

that the revenue court has only jurisdiction to decide a question of proprietary right or to order the defendant to bring a suit in a civil court under the provisions of section 199 of the Tenancy Act, in a case in which the defendant has expressly pleaded his proprietary title and he argues that inasmuch as the plaintiffs in the present case did not plead proprietary title when sued in the revenue court the question never was capable of being decided by a revenue court. We think that such construction of the Tenancy Act is quite contrary to the entire policy of the law. We think that when the plaintiffs were sued in the revenue court they were bound under the provisions of section 199 of the Tenancy Act read with section 13 of the Code of Civil Procedure (Act No. XIV of 1882) to put forward as a defence to the suit their plea of proprietary title, and that having failed to do so the matter is *res judicata*, and it is not open to them to raise the question afresh in the present suit. We find that a similar view was taken by a Judge of this Court in the case of *Bihari v. Sheobalak* (1). The learned Judge in that case points out the alteration that has been made in the law by section 199 of the Tenancy Act and distinguishes cases arising since the passing of that Act from cases coming under the provisions of Act No. XII of 1881. We allow the appeal, set aside the decrees of the courts below, and dismiss the plaintiffs' suit with costs in all courts including in this court fees on the higher scale.

Appeal decreed.

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

JHUNKU SINGH (DEFENDANT) *v.* CHHOTKAN SINGH AND OTHERS
(PLAINTIFFS).*

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Usufructuary mortgage—Mortgagee not in possession of a portion of the mortgaged property—Acquiescence of mortgagee in part performance—Stipulation for interest—Redemption without payment of interest.

Where a mortgage-deed provides for payment of interest if "there is any defect (*nugs*) in the mortgaged property and any manner of defect arise in the mortgagee's possession," held that the defect referred to is a defect in the title of the mortgagor whereby the mortgagee should fail to get possession or having got possession should lose it.

* Second Appeal No. 1389 of 1907 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 7th September 1907, confirming a decree of Achal Behari, Subordinate Judge of Gorakhpur, dated the 30th July 1906.

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Held further that the mortgagee having allowed the mortgagors to retain possession of a part of the mortgaged property and made no claim in respect of the stipulation in the mortgage-deed referred to above his claim for interest is barred by his acquiescence. *Partab Bahadur Singh v. Gajadhar Bakhsh Singh* (1) and *Khuda Bakhsh v. Alim-un-nissa* (2) referred to.

THE facts of the case are as follows :—

Chahak Bahadur Singh and Harbans Bahadur Singh, plaintiffs, 2nd party, mortgaged with possession the properties in dispute to defendant Jhunku Singh under a mortgage deed, dated 25th August 1888; and subsequently sold their share in mauza Badhia to Chhotkan Singh, plaintiff, 1st party, under a sale deed, dated 23rd June 1905. The plaintiff 1st party deposited the mortgage money in court under section 83, Act IV of 1882, to defendant's account but the latter refused to accept the tender on the ground that he had not obtained possession of a portion of the mortgaged property. A suit was brought for redemption. The Subordinate Judge decreed the plaintiffs' claim. On appeal the District Judge referred the case to the lower court for a finding as to the length of the period of dis-possession of the mortgagee. On return of the finding the District Judge relying on the case of *Lachman Das v. Baldeo Singh* (3) dismissed the appeal. The defendant appealed.

Hon'ble Pandit *Madan Mohan Malaviya* (with him *Babu Jogendranath Chaudhri*) for the appellant, contended that the lower appellate court having found that the defendant was kept out of possession of more than half of the property for 4 years and 7 months, should have decreed interest to the defendant for that period and that the lower appellate court having held in its order, dated 9th November 1906, that the defendant was entitled to interest, it was not competent to go behind that order. He relied on *Kishun Kuar v. Ganga Prasad* (4).

The Hon'ble Pandit *Sundar Lal* (with him *Babu Iswar Saran*) for respondents, relied on *Partab Bahadur v. Gajadhar Bakhsh* (1) and *Khuda Bakhsh v. Alim-un-nissa* (2).

