

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Acting Chief Judge and
Mr. Justice Gokaran Nath Misra.

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January, 17.

SARFARAZ SINGH (DEFENDANT-APPELLANT) v. DEPUTY COMMISSIONER, MANAGER, COURT OF WARDS, ESTATE AJODHIA, DISTRICT GONDA (PLAINTIFF-RESPONDENT).*

Oudh Rent Act (XXII of 1886), section 127—Decree for arrears of rent as well as for ejectment passed under section 127 Oudh Rent Act—Appeal to Civil Court against the decree for ejectment—Guardian ad litem not properly appointed after due notice to minor but conducting the case properly on behalf of minor—Minor, if entitled to challenge the result of the suit for want of proper appointment of guardian—Occupancy rights, extinguishment of—Mortgagee of occupancy rights, position of, after extinguishment.

Where a suit was brought against the appellant treating him as a tenant under section 127, Oudh Rent Act, and the rent was determined and a decree was passed for arrears of rent as well as for ejectment, *held*, that the decree for rent passed in such a case was appealable to the civil courts along with the appeal against the decree for arrears of rent and that no separate appeal would lie to a court of revenue against the decree for ejectment. *Ram Bahadur Singh v. Dharam Raj Singh* (1) relied upon.

It is now a settled rule of law that if a minor is sufficiently represented in a suit and his guardian, though not properly appointed, conducts the suit on behalf of the minor in a proper manner the minor cannot be allowed to challenge the result of that suit by alleging that at the time of the appointment of the guardian *ad litem* of the minor no notice thereof was given to him.

Where an occupancy tenant mortgages his holding and the occupancy tenure is extinguished by virtue of relinquishment or ejectment the interest of the mortgagee in respect of that

*Second Rent Appeal No. 50 of 1928, against the decree of Saiyid Asghar Hasan, District Judge of Gonda, dated the 2nd of May, 1928, confirming the decree of M. Ghulam Jilani, Assistant Collector, First Class, District Gonda, dated the 9th of August, 1926, decreeing the plaintiff's claim.

(1) (1928) 5 O. W. N., 1127.

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holding also ceases from that date. The position of the mortgaggee thereafter would be either that of a trespasser or that of a tenant if so recognized by the landlord.

Ram Racha Dube v. Gokul Rai (1), *Musammat Naubat Bibi v. Raghubar Koeri* (2), *Mohammad Sher Khan v. Ram Dhari Rai* (3), and *Haji Hansai Khan v. Faujdar Khan* (4), referred to.

The case was originally heard by SRIVASTAVA, J., who referred it to a Bench for decision. His order of reference is as follows.

SRIVASTAVA, J.:—This is a second rent appeal arising out of a suit for arrears of rent and ejection under section 127 of the Oudh Rent Act. The claim has been decreed by both the courts below.

One of the points raised by Mr. Ghose, the learned Counsel for the plaintiff-respondent, is that the appeal so far as it was directed against the order of ejection passed by the Assistant Collector did not lie to the learned District Judge and a second appeal in respect of it does not lie to this court. The same question was raised in certain other Rent Appeals and in view of the importance of it I have referred those cases to a Bench of two Judges. They are Rent Appeals Nos. 27 to 30 of 1928.

The learned Counsel for the defendant-appellant also questions the soundness of certain decisions of the Board of Revenue and of the decision of the late Judicial Commissioner's Court, in the case of *Lal Jagdis Bahadur Singh v. Sheoraji* (5) which have been relied upon by the lower appellate court. He contends that the ejection of the *qabzadar* cannot affect the rights of the mortgaggee under a mortgage created before the ejection. This question also is one of considerable importance. I, therefore, certify this case as a fit one for being heard by a

(1) (1914) 25 I. C., 201.

(2) (1920) 4 U. D., 38.

(3) (1922) 5 U. D., 230.

(4) (1927) Revenue Cases, 422.

