1934

SUKH LAL v. BHOORA

abundant authority for the view that waiver is something more than mere inaction or omission. But in my opinion it is not necessary that it should amount to any novation of contract or any new agreement for consideration or that it should be any other bilateral arrangement.

Sulaiman, C.J.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

1934
September, 24

AJODHIA KALWAR AND ANOTHER (DECREE-HOLDERS) *v.* BALKARAN AND OTHERS (JUDGMENT-DEBTORS)*

Agra Tenancy Act (Local Act III of 1926), sections 199, 203—Interest of Thekadar—Saleability in execution of decree—Perpetual lease by owner of sir plots—Lease of proprietary rights and not mere agricultural lease.

According to section 203 of the Agra Tenancy Act, if the lease specifically grants the right of transfer the interest of the thekadar is saleable in execution of a decree.

Where the lessor is the sole proprietor of the plots and grants a perpetual lease thereof, giving to the lessee rights of inheritance and transfer, with full liberty to cultivate the lands himself or to get it cultivated by others, or to build houses or to plant groves thereupon, the lease is of necessity a lease of proprietary rights in the land and not a mere agricultural lease, and the lessee is a thekadar and not a mere non-occupancy tenant, and his interest is saleable in execution of a decree.

Messrs. *Mushtaq Ahmad, Gajadhar Prasad* and *Shankar Sahai Verma,* for the appellants.

Mr. *S. S. Sastry,* for the respondents.

SULAIMAN, C.J., and RACHHPAL SINGH, J.:—This is a decree-holders' appeal arising out of execution proceedings. The decree-holders had obtained a simple money decree against the judgment-debtors, and in execution of it they attached three plots of land belonging to the judgment-debtors. The latter objected that they were mere non-occupancy tenants of these

*Appeal No. 29 of 1933, under section 10 of the Letters Patent.

plots and their rights were not saleable. The decree-holders' contention was that the judgment-debtors had acquired the rights of perpetual lessees under a registered document executed by a zamindar on the 23rd September, 1927. The first court held that the rights of the judgment-debtors were not transferable in spite of a provision to that effect in the lease. The lower appellate court came to a contrary conclusion. A learned Judge of this Court in second appeal has agreed with the view of the first court and has dismissed the decree-holders' application.

The sole question before us for consideration is whether under the terms of this particular document, the judgment-debtors acquired transferable rights, which can be attached and sold, or whether the rights possessed by them are not attachable and saleable.

Prior to the Tenancy Act of 1901 there was not any clear restriction on the power of the zamindar in granting rights in perpetuity to tenants. But section 20 of Act II of 1901 provided that the interests of certain tenants would not be transferable, and also provided that "the interest of a thekadar is, subject to the terms of his lease, heritable, but not transferable".

This last mentioned sub-section (3), with its rather ambiguous language, was the subject of interpretation in two cases, in which slightly different meanings were attached to it. In the case of *Ballabh Das* v. *Murat Narain Singh* (1), it was held by at least one of the Judges that there was no prohibition against the transferability of the rights of a thekadar, if under the terms of the document a right of transfer was specifically conferred. In the case of *Majid Husain* v. *Kurban Ali* (2) it was held by the Letters Patent Bench affirming the decision of a single Judge of this Court that under section 20(3) it was not open to the zamindar to create a theka with transferable rights. It does not, however, appear that although the latter case was decided a few

(1) (1926) I.L.R., 48 All., 385. (2) A.I.R., 1926 All., 412.

1934

AJODHIA KALWAR v. BALKARAN

days after the first, the former decision was cited before the Letters Patent Bench. We may point out that the decree-holders' case also receives considerable support from the observations made in the cases of *Raghunath Tewari* v. *Buddhu Ram Tewari* (1), and *Mahesh Narain Singh* v. *Bisheshar Lunia* (2).

It may be pointed out that the words "subject to the terms of his lease" in the old section were *prima facie* applicable to both "heritable" and "not transferable", as there was only one verb "is" in the sentence. If the language of the corresponding section in the new Tenancy Act had not been changed, we might have felt inclined to refer this case to a larger Bench. But in the new Tenancy Act (Act III of 1926) there have been radical changes in the provisions so far as a thekadar or a lessee of proprietary rights is concerned. Under the old Act a thekadar came within the definition of a tenant and used to be treated as a non-occupancy tenant. In section 3(6) of the new Act, a tenant excludes a thekadar "save as otherwise expressly provided by this Act". It follows that, unless in the relevant section a thekadar is specifically included in the word "tenant", the provisions would be inapplicable to him. A separate chapter (Chapter 13) specifically deals with the rights of a thekadar, and section 199 contains the definition of thekadar as being "a farmer or other lessee of proprietary rights in land, and in particular of the right to receive rents or profits". Then section 203 is very clear in its language, and is headed by an exception, "Except as may be otherwise provided by the terms of the theka", which governs the whole section, including the provisions as to the non-transferability or non-saleability in execution of a decree, and non-heritability unless the theka has been given on payment of a premium.

