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the decree. Before their purchase the decree had been assigned to Lachmi Narain, who applied for its execution, and in the deed of assignment it was distinctly provided that the share in Muzaffra should not be proceeded against, but should be deemed to be released from liability. It is not asserted on behalf of the plaintiffs that they were ignorant of the provisions of this sale-deed. On the contrary, the allegations contained in the plaint show that they were fully cognizant of what that sale-deed provided. They have set out among the terms of the sale-deed the clause which was to the effect that the decretal amount would not be recoverable from the 5 biswa share of Muzaffra. So far, therefore, from the plaintiffs having been misled by the decree of 1880, they were fully aware when they satisfied that decree that the share of Muzaffra was no longer liable under it. That being so, they cannot plead estoppel against the defendants, and claim contribution from them upon the ground of the liability of that share to contribute rateably towards the mortgage debt.

In our opinion this appeal must fail. We dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Blair and Mr. Justice Aikman.

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KALLU AND ANOTHER (DEFENDANTS) *v.* DIWAN (PLAINTIFF).*

Land-holder and tenant—Mortgage of holding by land-holder to tenant—Mortgagee's rights as tenant not merged in his rights as mortgagee.

The fact of a tenant's taking a mortgage of land comprised in his holding from his landlord does not of itself extinguish the tenancy by merging the rights of the tenant in those of the mortgagee. The effect of such a mortgage on the tenant rights would be merely that they would be in abeyance. When the landlord redeemed the mortgage, the parties would revert to their former position, and the landlord would not be entitled to get possession of the land except by ejecting the tenant in due course of law.

IN the suit out of which this appeal arose the plaintiff claimed a decree for redemption of a usufructuary mortgage of 17 bighas 17 biswas situated in mauza Kaserwa Kalan, pargana Shamli, executed on the 1st of May 1890 in favour of the defendants and their deceased brother Tarif. The plaintiff alleged that on the date mentioned he (the plaintiff) put the mortgagees in possession, and "accordingly they have been in

* Appeal No. 59 of 1901 under section 10 of the Letters Patent.

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possession as mortgagees up to this time." The defendants admitted that the plaintiff had mortgaged some land to them, but asserted that of that land the plaintiff had never in fact given them possession. They stated further that they were in possession of 17 bighas 17 biswas of the plaintiff's land, but that they were in possession as tenants and not as mortgagees, and that that land was not mortgaged. The defendants averred that the plaintiff had brought the present suit in collusion with the patwari in order to get possession of their tenancy and prevent any occupancy rights accruing in their favour.

The Court of first instance (Munsif of Kairana) found that the mortgaged land was identical with that which the defendants asserted to be their tenancy, and therefore gave the plaintiff a decree for redemption, though not for possession. The plaintiff appealed, and the lower appellate Court (Additional Subordinate Judge of Saharanpur) modified the decree of the first Court by decreeing possession in favour of the plaintiff. The lower appellate Court apparently held that the question whether the defendants were or were not tenants of the mortgaged property was not one which arose on the pleadings, but if they were, they could be no more than non-occupancy tenants, and by accepting the mortgage they had by their own act changed the nature of their possession from that of tenants to that of mortgagees. The defendants appealed to the High Court, where the appeal came before Banerji, J., sitting singly, by whom the following judgment was delivered :—

"In my opinion the lower appellate Court arrived at a right conclusion. The suit was one for the redemption of a mortgage alleged to have been made in favour of the appellants in 1890. The quantity of land mortgaged is 17 bighas 17 biswas, and the amount of the mortgage money was Rs. 360. It is admitted that a mortgage of that quantity of land was made in favour of the appellants for that amount. Their defence to the suit was that the land mortgaged to them was not the land of which the plaintiff claimed possession. They asserted that they were mortgagees of a different piece of land, and that the land of which possession was claimed was their occupancy holding. The Court of first instance held that the land which was claimed by the

plaintiff in this suit was the land which he had mortgaged to the defendants under the mortgage of 1890. This finding has been accepted by the defendants and has become final. The Court of first instance, however, was of opinion that the defendants were non-occupancy tenants of the said land before the mortgage was made, and that Court, holding that they are still tenants of the land and cannot be ousted from it, made a decree for redemption, but dismissed the claim for possession. The plaintiff appealed. The lower appellate Court set aside that portion of the decree which refused to award possession to the plaintiff.

