

As regards the second point; under the stamp law all the executants were liable to pay the deficiency in stamp and the penalty, and having regard to the attitude taken up by the defendants in denying all the transactions regarding the Bombay suit, we do not think that the lower appellate court was wrong in making them liable for the proportionate amount of that sum. We think there is no force in this appeal and we, therefore, dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Gokul Prasad.

TULSHI RAM AND OTHERS (PLAINTIFFS) v. SAT NARAIN AND OTHERS (DEFENDANTS).*

1920
RAM SANGH
v.
SAT NARAIN.

1920
June, 15.

Occupancy holding—Mortgage—Collateral covenant for the protection of a mortgage of occupancy holdings not enforceable.

Certain occupancy holdings were mortgaged usufructually with a covenant that if the mortgagor failed to pay, or if the mortgagees were dispossessed from the property mortgaged, they would be entitled to recover the mortgage money by sale of certain other property of the mortgagor.

Held, on suit brought on this covenant by the mortgagees after dispossession, that, the mortgage of the occupancy holdings being itself illegal, the covenant fell with it, and the plaintiffs could not recover. *Ram Pratap Rai v. Ram Phal Teli* (1) and *Pooran Singh v. Jai Singh* (2) referred to. *Bajrangji Lal v. Ghura Rai* (3) and *Rajendra Prasad v. Ram Julian Bai* (4) distinguished.

IN this case one Raja Ram mortgaged with possession certain occupancy holdings for a sum of Rs. 500, the mortgage money being repayable from the profits. The mortgage also contained a covenant to the effect that, if the mortgagor failed to pay or if the mortgaged property went out of the possession of the mortgagees, the mortgagees would be entitled to recover their money by sale of three groves and a well situate in the village. The mortgagees having been dispossessed sued on the covenant. The court of first instance decreed the suit. On appeal, however, the lower appellate court dismissed it upon the ground that, the main object of the deed being to place the plaintiffs in possession

* Second Appeal No. 1098 of 1917, from a decree of Ram Chandra Chaudhri, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 15th of May, 1917, reversing a decree of Sidheshwar Maitra, Munsif of Allahabad, dated the 30th of June, 1916.

(1) (1912) 18 Indian Cases, 9.

(3) (1916) I. L. R., 38 All., 282.

(2) (1912) 17 Indian Cases, 522.

(4) (1917) I. L. R., 30 All., 539.

1920

TULSHI RAM
v.
SAT NARAIN.

of the occupancy holdings, which amounted to a transfer not recognized by law, the covenant also could not be enforced, and the suit was not maintainable. The plaintiffs appealed to the High Court.

Munshi *Gulzari Lal*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondents.

SULAIMAN and GOKUL PRASAD, JJ.:—This is a plaintiffs' appeal arising out of a suit for sale on foot of a mortgage-deed, dated the 19th of August, 1909, executed by Raja Ram for a sum of Rs. 500. The deed combines features of a usufructuary mortgage deed and a simple mortgage deed. In it certain occupancy holdings were mortgaged with possession for a term of seven years and from the produce of the holding the principal sum secured by the deed was to be repaid in instalments from 1318 fasli to 1324 fasli. In case of failure to pay the sum, or if the occupancy holding went out of the possession of the mortgagee, the deed provided that the mortgagee would be entitled to recover his mortgage money by sale of three groves and a well situate in the village. The plaintiffs' case was that having been dispossessed from the occupancy holdings they are entitled to recover the money by sale of the hypothecated property. Several pleas were taken in defence, one of them being that, the mortgage being one of an occupancy holding, it was void and the suit was not maintainable. The court of first instance decreed the suit. The lower appellate court, however, has dismissed it on the ground that the main object of the deed was to place the plaintiffs respondents in possession of the occupancy holding, which amounted to a transfer not recognized by law, and the suit was therefore not maintainable. The plaintiffs have come up in second appeal to this Court and it is contended on their behalf that the mortgage deed must be split up into two parts; that although the deed, so far as it was a mortgage of the occupancy holding, was not enforceable, nevertheless there was nothing to prevent the plaintiffs from enforcing their remedy as against the groves and the well, which were saleable.

In our opinion the mortgage deed embodies one single transaction. The main purpose of the deed was to mortgage the

occupancy holding, and it was provided that, in the event of the mortgagee not obtaining possession of the occupancy holding, he would be entitled to recover his mortgage money with interest by sale of the other property detailed therein. The effect of this deed really was to make a mortgage of the occupancy holding with an indemnity clause entitling the mortgagee to recover his money in another way prescribed therein. In our opinion it is impossible to split up the deed into two distinct parts. The whole deed embodies one single transaction, and the right to recover the amount by sale of the groves and the well is dependent upon, and comes into existence after the failure of the mortgāgor to give effect to the mortgage of the occupancy holdings which, in our opinion, is not enforceable. This case is very much similar to the case of *Ram Pratap Rai v. Ram Phal Teli* (1), where “*A* had advanced a loan to *B* under an agreement that if *B* failed to pay *A* the interest from year to year, *B* will put *A* in possession of an occupancy holding, the transfer of which was forbidden by law. In the agreement there was a covenant of indemnity that in case of failure to put *A* in possession, *A* might sue for principal and interest.” PIGGOTT, J., held that the plaintiff was not even entitled to sue upon what may be described as a covenant of indemnity, that is, a stipulation that in case of failure to put *A* in possession, *A* might sue for principal and interest; and he held that the alternative promise was really incapable of being separated altogether from the illegal portion of the agreement. In the present case, as the deed is worded, it is quite clear that it was intended primarily to be a mortgage of the occupancy holding. The right to recover the amount of the principal and interest by sale of the other property was made dependent on the failure of the mortgagors to put the mortgagee in possession of the occupancy holding. The two portions of the deed, in our opinion, are inseparable. If the plaintiff cannot compel the mortgagor to put him in possession of the occupancy holding, he is not entitled to recover the money on the ground that the mortgagor has failed to carry out the illegal part of the contract. In the case of *Pooran Singh v. Jai Singh* (2)

