VEVINDRA-MUTHU PILLAI v. MAYA NADAN.

SESHAGIRI AYYAR, J.

enunciated in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(1). In *Krishnabhupati Devu* v. *Vikrama Devu*(2), this view seems to have found favour with the learned Judges. In *Magan Lal* v. *Doshi Mulji*(3), there are observations of Sir LAWRENCE JENKINS which may be regarded as enunciating the same principle. The rule itself is so eminently a workable one and steers clear of many difficulties which have sprung round the application of section 47 that in my opinion, both the letter of the law and the reason of it demand, that this principle should be given wide effect by Courts in this country. I would therefore answer all the questions referred to us by saying that if the points for decision in an application before the executing Court relate to the rival rights of the decree-holder and of the judgment-debtor and also relate to execution, discharge, or satisfaction of the decree it should be dealt with in execution and not by separate suit. The right of appeal and second appeal will be governed by the same rules as affect application under section 47.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Burn.

1919, August, 1.

SUBRAMANIA PATTAR (PLAINTIFF), APPELLANT,

v.

KATTAMBALLI RAMA (DEFENDANT), RESPONDENT.*

Lessor and lessee—Agricultural lease—Flooding by sea-water—Land rendered unfit for cultivation—Right of lessee to abatement of rent—Duty to avoid lease in toto—Transfer of Property Act (IV of 1882), sec. 108, cl. B (e)—Principle of the section, applicability of.

If by an inundation of sea-water a portion of lands leased for agricultural purposes becomes unfit for cultivation and the landlord brings a suit to recover the whole rent reserved in the lease, the tenant can plead as a defence that he is entitled to a proportionate abatement and is not bound to have avoided the lease *in toto*. The principle of proportionate abatement was recognized in India prior to the Transfer of Property Act, and is in accordance with natural justice. Neither section 108 B (e), Transfer of Property Act, nor

(1) (1892) I.L.R., 19 Calc., 683 (P.C.).
(2) (1895) I.L.R., 18 Mad., 13. (3) (1901) I.L.R., 25 Bom., 631.
* Second Appeal No. 2041 of 1918.

its principle is applicable to cases of flooding by sea-water of lands leased for agricultural purposes.

Sheik Enayatoolluh v. *Sheik Elaheebuksh*, (1864) W.R. Gap. (Act X Rulings), 42, followed.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of South Kanara, in Appeal Suit No. 73 of 1918, preferred against the decree of K. RAMU NAYAR, the District Munsif of Kasaragod at South Kanara, in Original Suit No. 524 of 1916.

This suit was instituted to recover part of the rent due for 1912 and the whole of the rent due for 1913 to 1916 on a marupat (counter-part of a lease) executed by the defendant in 1907 to one Kunhani. The present karnavan of Kunhani's tarwad assigned to the plaintiff by a deed, dated 1st April 1916, the right to collect the rents. The lease was for 20 years of a plot of paddy land and two plots of garden land. The rent fixed was 90 paras of paddy for the former and Rs. 10 for the garden plots, payable annually. The defendant, while admitting the lease, pleaded that in consequence of a rush of sea-water in 1912 the paddy land became unfit for cultivation and that it was not cultivated since then. He further pleaded that the karnavan had agreed to remit the rent. The lower Courts found that the paddy land was flooded by sea-water and was rendered unfit for cultivation, and that though the alleged agreement to remit rent was not proved the defendant was entitled to a remission of rent for the paddy land under the provisions of section 108, clause B (*e*) of the Transfer of Property Act. The plaintiff preferred this second appeal and contended inter alia that the defendant, not having avoided the lease *in toto*, was not entitled to an abatement of rent.

