

1885

QUEEN-
EMPERESS
v.
DAN SAHAI.

had made any such statements, and so forth. The course adopted by the Judge was contrary to practice, and inconsistent with all the rules regulating the admissibility of evidence, and Phear, J., in the case mentioned above, has pointed out the mischief and dangers of such a mode of procedure.

Under the circumstances I cannot allow the conviction of Dan Sahai to stand, and, it being reversed, he is acquitted.

Conviction quashed.

1885
July 3.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

RADHEY LAL AND OTHERS (PLAINTIFFS) v. MAHESH PRASAD AND ANOTHER (DEFENDANTS)*.

Extinguishment of charge—Equitable estoppel.

An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the grantee and her heirs should be entitled to take possession of the property. He subsequently mortgaged the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mortgagees obtained a decree upon their deed, and in execution thereof the property was attached and sold, and the decree-holders obtained possession. The heirs of the mortgagor sued the decree-holders for recovery of possession and for arrears of the annuity, claiming under the terms of the grant.

Held that the charge merged and was extinguished, and as the grantor had professed to transfer the property to the mortgagees unincumbered, he was bound to give it over to them free from incumbrance, and it would not lie in his mouth, nor in the mouths of his heirs, to set up the charge against the mortgagees and their vendees.

In 1844, one Shaikh Haidar Ali sold certain zamindari property to Sheikh Abdullah, the brother of his wife Musammat Zainab Bibi. As Zainab Bibi's dower was due, Abdullah, on the 8th March, 1844, executed in her favour an instrument whereby he promised to pay to her and her heirs, out of the income of the property purchased by him from Haidar Ali, an annuity of Rs. 100 down to the year 1862, and, after that year, of Rs. 200. It was stipulated that, in the event of failure by the grantor or his heirs to pay the said annuity, the property, out of the income

* First Appeal No. 139 of 1884, from a decree of Babu Abinash Chander Banerji Subordinate Judge of Allahabad, dated the 24th June 1884.

of which it was payable, should become the property of the grantee and her heirs, and they should be entitled to obtain possession of it. After the execution of this instrument, Abdullah remained in possession of the property, and paid the annuity. On the 5th June, 1868, he mortgaged the property to Mahesh Prasad and Partab Narain, the defendants in the present suit, by a deed in which he described it as his absolutely, and made no mention of the charge held upon it by Musammat Zainab Bibi. In March, 1873, the mortgagees obtained a decree on their deed against the mortgagor, and, in execution thereof, the property was attached and put up for sale, and was purchased by the decree-holders themselves, who obtained possession. On the 25th May, 1878, Musammat Zainab Bibi died, and Sheikh Abdullah survived her a few days only. The sons of the latter, who were the nephews and heirs of Musammat Zainab Bibi, sold half their rights to one Radhey Lal, by a sale-deed dated the 29th March, 1883.

1885

 RADHEY LAL
 v.
 MAHESH
 PRASAD.

The present suit was brought by Radhey Lal and the sons of Abdullah to recover possession of the property, and for Rs. 1,200 as arrears of the annuity from 1284 to 1289 fasli, claiming under the terms of the deed of the 8th March, 1844. The defendant pleaded (*inter alia*) that, upon the death of Musammat Zainab Bibi, the right to receive the annuity devolved upon the grantor and his heirs, and consequently merged and was extinguished, and could not now be enforced.

The Court of first instance dismissed the suit on the grounds, first that it was barred by limitation, and, secondly, that the charge was extinguished when the right to receive the annuity devolved upon Abdullah by inheritance from Musammat Zainab Bibi.

The plaintiffs appealed to the High Court.

Mr. *N. L. Paliologus* and *Bala Juala Prasad*, for the appellants.

Mr. *W. M. Colvin*, *Munshi Hanuman Prasad*, and *Ram Prasad*, and *Babu Oprokush Chander Mukarji* for the respondents.

PETHERAM, C. J.—I am of opinion that this appeal must be dismissed. The facts are, that one Shaikh Abdullah, being in possession of a certain property, made a grant from it of an

1885

RADHEY LAL
v.
MAHESH
PRASAD.

annuity to his sister and her heirs, with a proviso that, in case of failure to pay the annuity, the grantee and her heirs should be entitled to take possession of the property. He paid the annuity and kept possession, and subsequently mortgaged the property to the present defendants, and, by the terms of the mortgage, declared that the property was absolutely his own, and that no other person had any interest in it. He remained in possession, and paid the annuity till his sister's death. He was then her heir, and therefore the whole right to the charge, and the right to possession in default of payment, vested in him.

The charge consequently merged and was extinguished, and as he had previously professed to transfer the property to the defendants unincumbered, he was bound to give it over free from incumbrance. The charge having been extinguished in his hands, he then had what he professed to have at the time when he executed the mortgage, and it would not lie in his mouth, nor in mouths of his two sons, to say that the charge was still existing, and could be set up against the mortgagees and their vendees. This would amount to taking advantage of his own fraud—a course which no Court of law would allow for a moment. I am therefore of opinion that the Subordinate Judge was right, and that the appeal must be dismissed with costs.

BRODHURST, J.—I am of the same opinion.

Appeal dismissed.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

ABADI HUSAIN (PLAINTIFF), v. JURAWAN LAL AND OTHERS (DEFENDANTS).*

*Landholder and tenant—Transfer of "right of occupancy"—Lease—Mortgage—
"Zar-i-peshgi" lease—Act XII of 1881 (N.W. P. Rent Act) ss. 8, 9.*

The occupancy-tenants of certain land executed a *zar-i-peshgi* lease in favour of certain persons, by which, in consideration of a sum of money, it was agreed that the latter should have the right of occupying and cultivating the

* Second Appeal No. 950 of 1884, from a decree of Pandit Jagat Narain, Subordinate Judge of Farakhabad, dated the 14th April, 1884, reversing a decree of Maulvi Munir-ud-din Ahmad, Munsif of Kanauj, dated the 19th December, 1883.

1885

July 4