

(1880) 04 CAL CK 0003

Calcutta High Court

Case No: None

Pepin

APPELLANT

Vs

Chunder Seekur
Mookerjee and
Another

RESPONDENT

Date of Decision: April 1, 1880

Citation: (1880) ILR (Cal) 811

Hon'ble Judges: Wilson, J

Bench: Single Bench

Judgement

Wilson, J.

This is a suit by the assignor against the assignees of a lease, in which the plaintiff seeks to be indemnified in respect of money which he has been compelled to pay by reason of the defendants' failure to perform the covenants in the lease. (His Lordship then stated the facts of the case, and continued). Therefore the present suit was brought by the plaintiff to recover from the defendants the sum recovered from him by the Administrator-General, together with his own costs of defence, amounting to Rs. 1,028-9. The case came before Mr. Justice Pontifex for settlement of issues. That learned Judge held, that the plaint disclosed a good cause of action, on the authority of *Moule v. Garrett* (L.R. 7 Ex. 101), and the following issues were settled:

1st.--Does limitation apply?

2nd.--Have the defendants, or either of them, by any and what payments to the original lessors, absolved themselves or himself to any and what extent from liability to the plaintiff?

3rd.--Are the defendants, or either of them, liable to any and what damages?

2. These issues came on for trial on the 23rd and 24th of March.

3. As to the first issue, that as to limitation, the defendants' case was put thus. It was said that the implied obligation of the assignee of a lease is to perform the covenants of the lease. On the failure to perform such covenants by the assignee a right of action accrues to the assignor, and therefore limitation runs from that date. For this *Burnett v. Lynch* (5 B. & C 598) was cited.

4. I do not think *Burnett v. Lynch* (5 B. & C 598) is an authority for such a proposition. What was decided is thus stated by Bayley, J.: "An action upon the case founded upon the tort will lie, on this ground, that from the facts stated in this declaration the law raises a duty on the defendants to perform the covenants, that there has been a breach of the duty, and that damage has accrued to the plaintiff in consequence of that breach of duty."

5. But even were the obligation such as that contended for, it does not follow that no other obligation lies upon the assignee. An assignment of a lease commonly contains a covenant by the assignee to pay the rent and perform the covenants, and also a covenant to indemnify the assignor. *Moule v. Garrett* (L.R. 7 Ex. 101) is in my judgment a clear authority to the effect that, in the absence of express covenant, such an obligation to indemnify is to be implied. Then by Article 83 of the first division of the second schedule of the Limitation Act (XV of 1877), limitation in the case of a contract of indemnity runs from the date when the plaintiff is actually damnified. In the present case, therefore, limitation began to run when the Administrator-General recovered against the plaintiff, and the suit is not barred.

6. With regard to the second issue the defendants have failed to show any defence under it. The first defendant has never paid anything to the original lessor. The second defendant has paid Rs. 5,500; but he paid it after the Administrator-General had paid the amount of the decree against him, and from the amount for which that defendant settled the claims against him, it is plain that he was allowed the benefit of the Administrator-General's payment.

7. As to the third issue it was contended for the defendants that the plaintiff cannot recover the whole of his claim. It was pointed out that the Administrator-General claimed against the present plaintiff, not only the damages recovered against him, but also the costs he had to pay to Burno Moye, and his own costs of defence; and that the present plaintiff has further added to this claim the costs he had to pay the Administrator-General, and his own costs of defence. These costs, it was contended, cannot be recovered, and for this were cited *Baxendale v. London, Chatham, and Dover Railway Co.* (L.R. 10 Ex. 35.) and *Fisher v. Val de Travers Co.* (L.R. 1 C.P. Div. 511). In *Baxendale v. London, Chatham, and Dover Railway Co.* (L.R. 10 Ex. 35), the plaintiffs contracted with Harding to carry pictures from London to Paris. They afterwards contracted with the defendants, that the latter should carry the pictures. By the defendants' negligence, the pictures were damaged. Harding sued the plaintiffs, who defended the action, and had to pay the value of the pictures and Harding's costs; they also incurred costs in defending. The plaintiffs then sued the

defendants, and claimed to recover the value of the pictures, and also the costs paid and incurred. The defendants accepted the assessment of value in the former suit by paying the amount into Court, but denied their liability for costs. The Exchequer Chamber decided in favour of the defendants, on the ground that the two contracts being separate and independent, costs incurred in defending an action upon the one were not the natural and proximate result of a breach of the other. That case seems to me, I must say, a very plain case. To have allowed the costs, would have been to take into consideration a matter (the other contract,) not necessarily or naturally connected with the contract in question or its breach, and not in the contemplation of the parties at the time of contracting. The case was followed as to costs--*Fisher v. Val de Travers Co.* (L.R. 1 C.P. Div. 511).

8. The distinction between such cases and the present is clearly pointed out by Quain, J., in *Baxendale v. London, Chatham, and Dover Railway Co.* (L.R. 10 Ex. 35): "If this were a contract of indemnity, where although there may be two contracts in form there is only one in substance, our decision might be in favour of the plaintiff. In such a case a surety, who is called upon to pay the debt due or duty owing from the principal, may well be justified in defending an action at the principal's expense." In the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract; and in cases of such a nature there is a series of authorities to the effect, that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered. Thus, where one person has warranted to another that he had authority to make a contract on behalf of a third person, and on the faith of the warranty legal proceedings are taken to enforce the contract against such third persons, and it turns out that the guarantor had no such authority, the costs are recoverable against him: *Collen v. Wright* (7 E.&B. 301 : S.C. E. & B. 647), *Godwin v. Francis* (L.R. 5 C.P. 295). In cases of indemnity it has been so held in many cases: *Duffield v. Scott* (3 IT.R. 374), *Penley v. Watts* (7 M.&W. 601 . B.), *Smith v. Compton* (3 B. Ad. 407), *Howard v. Lovegrove* (L.R. 6 Ex. 43).

9. In the present case I think the costs incurred by the Administrator-General in the suit by Burno Moye, and those incurred by the present plaintiff in the suit by the Administrator-General against him, were reasonably and properly incurred, I therefore find as to the third issue, that the plaintiff is entitled to recover from the defendant the sums of Rs. 6,932-12-11, Rs. 997-7-6, and Rs. 1,028-9, with costs on scale No. 2.