

orders, though in dealing with such orders, we may still be guided by the spirit of those observations.

At that point, it has to be conceded that even interlocutory orders may sometimes involve questions of principle or practice of much general importance, and that the present case, involving as it does very large interests, is of an entirely exceptional character.

In the circumstances, I agree with the learned Chief Justice that leave to appeal should be given under clause (c) of section 109.

A. P. B.

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 SIVA PRASAD
 SINGH
 v.
 RANI
 PRAYAG
 KUMARI
 DEBI.
 RICHARDSON
 J.

APPELLATE CIVIL.

Before Greaves and B. B. Ghose JJ.

AMBICA DEBI AND ANOTHER

v.

SWARNAMAYI DASI.*

1922
 Feb. 23.

Landlord and Tenant—Occupancy raiyat unauthorised to transfer his holding—Usufructuary mortgage—Abandonment—Right of landlord to re-enter.

Where an occupancy raiyat, not authorised to transfer his holding, created a usufructuary mortgage and delivered possession to the mortgagee who was subsequently dispossessed by the landlord :—

Held, in a suit for possession by the mortgagee, that the plaintiff was entitled to possession in view of the express finding that there was no abandonment by the tenant ; the mere execution of a usufructuary mortgage followed by possession does not entitle the landlord to re-enter on the holding or recover possession.

* Appeal from Appellate Decree, No. 51 of 1920, against the decree of B. L. Banerjee, Subordinate Judge of Midnapur, dated July 29, 1919, reversing the decree of Ram Chandra Ghose, Munsif of Tamluk, dated March 26, 1918.

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Dayamayi v. Ananda Mohan Boy Chowdhury (1) followed.
Bhupendra Nath Bose v. Bansi Tanti (2) and *Monohar Pal v. Ananta Moyee* (3) referred to.

SECOND APPEAL by Sreemati Ambica Debi and another, the defendants.

This appeal arose out of a suit instituted by the plaintiff, usufructuary mortgagee, against the mortgagor of non-transferable occupancy holdings, his landlords and some others, for the possession of the mortgaged lands, after declaration of title thereto; it was argued, *inter alia*, on behalf of the defendants that as some of the jotes were purchased by the landlord, the defendant No. 6, in execution of a rent decree at least, so far as those jotes were concerned the mortgagee was not entitled to possession as the mortgage was a mere incumbrance and could have no priority over the rent-sale. The learned Munsif, who tried the suit, gave effect to this contention and made only a partial decree; the plaintiff thereupon appealed before the Subordinate Judge and the Subordinate Judge decreed the appeal, holding that as the mortgage was not a full transfer of the tenant's rights and there was no abandonment, the plaintiff was entitled to possession on satisfying the rent decree. The defendants appealed to the High Court.

Mr. Jyotish Chandra Hazra (with him *Babu Mahesh Chandra Banerjee* and *Babu Santosh Kumar Pal*), for the appellants. The plaintiff cannot succeed in this suit; the jotes being non-transferable occupancy holdings, the mortgage followed by possession, amounts to abandonment. The mortgage can at best be regarded as an incumbrance within the meaning of section 161 of the Bengal Tenancy Act; it

(1) (1914) I. L. R. 42 Calc. 172. (2) (1913) I. L. R. 40 Calc. 870.

(3) (1913) 17 C. W. N. 802.

cannot have priority over a rent sale: *Krishna Chandra Datta Chowdhury v. Khiran Bajania* (1), *S. M. Meherunnesa v. Sham Sundar Bhuiya* (2), *Kalinath Chakravarty v. Kumar Upendra Chandra Chowdhury* (3).

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There is no prayer in the plaint seeking for redemption.

Babu Hiralal Sanyal (with him *Babu Charu Chandra Biswas*), for the respondents. The defendants are now trying to set up a new case; in the Court below the plaintiff was treated as a trespasser and it was said that the tenant had abandoned the holding: it is found that there was no abandonment; the usufructuary mortgage of a non-transferable holding does not by itself amount to abandonment: *Dayamayi v. Ananda Mohan Roy Chowdhury* (4).

Mr. Jyotish Chandra Hazra, in reply.

GREAVES AND GHOSE JJ. This is an appeal by the defendants Nos. 1 and 6 against a decision of the Subordinate Judge of Midnapur modifying a decision of the 4th Munsif at Tamruk. The plaintiff in the suit was a usufructuary mortgagee. The mortgage was executed in his favour by defendant No. 7. The appellant, defendant No. 6, is the landlord and the first defendant is a new tenant with whom defendant No. 6 purports to have settled the lands. The holding which is a non-transferable occupancy holding was sold for non-payment of rent and was purchased by defendant No. 6, the landlord. The lower Appellate Court has passed a decree for possession of the lands in suit in favour of the mortgagee, the plaintiff, on condition of his paying to the landlord, the appellant No. 6, a sum of Rs. 45, the amount of the arrears

(1) (1903) 10 C. W. N. 499.

(3) (1896) 1 C. W. N. 163.

(2) (1902) 6 C. W. N. 834.

(4) (1914) I. L. R. 42 Calc. 172.

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of rent for which the holding was brought to sale.

Two points have been urged before us in this appeal. First, it is said that the plaintiff cannot maintain the suit inasmuch as the execution of the usufructuary mortgage by defendant No. 7 gave the landlord a right to obtain possession of the holding, and it is said that by virtue of the mortgage the plaintiff acquired no right in the land. Secondly, it is said that there was no prayer for redemption in the original plaint. So far as the first point is concerned what has been argued before us is that the mere execution of the usufructuary mortgage by the tenant followed by possession of the mortgagee, even without any definite evidence that the tenant has abandoned the holding, is sufficient of itself to entitle the landlord to possession and in support of this contention we were referred to several cases, the one which bears the most upon the point being the case of *Krishna Chandra Datta Chowdhury v. Khiran Bajania* (1) where it is held that by creating a usufructuary mortgage, an occupancy raiyat not authorised to transfer his holding makes himself liable to ejection by the landlord.

As against this on behalf of the respondent it is stated that, that decision must be taken to have been impliedly overruled by the decision in the case of *Dayamayi* (2) for it is said that where a transfer is not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been an abandonment. So far as the abandonment is concerned, there is an express finding in the judgment of the lower Court that there was no abandonment of the holding

(1) (1903) 10 C. W. N. 499.

(2) (1914) I. L. R. 42 Calc. 172 ;
 20 C. L. J. 52.

by defendant No. 7; consequently it seems to us that the argument advanced before us on behalf of the respondent is well-founded and that the mere execution of a usufructuary mortgage followed by possession does not entitle the landlord to re-enter on the holding or recover possession. Reference may be made in support of the conclusion at which we have arrived to the case of *Bhupendra Nath Bose v. Bansi Tanti* (1) which is a decision, that a transfer by way of usufructuary mortgage stands on the same footing as other partial transfers; and in the case of *Monohar Pal v. Srimati Ananta Moyee* (2) it is said (at p. 806) that the mere execution of a usufructuary mortgage might not of itself be sufficient to establish abandonment. So far as the second question is concerned it seems to us that the suit was adequately framed for the purposes of the decree which was obtained.

In the result the appeal fails and must be dismissed with costs.

The cross-objections are not pressed. They are dismissed but without costs.

A. S. M. A.

Appeal dismissed.

(1) (1913) I. L. R. 40 Calc. 870.

(2) (1913) 17 C. W. N. 802.