case of a purchaser who has not the credit alluded to in rule 86 (1), but we need not consider that matter further. The appeal succeeds and is allowed with costs in all Courts.

Solicitor for respondent: *The Government Solicitor.*

A.S.V.

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## APPELLATE CIVIL.

*Before Mr. Justice Krishnan Pandalai and Mr. Justice Curgenven.*

BHAGAVATULA KRISHNA RAO (PLAINTIFF), APPELLANT,

*v.*

MUNGARA SANYASI AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

1931, November 12.

*Landlord and tenant—Decree for possession obtained by third party against both landlord and tenant—Effect of—No termination of tenancy or destruction of landlord's title merely by reason of—Execution of decree allowed by third party to become barred—Subsequent suit by landlord against tenant for possession—Maintainability of—Eviction of tenant by title paramount—What amounts to—Unexecuted decree for possession obtained by third party if amounts to.*

A suit by a lessor for the recovery of a portion of a house alleged to have been let by him to the defendant was dismissed by the Courts below on the preliminary ground that it was not maintainable by reason of a decree for possession of the suit house obtained in a prior suit by a third party against both the lessor (plaintiff) and the lessee (defendant). Possession of the suit house was decreed to the third party in the prior suit on the ground that he was the owner thereof, that the possession of the house by the lessor (plaintiff) became adverse to the third party only within twelve years of his suit, and

* Second Appeal No. 146 of 1927.

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that his suit was therefore in time. The third party did not, however, execute the decree in his favour and it had become barred on the date of the lessor's suit.

*Held*, reversing the Courts below, that, in the absence of anything further done or alleged amounting to a new arrangement between the third party and the lessee (defendant) or to an attornment, the decree obtained by the third party had not the effect as between the lessor and the lessee of destroying whatever rights the lessor might have previously had or of automatically putting an end to the tenancy pleaded by the lessor.

The finding as to title in the prior suit is not *res judicata* between the lessor and the lessee who were only co-defendants therein and the unexecuted decree for possession obtained by the third party therein had not the effect of destroying the lessor's title as between him and his tenant.

*Bala* v. *Abai*, (1909) 11 Bom. L.R. 1093, dissented from on this point.

An unexecuted decree for possession obtained by a third party does not operate as an eviction of the tenant by title paramount liberating him from the estoppel against pleading *jus tertii*.

*Devalraju* v. *Mahamed Jaffer Saheb*, (1911) I.L.R. 36 Mad. 53, followed.

*Ram* v. *Pramatha*, (1921) 35 C.L.J. 146, 154, 155, considered.

APPEAL against the decree of the District Court of Vizagapatam in Appeal Suit No. 312 of 1924 preferred against the decree of the Court of the District Munsif of Vizagapatam in Original Suit No. 341 of 1923.

*P. Somasundaram* for appellant.

*V. Govindarajachari* for respondents.

*Cur. adv. vult.*

JUDGMENT.

KRISHNAN PANDALAI J.

KRISHNAN PANDALAI J.—The plaintiff's suit for recovery from the five defendants, of whom two to five are minor sons of the first defendant, of a portion of a house alleged to have been let by plaintiff to the first

defendant in 1909 and for which he alleges that that defendant paid rent to him till 1915 has been dismissed by both the Courts below without taking evidence on these allegations, though they were denied by the defendants, on the preliminary ground that the suit is not maintainable by reason of the decree for possession of the suit house obtained in Original Suit No. 12 of 1915 against the plaintiff and the first defendant by the Putta family who established their title to the house but who allowed that decree to become time-barred. The lower Courts took the view that the passing of that decree had the effect as between the parties to this suit of destroying whatever rights the plaintiff may have previously had and of automatically putting an end to the tenancy pleaded by the plaintiff and that, even if the plaintiff's allegations that he let the defendants into possession as tenants be true, he would not be entitled to recover against them after that decree. The only question for determination is whether that view is correct.

