FULL BENCH.

1912
January,
23.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Karamat Husain and Mr. Justice Chamier.

JAI NATH PATHAK AND ANOTHER (PLAINTIFFS) *v.* KALKA UPADHYA AND OTHERS (DEFENDANTS.)*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 9—*Fixed rate tenancy—Entry of name of tenant in—"Conclusive proof" revenue records.*

The entry mentioned in section 9 of the Agra Tenancy Act, 1901, is "conclusive proof" only as to the nature of the tenancy as between the zamindar and the tenant and does not apply to questions as to the title to the tenancy as between rival claimants thereto. *Mulai Singh* v. *Rajwant Singh* (1) overruled.

THIS was a suit for a declaration of title to certain property including some fixed rate holdings. The facts of the case are stated in the following order recommending that the appeal should be referred to a Full Bench.

KARAMAT HUSAIN and CHAMIER, JJ.—This is the plaintiffs' appeal. Their claim has been dismissed by the lower appellate court on a point of law. The facts must be, for the present assumed to be as follows :—Two brothers, Ishri and Ram Narain, were joint in estate. Ram Narain predeceased his brother who thus became sole owner of the property. Ishri died leaving two daughters, one of whom, Musammat Anjora, is still alive. Possession of the property should have passed to Musammat Anjora, but was taken by Musammat Rupao, widow of Ram Narain. Part of the property consisted of fixed-rate tenancy, and at the last revision of the settlement before the passing of the Agra Tenancy Act, Musammat Rupao was recorded as the fixed rate tenant. In 1908 she transferred the holding to her nephews. The plaintiffs in the present suit, who are the sons of the above-named Musammat Anjora and her sister, Musammat Nidha, claim a declaration that the transfer is not binding upon them. They say that the person now entitled to the holding is Musammat Anjora and that Musammat Rupao took and held possession with her consent; but whether Musammat Rupao took possession with Musammat Anjora's consent; or adversely to her is immaterial, as they, the plaintiffs, will not be entitled to possession until the death of Musammat Anjora.

The first court decreed the claim, but on appeal the Additional Judge held that under section 9 of the Agra Tenancy Act the entry of Musammat Rupao's name as fixed rate tenant was conclusive proof that she was fixed rate tenant of the land, and therefore it was her *stridhan* and the plaintiffs' claim to be reversionary heirs of Ishri in respect of the holding failed. He accordingly dismissed the suit.

* Second Appeal No. 191 of 1911 from a decree of E. E. P. Rose, Additional Judge of Jaunpur, dated the 10th of December, 1910, reversing a decree of Babu Lal Mehr, Munsif of Jaunpur, dated the 22nd of April, 1910.

(1) Weekly Notes, 1903, p. 68.

1912

JAI NATH PATHAK v. KALKA UPADHYA.

The view taken by the lower appellate court receives support from the decision of this Court in *Mulai Singh* v. *Rajwant Singh* (1) which he quotes. As at present advised, we are unable to accept that ruling. If it is correct, it would appear that the entry of the name of a Hindu widow as tenant of a holding at fixed rates at the last revision of the settlement before the passing of the Agra Tenancy Act converts the holding into her *stridhan* and deprives the male collaterals of her husband of their right of inheritance. There must be a large number of cases in which a Hindu fixed rate tenant died before the revision in question, leaving, besides a widow, either male collaterals or daughters or daughter's sons. We do not think that section 9 of the Agra Tenancy Act was intended to deprive all the heirs of a Hindu except his widow of their right in such cases. It seems to us that the words 'conclusive proof' in the section were intended to meet the case of disputes between the landlord on one side and the holder for the time being of the tenancy on the other. The circumstance that the Legislature provided special rules of succession by section 22 of the Act for certain tenancies, but said nothing about the succession to fixed rate tenancies leads to the inference that it did not intend to interfere with the personal law of succession applicable to fixed rate tenants. Nawab *Abdul Majid* contended that the effect of sections 9 and 20 of the Act is that all Hindu females recorded as fixed rate tenants at the last revision of the settlement before the passing of the Act have power to alienate their holdings to whomsoever they please. He even went so far as to say that this is generally understood to be the law. The question is of great importance. As we are not prepared to accept the decision to which we are referred, we direct that the record be laid before the learned Chief Justice with a view to this appeal being laid before a larger Bench.

