

APPELLATE CIVIL.

Before Mr. Justice Martineau and Mr. Justice Campbell.

RALIA RAM AND ANOTHER (PLAINTIFFS)
Appellants,

versus

AMIR CHAND AND OTHERS (DEFENDANTS)
Respondents.

Civil Appeal No. 2191 of 1918.

Civil Procedure Code, Act V of 1908, Order II, rule 2—mortgagor becoming tenant of mortgagee under a lease—first suit for rent—whether second suit for money due on the mortgage deed is barred.

The plaintiffs sued for the recovery of money due on a mortgage deed executed by the defendants on the 9th December 1906 for a term of 6 months. The suit was dismissed as barred under Order II, rule 2, Civil Procedure Code, by reason of the plaintiffs having brought a suit in 1910 for rent on the basis of a lease, executed on the same date as the mortgage-deed.

Held, that although the mortgage deed and the lease were executed on the same day, and the rent was equal to the amount of interest, yet in view of the fact that the mortgage deed contained no reference to the lease and that the mortgagees were not restricted in their choice of tenants the mortgage and the lease formed two distinct transactions. The institution of the former suit which was based on the lease was therefore no bar to the present suit.

Muhammad Hussain v. Abdul Ghafur Khan (1), followed.

Natha Singh v. Chuni Lal (2), and *Madhwa Sidhanta v. Venkataramanjulu* (3), distinguished.

First appeal from the decree of Lala Ganga Ram Wadhwa, Senior Subordinate Judge, Amritsar, dated the 24th June 1918, dismissing the suit.

SHEO NARAIN and FAKIR CHAND, for appellants.

TEK CHAND and DALIP SINGH, for Respondents.

The judgment of the Court was delivered by—

MARTINEAU J.—The plaintiffs sue for the recovery of money due on a mortgage deed executed by the defendants on the 9th December 1906. The suit has been

(1) (1921) I. L. R. 8 Lab. 1. (2) 69 P. R. 1918.

(3) (1908) I. L. R. 26 Mad. 662 (F. B.)

dismissed as barred by Order II, rule 2, Civil Procedure Code, by reason of the plaintiffs having brought a suit in 1910 for rent on the basis of a lease executed on the same date as the mortgage deed, the lower Court holding that the interest on the mortgage is identical with the rent, and that the cause of action was the same in both suits. The plaintiffs have appealed, and the only question is whether Order II, rule 2, applies.

The mortgage deed provided that the property was mortgaged to the plaintiffs with possession for Rs. 30,000, that the defendants were to pay interest monthly at the rate of 10 annas *per cen. per mensem*, and that the rent realized by the plaintiffs from the property mortgaged would be credited towards the payment of the interest. The defendants were to redeem within six months, and if they failed they would continue to pay interest till the date of redemption. In case of default on the part of the defendants the plaintiffs were at liberty to realize the amount due with interest from the mortgaged property or from the other property or persons of the defendants whenever they liked.

In the lease it was stated that the defendants took the mortgaged property from the plaintiffs on a rent of Rs. 187-8-0 *per mensem* for six months. The rent was to be paid monthly and in default the mortgagees could realize the amount at any time they liked.

The lower Court has followed *Natha Singh v. Chuni Lal* (1), in which it was held that there was only one covenant between the parties and that the lease was granted simply to provide a mode for realizing interest payable on the mortgage. But that decision was based on the fact that the mortgage deed contained a reference to an agreement between the parties to draw up a lease of the mortgaged property. There is no such clause in the mortgage deed on which the present plaintiffs are suing, so that *Natha Singh v. Chuni Lal* (1) is distinguishable from the present case.

Most of the cases cited by Mr. Sheo Narain on behalf of the appellants also present distinctive features, but there is one case which is in point and supports his contention, namely *Muhammad Hussain v. Abdul*

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Ghafur Khan (1) in which it was held that the lease, though executed on the same day as the mortgage, was a separate contract. Mr. Tek Chand contends that that case is distinguishable because there was a provision in the mortgage deed that the mortgagee could lease the property to any one he liked

But although the mortgage deed executed by the defendants in the present case does not contain such a provision it imposes no restriction on the power of the mortgagees to choose their tenants, and it recites that the mortgagors have delivered possession to the mortgagees, so that there is no essential distinction between the two cases.

The case relied on by Mr. Tek Chand is *Madhwa Sidhanta v. Venkataramanjulu* (2) in which it was held that the striking identities in the provisions of the mortgage and the lease, which had been executed on the same day, pointed to the view that the two instruments were parts of the same transaction. But the similarity between the provisions of the two instruments in that case was greater than it is in the present case. In default of payment of interest on the mortgage compound interest was to be charged at a certain rate and the lease also provided that if the rent were not paid by the due date it would carry interest at the same rate. Further it was pointed out in the judgment that the particular expression used in the lease to denote interest on the rent was the same as that used in the mortgage for interest on the interest, and that it was not appropriate in the lease except upon the view that what was spoken of as rent was in the contemplation of the parties only interest.

In the present case, although the mortgage deed and the lease were executed on the same day and the rent was equal to the amount of interest, yet in view of the facts that the mortgage deed contained no reference to the lease, and that the mortgagees were not restricted in their choice of tenants, we think that the mortgage and the lease were two distinct transactions. The institution of the former suit, which was based on the lease, is therefore no bar to the present suit.

(1) (1921) I. L. R. 3 Lah. 1.

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

We accordingly accept the appeal, reverse the decree of the Subordinate Judge, and remand the case to his Court under Order XLi, rule 23, Civil Procedure Code, for decision on the merits. The Court fee paid on the memorandum of appeal will be refunded, and other costs will be costs in the case.

A. R.

Appeal accepted, Case remanded.

REVISIONAL CRIMINAL.

Before Mr. Justice Martineau.

DEVI DYAL—*Petitioner,*

versus

THE CROWN—*Respondent.*

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Criminal Revision No. 1038 of 1922.

Indian Penal Code, 1860, sections 499, 500—Defamation—evidence of general reputation of complainant—whether relevant—proof that accused made or published the imputation complained of—whether necessary where accused when examined by the Magistrate admitted publication—Examination of accused—confined to matters appearing in the evidence against him—Criminal Procedure Code, Act V of 1898, section 342.

The petitioner was convicted of an offence under section 500 of the Indian Penal Code, for having defamed an Extra Assistant Commissioner by publishing an imputation that the latter had compelled him to pay a bribe in order to avoid a prosecution for a certain offence. The petitioner wanted to produce evidence as to the complainant having taken bribes on other occasions, and general evidence as to the complainant's reputation, but this was disallowed by the trial Court.

Held, that evidence as to the complainant having taken bribes on other specific occasions would be irrelevant, but that the petitioner was entitled to produce evidence to show that the complainant had the reputation of being a bribe-taker.

Scott v. Sampson (1), and Odgers on Libel and Slander, 5th Edition, page 402, referred to.