1925.

LAURENTIUS EKKA v. DHUKI KOERI.

Rai (1)]. The recent decision of their Lordships of the Judicial Committee in the case of *Sourindra Nath Mitter* v. *Heramba Nath Bandopadhyaya* (2) may be usefully cited, though the facts of the case are not very similar to those of the present one. On principle there does not seem to be any reason for interfering with a compromise consented to by the pleader duly authorized in this behalf, unless fraud or collusion is imputed to the pleader. No such collusion or fraud has been pleaded in the petition. No doubt, ignorance of the compromise, want of instructions to the pleader and possibly fraud practised by the opposite party have been vaguely stated in the petition. These are, however, not sufficient to affect the compromise filed in the present case. Again, the petitioner no. 1 says that he was looking after the case and went away on the 23rd December, 1922, to make arrangements for Christmas festivities, but there were about ten other petitioners and there is no reason why the petitioners other than petitioner no. 1 could not remain in Ranchi to look after the case.

For all these reasons I dismiss the applications.

Applications dismissed.

APPELLATE CIVIL.

Before Mullick and Ross, J.J.

1925.

April, 8, 14; May, 1.

GARBHU MAHTON

v.

MUSSAMMAT BIBI KHUDAIJATUNNISSA.*

Bengal Tenancy Act, 1885 (*Act V of* 1885), *sections* 22 *and* 26—*Occupancy* raiyat, *dying intestate without heirs*,

* Appeal from Appellate Decree no. 361 of 1922, from a decision of B. Krishna Sahay, Subordinate Judge of Purnea, dated the 6th February, 1923, reversing the decision of M. Amir Hamza, Munsif (First Court), Patna, dated the 17th August, 1921.

(1) (1923) I. L. R. 2 Pat. 731. (2) (1923) All. Ind. Rep. (P. C.) 98.

1925.

GARBHU MAHTON v. MUSSAMMAT BIBI KHUDAIJAT-UNNISSA.

whether holding reverts to landlord without encumbrance—holding, whether becomes extinct—section 26, clause (a), meaning of.

Where an occupancy *raiyat* dies intestate without leaving heirs his occupancy right does not escheat to the Crown but is extinguished under section 26, Bengal Tenancy Act. This, however, does not mean that the holding becomes extinct: only the occupancy right is terminated as in the case of a transfer of an occupancy right to a person jointly interested in the land as proprietor.

Muktakeshi Dassi v. *Pulinbehari Singh* (1), dissented from. *Rammohan Pal* v. *Sheikh Kachu* (2), applied.

In such a case, therefore, the holding becomes a holding without a tenant and reverts to the landlords.

Srikanta Prasad v. *Jag Sahu* (3) and *Sonet Kooer* v. *Himut Bahadur* (4), referred to.

Where a tenant can legally alienate or encumber his holding and that holding reverts to the landlord on the death of the tenant intestate without heirs, what reverts is the estate that was in the tenant as encumbered by him and diminished by virtue of section 26, Bengal Tenancy Act, 1885, by the loss of the occupancy right.

The Collector of Masulipatam v. *Cavaly Vencata Narrainapah* (5) and *Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam* (6), relied on.

Appeal by the defendant no. 1.

This was an appeal by defendant no. 1 against a decree of the Subordinate Judge of Patna in a suit brought by the plaintiff-respondent for recovery of possession of ·51 acre of land in the following circumstances.

The plaintiff claimed to be the proprietor of 16-annas of *mauza* Simli Morarpur, *tauzi* no. *samelat*,

(1) (1908-09) 13 Cal. W. N. 12.
(2) (1905) I. L. R. 32 Cal. 386, F. B.
(3) (1921) 6 Pat. L. J. 237.
(4) (1876) I. L. R. 1 Cal. 391; L. R. 3 I. A. 92.
(5) (1859-61) 8 Moo. I. A. 500.
(6) (1866-67) 11 Moo. I. A. 619.

1925.

