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We make the rule absolute, and set aside the order raising the attachment of the shop, and direct that it continue upon the equity of redemption of the judgment-debtor, or the right of the judgment-debtor to redeem the mortgaged premises. The application being in part only successful, the parties will bear their own costs in it.

Rule made absolute and order set aside.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

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KA'SHI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* SADA'SHIV SAKHARA'M SHET AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Ejectment—Parties to suit—Right of action—Defendant.

The plaintiff, in an ejectment suit, can make out a legal title to the land, he is entitled to maintain a suit against the person in actual juridical possession of such land for recovery without making the person under whom the latter claims to hold a party to the suit.

Where plaintiffs based their title to the land in dispute on a lease granted by Government giving occupancy right to their predecessor in title, and sued the defendants in ejectment, and the defendants claimed to hold the land under an occupancy title conferred on them by Government subsequent to the plaintiffs' lease, it was held that though Government might have properly been made a party so as to bind it by the decree and prevent future litigation, it was not a necessary party to the suit.

SECOND appeal from the decision of Ráo Bahádur Káshináth B. Maráthe, First Class Subordinate Judge of Ratnágiri with appellate powers, reversing the decree of Ráo Sáheb N. B. Bramhe, Second Class Subordinate Judge of Málvan.

Suit in ejectment. The plaintiffs sued to recover possession of certain *sheri* or Crown land, alleging that their predecessor had obtained it from Government in 1845, and that from him it had devolved on them.

The defendants claimed to hold the land under an order made in 1885 by the Revenue Commissioner, who had given them possession. They contended that the plaintiffs' cause of action, if any, lay against Government, and not against them.

* Second Appeal, No. 89 of 1893.

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The Subordinate Judge held that the plaintiffs were entitled to the land, that they had a right to sue the defendants, and that neither Government nor the Revenue Commissioner was a necessary party to the suit. He, therefore, allowed the claim.

On appeal by the defendants the Judge held that the suit was defective owing to the plaintiffs' omission to join Government as a party, and he passed the following order :—

"If the plaintiffs elect, within three months from this date, to withdraw the present suit and present it to the proper Court after joining the Government or the Commissioner or the Secretary of State as a party, they have this Court's permission to do so. The suit will otherwise stand rejected."

The following is an extract from his judgment :—

"Now, the most important question is who is the principal offender in the matter, the Government or the defendants? The defendants might have earnestly pressed their request to be put into possession of the land; but they are not guilty of any direct trespass on the land. They have come in as tenants of Government (s[illegible] exhibit 82) rather than as trespassers. I think the Government are principally r[illegible] sible for the trespass, if any, inasmuch as they, by their officers, drove out the vious tenant and put in a new one. The Government, as landlord, have broke agreement, express or implied, with their former tenant, and have entered int[illegible] agreement with the defendants as new tenants. The new tenants occupy t[illegible] under the title of Government as landlord and under no independent title as against the former tenant (plaintiff). The defendants have incurred no independent responsibility towards the plaintiffs. Even if the Government officers' orders should be illegal, the responsibility of Government towards their former tenant cannot disappear, and the Government are a necessary party to the plaintiffs' suit. The plaintiffs' pleader argues that the Government have, by their Resolution (Exhibit 117), declared their inability to restore the land to the plaintiffs and admit a claim for compensation. The plaintiffs do not wish to trouble the Government with a suit for recovery of possession of the land. When they deem it fit, they would sue the Government in damages only. Their present claim for recovery of possession should be allowed as against the defendants only, who are in possession, but if the defendants have not come into possession by any independent act of theirs, there is no cause of action as against them alone. At best, the defendants and Government have jointly entered on the land, and they must be ousted by a decree of the Civil Court. The Government, as superior holders and recipients of rent from the defendants, are in direct possession of the land, and the plaintiffs can never completely succeed in getting back their possession, unless and until the plaintiffs obtain a decree against Government declaring the latter incompetent to lease the land to any person other than the plaintiffs during the fresh lease for thirty years. For as soon as the defendants are ejected by a decree of Court against them only, the Government might put in a third person and disappoint the plaintiffs. The Civil Court should, therefore, never give an inadequate and infructuous relief to the plaintiff. The Civil Court is

bound to join all persons interested in the subject-matter of a suit. The plaintiffs' suit is, of course, defective for want of parties, and it cannot proceed."

The plaintiffs preferred a second appeal.

Inverarity with *Mánekshán J. Taleyárkhán*, for the appellants (plaintiffs):—The Government was not a necessary party. We have a legal title to the land and have a right to establish it against the defendants who are in possession. The defendants who have been put in possession by Government may call on the Court to make Government a party, or Government may apply to be made a party, but so far as we are concerned, we have got nothing to do with Government. We want to establish our title against the defendants. If the Court had joined Government as a party at the instance of the defendants, future litigation, if any, might have been prevented, but the non-joinder of Government cannot affect us—Dicey on Parties to Actions, pp. 430, 494.

Branson with *Náráyan G. Chandávarkar*, for respondents (defendants):—We claim under Government, and until Government is brought on the record, the question as to title cannot be fully determined. Government is, therefore, a necessary party, and as the plaintiffs omitted to join them, the suit was properly dismissed—*Mahomed Israil* v. *Wise* (1); *Krishno Lall* v. *Bhyrub Chunder* (2); *H. H. Cannon* v. *Bissonath* (3). Government is considered to be a necessary party to such suits in Bengal.

