mortgaged property, it may well be in his interests to delay execution as long as possible while he puts off the appellant's claims.

I would reverse the order of the District Judge and direct that the application of the petitioner be disposed of according to law in the light of the observations in the judgment. Costs to abide and follow the result.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Sadasiva Ayyar.

DAVOOD MOHIDEEN RAVUTHAR (SECOND DEFENDANT), APPELLANT,

1920, October 1.

v.

JAYARAMA AIYAR AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Landlord and Tenant—Lessee sub-leasing his right to another for a term without obtaining possession—Trespass by stranger—Right of lessee to sue stranger for possession, mesne profits and damages.

A lessee of certain lands who had not obtained possession from his lessor but sub-leased his right to others for a term with a stipulation that they should obtain possession, has no right to sue during the continuance of the term trespassers in possession either for mesne profits or for damages.

Per WALLIS, C.J. (SADASIVA AYYAR, J., contra). The lessee is also not entitled to sue the trespassers for possession.

APPEAL against the decree of K. S. VENKATACHALA AYYAR, Acting Subordinate Judge of Tanjore, in Original Suit No. 2 of 1919.

The facts are set out in the judgment of WALLIS, C.J.

R. Kuppuswami Ayyar for appellant.

A. Krishnaswami Ayyar for respondents.

WALLIS, C.J.—The plaintiff in this case on 6th December 1917 took the suit lands and other lands on lease from the first defendant under a rental agreement (Exhibit A) for four years from 15th December 1917 at an annual rent of Rs. 400

* Appeal No. 375 of 1919.

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WALLIS, C.J.

and on the same day Venkatachalla and Ponnusami Muthiriyan took the same lands from the plaintiff for the same term and at the same rent, under Exhibit V, which is styled a deed of sub-lease and contains a stipulation that they would themselves take possession of the lands and enjoy them. The plaintiff did not obtain possession of the suit lands and brought this suit to recover possession and mesne profits of them from his lessor the first defendant and defendants 2 to 4 who were alleged to be in wrongful possession of them. The Subordinate Judge found that defendants 2 to 4 were in possession of the suit lands as trespassers, and passed a decree for possession against all the defendants, and for Rs. 350 for past mesne profits and Rs. 549 for proportionate costs against the second defendant and directed an inquiry as to future mesne profits from the date of suit until payment. There was a like decree against the third and fourth defendants in respect of the lands in their occupation. The second defendant has alone appealed. On the question of fact we see no reason to differ from the finding of the Subordinate Judge that the possession of the second defendant was that of a trespasser. The lands in question had been leased for three years not to him but to his brother-in-law, and his case in his written statement that he paid Rs. 200 to the first defendant who promised to execute a registered lease in his favour for another two years has not been proved. As the Subordinate Judge has pointed out, there is a variance between his written statement and his evidence, which was that he obtained the lands in the first instance under an oral lease for five years. This evidence the Subordinate Judge has disbelieved and we see no reason to differ from him.

There remains, however, the important question whether the plaintiff is entitled to mesne profits against the second defendant in spite of the fact that he had transferred the whole of his term to Venkatachalla and Ponnuswami under Exhibit V. It is opposed to general principles to allow one person to sue for what belongs to another, or for damages sustained by another, and any departure from this principle would in my opinion be sure to lead to undesirable complications. Rules 78 and 79 in Dicey's Parties to an Action, pages 324, 330 are as follows:

"*Rule* 78.—No one can bring an action for any injury which is not an injury to himself."

"*Rule* 79.—The person who sustains an injury is the person to bring an action for the injury against the wrongdoer."

This is the foundation of the English rule which was applied in *Ramanadan Chetti* v. *Pulikutti Servai*(1), in *Krishna Nambudri* v. *The Secretary of State*(2), and in earlier cases in India, that a lessor is not entitled to sue a trespasser for possession and mesne profits for the period during which the tenant's term is outstanding. That this rule applies equally to India was shown by Sir JOHN EDGE, C.J. in *Sita Ram* v. *Ram Lal*(3), with the concurrence of four Judges of that Court:

"The principle, it appears to me, must be the same all the world over, and certainly must be the same in India as in England. That principle is that where a man, whether the owner or merely a tenant, creates a tenancy under him which entitles the tenant to the exclusive use of the land or of the house, as it may be, the man creating the tenancy cannot have any right to actual possession, unless he has by the lease or by agreement with his tenant reserved to himself a right to re-enter and take possession. He has of course a right by due process of law if the facts arise, to have the tenancy created by him determined and his tenant ejected; but so long as the tenant is entitled to possession, the landlord cannot be entitled to possession. That right to possession he has parted with by the creation of the tenancy. It is no new proposition of law, and the application of that proposition of law, which I believe to be correct, does not introduce into India any new system either of law or of procedure. A landlord whose title is denied by his tenant has got a right to have the tenancy determined. A landlord whose title is questioned by any one else than the tenant has got a right to a declaration under section 42 of the Specific Relief Act; and if any one enters on the receipt of the rents and profits of the land and takes from his tenants the rents which were due to him, he is entitled as against such person, not only to a declaratory decree declaring his title and that the other person has no title, but to a decree putting him into possession, that is, what is known as, formal possession, as contradistinguished from actual or khas possession, of the land as against the person wrongfully taking the rents and profits to which he, the landlord, is entitled."

