannadhi(1) *and was paid by the tenants expressly for or towards that share alone* (these facts being required to be alleged and proved by that co-sharer in any litigation between him and other co-sharers) if he wants to rebut the natural presumption that he collected for the common benefit, plain law and equity, in my opinion, is in favour of the view that he collects whatever he collects on behalf of all.

In the result, I concur in dismissing the second appeal with costs.

N.R.

(1) (1904) I.L.R., 27 Mad., 465.