C. V. Anantakrishna Ayyar for the appellant.

K. P. Lakshmana Rao for the respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—The finding of the Courts below is that a portion of the demised premises became unfit for paddy cultivation, because it was inundated by sea-water. The question therefore arises whether the tenant can plead as a defence to a suit for rent that he is entitled to proportionate abatement. There is not much authority on the subject. Mr. Anantakrishna Ayyar contended that the principle of section 108, clause B (*e*) of the Transfer of Property Act, was applicable

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and that the only remedy open to the tenant was to have avoided the lease *in toto*. Mr. Lakshmana Rao, for the respondent, argued that the Transfer of Property Act not being in terms applicable to agricultural tenancies, the application of the principle underlying the section must depend upon whether there are recognized pre-existing rules on the subject which render the application of the principle inequitable. He drew our attention to *Sheik Enayatoollah* v. *Sheik Elaheebuksh*(1) and *Salimullah* v. *Kaliprosonna*(2) and contended that prior to the enactment of the Transfer of Property Act, the principle of rateable apportionment was recognized in this country. We may say that the idea is in accordance with notions of natural justice and unless we are compelled to apply the provisions of the Act, there is no ground for not following the judgment of Sir BARNES PEACOCK in *Sheik Enayatoollah* v. *Sheik Elaheebuksh*(1).

Even if the principle of section 108, clause B (*e*), is to be invoked, it is not clear that the present case is covered by the accidents enumerated. From the earliest time flooding by sea-water has not been recognized in England as standing on the same footing as destruction by fresh water floods. It is explained in 18 Halsbury, 481, that whereas deterioration by fresh water flooding is reparable, flooding by sea-water would render the land practically unfit for all time to come. Whatever may be the reason, it was laid down in Bacon's Abridgment, Vol. VII, page 63, that the tenant can claim abatement when the leased land was flooded by sea-water and this view has been accepted as good law by all text writers—Woodfall, page 479; Foa, page 112; and Halsbury, Vol. 18, page 481. Therefore, even under the Transfer of Property Act, following these authorities, the word *flood* may have to be restricted to flooding by other than sea-water. Further, it is open to argument whether section 108 B (*e*) is exhaustive of the right of the tenants. Avoidance of tenancy is no doubt one mode of relief. But does it exclude the idea that the claim for abatement is available to him? The English law seems to countenance the view that avoidance is the only remedy, *Baker* v. *Holtpzaffal*(3). In *Siddick Haji*

(1) (1864) W.R. Gap. (Act X Rulings), 42. (2) (1915) 22 C.L.J., 569.
(3) (1811) 4 Taunt, 45.

Hoossain v. *Bruel & Co.*(1) and *Dhuramsey* v. *Ahmedabhai*(2) this principle was accepted. However that may be, in our opinion, as the Act is not in terms applicable, there is no reason for importing by way of analogy these technical considerations in discussing rights between landlord and tenant in respect of agricultural tenancies. We think the learned Judge was right. The second appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Sir Abdur Rahim, Kt., Offg. Chief Justice, and Mr. Justice Seshagiri Ayyar.

VEERAPPA CHETTY (SECOND DEFENDANT), APPELLANT,

v.

RAMASAMI CHETTY AND ANOTHER (SECOND PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

1919, April 10, 30, May 1, and August 1.

Execution—Attachment and sale of lands—Transfer of territorial jurisdiction of Court—Order of Court which did not pass the decree but to which execution was transferred—Attachment and sale of lands by Court after deprivation of territorial jurisdiction, Validity of—Estoppel against judgment-debtor, how far binding upon auction-purchaser.

A Court to which execution of a decree is transferred has no jurisdiction to order either the attachment or sale of immoveables in execution, if at the time of the order such Court had no territorial jurisdiction over the immoveables. Though a judgment-debtor, who does not object to a confirmation of a sale by such Court, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate against a subsequent purchaser of the same property in a sale held by a Court having jurisdiction, in execution of another decree against the same judgment-debtor.

Mahomed Mozuffer Hossein v. *Kishori Mohun Roy*, (1895) I.L.R., 22, Calc., 909, explained; *Prayag Roy* v. *Sitha Prasad Tewari*, (1908) 35 Calc., 877 and *Parsidh Narain Singh* v. *Janaki Singh*, (1907) 7 C.L.J., 644, dissented from.

APPEAL against the decree of A. NARAYANAN NAMBIYAR, the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 22 of 1916.

The facts are stated in the judgment.

A. Krishnaswami Ayyar and *T. Ranga Achariyar* for appellant.

T. R. Venkatarama Sastri for first respondent.

(1) (1901) I.L.R., 35 Bom., 333. (2) (1891) I.L.R., 23 Bom., 15.

* Appeal No. 272 of 1917.