APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., the Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

1912. October 9 and 17, and 1914. January 6 and 7.

CHURIYAYI KANARAN (PLAINTIFF, APPELLANT), APPELLANT,

v.

MATTARAI CHIRUTHA AND ANOTHER (DEFENDANTS NOS. 9 AND 10, RESPONDENTS), RESPONDENTS.*

Malabar Tenants Improvements Act (Madras Act I of 1900), ss. 3 and 5—Tenant introduced by mortgagor after mortgage—Purchaser in execution of decree on mortgage—Right to improvements against—Right of tenant to improvements not confined against lessor.

The word 'tenant' in section 3 of the Malabar Tenants Improvements Act (Madras Act I of 1900) includes also a lessee from a mortgagor after the creation of a mortgage in favour of a stranger. Hence, such a tenant is entitled under section 5 of the Act to the value of improvements effected by him even as against a purchaser in execution of the decree under a mortgage.

Section 5 of the Act does not confine the tenant's rights to improvements only as against his lessor.

APPEAL under article 15 of the Letters Patent, presented against the judgment of SUNDARA AYYAR, J., in Second Appeal No. 1271 of 1911, preferred against the decree of A. EDGINGTON, the District Judge of North Malabar, in Appeal No. 361 of 1910, preferred against the decree of K. V. KARUNAKARA MENON, the District Munsif of Tellicherry, in Original Suit No. ?63 of 1909.

The first defendant executed a simple mortgage of the suit land to the plaintiff on 25th June 1900. The suit was to recover the amount due under the mortgage by sale of the mortgaged property. Defendants Nos. 9 and 10 claimed the value of improvements as lessees under the mortgagor. The mortgage to the plaintiff was in 1900. The lease of defendants Nos. 9 and 10 began according to them, before 1900 and was renewed by documents subsequent to the date of mortgage. The mortgagee-plaintiff denied that the lease under which defendants Nos. 9 and 10 claimed began before the date of his mortgage in 1900. The lower Courts holding that it was unnecessary to decide the questions as to (*a*) whether the lease under which defendants

* Letters Patent Appeal No. 237 of 1912.

Nos. 9 and 10 claimed began before or after the date of plaintiff's mortgage, and (*b*) whether the leases and renewals granted to defendants Nos. 9 and 10 were proper and valid, decreed the sale of the plaint property for the amount due to the plaintiff subject to the right of defendants Nos. 9 and 10 to receive compensation for their improvements, if any, in the lands. Plaintiff preferred the Second Appeal No. 1271 of 1911 on the grounds that the leases were subsequent to his mortgage and that therefore the defendants Nos. 9 and 10 were not entitled to compensation for improvements effected by them.

The Second Appeal No. 1271 of 1911 was heard by SUNDARA AYYAR and SADASIVA AYYAR, JJ.

SADASIVA AYYAR, J., dismissed the Second Appeal agreeing with the lower Courts that it was unnecessary to go into the questions which were not decided and that the lessees were entitled to compensation as the leases were granted for short periods and were according to the usage obtaining in Malabar and did not contain any unusual or onerous terms. SUNDARA AYYAR, J., reversed the decrees of the Courts below and remanded the case for disposal according to law holding that the questions left undecided must be decided, that the lessee was not entitled to any improvements as against any person except his lessor, and that if the lease had been created subsequent to the mortgage to the plaintiff, the plaintiff was not bound to pay the value of the improvements.

As a result of this difference of opinion, the Second Appeal was dismissed with costs.

Against this, the above Letters Patent Appeal No. 237 of 1912 was filed.

C. V. Anantakrishna Ayyar for plaintiff, appellant.

Ryru Nambiyar for defendants, respondents.

C. V. Anantakrishna Ayyar for the appellant. This is not a suit in ejectment. It is only for sale. The question is whether a lease subsequent to a hypothecation is valid as against the hypothecatee. Persons claiming under subsequent alienations hold a subordinate position to the hypothecatee.

[SANKARAN NAIR, J.—If it is only a hypothecation, is not the owner of the land hypothecated entitled to enjoy it in the usual way by letting it out?]

Under section 48, Transfer of Property Act, when there are various alienations, they take effect in the order of their dates. Again under section 106, a lease is a transfer. So a lease created after a hypothecation is subject to it.

