1926
February,
1.

Before Mr. Justice Sulaiman and Mr. Justice Mukerji.

BALLABH DAS (DECREE-HOLDER) *v.* MURAT NARAIN SINGH AND OTHERS (JUDGEMENT-DEBTORS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 20—"Thekadar"—*Perpetual lease of a village, not for agricultural purposes—Power of lessee to mortgage—Act No. IV of* 1882 *(Transfer of Property Act), section* 108 *—Lease.*

An entire village was leased in perpetuity for the consideration of a premium and a yearly rent. There was nothing to indicate that the lessee was expected to cultivate any of the land in the village himself, nor any covenant restraining the transfer of his interest.

Held on a construction of the document that section 20 of the Agra Tenancy Act, 1901, did not apply and that it was competent to the lessee to make a valid mortgage of his rights under the lease.

Held also by SULAIMAN, J., that the failure of a mortgagor to raise the plea of non-transferability in a suit on the mortgage would not prevent him raising it subsequently as a plea in bar of sale in execution of a decree passed against him. *Mubarak Husain* v. *Ahmad* (1), followed.

THE facts of this case were as follows :—

On the 18th of February, 1875, one Sita Ram granted a permanent lease of an entire village in favour of one Kalka Prasad Singh. The heirs of Kalka Prasad Singh, in the years 1915 and 1916, made two mortgages of the whole of this village in favour of Seth Ballabh Das. The mortgagee brought a suit for sale on the basis of his mortgage deeds. No written statement was put in, and the mortgagors did not

* Second Appeal No. 1800 of 1924, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 28th of May, 1924, confirming a decree of Gauri Shanker Tewari, Subordinate Judge of Mirzapur, dated the 20th of April, 1923.

(1) (1924) I.L.R., 46 All., 489.

1926

BALLABH DAS v. MURAT NARAIN SINGH.

contest the claim on the ground that the property mortgaged was not transferable. An *ex parte* decree was passed. When this decree was put into execution, the judgement-debtors raised an objection that their interest in the property was not transferable inasmuch as they were thekadars within the meaning assigned to that term in the Agra Tenancy Act, 1901. Both the courts below accepted this contention and accordingly the application for execution was disallowed. The decree-holder appealed to the High Court.

Babu *Piari Lal Banerji* and Munshi *Sheo Dihal Sinha*, for the appellant.

Munshi *Gadadhar Prasad*, for the respondents.

The judgement of SULAIMAN, J., after stating the facts as above, thus continued :—

First of all it is contended that section 20(3) which makes the interest of a thekadar, subject to the terms of the lease, not transferable does not apply to execution sales. The argument is that wherever the legislature intends that the word " transferable " should cover execution sales also, it expressly has said so. Our attention is drawn to sub-clause (2) where it is expressly provided that the interest of other tenants is not transferable in execution of a decree of a civil or revenue court or otherwise. This contention cannot be accepted. The word " transferable " is used at two places in the same section 20. In sub-clause (2) it is used in its general sense, no matter whether the transfer is voluntary or involuntary. Although the whole clause is not repeated in sub-clause (3), there is no reason to suppose that the word " transferable " is not used in the same sense in that clause also and that it is confined to private transfers only. In my opinion this contention therefore must be rejected.

1926

BALLABH DAS v. MURAT NARAIN SINGH.

The next argument advanced before us is that the lease in question was executed in the year 1875, long before the present Agra Tenancy Act was passed, and that inasmuch as at that time there was no prohibition against transfers of an interest by a thekadar, the interest remained transferable. This argument also has no force. Assuming that the interest was transferable prior to 1901, it can be made non-transferable by an express enactment. The law governing the transfer must be that which was in force on the dates when the transfers in dispute took place. *Sulaiman, J.*

Thirdly, it is contended that it was the duty of the mortgagors to raise the plea of non-transferability now disputed before us and their failure to raise it prevents them from raising this point in the execution department. The contention is that the plea is barred by the principle of *res judicata*. There would appear to be some force in this contention, especially in cases where the nature of the tenancy is not quite clear and where it may be disputed whether the right is or is not transferable. But in view of the pronouncement of the Full Bench in the case of *Mubarak Husain* v. *Ahmad* (1), where stress was laid on the want of jurisdiction in the court itself for selling properties which were declared by law to be non-transferable, I feel precluded from allowing this point to be raised.

