

damages was supported by two of the learned Judges of the Calcutta High Court.

In my opinion it is clear that the proper construction of section 179 of the Bengal Tenancy Act is that the parties have a right to contract out of the Act. I must admit that at first I was strongly attracted to the argument advanced by Sir Sultan Ahmad in opening the appeal that when once it was found that the lease related to a permanently-settled area the terms of the contract both express and implied under the general law and quite apart from all other terms of the Bengal Tenancy Act governed the situation and that, therefore, no reference could be made to any of the terms of the Bengal Tenancy Act. I am, however, convinced that the view which really led to the reference of this case to the Full Bench was erroneous.

I would dismiss this appeal with costs.

KULWANT SAHAY, J.—I agree.

JAMES, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Kulwant Sahay, J.

TULSI AHIR

v.

RAM DAS SAHU.*

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Bengal Tenancy Act, 1885 (Act VIII of 1885), section 60—rent suit by usufructuary mortgagee—mortgagee's name recorded in Collector's land register—co-sharers impleaded as pro forma defendants—claim against pro forma defendants to

* Appeal from Appellate Decree nos. 180 to 184 of 1931, against a decision of R. B. Beevor, Esq., I.C.S., District Judge of Saran, dated the 20th September, 1930, reversing a decision of Babu Bhagwan Prasad, Additional Munsif of Sewan, dated the 19th December, 1929.

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disgorge proportionate rent if received from tenant—plea of defendants that mortgagee's right to sue did not exist—section 60, whether operates as a bar.

Section 60 of the Bengal Tenancy Act, 1885, is a bar against the tenant only (in so far as it is a bar at all), and does not operate as a bar against parties from whom money is claimed on the basis of any other relationship.

Therefore, in a case where the plaintiff also seeks to recover money from a person who is alleged to have received the rent from the tenant it is open to the defendant to plead that the plaintiff's right to recover the money claimed does not exist.

R, a usufructuary mortgagee, whose name stood recorded, along with those of the proprietors, in the Collector's land register, sued the tenant for rent under section 148A of the Bengal Tenancy Act, 1885, impleading the co-sharers (who were also the mortgagors) as pro forma defendants. The claim against these pro forma defendants was that if it should be held that the tenants had paid the rent to them then they should be made to disgorge a proper proportion of the rent so received by them. Both the tenants and the pro forma defendants pleaded that the mortgagee's right to recover the rent did not exist. The finding of fact was that the plaintiff's right to sue had ceased owing to the fact that he had been out of possession for more than twelve years. The lower appellate court, however, did not entertain the plea of the defendants by reason of the provision of section 60 of the Bengal Tenancy Act and decreed the plaintiff's suit.

Held, that the facts of the case did not attract the operation of section 60.

Sheo Charan Dhobi v. Bansi Singh(1), followed.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

S. M. Mullick and *P. P. Varma*, for the appellants.

A. B. Mukharji and B. N. Mitter, for the respondents.

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COURTNEY TERRELL, C.J.—The suits out of which these appeals arise are in form suits for rent. In fact they are very clearly suits for possession by one person claiming title to the land against another. Five suits for rent were brought by the plaintiffs on this allegation that the rent was due and the pro forma defendants were added as co-sharers, the suit being brought under section 148A of the Bengal Tenancy Act, and the claim against the co-sharers was that if it should be held that the tenants had paid the rent to the pro forma defendants then the pro forma defendants should be made to disgorge a proper proportion of the rent so received by them.

The defence that was put in both by the tenant defendants and the pro forma defendants was that the plaintiffs had in fact no title to sue and the following facts were relied upon. It appears that the proprietor defendants had a 7-annas odd share in the village and in November, 1903, the proprietors gave 4 annas 10 gandas out of this 7 annas to the plaintiffs in usufructuary mortgage, but that since the year 1914 the plaintiffs had not been in possession and that the rent had been collected by the pro forma defendants from the tenant defendants and that the plaintiffs since the year 1914 had not collected a single pice of rent and in fact in the year 1919 the plaintiffs had made a complaint in writing against the pro forma defendants alleging the fact of the mortgage and alleging that they had been dispossessed in the year 1914 and threatening legal proceedings unless their possession as mortgagees was restored. Needless to say if the allegation by the plaintiffs in their complaint in the year 1919 were true by the date of these suits in 1929 the position of the plaintiffs as mortgagees in possession and as mortgagees at all had come to an end. It was found as a fact by the trial court that the rent had throughout been

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paid by the tenant defendants to the proprietors, the pro forma defendants, and that the plaintiffs had in fact been out of possession since July, 1914, and were not in the position of mortgagees in possession.

