

## APPELLATE CIVIL.

1912  
May, 17.

*Before Mr. Justice Tudball and Mr. Justice Chamier.*

ASGHAR HUSAIN (PLAINTIFF) v. PAL AHIR AND OTHERS (DEFENDANTS).\*

*Estoppel—Occupancy holding mortgaged to zamindar and sold in execution of a decree on the mortgage as a fixed-rate holding—Ejection of purchaser—Right of purchaser to recover possession—Possessory title.*

An occupancy holding was mortgaged to the zamindar as a fixed-rate holding, was sold as such in execution of a decree on the mortgage and purchased by a stranger, who remained in possession thereof for some eleven years, paying rent to the zamindar. Subsequently the purchaser was dispossessed by the judgment-debtor. Held on suit by the purchaser to recover possession that the defendant was estopped from setting up the plea that the holding was an occupancy holding and that, the defendant having no title at all, the plaintiff was entitled to regain possession on the strength of his possessory title.

This was an appeal under section 10 of the Letters Patent against a judgement of RICHARDS, J. The facts of the case sufficiently appear from the judgement under appeal, which was as follows :—

“This appeal arises out of a suit for possession of immovable property. The merits of the case seem to be with the plaintiff, who obtained a decree in both the courts below. It appears that the defendants or their predecessor in title mortgaged the property now in suit. In the mortgage the property was described as being held as a fixed-rate tenancy. A suit was instituted on foot of the mortgage. A decree was granted and the property was sold as a fixed-rate tenancy. The auction purchase took place on the 23rd of August, 1897, and the sale was confirmed on the 2nd of November, 1897. The plaintiff in his plaint alleges all these facts, and further that he was dispossessed by the defendants on the 17th of October, 1908. The suit was instituted on the 21st of November, 1908. Notwithstanding the description of the property in the mortgage and in the decree, as also at the time of the auction sale, it now turns out that all along the property was held as an occupancy holding and not as a fixed-rate tenancy. The plaintiff comes into court having to admit that the holding is an occupancy holding. The lower appellate court has held that the holding is an occupancy holding, but that the defendants are estopped from setting up this defence. In my opinion the defendants are entitled to succeed. Section 9 of Act XII of 1881 provides that a right of occupancy shall not be transferable in execution of a decree. The result is that the plaintiff has to come into court and ask for possession on the basis of an alleged sale of an interest in land which the law in the most express terms provides shall not be sold. A number of authorities have been cited. In the case of *Ashu Tosh Sikdar v. Behari Lal Kirtania* (1) it was held that a sale in contravention of the terms of section 99 of the Transfer of Property Act is not a nullity, but

\* Appeal No. 39 of 1911 under section 10 of the Letters Patent.

(1) (1907) I. L. R., 35 Cal., 61.

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merely voidable. In that case the property had been attached and sold on foot of a simple money decree, there being at the time a subsisting mortgage against the property vested in the decree-holder. The appeal arose out of an application to set aside the sale and not, as in the present case, a suit to recover possession based on the sale. Furthermore, the provisions of section 99 of the Transfer of Property Act are not altogether analogous to the provisions of section 9 of Act XII of 1881. In the case of *Madho Lal v Katwari* (1) it was held that in execution of a decree for enforcement of a hypothecation bond by sale of specific property an objection by the judgement-debtor that the property is not transferable with reference to section 9 of the N.-W. P. Rent Act could not be entertained. This case also arose out of execution proceedings. In the present case the plaintiff has to come into court admitting that he is not in possession and that he is seeking possession of property which he has to admit was not transferable by the court. In other words the plaintiff has to say himself the very thing which it is claimed the defendants are estopped from saying.

"I am asked to hold that the decrees of the courts below may be supported by virtue of section 9 of the Specific Relief Act. The plaintiff, it was said, being in possession and being wrongfully dispossessed, brought his suit within six months. I am afraid that this contention is not open to the plaintiff. Even assuming that the plaintiff was dispossessed by the defendants otherwise than in due course of law, if he had wished to recover possession on this ground, he ought to have instituted the suit on this ground alone and not, as he has done in the present case, by bringing a suit for ejection on title. It has been clearly and distinctly held by a Full Bench of this Court in the case of *Laachman v. Shambhu Narain* (2) that a plaintiff suing for possession on the basis of title cannot get a decree for possession under the first paragraph of section 9 of the Specific Relief Act. Although I feel bound to allow this appeal, I do not think that the defendants are entitled to costs in any court. I accordingly allow the appeal and, setting aside the decrees of both the courts below, dismiss the plaintiff's suit. I direct that the parties shall abide their own costs in all courts."

The plaintiff appealed.

