

1928.

MANGOBINDA
SADHU

v.

MAHARAJA
KUMAR
SATYA
NIRANJAN
CHAKRA-
VERTY.

DAS, J.

underground operations on a large scale for twelve years before suit and that accordingly they have acquired no title by adverse possession.

There only remains the question of damages. Mr. B. C. Barat who is an expert on the subject was appointed a commissioner to ascertain the amount of coal extracted and the prices thereof and he submitted a report and this report was accepted by the learned Subordinate Judge. In my opinion no ground has been shown why we should interfere with the judgment of the learned Subordinate Judge on the question of damages.

The appeal fails and must be dismissed with costs.

ALLANSON, J.—I agree.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Fazl Ali, JJ.

BHAIYA BALMAKUND SAHAY

v.

BHAGWAT NARAYAN SINGH.*

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July, 5.

Chota Nagpur Encumbered Estates Act, 1876 (Beng. Act VI of 1876), section 12 (A) scope of—person affected by the Act, whether empowered to borrow money—mortgagee, whether entitled to money decree—implied covenant to repay.

Section 12(A), Chota Nagpur Encumbered Estates Act, 1876, provides :

“ When the possession and enjoyment of property is restored under the circumstances mentioned in the first or the third clause of section 12, to the person who was the holder of such property when the application under section 2 was made, such person shall not be competent without the previous sanction of the Commissioner,

(a) to alienate such property, or any part thereof in any way, or

(b) to create any charge thereon extending beyond his lifetime.

*Appeal from Appellate Decree no. 737 of 1926, from a decision of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 22nd March, 1926, reversing a decision of Maulavi Syed Muhammad Zarif, Munsif of Hazaribagh, dated the 31st July, 1924.

Held, (i) that section 12(A) only prohibits the alienation of the property or the creation of a charge thereon, but does not debar the person affected by the Act from borrowing money, (ii) that although the creditor cannot get a mortgage decree, he is entitled to enforce the personal covenant by the mortgage to repay, which is always implied in a mortgage.

Ladu Narain Singh v. Goverdhan Das (1), followed.

Moti Chand v. Ikramullah Khan (2), distinguished.

Appeal by the plaintiffs.

The facts which gave rise to this appeal were briefly these: On the 5th May, 1918, the defendant borrowed a sum of Rs. 3,000 from the plaintiff and executed a usufructuary mortgage deed in his favour in respect of certain property. The defendant's estate had been under management under the Encumbered Estates Act VI of 1876 previous to this mortgage deed; but it had been released at the time when this mortgage deed was executed. The plaintiff brought a suit on the mortgage deed and he also prayed that in case it was held that he was not entitled to a mortgage decree, a money decree might be passed. The main defence in the case was that in view of the provision of section 12(A) of the Chota Nagpur Encumbered Estates Act VI of 1876 the plaintiff was not entitled to either a mortgage decree or a money decree. The learned Subordinate Judge who tried the suits held that in view of the provisions of section 12(A) of the Chota Nagpur Encumbered Estates Act, the plaintiff was not entitled to a mortgage decree but he took the view that as every mortgage carried with it a personal covenant to pay the money borrowed, a money decree could be passed in the circumstances of the case and so he granted a money decree for the amount claimed. The defendant thereupon appealed to the Judicial Commissioner who held that the mortgage being void, the covenant to repay was also void, as the two parts of the transaction were not

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(2) (1917) I. L. R. 99 All. 178

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BRATYA
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K. P. Jayaswal (with him *Sunder Lal*), for the appellants.

Pugh (with him *Ragho Saran* and *D. P. Sinha*), for the respondents.

FAZL ALI, J. (after stating the facts as set out above, proceeded as follows:) In my opinion the view taken by the Judicial Commissioner cannot be upheld in law. Section 12(A) of the Chota Nagpur Encumbered Estates Act runs thus :

" When the possession and enjoyment of property is restored under the circumstances mentioned in the first or the third clause of section 12, to the person who was the holder of such property when the application under section 2 was made, such person shall not be competent, without the previous sanction of the Commissioner,

- (a) to alienate such property, or any part thereof in any way, or
- (b) to create any charge thereon extending beyond his life time."

It is clear from the words used in this section that all that was prohibited or meant to be prohibited was the alienation of the property or the creation of any charge upon the property without the sanction of the Commissioner. Now, there is nothing in this section to suggest that a person who is affected by the Act is debarred from borrowing money altogether. It follows, therefore, that though the mortgage cannot be enforced against the property under the terms of the Act, there seems to be no reason why the plaintiff should be held to be debarred from enforcing the personal covenant by the mortgagor to repay the money borrowed. This view finds support from a decision given by my learned brother in the case of *Ladu Narain Singh v. Goverdhan Das* (1). Mr. Pugh appearing for the respondent relies on the case of *Moti Chand v. Ikramullah Khan* (2). That was a case under the Agra Tenancy Act (Act II of 1901) and the

(1) (1925) I. L. R. 4 Pat. 478.

(2) (1917) I. L. R. 39 All. 173.

facts were that the proprietors of certain villages in the district of Azamgarh, while selling their proprietary rights in those villages, also attempted to sell their prospective ex-proprietary rights in the sir and khudkasht lands which they could not do under the Act. In order to give the attempted sale of these lands the appearance of an independent transaction, the vendors stipulated in the sale deed that they would execute a separate deed of relinquishment in respect of the sir and khudkasht lands on a subsequent date; otherwise they would be liable to pay damage at the rate of Rs. 16 per bigha. Three days later they executed a deed of relinquishment, but subsequently refused to relinquish the lands or give up possession. The vendors thereupon brought a suit for damages on the basis of the agreement in the sale deed. It was held by the Judicial Committee that the agreement could not be enforced because it was in effect an arrangement for the reduction of the purchase money on the vendor's failure or refusing to relinquish such lands and thus it was no more than an ingenious device to defeat the policy of Act II of 1901. In considering the effect of this agreement their Lordships of the Judicial Committee observed as follows: "The policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his sir land or land which he has cultivated continuously for twelve years at the date of the transfer; for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands, or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands. All such devices, arrangements, and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any Civil Court or in any Court of revenue."

This case which the Judicial Committee had to deal with is easily distinguishable from the present

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case in which there is neither any ingenious device nor any attempt to defeat the policy of the Encumbered Estates Act which does not prohibit the taking of loans. As I have already pointed out, the covenant to repay the money borrowed is implied in the mortgage and it is open to the plaintiff to enforce this covenant without in any way interfering with the policy of the Act.

I would, therefore, allow this appeal, set aside the judgment and the decree of the lower appellate Court and restore the decree of the first Court. The plaintiff will be entitled to his costs throughout.

DAS, J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

Before Adami and Kulwant Sahay, JJ.

JAGESWAR MANDAL

v.

SRIDHAR LAL ADITYA DEB.*

Mortgage—decree for sale—Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV—purchaser of a share of mortgagor's interest—not made party to suit—right of redemption—payment of proportionate mortgage-debt—calculation to be made on the basis of the mortgage bond.

A purchaser of a share of the mortgagor's interest who was not made a party to a suit of the mortgagee, who had obtained a decree under the Code of Civil Procedure, 1908,

*Second Appeal no. 92 of 1926, from a decision of Babu J. C. Bose, Subordinate Judge of Purulia, dated the 30th October, 1925, modifying a decision of Babu Ram Prasad Ghosal, Munsif of Purulia, dated the 30th July, 1924.

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