rule 22 of the Code of Civil Procedure, fail and are dismissed with costs.

1910

CHINTAMAN v. DULARI.

Decree modified.

FULL BENCH.

1910. *July* 28.

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

TULSHI RAM SAHU AND ANOTHER (PLAINTIFFS) *v.* GUR DAYAL SINGH AND ANOTHER (DEFENDANTS).*

Act No. IV of 1882 *(Transfer of Property Act), section* 91—*Redemption—Mortgage of fixed rate tenancy by tenant—Death of tenant without heirs—Right of zamindar to redeem—Escheat to Crown—Act (Local) No. II of* 1901 *(Agra Tenancy Act), sections* 5, 18, 20, 57.

Held that on the death of a fixed-rate tenant without heirs his tenancy does not escheat to the Crown but reverts to the zamindar. *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (1) overruled. *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (2) distinguished.

THE facts of this case were as follows:—

One Ram Dhian Koeri was a fixed rate tenant of the holding in dispute. In 1870 he usufructuarily mortgaged the holding to the respondents, Gurdial Singh and others. Ram Dhian disappeared and was not heard of for more than seven years. The zamindars of the village, thereupon, brought this suit for redemption on the ground that Ram Dhian having died heirless, the tenancy lapsed to them. Among other defences, it was pleaded that on the death of Ram Dhian, the tenancy went to the Crown and not to the zamindar, and the zamindar consequently had no interest to redeem the mortgage. This plea found favour with both the courts below and they dismissed the plaintiffs' suit. The plaintiffs appealed to the High Court. At the hearing of the appeal before the Single Bench the correctness of the ruling in *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (1) was not discussed, the learned Judge having stated that he considered himself bound by that ruling. It was, however, contended that as there was no finding by the lower Appellate Court that the tenant was in fact dead, the ruling could not apply. This contention was met

* Appeal No. 132 of 1909 under section 10 of the Letters Patent.

(1) (1908) I. L. R., 30 All., 488. (2) (1876) L. R., 3 I. A., 92; I. L. R., 1 Calc., 391.

1910

TULSHI RAM SAHU v. GUR DAYAL SINGH.

by the argument that, as it was the plaintiff's case that the tenant was dead, no specific finding was necessary. It was further contended that the case fell under section 87 of the Agra Tenancy Act, 1901.

The following judgement was delivered by ALSTON, J.:—

"In my opinion the suit out of which this appeal arises was rightly dismissed. A zamindar claimed the right to redeem a usufructuary mortgage which had been executed by a tenant at fixed rates. The lower appellate court dealt very shortly indeed with the appeal, holding that the case was covered by the ruling of *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (1). It has been contended here by the learned counsel for the appellant that the ruling has no application, because it was based on the fact that the fixed rate tenant had died without heirs, and that in consequence the rights which he possessed in the land had become vested in the Crown. Whether that circumstance did or did not lie at the foundation of the ruling, I need not decide, for it was the appellant plaintiff's case that the tenant, not having been heard of for a long time must be presumed to be dead. That view was pleaded in the third paragraph of the plaint. It was repeated in the prayer for relief. It was reiterated in the first ground of appeal to the lower appellate court. There is nothing in the plaint to suggest as it is now argued that the zamindar's case was that there had been an abandonment of the land within the meaning of section 87 of the Tenancy Act. Moreover, having regard to the fact that the zamindar had himself admitted the existence of a usufructuary mortgagee in possession, and to the further fact that he made no attempt to show that the tenant had "left the neighbourhood, without arranging for the payment of his rent as it fell due and giving notice to the landholder of such arrangement," he had not even laid the foundation for the case of abandonment which is now set up. The first Court found that the tenant was still alive, but the lower appellate court said nothing on this point. It is in my opinion, however, unnecessary to remand the case for a finding on the point; for upon any view of the case set up by the plaintiff in his plaint the suit must fail. The appeal is dismissed with costs."

The plaintiffs appealed under section 10 of the Letters Patent.

The appeal came on for hearing before the Chief Justice and Mr. Justice BANERJI who referred the case to a Full Bench.

Mr. *M. L. Agarwala*, for the appellants:—

On the death of a fixed rate tenant, the tenancy lapsed to the zamindar and not to the Crown. The ruling in *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (1) did not lay down the correct law. It purported to follow the precedent of *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (2) but that dealt with a case different from that of a fixed

(1) (1908) I. L. R., 30 All., 488. (2) (1876) I. L. R., 1 Calc., 391.

rate tenancy. There the question was in respect of a *mukarrari* tenure which was a lease in perpetuity, the grantor reserving no right of re-entry in himself. Whereas in the case of a fixed rate tenure, the zamindar had such right. He could eject the tenant if he failed to pay the rent or was guilty of any other breach of contract. It was only freehold that went to the Crown; *Attorney General* v. *Sir George Sands* (1), *Walker* v. *Denne* (2) and *Downe* v. *Morris* (3).