Exhibit 1 is the judgment in Original Suit No. 12 of 1915. Five members of the Putta family were plaintiffs, the fifth defendant was another member who did not join as plaintiff and was therefore impleaded as a defendant. The present plaintiff was the second defendant and his mother, since deceased, was the first defendant. The present first defendant was the fourth defendant. He and the third defendant, another member of his family, were added as sub-tenants of a portion under the first and second defendants to whom the plaintiffs alleged they had let the whole house. The third and the fourth defendants remained *ex parte*. The first and second defendants contested the suit setting up that they were not tenants but owners and also that they were in adverse possession for more than

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twelve years. It was found that the plaintiffs were the owners, that, though the tenancy alleged was not proved, the possession of the first and second defendants which had begun before 1897 was only permissive at the beginning and that, though it may have become hostile later, i.e., in 1904, as more than twelve years had not elapsed thereafter before the suit was brought, the suit was in time. A decree for possession was accordingly passed in favour of the plaintiffs. That decree was never executed and has now become barred.

It is difficult to see how this decree merely as a decree could have any such effect as the lower Courts attribute to it as between the present parties who were co-defendants in that suit. The finding as to title like every other finding in the case was one between the Putta family on one side and these parties both of whom were defendants on the other. As between the present parties the matters decided are certainly not *res judicata* and the respondents' Advocate admits that this is so. In spite of that judgment and decree, it is certainly open to the plaintiff as against these defendants to prove that the findings in it as to title and permissive possession are wrong and, even if they were right, to show that when this suit was brought he had acquired an unquestionable title by possession as owner for about nineteen years. The statement of the District Judge that on the appellant's own pleadings he has no title on which he can sue, for the fact that the decree became barred cannot revive a title once lost, shows that he entirely misapprehended the effect of judgments not *inter partes*. There is no question of reviving the appellant's title because it was never lost as between the present parties. If those facts are proved again in this suit they will only show that so early as 1904 the present plaintiff and his mother had asserted adverse

possession as against the true owner and, as the true owner never executed the decree obtained by him, his remedy to get possession was lost as a natural consequence of which they perfected their title by enjoyment till 1923 when this suit was brought; *Ameeroonissa Begum* v. *Amir Khan*(1), *Singaravelu Mudaliar* v. *Chokkalinga Mudaliar*(2) and *Puthia Valappil Ayissa* v. *Lakshmana Prabhu*(3).

Similarly the idea that by reason of that decree the tenancy granted by the plaintiff to the first defendant became as between themselves automatically extinguished as the Munsif says and ended as the learned District Judge says is also based on the same erroneous idea that that decree did or indeed could affect the legal relations *inter se* between parties who were co-defendants.

According to section 116 of the Indian Evidence Act and the decisions of the Privy Council on it, *Bilas Kunwar* v. *Desraj Ranjit Singh*(4) and *Vertannes and others* v. *Robinson and another*(5), if it is proved that the first defendant was let into possession as tenant of the portion of the house sued for by the plaintiff, he will be estopped from pleading plaintiff's want of title at the time of the lease even after the expiry of the term so long as he has not surrendered possession. It was to meet this difficulty that the defendants put forward the decree in Original Suit No. 12 of 1915 as having the effect of destroying the plaintiff's title and terminating the tenancy between the plaintiff and defendants. That the decree did not destroy plaintiff's title as between these parties has been explained. And mere termination of the tenancy by expiry of the term is no use to

(1) (1872) 17 W.R. 119. (2) (1922) I.L.R. 46 Mad. 525, 534.
(3) (1911) 1 M.W.N. 207. (4) (1915) I.L.R. 37 All. 557 (P.C.).
(5) (1927) I.L.R 5 Rang. 427, 440 (P.C.).

