

1910

BATUL
KUNWAR
v.
MUNNI LAL.

section. In the case of *Amanat Bibi v. Imdad Husain* (1) their Lordships explained the meaning of section 7 of Act VIII of 1859, which corresponds with the section now under consideration and observed in the course of their judgement as follows:—
“It appears to us that the fair result of the evidence is that at the date of the former suit the respondent was not aware of the right on which he is now insisting. A right which a litigant possesses without knowing or ever having known that he possesses it can hardly be regarded as a “portion of his claim” within the meaning of the section in question.” We are, therefore, of opinion that the decision of the learned Judge of this Court affirming the decision of the court below is correct, and we dismiss the appeal with costs.

Appeal dismissed.

1910
May 30.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.
RAM PARGAS UPADHIA AND OTHERS (DEFENDANTS) v. SUBA UPADHIA
(PLAINTIFF) AND RAJ KUMAR LAL AND ANOTHER (DEFENDANTS).
Act (Local) No. II of 1901 (Agra Tenancy Act), section 20—Occupancy holding—Mortgage of occupancy holding executed before the Agra Tenancy Act came into force—Act (Local) No. 1 of 1904 (General Clauses Act), section 6.

A mortgage of an occupancy tenancy executed prior to the coming into operation of the Agra Tenancy Act is a perfectly valid transaction, and is not affected by the subsequent passing of that Act. *Babu Lal v. Ram Kati* (2) referred to. *Harnandan Bai v. Nalchedi Bai* (3) distinguished.

THE facts of this case were as follows:—

One Balgobind Rai (defendant No. 6) mortgaged his occupancy holding to Raj Kumar (defendant No. 5), on the 20th of July, 1881. Raj Kumar sub-mortgaged portions of the tenancy to the appellants (defendants Nos. 1 to 4) in 1899 and 1904, respectively. The plaintiff purchased the mortgagee rights of Raj Kumar on the 7th of July, 1907, and sued for possession by redemption of the sub-mortgagees. The court of first instance dismissed the suit. The lower appellate court

* Second Appeal No. 831 of 1909, from a decree of Chhajju Mal, Subordinate Judge of Ghazipur, dated the 2nd of July, 1909, reversing a decree of Kalka Singh, Munsif of Ballia, dated the 17th of November, 1908.

(1) (1889) L. R., 15 I. A., 106; I. L. R., 15 Cal., 800.

(2) Weekly Notes, 1906, p. 28.

(3) Weekly Notes, 1906, p. 302.

decreed the claim. The defendants Nos. 1 to 4 appealed to the High Court.

Mr. S. A. Haidar (with him Maulvi Muhammad Ishaq, for whom Babu Sital Prasad Ghosh), for the appellants, contended that the transfer in favour of the plaintiff was illegal, having been made after the coming into operation of the Agra Tenancy Act. He further submitted that those occupancy tenants who had acquired their rights prior to the passing of Act II of 1901, could not transfer their rights after the coming into force of the said Act, and consequently the mortgagee of an occupancy holding could not legally transfer his rights when the said Act was in force. He relied on *Banmali Pande v. Bisheshar Singh* (1) and on *Harnandan Rai v. Nakchedi Rai* (2).

Mr. M. L. Agarwala (with him Munshi Govind Prasad), for the respondents, submitted that the transfer was a perfectly legal one. He relied on *Babu Lal v. Ram Kabi* (3) and on section 6 of Local Act No. 1 of 1904 (General Clauses Act).

Mr. S. A. Haidar was heard in reply.

STANLEY, C. J. and GRIFFIN, J.—This appeal arises out of a suit for redemption of a sub-mortgage. One Balgobind Rai was the occupancy tenant of a holding. He, on the 20th of July, 1881, mortgaged this holding to one Raj Kumar Lal; and on the 23rd of November, 1899, Raj Kumar Lal executed a sub-mortgage of a portion of the mortgaged property in favour of the defendants, and again on the 18th of July, 1904, he executed a further mortgage of the same property in favour of the defendants. Then, on the 9th of July, 1907, Raj Kumar transferred his mortgage security to the plaintiff. The plaintiff instituted the suit out of which this appeal has arisen for the redemption of the sub-mortgages executed in favour of the defendants by Raj Kumar, his predecessor in title. The court of first instance dismissed the plaintiff's claim, but on appeal the lower appellate court reversed the decision of the court below and gave a decree in favour of the plaintiff. Against this decree the present appeal has been preferred, and the only contention raised before us on behalf of the appellants is that which is stated in the second paragraph of

1910

RAM PARGAS
UPADHIAc.
SUBA
UPADHIA.

