

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

NAKCHEDI BHAGAT (PLAINTIFF) v. NAKCHEDI MISR AND OTHERS
(DEFENDANTS).*

1896
April 13.

*Mortgage by tenant at fixed rates—Ejection of mortgagor by zamindár—
Suit for redemption against mortgagee in possession of the mortgaged
property.*

The rule of law which prohibits a mortgagee or tenant from disputing his mortgagor's or landlord's title does not bar the mortgagee or tenant from showing that the title of his mortgagor or landlord under which he entered has determined.

Hence where a tenant at fixed rates, who having mortgaged his fixed rate holding by a usufructuary mortgage and put the mortgagee in possession, was ejected by the zamindár, subsequently sued the mortgagee, who had remained in possession after his mortgagor's ejection, for redemption, it was held that the mortgagee could plead successfully that the mortgagor's interest in the holding had determined by the ejection of the mortgagor.

THIS was a suit for possession of certain zamindari property by redemption of a mortgage made in 1858 by the then tenant of the land, Ram Charan, in favour of one Ram Nawaz Misr, the ancestor of the principal defendants. The plaintiff was the purchaser of the mortgagor's rights from Musammat Anupi, the representative of the original mortgagor.

The principal defendants pleaded that in 1872 the rights of the mortgagor under the mortgage in suit had been extinguished by the ejection of the then mortgagor, Palakdhari, by the zamindar, and that, so far as the portion of the land in suit which was held by them was concerned, they had since the ejection of Palakdhari held it as tenants of the zamindar and not as mortgagees.

It appeared that in 1871 the zamindar had sued Palakdhari for arrears of rent, and in that suit a compromise was effected by which Palakdhari agreed to pay up the arrears within a year's time. The payment was not made, and in 1872 Palakdhari was ejected and formal possession given to the zamindar. The mortgagees however were not ejected at the same time. A suit was

* Second Appeal No. 116 of 1894, from a decree of Rai Kishan Lal, Subordinate Judge of Gházipur, dated the 24th November 1893, reversing a decree of Maulvi Syed Abbas Ali, Additional Munsif of Korantadih, dated the 30th June 1893.

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subsequently brought against them by the zamindar, which was compromised, the mortgagees giving up a portion of the property in suit and acknowledging themselves to be tenants of the zamindar and not mortgagees.

The Court of first instance (Munsif of Korantadih) gave the plaintiff a decree for a small portion of the land claimed, which it found had been throughout in the possession of the mortgagees, as such, and not as tenants of the zamindar. The plaintiff appealed.

The lower appellate Court (Sudordinate Judge of Gházipur) found that inasmuch as Palakdhari's rights, both as tenant and as mortgagor, had been extinguished by the ejectment proceedings taken in 1872, the plaintiff had no right of redemption in respect of any of the lands in suit. It accordingly dismissed the plaintiff's claim *in toto*.

The plaintiff thereupon appealed to the High Court.

Munshi *Jwala Prasad* for the appellant.

Munshi *Gobind Prasad* for the respondent.

EDGE, C. J., and BLENNERHASSETT, J.—This was a suit for the redemption of a mortgage. The plaintiff had been a tenant at fixed rates of certain land. Whilst he was such tenant he granted the mortgage of his fixed rate holding now sought to be redeemed. It was a usufructuary mortgage, and possession was given to the mortgagee. Afterwards the tenant at fixed rates became in arrear in payment of his rent. A decree for arrears of rent was obtained against him under Act No. X of 1859. The decree was obtained on a compromise, and was made in accordance with the terms of the compromise, and the terms were that the tenant at fixed rates should have twelve months within which to pay up the arrears, otherwise he should be ejected. On the expiration of the twelve months, *viz.*, in May 1872, the tenant at fixed rates had failed to pay the arrears decreed, and thereupon the zamindar, decree-holder, proceeded against the tenant at fixed rates and ejected him under Act No. X of 1859. The Collector of the district made an order of ejectment, and on the 12th of June 1872,

formal possession was given to the zamiadar, landlord, decree-holder. It appears that the usufructuary mortgagee was permitted by the zamindar to continue in occupation of a portion of the lands, and several years after, when the zamindar sought to eject the mortgagee, it was held that as to a portion of these lands the mortgagee had acquired a right of occupancy. We presume that the mortgagee had been in occupation for more than twelve years after the proceedings in ejectment had determined.

On these facts the mortgagor now seeks redemption of the mortgage, it being contended on his behalf that as his mortgagee was put into possession by him under the usufructuary mortgage and is still in possession of a portion of the property mortgaged, the mortgagee cannot deny the mortgagor's title and cannot assert that a mortgage is not still continuing and capable of being redeemed, and cannot dispute that if there is redemption of the mortgage the plaintiff is entitled to be reinstated in possession by the defendant-mortgagee. The suit is really one by which a former tenant at fixed rates, who was ousted in 1872 from his tenancy, and whose tenancy then determined, seeks to be again placed in possession of the lands or some portion of them, on a contention that, as his mortgagee is still in possession, his tenancy at fixed rates was reinstated or continued. As a general rule, neither a mortgagee nor a tenant can dispute his mortgagor's or landlord's title unless that title has determined. If the title of the mortgagor in the one case or of the landlord in the other has determined, the mortgagee or the tenant can show that the title under which he entered has determined in fact and in law. Now the tenancy at fixed rates undoubtedly determined on the ejectment in June 1872, and it is needless to observe that in this case no new tenancy at fixed rates could possibly have been created. What the tenant at fixed rates had done by the mortgage was that by granting that mortgage he gave to the mortgagee a right to go into occupation of the fixed rate holding. He did not transfer his right of tenancy. When the mortgagor's title determined, the usufructuary mortgage, so far as it depended on that title, determined also. The fact that the zamindar allowed the

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mortgagee after 1872 to continue in possession and pay rent to him direct did not keep alive the tenancy at fixed rates of the mortgagor which had already determined, and it did not create in favor of that mortgagor any right of tenancy whatever. The case is similar to that of a landlord who ejects his tenant, the tenant having sublet. If the sub-tenant's title depends upon his immediate lessor's title, it falls to the ground with that lessor's title; but the landlord is not bound to eject the sub-tenant, if he prefers to keep him on as a tenant and to allow him to attorn to himself.

The first Court decreed the claim in part. The lower appellate Court dismissed the suit entirely. This is the plaintiff's appeal. We dismiss the appeal.

Appeal dismissed.

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April 14.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

MIHIN LAL AND OTHERS (DEFENDANTS) v. IMTIAZ ALI AND OTHERS (PLAINTIFFS).*

Procedure—Parties—Appeal—Civil Procedure Code, section 32—Party added in appeal who was not a party to the suit nor a representative of such party.

When a Court hearing an appeal is of opinion that a person not a party to the suit and not entitled to be brought on the record in a representative capacity should be a party to the record, its proper course is to remand the case to the Court of first instance, and to direct that Court to bring on the particular person as a defendant, or as a plaintiff if he consents, give him time to file his statement and opportunity to produce his evidence, and try the issues raised between him and the opposite side.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Satya Chandar Mukerji for the appellants.

Pandit Sundar Lal for the respondents.

EDGE, C.J. and BLENNERHASSETT, J.—The plaintiffs brought their suit for possession and for damages. They made certain persons defendants. The plaintiffs obtained a decree. The defend-

* Second Appeal No. 146 of 1894, from a decree of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farakhabad, dated the 19th November 1893, confirming a decree of Pandit Raj Nath Sahib, Munsif of Farakhabad, dated the 19th December 1890.