

mortgagee has notice of the subsequent encumbrance and the subsequent encumbrancer has no notice of the prior mortgage; in such a case it may be just to penalize the prior mortgagee for his disregard of the provisions of section 85 of the Transfer of Property Act. The present case is not such a case, and is we think covered by the Privy Council decision.

The District Judge has taken an account of the profits received by the prior mortgagee after entering into possession and has set them off against the interest. That being so we do not think we can take the profits as the equivalent of the interest as was done in the Privy Council case. The rule there adopted is not laid down as a rule of law but as a rule "just and convenient and not objected to by either party."

We, therefore, accept the District Judge's finding and adopt his account for the final decree. If the plaintiffs do not redeem the third and fourth defendants, the plaintiffs will have no costs from the third and fourth defendants and will pay their costs. Six months will be allowed for redemption.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

PERIA KARUPPAN (THIRD DEFENDANT), APPELLANT,

v.

1908.
February 13.

SUBRAMANIAN CHETTI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 4), RESPONDENTS.*

Landlord and Tenant—Notice determining tenancy—Denial of landlord's title after suit does not render previous notice unnecessary.

A tenant is entitled to reasonable notice before ejectment, and fifteen days' notice to a cultivating tenant in the middle of the cultivating season is not sufficient notice.

A landlord in a suit for ejectment against a tenant is bound to prove a complete cause of action when the suit was instituted, and the tenant, who for the first time denies the landlord's title in his written statement, is not

* Second Appeal No. 181 of 1905, presented against the decree of M. R. Ry. W. Gopalachariar, Subordinate Judge of Madura (East), in Appeal Suit No. 252 of 1904, presented against the decree of M. R. Ry. V. R. Kuppusami Iyer, District Munsif of Sivaganga, in Original Suit No. 200 of 1901.

PERIA
KARUPPAN

v.

SUBRA-
MANIAN
CHETTI.

by such denial disentitled to set up want of proper notice before the institution of the suit.

Abdulla Naha v. Moidin Kutti, (17 M.L.J., 287), not followed

Unhamma Devi v. Vaikunta Hegde, (I.L.R., 17 Mad., 218), followed.

SUIT for possession of land and damages.

The plaintiff's case was that the lands were mortgaged with possession to him by the second defendant and one S deceased, uncle of the first defendant, in 1881. The third defendant was the son-in-law of S. The plaintiff alleged that S cultivated the land and paid the rent and that, after the death of S, the first defendant succeeded as heir, and the third defendant continued to cultivate and pay the produce. From 1899, however, the third and other defendants refused to pay the produce. The plaintiff brought this suit for possession of the mortgaged land and for damages for being kept out of possession.

Defendants Nos. 1 and 2 pleaded that plaintiff was entitled to possession but not to damages.

The third defendant alleged that the land was his ancestral property and that the mortgage relied on by plaintiff was fraudulent. He denied having executed any rental deed to plaintiff or paid rent to him.

The District Munsif held that, as the plaintiff had according to his statement rented the land to third defendant, he ought, after proper notice, to sue as lessor to recover the land from his lessee, and that his present suit to recover on the footing of the mortgage was unsustainable. On appeal this decision was reversed and the suit remanded for retrial. It was ultimately held by the lower Appellate Court that the plaintiff was entitled to recover possession, as the third defendant was only holding as tenant of the plaintiff, and that the notice given by plaintiff in December 1900 to the third defendant asking him to surrender possession in fifteen days was a sufficient notice to determine the tenancy.

The third defendant appealed to the High Court.

The chief question raised in the appeal was whether the notice given to third defendant was sufficient.

P. R. Sundra Ayyar and *C. V. Anantakrishna Ayyar* for appellants.

T. Subrahmanis Ayyar for first respondent.

JUDGMENT.—We think the third defendant, as tenant of the plaintiff, the usufructuary mortgagee, was entitled to reasonable

notice before ejection. In the present case the plaintiff gave only fifteen days notice in December in the middle of the cultivation season which is clearly unreasonable. It was then argued for the respondent that in this case no notice was necessary, because in his written statement the third defendant had denied the plaintiff's title as landlord and so forfeited his tenancy. In support of this contention a recent decision (*Abdulla Naha v. Moidin Kutti*(1)) was referred to. This decision is not in accordance with *Unhamma Devi v. Vaikunta Hegde*(2) where it is said to be settled law that the denial of title for the first time in the suit does not disentitle the tenant to notice for the reason that the plaintiff is bound to show that at the date of suit he had a complete cause of action. We agree with the decision which is in accordance with the view taken in Bombay and Calcutta (*Vithu v. Dhondi*(3)), *Prannath Shaha v. Madhu Khulu* (4), *Nizamuddin v. Mamtazuddin*(5); and we are unable to follow the decision in *Abdulla Naha v. Moidin Kutti*(1).

In the result the decree of the District Judge must be set aside and the decree of the District Munsif must be restored with costs in this and the lower Appellate Court.

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(1) 17 M.L.J., p. 287.

(3) I.L.R., 15 Bom, 407.

(5) I.L.R., 28 Calc., 135

(2) I.L.R., 17 Mad., 218.

(4) I.L.R., 13 Calc., 96.
