APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

ZAMINDAR OF ETTAYAPURAM (SECOND DEFENDANT), APPELLANT,

v.

SANKARAPPA REDDIAR (PLAINTIFF), RESPONDENT.*

1903.
October 30.
November 10, 18.

Rent Recovery (Madras) Act—VIII of 1865, ss. 7, 38, 39, 40, 78—Landlord's right to sell by summary process—Dependent on observance of special provisions of Act—Infringement of tenant's rights at common law where special provisions not observed—Tenant's right of action—Effect of the Statute on that right.

Under the common law, a land-holder has no right to sell his tenant's interest in the land for arrears of rent in a summary way. That right is given only by the Rent Recovery Act, and prior to exercising it the landholder must have complied with the special provisions of the Act as to tender of proper patta and exchange of patta and muchilika. Where a landholder who has not complied with these provisions summarily sells his tenant's interest in the land, he violates the tenant's right. Such violation is actionable in a Civil Court as an infringement of a common law right, and that right of action is not taken away by the Statute. The special remedy given to a tenant by section 40 of the Rent Recovery Act is cumulative, and it is open to a tenant to adopt it if he prefers it to the ordinary proceedings in a Civil Court. Though section 78 of the Rent Recovery Act only refers to the recovery of damages, the ancillary remedies of declaration and injunction would lie even if the only right to object to an attachment were that which is given by that Act. These remedies are clearly available where the right is one at common law.

Mahomed v. *Lakshmipati*, (I.L.R., 10 Mad., 368), commented on.

Ramayyar v. *Vedachella*, (I.L.R., 14 Mad., 441), approved.

The question of limitation discussed.

Where the purchaser of a tenant's interest in land takes, without demur, patta in the name of his vendor, it will not be open to him to object to that patta (in a suit for a declaration that an attachment was invalid) unless he has given timely notice to the landlord claiming that his own name should be entered in the patta.

Ekambara Ayyar v. *Meenatchi Ammal*, (I.L.R., 27 Mad., 401), and *Sree Sankarachari Swamiar* v. *Varada Pillai*, (I.L.R., 27 Mad., 332), referred to.

SUIT by a tenant for a declaration that an attachment made by his landlord for arrears of rent was invalid. Plaintiff alleged that

* Second Appeal No. 283 of 1902 presented against the decree of S. Doraisamy Ayyangar, Subordinate Judge of Tinnevelly, in Appeal Suit No. 121 of 1901, presented against the decree of S. Authinarayana Ayyar, District Munsif of Satur, in Original Suit No. 318 of 1900.

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first defendant had sold his interest in the lands in suit to him 14 years ago, though the first defendant was still described as pattadar in the landlord's registers. Plaintiff contended that second defendant, the landlord, had improperly attached a portion of the land for arrears of rent, and that the attachment was invalid. He prayed for a declaration to that effect. First defendant remained *ex parte*. The District Munsif made the declaration, and the Subordinate Judge confirmed it, on appeal.

Second defendant preferred this second appeal.

V. Krishnaswamy Ayyar and *M. R. Ramakrishna Ayyar* for appellant.

P. R. Sundara Ayyar and *K. N. Ayya* for respondent.

The case first came before the Officiating Chief Justice (Sir Subrahmania Ayyar) and Russell, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH:—SIR SUBRAHMANIA AYYAR, OFFG. C.J.—Under the common law, the defendant, as landholder is, of course, not entitled to sell the plaintiff's interest in the land in respect of which rent is due, in a summary way. Such a right to sell by summary process is given to a landholder in the position of the defendant only by the Rent Recovery Act (VIII of 1865), sections 38 to 40. But the exercise of this right is, among other things, subject to the condition that prior to taking the process the landholder has followed the provisions of section 7 of the Act as to the exchange of patta and muchilika or the tender of such a patta as the tenant was bound to accept.