(5) (1903) 6 O. C., 289.

Bench of two Judges under section 14(2) of the Oudh Courts Act, 1925.

Mr. *Naimullah*, holding brief of Mr. *Hyder Husain*, for the appellant.

The Government pleader Mr. *H. K. Ghose*, for the respondent.

HASAN, A.C.J., and MISRA, J. :—This appeal arises out of a suit for arrears of rent brought under section 127 of the Oudh Rent Act (XXII of 1886) by the Court of Wards, Ajodhya estate, against Sarfaraz Singh the appellant. The suit was decreed by the Assistant Collector of Gonda on the 9th of August, 1926, and while passing the decree for arrears of rent he passed a decree for ejectment of the appellant also. This decree has been confirmed on appeal by the learned District Judge of Gonda on the 2nd of May, 1928. The appellant has now appealed to this Court.

The facts of the case are that the land in suit consisted of the occupancy holding of two minors, named Raghuraj and Ram Raj. The land had been mortgaged to the appellant Sarfaraz Singh under various deeds, some of which were executed by one Ramnidh, uncle of the minors, and others were executed by Musammat Hubraji, their mother. The minors failed to pay rent and on the 1st of September, 1919, a decree for arrears of rent was obtained by the Court of Wards against the said minors under the guardianship of their mother Musammat Hubraji. The decree remained unsatisfied and on the basis thereof the Court of Wards brought a suit for ejectment of the minors from the said holding and obtained a decree on the 30th of September, 1920. The mortgagee was not made a party to either of these two suits and he continued to remain in possession. In June, 1923, the Court of Wards took out execution proceedings and took delivery of possession of the said hold-

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ing. In spite of the decree for ejectment against the tenants and in spite of the delivery of possession through court the appellant continued to remain in possession. The Court of Wards thereupon brought the present suit on the 23rd of March, 1926. They treated the appellant as a tenant under section 127 of the Oudh Rent Act and claimed a decree for arrears against him and also prayed for his ejectment. The rent was determined and as stated above a decree for the amount so found was passed against the appellant and a decree for ejectment was also passed against him.

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When the appeal came on for hearing before a single Judge of this Court a preliminary objection was taken on behalf of the respondent that no appeal lay to this Court against the decree of the courts below so far as it directed the ejectment of the appellant. The contention was that an appeal against a decree for ejectment would lie to a Court of Revenue and not to a Civil Court. The learned Judge of this Court thereupon referred this case for decision of a Bench of two Judges and the case has now been laid before us.

Regarding the preliminary objection we may state that this very point was raised in Rent Appeal No. 22 of 1928 which has been decided by a Bench of this Court and will be found reported in *Ram Bahadur Singh v. Dharam Raj Singh* (1). It has been held in that case that the decree for ejectment passed in such cases is appealable to the Civil Courts along with the appeal against the decree for arrears of rent and that no separate appeal would lie to a Court of Revenue against the decree for ejectment. The learned Counsel for the respondent accepts this decision for the purposes of this appeal. The preliminary objection fails and is, therefore, rejected.

As to the merits the learned Advocate for the appellant has raised three points in support of his appeal;

(1) (1928) 5 O. W. N., 1127.

firstly that the tenure in suit is not an occupancy tenure, but is an under-proprietary tenure conferred upon the ancestors of the mortgagors under a settlement decree dated the 31st of January, 1872; *secondly* that the decree for ejectionment is not a valid decree and is in any case not binding upon the appellant since he was no party to the ejectionment suit brought against the mortgagors by the Court of Wards and *thirdly* that the Court of Wards have accepted rent from the appellant and it was not open to them to treat him as a tenant under section 127 of the Oudh Rent Act.