"The lower appellate Court was right in saying that the Court of first instance had granted to the defendants a relief which they had never asked for, and had arrived at a finding contrary to the pleadings of the parties. The defendants denied that they were mortgagees of the land in suit. They never asserted that they were both mortgagees and tenants of that land; so that the Court of first instance, in holding that they continued to be tenants in spite of the mortgage, came to a finding which was not in accordance with the defendants' plea. I take the lower appellate Court to hold that when the defendants took a mortgage of the land of which they had been non-occupancy tenants, they gave up the tenancy and became mortgagees, and thus ceased to be tenants. There can be no doubt on the findings that the defendants had at the date of the mortgage no right of occupancy in respect of the mortgaged land. It is also noticeable that the mortgage deed does not purport to mortgage the zamindari rights of the mortgagor maintaining the tenancy rights of the mortgagees. It is not the defendants' case that they were both mortgagees and tenants. From these circumstances it may be rightly inferred, and that I take to be the inference at which the lower appellate Court has arrived, that the defendants ceased to be the tenants of the plaintiff, and took a mortgage of the land of which they were tenants. That being so, no question of the acquisition of a right of occupancy or of the existence of a tenancy arises, and the mortgagor is entitled to possession of the land which he mortgaged to the defendants under the usufructuary mortgage in question. This case is different from that of a mortgage, which included land in

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which the mortgagee had a right of occupancy before the mortgage. I dismiss the appeal with costs."

On appeal under section 10 of the Letters Patent by the defendants mortgagees from this judgment—

Maulvi *Muhammad Ishaq*, for the appellants.

Mr. *Abdul Raoof*, for the respondent.

BLAIR, J.—The plaintiff sued for the redemption of a usufructuary mortgage, dated the 1st of May, 1890. The mortgagees pleaded that the mortgage in question did not apply to the land which was sought to be redeemed, and they alleged that in the land sought to be redeemed they had a tenancy. The Court of the Munsif held that the mortgage did apply to the plot in which the tenancy of the mortgagees lay, and gave the plaintiff a decree for redemption; but, having regard to the fact of the existence of the tenancy, declined to give him a decree for possession. The Court of first appeal agreed with the finding that the mortgage applied to the plot of which the mortgagees declared themselves to be, and in the absence of evidence by the plaintiff must be taken to be, tenants. The first appellate Court, however, held that the defendants by their act of accepting the mortgage of the same land had changed the nature of their possession, and that the plaintiff, when he claimed redemption, was entitled to get actual possession. On appeal to this Court, our brother Banerji held, supporting the decision of the lower appellate Court, that it may be rightly inferred, and I take it to be the inference at which the lower appellate Court had arrived, that the defendants ceased to be the tenants of the plaintiff by taking a mortgage of the land of which they were tenants up to the date of the mortgage. In my opinion the lower appellate Court, and also the learned Judge of this Court, held that as an inference of law arising from the fact of the defendants accepting a mortgage from their landlord, and they held not upon any evidence external to that transaction. As a proposition of law, we find ourselves unable to accept the ruling of the Judge of this Court and of the lower appellate Court. In our opinion the effect of the mortgage was not to destroy the tenancy, but only to suspend the obligation of the tenant to pay rent to the landlord while the mortgage

subsisted. We entirely agree with the ruling of our brother Burkitt in second appeal No. 122 of 1898, upon which judgment was delivered on the 20th December, 1898,* a case which, we may remark, would properly find place in the Indian Law Reports, that no such extinction of tenancy or merger in effect took place on the grant to an occupancy tenant of a usufructuary mortgage by his landlord. In our opinion the ruling in that case is absolutely sound law, and governs cases of tenancy of a less durable character than an occupancy right. I would therefore decree this appeal, set aside the judgment of the Judge of this Court and also of the lower appellate Court, and restore the decree of the Munsif, with this observation that the possession to which the plaintiff is entitled is a possession subject to the subsisting tenancy. He will have the right to receive the rent, but will not enter into physical possession until such time as the tenancy has been determined according to law.

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* The judgment in this case was as follows:—

BURKITT, J.—In my opinion the decision of the Additional Judge in this case cannot be supported. I entirely dissent from the novel and extraordinary doctrine laid down by the Additional Judge that, if an occupancy tenant lends money to his landlord and takes from his landlord a mortgage of an area of land, which includes his own occupancy holding, he thereupon ceases to be an occupancy tenant under some novel doctrine of merger, apparently invented for this case. If this doctrine were affirmed, the result would be that the occupancy tenant referred to would be in a much worse position after his possession as mortgagee had ceased than before. For according to the Additional Judge he would have ceased to be an occupancy tenant. I cannot assent to this doctrine. I see no reason why in such a case the occupancy tenure should be forfeited, and it is the first time I have heard such a doctrine mooted.

