1893

QUEEN-EMPRESS v. SOSHI BHUSHAN.

of March 1887, by handing that document to the Professor of Law of Queen's College, as a genuine certificate signed by the Principal of Canning College, and that he again committed an offence under s. 471 of the Code when, in November 1892, he handed that document to the head clerk of Queen's College for the purpose of obtaining the grant to him of a consolidated certificate. We dismiss this appeal.

FULL BENCH.

1893.
June 28.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

KHIALI RAM (PLAINTIFF) *v.* NATHU LAL AND OTHERS (DEFENDANTS).*

Act XII of 1881, *ss.* 7, 8, 9—*Landlord and tenant—Ex-proprietary tenant, power of to sub-let—Right of occupancy.*

An ex-proprietary tenant can sub-let the whole or any part of his occupancy holding, and such a sub-letting is not forbidden by s. 9 of Act No. XII of 1881.

THIS was a reference to the Full Bench made at the instance of Knox and Burkitt, JJ. The facts of the case as stated in the referring order are as follows:—"Khiali Ram, the appellant in this second appeal, was plaintiff in the Court of first instance. He is the zamíndár of the mahál, and Nathu Lal, one of the respondents, is an ex-proprietary tenant in the same mahál. Khiali Ram alleges that Nathu Lal had given a lease for a term of five years, bearing date the 21st of June 1887, over certain land set out in the plaint to the respondents Khiali Ram, Dudraj and Baldeo. He sought to have the lease set aside, to have the lessees ejected, and possession given to him the zamíndár. The ground on which he claims these reliefs was that the lease was one in contravention of the terms of s. 9 of Act No. XII of 1881. The Court of first instance held that the prohibition against the transfer of his holding by an ex-proprietary tenant refers to a complete transfer only, and not to a lease for

* Second Appeal No. 948 of 1889 from a decree of Rai Banwari Lal, Subordinate Judge of Sháhjahánpur, dated the 24th of April 1889, confirming a decree of Pandit Pitambar Joshi, Munsif of Tilhar, dated the 17th of July 1888.

1893

KHIALI RAM v. NATHU LAL.

a short period like five years, and dismissed the plaintiff's claim so far as the ex-proprietary tenure was concerned. The lower appellate Court confirmed the decree so far, and the appellant now again contends before us that the lease is invalid inasmuch as it is opposed to the provisions of the rent law above cited."

The point arising on these facts was thus referred to the Full Bench:—"Can an ex-proprietary tenant to whom s. 9 of Act No. XII of 1881 applies, sub-let his holding or any part of it; in other words, is such a sub-letting forbidden by s. 9 of Act No. XII of 1881?"

Mr. *J. Simeon* for the appellant.

Pandit *Sundar Lal* for the respondents.

The judgment of the Court was delivered by EDGE, C. J.

The question which has been referred to the Full Bench is,—"Can an ex-proprietary tenant, to whom s. 9 of Act No. XII of 1881 applies, sub-let his holding or any part of it; in other words, is such a sub-letting forbidden by s. 9 of Act No. XII of 1881?" The reference was rendered necessary by the conflicting decisions of this Court, some bearing directly on this question, others applying by analogy.

The sub-letting in this case was by a lease for a term of five years, by which the lessees agreed to pay an annual rent of Rs. 100, of which they agreed to pay Rs. 40 to the zamíndár and Rs. 60 to Nathu Lal, the ex-proprietary tenant and grantor of the lease. The zamíndár, who was no party to the granting of the lease, is the plaintiff, and has brought the suit, out of which this reference has arisen, for possession of the occupancy holding, alleging that the granting of the lease was, by reason of s. 9 of Act No. XII of 1881, illegal, and had determined the right of occupancy of his ex-proprietary tenant. Nathu, the ex-proprietary tenant, and his lessees are the defendants to the suit.

The three sections of Act No. XII of 1881, which appear to us to be material to the consideration of the question referred, are ss. 7, 8, and 9. By the first two paragraphs of s. 7 it is enacted that

"Every person who may hereafter lose or part with his proprietary rights in any mahál, shall have a right of occupancy in the land held by him as sír in such mahál at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages.

"Persons having such rights of occupancy shall be called ex-proprietary tenants, and shall have all the rights of occupancy tenants."

S. 8 is as follows:—

"Every tenant who has actually occupied or cultivated land continuously for 12 years has a right of occupancy in the land so occupied or cultivated by him.