Dr. *Satish Chandra Banerji*, for the appellant :—

The defendants, who are the mortgagors and, as such, were defendants to the suit on the mortgage, and who were judgement-debtors to the decree in execution of which the plaintiff purchased the property in dispute, had full knowledge of all proceedings before and after execution and had full opportunity of raising the objection at several stages of those proceedings that the holding was an occupancy holding, and as such, non-transferable. Having failed to raise such objection at any time prior to the sale, it was not competent for them to resist the purchaser after the confirmation of the sale, when, so far as the parties to the execution case

(1) Weekly Notes, 1888, p. 41.

(2) (1910) I.L.R., 38, All., 174.

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were concerned, the title vested in the purchaser; *Dwarkamath Pal v. Tarini Sankar Ray* (1). Moreover, the defendants having failed to come within six months of their dispossession their occupancy right was extinguished, and they had no right left to interfere with the possession of the plaintiff; *Dalip Rai v. Deeki Rai* (2).

Mr. *Muhammad Ishaq Khan*, for the respondents:—

The principle of estoppel could not be invoked to defeat the plain provisions of a Statute. There was an express provision of law that an occupancy holding could not be sold. The fact that the defendants did not raise the point during the pendency of the suit and the execution proceedings could not operate as an estoppel; *Jagadbandhu Saha v. Radha Krishna Pal* (3), *Abdul Aziz v. Kanthu Mullik* (4). The defendants being in actual physical possession of the property, the plaintiff must establish his title before he could oust them. The defendants were occupancy tenants and were wrongfully dispossessed. They, however, got back possession before the expiry of 12 years. They could not be ejected. Section 79 of the Agra Tenancy Act applied where the zamindar dispossessed his tenants. It did not apply to the case of the dispossession of a tenant by an outsider.

Dr. *Satish Chandra Banerji* was not heard in reply.

TUDBALL and CHAMIER, JJ.—The facts of the case out of which this appeal has arisen are as follows. The predecessors in title of the defendants respondents were occupancy tenants of a certain holding. On the 4th of June, 1885, they mortgaged this holding describing it as a *fixed-rate tenure* in favour of the zamindar of the village. A suit was brought to enforce the mortgage in December, 1895, and on the 27th of July, 1896, a decree for sale was passed. On the 23rd of August, 1897, the property was sold as a *fixed-rate tenure* and was purchased by the plaintiff, a stranger to that suit. The judgement-debtors objected to the zamindar being allowed to bid at the sale. On the 2nd of November, 1897, a sale-certificate was granted to the plaintiff. From that date up to the 16th of October, 1908, the plaintiff had been in possession of the holding, paying rent to the zamindar.

(1) (1907) I.L.R., 34 Cal., 199

(2) (1899) I.L.R., 21 All., 204

(3) (1909) I.L.R., 36 Cal., 920.

(4) (1910) I.L.R., 38 Cal., 512.

On the latter date he was dispossessed by the defendants,<sup>12</sup> who asserted that the land was their occupancy tenure. Hence the present suit was brought by the plaintiffs to recover possession. The court of first instance and the lower appellate court decreed the claim. On second appeal to this Court the learned Judge before whom the case came dismissed the suit, holding that, as a right of occupancy could not be sold in execution of a decree, the plaintiff acquired no title to the holding, and therefore he was not entitled to a decree in a suit for ejectment against the defendants. Two points are pressed before us. The first is that the judgement-debtors are estopped from saying that the tenure was an occupancy tenure and not a *fixed-rate tenure*; and secondly, even though no title passed to the plaintiff by the auction-sale, still, on the 16th of October, 1908, the defendants had no title themselves, and therefore the plaintiff is entitled to a decree for possession against them on the strength of his possessory title. We think both these contentions are sound. It is clear that the defendants as well as the zamindar gave out that the tenure was a *fixed-rate tenure*, that is, one transferable in execution of a decree. The judgement-debtors in the mortgage suit raised no objection whatsoever either in the course of the suit or in execution proceedings on the ground that the tenure was not transferable under law. The plaintiff, acting on the belief that the tenure was a *fixed-rate tenure*, as stated by the parties to the mortgage-deed and the mortgage suit, purchased it. We think that it does not lie in the mouth of the defendants to say now that the tenure was not a *fixed-rate tenure*. Furthermore, it is quite clear that for about eleven years the defendants had been out of possession. The plaintiff has held possession and has been accepted by the zamindar as a tenant and has paid rent for the holding. Any right which the defendants had as tenants disappeared long ago, and when, on the 16th of October, 1908, they dispossessed the plaintiff, the latter had at least a possessory title, while the defendants had no title whatsoever. On the basis of his possessory title alone the plaintiff would be entitled to a decree. We allow this appeal, set aside the judgement of the learned Judge of this Court, and restore the decree of the lower appellate court. The plaintiff will have his costs throughout.

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*Appeal allowed.*