

holding as opposed to the landlord's, and to settle what had been a vexed question, how far a tenant has the power, without the consent of his landlord, to transfer his holding. The section refers to transfers made by the tenant independently of the landlord, and it was not intended to disallow transfers when made with the consent of the landlord, or at his instance, as in the case before us, in execution of a decree of the Civil Court, when there is otherwise nothing in the law forbidding a tenant's rights to be sold in execution of such a decree. It will be seen that the effect of s. 9, Act XVIII of 1873, is to give a larger property in their holdings to tenants at fixed rates than it gives to the tenants with rights of occupancy, and a larger property to the latter than it gives to mere tenants-at-will. The first class can transfer their holdings at their own pleasure, and the second class can only do so under limitations. This distinction between the different powers of transfer in different classes of tenants is intelligible only when we ascribe it to the desire to protect the landlord against transfers at the will and pleasure of his tenants. It is certain that the Rent Act does not extend to the tenants any absolute right to be maintained in their holdings against their landlords. Tenants with rights of occupancy are not protected against being ejected from their holdings by their landlords in execution of decrees for arrears of rent obtained against them by their landlords, and it would appear that the landlord might, if so disposed, bring to sale his tenant's interest in his holding in execution of a decree for rent, under s. 171 and following sections of Act XVIII of 1873. I see no reason to suppose that it was the intention of s. 9, Act XVIII of 1873, to invalidate the sale in the case before us.

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APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

BASANT RAI AND OTHERS (DEFENDANTS) v. KANAUJI LAL (PLAINTIFF)*

Usufructuary mortgage followed by sale—Revival of mortgage by cancellation of sale—Redemption of mortgage—Attachment in the execution of decree—Claim to attached property—Effect of order under Act VIII of 1859 (Civil Procedure Code), s. 246.

Z mortgaged in 1859 certain immoveable property, being joint ancestral property, for a term of five years, giving the mortgagee possession of the mort-

* Second Appeal, No 1365 of 1878, from a decree of R. S. Saunders, Esq., Judge of Farukhabad, dated the 13th November, 1873, affirming a decree of Pandit Harsahai, Subordinate Judge of Farukhabad, dated the 2nd September, 1878.

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gaged property. In 1861 Z sold this property to the mortgagee, whereupon the sons of Z sued their father and the mortgagee, purchaser, to have the sale set aside as invalid under Hindu law, and in August 1864 obtained a decree in the Sudder Court setting aside the sale. The mortgagee, purchaser, remained, however, in possession of the property as mortgagee. In May 1867, Z having sued the mortgagee for possession of the property on the ground that the sale had been set aside as invalid, the High Court held that Z could not be allowed to retain the purchase-money and to eject the mortgagee, purchaser, but must be held estopped from pleading that the sale was invalid. In November 1867, one K having caused the property to be attached and advertised for sale in the execution of a decree which he held against Z and his sons, the mortgagee objected to the sale of the property on the ground that Z and his sons had no saleable interest in the property. This objection was disallowed by the Court executing the decree, and the rights and interests of Z and his sons were sold in the execution of the decree, K purchasing them. In 1878 K sued, as the purchaser of the equity of redemption, for the redemption of the mortgage of 1859. Held that K was entitled to redeem the property. Held also that the mortgagee not having contested in a suit the order dismissing his objection to the sale of the property in execution of K's decree, he could not deny that K had purchased the rights and interests remaining in the property to Z and his sons. Held also that the mortgagee had no lien on the property in respect of his purchase-money. Held also that, it being stipulated in the deed of mortgage that the mortgagee should pay the mortgagor a certain sum annually as "*malikana*" and the mortgagee not having paid such allowance since the date of the sale, the plaintiff was entitled to a deduction from the mortgage-money of the sum to which such allowance amounted.

