Present : Bertram C.J. and Schneider J.

1922.

MOHIDEEN *v.* ISEY.

52—D. C. Colombo, 2,306.

Sale by auctioneer under a mortgage decree—Purchaser gets title from date of transfer, and not from date of sale—Civil Procedure Code, ss. 201 and 289—Convenant by a lessor to pay a sum of money to lessee in the event of his selling the property pending lease—Not applicable to sale in execution—Claim for damages by lessee for mortgaging property after lease—Liability of lessee to pay rent though subtenants do not pay rent owing to lawful act of lessor.

A leased his land to B who did not register his lease. Thereafter A mortgaged it to C, who put the bond in suit and obtained judgment. The property was sold by an auctioneer under the mortgage decree.

Held, that the lessee (B) was bound to pay rent to the lessor (A) up to the date of the execution of the deed of transfer in the absence of any special agreement, as the purchaser's title does not relate back to the date of the actual sale as in the case of a Fiscal's sale.

The lessee alleged that after the notice of sale, his subtenants were disturbed in mind, and would not pay their rents.

Held, that this did not justify the lessee with holding rent from the lessor. "A tenant is not discharged from his legal obligations to his landlord by a purely lawful act on the part of that landlord, simply because in consequence of that act his own subtenants misconceived their own legal position."

A covenant by the lessor to pay a sum of money to his lessee, in the event of his selling the property pending the lease, does not apply to a sale in execution.

The lessee has no right to claim damages from his lessor for granting the mortgage (which was registered) after leasing it to the lessor.

THE facts are set out in the judgment of the District Judge (H. A. Loos, Esq.):—

The defendant leased certain premises to the plaintiff by the indenture of lease No. 83 dated October 30, 1918, for a period of five years, commencing from October 1, 1918, at a monthly rental of Rs. 280.

At the time of the execution of the indenture, the plaintiff paid to the defendant a sum of Rs. 2,500 in advance as the rent for the last nine months of the terms.

One of the covenants of the lease was to the effect that in the event of the sale of the leased premises by the defendant during the pendency of the lease, the defendant should pay to the plaintiff the advance of Rs. 2,500 or any portion thereof that may then be due and a sum of Rs. 1,500 as damages.

1922.

Mohideen v. Isey

Under writ issued in the action No. 52,821 of this Court against the defendant in execution of a mortgage decree, the leased premises were sold on January 1, 1920.

The plaintiff accordingly lost the possession of the leased premises on March 5, 1920, on which date the Fiscal placed the purchaser in possession.

The plaintiff now claims the sum of Rs. 2,500 paid by him in advance, less a sum of Rs. 950 which he admits he has received therefrom from the defendant, together with the sum of Rs. 1,500, the damages fixed by the indenture of lease, as payable to him in the event of a sale of the premises by the defendant.

As a matter of fact the plaintiff claims from the defendant in his prayer a sum of Rs. 4,550, but there is nothing to show what the amount in excess of that referred to above represents.

The defendant admits the execution of the indenture of lease, and that it contains the covenants referred to above.

She also admits the sale of the leased premises, but denies that the plaintiff is entitled to any damages, for the sale was not a voluntary one, but a forced sale, and also states that the plaintiff omitted to register the lease in his favour, which was prior in date to the mortgage bond in execution of the decree upon which the premises were sold, and that the default of the plaintiff in that respect disentitles him to claim damages.

By way of further answer, the defendant states that in addition to the sum of Rs. 945 which the plaintiff admits he has been paid, the defendant is entitled to credit for rent from December, 1919, to February, 1920, amounting to Rs. 840, and to the price of a calf and three goats sold to the plaintiff by her, viz., Rs. 100.

The defendant admits that there is a sum of Rs. 466.98 due to the plaintiff.