Munshi *Gokul Prasad* (for Babu *Durga Charan Banerji*) for the appellants.

The name of the widow was only entered after death of Ram Narain. She had only a Hindu widow's estate. The record was only evidence of the nature of the holding as between landlord and tenant. There was no special provision prescribing the devolution of fixed rate tenancies. It followed that the general law applied. Section 22 laid down the law with reference to other kinds of tenancies. The expression 'conclusive proof' in section 9 of the Agra Tenancy Act did not apply to disputes between sharers *inter se*, it is conclusive proof of the nature of a tenancy only.

The first enactment on the point was Act X of 1859. Sections 3 and 4 contemplated suits between zamindar and tenant. Then came Act XII of 1881, sections 4 to 6. Under these Acts the Court had to make inquiries about the nature of tenancies. In 1882-3 there was a revision of permanent settlements in these provinces

(1) Weekly Notes, 1906, p. 68.

and the nature of tenancies was inquired into and recorded. The present Act has made the entry conclusive, but only so far as the nature of the tenancy is concerned. Section 9 deals with the rights of tenants as between them and the zamindar, not with their rights *inter se*. The same view was taken by GRIFFIN, J., in an unreported case S. A. 26 of 1906, decided on 31st July, 1907. If the Legislature had intended suits of this kind to be barred, it would have said so, as in section 32 of the Tenancy Act. The Board of Revenue also took the same view in Select Decision No. 2 of 1909 where they differ from the case of *Mulai Singh* v. *Rajwant Singh* (1) and agree with GRIFFIN, J.

The Hon'ble *Nawab Muhammad Abdul Majid*, for the respondents, relied on the case of *Mulai Singh* v. *Rajwant Singh* and the language of the section.

RICHARDS, C. J., and KARAMAT HUSAIN and CHAMIER, JJ.—

The facts which must be assumed for the purposes of this appeal are very clearly set forth in the order of reference of the learned Judges. The short point for our decision is whether or not a person who was recorded in the manner stated must be deemed to have all the estate in the fixed rate tenancy vested in him or her alone, irrespective of the rights of all other persons, who under the ordinary law would be entitled to the tenancy, but for the fact that such a person is so recorded. The defendants, who are the transferees of Musammat Rupao, rely on the provisions of section 9 of the Agra Tenancy Act. That section is as follows:—"Every entry at the last revision of records before the commencement of this Act recording a person as a permanent tenure-holder or a fixed rate tenant, or otherwise shall, in the absence of a judicial decision to the contrary, in proceedings instituted before the commencement of this Act, be conclusive proof that such person is a permanent tenure-holder or a fixed rate tenant, or not, as the case may be."

The section is certainly unfortunately worded, and *primâ facie* the language of it is in favour of the defendants' contention *viz.*, that Musammat Rupao must be deemed, having regard to the words of the Act, to have had the entire estate in the fixed rate tenancy, and that their title as her transferees is

(1) Weekly Notes, 1906, p. 68.

1912

JAI NATH PATHAK v. KALKA UPADHYA.

complete. This view met with favour by the learned Judges who decided the case of *Mulai Singh* v. *Rajwant Singh* (1). They say:—"In our opinion the language of the section is clear and imperative."

