Tenancy Act a lease is hardly a transfer of proprietary interest in land, for the Act speaks of leases by landholders to tenants and by tenants to sub-tenants. Even a thekadar has been defined as a farmer or other lessee of proprietary rights and not as a transferee of proprietary rights in some form or another, and in chapter XIII, more particularly in section 220, it is provided that suits between a thekadar and his lessor shall be instituted in the revenue court. Although a thekadar is not expressly included in the definition of tenant, the provisions relating to tenants apply in the majority of cases to thekadars as well. It will, therefore, be inappropriate to say that when a defendant admits that the plaintiff is the proprietor of the holding and the defendant is a thekadar a question of proprietary right is in issue between the plaintiff and the defendant claiming such right. We, therefore, think that the view taken by the learned District Judge is correct and our order is that the appeal be returned for presentation to the Commissioner. As we indicated before, the attitude taken by the defendant was inconsistent, and we direct that the parties will bear their own costs of this reference.

Before Mr. Justice Ismail

1939
May, 5

PRABHU DAYAL (APPLICANT) *v.* LALDAS MAGANLAL AND OTHERS (OPPOSITE PARTIES)*

Civil Procedure Code, order XXXIX, rules 1, 2— *Injunction to stay another suit* inter partes *pending in a court outside the province—Jurisdiction of High Court to stay such suit—Inherent jurisdiction—Civil Procedure Code, section* 151— *Equitable grounds—Filing of mortgage suit in another province for the purpose of avoiding the operation of the U. P. Agriculturists' Relief Act—Whether illegal or inequitable.*

A mortgage comprising properties situate within the United Provinces as also properties outside those provinces was executed in 1934. The mortgagor, claiming to be an agriculturist within the meaning of the U. P. Agriculturists' Relief Act, brought a suit under section 33 of the Act at Agra in which he claimed the benefit of reduction of interest. While

*Application in F. A. F. O. No. 86 of 1939.

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this suit was pending, the mortgagee brought a suit in Bombay for the enforcement of the mortgage. The question then arose whether the court at Agra, and on appeal the High Court, could grant an injunction restraining the mortgagee from proceeding with his suit in Bombay:

Held that the injunction could not be granted under the provisions of order XXXIX, rules 1 and 2, of the Civil Procedure Code because they did not apply to the case, inasmuch as the enforcement of a valid mortgage could not be characterised as an attempt to waste or damage the property and no question arose of a wrongful sale in execution of a decree as the mortgagee had not yet obtained any decree, and the bringing by the mortgagee of a suit on his mortgage was not committing an injury of any kind.

Apart from the provisions of the Civil Procedure Code, however, the High Court had inherent power to restrain a party from proceeding with a suit in another court. But the only justification for the exercise of this equity jurisdiction by the Court would be that a party within reach of its jurisdiction was doing something which was against its notions of equity. In the present case the action of the mortgagee could not be characterised as illegal or even improper. He was within his rights in instituting the suit on his mortgage in Bombay in a court which would not recognize the provisions of the U. P. Agriculturists' Relief Act. There was no justification for restraining him from claiming his legal rights under the mortgage from the Bombay court.

Mr. *G. S. Pathak,* for the applicant.

Dr. *S. N. Sen* and Mr. *M. L. Chaturvedi,* for the opposite parties.

ISMAIL, J.:—This is an application by Pandit Prabhu Dayal under order XXXIX, rules 1 and 2 and section 151 of the Civil Procedure Code. The facts that have given rise to this application may be briefly stated. It appears that the applicant executed an equitable mortgage on 14th May, 1930, in favour of Seth Lal Das for a large sum of money. The properties hypothecated under this mortgage were situate within the United Provinces. On 9th October, 1934, the applicant executed another mortgage in favour of Seth Lal Das and his wife. In this mortgage some properties outside this province were also included. The principal and interest due under the bond of 14th May, 1930, formed

