

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan.

NAGESHAR TEWARI AND ANOTHER (PLAINTIFFS-APPELLANTS) v. GUDAR SINGH AND OTHERS (DEFENDANTS-RESPONDENTS).*

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July, 19.

Transfer of Property Act (IV of 1882), section 52—Lis pendens, doctrine of—Lease by mortgagor during pendency of suit for sale by mortgagee, validity of.

A lease of immovable property by the mortgagor in favour of a third party during the pendency of a suit by the mortgagee for the relief of sale is void by reason of the rule of *lis pendens*. The lease must be deemed to have created no rights in the lessee as against the mortgagee decree-holder who also becomes the purchaser of the property.

Mr. Radha Krishna, for the appellants.

Mr. Hyder Husain, for the respondents.

HASAN, J. :—This is the plaintiffs' appeal from the decree of the Additional Subordinate Judge of Sultanpur, dated the 11th of January, 1927, affirming the decree of the Munsif of Amethi, dated the 16th of June, 1926.

The plaintiffs' case, which has failed in the courts below, is that they held the two plots in suit under a simple mortgage from Gudar Singh, defendant No. 1, Rup Narain Singh, predecessor-in-interest of Jaggu Singh and Sheonath Singh, defendants Nos. 2 and 3 respectively, and Nimar Singh (now deceased) uncle of Gudar Singh, Jaggu Singh and Sheo Nath Singh, that they put the mortgage in suit for the relief of sale, that the court of first instance dismissed the suit on the 14th of June, 1913, but on appeal the decree of that court was reversed and a decree for sale was made in their favour on the 22nd of October, 1913, and that the two

*Second Civil Appeal No. 131 of 1927, against the decree, dated the 11th of January, 1927, of Krishna Nand Pandey, Additional Subordinate Judge of Sultanpur, affirming the decree, dated the 16th of June, 1926, of Syed Hasan Irshad, Munsif of Amethi at Sultanpur, dismissing the suit.

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plots were then put to sale and purchased by the plaintiffs and possession thereof was delivered to them on the 2nd of September, 1920. It is further said that Nagai, defendant No. 4, obstructs the plaintiffs from the enjoyment and actual occupation of the plots in suit on the basis of a perpetual lease executed by the mortgagors in his favour in July, 1913. This conduct of Nagai is said to have given cause of action for the relief of possession of the plots in suit.

Having regard to the defence raised by the lessee the courts below have refused to grant the relief of possession on the ground that they had no jurisdiction to do so and as to any relief of declaration they have further held that it was barred by the provisions of article 120 of schedule I of the Indian Limitation Act.

According to my judgment the courts below have gone entirely astray in the decision of this case. The perpetual lease of July, 1913, was the only foundation on which the defence rested and the plaintiffs impugn its validity on the ground that it was void for the reason that it was executed during the pendency of the suit for sale already referred to. The courts below without deciding the issue as to whether the lease was affected by the doctrine of *lis pendens* or not decided the issues as to jurisdiction and limitation and dismissed the suit. This was clearly placing the cart before the horse. As to whether the relief of possession could or could not be granted by the civil courts and whether the suit was barred by any rule of limitation are questions the answers to which entirely depend on the decision of the question as to whether the lease was void by reason of the rule of *lis pendens* or not.

On the facts stated above, there is no doubt that the lease is void for that reason. According to section 52 of the Transfer of Property Act, 1882, the two plots in question could not be "transferred or otherwise dealt

with by any party to the suit so as to affect the rights of any other party thereto under any decree which may be made therein." It follows that the lease must be deemed to have created no rights in the lessee as against the decree-holder who eventually also became the purchaser of the plots in suit. Nagai, therefore, cannot be given the status of a lessee under the lease in question as against the plaintiffs and the relief for possession can be granted in this suit, if not otherwise barred.

Having held that the lease in question is of no effect against the rights of the plaintiffs it must further be held that the substantial relief in the suit was one of possession and not of declaration of any right or of cancellation of the lease. It is agreed that the relief for possession is not barred by any rule of limitation and, if not otherwise barred also, it should have been granted.

I, therefore, reverse the decrees of the courts below and as those decrees have disposed of the suit upon a preliminary point and there still remain more issues for decision and as the decrees of those courts are hereby reversed in appeal I remand the case to the court of first instance (through the lower appellate court) with directions that the suit be re-admitted under its original number in the register of suits and that such of the issues as have not been decided in this order shall be decided by that court and the suit shall be disposed of according to law. Costs in this Court will be paid to the appellants by the respondents. Other costs will abide the event.

Case remanded.

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