

1902

JAMNA  
BIBI  
v.  
SHEIKH  
JHAU.

consideration which can weigh with us in interpreting the law. For the foregoing reasons we allow the preliminary objection and dismiss the appeal with costs.

*Appeal dismissed.*

1902  
July 4.

## APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.*  
SHAM DAS AND ANOTHER (DEFENDANTS) v. BATUL BIBI (PLAINTIFF).  
*Mortgage—Usufructuary mortgage of zamindari and sir—Loss by mortgagor of proprietary rights—Mortgage to take effect against ex-proprietary rights of mortgagor—Mortgagor not entitled to relinquish ex-proprietary rights to the zamindar—Act No. XII of 1881 (N.-W. P. Rent Act), section 31.*

A zamindar having mortgaged by way of usufructuary mortgage his zamindari together with his *sir* land, lost his zamindari rights and became an ex-proprietary tenant of the *sir*. *Held* that the usufructuary mortgage did not become ineffectual, but took effect as a mortgage of the ex-proprietary rights. *Moody v. Mathews* (1), *Hughes v. Howard* (2), *Trumper v. Trumper* (3), *Khiali Ram v. Nathu Lal* (4) and *Sukru v. Tafazzul Husain Khan* (5) referred to.

*Held* also that in such a case as above the mortgagor, ex-proprietary tenant, could not to the prejudice of the mortgagee, surrender to the zamindar his ex-proprietary interest. *Badri Prasad v. Sheo Dhian* (6) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. G. W. Dillon, for the appellants.

Maulvi Ghulam Muftaba, for the respondent.

STANLEY, C.J. and BANERJI, J.—One Rajab Ali was entitled to a share of zamindari property and *sir* lands appertaining to it. On the 25th of January, 1890, he mortgaged it to the plaintiff, and in the years 1893 and 1895 he also granted usufructuary mortgages in favour of the defendants of the same property. The defendants brought a suit for possession as mortgagees on foot of their earlier mortgage, and obtained a

\* Second Appeal No. 462 of 1900 from a decree of Syed Muhammad Ali, District Judge of Jaunpur, dated the 7th February 1900, reversing a decree of Babu Shrish Chandar Bose, Subordinate Judge of Jaunpur, dated the 29th September 1899.

(1) (1801) 7 Ves., 174.

(2) (1858) 25 B., 575.

(3) (1873) L. R., 8 Ch., 870.

(4) (1893) I. L. R., 15 All., 219.

(5) (1894) I. L. R., 16 All., 398.

(6) (1896) I. L. R., 18 All., 354.

decree on the 4th of January, 1894, and on the 2nd March, 1894, got possession of the *sir* lands. The plaintiff brought a suit on foot of her mortgage impleading both Rajab Ali and the defendants, and on the 24th of June, 1895, obtained a decree for sale, which decree was made absolute on the 15th of February 1896. At the auction sale held in execution of her decree, the plaintiff purchased the property on the 20th of August, 1896, and obtained possession on the 25th of February, 1897. Upon this sale Rajab Ali became ex-proprietary tenant of the *sir* lands, and he, on the 15th of January 1898, relinquished his ex-proprietary rights in favour of the plaintiff. This, the defendants maintain, Rajab Ali had no right to do. The plaintiff instituted the suit out of which this appeal has arisen for possession of the *sir* lands, alleging that the defendants had ejected the sub-tenants from a portion of such lands, and had obtained possession of such portion, and that they had obstructed the plaintiff in realizing the rents of other portions of the *sir* lands. The main defence was that Rajab Ali's ex-proprietary right in respect of the *sir* land became vested in the defendants as usufructuary mortgagees, and that he was not competent to relinquish this right in favour of the plaintiff to the detriment of the defendants, and so the relinquishment was void as against the defendants.