"Such tenants shall be called occupancy tenants. The occupation or cultivating of the father or other person from whom the tenant inherits shall be deemed to be the occupation or cultivating of the tenant within the meaning of this section:

"Provided that no tenant shall acquire, under this section, a right of occupancy—

"(*a*) In land which he holds from an occupancy tenant, or from an ex-proprietary tenant, or from a tenant at fixed rates;

"(*b*) In sír land;

"(*c*) In land held by him in lieu of wages:

"Provided also that, when a tenant actually occupies or cultivates land under a written lease, without having a right of occupancy in such land, the period of twelve years necessary for acquiring a right of occupancy therein by him or any one claiming under him shall begin on the expiration of the term of such lease. If during the currency of such lease he ceases to occupy the land comprised therein and sub-lets it to another, no right of occupancy in such land shall be acquired by the sub-lessee during the currency of the lease."

1893

KHIALI RAM v. NATHU LAL.

S. 9 is as follows :—

"The right of tenants at fixed rates may devolve by succession or be transferred.

"No other right of occupancy shall be transferable in execution of a decree or otherwise than by voluntary transfer between persons in favour of whom as co-sharers such right originally arose, or who have become by succession co-sharers therein.

"When any person entitled to such last mentioned right dies, the right shall devolve as if it were land : Provided that no collateral relative of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this clause."

An "occupancy tenant" under the Act is a person having a "right of occupancy." As we shall show presently, a "right of occupancy," as that term is used in the Act, does not imply that the person in whom that right is vested must himself or by his servants actually occupy or cultivate the holding in which he has the "right of occupancy."

It will be seen from s. 8 of Act No. XII of1881, first,, that proviso (*a*) refers to cases in which a person having no right of occupancy in a holding in respect of which there is a right of occupancy may hold such land as a tenant of the occupancy tenant, that is, of the person who has in such land the right of occupancy, and, secondly, from the last proviso, that it was contemplated that a sub-lessee not holding under an existing lease, may, under the earlier part of the section, acquire a right of occupancy in the land held by him after the expiration of the lease to his immediate landlord who is not an occupancy tenant.

We have thus in s. 8 two classes of sub-tenants recognised, namely, a tenant of an occupancy tenant and a tenant of a lessee who holds under a written lease. The word "tenant" was thus defined by Littledale, J., in *R. v. Ditcheat*, (1), "a tenant is a person who holds of another, he does not necessarily occupy."

(1) 9 B. and C., 183.

The tenant of an occupancy tenant until his tenancy is determined either by the determination of the right of occupancy of the occupancy tenant under whom he is holding, as, for instance, by an ejectment under the Act, or by his own ejectment under the Act, has a right to occupy the land, although whilst the right of occupancy of the occupancy tenant from whom he is holding is subsisting he never can obtain a right of occupancy in the land. Similarly the sub-tenant of a tenant holding under a written lease has a right to occupy the land held by him as such sub-tenant, although he cannot during the currency of such written lease obtain any right of occupancy in the land.

These considerations show that a right of occupancy must not be confounded with a right to occupy. Those two rights may co-exist in the same person, as when an occupancy tenant himself or by his servants, cultivates his occupancy holding. Or, those two rights may be vested in two different persons, the right of occupancy being vested in the occupancy tenant and the right to occupy being vested in his tenant during the currency of the latter's tenancy. In the latter case the position is similar in some respects to the position of a proprietor who lets his land to a tenant, the proprietary right remaining vested in the landlord and the right to occupy the land vesting in the tenant. A right of occupancy may be acquired under s. 8 by a person who has not acquired it under s. 5 as a tenant at a fixed rate or under s. 7 as an ex-proprietary tenant: but, although under s. 9 the right of tenants at fixed rates may devolve or be transferred, a different limitation is placed by that section on the devolution or transfer of any other right of occupancy. S. 9 does not prohibit the transfer of any right to occupy. What the second paragraph of s. 9 of Act No. XII of 1881 does enact is "No other *right of occupancy* shall be transferable, &c.," which is a very different thing from enacting that "no other right to occupy shall be transferable." The second paragraph of s. 9 makes all rights of occupancy other than those of tenants at fixed rates absolutely incapable of being transferred except by voluntary transfer between persons in favour of whom as co-sharers such right

1893

KHIALI RAM v. NATHU LAL.

originally arose, or who have become by succession co-sharers therein."

