ORIGINAL CIVIL.

Before Mr. Justice Farran.

1892.
June 16, 17.

RAGOONA'THDÁS GOPÁLDÁS AND OTHERS, PLAINTIFFS, *v.* MORA'RJI JUTHA AND OTHERS, DEFENDANTS.*

Lessor and lessee—Lease to one partner on behalf of himself and his co-partners—Suit for rent—Co-partners not proper parties—Agency under a conveyance different to that under mere contract—Use and occupation.

When one partner A. takes a lease of premises in his own name, though on behalf of the partnership, and with the assent of his partners B. and C., B. and C. are not liable to be sued by the lessor for the rent reserved by the lease.

A lease is not a mere contract; it is a conveyance, and effects a transfer of property. The lessee can only be the person named in the lease. If that person becomes a lessee on behalf of some one else—as he may do—the law regards him as a trustee for that other person, and does not consider that other person as the lessee, since there is no demise or conveyance to him. The covenant to pay rent may be made on behalf of another person, but, as far as the lessor is concerned, it must be deemed to be only on behalf of the person to whom the demise is made.

Neither are B. and C. liable to be sued by the lessor as for use and occupation of the premises occupied by them. Having demised the property to A., the lessor had no power to suffer or permit any one to occupy the premises during the continuance of the lease, and, therefore, the foundation of a claim for use and occupation was necessarily wanting.

RE-HEARING under sections 38 and 39 of the Presidency Small Cause Courts Act XV of 1882.

This was a suit for rent, or, in the alternative, for use and occupation of three shops in Shaik Memon Street.

The facts and arguments of counsel appear fully from the judgment.

Jardine and *Rivett-Carnac* for the plaintiffs.

Inverarity and *Scott* for the defendants.

FARRAN, J.:—By their plaint in this suit the plaintiffs seek to recover from the three defendants the sum of Rs. 1,871-10-0 for rent of three shops in Shaik Memon Street from 1st *Bhadrapada Sud* 9th, *Samvat* 1946, to *Margsirsha Sud* 8th, *Samvat* 1948, at Rs. 175 per month, giving credit for Rs. 928-6-0 received on account.

* Small Cause Court Suit No. $\frac{7}{776}$ of 1892.

1892.

RAGOONÁTHDÁS GOPÁLDÁS v. MORÁRJI JUTHA.

The suit was originally tried in the Small Cause Court, where the third defendant, Wágji Mulji, appeared and admitted the claim. A decree was passed against him on that admission and against the other two defendants upon the evidence adduced. The decree against the last two defendants has been set aside by the High Court, and as against them the case came before me for retrial. It is a very peculiar one.

The plaintiffs, as the executors of Gopáldás Mádhowdás, are the owners of the three shops in question. The plaintiff Vithaldás says that Wágji Mulji and one Máneckchand Amalak were in 1887 negotiating for a partnership to carry on the business of chemists and druggists, and that Wágji Mulji arranged with him the terms of a lease of the three shops in which it was intended to carry on the business. A lease for three years, in the terms arranged by Wágji Mulji, was granted by the plaintiffs to Máneckchand Amalak at Rs. 135 per month. Soon after this Wágji and Máneckchand entered into the proposed partnership. The defendant Morárji Jutha became their partner. The partnership was carried on in the name of Vassanji Nathu & Co. That firm occupied two of the shops. The third was leased by Máneckchand Amalak to the firm of J. Brothers. From entries which have been put in from the books of Vassanji Nathu & Co., it appears that a rent account was opened in their books in the name of the plaintiffs' estate, and that the rent of the three shops was from time to time paid out of the partnership funds, and debited to that account; and that another account was opened in the name of Moreshwar A'nandráo, and that the rent of the shop leased to J. Brothers, when received from time to time, was credited to that account, and added to the partnership funds. In the plaintiffs' books the rent account was kept in the name of Máneckchand Amalak, and the bills were rendered, and the receipts were given, in that name. During the currency of that lease Máneckchand Amalak withdrew from the partnership, and the defendant Jugjivan Sunderji was admitted as a partner. No change was, however, made in reference to the lease. There is no very clear evidence to show what was the exact arrangement between Máneckchand Amalak and the partnership in reference to the lease, but I think that the fair inference to draw

1892.