The Subordinate Judge upheld this defence, and decided that Rajab Ali could not, to the prejudice of his mortgagees, the defendants, relinquish his ex-proprietary holding. He held that the plaintiff by her prior purchase acquired only the zamindari interest of Rajab Ali, and that the defendants were in possession of the *sir* lands, not as mortgagees of the proprietary right of Rajab Ali, which alone passed to the plaintiff, but as mortgagees of his ex-proprietary rights. He quotes the case of *Karamat Khan v. Samiuddin* (1) in support of his view. On appeal the District Judge reversed the decree of the lower Court, holding that, inasmuch as no lease was granted of his occupancy holding by Rajab Ali as an ex-proprietary tenant, there was nothing to prevent him from availing himself of the right to relinquish his holding if he chose to do so. "No authority," he says, "has been pointed out for the contention that the defendants respondents

1902

SHAM DAS

v.

BATUL

BIBI.

1902

---

SHAM DAS  
v.  
BATUL  
BIBI.

became mortgagees of the ex-proprietary rights of Rajab Ali by reason of the proprietary rights of Rajab Ali having been sold subsequent to the mortgage. The intention of Rajab Ali could never have been to mortgage his cultivatory rights as an ex-proprietary tenant. What Rajab Ali himself did not possess at the time of the mortgage to the defendants he could not transfer. It is therefore not sound to contend that the mortgage by Rajab Ali in favour of the defendants included the mortgage of his occupancy rights as an ex-proprietor as well as his proprietary rights." In another part of his judgment he says :—" It cannot for a moment be supposed that the defendants respondents acquired the same rights as Rajab Ali acquired as an ex-proprietor after his proprietary rights had been sold ; for such acquisition of occupancy rights was prohibited by section 9 of the Rent Act."

We are unable to agree in the view taken by the learned District Judge. The defendants were in possession of the *sir* land under and by virtue of their usufructuary mortgage. When Rajab Ali lost his proprietary rights in the *sir* his tenure was changed, no doubt, from that of a proprietary tenure to an ex-proprietary tenure. Some interest, however, in the *sir* lands still remained vested in him ; but he had already disposed of the usufruct of the land by the mortgages which he had executed in favour of the defendants. These mortgages, we think, attached to, and bound the estate of the mortgagor in its altered condition. Instead of the defendants continuing in possession as usufructuary mortgagees of land held under a proprietary tenure, their possession became that of mortgagees of an ex-proprietary tenure. In no way is the plaintiff, as it appears to us, prejudiced by this ; she will be entitled to payment of the rent just as she would have been entitled to receive it from Rajab Ali if the defendant's mortgage had not been in existence. The District Judge says, what Rajab Ali himself did not possess at the time of the mortgage to defendants, he could not transfer. He overlooks the fact that a mortgagee is entitled for the purposes of his security to all such interests as may be acquired either as accretions to or in place of the original interest which was conveyed to him ; for example, in the case of a mortgage or charge upon lease-holds, if a new lease be obtained by a mortgagor, either on a forfei-

1902

---

 SHAM DAS  
 v.  
 BATUL  
 BIBI.

ture of the original lease or by other means, the owner of the mortgage or charge will have the benefit of the new lease for the purpose of his security, and yet the mortgagor could not at the time of the mortgage have transferred the new lease to the mortgagee as it was not in existence—*Moody v. Mathews* (1), *Hughes v. Howard* (2), *Trumper v. Trumper* (3). It appears to us, therefore, clear that the ex-proprietary interest acquired by Rajab Ali in place of his proprietary interest in the *sir* land became subject to the defendants' mortgages.

Assuming this to be so, the next question is whether Rajab Ali was justified in relinquishing his ex-proprietary holding in favour of the plaintiff. In our opinion he was clearly not entitled to do so. It is a well-recognised principle of law that a man shall not derogate from his own grant. The effect of the relinquishment of his tenancy by Rajab Ali, if the relinquishment were valid, would be not merely to impair the security of the defendants, but to altogether destroy it. The principle to which we have referred is recognised in the case of *Badri Prasad v. Sheo Dhian* (4), in which case it was held that where an occupancy tenant grants a lease of land forming part of his occupancy holding for a term of years, he cannot, during the subsistence of such term, relinquish his holding to the zamindar so as to put an end to his lessee's rights under the lease. The principle applies to the case of a mortgage as well as to the case of a lease.

