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ment or sale. Under the Agra Tenancy Act, an occupancy holding of a tenant is not transferable and cannot be sold by auction in execution of a decree. The dwelling house of an agriculturist may be deemed to be an appurtenant to his holding. Further, section 266 of the Code of Civil Procedure, 1882, which has been re-enacted in section 60 of Act No. V of 1908, prohibits the sale of materials of dwelling houses occupied by agriculturists. The court therefore has not the power to sell the materials of such a dwelling house, and it necessarily follows that it cannot make a decree for sale of such property. In this view the claim for sale of the dwelling house of the defendants ought not to have been decreed. The order in the decree for sale of the grove was clearly erroneous. The result is that we allow the appeal so far that we dismiss the claim for sale of the hypothecated property and affirm the remainder of the decree of the court below. We make no order as to the costs of this appeal.

Decree modified.

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May 20.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin
GAYA PRASAD AND OTHERS (PLAINTIFFS) v. GANGA BISHAN
(DEFENDANT).*

Act (Local) No. I of 1903 (Bundelkhand Encumbered Estates Act), section 13—Sub-mortgage by usufructuary mortgagee—Covenant to indemnify sub-mortgagee if dispossessed—Effect on such covenant of mortgagees taking advantage of the provisions of the Bundelkhand Encumbered Estates Act, 1903.

The mortgagee in possession under a usufructuary mortgage executed a sub-mortgage of his mortgage rights and covenanted with the sub-mortgagee that if during the period of the mortgage the property mortgaged, in any year, by any reason, should pass out of the possession of the sub-mortgagee, or the mortgage deed for any reason should be declared to be invalid, he, the executant, would be liable to pay the loss sustained by the mortgagee. The mortgagees took advantage of the provisions of the Bundelkhand Encumbered Estates Act. The mortgagee took no steps under the Act to realize the amount due to him on his mortgage. The sub-mortgagee did prefer a claim, but it was rejected, and he did not appeal against the special Judge's order rejecting it. The sub-mortgagee was ejected from the mortgaged property, and thereafter his sons sued the mortgagee on his covenant, claiming damages on account of his ejection. *Held* that the suit was not barred by reason of anything contained in the Bundelkhand Encumbered Estates Act, 1903.

THIS was an appeal under section 10 of the Letters Patent from a judgement of KARAMAT HUSAIN, J. The facts out of which the appeal arose are fully stated in the judgement under appeal, which was as follows :—

“The facts necessary for the disposal of this appeal are these. Sartan and Achehe Lal executed a mortgage with possession in favour of Ganga Bishan on the 26th June, 1885, and put the mortgagee in possession of the property mortgaged to him. On the 7th of November, 1900, Ganga Bishan executed a deed in favour of Basdeo and put Basdeo in possession of the property. The heirs of Sartan and Achehe Lal started proceedings under the Bundelkhand Encumbered Estates Act I of 1903. Basdeo advanced his claim under the deed of the 7th of November, 1900, before the special judge, but the original mortgagee Ganga Bishan put forward no claim under the mortgage of 1885 before the special judge. The special judge came to the conclusion that Basdeo was a sub-mortgagee and had therefore no *locus standi*. Basdeo did not appeal against the decision of the special judge. Thereafter by the order of the special judge the sub-mortgagee was ejected from the mortgaged land. The result was that the heirs of Sartan and Achehe Lal got back the property without paying anything either to Ganga Bishan or to Basdeo. The plaintiffs, who are the heirs of Basdeo, instituted a suit against Ganga Bishan for the recovery of the amount due under the deed of 7th November, 1900, and interest by way of damages. The pleas raised in defence were that Basdeo was a transferee of Ganga Bishan's mortgagee rights; that he was not a sub-mortgagee; that the plaintiffs' ancestor ought to have preferred an appeal from the decision of the special judge; that their ancestor was guilty of negligence in not appealing against the decision of the special judge and was not therefore entitled to succeed against the defendant Ganga Bishan. The Court of first instance decreed the claim. The defendant appealed to the lower appellate court, and the following pleas, according to the judgement of the lower appellate court, were argued in that court :—(1) that the claim was time barred; (2) that the claim was barred by the explanation to section 13 of Act No. I of 1903; (3) that the finding of the lower court that Ganga Bishan appellant should have appealed against Sartan and others was not correct; (4) that the lower court placed a wrong interpretation on the mortgage deed of the 7th of November, 1900; (5) that the plaintiffs suffered no loss by the act of the appellant. On the first point the lower appellate court came to the conclusion that the suit was not time barred. On the second point it came to the conclusion that the claim was not barred by the explanation to section 13 of Act No. I of 1903, inasmuch as the respondents do not seek to enforce the claim as against the heirs of the original mortgagors. On the third point that court remarks as follows :—‘The defendant appellant should have assisted the plaintiffs' ancestor as against the mortgagors. But as a fact he did not. On the contrary, he laid his claim on another mortgage deed and about the same property against the original mortgagors. He should not have done so.’ The findings on the fourth and fifth points are that the defendant appellant is under the terms of the deed of 7th of November, 1900, bound to pay any damages sustained by the sub-mortgagee or his heirs. On the above findings the lower appellate court confirmed the decree

