

modifications of the rights of both parties may be required; some restraints on one side or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations or duties; some compensatory or preliminary or concurrent proceedings to fix, contract, or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights or the redress of injuries. In all these cases, Courts of common law cannot grant the desired relief.....But Courts of equity are not so restrained. They may adjust their decrees so as to meet most, if not all, of these exigencies, and they may vary, qualify, restrain, and model the remedy so as to suit it in mutual and adverse claims, controlling equities, and the real, and substantial rights of all the parties"—Story's *Equity Jurisprudence*, ss. 27, 28. And, applying these principles to the present case, my answer to the third question is, that the plaintiff cannot obtain a decree for possession of his share of the property in suit without such decree being rendered contingent upon payment by him of such proportion of the purchase-money as would represent his proportionate share of the liability to the ancestor's debts liquidated by the proceeds of the auction-sale.

I wish to add that I have considered it my duty to consider this case at such length because of the conflict of decision existing in the Reports, which has thrown much doubt upon important rules of law governing the inheritance of a population nearly as large as the whole of the German-speaking population of Europe.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

INDAR SEN AND ANOTHER (DEFENDANTS) *v.* NAUBAT SINGH AND OTHERS
(PLAINTIFFS).*

Landholder and tenant—Ex-proprietary tenant—Relinquishment of ex-proprietary rights—Act XII of 1881 (N.-W. P. Rent Act), ss. 9, 31.

Held by the Full Bench that an ex-proprietary tenant is not competent to relinquish his holding to his landlord by private arrangement.

Per PETHERAM, C. J.—S. 31 of the N.-W. P. Rent Act (XII of 1881) was enacted absolutely in the interests of the cultivator, and provides, in effect, that although the occupancy tenant may not be turned out, and may not transfer his

* First Appeal No. 18 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 19th May, 1883.

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rights, he is not to be regarded as bound to his holding, that he may relinquish it, and that, in that case, he is not liable for rent; but this provision must not be taken advantage of by letting the zamindar buy the holding, and thus introducing a new cultivator, contrary to the prohibition contained in s. 9.

THE plaintiffs in this case sued the defendants for possession of certain shares in certain mauzas and certain shops, claiming as usufructuary mortgagees under a deed dated the 3rd April, 1882, executed in their favour by the defendants. This deed conveyed to the plaintiffs all the rights and interests appertaining to the shares in the mauzas, together with the "*haq khud kash*." The Court of first instance decreed the claim. The defendants appealed to the High Court, contending that "a decree for possession of the *sir*-land was contrary to law." With reference to this contention, the Divisional Bench (FETHERAM, C. J., and BRODHURST, J.), hearing the appeal, referred to the Full Bench the question—"Whether a person who creates a usufructuary mortgage of zamindari property becomes an ex-proprietary or occupancy-tenant of the *sir*-land, under s. 7 of the Rent Act, 1881?" This question having been answered in the affirmative by the majority of the Judges (1), the case came again before the Divisional Bench. It was then contended, on behalf of the respondents, that the appellants had relinquished their rights in respect of their *sir*-land in a mauza called Ruknipur, their share in which was part of the mortgaged property. The respondents relied on an instrument executed by the appellants, dated the 26th April, 1882. This instrument, after reciting the mortgage, continued as follows:—

"Fifty-six *pukta* bighas and sixteen biswas of land have been in our cultivation, and we of our free will and consent have relinquished the said land to the mortgagees, which they have accepted. Therefore we hereby declare that neither we nor our heirs shall have any claim to the rights of cultivation. If we claim them, then our claim will not be cognizable. The mortgagees are at liberty to give the cultivatory land for cultivation to whomsoever they may like, or keep it in their cultivation: we have nothing to do with it. Therefore these few words, by way of relinquishment of cultivation, have been written that they may be of use when needed."

(1) *Ante*, p. 553.

The Divisional Bench thereupon referred to the Full Bench the question—Whether an ex-proprietary tenant could relinquish his holding to his landlord by private arrangement ?

Babu *Ratan Chand*, for the appellants.

Mr. *J. Simeon*, for the respondents.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J.—This was a suit brought by a mortgagee for possession of the mortgaged property, which was a zamindari interest belonging to the defendant, including *str*-land. The first question which arose in the case was—What is the position of a zamindar who has mortgaged his interest with possession, in reference to his *str*? That point was decided by the ruling of the Full Bench, dated the 7th March (1). The Court then held that the zamindar's position was that of an ex-proprietary tenant under the Rent Act, a mortgage being a transfer of a proprietary interest. After this decision, the case came before a Divisional Bench, and a further question then arose. It appears that, after the mortgage and the creation of the ex-proprietary tenancy, the defendant relinquished his ex-proprietary rights in favour of the new zamindar, the mortgagee. The question now is, whether the transaction can be enforced, because, although the ex-proprietary tenancy was relinquished, the mortgagee was never put in possession, and the agreement is still executory.

