RAMUNNI v. SHANKU.

Sankaran Náyar for appellant.

Respondent did not appear.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Turner, C.J., and Brandt, J.).

JUDGMENT.—A mortgagee in possession is liable for waste, and if waste is proved, the mortgagor is entitled to have an account taken and the value of the damage deducted from the mortgage debt: *Weatherington* v. *Bankes*(1).

The circumstance that the rights of the parties have been ascertained by a decree does not deprive the mortgagor of his equity if the waste is committed subsequently to the decree. Inasmuch as the mortgagee may be entitled to a deduction which he could ordinarily establish by separate suit, the provisions of section 244 of the Civil Procedure Code appear to us to enable him to require the Court executing the decree to take account of the altered circumstances when application is made for the execution of the decree. This appears to give effect to the policy of the law which is adverse to the institution of a fresh suit; the orders of the Courts below are therefore set aside and the case remanded, costs to abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

1885. Aug. 31.

MAHOMED (PLAINTIFF), APPELLANT,

and

LAKSHMIPATI (DEFENDANT), RESPONDENT.*

Civil Procedure Code, s. 11—*Rent Recovery Act—Act VIII of* 1865, *Madras*, ss. 39, 40, 78—*Remedy of tenant aggrieved by notice of attachment.*

A tenant having received a notice of attachment under s. 39 of the Rent Recovery Act sued in a District Múnsif's Court to have the notice cancelled, no specific damage being alleged:

Held, that the suit did not lie.

SECOND appeal against the decree of T. Weir, Acting District Judge of Madura, in Appeal Suit No. 485 of 1884, reversing the

(1) Sel. Ch. Ca. 31.

* Second Appeal No. 430 of 1885.

decree of S. Krishnasámi Ayyar, District Múnsif of Dindigul, in Original Suit No. 479 of 1883.

This was a suit brought by the plaintiff against his landlord alleging that a notice sent to him by the defendant, intimating his intention to sell certain land specified in the plaint as if there were arrears of rent due from the plaintiff, was invalid in law, in that no change of pattá and múchalká or agreement to dispense with such exchange had been made between them; and praying that the notice be cancelled. No specific damage was alleged.

The District Múnsif decreed as prayed, but his decree was reversed on appeal by the District Judge on the ground that it was passed without jurisdiction.

The plaintiff preferred this second appeal.

Rama Ráu for appellant argued that s. 40 of the Rent Recovery Act does not oust the jurisdiction of the ordinary Civil Courts, and that the District Múnsif had jurisdiction to entertain and try the suit under s. 11 of the Code of Civil Procedure. Reference was also made to s. 78 of the Rent Recovery Act in support of this view.

Subramanya Ayyar for respondent argued that s. 78 of the Rent Recovery Act did not apply, the suit being neither to recover money paid nor to obtain damages; and that that Act specially barred the jurisdiction claimed by the District Múnsif under s. 11 of the Code of Civil Procedure; and further, that the suit was barred by limitation.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Hutchins and Parker, JJ.).

JUDGMENT.—The appellant brought this suit in the Múnsif's Court and the relief which he sought was that a notice, intimating his landlord's intention to sell some of his land for arrears of rent, might be cancelled. His case was that there had been no such acceptance, tender, or waiver of a pattá as warranted the landlord's taking proceedings under Act VIII of 1865, and further that the rent claimed was excessive.

The Múnsif granted the relief prayed for with costs. On appeal, the District Judge held that the Múnsif had acted without jurisdiction and dismissed the suit. The contention in this Court is that the Múnsif had jurisdiction and that s. 40, Act VIII of

MAHOMED v. LAKSHMIPATI.

1865, does not preclude the Civil Courts from taking cognizance of such a suit.

There is course, no doubt, that a person, aggrieved by any proceedings taken under colour of Act VIII, is at liberty to file his suit for damages either before the Collector (s. 49) or in the ordinary tribunals (s. 78), but the present suit is not one for damages, and the right to resort to the ordinary tribunals is at least limited by the general principle that there must be a cause of action shown, an injurious act producing damage.

Here there is no cause of action alleged. All that is stated is that the landlord sent a notice under s. 39 that he intended to move the Collector to sell certain land unless certain arrears claimed were paid within a month. Section 40 allows a month's grace within which the alleged defaulter may either pay the money or show cause before the Collector why the sale should not be held. In a certain sense, therefore, the notice gives a cause of action before the Collector, for it enables the defaulter to come into the Collector's Court, and indeed requires him to do so within a month, if he has any objection to make. But it gives no cause of action before the ordinary Courts. The Courts are strictly judicial, but the Collector combines judicial and executive functions, being both bound to sell if no objection is raised and the proceedings appear regular, and bound to adjudicate on such objections as may be raised.

Section 40 says that the appeal, *i.e.*, the showing cause against the intention to sell, must be made before the Collector and within a month. It does not say, nor is there anything in the Act to imply, that it may also be made before the ordinary Courts of justice. If it can be made in a Múnsif's Court, it must be under the ordinary law and upon a proper cause of action shown. A mere notice does not afford such a cause of action, but if it did, there being no other article in the Limitation Act applicable, the suit might be instituted at any time within six years under the general article 118.

The decree of the Lower Appellate Court is right, and we dismiss this second appeal with costs.