The plaintiff's counsel proposed a large number of issues to several of which the defendant's counsel objected for the reasons appearing in the record, and eventually the parties went to trial upon the following issues, viz.:—

(1) Is the defendant liable to refund to the plaintiff the advance of Rs. 2,500, and to pay a sum of Rs. 1,500 as damages?
(2) What sum did the defendant repay to the plaintiff?
(3) Was the plaintiff not liable to pay defendant rent for January and February, 1920, by reason of the aforesaid sale?
(4) Did the defendant sell to the plaintiff a calf and three goats?
(5) If so, for what amount?
(6) Was there a sale with the meaning of the lease?
(7) Did the plaintiff lose his rights by reason of his default, if any, in the registration of his lease?
(8) Is the plaintiff liable to pay rent to the defendant up to the date of dispossession, viz., March 5, 1920, or only up to the date of sale?
(9) Has the plaintiff paid rent for the month of December, 1919?

As regards the first issue, the defendant admits her liability to refunds the amount of the advance, less the sums for which she is entitled to credit.

As regards the ninth issue, the plaintiff admits that he has not paid rent for the month of December, 1919, but denies his liability to pay it.

As regards the second issue, the plaintiff admits that he has received from the defendant the sums of Rs. 550 and Rs. 393.02, out of the advance of Rs. 2,500, so that according to him there in a balance sum of Rs. 1,556.98 still due out of the sum of Rs. 2,500.

I am not prepared to hold that the defendant paid the sum of Rs. 150 referred to in the answer to the plaintiff on the evidence before me.

The defendant's only witness who is her son and attorney gave somewhat unsatisfactory evidence on that point, and ultimately admitted that he had not paid that sum to the plaintiff, but that he had asked his brother-in-law to do so, in the absence of the evidence of the brother-in-law, or of any document to prove the payment, I must hold that the payment has not been proved.

Then, too, as regards the question of the sale of a calf and three goats to the plaintiff by the defendant, I am not satisfied that there was any such sale.

The plaintiff states that the defendant made a present of the calf to him in consideration of his having kept a cow and calf of the defendant on the leased premises for sometime, and he also states that a goat and two kids of the defendant were left with him to be looked after, that one of the kids died, and the defendant removed the goat and the remaining kid about twelve or sixteen months ago.

The evidence of the plaintiff appears to me to be more probable than that of the defendant's son, and I accept it in preference to that of the latter.

So that I am of opinion that the defendant is not entitled to credit for the sums of Rs. 150 and Rs. 100 referred to in the answer.

The sale of the premises took place in January, 1920, so that the plaintiff was undoubtedly liable to pay the defendant the rent for the month of December, 1919, but I do not think he was liable to pay the rent for January and February, 1920, to the defendant, for the reason that the purchaser of the premises at the sale would have been entitled thereto, and if the plaintiff has recovered the rent for those months he will perhaps be called upon by the purchaser to account to him therefor.

The main point in the case is as to whether the sale which took place can be said to be one within the meaning of the words of the lease; the words are: "In the event of the sale of this property by the lessor . . . ." In my opinion what was intended thereby was clearly a voluntary sale by the lessor, and not a forced sale. It was undoubtedly not the most honest thing for the defendant to have done, to have mortgaged the premises without notice to the lessee within less than a month of the execution of the indenture of the lease, and then to have made default in payment which resulted in the sale of the leased property, but the words of the lease do not appear to me to indicate that anything but a voluntary sale was contemplated by the words in question, so that the defendant is not liable to pay the sum of Rs. 1,500 referred to in the lease as damages.

I hold therefore on the first issue that the defendant is liable to refund the balance remaining out of the advance of Rs. 2,500, but not to pay the sum of Rs. 1,500 as damages.

On the second issue I hold that the defendant has repaid to the plaintiff only a sum of Rs. 943.02.

On the third and fourth issues I hold in favour of the plaintiff.

On the sixth issue I hold that there was not a sale within the meaning of the lease.

1922.