The omission to recognise the distinction between a "right of occupancy" as those words are used in Act No. XII of 1881, and a right to occupy, and the assumption by some members of the Court in one case that a right of occupancy means "Nothing but the right to live on and cultivate the land as one's own," led to the conflict of authority which exists in the rulings of this Court on the effect of the second paragraph of s. 9 of Act No. XII of 1881.

We now propose to show that since 1851, except in some decisions of this Court, to which we shall refer later on, a tenant with a right of occupancy has always been considered to have enjoyed the power of sub-letting, and that such power has not been interfered with by the Legislature.

In 1851 the question arose as to whether a maurusi ryot had a right to sub-let his holding. The opinion of the Local Government on that subject is to be found in the letter from the Secretary to Government, North-Western Provinces, to the Secretary to the Sudder Board of Revenue, dated Simla, the 6th October 1851, No. 3580 of 1851, published in *Selections from Government Records: Thomason's Despatches*, Vol. 2, pages 216 and 217.

The third paragraph of that letter is as follows:—

"On mature deliberation, the Lieutenant-Governor does not perceive how the right of a mouroosee ryot to sub-let his land can be denied. He has a right of occupancy so long as he pays according to the pargana rate for the land in his occupation. If from any cause he does not cultivate the land himself, he is at liberty, sooner than throw up any portion of his land, to provide for its cultivation by others. He continues responsible to the málguzár for the rent of his land, and so long as he pays it, the málguzár cannot interfere with him. If he sub-lets to a great advantage, presumption exists that the rent he pays is below the pargana usage, and the malguzár may sue for re-adjustment and increase of rent; but he cannot summarily set aside the mouroosee ryot and collect direct from the

under-tenant. That would virtually be to oust the mouroosee ryot, contrary to the conditions of his tenure, which are continued cultivation and punctual payment of the equitable rent."

S. 6 of Act No. X of 1859 was as follows:—

"Every ryot, who has cultivated or held land for a period of twelve years, has a right of occupancy in the land so cultivated or held by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khomar, neejjote, or seer land belonging to the proprietor of the estate or tenure and let by him on lease for a term or year by year, nor (as respects the actual cultivator) to lands sub-let for a term or year by year by a ryot having a right of occupancy. The holding of the father, or other person from whom a ryot inherits, shall be deemed to be the holding of the ryot within the meaning of this section."

The question whether a ryot having a right of occupancy under s. 6 of Act No. X of 1859 could legally sub-let his holding came before the High Court at Calcutta on at least two occasions.

In *Haran Chundra Paul* v. *Mookta Soonduree* (1) Sir Barnes Peacock, C.J., and Dwarkanath Mitter, J., in 1868 held that the plaintiff, who was a tenant with a right of occupancy, "did not transfer any right of occupancy, if he merely sub-let the land to ryots to hold under him. It is expressly provided by s. 6 of Act X of 1859 that the rule therein laid down does not, as respects the actual cultivator, apply to land sub-let for a term of years by a ryot having a right of occupancy. It therefore recognises the right of a ryot having a right of occupancy to sub-let the lands which he holds, although the ryot holding under him does not gain a right of occupancy as against him."

In *Jumeer Gazee* v. *Goneye Mundul* (2) the right of a tenant who had a right of occupancy to sub-let by lease was recognised. That case was decided under Act No. X of 1859.

(1) 10 W. R., C. R. 113. (2) 12 W. R. C. R., 110.

1893

KHIALI RAM v. NATHU LAL.

In *Sadut Ali* v. *Pandit Hait Ram* (1) it was stated in the judgment of the Court that in respect of occupancy tenures subletting had been recognised to be the practice by high authority.

Section 7 of Act No. XVIII of 1873 is the same as the first two paragraphs of s. 7 of Act No. XII of 1881. Section 8 of Act No. XVIII of 1873 is the same as s. 8 of Act No. XII of 1881. Section 9 of Act No. XVIII of 1873 is as follows :—

"The right of tenants at fixed rates shall be heritable and transferable.

"No other right of occupancy shall be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such right.

"When any person entitled to such last mentioned right dies, the right shall devolve as if it were land : Provided that no collateral relative of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this section."

The difference which exists between s. 9 of Act No. XVIII of 1873 and s. 9 of Act No. XII of 1881 is immaterial to the purpose for which we refer to s. 9 of Act No. XVIII of 1873.

