

ASA BEEVI
v.
KARUPPAN
CHETTY.
WALLIS, C.J.,
BAKEWELL
AND
KUMARA-
SWAMI
SASTRIYAR,
J.J.

Labbai(1), and the same view appears to have been expressed by Sir LAWRENCE JENKINS, C.J., in *Sumsuddin v. Abdul Hussain*(2), though the judgment in that case proceeded upon the construction of the provisions of the Transfer of Property Act. Reliance has also been placed upon the decision in *Muhammad Hashmat Ali v. Kaniz Fatima*(3), but there is no discussion of the authorities in that case.

On the whole, we think that there is a large preponderance of authority in favour of the view that a transfer or a renunciation of the right of inheritance before that right vests is prohibited under the Muhammadan Law. The rules of Muhammadan Law are not affected by the Transfer of Property Act and it is, therefore, unnecessary to consider whether this transfer or renunciation would not also be invalid under the provisions of section 6 of the Transfer of Property Act itself.

For these reasons, the Letters Patent Appeal fails and is dismissed with costs.

N.R.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Bakewell
and Mr. Justice Kumaraswami Sastriyar.*

1917,
September
12.

VEMA RANGIAH CHETTY (DEFENDANT), APPELLANT,

v.

V. M. VAJRAVELU MUDALIAR (PLAINTIFF),
RESPONDENT.*

Provincial Small Cause Courts Act (IX of 1887), Sch. II, art. 7—Suit involving apportionment of rent, whether a suit of small cause nature—Transfer of Property Act (IV of 1882), ss. 2 (d) and 36, applicability of, to transfer in execution.

A suit the determination of which involves apportionment of rent by the Court, falls within article 7 of the second schedule of the Provincial Small Cause Courts Act and is exempted from the cognizance of a Provincial Small Cause Court.

(1) (1913) 24 M.L.J., 258.

(2) (1907) I.L.R., 31 Bom., 165.

(3) (1915) 13 A.L.J., 110.

* Letters Patent Appeal No. 57 of 1917.

Though according to section 2 (d) of the Transfer of Property Act, the Act does not apply to sales in execution, yet the principle of section 36 of the Act which embodies a rule of justice, equity and good conscience can be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease.

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APPEAL under clause 15 of the Letters Patent against the judgment of SADASIVA AYYAR, J., in *Rangiah Chetty v. Vajravelu Mudaliar*(1).

Plaintiff gave on lease two properties on 27th February 1901 to the defendant's father for ten years at a fixed rent for each year and the rent of each year was made payable in three equal instalments, on the 15th of May, 15th November and 15th February. Plaintiff lost the first of the two properties early in 1901 and the second by virtue of a court-sale held in April 1907 in execution of a decree against him, the sale being confirmed in December 1907. In this suit the plaintiff claimed that he was entitled to a rateable amount of each year's rent (viz., one-third of the whole rent) in respect of the second property for the instalments payable in February, May and November 1907 and February and May 1908. The plaintiff stated in his evidence that the defendant's father apportioned the rent for the suit property at one-third of the whole rent. The defendant denied the truth of the lease and stated that the rent was discharged by his father and the rateable amount claimed was excessive. The District Munsif held that the plaintiff was entitled to rent only up to April 1907 (the date of sale) but that the rent was discharged and that there was no apportionment. On appeal the Subordinate Judge held that there was no apportionment by defendant's father, that there was no discharge, that the plaintiff was entitled for the ten months' rent in 1907, viz., from February 1907 to December 1907, when the sale was confirmed and that the purchaser in court-sale was entitled to rent thereafter.

The defendant preferred a second appeal which was heard by SPENCER and SADASIVA AYYAR, JJ. A preliminary objection was raised that no second appeal lay. SPENCER, J., held that there was no apportionment prior to suit, that as the suit involved an

(1) Second Appeal No. 1431 of 1915 preferred against the decree of K. KRISHNAMACHARIYAR, the Subordinate Judge of North Arcot, in Appeal No. 142 of 1914, preferred against the decree of M. A. KRISHNA RAO, the District Munsif of Sholinghur, in Original Suit No. 140 of 1913.

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apportionment of rent it was not a suit of a small cause nature, so as to preclude a second appeal, but that as the rent for the third instalment of 1907 was not due in December 1907 when plaintiff lost possession but was due only in February 1908, he was not entitled to ten months' rent but was entitled only to the rent of the two out of the three instalments of 1907. SADASIYA AYYAR, J., held that there was an apportionment by defendant's father, that even if there was no apportionment, the suit was of a small cause nature as the plaintiff claimed a specific amount as rent on the basis of an equitable apportionment, that the determination of the apportionment which was not prayed for in the plaint was only incidental to the main relief and that hence no second appeal lay. In the result the second appeal was dismissed with costs under section 98, Civil Procedure Code.

The defendant preferred this Letters Patent Appeal.