Munshi *Govind Prasad* for the respondents:—

Section 20 of the Agra Tenancy Act, 1901, laid down that the interest of a fixed rate tenant was both heritable and transferable. It contemplated that the tenant had absolute interest in the tenancy. Fixed rate tenure was of the nature of *mukarrari* tenure. The ruling in 1 Calc. 391 did apply to the case.

STANLEY, C. J.:—The plaintiffs are zamindars of the village of Karmanpur in the district of Ballia. There is a small cultivatory holding which was held from the plaintiffs by one Ram Dhian as a tenant at fixed rates. In the year 1870 he executed a usufructuary mortgage of this holding in favour of the respondents, which contained a provision for redemption in any Jeth. Ram Dhian is said to have disappeared a number of years ago, and according to the plaintiffs he has not been heard of for more than seven years and must be presumed to have died. It is also alleged that he died without heirs. The plaintiffs instituted the suit for redemption of the usufructuary mortgage, out of which this appeal has arisen. The right of the plaintiffs to redeem is contested and the defendants further allege that Ram Dhian is alive. The lower appellate court held, relying upon the decision of a Bench of this Court in the case of *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (4), that the plaintiffs had no interest in the equity of redemption of the property and could not maintain a suit for redemption. A second appeal was preferred to this Court and the learned Judge, before whom it came for disposal, dismissed it. An appeal under the Letters Patent was then preferred, and the correctness of the decision in *Ram Dihal Rai* v. *The Maharaja of Vizianagram* is challenged. My

(1) Freeman (Chancery cases) 129; Hardres, 486-89.
(2) (1793) 2 Ves (Jun) 170.
(3) (1844) 3 Hare, 394.
(4) (1908) I. L. R., 30 All., 488.

1910

TULSHI RAM SAHU v. GUR DAYAL SINGH.

brother Banerji and myself, before whom the appeal came for hearing, were of opinion that the question raised was one of importance and should be decided by a larger Bench. Accordingly the appeal has come before us.

The sole question for determination is whether or not the lower appellate court and the learned Judge of this Court were right in holding that the plaintiffs had no such interest in the mortgaged property as entitled them to maintain a suit for redemption of the defendants' mortgage. The contention on behalf of the appellants is that Ram Dhian died without heirs and that thereupon his tenancy became extinguished and that the plaintiffs are entitled to possession of the holding, or at least to possession of it on redemption of the mortgage of 1870.

In *Ram Dihal* v. *The Maharaja of Vizianagram* the facts were these:—A zamindar brought a suit to redeem a mortgage made by a fixed rate tenant alleging that the fixed rate tenant had died without heirs and that his interest had thereby lapsed to him. The court of first instance held that, in the event of the tenant having died childless, his interest went to the Crown and not to the plaintiff, and dismissed the suit. His decision was reversed by the lower appellate court and a second appeal was preferred to the High Court. The learned Judges before whom it came for disposal held that the tenancy did not lapse upon the death of the tenant without heirs, but that the tenancy became vested in the Crown. They relied on the ruling of their Lordships of the Privy Council in *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (1). They further held that in order to redeem, the person seeking redemption must have an interest "in the mortgaged property," that the mortgaged property in that case was the interest of a fixed rate tenant, and that the mere fact that the zamindar has a proprietary interest in the land out of which this interest is carved, does not give him an interest within the meaning of section 91 of the Transfer of Property Act.

Let us see what was decided in *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor*. In that case the grantee from a Hindu zamindar of an ordinary *mokurraree istimraree* tenure died without heirs and it was held that the Crown by the general

(1) (1876) L. R., 3 I. A., 92; I. L. R., 1 Calc., 391.

prerogative was entitled to the lease; that the *mokurraree*, though carved out of zamindari, being an absolute alienable interest therein, could not have reverted to the grantor and that there was no authority upon which the power of taking by escheat can be attributed to the grantor. In that case it will be observed that the *mokurraree* was an absolute and alienable interest. It could not have been forfeited for the non-payment of rent. The zamindar could only in the case of non-payment of rent have caused it to be seized, put up for sale and sold to the highest bidder. It was therefore property which might have passed to any purchaser, and having so passed the estate would not have determined upon the death of the grantee without heirs if it had been sold in her life-time. The language of their Lordships is as follows:—"The *mokurraree* was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold, as Mr. Doyne has shown, under Act X of 1859, even in a suit for rent. It could not have been forfeited for the non-payment of rent; for in such a case the zamindar could only have caused it to be seized, put up for sale, and sold to the highest bidder. It is therefore property which, like that in the case above cited, might have passed to any purchaser, whatever his nationality, or by whatever law he was to be governed. It cannot, their Lordships think, be successfully argued that having so passed the estate would have determined upon the death of Sharfun-nissa (supposing it had been sold in her life-time) without heirs, for the grant contains no provision for the lease of the estate created in such event."