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of the first-court. Ganga Bishan defendant has preferred a second appeal to this court, and the following pleas have been argued by his learned counsel before me, (a) The deed of the 7th of November, 1900, is a transfer of all the mortgagee rights and not a sub-mortgage; (b) the plaintiffs under the terms of the deed of 7th of November, 1900, are not entitled to any claim against the defendant; (c) section 10(d) of the Bundelkhand Encumbered Estates Act bars the suit; (d) the explanation to section 13 of Act I of 1903 bars the suit; (e) the claim is time barred; (f) the plaintiffs having failed by their own negligence to make good their claim under Act No. I of 1903 cannot claim compensation from the defendant. I have carefully gone through the deed of the 7th of November, 1900, and I have no doubt that it is not a transfer of all the mortgagee rights but is a sub-mortgage. The document very distinctly says 'I have sub-mortgaged the mortgagee rights (*dar rahan dakhli*).' The first ground is therefore untenable. There is no force in the second plea also, because that document in very distinct terms says that if during the period of the mortgage the property mortgaged, in any year by any reason passes out of the possession of Basdeo or the said mortgage deed for any reason is declared to be invalid the excoctant will be liable to pay the loss sustained by the mortgagee. I am of opinion that section 10(d) of Act No. I of 1903 has no application to the case before me. The special judge on the application of Basdeo ruled that he had no *locus standi*. In such a case it cannot be said that Basdeo's debt was a debt in respect of which no fresh suit could be instituted. The explanation to section 13 of Act No. I of 1903 does not also cover this case. In the first place there was no determination as to the amount which was justly due to Basdeo and in the second the representatives of the original mortgagor are no parties to the suit. There is no force in the plea of limitation and no fact has been brought to my notice to support that plea. The sole question on which the decision of this appeal turns is whether the plaintiffs as heirs of the sub-mortgagee Basdeo had or had not a *locus standi* to have their money satisfied out of the property which belonged to Sartan and Achehe Lal. A sub-mortgagor has been held in a Full Bench ruling of this court in *Ramshankar Lal v. Ganga Prasad* (1) to get a security, that is, an interest in the property mortgaged, and that being his position he undoubtedly has a *locus standi* and is one of the persons who have a claim against the property of the proprietor. It is, however, contended by the learned vakil for the respondent that sections 6, 7 and 8 of the Bundelkhand Encumbered Estates Act go to show that a special judge has to make an inquiry with reference to those debts only which are the private debts of the proprietor and can take no notice of any other incumbrance created by a mortgagee on the property of the proprietor to which that proprietor is no party. I am unable to accept such an interpretation of those sections. The result of such interpretation will be that the sub-mortgagee from the mortgagee who may have advanced large sums of money on the security of the mortgagee rights will have no remedy at all, and I do not think that the Legislature intended that the mortgagors should get their property free from the security created in favour of the sub-mortgagee without giving him any chance of establishing his claim. Section 9 of Act No. I of 1903 shows that the special judge shall

