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Court : Allahabad

Decided On : Jun-24-1912

Reported in : 16Ind.Cas.44

Judge : Chamier, J.

Appellant : Debi Chand

Respondent : Bharat and ors.

Judgement :

Chamier, J.

1. This was a suit by a usufructuary mortgagee against his mortgagors on the basis of a kabuliyat signed by them. It appears that on the day when the mortgage was made, the mortgagee gave the mortgagors a lease of part of the mortgaged property. The land leased was old khudkasht land of the mortgagors. The suit has been dismissed by the Courts below on the ground that the arrangement was illegal. They have omitted to notice that the mortgage is not affected by the Tenancy Act. It was held by this Court in *Madho Bhartki v. Barti Singh* 16 A. 337 that a usufructuary mortgage did not fall within Section 7 of the old Rent Act of 1881 and that a person, who made a usufructuary mortgage, did not, therefore, become ex-proprietary tenant of his sir land. The arrangement now in question was not illegal when made and was not rendered illegal by the passing of the Tenancy Act. I allow this appeal, set aside the decisions of the Courts below and

remand the case through the lower Appellate Court to the Court of first instance for decision on the merits. Costs here and in the lower Appellate Court will be costs in the cause, and costs in this Court will include fees on the higher scale.

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