

1908
July 14.

Before Mr. Justice Richards and Mr. Justice Karamat Husain.
RAM DIHAL RAI AND OTHERS (DEFENDANTS) v. THE MAHARAJA OF
VIZIANAGRAM (PLAINTIFF).*

Act No. IV of 1882 (Transfer of Property Act), section 91--Mortgage--Fixed rate tenant--Suit by zamindar to redeem a mortgage made by a fixed rate tenant on the death of the tenant without heirs.

Held that the zamindar is not, within the meaning of section 91 of the Transfer of Property Act, 1882, a person having an interest in the mortgaged property so as to entitle him to redeem a mortgage of his holding made by a tenant at fixed rates who has died without heirs. *Ranee Sonet Kowar v. Mirza Himmud Bahadoor* (1) referred to.

THIS was a suit brought by a zamindar to redeem a mortgage made by a fixed rate tenant. The plaintiff alleged that the fixed rate tenant had died without heirs and that his interest having thereby lapsed to the zamindar the plaintiff was entitled to redeem. The Court of first instance (Munsif of Ballia) found that in the event of the tenant having died childless his interest went to the Crown, and not to the plaintiff, and accordingly dismissed the suit. The plaintiff appealed. The lower appellate Court (Subordinate Judge of Ghazipur) reversed the decision of the Munsif and remanded the case for trial on the merits. Against this order the defendants appealed to the High Court.

Mr. M. L. Agarwala, for the appellants.

Dr. Satish Chandra Banerji (for whom Babu Jagubandhu Phani), for the respondent.

RICHARDS and KARAMAT HUSAIN, JJ.—This was a suit brought by a zamindar to redeem a mortgage made by a fixed rate tenant. The plaintiff claimed that the fixed rate tenant had died without heirs and that accordingly he was entitled to redeem the mortgage. The Court of first instance, in what we think a well-considered judgment, dismissed the claim. The lower appellate Court reversed the decree of the Court of first instance and held that the plaintiff was entitled to redeem. The learned Judge commences by saying that the admitted facts of the case are that the tenancy was a fixed rate tenancy and that the tenant had died heirless. The lower appellate Court ought

* First Appeal No. 31 of 1908, from an order of Srish Chandra Bose, Subordinate Judge of Ghazipur, dated the 22nd of January 1908.

to be very careful in stating that facts are admitted unless they really are. This Court has to accept the findings of fact of the lower appellate Court. In the present case the onus of proving that the tenant died heirless lay upon the plaintiff, and we need hardly say that this was a onus which it would be extremely difficult for any plaintiff to discharge. We doubt very much whether the fact that the tenant died without heirs was ever admitted by the defendants. However, in the view which we take, this matter is not very material. In our judgment the tenancy did not lapse upon the death of the tenant without heirs. The tenancy has now vested in the Crown if the tenant died without heirs—*Ranee Sonet Kowar v. Mirza Himmuit Bahadoor* (1). In order to redeem the person seeking redemption must have an interest in "the mortgaged property." The mortgaged property in the present case was the interest of a fixed rate tenant, and the mere fact that the zamindar has a proprietary interest in the land out of which the interest of a fixed rate tenant is carved does not give him "an interest in the mortgaged property" within the meaning of section 91 of the Transfer of Property Act.

Both parties admit that the same question as arises in this appeal arises in F. A. f. O. 33 of 1908 and that the same judgment rules both cases.

We allow the appeal, set aside the decree of the Court below, and restore that of the Court of first instance with costs in all Courts.

Appeal decreed.

(1) (1876) L. R., 3 I. A., 92.

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