

(1903) 10 MAD CK 0001

In the Madras High Court

Case No : Second Appeals No's. 74 and 236 of 1902

Ekambara Ayyar and Others

APPELLANT

Vs

Meenatchi Ammal and Others

RESPONDENT

Date of Decision : 06-10-1903

Acts Referred:

Citation : (1903) 10 MAD CK 0001

Hon'ble Judges : Boddam, J;Bhashyam Ayyangar, J

Bench : Division Bench

Advocate : P.R. Sundara Ayyar and Sankara Ayyar, for the Appellant; P.S. Sivaswami Ayyar, for first Respondent and T.V. Sheshagiri Ayyar, for the Respondent

Final Decision : Allowed

Judgement

Bhashyam Ayyangar, J.

(Second Appeal No. 74 of 1992)

1. The important question of law arising in this appeal is whether a landholder (specified in Section 3 of the Rent Recovery Act) ejecting a tenant

under the provisions of Section 10 of the Act, recovers possession of the land free of encumbrances created by the tenant or only subject thereto.

2. In the present case the encumbrance was a usufructuary mortgage with a covenant to pay, the mortgagor (tenant) however, continuing in

possession as lessee of the mortgagee. About two years after the mortgage, the landholder, a shrotriendars, brought a suit against the tenant

(under Section 9) to enforce acceptance by him of a patta, and obtained a decree directing the acceptance of the patta as settled by the judgment.

On an application made by the shrotriendar u/s 10, stating that the tenant had failed to accept the patta and execute a muchilika within ten days

from the date of the judgment, the Collector passed an order for ejecting the tenant and the order was executed u/s 73. The mortgagee now sues

the tenant and the shrotriendar for a personal decree against the former and for the sale of the mortgaged property now in the possession of the

latter. The District Judge, reversing the decree of the District Munsif in so far as it dismissed the suit as against the shrotriendar, gave a decree for

sale of the mortgaged property on the ground that an order of ejectment u/s 10 cannot stand on a different footing from a sale for arrears of rent

u/s 38 as regards its effect on mesne encumbrances and charges created by the tenant. As pointed out by the District Judge, the Collector was

wrong in passing an order of ejectment in the circumstances of the case, there having admittedly been no tender of patta by the shrotriendar after

the judgment of the Collector (see the decision of the Full Bench in Shanmuga Mudaly v. Palnati Kuppu Chetty ILR 25 Mad. 613). But the order

not having been appealed against has become final, and its propriety cannot be questioned in this suit (Manicka Gramani v. Ramachandra Ayyar

ILR 21 Mad. 482).

3. After a very full and careful consideration I have been constrained to come to the conclusion that the decision of the District Judge cannot be

upheld, and that the ejectment of a tenant, u/s 10 or 41 operates not only as a determination of the tenant's right of occupancy, but also as an

extinguishment of all mesne encumbrances and subordinate interests created by the tenant. The case relied upon by the District Judge of a sale u/s

38 for arrears of rent, which, unlike land revenue, forms no charge upon the land, is not really analogous to an ejectment. In the former case,

Section 38 provides that, when by express contract or by the usage of the country, the tenant has a saleable interest in the land on which the arrear

is due, the landholder may realize the arrears (with interest thereon) by selling such interest. In construing this section, it was held by a Full Bench of

this Court in Rajagopal v. Subbaraya ILR 7 Mad. 31 that the interest sold under that section is the saleable interest of the tenant as it exists at the

date of the sale. A purchaser at such a sale therefore acquires the tenant's holding subject to encumbrances created by him prior to the sale.

Taking the ordinary case of a lessor and lessee, under the general law, a sale of the lessee's leasehold interest for arrears of rent will of course be

