APPELLATE CIVIL.

Before Mr. Justice Napier and Mr. Justice Krishnan.

1920, October 6.

RAJARAJESWARA SETHUPATHI, *alias* MUTHURAMALINGA SETHUPATHI, RAJAH OF RAMNAD, BY HIS AUTHORIZED AGENT, S. TIRUMALAI IYENGAR (PLAINTIFF), APPELLANT,

v.

RAMANATHASWAMI AT RAMESWARAM BY TRUSTEE V. VENKATASUBBA IYER (DEFENDANT) RESPONDENT.*

Civil Procedure Code (V of 1908), sec. 11—Suit for rent by lessee for a term of a zamindari—Reference to arbitration—Award passed into a decree—Finding of arbitrator, not incorporated in the Judgment—Surrender of lease—Subsequent suit for rent for another year covered by lease instituted by the zamindar—Previous judgment, whether res judicata—Section 11, Civil Procedure Code, whether a rule of jurisdiction or tesoppel.

A decision in a suit for rent, instituted in a Civil Court by the lessee for a term of a zamindari against the tenant, is not res judicata in a subsequent suit for rent, instituted by the zamindar after surrender of the lease by the lessee, even though the rent claimed in the later suit was for a period covered by the original lease.

Surrender by the lessee does not operate as an assignment of the rights of the lessee in favour of the lessor, but determines the tenancy so as to let in the lessor's rights.

SECOND APPEAL against the decree of C. V. VISWANATHA SASTRI, Acting District Judge of Rāmnād, in Appeal Suit No. 141 of 1919, preferred against the decree of S. V. PADMANABHA AYYANGAR, District Munsif of Paramakudi, in Original Suit No. 40 of 1916.

This, and some other connected suits, were instituted by the present Raja of Rāmnad to recover tree-tax, railway cess and road cess, from the defendant who is the trustee of Rameswaram Devastanam in respect of lands held by the Devastanam, included in the plaintiff's Samasthanam. The defendant pleaded that tree-tax could not be recovered for the suit lands, as they were Devadayam lands and as such exempt from such taxes by law and by custom; the defendant also pleaded that the claim was negatived by two sets of previous decisions between the

* Second Appeal No. 1888 of 1919.

parties, and that the present claim was res judicata by reason of the decisions in two suits of 1879 (Original Suits Nos. 288 and 289 of 1879, on the file of the District Munsif's Court of Paramakudi), which were appealed against (Appeals Nos. 243 and 244 of 1880, on the file of District Court of Madura). In a judgment delivered in common in these and other appeals, the District Court held that Devadayam lands were exempt from tree-tax, though the decisions of the District Munsif in the two suits (Original Suits Nos. 288 and 289 of 1879), which had dismissed the zamindar's suit against the Devastanam, were affirmed by the District Court in the appeals therefrom. It was contended by the defendant, however, that the District Court had really meant to allow those appeals and that there was a clerical mistake in giving the numbers of the appeals in those suits.

Another set of decisions relied on by the Devastanam, as constituting res judicata in its favour, were Original Suits Nos. 571 and 572 of 1903, on the file of the Paramakudi District Munsif's Court. Those suits were instituted by the lessees of the Rāmnād zamindari against the Devastanam to recover similar tree tax from the lands in their holding. The whole of the Rāmnād Samasthanam had been leased to two lessees under a deed, dated 20th February 1901, one of whom was also the trustee of the Devastanam; the above suits were referred to arbitration; the arbitrator passed an award holding that the defendant-Devastanam was not liable for tree-tax, and that the matter was also res judicata by reason of the decisions in the abovesaid suits (Original Suits Nos. 288 and 289 of 1879). The Court of the District Munsif accepted the award, overruling the objections raised by the then plaintiff, and passed, in accordance with the award, a decree dismissing the suit. The findings of the arbitrator were not incorporated in the judgment of the District Munsif. The lessees of the zamindari surrendered the lease by a deed, dated 25th October 1911. The present zamindar instituted the present suit and other connected suits on 11th December 1914, for recovery of similar tree-tax as well as road cess and railway cess due for faslis 1322 to 1323. The District Munsif, who tried these suits, held that the plaintiff's claim for tree-tax, etc., was not barred as res judicata by either of the decisions relied on, namely, those in Original Suits Nos. 288 and 289

