1931.

RAJA PRITHWI CHAND LAL CHAUDHURI v. RAJA KIRTYANAND SINGH

KHWAJA MOHAMMAD NOOR, J.

no arrear, the June kist having been received on the 9th June, 1923, and the September kist on 26th September, 1923. There being no arrears, the sales were ultra vires. I, therefore, agree with my learned brother that the appeals be allowed, the decree of the District Judge be set aside and those of the Munsif be restored. It be declared that the sales held on 7th January, 1924, of the estates bearing Tauzi nos. 2480 and 2480/1 of Monghyr Collectorate was without jurisdiction and null and void. The appellant will get his costs throughout.

Appeals allowed.

APPELLATE CIVIL.

1931.

March, 23.

Before Terrell, C. J. and Kulwant Sahay, J.

MUSAMMAT KERKATI

v.

DIBAKAR NAIK.*

Central Provinces Tenancy Act, 1898, (*Act XI of* 1898), *section* 46—*occupancy tenant, whether can transfer his holding by will.*

An occupancy tenant governed by the Central Provinces Tenancy Act, 1898, cannot make a testamentary disposition in respect of his holding.

Musammat Laxmi Bai v. *Alyar Khan*(1) and *Sheodayal* v. *Ramprasad*(2), followed.

Musammat Kishuni Kuer v. *Andu Mahton*(3), distinguished.

Sakuru Mali v. *Sri Brahmaputra Balbhadra Mahaprabhu*(4), referred to.

Circuit Court, Cuttack.

* Appeal from Appellate Decree no. 11 of 1929, from a decision of Babu Sadhucharan Mahanty, Subordinate Judge of Sambalpur, dated the 30th June, 1928, modifying a decision of Babu Priyalal Mukherjee, Munsif of Sambalpur, dated the 23rd December, 1926.

(1) (1887) 2 C. P. L. R. 167.

(2) (1924) 90 Ind. Cas. 247.

(3) (1929) I. L. R. 9 Pat. 654.

(4) (1919) 4 Pat. L. J. 354.

1931.

MUSAMMAT KEBKATI v. DIBAKAR NAIK.

Appeal by defendants nos. 1 and 2.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

D. P. Das Gupta, for the appellants.

S. C. Chatterji and *A. Dutta*, for the respondents.

KULWANT SAHAY, J.

KULWANT SAHAY, J.—This is an appeal by the defendants nos. 1 and 2 against the decree of the Subordinate Judge of Sambalpur modiying the decree of the Munsif and decreeing a portion of the plaintiff's claim. The suit was for a declaration of the plaintiff's title to the estate left by one Gobind Naik as his next reversionary heir. Gobind Naik died leaving a will, dated the 24th of June, 1905, bequeathing his properties to his youngest daughter Musammat Siria. He had three other daughters, one of whom died without issue, and the remaining two are the defendants 6 and 7 in the suit. Musammat Siria died leaving two daughters who are the appellants in this appeal. The husband of Musammat Siria and the husbands of the two daughters are defendants 5, 3 and 4 respectively. The plaintiff's case is that the will conferred only a life interest on Musammat Siria and that after her death he, as the next reversionary heir, was entitled to succeed, and that the daughters of Musammat Siria, her husband and her daughters' husbands, who are in possession of the properties, have no title thereto. The remaining two daughters of Gobind Naik, viz., the defendans 6 and 7 have no objection to the suit being decreed in favour of the plaintiff. The suit was contested by the defendants 1 to 5 and their case was that by the will an absolute estate was bequeathed to Musammat Siria and that on her death her daughters are the legal heirs entitled to the property.

Both the Courts below have construed the will as bequeathing an absolute estate upon Musammat Siria, and this finding is not questioned in this Second Appeal, the plaintiff being content with that finding.

1931.

MUSAMMAT KERKATI v. DIBAKAR NAIK.

KULWANT SAHAY, J.

The Munsif dismissed the suit altogether. On appeal, however, the learned Subordinate Judge has given a modified decree in favour of the plaintiff in respect of the raiyati lands held by Gobind Naik and bequeathed under the will to Musammat Siria. The will related to bhogra lands, to certain houses and to raiyati lands. As regards the bhogra lands and the house property the learned Subordinate Judge has found that the will was operative; but as regards the raiyati lands he was of opinion that a raiyat had no right to bequeath his occupancy right by will under the provisions of the Central Provinces Tenancy Act. It is against this finding of the Subordinate Judge that the appellants have come up in appeal to this Court; and the sole question for consideration is whether raiyati holdings can be bequeathed by will by a raiyat under the Central Provinces Tenancy Act.