1920

TULSHI RAM
v.
SAT NARAIN.

(1) (1912) 18 Indian Cases, 9.

(2) (1912) 17 Indian Cases, 522.

1920

TULSHI RAM
v.
SAT NARAIN.

Mr. Justice Chamier held that where *P* executed a bond in favour of *J* and on the same date gave him a lease of his occupancy holding, that the two documents formed really one transaction, the plaintiff was not entitled to recover the money on the bond because a lease of the occupancy holding was illegal and the two transactions could not be separated from each other. On behalf of the appellant reliance is placed on the case of *Bajrangi Lal v. Ghura Rai* (1). In that case the plaintiff had first executed a sale deed of his occupancy holding and also his fixed-rate holding for consideration, and then brought a suit to set aside the sale on the ground that the transaction was illegal inasmuch as the transfer of an occupancy holding was void. The High Court held that, so far as the fixed-rate holding was concerned, the suit could not be decreed. In case of a sale out-and-out, if it so happens that part of the property conveyed is not saleable, the whole sale cannot be bad. The inclusion of a property which is not saleable will of course not prevent the passing of the interest in the other property to the vendee. Further, the Court seems to have been of opinion that the plaintiff himself could not come to court and ask for a declaration that the deed executed by him was illegal. In the case of *Rajendra Prasad v. Ram Ratan Rai* (2) there was a mortgage of occupancy and fixed-rate holdings prior to the passing of the present Tenancy Act. The plaintiff brought a suit for sale of the fixed-rate holding only. It was held that such a suit was maintainable and that the relief against the fixed-rate holding could be enforced. This was a case in which both occupancy and fixed-rate holdings had been mortgaged jointly. The court held that it was open to the mortgagee to give up part of his security and enforce his claim as against the other. The charge on the fixed-rate holding could very easily be separated from that purported to have been created on the occupancy holding. That case is, therefore, clearly distinguishable from the present case where the mortgage was primarily one of occupancy holding only, and it was only in the event of the mortgagee not retaining possession of the occupancy holding that a right was given to him to realize his money by sale of the other property; this

(1) (1916) I. L. R., 33 All., 232. (2) (1917) I. L. R., 39 A. II., 539.

right could come into force only on the failure of the mortgagor to carry out the illegal contract of transferring his occupancy holding to the plaintiff. In our opinion the view of the lower appellate court is correct. The appeal fails and is hereby dismissed with costs.

1920

TULSHI RAM
v.
SAT NARAIN.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Gokul Prasad.

JAWAHAR BANO AND ANOTHER (DEPENDANTS) v. SHUJAAT HUSAIN BEG AND OTHERS (PLAINTIFFS) AND KAZIM ALI BEG (DEPENDANT).^{*}
Civil Procedure Code (1908), order XLI, rule 33—Decree against three defendants—Appeal by two only, the third not being made a party to the appeal—Jurisdiction of appellate court to modify decree in favour of the non-appealing defendant.

1920
June, 17.

A decree was passed for varying amounts against three defendants, of whom two only appealed, the third not being made a party to the appeal.

Held that it was competent to the appellate court to modify the decree in favour of the defendant who had not appealed by decreasing the whole sum due to the plaintiffs against the defendants who had. *Rangam Lal v. Jhandu* (1) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Munshi *Narain Prasad Ashthana*, for the appellants.

Munshi *Girdhari Lal Agarwala* and Maulvi *Iqbal Ahmad*, for the respondents.

SULAIMAN and GOKUL PRASAD, JJ. :—These two connected appeals are appeals by the defendants in suits for profits under section 165 of the Tenancy Act against their co-sharers. It is admitted that the plaintiffs are entitled to a $\frac{1}{6}$ share of the total profits.

Second Appeal No. 1296 arises out of a suit which was brought on the 21st of July, 1916. The suit was decreed partly against Kazim Ali Beg and partly against Musammats Jawahar Bano and Mumtaz Bano. Musammats Jawahar Bano and Mumtaz Bano appealed to the District Judge without

^{*} Second Appeal No. 1298 of 1917, from a decree of Jagat Narain, First Additional Judge of Aligarh, dated the 28th of July, 1917, modifying a decree of Zain-ud-din, Assistant Collector, First class, of Aligarh, dated the 15th of January, 1917.