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IMPERIAL
BANK OF
INDIA,
JULLUNDUR
v.
MST.
MAYA DEVI.
TEK CHAND J.

the proposition of law put forward by the learned counsel for the appellant were accepted as correct.

I hold, therefore, that the plaintiff was entitled to the decree, which has been passed in her favour by the learned Subordinate Judge. I would accordingly dismiss the appeal with costs.

ABDUL RASHID J.—I agree.

A. N. C.

Appeal dismissed.

LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

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Dec. 12.

AMAR NATH AND OTHERS (PLAINTIFFS) Appellants
versus

DUNI AND OTHERS (DEFENDANTS) Respondents.

Letters Patent Appeal No. 22 of 1932.

Adverse possession—Tenant of mortgagee of mortgaged land—whether holds adversely to mortgagor—during the subsistence of the mortgage.

Held, that though a tenant put in possession of land by a mortgagee may claim adversely against the mortgagee, his possession cannot become adverse against the mortgagor until the mortgage is redeemed and the mortgagor becomes entitled to immediate possession.

Muhammad Husain v. Mul Chand (1), *Zinda v. Mst. Roshnai* (2), *Gitabai v. Krishna Malhari* (3), and *Muhammad Mumtaz Ali Khan v. Mohan Singh* (4), relied upon.

Letters Patent Appeal from the decree passed by Jai Lal J. on 23rd February, 1932, reversing that of R. S. Lala Shibbu Mal, Additional District Judge, Sialkot, at Gurdaspur, dated 18th December, 1930, and restoring that of Chaudhri Sheo Parshad, Subordinate Judge, 4th Class, Sialkot, dated 24th February, 1930, dismissing the plaintiffs' suit.

(1) (1905) I.L.R. 27 All. 395. (3) (1921) I.L.R. 45 Bom. 661.

(2) 1928 A.I.R. (Lah.) 250. (4) (1923) I.L.R. 45 All. 419, 424 (P.C.).

NAWAL KISHORE and H. S. KHORANA, for Appellants.

FAKIR CHAND MITAL, for J. L. KAPUR, for Respondents

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ADDISON J.—The landlords of the land in dispute, who are the appellants, mortgaged it to certain persons on the 1st April, 1897. The mortgage was with possession and the respondents became tenants under the mortgagees and paid rent. This fact was entered in the revenue papers. In 1913-14, for some unknown reason, the revenue authorities removed the names of the mortgagees from the revenue records. Thereafter in 1915 the mortgagor-landlords sued the tenants for possession of the land. Under orders of the Court the mortgagees were impleaded as defendants as well. The suit was dismissed on the ground that the mortgage still subsisted and therefore the mortgagors had no right to eject the tenants, that right being vested in the mortgagees. It was further held in that suit that the plea of the defendants that they had not been paying any rent to the mortgagees, but were holding the land in their own right as owners was false and that, as a matter of fact, they had been paying rent to the mortgagees.

In 1925 the owners of the land instituted a suit for the redemption of the mortgage and obtained a final decree on the 4th July, 1927. When they sought to eject the tenants in execution of the decree they were unable to do so and consequently, on the 16th April, 1929, they instituted the present suit for the ejectment of the tenants. The plea on behalf of the tenants was that they had obtained title to the land by prescription. This plea has been accepted by a Single Bench of this Court, and against this decision this Letters Patent Appeal has been preferred.

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The view taken by the Judge who heard the second appeal was that it became known both to the mortgagors and the mortgagees in the 1915 suit that the tenants pleaded that they were owners of the land and had never paid any rent, though this plea was found false in that suit. He thought that this assertion of title to the knowledge of the mortgagors and mortgagees was sufficient to start adverse possession against both, especially as there was no evidence that after 1915 rent was paid. He came to this conclusion in spite of the fact that in the revenue records they continued to be recorded as tenants paying rent. Before us it was contended on behalf of the appellants that this view is erroneous. In *Muhammad Husain v. Mul Chand* (1), it was held that possession of mortgaged property obtained by ouster of a mortgagee in possession was not necessarily adverse to the mortgagor also, for the reason that such possession, so far as the mortgagor is concerned, cannot become adverse until the mortgagor becomes entitled to immediate possession. It was held in *Zinda v. Mst. Roshnai* (2), that where a mortgagee is let into possession he is bound to protect the interests of the mortgagor and to prevent any invasion of his rights by a stranger. If the mortgagee allows any person to come into possession of the property, there will be no invasion of the rights of the mortgagor and when the time for redemption comes, he will be entitled to treat the stranger as a trespasser, and the stranger's right by adverse possession against the mortgagor will not commence unless and until the mortgagor has redeemed the property. Similarly in *Gitabai v. Krishna Malhari* (3), it was held that though a tenant put in possession of

(1) (1905) I. L. R. 27 All. 395. (2) 1928 A. I. R. (Lah.) 250.

(3) (1921) I. L. R. 45 Bom. 661.

land by a mortgagee may claim adversely against the mortgagee, his possession cannot become adverse against the mortgagor until the mortgage is redeemed and the mortgagor becomes entitled to immediate possession.

In the case before us the landlords tried in 1915 to eject the tenants and were not allowed to do so on the ground that they were not entitled to possession, that right being vested in the mortgagees. That decision was correct and until the mortgagors redeemed the land in 1927 they had no right to eject the tenants. Their Lordships of the Privy Council in *Muhammad Mumtaz Ali Khan v. Mohan Singh* (1), said as follows :—

“ The Board are unable to hold the simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which *ex hypothesi* was unfounded at the date when it was made, can, by the mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor. It is true that the defendant might, if he had chosen, have at once instituted proceedings for a declaratory decree that the plaintiff was not an under-proprietor, but such a course was equally open to the plaintiff. Each party had had his supposed rights judicially challenged by the other, the plaintiff by the notice of ejectment, of which he had obtained cancellation, the defendant by the assertion in the proceedings for cancellation of the notice for ejectment that he was not liable to be ejected, because of his rights as under-proprietor. The Board, however, do not consider that it was the duty of either party to institute such a suit if they were content that possession should remain on the same footing as before the notice of

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ejectment was served. They are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. * * * * * It is notorious, that in actions for rent or enhancement of rent or for ejectment the persons in possession are prone to maintain rights which they do not possess, and if for any reason, as in the present case, no judicial determination is arrived at but the parties continue on the original footing, the mere lapse of so short a period as six or twelve years (which might be amply explained upon other grounds) would deprive the landlord of his proprietary rights, unless in the meantime he had brought a declaratory suit to settle once and for all the terms on which possession was held.”

These remarks apply with full force in the present case. For the reasons given there is no doubt that the plea of adverse possession cannot be allowed to prevail. I would accept the appeal, set aside the order of the Single Bench and decree the suit with costs throughout.

DIN
MOHAMMAD J.

DIN MOHAMMAD J.—I agree.

P. S.

Appeal accepted.