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No relief is sought by the plaintiff against the defendants Nos. 2 and 3, as they are merely made parties to have the accounts taken in their presence. No objection has been taken by them or on their behalf.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muthusámi Ayyar.

1886. October 11. November 13.

PADAKANNAYA (DEFENDANT No. 2), APPELLANT,

and

NARASIMMA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Rent Recovery Act—Act VIII of 1865—Mulageni lease—Encumbered tenancy—Sale for arrears of rent.

A demised land to B on a mulageni lease. B mortgaged his tenancy to C. The rent under the mulageni lease fell into arrears, and A obtained a decree against B for the amount:

Held, that arrears of rent are not a first charge on the tenant's holding, and accordingly that the landlord could not execute his decree by sale of the tenancy free from the mortgage created by the tenant—*Rájágopál* v. *Subbaráya* (I.L.R., 7 Mad., 31) followed.

APPEAL against the decree of H. M. Winterbotham, District Judge of South Canara, confirming the decree of A. Venkatarámayya, District Múnsif of Mangalore, in Original Suit No. 40 of 1884.

The plaintiff was the mulagár or proprietor of certain lands of which defendant No. 1 was the tenant under a mulageni or permanent lease granted by the plaintiff's father. The lease reserved a certain annual rent which subsequently fell into arrears. The plaintiff sued defendant No. 1 to recover the arrears of rent and obtained a decree for the amount in Original Suit No. 302 of 1881 on the file of the District Múnsif of Bantval, and in execution of the decree attached the mulageni right of defendant No. 1. But, long before the suit, defendant No. 1 had mortgaged his mulageni right to the father of defendant No. 2 under exhibit II of which the material parts are set out in the first paragraph of the judgment of the Court, see *infra*. Defendant No. 2 accord-

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* Second Appeal No. 13 of 1886.

ingly preferred a claim as mortgagee in the attachment by the plaintiff, and his claim was allowed. The plaintiff brought this suit under s. 283 of the Code of Civil Procedure for a declaration that he was entitled to execute his decree by the sale of the mulageni right of defendant No. 1 free from the mortgage of defendant No. 2.

Both the Lower Courts decreed in favor of the plaintiff, and defendant No. 2 preferred this second appeal.

Ramachandra Ráu Saheb and *Srinivasa Ráu* for appellant argued that the plaintiff could only sell the mulageni interest subject to the mortgage of defendant No. 2, because defendant No. 2 did not undertake to pay rent either expressly or impliedly, and was not a party to the decree sought to be executed. They further urged that the decree was only a money decree, and that neither it nor the mulageni lease made the rent a charge on the mulageni interest of the tenant; and relied, *inter alia*, on *Rájágopál* v. *Subbaráya* (I.L.R., 7 Mad., 31).

Gopala Ráu for respondents.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.)

JUDGMENT.—On the 29th June 1854, the plaintiff's father granted the land in suit to the defendant No. 1 on a "Mulageni" or permanent lease. On the 22nd April 1865, defendant No. 1 mortgaged his "Mulageni" right to the father of defendant No. 2 with possession. Exhibit II, which is the instrument of mortgage, contained the following provision:—"Henceforth we shall cultivate the said mortgaged garden and land *as under you*, and pay Government assessment out of the produce of the garden, 25 muras of rice for mulageni to the muli proprietor out of the geni of the fields, and from the remaining rice, we shall pay you 23 muras, at 45 polike as fixed on, at your house at the two suggi (second crops) of Kartigai within the 30th Palguna Bahula of every year, and get receipt for the same. The time fixed for redeeming the mortgaged land is 16 years from this date, that is to say, the Mesha Sankramana (the commencement of the Mesha month) of the next Vikrama year. Should any of the loan obtained by us and part of *the interest* remain unpaid, we shall pay for the balance of rice its price during the year, with interest thereon at the fixed rate, and release the mortgage deed and the

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mulageni chit and the tahanama, the mortgage deed executed to Ballukraya and the simple bond which we have given you and the garden land, &c."

Subsequently to this mortgage, the defendant No. 1 allowed the rent due to the plaintiff (mulagar or proprietor) to fall into arrears; and in Original Suit 302 of 1881 on the file of the Múnsif at Bantwal, the latter obtained a money decree against the former for those arrears. In execution of the decree, the plaintiff attached the mulageni right of defendant No. 1, but defendant No. 2 preferred a claim with reference to his mortgage. This claim being allowed, the plaintiff brought this suit under s. 283 of the Code of Civil Procedure to obtain a declaration that he was entitled to recover the arrears of rent decreed to him by the sale of the mulageni right free of the encumbrance created thereon by the mortgagee in favor of defendant No. 2. The Courts below decided in favor of the claim. The District Múnsif observed that the mulageni right assigned to defendant No. 2 by way of mortgage vested in him subject to the pre-existing liability to pay rent; and on appeal, the District Judge agreed with him and held that the liability to pay rent was inseparably attached to the right of occupancy, and that the one could not be severed from the other by a mortgage executed by the tenant in favor of a third party.

