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AGHORE
NATH
v.
SHAMA
SUNDARI.

Babu *Jogindro Nath Chaudhri* for the appellant.

Munshi *Hanuman Prasad* for the respondents.

The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgment:—

STRAIGHT, J.—We see no reason to depart from our ruling in *In the matter of the petition of Badri Prasad* (1) which is directly applicable to the present case. Upon the authority of that decision we hold that the sale under the order of the Munsif was bad by reason of his want of jurisdiction to direct it to be held, and that it must on this ground be set aside. We accordingly decree the appeal with costs in both Courts, and set the sale aside.

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June 26.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

KASIM MIAN AND ANOTHER (DEFENDANTS) v. BANDA HUSAIN AND OTHERS (PLAINTIFFS).*

Landholder and tenant—Transfer by occupancy-tenant of his holding—Effect on occupancy-right—Transfer of trees—Act XII of 1881 (N.-W. P. Rent Act), s. 9.

The presumption of law and the general rule is that property in timber on a tenant's holding rests in the landlord in the same way as, and to no less an extent than, the property in the soil itself.

Faqueer Soonar v. Khuderun (2); *Ajudhia Nath v. Sital* (3); *Abdool Rohoman v. Dataram Bashee* (4); *Ruttonji Edulji Shet v. The Collector of Tanna* (5) referred to.

Held therefore, where an occupancy-tenant transferred his holding, that the transfer was not only invalid in respect of the holding, but in respect also of the trees on the holding.

Where an occupancy-tenant, under the impression that he was a tenant at fixed rates, sold his holding, and the landholder sued the tenant and his vendee to set aside the transfer, as contrary to law, and for possession of the holding, held that the transfer could not be treated as a relinquishment by the tenant of the holding to the landholder, and that the proper decree to make was that the transfer should be cancelled, that the plaintiff was entitled to eject the vendee from the land, but the plaintiff was not entitled to take the holding from the vendor.

* Second Appeal, No. 652 of 1882, from a decree of D. M. Gardner, Esq., Judge of Benares, dated the 27th February 1882, modifying a decree of Babu Mritonjoy Mukarji, Munsif of Benares, dated the 8th November 1881.

(1) I. L. R., 4 All., 359.

(3) I. L. R., 3 All., 567.

(2) N.-W. P. H. C. Rep., 1870, p. 251.

(4) W. R., Jan.—July, 1864, p. 367.

(5) 11 Moo. I. A., 295.

THE facts of this case, so far as they are material for the purposes of this report, were as follows:—The occupancy-tenants of certain land, covered with trees, situate in a village in the Benares district, and known as the “*bagh* (grove) of Babu Sheo Shankar,” sold the “*bagh* or land” to the defendant Kasim Mian. It was stated by the vendors in the deed of sale as follows:—“We have put the vendee in proprietary possession of the property sold just as we were, and from the date of the execution of this deed he acquires the same right and power as we possessed with respect to the property sold.” The vendors made this sale under the impression that they were tenants at fixed rates of the land, and therefore were competent to alienate it, whereas they were merely occupancy-tenants. The present suit was brought by the zamindars of the village against the vendors and the vendee to set aside the sale, and to eject the vendee, on the ground that the transfer by an occupancy-tenant of his holding was illegal under s. 9 of the N.-W. P. Rent Act. The Court of first instance gave the plaintiffs a decree as claimed. On appeal by the defendants the lower appellate Court modified this decree to the effect that the plaintiffs should have possession of the land as against the vendee, the defendant Kasim Mian, on payment of Rs. 133, the price of trees, his property, standing on the land. On second appeal by the defendants the plaintiffs objected, under s. 561 of the Civil Procedure Code, to the decree of the lower appellate Court in respect of the trees.

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The *Senior Government Pleader* (Lala Juala Prasad) and Munshi Hanuman Prasad for the appellants.

Pandit Bishambhar Nath, Munshi Kashi Prasad, and Shah Asad Ali for the respondents.