The substance of the plaint in the present case is that, though the defendant had not conformed to the provisions of the said section 7, he was yet proceeding to sell the plaintiff's interest in the land. If this be true, the defendant's action, in proceeding summarily against the plaintiff's land, would be a violation of the plaintiff's right as owner of the land and would be actionable in courts as an infringement of a common law right. This right of action will be available unless it is taken away by statute expressly or by necessary implication.

The provisions of section 40, which enable a tenant, whose interest in immoveable property the landholder is seeking to attach and sell, to institute a summary suit before the Collector by way of appeal against the attachment, obviously cannot be held to deprive the tenant of his remedies under the general law, in

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respect of what, in theabsence of a strict adherence to the provisions of the Rent Recovery Act, would be a derogation of the plaintiff's right under the common law. The special remedy of a summary suit before the Collector must, according to the well recognized canon of construction applicable to such cases (see per Willes, J., in *Wolverhampton Water Works Company* v. *Hawkesford*(1)), be held merely to be a cumulative remedy which it is open to the tenant to pursue if he think fit to do so in preference to proceeding in the ordinary courts.

That the legislature has left no room for doubt on the point is clear from section 78 of the Act, which provides that nothing in the Act shall be construed to debar any person from proceeding in the ordinary tribunals to recover money paid or to obtain damages in respect of anything professedly done under the authority of the Act. It is true this section does not refer to specific relief such as a declaration or an injunction. I cannot, however, agree in the contention that this section by implication takes away a party's right to obtain remedies other than that of an action for damages in cases where damages would not be the adequate remedy. The manifest object of the section was to lay down that a party aggrieved by proceedings taken under the Act is not confined to the special remedies given by it, but that he is at liberty to proceed in the Civil Courts; and the reference to damages only was probably because ordinarily award of damages would meet the requirements of justice. It would be most unreasonable to construe a provision intended to leave untouched a suit for damages, as depriving the injured party of a remedy by injunction or otherwise, even if the latter were the only adequate remedy in the circumstances of the case.

Suppose, for instance, a landholder is taking steps under section 45 to have the tenant arrested for alleged non-payment of rent, while the existence or the amount of arrears is not admitted, must the tenant wait to be arrested and after arrest claim under section 47 to be produced before the functionary who issued the warrant, to establish his contentions? Is it not open to him to anticipate the landholder's proceedings by suing in the ordinary courts for an adjudication on the points involved and pending such adjudication to restrain the landholder from

(1) 28 L.J.C.P., 242.

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proceeding under section 45? Surely the answer to this question must be in the affirmative. The arrest of a tenant at the instance of a landholder, when no rent was recoverable, as for instance where no proper patta had been tendered or where no rent was due, would, of course, be a serious violation of the tenant's personal right under the common law, and it would be impossible to contend that an injunction cannot be obtained against the threatened invasion of such a right, simply because a special remedy is given when, under colour of the Act, the invasion has been accomplished.

Cooper v. *Whittingham*(1) and *Hayward* v. *East London Water Works Company*(2) throw light upon the view that ought to be taken in such cases. In *Cooper* v. *Whittingham*(1) the plaintiff sued, among other things, for an injunction to restrain the defendants from importing certain pirated copies of a copyright work. Such importation was prohibited by the 17th section of the Copyright Act, 1842 (5 & 6 Vict., cap. 45), which section also enacted a particular penalty in respect of the act prohibited, viz., £10 for each offence and a sum double the value of the forfeited copies, half the former and the whole of the latter being made payable to the proprietor of the copyright. The objection that the imposition of such a penalty precluded the injured person from claiming the remedy by way of injunction was considered untenable by Jessel, M.R. His observations, so far as they are necessary here, were as follows:—"It was said . . . . that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty and that nothing else could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which if done would be an offence. Whenever an act is illegal and is threatened, the Court will interfere and prevent the act being done; and as regards the mode of granting an injunction the Court will grant it either when the illegal act is threatened but has not actually been done or when it has been done and seemingly is intended to be repeated." In *Hayward* v. *East London Water Works Company*(2) Chitty, J., adopted the same view of the law observing (at p. 146) "I see no reason why

(1) L.R., 15 Ch.D., 501. (2) L.R., 28 Ch.D., 138 at p. 146.

the Court should refuse to protect a right by injunction merely because it is a statutory right."

