

that the case of *Mussammât Bibi Walian v. Banke Behari Pershad Singh* (1) was an authority to the effect that the absence of a formal order appointing a guardian was a mere irregularity which under section 578 would not be a ground for reversing the judgment. But that was a suit brought to set aside a decree in which their Lordships of the Privy Council were satisfied that in the suit in which the decree had been obtained the minor's interests had been effectively represented by their mother, who appeared throughout the proceedings as their guardian *ad litem*. In the present case the minor's interests had been entirely disregarded.

BY THE COURT.—We decree the appeal, set aside the order under appeal and return the case to the lower appellate Court with instructions to readmit it on the file of pending appeals and to dispose of it according to law in the presence of the guardian *ad litem* who has since been appointed by this Court. The respondents will pay the costs of the appellant in this Court.

Appeal decreed.

Before Mr. Justice Griffin.

RAGHUNANDAN PRASAD (PLAINTIFF). v. AMBIKA SINGH AND
OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 91—Mortgage—Redemption—Who may redeem—Perpetual lessee.

In a suit for redemption of a mortgage the plaintiff was a perpetual lessee of the mortgaged premises from the mortgagor, holding under a lease granted upon payment of a premium of Rs. 800, with a yearly rental of Rs. 40 odd. By the terms of the lease the lessee was not liable to be ejected, even for non-payment of rent, while, if the title of the lessors proved defective, the lessee was entitled to a refund of the premium.

Held that the lessee was under the above circumstances entitled to redeem.

Paya Matahil Appu v. Kovamel Amina (2), *Radha Pershad Misser v. Monohur Das* (3), *Jugul Kissors Lal Sing Deo v. Kartic Chunder*

*Second Appeal No. 936 of 1904, from a decree of Syed Muhammad Tajammul Husain, Subordinate Judge of Ghazipur, dated the 27th of May 1904, reversing a decree of Babu Bangopal, Munsif of Ballia, dated the 11th of December 1900.

(1) (1903) L. R., 30 I. A., 182. (2) (1895) I. L. R., 19 Mad., 151,
(3) (1880) I. L. R., 6 Cal., 317.

1907

RAMOHAN-
DRA DAS

v.
JOTI
PRASAD.

1907
July 16.

1907

RA GHUNAN-
DAN PRASAD
v.
AMBIKA
SINGH.

Chottoadhyia (1), *Kasumunnissa Bibee v. Nilratna Bose* (2), *Girish Chunder Dey v. Juramoni De* (3) and *Ram Subhag v. Nar Singh* (4) referred to.

THE plaintiff in this case, describing himself as a permanent lease-holder under an instrument of the year 1897 sued to redeem a mortgage created by the predecessor in title of his lessor in the year 1840 over a property of which the sir land leased to the plaintiff formed part. The terms of the lease under which the plaintiff held were to the following effect:

In consideration of a sum of Rs. 800 premium the plaintiff is placed in possession of the sir lands specified in the document, and, subject to the yearly payment of the rent of Rs. 40-6-6, he can do whatever he likes with the property. Even for non-payment of rent he may not be ejected, and the lessors have their remedy to recover their rent by proceeding against other property. If the title of the lessors is found to be defective, they are liable to repay the Rs. 800 premium. The lease was one in perpetuity.

The Court of first instance (Munsif of Ballia) decreed the plaintiff's claim. The defendant appealed, and the lower appellate Court (Subordinate Judge of Ghazipur), holding that the terms of the lease under which the plaintiff held did not confer on him the rights to ask for redemption of the mortgage of 1840, allowed the appeal and dismissed the suit.

The plaintiff thereupon appealed to the High Court.

Munshi *Gobind Prasad* and Munshi *Haribans Sahai*, for the appellant.

Mr. *W. Wallach* and Maulvi *Muhammad Ishaq*, for the respondents.

GRIFFIN, J.—The plaintiff, who is described as a *istimrari pattadar* (permanent lease-holder) under an instrument of the year 1897 in respect of certain sir land, sues to redeem a mortgage created by the predecessor in title of his lessor in the year 1840 over a property, of which the sir land leased to the plaintiff is a part. The question for decision in this appeal is whether the plaintiff has such an interest in the mortgaged property as would give him a right to redeem under the provisions of section 91 of the Transfer of Property Act. The lower appellate Court has held that the plaintiff has no such interest under his lease as

(1) (1892) I. L. R., 21 Cal., 116.

