

## APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

PENUMETSA SUBBARAJU (FIRST DEFENDANT), APPELLANT,

v.

VEEGASENA SEETHARAMARAJU AND ANOTHER (PLAINTIFFS),  
RESPONDENTS.\*

1914  
October 28  
and  
November 5.

*Substitution of property and security—Right of purchaser in court-auction to substituted properties—Transfer of Property Act (IV of 1882), ss. 2 (d), 8, 36, 44 and 52—‘Contract to the contrary’ in section 36 of the Transfer of Property Act.*

After a decree for sale on a mortgage, the mortgagor who was in possession gave a lease of his properties to the first defendant for one year from July 1907 to July 1908 with a covenant for payment of the rent on 10th January 1908. In ignorance of this lease and the reservation of a rent the mortgaged properties and the crops were brought to sale in November 1907 and plaintiff purchased the lands together with the crops thereon and the sale was confirmed in December 1907. The crops were harvested in January 1908 by the lessee. In a suit by the purchaser, for the rent of the whole year from the mortgagor and his lessee.

*Held:*

(a) that the purchase of the right, title and interest of the mortgagor to the lands and of the standing crops thereon entitled the purchaser to receive the whole rent reserved which was the thing substituted by the mortgagor for the crops,

(b) that sections 8 and 36 of the Transfer of Property Act (IV of 1882) were inapplicable as the purchase was in court-auction,

(c) that a stipulation to pay rent of a year's lease at a particular date is a contract to the contrary within the meaning of section 36 of the Transfer of Property Act (IV of 1882), which enacts that the right to rent as between the transferor and the transferee ordinarily accrues from day to day, and

(d) that the creation of a lease for one year after a suit and decree on mortgage is not affected by the doctrine of *lis pendens* enunciated in section 52 of the Transfer of Property Act (IV of 1882) as such a lease is an ordinary incident of the beneficial enjoyment of a mortgagor allowed to remain in possession.

SECOND APPEAL against the decree of G. KODANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Kistna at Masulipatam, in Appeal No. 225 of 1911 (transferred from the file of N. LAKSHMANA RAO, the Subordinate Judge of Kistna at Ellore, preferred against the decree of T. S. KRISHNA AYYAR, the District Munsif of Narasapur, in Original Suit No. 575 of 1908.

\* Second Appeal No. 1280 of 1913.

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The facts of this case appear from the judgment of SADASIYA  
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*P. Narayanamurti* for the appellant.

The Honourable Mr. B. N. Sarma for the respondents.

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SADASIYA AYYAR, J.—The first defendant is the appellant before us. He was the lessee under the defendants Nos. 7 and 8 for the year July 1907 to July 1908 of the plaint lands. The plaintiff purchased in court-auction in November 1907 in execution of a mortgage-decree against the defendants Nos. 7 and 8 (passed solong ago in 1898 or 1899) the plaint lands. The plaintiff purchased not only the lands but also the crops standing thereon. The sale was confirmed in December 1907 under the old Civil Procedure Code. The crops were harvested in January 1908 by the first defendant. The rent reserved by the defendants Nos. 7 and 8 with the first defendant was 212 bastas of paidy and its value is said in the lease-deed to be Rs. 1,272 at Rs. 6 per basta or bag. The first defendant paid Rs. 400 of the rent to the defendants Nos. 7 and 8 and carried away the crops in January 1908.

The plaintiffs brought the suit for recovery of Rs. 1,272 (the value of the grain-rent due to the defendants Nos. 7 and 8 by the first defendant) on the allegation that by the plaintiffs' purchase of the land and of the standing crops in November 1907 in Court-auction they (the plaintiffs) became entitled to the crops themselves or, at least, they became entitled to recover the rent of Rs. 1,272, plaintiffs alleging further that the first defendant and the defendants Nos. 7 and 8 colluded together and cut and carried away the crops in January 1908 without paying even the rent of Rs. 1,272 to the plaintiffs. Plaintiffs also claim interest at Re. 1 per cent per mensem from the 12th January 1908 till the date of suit (16th of November 1908).

The lower Appellate Court held that the plaintiffs were entitled to at least the rent amounting to 212 bags of grain.

It further held that, though the lease-deed mentioned Rs. 6 per bag as the price, the real price was only Rs. 5 per bag and the price of the 212 bags was therefore Rs. 1,060 and not Rs. 1,272 as claimed in the plaint. It further found that as the defendant No. 1 had paid Rs. 400 to defendants Nos. 7 and 8 who were not entitled to receive it, the defendants Nos. 7 and 8 must be deemed to have had and received it for the plaintiffs. It

therefore gave a decree against the defendants Nos. 7 and 8 for the Rs. 400 received by them out of the rent and it gave a decree for the remaining Rs. 660 out of the Rs. 1,060 against the defendants Nos. 1 to 6. It disallowed the plaintiffs' claim for interest on the ground that the plaintiffs' suit was one for unliquidated damages and not for rent or liquidated damages.

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The contentions in appeal are—

(a) that the plaintiffs having purchased only the standing crops and the first defendant under his lease-deed having become entitled to the crops as lessee, the plaintiffs purchased nothing. (I should add that this contention is not raised in any of the grounds of the Memorandum of Second Appeal but as a question of law it was allowed to be argued.)