GARBHU MAHTON v. MUSSAMMAT BIBI KHUDAIJAT-UNNISSA.

in which the land in suit was situated. The land was formerly the occupancy holding of two brothers, Nokha Mahto and Una Mahto. Nokha Mahto died leaving a widow *Mussammat* Bhatni. On his death the holding went by survivorship to his brother Una who mortgaged it to defendant no. 1 on the 18th of November, 1912. According to the allegation in the plaint, which was not traversed in the written statement, Una Mahto died in the month of *Poos*, 1326, that is, January, 1919. On the 12th of January, 1919, *Mussammat* Bhatni, who had entered into possession of the holding on Una's death, executed a deed of sale of the holding in favour of defendant no. 1, in consideration of the dues under the earlier mortgage and of a sum of Rs. 50 advanced for the *sradh* of Una Mahto. The defendant no. 1 entered into possession of the property. The plaintiff, claiming the property by right of reversion on the death of the last tenant without heirs, settled it with defendant no. 2. Criminal proceedings between defendant no. 1 and defendant no 2 having terminated unfavourably to the latter, the plaintiff brought this suit.

The defendant pleaded that *Mussammat* Bhatni lawfully entered into possession on the death of Una and conveyed the holding to him for legal necessity and that he was recognized by the landlords as tenant and therefore could not be ejected.

The Munsif held that *Mussammat* Bhatni, being a brother's widow, was no heir under the Hindu law. He found, however, that she was entitled to maintenance out of the entire property left by Una and that the landlord had no right to take possession of the land. He further found that she was in possession and that subsequently to the conveyance the defendant no. 1 was in possession and was recognized as tenant by one of the *maliks*, Kannoo Lal. He also found that the sale was for legal necessity and was valid, and consequently he dismissed the suit.

1925.

GARBHU MAHTON v. MUSSAMMAT BIBI KHUDAIJAT-UNNISSA.

On appeal the Subordinate Judge agreed with the finding of the Munsif that *Mussammat* Bhatni was not an heir of Una Mahto. Differing from the Munsif he held that she had no right to convey the land and the conveyance conferred no title on the purchaser. He further held, on the authority of *Muktakeshi Dassi* v. *Pulinbehari Singh* (1) that on the death of the last tenant without heirs the security of the mortgage created by him was extinguished. He was also of opinion that the fact that *Mussammat* Bhatni sold the holding to defendant no. 1 showed that she had no intention to charge it with her maintenance, and there was in fact no charge upon the property for her maintenance; and, in the result, he decreed the suit.

Abani Bhusan Mukherjee, for the appellant: The landlord has no *locus standi* to bring this suit for ejectment as the holding reverts to the Crown and not to the landlord. It has been held in *Sonet Kooer* v. *Himut Bahadur* (2) that a *mukarrari* tenure escheats to the Crown. The same principle applies to the present case. The provisions of section 22, Bengal Tenancy Act, are wide enough to cover the case of an occupancy *raiyat* dying intestate without heirs. Even if section 26 be held to be applicable to the present case, the occupancy right will be extinguished but the holding will not become extinct. This section has to be read in the light of the analogous provisions of sections 22 and 86, whereby the holding remains stripped of the occupancy rights. The wording of section 26 is quite clear. It nowhere provides that the holding shall be extinguished. The landlord, as the reversioner, will take the holding subject to the encumbrance which subsists along with the holding, although the tenancy is terminated. In *Jeswant Singh Jee* v. *Jet Singh Jee* (3) the Crown took subject to the charge of maintenance. The Privy Council has held in some of the cases that a property escheats to

(1) (1908-09) 13 Cal. W. N. 12. (2) (1876) I. L. R. 1 Cal. 391, P.C.
(3) (1841-46) 3 M. I. A. 246.

1925.

GARBHU MAHTON v. MUSSAMMAT BIBI KHUDAIJAT-UNNISSA.

the Crown subject to encumbrances thereon. *Muktakeshi Dassi* v. *Pulinbehari Singh* (1), in so far as it lays down a contrary proposition, should not be followed. There is no difference between cases where the land reverts to the Crown by escheat or goes to the landlord as the last reversioner.

