

As regards the alternative contention of the appellants, their Lordships are not prepared to differ from the view of the learned Judges of the High Court that time was not of the essence of the contract. Any interest or compound interest accruing after the 15th July, 1925, fell to be borne by the respondents and there is no sufficient evidence of the loss of any remission by the creditors substantial enough, not only to cover such interest and compound interest up to the 30th December, 1925, but to provide a further balance available to the appellants.

In the event of the rejection of both their contentions, the appellants offered no argument against the relief given by the High Court to the respondents, subject to payment of the compensation already referred to.

Their Lordships are therefore of opinion that the decree of the High Court should be affirmed, and that the appeal should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellant: *Watkins and Hunter.*

Solicitors for the respondent: *Hy. S. L. Polak and Company.*

PRIVY COUNCIL.

RAJA BRAJA SUNDAR DEB

v.

RAM CHANDRA PAIKARA.

On Appeal from the High Court at Patna.

Possession, conditional decree for—Possession recovered by plaintiff from third party pending appeal—right of defendants in appeal to recover possession without separate suit.

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

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SURENDRA
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SUKUL.

LORD
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J. C.*

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Lands granted to a junior branch of a family were usufructually mortgaged. In a suit for a declaration that the property was inalienable, that the mortgage was invalid and involved forfeiture, and for possession, the issue of forfeiture having been abandoned, the trial Judge made a decree declaring the property to be inalienable and the mortgage invalid and that the plaintiff was entitled to resume possession only if the grantees allowed the mortgagee to remain in possession. Pending an appeal to the High Court by the grantees, the plaintiff obtained possession from the mortgagee. The High Court, in the appeal by the grantees, confirmed the finding of inalienability of the lands and invalidity of the mortgage and held that, the issue of forfeiture having been abandoned, the appellant-grantees were entitled to a decree for possession.

Held, that the decree for possession was rightly made in the appeal and that it was not necessary for the grantees to institute a separate suit to recover possession.

Judgment of the High Court affirmed.

Appeal (no. 28 of 1934) from a decree of the High Court (January 13, 1933) which modified a decree of the Subordinate Judge of Cuttack (January 22, 1930).

The facts and contentions are stated in the judgment of their Lordships of the Judicial Committee.

Dunne, K. C. and Wallach, for the appellant.

Sir Thomas Strangman, for the respondents 1 to 4. The 5th defendant, the mortgagee, was not represented.

The judgment of their Lordships was delivered by—

SIR JOHN WALLIS.—Raja Braja Sundar Deb, the plaintiff in this case, is the proprietor of Killa Aul, an impartible zemindary in the district of Cuttack. Defendants 1 to 4 are a branch of his family who held the suit lands under grants for maintenance made by his predecessors. The 5th defendant is the Raja of Kanika in the same district. On the 21st of April, 1923, defendants 1 to 4 executed a usufructuary mortgage of the suit lands in favour of the 5th defendant for a consideration of Rs. 3,200, to be discharged both as to principal and interest by nine years'

possession of the suit lands. In the eighth year, on the 11th June, 1930, the plaintiff instituted this suit in the Court of the Subordinate Judge of Cuttack for possession of the suit lands and mesne profits, on the ground that by this alienation the defendants 1 to 4 had incurred a forfeiture and the plaintiff was entitled to re-enter. He accordingly prayed for declarations (1) that according to the custom of the estate the defendants had no right to alienate the suit properties in any way, (2) that the usufructuary mortgage in favour of the 5th defendant was invalid and inoperative and not binding upon him, and (3) that defendants 1 to 4 having given up possession and forfeited their rights by this alienation, the plaintiff was entitled to resume them and re-enter. Fourthly he prayed for possession and mesne profits. The defendants 1 to 4 pleaded that they held the suit lands under permanent grants and not as Biradaran Korakposak grants as alleged in the plaint. The latter generally known as Kharposh grants are made for maintenance of the junior members of the family and are resumable on failure of their male heirs. This question was the subject of the 3rd issue and there are concurrent findings of the Courts below that these were not permanent, but Biradaran Khorakposak grants.

These defendants also alleged that by the custom of the estate lands held under these grants were transferable, and denied that by executing this usufructuary mortgage without the knowledge or permission of the plaintiff and putting the 5th defendant in possession, they had forfeited their rights and the plaintiff had become entitled to re-enter and resume possession. They also pleaded that, even if these grants were not transferable, the plaintiff had no cause of action, as the transfer was not absolute, but was subject to a right of redemption which they could exercise at any time.

On these questions the Subordinate Judge decided on the 4th issue that by custom these grants are not transferable, and the defendants had no right to

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transfer them by sale, gift or mortgage, and that the restriction applied to temporary transfers as well as to permanent transfers. The High Court on appeal concurred in the finding that by custom these grants are not transferable, and that finding has not been questioned in this appeal which is only concerned with the further question whether the plaintiff was entitled to resume the tenures in question by reason of the mortgage executed by defendants 1 to 4 in favour of defendant 5.

