LETTERS PATENT APPEAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Dunkley

P. B. BOSE

v.

M.R.N. CHETTYAR FIRM AND ANOTHER.*

1938

Jan. 14.

Conversion—Negligence - Negligence per se not actionable—Stranger's claim for damages—Landlord and tenant of agricultural land—Claim of lien on crops for rent—Sale of crops by Court receiver—Landlord's suit for conversion—Joinder of defendants in one suit for breach of contract and tort—Appellate Court's decree—Effect on person not a party to the appeal—Civil Procedure Code, O. 1, r. 3, O. 41, rr. 20, 33.

Apart from special contract, a landlord of agricultural land has no charge or lien of any kind on the crop grown by his tenant for the payment of his rent. The landlord is not the owner of the produce of the land, nor in possession of the produce or entitled to immediate possession of it, and cannot maintain a suit for conversion of the crop. A suit by the landlord does not lie against the receiver of the crop appointed by a Court who has sold it, whether negligently or otherwise, or against the person at whose instance the receiver was appointed.

The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care, and where failure in that duty has caused damage.

Grant v. *Australian Knitting Mills, Ltd.*, (1936) A.C. 85; *M'Alister* v. *Stevenson*, (1932) A.C. 562, referred to.

O. 1, r. 3 of the Civil Procedure Code permits the joinder of two defendants in one suit, the claim against one being under a contract and against the other in tort under the conditions therein specified.

Grant v. *Australian Knitting Mills, Ltd.*, (1936) A.C. 85, referred to.

Rule 33 of Order 41 of the Civil Procedure Code must be read together with rule 20 of the same Order, and so a decree cannot be made by an appellate Court affecting a person who is not before the Court.

V.P.R.V. Chetty v. *Seethai Acha*, I.L.R. 6 Ran. 29 (P.C.), referred to.

Per ROBERTS, C.J.—A stranger who has no right to sue for conversion cannot maintain an action for damages for negligence because the damage from a wrongful conversion results in the owner in possession being unable to fulfil his contractual obligations.

Third parties cannot sue for negligence upon the same facts as those on which an undisputed owner in actual possession can maintain an action for trover; since it would be said that whenever the seizure was wrongful there was a want of care in making it.

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* Letters Patent Appeal No. 1 of 1937 arising out of Civil Second Appeal No. 84 of 1936 of this Court.

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P. K. Basu for the appellant. The 1st respondent has no right to sue the appellant and the receiver in tort. The crops did not belong to the 1st respondent, and simply because he expected his tenant to pay him the rent out of the crops, he cannot sue the appellant or the receiver for conversion. The landlord had no claim, charge or interest over or in the property disposed of. If negligence is alleged, no duty by the appellant towards the 1st respondent has been established. The 1st respondent in suing his tenant for rent had no right to join the appellant and the receiver in the suit basing his claim against the latter on tort.

Rule 33 of O. 41 of the Civil Procedure Code must be read with rule 20 of the Order. An appellate Court cannot dismiss a suit decreed against a person who is not a party before it. *V.P.R.V. Chokalingam Chetty* v. *Seethai Achi* (1).

Chari for the 1st respondent. In his mortgage suit against the tenant the appellant included a piece of land which did not belong to the tenant but belonged to the landlord, the 1st respondent. He got the receiver to take and sell the paddy from this land. By this act of negligence he prevented the tenant from paying the rent to the landlord. The appellant owed a duty to see that the landlord was not deprived of his rent. The appellant knew that the rent due to the landlord would be paid out of the paddy and he had no right to dispose it of.

There is a clause in the tenancy agreement to the effect that the tenant was not to sell or mortgage the paddy before first paying, out of the produce, the rent due to the landlord. The appellant could only deal with the paddy subject to the rights of the landlord over it for his rent.

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(1) I.L.R. 6 Ran. 29.

A.R.M.A.L.A. Chettyar Firm v. *Pillay* (1); *S.M.R.M. Firm* v. *P.L.A.R.M. Firm* (2); *O.P. Naidu* v. *N.K. Chettyar Firm* (3).

P. K. Basu in reply. The 1st appellant had no notice of the alleged agreement.

DUNKLEY, J.—This is a special appeal, under clause 13 of the Letters Patent of this High Court, on a certificate granted by Baguley J., in Second Appeal No. 84 of 1936. All parties are agreed that on this certificate the whole appeal is open to our consideration and in deciding the questions of law involved we are in the same position as was the learned Judge who heard the second appeal. I mention this point because it is of importance owing to the changes in the positions of the parties during the course of the various proceedings.

