

1877

GANPAT RAI  
v.  
SARUFI.

to hold that the sale of the decree carried with it necessarily the right to an assignment of all securities held by the original creditor.

Whether this be so or not the lien in the present instance has not been assigned to the plaintiffs, and, therefore, they cannot claim the benefit of it. The decree of the Court below must be reversed and the suit dismissed with costs.

*Appeal allowed.*

1877

JUNE 29.

## APPELLATE CIVIL.

*Before Mr. Justice Turner and Mr. Justice Spinkie.*

BAKHAT RAM AND ANOTHER (PLAINTIFFS) v. WAZIR ALI AND OTHERS (DEFENDANTS).\*

*Act XVIII of 1873 (North-Western Provinces Rent Act), ss. 7, 95—Sir-land—Ex-proprietary Tenant—Mortgage of Proprietary rights in a Mahal followed by Sale—Ejectment—Mesne Profits—Trespasser—Jurisdiction—Civil Court—Revenue Court.*

A suit to eject a person from land as a trespasser, a person who has entered upon such land asserting his claim to the status of an ex-proprietary tenant, and to recover from him mesne profits, is a suit cognizable by the Civil Court (1).

The possession of sir-land by conditional mortgagees must be treated as the possession of the mortgagors; held accordingly that where the mortgagees of certain proprietary rights in a mahal, being in possession of such rights, purchased the same at an auction-sale, the sir-land included in the proprietary rights was held by the mortgagors at the time of the auction-sale, within the meaning of s. 7 of Act XVIII of 1873, and that after the sale, in virtue of the provisions of that section, they became entitled to a right of occupancy in the sir-land.

Inasmuch as the mortgagors had a right of occupancy in the sir-land they could not be treated as trespassers for ejecting the mortgagees' tenant and taking possession; but inasmuch as instead of giving notice to the mortgagees of their intention to avail themselves of such right and to enter on the sir-land as tenants, at the same time offering to pay such rent as might, having regard to the provisions of s. 7, be properly payable by them, they entered on the sir-land and ousted the mortgagees' tenant, they rendered themselves liable for mesne profits.

THIS was a suit to eject the defendants as trespassers from certain sir-land and to recover mesne profits. The plaintiffs held

\* Special Appeal, No. 399 of 1876, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Ghazipur, dated the 12th January, 1876, reversing a decree of Maulvi Ezid Bakhsh, Munsif of Muhammadabad, dated the 20th August, 1875.

(1) See also *Ghisa v. Didari*, H. C. R., v. *Sital*, p. 228; and *Mata Parshad v. Janki*, p. 226.

1877

---

 BARNAT RAM  
 v.  
 WAZIR ALI,

possession of the share which included the sir-land as conditional mortgagees. The sir-land was sub-let by them to a tenant. The rights in the share remaining in the mortgagors, who were the defendants in this suit, were sold at auction and purchased by the plaintiffs, who thus became possessed of the share and the sir-land in full proprietary right. The defendants, the plaintiffs alleged, had ousted the plaintiffs' tenant from the sir-land. The defendants set up as a defence to the suit that, having lost their proprietary rights, they were entitled, in virtue of s. 7 of Act XVIII of 1873, to a right of occupancy in the sir-land. The Court of first instance, holding that, as at the time of the auction-sale the plaintiffs were already in possession as mortgagees, they did not lose their right to possession by purchasing the rights remaining in the mortgagors, gave the plaintiffs the decree which they sought, without determining what was the amount of mesne profits they were entitled to recover, although an issue had been fixed as to this point. On appeal by the defendants, the lower appellate Court held that the plaintiffs' rights as mortgagees merged in the higher title acquired by the auction-sale, and remanded the suit to the Court of first instance, under s. 351 of Act VIII of 1859, in order that it might take evidence as to the produce of the land, and then determine whether or not the suit was cognizable by the Civil Court.

The plaintiffs appealed to the High Court, taking exception to the lower appellate Court's procedure, and contending that the suit was cognizable by the Civil Court, that if the defendants had any right in the land they could enforce it according to law, but could not eject the plaintiffs' tenant, that the only questions in the suit were whether the plaintiffs' tenant had been dispossessed and what damages the plaintiffs were entitled to, and that, when the defendants adduced no evidence as to the damages, although an issue was framed on that point, they could not fairly complain of the decree of the Court of first instance in that respect.

*Lala Lalta Prasad*, for the appellants.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Shah Asad Ali*, for the respondents.

1877

BAHHAT RAME  
v.  
WAZIR ALI.

The suit was re-manded to the lower appellate Court, under s. 354 of Act VIII of 1859, the Court (after stating the facts of the case and the manner in which it was dealt with by the lower Courts) making the following

ORDER OF REMAND—It was the duty of the lower appellate Court to determine for itself whether or not the suit was cognizable by the Civil Court, and if it held the suit to be cognizable to proceed to determine it, remitting an issue under s. 354 touching damages, or if it found the suit was not cognizable to dismiss it forthwith. That the suit as brought was cognizable by a Civil Court we see no reason to doubt. The plaintiffs contend that the defendants ousted their tenant and took possession as trespassers. Such a suit may be instituted in the Civil Court.