[SANKARAN NAIR, J.—The hypothecatee is not entitled to possession. The lease will be invalid only if he is entitled to possession. If the lease stands in his way of getting possession of the land by bringing it to sale, it is invalid as against the hypothecatee. Is there any case, English or Indian, which says that a lease is invalid as against the hypothecatee? The hypothecator can do anything consistent with the rights of the hypothecatee.]

So far as I know there is no case. According to Form VII of the Civil Procedure Code, in Appendix D the property could be sold, if money is not paid. There is no reservation made for the rights and claims of subsequent alienees. The tenant is not a lessee so far as the mortgagee is concerned.

[SANKARAN NAIR, J.—Then how do you get over the Malabar Tenants Compensation Act?]

"Tenant" is defined in section 3, clause (2). My contention is that he is not a tenant. He does not believe in good faith that he is entitled to possession.

[SANKARAN NAIR, J.—The object of the Act is to give the tenants compensation for value of improvements, even though they are ejected. It is enough, to bring them under the definition, that they believe in good faith that they are tenants.]

The tenant claims only value for improvements. He does not claim the right to retain possession. If instead of the other defendants being lessees, they are usufructuary mortgagees, it is anomalous to say that the first mortgagee is to be prejudiced by subsequent alienations.

[SANKARAN NAIR, J.—In such cases also the value of the improvements will be allowed. It is really anomalous but for the provisions of the Act. You may say that the Act departs very much from the ordinary rules governing landlords and tenants. The Act was meant to be so.]

Order XXI, rule 95, Civil Procedure Code, says that if a lease is created after an attachment of the judgment-debtor's property, the lessee could be physically turned out. So that in this suit

the hypothecatee is entitled to have the property sold free of any claims by subsequent alienees.

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Ryru Nambiyar for the respondents argued that the case was governed by the Act itself and that hence the tenant was entitled to get compensation for the improvements when ejected.

Cur ad Vult.

WHITE, C.J., AND SANKARAN NAIR AND OLDFIELD, JJ.

JUDGMENT.—The question for decision is whether the defendants, tenants holding under the mortgagor the first defendant are entitled to get the value of improvements made by them on eviction by the purchaser in execution of the mortgage decree obtained by the plaintiff. We proceed on the footing that the lease to the defendants is subsequent to the creation of the mortgage. The plaintiff's case is that it was not open to a mortgagor to create any right in derogation of the mortgage. The defendants claim the value of improvements under the Madras Act I of 1900. Section 5 of that Act declares the right of "every tenant" to receive compensation for improvements on ejectment. It is argued that this section entitles the tenant to receive compensation only from his lessor. There is no such restriction in the section itself. The definition of the term (see section 3) shows that it includes persons other than those included in the word as defined in the Transfer of Property Act and includes persons who did not enter into possession under any agreement with, or with the consent of, the person, entitled to obtain possession of the property. The customary law leaves no doubt on the point.

In Major Walker's Report on the Land Tenures of Malabar (1801), a recognized authority, it is stated: "should there be a paramba without any known owner and a kudian (tenant) believing that it was without a master settled on it and made considerable improvements, on the return of the jenmkar or any one producing sufficient proofs that he was the owner of the paramba, the kudian must in that case, without dispute, accede to the demand, provided the jenmkar pays *kuli kanom* or the value of the improvements."

Accordingly the "tenant" according to section (3) includes any person who enters into possession of waste land without the consent of the owner but with the *bona fide* intention of paying

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the customary rent to the owner when ascertained. Similarly the holders of land under cowles granted by Government received before the passing of the Act the value of improvements on surrendering the land to the janmi: so also tenants holding under invalid kanoms, leases or mortgages granted by the karnavan when surrendering the lands to the tarwad; tenants let into possession by a person claiming jenm title on eviction by the person found to be the true janmi of the land also received compensation. The section accordingly defines tenants to include mortgagees as well as persons who in good faith believed themselves to be mortgagees or tenants. It is clear therefore that the defendants who are in possession as tenants under the mortgagor are "tenants" within the definition and accordingly entitled to get compensation for improvements on eviction. It is not contended before us that the defendants are entitled to hold possession against the purchaser. The decrees of the lower Courts which direct the sale of the first defendant's interest in the property will be modified by ordering the sale of the property subject to the right of the defendants to receive compensation for the value of improvements.

With this modification the decree is confirmed and the appeal dismissed with costs.

N.R.