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for redemption of property the subject of a usufructuary mortgage, dated the 25th of August 1888. The plaintiffs, 2nd

(1) Weekly Notes, 1883, p. 91. (3) (1902) L. R., 29 I. A., 148, s. c., I. L. R.,

24 All., 521.

(2) (1908) 6 A. L. J. R., 54.

(4) (1904) I. L. R., 27 All., 313.

party, who are the mortgagors, sold their interest in the equity of redemption to the plaintiff No. 1 on the 23rd June 1905 and the plaintiff No. 1 deposited the mortgage debt, Rs. 1,800, in court under section 83, Act IV of 1882, to the account of the defendant but the defendant refused to accept the same. The properties mortgaged are 12 bighas of *sir* in Badhia and fractional shares in 5 villages, *viz.* Tirhabir and 4 others. The defendant obtained possession of the *sir* and the share of Tirhabir on the execution of the mortgage, but he did not get possession of the shares in the other villages till April 1893, *i.e.* 4 years and 7 months after the date of the mortgage.

The principal ground upon which the defendant refused to accept the amount deposited in court was that the mortgage deed contained a provision for the payment of interest at the rate of 2 per cent. per mensem if possession of the mortgaged property were not delivered to the mortgagee; and that he did not get possession of portions of the mortgaged property until the month of April 1893, and is, therefore, entitled to interest on the mortgage debt. The court of the first instance decreed the plaintiff's claim and the decision of that court was affirmed by the lower appellate court.

Two grounds of appeal have been pressed before us; the first is that inasmuch as the lower appellate court found that the defendant was kept out of possession of part of the mortgaged property for a period of 4 years and 7 months, it should have decreed portion at least of the interest claimed for that period. The stipulation in the deed provides for payment of interest if "there is any defect (*nuqs*) in the mortgaged property, or any manner of defect arise in the mortgagee's possession." It is not quite clear what these words mean, but we are disposed to think that they refer to a defect in the title of the mortgagor whereby the mortgagees should fail to get possession or having got possession should lose such possession. However this may be, the mortgagees took possession of part of the mortgaged property and raised no objection. They allowed the mortgagors to retain possession of the residue of it and made no claim in respect of the stipulation in the mortgage deed to which we have referred. We are inclined to think that the lower appellate court was right in the

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reason which it suggested for this. It observes that "apparently the land revenue assessment is comparatively high and neither party was very anxious to pay it." The principle underlying the decision in *Raja Partab Bahadur Singh v. Gajadhar Bahsh* (1) and in the case of *Khuda Bahsh v. Alim-un-nissa* (2) seems to us to be applicable to this case. The mortgagee's claim for interest is barred by his acquiescence. On this ground the appeal in our opinion fails. The only other contention raised was that the lower appellate court, in an order of the 9th November 1906, by which an issue was referred for determination to the court of first instance, stated that the mortgagee was entitled to interest for the period of his dispossession. It is contended that having expressed this view the learned Judge was not justified afterwards in dismissing the mortgagee's claim for interest. We cannot accede to this contention, but assuming that the lower appellate court was not justified in the course it adopted, the respondents are entitled now to support the decree of that court on the ground that the mortgagee having acquiesced in the mortgagor's remaining in possession of portion of the mortgaged property, cannot succeed in his claim for interest.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

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February 27.

MISCELLANEOUS CIVIL.

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

RAM DEHANI SAHU (APPLICANT) AND LALIT SINGH AND OTHERS
(OPPOSITE PARTIES). *

Act No. IV of 1882—(Transfer of Property Act), sections 92, 93—Application for enlargement of time—Application to be made to the court of first instance, not to an appellate court.

An application under section 93, Transfer of Property Act, 1882, for extension of the time for payment of mortgage money in a decree passed under section 92 of that Act by an appellate court must be made to the court of first instance

* Civil Miscellaneous No. 300 of 1908.

() (1902) I. R., 21 I. A., 148 ; S. C., (2) (1904) I. L. R., 27 All., 813.
I. L. R., 24 All., 521.