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(1) (1898) I.L.R., 21 Mad., 288. (2) (1909) 19 M.L.J., 347.
(3) (1896) I.L.R., 18 All., 440 (F.B.), 448.

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WALLIS, C.J.

This case was followed in *Tiruvengada Konan* v. *Venkatachala Konan*(1), to which my learned brother was a party, in preference to the observations of SUNDARA AYYAR, J., in *Ambalavana Chetty* v. *Singaravelu Udayar*(2), which had been treated in some cases, not reported in the authorized reports, as affording sufficient ground for refusing to accept the law as laid down by SUBRAHMANYA AYYAR and BENSON, JJ., in *Ramanadan Chetti* v. *Pulikutti Servai*(3). These observations of SUNDARA AYYAR, J., which were made with reference to the question whether the possession of a trespasser is adverse to the landlord as well as the tenant, did not take account of the different sorts of possession to which the landlord and the tenant are entitled during the pendency of the term as explained by Sir JOHN EDGE in *Sita Ram* v. *Ram Lal*(4), which case unfortunately was not brought to the learned Judge's notice. They were not concurred in by ABDUR RAHIM, J., who was sitting with him, and in my opinion they show no sufficient reason for differing from *Ramanadan Chetti* v. *Pulikutti Servai*(3).

In that and in the other cases to which I have referred the landlord has fulfilled his duty of putting the tenant in possession before the date of the trespass, whereas here he has been prevented from doing so by the trespass. That, however, does not in my opinion give the plaintiff a right to recover the possession and enjoyment of the land, khas possession as it is called in Northern India, together with compensation for the deprivation of such possession and enjoyment in the shape of mesne profits. It is not the plaintiff, but his lessees Venkatachalla and Ponnuswami who are entitled to such possession and mesne profits.

As regards possession, it seems to me that the most the plaintiff could be entitled to would be, if he had impleaded his lessees, to get a decree directing possession to be given to them. If *Bissesuri Dabeea* v. *Baroda Kanta Roy Chowdry*(5) went further, I agree with SUBRAHMANYA AYYAR and BENSON, JJ., in *Ramanadan Chetti* v. *Pulikutti Servai*(3), that it should not be followed.

The second defendant has not appealed in the present case against the decree for possession, no doubt because it would

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(1) (1916) I.L.R., 39 Mad., 1042. (2) (1912) M.W.N., 669.
(3) (1898) I.L.R., 21 Mad., 283. (4) (1896) I.L.R., 18 All., 440 (F.B.), 448.
(5) (1884) I.L.R., 10 Calc., 1076.

avail him nothing as the time for which he claimed to hold has expired; but it has been necessary to consider the sort of possession to which the plaintiff would be entitled on the facts, as in my opinion he could only claim mesne profits as damages for the defendants' trespass if he was entitled to possession and enjoyment or khas possession, and he would not be entitled to claim such mesne profits when his lessee was the person entitled to such possession He might, I think, have recovered damages for loss of rent as lessor owing to the defendants having trespassed on the lands and prevented him from giving his lessees possession, if he had in fact sustained any such damages but in the present case he has not as the effect of the trespass in this case was to relieve him from liability to pay rent to his lessor to the same extent to which he became disentitled to recover it from his lessee. I agree with the order proposed by my learned brother.

SADASIVA AYYAR, J.—This is an Appeal from the judgment of the Subordinate Judge of Tanjore in a suit brought by the plaintiff, a lessee of the suit lands for a term of four years, who demised the whole of this term to third parties, to recover possession and mesne profits from the defendants (Nos. 2 to 4) who, he says, trespassed on this property. The plaintiff succeeded in the lower Court. The second defendant is the appellant before us.

The facts appear to be that the second defendant's brother-in-law held this property on a three years' lease from the first defendant, the plaintiff's lessor. The defendants' case is that they held it not on a three years' lease but on a five years' lease: at any rate, that they became entitled in some manner or other, to remain in possession for five years. I agree with the Subordinate Judge that it is not shown, and I see no reason for differing from his finding, that the defendants were only entitled to remain in possession for three years and that their right to possession expired before the commencement of the present lease, that is, before 15th December 1917.