Prior to the passing of this Act there had been somewhat similar provisions in Act X of 1859, (sections 3, 4 and 7) and Act XII of 1881 (sections 4, 5 and 6). Under those Acts it was the duty of the Court to inquire as to the nature of a tenancy which had been held at fixed rates for certain periods, and certain presumptions in favour of the tenants were provided. Those sections were all intended to meet the case of disputes between the zamindar and his tenant as to the nature of the tenancy. Before the passing of the Agra Tenancy Act of 1901, at the time of revision of records, inquiries were held as to the nature of these tenancies, but these again were inquiries between the zamindar and the tenant and did not touch upon the title to the tenancy itself. It is admitted that fixed rate tenancies, unlike occupancy tenancies, are heritable and transferable. Section 20 expressly so provides. Fixed rate tenancies devolve on the death of the fixed-rate tenant according to the ordinary law. If the contention of the defendants be sound, namely, that by virtue of section 9 the entry is conclusive not only between landlord and tenant but also between all persons claiming the tenancy, then it follows that if the managing member of a joint and undivided family was recorded as the fixed rate tenant, the tenancy on his death would not devolve upon the surviving members of the joint family but would go to the heirs of the member of the family (who happened to be recorded) as if the family were separate. Again, if the widow or a daughter succeeded to a fixed rate tenancy on the death of a fixed rate tenant who was a Hindu, the tenancy on the death of the widow or daughter would go to the heir of the widow or daughter and not to the heirs of the last male holder. It seems to us quite clear that this could not have been intended. A learned Judge of this Court in Second Appeal No. 26 of 1906, held that section 9 did not apply to questions as to the title to the fixed rate tenancy. The same view was taken by the Board of Revenue in *Gajadhar Dasaundhi* v. *Gokul Dasaundhi* (2). In our opinion

(1) Weekly Notes, 1906, p. 68. (2) Select Decisions, No. 2 of 1906,

1912

JAI NATH PATHAK v. KALKA UPADHYA.

the decision of the court below was not correct. The entry mentioned in section 9 is conclusive proof only as to the nature of the tenancy. The case, however, was decided on the preliminary point, and the general merits of the case were not gone into by the lower appellate court. We accordingly allow the appeal, set aside the decree of the lower appellate court and remand the case with directions that the same may be re admitted, and the learned Judge do proceed to hear and determine the same according to law. Costs in this Court will be costs in the cause.

Appeal decreed—Cause remanded.

PRIVY COUNCIL.

P. C. 1912 *January* 31, *February* 1, 21.

PARBATI (DEFENDANT) *v.* MUZAFFAR ALI KHAN AND OTHERS (PLAINTIFFS) AND MUZAFFAR ALI KHAN AND OTHERS (PLAINTIFFS) *v.* PARBATI (DEFENDANT).

Two appeals consolidated.

[On appeal from the High Court at Allahabad.]

Mortgage—Suit for redemption of usufructuary mortgage—Defendants setting up title under sales of mortgagor's interest—Title by adverse possession—Separation of member of joint Hindu family and purchase of property with self-acquired means—Possession adverse to mortgagors.

These were cross appeals from the decision of the High Court in *Muzaffar Ali Khan* v. *Parbati* (1). The plaintiffs relied on a usufructuary mortgage of 1846 and sued for redemption of the property in suit, two shares in a village called Lohari. The case of the defendants was that they were in possession, not under the mortgage, but under sales of the 27th of May, 1853, and the 20th of March, 1854, respectively by which the equity of redemption in the shares mortgaged in 1846 had passed to those through whom they claimed title, and they pleaded adverse possession. Both the lower courts had upheld the later sale and dismissed the suit as to that share in Lohari. As to the earlier sale the courts below had differed, the first court upholding it, and the High Court deciding in favour of the plaintiffs. On appeals by both parties, it was immaterial, in the view taken by their Lordships of the Judicial Committee of that sale (27th May, 1853) by what title Ashraf-un-nissa, one of the widows of the mortgagor, obtained the share she took, and whether or not she had a daughter who survived him. Her share was certainly transferred by the sale to Baldeo Sahai, who, though he was the grandson of one of the mortgagees and the son of the other, with both of whom he had lived as a member of a joint Hindu family, had, according to reliable evidence, separated from them and at the time of the sale was carrying on, with a nucleus of property derived from his grandmother, a money-lending business from the profits of which he was enabled to purchase, with self-acquired funds,

Present:—Lord SHAW, Lord ROBSON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1907) I. L. R., 29 All., 640.