I am of opinion that the transaction cannot be recognized. The position of an ex-proprietary tenant is defined by the Rent Act. S. 7 creates the tenancy ; s. 9 lays down certain rules relating to transfer, and provides that “the rights 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.” The plain meaning of this is, that occupancy-tenants (including all who occupy the land for their subsistence except tenants at fixed rates) are not competent to sell their rights, except to co-sharers in the same interest. Where a number of persons are jointly engaged in the cultiva-

(1) *Ante*, p. 553.

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tion of land, they may, as between themselves, sell their occupancy-rights. In other words, any one of them may so transfer his rights that, in a case where, for instance, six persons originally were in joint cultivation, one of them has gone, and only five of the original joint cultivators remain. No stranger, however, is introduced into the original body. We here have the case of a mortgage, and a new class of occupancy-tenants created in the person of the mortgagor. The mortgagor then proposes to relinquish his rights in favour of the landlord. Now, if this were a valid transaction, the landlord would in effect become a joint cultivator with the other co-sharers. This means the introduction of an outsider as an occupancy-tenant, and that is exactly what the law prohibits. S. 31 of the Rent Act was enacted by the Legislature absolutely in the interests of the cultivator. It provides in effect that, although the occupancy-tenant may not be turned out, and may not transfer his rights, he is not to be regarded as bound to his holding, that he may relinquish it, and that in that case he is not liable for rent. This provision has been taken advantage of by letting the zamindar buy the holding, and thus introducing a new cultivator. My answer to this reference is, that the occupancy-tenant's interest is not absolute, and that the mortgagor cannot, under the circumstances, be ejected from the *str*-land by the new zamindar, the mortgagee.

STRAIGHT, J.—As I understand the question put by this reference, it is virtually this:—Can an ex-proprietary tenant relinquish his ex-proprietary tenancy to his landlord by private arrangement?

The circumstances of the case are, that on the 3rd April, 1882, a mortgage-deed was executed by the defendant in favour of the plaintiff, and the latter now sues for possession of the property. On the 26th April, a document^c was executed, which virtually assigned or relinquished the ex-proprietary rights which, under the recent ruling of the Full Bench, the mortgagor had acquired on the completion of the mortgage.

It is contended, on behalf of the mortgagee, that the document is a valid one, and that it should be recognized and enforced. In the first place, it does not recite any consideration; and if a

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document is executed for no consideration, it cannot be enforced. But it has been said that there *was* some consideration, namely, the release of the mortgagor from payment of the rent, which otherwise would have been due from him. If this is correct, there is a transfer of ex-proprietary rights by the mortgagor in favour of the mortgagee, and that is a transaction in the teeth of s. 9 of the Rent Act. So that, whichever way we look at the matter, the contract is either unenforceable or prohibited by s. 9. I am of opinion that it is not competent for an ex-proprietary tenant, by private arrangement, to transfer his ex-proprietary rights to his landlord; and in this view I concur in the answer given to this reference by the Chief Justice. The result is, that in any decree in this suit giving possession to the mortgagee, he cannot obtain the ex-proprietary rights referred to in the deed.

BRODHURST, J.—I am of the same opinion.

TYRRELL, J.—I am of the same opinion.

*Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight,
 Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

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MURLI RAI AND OTHERS (PLAINTIFFS) v. LEDRI AND ANOTHER (DEFENDANTS)*.

Landholder and tenant—Mortgage by conditional sale of occupancy rights to zamindar—Act XVIII of 1873 (N.-W. P. Rent Act), s. 9—Act XII of 1881 (N.-W. P. Rent Act), ss. 2, 9.

The occupancy-tenant of certain land, before the N.-W. P. Rent Act (XII of 1881) came into force, mortgaged his rights to his zamindars by a deed of conditional sale. The zamindars sued the heirs of the conditional vendee for foreclosure and possession of the mortgaged property.

Held by the Full Bench that the terms of the judgment of the Full Bench in *Naik Ram Singh v. Murli Dhar* (1) were directly applicable to the case, and that the transaction of mortgage, which was subsequently to become a sale, was not a transaction to which s. 2 of the Rent Act applied, because the sale would not have effect till after the Act came into operation.

In this case, the occupancy-tenant of certain land, before the N.-W. P. Rent Act (XII of 1881) came into force, executed a deed of mortgage by conditional sale of his rights and interests in favour of his zamindars. The latter brought the present suit

* Second Appeal No 1015 of 1884, from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Ghazipur, dated the 14th June, 1884, reversing a decree of Babu Nil Madhab Roy, Munsif of Ghazipur, dated the 12th December, 1883.