APPELLATE CIVIL.

Before Das and Ross, J.J.

KHARAG NARAYAN

v.

DWARKA PRASHAD SINGH.*

1924.

Feb., 12.

Occupancy Rights—Acquisition of, by zarpeshgidar, whether possible.

A person who enters into possession of land under a *zarpeshgi* lease, the primary object of the lease not being to create the relationship of landlord and tenant but to provide a security as between debtor and creditor, cannot acquire occupancy rights in the land during the period of the lease.

Ramdhari Singh v. *M. H. Mackenzie*(1), not followed.

Sheo Sahay Misir v. *Bajo Singh*(2), followed.

Bengal Indigo Company v. *Raghobur Das*(3) and *Noakes and Company, Limited* v. *Rice*(4), referred to.

Appeal by the plaintiffs.

This was a suit to enforce a mortgage bond executed by certain persons represented by defendants first party on the 18th April, 1909. The defendants, other than defendants first party, were interested in the mortgage security either as prior mortgagees and purchasers or as subsequent mortgagees and purchasers. The suit was not seriously contested by the defendants first party; defendant 13 who was both a prior and a subsequent purchaser in respect of some of the mortgaged properties raised various issues, all of which succeeded in the trial Court.

The history of the transaction between plaintiffs and the defendants first party was as follows: On the 10th January, 1901, they borrowed Rs. 200 from

* First Appeal No. 219 of 1920, from a decision of Babu Kamla Prashad, Officiating Subordinate Judge of Monghyr, dated the 31st May, 1920.

(1) (1905-06) 10 Cal. W. N. 351.

(2) (1917) Cal. W. N. (Pat.) 271.

(3) (1897) I. L. R. 24 Cal. 272; L. R. 23 I. A. 158.

(4) (1902) A. C. 24.

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the plaintiffs and executed a simple bond in their favour. It was stated that the money was borrowed to enable them to pay the Government revenue and to meet other necessary expenses. On the 4th September, 1902, there was a sum of Rs. 288 due to the plaintiffs upon the bond of the 10th January, 1901. They required a fresh advance of Rs. 462 on that day, Rs. 60 to pay off certain decrees which had been obtained against them and Rs. 402 for certain necessary purpose. On the 4th September, 1902, the defendants first party accordingly executed a mortgage bond in favour of the plaintiffs to secure an advance of Rs. 750. Out of the money borrowed they discharged the bond of the 10th January, 1901, and took a present advance of Rs. 462. The bond in suit, dated the 18th April, 1909, was executed in order to pay off the mortgage bond of the 4th September, 1902.

The learned Subordinate Judge took the view that the doctrine of antecedent debt had no application to the case and he thought that there was no legal necessity which entitled the defendants to incur the debt. He also came to the conclusion that the mortgage bond in suit was a *farzi* transaction intended to defeat or delay the claim of defendant No. 13.

Defendant No. 13 represented the interest of one Holloway who, on the 10th October, 1897, had advanced Rs. 15,400 to the defendants first party on the security of a mortgage executed in his favour in respect of certain properties. At the same time the defendants first party had also executed in favour of Holloway, as security for the loan, a lease in respect of 220 *bighas*, 9 *kathas* and 13½ *dhurs*, of *khudkasht* land for twenty years from 1305 to 1324, for the purpose of cultivating indigo.

P. K. Sen (with him *B. C. Mitter* and *S. N. Banerji*), for the appellants.

Sultan Ahmed (with him *Sheonandan Roy*, *Dhinesh Chandra Varma*, *Atul Krishna Roy* and *Lakshmi Kant Jha*), for the respondents.

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DAS, J. (after stating the facts proceeded as follows):—

In my opinion it is quite impossible to support the judgment of the learned Subordinate Judge. The mortgage in suit was clearly to discharge an antecedent debt Apart from that, the evidence is clear and convincing that the money was borrowed for purposes of necessity. In dealing with this question it must be remembered that the defendants first party have not seriously contested the claim of the plaintiffs. [His Lordships then dealt with the evidence and also came to the conclusion that the bond in suit was not a *farzi* transaction.]

The next question is whether defendant No. 13 has occupancy rights in 220 *bighas*, 9 *kathas* and 13½ *dhurs* of land comprised in the mortgage security. The claim of defendant No. 13 arises in this way: One Holloway advanced Rs. 15,400 to the defendants first party on the 10th October, 1897. As security for the money advanced, the defendants first party executed a mortgage bond in his favour in respect of certain properties specified therein. They also executed a lease in respect of 220 *bighas*, 9 *kathas*, 13½ *dhurs*, of *khudkhast* land belonging to the defendants first party. Defendant No. 13 represents the interest of Holloway. The *patta* executed by the defendants first party in favour of Holloway makes it perfectly clear that the lease was executed as a security for the loan advanced. The lease was for twenty years, from 1305-1324, for the purpose of cultivating indigo: but *Exhibit F*, the *patta*, shows that this lease was granted as a security for the loan of Rs. 15,400 advanced by Holloway to the defendants first party and that the object of the lease was not to create the relationship of landlord and tenant but to provide a security as between debtor and creditor. In my opinion *Exhibit D*, the mortgage deed, *Exhibit E*, the *ekrarnama*, and *Exhibit F*, the lease, must be taken and read as one transaction; and, when so read, there

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is no difficulty in coming to the conclusion that the transaction was a transaction between debtor and creditor, and not a transaction between lessor and lessee.

