

are of opinion that the *suleh-nama* was within s. 257A of the Civil Procedure Code, and that the order of the Judge of Gorakhpur of the 12th January, 1882, is a legal and proper one. With these remarks in reply to the reference made to us we leave the appeal for disposal to the Division Bench.

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SITA RAM
v.
DASRATH
DAS.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

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March 21.

GANGA DIN AND ANOTHER (DEFENDANTS) v. DHURANDHAR SINGH (PLAINTIFF).*

Landholder and tenant—Usufructuary mortgage by occupancy-tenant—“Transfer”—Act XII of 1881 (N.-W. P. Rent Act), s. 9.

A mortgage with possession by an occupancy-tenant of his cultivatory holding is a “transfer” within the prohibition of s. 9 of the N.-W. P. Rent Act, 1881.

THE facts of this case were that sometime prior to 1873, Babadin and Sahai, defendants in this suit, who were occupancy tenants of certain land, mortgaged it to Pragdin, also a defendant in this suit, giving him possession. By a deed, dated the 17th September, 1873, Pragdin sub-mortgaged a portion of the land to Tulshi, also a defendant in this suit, and gave him possession thereof. The material portion of that deed was as follows:—“The said Tulshi shall remain in possession of the mortgaged land, and pay the rent thereof; I shall redeem the mortgaged land at the end of the month of Jaith in any year. I pay in a lump sum Rs. 150 in cash to the aforesaid Tulshi; the mortgagee shall have no claim to the interest nor I to the profits.” On the 19th June, 1880, the defendants Babadin and Sahai transferred for a period of ten years their right to redeem the mortgage in favour of Pragdin to the plaintiff in this suit Dhurandhar Singh. The material part of the deed of the 19th June, 1880, was as follows:—“We have received the full and complete mortgage-money from the said mortgagee: we therefore covenant and record that the mortgagee shall by paying Rs. 72 in the month of Jaith of the current year to Pragdin, mortgagee, obtain redemption of the mortgaged cultivatory holding: that by obtaining possession thereof as a mortgagee he may

* Second Appeal No. 342 of 1882, from a decree of J. M. C. Steinbelt, Esq., Judge of Banda, dated the 16th January 1882, reversing a decree of Kazi Wajeh-ullah Khan, Subordinate Judge of Banda, dated the 10th September, 1882.

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cultivate it himself or get it cultivated by some other tenant and pay its rent and enjoy its profits and bear the loss or may sub-mortgage it if he likes: we or our heirs shall have no objection: that after expiry of ten years we will redeem our mortgaged cultivatory land at the latter end of the month of Jaith in any year that we pay in a lump sum Rs. 150 in cash to the mortgagee aforesaid: the mortgagee shall not claim interest, nor shall we claim mesne profits." Dhurandhar Singh brought this suit against Babadin (1), Sahai (2), Pragdin (3), Ganga (4), nephew of Tulshi, and Tulshi (5), claiming possession of the land as mortgagee. The first three defendants did not appear. Ganga and Tulshi defended the suit, their defence raising the question whether, with reference to the provisions of s. 9 of the N.-W. P. Rent Acts, 1873 and 1881, the mortgage by the defendants Babadin and Sahai to the plaintiff of their occupancy holding was valid or not. This question raised the point whether a usufructuary mortgage is a transfer within the meaning of s. 9 of the Rent Acts, XVIII of 1873 and XII of 1881. The lower appellate Court held on this question that "a mortgage was a temporary and not a permanent transfer," and therefore did not come within the prohibition contained in the above-named section. On second appeal by the defendants Ganga and Tulshi the same point was raised. The Divisional Bench before which the appeal came for hearing (STRAIGHT and BRODHURST, JJ.) referred the point to the Full Bench, the order of reference being as follows:—

STRAIGHT, J.—The Full Bench reference in *Badri Nath v. Parbat* (1) and *Gopal Pandey v. Parsotam Das* (1) does not cover the point raised by this appeal. We therefore refer to the Full Bench the following question:—Is a mortgage of a cultivatory holding by an occupancy-tenant under which possession is giving to the mortgagee for a term of years within the prohibition of s. 9 of the Rent Acts of 1873 and 1881?

Babu *Beni Prasad* and Munshi *Kashi Prasad*, for the appellants.

Mr. *Howell*, for the respondent.

The following opinions were delivered by the Full Bench :—

STUART, C. J.—In the order of reference in this case it is stated that the Full Bench reference in *Badri Nath v. Parbat* (1) and *Gopal Pandey v. Parsotam Das* (1) did not cover the point raised in the case then referred. I suggested at the hearing that the reasoning used by our answers in those cases appeared to me equally to apply to the present reference, the only difference being that in the former the transfer was a simple mortgage, whereas in the present case it is a mortgage for a term of years, or, in other words, a usufructuary mortgage for such a period. In fact, in my remarks proposing the reference in *Badri Nath v. Parbat* (1) I said : “ It was admitted at the hearing before Brodhurst, J., and myself that a usufructuary mortgage by an occupancy-tenant to a stranger mortgagee was as a transfer bad under s. 9 of the Rent Act.” That is exactly the state of things expressed in the referring order now before us, and my answer is that a mortgage of a cultivatory holding by an occupancy-tenant is within the prohibition of the Rent Acts of 1873 and 1881.

STRAIGHT, OLDFIELD, BRODHURST, and TYRELL, JJ.—We are of opinion that a mortgage with possession by an occupancy-tenant of his cultivatory holding is a transfer within the prohibition of s. 9 of the Rent Act, 1881.

APPELLATE CIVIL.

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March 27.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.
ZAFARYAB ALI AND OTHERS (PLAINTIFFS) v. BAKHTAWAR SINGH
(DEFENDANT).*

“*Wakf*” property—*Suit relating to public charity—Civil Procedure Code, s. 539—Religious endowment—“Religious institution”—Act VI of 1871 (Bengal Civil Courts Act), s. 24—Muhammadan Law.*

Certain Muhammadans sued to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and the sale of the mortgaged property in execution of that decree, and for the demolition of buildings erected by the purchaser, and the ejection of the purchaser.

* Second Appeal No. 914 of 1882, from a decree of H. G. Keene, Esq., Judge of Saharanpur, dated the 16th May, 1882, reversing a decree of Maulvi Muhammad Said Khan, Munsil of Muzaffarnagar, dated the 17th March, 1882.