The relevant section of the Act, which is Act XI of 1898, is section 46. Sub-section (*1*) of this section provides that when an occupancy tenant dies his right in his holding shall devolve as if it were land. It is contended on behalf of the appellants that the interest of an occupancy tenant under the Central Provinces Tenancy Act is similar to the interest of occupancy tenants under the Bengal Tenancy Act and the Chota Nagpur Tenancy Act, and, as it has been held under these two Acts that the interest of an occupancy tenant in his holding is not a personal interest but the interest in property like any other property, therefore, as under the Bengal Tenancy Act an occupancy raiyat has the right to make a will in respect of his occupancy holding, a raiyat under the Central Provinces Tenancy Act has also the right to make a will in respect of his holding. That an occupancy raiyat under the Chota Nagpur Tenancy Act has the right to make a valid testamentary disposition of his occupancy holding was held by a Division Bench of this Court in *Musammat Kishuni Kuar* v. *Andu Mahton*(1) The learned Advocate for the respondents, however,

(1) (1929) I. L. R. 9 Pat. 654.

contends that this ruling has no application to occupancy tenants under the Central Provinces Tenancy Act. and he has referred to certain provisions of the Act and compared them with the similar provisions in the Chota Nagpur Tenancy Act and the Bengal Tenancy Act. He has also referred to certain decisions under the Central Provinces Tenancy Act and has contended that so far as the Central Provinces are concerned the law is settled that an occupancy raiyat has no right to make a valid testamentary disposition of his holding. He has also referred to the preambles of the Bengal Tenancy Act and the Chota Nagpur Tenancy Act. While the latter two Acts purport to amend and consolidate certain enactments relating to the law of landlord and tenant, the Central Provinces Tenancy Act does not purport to amend and consolidate the law relating to landlord and tenant but to consolidate and amend the law relating to agricultural tenancies in the Central Provinces; and the learned Advocate for the respondents contends that the Central Provinces Tenancy Act is not an Act which merely regulates the relationship existing between the landlords and tenants but prescribes a complete code relating to agricultural tenancies.

After a careful consideration I am of opinion that the arguments of the learned Advocate for the respondents are sound and ought to prevail. As was observed in *Sukuru Mali* v. *Sri Brahmapura Balbhadra Mahaprabhu*(1) the dictum that an occupancy right is a personal right is now an exploded theory even in the Central Provinces. It is a right in property and under the express terms of section 46 such a right does not now revert to the landlord on the death of the occupancy tenant but devolves upon the heir of the tenant as if it were land. The occupancy tenant has the right to sell, make a gift of, mortgage and sublet his right in his holding under certain restrictions. There is nothing in the Central Provinces Tenancy Act to restrict the powers of the

(1) (1919) 4 Pat. L. J. 354.

1931.

MUSAMMAT KERKATI v. DIBAKAR NAIK.

KULWANT SAHAY, J.

occupancy tenant to make a testamentary disposition of his right in his holding. Ordinarily, therefore, it would appear that he would have such a right; but there are differences in the provisions of the Chota Nagpur Tenancy Act and the Bengal Tenancy Act on the one hand and the Central Provinces Tenancy Act on the other. Section 23 of the Chota Nagpur Tenancy Act provides that if a raiyat dies intestate in respect of a right of occupancy it shall descend in the same manner as other immoveable properties, subject of course to any local custom to the contrary. This implies that a raiyat can make testamentary disposition in respect of a right of occupancy. There is a similar provision in the Bengal Tenancy Act (*see* section 26 of the Act). There is no such provision in the Central Provinces Tenancy Act. It was held so far back as the year 1887 by the Judicial Commissioner of the Central Provinces that an occupancy tenant cannot transfer his right in his holding by will —*Musammat Laxmi Bai* v. *Alyar Khan*(1). This was under the old Tenancy Act of 1883. The Tenancy Act has since then been amended several times. Act XI of 1898 was amended so recently as the year 1920 by Act I of 1920. Since the decision of the Judicial Commissioner in *Musst. Laxmi Bai's*(1) case the Courts in the Central Provinces have taken the same view consistently throughout. In *Sheodayal* v. *Ram prasad*(2) the Judicial Commissioner of Nagpur while considering this question observed as follows:

"As far back as in 1887 Crosthwaite, J. C., with reference to s. 43 of the old Tenancy Act of 1883, then in force held in *Laxmi Bai* v. *Alyar Khan*(1) that an occupancy tenant could not make any disposition of his tenant's right by will. Had this view been erroneous the Statute which has been changed twice since then would have surely undergone a change

(1) (1887) 2 C. P. L. R. 167.
(2) (1924) 90 Ind. Cas. 247.

in this respect so as to clothe the tenant with a right to make a bequest of his tenant's right. The question had arisen again in 1901 in connection with the powers of an absolute occupancy tenant to make a testamentary disposition of his right in the holding and it was held by Ismay, J. C. in *Anandi Bai* v. *Harlal*(1) that a will by an absolute occupancy tenant was invalid. This case was apparently under the Tenancy Act of 1898. Since then there has been a change and the new Tenancy Act of 1920 has appeared in the Statute book, but we do not find any change which would vest a devisable interest in the tenant of the Central Provinces. This clearly supports the argument that the Legislature thinks that the Statute has all along been rightly interpreted by the Court of the Province in this matter."

This is—if I may be permitted to say so—a sound view to take, and it must be held that so far as the Central Provinces are concerned it is a settled law that a tenant has no right to make a testamentary disposition in respect of his occupancy holding. It is for the Legislature to consider whether such an interpretation of the law is correct or not and whether the law requires any amendment in this respect. So long as this is not done, the Courts are bound by the *cursus curiae* so far as the Central Provinces are concerned.

I am, therefore, of opinion that the view taken by the learned Subordinate Judge is correct and this appeal must be dismissed with costs.

COURTNEY TERRELL, C. J.—I agree.

Appeal dismissed.

(1) (1901) 15 C. P. L. R. 1.