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and must prevail. As regards the balance he contends that the Code of 1903 gives the court discretion, which the Code of 1882 did not, and that the court was no longer compelled to forfeit this deposit to Government. The Code of 1908 does give the court discretion, and we think that the court should have, in the present case, exercised that discretion. At the same time, owing to what had taken place apparently between the judgement-debtor and the purchaser, the expenses of the sale appear never to have been paid into court. While, therefore, we set aside the order of forfeiture regarding the remainder also, we under the circumstances of the present case, direct that the purchaser will be entitled to recover the sum deposited by him upon his depositing by way of court fees such sum, if any, as should have been deposited by the judgement-debtor when he petitioned the court to set aside the sale. We make no order as to costs.

Application allowed.

APPELLATE CIVIL.

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February 16.

Before Mr. Justice Tudball and Mr. Justice Piggott.

DIPAN RAI AND OTHERS (DEFENDANTS) *v.* RAM KHELAWAN (PLAINTIFF) *

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 10 *and* 20—*Act No. IX of* 1872 *(Indian Contract Act), section* 65—*Usufructuary mortgage of sir lands—Possession not delivered to mortgagee—Suit to recover possession not maintainable.*

To secure repayment of money advanced to them by the plaintiff the defendants executed a usufructuary mortgage of certain *sir* land, but did not give possession. The mortgagee sued to recover possession of the land or to realize the mortgage debt by sale. *Held* that neither relief was open to him: but he could treat the mortgagees as exproprietary tenants and get rent assessed against them. *Murlidhar* v. *Pem Raj* (1) followed. *Jijibhai Laldas* v. *Nagji Gulab* (2) distinguished.

THE facts of this case were as follows:—

The defendants executed a usufructuary mortgage in favour of the plaintiff in respect of some plots of *sir* land on the 11th July, 1905, and covenanted as follows:—

"This field the creditor may keep in his own possession or may have it cultivated through sub-tenants. The creditor may

* Second Appeal No. 7 of 1909 from a decree of Sri Lal, District Judge of Ghazipur, dated the 22nd of September 1908, confirming a decree of Baij Nath Das, Munsif of Ghazipur, dated the 22nd of June 1908.

(1) (1899) I. L. R., 22 All., 205. (2) (1909) 11 Bom., L. R., 693.

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enjoy the yield of the field in lieu of the interest on his money. We the executants shall pay the Government revenue every year from our own pocket. The creditor shall have nothing to do with the Government revenue. In case the creditor aforesaid has to pay the revenue, then after first paying him off this money for the revenue with interest thereon at one per centum per month, we shall be competent to pay the principal amount secured by this deed on any Jeth *puranmashi* and get the deed returned to us. The creditor may have mutation of names effected in his favour in the revenue papers. If any damage occurs to the field or if we or our heirs dispossess the creditor from the field, then in that case we empower the creditor aforesaid to sue in Civil Courts and recover from our persons and movable and immovable properties the whole of his money together with damages at the rate of two rupees per cent. per month from the date of dispossession and with all costs."

Physical possession, however, of the *sir* was not given to the mortgagee. The mortgagee brought this suit for possession and in the alternative for recovery of the money secured by the mortgage. The court of first instance dismissed the plaintiff's suit so far as recovery of possession was concerned, but gave him a decree for money under section 68 of the Transfer of Property Act, 1882. On appealt he District Judge confirmed the decree of the court of first instance. The defendants appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellants, contended that the appellants having become exproprietary tenants, their continuance in cultivation did not amount to dispossession of the respondent. The mortgage of the proprietary rights in the *sir* was a valid mortgage, and the possession of the mortgagee as such has not been disturbed. He had the right to get rent assessed on the exproprietary tenancy of the mortgagor. The covenant in the mortgage-deed to deliver physical possession of the *sir* was invalid and the mortgagee could neither sue for delivery of possession nor for recovery of money. He cited *Bhikham Singh* v. *Har Prasad* (1), *Murlidhar* v. *Pem Raj* (2),

(1) (1896) I. L. R., 19 All., 35. (2) (1899) I. L. R., 22 All. 205.

Harnandan Rai v. *Nakchhedi Rai* (1) and *Ram Sarup* v. *Kishan Lal* (2). The covenant itself being illegal, stipulation to pay damages in the event of breach of such covenant also was illegal; *Taylor* v. *Chester* (3), *Laxman Lal K. Pandit* v. *Mulshankar* (4), *Gopalrao* v. *Kallappa* (5).

