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who have both discharged him. Without giving him an opportunity of showing cause the District Magistrate has directed at once (and on what, as far as we can see, are insufficient grounds) a third inquiry. We do not think that this order can be supported and we accordingly set it aside.

Application allowed.

APPELLATE CIVIL.

1914
January, 17.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

PRAG AND ANOTHER (DEFENDANTS) *v.* SITAL PRASAD AND ANOTHER (PLAINTIFFS)*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 10*—Exproprietary tenant—Contract to pay a higher rate of rent than that prescribed by law invalid.*

Held that a proprietor who becomes, by the operation of section 10 of the Agra Tenancy Act, 1901, an exproprietary tenant cannot enter into a valid agreement to pay rent for his exproprietary holding at a higher rate than that prescribed by the section.

THE facts of this case were as follows :—

The defendants were proprietors of certain *sir* land. They mortgaged it to the plaintiff. Having under the law become exproprietary tenants of the land they agreed to pay rent at a higher rate than was payable under section 10 of the Agra Tenancy Act. The plaintiff sued for rent at the rate agreed upon. The defence was that the rate agreed upon was in contravention of the law. The first court dismissed the suit. The lower appellate court decreed it, and a single Judge of the High Court confirmed the appellate decree in the following judgement :—

"In my opinion the lower appellate court's decision was correct. The appellants parted with their proprietary rights in the land and agreed to pay rent therefor at a rate considerably in excess of that laid down in section 10 of the Tenancy Act. That section lays down that they should be entitled to held the land at a certain rent. But this does not in my opinion preclude them from entering into an agreement to pay at a higher rate. Several rulings have been quoted to show that an agreement to resign exproprietary rights is not enforcible. But the section lays down that a proprietor who parts with his proprietary rights *shall* become a tenant. It does not lay down that he shall be *entitled* to become a tenant. As I read the section, there is nothing to prevent such a tenant from contracting to pay rent at any rate that may be

*Appeal No. 63 of 1913 under section 10 of the Letters Patent.

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agreed upon, and I think the ruling in *Sheo Nandan Rai* v. *Thakur Rai* (1) is sufficient authority for this proposition. I dismiss the appeal under Rule II."

From this judgement the defendants appealed under section 10 of the Letters Patent.

Munshi *Haribans Sahai*, for the appellants, submitted that the zamindar could not claim rent at a higher rate than was payable under section 10 of the Agra Tenancy Act. The word used in the section was "shall" and the provisions were imperative. An agreement to the contrary was not binding.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Munshi *Gulzari Lal*), for the respondents, submitted that section 10 gave an exproprietary tenant the privilege of paying rent at the rate mentioned therein, but there was no bar to his binding himself to pay more. If he entered into an agreement with respect to the payment of rent at a particular rate that agreement was enforcible against him. The words used in the section were not that "he shall hold the land at a rent &c." but that "he shall be entitled to hold the land at a rent &c." That showed that a right was given to the tenant, but there was no bar to his waiving it. The Legislature had not taken away the freedom of contract as to the rate of rent. *Sheo Nandan Rai* v. *Thakur Rai* (1). If the Legislature intended to lay down a different rule, then it had not been able to express its intention in exact language. In the same clause of section 10 the Legislature had used two phrases, namely, "shall become" and "shall be entitled to" with some purpose.

Munshi *Haribans Sahai* was not heard in reply.

RICHARDS, C. J., and BANERJI, J. :—The facts out of which this appeal arises are admitted. The suit was one for rent. The holding at one time was the *sir* of the defendants, who were then proprietors. They mortgaged their proprietary rights, and on the same day agreed to pay a rent to the plaintiffs of Rs. 8 per bigha. It is admitted that the rate which an exproprietary tenant, within the meaning of the Tenancy Act, would pay for an exproprietary holding would be Rs. 3-11 odd. Accordingly the rent claimed in the present suit is largely in excess of the rent to which the defendants were entitled as exproprietary tenants to hold the land. The court of first instance dismissed the suit of the plaintiffs on

(1) (1909) 6 A. L. J., 161.

the ground that the agreement to pay an excess rent was contrary to law. The lower appellate court reversed this finding and decreed the suit. A learned Judge of this Court dismissed the appeal affirming the decree of the lower appellate court. Hence the present appeal.

Section 10 of the Tenancy Act provides that where a proprietor alienates his proprietary rights he shall become a tenant with a right of occupancy in his *sir* land. It goes on further to provide that he shall be *entitled to hold* the same at a rent which shall be four annas in the rupee less than the rate generally payable by non-occupancy tenants for land of similar quality.

It is argued on behalf of the plaintiffs that while an exproprietary tenant is "*entitled to hold*" his land at that rate, there is nothing in law to prevent him entering into a contract to pay a higher rent. The appellant contends, on the other hand, that by alienation a proprietor becomes an exproprietary tenant with all the rights of such and that he cannot contract himself out of such right.

In our opinion the contention put forward on behalf of the appellant is correct. This Court has always held that a proprietor cannot contract himself out of his right to become a tenant of his *sir*, and in our opinion he cannot contract himself out of his right to become an exproprietary tenant with all the rights of such. We need hardly point out that to hold otherwise would be contrary to the clear policy of the Act, and would in fact make the provisions of section 10 entirely nugatory.

We accordingly allow the appeal, set aside the decree of this Court and also of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.