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and claims for mesne profits have always been treated as separate causes of action in the Codes of Civil Procedure following in this the English law." Suppose the plaintiff wrongfully omitted to join the relief for ejectment in his present claim for mesne profits, the penalty is not the dismissal of his present claim for mesne profits which has been fully established upon evidence and the findings of both the Courts are in his favour, namely, that the plaintiff was wrongfully kept out of possession by the defendants and is entitled to mesne profits wrongfully appropriated by the defendants. If the contention of the defendants is correct, the plaintiff would only be not entitled to bring a suit for ejectment under rule 2, clause (*2*), of Order II but that to my mind does not debar him from bringing a suit for ejectment in future. Upon the facts in the case the plaintiff was in difficulty in bringing a suit for ejectment, inasmuch as the lands in suit have been allotted by partition to the takhtas of the other landlords.

The result is that the decree of the learned District Judge is set aside and that of the Munsif is restored.

The appeal is decreed with costs.

JAMES, J.—I agree.

Appeal decreed.

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Oct., 29, 30. Nov., 12.

APPELLATE CIVIL.

Before Jwala Prasad and James, JJ.

DASAIN SAHU

v.

MUSAMMAT RAMDULARI KUER.*

Mortgage—mortgagor in possession, whether can grant a permanent lease in respect of any portion of the mortgaged

* Appeal from Appellate Decree no. 162 of 1929, from a decision of Babu Krishna Sahay, Additional Subordinate Judge of Saran, dated the 9th October, 1928, confirming a decision of Babu Shiva Pujan Ray, Munsif of Chapra, dated the 30th January, 1928.

property—limitations—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 66.

A mortgagor in possession can grant a permanent lease in respect of any portion of the mortgaged property provided it is not destructive or permanently injurious to the property so as to render the mortgagee's security insufficient.

Natho Singh v. *Lachu Singh*(1), *Wazir Ali* v. *Moti Chand*(2), *Balmakund Ruyia* v. *Moti Lal Barman*(3) and *Beni Prasad* v. *Parmeshwar Singh*(4), followed.

Kiran Chandra Bose v. *Duit and Company*(5), referred to.

[NOTE.—In the present case the permanent lease was granted before the introduction of section 65-A by the Transfer of Property (Amendment) Act XX of 1929.]

Appeal by the plaintiffs.

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

C. C. Das and *Rajeshwari Prasad*, for the appellants.

N. N. Sinha, for the respondents.

JWALA PRASAD, J.—This is an appeal by the plaintiffs. They obtained a mortgage decree on foot of three simple mortgages executed by one Badri Narayan in favour of appellant no. 1 and the father of appellant no. 2 on the 2nd of February, 1905, the 21st of August, 1906, and the date of the third mortgage is not known. The mortgage decree was obtained in Suit no. 144 of 1913. In execution of that decree the plaintiffs purchased on the 10th of February, 1916, 9 annas 9 pies pokhta share of the mortgagor in mauza Manopur Gambhair and obtained delivery of possession on the 8th of May, 1916. They did not obtain possession of the zerait land in suit on account of the same having been given in mukarrari to Sheodutt Singh, husband of defendant no. 1, on the 21st January, 1909, and the name of respondent

(1) (1928) A. I. R. (Pat.) 238.
(2) (1905) 2 All. L. J. 294.
(3) (1915) 20 Cal. W. N. 350.
(4) (1930) Unreported S. A. 1388-1393 of 1926.
(5) (1924) 40 Cal. L. J. 500.

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no. 1 was recorded in respect of the said zerait land in the revisional record-of-rights. The plaintiffs say that they obtained possession of the zerait land but were subsequently dispossessed by the respondent in 1328 Fasli and consequently they pray for recovery of possession.

JWALA PRASAD, J.

The Courts below have held that the plaintiffs never obtained possession of the land in suit in execution of the mortgage decree and the same had always been in possession of respondent no. 1 on the strength of the mukarrari lease executed by the mortgagor Badri Narayan, who was the former proprietor of the land in dispute. The Courts below have also held, in spite of the contention of the plaintiffs to the contrary, that the mukarrari transaction was bona fide and was not farzi for the benefit of the mortgagor Badri Narayan. Two properties were mortgaged to secure the repayment of the mortgage debt, namely, the milkiat share in Manopur Gambhair and Manopur-gang. The plaintiffs in execution of their mortgage decree sold only one of them, Manopur Gambhair, and as the entire debt was satisfied by the sale-proceeds thereof they did not and could not proceed against Manopur-gang. Both the Courts below have, therefore, concurrently held that the value of the mortgaged properties was more than sufficient to pay off the mortgage debt and that the grant of the mukarrari lease of four bighas zerait land in the village by the proprietor did not in any way deteriorate the value of the property so as to prejudicially affect the security afforded to the mortgagee.

