

1875

DATA CHAND
v.
SABERAZ.

elue to the names of the owners being found in the settlement records.

At page 314 of Atkyn's Reports mention is made of a case in which Sir J. Jekyll decreed a redemption upon the circumstance of the person who was in possession of an estate originally in mortgage calling it by the name of the mortgaged estate in his will. This case supports my judgment not less than that of *Stansfield v. Hobson* above quoted.

SPANKIE, J.—I am under the impression that my honorable colleagues take a different view of this case than I do. I, therefore, would simply say that I adhere to my former judgment. Nothing was stated at the hearing which shows me that my opinion was wrong, and I can add nothing to what I have already put on record.

APPELLATE CIVIL

1875
December 15

(*Mr. Justice Pearson and Mr. Justice Turner*)

CHUNNI (DEFPENDANT) v. THAKUR DAS AND OTHERS (PLAINTIFFS)*

Mortgage—Condition against Alienation—Auction-purchaser

A transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable in so far as it is in defiance of the mortgagee's rights.

Where, in contravention of a condition not to alienate, the mortgagor had transferred his proprietary right in the mortgaged property to a third person for a term of years, the Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt, unless such purchaser desired its continuance.

DALGANJAN mortgaged to the plaintiffs, by a deed dated the 24th November, 1870, a share in a certain village as security for the repayment of a loan made to him by the plaintiffs. The mortgage-

* Special Appeal No. 1000 of 1875, from a decree of the Judge of Bareilly, dated the 3rd August, 1875, reversing a decree of the Subordinate Judge, dated the 23rd February, 1875.

deed contained a condition against alienation to the following effect:—"I will not transfer the mortgaged property to any one else until the principal sum together with interest is repaid. Should I transfer it the transfer shall be illegal" The mortgagor, under the terms of the deed, continued in possession of the property. On the 9th October, 1874, Dalganjan granted the defendant a "lease" (*katkina*) of his rights as zemindar and malguzar in the share for a term of 11 years from 1282 fasli (1874-75) to the end of the rabbi harvest of 1292 fasli at a fixed annual rent of Rs. 291 on these, amongst other, conditions—that the lessee should duly pay the Government revenue, instalment by instalment, together with the cesses, as also the annual rent, instalment by instalment—that no increase or reduction, during the term of the lease or at any settlement, in the Government revenue should affect the lessor—that the lessee should be liable for the carrying out of Government orders, and the expenses connected therewith—that while he held under the lease the lessee should keep the ryots satisfied—that during the term of the lease the lessee should not be at liberty to surrender the estate. The plaintiffs obtained a decree on the 5th December, 1874, for the sale of the mortgaged property in satisfaction of the mortgage-debt.

They instituted the present suit for the invalidation of the lease, alleging that it was granted at a low rate of rent, in bad faith, with the object of frustrating the execution and satisfaction of their decree. The defendant Chumni pleaded that the plaintiffs had no cause of action against him, as he took the lease in good faith prior to the passing of the decree, and the lease in no way hindered them from enforcing their lien on the property.

The first Court dismissed the suit on the ground that there was nothing to show that the lease was granted in bad faith, and that the stipulation in the deed of mortgage against the transfer of the property did not prevent the mortgagor from granting a lease of it. It remarked that the plaintiffs might bring the property to sale notwithstanding the lease, and that their statement that the property would fetch a small price at an auction-sale in consequence of the lease was merely conjectural. On appeal by the plaintiffs they contended that the stipulation in the mortgage-deed rendered the

1875

 CHUMNI
 v.
 THAKUR DAS.

1875
 CHUNNI
 v.
 H. KUR
 LÁs.

lease invalid, and that the lease would interfere with the auction-sale of the property, as no one would be willing to purchase it subject to the lease. The lower appellate Court held, with reference to a ruling (1) of the late Sudder Court that the lease was invalid, being a violation of the stipulation against alienation contained in the mortgage-deed.