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of 1879 or in Original Suits Nos. 571 and 572 of 1903, and that the Devastanam was by law and custom bound to pay tree-tax to the Rāmnād zamindar, and he accordingly decreed the sums claimed in the plaint for tree-tax, road cess and railway cess. On appeal by the defendant, the Subordinate Judge held that the claim for tree-tax was barred by res judicata and he accordingly modified the decree by disallowing the plaintiff's claim for tree-tax. The plaintiff preferred this Second Appeal.

The Hon'ble *the Advocate-General* (*K. Srinivasa Aiyangar*) and *S. Sundararaja Ayyangar*, for appellant.

T. Rangachari and *V. N. Venkatavaradhachari* for respondents.

NAPIER, J.

NAPIER, J.—This Second Appeal arises out of a suit by the Zamindar of Rāmnād to recover theerva from the trustee of the Rameswaram temple for trees growing on the land attached to the temple. The written statement alleged first that the topes belonging to the temple were Devadayam land and that the temple is not liable to any theerva in law or by custom; secondly, that the suit was barred by section 11, Civil Procedure Code, by virtue of two decrees, one that of the District Court of Madura on Appeal in Original Suits Nos. 288 and 289 of 1879, the other the decree in Original Suits Nos. 571 and 572 of 1903 in the Court of the District Munsif of Paramakudi. Issues were framed, the third issue being "whether the plaintiff's claim is barred by res judicata?" The District Munsif decided against the defendant in respect of both judgments pleaded as res judicata but the lower Appellate Court has reversed that decision holding that both these decisions operated as res judicata. This question now comes before us for decision.

With regard to the judgment and decree of the District Judge of Madura, the lower Appellate Court is clearly in error. The ground of his decision is to be found in the concluding words of paragraph 7:

"I have no doubt that the learned Judge referred to Original Suits Nos. 288 and 289 and not to Appeal Suits Nos. 288 and 289 when he passed his judgment."

An examination of the judgment clearly shows that this is an error. We are not concerned with what the intention of the

District Judge was but with the judgment and the decree that he passed. He says in paragraph 12:

"I also find that except in Appeal Suits Nos. 288 and 289 no attempt was made to prove any special right to exemption."

In paragraph 13 he says:

"It is right to mention here that only Nos. 87, 97 and 111 were presented in time, and I only consented to admit the other appeals in order, etc."

Paragraph 14:

"The result is that I dismiss Nos. 87, 97 and 111 with costs and the other appeals except Nos. 288 and 289 without costs."

Paragraph 15:

"Nos. 288 and 289 require special notice. I shall reverse the decrees in those cases."

Exhibits II and III are the suit registers in Original Suits Nos. 288 and 289 of 1879, which decrees the lower Appellate Court has found were reversed. The register shows that both of these appeals were confirmed. It is therefore clear beyond doubt that Appeal Suits Nos. 288 and 289 were the appeals, the decrees in which were reversed, and these appeals were by Ramabhadra Nageswara Iyer and Meerakanni Peer Mahomed, who are not shown to have had any connexion whatsoever with the temple.

Mr. T. Rangachari has practically abandoned the appellate Court's view, but he relies on the fact that Ramaswami Iyer, Receiver of the Rameswaram Devastanam, was the defendant in Original Suits Nos. 288 and 289 and seeks to use the general words as to topes of the pagoda as being res judicata. It is of course impossible to found a plea of res judicata against the decree in the suit; and as the appeals of the temple trustee were dismissed, we cannot go behind that decision. This plea of res judicata by virtue of the judgment of the District Judge therefore fails.

[His Lordship next considered the question whether the findings of an arbitrator upon a reference to arbitration in a pending suit, which were accepted by the Court, but were not incorporated in the Court's judgment were res judicata in a subsequent suit, and proceeded:]

In the result I am of opinion that the plea of res judicata by virtue of section 11, Civil Procedure Code, is bad. It might be

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that in the circumstances of the case the award and the judgment might operate as a judgment by consent and estop the parties to the award and judgment, but no such question has been raised in this case or urged before us.

