

APPELLATE CIVIL.

Before Mr. Justice Lokur.

SADASHIV GOVIND AREKAR (ORIGINAL DEFENDANT No. 1), APPELLANT
 v. YASHVANT BHIKAJI VILANKAR AND OTHERS (ORIGINAL
 PLAINTIFF AND HEIRS OF DEFENDANT No. 2), RESPONDENTS.*

1938
 November 23

Civil Procedure Code (Act V of 1908), O. XXXV, r. 5—Interpleader suit—Tenant—Landlord—“ Making claim through ”—Interpretation.

Order XXXV, r. 5 of the Civil Procedure Code, 1908, precludes a tenant from compelling his landlord to have his title determined as against a stranger.

Where a person claimed certain property sold to him by another person, contending that the latter had, after the sale, no right to lease the property to a third person a suit by the third person (tenant) to have it decided as to which of these two persons is entitled to recover the property from him, is barred under O. XXXV, r. 5 of the Civil Procedure Code, 1908.

Cook v. The Earl of Rosshyn,⁽¹⁾ and *Dungey v. Angove*,⁽²⁾ referred to.

APPEAL from Order passed by A. Majid, District Judge, Ratnagiri, setting aside the decree made by B. K. Khade, Subordinate Judge, Chiplun.

Interpleader suit.

The property in dispute belonged to Gopal (defendant No. 2). On May 27, 1926, he sold certain property to Sadashiv (defendant No. 1) for Rs. 3,000.

On January 12, 1927, defendant No. 2 executed in favour of defendant No. 1 a *makte-patra* of the property sold on May 27, 1926.

On February 1, 1928, defendant No. 2 made a statement before the Talathi as follows :—

“ Our *Thikans* were given in purchase to Sadashiv Govind Arekar resident of Palshet on May 27, 1926 for a sum of Rs. 3,000. In that sale-deed land of Hissa No. 3 (of) Survey No. 147 remained to be written through oversight. I have given the said

*Appeal from Order No. 84 of 1937.

⁽¹⁾ (1859) 1 Giff. 167.

⁽²⁾ (1794) 2 Ves. Jun. 304.

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Survey No. 147 Hissa No. 3 in purchase to Arekar under the said sale-deed. And at present *vahivat* also is of Arekar. I have no connection whatsoever with that land. Therefore I agree to enter the said land in the name of Sadashiv Govind Arekar in the Record of Right papers. This is given in writing. Dated 1st February 1928."

On July 11, 1935, defendant No. 2 gave a notice to defendant No. 1 and Yashwant (plaintiff) stating that he had given the land to the plaintiff on a lease, that therefore defendant No. 1 should not receive the rent from plaintiff and the plaintiff should pay the rent to him.

On August 6, 1935, plaintiff sent defendant No. 1 a reply to defendant No. 1's notice dated July 23, 1935, stating that the property belonged to defendant No. 2, that he had not taken the same on rent from defendant No. 1 and that he did not owe any rent to him.

On July 16, 1936, plaintiff filed the present suit to have it decided as to whether defendant No. 1 or defendant No. 2 was entitled to recover the rent from him, alleging that he had taken the land and the building thereon on a lease from defendant No. 2 on November 1, 1927 at a monthly rent of Rs. 2, that both defendants Nos. 1 and 2 were demanding the same from him and that he was willing to pay to whomsoever should be held entitled to recover it.

Defendant No. 1 contended, *inter alia*, that he had purchased the suit property and other property from defendant No. 2 on May 27, 1926 for Rs. 3,000, that he had leased the suit property to plaintiff and the other property to defendant No. 2, that defendant No. 2 had no right to demand the rent from plaintiff, that he had filed Civil Suit No. 419 of 1935 to recover the rent from the plaintiff and that the plaintiff and defendant No. 2 had brought the suit in collusion to defeat him.

Defendant No. 2 contended that he had transferred the whole of his property to defendant No. 1 to defraud his creditors, that the sale to defendant No. 1 was *benami*, that the plaintiff had taken the suit property on a lease from him, and that defendant No. 1 had no right to recover the rent from the plaintiff.

The learned trial Judge dismissed the suit on the ground that the plaintiff could not compel his landlord to interplead with a person who claimed independently.

On appeal, the learned District Judge set aside the decree, observing as follows :—

“ The sale-deed by defendant No. 2 to defendant No. 1 admittedly does not comprise the property in suit. Nor is there any evidence on behalf of defendant No. 1 to prove that he was in possession of the property and that he leased it out to the plaintiff. It is no doubt true that some rent was paid by the plaintiff to defendant No. 1, but that has been accounted for more than sufficiently by the plaintiff by stating that he did so at the instance of defendant No. 2. Defendant No. 2 thereafter served him with the notice, Exhibit 28. It is clear that defendant No. 1 claims the property through defendant No. 2. The lower Court, in my opinion, erred in holding that he claimed the property independently of defendant No. 2. I have already stated above that the sale-deed does not comprise the property in suit. According to him it remained to be mentioned in the sale-deed, and according to defendant No. 2 the sale-deed itself not only does not contain the property in suit but that it was of a *benami* character even in respect of the property included in it. In these circumstances, the suit, in my opinion, is perfectly sustainable. Defendant No. 1 is certainly claiming through defendant No. 2 and not independently of him.

