

Present: Pereira J.

1913.

MARIKAR v. MOHAMED *et al.*

467—C. R. Kalutara, 6,668.

Landlord and tenant—Invecta et illata—Sale in execution—Tacit hypothec over proceeds of sale.

The tacit hypothec that a landlord has over the *invecta et illata* in the house let out attaches, in the case of movable property, to the proceeds sale of such property in the hands of a person who knowingly has had the property sold in execution of a decree in his favour and drawn the money himself.

THE facts appear from the judgment.

Arulanandam, for first, second, third, and fourth defendants.—The landlord has no more than a lien over the *invecta et illata*. The mere existence of this lien does not help the landlord when he comes in competition with other creditors of his tenant. To claim preference the lien ought to be perfected by due attachment (*Voet 20 2, 3; Ram. 1877, 62; also Grenier's Reports 1874 (D. C.), 33*). In South Africa it has been held that a person who effects the removal destroys the lien even if he had notice of it. *Wille's Landlord and Tenant in South Africa, 360 and 361*. There is no evidence that the defendants had notice of the landlord's claim.

A. St. V. Jayewardene, for plaintiff, respondent.—The landlord's claim is not a mere lien. He has a tacit hypothec over the goods, and can, therefore, follow the proceeds sale as against a person who had knowledge of the landlord's claim. There are good grounds for supposing that the defendants knew of the landlord's claim. Besides, there is the sworn testimony of the plaintiff.

Arulanandam, in reply.—Even if the landlord's claim is regarded as a tacit hypothec, there is no authority for supposing that the landlord has priority over a man who has a judgment and has sequestered the property. The law favours the man who is diligent in asserting his rights.

Cur. adv. vult.

December 29, 1913. PEREIRA J.—

In this case the plaintiff had rented out a house to the fourth defendant, and the fourth defendant owed him Rs. 120 as rent. The first, second, and third defendants had the stock in trade of the fourth defendant in the boutique let to him by the plaintiff

1913.

PEREIRA J.

*Morikar v.
Mohamed*

seized on a mortgage decree. The plaintiff as landlord claimed a tacit hypothec over this property as security for the rent due to him, and this right he undoubtedly had. With full notice of the plaintiff's claim, the first, second, and third defendants had the property mentioned above sold under the seizure already referred to; and the question arising on the present appeal is whether by reason of this sale the plaintiff lost his right of tacit hypothec, and, even so, whether the first, second, and third defendants were entitled to take for themselves the proceeds of sale. It must here be remembered that the tacit hypothec that a landlord has, under the Roman-Dutch law, over the *invecta et illata*, in the house given on rent, is something more than a mere lien or *jus retentionis*, although in some cases of tacit mortgage a *jus retentionis* attaches to it; and so the mere deprivation of the exercise of the right of retention does not by itself affect the right of tacit hypothec, but in the event of a *bona fide* sale and removal of movable property which is subject to a right of tacit hypothec the principle *mobilia non habent sequelam* applies, and the property itself cannot be followed up; but the proceeds stand in the place of the property, and the burden of hypothec attaches to the proceeds in the hands of a person who has received the same with full knowledge of the hypothec and in spite of the claim of the party entitled to it. In the present case the first, second, and third defendants should have given the plaintiff notice before drawing the money received by the Fiscal, because the sale took place after even the institution of the present case. I am not sure that a person who innocently and without knowledge of the facts receives the proceeds of sale of property subject to a tacit hypothec and converts the same to his own use is similarly liable, it being the duty of the landlord to assert his claim openly; but the question here involved need not be gone into in the present case.

For the reason given above I dismiss the appeal with costs.

Appeal dismissed.