On special appeal to the High Court by the defendant Chunni, it was contended on his behalf that the stipulation in the mortgage-deed was a mere personal covenant binding on the mortgagor, but which did not bind him, and which could not defeat his right to hold under the lease for the term it was granted, the lease being a *bonâ fide* lease; that it was not shown that the lease obstructed the rights of the mortgagee; and that the plaintiffs had no cause of action against him, the lease having been granted and taken in good faith.

The *Junior Government Pleader* (Bábu Dwárka Náth Banarji) for the appellant.

Mr. *Colvin* and Bábu *Jogendro Náth* for the respondents.

The judgment of the Court was as follows:—

The lease is not a lease merely for agricultural purposes, but a transfer (2) of the interest of the proprietor for a term of years. Is it a violation of the condition against alienation? It has been held

(1) 8 S. D. A., N.-W. P., 341. See another case of a lease—*Gossain Mungul Doss v. Rughoonath Sahoy*, 17, W. R., 560, and as to such conditions generally—see on the one hand *Heera Lal v. Rutchpal*, 6 S. D. A., N.-W. P., 39; *Mithoo Beebee v. Madho Pershad*, 7 S. D. A., N.-W. P., 614—and on the other, *Gungapershad Singh v. Beharee Lal*, S. D. A., L. P., 1857, p. 825, and the cases there cited. Where the transfer is made *bonâ fide* for the purpose of paying off the mortgage-debt, a condition not to alienate cannot operate to annul it, see *Dookhchore Rai v. Hajee Hidayut-ool-lah*, H. C. R., N.-W. P., F. B., 1866-1867, p. 7; but the debt must be at once discharged by the transfer. see *Mahomed Zakoollah v. Baneer Pershad*, H. C. R., N.-W. P., 1869, p. 40. See also *Koondun Lal v. Wazeer Ali*, H. C. R., N.-W. P., 1871, p. 205. (2) As to the meaning of "transfer," when used in a *wajibularz*, see *Chuttur Mull v. Chuttur Kishore Lall*, H. C. R., N.-W. P., 1868, p. 396. In that case it was ruled that the mere transfer of property to the possession of a tenant for a term of years, who pays rent to the owner, would not fall within a prohibition not to "transfer." This refers presumably to a transfer for agricultural purposes.

that such conditions are introduced to protect the lien created by the mortgage, and that a transfer made in contravention of the condition is not absolutely void, but voidable so far as it is in defeazance of the mortgagee's rights. In the present case the mortgagees have obtained a decree for the sale of the estate in satisfaction of the loan. The existence of the lease may induce purchasers to offer a less price for the property than they would offer if they could obtain immediate possession. On the other hand, the lease may be an arrangement highly beneficial to the owner of the estate and thus a substantial increment to its value. The mortgagees will have obtained all that in equity they are entitled to, if the Court gives them a declaration that the lease will not be binding on a purchaser in execution of the decree, unless he desires its continuance. The decrees of the Courts below will be modified accordingly, but as the appeal substantially fails, we must order the appellant to bear the respondents' costs.

1875

CHUNNI
v.
THAKUR
DÁS.

CRIMINAL JURISDICTION.

1876

January 14

(*Mr. Justice Oldfield*)

QUEEN v. KULTARAN SINGH

Act X of 1872, ss. 468, 471, 472, 473—Offence against Public Justice—Offence in Contempt of Court—Prosecution—Procedure

An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X of 1872.

But notwithstanding this the Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468, 469, Act X. of 1872, may not, except as is provided in s. 472, try the accused person itself for the offence charged.

The case of *Sujtoollah*, petitioner (1), followed.

A SUIT was brought against Kultaran Singh for the recovery of arrears of rent, in which he produced a witness, Bhikam Singh, who gave evidence as to the payment of the rent by Kultaran Singh. This evidence, in the opinion of the Assistant Collector trying the suit, afforded ground for inquiry into a charge against Kultaran

(1) 22 W. R. Cr. 49, see however *Reg. v. Navranbeg Dulabeg*, 10 Bom. H. C. Rep., 73; and 7 Mad. H. C. Rep., Rulings xvii and xviii.