In *Goki* v. *Kewal Ram* (2) the Sudder Board of Revenue, N.-W. P., held, with reference to s. 9 of Act No. XVIII of 1873, that an occupancy tenant had a right to sub-let his holding. In *Kunj Behari* v. *Kinlock* (3) Spankie and Oldfield, JJ., held that s. 9 of Act No. XVIII of 1873, did not bar a sub-letting "by an occupancy tenant, as by so doing he does not part with his occupancy right within the meaning of that section."

In *Haji Kidayat-ulla* v. *Ram Newaz Rai* (4) Sir R. Stuart, C.J., and Oldfield, J., held that s. 8 of Act No. XVIII of 1873 showed that a sub-lease by an occupancy tenant was contemplated by that Act and consequently was not a transfer of the right of

(1) S. D. A., N.-W. P. Rep. 1866, Vol. 1, p. 37.
(2) 1 Legal Remembrancer, Rent and Revenue Series, 202.
(3) Weekly Notes, 1881 (2nd Ed.), p. 11.
(4) Weekly Notes, 1882, p. 80.

occupancy to which s. 9 of that Act would apply. The lease in that case was granted by an ex-proprietary tenant and provided that the lessor should have no right of re-entry on the land so long as the stipulated rent was paid. Those learned Judges held that the perpetual character of the lease made no difference, that under the lease the use of the land passed to the lessee, that such use was recoverable on non-payment of the rent reserved, and that the right of occupancy remained in the lessor, who was an ex-proprietary tenant.

The authorities which we have cited show that down to 1882 the right of every occupancy tenant to sub-let his occupancy holding was recognised.

The earliest decision, of which we are aware, which threw a doubt upon the right of an occupancy tenant, other than a tenant at a fixed rate, to sub-let his occupancy holding was that of *Ganga Din* v. *Dhurandhar Singh*. That case came before the Full Bench in 1883 and is reported in I. L. R., 5 All., 495, and W. N. for 1883, p. 89. It was there held that a mortgage with possession by an occupancy tenant of his occupancy holding was a transfer which was prohibited by the second paragraph of s. 9 of Act No. XII of 1881. The mortgagor was not a tenant at a fixed rate. The mortgage then in question was usufructuary. No doubt a usufructuary mortgage by an occupancy tenant of his occupancy holding does for the term of the mortgage transfer such right to the possession of the land mortgaged as the mortgagor has, but it does not transfer the right of occupancy and no decree for sale of the right of occupancy could be obtained in a suit by the mortgagee under Act No. IV of 1882, whether the second paragraph of s. 9 of Act No. XII of 1881 applied or not. Even if an occupancy tenant other than a tenant at a fixed rate were to bring a suit for the redemption of a usufructuary mortgage of his occupancy holding, no decree for sale under s. 92 and no order for sale under s. 93 of Act No. IV of 1882 of the right of occupancy could, by reason of the bar of the second paragraph of s. 9 of Act No. XII of 1881, be made. Possibly Act No. IV of 1882 did not apply to the mortgage in the case

1893

KHIALI RAM v. NATHU LAL.

which we are considering, or was not present to the minds of the learned Judges who decided that case. It is plain from ss. 58, 67, and 68 of Act No. IV of 1882 that a usufructuary mortgagee of land cannot maintain a suit for sale of the mortgaged property, and that his rights of suit are confined to a right of suit for possession for the purposes of enjoying the usufruct in the manner provided by the mortgage, and to a right of suit for the mortgage money, when such suit would lie under s. 68 of Act No. IV of 1882. We fail to see how the second paragraph of s. 9 of Act No. XII of 1881 can apply to a usufructuary mortgage, as that word is defined in clause (*d*) of s. 58 of Act No. IV of 1882, of an occupancy holding by the tenant having the right of occupancy. On the other hand, the second paragraph of s. 9 of Act No. XII of 1881 would, as it appears to us, apply to a simple mortgage, a mortgage by conditional sale, or an English mortgage, as such mortgages are defined respectively in clauses (*b*), (*c*), and (*e*) of s. 58 of Act No. IV of 1882, as the mortgagee would, if it were not that the second paragraph of s. 9 enacts that "no other right of occupancy shall be transferable in execution of a decree, &c.," be entitled in case of default to obtain from a Civil Court a decree for sale of all the mortgagor's rights in the property, or a decree for foreclosure which would deprive the mortgagor of all rights in the property. By reason of the second paragraph of s. 9 of Act No. XII of 1881 a mortgagee, under a simple mortgage, a mortgage by conditional sale, an English mortgage, or any other form of mortgage under which in other cases a mortgagee could obtain a decree for sale or a decree for foreclosure, granted by a tenant, other than a tenant at a fixed rate, having a right of occupancy, would take no interest in the occupancy holding, as any such mortgage would be in contravention of the spirit, if not of the letter, of the paragraph in question.

