

1883

The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment :

DOWNES
v.
RICHMOND.

TYRRELL, J.—The appellant procured, and took, and acted on an insolvency order which was granted to him, because of the withdrawal of the opposition of his creditors, by reason solely of the appellant's engagement to pay Rs. 80 a month until the whole of his debts should be discharged. Under these circumstances the order of the Court below, against which this appeal is made, was proper, and should not be disturbed. We dismiss this appeal.

1883

January 8.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

KUPIL RAI AND OTHERS (DEFENDANTS) v. RADHA PRASAD SINGH (PLAINTIFF).*

Landholder and tenant—Submergence of occupancy-tenant's land—Dilution—Liability for rent—Resumption by landholder—Custom—Jurisdiction—Act XII of 1881 (N.-W. P. Rent Act), ss. 18, 31, 34 b., 95 (n).

A landholder, alleging that by local custom when land was submerged, and the tenant ceased to pay rent for the same, his right to it abated, and when the land re-appeared the landholder was entitled to possession thereof; that certain land belonging to him had been submerged and the occupancy-tenant thereof had ceased to pay rent for it; and that such land had re-appeared and had come into his possession under such custom; sued such tenant in the Civil Court for a declaration of his right to the possession of it.

Held that, inasmuch as ss. 18 and 31 of the N.-W. P. Rent Act 1881 showed that, notwithstanding the submergence of the land, the tenancy still subsisted; and as the tenant could not lose his right to the land except by relinquishment or ejectment under the provisions of that Act; and as the custom set up by the landholder was opposed to the provisions of s. 34 (b) of that Act; the suit was not maintainable. Further that, with reference to the provisions of s. 95 (n) of that Act, the suit was not cognizable in the Civil Courts.

THE plaintiff in this suit, the zamindar of a certain village, sued the defendants to set aside an order made under s. 530 of Act X of 1872 (Criminal Procedure Code), declaring the latter to be in possession of certain land in the village as tenants, and to have it declared that he was in proprietary possession of the land. It appeared that the land in question had been submerged by the river Ganges, the defendants being at the time of such submer-

* Second Appeal No. 1354 of 1881, from a decree of Maulvi Muhammad Baksh, Subordinate Judge of Ghazipur, dated the 12th August, 1881, modifying a decree of Muunshi Kulwant Prasad, Muunsif of Balia, dated the 25th March, 1881.

gence the occupancy-tenants of the land. The plaintiff based his claim on the allegations that the defendants ceased to pay rent for the land when it was submerged, and that by local custom, if a tenant ceased to pay rent for land which was submerged, when it re-appeared the zamindar was entitled to possession, the tenant's right abating; and that the land in question had come into his possession by virtue of that custom. The defendants contended that they had paid rent for the land continuously, and that, even if they had not paid rent for it while it was submerged, they had not thereby lost their occupancy-right in it. The lower Courts gave the plaintiff a decree, holding that he was entitled, by custom, as zamindar, to resume the land, as no rent had been paid for it while it was submerged, and finding that he was in possession.

In second appeal the defendants contended that no custom would authorize the plaintiff to eject them in contravention of the provisions of the N.-W. P. Rent Act, 1881.

Mr. *Howard*, for the appellants.

Mr. *Conlan* and *Lala Lalta Prasad*, for the respondent.

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

OLDFIELD, J.—In our opinion this plea has force, and the suit is not maintainable. Admittedly defendants were tenants with rights of occupancy in respect of the land in dispute prior to its diluvion. Now the provisions of the Rent Act show that the tenant-right is not lost merely in consequence of diluvion. S. 18 of the Act enables a tenant to obtain abatement of his rent on the ground that the area of the land in his holding has been diminished by diluvion; and, with reference to the provisions of s. 31, he continues liable for the rent of the land in his holding for the ensuing year, unless he gives due notice, in the manner prescribed, that he desires to relinquish it, or unless it is let to any other person by the landlord or his agent; and it is explained that no notice can be given in respect of a portion only of any land held under the same lease or engagement. These sections show that the tenancy may continue to subsist, notwithstanding diluvion, with all its obligations and liabilities: the landlord is entitled to demand rent and the tenant

1883

KUPIL RAI
v.
RADHA PRA-
SAD SINGH.

1883

KUPIL RAI
v.
RADHA PRA-
SAD SINGH.

is liable to pay it, unless he has obtained abatement of rent or relinquished the holding. The right of an occupancy-tenant also determines by relinquishment of the holding or by his ejection by the landlord ; but ejection can only take place in execution of a decree or order under the provisions of the Rent Act (ss. 34, 35), and in the absence of such ejection or relinquishment, the tenant-right must be held to subsist ; and this rule will hold good in respect of lands submerged, the tenant's right in the site not being lost ; he is entitled to entry on the land on its re-appearance ; and any entry by the landlord under such circumstances will amount to the ejection of the tenant, and be illegal with reference to s. 34b, Rent Act.

This is the position in which the plaintiff has placed himself, if, as he asserts, he is now in possession, for there has been no relinquishment of the holding on the part of the defendants or ejection of them in due course of law.

We cannot entertain the question of custom set up by the plaintiff, for no custom would be a justification for ejection of the defendants in contravention of the express provisions of s. 34b, Rent Act. These are the considerations which necessarily preclude us from giving a decree declaratory of plaintiff's right to the possession of the lands in suit. He can have no right until he shows that the defendants' tenancy has legally determined under the provisions of the Rent Act. Moreover, the Civil Court cannot take cognizance of this claim with reference to the provisions of s. 95, Rent Act, as the facts show that it is a dispute or matter in which an application of the nature mentioned in cl. (n) of s. 95 might be made. We decree the appeal, and modify the decrees of the lower Courts, and dismiss the claim against the defendants-appellants in respect of the land, the subject of this appeal, with proportionate costs in all Courts.