Yusuf Husain (with him *Khurshaid Hasnain* and *Syed Ali Khan*), for the respondents: Section 26, Bengal Tenancy Act, is a bar to the Crown taking the holding of an occupancy *raiyat* by escheat. In the event of his dying intestate without heirs the tenancy is extinguished and the landlord enters the land by virtue of his original proprietary interest. An occupancy holding, which is nothing but a bundle of rights, becomes extinct as soon as those rights are extinguished, and the landlord is entitled to take possession of the land not by the operation of any statute but by virtue of his superior right as landlord; everything within the ambit of his *zamindari* originally belonged to him.

The difference between the language of sections 22, 26 and 86, Bengal Tenancy Act, is significant. Under section 22 there is a proviso that the rights of third parties shall not be prejudicially affected. Again, under section 86, registered incumbrances cannot be avoided by the landlord of a surrendered holding. The absence of any such provision in section 26 is inexplicable unless the intention of the legislature be that the landlord is to take the land free of encumbrances. When the holding becomes extinct on the termination of the occupancy right the security afforded by the holding also ceases to exist. All those cases which hold that the *zamindari* escheats to the Crown, subject to charges created thereon, are distinguishable. The Crown takes the property of the tenant by operation of law in a representative capacity, whereas in cases where the landlord enters on the land, he does so not as a reversioner or

(1) (1908-09) 13 Cal. W. N. 12.

representative but by virtue of his original proprietary interest. I rely on *Muktakeshi Dassi* v. *Pulinbehari Singh* (1) which is still good law. In the absence of any direct authority to the contrary, this case should be followed.

Abani Bhusan Mukherjee, replied.

Cur. adv. vult.

Ross, J. (after stating the facts set out above, proceeded as follows): In second appeal it is contended that as the plaintiff is only a cosharer landlord, the most he is entitled to is joint possession with the defendant and that as he has framed his suit in ejectment, even this belief should not be given. It is further contended that the case of *Muktakeshi Dassi* v. *Pulinbehari Singh* (1) was wrongly decided and that if the landlord is entitled to the property, he must take it subject to the mortgage.

With regard to the first point the learned Counsel for the respondent has shown that in the grounds of appeal in the Court below it was stated that the learned Munsif was wrong in considering that the plaintiff was only a cosharer landlord and ought to have considered that he was the 16-annas landlord; and consequently the receipts granted by Kannoo Lal did not relate to the land in suit. He contended that this point was clear and was not disputed and that the decision of the learned Subordinate Judge was on the basis that the plaintiff was the sole landlord. Now in the written statement, although it is pleaded that the landlord recognized the defendant no. 1 as tenant and recorded his name and granted him receipts, yet the statement in the plaint that the plaintiff is the 16-annas landlord is not expressly denied. In the judgment of the learned Subordinate Judge there is no reference to the finding of the Munsif that the plaintiff was a cosharer landlord and there is no

(1) (1908-09) 13 Cal. W. N. 12.

1925.

GARBHU MAHTON v. MUSSAMMAT BIBI KHUDAIJAT-UNNISSA.

ROSS, J.

discussion of this point. In view of the fact that the suit was decreed in full, it must be taken that the judgment proceeded on the basis that the plaintiff was the sole landlord and the inference to be drawn is that the case was argued on that footing. This view finds support in the fact that the learned Subordinate Judge has not referred to or discussed the effect of the receipts granted by Kannoo Lal. I shall, therefore, deal with the case on the footing that the plaintiff is the sole landlord of the village in which the land in suite is situated.

The question then is, what situation arose in law on the death of Una Mahto without heirs because it was not contended for the appellant that *Mussammat* Bhatni was a heir? Section 26 of the Bengal Tenancy Act occurs in Chapter V which deals with occupancy rights and lays down the law for the devolution of the occupancy right as follows:

"If a *raiyat* dies intestate in respect of a right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner as other immoveable property: provided that in any case in which under the law of inheritance to which the *raiyat* is subject his other property goes to the Crown, his right of occupancy shall be extinguished."

