

making such applications clearly would not amount to an offence under section 5 of the Act.

It has also been urged that the trial is vitiated because the complainant did not deposit security as required by section 11 of the Act. The complainant was ordered to furnish security. He did furnish security which was accepted as *prima facie* sufficient, and the accused were accordingly summoned. Subsequently it was found on inquiry that the property which he had offered as security did not belong to him. The Deputy Commissioner has ordered the prosecution of the complainant for an offence under section 417 in respect of this bond. The mere fact that the security bond was found to be defective would not in my opinion vitiate the trial. It does not affect the merits of the case and it certainly did not occasion a failure of justice. This point was apparently not pressed before the learned Sessions Judge as there is no reference whatever to it in his referring order.

I therefore accept the reference so far as Gopal is concerned, set aside his conviction and sentence and direct that the fine, if paid, be refunded to him. I reject the reference so far as the other accused persons are concerned.

Reference rejected.

APPELLATE CIVIL

Before Sir C. M. King, Knight, Chief Judge

JAGMOHAN AHIR (DEFENDANT-APPELLANT) *v.* RAM
KISHEN MISIR (PLAINTIFF-RESPONDENT)

1936
April, 29

Oudh Rent Act (XXII of 1886), sections 3(18), 48, 53(2), 59 and 60—Section 59, Oudh Rent Act, scope of—Tenant withdrawing his suit to contest notice of ejectment—Landlord taking no action under section 60—Tenant, status of—Heir of statutory tenant, whether becomes trespasser after five

*Second Civil Appeal No. 332 of 1934, against the decree of Pandit Kishen Lal Kaul, Subordinate Judge of Sultanpur, dated the 6th of August, 1934, reversing the decree of Babu Bishambhar Nath Chaudhri, Munsif of Amethi at Sultanpur, dated the 27th of February, 1934.

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years—Landlord failing to eject within three years—Heir, status of—Landlord and tenant—Landlord executing usufructuary mortgage in favour of tenant—No merger of rights as mortgagee and as tenant—Tenant selling his rights as possessory mortgagee—Construction of sale-deed—“Dakhal” or “qabza”, meaning of—Vendee, if entitled to cultivatory possession.

Section 39, Oudh Rent Act, applies only to a tenant who fails to institute a suit to contest the notice of ejectment. Where, however, the tenant does institute a suit to contest the notice although he subsequently withdraws it he must be regarded as a tenant holding over and not as a trespasser unless the landlord takes steps to enforce the notice by ejectment under section 60, Oudh Rent Act. *Haraj Kunwar v. Samad* (1), followed.

The heir of a statutory tenant is entitled to retain possession of the holding as a tenant for five years. After the expiration of five years the landlord may eject him under section 53(2), Oudh Rent Act, at any time within a period of three years. If the landlord does not eject him during the period of three years then the heir acquires the status of a statutory tenant. Even during the three years, during which the heir is liable to ejectment under section 53(2), Oudh Rent Act, he is not a trespasser liable to ejectment by a Civil Court but can be ejected only in accordance with the provisions of Oudh Rent Act.

Where the landlord executed a usufructuary mortgage of the plot in favour of the tenant, the tenant's rights as mortgagee and as tenant do not merge and he remains a tenant. If he sells his rights as possessory mortgagee, his vendee is not entitled to eject him but is only entitled to possession as a usufructuary mortgagee and realize rent from the tenant and not to actual possession of the plot. The words “*dakhal*” or “*qabza*” in the sale-deed must in the context refer to possession as usufructuary mortgagee and cannot refer to cultivatory possession as a tenant as the tenancy right cannot be sold.

Mr. K. P. Misra, for the appellant.

Mr. M. L. Saksena, for the respondent.

KING, C.J.:—This is a defendant's appeal arising out of a suit for mortgagee possession of a plot of tenancy land.

The plot in suit was in the cultivation of Darshan Ahir as a tenant. In the year 1920 the landlord issued a notice of ejectment against Darshan who filed a suit to contest the notice. On the 21st of April, 1921, Darshan withdrew his suit. Probably he had come to an amicable agreement with his landlord, as the latter did not take action under section 60 of the Oudh Rent Act to eject Darshan and the finding of the Court below is that Darshan remained in possession throughout. In 1922 the landlord executed a usufructuary mortgage of the plot in favour of Darshan for a consideration of Rs.50 (exhibit 1). The position of Darshan therefore became twofold. He was both a tenant and a mortgagee in possession of the plot. I think the trial Court was right in holding that his rights as mortgagee and as tenant could not merge, and therefore Darshan remained a tenant throughout. About eight years before the present suit Darshan died and he was succeeded by his son Jagmohan, the present defendant. In 1932 Jagmohan sold his rights as possessory mortgagee to the plaintiff Ram Kishen. The plaintiff sues on the basis of this sale for actual physical possession of the plot in suit. In the alternative he claims a decree for the mortgage money by sale of the mortgaged property.

The trial Court dismissed the suit upon the view that Darshan, and after him Jagmohan, remained tenants of the plot throughout and the sale of the mortgagee rights by Jagmohan to the plaintiff did not entitle the plaintiff to eject Jagmohan as the plaintiff was only entitled to possession as a usufructuary mortgagee and was entitled to realise rent from the defendant but not to actual possession of the plot.