One Po Tun, purporting to be the owner thereof, mortgaged by simple mortgage 154 acres of agricultural land to one P. B. Bose. After the execution of the mortgage deed, in litigation between Po Tun and the M.R.N. Chettyar Firm it was decided that the M.R.N. firm was the real owner of 38 acres, out of the 154 acres mortgaged by Po Tun to Bose, and was entitled to possession thereof. This fact was brought to the knowledge of Bose, who ceased thereupon to have any interest as mortgagee in these 38 acres. A portion of the area mortgaged to Bose was cultivated by Po Tun himself and the remainder was leased by Po Tun to tenants. Po Tun remained in occupation of the 38 acres, to which the M.R.N. firm had established its title, as the tenant of that firm.

Bose subsequently brought a suit on his mortgage (Civil Regular No. 15 of 1934 of the Assistant District

(1) L.P. Ap. No. 8 of 1933, H.C. Ran. (2) L.P. Ap. No. 7 of 1935, H.C. Ran. (3) A.I.R. (1936) Ran. 488.

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Court of Pyapôn) and at the same time applied for the appointment of a receiver to collect the produce and rental paddy of the mortgaged lands (Civil Miscellaneous Case No. 17 of 1934 of the Assistant District Court of Pyapôn). Bose, by a careless error, brought his mortgage suit in respect of the whole area of 154 acres, and his application for the appointment of a receiver was made in respect of the crops and rents of the whole area, the 38 acres being treated in the application as land which Po Tun was himself working as owner. The application for appointment of receiver was granted and U Ba Shwe, Bailiff of the Township Court of Kyaiklat, was appointed receiver. He, in accordance with his order of appointment, proceeded to collect the whole crop grown on the 38 acres owned by the M.R.N. firm. The agent of the firm protested to the receiver, who referred him to the Court, and the agent then approached Bose, who at once made an application to the Court to release the crops grown on these 38 acres from the custody of the receiver, and an order was made accordingly. But when the order was communicated to the receiver he had already sold the whole of the crop and had, according to his own allegation, paid away the whole of the proceeds of the sale in meeting the expenses of collecting the crop.

The M.R.N. firm then brought a suit for the recovery of the rent of these 38 acres in Civil Regular No. 161 of 1935 of the Township Court of Pyapôn. Three defendants were impleaded in this suit, Po Tun on his contract to pay the rent and P. B. Bose and the receiver in tort. The cause of action against Bose and the receiver is set out in paragraph 6 of the plaint as follows :

"That the plaintiff submits that the 2nd and 3rd defendants had no right to the rents in respect of the aforesaid land and the

realisation and appropriation thereof by them amount to wrongful conversion on their part."

In the Township Court the M.R.N. firm obtained a decree against Po Tun for the amount of the rent due, but the suit against Bose and the receiver was dismissed. Po Tun did not appeal against the decree passed against him, but the M.R.N. firm appealed in regard to the dismissal of the suit against Bose and the receiver, and Po Tun was joined as a respondent in this appeal (Civil Appeal No. 44 of 1935 of the Assistant District Court of Pyapôn). The learned Assistant District Judge allowed the appeal on the ground that

"it is now settled law that a landlord has a sort of charge on the rental paddy and he can follow it in the hands of a third party who takes it with notice of the charge",

and he decreed the suit against Bose and the receiver. They, in their turn, then brought Second Appeal No. 84 of 1936 of this High Court against the judgment and decree of the Assistant District Court, and joined the M.R.N. firm as the only respondent; Po Tun was not a party to this second appeal.

Baguley J. in his judgment in the second appeal, with respect, rightly pointed out that, apart from a special contract, a landlord of agricultural land has no charge or lien of any kind on the crop grown by his tenant for the payment of his rent. The produce of the land belongs to the tenant, who is in occupation of the land and by his labour and skill grows the crop, and, unless there is an agreement to the contrary between the landlord and the tenant, the landlord has no right to require that his rent shall be paid before the tenant disposes of the produce.

The learned Judge then proceeded to examine the liability of Bose and the receiver in tort, and came to the conclusion that both were liable in tort to the

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M.R.N. firm, and confirmed the decree of the Assistant District Court against them, although on other grounds. Against this judgment P. B. Bose obtained a certificate for further appeal, and joined the M.R.N. firm and the receiver as respondents, and this is the appeal which is now before us for decision.

In the second appeal the learned Judge did not specifically state the grounds on which he held that the M.R.N. firm had a right of action against the receiver, but, if I understand his judgment correctly, he held that the receiver was liable for conversion. Certainly the receiver was not guilty of any negligence and therefore, if there is any right of action against him, it must be for conversion. The suit against the receiver must, in consequence, be dismissed on the very simple ground that the plaintiff, the M.R.N. firm, was not the owner of the produce of the land, nor was the firm ever in possession of the produce or entitled to the immediate possession of it, and therefore the firm could not maintain an action of conversion in respect of the produce.