T. V. Muttukrishna Ayyar for the appellant.—On both the questions raised in the case I contend for the view taken by SPENCER, J. : (1) The suit is not of a small cause nature. There was no contract of apportionment between the parties of the rent payable on the loss of one of the two properties. Whatever apportionment there was before, it was all one-sided and not with my consent. It is in this suit that the apportionment has to be made by the Court for the first time and hence this suit falls under clause (7) of the second schedule to the Provincial Small Cause Courts Act. (2) One of the two properties leased passed to a stranger in a court-sale. Section 36 of the Transfer of Property Act does not apply to execution sales—see section 2 (d) of the Transfer of Property Act. Rent cannot be apportioned from day to day—see *Mathewson v. Shyam Sunder Sinha*(1). *Kunhi Sou v. Mulloli Chathu*(2) and *Lakshminaranappa v. Melothraman Nair*(3) are against me.

K. Yegnanarayana Adiga for *K. P. Lakshmana Rao* for the respondent.—The suit is of a small cause nature. It is the frame of the plaint that determines the *forum*. No apportionment is prayed for in the plaint but only a money rent; and even if rent has to be apportioned by the Court on account of

(1) (1906) I.L.R., 33 Calc., 786.

(2) (1915) I.L.R., 38 Mad., 86.

(3) (1903) I.L.R., 26 Mad., 540.

eviction from a portion of the leased premises (for which see Foa's Landlord and Tenant, page 170), it arises only incidentally. The vakil was not called upon to argue on the merits.

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The following judgment of the Court was delivered by

WALLIS, C.J.—The learned Judges have differed on the question whether a second appeal lies to this Court and that depends upon the question whether the present suit is one of a small cause nature, and if it be a suit for the apportionment of rent it is not of a small cause nature; see article 7 of second schedule of the Provincial Small Causes Courts Act. The plaintiff in this case recites that the lessee failed to get possession of a portion of the demised premises by reason of a decree against the lessor. The plaintiff who sues for rent claims only a rateable amount, namely, one-third of the stipulated rent or Rs. 116-10-8 a year. He does not allege that the rent had been apportioned at this figure by consent of the parties but only that the defendant had settled the claim for rent up to 1904 — on what terms he does not say. The finding is that there was no agreement about it, and therefore it is quite clear that the suit did involve an apportionment of rent and could not have been decided without it, that, therefore, it was not a suit of a small cause nature, and that a second appeal lies. The Letters Patent Appeal must be allowed with costs and we must proceed to dispose of the second appeal.

The only ground taken is that the lower Courts were wrong in apportioning the rent between the original lessor and the purchaser of his interest in execution at a court-sale. Section 36 of the Transfer of Property Act provides for such apportionment, and although it is no doubt true that, under section 2 (d) of the Act, it does not apply to sales in execution, yet the section embodies a rule of justice, equity and good conscience which we think should be applied. That appears to be the view taken by this Court in *Kunhi Sou v. Mulloli Chathu*(1) following *Lakshminaranappa v. Melothraman Nair*(2). The case reported in *Satyendra Nath Thakur v. Nilkantha Singha*(3) was a case of a transfer of the lessee's interest, and it is unnecessary for us to consider it. With great respect we are unable to follow the

(1) (1915) I.L.R., 38 Mad., 86.

(2) (1903) I.L.R., 26 Mad., 540.

(3) (1894) I.L.R., 21 Calc., 388.

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decision in *Mathewson v. Shyam Sunder Sinha*(1). In this case the question may depend upon the terms of the contract of sale and neither the sale proclamation nor the sale certificate have been produced and in the absence of any evidence we must presume that what was sold was simply the land. The second appeal therefore fails and is dismissed with costs.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Kumaraswami Sastriyar.

KUMARAPPA REDDI (PLAINTIFF), APPELLANT,

v.

MANAVALA GOUNDAN (DEFENDANT), RESPONDENT.*

1916,
September.
5, 6 and 20
and 1917,
May, 3,
August, 7 and
15 and
November,
12 and 23.

Civil Procedure Code (Act V of 1908), sec. 100—Custom or usage having the force of law—Extent of jurisdiction of High Court in second appeal in deciding custom or usage—Mirasidar in Chingleput district, right to thunduvaram by custom from Government ryots—Onus of proving custom on Mirasidar—Civil Procedure Code, sec. 103—Power of High Court to decide facts under—Admissions of a party, binding nature of, unless explained—Provincial Small Cause Courts Act (IX of 1887), Sch. II, art. 13—Thunduvaram, dues within—Burden of proving abandonment of customary right—Non-exercise of right for a long time, effect of.

Held by the Full Bench:—The existence of a custom or 'usage having the force of law' is a mixed question of fact and law. Section 100, Civil Procedure Code, precludes the High Court from interfering in second appeal with the findings arrived at by the lower Court of actual facts from which the existence of the custom has been inferred; the inference as to the existence and the decision as to the validity, of the custom being matters of law, revisable by the High Court in second appeal.

Kakarla Abbaya v. Raja Venkata Papayya Rao (1906) I.L.R., 29 Mad., 24, overruled. *Koilas v. Padmakisor* (1917) 25 C.L.J., 613 and *Pankajammal v. The Secretary of State for India* (1917) I.L.R., 40 Mad., 1108, followed. *Palaniappa Chetty v. Sreemath Devasikamony Pandarasannadhi* (1917) I.L.R., 40 Mad., 709 (P.C.), referred to.

Held further, (a) that in a suit by an *ekaboga mirasidar* in a village in the Chingleput district, for certain customary dues called *thunduvaram* from the

(1) (1906) I.L.R., 33 Cal., 786.

* Second Appeal No. 1660 of 1913.