Dr. *Satish Chandra Banerji* (with him Babu *Parmeshwar Dayal*), for the respondent, submitted that the appellant had divided the deed into two sections, *viz.*, (1) usufructuary mortgage of proprietary rights and (2) usufructuary mortgage of exproprietary tenancy. This was not the correct interpretation of the deed. There being a personal covenant to pay, the mortgage was anomalous, and a suit to recover the money could be brought. Even on the assumption that there was a usufructuary mortgage of the exproprietary tenancy, the parties were not *in pari delicto*, because the High Court under the old Rent Act had held that a usufructuary mortgage of an occupancy holding was valid, and it was not till 1906, *i.e.*, after the execution of this mortgage, that the High Court decided that the law had been altered by the new Tenancy Act. Under the circumstances the mortgagee was entitled to recover his money under section 68 (*b*) of Act IV of 1882, for, possession not having been delivered, the mortgage security did materially diminish. *Ganesh Singh* v. *Sujhari Kuar* (6).

If the mortgage failed by reason of the prohibition contained in the Tenancy Act, section 65 of the Contract Act applied. and the mortgagee could recover the money under that section ; *Jijibhai Laldas* v. *Nagji Gulab* (7), *Gulab Chand* v. *Fulbai* (8). Moreover the transaction was really one of loan, and the bond a simple money bond. Some money was advanced, and there were two ways pointed out in which the creditor's claim might be discharged, *viz.* (1) by putting the creditor in possession, and (2) by repaying the money with interest. There was an express covenant to pay the money ; this was separable from other covenants in the deed and might be enforced. He referred to the Indian Contract Act, section 58, and the illustration.

(1) (1906) 3 A. L. J., 691.
(2) (1907) I. L. R., 29 All., 327.
(3) (1869) L. R., 4 Q. B., 309.
(4) (1908) 10 Bom., L. R., 553.
(5) (1901) 3 Bom., L. R., 164.
(6) (1887) I. L. R., 10 All., 47.
(7) (1909) 11 Bom., L. R., 693.
(8) (1909) 11 Bom., L. R., 649.

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Mr. *M. L. Agarwala*, in reply, submitted that section 65 of the Indian Contract Act had no application. That section contemplated an agreement which was discovered to be void and not one which was void in its very inception. There is a fiction that every person is supposed to know law. When Act II of 1901 was passed it was very widely discussed: it must be presumed that the parties knew of its provisions. If they entered into the transaction notwithstanding the express prohibitive clause in the Act, they must bear its consequences.

The case of *Jijibhai Laldas* v. *Nagji Gulab* says that if two persons are equally guilty, the right of the person in possession must prevail. Here the plaintiff is not in possession. Moreover, the ruling is opposed to I. L. R., 22 All., 205. The provision in the deed entitling the mortgagee to recover the money was dependent upon his suffering any loss in the field or being deprived of its possession through the default of the mortgagor. He could not avail himself of such provision, as the covenant to give possession was in itself illegal.

TUDBALL and PIGGOTT, JJ.—The facts of the case out of which this appeal arises are as follows:—

The defendants appellants were owners of certain lands which they cultivated as their *sir*. On the 15th of July, 1905, they executed a document in favour of the plaintiff respondent to the following effect. They set forth that they had taken a loan of Rs. 599 from the plaintiff, and had placed him in actual physical possession of their *sir* lands, so that he might cultivate the lands himself or through sub-tenants, in order that the plaintiff might recover from the income of the land the interest on his money. They made a stipulation as to the payment of revenue due on the lands, with which we are not concerned. They further contracted that they should redeem the mortgage only by paying the principal on the *puranmashi* of Jeth of any year. They further stipulated that if they or any of their heirs in future should dispossess the plaintiff, then the latter should be able to recover from them the amount lent with interest as damages at the rate of 24 per cent. per annum from their persons and property. The document nowhere contains a hypothecation of the property in question. It has been found

as a matter of fact by the courts below that the defendants did not place the plaintiff in actual physical possession of the *sir* lands.

The plaintiff came into court asking for the following reliefs:—*(a)* actual possession over the lands in suit with damages, or *(b)* in the alternative, for a decree for sale of the mortgaged property with costs and future interest, to recover Rs. 599 principal and Rs. 144 interest by way of damages. The courts below have held that the plaintiff was not entitled to actual physical possession over the *sir* lands, inasmuch as the defendants became exproprietary tenants on the execution of the document, and as such were entitled to hold and cultivate the lands on payment of rent. They have further held that by reason of the plaintiff not having got actual possession from the defendants, there has been diminution in the security offered by them, and under section 68, Transfer of Property Act, the former was entitled to recover the money, and accordingly they granted him a simple money decree only. The defendants have now appealed to this court and urge that in so far as the contract between the parties was for delivery of possession of the exproprietary tenure which came into existence on the execution of the mortgage it is void, but that in so far as it is a mortgage of proprietary rights, the contract was a perfectly legal one, and as the appellants are ready to pay any rent which may be fixed upon their exproprietary tenure the plaintiff is not entitled to any relief whatsoever. There can be no question that directly the mortgage was executed the appellants became exproprietary tenants of the lands, and, as such, were entitled to continue in cultivatory possession on payment of rent. In so far as the contract may be deemed to be an usufructuary mortgage of the exproprietary tenure, there can be no doubt that it is void in view of the terms of sections 10 and 20 of the Tenancy Act. In the case of *Murlidhar* v. *Pem Raj* (1), which was decided under the old Act No. XII of 1881, it was held that if the vendor of land contracts to put the vendee in cultivatory possession of the *sir* land, the contract is void and the vendee cannot recover any

(1) (1899) I. L. R., 22 All., 205.