part of the consideration of the later mortgage. It was stated in the deed that in consequence of the execution of the second mortgage the first mortgage was satisfied and discharged. Under the terms of the mortgage deed the applicant was required to pay a certain amount periodically on account of interest due under the mortgage. It is stated by the applicant, and this statement is not disputed, that the applicant paid the instalments till April, 1938. Since then the payment of interest has been withheld. The applicant states that he was advised that he was paying a higher rate of interest than what he was bound to do as an agriculturist according to the provisions of the Agriculturists' Relief Act. He therefore called upon the creditors to render accounts to the applicant. As the creditors failed to render accounts a suit was filed by the applicant under section 33 of the Agriculturists' Relief Act in the court of the Civil Judge, Agra, on the 5th of March, 1937. On the objection of the mortgagees the plaint was returned for presentation in the court of the Munsif of Agra. The plaint was then presented in the latter court on 10th February, 1938. While this suit was pending, in October, 1938, the mortgagees brought a suit at Bombay for the enforcement of the mortgage of 1934. It is assumed for purposes of this application that the Bombay High Court has got jurisdiction to try the suit instituted by the mortgagees. The applicant made an application to the Munsif of Agra for the issue of an injunction restraining the mortgagees from proceeding with the Bombay suit. The Munsif rejected the application but the learned District Judge granted it. Ultimately the suit pending in the court of the Munsif under section 33 of the Agriculturists' Relief Act was dismissed. The applicant then filed an appeal from the decision of the trial court in the court of the District Judge which is still pending. The injunction granted by the District Judge having come to an end with the termination of the suit the applicant applied to the District Judge for

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the issue of an *ad interim* injunction. This application, however, was rejected. The applicant has filed a first appeal from order to this Court against the order of the District Judge refusing to grant injunction. This appeal has not been admitted yet. The applicant after filing the appeal made an application for the issue of a temporary injunction pending the disposal of the appeal. This was granted on the 17th of March, 1939, by a learned Judge of this Court and notice was issued to the opposite party to show cause why the *ex parte* order granting a temporary injunction may not be confirmed. The opposite party has now appeared and contests the application of the applicant on several grounds. I have heard learned counsel for the parties at considerable length and I now proceed to consider some of the points raised at the Bar.

Learned counsel for the opposite party contends that the suit instituted by the applicant under the Agriculturists' Relief Act is not maintainable as some of the properties hypothecated are situate outside the United Provinces. In support of this contention reliance is placed on a Bench ruling of this Court in *Wahid Uddin* v. *Makhan Lal* (1). In that case properties in Meerut and Delhi were hypothecated by an agriculturist. The mortgagor brought a suit under section 33 of the Act. The learned Judges held that the suit was not maintainable as the mortgage was indivisible and some of the properties were outside this province to which the provisions of the Act did not apply. Learned counsel for the applicant has attempted to distinguish this ruling. In my opinion it is not proper for me to express any opinion on the merits of the case. This is a question that will have to be considered later. It is urged by learned counsel for the opposite party that the suit in Bombay is for the enforcement of the second mortgage, while the suit under section 33 of the Act refers to the mortgages of 1930 and 1934 both. It is urged that the mortgage of 1930 does not subsist while

(1) I.L.R. [1938] All.781.

the suit with reference to the second mortgage is not maintainable in view of the ruling cited above. This again is a matter which will have to be determined later if the appeal filed by the applicant is admitted. It may be mentioned that the ruling of the Bench would be binding on me as a single Judge. As stated above I am not prepared to enter into the merits of the case.

The next point stressed by learned counsel for the mortgagees is that order XXXIX, rule 1 has no application to the facts of the present case and that this Court has no jurisdiction to issue an injunction restraining the mortgagees from seeking their legal remedy in the Bombay High Court. Learned counsel for the applicant contends that his application is covered by order XXXIX, rules 1 and 2. I now proceed to examine the aforesaid rules. Rule 2 provides: "In any suit for restraining the defendant from committing a breach of contract or *other injury of any kind* . . . ." The words "any kind" have been added in the present Code of Civil Procedure. They were absent in the old Code. In *Darab Kuar* v. *Gomti Kuar* (1) it was held that section 493 applied to suits restraining a defendant from committing a breach of contract or injuries akin to breaches of contract. The learned Judges declined to grant an injunction restraining the defendant from interfering in the management of the properties in dispute. This ruling, however, is no longer good law in view of the addition of the words "of any kind". The question is whether the lawful exercise of a right vested in a person can be legally restrained by the court under this rule. In my opinion this cannot be done. It must be conceded that the mortgagees have as much right to bring a suit in Bombay as the applicant has got a right to institute a suit at Agra. The mortgagors want to take advantage of a local legislation which is enacted exclusively for the benefit of the agriculturists. The mortgagees on the other hand are anxious to enforce the terms of a contract solemnly entered into by the

(1) (1900) I.L.R. 22 All. 449.

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parties. It is impossible to hold that the action of the mortgagees is illegal or dishonest. In my judgment rule 2 does not help the applicant.

Coming to rule 1, I find it difficult to hold that the property in suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. The mortgagees have not yet obtained a decree and therefore no question of execution arises. The enforcement of a mortgage can never be characterised as an attempt to waste or damage any property. Sub-clause (*b*) obviously has no application. In my opinion therefore rule 1 in terms does not apply.