It follows that even if the right to object to the attachment were no more than a right under the Rent Recovery Act a suit to obtain the ancillary remedies of declaration and injunction would lie. That must be equally, if not *a fortiori*, so when the right is a common law right notwithstanding it is invaded under colour of the statute and notwithstanding that a particular remedy is given by the statute for what is done in contravention of its provisions.

If the construction of section 78 contended for were well-founded, a suit in a civil court to set aside a sale improperly brought about under sections 38 to 40 would also not be sustainable. But *Nattu Achalai Ayyangar* v. *Parthasaradi Pillai*(1) is a ruling to the contrary, the defect in the sale on which the judgment is rested being want of due service of the prescribed notice on the defaulter. If this decision is correct, as it certainly seems to be, it is difficult to understand why a tenant should not be at liberty to avert an improper sale by suing in the Court for a declaration of the invalidity of the attachment; in other words, to set it aside; though it was apparently held otherwise in *Mahomed* v. *Lakshmipati*(2). It must be confessed that it is not easy to follow the reasoning in the last mentioned case. Is the ground of the decision, that an improper attachment under sections 38—40 does not, in the absence of actual pecuniary loss, amount to an actionable wrong, or is it that the sole remedy available under the law in respect of such attachment is a summary suit before the Collector? In either case, for reasons already stated, I find myself unable to agree in the conclusion arrived at by the learned Judges.

It only remains, in this connection, to notice the argument founded on the fact that a suit such as the present would be subject, not to the special and short period of limitation prescribed by the Rent Recovery Act, but to the 6 years period under article 120 of the Limitation Act. Though at first sight this may seem calculated to countenance want of due diligence on the part of persons objecting to attachments like that under consideration, yet a moment's reflection will show that such will not be its practical effect; for the plaintiff in such a suit must be as prompt as if he were proceeding by way of appeal before the Revenue Courts

(1) I.L.R., 3 Mad., 114. (2) I.L.R., 10 Mad., 368.

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under section 40, and if no suit is instituted within the month to set aside the attachment and avert the sale, the landholder could get the land sold, and subsequent to the sale no suit in respect of the attachment would lie, for the simple reason that there is no subsisting attachment to be set aside. That a civil suit to set aside a sale which has taken place, lies, has, as already pointed out, been held; and the period of limitation for such a suit being one year only, I fail to see any real force in the above argument. Even if there were any force, it is difficult to perceive how that alone could warrant our adopting a different conclusion.

The next question is as to whether the patta relied on by the defendant was open to objection on the ground that it runs in the name of the plaintiff's vendor instead of that of the plaintiff. On behalf of the defendant it was alleged that notwithstanding the sale of the land to the plaintiff many years ago, pattas running in the name of the vendor had been tendered to and accepted by him till now. Probably the officers of the Court of Wards, who were in charge of the defendant's zamindari at the time of the sale and subsequently, following the practice prevailing in respect of Government ryotwary lands of not altering the registry except on the application of the parties concerned, continued to make out the patta in the name of the plaintiff's vendor, instead of that of the plaintiff, who, it is alleged, had not applied for the change. Be this as it may, if the plaintiff had, subsequent to the purchase, taken without demur, as asserted on behalf the defendant, pattas in the name of the vendor, it would not be open to him to object to the present patta unless he could show that he had given timely intimation to the defendant that his own name should be inserted in the patta (*Ekambara Ayyar* v. *Meenatchi Ammal*(1) and *Sree Sankarachari Swamiar* v. *Varada Pillai*(2)).