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part of the sale consideration on the failure of the vendor to put him in *such* possession. The present is a case not of sale but of mortgage, but under the Tenancy Act a mortgage of exproprietary right is as invalid as the sale mentioned in the above ruling. On behalf of the respondent no attempt has been made to support the decision of the lower court, but it has been urged that in view of the terms of section 65, Contract Act, now that the contract has been discovered to be void, the plaintiff is entitled to the return of his money. Attention on this point was called to the ruling *Jijibhai Laldas* v. *Nagji Gulab* (1). The position of the parties in the case quoted was the reverse of the position occupied by the parties to the present appeal. In that case a certain alienation was declared to be void on account of the terms of the Bhagdari Act, 1862. The transferee had actually been put in possession, and the alienor came into court suing for possession of the property on the ground that the transfer was void. The court decreed the claim only on the terms of the plaintiff refunding the money which he had received from the defendant, on the principle that he who seeks equity must do equity. The case is an example of the rule *in pari delicto potior est conditio defendentis*. In the present case the parties are in a totally different position. The defendants are in possession and the plaintiff seeks to enforce an agreement which is void. As was observed by BANERJI, J., in 22 All., 205, to accede to the plaintiff's request would be equivalent to enforcing an agreement the consideration of which was unlawful. That case was of a transfer of an occupancy holding. In our opinion the parties must be held to have known at the date of the execution of the mortgage-deed that the transfer of an exproprietary interest in the *sir* land was contrary to the provisions of the Tenancy Act and therefore void. The parties therefore are in *pari delicto*, and the case is clearly one of those in which relief cannot be given to the plaintiff. Section 65, Contract Act, does not apply to these circumstances. As the mortgage, in so far as it is a mortgage of proprietary rights, is a perfectly valid one, it is open to him to have rent assessed on the exproprietary tenure and to recover it from the

(1) (1909) 11 Bom. L. R., 693.

defendants, who would be entitled to redeem the mortgage on the date mentioned in the mortgage bond. In the present case the plaintiff is not entitled to any relief whatsoever. In this view of the case, we allow the appeal, set aside the decrees of the courts below and dismiss the plaintiff's suit with costs in all courts.

Appeal decreed.

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

HARCHARAN AND OTHERS (PLAINTIFFS) *v.* BINDU AND OTHERS (DEFENDANTS).*

Suit for profits—Limitation—Adverse possession—Profits collected by co-sharers—Suit by other co-sharers to recover their shares.

Co-sharers who collect profits for other co-sharers are in a position similar to that of a lambardar. Where no adverse title has been set up, the mere fact that a co-sharer plaintiff has not received profits for more than twelve years before suit will not bar his claim.

Raj Bahadur v. *Bharat Singh* (1) and *Mihin Lal* v. *Badri Prasad* (2) followed.

THIS was an appeal under section 10 of the Letters Patent from a judgement of AIKMAN, J. The facts of the case sufficiently appear from the judgement under appeal, which was as follows:—

"The respondent Kali Charan brought a suit to recover a share of the profits of certain *shamlat* land belonging to a village in which he owns a share. None of the defendants was a lambardar. They were co-sharers in the village. The court of first instance found that there was no evidence that either the plaintiff or his predecessor in title had ever received any profits of his share in the *shamlat* land and dismissed the suit on this ground. On appeal the learned District Judge professing to follow the ruling in *Mihin Lal* v. *Badri Prasad* (1) gave the plaintiff a decree. The defendants come here in second appeal. In the case relied on by the learned Judge it will be seen from the concluding portion of the judgement at page 439 that great stress was laid on the fact that the defendant was a lambardar and it was remarked that the possession of a lambardar is not adverse possession. In my opinion the same principle cannot be applied to the case of co-sharers. If the defendants here appropriated to themselves the whole profits of the *shamlat* land, they thereby, I hold, gave notice to the plaintiff that they were setting up a title adverse to him, and if they did so for upwards of 12 years, as in this case, the plaintiff's claim would be barred. A case like the present is distinguishable from the case of co-owners in a joint family. In my opinion the Assistant Collector was right. I allow the appeal with costs, set aside the decree of the lower appellate court with costs and restore that of the court of first instance."

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* Appeal No. 58 of 1909 under section 10 of the Letters Patent.

(1) (1904) I. L. R., 27 All., 348. (2) (1905) I. L. R., 27 All., 436.