If the pleadings were construed strictly, the above ground would be sufficient to dispose of the claim against P. B. Bose also because the plaintiff, as I have set out, specifically charged Bose with being guilty of conversion, and the plaintiff is not entitled to succeed on a cause of action based on negligence, which is an entirely different cause of action to that which he set up in his plaint. But the learned Judge in second appeal construed the pleadings with the utmost liberality and examined the liability of Bose on the ground of negligence and held that he was liable on this ground. It therefore behoves us to consider whether the M.R.N. firm could maintain an action in negligence against P. B. Bose. That Bose showed want of care in making his incorrect application for the appointment of a receiver, and that it was owing to this want of care that

the crop grown on the M.R.N. firm's land was sold, and in consequence the M.R.N. firm has been in fact unable to recover the rent from Po Tun, cannot be gainsaid; but negligence *per se* is not actionable. In the recent case of *Grant* v. *Australian Knitting Mills, Limited and others* (1) their Lordships of the Privy Council stated the law as follows:

"The mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists."

In *M'Alister (or Donoghue)* v. *Stevenson* (2), a decision of the House of Lords which was discussed and adopted by the Privy Council in *Grant* v. *Australian Knitting Mills, Limited* (1) Lord Macmillan said in the course of his speech:

"The law takes no congizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. * * * * The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty."

In order, therefore, that the M.R.N. firm may succeed on the ground of negligence against Bose, it must be established that in the circumstances of this case Bose owed a duty to the firm to take reasonable care. The legal conception of the word "duty" has, no doubt, been widely extended by recent decisions. The most authoritative exposition of the present law is

(1) (1936) A.C. 85, 103. (2) (1932) A.C. 562, 618, 619.

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to be found in the speeches delivered in *M'Alister (or Donoghue)* v. *Stevenson* (1). Lord Atkin in the course of his speech said (at p. 580) :

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Lord Macmillan said (at p. 619) :

"What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other."

What are the facts of this case upon which it is said that Bose owed a duty to the M.R.N. firm? There was an agreement of tenancy between Po Tun and the firm; it is an incomprehensible document, but it might be construed as containing an undertaking by Po Tun not to dispose of any part of the crop until the rent had been paid. If Bose had had notice of this agreement it might be (although it must not be understood that I express any opinion on this point) that he would be under a duty to see that the rent was paid before at his instance a receiver took possession of the crop; but it is common ground that Bose did not have notice of this agreement. The only ground on which an attempt has been made to base the existence of such

(1) (1932) A.C. 562.

a duty is the assertion of the existence of a vague custom, of which there is no evidence, that landlords of agricultural land in Burma generally expect to be paid their rent out of the produce of the land. Adopting the language of Lord Atkin, does the existence of this general expectation on the part of landlords, if it does exist, cause the M.R.N. firm to be so closely and directly affected by the act of Bose in applying for the appointment of a receiver that Bose ought reasonably to have had the firm in contemplation as being so affected when he was directing his mind to the making of his application? The answer to this question must clearly be in the negative; otherwise the result would plainly be that every purchaser from a tenant of the latter's crop would be liable to an action in negligence if, before making his purchase, he did not first satisfy himself that the tenant had paid his rent, a proposition which on the face of it is absurd. The conclusion therefore is that in the circumstances of this case Bose owed no duty to the M.R.N. firm, and therefore the M.R.N. firm could not maintain an action in negligence against Bose.

We have had cited to us certain unreported decisions of this Court regarding the rights of a judgment-creditor who attaches the crop of his judgment-debtor, who is a tenant of the land which he cultivates, but these decisions have no bearing on the present case. They proceeded on the ground that the judgment-creditor could attach only the right, title and interest of the judgment-debtor in the crop, and in this sense the judgment-creditor "steps into the shoes" of the judgment-debtor and is bound by the contracts entered into by the judgment-debtor in regard to the crop. An application for the appointment of a receiver is on an entirely different footing, for the receiver holds the property subject to the orders of the Court and

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not for the benefit of any particular party ; *Ma Joo Tean and another* v. *The Collector of Rangoon* (1).