The lower appellate Court has taken a contrary view and has decreed the plaintiff's suit for actual physical possession of the plot in suit.

It appears to me that the view taken by the Court below is not correct. The learned Subordinate Judge has held that when Darshan withdrew his suit contest-

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ing the notice of ejection, the result, under section 59 of the Oudh Rent Act, was that the tenancy ceased with effect from the 15th day of May, 1921. The Court held that, simply by reason of holding over after that date, Darshan could not acquire the rights of statutory tenant in respect of the land in suit and could not claim to have retained such rights. The Court seems to take the view that after the 15th of May, 1921, Darshan was not a tenant but a mere trespasser. I do not think that this view is correct. It is true that section 59 of the Oudh Rent Act lays down that if a tenant on whom notice of ejection has been served fails to institute a suit to contest his liability to be ejected, his tenancy shall cease on the 15th day of May next following unless after the service the landlord has authorised him in writing to continue to occupy the land. This section does not in terms apply to the facts of this case because it applies only to a tenant who fails to institute a suit to contest the notice. Darshan did institute a suit to contest the notice, although he subsequently withdrew the suit. However, even if we take it that the position of Darshan, after withdrawing his suit, would be the same as the position of a tenant who failed to institute a suit, there is good authority for the view that Darshan must be regarded as a tenant holding over and not as a trespasser unless the landlord took steps to enforce the notice by ejection under section 60. It is admitted that no action under section 60 was taken. In support of this view I would refer to the case of *Haraj Kunwar v. Samad* (1). In that case it was held that where a notice of ejection is issued against a tenant and the notice is not contested, or if a suit is instituted to contest the notice but it is unsuccessful and the notice is upheld, in either of these cases the tenancy is determined only when the tenant actually surrenders possession of the holding or when proceedings for actual ejection are taken under section 60 of the Oudh Rent Act. Where the tenant

(1) (1930) 7 O.W.N., 330.

does not surrender possession of the holding and the landlord does not take proceedings under section 60, the tenant must be deemed to have continued as a tenant holding over and cannot be considered to be a trespasser. Following that authority I take it that Darshan's tenancy did not determine but he continued to be a tenant holding over and was entitled to be treated as a tenant unless and until ejected by due process of law.

The Court below has given another reason for holding that the defendant is not entitled to remain in cultivatory possession as a tenant. Its reasoning is that even if for the sake of argument it be held that Darshan had the rights of a statutory tenant in the land in suit at the time he took the mortgage of it, then those rights could under section 48 of the Oudh Rent Act enure for the benefit of his son Jagmohan only for a period of five years from the date of Darshan's death and the said period of five years expired before Jagmohan sold the mortgagee rights to the plaintiff. The learned Subordinate Judge takes the view that Jagmohan's rights as the heir of a statutory tenant came to an end five years after Darshan's death and for that reason he could not successfully resist the plaintiff's claim for actual physical possession of the land in suit. I think this view is also wrong. It is true that the period of five years after Darshan's death expired before the execution of the sale deed in 1932. On that date Jagmohan was the heir of a statutory tenant and he was liable to ejectment under section 53(2) but he was not a mere trespasser without any rights whatever as a tenant. The explanation given to the definition of a "statutory tenant" in section 3, clause 18 of the Oudh Rent Act reads as follows:

"A person who succeeds as an heir of a statutory tenant under section 48 shall not be deemed to be a statutory tenant unless he has obtained a patta from the landlord or has remained in occupation of the holding for three years after the expiration of the period for which he is entitled to retain occupation of the holding under section 48."

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This means that the heir of a statutory tenant is entitled to retain possession of the holding as a tenant for five years. After the expiration of five years the landlord may eject him under section 53(2) at any time within a period of three years. If the landlord does not eject him during the period of three years then the heir acquires the status of a statutory tenant. Even during the three years during which the heir is liable to ejectment under section 53(2) he is not a trespasser but a tenant and he is not liable to be ejected otherwise than in accordance with the provisions of the Oudh Rent Act. He is not liable to be ejected as a trespasser by a suit in a Civil Court. I am of opinion that the trial Court took the correct view in this case. Jagmohan was certainly a tenant when he sold the mortgagee rights to the plaintiff and he has not lost his rights of tenancy by the sale of his mortgagee rights. The sale deed in the plaintiff's favour clearly shows that the interest transferred to the plaintiff consisted of the interest of a usufructuary mortgagee. The tenancy rights were not transferable by sale. In my view the plaintiff by acquiring the rights of a usufructuary mortgagee became entitled to possession as a mortgagee and to the rent payable by the defendant, but he was not entitled to actual cultivatory possession of the plot.

It is urged that the sale deed itself provides that if the plaintiff is unable to get possession of the land then he would be entitled to recover the mortgage money with interest. The words "dakhil" or "qabza" in the sale deed must in the context refer to possession as a usufructuary mortgagee. In my opinion it could not refer to cultivatory possession as a tenant. The tenancy right was not, and could not be sold.

For the reasons given above I think the view taken by the lower appellate court is wrong and the view taken by the trial Court is right. I therefore allow the appeal with costs in this Court and the Court below and restore the decree of the trial Court.

Appeal allowed.