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debts is one thing, and the validity of a mortgage over the joint estate is quite another thing."

In the present case the doctrine is invoked against grandsons and in the life-time of sons. Nothing more need be said. The invocation of the doctrine entirely fails.

Their Lordships will humbly advise His Majesty that the appeal should be refused with costs.

Solicitors for the appellants: *Barrow, Rogers* and *Nevill.*

Solicitor for the respondents: *H. S. L. Polak.*

APPELLATE CIVIL.

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February, 1.

Before Mr Justice Gokul Prasad and Mr. Justice Stuart.

MANPAL SINGH (DEFENDANT) *v.* RAJA PARTAB SINGH AND ANOTHER (PLAINTIFFS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section 22—Occupancy rights created under Act No. X of* 1859*—Tenant succeeded by widow in* 1868*—Widow's death after passing of Act No. II of* 1901*—Succession.*

The holder of an occupancy tenancy died about the year 1868. After his death, his widow took possession of the holding and remained in possession until 1898, when she made a gift of it. The widow died in 1915, and the reversioners then sued the donees to recover possession.

Held that the widow did not succeed to a heritable estate, but acquired by virtue of possession an estate in herself. Succession to this estate was governed by the present Agra Tenancy Act of 1901, and the plaintiffs, not being sharers in the cultivation at the date of the death of the widow, were not entitled to succeed.

THE facts of this case are fully set forth in the judgment of GOKUL PRASAD, J.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Gulzari Lal*, for the respondents.

GOKUL PRASAD, J.:—This appeal arises out of a suit for possession of a certain cultivatory holding. The plaintiffs came to court on the allegations that one Nanhe Singh, who owned a large area of occupancy holding and fixed rate holding, died about 1868, that after him his widow Musammat Nankai entered into possession of the occupancy holding as a life-tenant with limited rights only, that she made a gift of the said property to Manpal

* Second Appeal No. 600 of 1920, from a decree of B. J. Dalal, District Judge of Allahabad, dated the 9th of February, 1920, confirming a decree of Abdul Halim, Subordinate Judge of Mirzapur, dated the 19th of August, 1918.

Singh, defendant, and his wife, in the year 1893, that she being only a life-tenant had no right to make the gift, that the gift was, therefore, invalid, that she died in the year 1915 and that thereupon they, the plaintiffs, now sued as her next reversioners for possession which was postponed till her death. The original tenant Nanhe Singh having died before the Tenancy Act of 1873 was passed, the question is, was there a succession to his holding at the time of his death and, if so, to whom? We have not been able to find any provision of law regulating the devolution of succession to an occupancy tenancy at that time. The right of an occupancy tenant was first created by Act X of 1859. Section 6 of that Act runs as follows:—"Every ryot, who has cultivated or held land for a period of twelve years, has a right of occupancy in the land so cultivated or held by him, whether it be held under *pottah* or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khomar neejjote, or seer land belonging to the proprietor of the estate or tenure and let by him on lease for a term or year by year, nor (as respects the actual cultivator) to lands sub-let for a term or year by year by a ryot having a right of occupancy. The holding of the father, or other person from whom a ryot inherits, shall be deemed to be the holding of the ryot within the meaning of this section."

In the case of *Ajoodhya Pershad* v. *Mussamut Imam Bandi Begum* (1), a Full Bench of the Calcutta High Court held that such a right was not transferable, and Sir BARNES PEACOCK stated in his judgment:—"Speaking for myself, I am not at all sure that a right of occupancy gained under section 6, Act X of 1859, is necessarily heritable."

In *Narendra Narayan Roy Chowdhry* v. *Ishan Chandra Sen* (2) a Full Bench of the Calcutta High Court decided that such a right was not transferable.

In *Doorga Pershad* v. *Doochur Pershad and others* (3) this Court held that the ordinary Hindu law did not of necessity apply to the succession of an occupancy holding, and appeared to lay down a principle that in certain circumstances a co-cultivator, closely related to the occupancy tenant, such as a son *et cetera*,

(1) (1867) 7 W. R., C. R., 528. (2) (1874) 13 B. L. R., 274.
(3) N.-W. P., H. C. Rep., (1868), p. 188.

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might succeed to the holding. At page 185 they are reported to have said :—"It is assumed in the judgment appealed from, that upon the death of a ryot having a right of occupancy, his heirs, however remote, may claim to succeed to his holding as their inheritance. No authority is cited, except that the Hindu law of inheritance is referred to, and the defendants being found to be heirs by Hindu law are declared entitled to the right of occupancy by inheritance. On the death of a ryot having a right of occupancy his son or other immediate heir residing with him in the village usually succeeds. Remote heirs residing elsewhere and coming to the village after an interval have not been allowed to take possession of his holding as a part of their inheritance. In the case, the grandson of the ryot (his daughter's son) who, it is stated, would presumably inherit his own father's cultivation, was not allowed to succeed to the holding of his grandfather. It may be inferred that he resided with his father elsewhere than in the deceased ryot's village."