As regards this question the Subordinate Judge states that the plaintiff's advocate had submitted that this was a question arising between defendants 1 to 4 and need not be considered for the moment, and that he wanted the decision to be confined to the question whether the transfer was valid or invalid. The Subordinate Judge however considered that the two questions were inextricably mixed. In accordance with his finding that by the custom of the estate the grants were not transferable he held that the mortgage in favour of defendant 5 must be declared to be invalid and inoperative.

On the question of resumption he held on the evidence that the grants were only resumable on the failure of the male heirs of the grantees. The result was that the mortgage was inoperative and the lands must remain in possession of defendants 1 to 4. If, however, they allowed the 5th defendant to remain in possession, the plaintiff would have a right to re-enter. The decree accordingly declared that the mortgage in favour of the 5th defendant was invalid and inoperative, but that the plaintiff would only be entitled to re-enter in case the 5th defendant did not vacate the lands and was allowed by defendants 1 to 4 to remain in possession of them.

As regards the decree Fazl Ali, J. who delivered the judgment of the High Court on the appeal observed that it was most unsatisfactory and could not easily be executed, as the 5th defendant might not be willing to give up possession and it would not be easily proveable whether he had continued in possession with

the collusion of defendants 1 to 4. No such difficulty however had in fact arisen, as the 5th defendant whose outstanding claims may have been otherwise satisfied and who did not appeal from the decree, appears not to have opposed the application for execution, and the plaintiff was put in possession under Order XXI, Rule 35, of the Civil Procedure Code less than two months after the passing of the decree. The 5th defendant not having appealed, no question as to his rights arises on this appeal.

On the appeal preferred by defendants 1 to 4 the High Court, as already stated, confirmed the findings of the lower Court as to the nature of the tenure and as to the grants being not transferable, and these are concurrent findings with which the Board does not interfere. As regards the question whether by executing the usufructuary mortgage and putting the 5th defendant in possession, defendants 1 to 4 had forfeited their tenure, Fazl Ali, J. was disposed to hold that they had not incurred a forfeiture which entitled the plaintiff to re-enter, but did not base the decision of the Court on this ground. He stated that admittedly this issue was not pressed in the Court below, and that at the hearing of the appeal the Advocate for the respondent had taken up the same position, and had confined himself to contending that as the plaintiff had been put in possession in execution of the decree, defendants 1 to 4 could not recover possession in this suit but must be referred to a separate suit. As to this contention the learned Judge observed that, as the issue of forfeiture had not been pressed in the Court below, defendants 1 to 4 ought not to be driven to a separate suit. The case of forfeiture in his view had been virtually abandoned in the Court below, and it must consequently be held that defendants 1 to 4 had not incurred forfeiture and that they were entitled to recover possession of the disputed lands from the plaintiff if he had already been put in possession of them, as in fact he had. The Court accordingly allowed the appeal in part, and gave defendants 1 to

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4, the first four respondents here, a decree for possession against the plaintiff if possession had been delivered to him.

Their Lordships agree with the learned Judges of the High Court and are of opinion that the issue as to forfeiture having been abandoned by the plaintiff, defendants 1 to 4 are entitled to recover possession in this suit, and will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for the appellant: *Hy. S. L. Polak and Co.*

Solicitors for respondents 1 to 4: *W. W. Box and Co.*

REVISIONAL CRIMINAL.

Before Varma and Rowland, JJ.

AJABLAL RAI

v.

KING-EMPEROR.*

Penal Code, 1860 (Act XLV of 1860), sections 224 and 225—escape from lawful custody—unlawful assembly—common object of rescuing from lawful custody—joint trial of persons escaping from lawful custody and persons rescuing, if legal—‘same transaction’, meaning of—Code of Criminal Procedure, 1898 (Act V of 1898), sections 235 and 239.

A, a proclaimed offender, was arrested by a defadar and after his arrest other persons assaulted the dafadar and his party and thereby they effected the escape of A from lawful custody. A was charged under section 224 of the Penal Code for escaping from lawful custody and the other persons were charged under sections 147 and 225 of the Penal Code for being members of an unlawful assembly and intentionally offering resistance to the lawful apprehension of A and rescuing him. A and the other persons were tried jointly and the legality of the joint trial was questioned.

* Criminal Revision no. 405 of 1935, from an order of L. J. Lucas, Esq., I.C.S., Sessions Judge, Monghyr, dated the 9th July, 1935, affirming an order of Babu Hardip Singh, Deputy Magistrate, First Class, Monghyr, dated the 28th May, 1935.

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18, 19.
October, 2.