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SINGH
v.
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SINGH.

They set out to prove a specific case that nothing of any kind had happened as alleged in the plaint. They undoubtedly are found by the learned District Judge to have failed to prove that case.

In appeal it has been argued that all that the appellants had to do for the purpose of proving the falsity of the accusation was to put in the judgment of the criminal court which terminated in their acquittal. We do not, however, accept this view. In the words of BOWEN, L. J., in *Abrath v. The North-Eastern Railway Company* (1), "In an action for malicious prosecution the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made."

In any circumstances, we cannot disturb the finding of the learned District Judge. We accept his view that in the circumstances of this particular case the plaintiffs had failed to surmount their first obstacle inasmuch as the evidence which they produced in support of their case was unworthy of belief and did not establish their innocence. We would, therefore, dismiss this appeal with costs.

Appeal dismissed.

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March, 17.

Before Mr. Justice Lindsay and Mr. Justice Stuart.

HAR PRASAD TIWARI (PLAINTIFF) v. SHEO GOBIND TIWARI
(DEFENDANT).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 20—Act No. IX of 1872 (Indian Contract Act), section 24—Occupancy holding—Mortgage—Suit on personal covenant to pay.

The mortgage of an occupancy holding being void in its entirety, it is not open to the mortgagees to sue for a money decree on the basis of a personal covenant to pay contained in such a mortgage. *Kanhai v. Tilak* (2), *Murli-dhar v. Pem Raj* (3) and *Bhawani Prasad v. Ghulam Muhammad* (4), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

* Second Appeal No. 828 of 1920, from a decree of Abdul Hasan, Subordinate Judge of Jaunpur, dated the 2nd of March, 1920, confirming a decree of Nand Lal Singh, Munsif of Jaunpur, dated the 7th of December, 1918.

(1) (1883) L. R., 11 Q. B. R., 440 (455). (3) (1899) I. L. R., 22 All., 205.

(2) (1912) 16 Indian Cases, 42.

(4) (1895) I. L. R., 18 All., 121.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Haribans Sahai*, for the respondent.

LINDSAY and STUART, JJ.:—We have heard the learned counsel for the appellant in this case and we think the appeal ought to fail. The facts are that the defendant respondent, Sheo Gobind Tiwari, made three mortgages of property in favour of the plaintiff on successive dates. These mortgages were usufructuary mortgages, and in the case of the first two the property mortgaged was admittedly portions of an occupancy holding. In the third mortgage the property consisted partly of fixed-rate tenancy and partly of occupancy holding. It appears that after these mortgages were executed, two-thirds of the mortgaged property was lost to the mortgagee owing to its being discovered that the mortgagor had a right in these properties only to the extent of one-third. Having thus been deprived of a portion of the mortgage security, this suit was brought by the plaintiff, purporting to be a suit under section 68 of the Transfer of Property Act. The plaintiff asked for a simple money decree. Both courts have refused to give him one, on the ground that the mortgage contracts were void, being forbidden by the provisions of the Agra Tenancy Act. It has been argued before us that, inasmuch as there was a personal covenant in each of these mortgages the plaintiff was entitled to resort to those covenants and to ask at least for a simple money decree. It seems that when these mortgage-deeds were executed, a covenant was entered into by the mortgagor on behalf of himself and his successors in interest, whereby he undertook to pay interest at the rate of 2 per cent. per mensem on the principal sum in case the mortgagee lost possession owing to any default on the part of the mortgagor. We may mention here that the arrangement was that the mortgagee was to be in possession under these mortgages in lieu of interest.

It appears to us that the decision of the courts below ought to be upheld, and we have an authority directly in point in this case in a decision of Mr. Justice CHAMIER which is reported at page 42 of volume XVI of the *Indian Cases*, (*Kanhai v. Tilak*). That case purports to follow the decision of a Full Bench in *Murlidhar v. Pem Raj* (1). That Full Bench ruling in turn

(1) (1899) I. L. R., 22 All., 205.

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followed the ruling of a Division Bench in *Bhawani Prasad v. Ghulam Muhammad* (1). It is true that both these latter cases related to transactions of sale. Those were cases in which the vendee sought to get back the purchase money from his vendor when it was found that possession could not be obtained inasmuch as the transaction involved the transfer of *sir* land and the relinquishment of ex-proprietary rights. We agree with the view taken by Mr. Justice CHAMIER in the case above-mentioned that to enforce an agreement of this kind would be contrary to the provisions of section 24 of the Contract Act. Under that section the entire contract is deemed to be void, and that being so, the personal covenants upon which the plaintiff relies in this case and which are embodied in these three mortgage bonds, must fall along with the contract of mortgage. The decision of the court below must be upheld. The appeal fails and is dismissed with costs.

Appeal dismissed.

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March, 17

*Before Sir Grimwood Mears, Knight, Chief Justice, and Justice
Sir Pramada Charan Banerji.*

KARAMAT ALI AND ANOTHER (DEFENDANTS) v. THE GORAKHPUR
BANK, LIMITED (PLAINTIFF).*

*Mortgage—Contribution—Liability of auction purchaser of part of mortgaged
property.*

Certain property which was subject to a mortgage was sold in execution of a simple money decree and was purchased by three separate purchasers in equal shares. Purchaser No. 2 then mortgaged his share to a Bank, which brought a suit on its mortgage and having obtained a decree, became the purchaser of that one-third share. The original mortgagees then brought a suit for sale on their mortgage. As to purchaser No. 1, they agreed to release his share on payment of Rs. 1,333-5-4 and also agreed to compensate him for any additional amount which he might be made to pay on account of the decree. As to purchaser No. 3, his share was sold by auction and realized Rs. 4,200. As to the Bank, its share was also sold by auction and realized Rs. 10,000 and the decree was satisfied. The Bank then sued purchasers Nos. 1 and 3 and the mortgagees for contribution.

Held that the plaintiff had no claim either as against the mortgagees or as against purchaser No. 3, but only as against purchaser No. 1 in whose case the suit had been dismissed and plaintiff had not appealed. *Shanto Chandar*

* First Appeal No 403 of 1919, from a decree of Gobind Prasad, Subordinate Judge of Azimgarh, dated the 19th of September, 1919.

(1) (1895) I. L. R., 18 All., 121.