APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

TAYAWA (ORIGINAL PLAINFIFF), APPELLANT, *v.* GURSHIDAPPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1900. *September* 26.

Landlord and tenant—Lease—Ouster of tenant by paramount owner—Claim by tenant against his lessor for compensation for such ouster—Covenant for quiet enjoyment—Damages—Measure of damages—Transfer of Property Act (IV of 1882), sec. 108, cl. (c).

The words "without interruption" in section 108, clause (*c*), of the Transfer of Property Act (IV of 1882) give a lessee in India the same rights as he would have under what is known in England as a covenant for quiet enjoyment in an unqualified form. In other words, the lessee is protected against interruption by whomsoever it is occasioned.

Where the interruption is caused by the paramount owner of the property, and not by a stranger, the lessor is bound to remove the interruption, and if he fails to do so, he must indemnify the lessee.

A held land under a lease granted by B for eleven years. B had no title to the land, which really belonged to C. In 1895 C dispossessed A.

Held, that under clause (c) of section 108 of the Transfer of Property Act (IV of 1882) A was entitled to recover compensation from B.

SECOND appeal from the decision of Ráo Bahádur Raghavendra Ramchandra Gangolli, Additional First Class Subordinate Judge, A.P., at Bijápur, varying the decree of Ráo Sáheb H. V. Chinmulgund, Second Class Subordinate Judge of Muddebihál.

Suit by a lessee to recover possession of land held by her under a lease from defendant No. 1 and of which she had been dispossessed by defendant No. 3, the paramount owner, and for mesne profits from defendant No. 1 and compensation for such dispossession.

One Kadir Padsha (defendant No. 3), who was the owner of the land in question, mortgaged it in 1868 with possession to Kassim Saheb (defendant No. 2) for twenty-two years (*i. e.* up to 1890).

In 1879 Kassim Saheb (defendant No. 2), the mortgagee, leased it to the husband of the plaintiff Tayawa for twenty-five years (*i. e.* up to 1904).

In 1892, although his mortgage term had expired in 1890,

* Second Appeal, No. 485 of 1899.

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Kassim Saheb (defendant No. 2) sold the land to Gurshidappa (defendant No. 1), who in the following year (1893) leased it to the plaintiff for eleven years, *i.e.* the unexpired portion of the term of twenty-five years for which it had been leased, as above stated, by Kassim Saheb (defendant No. 2) to the plaintiff's husband.

Meanwhile, in 1892, Kadir Padsha (defendant No. 3) had filed a suit for partition against Kassim Saheb (defendant No. 2) and obtained a decree against him, in execution of which he dispossessed the plaintiff in 1895.

Thereupon the plaintiff brought this suit against her lessor, Gurshidappa (defendant No. 1), and Kassim Saheb (defendant No. 2) and Kadir Padsha (defendant No. 3), claiming to recover the land for the remaining period of her lease (ten years) and the profits for one year during which she had been dispossessed.

The first Court held that the plaintiff was not entitled to recover possession of the land, inasmuch as it belonged to Kadir Padsha (defendant No. 3), and the other defendants had no right to alienate it beyond the term of twenty-two years for which he had mortgaged it in 1868. The Court also ordered the first defendant Gurshidappa to pay the plaintiff one year's profit and also compensation at the same rate for nine years, *i. e.* the remaining period of the lease granted by him in 1893 to the plaintiff.

In appeal this last claim to compensation for nine years was held to be not maintainable, but the rest of the decree was confirmed.

The plaintiff appealed to the High Court.

Krishnaji Hari Kelkar for (plaintiff) appellant:—The question is whether section 108, clause (*c*), of the Transfer of Property Act implies an unqualified covenant for quiet enjoyment. Under the English law, the law does not imply an unqualified covenant. To protect against the paramount owner there must be an express covenant. Otherwise the lessee has no remedy against eviction by a paramount title-holder, but under the Transfer of Property Act the obligation of the lessor is wider than in England. The words 'without interruption' in clause (*c*) of section 108 are not limited in any way, and protects the lessee from disturbance even by the paramount owner—*Rasam* v.

Douzette.[1] The case is not covered by clause (*a*). There the ordinary care required on the part of the lessee is limited to the intended use of the property, and must be referred to the enjoyment and not to any defect in the title.

N. V. Gokhale for respondent No. 1 (defendant No. 1) :—The suit is only for possession, and this being so it cannot be converted into one for damages. Clause (*a*) of section 108 of the Transfer of Property Act clearly imposes an obligation on the lessee to find out all the defects in the title. The lessee in this case failed to do this and cannot now claim any relief.

