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MUHAMMAD
BAKARv.
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BAKAR ALI
KHAN.

be dismissed with costs. And their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants:—*T. L. Wilson and Co.*

Solicitors for the first respondent:—*Barrow, Rogers and Nevill.*

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February 12.

APPELLATE CIVIL.

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

RAM DIAL AND OTHERS (DEFENDANTS) v. NARPAT SINGH (PLAINTIFF). *
Act (Local) No. II of 1901 (Agra Tenancy Act), section 20 (2)—Civil Procedure Code (1882), section 265—Occupancy holding—Mortgage of occupancy holding and appurtenant house—Mortgaged property not saleable.

Where an occupancy tenant purported to mortgage (1) a grove, which was his occupancy holding, and (2) a house appurtenant to such holding, *Held* that having regard to section 20 (2) of the Agra Tenancy Act, 1901, and section 265 of the Code of Civil Procedure (1882) neither the grove nor the house could be sold in execution of a decree on the mortgage.

THIS was a suit for sale upon a mortgage, dated the 26th of September, 1898, executed by the defendants Nos. 1 to 3 in favour of the plaintiff. The mortgage bond provided for payment of the amount secured by it by instalments covering a period of twelve years. The plaintiff alleged that default had been made in the payment of one of the instalments, and claimed the amount of all the instalments remaining unpaid. He also prayed for the sale of the mortgaged property, which consisted of a grove, admittedly the occupancy holding of the mortgagors, and a dwelling house and inclosure, which they occupied as such occupancy tenants. The court of first instance (Munsif of Bulandshahr) granted the plaintiff a decree for only one of the instalments, in respect of which default had been made, and dismissed the remainder of the claim, including the claim for sale. The lower appellate court (Additional Subordinate Judge of Aligarh) modified the decree of the court of first instance and made a decree for the whole amount claimed. It upheld the first court's finding that the mortgaged grove was not liable to

* Second Appeal No. 145 of 1908, from a decree of Mubarak Jishi, Additional Subordinate Judge of Aligarh, dated the 13th of December, 1907, reversing a decree of Mubarak Hussain, Munsif of Bulandshahr, dated the 31st of July, 1907.

sale, but it was of opinion that the dwelling house could be sold. The defendants appealed to the High Court.

Babu *Parbati Charan Chatterji*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for sale brought upon a mortgage, dated the 26th of September, 1898, executed by the defendants Nos. 1 to 3 in favour of the plaintiff. The mortgage bond provides for payment of the amount secured by it by instalments covering a period of twelve years. The plaintiff alleges that default has been made in the payment of one of the instalments and he claims the amount of all the instalments remaining unpaid. He also prays for the sale of the hypothecated property, which consists of a grove, admittedly the occupancy holding of the mortgagors, and a dwelling house and enclosure in which they reside as such occupancy tenants. The court of first instance granted to the plaintiff a decree for only one of the instalments in respect of which default had been made, but it dismissed the remainder of the claim, including the claim for sale of the mortgaged property. The lower appellate court has modified the decree of the court of first instance and made a decree for the whole of the amount claimed. In its judgement it upheld the first court's finding that the mortgaged grove was not liable to sale, but it was of opinion that the dwelling house could be sold. In the decree which was prepared there is, however, an order for the sale of all the mortgaged property including the grove.

In this appeal the first contention raised on behalf of the appellants is that the plaintiff is not entitled to claim the amounts of unpaid instalments. Having regard to the terms of the mortgage we are unable to accede to this contention. Under the mortgage-deed the mortgagee is given the right to claim all the instalments in the event of default being made in the payment of any one of them. The court below was therefore right in making a decree for the instalments which remained unpaid.

It is next contended that the decree for sale of the dwelling house of the mortgagors is contrary to the provisions of section 266 of the Code of Civil Procedure of 1882, which exempts the materials of the dwelling house of an agriculturist from attach-

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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.

1910
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.