In a subsequent decision, *Musumat Pem Koeer* v *Upper Balee Singh* (1), the same Court held that it was not correct to say that the ordinary Hindu law would apply. The learned Judges in their judgment had referred to paragraph 128 of the 'Directions to Settlement Officers'. Those observations referred to tenants at fixed rates and not to tenants in general.

However, leaving this matter aside, it is quite clear that we cannot in the face of these authorities come to the conclusion that the right of an occupancy tenant devolved according to the ordinary rule of succession of Hindu law as in the case of other estate. Until the passing of Act XVIII of 1873 there was no rule of succession provided for occupancy holdings. They were apparently governed by custom, which varied in different villages. No custom is found here.

Under these circumstances there are two ways of looking at the case. The point, in short, is, what was the nature of the right which Musammat Nankai obtained by virtue of taking possession of the occupancy tenancy? After the death of her husband she continued in undisturbed possession thereof up to the time of her death. If she was in possession, as alleged by the plaintiffs, by inheritance, the defendants could acquire no rights from her

(1) N.-W. P., H. C. Rep., (1870), p. 83.

by virtue of the gift in their favour because she had no such rights to pass, and, further, the plaintiffs, whose rights of enjoyment could be said at the best to have been postponed during her life, could not have possibly been co-sharers in the cultivation of the *sir*, as they were not in existence at the time of her husband's death, and, therefore, their suit was bound to fail. If, on the other hand, by such continuous possession she obtained an occupancy right in herself, then the succession opened on her death and the plaintiffs did not fulfil the conditions prescribed under section 22 of the Tenancy Act now in force to come in as her heirs. In either view of the case the plaintiffs' claim was bound to fail and the courts below have erred in decreeing the claim. I would, therefore, allow the appeal and modify the decrees of the courts below by decreeing the plaintiffs' claim only in respect of the fixed-rate tenancy and dismissing the rest of the claim with proportionate costs.

STUART, J.:—I concur in the order proposed. I have to add very little to it. As I understand the law, the right of an occupancy tenant was created for the first time by the provisions of section 6 of Act X of 1859, except under special customs, which are not shown to have existed in the village in which the land in dispute is situated. In order to decide the question whether on the death of an occupancy tenant whose rights were created by Act X of 1859 and who died before Act XVIII of 1873 came into force, such rights were heritable or not, it would appear to be necessary only to examine the words of section 6, and after examining these words to decide whether this section created in the occupancy tenant an estate such as is known to the law of England as 'an estate of inheritance'. Apart from anything which may have been decided by this Court, it appears to me that on the wording of the section it is impossible to hold that an 'estate of inheritance' was so created. An occupancy tenant under that section obtained, in my opinion, a non-heritable right to retain the cultivation of his occupancy holding so long as he paid his rent, and such right was created by the Act of 1859 for the first time, where it had not previously existed by custom. Act XVIII of 1873 undoubtedly created an estate of inheritance, but I agree with the view that was taken as long ago as 1876 by Sir BARNES PEACOCK that the right created by Act X of 1859 was

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neither transferable nor heritable. So when Nanhe Singh died, the rights of occupancy came to an end. His widow Nankai, being permitted to continue cultivation of the holding after her husband's death, acquired in her own right after twelve years the right of an occupancy tenant. Now that she is dead, the question is how is succession to her governed? It is clearly governed by the provisions of section 22 of the present Tenancy Act (Local Act No II of 1901), and the plaintiffs cannot claim the right to succeed her, as they did not (whatever be their title in other respects) share in the cultivation of the holding at the time of her death.

BY THE COURT.—The order of the Court is that the appeal is allowed and the decrees of the courts below are modified, the claim of the plaintiffs to the occupancy holding only being dismissed. Costs are to be in proportion to failure and success.

Appeal allowed.

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February, 6.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BHATELE CHUNNI LAL (PLAINTIFF) *v.* CHAKARPAN AND OTHERS (DEFENDANTS)*.

General rules for Subordinate Civil Courts, Chapter V, rule 4—Execution of decree—Sale of property by Civil Court as non-ancestral—Subsequent suit to set aside sale on the plea that the property sold was in fact ancestral.

Where immovable property is sold by a Civil Court as non-ancestral, the judgment-debtor having knowledge of the sale, and opportunity, if so advised, to raise the question of the nature of the property in execution, he cannot thereafter sue to set aside the sale upon the ground that the property was in fact ancestral and should not have been sold by the Civil Court. *Behari Singh* v. *Mukat Singh* (1) and *Dalip Narain Singh* v. *Parmaoti Bibi* (2) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen*, for the appellant.

Munshi *Baleshwari Prasad*, for the respondents.

PIGGOTT and WALSH, JJ.:—The object of the suit out of which this appeal arises was to set aside an auction sale, held on the 20th of July, 1915, of property belonging to the plaintiff. The defendants impleaded were the auction-purchaser and the

* First Appeal No. 299 of 1919, from a decree of Raghunath Prasad, Subordinate Judge of Mainpuri, dated the 19th of May, 1919.

(1) (1905) I. L. R., 28 All., 273. (2) (1919) I. L. R., 42 All., 58.