

APPELLATE CIVIL.

1910
December, 23.*Before Justices Sir George Knox and Mr. Justice Karamat Husain.*

CHHOTE LAL (PLAINTIFF) v. SHEOPAL SINGH AND OTHERS (DEFENDANTS). *
Land-holder and tenant—Occupancy tenant—Usufructuary mortgage—Relinquishment of tenancy during the term of the mortgage.

Held that an occupancy tenant who has made a usufructuary mortgage of his holding and put the mortgagee in possession cannot during the subsistence of such mortgage relinquish his holding to the prejudice of the mortgagee's rights. *Bannu Rai v. Rafi-ud-din* (1) followed.

The facts of this case were as follows:—

In this case, an occupancy tenant mortgaged his holding with possession to one Chhote Lal, and afterwards relinquished his holding in favour of the zamindar, who instituted a suit in ejectment in the Revenue Court against the plaintiff. The occupancy tenant was not a party to the suit. Chhote Lal in that suit raised a plea that the relinquishment by the mortgagor in favour of the zamindar was a collusive transaction and could not affect his rights. While that suit was pending, Chhote Lal instituted a suit in the court of the Subordinate Judge for a declaration that the relinquishment, dated the 25th of September, 1909, was collusive and fraudulent and made for the purpose of causing loss to him and was void as against him. The Subordinate Judge, coming to the conclusion that the suit was barred by *res judicata*, dismissed the claim, and that decree was upheld by the lower appellate court (Subordinate Judge of Agra) on the ground that the relief sought was a relief in the discretion of the court to grant or refuse. The plaintiff appealed to the High Court.

Munshi *Haribans Sahai*, for the appellant.

Munshi *Benode Behari*, for the respondents.

KARAMAT HUSAIN, J.—In this case, an occupancy tenant mortgaged his holding with possession to one Chhote Lal, and afterwards relinquished his holding in favour of the zamindar, who instituted a suit in ejectment in the Revenue Court against the plaintiff. The occupancy tenant was not a party to the suit. Chhote Lal in that suit raised a plea that the relinquishment by

*Second Appeal No. 129 of 1910 from a decree of H. W. Lyle, District Judge of Agra, dated the 29th of November 1909, confirming a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 6th August 1909.

(1) (1205) I. L. R., 27 All., 82.

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the mortgagor in favour of the zamindar was a collusive transaction and could not affect his rights. While that suit was pending, Chhote Lal instituted a suit in the court of the Subordinate Judge for a declaration that the relinquishment, dated the 25th September, 1909, was collusive and fraudulent and made for the purpose of causing loss to him and was void as against him. The learned Subordinate Judge coming to the conclusion that the suit was barred by *res judicata* dismissed the claim and that decree was upheld by the lower appellate court on the ground that the relief sought was a relief in the discretion of the court to grant or refuse. The plaintiff comes here in second appeal. Following the ruling in *Runnu Rai v. Rafi-ud-din* (1) which I followed in *Ramdhari Rai v. Ramdhari Rai* (2) I hold that the occupancy tenant, after mortgaging his holding with possession to Chhote Lal, had no power to relinquish it in favour of the zamindar. I would, therefore, allow the appeal, set aside the decree of the courts below, and under the provisions of order 41, rule 23, send the case back through the lower appellate court to the court of first instance for trial on the merits. Costs will abide the event.

KNOX, J.—The facts are set out in the judgement of my learned brother, and in view of the course of rulings to which he has referred, I prefer not to adhere to the opinion which I have entertained and would have put forward at greater length had the matter been *res integra*. I was one of the Judges who in *Khiali Ram v. Nathu* (3) was prepared to hold and did hold that an ex-proprietary tenant could sublet the whole or any part of his holding, but I have always hesitated, with due respect to the learned Judge who decided the cases, in following the further step taken in *Badri Prasad v. Sheodhan* (4) and *Runnu Rai v. Rafi-ud-din* (5). The question arises—what will the decree-holder do with the decree when he gets it, and whether the Revenue Courts will pay any attention to it? These conflicts between Revenue and Civil Courts are to be regretted. It would be well if they could be put an end to by the Legislature. In view,

(1) (1905) I. L. R., 27 All., 82.

(2) (1910) 7 A. L. J., 305.

(3) (1893) I. L. R., 15 All., 219.

(4) (1896) I. L. R., 18 All., 354.

(5) (1905) I. L. R., 27 All., 82.

however, of the series of rulings abovementioned, I accept the view taken by my learned brother, and agree in his order, which will also be the order of the Court.

Appeal allowed.

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Twdball.
GHULAM NABI KHAN (PLAINTIFF) v. NIAZ-UN-NISSA (DEFENDANT)*

Construction of document—Sale—Agreement to repurchase executed on same day—Mortgage by conditional sale.

When what purported to be an out-and-sale was accompanied by a contemporaneous agreement giving to the vendor a right of repurchase within five years at the same price, it was held that the transaction was what it purported to be, and could not be construed as a mortgage by conditional sale. *Bhagwan Sahai v. Bhagwan Din* (1) followed. *Vasudeo v. Bhan* (2) referred to.

THE facts of this case were as follows:—

A sale-deed was executed in favour of the respondent on 12th August, 1894. On the same day another deed was executed between the parties which provided that if the purchase money were paid within five years, the transferee would reconvey the property to the vendor, and the sale would be deemed to be non-existent. This was a suit by the appellant vendor to redeem the property on payment of purchase money on the basis that the two deeds made the transaction a mortgage by way of a conditional sale. The court of first instance (Subordinate Judge of Moradabad) dismissed the suit, and this decree was affirmed on appeal by the District Judge. The plaintiff appealed to the High Court.

The Hon'ble *Nawab Muhammad Abdul Majid* (with him *Mr. B. E. O'Connor*), for the appellant, contended that the two documents must be read together as constituting a mortgage by conditional sale. In the case of *Bhagwan Sahai v. Bhagwan Din* (1) the vendees promised to reconvey as a matter of grace. Moreover that case was decided on principles of common law and did not apply. He cited *Ali Ahmad v. Rahmat-ul-lah*, (3) and referred to section 58, clause (c) of the Transfer of Property Act.

* Second Appeal No. 728 of 1910 from a decree of A. W. B. Cole, District Judge of Moradabad, dated the 3rd of May 1910, confirming a decree of Nihal Chandra, Subordinate Judge of Moradabad, dated the 11th of August 1909.

(1) (1890) I. L. R., 12 All., 387. (2) (1896) I. L. R., 21 Bom., 528.
(3) (1882) I. L. R., 44 All., 195.