

STRAIGHT, J.—I concur in what has fallen from the learned Chief Justice, but I wish to add that the main ground upon which I hold that this appeal should be dismissed is, that the case which is now put forward by Mr. Hill, the nature of which was shadowed forth by the second plea in the memorandum of appeal, is not the case upon which his client came into Court, or that which is presented on the face of the plaint. It is an entirely new case which has been stated in this Court for the first time in appeal, and raises an issue, which necessarily was not considered by the Court below, nor did the plaintiff give any evidence in support of it.

Under such circumstances, I do not consider that we should allow the plaintiff in appeal entirely to change the nature of the grounds upon which she alleges herself to be entitled to relief, and for this reason I concur in dismissing this appeal with costs.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

DEBI PRASAD (PLAINTIFF) v. HAR DAYAL (DEFENDANT).*

Occupancy tenant—Suit for ejectment—Act by tenant inconsistent with purpose for which land was let—Mortgage of occupancy-holding—Cancellation of mortgage before institution of suit for ejectment—Act XII of 1881 (North-Western Provinces Rent Act), ss. 9, 93 (b), 149.

An occupancy tenant made a usufructuary mortgage of his holding, and afterwards had the land and the mortgage deed returned to him, and the mortgage was cancelled. Subsequently, the landlord instituted a suit for ejectment, on the ground that by the mortgage the tenant had committed an act inconsistent with the purpose for which the land was let, within the meaning of Act XII of 1881 (N.-W. P. Rent Act), s. 93 (b).

Held by OLDFIELD, J., that, apart from the question whether executing a mortgage of his holding was an act within the meaning of s. 93 (b) of the Rent Act, the mortgage having been cancelled, there was no cause of action left, and the penalty should not be enforced, with reference to s. 149.

Held by MAHMOOD, J., that the occupancy tenure could not be brought to an end except on grounds clearly provided by the law; and the execution of the mortgage, though illegal and void, was not "any act or omission detrimental to the land" or "inconsistent with the purpose for which the land was let" within the meaning of s. 93 (b) of the Rent Act, and furnished no ground for ejectment. Gopal Pandey v. Parsotam Das (1), and Naik Ram Singh v. Murli Dhar (2) referred to.

* Second Appeal No. 88 of 1885, from a decree of G. J. Nicholls, Esq., District Judge of Azamgarh, dated the 10th September, 1884, affirming a decree of Babu Jagmohan Singh, Deputy Collector of Azamgarh, dated the 21st July, 1884.

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MASUMA
BIBI
v.
THE COLLEC-
TOR OF
BALLIA.

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DEBI PRASAD
v.
HAR DAYAL.

Also *per* MAHMOOD, J.—The terms of s 93 (b) of the N.-W. P. Rent Act apply, *exempli gratia*, to cases in which land is given to a tenant for purposes of cultivation, and is used by him for building or other purposes.

THIS appeal was heard under s. 551 of the Civil Procedure Code. It appeared that an occupancy-tenant made a usufructuary mortgage of his holding, and the zamindar instituted a suit for ejectment, on the ground that by the mortgage the tenant had committed an act inconsistent with the purpose for which the land was let, within the meaning of s. 93 (b) of the North-Western Provinces Rent Act (XII of 1881). Prior to the institution of the suit, however, the tenant had the land and the mortgage-deed returned to him, and the mortgage was cancelled. The Court of first instance and the lower appellate Court dismissed the suit. The plaintiff appealed to the High Court.

Munshi *Kashi Prasad*, for the appellant.

The respondent was not represented.

OLDFIELD, J.—There is no case for appeal. Apart from the question whether executing a mortgage of his holding was an act within the meaning of s. 93 (b) of the Rent Act, on which it is not necessary to express an opinion, the finding is that the mortgage has been cancelled, and there is no cause of action left, and the penalty should not be enforced, with reference to s. 149. The appeal is dismissed.

MAHMOOD, J.—I concur in the order proposed by my learned brother Oldfield, and I am anxious to state my reasons for doing so, because I am aware of several cases in which an occupancy-tenancy has been brought to an end on account of erroneous views prevailing in the Mufassal Courts in regard to the meaning of cl. (b), s. 93 of the Rent Act. But assuming that the use of land by an occupancy-tenant in a manner inconsistent with the nature of his lease would put an end to^e his tenure, I am of opinion that the execution of a mortgage, such as that in the present case, is not “any act or omission detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let.” Under s. 9 of the Act, occupancy-rights cannot be transferred; and I have before now said in *Gopal Pandey v. Parsotam Das* (1) that

(1) I. L. R., 5 All. 121. (2) I. L. R., 4 All. 371.

the term "transfer" as used in the section includes all kinds of mortgage, and hypothecation amongst others, and that the mortgage, being prohibited, is null and void. In this case we have a usufructuary mortgage, and this comes within the principle of the ruling of the Full Bench in *Naik Ram Singh v. Murli Dhar* (1). For the same reason, the mortgage, being illegal, would have no effect as against the zamindar, being a transaction opposed to the policy of the statute. What s. 93 (b) means by "any act or omission detrimental to the land" in a tenant's occupation, "or inconsistent with the purposes for which the land was let," may be thus illustrated. If an acre is given to a tenant for the purpose of cultivation, and he turns it into a tank, or builds upon it, that, in the view of the law, is an act "inconsistent with the purpose for which the land was let." But the execution of a mortgage, as in the present case, is not such an act. It would be illegal and void, but it would furnish no ground for ejection. The Act does not give authority to end a tenure on any grounds other than those mentioned in the statute itself: in other words, I do not think that the occupancy-tenure can be brought to an end, except upon grounds clearly provided by the law. The appeal should therefore be dismissed.

Appeal dismissed.

FULL BENCH.

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

NARAIN DAS AND OTHERS (DEFENDANTS) *v* LAJJA RAM (PLAINTIFF).

Appeal, abatement of—Death of plaintiff-respondent—No application for substitution of deceased's representative—Civil Procedure Code, ss. 368, 582—Act XV of 1877 (Limitation Act), sch. ii, No. 171B.

Held by the Full Bench (MAHMOOD, J. dissenting), that s. 582 of the Civil Procedure Code does not make the provisions of Chapter XXI, relating to the death of a defendant in a suit, applicable to the death of a plaintiff-respondent in an appeal, so as to render it obligatory on the defendant-appellant to make an application to the Court praying that the legal representatives of the deceased be

* Second Appeal No. 634 of 1884, from a decree of C. F. Hall, Esq. District Judge of Bareilly, dated the 1st February, 1883, modifying a decree of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 6th September, 1882.