BEFORE A FULL BENCH.

1876
April 20.

(Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.)

HANUMAN PARSHAD (PLAINTIFF) *v.* KAULESAR PANDEY (DEFENDANT).*

Act X of 1859, *ss.* 3, 4—*Act XVIII of* 1873, *ss.* 5, 6—*Rent in Kind (Bhaoli)—Enhancement of Rent—Tenant at a Fixed Rate.*

A rent in kind (*bhaoli*) which, though it varies yearly in amount with the varying amount of the yearly produce, is fixed as to the proportion it is to bear to such produce, is a fixed rent within the meaning of s. 3 of Act X of 1859 (corresponding with s. 5 of Act XVIII of 1873). A tenant, therefore, in a permanently settled district, holding his land at such a rent, is entitled to claim the presumption of law declared in s. 4 of Act X of 1859 (corresponding with s. 6 of Act XVIII of 1873) if he proves that, for a period of twenty years next before the commencement of the suit to enhance his rent, he has paid the same proportion of the produce of his holding.

The decision of the High Court in *Hanuman Parshad* v. *Ramjug Singh* (1) impugned, and of the Calcutta High Court in *Yacoob Hossein* v. *Wahid Ali* (2) dissented from.

This was a suit to enhance the rents of certain lands held by the defendant. The Court of first instance, applying the presumption of law declared in s. 4 of Act X of 1859, held that the rents were not liable to enhancement, and dismissed the suit. On appeal by the plaintiff the lower appellate Court gave him a decree in respect of certain of the lands for which the defendant paid rent in kind (*bhaoli*), holding, with reference to the ruling of the High Court in *Hanuman Parshad* v. *Ramjug Singh* (3), that the presumption of law laid down in s. 4 of Act X of 1859 was not applicable to such lands.

On special appeal by the plaintiff to the High Court it was contended, *inter alia*, that the presumption did not apply to certain other lands also, as the rents of the same were paid in kind.

The Court (Pearson and Spankie, JJ.) referred to the Full Bench the question whether the ruling of the High Court abovementioned was correct or not.

* Special Appeal, No. 733 of 1875, against a decree of the Judge of Benares, dated the 15th May, 1876, modifying a decree of the Collector, dated the 8th July, 1874.

(1) H. C. R., N.-W. P., 1874, p. 371.
(2) 4 W. R., Act X Rulings, 23; S. C., 1 Ind. Jur. N. S. 29. This case was followed in *Thakoor Pershad* v. *Mahomed Baker*, 8 W. R. 170; see, however, *Ram Dayal Singh* v. *Latchmi Narayan*, 6 B. L. R., App. 25, S. C., 14 W. R. 388, in which the Court expressed a doubt as to its correctness.
(3) H. C. R., N.-W. P., 1874, p. 371.

1876

HANUMAN PARSHAD v. KAULESAR PANDEY.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Bishambar Nath*, for the appellant.

Maulvi *Ruhullah*, for the respondent.

STUART, C. J., TURNER, SPANKIE, and OLDFIELD, JJ., concurred in the following opinion:

This suit falls to be decided under Act X of 1859. By the third section of that Act it was declared that ryots who, in the Provinces therein mentioned, hold lands at fixed rates which have not been changed since the permanent settlement are entitled to receive pottahs at those rates. This provision was introduced to give effect to the design announced by Government, when it established the permanent settlement, that the ryot as well as the zemindar should derive benefit from the boon. There is nothing in the section which limits its operation only to ryots who pay rent in cash. Ryots who pay rent in grain may, therefore, claim the privilege, if they can establish that the rates at which they have held their lands are fixed rates. In the case suggested the land is held on the terms that the tenant shall render to the landlord in each year a fixed share of the crop. The quantity of produce delivered may vary in each year, but the rate or share remains the same, be it a fourth or a third or a half, as the case may be. The rate of rent does not vary although its quantum or value may. If then the tenant proves that no alteration in the rate has been made since the permanent settlement, or entitles himself to the benefit of the presumption declared in s. 4 of the Act, he may demand a pottah at these rates as fixed rates.

PEARSON, J.—On re-consideration I am of opinion that the ruling (1) which was followed in *Hanuman Parshad* v. *Ramjug Singh* (2) is not maintainable in reference to the terms of ss. 3, 4, and 5, Act X of 1859. Ss. 3 and 5 show that the word "rent" used in s. 4 means the rate of rent, and whether or not the legislature when enacting these sections had in view a rent paid in the shape of a proportion of the produce, it is impossible to hold that the terms used will not include such a rent as well as a money-rent, and that a ryot in the Province of Benares who claims to hold at fixed rates, and

(1) *Yacoob Hossein* v. *Wahid Ali*, 4 W. R., Act X Rulings, 23; S. C., 1 Ind. Jur. N. S. 29. (2) H. C. R., N.-W. P., 1874, p. 371.

proves that he has for a period of twenty years before the commencement of a suit paid as rent the same proportion of the produce of his holding, is not entitled to the presumption which s. 4 declares.

APPELLATE CIVIL.

(*Mr. Justice Turner and Mr. Justice Spankie.*)

SALAMAT ALI AND OTHERS (PLAINTIFFS) *v.* BUDH SINGH AND OTHERS (DEFENDANTS).*

Mortgagor and Mortgagee—Constructive Fraud.

Mere silence on the part of a prior mortgagee on hearing that the mortgagor is mortgaging the property a second time is not such conduct as will amount to constructive fraud, and deprive him of his right to priority as against the second mortgagee.

Neither does the mere fact that, being aware of the second mortgage, he attests the execution of the mortgage-deed, amount to such conduct, where his knowledge of the contents of the deed is not shown.

Where a prior mortgagee, however, attested the execution of the deed mortgaging the property a second time, and, being aware of the contents of the deed, kept silence, and thus led the second mortgagee to think that the property was not encumbered, and to advance his money on the security of it, which the second mortgagee would not have done had he been aware of the existence of the prior mortgage, such silence was held to be conduct which amounted to constructive fraud on the part of the prior mortgagee and deprived him of his right to priority (1).

THIS was a suit for money charged on immoveable property. The facts of the case and the arguments in special appeal sufficiently appear from the order of the High Court remanding the case under s. 354, Act VIII of 1859.

* Special Appeal, No. 1062 of 1875, against a decree of the Subordinate Judge of Agra, dated the 30th August, 1875, modifying a decree of the Munsif of Jalesar, dated the 29th June, 1875.

(1) See also *Rai Seeta Ram* v. *Kishun Dass*, H. C. R., N.-W. P., 1868, p. 402, in which case it was held, where a prior mortgagee stood by and allowed the mortgagor to deal with the property as if it were unencumbered, while the second mortgagee, acting in the belief that he was taking a security free from encumbrance, advanced his money upon it at the solicitation of the prior mortgagee, that the prior mortgagee had lost his right to priority by reason of his conduct. See also *MacConnell* v. *Mayer*, H. C. R., N.-W. P., 1870, p. 315, in which case it was held, where a decree-holder brought to sale in execution of his decree property on which he held a mortgage without notifying his encumbrance on it, and on being asked by an intending bidder at the time of the sale whether there was any encumbrance on the property, gave an evasive answer which misled the bidder and induced him to purchase the property as unencumbered, that such decree-holder could not subsequently claim as against such bidder to enforce his mortgage.