

to worth noting for the information of the said Magistrate or his successor in office. The order against Murlī Singh, at the time when it was passed, was in my opinion a proper and legal order upon the facts found, and I shall not interfere with it. The application is dismissed.

1911

EMPEROR
v.
MURLI
SINGH.

APPELLATE CIVIL.

1911

June 16.

Before Mr. Justice Banerji and Mr. Justice Tudball.

BAHORAN UPADHYA (DEFENDANT) v. UTTAMGIR (PLAINTIFF).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 21—Occupancy holding—Mortgage—Suit by mortgagor to recover possession—Illegal contract—Restitution of benefit.

Held that the mortgagor of an occupancy holding who has put the mortgagee in possession cannot recover possession upon the ground merely that the mortgage is void under the provisions of the Agra Tenancy Act, 1901, without repaying to the mortgagee the money which he has received from him. *Fath-ud-din v. Karamat-ullah* (1) followed.

THIS appeal arises out of a suit brought by the plaintiff respondent for possession of an occupancy holding which he mortgaged to the defendant appellant under a mortgage deed, dated the 5th of August, 1905, by which a principal sum of Rs. 499 was secured. The grounds on which the claim was put forward were, that the land mortgaged was the cultivatory holding of the plaintiff; that under the provisions of the Agra Tenancy Act the mortgage of such land was void; that there was no consideration for the mortgage, and that it was nominal and fictitious. It is admitted that under the mortgage the mortgagee obtained possession of the property and that he is still in possession. The court of first instance decreed the suit simply on the ground that the property mortgaged was the cultivatory holding of the plaintiff, and the mortgage of it was void. The defendant appealed to the lower appellate court and raised two contentions; first, that the holding was a fixed rate tenancy, and secondly, that the court of first instance should have ordered the plaintiff to refund the mortgage money before obtaining back possession of the property. On the first point the lower appellate court found that the tenancy was an occupancy holding. On the second point it

* Appeal No. 93 of 1910 under section 10 of the Letters Patent.

1911

BAHORAN
UPADHYA
v.
UTTAMGIR.

held that, as a mortgage of such a holding was prohibited by section 21 of the Agra Tenancy Act, the plaintiff was entitled to recover possession without refunding the money which he had obtained from mortgagee. It accordingly dismissed the appeal. A second appeal was preferred to this Court but it was dismissed by the learned Judge before whom it came on for hearing.

Mr. *M. L. Agarwala*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondent.

BANERJI and TUDBALL, JJ:—This appeal arises out of a suit brought by the plaintiff respondent for possession of an occupancy holding which he mortgaged to the defendant appellant under a mortgage deed, dated the 5th of August, 1905, by which a principal sum of Rs. 499 was secured. The grounds on which the claim was put forward were, that the land mortgaged was the cultivatory holding of the plaintiff; that under the provisions of the Agra Tenancy Act the mortgage of such land was void; that there was no consideration for the mortgage, and that it was nominal and fictitious. It is admitted that under the mortgage the mortgagee obtained possession of the property and that he is still in possession. The court of first instance decreed the suit simply on the ground that the property mortgaged was the cultivatory holding of the plaintiff, and the mortgage of it was void. The defendant appealed to the lower appellate court and raised two contentions; first, that the holding was a fixed rate tenancy, and secondly, that the court of first instance should have ordered the plaintiff to refund the mortgage money before obtaining back possession of the property. On the first point the lower appellate court found that the tenancy was an occupancy holding; on the second point it held that, as a mortgage of such a holding was prohibited by section 21 of the Agra Tenancy Act, the plaintiff was entitled to recover possession without refunding the money which he had obtained from the mortgagee. It accordingly dismissed the appeal. A second appeal was preferred to this court, but it was dismissed by the learned Judge before whom it came on for hearing. From the decision of the learned Judge of this court this appeal has been preferred under the Letters Patent, and the contention raised before us is that the decree in the plaintiff's favour should have been made conditional upon his restoring

1911

 BAHARAN
 UPADHYA
 v.
 UTTAMGIR.

to the defendants the benefit which he, the plaintiff, had obtained under the mortgage, that is, upon his paying back the mortgage money. We are of opinion that this contention is well founded. If as a matter of fact, the plaintiff received from the defendant the amount of the mortgage, he should not be allowed to recover possession of the mortgaged property unless he restores to the defendant the benefit which he, the plaintiff, derived from the mortgage. It is true that under the Agra Tenancy Act the mortgage of a cultivatory holding is void, but the person who made the mortgage cannot, on principles of equity, be allowed to take back the property unless he put the defendant mortgagee into the position in which he was before the mortgage and restore to him the money which he received from him. This was so held in *Fasih-ud-din v. Karamat-ullah* (1). That was a case in which the proprietary rights and interests in a mahal, purporting to include the vendor's interest in his sir land, were sold, and the vendor expressly stipulated that he would not claim occupancy rights in the sir. He subsequently sued for possession of the sir as an exproprietary tenant. It was held that as the plaintiff asked for possession without tendering that portion of the purchase money which was the price of the interest in the sir it would be violating every principle of equity and good conscience to decree the claim. It was contended in that case that the appellant was entitled to a decree for possession without offer or tender or payment of the portion of the purchase money given for the sir. The learned Judges, EDGE, C. J., and BURKITT, J., observed:—"We are here administering the law and are bound to administer that law as far as we can according to equity and good conscience, and it seems to us that if we were to pass a decree in favour of the plaintiff in this case, we would be violating every principle of equity and good conscience by allowing a man by means of fraud to keep in his pocket the purchase money which he had obtained from his vendee and get back by the assistance of the court possession of the property which that purchase money represented. In *Bhikham Singh v. Har Prasad* (2) which was the converse of the case last mentioned, the principle laid down in that case was approved of. In Second Appeal No. 200

(1) Weekly Notes, 1888, p. 128. (2) (1896) I. L. R., 19 All., 85.