Nor could the proceedings taken by the defendant to have the plaintiff's interest sold be invalid for the reason that the notice prescribed by section 38, which was actually served on the plaintiff, purported to be addressed to the vendor of the plaintiff instead of to him, for in so doing, the defendant acted but in conformity with the frame of the patta, and the plaintiff would be precluded from objecting to such a notice for the same reasons that would preclude his objecting to the patta itself. In the view that the

(1) I.L.R., 27 Mad., 401.

(2) I.L.R., 27 Mad., 332.

service of the notice was the initiation of public proceedings for the sale of the plaintiff's interest in the land, such service may be taken to stand on the same footing as service of process in suits; and the present instance is not without analogy to cases of misnomer in judicial proceedings. In *Meredith* v. *Hodges*(1) it was long ago held that a defendant is estopped, by the recognizance of bail entered into for him by the name in which he issued, from pleading a misnomer, though he himself be no party to the recognizance, on the ground that the act of appearing by putting in bail must be considered as the defendant's own act. The matter was fully gone into in *Fisher* v. *Magnay*(2), where Tindal, C.J., and Coltman, Erskine and Cresswell, JJ., held that where a party is sued by a wrong name and suffers judgment to go against him without attempting to rectify the mistake, he cannot afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name. In the course of his judgment, Coltman, J., observed :—"It appears from *Crawford* v. *Satchwell*(3) that after judgment against a party by a given name the writ must issue in the same name, for the writ must follow the judgment." Similarly, therefore, it must be held that in proceedings taken under the Act with reference to a patta, no objection could be taken to the description of the tenant in such proceedings if it follows what is in the patta, and the tenant is precluded from objecting to the description in the patta itself.

RUSSELL, J.—The plaintiff in this case is a tenant with a saleable interest in his land. The second defendant is the landlord. The first defendant sold his interest to the plaintiff in 1885 but still remains the 'pattadar' in the landlord's registers.

The prayer in the plaint is that the Court will be pleased to pass a decree declaring the invalidity of the attachment made by the second defendant for arrears of rent for fasli 1308. The second defendant has proceeded under section 38 of Act VIII of 1865 to sell the plaintiff's interest in the land.

The relation of landlord and tenant, I think, admittedly exists between the plaintiff and the second defendant. The first defendant claims to have no interest in the suit. He has been *ex parte*. I

(1) 2 B. & P., 453. (2) 6 S.N.R., 588.
(3) 2 Str. R., 1218.

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do not agree with the District Munsif on this point. The plaintiff and the first defendant cannot both be tenants, and no one contends that the first defendant is. Hence the plaintiff must be.

The grounds on which the plaintiff asks for a decree are :—

(1) that the second defendant "did not grant patta to the plaintiff,"

(2) "improperly attached" the said land, still allowing the patta to stand in the name of the first defendant.

The issues raised in the case are :—

i. Whether the attachment for arrears of rent of the plaint lands is valid or not as against the plaintiff?

ii. Whether the plaintiff applied and the second defendant refused to transfer patta to the name of the plaintiff?

iii. Whether there is or is not the relationship of landlord and tenant between the second defendant and the plaintiff?

iv. Whether the plaintiff is estopped by his conduct from denying that he is the second defendant's tenant?

The two lower Courts have decreed in the plaintiff's favour. The landlord, the second defendant, appeals.

A point has been taken in appeal, which has not been raised in the Courts below to the effect that the plaintiff has no right to bring this suit in the Civil Court. It is argued that his only remedy is by way of appeal to the Collector under section 40, Act VIII of 1865. This point must be decided with reference to the principles laid down in the Full Bench ruling of this Court in *Ramayyar* v. *Vedachalla*(1): "Where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to; but where a statute is confirmatory of a pre-existing right the new remedy is presumed as cumulative or alternative unless an intention to the contrary appears from some other part of the statute." Again, "The key to the construction of Act VIII of 1865 is the existence of two coincident processes, one called summary and the other regular." No doubt the plaintiff has a remedy in the present case under section 41, Act VIII of 1865, but has he not also a remedy under the general or common law? His allegation, in substance, amounts to this, that the second defendant is interfering in an illegal manner with his interest in the

(1) I.L.R., 14 Mad., 441.

lands in suit and he asks the Court for a declaration that such interference is improper. The plaintiff is, I think, unquestionably entitled to bring such a suit in the ordinary Civil Courts. He is also, I think, entitled to pursue his remedy under section 41, Act VIII of 1865, if he wishes.

