the decrees of the Courts below decree the plaintiff's claim for the refund of 4 annas and 1 pie but without costs, as the plaintiff has failed to establish the title which he set up to the land covered by the pials and the pandal.

MADATHAPU RAMAYA v. THE SECRETARY OF STATE FOR INDIA.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

EKAMBARA AYYAR AND TWO OTHERS (DEFENDANTS NOS. 3 TO 5), APPELLANTS,

v.

MEENATCHI AMMAL AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

1903. September 15. October 6.

Landlord and tenant—Incumbrances by tenant and subsequent ejectment—Effect of ejectment on mesne incumbrances.

The ejectment of a tenant, under section 10 or 41 of the Rent Recovery Act operates not only as a determination of the tenant's right of occupancy, but also as an extinguishment of all mesne incumbrances and subordinate interests created by the tenant.

A tenant gave a usufructuary mortgage over his land and covenanted to repay the amount. About two years thereafter the shrotriemdar obtained a decree against the tenant directing him to accept patta as settled by the judgment. On his failure to do so the tenant was ejected. The mortgagee now sued the tenant and the shrotriemdar, claiming a personal decree as against the tenant and the sale of the mortgaged property as against the shrotriemdar, in whose possession it was:

Held, that the mortgagee was not entitled to an order for the sale of the mortgaged property.

SUIT on a mortgage. In Second Appeal No. 74 of 1902, plaintiff sued to recover Rs. 823-10-8 due under a deed of mortgage executed in his favour by defendants Nos. 1 and 2, claiming the amount personally as against these defendants and by sale of the mortgaged property. Defendants Nos. 1 and 2 were tenants of a maratham shrotriem village, of which defendants Nos. 3 to 5

* Second Appeals Nos. 74 and 236 of 1902, presented against the decrees of A. C. Tate, Acting District Judge of Chingleput, in Appeal Suit Nos. 95 and 100 of 1901 presented against the decrees of T. V. Venkateswara Ayyar, District Munsif of Conjeeveram, in Original Suit Nos. 800 and 841 of 1899.

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were shrotriemdars. Defendants Nos. 1 and 2 had given a usufructuary mortgage to plaintiff, with a covenant to pay, defendants Nos. 1 and 2, the mortgagors, remaining in possession as lessees of plaintiff. About two years after the date of the mortgage, the shrotriemdars, defendants Nos. 3 to 5, obtained a decree under the Rent Recovery Act directing defendants Nos. 1 and 2 to accept pattas. They, however, having failed to do so were ejected. Plaintiff, as mortgagee, now sued to recover the mortgage amount from the tenants personally and by the sale of the property in the hands of the shrotriemdars. The District Munsif decreed in plaintiff's favour as against defendants Nos. 1 and 2 personally, but dismissed the suit as against the shrotriemdars, defendants Nos. 3 to 5. Plaintiff successfully appealed to the District Judge against that portion of the decree which dismissed the suit against defendants Nos. 3 to 5, the District Judge ordering the properties to be sold for the mortgage amount. Defendants Nos. 3 to 5 preferred this second appeal.

P. R. Sundara Ayyar for appellants.

P. S. Sivaswami Ayyar for first respondent.

In Second Appeal No. 236 of 1902, the facts were similar except that the usufructuary mortgagee was in possession of the mortgaged land when the order of ejectment was passed against the tenant. Plaintiff sued to recover possession of the land, from which he had been ejected by the shrotriemdars in execution of the order of ejectment. The District Munsif dismissed the suit, but the District Judge reversed that order and decreed in plaintiff's favour.

Defendants Nos. 1 to 3 preferred this second appeal.

P. R. Sundara Ayyar and *Sankara Ayyar* for appellants.

T. V. Seshagiri Ayyar for respondent.

BHASHYAM AYYANGAR, J. (*Second Appeal No. 74 of* 1902).—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 incumbrances created by the tenant or only subject thereto.

In the present case the incumbrance 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 shrotriemdar,

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 shrotriemdar under section 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 under section 73. The *mortgagee now* sues the tenant and the shrotriemdar 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 shrotriemdar, gave a decree for sale of the mortgaged property on the ground that an order of ejectment under section 10 cannot stand on a different footing from a sale for arrears of rent under section 38 as regards its effect on mesne incumbrances 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 shrotriemdar after the judgment of the Collector (see the decision of the Full Bench in *Shanmuga Mudaly* v. *Palnati Kuppu Chetty*(1)). 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*(2)).

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, under section 10 or 41 operates not only as a determination of the tenant's right of occupancy, but also as an extinguishment of all mesne incumbrances and subordinate interests created by the tenant. The case relied upon by the District Judge of a sale under section 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

(1) LL.R., 25 Mad., 613. (2) I.L.R., 21 Mad., 482.

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such interest. In construing this section, it was held by a Full Bench of this Court in *Rajagopal* v. *Subbaraya*(1) 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 incumbrances 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 incumbrance 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 incumbrances created by the tenant (section 115, Transfer of Property Act). If the legal relation between a shrotriemdar 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 shrotriemdar re-enters on the land (under section 10 of the Rent Recovery Act for breach of a statutory condition therein referred to or under section 41 for non-payment of rent) the holding would become revested in the shrotriemdar as it was vested in him at the time he granted the lease and he might avoid all mesne charges and incumbrances, 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*(2) and *Great Western Railway Company* v. *Smith*(3)). The case has been argued before us principally on such footing, but there is nothing to show that the relation between the shrotriemdar 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 shrotriemdar 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 eject-

(1) I.L.R., 7 Mad., 31. (2) I.L.R., 21 Bom., 311.
(3) L.R., 2 Ch.D., 235.

ment under section 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 under section 10) in analogy to the case of the *Earl of Arundel*(1) (compare *Doldem Rayer* v. *Stridiland*(2)) 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*(3)), 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 *Venkatanarasimlu Naidu* v. *Danvamudi Kottayya*(4) and *Cheekati Zamindar* v. *Ranasooru Dhora*(5) 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 shrotriemdar. In determining the effect of an order of ejectment passed under section 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

(1) Dyer, 344.
(2) 2 Q.B., 792.
(3) I.L.R., 22 Bom., 389 at p. 397.
(4) I.L.R., 20 Mad., 299.
(5) I.L.R., 23 Mad., 318.

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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 incumbrances 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 under section 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 under section 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 incumbrance 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 incumbrances and maintain that the order of ejectment would annul certain incumbrances 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 incumbrances 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 under section 41 of the Rent Recovery Act.

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.

In *Jafree Begum* v. *Hossein Zaman Khan*(1) 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*(2) 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 neccessary 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*(3) 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

(1) 2 N.W.P.H.C.R., 6. (2) I.L.R., 15 All., 219.
(3) I.L.R., 22 Bom., 389.

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thereunder and it throws no light upon the question arising in this case.

It is unnecessary to consider and decide in this case the effect of a relinquishment under section 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 incumbrances created by the tenant may stand altogether on a different footing and the relinquishment itself when the land relinquished is burdened with such an incumbrance, may be inoperative to terminate his liability, as tenant to the landholder until the incumbrance ceases by efflnxion of time or is otherwise discharged by the tenant (*Sham Das* v. *Batul Bibi*(1), *Badri Prasad* v. *Sheodhian*(2)). 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.—I entirely agree.

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 under section 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 shrotriemdar 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.

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(1) I.L.R., 24 All., 538. (2) I.L.R., 18 All., 354.