Mr. Kuppuswami Ayyar contended that, having demised the whole of his term, the plaintiff had no right under the Transfer of Property Act, to sue for possession and mesne profits but that a suit should have been brought by his demisees. Section 108 (*j*)

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of the Transfer of Property Act says that "the lessee" (the plaintiff in this case) may transfer

"absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease."

Therefore, the lessee here remained under all his obligations to the first defendant (his lessor) in spite of this complete sub-demise of the lessee's interest. Therefore, he is in the position of a lessor under section 105, which says that:

"a lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

Thus, though the plaintiff is the lessee under the first defendant he is himself in the position of a lessor so far as the third parties to whom he has sublet the lands during the four years between 15th December 1917 and 15th December 1921 are concerned. In *Somiammal* v. *Vellaya Sethurayan*(1), HANNAY, J., and myself held that a landlord though he has given a lease to a third person was entitled for the purpose of putting his lessee into possession to maintain a suit to eject a trespasser and that the defendant in such a suit could succeed only if he showed that the plaintiff or his lessee had no right to possession because the defendant was himself entitled to possession either through a title paramount to the plaintiffs, or derived from the plaintiff or his lessee, or because the lessee was unwilling that the plaintiff should get possession during the term of the lease. The questions, whether the plaintiff in such a case if he is awarded possession is entitled also to recover damages against the trespasser and what the basis is on which the damages should be allowed to him, were not decided in that case. In *Tiruvengada Konan* v. *Venkatachala Konan*(2), NAPIER, J., and myself held that if the lessee had been put into possession and was then dispossessed by a stranger the lessor suing the trespasser during

(1) (1915) 29 M.L.J., 233. (2) (1916) I.L.R., 39 Mad., 1042.

the currency of the lease term could only get formal possession and that he could not get any damages against the trespasser, because it is the lessee who was entitled to get the mesne profits of the land during the currency of the term and the lessor could sustain no pecuniary damages as he had put his lessee into possession and his claim for rent against the lessee had not therefore been affected by the stranger's trespass. NAPIER, J., and myself were not inclined to adopt the rather too broad view of the lessor's rights indicated in certain passages in the judgment of SUNDARA AYYAR, J., in *Ambalavana Chetty* v. *Singaravelu Udayar*(1). In *Kathiri Kutee Musaliar* v. *Kutti Chekkutti Musaliar*(2), OLDFIELD and PHILLIPS, JJ., held that the landlord was entitled to maintain a suit for possession against a trespasser when there was no collusion between the tenant and the trespasser though the tenant was unwilling to join as co-plaintiff.

In the present case, the strangers, who are the plaintiff's lessees, did not obtain possession and the principle of the decision in *Somiammal* v. *Vellaya Sethurayan*(3), if applied, justifies the decree for khas possession granted by the lower Court in plaintiff's favour. I might add that the second defendant has not appealed against the decree awarding possession of the lands to the plaintiff and he gave up possession of the lands in December 1919, about the time when he filed this Appeal. The defendants 3 and 4 who were in possession of a portion of the plaint lands have also not appealed against the decree in the plaintiff's favour for the possession of the lands in their enjoyment. While it may be that, on principle, the decisions in *Ramanadan Chetti* v. *Pulikutti Servai*(4) and *Krishna Nambudri* v. *The Secretary of State*(5), are entitled to more weight than SUNDARA AYYAR, J., was inclined to give to them in his elaborate judgment in *Ambalavana Chetty* v. *Singaravelu Udayar*(1), I think it is better to adhere to the current of the later decisions of this Court from 1912 onwards and to hold that where the lessee was not put into possession the lessor was entitled to obtain a decree for khas possession against a stranger-trespasser.

(1) (1912) M.W.N., 669. (2) (1917) M.W.N., 339.
(3) (1914) 29 M.L.J., 233. (4) (1898) I.L.R., 21 Mad., 288.
(5) (1909) 19 M.L.J., 347.

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As I said, however, that question is not directly before us in this Appeal as the appellant has not appealed against the decree so far as it awarded possession to the plaintiff-respondent. His Appeal is directed to the award of mesne profits past and future and to the award of costs to the plaintiff and to the disallowance of his (second defendant's) costs.

