1937

MUZAFFAR-NAGAR BANK v. FATTA

payment by instalments which is to be drawn up in accordance with the provisions of section 3. It is not merely an amended decree but it is a new decree for payment by instalments. There is no provision in section 5 to the effect that this decree into which the old decree is converted should be deemed to bear the date of the original decree. There is, on the other hand, a clear provision that it should be drawn up in accordance with the provisions of section 3. It would therefore follow that when a decree is converted into a new decree under section 5, the court can fix a period for payment by instalments starting from the date of the new decree and not necessarily from the date of the original decree. This was the view expressed by a learned single Judge of this Court in *Ram Ghulam* v. *Bandhu Singh* (1), in which ALLSOP, J., observed that for the purposes of section 5 of the Act the meaning of the word "decree" in the first proviso to section 3(1) is the decree for instalments and not the original decree which is converted into a decree for instalments. We agree with that view. We accordingly dismiss the revision with costs.

## APPELLATE CIVIL

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

1937
*August*, 16

RAM CHANDRA SINGH AND ANOTHER (DEFENDANTS) *v.* MISRI LAL AND OTHERS (PLAINTIFFS)*

*Agra Tenancy Act (Local Act III of* 1926), *sections* 44, 82—*Illegal transfer by tenant—Transfer of ex-proprietary tenancy —Suit by landlord against such transferee—Section* 44 *not applicable—Agra Tenancy Act, sections* 242(3), 271 *explanation II—Question of proprietary right—Appeal.*

The question whether certain plots of land in the possession of the defendants were the *sir* plots of the defendants or whether they were their tenancies is not a question of pro-

*Appeal No. 7 of 1936, under section 10 of the Letters Patent.

(1) (1936) I.L.R., 58 All., 941.

prietary right, as explained by explanation II to section 271 of the Agra Tenancy Act. Accordingly such a question is not a question of proprietary right within the meaning of section 242(3) of that Act and does not confer a right of appeal to the District Judge.

Where a tenant, to whom land had been validly let by the landholder, makes an illegal transfer of the same, section 82 of the Agra Tenancy Act is applicable, and section 44 would not apply to such a case. The proper course for the landholder is not to bring a suit under section 44 against the transferee but to bring a suit under section 82 against both the tenant and the transferee.

Mr. *S. B. L. Gaur,* for the appellants.

Mr. *Panna Lal,* for the respondents.

SULAIMAN, C.J., and HARRIES, J.:—This is an appeal by the defendants arising out of a suit for ejectment. In 1907 a usufructuary mortgage was executed by Daulat Ram of certain zamindari share including his *sir* plots. At the same time he executed a counterpart of a lease under a contract of tenancy taking over possession of the property as lessee until the mortgage was redeemed. Admittedly Daulat Ram retained actual possession of his properties, the usufructuary mortgagee being in constructive possession thereof. Subsequently Daulat Ram sold to the defendants his equity of redemption in the mortgaged property and at the same time executed what was called a deed of relinquishment in their favour under which he relinquished and surrendered his possessory rights as lessee or tenant in favour of the defendants. The defendants obtained possession of these plots and remained in possession until the institution of the suit. The present suit was filed by the zamindars against the mortgagees under section 44 of the Agra Tenancy Act treating the defendants as persons who had either taken or retained possession of plots of land without the consent of the landholder and in contravention of the provisions of the Tenancy Act. One of the points raised in defence was that the defendants were proprietors. The trial court framed an issue as to the defendants

1937

RAM CHANDRA SINGH v. MISRI LAL

being proprietors and referred the same to the civil court for decision. The learned Munsif found that the defendants were proprietors and returned his finding to the revenue court. The revenue court thereupon dismissed the suit of the plaintiffs altogether. The plaintiffs appealed to the District Judge and not to the Commissioner, and the first ground taken was that the finding of the trial court that the land in suit was the *sir* of the defendants was not correct. There were other grounds taken, which admittedly did not raise any question of proprietary title at all. The learned District Judge dismissed the appeal. On appeal to this Court, it was allowed by a learned Judge and the plaintiffs' suit for possession was decreed with costs.