That being the governing intention between the parties to the contract, the question arises whether the lessee entered into possession in the capacity of mortgagee or in the capacity of *raiyat*. Mr. *Sultan Ahmed* on behalf of defendant No. 13 has contended before us that Holloway was already in possession as a *jotedar*. There is no evidence in support of this argument except the stray statements of Bhairo Dayal and Bansi Rai, two of the witnesses examined on behalf of defendant No. 13. There is, however, no documentary evidence in support of this evidence and I am not prepared to act upon it. Mr. *Sultan Ahmed* relied upon the case of *Ramdhari Singh* v. *M. H. Mackenzie* (1) in support of his argument that a *raiyat* by taking a *zarpeshgi* lease of land of which he was then put in possession does not divest himself of his right to acquire a right of occupancy. That decision has not been followed in the subsequent decisions of the Calcutta High Court and of this Court, and I am not prepared to follow it. It was laid down by Chapman and Atkinson, J.J., in *Sheo Sahay Misir* v. *Bajo Singh* (2) that the "primary object of the *zarpeshgi* lease is not to create the relationship of landlord and tenant but to provide a security as between debtor and creditor. That being the governing intention between the parties to the contract it is clear that the *zarpeshgidars* entered into possession in the capacity of mortgagees and not as *raiyats*; and consequently they are not entitled to claim occupancy rights although there was a letting of the land in the sense that they were required by the terms of the *zarpeshgi* lease to cultivate the lands and to pay merely a nominal annual rent." The leading case on the subject is that

(1) (1905-06) 10 Cal. W. N. 351. (2) (1917) Cal. W. N. (Pat.) 271.

of *Bengal Indigo Company* v. *Raghobur Das* (1) which lays down that where the leases are not mere contracts for the cultivation of the land but are intended to constitute and do constitute a real and valid security to the tenant for the principal sums which he had advanced, and interest thereon, the tenant's possession under the documents is in part at least not that of a cultivator only but that of a creditor operating repayment of the debt due to them by means of their security. The question, to my mind, is to see whether the relationship between Holloway and the defendants first party was that of lessor and lessee or that of mortgagor and mortgagee. As soon as we find a debt and a security for the debt, the transaction is one of mortgage, by whatever name it may be called by the parties; and once you get a mortgage, there is no difficulty in working out the rights of the parties. As Lord Macnaughten pointed out in *Noakes & Co., Ltd.* v. *Rice* (2), "Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption." Lord Macnaughten added that it followed as a necessary consequence that when the money secured by a mortgage of land was paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security. In my opinion it is impossible to hold that defendant No. 13 has acquired any rights of occupancy in these lands.

The last question is as to interest. The interest in the bond is 24 *per cent. per annum* with yearly rests. No evidence was adduced by the plaintiffs to prove that this was the market rate of interest on a transaction

(1) (1897) I. L. R. 24 Cal. 272; I. R. 23 I. A. 158.
(2) (1902) A. C. 24.

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of this nature. That being so, the interest must be calculated at the market rate of interest. We think that the plaintiffs are entitled to interest at the rate of 12 *per cent. per annum* with yearly rests.

There are various defendants who have various rights in these properties which have not been determined by the learned Subordinate Judge. Before this case is finally disposed of, the rights of these parties must be determined.

We allow the appeal, set aside the judgment of the Court below and remand the case to the learned Subordinate Judge for disposal of those issues which have not been disposed of by him and to pass a decree in accordance with this judgment. The appellants are entitled to the costs of this appeal from defendant No. 13. So far as the costs in the Court below are concerned, they are entitled to them from defendants first party and are entitled to add them to their mortgage security.

ROSS, J.—I agree.

Appeal allowed.

Case remanded.

REFERENCE UNDER THE INCOME-TAX ACT.

Before Dawson Miller, C.J., and Mullick, J.

1924.

January. 24.

MAHARAJADHIRAJ OF DARBHANGA

v.

COMMISSIONER OF INCOME-TAX.*

Income-Tax Act, 1922 (*Act XI of* 1922), *sections* 2, 4, 14 *and* 28—*Super-tax, whether payayble on dividends when already paid by the company—Agricultural income, whether includes rent for* jalkar, hats *and* ghatlagi—*Bengal Permanent Settlement Regulation*, 1793 (*Regulation* 1 *of* 1793)—*effect of—whether permanently-settled revenue-paying estates are chargeable with income-tax.*

*Miscellaneous Judicial Case No. 53 of 1923.