APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

BENI PRASAD

v.

GANGOO SINGH.*

1928.

Feb., 1.

Transfer of Property Act, 1882 (Act IV of 1882), section 66—mortgagor, lessee of, when is entitled to keep his lands against the mortgagee—lease, whether granted in the ordinary course of management—burden of proof lies on the lessee.

A tenant who is settled on the land by the mortgagor after the mortgage can keep his lands against the mortgagee upon proof, the burden whereof is upon him, that the lease in his favour was granted on the usual terms in the ordinary course of management.

Madan Mohan Singh v. *Raj Kishori Kumari* (1), *Anand Ram Marwari* v. *Dhanpat Singh* (2) and *Mathura Rai* v. *Mandil Das* (3), followed.

Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

Sir Sultan Ahmad (with him *G. N. Mukherjee*), for the appellants.

A. B. Mukherjee and *D. C. Varma*, for the respondents.

KULWANT SAHAY, J.—This appeal arises out of a suit brought by the plaintiffs appellants for recovery of possession of four bighas odd of land under the following circumstances—

Mauza Pahsara tauzi no. 1077 formed the proprietary interest of the defendants second party. The

* Appeal from Appellate Decree no. 1048 of 1925, from a decision of H. R. Meredith, Esq., I.C.S., District Judge of Monghyr, dated the 18th May, 1925, reversing a decision of Maulavi Saiyid Abdul Fath, Munsif of Begusarai, dated the 9th June, 1924.

(1) (1916-17) 21 Cal. W. N. 88. (2) (1918) 1 Pat. L. J. 568.
(3) (1920) 1 Pat. L. T. 392.

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defendants second party gave the village Pahsara in mortgage to Rai Bahadur Dalip Narain Singh excluding 51 bighas of land which contained a bungalow and some fruit trees and an open ground. On the 30th October, 1914, the defendants second party mortgaged this 51 bighas to the plaintiffs. There were two other mortgages on the 23rd December, 1914, and 18th September, 1916, of the same 51 bighas of land to the plaintiffs for further advances. The plaintiffs instituted a suit to enforce the three mortgages and obtained a mortgage decree in execution whereof the mortgaged property was sold and purchased by the plaintiffs on the 20th March, 1922. They obtained delivery of possession on the 4th August, 1922. They took actual possession of the lands sold except the four bighas and odd now in dispute in respect whereof they were resisted by the defendants first party who claimed the said four bighas odd as their occupancy holding. There was a proceeding under section 144 of the Code of Criminal Procedure in which the defendants first party were successful. They accordingly instituted the present suit for a declaration that they were entitled to khas possession of the lands in dispute and that the defendants first party had no right to remain on the land as tenants thereof.

The defence was that the defendants first party had acquired settlement of the lands in dispute from the defendants second party first orally and then under a parwana in 1915. The learned Munsif held that the settlement set up by the defendants first party had not been established and he gave a decree for khas possession in favour of the plaintiffs. On appeal the learned District Judge has set aside the decision of the Munsif and has held that the defendants first party had acquired occupancy rights in the lands in dispute. He found that the lands in dispute were not the khudkasht lands of the proprietors; that it was admitted that the defendants first party were settled raiyats of the village and he came to the conclusion that the settlement having been established they acquired occupancy rights.

In second appeal it has been contended on behalf of the plaintiffs appellants that the learned District Judge was wrong in holding that it was admitted on behalf of the plaintiffs that the defendants first party were settled raiyats of the village. It has been pointed out on behalf of the respondents that the survey khatians show that the defendants first party have got other holdings in the village and in the absence of an affidavit on behalf of the plaintiffs to show that there was no such admission before the District Judge, it must be accepted that such an admission was made before him.