(1) (1906) I. L. R., 29 All., 129. (2) Weekly Notes, 1906, p. 302.

(3) Weekly Notes, 1906, p. 28.

1919

RAM PARGAS
UPADHYA
v.
SUBA
UPADHYA.

the grounds of appeal, viz. that the transfer in favour of the plaintiff, dated the 7th of July, 1907, was illegal and created no right which can be enforced in a Court of Justice. The appellant's case is that inasmuch as under section 20 of the Agra Tenancy Act, Act II of 1901, the holding of an occupancy tenant cannot be transferred except as provided in that section, Raj Kumar was not in a position to transfer his mortgage to the plaintiff, and the plaintiff, consequently, was not in a position to redeem the defendants' mortgages. There appears to us to be no force in this contention. At the time when Balgobind Rai executed the mortgage of the 20th of July, 1881, he had power to do so, and Raj Kumar acquired under that instrument a valid mortgage with all the rights and incidents attaching to such mortgage. As such mortgagee, he had power to execute a sub-mortgage, and as such mortgagee, he was entitled to transfer his mortgage security, the right of transfer being an incident of the mortgage. No doubt, section 20 of the Agra Tenancy Act prohibits the transfer of an occupancy tenancy except as therein provided. But that Act was not in force when the mortgage of the 20th of July, 1881, was executed, and by the provisions of the United Provinces General Clauses Act of 1904, rights accrued before the Agra Tenancy Act came into force, are not prejudiced by that enactment. Section 6 of the General Clauses Act to which we have referred, provides among others that "where any United Provinces Act repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed." As we have said, a mortgage of an occupancy tenancy executed prior to the Agra Tenancy Act is valid. This was so decided in the case of *Babu Lal v. Ram Kali* (1). The mortgage, therefore, of the 20th of July, 1881, was a valid and subsisting mortgage, under which the mortgagee possessed all the rights of a mortgagee including the right to transfer his mortgage and also a right to sub-mortgage. Having sub-mortgaged the property, the mortgagee possessed the right to redeem that mortgage and a transferee

from him had a like power. It is said that this view is in conflict with a ruling of this Court in *Harmandan Rai v. Nakhedi Rai* (1). The facts of that case are not similar to those now before us. In that case a simple money bond was executed before the passing of the Agra Tenancy Act, in which there was a provision that in default of payment of the debt the simple bond should be converted into a usufructuary mortgage. Default was made in payment but not till the 22nd of June, 1902, when the Agra Tenancy Act was in force, and it was held that the agreement of the parties to create a usufructuary mortgage could not be carried out in view of the provisions of section 20 of that Act. It is obvious that this case was governed by different considerations from those which present themselves in the present appeal.

We think that the lower appellate court was right and dismiss the appeal with costs.

Appeal dismissed.

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

MUHAMMAD ALAM AND ANOTHER (DEPENDANTS) *v.* AKBAR HUSAIN
AND OTHERS (PLAINTIFFS).*

1910
May 31.

Act No. 1 of 1877 (Specific Relief Act), section 42—Muhammadan law—Waqf—Right of Muhammadans entitled to use such property to sue for a declaration that property is waqf.

The plaintiffs, Muhammadans resident in the city of Kanauj, sued for a declaration that a certain *idgah* and the land adjoining it situated in a village in pargana Kanauj was waqf property. *Held* that as Muhammadans who had a right to use the *idgah* they were entitled to sue and that no special permission was required to enable them to do so. *Zafaryab Ali v. Bakhtawar Singh* (2) and *Jawabra v. Akbar Husain* (3) followed. *Wajid Ali Shah v. Dianat-ullah Beg* (4) distinguished.

THE facts of this case were as follows:—

Certain Muhammadans, seven in number, residents of the city of Kanauj, brought a suit for a declaration that a certain *idgah* and lands joining it situate at Kandrauli, a village in

* Second Appeal No. 987 of 1909, from a decree of Muhammad Ishaq Khan, District Judge of Farrukhabad, dated the 8th of June 1909, modifying a decree of Daya Nath, Subordinate Judge of Fatehgarh, dated the 27th of September 1907.

(1) Weekly Notes, 1906, p. 302.

(2) (1883) I. L. R., 5 All., 497.

(3) (1884) I. L. R., 7 All., 178.

(4) (1885) I. L. R., 8 All., 31.