

This being our view, we must hold that the present appeal is entertainable by this Court and not by the Commissioner of the Bhagalpur Division.

We may mention that the view we have taken is in consonance with the long established practice which has not been questioned so far and according to which all appeals arising out of Probate proceedings in the Santal Parganas in which the subject-matter of the dispute exceeds the value of Rs. 1,000 have been instituted in and disposed of by this Court.

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### APPELLATE CIVIL.

Before Das and James, JJ.

PRASAD NATH JOGI

v.

AMBICA PRASAD SINGH.\*

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June, 26, 27.

*Landlord and Tenant—tenant dying without heir—holding, whether reverts to landlord—limited owner, mortgagee, right of, to retain possession—landlord, right of, to question alienation on ground of legal necessity.*

The holding of a tenant dying intestate without any heir reverts to the landlord whose right to resume possession cannot be defeated by a limited owner executing a conveyance in respect of the holding, the landlord having got the right to question the alienation on the ground of justifying legal necessity.

*Garbhu Mahto v. Bibi Khudaijatunnissa*(1), *The Collector of Muslipatam v. Cavalry Vencata Narrainapah*(2) and *Cavalry Vencata Narrainapah v. The Collector of Muslipatam*(3), followed.

\*Appeal from Appellate Decree no. 1371 of 1926, from a decision of Maulvi Amir Hamza, Subordinate Judge of Saran, dated the 16th August, 1926, reversing a decision of Maulvi Saiyid Ahmad, Munsif of Chapra, dated the 27th June, 1927.

(1) (1925) I. L. R. 4 Pat. 774.

(2) (1859-61) 8 M. I. A. 500.

(3) (1866-67) 11 M. I. A. 619.

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Appeal by the defendant.

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

*S. M. Mullick* (with him *Harnarain Prasad* and *Bankey Bihari Prasad*), for the appellant.

*S. Dayal*, for the respondent.

DAS, J.—In this suit the plaintiffs claim to recover possession of the disputed holding on the ground that “Mussammat Simrikhia” that is to say, the tenant, “died on the 1st JUNE, 1924, without leaving any male or female issue or any other heir surviving her”. According to the plaintiffs “from the date of her death, the tenancy right has extinguished, as she died without leaving any heir”. The suit was contested by the defendant on the ground that he was one of the heirs of the last male holder of the holding. He also relied on a usufructuary mortgage bond alleged to have been executed in his favour by Mussammat Simrikhia. There is no suggestion in the written statement that there is a custom of transferability of occupancy holdings. The Courts below appear to have tried only one question, namely, whether the defendant was an heir of the last male holder of the disputed lands. The lower appellate Court found against the defendant and gave the plaintiffs a decree substantially as claimed by them. The defendant appeals to this Court.

The finding of the lower appellate Court that the last male holder has left no heirs at all is conclusive so far as this Court is concerned, so that it follows that the right of occupancy is extinguished; and, to quote the words of Ross, J., in *Garbhu Mahto v. Mussammat Bibi Khudaijatunnissa*<sup>(1)</sup>, “the holding is a holding without a tenant and must revert to the landlord”. Mr. S. M. Mullick, however, relies

(1) (1925) I. L. R. 4 Pat. 774.

upon the decision of Ross, J., in the case to which I have just referred in support of his argument that the defendant is entitled to retain possession until he is redeemed by the landlord or until his tenancy is otherwise lawfully determined. In the case which Ross, J., was considering the mortgage was executed by Una Mahto, a full owner; in the case before us the mortgage was executed by a limited owner; and the question, therefore, arises whether Mr. S. M. Mullick is entitled to rely upon the decision to which I have just referred in support of his argument in this case.

It was contended by Mr. S. Dayal that the right of the landlord to resume possession of the holding is complete unless it is established that there is some equity in favour of the mortgagee in possession binding on the estate itself. According to him a limited owner is not entitled to borrow money on the security of immovable property except for a justifying necessity; and he further contends that as it has not been established in this case that there was a justifying necessity to support the transaction, the landlord is entitled to succeed in the action. Mr. S. M. Mullick contends in answer to the argument of Mr. S. Dayal that under the Hindu Law a reversioner only is entitled to challenge an alienation made by a Hindu widow; and that, as the landlord is not in the position of a reversioner, it is not open to him to raise the question whether the usufructuary mortgage was for a justifying necessity or not.