That being so, the question is whether the plaintiff is entitled to succeed in this suit. It is admitted that the lands have never been transferred to the plaintiff's name by the second defendant. It is alleged by the second defendant that up till Fasli 1308, the patta, though issued in the name of the first defendant, was "received fasliwar by plaintiff, plaintiff's son and plaintiff's undivided brother Subbah Reddy" and the rent was being regularly paid without any arears till recently.

There is no issue and no finding on the question whether there was a tender to the plaintiff for the Fasli 1308. The only objection to the patta, I take it, is that the first defendant's name is entered therein instead of the plaintiff's name and both the Courts find that such a patta is not a proper one. Assuming that pattas drawn up in precisely the same manner had been accepted for a series of years previous to Fasli 1308, in respect of this holding, then, I consider that the plaintiff would in this suit be estopped from asserting that the patta is improper.

Under such circumstances, if there was a tender of the patta to the plaintiff, though it ran in the name of the first defendant, it would not be open to the plaintiff now to object to it. This seems to me to be in principle what was decided by the Court in *Sree Sankarachari Swamiar* v. *Varada Pillai*(1) and also in *Govinda Setti* v. *Sreenivasa Row Sahib*(2) :

Before the appeal can be decided it is necessary to have findings on the following issues :—

i. Whether there was a tender of patta to the plaintiff such as is referred to in section 7, cl. 2, Act VIII of 1865.

ii. Whether the patta tendered to the plaintiff is the same as that tendered to, and accepted by, the plaintiff in previous years.

A further question is raised, namely, whether the procedure followed by the second defendant is valid with reference to section 39 of the Act.

(1) I.L.R., 27 Mad., 332. (2) Second Appeal No. 1331 of 1901 (unreported).

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It is found that the "written notice" was served upon the plaintiff, but it ran in the name of the first defendant. With reference to the remarks made above, I would hold that if the plaintiff has allowed himself to be treated as the tenant for a series of years it would not now be open to him in this suit to say that he was not the "defaulter." On the contrary, I think if, as both the plaintiff and the second defendant admit, the plaintiff is the tenant, he must be the defaulter when there is an arrear. I would hold therefore that "written notice" has been served on the defaulter.

Another question raised is whether this written notice has been given by the "person to whom an arrear is due." The Subordinate Judge does not give a definite judgment on the point, but it appears to me the plaintiff had no doubt that the notice came from the landlord, though signed by the karnam, who is stated to be an amin of the second defendant. It has not appeared during the course of the suit that the notice was not issued in the regular manner usual in the zamindari. Provided, therefore, that there was a tender of such a patta as the plaintiff was bound to accept, it appears to me the second defendant's procedure has been quite regular and the plaintiff's suit must fail.

If there was no such tender, the plaintiff would succeed.

I would remand the case for a finding on the issues mentioned above. Costs would abide the result.

The case of *Mahomed* v. *Lakshmipati*(1) was not cited at the bar and did not come to my notice before I wrote the above judgment. I agree to the reference to the Full Bench.

Sir SUBRAHMANIA AYYAR, OFFG. C.J., and RUSSELL, J.—Before disposing of the case we must, as the view that the present suit is sustainable is in conflict with the case of *Mahomed* v. *Lakshmipati*(1) refer for the opinion of the Full Bench, the following question:—

Is the present suit sustainable in law?

The case came on for hearing in due course before the Full Bench constituted as above.