The judgment of the Court (STRAIGHT and TYRRELL, JJ.), so far as it is material for the purposes of this report, was as follows:—

TYRRELL, J.—There remains the question of the validity of the transaction in respect of the trees standing on the land, that is to say, what is the character and extent of the cultivator’s right of property in such trees?

The settled law of the English Courts is, that “the general property in trees is in the landlord,” but in this part of India

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tenants ordinarily possess by local usage or by prescription considerable rights in the timber and in the produce of trees planted by them or by their predecessors in title on or around the lands cultivated by them. In some parts of the North-Western Provinces the tenants have an unrestricted power to remove and sell their trees, subject only to the landlord's right to receive a fixed portion of the price. Elsewhere the tenant pays a tree-tax, *peri*, for every tree to the landlord; and is then free to appropriate the produce and loppings of the trees. And it may be that there are districts where the tenant has an exclusive and absolute property in the trees he has grown or inherited on his lands. But apart from such local and particular conditions, which would, of course, be made questions in issue in the case in which they might be alleged, the presumption of law and the general rule would be that the property in timber on a tenant's holding rests in the landlord in the same way as, and to no less an extent than, the property in the soil itself, and such has been the current rulings on the subject by this Court. In *Faqueer Soonar v. Khuderun* (1) Turner, Offg. C.J., and Turnbull, J., "had no hesitation in holding that trees, so long as they are not severed or cut, are *primâ facie* to be taken as passing with the land on which they grow."

In Second Appeal, No. 931 of 1880 (2), it was held by Pearson and Oldfield, JJ., that in the Banda district a cultivator's right in timber planted by him in his cultivatory holding ceased with the determination of his holding.

In *Aindlia Nath v. Sital* (3) the same Division Bench ruled that, "looking to the character of the tenure of a right of occupancy-tenant," such tenant "could only make a valid hypothecation of the trees on the land he held for the term of his tenancy. With his ejection from the land and cessation of his tenancy the hypothecation ceased to be enforceable."

In Second Appeal, No. 104 of 1881 (4), this Bench held that certain cultivators, having relinquished their lands, lost all right

(1) N.-W. P. H. C. Rep., 1870, p. 251.

(3) I. L. R., 3 All., 567.

(2) Not reported.

(4) Not reported.

and title in the trees, which passed with the land on which they stood to the landlord.

The Calcutta High Court in *Abdool Rohoman v. Dataram Bashee* (1) applied the rule that the zamindar "has a right in the fruit and other trees grown on the land by the tenant, and although the tenant has a right to enjoy all the benefits of the growing timber during his occupancy, he has no power to cut down and use the timber." And the Judicial Committee of the Privy Council in *Ruttonji Edulji Shet v. The Collector of Tanna* (2) determined the questions at issue in that action, on the principle that "the trees upon the land were part of the land, and the right to cut down and sell these trees was incident to the proprietorship of the land" (p. 313). We see no sufficient reason for dissenting from the general rule thus propounded, and the application of it to the case before us leads us to the decision that the transfer of the trees on her holding by Jeota to Kasim Mian was no less invalid than the transfer of the holding itself; that the contract in both respects was equally void, the vendor having no transferable interest in either the land or the standing trees: and therefore that the transfer altogether must be declared to be null and void. But we are not disposed to hold that the mere fact that the cultivator, under a mistaken notion as to her rights and her competency to deal with the property, took it into the market, and even yielded up possession of it to the vendee, can properly be treated as a relinquishment of the holding or any of its incidents to the zamindars. We think that the proper decree to be made in the case, under all its circumstances, is that the transfer to the vendee, being an invalid and void contract, should be cancelled; that plaintiffs are entitled to eject the vendee from the land and all the appurtenances thereof, including the timber in question; but that the plaintiffs are not entitled to take the holding from the appellants vendors, who have not relinquished it to them: and that all the costs of the litigation should be paid by the said vendors, the vendee being left to his remedy to recover from his vendors such sum or sums as he may have paid to them on account of the sale in question. We direct that a decree be prepared accordingly.

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(1) W R., Jan.—July, 1864, p. 367. (2) 11 Moo. I. A., 295.

