1916

HAR CHANDI LAL v. SHEORAJ SINGH.

the mortgage of the 13th of November, 1876, if such mortgage be looked on as a contract to give security, for his attempt to create a security on Jai Chand's property admittedly failed. In their Lordships' opinion, therefore, the mortgage of the 13th of November, 1876, was in the events which happened wholly unaffected by the mortgages of 1887.

It being admitted that if the mortgage of the 13th of November, 1876, is a subsisting mortgage, it is not statute barred, the appeal succeeds, and the order of the Subordinate Judge ought to be restored with costs here and below. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents: *Barrow, Rogers and Nevill,*

J. V. W.

APPELLATE CIVIL.

1916
November, 21.

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

CHHIDDU AND ANOTHER (DEFENDANTS) *v.* SHEO MANGAL SINGH (PLAINTIFF)*.

Act (Local) No. XII of 1881 (*N.-W. P. Rent Act*), *section* 9—*Occupancy tenant—Usufructuary mortgage of holding—Relinquishment by mortgagor in favour of the zamindar.*

Where a mortgage with possession of an occupancy holding had been made by the tenant before the coming into force of the Agra Tenancy Act, 1901, it was *held* that the tenant mortgagor could not defeat the rights of the mortgagees by surrendering the holding to the zamindar.

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 are stated in the judgement under appeal, which was as below :—

"This is plaintiff's appeal in a suit for ejectment originally filed in the court of an Assistant Collector. The plaintiff is admittedly the zamindar of the land in suit. In his plaint he describes the two defendants, Chedu, son of Dan, and Chhiddu, son of Matru, Kunjras, as non-occupancy tenants of the land in suit. The defendants filed a written statement in which they described themselves as mortgagees in possession on behalf of the tenant-in-chief, who was a tenant with occupancy rights. On their plea Mithu, son of Faqira, was

* Appeal No. 31 of 1916, under section 10 of the Letters Patent.

added as a defendant. The Assistant Collector came to the conclusion that there had been a mortgage by Faqira, father of Mithu, in favour of the original defendants and that this fact alone was sufficient to oust his jurisdiction. He dismissed the suit accordingly. The District Judge was obviously inclined to the opinion that the Assistant Collector was wrong on the question of jurisdiction. He has, however, rightly remarked that the question was one which might be passed over in his court, in virtue of the provisions of section 197 of the Agra Tenancy (Local Act II of 1901). He was of opinion that he had materials on the record sufficient to determine the appeal. He has found that there was a mortgage by Faqira in favour of the original defendants, and that this fact alone was sufficient to protect the said defendants from ejectment during the period of the mortgage. The plaintiff's suit having thus been dismissed by both the courts below, it is contended in second appeal to this Court that the findings of the court of first appeal are not sufficient to dispose of the case. The facts apparent from the record are somewhat peculiar. It would seem that the land was conveyed to the fathers of the two original defendants by two distinct transactions. There was a mortgage by Faqira in the month of May, 1897, in favour of Matru for a period of fifteen years. Before this period had expired Faqira executed another mortgage in favour of Dan for a period of twenty years. The record does not show that Dan and Matru are related, though they are members of the same caste, and it would seem that their sons, the two defendants originally impleaded, are amicably in joint possession of the land in suit. After the death of Faqira there was a suit for arrears of rent against Mithu which resulted in a decree in favour of the zamindar. If the latter had proceeded to eject Mithu for non-satisfaction of this decree, the mortgagees in possession would no doubt have had an opportunity of protecting themselves by paying into court the amount of the decree money. It is not clear from the record whether any proceedings in ejectment had been commenced, but on the 29th of January, 1911, Mithu relinquished his holding in favour of the plaintiff zamindar. Subsequently Mithu himself brought a suit to get this relinquishment set aside, on the ground that it had been brought about by fraud or coercion, and this suit failed. The learned District Judge has quoted authority for the position taken up by him, that Mithu was not entitled during the pendency of the mortgage in favour of Dan, to relinquish his holding to the prejudice of the latter. It seems to me that there are two currents of opinion in this Court on this question. The matter came before a Full Bench recently in the case of *Brij Kumar Lal* v. *Sheo Krishna Misra* (1). In deciding that case the Court laid stress on certain facts which had been concluded by the findings of the court below. These were as follows:—(1) that the mortgage set up against the zamindar was for consideration and genuine; (2) that the object of the relinquishment was to defeat the mortgagee's rights. On these findings it was held that the Civil Court had rightly granted the mortgagee a declaration that the relinquishment by the tenant was ineffectual against him and an injunction restraining the zamindar from interfering with his possession. A number of authorities on the point are

(1) (1914) I. L. R., 37 All., 444.