RANADE, J. :—The principal question in respect of which the remand order of 22nd January, 1900, was made by us, has been decided by the lower Appellate Court, which found that no fraud or collusion was proved on the part of defendant No. 1 when he took the agreement (Exhibit 35) from the plaintiff in substitution of the previous agreement (Exhibit 53). It also found that in case plaintiff was held entitled to compensation, she should recover Rs. 442-8-0 from defendants Nos. 2 and 3. These defendants Nos. 2 and 3 have taken no objection to this finding. Mr. Kelkar, who appeared for plaintiff-appellant, also took no exception. He however raised the question that the appellant was entitled to claim damages for loss of possession from her lessor, respondent-defendant No. 1. Mr. Gokhale, who appeared for this respondent, contended that the appellant was not entitled to raise a new question not covered by the issues sent down in the remand order. Mr. Gokhale also contended, on the merits, that as the agreement of the lease did not contain any clause entitling plaintiff to claim compensation for loss of possession, the claim for damages was not maintainable.

In regard to the first objection we find, from the notes of arguments urged on both sides when the case was first argued before us, that this question of law was discussed along with the question of fraud. We thought at the time that if fraud were proved, it would not be necessary to consider the question about the right to claim damages. As fraud has not been proved, that question must now be considered. We overrule this objection.

(1) (1874) 23 Cal. W. R. 121.

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As regards the claim to damages, it appears to be established that the lands in dispute originally belonged to respondent-defendant No. 3. He mortgaged the same to defendant No. 2 for a period of twenty-two years, which term expired about 1890. While defendant No. 2 was in possession, he leased the land to plaintiff's husband in 1879 for a period of twenty-five years, *i.e.* for a much longer period than was covered by the mortgage. In 1892, after the mortgage for twenty-two years had expired, defendant No. 2 sold the land to defendant No. 1, and this defendant No. 1 in 1893 leased the land to the plaintiff for eleven years, which represented the unexpired portion of defendant No. 2's lease for twenty-five years. Defendant No. 3 on his part brought a partition suit in 1892 against defendant No. 2, and, in execution of the decree obtained by him, dispossessed the plaintiff in February, 1895. Thereupon the plaintiff, as lessee under defendant No. 1, brought her present suit against all the three defendants in 1895 to recover possession of the land for the term of ten years, of which she had been deprived of possession, and she also claimed profits for one year (1894-95).

The defendants denied their liability for different reasons. Defendant No. 1 contended that he had placed the plaintiff in possession and had not disturbed her. Defendant No. 2 said that he had sold the land to defendant No. 1 and had not obstructed plaintiff, and as defendant No. 3 had ousted the plaintiff, defendant No. 3 was responsible for the disturbance. Defendant No. 3 said that he was not bound by the alienation made by defendant No. 2 and the lease passed by defendant No. 1 as they had no right to deal with his land after the mortgage had expired, and plaintiff's remedy was against defendant No. 1 only for the loss sustained by her.

The Court of first instance held that plaintiff was not entitled to get possession of the land as it belonged to defendant No. 3, and the other defendants had no right to alienate the same beyond the period of the mortgage for twenty-two years. The claim for one year's profits, Rs. 98-4-0, was allowed against defendant No. 1, and he was also ordered to pay compensation to plaintiff at the same rate for nine years, during which period plaintiff was deprived of the benefit of the lease.

In appeal this last claim for compensation for nine years was held to be not maintainable, and defendant No. 1 was ordered to pay Rs. 98-4-0 only, and costs in proportion.

In second appeal, we deemed it necessary to send down an issue as to whether fraud or collusion was proved as against defendant No. 1, when he substituted the new lease for the old one of defendant No. 2. This has been found to be not the case, and the only question we have now to consider is whether, independently of fraud or collusion, defendant No. 1 was liable to make compensation to the plaintiff for the loss of profits sustained by her by reason of her being ousted by defendant No. 3 in his right of paramount owner of the land.

The decision of this question depends upon clause (*c*) section 108 of Act IV of 1882, which was introduced in 1893 in this Presidency. That clause provides "that the lessor should be deemed to contract with the lessee that, if the latter pays the rent reserved, he may hold the property during the time limited by the lease without interruption." These last words "without interruption" are not qualified in any way, and have been understood to mean what in England is known as a covenant for quiet enjoyment in an unqualified form. In other words, the lessee is protected against interruption by whomsoever it is occasioned. The qualified covenant in English leases protects the lessee against the lessor, or his heir or assigns, or any other person claiming by or under him or them; while when the covenant is unqualified, the lessee is protected against interruption from any person whomsoever.