Mohideen v. Issy

On the eighth and ninth issues I hold that the plaintiff was liable to pay rent to defendant only up to the date of sale, and not to date of dispossession, and that the plaintiff is liable to pay the rent for the month of December, 1919.

There is no need to deal with the fifth and seventh issues, in view of the above findings.

In the result the plaintiff is entitled to judgment for the sum of Rs. 2,500, less the sums of Rs. 943.02 and Rs. 280 (rent for December, 1919), or to a sum of Rs. 1,276.98 with interest, and costs. Let decree be entered accordingly.

E. G. P. Jayatileke (with him *H. V. Perera* and *R. C. Fonseka*), for appellant.

E. W. Jayawardene, for respondent.

August 1, 1922. BERTRAM C.J.—

The facts in this case are simple. The owner of the property first of all leased it to the plaintiff. The plaintiff failed to register the lease. Within a month of the lease, the owner mortgaged it. Within a year of the mortgage, the mortgagee put his bond in suit, obtained execution, and had the property sold by an auctioneer. Various questions then arise between the lessee and the lessor. There are only four points which we need consider. The first is this:—

When an auction sale takes place in pursuance of a mortgage, from what date is the purchaser entitled to the rent? The answer appears to be, subject to any special condition in the conditions of sale, from the date of the execution of the transfer. There is nothing in the Code to correspond with section 298, which would make the purchaser's title relate back to the date of the actual sale. The lessee was consequently bound to pay the lessor his rent up to that date; in the present case up to February 11, 1920.

The second point is this:—

Can a lessee who in such a case has failed to register his deed, and is displaced owing to the prior registration of the mortgage claim, to withhold his rent from his lessor from the moment of the notice of the sale, on the ground that that notice so disturbed the minds of his subtenants, that he could not get them to pay their rents to himself? Clearly he cannot. A tenant is not discharged from his legal obligations to his landlord by a purely lawful act on the part of that landlord, simply because in consequence of that act his own subtenants misconceived their own legal positions.

The third point is this:—

Does a covenant by the lessor to pay a sum to his lessee in the event of his selling the property, pending a lease, apply to a sale in execution of a mortgage bond. I cannot read the words as doing so. The sale in such a case is not a sale by the lessor, it is a sale by the Court at the instance of the mortgagee.

The fourth and final point is this:—

Has the lessee in such a case, when he is displaced by the prior registration of the mortgage, a right to claim damages against his landlord in respect of that displacement independently of the covenant above referred to? In my opinion he has not. In granting the mortgage the landlord has not been guilty of any breach of his obligation to the tenant. His obligations are to put the tenant into possession, and to do nothing during the tenancy which would interfere with his right of possession. In executing the mortgage he did not thereby necessarily affect the tenant's position. The mortgage was subject to the lease, and, in the absence of any special action by the person interested, would not have taken priority over the lease. The reason why it acquired priority is that the mortgagee was more diligent than the lessee. He was more active in the appreciation of his rights under the laws affecting the land registration. The mortgagee registered his mortgage at once, and it was this superior diligence on the part of the mortgagee that was the cause of the lessee's displacement.

I have every sympathy with the appellant. I think that the lessor in executing this mortgage must have fully realized its probable effect. I do not think he would have succeeded in obtaining the mortgage, but for the fact that both he and the mortgagee knew that the lease was not registered. It is not possible, however, to prove any fraud or collusion on the part of the mortgagee, and under the circumstances I fear that the lessee must suffer for his lack of diligence.

Under the circumstances the decree must be varied by the substitution of the figures Rs. 902.98 for the figures Rs. 1,276.98. With regard to the costs, I think that the judgment should be varied, and that in the Court below the plaintiff should get costs in the class corresponding to the amount as to which he succeeded, that is to say, Class 3. With regard to the costs in this Court, the variation of the judgment is so very slight that, in view of all the circumstances of the case, each party should bear its own costs.

SCHNEIDER J.—I agree.

Varied