On the 17th June, 1859, one Zalim Singh mortgaged a ten biswas share in a certain village to Basant Rai and certain other persons for Rs. 2,200, for a term of five years, giving the mortgagees possession of the share. On the 21st May, 1861, Zalim Singh executed a deed of sale of the share in favour of the mortgagees. The sons of Zalim Singh sued their father and the mortgagees, purchasers, to set aside this sale as being invalid under Hindu law, it having been made without their consent and to meet liabilities created through the personal extravagance of Zalim Singh. On the 1st March, 1864, the Court of first instance gave the sons of Zalim Singh a decree setting aside the sale on the ground that it had not been made for legitimate family purposes, but for the gratification of the vendee's personal extravagances. This decree was affirmed by the Sudder Court on appeal by the mortgagees, purchasers, on the 22nd August, 1864. The mortgagees, purchasers, remain however in possession of the share as mortgagees. In 1866 Zalim Singh sued the mortgagees for the possession of the share on the ground that the sale had been set aside. On the 27th May, 1867, the High

Court held, on appeal by the mortgagees, that Zalim Singh could not be allowed to retain the purchase-money, and to eject the purchasers, but must be held estopped by his own act from pleading the invalidity of the sale. Subsequently one Kanauji Lal having applied for the sale of the share in the execution of a decree which he held against Zalim Singh and his sons, the mortgagees objected to the sale. On the 15th November, 1867, their objection was disallowed. On the 20th November the share was sold in the execution of this decree, and was purchased by Kanauji Lal. Kanauji Lal brought the present suit in June 1878 for the redemption of the mortgage of the 17th June, 1859. The facts of the suit are sufficiently stated in the judgment of the High Court, to which the defendants appealed from the decree of the lower appellate Court affirming that of the Court of first instance in the plaintiff's favour.

Mr. *Howard* and *Munshi Hanuman Prasad*, for the appellants.

The *Junior Government Pleader* (*Babu Dwarka Nuth Banarji*) and *Pandits Bishambar Nuth* and *Nand Lal*, for the respondent.

The High Court (*SPANKIE, J.* and *STRAIGHT, J.*) delivered the following

JUDGMENT.—The plaintiff, respondent, is the auction-purchaser of the ten biswas zamindari share of Zalim Singh, the subject of dispute. He avers that the share was mortgaged on the 17th June, 1859, to the defendants for Rs. 2,200, and for a term of five years, and that on the 21st May, 1861, Zalim Singh executed a deed of sale of the property in favour of the mortgagees, giving them credit for Rs. 2,200, the mortgage-money, Rs. 250 in cash, and retaining Rs. 5,800 to be paid on account of debts to the plaintiff: *Lalta Prasad* and others, sons of Zalim Singh, sued to set aside the sale and succeeded in obtaining a final decree in their favour from the *Sudder Dewany Adawlat, North-Western Provinces*, on the 22nd August, 1864: the defendants, however, continued in possession of the share as mortgagees: there was a stipulation in the mortgage-deed that Zalim Singh was to receive Rs. 75 yearly as “*malikana*” or proprietary allowance: this sum the mortgagees deducted yearly from the principal sum advanced on the mortgage, leaving now a balance of Rs. 925 due to the mortgagees: the plaintiff claims to redeem the share of Zalim Singh on payment of Rs. 925 or such sum as the

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Court shall declare to be due. The defendants contend that the purchase of the interest of the sons of Zalim Singh by the plaintiff at auction gave him no right of suit: they had no right during their father's lifetime: Zalim Singh had admitted the sale to defendants and he had ineffectually endeavoured to recover possession of the share, but the High Court, North-Western Provinces, on the 27th May, 1867, rejected his claim: the plaintiff's suit to redeem the mortgage on the ground that the sale of the 21st May, 1861, was invalid was barred by s. 13, Act X of 1877, and the admission of Zalim Singh. They also contend that they were entitled to repayment of the sale consideration and that the allowance of Rs. 75 ceased from the date of the sale, and that there was no condition in the mortgage-deed for the deduction of this sum yearly from the principal sum advanced on mortgage: Zalim Singh himself realized this sum prior to the sale. The Subordinate Judge held that the defendants, who objected to the sale of the share in execution of decree and against whose objection an order was passed on the 15th November, 1867, ought to have contested that order in a regular suit within the period prescribed by law: they had not done so, and the order became final, and they could not now contend that Zalim Singh had no rights that could be sold: the plaintiff therefore had a clear right of suit. He also held that the property in dispute could not be considered liable for the consideration of the sale-deed, that deed having been set aside by the Sudder Dewany Adawlat in 1864: the defendants themselves have admitted all along that they were mortgagees: as they had failed to show that the proprietary allowance of Rs. 75 had been paid yearly, the sum should be deducted from the amount of the mortgage-loan. He accordingly gave a decree to plaintiff as claimed. The defendants appealed and repeat their original pleas. The Judge held that the mortgage of 1859, which had merged in the sale of 1861, revived when that sale was cancelled under the decision of the Sudder Dewany Adawlat of 1864: the sale was set aside because it was invalid under the Hindu law. He accepts the argument of the Subordinate Judge in regard to the finality of the order under s. 246, Act VIII of 1859, and he further holds that defendants were not entitled to any refund of Rs. 8,000, as sale-consideration, before redemption could be allowed: if they are entitled to that sum, they could only claim it from Zalim Singh

personally : they could not claim it from the plaintiff who had purchased the equity of redemption : the defendants had never brought a suit for the recovery of the money. The Judge also allowed the deduction of Rs. 75 yearly from the mortgage-loan as there was no proof that the allowance had been paid.