In the present case the disturbance was made by the paramount owner of the land, who had mortgaged it to defendant No. 2 and the latter had sold it to defendant No. 1, and the defendant No. 1 had leased the land to the plaintiff for a longer term than was covered by the mortgage. Defendant No. 3 is not a person without lawful right, and is not a stranger against whose wrongful disturbance the lessee must protect herself.

Under the law as it stood before the Transfer of Property Act was passed, it was held that there was an implied contract that the lessor would give peaceable possession of the land leased, and that if the lessee were evicted by title paramount to

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that of the lessor, or by a person to whom he had given the land on lease, he is discharged from the payment of rent, and may claim proportionate reduction—*Munee Dutt Singh* v. *William Campbell* (1); *Kristo Soondur Sandyal* v. *Koomar Chunder Nath Roy* (2); *Gopanund Jha* v. *Lalla Gobind Pershad* (3); *Kadumbinee Dossia* v. *Kasheenath Biswas*.(4) In *Mrs. Benjamin Douzelle* v. *Girdharee Singh* (5) it was held that in the absence of express agreement to the contrary, a landlord is bound by an implied obligation to indemnify the tenant against disturbance by his own act or by the acts of those who claim under him, or by right paramount to him, but not against the wrongful acts of strangers.

This being the state of the law as it stood before Act IV of 1882 was passed, the unqualified words in section 108, clause (*c*), must be understood to have enlarged, and not narrowed the old law. The Indian Law Commissioners, who prepared the Bill which became Act IV of 1882, have stated in their report that they were of opinion that the lessor's contract for quiet enjoyment should be not limited to the acts of the lessor, or his heirs, or assigns, or those claiming under him; in other words, if the disturbance is made by the paramount owner of the property, and not by a stranger, the lessor is bound to remove the interruption, and if he fails to do so, he must indemnify the lessee. Mr. Gokhale for the respondent contended that the defect of title in this case was one which the lessee could with ordinary care have discovered, and therefore under clause (*a*), section 108, the lessee could claim no compensation from the lessor. It is in evidence, however, that the lessee-plaintiff in this case was an innocent woman, who had no notice of defendant No. 3's title, and though the latter gave notice to the other defendants, he gave no intimation of his objection to the plaintiff. The defect of title was one which defendant No. 2 did not admit. He claimed the right as a relation of defendant No. 3 to hold the land and alienate the same, independently of the mortgage, for the joint debts of himself and of defendant No. 3. He contested the point in both the lower Courts.

(1) (1869) 11 Cal. W. R. 278; 12 Cal. W. R. 149.
(2) (1871) 15 Cal. W. R. 230.
(3) (1869) 12 Cal. W. R. 109.
(4) (1870) 13 Cal. W. R. 338.
(5) (1874) 23 Cal. W. R. 121.

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Under the circumstances clause (*a*) does not apply. Clause (*c*) applies, and the plaintiff-appellant has a right to claim compensation from her lessor, defendant No. 1. The measure of that compensation has been fixed in the remand inquiry, and though no objection has been taken to it, we find that the lower Appellate Court has calculated the amount on a wrong principle which it calls capitalized value. It obviously means present value of future payments. The amount for nine years at the correct calculation would be Rs. 574-12-0, out of which we must deduct the two famine years. That would leave a balance of Rs. 378-4-0. Adding Rs. 98-4-0 for 1894-95, the total sum is Rs. 476-8-0. This sum may be recovered by the appellant from the respondent No. 1. The other respondents are clearly not responsible to the plaintiff.

We accordingly vary the decree of the Court below by substituting Rs. 476-8-0 in place of the sum awarded by it, together with costs to be paid by respondent No. 1 to plaintiff. The other respondents should bear their own costs.

Decrees varied.

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

GOPAL AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* KRISHNA-RAO AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1900. *October* 9.

Limitation Act (XV of 1877), sch. II, arts. 136, 138 and 144—Symbolical possession—Auction-purchaser—Suit for possession from judgment-debtor—Limitation.

Where an auction-purchaser at a court sale has obtained symbolical possession, he or his assigns may sue the judgment-debtor for actual possession within twelve years from the date of obtaining such symbolical possession. Article 144 of the Limitation Act (XV of 1877) applies.

Articles 136, 137 and 138 of schedule II of the Limitation Act (XV of 1877) refer to cases where no possession, formal or actual, has been obtained through the Court.

Article 136 applies to a private purchaser from a person not in possession.

* Second Appeal, No. 335 of 1900.