

THE
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APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Campbell.

MUHAMMAD HUSSAIN (PLAINTIFF)—*Appellant,*

versus

ABDUL GHAFUR KHAN (DEFENDANT)—

Respondent.

Civil Appeal No. 453 of 1919.

1921

Nov. 16.

Civil Procedure Code, Act V of 1908, order II rule 2—mortgage—lease by mortgagee to mortgagor—suit for rent—subsequent suit for recovery of the mortgage money.

The defendant-respondent mortgaged his house with possession to the plaintiff-appellant on the 28th June 1910, for Rs. 600 at Re. 1 *per cent. per mensem* interest, for one year which period could be extended. The deed expressly stipulated that the mortgagee was at liberty to let the house to any one he liked. On the same date the mortgagee leased the house to the mortgagor under a written lease at an annual rent of Rs. 72. On the 19th October 1911 the mortgagee sued for recovery of Rs. 90 as rent due for 15 months and obtained a decree, and on the 26th July 1918 he instituted the present suit for recovery of the mortgage money and interest. The question for decision was whether the suit was barred by order II, rule 2 of the Code of Civil Procedure.

Held, that each case has to be decided on its own facts and the question for decision here was whether the cause of action in the 1911 case was the same as in this case.

Held also, that the cause of action was not the same; the mere fact that a lease was executed indicated that the parties did not stand upon the mortgage alone but entered into a fresh contract. The suit of 1911 was based upon a breach of the lease contract not upon the mortgage and consequently the present suit was not barred by order II, rule 2 of the Code.

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Natha Singh v. Chuni Lal (1), *Altaf Ali Khan v. Lalta Prasad* (2), and *Madhwa Sidhanta v. Venkataramaniulu* (3), distinguished.

Second appeal from the decree of Rai Bahadur Misra Jwala Sahai, District Judge, Ludhiana, dated the 22nd January 1919, reversing that of Lala Chuni Lal, Senior Subordinate Judge, Ludhiana, dated the 19th November 1918, and dismissing plaintiff's suit.

MEHE CHAND, MAHAJAN, for Appellant.

KANWAR NARAIN and BADR-UD-DIN, for Respondent.

The judgment of the Court was delivered by—

LEROSSIGNOL, J.—The only question in this appeal is whether the present suit is barred under order 2, rule 2 of the Code.

The defendant mortgaged his house to plaintiff for Rs. 600, possession was to be with the plaintiff, who was entitled to charge interest at 1 per cent. per mensem and was to set off against the interest any sums received by way of rent.

It was open to him to induct any tenant he chose, but he gave the house to defendant on a year's lease at Rs. 6 per mensem. In 1911 the plaintiff sued the defendant for Rs. 90 being rent for 15 months and obtained a decree.

He has now sued him for recovery of the mortgage debt plus interest and the District Judge has dismissed his suit on the ground that this case is parallel with *Natha Singh v. Chuni Lal* (1) and the rent suit of 1911 was really a case between mortgagee and mortgagor, as the plaintiff could then have sued to recover the whole mortgage debt.

It is not necessary for us to discuss the correctness of *Natha Singh v. Chuni Lal* (1) but it is obvious that this case presents many points of variance from that.

(1) 69 P. R. 1918.

(2) (1897) I. L. R. 19 All. 486.

(3) (1908) I. L. R. 29 Mad. 662 (F. B).

In this case the mortgage was not for one year only, but specially provided for continuance of the contract for more than one year, nor was the lease mentioned in the mortgage, which on the contrary stipulated for free choice to the mortgagee in the matter of tenants. Each case, however, has to be decided on its own facts, and the question here for decision, is whether the cause of action in the 1911 case was the same as in this case. We hold very distinctly, that it was not; the mere fact that a lease was executed indicates that the parties did not stand upon the mortgage alone, but entered into a fresh contract. The suit of 1911 was based upon a breach of the lease contract not upon the mortgage. In *Attaf Ali Khan v. Lalla Prasad* (1) and *Madhwa Sidhanta v. Venkataramanjulu* (2) are some *dicta* which *prima facie* favour the respondent, but those are by no means parallel cases with this and as said above each case stands on its own facts.

In this case the plaintiff secured by the lease remedies which he did not enjoy under the mortgage and the causes of action in the two suits were quite different. We accept the appeal and restore the first Court's decree with costs throughout.

Appeal Accepted.

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(1) (1897) I. L. R. 19 All. 496.

(2) (1908) I. L. R. 26 Mad. 662 (F. B).