The grant in this case was, it will be observed, that of an absolute interest and altogether unlike the interest of a fixed rate tenant. Let us see what is the nature of the interest of a fixed rate tenant.

Section 5 of the Agra Tenancy Act, I of 1901, prescribes that when any land in a district which is permanently settled, has been held by a tenant and his predecessor in title from the time of the permanent settlement at the same rate of rent, "such tenant shall have a right of occupancy at that rate." A fixed rate tenant therefore is a tenant who has a right of occupancy at a fixed rate. Section 18 prescribes that a right of occupancy shall be extinguished

1910

TULSHI RAM SAHU v. GUR DAYAL SINGH.

when, amongst other cases, a tenant dies leaving no heir entitled under the Act to inherit the right of occupancy. A fixed rate tenant is liable to ejectment for non-payment of rent or breach of conditions (section 57). It appears to me, therefore, that a fixed rate tenancy is but a limited interest, which cannot be the subject of escheat to the Crown. In fact, the Act provides that on the death of the tenant without heirs the interest of such a tenant, described in the Act as a right of occupancy, shall be extinguished. With all deference to the learned Judges who decided the case of *Ram Dihal Rai* v. *The Maharaja of Vizianagram*, I am of opinion that that case was wrongly decided. If then it be the case that Ram Dhian is dead without leaving an heir as defined in section 22 of the Act, the plaintiffs are clearly entitled to redeem the mortgage held by the respondents, if they are not entitled to possession of the holding without redemption. The question whether the plaintiffs are bound to discharge the mortgage debt does not arise, because they are willing and have offered to do so. The first court found that Ram Dhian was still alive. If this be so, the plaintiffs' suit must fail. The lower appellate court, however, dismissed the appeal to it on the sole ground that the plaintiffs could not be regarded as having any interest in the equity of redemption of the holding, and this is the view which seems to have commended itself to the learned Judge of this Court. I would allow the appeal and set aside the decree of the learned Judge of this Court: and as the lower appellate court, decided the appeal on a preliminary point, I would remand the appeal to that court with directions that that court determine the appeal on the merits.

KNOX, J.:—I have nothing to add to the judgement of the learned Chief Justice. I fully agree with the view taken by him.

BANERJI, J.:—I also concur with the learned Chief Justice. The view taken in *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (1) was never adopted, as far as I am aware, in any other case and seems to me to be inconsistent with the nature of a tenancy at fixed rates. Such a tenancy is carved out of the landholder's interest in the land to which it relates and a fixed

(1) (1908) I. L. R., 30 All., 488.

rate tenant has no absolute interest in it. If the tenancy comes to an end it necessarily goes back to the estate which it was carved out of and lapses to the landholder. It is true that a fixed rate tenant has a heritable and transferable interest in his holding under section 20 of the Agra Tenancy Act, but if he does not transfer the holding and dies leaving no heirs entitled to inherit it, the tenancy becomes extinct and reverts to the landlord who created it. The landlord has in certain cases a right to determine the tenancy, eject the tenant and re-enter into possession. For example, under section 57 of the Act, a tenant, not being a permanent tenure-holder, may be ejected for any of the reasons mentioned in the several clauses of the section, and as a fixed rate tenant is not a permanent tenure-holder, he may be ejected for any of those reasons. His interest in his holding is thus of a limited character and differs in material respects from an absolute hereditary *mokurrari* tenure which formed the subject of consideration by their Lordships of the Privy Council in *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (1). As pointed out by their Lordships, such *mokurrari* is an absolute interest and could not have been forfeited to the zamindar. Such is not the case with a fixed-rate tenancy. The ruling of their Lordships therefore does not support the decision in the case of *Ram Dihal Rai* v. *The Maharaja of Vizianagram*. Having regard to the incidents of a fixed rate tenancy I am unable, with great respect, to agree with that decision and to hold that a tenancy in these provinces escheats to the Crown.

BY THE COURT :—The order of the court is that the appeal be allowed and the decrees of the learned Judge of this court and of the lower appellate court be set aside and, as the case was decided by the lower appellate court on a preliminary point and we have overruled the court on that point, we remand the case under order XLI, rule 23, to the lower appellate court with directions to readmit the appeal under its original number in the register of civil appeals and proceed to determine the appeal.

Appeal decreed. Cause remanded

(1) (1876) L. R., 3 I. A., 92 ; I. L. R., 1 Calc., 391.