This seems to mean that although the other property of an occupancy *raiyat* dying intestate escheats to the Crown, his occupancy right does not escheat to the Crown but is extinguished. This does not mean that the holding ceases to exist but only that the occupancy right is terminated, as in the case of transfer of an occupancy right to a person jointly interested in the land as proprietor [*Rammohan Pal* v. *Sheikh Kachu* (1)]. The holding is then a holding without a tenant and must revert to the landlord. This right of the landlord to the reversion where there are no heirs is clear on principle and is recognized by implication in *Sonet Kooer* v. *Himmut Bahadur* (2) and is expressly recognized by this Court in *Srikanta Prasad* v. *Jag Sah* (3). So far as the

(1) (1905) I. L. R. 32 Cal. 386, F. B. (2) (1876) I. L. R. 1 Cal. 391.
(3) (1925) 6 Pat. L. T. 237.

decision in *Muktakeshi Dassi* v. *Pulinbehari Singh* (1) is to the contrary effect, I would respectfully differ from it.

The question then is, what reverted to the landlord? In the *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (2) and in *Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam* (3) it was held, in dealing with the escheat of a *zamindari* to the Crown, that a mortgagee under a mortgage created by the last holder was entitled as against the Crown, who took the estate by escheat on the death of the widow for want of heirs, to possession of the estate under the mortgage as security for the amount advanced and interest, subject to the equity of redemption by the Crown. If property escheats to the Crown subject to equities there can be no reason why it should not revert to the landlord on the same terms. The question whether the holding in the present case reverts subject to the mortgage created by the last holder depends on whether the holding was transferable or not. Now in this case the transferability of the holding has never been questioned, but has been assumed. The transfer to defendant no. 1 is referred to in the plaint but is not questioned on the ground of non-transferability. If the last holder had sold the holding the landlord would have got nothing: as he has transferred it by way of mortgage, the landlord gets only the right to redeem. It seems clear that where a tenant can legally alienate or encumber his holding as in the present case, and that holding reverts to the landlord on the death of the tenant intestate without heirs, what reverts is the estate that was in the tenant as encumbered by him, diminished, of course, by virtue of section 26, by the loss of the occupancy right. Now Una Mahto mortgaged this holding to the defendant no. 1. The conveyance from *Mussammat* Bhatni may be, and, in my opinion is, without legal effect But the position of the defendant no. 1 is at least that of a mortgagee

(1) (1908-09) 13 Cal. W. N. 12. (2) (1859-61) 8 M. I. A. 500, 529.
(3) (1866-67) 11 M. I. A. 619.

1925.

GARBHU MAHTON v. MUSSAMMAT BIBI KHUDAIJAT-UNNISSA.

ROSS, J.

in possession and he is entitled to retain possession until he is redeemed by the landlord or until his tenancy is otherwise lawfully determined. It is unnecessary to consider the decision of *Muktakeshi Dassi* v. *Pulinbehari Singh* (1) in this connection as that was a case of a non-transferable holding.

In *Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam* (2) the Judicial Committee observed as follows: "This declaration is fatal to the respondent's claim to immediate possession of the *zamindari*, but it will leave the equity of redemption in the Crown. In strictness the present suit should stand dismissed, leaving the Crown to assert that equity, if it shall be so minded, in a suit properly framed for that purpose. It has, however, been suggested at the Bar that provision for redemption might be made in this suit. If the parties can agree as to the terms of redemption, their Lordships would not be unwilling to have them embodied in the order to be made on this appeal. But if they do not so agree, the order which their Lordships must recommend to Her Majesty as a consequence of the before mentioned declaration is that the respondent's suit stands dismissed without prejudice to the right of the Crown to redeem." In my opinion, the order to be made in the present case ought to follow the terms of that decision of the Privy Council.

The result is that the appeal must succeed and there will be a declaration that the plaintiff has a right to redeem the holding in suit and that if the parties can agree within fifteen days as to the terms of redemption, these terms will be embodied in the decree of this Court; and, in that case, each party will bear his own costs throughout. But if they do not so agree then the appeal will stand decreed and the plaintiff's suit will be dismissed with costs throughout, without prejudice to his right to redeem.

MULLICK, J.—I agree.

Appeal decreed.

(1) (1908-09) 13 Cal. W. N. 12. (2) (1866-67) 11 M. I. A. 619, 636.