It has been brought to our notice that the learned Judge, purporting to act under Order 41, rule 33, of the Code of Civil Procedure, has in his judgment made an order affecting a person who was not a party to the second appeal, in that he has dismissed the suit as against Po Tun who, as I have said, did not appeal in respect of the decree which was passed against him. The learned Judge appears to have thought that there was a misjoinder of defendants in the original suit, and that a decree based on a breach of contract against one defendant and a decree for damages in tort against another defendant cannot be made in the same suit. With the greatest respect, this is a misconception of the law. There was no misjoinder of defendants in this case ; the provisions of Order 1, rule 3, of the Code of Civil Procedure cover the joinder of the three defendants in the suit in the Township Court. There is no reason why a decree for damages for breach of contract against one defendant and a decree for damages in tort against another defendant should not be passed in the same action ; in *Grant* v. *Australian Knitting Mills, Limited* (2) the Privy Council made a decree against the retailer of the underwear for breach of contract and against the manufacturer of the underwear in tort. Our difficulty, however, is that Po Tun is not a party to the appeal before us ; but it is, we think, necessary that we should point out that in *V.P.R.V. Chokalingam Chetty* v. *Seethai Acha and others* (3) their Lordships of the Privy Council laid down that rule 33 of Order 41 of the Code of Civil Procedure must be read together with rule 20 of the same Order, and that a decree cannot be made

(1) (1934) I L.R. 12 Ran. 437. (2) (1936) A.C. 85, 103.
(3) (1927) I.L.R. 6 Ran. 29.

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by an appellate Court affecting a person who is not before the Court. The order dismissing the suit against Po Tun was made without jurisdiction, and we must therefore point out that it is of no effect and cannot be acted on ; that is, the decree of the original Court against Po Tun stands.

As regards P. B. Bose and the receiver U Ba Shwe this appeal is allowed, the judgments and decrees of the Assistant District Court, Pyapôn, on first appeal and of this Court on second appeal are set aside, and the judgment and decree of the Township Court of Pyapôn, dismissing the suit as against them is restored with costs in their favour in all Courts. We assess the advocate's fee in this Court at ten gold mohurs.

ROBERTS, C.J.—I have had the advantage of reading the judgment of my brother Dunkley in this case. It sets out the facts in detail and reaches conclusions with which I entirely agree. It is therefore necessary to say only a very few words.

The respondents the M.R.N. Chettyar Firm were the landlords of Po Tun, but they had no lien or charge upon his crop, as has been pointed out by the learned Judge in second appeal. They had no right to its possession though it is true that in the normal course of events the tenant would be enabled to pay his rent out of his crop. Accordingly a seizure of the crop of which Po Tun was the undisputed owner, and of which he was in actual possession could give no one except Po Tun himself the right to maintain an action for damages for conversion.

Negligence in law is the breach of a duty to take reasonable care ; and want of care is therefore only actionable at the suit of a person who has suffered damage because the defendant has acted in breach of a

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common law duty towards him, or of a statutory duty towards the public at large or a class of the public of which he is a member.

The seizure of Po Tun's crops may have been a conversion actionable at his suit but it is mistaken law to say that a stranger who cannot maintain an action for conversion, can maintain an action for damages for negligence because the damage from a wrongful conversion results in the owner in possession being unable to fulfil his contractual obligations. To hold this, would in effect be to enable third parties to sue for negligence upon the same facts as those on which an undisputed owner in actual possession can maintain an action for trover : since it would be said that whenever the seizure was wrongful there was a want of care in making it. It seems to me that a test to be applied is to examine the nature of the rights of the M.R.N. Chettyar Firm against Po Tun if there had been no seizure by the receiver and Po Tun had kept the paddy and not sold it. The firm might have had an action *ex contractu* for the rent, but not an action of detinue, because they had no right to the possession of the crop, nor was there any contract of bailment. I have examined the contract of tenancy in this case with some care. It is in a printed form but its provisions are far from clear, and it seems a pity that agreements of this kind should not, if they cannot be drawn up under legal advice, at least follow precedents from which the legal position can be ascertained clearly. The contract in this case does not state that any paddy shall be the property of the paddy land owners until the rent is paid, but it contains a covenant by the tenants to deliver good paddy measured in the baskets of the paddy land owners at such place as may please the latter, and a covenant not to alienate or use any paddy till the rent is paid. Under it therefore

the paddy belongs to the tenant and an actionable wrong suffered by Po Tun at the hands of third parties in respect of his paddy is thus no concern of the M.R.N. Chettyar Firm at all.

The learned trial Judge in second appeal thought that Bose should have had the firm in contemplation when he had notice that part of the land had passed to their possession and ownership. It had in fact passed into their ownership but Po Tun was their tenant in occupation and the crops belonged to him. I therefore agree with my learned brother Dunkley that this appeal should be allowed in the terms stated by him in his judgment. And I also agree that the order made in second appeal dismissing the suit against Po Tun was, for the reasons stated by my learned brother, without jurisdiction and is of no effect.

MYA BU, J.—I have had the advantage of reading the judgments of my learned brother, Dunkley J., and of my Lord, the Chief Justice. I concur in their conclusions and have nothing more to add.