1911

BAHORAN
UPADHYA
v.
UTTANGIR.

of 1911, decided by one of us on the 8th of April last, the facts were exactly similar to the facts of the present case. It was held that the plaintiff was not entitled to recover possession without paying the money which he had received from the defendant as consideration for the mortgage made by him. A similar view was held by KARAMAT HUSAIN, J., in Second Appeal No. 1030 of 1909, decided on the 10th of June, 1910. The principle of the ruling of the Bombay High Court in *Jiji Bhai Lubdas v. Nugji Gulab* (1) is also to the same effect. The learned vakil for the respondent has referred us to the decision of this court in *Madan Lal v. Muhammad Ali Nasir Khan* (2). That case, in our opinion, is perfectly distinguishable from the present case. There the tenant of the occupancy holding in question did not make a voluntary transfer of it, but his rights were sold by auction in execution of a decree and were purchased by his wife who subsequently transferred them to the defendant. This transfer was in violation of the provisions of the Tenancy Act and did not confer any title on the auction purchaser. The tenant subsequently relinquished his holding, and thereupon the landholder brought a suit to recover possession of the land from the transferee. The plaintiff in that case had derived no benefit, of which he could be held liable to make restitution. That case, therefore, has no bearing upon the question before us. In our judgement, if the plaintiff received the mortgage money from the defendant, he is not entitled to recover possession of the property mortgaged by him from the mortgagee unless he restores to the mortgagee the mortgage money received by him. On the principle that he who seeks equity must do equity, he cannot be allowed to retain the mortgage money in his own hands and at the same time to take back the property. The case of the mortgagee under similar circumstances seeking to recover possession from the mortgagor is different. This was pointed out in *Bhikham Singh v. Har Prasad* (3) and in *Dipan Rai v. Ram Khelawan Rai* (4). In the present case, however, the plaintiff alleged that he had not received any part of the mortgage money. This point was not considered by the court below and no finding was arrived at in regard to it. We must,

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

(2) Weekly Notes, 1906, p. 182.

(3) (1896) 1. L. R., 19 All., 85.

(4) (1910) 1. L. R., 32 All., 383.

therefore, obtain from the court below a finding on the following issue, which we refer to that court under the provisions of order XLI, rule-25, of the Code of Civil Procedure:—

Was the amount secured by the mortgage of the 5th of August, 1905, or any part thereof, paid by the defendant to the plaintiff?

The court will take such additional evidence relevant to the above issue as may be tendered by the parties. On receipt of the finding ten days will be allowed for filing objections.

Issue referred.

FULL BENCH.

Before The Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

MUHAMMAD MUZAMIL-ULLAH KHAN (DEFENDANT) *v.* MITHU LAL AND ANOTHER (PLAINTIFFS) AND CHOKHEY SINGH AND OTHERS (DEFENDANTS). *
Hindu law—Joint family property—Mortgage by father alone—Subsequent sale by father to a third party—Suit by mortgagees for sale—Competence of purchaser to rely on invalidity of the mortgage.

The head of a joint Hindu family mortgaged in 1886 property belonging to the joint family, but neither for legal necessity nor to pay an antecedent debt. In 1888 the mortgagor sold the same property to a third person. The purchaser remained in possession for more than twelve years, when the mortgagees instituted a suit for sale on their mortgage.

Held by RICHARDS, C. J., and BANERJI, J., that in view of the fact that the purchaser had acquired a title to the property by adverse possession as against all the members of the family, it was open to him, notwithstanding that his title was originally acquired from the mortgagor alone, to set up as a defence the invalidity of the mortgage.

Per CHAMIER, J., according to the ruling of the majority of the Full Bench in *Chandradeo v. Mata Prasad* (1) the mortgage made by the father alone was void, and, this being so, it was open to the purchaser, who was in possession of the property, to rely upon its invalidity, whatever the weakness of his own title might be.

Chandradeo v. Mata Prasad (1), *Dalgobind Das v. Narain Lal* (2), *Brijbasi Lal v. Gopal Das* (3), *Kali Shankar v. Nawab Singh* (4) and *Bhagirathi Misr v. Sheobhik* (5) referred to.

* Second Appeal No. 712 of 1910 from a decree of D. R. Lyle, District Judge of Aligarh, dated the 30th of May, 1910, reversing a decree of Jagat Narain, Additional Subordinate Judge of Aligarh, dated the 2nd of March, 1910.

(1) (1909) I. L. R., 31 All., 176.

(3) Weekly Notes, 1903, p. 200.

(2) (1898) I. C. R., 15 All., 329

(4) (1909) I. L. R., 31 All., 507.

(5) (1898) I. L. R., 20 All., 325.

1911

BAHORAN
UPADHYA
v.
UTTAMGIR.

1911
June 17.