APPELLATE CIVIL.

1928.

November, 9.

Before Das and Ross, JJ.

GOSAINDAS BAISTAB
v.
GOLAP SINGH.*

Landlord and tenant—usufructuary mortgage by landlord—mortgagee, whether becomes the landlord—mortgagor, decree for cess in favour of—whether a rent decree—landlord and tenant, relationship of, whether subsists.

An usufructuary mortgagee is a landlord, within the meaning of the Bengal Tenancy Act, 1885, in respect to tenants of the mortgaged land.

Brohmanand Nath Deb Sircar v. *Hem Chandra Mitra*(1), followed.

A landlord who executes and usufructuary mortgage parts with his interest in the zamindari and the relationship of landlord and tenant ceases to exist, from the time of execution, between him and the tenant and, therefore, a decree obtained by him for arrears of cess after the date of the mortgage is only a money decree.

Forbes v. *Maharaj Bahadur Singh* (2), followed.

Appeal by the defendants.

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

Atul Krishna Roy, for the appellant.

Abani Bhusan Mukharji, for the respondents.

DAS, J.—Defendants nos. 2 to 4 are the landlords and defendants 5 to 16 were in possession of mauza Adardih as mukarraridars under defendants 2 to 4. Sometimes in 1326 the landlords gave an

*Appeal from Appellate Decree no. 1680 of 1926, from a decision of Rai Sahib Priya Chattarji, Subordinate Judge of Manbhum, dated the 27th of November, 1926, reversing a decision of Babu Ram Prasad Ghosal, Munsif of Purulia, dated the 13th of August, 1925.

(1) (1913-14) 18 Cal. W. N. 1016. (2) (1914) I. L. R. 41 Cal. 926, P. C.

usufructuary mortgage of their interest in mauza Adardih to defendant no. 17. It has been found by the Court below that since 1326 defendant no. 17, the mortgagee, has been realizing rent in respect of mauza Adardih from defendants nos. 5 to 16.

Defendants 2 to 4 instituted a suit against the mukarraridars for recovery of cess due to them in respect of the years 1324 and 1325 and, in due course obtained a decree. The decree not having been satisfied, the mukarrari interest was put up for sale and was purchased by defendant no. 1 on the 3rd of October, 1921. Meanwhile the plaintiff had purchased a 4-annas 6-gandas interest in the mukarrari from defendants 6, 7 and 11 to 14 on the 9th of May, 1920. The plaintiff was not a party to the suit for cess, nor was he a party to the subsequent execution proceedings; and the suit out of which this appeal arises was instituted by him, in substance, for a declaration that the court sale held on the 3rd of October, 1921, did not operate to convey his interest in the mauza to defendant No. 1 and for recovery of joint possession to the extent of that interest. The lower Appellate Court relying upon the decision of the Judicial Committee in *Forbes v. Maharaj Bahadur Singh* (1), has found in favour of the plaintiff; and defendant No. 1 appeals to this Court.

As I have mentioned the plaintiff took a conveyance of the interest of some of the mukarraridars on the 9th of May, 1920, and it appears that the suit for cess which resulted in the court sale on the 3rd of October, 1921, was instituted subsequent to the transaction of the 9th of May, 1920. It follows therefore that if the decree obtained by the landlord as against the mukarraridars can be regarded as a rent decree, the plaintiff's claim must fail; but if, on the other hand, that decree cannot be placed on a higher footing than a money decree, then the plaintiff is entitled to succeed in the action.

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In my opinion the learned Subordinate Judge was right in taking the view that the principle of the decision of the Judicial Committee applied with equal force to the facts of the present case. It is true that in *Forbes v. Maharaj Bahadur Singh* (1), the zamindar brought a suit for arrears of rent after he had parted with all his interest in the zamindari; and it is contended before us by Mr. Atul Krishna Roy on behalf of the appellant that it cannot be urged in this case that the landlords having executed an usufructuary mortgage have parted with all their interest in the zamindari. But the decision of the Judicial Committee rests on the view that the right to proceed to sell under the Bengal Tenancy Act is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. The Judicial Committee pointed out that "landlord" in the Bengal Tenancy Act is declared to mean "a person immediately under whom a tenant holds and includes the Government"; and that "Rent" is declared to mean "Whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant"; and it had no difficulty in coming to the conclusion that "The governing idea throughout the multifarious provisions contained in Chapter VIII to regulate the respective rights and obligations of landlords and tenants is the subsistence of the relationship that gives rise to those rights and obligations". Now, as I have said, in the case before the Judicial Committee the landlord had already parted with his zamindari interest at the date when he instituted his suit for recovery of arrears of rent; and it was held by the Judicial Committee that the decree in such a suit could not be regarded as a rent decree. In my opinion the facts in that case cannot, on principle, be distinguished

(1) (1914) I. L. R. 41 Cal. 926, P. C.

from the facts in the present case. It was contended before us that the landlord executing an usufructuary mortgage cannot be said to have parted with his interest in the land; for he still retains a valuable right—the right to redeem. But, as I have said, the question depends on the solution of the problem, whether there was the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced.