The next question is whether, even if the judgment could operate as res judicata, the plaintiff here would be bound by the judgment and decree in the arbitration. The plaintiff in that suit was a lessee for 20 years; and it is not contended before us that the decision in that case binds the plaintiff as lessor. What is contended is that as this suit seeks to recover theerva for the years which were covered by the original lease to the lessee in the former suit, the lessor is bound by the decision, he being in the possession of the estate by virtue of a surrender from the lessee. This point was not raised before or considered by the lower Appellate Court. Mr. T. Rangachari contends that the right established by that decision to freedom from theerva enures for the whole term of the lease, although the lease has been surrendered; and he claims that he is entitled to it by analogy with the estoppel provided for in section 41 of the Transfer of Property Act. He was doubtful whether he could put this claim as high as one arising under the words of section 11 which are:

"or between the parties under whom they or any of them claim litigating under the same title."

In my opinion his contention clearly cannot be supported, for the plaintiff is not litigating under the same title, in that he claims as owner, whereas the plaintiff in the previous suit claimed as a lessee under him.

Mr. T. Rangachari suggests however that a surrenderee is in the same position as an assignee; and he relies on the language of the Calcutta High Court in *Raghunath Singh* v. *Mr. William Cox*(1). The question there was as to the effect of surrender by a ryot on the rights of a mortgagee. The Court quoted with approval the language of CHANNELL, J., in *Walter* v. *Yalden*(2). In that case, it was decided that where a trespasser had acquired against a lessee a title under the Statute of Limitations the lessee could not surrender the lease and let in

(1) (1914) 19 C.W.N., 268. (2) [1902] 2 K.B., 304.

the landlord until the expiration of the term for which the lease was granted. The actual decision does not assist him, because, in the English law as well as by the Limitation Act, title is acquired by adverse possession, and such title is for all purposes as good as a conveyance. But he relies on the words used by CHANNELL, J.,:

"The law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment."

I do not think that these words used by the learned Judge are to be construed strictly as laying down that a lessor acquires the title of the lessee by surrender. Another case relied on by the learned Vakil was *Seshappaya* v. *Venkataramana Upadya*(1). That decided that a mulgeni tenant will not be bound by a decision against his lessor, as his interest is not subordinate to that of the lessor, the tenure being a permanent heritable tenure not created subsequent to the decision against his landlord. I do not see how this case helps the defendant.

Mr. T. Rangachari also relies on the language of the Bench in *Suppa Bhattar* v. *Suppu Sokkaya Bhattar*(2), where the learned Judges speak of "a decree of a Court of competent jurisdiction forming a link in the chain of a party's title." I do not think that this case is of any assistance, for the word "title" used in that case has no possible reference to a decision on the mutual rights of the lessor and lessee under the terms of their contract. Mr. T. Rangachari relied on a phrase used in Foa's Landlord and Tenant on page 624, "Title by surrender," but I cannot treat this language as any authority on the point. In Woodfall's Landlord and Tenant surrender is treated as one of the modes of the termination of the tenancy, and the same principle is applied in section 111 of the Transfer of Property Act. Sub-section (*e*) of that section provides that a lease of immoveable property determines by express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor by mutual agreement between them; and section 115 provides for the effect of surrender on under-leases, but there are no further statutory provisions. The

(1) (1910) I.L.R., 33 Mad., 459. (2) (1915) 29 M.L.J., 558.

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fundamental error in the contention of the learned Vakil is the assumption that res judicata operates on all substantive rights. The result of a decision between parties is at the highest to raise an estoppel between the parties bound by the previous judgment. It in no way affects title nor can it operate in the same manner as a covenant.

It was finally argued that the defendant by the surrender has been deprived of the benefit of the decision. That may be so, but the question of rights between lessor and lessee is not concluded by the failure of the plea of res judicata, and further if an under-lessee desires to bind the ultimate landlord by a decision between himself and his lessor it is perfectly open to him to ask the Court to make the landlord a party, in which case the landlord will be bound by the judgment entirely apart from any question of surrender. I am, therefore, clear that neither under section 11, Civil Procedure Code, as pleaded, nor under the general principle applicable to awards of arbitrators operating as estoppel by consent does this award or judgment bind the plaintiff in the present suit.