In second appeal the same pleas are urged. The decision of the Sudder Dewany Adawlat of the 22nd August affirmed that of the Judge, dated 1st March, which set aside the sale of 1861 as not having been made for legitimate family purposes but for the gratification of the personal extravagance of Zalim Singh. It was therefore invalid under the Hindu law. But though the sale was set aside, possession was not given to the plaintiffs, the sons of Zalim Singh. The defendants remained in possession as mortgagees. The sale having been declared altogether inoperative, and having been completely set aside, it cannot be said that the mortgage was extinguished by the execution of the sale-deed. The defendants were simply left in possession as mortgagees. The mortgage transaction has never been impugned, and the plaintiff as the representative of the original mortgagor has certainly a right to redeem the mortgage.

The Courts below appear to have rightly held that, as the defendants objected to the sale by auction of the rights of Zalim Singh and an order was passed against them on the 15th November, 1867, which they had never contested in a regular suit, they could not now deny that the plaintiff had purchased whatever rights still remained to Zalim Singh and his sons. In holding this to be the case the lower appellate Court has followed the ruling in *Badri Prasad v. Muhammad Yusuf* (1) of this Court in Full Bench.

The lower appellate Court has not, as urged by the appellants, misunderstood this Court's decision of the 27th May, 1867. That decision ruled that, although the sale by Zalim Singh was set aside, yet Zalim Singh (then plaintiff) could not equitably be allowed to retain the purchaser's money and to eject the purchaser from the property sold. He must be held estopped by his own act from pleading the invalidity of the sale. But this decision was passed as against Zalim Singh himself, who on the strength of the Sudder Dewany Adawlat's decision of the 22nd August was seeking to obtain possession of the property from the defendants. But it does not follow

(1) I. L. R., 1 All. 381.

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that the defendants have a lien on the property to the extent of the purchase-money. They are not in possession under the sale-deed, but were in possession as mortgagees, and as such have continued to be recorded in the Collector's books. The sale had already been declared invalid, when the plaintiff purchased Zalim Singh's rights at auction and acquired by his purchase the right of redeeming the mortgage. If the purchase-money had been received by Zalim Singh who is no longer alive, the purchasers might have sued to recover the purchase-money from him during his life, and might possibly in execution of their decree have proceeded against Zalim's rights and interest in the property. They did not adopt this course, though the sale was, as has been observed, completely set aside by the judgment of the *Sudder Dewany Adawlat* in 1864. Any claim to recover the money now would appear to be barred by time, and the defendants, mortgagees, can have no right now to make the property responsible for the repayment of the purchase-money on account of the sale in 1861, which was held to be altogether invalid, as against the plaintiff who has purchased the equity of redemption of the mortgage in 1859, and that too after the objections of these defendants had been overruled, and the order made against them on the 15th November, 1867, had become final.

The finding of the lower appellate Court regarding the Rs 75, "*malikana*," is one of fact, with which we cannot interfere. The Judge in deducting this yearly allowance from the principal of the mortgage-loan has not acted contrary to law, and the plea that he should not have done so, because the term of the mortgage had expired, has no force, inasmuch as the mortgagees have continued to hold possession under the mortgage and as long as they do so are bound by its conditions. We dismiss the appeal and affirm the judgment with costs.

Appeal dismissed.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KAMAL SINGH (PLAINTIFF) v. BATUL FATIMA (DEFENDANT)*

Trust—Assignment by Trustees—Limitation.

In 1840 the purchasers and recorded proprietors of a four biswas share of a certain village caused a statement to be recorded in the village record-of-rights.

* Second Appeal, No. 266 of 1870, from a decree of J. H. Prinsep, Esq., Judge of *Cawnpore*, dated the 19th December, 1878, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of *Cawnpore*, dated the 4th March, 1878.

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