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June 19.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*  
BRIJ MOHAN DAS (PLAINTIFF) v. ALGU AND ANOTHER (DEFENDANTS).\*

*Act No. XII of 1881 (N.-W. P. Rent Act), section 9—Occupancy tenant  
—Transfer—Usufructuary mortgage of occupancy holding.*

*Held that the second paragraph of section 9 of the N.-W. P. Rent Act, 1881, is no bar to the creation of a usufructuary mortgage of an occupancy holding by the tenant having a right of occupancy. Khiali Ram v. Nathu Lal (1) followed. Ganga Din v. Dhurandhar Singh (2), and Abadi Husain v. Jurawan Lal (3) referred to.*

THIS was a suit for possession of immovable property and for mesne profits. The facts out of which it arose are as follows. One Algu, an occupancy tenant of the land in suit, granted a usufructuary mortgage of the land to Brij Mohan Das on the 22nd August, 1880. On the same date Brij Mohan Das gave a lease of the same land to Algu at a rent equivalent to the interest stipulated for in the mortgage and a kabuliat was executed by Algu in favour of Brij Mohan Das. The rent fell into arrears, and proceedings were taken by the lessor in the Rent Court for the ejectment of the lessee for non-payment of rent, and an order for ejectment was passed on the 10th of July, 1884, when possession of the lands was given to Brij Mohan Das. Subsequently, in or about the year 1897, Algu and his son Binayak illegally took possession of the mortgaged property, ousting the mortgagee. Brij Mohan Das thereupon renewed his application to the Rent Court for ejectment of the defendants from the holding. This application was rejected by the Rent Court on the ground that the relation of landlord and tenant no longer subsisted between Brij Mohan Das and Algu, it having been determined by the ejectment proceedings in 1884. The present suit was accordingly brought by Brij Mohan Das, in which he sought to eject the defendants Algu and Binayak as trespassers, and also asked for mesne profits. The Court of first instance (Munsif of Benares) decreed the claim for mesne profits, but refused a decree for possession. The lower appellate Court (District Judge of Benares) affirmed the

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\* Second Appeal No. 819 of 1901, from a decree of C. A. Sherring, Esq., District Judge of Benares, dated the 21st of May, 1901, confirming a decree of Babu Sris Chandra Bose, Munsif of Benares, dated the 24th of September, 1900

(1) (1893) I. L. R., 15 All., 219.

(2) (1883) I. L. R., 5 All., 495.

(3) (1885) I. L. R., 7 All., 866.

decree of the Court of first instance. The plaintiff thereupon appealed to the High Court.

Pandit *Baldeo Ram Dave*, for the appellant.

Munshi *Gulzari Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The facts of this case are simple. Algu, one of the defendants respondents, being an occupancy tenant of agricultural lands, on the 22nd of August, 1880, granted a usufructuary mortgage of those lands to the plaintiff-appellant, Brij Mohan Das. On the same date Brij Mohan Das gave a lease to Algu of the same lands at a rent equivalent to the interest stipulated for in the mortgage, and a *kabuliat* was executed by Algu in favour of Brij Mohan Das. The rent fell into arrears, and proceedings were taken by the lessor in the Rent Court for the ejectment of the lessee for non-payment of rent; an order of ejectment was passed on the 10th of July, 1884. That order was executed on the 21st of December, 1884, when possession of the lands was given to Brij Mohan Das. Subsequently, in or about the year 1897, the defendant Algu and his son Binayak, the second defendant, illegally took possession of the mortgaged property, ousting the mortgagee. Brij Mohan Das thereupon renewed his application to the Rent Court for ejectment of the defendants from the holding. The Rent Court properly rejected this application, inasmuch as the relation of landlord and tenant no longer subsisted between Brij Mohan Das and Algu, it having been determined by the ejectment proceedings in 1884. The present suit was therefore brought by the plaintiff claiming possession of the lands and also mesne profits. The Court of first instance decreed the claim so far as regards mesne profits, but dismissed the suit so far as regards the claim for possession of the lands. The lower appellate Court affirmed this decree. Hence the present appeal.