(b) that as the plaintiff did not purchase the right of the defendants Nos. 7 and 8 to the rent, they ought not to have been given a decree for the rent and their plaint ought not to have been allowed to be amended into a suit for the amount of the rent.

As regards the first contention it raises the question whether when there has been a court-auction-sale in pursuance of a mortgage decree, the mortgagor in possession could convey to a lessee the right to raise crops on the land and take them away so as to prevent the crops being validly sold in execution of the decree for sale already passed. In *Thakur Prasad v. Gaya Sahu* (1), it was held that "a lease of property made by a judgment-debtor against whom a mortgage decree for sale had been made came within the purview of section 52 of the Transfer of Property Act" and that the lessee cannot set up any rights under the lease as against the purchaser in the court-auction-sale held in execution of the mortgage decree. I think, however, that the proposition is stated too broadly in that judgment as it ignores the ordinary incident of the beneficial enjoyment which a mortgagor who is allowed to remain in possession is entitled to have the benefit of. In *Radhika v. Radhamani* (2), the learned Judges MUTHUSWAMI AYYAR and HUTCHINS, JJ., stated that "yearly leases and such other acts as are either the necessary or the ordinary reasonable incidents of an interim beneficial enjoyment will not be affected though they were made *pendenti lite*." In

(1) (1898) I.L.R., 20 All., 349.

(2) (1884) 1.L.R., 7 Mad., 96 at p. 99.

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this case I think that the lease in first defendant's favour having been only for one year the decree for sale and the court-auction-sale held in pursuance thereof will not affect the rights of the first defendant lessee to the beneficial enjoyment of the crops. The purchase of the crops therefore by the plaintiff in the court-auction did not give the plaintiff a title to the crops themselves but only what took the place of the right to the crops which would have vested in the mortgagor judgment-debtor if he had not parted with such right. We are unable to accept the contention of Mr. P. Narayanamurti (vakil for the appellant) that because the plaintiff did not purchase the rent which the mortgagor reserved to himself in the place of the right to cultivate and harvest the crops which right he parted with to the lessee, therefore the plaintiff could not obtain the right even to the rent. A purchaser gets title not only to the property purchased but also to whatever has been lawfully substituted for the whole, or part of the property sold to him. The larger right to the owner of a land to the profits, and crops growing on that land includes the smaller right to the rent reserved by him in consideration of his having parted with the right to the crops themselves in favour of lessees. A sale of such larger right conveys a title to the smaller right which had taken the place of the larger right.

The sale in court-auction was made of the larger right to the standing crops as the Court had no notice that a smaller right to rent had been substituted by the judgment-debtor. The right to the rent was a legal incident attached to the right in the property. The entire interest of the mortgagor in the land together with all the legal incidents were intended to be and were in fact sold. The contention based on section 8 of the Transfer of Property Act, namely that the plaintiffs in any case are entitled only to the proportionate rent due after the confirmation of the sale (November 1907) till the end of the tenancy (July 1908) might be met by two answers. One answer is that neither section 8 nor section 36 of the Transfer of Property Act (the latter section providing that rent accrues from day to day) applies to transfers of rights by execution sales [see section 2, clause (d) of the Act and *Satyendra Nath Thakur v. Nilkantha Singha*(1).] The second answer is that we have to look to

what has to be substituted for the grain profits purchased by the plaintiffs and not what rent he would have been entitled to if the mortgagors had, by a *private* sale sold *the lands alone* on the date of the confirmation of the sale. Further section 36 of Act IV of 1882 about the daily accrual of rent applies only "in the absence of a contract . . . . to the contrary." Here, Exhibit B clearly says that the whole rent shall be payable on the Makarasankranthi day, that is the 10th January 1908 (and in default with interest from that date). When the contract shows that the whole rent accrues on that fixed date it seems to be clearly a contract to the contrary of what is enacted in section 36 and it has been so decided in *Satyendra Nath Thakur v. Nilkantha Singha*(1), by NORRIS and BANNERJEE, JJ. I think therefore that though the plaintiff may not be entitled to get the value of the crops themselves harvested and taken away by the lessees, owing rather to the equities in favour of the lessees than to the absence in the plaintiffs of a legal title to the crops, the plaintiffs are entitled to be substituted for the mortgagors in respect of the right to recover the whole rent due by the lessees. This substitution of properties and securities in favour of a person, who, through no fault of his own, is deprived of the original properties and securities, is well known to the law. This principle is embodied in sections 44 and 73 of Act IV of 1882 and is referred to and illustrated by Mr. Justice KRISHNASWAMI AYYAR in *Venkatrama Iyer v. Esumsa Rowthen*(2). As the lessees had paid only Rs. 400 of the rent to the mortgagors, the decree for the balance of Rs. 660 passed in the plaintiff's favour against the lessees was rightly passed. I would therefore dismiss the appeal of the lessee (the first defendant) in Second Appeal No. 1280 of 1913 with costs.

NAPIER, J.--I entirely agree.

N.B.

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(1) (1894) I.L.R., 21 Calc., 383 at p. 386.

(2) (1910) I.L.R., 33 Mad., 429 at pp. 434 and 435.