Before I come to the main point which really arises in this case, I must note an objection that has been raised on behalf of the respondent. The contention is that the language of sub-clause (3) in section 20 makes the interest of a thekadar always non-transferable and that it is only heritable when the terms of the lease expressly provide for it. If the language of sub-clause (3) were to be interpreted strictly and literally, there may at first sight appear to be some force in this

(1) (1924) I.L.R., 46 All., 489.

1926

BALLABH DAS v. MURAT NARAIN SINGH.

contention. It must be admitted that the language is not happy. But if we were permitted to examine the report of the Select Committee, it would appear that the intention was not to alter the law so far as a thekadar was concerned. In the Act of 1873 or the Act of 1881 there was no absolute prohibition against the transfer of an interest by a thekadar, the transferability depending on the terms of the contract. It seems to me that although the language is not happy the meaning of sub-clause (3) is that the interest of a thekadar is heritable but not transferable, provided there is no provision to the contrary in the lease.

Sulaiman, J.

The main question to consider is whether the present lease is really a lease for agricultural purposes or not. No doubt the word "thekadar," which was not defined in the Act of 1873 and was defined to include a tenant in 1881 and now includes every farmer or other lessee of proprietary rights under section 4(6), is of a wide scope. But it does not follow that every *theka* is governed by the Agra Tenancy Act. The preamble of the Act indicates that the object of the legislature was to consolidate and amend the law relating to *agricultural* tenancies and certain other matters in these provinces. Under section 108(*j*) of the Transfer of Property Act a lessee is entitled to transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in property unless the right is clearly not transferable. Section 117 of the Act, however, makes the provision of that section inapplicable to leases for agricultural purposes, unless notified by Government. It is, therefore, important to consider whether the lease in question was or was not a lease for agricultural purposes. If it was not a lease for agricultural purposes, then it would be governed by the Transfer of Property Act and not by the Agra Tenancy Act. Land is defined in section 4

(2) as land which is let or held for agricultural purposes. Sub-clause (6) defines "thekadar" as farmer or other lessee of proprietary rights, which must mean rights in land, otherwise a lessee of proprietary rights in house properties would come within the definition of a thekadar in the Agra Tenancy Act. That obviously could not have been the intention. The expression "agricultural purposes" has not been defined anywhere, but a lease cannot be called a lease for agricultural purposes unless the primary object of the lease is cultivation or agriculture. It is, therefore, necessary to examine the terms of the lease. The lease itself is called a *zar-i-peshgi* lease in perpetuity. The entire village is leased to the lessee who is put in possession thereof and authorized to let out land to tenants and make collections. Clause (3) of the lease provides that the lessee will be entitled to all the income, produce, *mal* and profit arising from *mal*, *sair* items, *sir* land, high and low lands, water and forest produce, tanks and ponds, groves, markets, *baras* (enclosures), land on the banks of the Ganges which may appear or disappear by fluvial action of the river. Although the power of the lessee is described in detail, there is no express mention that he is to cultivate the lands himself. No doubt such power would be implied, but the point is that there is no express mention of any intention on the part of the lessee to cultivate the lands himself. Furthermore, the amounts which are to be paid to the lessor are called instalments of profits, and in case of default of payment interest at the rate of eight annas per cent. per mensem is to run on the amount, which could be deducted from the premium (*zar-i-peshgi*) advanced to the lessor. The lessee is not entitled to plant groves on the land. The lessee is also to be responsible for payment of Government

Sulaiman, J.

1926

BALLABH DAS v. MURAT NARAIN SINGH.

revenue and cesses. Reading the lease as a whole, therefore, it is impossible to say that the primary object of this transaction was agriculture, that is to say, that the entire village was let out to Kalka Prasad Singh for the purposes of cultivation or other agricultural purposes. Part of the village consists of waste and abadi lands and it was not likely that all the area could be brought under cultivation. Having regard to all these circumstances, it is impossible to hold that the lease in dispute in this case was a lease for agricultural purposes so as to be exempted from the operation of section 108 of the Transfer of Property Act and to be governed by the Agra Tenancy Act. The lease is therefore not governed by the Agra Tenancy Act and the rights under it are not non-transferable.