subject to any encumbrance created by the lessee on the leasehold whereas if the lease be determined by forfeiture (Clause (g) of Section 111 of the Transfer of Property Act) the land will revert to the lessor free of all encumbrances created by the tenant (Section 115, Transfer of Property Act). If the legal relation between a shrotriendard and a ryot under him were that of a lessor and lessee, there could be little doubt both under the English and under the Indian Law, that when the shrotriendard re-enters on the land (under Section 10 of the Rent Recovery Act for breach of a statutory condition therein referred to or u/s 41 for non-payment of rent) the holding would become re-vested in the shrotriendard as it was vested in him at the time he granted the lease and he might avoid all mesne charges and encumbrances, so that sub-lessees and other persons claiming under the ryot would lose their estates as well as the ryot himself (Section 115 of the Transfer of Property Act; Foa's "Landlord and Tenant," 2nd Edition, page 513; Timmappa v. Rama Venkanna ILR 21 Bom. 311 and Great Western Railway Co. v. Smith LR 2 Ch.D. 235). The case has been argued before us principally on such footing, but there is nothing to show that the relation between the shrotriendard and the mortgagor (in the present case) was that of a lessor and lessee or landlord and "tenant", a word which standing by itself denotes in law "one who holds lands by any kind of title whether for years or for life or in fee" and does not necessarily mean a lessee unless it is used in opposition to landlord. The question therefore as to whether the estate of a ryot having a right of occupancy in his holding under a shrotriendard is a conditional estate of the kind contemplated by Section 31 of the Transfer of Property Act in which the interest of the ryot ceases on the happening of the contingency of his ejectment u/s 10 or Section 41 of the Rent Recovery Act or whether with reference to his holding such a ryot can be regarded as legitimus dominus pro tempore so as to entitle him to create an estate in a mortgage which shall not be subject to forfeiture (on the ejectment of the mortgagor u/s 10) in analogy to the case of the Earl of Arundel Dyer, 344 (compare Doldem Rayer v. Stridiland 2 Q.B., 792) quoted and explained in Bacon's "Abridgment," Vol. I, page 143, where the feoffee of a manor upon condition was held, notwithstanding that the condition had been broken, to have created enduring grants by copy because he was legitimus dominus pro tempore, (Narayan v. Parshotam ILR 22 Bom. 389 at p. 397), has

to be determined mainly with reference to the provisions of the Rent Recovery Act and the Indian decisions in analogous cases. The legal relation between landholders of the classes specified in Section 3 of the Rent Recovery Act and their ryots or tenants corresponding to holders on ryotwari tenure under Government, has been fully considered by this Court in the two cases of Yenkatanarasimlu Naidu v. Danvamudi Kottayya ILR 20 Mad. 299 and Cheekati Zamindar v. Ranasooru Dhora ILR 23 Mad. 318 and it was therein held that as a general rule such relation is not according to the common law of the land that of lessor and lessee. The present case therefore should be decided on the footing that the mortgagor's interest was that of a ryot with a right of occupancy and not a mere leasehold derived from the shrotriendar. In determining the effect of an order of ejectment passed u/s 10, it will be useful to bear in mind the corresponding provisions in the repealed Madras Regulations XXX of 1802 and V of 1822. It was enacted by Section 10 of the former Regulation that if ryots persist in refusing to exchange pattas and muchilikas with the proprietors for the space of one month after the tender of a patta, the proprietor ""shall have power to grant the lands of the ryots so refusing to other persons."" This provision was modified by Section 8 of the latter enactment which provided that the proprietor should apply to the Collector and obtain his leave for making over the land to others and that if the Collector was satisfied that the patta tendered by the proprietor was just and correct, the ryot should ""be ejected under the Collector's order"" unless he assented to the patta. It is therefore clear that the object of Section 10 in requiring the Collector to pass an order ejecting a perverse tenant is to enable the landholder to have the lands cultivated under him or by others, and this object cannot be fully attained in cases in which the ryot has transferred possession to a lessee or mortgagee, if such encumbrances are not annulled by the ejectment of the tenant, but the ejectment is to have operation only subject thereto. Attention may be drawn to Section 73 of the Rent Recovery Act which provides not only for the ejectment of the tenant, but expressly for the removal of others also offering opposition to the execution of the order. If the ryot has a saleable interest in the land and he transfers the holding by sale, he ceases to be the tenant of the landholder and the transferee becomes tenant in his place, liable to the landholder for the payment of rent accruing due subsequent to the sale. In such a case

the suit u/s 9 must be brought against the real tenant, i.e., the person in whom the right of occupancy is vested and the order of ejectment passed

u/s 10 will have no validity, if the suit has been instituted against a person after he has transferred his holding by sale, except of course in cases

where the vendee is estopped from denying that his vendor is the landlord's tenant. The difficulty as to the effect of an order in ejectment arises

only when the order is passed against the real tenant, who has previous thereto, transferred possession to a lessee or mortgagee under him. If such

a lease or mortgage is to subsist notwithstanding the ejectment of the tenant himself, the landholder cannot sue the lessee or mortgagee in