RAGOONÁTH-DÁS GOPÁLDAS v. MORÁRJI JUTHA.

is that Máneckchand Amalak was a trustee of it for the partnership, and that the partners were the beneficial owners. It is quite clear that the defendants Morárji and Jugjivan could, in no sense, have been lessees of the three shops from the plaintiffs during this period. They joined the firm after the lease had been granted, and there was no assignment of the lease to them. The plaintiffs, therefore, could not have sued them for rent under the old lease.

In June, 1890, some months before the old lease expired, Wágji Mulji obtained from the landlord the new lease now sued upon, for three years, to begin from the termination of the former lease, at the enhanced rent of Rs. 175 per month. Vithaldás says that Wágji came to him and said: "We want the shop for three years more," and that he, Vithaldás, said: "You will then have to pay Rs. 175 per month." Wágji agreed to this. Vithaldás asked in whose name Wágji was going to take the lease. Wágji said: "In my own name." The lease was then drawn up by Vithaldás, and Wágji Mulji came one or two days after and signed it, saying: "We have all agreed to Rs. 175, and I will sign the lease." Wágji, in his account of what took place given in a suit to which I shall presently refer (he was not examined before me), says that he went to Vithaldás and told him that he wanted to separate himself from his partners, and that Vithaldás should lease to him, and that Vithaldás agreed to do so, but demanded Rs. 175 rent, to which he (Wágji) agreed. It is difficult to place much reliance upon the exact words used at an interview which took place so long ago. I doubt whether Wágji stated so clearly to Vithaldás that he was acting for the partnership as the latter represents. The lease itself in referring to the three shops describes them thus:—"In all three shops, in which I at present sit, having taken the same from you in the name of Máneckchand Amalak," and contains no reference whatever to the partnership, or his partners. This rather points to the conclusion that Wágji represented himself to Vithaldás as the real owner of the lease, and did not bring his partners prominently forward. On the other hand, I cannot believe that Wágji made it clear to Vithaldás that he wanted the lease for himself exclu-

sively, and not for his partners. The plaintiffs in that case could hardly have felt themselves justified in filing this suit.

After the lease came into operation, rent was paid under it only on one occasion, *viz.*, up to 13th October, 1890, out of the partnership funds, in the same way as it had been paid under the old lease. Rs. 303-6-0 were thus paid. After that some further payments were made by Wágji, but they were not entered in the partnership account; nor were the payments made by J. Brothers received by the partnership or entered in their books. Wágji received them.

On the 15th December, 1890, the partnership was dissolved, and Wágji separated from the two other partners. They continued to occupy the two shops, but did not interfere with the third shop which J. Brothers occupied, or collect its rent.

On the 3rd March, 1891, Morárji and Jugjivan filed a suit in the High Court to have the accounts of the partnership taken. They alleged in their plaint that Wágji, without their knowledge, obtained the lease in question in his own name; that, on the dissolution of the partnership, it was agreed that they should continue to occupy the two shops at Rs. 80 per month, until Wágji's debt of Rs. 3,180-13-0 to them should be paid; and that until then they should receive the rent of the third shop, and pay it to the landlords.