It was faintly contended before us that an usufructuary mortgagee does not stand in the position of a landlord. I am unable to agree with this contention. It was held by the Calcutta High Court in *Brohmanand Nath Deb Sircar* v. *Hem Chandra Mitra*(1) that an usufructuary mortgagee is a person immediately under whom a tenant holds and is in the position of the landlord and is entitled to sue for rent in his character as such. Now, if this be so, then it is obvious that there cannot be two landlords at the same time. In the Chota Nagpur Tenancy Act, which is the Act which we have to consider in this case,

"'Landlord' means 'a person immediately under whom a tenant holds and includes the Government';"

and

"'Rent' means 'whatever is lawfully payable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant and includes all dues (other than his personal services) which are recoverable under any enactment for the time being in force, as if they were rents';"

and

"'Tenant' means 'a person who holds land under another person and is, or, but for a special contract, would be liable to pay rent for that land to that person'."

It will be seen, therefore, that these terms mean exactly the same thing in the Chota Nagpur Tenancy

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Act as they do in the Bengal Tenancy Act. What then is the position? At the date of the suit instituted by defendants 2 to 4 against the mukarraridars, defendants 5 to 16, defendants 2 to 4 were not the landlords of defendants 5 to 16; and it follows therefore that although they were entitled to recover cess which had accrued due to them in 1324 and 1325 (the usufructuary mortgage having been executed in 1326) the decree which they in fact obtained as against the mukarraridars cannot be regarded as a rent decree. It follows, therefore, that the plaintiff having purchased the interest of some of the mukarraridars cannot be affected by the court sale held on the 3rd of October, 1921.

It was then urged by Mr. Atul Krishna Roy that the present suit was barred by the provisions of section 214 of the Chota Nagpur Tenancy Act. That section provides that

"No suit shall be entertained in any Court to set aside or modify the effect of any sale made under this Chapter, save under section 212 or section 213, or on the ground of fraud or want of jurisdiction."

Now the plaintiff did no doubt invite the Court to set aside the Court sale; and I am of opinion that he is not entitled to a decree for setting aside the sale. But he also asked for a declaration

"That the 4 annas 6 gandas share of the plaintiff in mauza Adardih has not been sold in the sale."

and I see no reason for holding that section 214 of the Chota Nagpur Tenancy Act prevents us from giving this relief to the plaintiff. We are not setting aside the sale, nor are we modifying the effect of the sale, but we are merely stating what the effect of that sale is, having regard to the fact that at the date of the sale defendants 2 to 4 were not the landlords of the mukarraridars. It was contended that a decision of this Court in *Raja Baldeo Das*

Birla v. *Lal Nilmoni Nath Sahi Deo* (1) has conclusively determined this point in favour of the appellant's contention. I cannot agree with this argument. That was a suit instituted by certain khorposhdars to have a court sale set aside. The sale was held in execution of a rent decree passed in favour of the landlord as against the tenant under whom the khorposhdar in question held various mauzas. Now it is obvious that section 214 was a complete bar to the suit in so far as the claim to have the sale set aside was concerned. But the plaintiff also claimed that the sale did not affect their interest in the villages sold. This argument failed in this Court and the judgment of this Court on this point is as follows:—

"The plaintiff's position is not tenable. They are encumbrancers and the sale of the tenure necessarily destroyed their encumbrance. Consequently if the sale was a sale of a tenure, they were represented by the tenure-holder and are not entitled to attack the sale on grounds which are not available to the tenure-holder; but the tenure-holder manifestly could not plead that the sale did not affect his interest". It is obvious that the decision cannot be cited as an authority in the present case where it cannot for a moment be urged that the plaintiff having purchased the right, title and interest of some of the defendants on the 9th of May, 1920, was represented by them in a suit instituted after that date. In my opinion the case has been rightly decided by the learned Subordinate Judge and I would dismiss this appeal with costs.

ROSS, J.—I agree.

Appeal dismissed.

(1) F. A. 102 of 1925.