possession as his tenant for acceptance of patta or for payment of rent, for the simple reason that there is neither privity of contract nor privity of

estate between himself and them. The land will not be at his disposal for cultivation before the expiration of the term of the sub-lease or the

redemption of the mortgage. In the case of a simple mortgage or charge, it may be that even if it should subsist after the ejectment, it may not be an

obstacle to the landholder recovering possession of the land and having the same cultivated by others, though the existence of such encumbrance

on the land might deter several persons who would otherwise be willing from taking up the land for cultivation and paying rent. In the absence of

statutory provisions sanctioning such a distinction, it will not be possible on principle to recognize a distinction between the different classes of

encumbrances and maintain that the order of ejectment would annul certain encumbrances but not others. Though there is no decision on Section

10 of Act VIII of 1865 or on any corresponding provision, if any, of similar enactments in other Provinces in India, as to the effect of an ejectment

thereunder on encumbrances or subordinate interests which have been created by the (ejected) tenant, reference may usefully be made to two

decisions of the Allahabad High Court which would have a bearing upon the effect of an order of ejectment of a tenant u/s 41 of the Rent

Recovery Act.

4. Under that section a tenant may be ejected from his holding for non-payment of rent if he has no saleable interest in the land. The fact, however,

that a ryot having a right of occupancy cannot transfer it by sale will be no bar to his transferring temporary possession of his holding to a lessee or

mortgagee.

5. In *Jafree Begum v. Hossein Zaman Khan* 2 N.W.P.H.C.R. 6. it was held that a lease granted by an occupancy ryot against whom an order of

ejectment had been obtained for non-payment of rent will be of no avail to the lessee to support his possession as against the Zamindar. In *Khiali*

Ram v. Nathu Lal ILR 15 All. 219 a Full Bench of the Allahabad High Court while holding that a tenant with a right of occupancy can sub-let the

whole or any part of his occupancy holding observed as follows (at, page 230).

""In order that the effect of our opinion may not be misunderstood

and our decision be not misapplied, it is necessary to say that it is obvious to us that the interest in an occupancy holding of any person to whom an

occupancy tenant sub-lets, or to whom he grants a usufructuary mortgage of land comprised in his occupancy holding will determine, if it has not

previously determined, on the termination of the right of occupancy, and can subsist no longer than the right of occupancy subsists. Such sub-tenant

does not by the sub-letting become the tenant of the Zamindar who is entitled to receive from his occupancy tenant the rent due by him."" The

decision of the Bombay High Court in *Narayan v. Parshotam* ILR 22 Bom. 389 which was principally relied upon by the learned pleader for the

Respondent turned entirely upon the construction of certain sections of the Bombay Revenue Code and of certain rules framed thereunder and it

throws no light upon the question arising in this case.

6. It is unnecessary to consider and decide in this case the effect of a relinquishment u/s 12 (at the end of the Revenue year) of his holding by a ryot

as it is not analogous to an ejectment on forfeiture. The operation of such relinquishment on mesne encumbrances created by the tenant may stand

altogether on a different footing and the relinquishment itself when the land relinquished is burdened with such an encumbrance, may be inoperative

to terminate his liability, as tenant to the landholder until the encumbrance ceases by effluxion of time or is otherwise discharged by the tenant

(*Sham Das v. Batul Bibi* ILR 24 All. 538, *Badri Prasad v. Sheodhian* ILR 18 All. 354). The second appeal must therefore be allowed with costs

in this and in the lower Appellate Court and, reversing the decree of the lower Appellate Court, I would restore the decree of the District Munsif.

Boddam J.

7. I entirely agree.

8. In Second Appeal No. 236 of 1902.- The only difference between this case and Second Appeal No. 74 of 1902 is that in this case the

usufructuary mortgagee was himself in possession when an order of ejectment u/s 10 was passed against the tenant, the mortgagor, who did not

retain possession of the holding as lessee under the mortgagee and the suit is for recovery of possession of the land from the shrotriendardar who, in

execution of the order of ejectment, caused the ejectment of the mortgagee the Plaintiff who was in possession of the holding. The reasoning on

which our judgment in Second Appeal No. 74 of 1902 proceeds is equally applicable to the present case, and we therefore allow this appeal with

costs in this Court and in the lower Appellate Court and, reversing the decree of the lower Appellate Court, we restore the decree of the District

Munsif.