

wrongfully excluded from such joint possession, he is entitled to a decree to be put back into the possession which he enjoyed before he was evicted. That is the decree which has been granted to the respondent in this case, and I can find no fault with it. The learned vakil for the appellant mainly relied upon the ruling in *Rahman Chaudhri v. Salamat Chaudhri* (1). I must confess that with some of the observations contained in that judgment I am not prepared to agree, but, as the learned Judge of the lower appellate Court points out, that case is distinguishable from the present, and it cannot be regarded as an authority in support of the appellant's contention. I would dismiss the appeal.

BURKITT, J.—On the finding by the learned District Judge that the plaintiff had been illegally ousted from joint possession of certain sir land, I concur with the learned Judge of this High Court that he is entitled to be restored to that possession. He is entitled to be restored to that from which he was illegally ousted. During the argument the case of *Rahman Chaudhri v. Salamat Chaudhri* (1) was cited. The facts in that case, however, differ wholly from the facts in the case we are now considering, and it does not appear to be in any way in point. I concur in the observations of the learned Chief Justice on the question of the damages, and I would dismiss this appeal.

Appeal dismissed.

APPELLATE CIVIL.

1904
May 3.

Before Mr. Justice Blair and Mr. Justice Banerji.

BINDESHRI RAI (DEPENDANT) v. SADHO CHARAN RAI AND OTHERS
(PLAINTIFFS).*

Civil and Revenue Courts—Jurisdiction—Suit by usufructuary mortgagee of an occupancy holding for possession of the property mortgaged to him.

Held that a suit brought by the usufructuary mortgagee of an occupancy holding for possession of the property mortgaged to him was rightly

* Second Appeal No. 738 of 1902, from a decree of L. Marshall, Esq., officiating District Judge of Ghazipur, dated the 8th of August 1902, reversing a decree of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 30th of January 1902.

(1) Weekly Notes, 1901, p.48.

1904

BINDESHRI
RAI
v.
SADHO
CHARAN
RAI.

brought in a Civil and not in a Revenue Court. *Khiali Ram v. Nathu Ram*, (1) and *Brij Mohan v. Algu*, (2) referred to. *Gaura Kumwar v. Dwarika Prasad* (3) discussed.

IN this case Bindeshri Rai and others, occupancy tenants, executed a usufructuary mortgage of their occupancy holding in favour of Sadho Charan Rai and others. The mortgagees at first obtained possession, and then leased the property mortgaged to the mortgagors. After a time the mortgagors subtenants failed to pay rent, and the mortgagees ineffectually attempted to eject them by proceedings in the Revenue Courts. Failing in this they brought the present suit in the Court of a Subordinate Judge asking for possession of the mortgaged property or in the alternative for the mortgage money. The Court of first instance (Subordinate Judge of Ghazipur) gave the plaintiffs a decree for recovery of the mortgage debt, or in default for sale of the mortgaged property. The plaintiffs appealed, and the lower appellate Court (District Judge of Ghazipur) allowed the appeal, and gave the plaintiffs a decree for possession of the mortgaged property. Bindeshri Rai, one of the defendants, thereupon appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

The respondents were not represented.

BLAIR and BANERJI, JJ.—The appellant, who was the defendant in the Court of first instance, is an occupancy tenant, and made a usufructuary mortgage of his occupancy holding to the plaintiffs. The plaintiffs not having obtained possession of the land mortgaged to them brought the suit which has given rise to this appeal for recovery of possession and in the alternative for the mortgage money. The mortgage also comprised a holding at fixed rates, but as to this there is no controversy in this appeal. The lower appellate Court made a decree in favour of the plaintiff for possession. The defendant contends in this appeal that the suit for possession of the occupancy holding was not maintainable in the Civil Court, and relies upon two unreported judgments of this Court, to which we shall presently refer. It was held by the Full Bench in *Khiali Ram v. Nathu Lal* (1) that a usufructuary mortgage of his holding by an

(1) (1898) I. L. R., 15 All., 219. (2) (1903) I. L. R., 26 All., 78.

(3) (S. A. No. 488 of 1900, decided on the 15th January 1901).

occupancy tenant does not amount to a transfer of his holding within the meaning of section 9, Act No. XII of 1881; so that the validity of a usufructuary mortgage by an occupancy tenant was recognised in that case. It was also recognised in the recent case of *Brij Mohan v. Algu* (1) in which a decree was made in favour of the mortgagee for recovery of possession of the occupancy holding. Of the two unreported cases which have been cited to us, the first, namely, S. A. 415 of 1897, decided on the 23rd of November 1899, does not seem to be in point, inasmuch as that was a suit by the usufructuary mortgagee against a sub-tenant of his mortgagor for ejection. In the other case, which is S. A. 438 of 1900, decided on the 15th of January 1901, if the learned Judge who decided it meant to hold that, although an occupancy tenant could validly transfer his right to occupy, the mortgagee was not entitled to sue in the Civil Court to recover possession upon the mortgagor's refusal to deliver possession, we are unable to agree with him. Our learned brother says in his judgment:—"I am of opinion that the Civil Court has no jurisdiction to eject the occupancy tenant from his holding and put the mortgagee in possession." With all deference we fail to see how such a suit can be regarded as a suit to eject the occupancy tenant from his holding. The holding would still continue to be that of the tenant. The suit by the transferee of the occupancy tenant's right to occupy is in reality one to enforce the contract for delivery of possession for the term of the mortgage which the tenant made with him, a contract which is valid and enforceable at law. Such a suit cannot be brought in a Court of Revenue. To hold that it cannot be brought in a Civil Court would be to deprive the holder of a valid mortgage of all remedy if his mortgagor fails to perform his part of the contract. In our judgment the lower appellate Court was right. We therefore dismiss this appeal, but without costs as the respondents are unrepresented.

Appeal dismissed.

(1) (1903) I. L. R., 26 All., 78

1904

BENDESHI
RAI
v.
SADHO
CHARAN
RAI.