On the 12th March, 1891, Wágji brought a suit in the Small Causes Court to eject Morárji and Jugjivan from the two shops, alleging that they were occupying them by his leave and licence, and as his monthly tenants, at Rs. 80 per month. The hearing of this suit was for a long time delayed by an injunction against its continuance obtained by Morárji and Jugjivan in the partnership suit in the High Court. The rent of the three shops falling into arrears, Vithaldás and his co-executor, on the 4th May, 1891, issued a distress warrant against Wágji Mulji alone, and under it seized some goods in the two shops. The defendants Morárji and Jugjivan intervened and claimed the goods. Vithaldás applied to have the proceedings amended by adding their names. They alleged that they were occupying the shops as tenants of Wágji, and not of the plaintiffs. Vithaldás did not give evidence.

1892.

RAGOONÁTH-DÁS GOPÁLDÁS v. MORÁRJI JUTHA.

The amendment was refused, and the claim of Morárji and Jugiivan to the goods distrained was allowed.

It was thus summarily decided that the plaintiffs' claim under the lease was against Wágji alone. The rent account of the new lease in the plaintiffs' books had been kept in Wágji's name, and the receipts for rents were also made out in the same way. When the distress warrant issued by the plaintiffs thus turned out fruitless, they did not file a suit against all the three partners for rent. From the above conduct on their part the inference naturally to be drawn is that they did not consider that they could succeed in such a suit against Morárji and Jugiivan. Vithaldás says that they were considering their position.

The ejectment suit of Wágji against Morárji and Jugiivan came on for hearing in the Small Causes Court on the 9th December, 1891. Wágji's case, then made and sworn to by him, was that, with the assent of his partners, and to the knowledge of the plaintiffs, he had taken the lease in his own name, and on his own account; and that, on the dissolution of the partnership, he had arranged with the defendants Morárji and Jugjivan that they should occupy the two shops for three months, they paying Rs. 80 per month rent during that period. There was some other evidence in support of the three months' arrangement.

Morárji, on the other hand, swore that Wágji consulted him as to the renewal of the lease, and asked him if " we " (the partners) should get it renewed, to which Morárji assented, saying that Wágji might renew it, either in his own name, or that of the partnership. He denied the three months' arrangement, and said that the lease was partnership property.

In the High Court suit this man had, in his plaint, affirmed that the lease had been taken without his knowledge by Wágji. In the distress warrant proceedings he had said that Wágji was liable for the rent of the shops, and that the partnership was liable to Wágji, and not to the plaintiffs. In the ejectment suit, when pressed in cross-examination, he said that he was the plaintiffs' tenant from the time of the new lease, and was liable to them for the whole rent from the 24th August, 1890, and that he would pay Gopáldás when he made a demand.

Jugjivan said that the shops were partnership property, and denied the three months' agreement set up by Wágji. He admitted that he was liable to Gopáldás for rent from the dissolution, but said that he had no claim in respect of the shop occupied by J. Brothers.

The learned Judge, having heard this evidence in the ejectment suit, ordered possession of the premises to be given to Wágji on the 31st December, 1891. This he could only have done on the ground that the lease was a lease to Wágji alone, and not a lease to Wágji and his partners. The applicant Wagji had to show (under section 41 of the Small Causes Court Act) that the defendants were his tenants, or held the shop by his permission. The learned Judge must have disbelieved the defendants' case that the lease was partnership property, and must have considered that Wágji and his partners were not co-tenants of the present plaintiffs.

The plaintiffs then, on the 3rd March, 1892, filed the present suit, making Morárji and Jugjivan defendants, evidently in consequence, and on the strength, of the statements and admissions made by Morárji and Jugjivan in the ejectment suit.

Upon the above facts and conflicting statements it is quite impossible for the Court to come to a positive conclusion as to what were the arrangements of the partners, *inter se*, when the new lease was taken. There are, no doubt, the statements and admission of Morárji that the lease was taken by Wágji for the partnership, under his instructions; and that he is the tenant of the plaintiffs, and liable to them for the rent. But there is also on the record the statement of the same defendant that he was the tenant of Wágji, and not of the plaintiffs. These admissions of Morárji, which support the plaintiffs' case, are not, however, estoppels. They are merely evidence, which the Court has to take into consideration with the other evidence, in order to arrive at the truth. They are not, moreover, statements and admissions made contrary to the interest of the person making them, and so they do not carry with them that important guarantee of their truth. They have been disbelieved by the Judge before whom they were made. I cannot, therefore, on the

1892.

