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August 15.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

BANMALI PANDE (PLAINTIFF) *v.* BISHESHAR SINGH AND ANOTHER (DEFENDANTS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 20, 21 *and* 31—*Occupancy holding—Rights of alienation possessed by occupancy tenants—Mortgage.*

Held that the law enacted in sections 20 and 21 of the Agra Tenancy Act, 1901, obliterates any distinction which might have existed or have been supposed to exist between the right of occupancy and the right to occupy wherever transfers were made or contemplated by tenants, and that the tenants mentioned in these sections can no longer transfer either the right of occupancy or the right to occupy otherwise than by a sub-lease.

A subsequent mortgagee of an occupancy holding, whose mortgage was executed after the coming into force of the Agra Tenancy Act, has, therefore no right to redeem a prior mortgage over the same holding. *Khiali Ram* v. *Nathu Lal* (1) and *Brij Mohan Das* v. *Algu* (2) distinguished. *Madan Lal* v. *Muhammad Ali Nasir Khan* (3) approved.

THE plaintiff in this suit claimed as subsequent mortgage of a cultivatory holding of one Dip Singh a right to redeem a prior usufructuary mortgage over the same holding granted by Dip Singh to Bisheshar Singh and Kauleshar Singh, who were in possession. The Court of first instance (Munsif of Rasra) decreed the plaintiff's claim. The defendants, first mortgagees, appealed, and in appeal raised the plea that under the provisions of the Agra Tenancy Act, 1901, the mortgage in favour of the plaintiff was invalid and the plaintiff therefore had no right to sue for redemption of their mortgage. The lower appellate Court (Subordinate Judge of Ghazipur) accepted this contention, and, reversing the decision of the Munsif, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Maulvi *Abdul Majid*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

STANLEY, C.J., and KNOX, J.—The subject matter of the suit out of which this second appeal arises is the interest of an occupancy tenant, and the question which we have to decide is

* Second Appeal No. 1288 of 1904, from a decree of Syed Muhammad Tajammul Husain, Subordinate Judge of Ghazipur, dated the 15th of September 1904, reversing the decree of Babu Man Mohan Sanyal, Munsif of Rasra, dated the 12th of May 1904.

(1) (1893) I. L. R., 15 All., 219. (2) (1903) I. L. R., 26 All., 7.
(3) (1906) I. L. R., 28 All., 696.

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whether the holder of a subsequent usufructuary mortgage which purports to have been created over the interest of an occupancy tenant can sue for redemption of a prior usufructuary mortgagee who claims to hold a similar mortgage over the same holding. The Court of first instance decreed the claim in favour of the subsequent mortgage. The lower appellate Court held that the mortgage under which the plaintiff claimed was invalid and unlawful, that the plaintiff had acquired no rights in respect of the "mortgage land sought to be redeemed" and was in no way entitled to claim "redemption" under the Transfer of Property Act. It accordingly dismissed his suit. Three pleas are taken in appeal—the first is that the "mortgage" is not absolutely void, but is voidable as against the landlord; the second is that as neither the landlord nor the tenant had questioned the validity of the "mortgage" the defendants had no right in law to question the right of the plaintiff to maintain the suit, and the third was that the lower appellate Court had not taken into consideration the provisions of section 31 of the North-Western Provinces Tenancy Act, 1901. It will be seen that this third plea is virtually the first plea over again in different terms. The learned counsel for the appellant felt, as he proceeded in his argument, the difficulty of treating his client's rights as the rights of a mortgagee, and he adopted the line of reasoning sanctioned in the Full Bench ruling of this Court, *Khiali Ram* v. *Nathu Lal* (1). In that case it was held 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 sublet 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." Again in the same judgment it is laid down by the learned Judges, at page 230, that "the right of a zamindar 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

(1) (1893) I. L. R., 15 All., 219.

usufructuary mortgage, to the granting of which the zamindar was not an actively consenting party, sub-let or mortgaged the occupancy holding or any part of it." The learned counsel points out that this view was endorsed by the learned Judges of this Court who decided the case of *Brij Mohan Das* v. *Algu* (1). In this case the objection taken to the decision of the Full Bench of this Court, namely, that the only question referred to the Full Bench was whether or not an exproprietary tenant could sub-let his holding or a part of it, and so far as it applied to the interest of an occupancy tenant that judgment is an *obiter dictum* was fully considered. It was held after much consideration that the second paragraph of section 9 of the North-Western Provinces Rent Act, 1881, was no bar to the creation of a usufructuary mortgage of an occupancy holding by a tenant having a right of occupancy.