V. Krishnaswamy Ayyar and *M. R. Ramakrishna Ayyar* for appellant.

(1) I.L.R., 10 Mad., 368.

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P. R. Sundara Ayyar and *K. N. Ayya* for respondent.

The Court expressed the following

OPINION.—We are of opinion that the present suit is sustainable in law for the reasons stated in the order of reference. The correctness of the general principle stated in *Ramayyar* v. *Vedachalla*(1), viz., that "where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to; but where a statute is confirmatory of a pre-existing right the new remedy is presumed as cumulative or alternative unless an intention to the contrary appears from some other part of the statute" is not contested. The right which the plaintiff seeks to vindicate in this suit is undoubtedly a right which existed independently of Act VIII of 1865, and the only question, therefore, is whether the remedy by which he seeks in a Civil Court to protect his common law right of property against invasion by the defendant, under colour of Act VIII of 1865, which confers special rights on landholders, is clearly taken away, and the summary remedy provided by section 40 of that Act, is substituted therefor.

The chief argument is that under section 40 the landholder is authorized to take measures for bringing the tenant's property to sale for recovering arrears of rent, if and when no appeal has been made to the Collector against the attachment within one month from the date of the attachment, and that it, therefore, follows from this provision that the sale of the property in default of such appeal is lawful, and therefore cannot be forbidden by any Court.

In our opinion such a construction of the section is far-fetched and unwarranted. The object of the section simply is to authorize the landlord to send a notice to the Collector under section 16 of the Act, with a view to the property being brought to sale. Reliance also is placed on section 78 of the Act which, by way of precaution, saves the common law remedy by resort to the ordinary tribunals to recover money paid or damages in respect of anything purporting to be done under the authority of the Act. The argument is that the omission in the section to expressly save remedies other than the recovery of money or damages, does by implication take away any other remedy, such as by injunction or declaration. For the

(1) I.L.R., 14 Mad., 441.

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reason stated by the learned Officiating Chief Justice in the order of reference, we cannot accede to the contention that the common law remedy by way of specific relief is taken away by necessary implication.

In addition to the cases cited in the order of reference, we may refer to the decision in *Shuttrughon Das Coomar* v. *Hokna Showlal*(1) in which it was held that a suit for compensation for wrongful seizure of cattle will lie in a Civil Court notwithstanding that under the Cattle Trespass Act, I of 1871, a special remedy is provided for the recovery of compensation by resorting to the Magistrate. See also *Shankar Sahai* v. *Din Dial*(2).

If the decision in *Mahomed* v. *Lakshmipati*(3) is in conflict with our view in this case, we are unable to accept it as correct.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. November 30.

SESHAGIRI ROW (PLAINTIFF), APPELLANT,

v.

NAWAB ASKUR JUNG (DEFENDANT), RESPONDENT.*

Letters Patent—Art. 12—" Cause of action " —Promise made out of the jurisdiction of High Court to pay within the jurisdiction—Breach—Suit on Original Side—Jurisdiction.

Defendant, at Hyderabad, undertook (as was assumed for the purposes of the case) to pay plaintiff within the jurisdiction of the Madras High Court a sum of money alleged to be due for services which had been rendered at Hyderabad or other places outside the jurisdiction. The alleged promise had not been performed and plaintiff brought this suit on the Original Side of the Madras High Court, no leave having been obtained:

Held, that the Court had no jurisdiction to try the suit. The words "cause of action" in article 12 of the Letters Patent, mean all those things which are necessary to give a right of action, and in a suit for a breach of contract the High Court has no jurisdiction, where leave has not been obtained, unless it is proved that the contract as well as the breach of it occurred within the local limits of it jurisdiction.

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(1) I.L.R., 16 Calc., 159. (2) I.L.R., 12 All., 409.
(3) I.L.R., 10 Mad. 368.

* Original Side Appeal No. 9 of 1903 presented against the decree of Mr. Justice Boddam in Original Suit No. 97 of 1902.