

Present : Schneider J.

1922.

APPUHAMY v. NONIS.

71—C. R. Colombo, 83,586.

Partition Ordinance, s. 17—Is lease an alienation?

A lease is not an alienation within the meaning of section 17 of the Partition Ordinance, 1863.

THE facts appear from the judgment.

L. V. Loos, for plaintiff, appellant.—The Commissioner was wrong in holding that a lease during the pendency of a partition suit was void. It has been held that a lease is not an alienation within the meaning of section 17 of the Partition Ordinance (*Kirihamy v. Mudhanse*¹). If the lease is valid, the plaintiff is entitled to claim damages.

Croos-Dabrera (with him *Alwis*), for defendant, respondent.—A lease has been held to be a *pro tanto* alienation. It must, therefore, be held to be an alienation within the meaning of section 17 of the Partition Ordinance. (See *Abcyskere v. Silva*.²)

The damages claimed are excessive. The plaintiff cannot claim both the rent paid in advance as well as damages for being kept out of possession.

July 12, 1922. SCHNEIDER J.—

In this action the plaintiff claimed a sum of Rs. 160 as damages; and Rs. 37·50 as repetition of rent paid by him to the defendants upon a lease granted by the defendants in his favour. His cause of action was the failure on the part of the defendants to give him possession of the property leased. In their answer the defendants admitted that the plaintiff had suffered damage to the extent of Rs. 160, and that he had also paid the sum of Rs. 37·50 as rent, but pleaded that the lease was void, in that it had been granted during the pendency of an action for the partitioning of the land, and that, therefore, the only claim which the plaintiff was entitled to maintain was one for the repetition of Rs. 37·50. Two issues were framed: (1) Whether the lease was void, in that it had been executed during the pendency of the partition action; and (2) if it was void, whether the plaintiff could claim any more than the sum of Rs. 37·50? The learned Commissioner decided the first issue against the plaintiff,

¹ (1921) 23 N. L. R. 272.

² (1911) 1 C. A. C. 37.

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following certain cases which had been cited to him. He, accordingly dismissed the whole of the plaintiff's case. The plaintiff has appealed, and his counsel cited the judgment of this Court in action (*Kirihamy v. Mudianse*¹), in which the question whether a lease was void because it had been executed during the pendency of a partition action has been fully considered with reference to previous authorities. This Court held, in the case I have mentioned, that a lease was not an alienation within the meaning of section 17 of Ordinance No. 10 of 1863. I agree with the principle of the decision of the Kegalla case, and would follow it. The present appeal is covered by the principle laid down in the Kegalla case. The lease, therefore, upon which the plaintiff bases his claim is a valid one, and he is entitled to maintain his action upon a breach of the terms of that lease. His claim for damages has been admitted. The sum paid as rent has been admitted. Therefore, the plaintiff is entitled to judgment for the sum of Rs. 197·50, with legal interest from this date, and to the costs of the action in the lower Court and in this Court. Counsel for the defendants has strenuously argued that it would be inequitable to award the sum of Rs. 160 as damages upon a lease, the total rental of which is only Rs. 62·50. The damages certainly do appear to be excessive, but I am unable to grant any relief after the admission which has been made in the answer. It cannot be regarded as a slip of the pen.

The appeal is accordingly allowed.

Appeal allowed.

¹ (1921) 23 N. L. R. 272.