

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

1908
November 30.

AYUB ALI KHAN (DEFENDANT) v. MASHUQ ALI KHAN (PLAINTIFF).^{*}
Act No. XII of 1881 (North-Western Provinces Rent Act), section 9—Act (Local) No. II of 1901 (Agra Tenancy Act), sections 22, 32 (2)—Occupancy holding—Succession—Suit for right to a share in an occupancy holding—Civil and Revenue Courts—Jurisdiction.

Held that a suit in a Civil Court for a declaration of the plaintiff's right to a share in an occupancy holding is not precluded by section 32 (2) of the Agra Tenancy Act.

Held also that there was nothing in the Rent Act of 1881 to prevent a woman becoming an occupancy tenant, and if she did so, on her death the tenancy would pass to her heirs and not the heirs of her husband.

THE facts out of which this appeal arose were as follows:—

An occupancy holding was held jointly by two brothers, Yakub Ali Khan and Muzaffar Ali Khan. On the death of Muzaffar Ali Khan, which took place before the present Tenancy Act came into operation, the name of his widow, Musummat Rasul-un-nissa, was recorded in his stead as joint occupancy tenant of the land. She died in 1902, after the new Tenancy Act came into force. Upon her death her step-brother Mashuq Ali Khan endeavoured to get his name entered in the revenue records in her stead. The revenue authorities, however, entered the entire holding in the name of Ayub Ali Khan, the son of Yakub Ali Khan. Thereupon Mashuq Ali Khan brought the present suit in the Civil Court for a declaration of his right to a moiety of the holding, for joint possession thereof and also for damages. The Court of first instance (Munsif of Bulandshahr) threw out the suit as not cognizable by a Civil Court. On appeal the learned Additional Judge of Aligarh held that it was cognizable by the Civil Court and remanded the case for disposal on the merits. Against that order of remand the defendant Ayub Ali Khan appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

AIKMAN and KARAMAT HUSAIN, JJ.—An occupancy holding was held jointly by two brothers, Yakub Ali Khan and Muzaffar Ali Khan. On the death of Muzaffar Ali Khan, which took place before the present Tenancy Act came into operation, the

^{*} First Appeal No. 44 of 1908 from an order of Khetta Mohan Ghose, Additional Judge of Aligarh, dated the 8th of January 1908.

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name of his widow, Mussammat Rasul-un-nissa, was recorded in his stead as joint occupancy tenant of the land. She died in 1902 after the new Tenancy Act came into force. Upon her death her step-brother Mashuq Ali Khan, plaintiff respondent, endeavoured to get his name entered in the revenue records in her stead. The revenue authorities, however, entered the whole holding in the name of Ayub Ali Khan, the son of Yakub Ali Khan. Thereupon the plaintiff Mashuq Ali Khan brought a suit in the Civil Court for declaration of his right to a moiety of the holding, for joint possession thereof, and also for damages. The Court of first instance threw out the suit as not cognizable by a Civil Court. On appeal the learned Additional Judge held that it was cognizable by the Civil Court and remanded the case for disposal on the merits. Against that order of remand the present appeal has been preferred. Two pleas have been urged before us. One is that the suit is obnoxious to the provisions of section 32 (2) of the Agra Tenancy Act, which prohibits any suit for the division of a holding or distribution of the rent thereof being entertained by a Civil or Revenue Court. In our opinion this plea cannot prevail. If, having got his declaration, the plaintiff attempted to sue for actual division of the holding or distribution of the rent he might be met by this section. We do not think that this section prohibits a suit like the present. It was next urged that, having regard to the provisions of section 22 of the Act which provides for succession to tenancies, the plaintiff does not possess the right which he sets up. The decision of this plea is more difficult. After giving the point our best consideration, we are of opinion that under the circumstances of the case the plaintiff has the right of succession under section 22 of the Act. The plaintiff's sister succeeded under the former Act No. XII of 1881. Under section 9 of that Act the occupancy right devolved to her "as if it were land." She being a Muhammadan widow acquired in our opinion an absolute right to be considered an occupancy tenant. Succession to her occupancy right is governed by section 22 of the new Act. It is true that that section is worded as if males alone can be exproprietary, occupancy or non-occupancy tenants, but we can find nothing in the other provisions of the Act which would prevent a woman

acquiring such rights. There is nothing to prevent a woman being a tenant of agricultural land, and if she held it continuously for 12 years she would acquire a right of occupancy just as a man would. We cannot therefore attach to the fact that the words in section 22 are words importing only the masculine gender the weight which is sought to be placed upon them. We think that Musammat Rasul-un-nissa having been an occupancy tenant, her half brother, who, it is not denied, was the son of the same father, is entitled to succeed under clause (c) of the section. The same question was very fully considered by the members of the Board of Revenue in *Ikramuddin v. Irshad Ali* (1). There it was held that a Muhammadan widow who succeeded to an occupancy holding acquired an absolute estate, and that on her death, after the 1st of January 1902, the persons to succeed will be her heirs and not the heirs of her deceased husband. We agree in this view. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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December 1.

Before Mr. Justice Richards and Mr. Justice Griffin

JAGAN NATH (PLAINTIFF) v. DIBBO AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 6—Hindu Law—Transfer by a Hindu reversioner of his reversionary interest.

Held that it is not competent to a Hindu reversioner to transfer his reversionary interest expectant on the death of a Hindu widow. *Sham Sunder Lal v. Achhan Kunwar* (2) followed.

On the 6th of September 1884, Tota Ram and Har Sukh, who then had a reversionary interest in certain property expectant on the death of a Hindu widow, Musammat Shitabo, executed a mortgage thereof in favour of one Jagan Nath. Musammat Shitabo was in possession, and her name was recorded in the revenue papers. The mortgage deed was registered and from the registration endorsement it appeared that the mortgagors appeared before the Sub-Registrar, acknowledged the deed and admitted receipt of the mortgage money. Musammat Shitabo died on the 5th October 1888. On the 18th of January 1906

* First Appeal No. 199 of 1906 from a decree of Kunwar Bahadur, Subordinate Judge of Shahjahanpur, dated the 18th April of 1906.

(1) Sel. Dec. Board of Revenue No. 2 of 1905. (2) (1898) L. R., 25 L. A., 183.