

## APPELLATE CIVIL.

1912

December, 4.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tuilball.*

KAMTA PRASAD (DEFENDANT) v. PANNA LAL (PLAINTIFF).\*

*Act (Local) No. II of 1901 (Agra Tenancy Act), sections 28, 29, 30 and 34—  
Expropriatory tenant—Mortgagee from expropriatory tenant holding over  
after ejection of mortgagor—Rent not fixed by agreement or by a decree of  
the Court—Right of zamindar to recover rent.*

G. and H. were zamindars who owned some *sir* land and an occupancy holding. They executed a usufructuary mortgage of their *sir* land and occupancy holding in favour of K. and the predecessor of J. In execution of a money decree against G. and H. their zamindari rights were sold and P. purchased the same. Subsequently, in execution of a decree for arrears of rent, P. got G and H. ejected by the Revenue Court. Later on P. got K. and J. the mortgagees also ejected by the Revenue Court. P. then brought a suit against K. and J. for arrears of rent for the period between the ejection of G. and H. and their own ejection.

*Held* that P. was not entitled to recover the rent in regard to the period of time between the two ejections as the rent had not been fixed either by agreement between the parties or by a decree of court.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are stated in the judgement under appeal, which was as follows :—

"This and the connected appeal No. 343 of 1911 arise out of two suits brought by the respondent Panna Lal for arrears of rent under the following circumstances. Godha and Hamir Singh owned certain zamindari shares to which some *sir* lands appertained. They had also an occupancy holding in another share of which they were not proprietors. On the 10th of March, 1897, they executed a usufructuary mortgage of their *sir* and occupancy lands in favour of Kamta Prasad and Malkhan. The rights of Malkhan subsequently vested in Jhandu. In execution of a money decree against Godha and Hamir Singh their zamindari rights were sold by auction and were purchased by the plaintiff Panna Lal. On the 6th of September, 1906, Panna Lal sued Godha and Hamir Singh for arrears of rent of the *sir* land. Kamta Prasad and Jhandu were not parties to this suit. On the 15th of September, 1906, the claim of Panna Lal was decreed, the defendants Godha and Hamir Singh having filed a confession of judgement. On the 29th of November, 1906, these persons were ejected from the holding. Kamta Prasad, however, continued in possession, and accordingly, on the 25th of August, 1909, Panna Lal sued him and Jhandu in the Revenue Court for ejection. They set up their mortgage, but the court of first instance held that they were tenants without rights of occupancy and ordered their ejection. From the order of the court of first instance they appealed first to the Commissioner and afterwards to the District Judge. The

\*Appeal No. 52 of 1912 under section 10 of the Letters Patent.

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latter held that the appeal was time-barred and dismissed it. From the decision of the District Judge, the application for revision, No. 4 of 1912, which has just now been decided, was filed. That application having been dismissed, the order of the District Judge has become final, and necessarily the order of ejection made by the Assistant Collector on the 12th of March, 1910, has become final. In pursuance of this order Kamta Prasad and Jhandu have been ejected. On the 22nd of March, 1910, Panna Lal brought the two suits out of which this and the connected appeal arise for arrears of rent for the period between the date of the ejection of Godha and Hamir Singh and that of the ejection of Kamta Prasad and Jhandu. The claim was decreed by the court of first instance and the decision of that court was affirmed by the lower appellate Court. The first contention in this appeal is that the mortgage of the *sir* lands included a mortgage of the proprietary rights in those lands and that, therefore, the purchase by the plaintiff was subject to the mortgage in favour of Kamta Prasad and Malkhan and the present suit for arrears of rent could not be brought against the appellant. As to this the terms of the mortgage deed of the 10th of March, 1897, clearly show that what was mortgaged was only the right to cultivate the *sir* lands and the lands held as an occupancy holding. The proprietary rights in the *sir* lands were not included in the mortgage. The mortgage deed in specific terms recites that it was a mortgage of the right to cultivate (*haq kash*), so that it was a mortgage of the right to cultivate the *sir* lands. As after the sale of the zamindari, the *sir* lands ceased to be *sir*, the mortgage may be deemed to have attached to the exproprietary rights acquired by Godha and Hamir Singh on the sale of the zamindari right. Therefore Kamta Prasad and Jhandu became, as regards the *sir*, mortgagees of the exproprietary rights. For non-payment of arrears of rent the mortgagor having been ejected, their rights as mortgagees determined with the determination of the exproprietary tenancy. If the mortgagees wished to maintain the exproprietary rights, they ought to have paid the rent payable in respect of the exproprietary holding and they ought to have paid off the amount on the decree passed against the exproprietary tenants. There was no obligation on the landholder to sue the mortgagees. He properly sued his tenants and obtained a decree for rent and for non-payment of the amount of the decree he took out ejection proceedings and thereby determined the tenancy, so that, as regards the *sir* lands, the appellant cannot contend that his rights as mortgagee still subsist. As I have said above, the appellant was ejected under the decree passed by the Assistant Collector on the 12th of March, 1910, but during the interval between the determination of the tenancy and the final ejection of the defendant appellant he remained in possession. He was allowed to continue in possession, and, as the courts below find that his possession must be deemed to have been that of a tenant on the same rent on which Godha and Hamir Singh held the lands, it was not necessary to sue to assess him with rent. As pointed out above, upon the determination of the tenancy the mortgage also determined, and subsequently to such determination the mortgagees must be deemed, as held by the Revenue Court, to have been the plaintiff's tenants. As such tenants they were liable to pay rent, and it is reasonable to infer that their tenancy was one on the understanding that the rent which their mortgagors paid should be paid by them. In my opinion the view taken