Under section 203, therefore, there can now be no doubt that, if the terms of the theka provide otherwise,

(1) A.I.R., 1930 All., 315. (2) [1931] A.L.J., 432.

the provisions as to non-transferability or non-saleability would be wholly inapplicable. It, therefore, follows that if the deed specifically grants the right of transfer and inheritance, such rights are acquired by the thekadar or lessee. A thekadar not being a tenant, the prohibition contained in sections 23 and 24 are not applicable to him.

It is strenuously contended on behalf of the respondents that even a perpetual lease of *sir* plots would be a mere agricultural lease, making the lessee an ordinary agricultural tenant, and would not amount to a theka, unless the document specifically purports to transfer proprietary rights. It seems to us that where the lessor is admittedly the owner of the plots and professes to grant a perpetual lease of those plots to the lessee with the right to hold on possession generation after generation and the right to sell and mortgage the same, and without any right in the lessor to eject the tenants, and premium is received as consideration for the grant of the perpetual lease, the lease must of necessity be a lease of proprietary interest in land, and not merely an agricultural lease for a short term. Where the lessor is not the proprietor of the land, for instance he may be a mere thekadar or a tenant-in-chief, or perhaps a mere co-sharer, a grant by him, even though ostensibly a perpetual lease, may not amount to such lease; but where the lessor is the full proprietor and for consideration grants rights of inheritance and transfer to the lessee in perpetuity, it is impossible to hold that the transaction amounts to a mere agricultural lease, which makes the lessee a non-occupancy tenant, who can be ejected at will and who acquires no more rights in the land than an ordinary non-occupancy tenant. To hold otherwise would mean that an owner of land can sell, mortgage or gift away his land but is incompetent to grant a perpetual lease of it.

The present case is particularly strong. The document in question recites that the lessor is the full owner

1934

AJODHIA KALWAR v. BALKARAN

of certain plots, and on receipt of Rs.1,000 as premium he purported to grant a perpetual lease to the lessees, giving them the right to hold possession generation after generation and the right to sell and mortgage the plots, either to cultivate the plots themselves or to get them cultivated by others, to erect houses, pucca and kachcha, plant trees of every kind, without any rights in the lessor to eject them, and to have their names entered in the Government papers; and the document is called a perpetual lease. There can be no doubt that the rights conferred on the lessees were much more than mere rights of an agricultural non-occupancy tenant. In this particular case, the primary object of the lease was to confer rights in perpetuity, both of inheritance and transfer, and to give full liberty to the lessees either to cultivate the land themselves or to get it cultivated by others, or to build houses or plant groves on the said land. It is, in our opinion, impossible to hold in this case that the lease embodied anything other than a lease of proprietary rights in the land.

It may, in this connection, be pointed out that section 199 does not restrict the definition of the thekadar to the particular case of the grant of the right to receive rents or profits, but applies to all farmers and other lessees of proprietary rights in the land.

We, therefore, regret that we are unable to accept the conclusion of the learned Judge of this Court that the judgment-debtors acquired no saleable interest in these plots at all. We would guard ourselves against being understood to lay down that the same remarks would apply to a case of a long-term lease, which falls short of a perpetual lease. In such a case the answer will depend on the particular terms of the document from which the primary intention of the parties will have to be inferred. Nor should we be understood to lay down that the power of a sole proprietor to grant a perpetual lease of plots belonging to him, which in this

1934

AJODHIA KALWAR v. BALKARAN

case has been assumed and never disputed, would be the same where he is not the sole owner but is holding exclusive possession of the lands with the consent, express or implied, of other co-sharers. No other person, who can be considered to be a co-sharer is a party to this case; and if any such person exists, he will, of course, not be bound by this decision.

The appeal is accordingly allowed, the decree of the learned Judge is set aside, and that of the lower appellate court is restored with costs.

MISCELLANEOUS CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Harries

RAJENDRA SINGH (DEFENDANT) *v.* UMA PRASAD (PLAINTIFF) AND ANOTHER*

1934 *September, 26*

Contempt of court—Interference with the administration of justice—Threatening letter by plaintiff to defendant in a pending suit, for the purpose of compelling him to withdraw a plea taken in defence—Threat of prosecution for defamation in respect of an allegation contained in the plea——Advocate's liability for drafting and signing the letter—Duties of advocate—Privilege.

One of the pleas raised in defence to a suit on a mortgage deed executed by the deceased father of the defendant was that the mortgagee, the deceased father of the plaintiff, had colluded with some unscrupulous money lenders in taking advantage of the loose habits of the defendant's father and running him into indebtedness and getting fictitious recitals to be made in the deed regarding payment of earlier debts. During the pendency of the suit a notice was sent on behalf of the plaintiff by his advocate to the defendant, threatening him that unless he withdrew the plea and paid a certain sum as damages he would be criminally prosecuted for defamation of the plaintiff's deceased father. Arising out of this notice, proceedings for contempt of the trial court were taken in the High Court under the Contempt of Courts Act, 1926, against the plaintiff and his advocate, and it was *held*:

*Miscellaneous Case No. 446 of 1934.