As to the fact that the defendant was an occupancy tenant, there can be no doubt. It is admitted that a suit for his ejectment was dismissed by the Revenue Court on the ground that he was an occupancy tenant. The Additional Judge says he was not. That, however, is not a matter within his cognisance to decide. It is for the *rent Court*—and *rent* Court alone—to decide the nature of a tenancy. The rent Court in this case has held that the defendant is an occupancy tenant.

The Courts below have given the plaintiff a decree for redemption on payment of one hundred and thirty rupees. As far as it goes, that decree is right. But there must be this added to it, *viz.*, that as the defendant is an occupancy tenant, the plaintiff on redemption will not be entitled to physical possession by ouster of the defendant.

I allow this appeal as stated above with costs.

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AIKMAN, J.—I am of the same opinion, but as we are differing from our learned colleague, I think it necessary to add a few words. The suit was, as has already been stated, one for redemption of a mortgage and for actual possession of the mortgaged land. The mortgage deed contains no materials by which the land mortgaged can be ear-marked. The defendants pleaded that the land which the plaintiff sought to get possession of had been for a long period anterior to the date of the mortgage held by them as agricultural tenants. It is true that they denied that the mortgage related to the land claimed by the plaintiff, and in this respect the finding of the Court of first instance was against them, and to that finding they submitted. But with reference to the defendant's plea that they had prior to the mortgage been tenants of the land in suit, the learned Munsif found in favour of the defendants, and that finding the plaintiff did not in his appeal venture to challenge. The Munsif came to the conclusion upon the evidence that the defendants had been in possession of the land in suit for ten years prior to the mortgage. He went on to discuss the question whether the defendants' occupation of the land during the term of the mortgage would go to make up the term necessary to give them a right of occupancy in the land, and he came to the conclusion that the defendants had acquired a right of occupancy. In my judgment the Munsif's conclusion was wrong, and the status of the defendants was not a matter which he as a Civil Court was empowered to determine. The finding as to the status of the defendants is, however, quite irrelevant to this case. The lower appellate Court and our learned colleague came to the conclusion that the effect of the mortgage was to put an end finally to the defendants' tenancy. In my opinion that is a conclusion which is not warranted by law. It is not pretended that the inference as to the effect of the mortgage is based upon any evidence. I entirely agree with my brother Blair in what he has said upon this question. The effect of the mortgage was to suspend for the time being the relationship of landholder and tenant between the parties. When the mortgage is redeemed, the parties are relegated to the position which they occupied immediately before the mortgage was executed. Our learned colleague, whose judgment is under

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appeal, distinguishes the case decided by Mr. Justice Burkitt on the 20th of December, 1898, on the ground that the tenancy there was an occupancy tenancy. I cannot draw any such distinction. If the defendants were not occupancy tenants when they entered into the mortgage they were at all events agricultural tenants, who had certain rights including the right to retain possession of their holding until ousted in due course of law. For the reasons set forth above, I concur in the order proposed.

By THE COURT.—The order of the Court is that the appeal is allowed with costs; the decision of this Court and of the lower appellate Court set aside with costs, and that of the Court of first instance is restored. We extend the time for payment of the mortgage money up to the 10th of September next.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1902
June 10.

RAN BAHADUR RAI AND ANOTHER (PLAINTIFFS). *v.* PARMESHAR BHARTHI (DEFENDANT).*

Pre-emption—Mortgage by conditional sale—Accrual of right of pre-emption when sale becomes absolute — Wajib-ul-arz — Partition of mahal.

The wajib-ul-arz, framed in 1883, of an undivided mahal consisting of several villages contained the following provision as to pre-emption:—"Should a sharer of any patti sell his share, he will sell it first to subordinate sharers; if they refuse to take it, then to sharers in the patti; and if they also do not take it, then to proprietors of the mahal; and in case of refusal by all the sharers before mentioned, he shall have power to transfer it to a stranger."

While this wajib-ul-arz was in force, namely, in 1890, certain property, to which its provisions applied, was mortgaged by a deed of conditional sale. In 1894, after partition of the mahal, a new wajib-ul-arz was framed for the mahal in which the mortgaged property was situated, which also contained a similar record of the custom of pre-emption in the following terms:—"Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in the mahal, and in case of refusal by the sharer in the mahal, to a sharer in the old mahal."

Held that the record as to the right of pre-emption being in both cases the record of a custom, and the provisions of the latter wajib-ul-arz being capable of application to the circumstances of the case, a right of pre-emption

* Second Appeal No. 339 of 1900 from a decree of R. Greeven, Esq., District Judge of Ghazipur, dated the 17th January 1900, reversing a decree of Maulvi Syed Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 22nd February 1897.