I would allow the appeal and setting aside the order of the courts below dismiss the judgement-debtors' objections with costs in all courts.

MUKERJI, J.—I agree with my learned brother that the judgement-debtors' objection to the execution of the decree must be disallowed.

As pointed out by my learned brother, the main law on the question of transferability of leases is contained in the Transfer of Property Act which is an all-India Act. By that law all leases, except where the terms prohibit, are transferable. Such being the case, the present lease should also be transferable. If there be a prohibition in law, we must see where that prohibition is. In section 117 of the Transfer of Property Act an exception has been made in the case of agricultural leases and it has been laid down that those shall be governed by the local laws where there are any. Such a local law is the Tenancy Act of Agra. Now we have to see whether the lease before us is

governed by the Agra Tenancy Act. We must remember that a lease which is to be exempted from the general provisions of the Transfer of Property Act must be essentially an agricultural lease. If it be not an agricultural lease in its essence, it will not be exempted. My learned brother has already pointed out, and I need not repeat it, that the Tenancy Act is directed to govern agricultural tenancies and not tenancies the object of which is not the promotion of agriculture.

The lease in this case nowhere states that the lessee has taken the land for the purpose of cultivating it himself. There is not a word to that effect. The lease, read as a whole, shows that the zamindar put the lessee in the same position as he himself occupied, except in a few minor matters, in consideration of a small sum of money to be paid to him year by year. The primary object of the lease was to obtain the proprietary rights of the lessor and not to utilize any land for the purpose of agriculture. Of course it would be open to the lessee to cultivate any particular land if he so desired. But that is a secondary object and not the primary object. In this view we cannot treat this lease as a lease of a farm. The word "thekadar" has been defined in the Agra Tenancy Act as including a farmer or other lessee of proprietary rights. The language employed is too wide and it must be conceded that a lessee of a house, although he would be a lessee of proprietary rights, would not be a thekadar within the meaning of the Agra Tenancy Act. Where the primary object of the lease, as in this case, is not agriculture, the lease must be treated as not an agricultural lease.

In this view the interest of the lessee is transferable and saleable in execution of the mortgage decree passed for the purpose.

1926

BALLABH DAS v. MURAT NARAIN SINGH.

BY THE COURT.—The appeal is allowed. The decrees of the courts below are set aside and the objection of the judgement-debtors is dismissed with costs in all courts. The execution will proceed.

Appeal allowed.

1926 *February*, 5.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Boys.

JANGI LAL (DECREE-HOLDER) *v.* MATA BADAL SINGH AND OTHERS (JUDGEMENT-DEBTORS).*

Act (Local) No. II of 1903 *(Bundelkhand Land Alienation Act), section* 16—*Civil Procedure Code, section* 68—*Execution of decree.*

The fact that land which is subject to the provisions of the Bundelkhand Land Alienation Act, 1903, happens to be ancestral land will not enable a court to apply section 68 of the Code of Civil Procedure and transfer the execution of a decree affecting it to the Collector for the purpose of his dealing with it in the manner provided by schedule III of the Code. *Hanuman Prasad Narain Singh* v. *Harakh Narain* (1), referred to.

THE facts of this case were as follows :—

The decree-holder appellant obtained a decree for money against certain members of an agricultural tribe, holding landed property in tahsil Karchhana of the Allahabad district, to which the Bundelkhand Land Alienation Act (Act II of 1903) is applicable. In 1920 he applied for the attachment and sale of the said landed property and got an attachment made; but before he could proceed with the sale of that property, an objection was made by the judgement-debtors that the property was not saleable under section 16 of the Act. That objection was allowed

* Second Appeal No. 1802 of 1924, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 29th of May, 1924, confirming a decree of Triloki Nath, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 24th of March, 1923.

(1) (1919) I.L.R., 42 All., 142.