In the result the judgment of the lower Appellate Court must be set aside except as to road-cess and railway-cess and interest thereon, and the case remanded to be disposed of on the other issues framed in the suit.

KRISHNAN J. KRISHNAN, J.—The only question arising in this case is one of res judicata. My learned brother has set out the circumstances in which it arises and I need not repeat them. The issue alleged to be res judicata is whether the plaintiff the Raja of Rāmnād is entitled to levy a tax on trees standing on the defendant's Devastanam lands in the Pamban village in Rameswaram or not. It is contended by the defendant that the Raja's claim to such tax is barred (1) by the decision in Original Suits Nos. 288 and 289 of 1879 and (2) by the decision in Original Suits Nos. 571 and 572 of 1903, all on the file of the District Munsif of Paramakudi.

As regards the suits of 1879 the judgment of the Munsif is not filed, but reliance is placed upon Exhibit IV, the judgment of the District Judge on appeal from a batch of cases including Original Suits Nos. 288 and 289. It no doubt appears from

Exhibit IV that the District Judge found(1) that the Raja had the right to levy a tax on trees on the Pamban island generally, but (2) that he had no right to do so as regards trees in Devadayam lands or in topes of the pagoda in this island, as they were exempt from such tax. It is the second finding that the defendant wishes to take advantage of in the present case.

Now it is only in Original Suits Nos. 288 and 289 and in Appeal Suits Nos. 243 and 244 therefrom that the Devastanam was a party and not in any of the other cases. The other cases, including Appeal Suits Nos. 288 and 289, were all between the Raja and third parties. On the face of Exhibit IV the second finding was given effect to only in Appeal Suits Nos. 288 and 289, all the other appeals being dismissed on the first finding, and the decrees of the Munsif in them, giving the Raja the tree-tax claimed, being confirmed. On these facts, it is clear that the defendant's plea of res judicata must fail under section 11, Civil Procedure Code, as the finding relied on is not proved to have been arrived at in a matter in issue in a suit between the Raja and the Devastanam. This is so even if we accept Mr. T. Rangachari's argument that because a common judgment was delivered by the District Judge in all the appeals both the findings should be taken to have been embodied in all of them, including Appeal Suits Nos. 243 and 244, for the decrees in them were for payment of tree-tax in spite of the second finding and such an incidental finding unnecessary for the decree cannot be held to make the matter res judicata against the successful plaintiff.

To get over this difficulty it was suggested for the Devastanam that when the District Judge reversed the decrees in Appeal Suits Nos. 288 and 289 he really meant to reverse the decrees in Original Suits Nos. 288 and 289 and to dismiss those suits, and that there is a clerical mistake in his judgment and that we should take it that the second finding was really arrived at and given effect to in those suits, and not in the appeals of the same number. This is a very plausible suggestion and it was accepted by the learned Sub-Judge, but I am unable to accept it.

The grounds relied on in support of it are (1) the sameness of the Original Suits Nos. 288 and 289 and of Appeal Suits Nos. 288 and 289 and the consequent ease with which one may

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have been mistaken for the other, (2) the improbability of any one but the Devastanam being concerned with pagoda topes, and (3) the opinion of the arbitrator Mr. Madhu Ayyar in his award in 1903 that such a mistake was made. The arbitrator's opinion is clearly not evidence at all. The other two considerations are after all mere speculations. On the other hand the extracts from the appeal register filed in appeal Exhibits II and III are independent evidence which show clearly that the Munsif's decrees in Original Suits Nos. 288 and 289 were in fact both confirmed on appeal and that there is no mistake on the point in the judgment Exhibit IV. I therefore agree with my learned brother that the plea of res judicata based on Exhibit IV is not established.

[His Lordship next considered the question whether the findings of an arbitrator not incorporated in the judgment of the Court were res judicata and came to the conclusion that they were.]