The learned counsel also urged that the Tenancy Act was an Act intended only to regulate the relations subsisting between landlords and tenants. The provisions contained in section 20 were provisions created and intended to protect and guard the interests of the landlord, and in construing them the Court should take into consideration the provisions of section 31 of the same Act. Section 81 enacts that every sub-lease or other transfer, etc., made by a tenant in contravention of the provisions of this Act shall be voidable as hereinafter provided. Further that when a tenant has made such a sub-lease or other transfer the landholder may sue for the cancellation of the same or for ejectment of the tenant or other transferee or of both. If these two sections were read together, he contended that the provisions of the Tenancy Act, 1901, did not affect and were not intended to affect transfers between tenants and transferees from tenants, and that such transfers, even in the case where the landlord was concerned, being voidable and not void, such transactions admitted of being validated.

We are ready to admit freely that we find very great difficulty in reconciling and in interpreting the language used in the Tenancy Act, 1901, as for instance in section 21, where it is laid down that where the interest of a tenant is not transferable,

(1) (1903) I. L. R., 26 All., 78.

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he shall not be competent to transfer his holding or any portion thereof otherwise than by lease as hereinafter provided.

In considering, however, the argument addressed to us by the learned counsel it is important to remember that the Tenancy Act of 1901 is not, as Act No. XII of 1881 was, an Act to amend the law relating to the recovery of rent, but an Act to consolidate and amend the law relating to agricultural tenancies, and that the language used in section 9 of the Act of 1881 has been very much amplified in sections 20 and 21 of the Act of 1901. While section 9 of Act No. XII of 1881 dealt with the rights of tenants at fixed rates and other rights of occupancy, section 20 of the present Act deals with the interest of exproprietary tenants, occupancy tenants, etc. It declares that those interests are not transferable in execution of a decree of a Civil or Revenue Court, and also that an exproprietary tenant and an occupancy tenant are not competent to transfer their holdings or any portion thereof otherwise than by a sub-lease as provided in the Act. Now the word "interest" which is used in the Act of 1901 is a word of a very large and comprehensive nature. While section 9 of Act No. XII of 1881 merely enacted that "no other right of occupancy shall be transferable in execution of a decree or otherwise," the Act of 1901 uses the wider term "interest" and provides that the interest of an occupancy tenant is not transferable in execution of a decree or otherwise, etc. The right to cultivate the land is one interest, the right to pay rent for such holding at favourable rates is another interest which an occupancy tenant has in the land he holds. Both interests are now declared not transferable. It appears to us then that the law enacted in sections 20 and 21 obliterates any distinction that might have existed or have been supposed to exist between the right of occupancy and right to occupy wherever transfers were made or contemplated by tenants, and that the tenants mentioned in these sections can no longer transfer either the right of occupancy or the right to occupy otherwise than by a sub-lease.

The Transfer of Property Act has drawn a sharp line of distinction between mortgages and leases, and from the reference made in that Act to leases for agricultural purposes contained in

section 117 it may well be inferred that leases for agricultural purposes stand on a different footing from mortgages. This is also apparent from reading section 10, cl. 2, and section 31 of Act No. II of 1901 together. The case before us is of a mortgage such as is contemplated and understood by "mortgages" in Act No. IV of 1882. Were we to grant a decree in this case, the decree would be intended to operate in the direction of transferring the interest of the occupancy tenant mortgagor from the prior mortgagee and into the hands of the plaintiff appellant. This would be in direct conflict with the provisions of section 20, which, as already pointed out, enacts that the interest of an occupancy tenant is not transferable in execution of a decree of a Civil or Revenue Court, and it is not for us to grant a decree which could not afterwards be executed, but would remain infructuous. Our attention has been drawn to the case of *Madan Lal* v. *Muhammad Ali Nasir Khan* (1) in which the same view was held by our brother Richards. For these reasons we hold that the view taken by the lower appellate Court was the right view, and we dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Rustomjee.

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BHADDAR (DEFENDANT) *v.* KHAIR-UD-DIN HUSAIN (PLAINTIFF) AND BHOLA (DEFENDANT).*

Land-holder and tenant—Site in abadi occupied by non-agricultural tenant—Adverse possession—License—Act No. V of 1882 *(Indian Easements Act), section* 60.

A person who was neither an agricultural tenant nor a village handicraftsman was found in possession of a house in the abadi which he and his predecessors in title had held for a period of considerably more than twelve years, without paying rent or acknowledging in any way the title of the zamindar to the site upon which it was built. *Held* that such person had acquired the absolute ownership of the site.

IN execution of a decree against one Parai the decree-holder Bhaddar caused to be attached and advertised for sale certain houses, situated in Mustafabad, a hamlet of Daraganj, a suburb of

* Second Appeal No. 910 of 1905, from a decree of W. J. D. Burkitt, Esq., officiating District Judge of Allahabad, dated the 23rd of June 1905, modifying the decree of Pandit Raj Nath, Subordinate Judge of Allahabad, dated the 16th of December 1904.

(1) Weekly Notes, 1906, p. 182.