

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Miller.

RADHA PERSHAD MISSER (DEFENDANT) *v.* MONOHUR
DAS (PLAINTIFF).*

1880
Sept. 5.

*Mortgage Bond—Covenant not to lease—Lease of Property mortgaged
—Suit to set aside Lease.*

A mortgaged certain property to *B*, agreeing, amongst other things, not to grant in zurpeshgi or mortgage the property to any one so as to cause any difficulty in the realization of the money advanced under the mortgage-bond. *A* subsequently leased in zurpeshgi part of the property to *C*. *B* obtained a sale-decree against *A* on his mortgage, and at the sale himself became the purchaser of the property. He then brought a suit against *C* to set aside the zurpeshgi lease, and to obtain khas possession. *Held*, that the covenant in the mortgage-bond merely created a personal liability between *A* and *B*, and that the sale under *B*'s mortgage-decree did not put an end to the zurpeshgi lease or affect the interests of the zurpeshgidar; that *B*'s suit against *C* was wrong in form; and that his proper course was to sue to have his right declared to sell the property in satisfaction of his mortgage-debt, so as to give the zurpeshgidar an opportunity of redeeming.

THIS was a suit brought by one Monohur Das against Radha Pershad Misser, to set aside a zurpeshgi lease of a certain village, which had been mortgaged to the plaintiff by one Syed Zahurul Haq, and to recover khas possession of the property under mortgage.

Zahurul Haq, on the 23rd December 1867, borrowed a sum of Rs. 3,500, at 2 per cent., from the plaintiff, giving as security, amongst other properties, the village above referred to; one of the terms of the mortgage being that he, the mortgagor, "would not sell absolutely or conditionally, grant in zurpeshgi lease, or make gift of, or mortgage, the said properties to any one, or execute any deed in any way by which any difficulty might arise in the realization of the money covered by the deed."

* Appeal from Original Decree, No. 173 of 1879, against the decree of Baboo Koylash Chunder Mookerjee Roy Bahadur, Officiating Second Subordinate Judge of Tirhut, dated the 3rd April 1879.

1880

RADHA
PERSHAD
MISSEK
v.
MONOHUR
DAS.

In July 1871 Zahurul Haq granted a zurpeshgi lease to the defendant of part of the properties included in the mortgage to the plaintiff.

On the 27th February 1873 the plaintiff brought a suit on his mortgage-bond, and obtained a decree for the sale of the mortgaged property, and at the auction-sale himself became the purchaser. The defendant, however, refused to give up possession to the plaintiff, contending that his zurpeshgi lease could not be set aside, nor he himself ousted from possession, inasmuch as he was not made a party to the mortgage-suit.

The Subordinate Judge held, that Zahurul Haq had no right to grant the zurpeshgi lease to the defendant in direct contradiction to the terms of the mortgage-bond, and that it was unnecessary that the defendant should have been made a party to the mortgage-suit, inasmuch as he had only a limited interest in the property, and did not stand in the place of his lessor. He therefore ordered the plaintiff to be put into possession of the property claimed, and set aside the defendant's ticca lease.

The defendant appealed to the High Court.

Baboo *Aubinash Chunder Banerjee* and Baboo *Hem Chunder Banerjee* for the appellant.

Baboo *Chunder Madhub Ghose* and Mr. *Sandel* for the respondent.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J.—We think that, having regard to the rule laid down by the Full Bench in *Emam Momtazooddeen Mahomed v. Rajcoomar Das* (1), and to subsequent decisions of this Court, amongst which we may specially notice the cases of *Byjnath Sing v. Goberdhun Lall Mohasohree* (2) and *Cheit Narain Sing v. Gunga Pershad* (3), we cannot do otherwise than allow the appeal, and dismiss the plaintiff's suit.

It is clear that the covenant entered into by the mortgagor in the mortgage-bond of 1867 did not render invalid the zur-

(1) 14 B. L. R., 408; S. C., 23 W. R., 187.

(2) 24 W. R., 210.

(3) 25 W. R., 216.

peshgi lease which was subsequently granted. We have held in other cases that such a covenant only creates a personal liability as between the mortgagor and the mortgagee.

Then it is also clear, that the subsequent sale under the decree of 1873 did not put an end to the zurpeshgi lease, or affect the interests of the zurpeshgidar.

The plaintiff has, therefore, no right to sue for khas possession of the property as against the zurpeshgidar. His only course would be to bring a suit against the zurpeshgidar to have his right declared to sell the property to satisfy his mortgage-debt, so as to give the zurpeshgidar an opportunity of redeeming.

This suit is one of a totally different character. The plaintiff has all along contended that he is entitled to khas possession, and that the zurpeshgi lease is void; and we should be entirely changing the nature of his claim if we were to allow him to frame and try it on the other basis.

The judgment of the lower Court must, therefore, be reversed; and the plaintiff's suit dismissed with costs in both Courts.

Appeal allowed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Pontifex, Mr. Justice Morris, Mr. Justice Mitter, and Mr. Justice Prinsep.

NIAMUT KHAN AND OTHERS*(PLAINTIFFS) v. PHADU BULDIA
(DEFENDANT).*

1880
Sept. 14.

Res judicata—Suit for Enhancement of Rent—Finding in Judgment not embodied in Decree—Civil Procedure Code (Act X of 1877), s. 13.

N. brought a suit against *P.* for enhancement of rent. *P.*'s defence was, *first*, that no notice of enhancement had been given; *secondly*, that the rent was not enhanceable, as he and his predecessors in title had held it at a fixed rent from the date of the Permanent Settlement. The suit was dismissed on the ground that no notice had been given; but the Munsif stated in his judg-

* Reference to a Full Bench in Appeal under s. 15 of the Letters Patent, from the decree of Mr. Justice Tottenham, dated 30th January 1880, made in appeal from appellate decree, No. 1082 of 1879, from the decree of A. T. Maclean, Esq., Judge of Zilla 24-Pargannas, dated 31st March 1879, reversing the decree of Baboo Okhoy Coomar Chatterjee, Second Munsif of Diamond Harbour, dated 23rd September 1878.

1880
RADHA
PERSHAD
MISSER
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