Defendant No. 2 contends in second appeal that rent is not a first charge on land as considered by the Judge, and relies on *Zamíndár of Rámnád* v. *Rámamany Ammál*(1) and *Virappa* v. *Kathana*.(2)

He also drew our attention to *Múnisámi* v. *Dakshanamurthi*(3) and stated that it was overruled by the Full Bench decision in *Rájágopál* v. *Subbarayá*.(4)

In the *Zamindár of Rámnád* v. *Rámanani Ammál*(1) one of the questions raised for decision was, whether the rent due to the zamíndár was a charge on a maganam or division of the zamíndárí, and whether the persons who purchased it subsequent to the date on which the rent claimed accrued due were liable for its payment by reason of the purchase. It was held in 1880 by a Division Bench of this Court that poruppu (annual payment) due to the

(1) I.L.R., 2 Mad., 234. (2) I.L.R., 6 Mad., 428.
(3) I.L.R., 5 Mad., 371. (4) I.L.R., 7 Mad., 31.

zamíndár was *rent* and not peshcush, and that as such, it was a debt due to the zamíndár and not a charge on the maganam.

In *Múnisámi* v. *Dakshanamúrthi*(1) a mittadár at Salem brought to sale the interest of a puttádár on his estate for arrears of rent under the provisions of Act VIII of 1865, and the then plaintiff became purchaser; one Kuppaiya obtained a decree against the puttádár upon a prior hypothecation for the sale of the puttádár's interest in satisfaction of his debt. The question raised for decision was whether the interest that passed to the purchaser at the sale under Act VIII of 1865 was subject to, or free of, the prior hypothecation. It was held, that the rent was first charge on the land, and that the puttádár's interest, which was the subject of hypothecation, was an interest defeasible on the exercise by the mittadár of his power of sale, subject to the provisions of Act VIII of 1865.

In *Rájágopál* v. *Subbaráya*(2) the question, whether a sale by a landlord of a tenant's interest in his holding for non-payment of rent under Madras Act VIII of 1865, defeated existing incumbrances, was again raised before a Division Bench. As the prior decisions upon that question were conflicting, it was referred to a Full Bench consisting of four Judges. It was ruled that the sale was subject to the existing encumbrances. The ground of decision was that the course of legislation from 1802 and the provisions of Act VIII of 1865 were incompatible with the view that what the landlord was entitled to sell for arrears of rent was the tenure itself, and not simply such property as existed in the tenant at the time of the sale.

In *Virappa* v. *Kathana*(3) there was a competition between a prior purchaser at a Court-sale of the tenant's interest in execution of a mortgage decree and a subsequent purchaser at the sale held for arrears of rent under Act VIII of 1865. The decision was in favor of the former, and it followed the Full Bench decision.

We must take it then that arrears of rent are not a first charge on the tenant's holding.

Another contention in second appeal is, that by agreement between the mortgagor and the mortgagee, the rent payable to the mulagár or landlord was charged on the land. But exhibit II,

(1) I.L.R., 5 Mad., 371. (2) I.L.R., 7 Mad., 31.
(3) I.L.R., 6 Mad., 428.

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on which the contention is based, evidences only an undertaking on the part of the mortgagor to pay the mulageni rent due to the landlord out of each year's produce. Further, the landlord was no party to this instrument, and we cannot say that the contention is well founded. However this may be, the decree under execution is only a money decree, and in the case of a competition between the decree-holder and a mortgagee, the former is certainly not entitled to bring to sale the execution debtor's property free of existing incumbrances.

We decree the appeal and reverse the decrees of our Lower Courts. The first respondent will pay the appellant's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

1887. April 19.

ÁLWAR AYYANGÁR AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

SÉSHAMMÁL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 98, 99, 157, 158.

A District Múnsif struck a case off the file of his Court on neither party appearing. Subsequently on an application by the plaintiffs the case was restored. The order of restoration was reversed by the District Judge.

Held, (1) that the order to strike off the case was illegal;

(2) that assuming that the case was dismissed, no appeal lay to the District Judge whose order was accordingly made without jurisdiction.

SECOND appeal against the decree of J. H. Nelson, District Judge of Chingleput, reversing the decree of N. R. Narasimhayyar, District Múnsif of Trivellore, and Civil Revision Petition, under s. 622 of the Code of Civil Procedure, praying the High Court to revise an order of J. H. Nelson, District Judge of Chingleput, dated 18th April 1885, reversing an order of N. R. Narasimhayyar, District Múnsif of Trivellore, dated 21st January 1885.

A suit filed in the Court of the District Múnsif of Trivellore was by an order, dated 13th December 1884, struck off the file on neither party appearing. On 21st January 1885 the District Múnsif on an application by the plaintiffs made an order restoring

* Second Appeal No. 770 of 1885 and Civil Revision Petition No. 245 of 1885.