The plaintiffs in appeal to the District Judge relied upon the fact which was undenied that they had in fact been registered and were still on the register recorded as mortgagees in possession. It may be noted that the proprietors were also registered as proprietors but the plaintiffs in appeal to the District Judge relied upon section 60 of the Bengal Tenancy Act and said that the tenant defendants were not entitled to rely in defence to a suit for rent by the registered mortgagees in possession upon any receipt for rent granted by any other person. The learned District Judge acceded to this argument. He held notwithstanding the findings of fact by the trial court and accepting those findings of fact that the fact that the plaintiffs had not been in possession for more than twelve years prior to the suit was immaterial, that the plaintiffs were registered, that the defendants could not rely upon their payments of rent for the years in suit to the proprietor defendants and, therefore, that the plaintiffs were entitled to succeed and accordingly he reversed the judgment of the Munsif who had dismissed the suits.

In appeal before us it has been pointed out that section 60 of the Bengal Tenancy Act has no application to a case of this kind. Here the plaintiffs have sued both the tenant defendants and the pro forma registered proprietor defendants and have claimed a remedy against the pro forma proprietor defendants. Indeed it is that part of the remedy claimed which is the most important part of the case. It is clearly open to the proprietor pro forma defendants being sued as they are and not having been brought into court at their own choice to defend the claim made by the plaintiffs against them that they should disgorge the rent they have received by shewing that the

plaintiffs have no rights to recover that rent. An instance of that situation is afforded by the case of *Sheo Charan Dhobi v. Bansi Singh*⁽¹⁾. In that case the plaintiff as a usufructuary mortgagee sued the defendants for rent and it was pleaded that the plaintiff was not entitled to sue for rent because his name had not been registered as mortgagee and furthermore the question of his title as mortgagee was put in issue and decided against him. After that he registered his name and sued again. It was held by Mr. Justice Imam of this Court, in answer to the contention that it was not open to the tenant defendants to plead in defence that somebody else was entitled to receive the rent, that in such a case section 60 of the Bengal Tenancy Act had no application and the learned Judge said "A reading of that section clearly points out to me that it relates to the cases of those who are proprietors, managers or mortgagees of an estate. In the present case the defendants deny the position of Bansi Singh as a mortgagee." In this case not only the tenant defendants but the proprietor defendants who are the real defendants in the case deny the existence of the mortgagees' rights and the cessation of the mortgagees' rights owing to the fact that they have been out of possession for more than twelve years has been found as a fact. Authorities have been placed before us in considerable numbers in each of which the suit was against the tenant defendants alone. They were not suits brought under section 148A of the Bengal Tenancy Act nor suits in which a claim was made against persons who had received the rents from the defendants. In the case where the plaintiff seeks to recover money from a person other than the tenant it is obviously open to that person to set up in defence that the plaintiff's right to recover the money claimed does not exist. Such bar as is produced by section 60 of the Bengal Tenancy Act is a bar against the tenant only in so far as it is a bar at all. It does not operate

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as a bar against parties from whom money is claimed on the basis of any other relationship. In my opinion the judgment of the learned Judge in appeal was erroneous. He had accepted the findings of fact of the trial court and on those findings of fact it is obvious that the suits must fail. I would, therefore, reverse the decision of the appellate court and restore the decision of the Munsif and the respondents should pay the costs throughout.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

PRIVY COUNCIL.

BHUP NARAIN SINGH

v.

GOKHUL CHAND MAHTON.

*J. C.
1933.

December,
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[On Appeal from the High Court at Patna.]

Specific Performance—Contract for Sale—Subsequent Transfer by Vendor—Bona-fide Purchaser without Notice—Onus of Proof—Specific Relief Act, 1877 (I of 1877) s. 27(b).

Where the purchaser under a contract for the sale of immovable property claims under section 27(b) of the Specific Relief Act, 1877, a decree for specific performance against a person claiming title from the vendor under a subsequent registered sale-deed, the onus is upon the defendant to prove that he is a *bona fide* purchaser for value without notice of the earlier contract so as to bring himself within the exception provided by the above section.

Himatlal v. Vasudev(1), *Muhammad Sadik Khan v. Masihan Bibi*(2) and other decisions in India to the above effect, approved.

Peerkha Lalkha v. Babu Koshiba Mali(3), disapproved.

* Present: Lord Thankerton, Sir John Wallis, and Sir George Lowndes.

(1) (1912) I. L. R. 36 Bom. 466.

(2) (1929) I. L. R. 9 Pat. 417.

(3) (1928) 25 Bom. L. R. 375.