The question then arises whether the defendants are to be regarded as trespassers or not.

In our judgment the Munsif was in error in holding that the plaintiffs, after the auction-sale, retained their position of conditional mortgagees. The lower appellate Court properly held that, having acquired the rights of the mortgagors, they thenceforward retained possession in full proprietary right; and inasmuch as up to the time of the auction-sale their possession of the sir as mortgagees must be treated as the possession of mortgagors, it appears to us the defendants are entitled to contend that the sir was held by them at the time of the sale, and that after the sale, in virtue of the provisions of s. 7 of the Rent Act, they became entitled to a right of occupancy in the sir as tenants at favourable rates; and if, in the assertion of this right at the proper season of the agricultural year, they took possession, offering to pay the proper rent due from them, the plaintiffs have no right to treat them as trespassers, but can only claim rent in the proper Court.

In order to enable us to determine the suit and to avoid the necessity for any further remand or remission of issues, we order the lower appellate Court to try the following issues:—(1) Under what circumstances did the defendants take possession of the land in suit, and did they or did they not inform the plaintiffs of their intention to take possession of it as tenants, and of their readiness to pay

rent. (2) If at the time the land was in the possession of the tenant, had the tenancy for the year in which the tenant was ousted commenced prior or subsequently to the auction-sale. (3) At what rent did the tenant hold the land in suit, and what proportion, if any, of that rent had he paid for the year in which he was ousted.

On the first issue the lower appellate Court found that the defendants had ousted the plaintiffs' tenant, and that they did not inform the plaintiffs of their intention to take possession of the sir-land as tenants, and of their readiness to pay rent. On the second issue it found that the tenancy for the year in which the tenant was ousted commenced subsequently to the auction-sale. On the third issue it found that the tenant paid an annual rent of Rs. 7-2-0, and that he had paid no portion of that rent for the year in which he was ousted. The lower appellate Court having returned its findings, the High Court delivered the following

**JUDGMENT.**—When the plaintiffs obtained the rights of the conditional vendors their rights as conditional vendees merged and they became possessed of the entire proprietary interest in the estate. Thereupon, by virtue of a provision of the rent law recently introduced, the defendants became entitled to hold their sir as tenants with rights of occupancy. Their proper course was to have given notice to the purchasers of their intention to avail themselves of their rights and to enter on the land as tenants, at the same time offering to pay such rent as might, having regard to the provisions of the Rent Act, be properly payable by them. It would then have been incumbent on them, or on the purchasers, if they were unable to agree to the amount of rent payable, to apply to the Revenue Court to determine the rent. The defendants, without communicating with the plaintiffs or taking any steps to have a rent assessed on the land, entered and ousted the tenant. They cannot, nevertheless, be deemed trespassers, for they have a right to the occupancy of the land, but the plaintiffs are entitled to recover damages for the use and occupation of the land, and we assess those damages at twenty-five per cent. less than the sum payable by the tenant.

The decree of the lower appellate Court, so far as it reversed the claim for ejectment, is affirmed, so far as it dismissed the claim for

1877

BAKHAT RAM  
v.  
WAZIR ALI.

1877

BAKHAT RAI  
v.  
WAZIR ALI.

1877

July 12.

damages it is in part affirmed and in part reversed, and the plaintiffs will obtain a decree for the sum above-mentioned. Under the circumstances, we order each party to bear their own costs in all Courts.

## APPELLATE CIVIL

*Before Mr. Justice Pearson and Mr. Justice Turner.*

PHULMAN RAI (DEFENDANT) v. DANI KUARI (PLAINTIFF).\*

*Pre-emption—Hindu Widow—Wajib-ul-arz.*

A Hindu widow holding by inheritance her deceased husband's share in a village fully represents his estate as regards such share, and is entitled to prefer a claim to pre-emption as a share-holder in such village.

THIS was a suit to establish the plaintiff's right of pre-emption to a share in a certain village, under a condition in the village administration-paper by which, on the sale of a share, share-holders were entitled to purchase in preference to strangers. The plaintiff was the widow of a deceased share-holder. Phulman Rai, a defendant in the suit, who also claimed the right of pre-emption, set up as a defence to the suit that the plaintiff was not a share-holder, being in possession of her deceased husband's share by way of maintenance, and not by inheritance, and that she could not maintain the suit. The Court of first instance dismissed the suit on the ground that the sale impugned by the plaintiff was only made on her refusing to purchase. The lower appellate Court gave her a conditional decree, being of opinion that she did not refuse to purchase. It did not enter into the question raised by the defence of Phulman Rai.

Phulman Rai appealed to the High Court, raising the same defence to the suit as he had raised in the Courts below. The High Court (Pearson and Turner, JJ.) remanded the suit to the lower appellate Court to determine whether the plaintiff was a sharer in the estate or only entitled to maintenance. The lower appellate Court did not distinctly determine this issue, but found that the share in the plaintiff's possession was joint and undivided ancestral property. To this finding the plaintiff took exception on the evidence.

\* Special Appeal, No. 266 of 1877, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 16th December, 1876, reversing a decree of Maulvi Hafiz Rahim, Munsif of Banagan, dated the 27th October, 1876.