The learned Subordinate Judge has clearly fallen into an error in the reason which he assigns for his decision. He refers to the Full Bench case of *Khiali Ram v. Nathu Lal* (1) as deciding that an occupancy tenant of agricultural land may grant a usufructuary mortgage of his holding; and so far therefore as the legality of the mortgage is concerned, held in

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accordance with the ruling that the plaintiff was entitled to maintain his suit. But he found that inasmuch as on the second application made by the plaintiff-appellant to the Rent Court for the eviction of the defendants the Rent Court refused to entertain the application, it therefore followed that the mortgage was not really a usufructuary mortgage at all. He says:—"Algu was ejected in 1884, and then plaintiff held through *shikmis*. They again got possession, and plaintiff, trying to eject them a second time, failed. Apparently then the mortgage in the first instance was not really with possession." In this the learned District Judge was entirely mistaken. The reason for the refusal by the Rent Court to entertain the application by the plaintiff for ejection of the defendants was that the relation of landlord and tenant did not exist between them, it having been determined by the previous orders passed in 1884. The Rent Court had therefore no jurisdiction whatsoever to entertain the application, and hence it was rejected. The only Court which could pass an order for the eviction of the defendants was a Civil Court, the defendants being trespassers. The reasons therefore assigned by the learned District Judge cannot be supported. The plaintiff was clearly, in our opinion, entitled to a decree for possession. It has been argued, however, before us that an occupancy tenant cannot lawfully grant a usufructuary mortgage of his holding by reason of the provisions of section 9 of Act No. XII of 1881. Our attention has been called to two cases in support of this contention, namely the Full Bench cases of *Ganga Din v. Dhurandar Singh* (1) and *Abadi Husain v. Jurawan Lal* (2). In the first of these cases it was held that a mortgage with possession by an occupancy tenant of his cultivatory holding was a "transfer" within provisions of section 9 of the Act to which we have referred. In the second case it was also held that a *zar-i-peshgi* lease granted by an occupancy tenant was a transfer of the occupancy rights within the meaning of section 9 of the Rent Act, and was therefore invalid. The question, however, was fully considered in a later Full Bench case, namely the case of *Khiaki Ram v. Nathru Lal* (3).

(1) (1883) I. L. R., 5 All., 495.

(2) (1885) I. L. R., 7 All., 866.

(3) (1893) I. L. R., 15 All., 219.

In that case there is no doubt, as has been pointed out, that the question was not really before the Court, the only question referred to the Full Bench being whether or not an expropriatory tenant, to whom section 9 of Act No. XII of 1881 applied, could sub-let his holding, or any part of it. In the judgment, however, of the Court the law upon the subject was fully considered, and the two earlier cases dealt with. The Court, consisting of all the Judges, decided that the previous decisions could not be followed, and held that—"No doubt a usufructuary mortgage by an occupancy tenant of his occupancy holding does for the term of the mortgage transfer such right to the possession of the land mortgaged as the mortgagor has; but it does not transfer the right of occupancy, and no decree for sale of the right of occupancy could be obtained in a suit by the mortgagee under Act No. IV of 1882, whether the second paragraph of section 9 of Act No. XII of 1881 applied or not." This case has been followed in a number of unreported cases, the latest of which is *Ramji Lal v. Beni Prasad* (Second Appeal No. 545 of 1901), in which our brothers Blair and Banerji held, relying upon the decision in *Khiabi Ram v. Nathu Lal* (1) that the second paragraph of section 9 of the Rent Act is no bar to the creation of a usufructuary mortgage of an occupancy holding by the tenant having the right of occupancy. We think, having regard to the fact of the decision of the Full Bench in the case of *Khiabi Ram v. Nathu Lal*, and the fact that it has been followed ever since its date, we ought not to disturb the current of authority, and that the rule laid down in these cases should be followed. Holding this view, we allow the appeal, set aside the decrees of the lower Courts in so far as they dismissed the plaintiff's claim for possession of the land in dispute, and in addition to the decree which they have passed, we give a decree for possession of the lands comprised in the usufructuary mortgage. We do not think, having regard to the conflict of authority upon this question, that we should award costs to either side. The parties will, therefore, abide their own costs of this appeal.

*Appeal decreed.*

(1) (1893) I. L. R., 15 All., 219.

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