Defendant No. 1 appealed.

G. N. Thakor, with *Y. V. Dixit*, for the appellant.

Dalvi, V. G., with *S. S. Kavlekar* and *M. G. Chitale*, for respondent No. 1.

B. N. Gokhale, for respondents Nos. 2 and 3.

B. S. Joglekar, for respondent No. 3.

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LOKUR J. This appeal arises out of an interpleader suit filed by the plaintiff to have it decided whether defendant No. 1 or defendant No. 2 is entitled to recover the property in suit from him. According to the plaintiff, defendant No. 2 was the owner of the property and he had taken it on an oral lease from him on November 1, 1927, at a monthly rent. He says that he was paying the rent to defendant No. 2 all along ; but on July 23, 1935, was served with a notice by defendant No. 1 that he should pay the rent to him. Defendant No. 2 also served him with a notice on July 11, 1935, asking him not to pay any rent to defendant No. 1 if demanded by him. In these circumstances the plaintiff filed this suit to have it decided as to who was entitled to the rent and the property. The trial Court held that such a suit was barred under Order XXXV, r. 5, of the Civil Procedure Code, 1908, as defendant No. 1 did not make a claim to the land through defendant No. 2 who was admittedly the landlord of the plaintiff. The suit was, therefore, dismissed, but the lower appellate Court held that defendant No. 1 claimed the property through defendant No. 2 and the suit was, therefore, not barred by Order XXXV, r. 5, of the Civil Procedure Code, 1908. The suit was, therefore, held maintainable and was remanded to the trial Court for disposal according to law.

Order XXXV, r. 5, of the Civil Procedure Code, 1908, provides that an interpleader suit cannot be filed by a tenant against his landlord for the purpose of compelling him to interplead with any person other than persons making a claim through such landlord, and the crucial question to be decided in this appeal is, whether defendant No. 1 can be said to be making a claim through defendant No. 2 who is admitted by the plaintiff to be his landlord.

It has been held in *Cook v. The Earl of Rosslyn*⁽¹⁾ that a tenant cannot sustain a bill of interpleader against his landlord unless the title be affected by some act done by the landlord *subsequently* to the lease. The same principle is laid down in *Dungey v. Angove*.⁽²⁾ The object of Order XXXV, r. 5, of the Code of Civil Procedure, 1908, is to prevent a tenant from compelling his landlord to have his title determined as against a stranger, and it is not disputed that an interpleader suit is maintainable if the landlord, subsequent to the letting, does anything whereby his right to recover the rent is entangled. Defendant No. 1 in this case claims the title to the property in suit under a sale-deed passed by defendant No. 2 on May 27, 1926. After that sale-deed, defendant No. 2 leased the property to the plaintiff on November 1, 1927. It follows, therefore, that if the claim of defendant No. 1 be good, defendant No. 2 had no right to lease the land to the plaintiff on November 1, 1927. It cannot, therefore, be said that defendant No. 1 is claiming through defendant No. 2, since he is challenging the very right of defendant No. 2 to let out the land to the plaintiff. There is, however, one circumstance which apparently seems to be in favour of the plaintiff. In the sale-deed executed by defendant No. 2 in favour of defendant No. 1, the property in suit was not included, but defendant No. 2 says that he wanted to transfer all his property to defendant No. 1, who is his sister's son, as *benami*, in order to screen it from his creditors. After passing the sale-deed, defendant No. 2 remained in possession of all the property by giving a rent-note or a *make patra* to defendant No. 1. Even in that rent-note the property in suit was not included. But subsequently on February 1, 1928, defendant No. 2 made a statement before the talati that the property in suit also was intended to be

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conveyed to defendant No. 1 and had been omitted in the sale-deed through oversight. So at his instance the property in suit also was entered in the name of defendant No. 1 in the Record of Rights (exhibit 25). It is argued from this that defendant No. 2 made such a statement before the talati subsequent to the lease in favour of the plaintiff and thereby his right to recover the rent became entangled. The statement of defendant No. 2 does not, however, mean that defendant No. 1's title was created on the date on which it was made. He merely admitted that the sale-deed passed by him prior to the lease was intended to include the property in suit. Defendant No. 1 also says the same thing and he claims title to the property from that date, viz., May 27, 1926, and not from the date of the statement. Hence, according to defendant No. 1, the subsequent lease by defendant No. 2 in favour of the plaintiff was unauthorised. He cannot, therefore, be regarded as claiming the property through defendant No. 2. The trial Court was, therefore, right in holding that so far as the suit is concerned defendant No. 1 claimed the property independently of defendant No. 2 and he contended that defendant No. 2 had no right to lease the property to the plaintiff. The plaintiff cannot, therefore, call upon defendant No. 2 to litigate with defendant No. 1 and have his title cleared. The suit is, therefore, barred under Order XXXV, r. 5, of the Civil Procedure Code, 1908.

I set aside the order of the lower appellate Court and restore the decree passed by the trial Court. The appellant shall recover his costs in this Court and in the lower appellate Court from respondent No. 1.

Appeal allowed.