Two points arise for consideration in this Letters Patent appeal. The first is whether the appeal at all lay to the District Judge. There is no doubt that suits under section 44 of the Tenancy Act come under the fourth schedule, Group B, serial No. 2, in which case an appeal would ordinarily lie to the Commissioner and not to the District Judge. Section 242(3) however provides for an appeal to the District Judge in a case where a question of proprietary right has been in issue between the parties and is in issue in the appeal or where a question of jurisdiction has been decided and is in issue in the appeal. No question of jurisdiction arose in this case, but it has been argued on behalf of the respondents that a question of proprietary right was raised in the first ground of appeal before the District Judge which has been quoted above. Sections 270 to 272 lay down the procedure when a question of proprietary right is raised in the revenue court. Explanation II to section 271 however lays down that "A question of proprietary right does not include the question whether land in the actual possession of a proprietor thereof is held by such proprietor as his *sir* or *khudkasht* or as a tenant or sub-tenant." It follows that where the lands were the *sir* plots of the defendants or where they were their tenancies, it would not be a

question of proprietary right within the meaning of the section. Accordingly the requirements of section 242(3) were not fulfilled; and therefore no appeal lay to the District Judge at all. The appeal should have been filed in the court of the Commissioner.

On the merits also, it seems to us that the suit was totally misconceived. Section 44 applies to a case where a person has taken possession of the landholder's land without his consent and in contravention of the provisions of this Act. In such a case the landholder can treat the occupier as a mere trespasser and sue him in the revenue court for his ejectment. Where however the land had been validly let out to a tenant who was in lawful possession thereof and the latter has transferred the same to another person, there is a special section 82 which is made applicable and to such a case section 44 would not apply. Under section 82 if a tenant transfers his holding or any portion thereof contrary to the Act, any person who thus obtained possession is liable to ejectment at the suit of the landholder. Sub-section (2) provides that to every such suit both the tenant and the person in whose favour the illegal transfer purports to have been made shall be made parties. If we were to apply the provisions of section 44 to a case where a lawful tenant has unlawfully transferred his holding to another person, we would be nullifying the express provisions of section 82(2) under which it is necessary that both the tenant and the transferee should be made parties. In a case of this kind the proper course for the landholder is to bring his suit under section 82 because it is the illegal act of his tenant which gives him the cause of action and it is not the occupation of the land by the transferee which amounts to an infringement of his right, because previously the landholder was not entitled to immediate possession of the land at all. Section 34 makes it quite clear that every transfer made by a tenant in contravention of the provisions of this Act shall be void.

1937

RAM CHANDRA SINGH v. MISRI LAL

It has been argued before us that the deed of relinquishment was really not a deed of transfer at all but was a mere surrender of the ex-proprietary rights of the tenant and not a transfer of his possessory right to the defendants. The position at that time was that the original mortgagor was lessee from the usufructuary mortgagee. If he had merely surrendered his rights and abandoned his holdings, the surrender would enure for the benefit of the mortgagees and other co-sharers in the mahal, and the tenant would not profess to pass any interest to the defendants. On the other hand in the deed of transfer it was the intention of the tenant to surrender and relinquish his rights of possession in favour of the defendants and not to the general body of co-sharers. Possession was also admittedly delivered to the defendants. The transfer itself was illegal and void, but we cannot but treat the transaction as a transfer of the holding, though unlawful, by the tenant to the defendants. Section 82 of the Act therefore applies.

We accordingly allow this appeal and setting aside the decrees of this Court and the lower appellate court, direct that the lower appellate court should return the memorandum of appeal filed in that court to the plaintiffs for presentation to the proper court.

It appears that the two points on which the appeal has been allowed were not in this form pressed before the learned Judge of this Court. We accordingly order that the parties should bear their own costs in this Court.