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GAYA SINGH  
v.  
UDIT SINGH.

“Ek suls hissa par Udit Singh mudailah mai jumla hakuq zamindári mai ek suls haq sár sakit-ul-milkiyat va do suls hissa par mudai malikana va zamindárana kabiz va dakhil rahe aur ek suls haq kasht sakit-ul-milkiyat se musta’fi hain.”

I see nothing in the Rent Act of 1881, by which any such voluntary vacation of tenure by a person who has acquired an ex-proprietary right is prohibited.

For these reasons I agree in the decree proposed.

*Appeal dismissed.*

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June 2.

*Before Mr. Justice Mahmood.*

RAM LAL DUBE AND OTHERS (JUDGMENT-DEBTORS) v. HAR NARAIN AND ANOTHER (DECREE-HOLDERS).\*

*Execution of decree—Decree conditional on payment of a sum certain within a fixed time—Payment after time specified in decree.*

A Court having framed a decree conditioned on the payment by the plaintiff of a sum certain within a specified time has no power to extend the time for payment after the period mentioned in the decree has elapsed. *Raja Har Narain Singh v. Chaudhrai Bhagwant Kuar* (1) referred to.

The facts of this case sufficiently appear from the judgment of Mahmood, J.

Mr. *Niblett*, for the appellants.

Munshi *Jwala Prasad*, for the respondents.

MAHMOOD, J.—The facts of this case as they have been put before me by Mr. *Niblett* for the appellants and Mr. *Jwala Prasad* for the respondents, may be stated to be the following:—

The decree-holders, respondents, are alleged to have executed a usufructuary mortgage with possession in favor of the judgment-debtors, appellants, about thirty years ago. Under the mortgage the mortgagees are admitted to have been placed in possession, and on the 2nd October 1888, the decree-holders, respondents, obtained

\* Second appeal No. 35 of 1890 from a decree of E. J. Kitts, Esq., District Judge of Jaunpur, dated the 19th September 1889, confirming a decree of Babu Promotho Nath Banerji, Munsif of Jaunpur, dated the 15th July 1889.

a decree for possession of the property by redemption on payment of Rs. 40, payable within 60 days from the date of the decree.

The terms of this decree, dated the 2nd October 1888, are important, because, in my opinion, the fate of this case turns upon the terms of the decretal order which is as follows :—

یہہ قذری و حکم ہوا کہ دعویٰ مدعی واسطے انفکاک رہن اس شرط سے قذری ہو کہ مدعیان اندر ساتھ یہہ کے آج کی تاریخ سے چالیس روزہ مدعا علیہم کے واسطے عدالت میں جمع کریں بقریہ دعویٰ تسمس ہو۔ مدعیان خرچہ اپنا اور مدعا علیہم کا ادا کریں \*

This may be translated into English in the following words almost literally :—

“ It is ordered and decreed that the plaintiffs' claim for redemption of the mortgage be decreed, subject to the condition that the plaintiffs do deposit Rs. 40, in Court within 60 days from to-day for the defendants; the rest of the claim be dismissed, the plaintiffs paying their own costs and also the costs of the defendants.”

I have quoted the exact terms of the decree in order to indicate the ground upon which my judgment will proceed, irrespective of the question whether or not this decree was properly made or properly framed. The decree became final and its terms cannot be interfered with by the Court executing the decree.

What happened next was that on the 21st May 1889, the decree-holders, respondents, made an application for execution of the decree of the 2nd October 1888, depositing with their application the above-mentioned sum of Rs. 40. The said sum was apparently accepted by the Court and ordered to be deposited, but on the same day the office reported that the deposit was in contravention of the terms of the decree of the 2nd October 1888. But notwithstanding this, the Court executing the decree allowed the application to be registered by its order of the 22nd May 1889.

The application having thus been registered, objections were raised to it by the judgment-debtors (appellants before me) mainly upon the ground that, by the dint of the terms of

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the decree itself, that decree ceased to be capable of execution, since the period for deposit had already elapsed.

These objections were disallowed by both the Courts below and this second appeal has been preferred against the order of the lower appellate Court confirming the decree of the Court of first instance.

Now it seems to me, in the first place, that the main ground upon which the judgment of the lower appellate Court proceeds is that under the second paragraph of s. 93 of the Transfer of Property Act (IV of 1882) the judgment-debtors, appellants, mortgagees, were bound to seek an order for foreclosure or sale of the property to which the decree of the 2nd October 1888, related. This seems to be an erroneous view of the law. A careful perusal of that paragraph indicates that an order for foreclosure or sale does not concern a mortgage such as that in this case, which is a usufructuary mortgage with possession. That paragraph has therefore no application, and I may say that the provisions of clause (a) s. 67 of the same enactment fortify the view that a usufructuary mortgagee is not entitled as such to have the right of bringing the mortgaged property to sale.

I need not dwell upon this aspect of the case, because the terms of the decree of the 2nd October 1888, are themselves clear and specific, limiting the right of redemption to 60 days, and those terms, whether right or wrong, must be adhered to by the Court executing the decree.

In arguing the case Mr. *Jwala Prasad* for the respondents has properly conceded that no order was made by the Court extending the period mentioned in the decree for the payment of the mortgage-money, and the learned *vakil* also conceded that the mere circumstance of the deposit being received by the Court on the 21st May 1889, cannot amount to an order extending the period of 60 days which was prescribed by the decree.

The principle laid down by their Lordships of the Privy Council in a recent unreported case of \**Raja Har Narain Singh v. Chaudh-*

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\* Since reported, I. L. R. 13 All. 300.

*rain Bhagwant Kuar* (decided on the 27th January 1891), is that when a period is fixed, as in that case it was fixed, by order of the Court under s. 521 of the Code of Civil Procedure for delivery of an award, and that period has elapsed, a subsequent granting of another period cannot amount to an extension of time already elapsed.

Applying the principle of that ruling to the present case, I am of opinion that after the lapse of 60 days allowed by the decree of the 2nd October 1888, which decree became final, the decree-holders, respondents, forfeited their right to execute the decree, and that the order of deposit made so late as 21st May 1889, by the Court executing the decree, could not cure the effect of the lapse of the period.

The proper order to be made in this case was that the application for execution should stand dismissed.

I make that order now by saying that I decree the appeal, and, reversing the decrees of both the lower Courts direct that application for execution stand dismissed, and that the decree-holders, respondents, do pay the costs of this litigation in all the Courts to the judgment-debtors, appellants.

*Appeal decreed.*

*Before Mr. Justice Straight.*

USUF KHAN AND OTHERS (DEFENDANTS) v. SARVAN AND OTHERS (PLAINTIFFS).\*

*Occupancy holding, transfer of—First and second mortgages of occupancy holding—Suit by second mortgagee to eject first mortgagee in possession.*

Where an occupancy holding was mortgaged under two successive mortgage deeds to different parties, and the mortgages under the first mortgage having been put in possession, the mortgagees under the second mortgage sued to eject them.

*Held* that, both parties being wrong-doers, inasmuch as both mortgages were illegal, the defendants, who were in possession, had a right, as against the plaintiffs, to retain possession.

The fact of this case are fully stated in the judgment of Straight, J.

\* Second appeal No. 1557 of 1888 from a decree of Maulvi Sayyid Akbar Husain, Officiating Subordinate Judge of Gházipur, dated the 16th July 1888, confirming a decree of Sayyid Zain-ul-Abdin, Munsif of Korantádh, dated the 28th April 1888.

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