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the defendants for as tenants they will still be bound by the same estoppel until they have surrendered possession. The defendants (respondents) have therefore cast about for other grounds for supporting the decision of the lower Courts. Their learned Advocate attempted first to argue that their plea was that the plaintiff has lost his title not by force of the decree as such but by withdrawal or termination of the licence under which he was holding from the true owner. This is a question of fact which was never pleaded and, in spite of the learned Advocate's strenuous argument, I am of opinion that it is an after-thought. That is not the ground on which the plaintiff has been non-suited and, if it were, evidence should have been taken on it. The Advocate indeed asked us to reserve to him leave, if the case is sent back, to give evidence on the point. We have had the plaint and written statements translated and placed before us by the respondents' Advocate. There is nothing in the written statement to show that the defendants pleaded that plaintiff's rights in the property were terminated or were transferred except by virtue of the decree. Indeed they could not have pleaded termination by the Putta people of their licence or permission of which the only indication is the opinion of the District Munsif in Exhibit I, because, according to that judgment itself, that termination took place in or about 1904, five years prior to the tenancy now sued on. It is therefore plain that no such plea can be allowed to be taken now or hereafter.

The next argument is that the decree in Original Suit No. 12 of 1915 operated as an eviction by title paramount and that the defendant was thereby liberated from the estoppel against pleading *jus tertii*. Here again the pleadings have to be examined to see what the

defendants pleaded. The only plea of any title derived by defendants from the Putta people is contained in paragraph five of the written statement where it is said that the defendant has learnt from his father that the original owners of the suit property, namely, the Putta people, granted the same to him. This is a matter to be established by evidence to be given by the defendant, which has not been done, and therefore it is not available at this stage of the case, whatever its effect may be even if proved. Then it is urged that the defendant has urged in paragraph four that, as the Putta people agreed not to disturb this defendant's father and they were only intent upon ejecting the present plaintiff, this defendant's father did not contest the suit. This was not a plea of any facts amounting to eviction by title paramount, but was only put forward as a reason for those defendants being *ex parte* in the former suit, and this only means that the defendants being tenants in any case took no interest in the dispute about the title. Nowhere is it stated that the defendants became the tenants of Putta people or attorned to them or paid rent to them. Thus there is no other plea of eviction by title paramount unless the decree itself has that legal effect. The question is whether it has.

The lower Courts relied on *Bala* v. *Abai*(1) and *Ram* v. *Pramatha*(2). The former case somewhat resembles the present one on the facts with the material difference that the tenant had, after the decree for possession against himself and his lessor by a third party (Babajee), accepted a sale-deed from that third party's heirs. Though this sale-deed was held to be collusive and does not appear to have been the ground for

(1) (1909) 11 Bom. L.R. 1093. (2) (1921) 35 C.L.J. 146.

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holding that the tenants had been evicted by title paramount, that fact is sufficient to support the decision though not on the grounds stated. The learned Chief Justice at page 1098 and BATCHELOR J. at page 1101 observe that the estoppel against the tenant under section 116 expired on the expiry of the term. This cannot be supported in view of the Privy Council decisions that it continues till possession is surrendered. He also took the view that the decree obtained by Babaji, which, as in this case, was not executed, had the effect of destroying the plaintiff's (lessor's) title as between him and his tenant. In my opinion this view is too widely stated to be correct as between co-defendants to a decree obtained by a third party. Though the case was itself rightly decided on the facts, it is not an authority for the respondents' proposition as to the effect of a decree for possession as an eviction by title paramount, and the general observations are too widely expressed to be literally accepted. In the case of *Ram* v. *Pramatha*(1) also the tenant had attorned to the true owner and in such a case it has been held that to constitute eviction by title paramount dispossession need not be by the tenant actually giving up possession to the third party but may be by attornment to him. In the passage at pages 154 and 155 which deals with what amounts to an eviction by title paramount RICHARDSON J., after referring to the absence of Indian decisions, first refers to early English decisions which establish the proposition that it is enough if the tenant on threat of eviction by the heir is obliged to attorn to him and that amounts to an entry by him. He then refers to other decisions that the bringing of an action of ejectment is equivalent to an entry. This sentence is relied on by

(1) (1921) 35 C.L.J. 146.

the respondents. In view of the decisions of our own Court to be presently mentioned, I am reluctant to extend to decrees for possession made under the Indian practice and procedure the effect attributed in this respect to actions for ejectment according to the English practice. Those who are curious to follow the development of the old English doctrine of livery of seisin which required "entry" and how gradually the requirement of livery of seisin and entry was dispensed with will find the matter dealt with by Sir F. Pollock in Pollock and Wright on Possession, pages 47 to 57. The learned writer deals at pages 84 and 85 with the acts necessary to work change of possession or disseisin according to earlier authorities and points out:

