

Subordinate Judge, he was clearly aware that Mr. Crowley was not the proprietor in that he sued him merely as "manager and mookhtar." It was, therefore, within his power to ascertain against whom the suit ought to have been brought.

Upon a strict interpretation of the law we think that the Subordinate Judge was right in holding that the suit was barred.

We must, therefore, set aside the order of the lower Appellate Court, and restore that of the first Court with costs, one gold mohur.

Appeal allowed.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.
**KANNIE LOLL SEIT AND ANOTHER (PLAINTIFFS) v. NISTORINY
 DOSSEE AND ANOTHER (DEFENDANTS).***

1884
 March 6.

Mortgage of leasehold property—Mortgagee in possession—Liability for rent—Transfer of Property Act—Act IV of 1882, ss. 65, 76.

Where the subject of a mortgage is leasehold property, and the mortgagee is put into possession under circumstances which amount to an assignment or transfer of the leasehold interest, the mortgagee becomes liable, as a rule, to pay the rent; but where the mortgagee is in possession and his name is registered in the landlord's books as the tenant, there can be no doubt as to his being liable for the rent.

THE plaintiffs in this case were the owners of certain land, No. 8, Juggo Mohun Mullick's Place, and some time back let out to the defendant Toolamoney three plots out of the land above-mentioned, on which the latter built some tiled huts which she let out to tenants. Subsequently on the 10th Assar 1282 (June 1875), Toolamoney mortgaged the tiled huts on this land to one Nistoriny Dossee. Nistoriny then entered into possession and repaired and built other huts thereon.

This mortgage and the fact of Nistoriny being in possession coming to the knowledge of the plaintiff, his agent induced Nistoriny to have her name entered in the landlord's books as the tenant of the property, and received rent from her at the rate of Rs. 59 a month and also a *salami* of Rs. 150.

In 1879, Toolamoney brought a suit against Nistoriny to redeem the property mortgaged and for an account, and obtained a

* Small Cause Court Reference under s. 69 of Act XV of 1882 and s. 617 of the Civil Procedure Code, by Baboo Koonjo Lall Banerjee, Second Judge of the Calcutta Court of Small Causes.

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decree against her. Subsequently to this decree Toolamoney paid rent up to Aghran 1288.

Rent of the premises having since then fallen in arrear the plaintiffs brought this suit in the Court of Small Causes against Toolamoney and Nistoriny for Rs. 1,062, being the rent due from Pous 1288 to Joisto 1290.

The Second Judge of the Small Cause Court found that Toolamoney was the real tenant and that Nistoriny was merely the mortgagee in possession, and gave the plaintiffs a decree against Toolamoney, dismissing the suit as against Nistoriny, stating that his judgment was, however, contingent on the opinion of the High Court, whether on the facts stated and the law applied, the decree should be against Toolamoney alone or against both Toolamoney and Nistoriny.

On the reference Mr. *Bonnerjee* appeared for the plaintiffs and Mr. *Trevelyan* appeared for Nistoriny.

No one appeared for Toolamoney.

The judgment of the High Court was delivered by

GARTH, C.J.—The Judge of the Small Cause Court has made a mistake in this case.

Whenever the subject of a mortgage is leasehold property, and the mortgagee is put in possession of it, under circumstances which amount to an assignment or transfer of the leasehold interest, the mortgagee becomes liable, as a rule, to pay the rent. But in this case there is no doubt about the matter, because the mortgagee has not only obtained possession, but has had her name entered in the landlord's books as the tenant of the property in the place of Toolamoney. Nistoriny is therefore liable for the rent, and the suit must be dismissed altogether as against Toolamoney.

The Small Cause Court Judge appears to have been misled by the language of s. 76 of the Transfer of Property Act, but it will be found that neither that section, which relates to mortgagees in possession, nor s. 65, which relates to the duties of mortgagors, contain any rules applicable to cases like the present. Those cases are therefore governed by the general law.

The plaintiff will be entitled to the costs of this reference from the defendant Nistoriny.

Attorney for plaintiffs : *Mitter and Bungo*.

Attorney for Nistoriny : *Dwarkanath Dutt*.