

Appellate Jurisdiction. (a)*Special Appeal No. 126 of 1869.*VENKATARAMANIER.....*Special Appellant.*ANANDA CHETTY.....*Special Respondent.*

The tenancy of an ordinary puttahdar in this Presidency when properly created entitles the tenant to the right of occupancy for the purpose of cultivation until default in the payment of the stipulated rent or surrender to the landlord in writing, and the right of the tenant is assignable as a mortgage security.

A verbal surrender by the tenant to the landlord after the assignment was known to the landlord cannot be relied on as rendering the assignment void.

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THIS was a special appeal against the decision of C. F. Chamier, the Civil Judge of Salem, in Regular Appeal No. 238 of 1868, reversing the decree of the Court of the District Munsif of Tripatur in Original Suit No. 628 of 1866.

The plaintiff sought to recover certain land attached by 2nd defendant in execution of a judgment debt payable by 1st defendant. The plaintiff alleged that nine years ago 1st defendant leased the property, agreeing to surrender it on demand, and further that in Fusly 1274 1st defendant relinquished the property as being unable to cultivate it.

The first defendant was *ex-parte*.

The second defendant alleged that the 1st defendant who enjoyed the property under a puttah had a proprietary right so that he could alienate it; that even supposing that the relinquishment alleged by plaintiff did actually take place, it was one subsequent in date to the mortgage on which the 2nd defendant's decree was passed.

The District Munsif found that the 1st defendant's tenancy was one at will, and that the 2nd defendant's mortgage was invalid.

The 2nd defendant's attachment was cancelled, and the property sued for ordered to be given over to plaintiff. First defendant to bear the whole costs of the suit.

Upon appeal by the 2nd defendant the Civil Judge reversed the decree of the District Munsif. The judgment of the Civil Judge was as follows:—

(a) Present: Scotland, C. J., and Innes, J.

It is clear that the 1st defendant was the puttahdar, that is, the quasi-owner of the land, subject to payment of the assessment, and that the plaintiff had no right to re-enter, except upon a sodirazinamah, or written surrender of the land, by the 1st defendant. The fact of no puttah having been actually issued does not alter the case. The 1st defendant's father's name was entered in the accounts as the holder of the land, and he was therefore the registered holder. If he had been merely a common tenant, his name would not have appeared in the accounts. There is no reason for doubt therefore, that in 1863 the 1st defendant who had his father's estate was quite competent to mortgage the land. His relinquishment of it in 1864 was a fraud upon the mortgage. No sodirazinamah has been given, but if the plaintiff desires to take possession on the ground that the 1st defendant has ceased to hold the land, he can only do so subject to the mortgage interest which the 1st defendant created, that is, by paying off the 2nd defendant's mortgage. There is not the slightest ground for releasing the land from attachment. I reverse the decree appealed against and dismiss the suit. The plaintiff will pay the costs of the 2nd defendant in both Courts.

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The plaintiff presented a special appeal to the High Court against the decree of the Civil Judge for the following reasons :—

The 1st defendant being a tenant at will can be ejected by the plaintiff at any time, and the mortgage therefore of the 2nd defendant from the 1st defendant is invalid in law.

There is no evidence to show that the 1st defendant's relinquishment in 1864 was a fraud upon the mortgage.

The plaintiff is entitled to recover the land, inasmuch as the 1st defendant has ceased to hold the same.

The 1st defendant is not entitled in law to create any incumbrance or charge upon the estate to the prejudice of the plaintiff's proprietary right to the land.

Rama Row, for the special appellant.

The Court delivered the following

JUDGMENT :—This was a special appeal from the decree of the Civil Judge of Salem reversing the decree of the District

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Munsif in a suit in which the plaintiff sought to invalidate the attachment at the instance of 2nd defendant of certain land as being the property of the 1st defendant in enforcement of a decree for the sale of the land in satisfaction of a debt secured by a mortgage executed by the latter to 2nd defendant.

The effect of the decree of the Civil Judge was to dismiss the plaintiff's suit.

The plaintiff claimed as Muttadar and stated that the 1st defendant had been merely his tenant at will and could not encumber the land with the mortgage to 2nd defendant. The District Munsif found that there was only a tenancy at will, but the Civil Judge came to the opinion upon the evidence that 1st defendant was the registered holder of the land and that plaintiff had no right of re-entry so long as the assessment was regularly paid or until 1st defendant gave in writing a surrender of the land: that the 1st defendant had therefore an interest which he could mortgage and which was not determinable after the mortgage by a surrender on the part of the 1st defendant without payment of the mortgage debt.

The ground of special appeal relied upon at the hearing was that the 1st defendant had no tenant right or interest in the land of which he could make a transfer or mortgage valid as against the plaintiff, his landlord. Now his tenancy has been found by the Civil Court to have been that of an ordinary Puttahdar, and we apprehend the established general rule of law in this Presidency to be that such a tenancy when properly created entitles the tenant to the right of occupancy for the purpose of cultivation until default in payment of the stipulated rent, at the time it becomes due, and that it may be determined upon such default under Section 41 of Madras Act VIII of 1865 or at any time by the landlord's acceptance of a surrender by the tenant which is required to be in writing by Section 12 of the same Act. The 1st defendant then had clearly a right to hold the land as tenant for a conditional term, and we see no reason why that right should not be assignable as a mortgage security or otherwise like any other interest in land, when there is no express agreement between the landlord and the tenant to the contrary, nor are we aware of any authority prohibiting

it. The assignee can claim no other rights than those possessed by the tenant and is subject to the same conditions and obligations. He can never, as the Civil Judge seems to have thought, throw the burthen of the mortgage debt upon the landlord. His only security is the title and interest of the tenant, and as soon as the tenancy has been legally determined, he can only look to his debtor (the original tenant) for payment of what may be due:—and of course the purchaser of the right, title and interest of the original tenant at a sale in execution of a decree for the mortgage debt could claim nothing from the landlord that the tenant would not have been entitled to claim; and would be liable to the rent and to be ejected if he failed to pay it.

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In the present case the tenancy of the 1st defendant appears to have been a valid and subsisting one when he executed the mortgage assignment to the 2nd defendant, and we are of opinion that it was effectual to pass, as it purports to do, the rights and obligations of the 1st defendant as tenant of the land, and that the verbal surrender by the 1st defendant after the assignment was known to the plaintiff cannot be relied upon as rendering it void. For these reasons the decree appealed from must be affirmed.

Appeal dismissed.

Appellate Jurisdiction. (a)

Special Appeal No. 78 of 1869.

NYNAKKA ROUTHEN.....*Special Appellant.*

VAVANA MAHOMED NAINA ROUTHEN } *Special Respondents.*
and another..... }

Where, an instrument, the registration of which was rendered compulsory by Section 17 of the last Registration Act (Act No. XX of 1866) was destroyed accidentally by fire soon after its execution, and before registration.

Held, in a Suit to compel the defendant to execute another instrument to the same effect as that which had been destroyed, that secondary evidence of the contents of the unregistered instrument was admissible.

Held, also, that the plaintiff was entitled to the relief prayed for.

THIS was a special appeal from the decision of J. D. Goldingham, the Acting Civil Judge of Madura, in Regular Appeals Nos. 192 and 200 of 1868, reversing the decree of

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of 1869.

(a) Present: Scotland, C. J., and Innes, J.