"The action of ejectment in its modern form tried the right to possession by means of the fiction that the nominal plaintiff, having entered under a lease made by the real plaintiff, was ousted by a mere stranger; and the real defendant was brought in by a rule of Court upon the terms that he should 'confess lease, entry and ouster and insist upon his title only.' And when this form of action, from its greater convenience, became the general and accepted method of trying the title to the freehold as well as to chattel interests, disseisin or ouster ceased to be a principal fact."

Having regard to these historical reasons which probably explain the effect of an action of ejectment as implying by fiction an ouster, it is not safe to apply it without qualification and regard to the reason of the thing to Indian Law. The decisions of our own Court bearing on the question require something more than the obtaining of a decree by a third party to enable the tenant to plead that he has been evicted by a title paramount to his lessors. In *Devalraju* v. *Mahamed Jaffer Saheb*(1) A, a dharmakarta who had leased temple property, was at the suit of B

(1) (1911) I.L.R. 36 Mad. 53.

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held not to be and B was held to be the rightful office-holder. (The District Judge in this case makes a mistake when he says that the tenant was not a party to the suit. He was a defendant but remained *ex parte*—see page 56). In a subsequent suit brought by A (in which B was also added) to recover for himself the rent due for the period of the lease for which rent A had accounted to B in the previous suit, the tenant pleaded that A had no title to recover, he having been found not to be the rightful dharmakarta. It was held that, as the tenant had not surrendered the land to A, or been evicted by B, or attorned to him or even notified A that he intends to hold under B, he continued to be under the estoppel laid down by section 116 of the Evidence Act. SPENCER J., after citing text-books on the point, said that an unexecuted decree for possession would not amount to eviction. In *Alaga Pillai* v. *Ramaswami Thevan*(1), where a tenant being served by Government with a notice under section 7 of the Madras Land Encroachment Act had accepted a patta from Government and thereafter held under Government, it was held that the notice and acceptance of patta amounted in those circumstances to eviction and that actual dispossession was not necessary. That case emphasises the requisites of constructive eviction and is of no use to the respondents. See also *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib*(2).

In my opinion the decree in Original Suit No. 12 of 1915, in the absence of anything further done or alleged amounting to a new arrangement between the Putta people and the defendant or to an attornment, has not the effect attributed to it, and the dismissal of the suit on that ground, assuming that was the ground, was

(1)(1925) 49 M.L.J. 742. (2) (1914) 28 M.L.J. 44.

wrong. The decree of the lower Courts is reversed and the suit remanded to the District Munsif for trial on the merits of the other issues recorded. The respondents must pay the costs of the appellant in this and in the lower appellate Court. The costs hitherto incurred in the Munsif's Court will be provided for in the revised decree. The appellant will have refund of the fee paid on the memorandum of appeal.

CURGENVEN J.—I agree.

A.S.V.

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## APPELLATE CRIMINAL—FULL BENCH.

*Before Mr. Justice Wallace, Mr. Justice Waller and Mr. Justice Krishnan Pandalai.*

THE REGISTRAR, HIGH COURT, MADRAS, PETITIONER,

*v.*

KODANGI *alias* ARUNACHALAM SERVAI, RESPONDENT.*

1930, October 20.

*Code of Criminal Procedure (Act V of 1898), ss. 476 and 195 (1) (b)—Meaning of the words "in relation to the proceeding"—Complaint to police against accused and others not charged—Court has no jurisdiction to take action under sec. 476 against complainant, under sec. 211, Indian Penal Code, in respect of persons not charged.*

When a charge is made by a complainant to the police against more than one individual, and the police, while charging before the Court one or more of such individuals with the offence complained of, do not charge them all, the Court has no jurisdiction to take action, under section 476 of the Code of Criminal Procedure, against the complainant, under section 211, Indian Penal Code, in respect of those not so charged.

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* Criminal Miscellaneous Petition No. 693 of 1930.