RAGOONÁTH-DÁS GOPÁLDÁS v. MORÁRJI JUTHA.

strength of these statements alone, find the facts in the sense in which the plaintiffs desire me to find them.

Looking at the evidence as a whole, the conclusion which I should feel inclined to draw is that Wágji took the lease in his own name, either without the knowledge of his partners, in order to have them in his power in this respect—the recitals in the lease already referred to, and the statements in Morárji's plaint in the High Court suit favour this view—or that, as stated by Wágji, he took it in his own name, and on his own behalf, with the assent of his partners, in view of a contemplated dissolution of the partnership. It is not, however, necessary for me so to decide; for I have come to the conclusion that, even if Wágji took the lease in his own name on behalf of the partnership, and with the assent of his partners, these partners are not liable to be directly sued by the plaintiffs for the rent reserved by the lease.

In English law books it is laid down that a partner who renews a lease in his own name is a trustee of it for the firm—Woodfall's Landlord and Tenant, (14th Ed.), p. 386; *Clegg* v. *Edmondson*[1]. In such cases the renewing partner is a trustee for himself and his partners, his *cestuis que trustent*. It is also clear law that, if a lease be made to a trustee, he is personally liable for the rent and covenants, and the lessor has no remedy at law against the *cestui que trust* in respect thereof—Woodfall's Landlord and Tenant, (14th Ed.), p. 82; *Walters* v. *Northern Coal Mining Company*[2]. The case last cited also shows that the lessor has no direct remedy against the *cestui que trust* in equity either. Leases for less than three years can, in England, be made in writing not under seal. No case has, however, been cited to me to show that any person other than the lessee has been held liable for the rent, on the ground that the lease has really been made on his behalf. The nature of a lease, it appears to me, precludes this being done. A lease is a conveyance, by way of demise, of lands or tenements, for life, or lives, for years, or at will—Woodfall's Landlord and Tenant, (14th Ed.), p. 129. The person to whom the land is conveyed is the lessee. The person conveying is the lessor. If land is conveyed to a particular indivi-

(1) 8 De G. M. & G., 787.

(2) 5 De G. M. & G., 629.

dual, it is conveyed to him, and not to him and some one else. In the case of an out and out conveyance this is obvious, and I do not see how different considerations can apply to a conveyance for years. In many cases the difference between a conveyance by way of lease—*e. g.*, for 999 years at a peppercorn rent—and an absolute conveyance is very small. The lessee, if I am correct in the above view, can only be the person named in the lease. If he becomes a lessee on behalf of some one else—as he may do—the law regards him as a trustee for that other person, and does not consider that other person the lessee, for the simple reason that there is no demise or conveyance to him. Who, then, is liable to the lessor for the rent? The lessee, surely, and no one else. It is true that the lease usually contains a covenant, or agreement, to pay the rent, and that an agreement to pay may be made on behalf of another than him named in the instrument, provided it is not under seal—*Beckham* v. *Drake*[1]. But in the case of a lessee I do not think that can be so. The person covenanting to pay the rent must, I think, be deemed to be the person to whom the demise is made only. This is so in the case of an absolute conveyance. Such an instrument usually contains covenants; but the only person directly liable to be sued on them is the conveying party, even though he is really conveying for the benefit of himself and his partners.

The same law must, I think, be also applicable in Bombay. The Indian Legislature treats leases as transfers of property, and not as mere contracts. The Transfer of Property Act thus defines a lease: "A lease of immoveable property is a transfer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid, or promised, or of money * * * to be rendered periodically, or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, and the money * * * to be so rendered is called the rent" (Act IV of 1882, section 105.) It is true that this particular Act has not yet been extended to Bombay, but the law which it

(1) 9 M. & W., 79.