As to the first point we have carefully read the decree of the Settlement Court. After its perusal we are of opinion that it did not confer any under-proprietary rights and that the rights which were conferred under it upon the ancestors of the minors named above consisted only of occupancy rights. The judgment clearly states that the claimants failed to establish any proprietary or under-proprietary right in respect of the 8 annas share of the village in which these lands are situate. After that declaration it is clear that when the Settlement Court decreed *qabzadari* rights they meant only heritable and non-transferable rights and not rights in the nature of an under-proprietary tenure. We, therefore, reject the first contention.

As to the second contention the argument, that was addressed to us was of a two fold character. One was to the effect that the decree is not valid and binding on the minors since no notice of the appointment of their guardian was given to them in the suit in which the decree for ejectionment was passed and the other was to the effect that the appellant not being a party to that decree it could not be considered binding upon him.

As to the first argument it appears to us that it cannot be sustained since in our opinion the mother of the

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minors actually contested the suit and the interests of the minors were sufficiently protected during the trial of that suit. It is now a settled rule of law that if a minor is sufficiently represented in a suit and his guardian, though not properly appointed, conducts the suit on behalf of the minor in a proper manner the minor cannot be allowed to challenge the result of that suit by alleging that at the time of the appointment of the guardian *ad litem* of the minor no notice thereof was given to him. The argument, therefore, fails.

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As to the second argument we may state that it has also no force. It is now settled by a series of decisions that where an occupancy tenant mortgages his holding and the occupancy tenure is extinguished by virtue of relinquishment or ejectment the interest of the mortgagee in respect of that holding also ceases from that date. This was held by PIGGOTT, J. in *Ram Racha Dube v. Gokul Rai* (1). It was a case where an ex-proprietary tenant whose tenure, we may observe, is of the same character as that of an occupancy tenant had mortgaged his holding and the question arose as to whether the rights of the mortgagee in respect of that holding could continue after the ejectment of the occupancy tenant. It was held that whatever rights were possessed by the tenant were extinguished by the ejectment and that after the ejectment the ex-proprietary tenure which formed the subject of mortgage ceased to exist. The same view has been taken by the Board of Revenue in several cases *vide Musammatt Naubat Bibi v. Raghubar Koeri* (2) decided by Messrs. HARRISON and FERARD; *Mohammad Sher Khan v. Ram Dhari Rai* (3), decided by Messrs. FREMANTLE and HOPKINS and *Haji Hansai Khan v. Faujdar Khan* (4) decided by Messrs. OAKDEN and McNAIR. We are, therefore, of opinion that the occu-

(1) (1914) 25 I. C., 201.

(3) (1912) 5 U. D., 230.

(2) (1920) 4 U. D., 38.

(4) (1927) Revenue Cases, p. 422.

pancy tenure ceased to exist when the tenants Raghuraj and Ram Raj were actually ejected in June, 1923, in execution of the decree for ejectment passed against them. The position of the mortgagee would thereafter be held either to be that of a trespasser or that of a tenant if so recognized by the landlord.

As to the third point the learned Advocate for the appellant drew our attention to several receipts on the record showing that rent had been accepted by the Court of Wards from the appellant. On examination, however, it appears that those receipts relate to a period anterior to ejectment. The Court of Wards accepted rent only on behalf of the occupancy tenant and in no way recognized the validity of the mortgage in his favour. No rent was accepted by the Court of Wards after the ejectment. The appellant had sent by money order rent for the subsequent period but the Court of Wards had refused to accept it. Under those circumstances it appears to us to be clear that the appellant has never been recognized as a tenant by the Court of Wards by virtue of acceptance of rent.

The result of all these findings is that the rights of the appellant as mortgagee of the occupancy holding came to an end when his mortgagors were ejected in 1923 and that thereafter the position of the appellant was that of a pure trespasser and the Court of Wards was justified in treating him as a tenant under section 127 of the Oudh Rent Act. The decree for ejectment has, therefore, been rightly passed. No question as to the amount of rent for which the decree was passed against him was raised in appeal.

The appeal, therefore, fails and is dismissed with costs.

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Appeal dismissed.