In *Wajiha Bibi* v. *Abhman Singh* (1) a Division Bench followed the ruling of the Full Bench in *Ganga Din* v. *Dhurandhar Singh* (2).

(1) Weekly Notes, 1883, p. 166. (2) I. L. R. 5, All., 495.

In *Abadi Husain* v. *Jurawan Lal* (1) it was held by a Full Bench that a zar-i-peshgi lease of an occupancy holding granted by tenants with a right of occupancy was a transfer in contravention of s. 9 of Act No. XII of 1881. The grantors were not tenants at fixed rates. How far the fact that the zar-i-peshgi lessees claimed and pleaded that they had acquired all the rights of the occupancy tenants may have influenced the Full Bench in its decision, we cannot say. For the same reasons which we have expressed in our comments upon the decision in *Ganga Din* v. *Dhurandhar Singh* (2) we are of opinion that the decision in *Abadi Husain* v. *Jurawan Lal* and others was wrong, and was based on a confusion by one or more members of the Court of a grant of a right to occupy with a grant of a right of occupancy.

In *Jharan Singh* v. *Shadi Ram* (3) in *Wali Muhammad* v. *Raghubar* (4), and in *Nugpal* v. *Sital Puri* (5) the decision of the Full Bench in *Abadi Husain* v. *Jurawan Lal* (1) and others was followed by Division Benches.

So far as the decision in *Madho Lal* v. *Sheo Prasad Misr* (6) related to the second paragraph of s. 9 of Act No. XII of 1881, it followed the decisions in *Ganga Din* v. *Dhurandhar Singh* (2) and *Abadi Husain* v. *Jurawan Lal* (1), and was, we are satisfied, wrong. The case of *Jhinguri Tewari* v. *Durga* (7) does not affect the question which we have to consider, as there the sale deed professed to transfer the right of occupancy. It has recently been decided, and we think rightly, in *Khamani Ram* v. *Sundar* (8), by the Board of Revenue, North-Western Provinces and Oudh, that although a tenant with a right of occupancy, other than a tenant at a fixed rate, cannot legally transfer his right of occupancy, he can sub-let the right to cultivate the land comprised in his occupancy holding, as such a sub-letting does not profess to be a transfer of the right of occupancy, and is not in contravention of section 9 of Act No. XII of 1881.

(1) I. L. R. 7, All., 866.
(2) I. L. R. 5, All., 495.
(3) Weekly Notes, 1889, p. 145.
(4) Weekly Notes, 1889, p. 145.
(5) Weekly Notes, 1890, p. 3.
(6) I. L. R. 12, All., 419.
(7) I. L. R. 7, All., 878.
(8) Weekly Notes, 1893, p. 9.

1893

KHIALI RAM v. NATHU LAL.

Our answer to the question referred is, that an ex-proprietary tenant can sub-let the whole or any part of his occupancy holding, and that such a sub-letting is not forbidden by section 9 of Act No. XII of 1881.

In order that the effect of our opinion may not be misunderstood and our decision be not misapplied, it is necessary to say that it is obvious to us that the interest in an occupancy holding of any person to whom an occupancy tenant sub-lets, or to whom he grants a usufructuary mortgage of land comprised in his occupancy holding, will determine, if it has not previously determined, on the termination of the right of occupancy, and can subsist no longer than the right of occupancy subsists. Such sub-tenant does not by the sub-letting become the tenant of the zamíndár, who is entitled to receive from his occupancy tenant the rent due by him. The rights of the zamíndár under Act No. XII of 1881 to obtain an enhancement of the rent payable to him or to obtain an ejectment of his occupancy tenant and of those holding under him, cannot be interfered with or lessened by the fact that his occupancy tenant has by a lease, or other form of sub-letting, or by a usufructuary mortgage, to the granting of which the zamíndár was not an actively consenting party, sub-let or mortgaged the occupancy holding or any part of it. A sub-tenant or usufructuary mortgagee as such is not entitled to use the land for any purposes other than those for which the occupancy tenant, if in possession, would be entitled to use it.

On the appeal being sent back to the Bench concerned, judgment was delivered on the 30th of June 1893 dismissing the appeal in accordance with the judgment of the Full Bench given above.