by the court below is right and this appeal must fail. I, accordingly, dismiss it with costs."

Against this decision an appeal was preferred under section 10 of the Letters Patent.

Munshi *Girdhari Lal Agarwala*, for the appellant.

Munshi *Benode Behari*, for the respondent.

RICHARDS, C. J., and TUDBALL, J. :—The facts out of which this and the connected appeal No. 51 of 1912, have arisen are set out at length in our judgement in L. P. A. No. 49 of 1912. Those two appeals arise out of the two suits for rent therein mentioned.

We find it impossible to hold that the plaintiff respondent is entitled to recover the rent which he claims in regard to the period of time between the two ejections. Admittedly no rent was fixed as between the present parties, either by agreement or by decree of court. Section 34 of the Tenancy Act (II of 1901, Local) clearly does not, and was never intended to, apply to the circumstances of the present case. It relates to the case of a person taking possession for the purpose of cultivating as a tenant without the consent of the landholder.

Here the present appellant defendant took possession with the full consent of the landholders Jodha and Hamir Singh in the year 1897. It is true that the latter by operation of law became the exproprietary tenants and have been ejected and that the appellant continued to occupy the land. Section 34 clearly does not apply.

Section 28 of the Act applies to the case of a sub-letting by a tenant before the commencement of the Act or a sub-letting subsequent to the Act in accordance with the provisions thereof. In the present case there was no sub-letting prior to the Act by a tenant and there has been no sub-letting since the Act came into force, in accordance with the provisions thereof. This section, therefore, does not apply.

Where the tenant has sub-let, otherwise than in accordance with the provisions of the Act, section 29 applies. It gives the landholder the option of enforcing or not the covenants between the tenant and sub-tenant. In the present case the plaintiff respondent is not seeking to enforce any such covenant; nor was there any sub-letting subsequent to the acquisition by Jodha

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and Hamir Singh of their exproprietary rights, unless we hold that mortgage operated as a sub-lease with effect from the date of the acquisition of exproprietary rights. Section 30 of the Act merely states that the interest of a sub-tenant ceases with the extinction of the interest of the tenant for whom he holds. The plaintiff does not in the present suit seek to enforce the terms of the contract between the appellant and Godha and Hamir. He puts them entirely on one side. Therefore we can find no provision in the law which enables him to enforce, as against the appellant, the contract between himself and the exproprietary tenants.

Unless he is entitled to recover this rent by some provision of the law, in the absence of a contract between the parties, or a decree of court, he is not entitled to recover it.

For these reasons we must hold that the suit fails. We allow the appeal. The suit will stand dismissed with costs in all courts.

*Appeal allowed.*

*Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.*

BHAGWATI PRASAD (PLAINTIFF) v. BHAGWATI PRASAD AND  
OTHERS (DEFENDANTS)\*.

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*Act (Local) No. III of 1901 (United Provinces Land Revenue Act), sections 111, 112, 233 (k)—Partition—Hindu law—Joint Hindu family—Minor—No necessity for minor to be specially represented in partition proceedings.*

Where a partition of the property of a joint Hindu family in which one of the members was a minor was found to have been properly carried out with due regard to the interests of the minor, it was *held* to be no ground for upsetting the partition, were such a course possible having regard to section 233 (k) of the United Provinces Land Revenue Act, 1901, that the minor was not represented in the partition proceedings by a formally appointed guardian. In such circumstances a minor member of the family is suitably represented by the managing member or members.

THIS was a suit for a declaration that the plaintiff was not bound by certain partition proceedings. The facts are fully set forth in the judgement. Shortly they were as follows :—

The proceedings were instituted by the defendants against the plaintiff and other members of his family. The plaintiff was a minor when those proceedings were instituted. No guardian was formally appointed to represent the plaintiff, but the major

\* Second Appeal No. 626 of 1911 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 1st of May, 1911, reversing a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakhpur, dated the 26th of November, 1910.