1892.

RAGOONÁTH-DÁS GOPÁLDÁS v. MORÁRJI JUTHA.

embodies, based upon the English law, has, for the most part, been the law applied to leases in Bombay.

It is said that if the lease had been made to the partnership in its own name, the plaintiffs could have shown who the partners were, and sued them for the rent, and it is argued that the same evidence should, in like manner, be admitted here, to show on whose behalf Wágji took the lease. The answer to this is that the name of a partnership in a lease is only a concise mode of naming the individual partners. The lease is to all the individual members of the firm, as though their names were set out at length in the lease. Here it is not suggested that the Wágji Mulji named in the lease is any one but the individual of that name.

I, therefore, am of opinion that the defendants Morárji and Jugjivan are not liable, at law, to the plaintiffs for the rent under the lease.

As to the count for use and occupation, I think that it is inapplicable here. The document put in is the counterpart of the lease signed by the lessee, which contains no words of demise, but it is admitted that, as is usual in such cases, the plaintiffs have signed a lease in favour of Wágji demising the shops to him. The claim for use and occupation arises when immoveable property is occupied by the defendant by the permission of the plaintiff. The plaintiffs in this case have transferred, or demised, the land for three years to Wágji; and have, during the continuance of the lease, no power to suffer or permit any one to occupy the shop. They have parted with their interest during the continuance of the lease. The premises, if permissibly occupied during its currency, must be occupied by the permission of Wágji, and not of the plaintiffs. Wágji should, therefore, have sued upon this count: the plaintiffs cannot. See *Walters* v. *Northern Coal Mining Company*[1]. This case contains an exhaustive resumé of the law, and is, in my opinion, conclusive of the one before me.

It is, I think, clear, upon the facts of the case, that, until Morárji gave his evidence in the ejectment suit, no one ever

(1) 5 De G. M. & G. 629.

supposed that he or Jugjivan was directly liable to the plaintiffs under the lease. Those admissions, mistaken in point of law, are, I think, really the foundation of this suit. They are not, however, sufficient in themselves to enable me to found a decree upon them. It would not be inequitable to compel the defendants Morárji and Jugjivan to pay the landlords the rent which, during the period of their occupation, Wágji has not paid to the landlords; but as I could only do so by holding that they were co-tenants with Wágji under the lease, the result would be that, although they have been evicted by Wágji from the premises, they would, in that view, continue liable for the rent for the remainder of the term, and subject to be sued by the landlords.

I must, for the above reasons, dismiss the suit, without costs in the Small Causes Court, as the suit was occasioned by the defendants' own admissions and promises to pay. The defendants must have their costs in this Court.

Attorneys for the plaintiffs :—Messrs. *Wádia and Ghándy.*

Attorneys for the defendants :—Messrs. *Turner and Hemming.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

J. KAHN AND ANOTHER, PLAINTIFFS, v. ALLI MAHOMED HA'JI UMER, DEFENDANT.*

1892 *July 9.*

Receiver—Partnership funds in hands of Receiver—Attachment by some of many creditors—Interference with Court's possession—Leave necessary—Leave only granted on terms ensuring equality—No priority allowed over other creditors.

Where a fund, such as the assets of a partnership, is in the hands of the Court through its officer the Receiver, one out of the whole body of creditors against the fund will not be allowed to gain priority over the remainder by the expedient of attaching the moneys in the hands of the Receiver. Such an attachment is an interference with the Court's possession through its officer the Receiver, and may, not therefore, be made without the Court's leave first obtained; which leave will not b granted except on such terms as will ensure equality between the creditors.

SUMMONS in Chambers.

The plaintiffs, having got a decree in the Small Causes Court against the defendant on the 8th January, 1892, attached under

*Small Cause Court Suit No. $\frac{366}{23394}$ of 1891.