(2) (1881) I. L. R., 8 Cal., 79.

(3) (1900) 5 C. W. N., 83.

(4) (1905) I. L. R., 27 All., 472.

would confer upon him the right to come in and ask to redeem the property.

1907

RAGHUNAN-
DAN PRASAD
v.
AMBIEA
SINGH.

The plaintiff comes in second appeal to this Court, and it is contended that under the special conditions of the lease in the plaintiff's favour he has such an interest in the property as would confer upon him the title to come in and redeem. The terms of the so-called *patta* are somewhat peculiar.

In consideration of a sum of Rs. 800 premium the plaintiff is placed in possession of the sir lands specified in the document, and, subject to the yearly payment of the rent of Rs. 40-6-6, he can do whatever he likes with the property. Even for non-payment of rent he may not be ejected, and the lessors have their remedy to recover their rent by proceeding against other property. If the title of the lessors is found to be defective, they are liable to repay the Rs. 800 premium. The lease was one in perpetuity. The terms of the document would, no doubt, bring it under the definition of "lease" as given in the Transfer of Property Act. The effect of the document is to confer all rights of ownership upon the plaintiff, subject to payment of a yearly rent. I am referred on behalf of the appellant to the following rulings:—*Paya Matathil Appu v. Kovamel Amina* (1), *Radha Pershad Misser v. Monohur Das* (2), *Jugul Kissore Lal Sing Deo v. Kartic Chunder Chottopadhyaya* (3), *Kasumunnisa Bibee v. Nilratna Bose* (4) and *Ram Subhag v. Nar Singh* (5).

In the last case it was held that a sub-mortgagee had a right to redeem a prior mortgage. In the Madras case it was held that the word "interest" was not necessarily confined to a right of ownership, but was sufficiently large to include any minor interest such as that of a tenant or a person having a charge. In the same judgment we find a dictum of Fry, L. J., to the following effect:—"According to the general law of the land a person who claims as lessee under a mortgagor after the mortgage and has thereby derived an interest in the equity of redemption has the right to redeem."

The Calcutta cases deal with the rights of *patnidars*. In the case reported in 8 Calc., 79, I find at p. 87 the observation of

- (1) (1895) I. L. R., 19 Mad., 151. (3) (1892) I. L. R., 21 Calc., 116.
(2) (1880) I. L. R., 6 Calc., 317. (4) (1881) I. L. R., 8 Calc., 79.
(5) (1905) I. L. R., 27 All., 472.

1907

RAGHUNAN-
DAN PRASADv.
AMBIKA
SINGH.

Pontifex, J., to the following effect:—“In this country *patnis*, *zare peshgi* leases and interests of that nature are very considerable interests in the land and cannot be looked upon as mere leases for a term of years, which a mortgagee might have the right to disregard. They are in fact substantial proprietary interests, on the grant of which, as in this case, considerable premiums are paid; and it is only equitable that persons in that position should be allowed the opportunity of preserving their interests by redeeming any mortgages made by the superior holder.”

In a more recent case—*Girish Chunder Dey v. Juramoni De* (1), it was held that a person holding a *ryati* interest in property had no such interest as would confer upon him a right to redeem the property. Upon the facts as stated in the report I am unable to ascertain what were the terms of the *ryati* lease in favour of the plaintiff in that case.

For the respondent I am referred to section 85 of the Transfer of Property Act, and it is contended that the plaintiff had no such interest in the property mortgaged as would render it necessary for him to be joined as a party under the provisions of that section. The test I am asked to apply is whether the plaintiff had such an interest in the mortgaged property as would be affected by the mortgage. Looking to the peculiar terms of the document under which the plaintiff holds, I am of opinion that the plaintiff had such an interest in the property as would confer upon him the right to come in and ask to redeem. The plaintiff cannot be described as a mere tenant or an ordinary lessee. Subject to the payment of this fixed amount every year he has all the rights of ownership.

The view that I take in this case is based upon the peculiar facts of the case. I must therefore allow the appeal, set aside the decree of the lower appellate Court and remand the case for trial on the merits. Costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.