1916

CHHIDDU v. SHEO MANGAL SINGH.

referred to by TUDBALL, J., in his order in the case of *Jaigopal Narain Singh* v. *Uman Dat* (1). It is clear that in some of the older cases of this Court, as for instance, *Rannu Rai* v. *Rafi-ud-din* (2), the position had been broadly taken up that an occupancy tenant who, prior to the coming into force of the Agra Tenancy Act (Local Act II of 1901), had made a usufructuary mortgage of his holding and put the mortgagee into possession, could not during the subsistence of this mortgage relinquish his holding to the prejudice of the mortgagee's rights.

If the principle thus broadly laid down is accepted as of universal application, it would seem that there was no necessity in the more recent ruling to which I have referred to discuss such a question as the object of the relinquishment, or the existence of collusion between the mortgagor and the zamindar. I take it that the law is finally settled to this extent, that an occupancy tenant who has mortgaged his holding under the circumstances stated and put the mortgagee in possession cannot enter into a bargain with his zamindar, so as to secure some collateral advantage for himself as consideration for the relinquishment of his holding, to the prejudice of the mortgagee whom he has himself put in possession. Whether any broader principle than this can be laid down as applicable to all cases seems to me at least open to argument. The mortgagees, by refusing or neglecting to pay rent regularly to the zamindar, might obviously put their mortgagor in a very unpleasant position It is all very well to say, as has been done in this case, that the mortgagee would be driven in the last extremity to protect the occupancy tenant from ejectment by paying into court the amount of any decree which the zamindar might have obtained against him, but there seems no good reason why the occupancy tenant, while not in possession and not enjoying any benefit from the produce of the land, should be put to the trouble of defending a series of suits for arrears of rent because the mortgagee in possession has not troubled himself to pay the rent regularly. If the conditions of the mortgage were such as to bind the mortgagee to pay rent regularly to the zamindar, I think the courts might well grant the mortgagor equitable relief against any breach of such condition and permit him to protect himself from further trouble by relinquishing his holding. Without therefore committing myself to any further attempt to define the law on this point, I think I have said enough to justify the conclusion that there should be some further findings of fact recorded before the decision of the courts below dismissing the plaintiff's suit can be affirmed. I have to consider what issues should be remitted. In argument before me it has been suggested that the mortgages in favour of Dan and Matru have not been proved in accordance with law, and that there should be a finding, both as to the factum of those mortgages, and as to the passing of consideration. It does not seem to me that any plea to this effect can fairly be read into the memorandum of appeal filed by the plaintiff in this Court; nor do I think it is a plea which I should permit to be raised at this stage The whole of the proceedings in the courts below, and the findings of both those courts, are based on the assumption that the defendants originally impleaded were placed in possession by Faqira,

(1) (1911) 8 A. L. J., 695 (2) (1904) I. L. R., 27 All., 82.

as mortgagees in virtue of a *bonâ fide* mortgage or mortgages. As a matter of fact the period of the mortgage in favour of Matru has expired, so that the only mortgage which can be set up in this case is that of 1901 in favour of Dan. As the case now stands before me I do not think it necessary or advisable to call for any finding as to whether this mortgage was legally proved or was for consideration. I think the courts below have virtually concluded these points in favour of the defendants.

"There remains the question of the transactions connected with Mithu's relinquishment. I remit the following issues to the courts below :—

(1) In relinquishing his rights as an occupancy tenant over the land in suit did Mithu obtain for himself any collateral advantage from the plaintiff zamindar, or can it otherwise be said that the plaintiff and Mithu were acting in collusion to the prejudice of the original defendants ?

(2) Were the original defendants, or either of them, as mortgagees of the land in suit, bound to pay the rent thereof regularly to the zamindar ? Were they in any way responsible for the fact that the zamindar obtained a decree for arrears of rent against Mithu ?

"As the case has not been looked at in either of the courts below from the point of view which I have taken, I think that the parties should be permitted to adduce evidence on these issues if they see fit to do so. The lower appellate court may record itself any additional evidence which the parties may offer, or cause the evidence to be taken by the court of first instance, but it must record its own findings. On return of the findings ten days will be allowed for objections."

The findings returned by the court of first appeal were (1) that there was no evidence that Mithu obtained any collateral advantage for himself from the zamindar as the price of relinquishing his rights and that there was nothing to show that the plaintiff and Mithu were acting in collusion to the prejudice of the respondent ; and (2) that the mortgagees were bound to pay the rent of the holding to the zamindar every harvest, and that their failure to pay the rent with due regularity make them responsible for the fact that the zamindar obtained a decree against Mithu.

