

been proved by the plaintiffs to disturb their possession, and consequently the suit fails. We allow this appeal and dismiss the suit with costs in all Courts.

Appeal decreed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

GULZAR SINGH (DEFENDANT) v. KALYAN CHAND (PLAINTIFF).*

Cause of action—Suit by zamindár to recover possession of occupancy holding against occupancy tenant and his alleged transferee in possession—Death of occupancy tenant after filing of suit but before notice—Act XII of 1881, s. 9.

A plaintiff is not entitled to a decree in his suit unless, by proof or admission or default of pleading, he shows that when he instituted that suit he was entitled to a decree.

One K. C., a zamindár, sued in a Court of Revenue to recover an occupancy holding from one B. S., his occupancy tenant, and that tenant's transferee, G. S., to whom, by a transfer which was inoperative under s. 9 of Act No. XII of 1881 B. S. had purported to make over his occupancy holding. The occupancy tenant died after the suit was filed, but before he had received notice of it, and the transferee being in sole possession of the occupancy holding defended the suit. *Held* under the above circumstances that the zamindár's suit must fail, inasmuch as at the time when it was filed he was not entitled to immediate possession of the occupancy holding.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gobind Prasad*, for the appellant.

Munshi *Ram Prasad*, Babu *Datti Lal* and Lala *Sheo Charan Lal* for the respondent.

EDGE, C. J., and AIKMAN, J.—The suit was brought by Lala Kalyan Chand, a zamindár, against Baldeo Singh, who was a tenant having a right of occupancy, but was not a tenant at fixed rates, and against Gulzar Singh, who was a sister's son of Baldeo Singh, to whom Baldeo Singh had made a gift of all his interest in the occupancy holding. The suit was brought on the 13th of February 1890, in a Court of Revenue, and a decree for possession was claimed on the ground that Baldeo Singh, by making the gift,

* Second appeal No 300 of 1891, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 4th February 1891, confirming a decree of Syed Mehdi Ali, Assistant Collector of Allahabad, dated the 13th March 1890.

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had committed an act inconsistent with the purpose for which the land was let, within the meaning of cl. (b) of s. 93 of Act No. XII of 1881. Baldeo Singh died before notice of the plaint was served upon him, but after the plaint was filed. He died some time between the 13th of February and the 13th of March 1890. The exact date of his death is immaterial. The Court of Revenue gave a decree for possession, and on appeal to the District Judge of Allahabad he confirmed that decree, but on different grounds. Gulzar Singh is the appellant here. We should say that after Baldeo Singh had died, the plaintiff had Gulzar Singh, who was already a defendant in his personal capacity to the suit, made a defendant as representing Baldeo Singh. Gulzar Singh in his representative capacity filed no written statement. In his personal capacity he filed a written statement in which he alleged that the gift was good, as he was a partner with Baldeo Singh in the cultivation, and that Baldeo Singh was his maternal uncle. He also pleaded that Baldeo Singh had died 20 days before the 13th of March 1890. Clause (b) of s. 93 of Act No. XII of 1881 did not apply to the case. The learned District Judge, the case being before him in appeal, rightly disregarded the question as to whether the suit had been brought in the proper Court or not. He was entitled to take that course under ss. 206, 207 and 208 of Act No. XII of 1881. He remanded certain issues, and it was found, and he himself found, that Gulzar Singh was not a co-sharer to whom a transfer could be made under the second paragraph of s. 9 of Act No. XII of 1881, *i. e.*, that he was not a co-sharer in favor of whom and Baldeo Singh the right of occupancy originally arose and had not become by succession a co-sharer in the right, and he found that at no time did Gulzar Singh share with Baldeo Singh in the cultivation of the holding. That is, shortly, the effect of the findings. It is therefore perfectly obvious that Gulzar Singh was not a person to whom Baldeo Singh could transfer his right of occupancy. On those findings, which are conclusive between the parties, it is obvious that Gulzar Singh was not a person who could be entitled to inherit the right of occupancy from Baldeo Singh, and, being a collateral, such right of occupancy could not devolve upon him. The case presents,