It only remains to consider whether section 9 of the Rent Act precludes the defendants from relying on the defence which has found favour with the lower appellate Court. It was laid down by a Full Bench of this Court in the case of *Khiati Ram v. Nathu Lal* (5), that the second paragraph of section 9 of Act No. XII of 1881 did not apply to a usufructuary mortgage. The learned District Judge evidently overlooked this authority. The present case is unlike the case of *Sukru v. Tafazzul Husain Khan* (6), in which an occupancy tenant gave a *simple mortgage* of his land, and the mortgagee brought a suit on his mortgage, and obtained a decree for sale under section

(1) (1801) Ves., 174.

(2) (1858) 25 B., 575.

(3) (1873) L. R., 8 Ch., 870.

(4) (1896) I. L. R., 18 All., 354.

(5) (1893) I. L. R., 15 All., 219.

(6) (1894) I. L. R., 16 All., 398.

1902

SHAM DAS  
v.  
BATUL  
BIBI.

88 of Act No. IV of 1882, and upon sale under the decree purchased the land himself, and obtained possession of it. This was clearly obnoxious to the provisions of section 9 of Act No. XII of 1881, and not binding on the landlord.

For the foregoing reasons we allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Subordinate Judge dismissing the plaintiff's claim with costs. The appellants will have their costs in all Courts.

*Appeal decreed.*

1902  
July 5.

*Before Mr. Justice Banerji and Mr. Justice Aikman.*

ALI AHMAD (JUDGMENT-DEBTOR) v. NAZIRAN BIBI (DECREE-HOLDER)\*  
*Act No. IV of 1882 (Transfer of Property Act), sections 86 and 87—  
Application for order absolute under section 87—Execution of decree  
—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule  
ii, articles 178 and 179.*

An application for an order absolute under section 87 of the Transfer of Property Act, 1882, is an application in execution of the decree under section 86 of the Act, and is governed as to limitation by article 178 of the second schedule to the Indian Limitation Act, 1877, the time from which limitation begins to run being the date fixed by the decree under section 86 for payment of the mortgage money.

*Kedar Nath v. Lalji Sahai (1), Oudh Behari Lal v. Nageshar Lal (2), Chunni Lal v. Harnam Das (3), Parmeshri Lal v. Mohan Lal (4), Bhagwan Ramji Marwadi v. Ganu (5), Muhammad Suleman Khan v. Muhammad Yar Khan (6), Chhedi v. Lulu (7), Ram Sarup v. Ghaurani (8) and Ranbir Singh v. Drigpal Singh (9) referred to.*

THE facts of this case are as follows :—

On the 27th of November, 1897, Naziran Bibi and Bismillah Bibi obtained a decree for foreclosure against Ali Ahmad conditioned on their paying off certain incumbrances. The time limited for redemption under this decree expired on the 27th May, 1898. On the 23rd of May 1901 Naziran Bibi applied to the Court for an order absolute for foreclosure in respect of her interest in the decree, alleging that the other decree-holder had

\*First Appeal No. 130 of 1901 from an order of Munshi Mata Prasad, Officiating District Judge of Ghazipur, dated the 16th of September, 1901.

(1) (1889) I. L. R., 12 All., 61. (5) (1899) I. L. R., 23 Bom., 644.  
(2) (1890) I. L. R., 13 All., 278. (6) (1894) I. L. R., 17 All., 39.  
(3) (1898) I. L. R., 20 All., 302. (7) Weekly Notes, 1902, p. 60.  
(4) (1898) I. L. R., 20 All., 357. (8) (1899) I. L. R., 21 All., 453.  
(9) (1898) I. L. R., 16 All., 23.