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February, 21.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

GHURA (DEFENDANT) v. SHITAB KUNWAR (PLAINTIFF),*

Expropriatory tenant—Mortgage of sir land followed by a perpetual lease of the same—Sale of mortgaged property in execution of decree—Rights of auction purchaser as against perpetual lessee.

Certain sir land was mortgaged by the owner, who thereafter, pending a suit for sale on the mortgage, granted a perpetual lease of the mortgaged property. The mortgaged property was sold in execution of a decree for sale on the mortgage, and the auction purchaser sued to eject the perpetual lessee.

Held that the auction purchaser was not entitled to a decree for physical possession as against the lessee, though, if the lease was fraudulent, she was entitled to the rent which the expropriatory tenants ought to pay for the land in suit.

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

“The dispute in this appeal relates to two parcels of land, known respectively as No. $\frac{106}{1}$ sir land and No. 336 a piece of *khudkash* land on which there stand some trees. The plaintiff Musammat Shitab Kunwar purchased these plots at public sale in execution of a decree held by one Musammat Anandi Kunwar, and possession was given her by the amin of the court on the 30th of December, 1910. While the suit was pending which led up to the decree for sale one Musammat Keola, on her own account and on account of minor sons of whom she was guardian, executed a perpetual lease of the same property in favour of one Musammat Ghura and got it registered.

Musammat Shitab Kunwar challenges the deed as collusive. The deed is dated the 28th of May, 1908, and at that date there was a “lis” pending about this same property between Musammat Anandi Kunwar and Hanuman Das and another. Musammat Keola is the wife of Hanuman Das. She says that Musammat Ghura is a mere trespasser and the present suit is for the ejectment of Musammat Ghura and for damages.

“The court of first instance found the collusion alleged proved; held Musammat Ghura to be a trespasser, and decreed Shitab Kunwar’s suit with damages. The lower appellate court held that Musammat Keola had no right to grant the perpetual lease so as to be valid and binding on Musammat Shitab Kunwar. The lease could not take precedence over the registered mortgage in enforcement of which the property was sold. It, however, held that the plaintiff could not get actual possession over the plots in question. This could only be got by a suit for ejectment in a Revenue Court. Moreover, as the plots were the sir

*Appeal No. 89 of 1913 under section 10 of the Letters Patent.

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and *khudkasht* holding of Hanuman Das for more than twelve years prior to the mortgage and sales, Hanuman Das and his heir had by reason of the auction sale acquired ex-proprietary rights. Musammât Ghura, the court held, stepped into the shoes of Hanuman Das, by virtue of the lease enforceable up to the date of the auction sale. It accordingly refused to give a decree for damages and varied the decree of the court of first instance into a decree for proprietary possession subject to ex-proprietary rights, if any, subsisting in favour of Hanuman Das and his legal representatives.

"This decree has pleased neither party. Musammât Shitab Kunwar contends that—

(1) Musammât Ghura is a trespasser and appellant is entitled both to actual possession and damages.

(2) She did not step into the shoes of Hanuman Das.

(3) The court should not have considered the rights of the heirs of Hanuman Das, those rights were not in issue in the present case.

"Musammât Ghura objected, under order XLI, rule 22. She contended that the doctrine of *lis pendens* cannot apply to No. 336; that the lease cannot be regarded as fraudulent; that the condition restraining alienation is null and void, and that the suit is not cognizable by a civil court.

"These objections may be at once put aside. I agree with the view taken by the lower court which has considered them all.

"The learned vakil referred me to the case of *Sham Das v. Batul Bili* (1). I do not think that this case has any bearing on the matters before me. In fact it has only any bearing if the lower appellate court was right in going into the question of the rights which Hanuman Das and his heirs might have become possessed of. In my opinion the lower appellate court was wrong in going out of its way in deciding this question, which was never raised before but it was invented by itself. Hanuman Das and his heirs were no parties to the appeal, and in view of the finding of the court of first instance, with which I agree, that Musammât Ghura was a trespasser, I hold that the appeal prevails. I decree the appeals, set aside the judgement and decree of the lower appellate court and restore that of the court of first instance with costs."

From this judgement the defendant appealed.

Munshi *Haribans Sakai*, for the appellant.

Babu *Sarat Chandra Chaudhri*, for the respondent.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit for ejectment from two plots of *sir* land. It appears that the owner of the property made a mortgage. A decree for sale of the mortgaged property was made in the first instance granting a decree for sale of one of the two plots, and after some further litigation a decree for sale of the proprietary rights in the two plots. Whilst this litigation was pending, the representative of the mortgagor made a perpetual lease in favour of the defendant.

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The plaintiff, who purchased under a sale held in execution of the decree, brings the present suit for physical possession of the two plots, alleging that the perpetual lease was fraudulent and collusive. It is quite clear as a general rule that a plaintiff in a suit for ejectment claiming physical possession must show a right to possession against all the world. It, therefore, becomes of importance to see whether, if the perpetual lease had never been made, the plaintiff would have been entitled to a decree for physical possession against the mortgagor. The Tenancy Act provides that when a proprietor's proprietary right is sold he *ipso facto* becomes an ex-proprietary tenant of his *sir*. This is a right which neither the court nor the proprietor himself can take away or give up. Consequently it is clear that the plaintiff would not have been entitled to a decree for possession against the mortgagor. This being so, it is clear that she cannot have a decree for possession against the present appellant. She is, no doubt, assuming the lease to be fraudulent, entitled to the rent which the ex-proprietary tenant ought to pay for the two plots. In our opinion the decree of the lower appellate court was under the circumstances a proper decree, and we accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower appellate court. We think under the circumstances (particularly as both parties contested the propriety of the decree of the lower appellate Court) that each party should bear his own costs in this court.

Appeal allowed.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Ryves and Mr. Justice Piggott.

TRILOKI NATH (APPLICANT) v. BADRI DAS AND OTHERS (OPPOSITE PARTIES).
Act No. III of 1907 (Provincial Insolvency Act), sections 5, 6, 15 and 16—Insolvency—Petition by debtor—Grounds for dismissing petition—Possibility of assets exceeding liabilities.

Where an insolvency petition is presented by a debtor whose debts amount to Rs. 500, and such petition fulfils the requirements of section 11 of the Provincial Insolvency Act, 1907, it is not a valid ground for dismissing the petition

*First Appeal No. 149 of 1913 from an order of Muhammad Shaif, Additional Judge of Meerut, dated the 25th of June, 1913.

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