publish in the gazette a notice in the vernacular language of the district calling upon all persons having claims against the person or property of the proprietor by whom or in respect of which an application is made under section 6 of the Act, to present to the special judge within two months of the publication of the notice a written statement of their claims, and I am of opinion that a sub-mortgagee is one of the persons who have a claim on the property of the proprietor. This leads me to discuss whether the plaintiffs were bound to appeal to the Commissioner under the provisions of section 30 of Act No. I of 1903 against the decision of the special judge. I am of opinion that the decision of the special judge that the plaintiffs had no *locus standi* was wrong, that they ought to have appealed to the Commissioner to have that decision set aside and that their failure to appeal was a negligence which debars them from seeking compensation against the defendants. In this connection I have to remark that the finding of the lower appellate court on the third point argued before that court is not a finding on that plea. The plea taken was that the finding of the first court that Ganga Bishan should have appealed against Sartan and others is not correct. The finding of the lower appellate court on that point is neither that the finding of the first court is correct nor that it is incorrect. It only says that the defendant appellants should have assisted Basdeo against the mortgagor. The conclusion at which I arrive is that Basdeo as a sub-mortgagee under the deed of the 7th of November, 1900, had a *locus standi*, that he ought to have appealed from the judgement of the special judge and that in consequence of his failure to have that decision set aside he lost his remedy against the defendant Ganga Bishan. I therefore allow this appeal, set aside the decrees of the courts below and dismiss the plaintiffs' suit with costs in all courts."

The plaintiffs appealed.

Pandit *Baldeo Ram Dave* (for *Munshi Iswar Saran*), for the appellants, relied upon the covenant of indemnity given by Ganga Bishan, the plaintiff's sub-mortgagor, which, he argued, was outside any of the provisions of the Act of which the original mortgagors had taken the benefit.

Mr. *A. H. C. Hamilton*, for the respondent, urged that the effect of the explanation to section 13 of the Bundelkhand Encumbered Estates Act, 1903, was to extinguish any claim that the plaintiffs may have had under the sub-mortgage in favour of their father.

STANLEY, C. J., and GRIFFIN, J.—The facts of the case are these:—One Achche Lal and another, the owners of property, executed a possessory mortgage of their property in favour of one Ganga Bishan on the 26th of June, 1885. On the 7th of November, 1900, Ganga Bishan sub-mortgaged this property to Basdeo and in that mortgage he entered into the following absolute covenant, namely, that if during the period of the mortgage,

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the property mortgaged, in any year, by any reason, should pass out of the possession of Basdeo, or the mortgage deed for any reason should be declared to be invalid, he (the executant) would be liable to pay the loss sustained by the mortgagee. The mortgagors took advantage of the Bundelkhand Encumbered Estates Act (Act I of 1903). Notices to claimants were issued in accordance with the provisions of that Act. Ganga Bishan, the mortgagee of the property from the proprietors, took no steps to realize the amount due to him under his mortgage of the 26th of June, 1885. Basdeo did prefer a claim, but that claim was rejected on the ground that he was merely a sub-mortgagee and therefore his remedy was against his sub-mortgagor and not against the proprietor. Subsequently Basdeo was ejected from the property. He then preferred the suit out of which this appeal has arisen for recovery of the damages sustained by him by reason of his being dispossessed. Both the lower courts passed a decree in his favour. But upon second appeal the learned judge of this court from whose decision this appeal under the Letters Patent has been preferred, came to the conclusion that Basdeo was guilty of negligence in not having preferred an appeal against the order of the special judge rejecting his claim, and that not having done so, he cannot recover against his sub-mortgagor upon the special covenant entered into in his mortgage deed. We are wholly unable to agree with our learned brother in his decision. Ganga Bishan gave an absolute covenant to Basdeo undertaking to compensate him for any loss which he might sustain by reason of his dispossession during the period of the mortgage. He was dispossessed. It was for Ganga Bishan rather than for Basdeo to take the proper steps before the special judge for enforcement of the mortgage of the 26th of June, 1885. Whether it was open to Basdeo or not to appeal against the order of the special judge, it was certainly open to Basdeo to rely upon the absolute covenant contained in his mortgage deed and to hold his sub-mortgagor responsible for the loss which he sustained by reason of his dispossession. We accordingly allow the appeal. We set aside the decree of the learned judge of this court and restore the decree of the lower appellate court. The respondent must pay to the appellant all the costs incurred in the High Court.

Appeal decreed.