Present: Dalton J. 1926.

PEIRIS *et al. v.* SINNAMUTHU *et al.*

224—C. R. Ratnapura, 18,929.

Landlord and Tenant—Lien—Landlord's claim in respect of rent—Seizure and sale—Goods in possession of tenant—Prior attachment.

Where a landlord who claimed a lien over goods in the possession of his tenant in respect of rent had made his lien effective by seizure of the goods, followed by sale.

Held, that the lien cannot be defeated by a prior attachment in execution of a mortgage decree.

APPEAL from an order of the Commissioner of Requests, Ratnapura. The facts appear from the Judgment.

Soertsz (with him *Schokman*), for plaintiffs, appellant.

H. V. Perera (with him *Rajakariar*), for defendants, respondent.

March 12, 1926. DALTON J.—

This appeal raises a question as to the nature of a landlord's hypothec with regard to property brought on his tenant's premises. The facts are as follows:—

The first plaintiff is the owner of a botique at No. 216, Main street, Ratnapura, which he rented to the first defendant on June 1, 1924, as a monthly tenant at the rate of Rs. 45 a month, the second plaintiff being in charge of the premises on behalf of the first plaintiff. On December 3, 1924, plaintiff filed his claim to recover rent then due, and on February 12, 1925, got judgment for the sum of Rs. 135. Writ was issued on February 12, 1925, property of the first defendant in the boutique was seized the next day, and on February 20 was sold by the fiscal on the premises where they had been seized. On March 3 he reported the sale to the Court and also reported that the property had been seized under writs issued in two other cases C. R. 17,748 and 18,518. The plaintiff thereupon moved for notice upon the judgment creditor in those two cases to show cause why the proceeds of the sale should not be paid out to him (plaintiff) on the ground that his claim was preferent. Case 17,748 was one of a claim against the present first defendant on a mortgage bond, upon which proceedings were taken by the judgment creditor (who has been called the second defendant in these present proceedings) on June 30, 1922, judgment being given thereon on August 15, 1922. Writ was issued on May 24, 1923, and the property mortgaged was seized on October 10, 1924, and February 19, 1925. The property mortgaged was furniture, and it is admitted it had been removed

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from premises which has been rented by the second defendant to the first defendant, to the premises rented by the first defendant from the plaintiff. Case C. R. 18,518 was a claim by the second defendant against the first defendant for rent in respect of premises he had hired from the second defendant. This claim for rent was filed on March 20, 1924, and judgment obtained on June 5, 1924. Writ issued on July 15, and the furniture seized on October 10, 1924, and February 15, 1925. On November 26, 1924, an order was made at the instance of the second defendant staying the sale.

It is admitted that throughout these proceedings, after the removal of the furniture by first defendant to the premises he rented from the plaintiff, the furniture remained on those premises and was never moved until after the Fiscal's sale.

For the second defendant it was urged that both his writs and seizures were prior to that of plaintiff, and it also appears to have been argued that a conventional mortgage takes preference of the landlord's tacit hypothec. The District Judge decided against the plaintiff's preferential claim; in arguing the appeal for the respondent Mr. Perera has not been able to rely upon the grounds given for that decision. He argued, however, that the landlord's lien was merely a *jus retentionis*. After the fiscal had seized on October 10, the landlord's lien, he submits, came to an end and the landlord became merely the agent of the fiscal, and custodian of the property for him. He referred to Wille's *Landlord and Tenant in South Africa, pp. 358-359* as an authority for his contention that if there is an attachment by a third party before the landlord's lien was perfected by seizure, then the lien came to an end.

With respect to second defendant's mortgage he argued that there was a decree in existence in respect of the mortgage, before plaintiffs' lien came into existence. It must be noted however that second defendant in addition to allowing the goods to be moved from his premises leased to the first defendant appears to have taken no steps to enforce that decree, and cannot deny that the mortgaged furniture was removed from his (second defendant's) premises to those of plaintiff. The argument is that as the lien arose subsequently to the mortgage which was registered, and after the latter had been converted into a decree, the lien cannot gain priority.

With respect to the law on the subject it has been argued that the landlord's lien is merely a *jus retentionis*. It may, I think, generally be taken that the term *jus retentionis* is similar to the English law term "lien," but as pointed out by Pereira J. in *Marikar v. Mohamed*[1], the tacit hypothec that a landlord has under the Roman-Dutch law over *invecta et illata* upon the premises rented is something more than a mere *jus retentionis*, although in some cases a *jus retentionis* attaches to it. " Whether in any particular case the lien shapes

[1] *17 N. L. R. 191.*

itself as a hypothec or a *jus retentionis* would appear to depend on the circumstances of possession. At all events the *jus retentionis* only exists where there is possession; and where there is no possession (as in the case of a person who merely repairs an existing house) it is hypothec or nothing " (per *Bristowe* J. in *United Building Society v. Smooklers Trustees* [1]).

Possession by the landlord is not denied, but it is urged that so soon as the seizure was made by the Fiscal, although the property remain on the premises, the landlord's possession disappeared. I am quite unable to agree. All the authorities go to show that it is removal that defeats the landlord's lien. It is true that the hypothec, in order to be made effective, must be confirmed by judicial process, but here we have both judicial seizure by the landlord and continued possession by the landlord of the property upon the leased premises until after the sale. In *Alexander v. Burger* [2] a judgment-creditor seized certain goods belonging to a debtor over which the landlord of the latter had a lien. The officer seizing the goods removed them from the leased premises. Innes C.J. says " It is clear if the goods had remained on the premises Alexander (the landlord) would have had a lien on them; but it is equally clear that the landlord's lien only lasts, as a general rule, while the goods are on the leased premises." It was also decided in *In re Stilwell* [3] that the lien over the property is in force as long as it remains on the leased premises and gives the landlord a preference over such property which cannot be defeated by any attachment in the execution of sentences. If however the removal of the *invecta et illata* has been completed before sequestration, the landlord has no longer any right of mortgage or preference over the goods removed (*Voet XX., tit. 11, s. 3*).

In this case on the facts it seems to me there was a tacit hypothec with a *jus retentionis*, which was made effective by seizure in proper form. That seizure was followed by judicial sale under the circumstances set out. The claim of the plaintiff (appellant) is therefore a preferent one. Landlords have a hypothec with preference—

> " In the *invecta et illata* when they have taken care to sequester these, and generally to be brief (so have) all who have by law of usage an hypothec or a right of retention in particular things . . . . . All these therefore will severally have preference in the *res singulares* bound to them by law or usage or of which they have the right of retention until reimbursement of expenditure on them, before other creditors whether hypothecarii or chirographarii, however protected by an anterior express conventional or by a legal hypothec whether general or special " (with a few exceptions mentioned). (*Voet XX., tit. 4, s. 19.*)

[1] (*1906*) *T. S. at 627.*
[2] (*1903*) *T. S. 80.*
[3] *1 Menzies 537.*

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The plaintiff is therefore entitled to preference as against the second defendant. The learned Judge's decision in dismissing the motion was therefore wrong. His order must be set aside, and the plaintiff's application for the payment of the proceeds of the amount of the sale to him is allowed, with costs of that application, and the costs of this appeal.

Appeal allowed.