The learned Advocate on behalf of the appellants contends that the mortgagor had no right to grant a permanent lease in respect of any portion of the mortgaged property irrespective of whether the lease deteriorated the security afforded to the mortgagee or not. It is also contended that the mortgagor had no right to take Rs. 600, the premium for the mukarrari

lease, from the husband of defendant no. 1 as a consideration for giving him the permanent right in the property in dispute. This contention is based upon the new provision in the Transfer of Property Act contained in section 65-A. That section curtails the right of the mortgagor in possession to grant permanent leases and forbids the taking of premium. This section was added in 1929 by section 30 of Act XX of 1929, and the object of the new provision in the Act was to set at rest the conflict of views entertained by different High Courts with respect to the right of the mortgagor in possession to grant leases, notably the view taken by the Allahabad High Court in *Wazir Ali* v. *Moti Chand*(1) and *Kiran Chandra Bose* v. *Duit and Company*(2). The new provision in question has to some extent made the position of the mortgagor in possession similar to that of a mortgagor in England where, unlike the Indian law, ownership in the property was transferred by the mortgagor to the mortgagee and the mortgagee obtained a legal title in the property as distinguished from the equitable title which is given to the mortgagee under the Indian law. The new provision contained in section 65-A does not apply to the present mortgage in suit. Section 66 of the Act prohibits the mortgagor from doing any act which is destructive or permanently injurious to the mortgaged property if by that act the security is rendered insufficient. Therefore, prior to the introduction of section 65-A in 1929 the mortgagor in possession of the property in the case of a simple mortgage was entitled to transfer or deal with the property in any way he liked provided the mortgagee's security was not rendered insufficient. He could grant permanent leases subject to the same condition. This view is supported by the decision of the learned Chief Justice of this Court, Sir Dawson Miller, in the case of *Natho Singh* v. *Lachu Singh*(3).

(1) (1905) 2 All. L. J. 294.
(2) (1924) 40 Cal. L. J. 500.
(3) (1928) A. I. R. (Pat.) 238.

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His Lordship held in that case that a mortgagor in possession is entitled to lease out the mortgaged property permanently irrespective of its effect on the mortgagee provided it is not destructive or permanently injurious to the property so as to render the mortgagee's security insufficient. The purchaser of the property in execution of the mortgage decree is not entitled to turn the lessee out. His Lordship relied upon the case in *Wazir Ali* v. *Moti Chand*(1). Similar is the principle enunciated by Sir Lawrence Jenkins, C.J. of the Calcutta High Court in the case of *Balmukund Ruwia* v. *Moti Lal Barman*(2); *vide* also the recent decision of this Court in an unreported case of *Beni Prasad* v. *Parmeshwar Singh*(3). The learned Advocate on behalf of the appellants does not now dispute the view taken in the aforesaid cases, but contends that the defendant no. 1 is not entitled now to resist the claim for khas possession of the land in dispute, inasmuch as her husband Sheodutt Singh was made a party to the mortgage suit of 1913 and he did not put forward his claim that the mukarrari right obtained by him in the zerait land in dispute was not liable to be sold in execution of the mortgage decree. Now the husband of defendant no. 1 had redeemed the prior usufructuary mortgage over the zerait land in question, dated the 21st September, 1894, created by Musammat Raio Kuer, aunt of the mortgagor Badri Narayan, out of the consideration money of Rs. 600 paid by him for obtaining the mukarrari lease in respect of the zerait land in question. The prior zarpeshgi debt was of Rs. 400 and this debt was binding on the appellants. The husband of defendant no. 1 had obtained the right to redeem the property in question and as such he was impleaded as defendant in the mortgage suit no. 144 of 1913 instituted by the plaintiffs to recover their mortgage debt. This fact, therefore, does not at all affect the

(1) (1905) 2 A. L. J. 294.
(2) (1915) 20 Cal. W. N. 350.
(3) (1930) Unreported S. A. 1388-1393 of 1926.

right of defendant no. 1 to remain in possession of the zerait land in question as a permanent mukarraridar.

The result is that the appeal is dismissed with costs.

JAMES, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and James, JJ.

1930.

Nov., 14.

BANKE BIHARI LAL

v.

RAM ANUGRAH CHAUDHURI.*

Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 106, 107 and 109—court trying a rent suit, whether has jurisdiction to decide an issue finally and definitely decided under section 106—Rent Court, decision of, which is at variance with previous decision under section 103, whether operates as res judicata.

A court trying a rent suit has no jurisdiction to decide an issue between the parties which has already been finally and definitely decided by a decision under section 106 of the Bengal Tenancy Act, 1885.

Held, therefore, that a decision of a rent court that *bhaoli* rent was payable only in respect of certain areas, which was at variance with a previous decision under section 106, cannot operate as *res judicata* to determine the areas for which such rent shall be payable in subsequent years.

Maharaja Sir Rameshwar Singh Bahadur v. *Younus Momin*(1), followed.

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* Appeals from Appellate decrees nos. 478, 479, 480 and 481 of 1929, from a decision of S. B. Dhavle Esqr., I.C.S., District Judge of Darbhanga, dated the 2nd January, 1929, modifying a decision of Maulavi Saiyid Abdul Hamid, Munsif of Samastipur, dated the 2nd July, 1927.

(1) (1921) 6 Pat. L. J. 588.