consequently, this peculiar feature, that if this suit had been brought for possession against Gulzar Singh as a trespasser and had been brought fourteen days after time when it was instituted, Gulzar Singh, on the facts found, would have had absolutely no defence. We are assuming that Baldeo Singh left no direct descendant upon whom the right of occupancy could devolve; yet it appears to us that the plaintiff's suit, treating it as a suit for possession, and not looking at it as controlled in any way by the reference to cl. (b) of s. 23 of Act No. XII of 1881, must fail. A person who sues for possession of any immovable property, *i.e.*, who sues to have another person in possession ejected, must, in order to entitle him to a decree, show that he had himself a right to the immediate possession at the date when he instituted his suit, assuming of course that his title to possession is denied. Now the second paragraph of s. 9 of Act No. XII of 1881 prevented the right of occupancy passing from Baldeo Singh to Gulzar Singh. That paragraph of that section prevents any right of occupancy to which it refers being transferable, except by voluntary transfer, between persons in favor of whom as co-sharers such right originally arose or who have become by succession co-sharers therein. Consequently, the gift was absolutely inoperative to transfer the right, and the right remained in Baldeo Singh, unless the making of the gift amounted to a relinquishment. Section 31 of Act No. XII of 1881 contemplates occupancy tenants relinquishing their occupancy tenancies and consequently their rights of occupancy. That section does not prohibit a relinquishment by an occupancy tenant, but it does provide that unless the occupancy tenant who wishes to relinquish gives the notice required by that section and relinquishes accordingly, he should continue liable for the rent, unless the landlord re-lets the land to some other person. Such occupancy tenant who relinquishes and has not given the notice provided for by that section would, no doubt, be liable to make good the loss to the landlord during the time the occupancy holding might remain unlet. Now, although it is clear that an occupancy tenant can relinquish his occupancy right and his occupancy holding, subject to any liability which he may incur by a non-observance of the requirements of s. 31 of Act No. XII

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of 1881, still it must in every case be considered whether the facts show a relinquishment. As we understand the meaning of relinquishment in this connection, it must be a relinquishment to or in favor of the landholder. A relinquishment might be inferred from a man ceasing to occupy the holding personally or by his servants or by his tenants and going away under circumstances from which it might be inferred that he did not intend to return and had abandoned any interest that he had in the holding. In such a case as that we are of opinion that a Court might infer that the occupancy tenant had relinquished his holding and his occupancy rights, but in a case like the present, in which it is obvious that Baldeo Singh, so far from intending to relinquish the right of occupancy or the occupancy holding in favor of the zamíndár, intended to transfer the holding and the right in it to his donee and to keep that right alive, it would be impossible for a Court to find that Baldeo Singh had relinquished in favor of his landlord his right of occupancy, although in one sense he had in favor of his nephew Gulzar Singh, so far as he was able, relinquished and intended to relinquish his right of occupancy. The position then stands thus:— At the time when this suit was instituted Baldeo Singh, who had not been ejected under Act No. XII of 1881 and who had not, transferred the right of occupancy to any person in whose favor such transfer would be effective under s. 9 of Act No. XII of 1881, and who had not relinquished his occupancy right in favor of his landlord, was alive and that right of occupancy was then a subsisting right vested in Baldeo Singh. Baldeo Singh and not the zamíndár was the person who, as against Gulzar Singh, was entitled to possession. The right not being transferable, whilst that right subsisted in Baldeo Singh, his landlord, the zamíndár, could not prove a right in himself to the immediate possession of the occupancy holding. In the view which we have taken in this case it was immaterial that Baldeo Singh was made a defendant in the suit; it is immaterial that he has died, so long as his death was subsequent to the institution of the suit, and it would be immaterial if he had continued alive to the present day and had not put in a defence in the suit, for Gulzar Singh on his pleadings read with the

plaint, shows that the right of occupancy had been in Baldeo Singh, and that Baldeo Singh was alive after the institution of the suit; and the plaint shows that the only ground on which a decree for possession is claimed was that Baldeo Singh professed to make a gift of the occupancy right and holding to Gulzar Singh and put Gulzar Singh in possession. A man peaceably in possession of immovable property is entitled to remain there until some one with a better title to immediate possession obtains a decree ejecting him. At the commencement of this suit the plaintiff was not entitled to the immediate possession of the occupancy holding, although, if he had brought his suit one fortnight later, after Baldeo Singh had died, and had brought that suit in the proper Court, Gulzar Singh would apparently, on the facts found here, have been without a defence. The ground on which we have to dismiss this suit, although a technical ground, is a ground which it is necessary to observe in law, *viz.*, that the plaintiff is not entitled to a decree in his suit, unless, by proof or admission or default of pleading, he shows that when he instituted that suit he was entitled to the decree. The transaction here between Baldeo Singh and Gulzar Singh was one flagrantly in contravention of the second paragraph of s. 9 of Act No. XII of 1881, and was supported in this suit by a false case. In speaking of a false case we refer to the attempt on the part of Gulzar Singh to prove that he had shared in the cultivation of the holding. For these reasons, although we allow the appeal and dismiss the suit, we do so without costs in any Court. We should say that obviously this decision, being one that at the time the suit was brought the plaintiff was not entitled to a decree for possession, cannot bar a suit which may be brought by the zamíndár against Gulzar Singh as a trespasser since the death of Baldeo Singh.

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Appeal decreed.
