

APPELLATE CIVIL.

Before Falshaw and Kapur, JJ.

BALKISHAN AND OTHERS,—Plaintiffs-Appellants

versus

BALDEO KUMAR AND OTHERS,—Defendants-Respondents.

Regular Second Appeal No. 456 of 1948.

Mortgage—Redemption—Rule of Damdupat in section 30 of the Punjab Relief of Indebtedness Act (VI of 1937) when applies—Tenants under mortgagee, whether protected by the provisions of the Punjab Urban Rent Restriction Act (III of 1949).

R. K. mortgaged with possession the house to B. R. on 22nd October, 1928, and the mortgage amount was to carry interest at 12 per cent per annum which after two years was to be raised to 15 per cent per annum. Sons and the widow of R. K. sued B. R. and his tenants for redemption on 15th March, 1945. Plaintiffs relied on the rule of Damdupat. Trial Court decreed the suit on payment of Rs. 3,884 representing the principal, interest at 7½ per cent and costs of improvement. In appeal the District Judge varied the decree by reducing the amount to Rs. 3,883-6-0 and also held that the tenants of the mortgagee could not be ejected. Plaintiffs appealed to the High Court.

Held, that the rule of Damdupat had no application to the facts of this case as there is no debt as defined in section 7 of the Relief of Indebtedness Act, and, therefore, section 30 of that Act has no application to the facts of this case.

Held further, that when a building is under mortgage with possession the tenants under the mortgagee are not tenants of the owner—the mortgagor—nor is the mortgagor the landlord *qua* such tenants, and, therefore, the provisions of the Punjab Rent Restriction Act do not apply in their favour and no restriction placed by this Act can in any way affect the rights of the owner *qua* the tenants. If the mortgage is redeemed and the owner becomes entitled to possession the tenants of the mortgagee cannot set up any title as against such owner.

Second Appeal from the decree of Shri Yash Pal Gandhi, Additional District Judge, Amritsar, dated the 23rd day of December, 1947, modifying that of Shri Fazal Ilahi, Sub-Judge, 1st Class, Amritsar, dated the 23rd January, 1946 (granting the plaintiffs a preliminary decree for redemption of the house on payment of Rs. 3,884 to defendant No. 1 and dismissing the suit against the other defendants and directing that Rs. 3,884 shall be deposited

1953

May, 6th

by the plaintiffs on or before 2nd February, 1946, along with Rs. 6-10-0 interest for one month and the amount will go on increasing at that rate till payment of the mortgage money) by granting the plaintiffs preliminary decree for redemption of the house on payment of Rs. 3,883-6-0 with interest at 7½ per cent per annum to be paid on or before 24th March, 1948, in court, failing which the plaintiffs will be at liberty to apply for final decree for sale of the mortgaged property and further holding that the tenants of the mortgagee could not be ejected, and leaving the parties to bear their own costs throughout.

SHAMAIR CHAND, for Appellants.

A. R. KAPUR, for Respondents.

JUDGMENT.

KAPUR, J. This is an appeal against an appellate decree of the learned Additional District Judge of Amritsar, varying the decree of the trial Court in a redemption suit.

Kapur, J.

Pandit Rikhi Kesh, on the 22nd of October, 1928, mortgaged the house in dispute in favour of Master Bodh Raj for Rs. 2,500. The interest agreed upon was 12 per cent per annum which was to be raised after two years to Rs. 1-4-0 per cent per mensem, the mortgage being with possession. On the 15th of March, 1945, the plaintiffs who are the sons and widow of the mortgagor brought a suit for redemption making the mortgagee and his tenants as party defendants. The plaintiffs relied on the rule of damdupat also. Several pleas were raised but it is not necessary to decide them. The trial Court decreed the plaintiffs' suit and allowed redemption on payment of Rs. 3,884 being the principal amount plus interest plus cost of improvements and interest thereon at 7½ per cent per annum. An appeal was taken to the Additional District Judge and there the decree was only slightly varied and the amount on payment of which the redemption was allowed was reduced to Rs. 3,883-6-0. It was also held that in this suit the tenants of the mortgagee could not be ejected.

In this appeal two points have been argued by Mr. Shamair Chand—(1) that the rule of damdupat applies and (2) that there is no protection to

Balkishan and others v. the tenants of the mortgagee and the decree so far as it relates to the tenants, is erroneous.

Baldeo Kumar and others v. Kapur, J. In my opinion the rule of damdupat has no application to the facts of this case as there is no debt as defined in section 7 of the Relief of Indebtedness Act, and, therefore, section 30 of that Act has no application to the facts of this case.