FARRAN, C. J.:—The order made by the First Class Subordinate Judge, A. P., in this case cannot, in our opinion, be supported.

The plaintiffs, alleging that the land in suit was their land by right of ownership, brought the present action to eject the defendants from, and to recover possession of it. They base their title to the land on what they allege to be a lease granted by Government, giving occupancy rights to one Rámji, from whom they claim that it has devolved upon them.

The suit in its frame is a simple action of ejectment to recover the land from the defendants, who are admittedly in possession of it, and, if the plaintiffs' case is correct, wrongfully in such pos-

(1) 21 Cal. W. R., 327. (2) 22 Cal. W. R., 52.
(3) 5 Cal. L. R., 154.

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session. That being the nature of the plaintiffs' claim, *primâ facie*, the defendants are the proper defendants to the suit.

The defendants on their part also claim to hold the land under an occupancy title conferred on them by Government subsequent to the plaintiffs' lease; but, if the plaintiffs' case is correct, Government having already alienated the land to the plaintiffs' predecessor-in-title by granting him an occupancy lease, could not (unless Government had the right to, and did, resume it, which is one of the questions in the case) afterwards grant it to the defendants.

The Court of first instance, deeming that the plaintiffs had made out a good title as occupants of the land, passed a decree in the plaintiffs' favour. The Appellate Court, without adjudicating upon the merits of the appeal, passed the following order:—"If the plaintiffs elect, within three months from this date, to withdraw the present suit and present it to the proper Court after joining the Government, or the Commissioner, or the Secretary of State as a party, they have this Court's permission to do so. The suit will otherwise stand rejected. The costs throughout in both Courts up to date shall be borne by the plaintiff-respondents."

That order was based upon the ground that as it was the action of the Commissioner by which the plaintiffs were deprived of the land, the cause of action of the plaintiffs was primarily against Government, as Government was the principal offender and that the defendants had incurred no independent responsibility towards the plaintiffs. This, however, is a misconception of the nature of a suit in ejectment. The owner of land is entitled to maintain a suit for its recovery from the person in possession without regard to the question how he (the owner) has been deprived of possession or how the present possessor has obtained it. The cause of action is the wrongful retention of the land by the defendants from its owners.

In appeal before us it has been argued for the respondents that the cases of *Mahomed Israil* v. *Wise*[1], *Krishno Lall* v. *Bhyrub Chunder*[2] and *H. H. Cannon* v. *Bissonath*[3] show that Govern-

(1) 21 Cal. W. R., p. 327. (2) 22 Cal. W. R., p. 52.
(3) 5 Cal. L. R., p. 154.

ment is a necessary party to the suit, and that as the plaintiffs have not made Government a party to it, or withdrawn the suit, it now properly stands dismissed. For the appellants, on the other hand, it is argued that though Government might have properly been made a party so as to bind it by the decree and prevent future litigation, Government is not a *necessary* party to the suit, and that all the questions involved in it can, as between the plaintiffs and the defendants, be decided in the absence of the Government; and that the order of the Appellate Court, which is in effect an order dismissing the suit for want of parties, is erroneous.

We are of opinion that the appellants' contention on this point is correct. We consider that if the plaintiff in an ejectment suit can make out a legal title to land, he is entitled to maintain a suit against the person in actual juridical possession of such land for its recovery without making the person under whom the latter claims to hold a party to the suit. It is in the power of the Court at the instance of the defendant or of its own motion, if it considers it expedient, to make the person under whom the defendant claims to hold a party to the proceedings. This is the English rule and practice (Dicey on Parties, Rules 112 and 113), and it appears to us to be the most convenient and just course. It is enough for the plaintiff to sue the person in actual possession. It would be unfair upon him to compel him to add a party of whom he may know nothing and against whom he may have no cause of complaint, while the defendant by disclosing the name of the person under whom he claims to hold can have him made at his own risk a defendant to the suit.

The cases in the Calcutta High Court to which we have been referred do not, in our opinion, decide more than this—that Government is a proper party in a suit like the present. In that view we entirely concur.

In the present suit the defendants' case is that they were placed in possession of the land by Government, and they could have asked that Government should be made a party. They did not ask this, neither has there been any application on the part of Government to be made a party. The issue in the first Court

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was based on the plea of the defendants that the suit was bad, inasmuch as it was not brought against Government. That issue was properly decided in the negative by that Court. The Appellate Court wrongly decided otherwise. The suit is not bad as it is framed and brought, neither is Government a necessary party to it. The most that can be said is that if Government be made a party, the questions at issue between the plaintiffs and Government can be effectually tried and determined in this suit, but the plaintiffs do not ask that those questions shall be determined in this suit, and Government cannot be affected by the result of this suit, so that those questions may safely be left to be determined, if necessary, in future litigation. Had the Court of first instance in the exercise of its discretion joined Government as a party, there would have been nothing to say against its procedure, but we think that it was unfair and unjust in the present case for the Appellate Court to have called on the plaintiffs at that stage of the proceedings to amend their plaint by adding Government as a party. Such an amendment would have the effect of materially changing the frame of the suit and nullifying the whole of the proceedings already had in it, since it would necessitate the return of the plaint to the plaintiffs and their presenting it afresh in another Court.

We must, therefore, set aside the order of the lower Appellate Court and remand the appeal for a trial on the merits, that is, for a determination of the title of the plaintiffs to the land as against the defendants. Costs hitherto incurred to abide the result.

Order set aside.