

APPELLATE CIVIL.

Before Mr. Justice Malgarkar.

NAGINDAS SANKALCHAND (ORIGINAL DEFENDANT), APPELLANT *v.* BAPALAJI PURSHOTTAM (ORIGINAL PLAINTIFF), RESPONDENT.*

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February 17.

Indian Evidence Act (I of 1872), section 116—Landlord and tenant—Tenant let into possession by mortgagor—Tenant continuing possession under rent-note passed to mortgagee—Insolvency of coparcener—Provincial Insolvency Act (V of 1920), section 28.

Where a tenant who has been let into possession by a mortgagor remains in possession under the mortgagee (who has no title to a part of the mortgaged property) and passes a fresh rent-note in favour of the mortgagee, he cannot, in a suit for ejection by the mortgagee, challenge the title of his landlord.

Where the rent-note is executed contemporaneously with the mortgage by the mortgagor and is part and parcel of a transaction admittedly forbidden by law or tainted by illegality, the rent-note necessarily fails with the other illegal transaction. But where the mortgagor is not the tenant and the rent-note is separate from and independent of the mortgage, the taint, if any, of the latter cannot extend to the former.

Laxmanlal v. Mulshankar⁽¹⁾ and *Bhavan Lallu v. Umar Mahamad Bhaiji*,⁽²⁾ distinguished.

The words "continuance of a tenancy" in section 116 of the Indian Evidence Act apply to the tenancy in the same suit in which the estoppel arises and not to any previous tenancy. It is not necessary in order to attract the provisions of section 116 that the tenant should be let into possession by the landlord. It is enough if in fact a new tenancy has arisen.

Shankar v. Jagannath,⁽³⁾ followed.

Lal Mahomed v. Kallanus,⁽⁴⁾ not followed.

Where joint family property is mortgaged it is doubtful whether the insolvency of one mortgagor of an undivided 3rd interest invalidates the mortgage of the other 3rds part of the other mortgagors, who are not insolvents.

SECOND Appeal against the decision of J. Davis, District Judge of Ahmedabad, in Appeal No. 152 of 1926 confirming the decree passed by C. N. Desai, Joint Subordinate Judge of Ahmedabad.

Suit in ejection.

The plaintiff sued the defendant for possession of property and for arrears of rent. By a rent-note dated February 7, 1924, the defendant had rented

*Second Appeal No. 719 of 1927.

⁽¹⁾ (1908) 32 Bom. 449.

⁽²⁾ (1926) 51 Bom. 43.

⁽³⁾ (1928) 30 Bom. L. R. 741.

⁽⁴⁾ (1885) 11 Cal. 519.

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from the plaintiff the house for a period of one year. That period expired but the defendant did not vacate the house. By way of defence the defendant set up an oral lease for one year. The defendant also challenged the plaintiff's title and raised the plea that the property was not the property of the landlord but of the official receiver.

The Subordinate Judge held the oral tenancy not proved and did not permit the defendant to raise other contentions in the suit.

On appeal before the District Judge the defendant abandoned the plea of fresh tenancy raised in the lower Court, but contended that the rent-note was invalid, and that the plaintiff had no title to the property. The District Judge held that the defendant having recognised the title of the plaintiff was estopped from challenging it. The defendant appealed to the High Court.

H. V. Divatia, for the appellant.

M. H. Mehta, for the respondent.

MADGAVKAR, J.:—The question in this appeal is whether the defendant-appellant is estopped from questioning the title of the plaintiff-respondent, as both the lower Courts have held.

The title originally vested in three brothers one of whom, Chandulal, became insolvent. Prior to the insolvency the brothers had let the appellant into possession as a tenant. After the insolvency of Chandulal the three brothers passed a mortgage in favour of the plaintiff-respondent, and the appellant thereafter attorned to the respondent and paid him rent. The respondent brought the present suit in ejectment, the appellant set up an oral tenancy for the period in suit. Both the lower Courts held it not

proved, but did not allow him to lead evidence questioning the respondent's title, on the ground that he was estopped. The defendant appeals.

It is argued for the appellant that he is not estopped on two grounds, firstly, because the mortgage by an insolvent was illegal under section 28 of the Provincial Insolvency Act and the taint of that illegality extends to the rent-note obtained by the mortgagee-respondent in his own favour; secondly, because the appellant was not let into possession by the mortgagee, but had already been in possession under the mortgagors. In support of the first proposition reliance is placed on the decisions of this Court in *Laxmanlal v. Mulshankar*⁽¹⁾ and *Bhavan Lallu v. Umar Mahamad*⁽²⁾ and on the second point, the authority of *Lal Mahomed v. Kallanus*⁽³⁾ is relied upon.

The arguments, in my opinion, fail on both the points. On the first point it is at least doubtful whether the insolvency of one mortgagor of an undivided 1/3rd interest invalidates the mortgage of the other 2/3rds part of the other mortgagors, who were not insolvents.

In regard to the two Bombay cases, viz., *Laxmanlal v. Mulshankar*⁽¹⁾ and *Bhavan Lallu v. Umar Mahamad*,⁽²⁾ the decision in both was expressly on the ground that the rent-note was part and parcel of the same transaction with the deed held void, as appears from the remarks of Batchelor J. in *Laxmanlal v. Mulshankar*,⁽⁴⁾ that the sale-deed and the rent-note were part and parcel of one single transaction, and the remarks and similar observations of Marten C. J. in *Bhavan Lallu v Umar Mahamad*⁽²⁾ towards the end of page 99. Where the rent-note is part and parcel of the same transaction with another admittedly forbidden by law, the rent-note necessarily falls with the other

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⁽¹⁾ (1908) 32 Bom. 449.⁽²⁾ (1926) 29 Bom. L. R. 97;
51 Bom. 43.⁽³⁾ (1885) 11 Cal. 519.⁽⁴⁾ (1908) 10 Bom. L. R. 553 at p. 557;
32 Bom. 449.

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illegal transaction. It may be that if the mortgagors had continued the tenancy under the mortgage, they might not be estopped from questioning the mortgage. Here, however, the appellant is not the mortgagor and his rent-note is separate from and independent of the mortgage and the taint, if any, of the latter cannot extend to the former.

On the second point I agree with and am bound by the decision of the Division Bench in *Shankar v. Jagannath*⁽¹⁾ on the question of the original tenancy, rather than by the decision in *Lul Mahomed v. Kallanus*.⁽²⁾ With respect, it appears to me that the words "continuance of the tenancy" in section 116 of the Indian Evidence Act applies to the tenancy in question in the same suit in which the estoppel arises and not to any previous tenancy. In fact it was not necessary in law for the mortgagee formally to interrupt the possession of the tenant of the mortgagor and reinstate him in possession in order to constitute him tenant of the mortgagee under a fresh rent-note and to cause estoppel to arise in a suit in ejectment by the mortgagee on the rent-note. I agree, therefore, with the judgment of Patkar J. in *Shankar v. Jagannath*,⁽¹⁾ where, even though the tenant was originally let into possession by the mortgagor from the time when he passed a fresh rent-note in favour of the mortgagee a new tenancy arose and he remained in possession under the mortgagee and did not continue in his former possession under the mortgagors. That former possession did not prevent estoppel from arising.

For these reasons the decision of the lower Courts is, in my opinion, correct and the appeal is dismissed with costs.

Decree confirmed

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⁽¹⁾ (1928) 30 Bom. L. R. 741.

⁽²⁾ (1885) 11 Cal. 519.