It is next contended that there is no finding in the judgment of the learned District Judge as to when the settlement alleged by the defendants first party was made. The case of the defendants first party was that they acquired settlement of the land orally sometime in the year 1313 and that it was subsequently confirmed by the parwana given in 1915. The learned District Judge has not come to any distinct finding as to the time when the settlement was originally made. He says that the settlement was made at least in 1915, if not earlier. The first two mortgages of the plaintiffs appellants were in 1914 and if the settlement was made for the first time in 1915 then certain points would arise which have not been taken into consideration by the learned District Judge.

It has been contended on behalf of the appellants that a mortgagor could not make settlement of the mortgaged property so as to alter the character of the land or to create tenancies which would impair the value of the security. Reference has been made to the observations contained in *Madan Mohan Singh* v. *Raj Kishori Kumari* (1). The proposition of law laid down in that case by Mookerjee, J., is that tenants who were settled on the land by the mortgagor after the mortgage could keep their lands against the mortgagee upon proof, the burden whereof would be upon them, that the leases in their favour were granted on the

(1) (1916-17) 21 Cal. W. N. 88.

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usual terms in the ordinary course of management. In the course of the judgment the learned Judge observed as follows—

"It cannot, however, be maintained as was pointed out by Lord Justice Romer in *Reynolds* v. *Ashby* that the mortgagor has anything like a general authority to deal with or affect the mortgaged property during his possession thereof. The true position thus is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage."

This principle of law has been accepted in this Court in *Anand Ram Marwari* v. *Dhanpat Singh* (1) and *Mathura Rai* v. *Mandil Das* (2). The point was taken in the plaint in the present case that the mortgagor had no right to create the tenancies in favour of the defendants first party, so as to alter the character of the land or to impair the value of the security. This aspect of the case has not been considered by the learned District Judge. It is necessary in the first place, to find as to whether the settlement alleged by the defendants first party was made before the mortgages created in favour of the plaintiffs or after the execution of the mortgages. If it be found that the settlement with the defendants first party was made before the first mortgage of the 30th October, 1914, no question would arise and the finding of the learned District Judge that the defendants first party have acquired settlement would be sufficient to dispose of the case and the decision of the learned District Judge dismissing the suit will stand. If, however, it is found that the settlement was made after the first

(1) (1916) 1 Pat. L. J. 563. (2) (1920) 1 Pat. L. T. 892.

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mortgage of the plaintiffs of the 30th October, 1914, it would be necessary to consider whether the effect of the creation of the tenancies in favour of the defendants first party was to alter the character of the land and whether the tenancies were created in the ordinary course of management and on usual and fair terms and as was pointed out by Mookerjee, J., in *Madan Mohan Singh* v. *Raj Kishori Kumari* (1), the burden of proof lies on the defendants first party.

The decision of the learned District Judge must therefore be set aside and the case remanded to him for disposal in accordance with the observations made above. Costs will abide the result.

MACPHERSON, J.—I agree.

Case remanded.

APPELLATE CIVIL.

Before Das and James, JJ.

RAGHUNATH DAS

v.

BALESWAR PRASAD CHAUDHURI.*

1927.

August, 11.

Rent suit—some only of joint tenants impleaded—suit, whether maintainable—landlord, whether can obtain a decree for the whole rent—joint promisors, liability of—English law, whether applicable to India—Indian Contract Act, 1872 (Act IX of 1872), section 43—Collector's Land Register, landlord's name recorded in, after institution of suit but before judgment —whether sufficient compliance with law.

A suit for rent against some only of the whole body of recorded tenants is maintainable, and the landlord can obtain a money decree for the whole amount of rent against one or more of such joint tenants whose liability for the rent is joint and several.

*Appeal from Appellate Decree no. 1686 of 1924, from a decision of Babu Jatindra Nath Ghosh, Subordinate Judge of Patna, dated the 11th September, 1924, confirming a decision of Babu Jamini Mohan Mukherji, Munsif of Barh, dated the 19th July, 1923.

(1) (1916-17) 21 Cal. W. N. 88.