On the return of these findings the learned single Judge allowed the appeal and decreed the plaintiff's suit with costs throughout.

The defendants appealed under section 10 of the Letters Patent.

Babu *Sital Prasad Ghosh*, for the appellants.

Munshi *Baleshwari Prasad*, for the respondent.

RICHARDS, C. J., and BANERJI, J :—This appeal arises out of a suit brought by the plaintiff to recover possession of certain

1916

CHHIDDU v. SHEO MANGAL SINGH.

property which until recently at least formed an occupancy holding. The facts have been ascertained and may very shortly be stated. Prior to the passing of the present Tenancy Act one Faqira, father of Mithu, was an occupancy tenant. He purported to make a usufructuary mortgage of the occupancy holding in favour of Chhiddu or his predecessor in title. Some time afterwards the occupancy tenant purported to relinquish his occupancy holding in favour of the zamindar, the plaintiff. The plaintiff accordingly claims that the tenancy has come to an end and that he is entitled as zamindar to resume possession. It has been found that the mortgagee was "responsible for the rent." We take this to mean that as between the mortgagor and the mortgagee, the mortgagor did not intend to pay the rent out of his own pocket. It cannot mean more than this, because the zamindar was not legally bound to accept the mortgagee as his tenant by virtue of the usufructuary mortgage. It has also been found that Mithu, when surrendering his tenancy, did not acquire "any collateral advantage." We take this to mean that it was not proved that there was any consideration for the relinquishment—that is to say, he did not receive a monetary consideration nor was he promised a new letting of the land or the letting of some other land in its place. The whole case has proceeded upon the basis that the zamindar (the plaintiff) was aware of the fact that there was a mortgage. There cannot be the least doubt that if the tenant's interest in land comprised in an occupancy holding was such that it could be legally mortgaged, the tenant, having made the mortgage, could not do any act which would prejudice the security which he pledged to the mortgagee. Further, there can be no doubt that in such a case, if the landlord knew that the tenancy had been pledged he could not accept a surrender of the tenancy. If he did so, he would be making himself a party to the fraudulent transaction of the mortgagor. The mortgagor's action in surrendering his tenancy after he had mortgaged it would undoubtedly be a fraud in equity. The only difficulty which arises in this case is due to the provisions of the Tenancy Act of 1881 and the ruling of this Court thereon. This Court had held that while an occupancy tenant could not confer any "rights of occupancy" upon his mortgagee nevertheless he could give the

1916

CHHIDDU v. SHEO MANGAL SINGH.

mortgagee a right to take possession and hold the land. The question can never arise under the present Tenancy Act, because the provisions of the old Act were amended and now it is settled law that a mortgage of, or attempt to mortgage, an occupancy holding is absolutely null and void. We think that, once we accept the proposition that an occupancy tenant under the Act of 1881, could confer some right upon his mortgagee, the principle which we have mentioned in the earlier part of our judgement at once applies, namely, that the mortgagor cannot, without committing a fraud, do anything which will prejudice the rights of his mortgagee, and that the zamindar once he knows of the existence of the mortgage cannot validly take a surrender from the tenant. The learned Judge of this Court refers to the possible trouble and expense which the tenant might suffer by reason of the fact that he might have to defend a suit or suits for rent. This is a matter which we do not think can be taken into consideration. The tenant ought to have considered the possibility of his suffering any of those things at the time he made the mortgage. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court.

Appeal decreed.

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

1916 *November*, 21.

PIARI LAL (DECREE-HOLDER) *v.* MADAN LAL AND OTHERS (JUDGEMENT-DEBTORS).*

Civil Procedure Code (1908), section 104 ; order XLIII, rule 1 ; order XXI, rule 90—Letters Patent, section 10—Appeal from order of a single Judge dismissing an appeal from an order refusing to set aside a sale.

Held that no appeal will lie under section 10 of the Letters Patent from an order of a Single Judge of the High Court dismissing an appeal from an order of an execution court under order XXI, rule 90, of the Civil Procedure Code refusing to set aside a sale.

Naim-ullah Khan v. *Ihsan-ullah Khan*, followed (1).

THIS was an application under order XXI, rule 90, of the Code of Civil Procedure made by the decree-holder to set aside upon the ground of irregularity and fraud the auction sale in execution of his decree of a cotton ginning factory. The application

*Appeal No. 29 of 1916, under section 10 of the Letters Patent.

(1) (1892) I. L. R., 14 All., 226.