The question, however, remains whether that finding binds the present plaintiff, the Raja. The plaintiffs in Original Suits Nos. 571 and 572 of 1903 were the lessees of the Raja, and not the Raja himself, and it is not contended by Mr. T. Ranga Achariyar that a finding against lessees will be binding on the lessor even if the lessees had put forward in the trial the lessor's title and bona fide endeavoured to support it. In fact a lessor as such cannot be held to be a person claiming under the lessees within the meaning of section 11, Civil Procedure Code. But, Mr. T. Rangachari argues that we have here a special case inasmuch as the Raja got his right to sue for the plaint rent by reason of the surrender of their term by the lessees and though he did not derive his title from them, he contends that the Raja should be treated in his capacity of surrenderee as an assignee of the lessees and as such a person claiming under them. This is a difficult question which seems to be *res integra* and which has therefore to be decided on general principles. After careful consideration I think with my learned brother that the contention is untenable. The effect of a surrender of his lease by the lessee is to determine the tenancy and to let in the landlord's rights. This is so stated in section 111 of the Transfer of Property Act, and as regards English Law

in Woodfall's "Landlord and Tenant." In a surrender there is no transfer of rights from one to the other but only an extinguishment of the lessee's rights. The under-lessees will no doubt not be prejudiced by their lessor's surrender as laid down in section 115, Transfer of Property Act, but that is because to the extent to which the lessee has parted with his rights in the property to his under-lessees his surrender could not take effect. It is this, I think, that is meant by the observation of CHANNELL, J., in *Walter* v. *Yalden*(1), when his Lordship observed that

"the law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment."

This observation was made with reference to a title created by prescription against the lessee, and cannot be extended to apply to a case of res judicata against him, which in my opinion creates no title nor interest in property. We cannot hold that the rule of res judicata creates any right or interest in the property though it may indirectly affect the rights of persons against whom it is effective. The rule is a rule of personal estoppel and does not attach itself to property. A lessee may defeat by surrender the advantage of res judicata which another has against him; there is nothing to prevent him from doing so, so far as I can see. If the third party had wanted to bind the landlord by the decision he should have taken care to have had him also made a party to the suit. I therefore agree that no estoppel arises from the decision in Original Suit Nos. 571 and 572 of 1903 against the Raja.

Before concluding, I should like to observe that I do not share my learned brother's views on the nature and scope of section 11, Civil Procedure Code. I do not think that the section deals with any question of jurisdiction, as it does not affect the cognisability of suits but only their trial or the trial of issues in them. Though worded as if the Court is prevented from doing certain things we must gather the nature of this rule from the section as a whole, when it will be clear that it is in reality a rule of personal estoppel, of the nature of an estoppel by record in English law. Though the question is not

(1) [1902] 2 K.B., 304.

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important here it may become important, for example, in a case under section 115, Civil Procedure Code, and I wish to guard myself against being misunderstood.

The plea of res judicata failing in toto, I agree to the order proposed by my learned brother.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1920, October 14.

THE OFFICIAL RECEIVER, TINNEVELLY (PETITIONER), APPELLANT,

v.

SANKARALINGA MUDALIAR AND THREE OTHERS (RESPONDENTS), RESPONDENTS.*

Provincial Insolvency Act (III *of* 1907), *ss.* 3, 16, 18, 36 *and* 37—*Order of adjudication—Appointment of Receiver by District Court—Sale in execution of money decree held by District Munsif's Court, subsequent to appointment of Receiver—Application by Receiver to the District Court for cancellation of sale and for delivery of possession—Application, whether competent—Jurisdiction of District Court.*

Where after the appointment of a Receiver for the estate of an insolvent had been made by a District Court, some of the properties of the insolvent were sold in auction by a District Munsif's Court in execution of a decree for money passed by the latter Court prior to the order of adjudication.

Held, it was competent to the Receiver to make an application to the District Court for annulment of the sale and for delivery of possession of the properties from the purchaser, under section 18, clause 3 of the Provincial Insolvency Act (III of 1907).

APPEAL against the order of E. PAKENHAM WALSH, Acting District Judge of Tinnevelly, in I.A. No. 461 of 1918 and Civil Miscellaneous Petition No. 566 of 1918 in I.P. No. 5 of 1917.

* Civil Miscellaneous Appeal No. 127 of 1919.