It may be urged that apart from the provisions of the Code this Court has power to restrain a party from proceeding with a suit in another court. This view has been taken in several cases in Bombay. In *Narayan Vithal Samant* v. *Jankibai* (1) a Full Bench of the Bombay High Court held that a single Judge sitting on the Original Side is competent under section 151 of the Code of Civil Procedure to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge's court in the mofassil and so in effect stay the proceedings. The suit for the enforcement of the mortgage, however, is not pending in a court subordinate to this Court and therefore this ruling is inapplicable. A similar view was taken in *Mulchand Raichand* v. *Gill & Co.* (2). In *Naik* v. *Balvant Sitaram* (3) it was held that the Bombay High Court had jurisdiction in the plaintiff's suit to pass an order restraining the defendant from proceeding with his suit in the Hyderabad courts. The facts were that the defendant filed a suit in Hyderabad State, being a resident of that State, against the plaintiff and subsequently the plaintiff filed another suit against the defendant in the Bombay High Court. The subject matter of the suit was the same and the defendant

(1) (1915) I.L.R. 39 Bom. 604. (2) (1919) I.L.R. 44 Bom. 283.
(3) A.I.R. 1927 Bom. 135.

entered appearance in the plaintiff's suit without protest and also made a counter claim. On these facts an injunction restraining the defendant was issued. This case no doubt shows that the High Court has got inherent jurisdiction apart from the provisions of the Code. In *Venechand* v. *Lakhmichand Manekchand* (1) PRATT, J., observed: "There is no doubt as to the jurisdiction of this Court to restrain a party within its jurisdiction from prosecuting a suit in a foreign court. The principle on which this jurisdiction is exercised is set forth in the judgment of Lord CRANWORTH in the case of *Carron Iron Co.* v. *Maclaren* (2). It is that 'The court acts *in personam* and will not suffer any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be in point of locality beyond its jurisdiction'."

It will be observed that the only justification for the exercise of the equity jurisdiction by this Court is that a party to the suit is doing something which is against its notions of equity. The question therefore is whether the mortgagees in this case are guilty of any such conduct. After giving my very serious consideration to the able arguments advanced by learned counsel for the parties I am unable to say that the action of the mortgagees can be characterised as illegal or even improper. The legislature in its wisdom has thought it fit to grant reliefs to a certain class of persons. In conferring such a right the terms of the contract entered into between the parties are to be ignored. Even the provisions of other enactments are superseded by this special enactment. The applicant is fully entitled to claim benefit of the provisions of the Act and no reasonable objection can be raised against his attempt to obtain a reduction of interest payable under the bond. On the other hand the mortgagees cannot be blamed for instituting a suit for the enforcement of their mortgage in a court which will not recognize the provisions of the local Act. In

(1) (1919) I.L.R. 44 Bom. 272. (2) (1855) 5 H.L.C. 416(436).

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my judgment the opposite party is within his rights in instituting the suit in Bombay and should not be restrained from taking such a course.

There is no doubt that the institution of two parallel suits in two courts may lead to complications which if possible should be avoided. It is for the applicant to take such steps as may be open to him. This Court however will not be justified in restraining one of the parties from claiming his legal remedy. An order of injunction no doubt will be helpful to the applicant, but it will manifestly be detrimental to the interest of the opposite party. In my opinion there is no justification for such a discrimination.

In the result I discharge the temporary injunction and dismiss the application with costs. I direct that the record be sent immediately to the court below to enable the applicant to proceed with his appeal.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Collister

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May, 8

NANDLAL BHANDARI MILLS (APPLICANT) *v.* COMMISSIONER OF INCOME-TAX (OPPOSITE PARTY)*

Income-tax Act (XI of 1922), sections 42(1), 43—"Agent"—"Business connection"—Selling agents at Cawnpore appointed by managing agents of a cloth mill at Indore—Income accruing to the managing agents out of the sales at Cawnpore—Assessment of the Cawnpore agents as "agents" of the non-resident managing agents.

The Nandlal Bhandari Mills, Ltd., Indore, was a cloth manufacturing company. The company appointed the firm of Nandlal Bhandari and Sons, Indore, as managing agents for the sale of the cloths manufactured by the company, the remuneration being a fixed allowance and a commission on the sale proceeds, the commission to be paid annually when the accounts of the company were made up. The firm of managing agents accordingly opened a branch of the company at Cawnpore, known as Nandlal Bhandari Mills, Ltd., Cawnpore, for the sale of the company's cloth. The Income-tax Officer, treating the branch at Cawnpore as the "agents", within the meaning of section 43 of the Income-tax Act, of the non-resident firm of Nandlal Bhandari and Sons, Indore,

*Miscellaneous Case No. 375 of 1937.