In the first place, I wish to remark that where the landlord brings a suit for *khas* possession the Court would do well to direct him to make his lessee a party to the suit, and if the lessee does not agree to be a co-plaintiff to make him a defendant along with the trespasser, so that all questions might be completely decided in the suit. It seems to me again that when the landlord is decreed *khas* possession in the case where his lessee never obtained possession the plaintiff is in his own primary right entitled only to formal possession and it is in his secondary right arising out of his obligation to put his lessee in actual possession that he is awarded actual possession. Under his primary right to formal possession he is entitled only to claim as damages the loss of rent (if any) arising from the injury caused to that primary right by the defendant's trespass, because the plaintiff's lessee was not bound to pay rent till he got possession and the plaintiff would (if he lost anything) be losing his rents only during the defendant's trespass. I would therefore hold that the plaintiff is not entitled to claim the net mesne profits. Is he entitled to claim damages in the shape of rents lost? The answer will depend on whether he has really incurred damages in the shape of rent lost. The trespass of the defendants 2, 3 and 4 deprived not only the plaintiff of formal possession but also the first defendant (the plaintiff's lessor) of such possession. No doubt the plaintiff would have been entitlod to recover rent from his sub-lessees if the defendants 2 to 4 had not committed the trespass and had allowed the plaintiff's sub-lessees to take possession. In that case the amount of such rent might in reason be awarded to him, if he really incurred pecuniary loss by deprivation of that rent (rent alone was allowed as damages against trespassers to the lessor plaintiff in *Veluyuthathudayan* v. *Angamuthudayan*(1) decided by this Bench recently). But the facts of this case are rather

(1) Appeal No. 6 of 1920 (unreported).

peculiar. The plaintiff himself would have been obliged to pay to the first defendant the same rent which he was entitled to obtain from his sub-lessees from the date on which his sub-lessees took possession of the lands from the trespassers, an obligation from which he has been freed through the trespass of the defendants 2 to 4 which gave rise to his cause of action against them to sue for possession. Prior to the date of recovery of possession from the trespassers the plaintiff was not bound to pay rent to the first defendant nor was he entitled to recover anything from the plaintiff's own lessees. Hence, the plaintiff himself personally has really lost nothing pecuniarily and it is the first defendant who has lost his rents and it is the plaintiff's lessees who have lost the difference if any between the net mesne profits and the rent. As regards the measure of damages in such cases, RATANLAL says (Law of Torts, Sixth Edition, page 317):

"The damages will vary considerably according to the plaintiff's interest in the land. This is obviously just both to prevent the plaintiff getting extravagant recompense when his interest is on the point of expiring or very remote, and to prevent the defendant being forced to pay for the same damage several times over. The same act may give rise to different injuries; the tenant may sue for the injuries to his possession and the landlord for the injuries to his reversion. And so, where several persons are entitled in succession as tenant for life, in tail, in fee, each can only recover damages commensurate to the injury done to their respective estates."

While I feel bound not to depart from the later precedents of this Court on the question of the lessor-plaintiff's right to sue trespassers in ejectment under a certain state of facts, I do not feel bound to go further and to hold that he is entitled to claim the damages which either the first defendant (plaintiff's lessor) or the third parties (plaintiff's lessees) may be entitled to recover from the trespassers. I hold therefore that the plaintiff has sustained no pecuniary damages and can recover neither rent nor mesne profits as damages.

In the result, the lower Court's decree would have to be modified by disallowing Rs. 350 awarded against the second defendant for past mesne profits, by allowing proportionate costs to the plaintiff against the second defendant on a fresh calculation entailed by such disallowance, and by omitting the direction

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for inquiries about future mesne profits. In this Appeal, the parties will bear and receive proportionate costs according to success and failure, the second defendant (appellant) having added frivolous claims in the Appeal petition such as credit for a sum of Rs. 200 falsely alleged by him to have been advanced to the first defendant.

Memorandum of Objections is dismissed.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1921, January 21.

SONTAYANA GOPALA DASU AND THREE OTHERS (DEFENDANTS 1 TO 4), APPELLANTS,

v.

INAPATALUPULA RAMI AND FOUR OTHERS (PLAINTIFFS AND DEFENDANTS 5 TO 7), RESPONDENTS.*

Void usufructuary mortgage—Possession by mortgagee as such for more than 12 years—Acquisition of title as mortgagee—Suit for redemption—Liability of mortgagee to account for the whole period of possession.

A person in possession of a property *as usufructuary mortgagee* under a void mortgage, for more than 12 years, acquires by prescription, the rights of a mortgagee, and is as such accountable to the mortgagor for the rents and profits not only of the last 3 years preceding the suit for redemption but for the whole period of his possession.

Madhava v. *Narayana*, (1886) I.L.R., 9 Mad., 244, and *Sundara Gurukkal* v. *Subramania Archakar*, (1912) 16 I.C., 960, followed.

SECOND APPEAL against the decree of B. C. SMITH, District Judge of Ganjām at Berhampur, in Appeal Suit No. 467 of 1917, preferred against the decree of B. ADINARAYANA NAYUDU Garu, District Munsif of Chicacole, in Original Suit No. 400 of 1914.

The plaintiffs in this case sued for possession of certain lands alleged to have been usufructuarily mortgaged by them to the defendants by two mortgage deeds in 1892 and 1893, the year of redemption being fixed as 1900. The plaintiffs

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* Second Appeal No. 1563 of 1919.