

1909

ALI AHMAD  
KHAN  
v.  
BANSIDHAR.

Ali Ahmad objected saying *inter alia* that the property cannot be sold. His objections were dismissed by the court below and he now comes here in appeal. No argument was addressed to us on the first ground contained in the memorandum of appeal. The second ground, *viz.* that the attachment of 1898 no longer subsists does not commend itself to us. It has been held by the Calcutta High Court in an exactly similar case, *Bonomali Rai v. Prosunno Narain Chowdhry and Muzaffar Shah* (1), following *Mahomed Warris v. Pitambur Sen* (2), that the case in the Weekly Reporter was a clear authority for the view that "the lien of the attaching creditor dated from the attachment and was not destroyed or affected by the order of release which was in effect set aside by the decree. This point was again considered and these cases were followed in *Ram Chandra Marwari v. Mudeshwar Singh* (3). This view is also consistent with that taken by the Bombay High Court in *Lalu Mulji Thakar v. Kashi Bai* (4) and *The Bank of Upper India v. Sheo Prasad and others* (5). We would note at the same time that from the commencement and up to date there has been an unbroken continuity in the efforts made by the decree-holder to obtain satisfaction of his decree. The original purchaser Bholanath purchased the property at a time when it was subject to an attachment order of a Civil Court and Ali Ahmad can hold no higher position.

This disposes of the remaining pleas taken in appeal. The appeal is dismissed with costs.

*Appeal dismissed.*

1909  
April 16.

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

SHEOLAL SINGH (PLAINTIFF) v. SUKHDEO SINGH AND OTHERS

(RESPONDENTS.)\*

*Act (Local) No. II of 1901 (Agra Tenancy Act), section 7—Applicability of—to mortgage executed in 1894—Mortgage of six—Whether mortgagor obtains expropriatory rights.*

R in 1894 made a usufructuary mortgage of his *vir* land to the plaintiff, S, the son of R, on the following day executed a *kabuliat* promising to pay rent in respect of that land to the mortgagee. The lower appellate court held that S

\* Appeal No. 90 of 1908 under section 10 of the Letters Patent.

(1) (1896) I. L. R., 23 Cal., 829.      (3) (1906) I. L. R., 33 Cal., 1158.  
(2) (1874) 21 W. R., 435.            (4) (1886) I. L. R., 10 Bom., 400.  
(5) Weekly Notes, 1897, p. 124.

1909

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 SHEO LAL  
 SINGH  
 v.  
 SUKHDEO  
 SINGH.

was joint with his father at the time of the mortgage and became an exproprietary tenant and was not liable to pay a higher rent than such tenants were liable to pay. *Held* that the mortgage having been made in 1894, the provisions of the Agra Tenancy Act of 1901 did not apply and the mortgagor acquired no exproprietary rights in respect of the *sir*. *S* was therefore liable to pay rent at the rate mentioned in the *kabuliat*. *Madho Bharti v. Barti Singh* (1) followed.

THE facts of this case are as follows:—

One Ram Lal Singh executed a usufructuary mortgage of his zamindari and *sir* lands in favour of the plaintiff Lala Sheo Lal Singh and Rai Madan Makund Lal, on the 30th August 1894. On the next day, that is, on the 31st August 1894, Ram Lal's son executed a *kabuliat* in respect of the *sir* lands on an annual rent of Rs. 112. The son Sukhdeo Singh was living jointly with his father Ram Lal Singh and was interested in that holding jointly with his father. The plaintiff on the 16th August 1906 brought a suit for his share of the rent of holding for the years 1311, 1312 and 1313 F. The defence was that the relation of landlord and tenant did not exist between the parties, and that the *kabuliat* was illegal. The court of first instance gave the plaintiff a decree for the sum claimed. On appeal by the defendant the District Judge modified the decree of the first Court. The plaintiff appealed to the High Court. KARAMAT HUSAIN, J, holding that the *kabuliat* was not binding dismissed the appeal.

The plaintiff appealed under section 10 of the Letters Patent.

Munshi *Kalindi Prasad* (for whom Munshi *Gokul Prasad*) for the appellant, submitted that a zamindar, making a usufructuary mortgage of his *sir* land did not become an exproprietary tenant in respect of it. *Madho Bharti v. Barti Singh*, (1).

Babu *Mangal Prasad Bhargava*, for the respondent, replied.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit brought by the plaintiff appellant for arrears of rent against Sukhdeo Singh, respondent. It appears that in 1894 Ram Lal Singh the father of Sukhdeo Singh, executed a usufructuary mortgage of his zamindari and *sir* lands in favour of Sheo Lal, plaintiff, and Rai Madan Makund, defendant. On the day following that of the mortgage Sukhdeo Singh executed a *kabuliat* in favour of the mortgagees in respect of the *sir* lands undertaking

(1) (1894) I. L. R., 16 All., 337.

1909

SHEO LAL  
SINGH  
v.  
SUKHDEO  
SINGH.

to pay a rent of Rs. 112 per annum for the occupation of it. As Rai Madan Makund did not join in the suit the plaintiff claimed his share of the rent in accordance with the provisions of sub-section (3) of section 194 of the Agra Tenancy Act. The court of first instance decreed the claim but the lower appellate court modified that decree, holding that the plaintiff was not entitled to the rent mentioned in the *kabuliat* but only to such rent as an exproprietary tenant was liable to pay. This decree has been affirmed by the learned Judge of this Court who heard an appeal from the decision of the lower appellate court. Hence this appeal under the Letters Patent.

The learned Judge of this Court was of opinion that the defendant, who is joint with his father Ram Lal Singh, the mortgagor, had acquired exproprietary rights in regard to the *sir* land under section 7 of Act No. XII of 1881 and that consequently he was not liable to pay any higher rent than that which under that section an exproprietary tenant is liable to pay. This view is opposed to the Full Bench ruling in *Madho Bharti v. Barti Singh*(1). In that case it was held that a zamindar who makes a usufructuary mortgage of his zamindari including his *sir* land does not so lose or part with his proprietary rights within the meaning of section 7 of Act No. XII of 1881, as to become an exproprietary tenant of his *sir* land. This ruling does not appear to have been brought to the notice of the learned Judge of this Court. As the usufructuary mortgage in favour of the plaintiff and Rai Madan Makund was made in 1894, the provisions of the Agra Tenancy Act of 1901 do not apply, and the mortgagor acquired no exproprietary rights in regard to the *sir* lands. The defendant who executed a *kabuliat* agreeing to pay rent at the rate of Rs. 112 a year, was liable to pay the rent at that rate. The Court of first instance was therefore right in decreeing the plaintiff's claim. We allow the appeal, set aside the decrees of this Court and of the lower appellate court and restore that of the court of first instance with costs in all courts.

*Appeal allowed.*

(1) (1894) I, L. R., 16 ALL, 337.