The next point raised is as to the correctness of the decision of the lower Courts in regard to the tenants of the mortgagee. The contention of the tenants was that they are protected under the Rent Restriction Act. 'Tenant' in section 2(i) of that Act is defined as follows :—

“ ‘tenant’ means any person by whom or on whose account rent is payable for a building or rented land and includes a tenant continuing in possession after the termination of the tenancy in his favour, but does not include a person placed in occupation of a building or rented land by its tenant, unless with the consent in writing of the landlord, or a person to whom the collection of rent or fees in a public market, cart-stand or slaughter-house or of rents for shops has been farmed out or leased by a municipal town or notified area committee.”

By clause (1) of section 13, it is provided :—

“ A tenant in possession of a building or rented land shall not be evicted therefrom in execution of a decree passed before or after the commencement of this Act, or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this section.”

Clause (2) provides that “ a landlord who seeks to evict his tenant” must apply to the Controller

appointed under the Act, and this clause sets out the circumstances under which the Controller can give a direction for possession. In clause (c) of section 2 'landlord' means "any person for the time being entitled to receive rent in respect of any building or rented land whether on his own account or on behalf, or for the benefit, of any other person, or as a trustee, guardian, receiver, executor or administrator for any other person, and includes a tenant who sublets any building or rented land in the manner authorised under the Act, and every person from time to time deriving title under a landlord."

Balkishan
and others
v.
Baldeo Kumar
and others
Kapur, J.

Thus when a building is under mortgage with possession, the tenants under the mortgagee are not tenants of the owner—the mortgagor—nor is the mortgagor the landlord *qua* such tenants, and therefore, the provisions of the Punjab Rent Restriction Act, do not apply in their favour and no restriction placed by this Act, can in any way affect the rights of the owner *qua* the tenants. If the mortgage is redeemed and the owner becomes entitled to possession, the tenants of the mortgagee cannot set up any title as against such owner.

The title of the lessee is thus a precarious one which is subject to defeasance on the mortgagor successfully asserting his statutory right of redemption and thus ending the mortgage itself.

In *Som Nath v. L. D. Desai* (1), a Division Bench of this Court decided this question. The head note there is :—

"The title of the tenant of a mortgagee is precarious and comes to an end upon termination of the interest of the mortgagee in the property as is provided by section 111 of the Transfer of Property Act. Such a person cannot seek protection of the Rent Restriction Act, and resist the suit of the mortgagor for redemption of the property instituted against the mortgagee as the relation-

Balkishan
and others
v.
Baldeo Kumar
and others
—
Kapur, J.

ship of landlord and tenant does not come into being between the mortgagor and the tenant of the mortgagee."

The learned Judges there relied on a judgment of the Court of Appeal in *Dudley and District Benefit Building Society v. Emerson* (1). In this case the dictum of Selborne, L. C., in *Corbett v. Plowden* (2), was applied. The Lord Chancellor there said as follows :—

"If a mortgagor left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease by the agreement under which possession is taken, or a legal lease by actual demise) the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagees may be asserted against both of them."

No doubt that was a case where the position was that of mortgagor who was left in possession and the person wanting possession was the mortgagee but in principle it does not make any difference.

In *Iron Trades Employers Insurance Association, Limited v. Union Land and House Investors, Limited* (3), there was a covenant by the mortgagor that he would not exercise his statutory power to grant leases save on a condition. It was held by the learned Judge deciding that case that the parties had added to the statutory conditions a fresh contractual condition and Farwell, J., used the following phrase in a part of his judgment—

"Any lease he might attempt to grant to some third party would be in no way binding on the mortgagee, and as between the lessee and the mortgagee would create no estate or interest other than that which I will mention in a moment."

(1) (1949) 2 A.E.R. 252

(2) (1884) 25 Ch. D. 681

(3) (1937) 1 A.E.R. 484

In a recent case decided by their Lordships of the Supreme Court in *Messrs Importers & Manufacturers, Ltd. v. Pheroze Framroze Tara-porewala and others* (1), it was held that a decree for possession against a tenant in a suit for ejectment is binding on a person claiming title under or through the tenant and is executable against such person whether or not he was or was not a party to the suit; the non-joinder of such a person does not render the decree any the less binding on him.

Balkishan
and others
v.
Baldeo Kumar
and others

Kapur, J.

All these cases go to support the contention of the appellants that the Rent Restriction Act is no bar to a decree being passed against the respondents who are tenants of the mortgagee.

The appeal is, therefore, allowed and the decree of the learned District Judge is varied to the extent that the Rent Restriction Act will be no protection to the tenants of the mortgagee against the rights of the mortgagor and the decree for redemption.

We give three months' time to the mortgagor to pay the amount due under the decree.

The parties will bear their own costs throughout,

FALSHAW, J.—I agree.

Falshaw, J.