In my opinion the argument advanced before us by Mr. S. M. Mullick ought not to succeed. The argument that it is only the reversioner who is entitled to challenge the alienation by a limited owner is negatived by the decisions of the Judicial Committee in *The Collector of Muslipatam v. Cavalry Vencata Narrainapah*<sup>(1)</sup> and *Cavalry Vencata Narrainapah v. The Collector of Muslipatam*<sup>(2)</sup>. It will be noticed that Ross, J., in deciding the case in

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the way in which he did decide it, prominently referred to the decision of the Judicial Committee which I have just mentioned. His Lordship puts the proposition in this way: "The question then is what reverted to the landlord? In *The Collector of Muslipatam v. Cavalry Vencata Narrainapah*<sup>(1)</sup> and in *Cavalry Vencata Narrainapah v. The Collector of Muslipatam*<sup>(2)</sup> 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". As I have pointed out, the transfer in the case which Ross, J., was considering was a transfer by the last male holder; in this case the transfer was by a limited owner. Now I propose to state shortly what was decided by the Judicial Committee in *The Collector of Muslipatam v. Cavalry Vencata Narrainapah*<sup>(1)</sup>. In that case the Crown claimed to seize an estate which was last in the possession of a limited owner as an escheat on the failure of heirs. Now the limited owner who was last in possession had executed mortgages in favour of the respondent; and the question arose whether the appellant, the Collector of Muslipatam, was entitled to resume the estate free from the mortgage rights of the respondent. Now in passing, I may mention one of the arguments which was advanced by Mr. S. M. Mullick to distinguish the present case from the case decided by the Privy Council. It was contended that the title of

(1) (1859-61) 8 Moo. I. A. 500.

(2) (1866-67) 11 Moo. I. A. 619.

the Crown to seize an estate by escheat really rests on heirship and that accordingly it is open to the Crown to challenge the alienation made by a Hindu widow. The argument is wholly wrong. The Privy Council takes pain to point out that the title of the Crown by escheat to the property of a Hindu dying without heirs rests not on Hindu Law but, to quote the words of the Judicial Committee, "when it is made out clearly that by the law applicable to the last owner, there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the courts of the country alike. Private ownership not existing, the State must be owner as ultimate Lord. Consequently, the claim of the Government, in the present instance, might have been considered with reference to this principle". But then the question fell to be considered whether the title of the Crown was paramount to that of the mortgagee. In dealing with this question, their Lordships said: "Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a Hindu subject, though a Brahmin, dying without heirs; and they think that the claim of the appellant to the zamindari in question (subject, or not subject, to a trust) ought to prevail, unless it has been absolutely or to the extent of a valid and subsisting charge, defeated by the acts of the widow, Lutehmedavamah, in her lifetime. In the latter case, the Government will, of course, be entitled to the property subject to the charge". In the result their Lordships directed an enquiry on the question whether the charges created by the limited owner were for justifying necessity. The case of *Cavalay Venkata Narrainapah v. The Collector of Muslipatam*(<sup>1</sup>) need not be discussed. It

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adopts the same principle and holds that the charges had been established to the satisfaction of the Court.

Now it seems to me that the same principle should apply in a case of this nature. Section 26 of the Bengal Tenancy Act provides 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 immovable 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 ”;

and, as Ross, J., pointed out in the case to which I have just referred, when the right of occupancy is extinguished the holding reverts to the landlord. Now it is not disputed in the present case that circumstances have happened which would entitle the Crown to take by escheat the other property of the tenant assuming that the tenant left other property; and it is not disputed that the Crown would take the other property free from the mortgage claim of any person, assuming that the mortgage had been created by the limited owner, unless it could be established that there was a justifying necessity to support the mortgage. On what ground can it then be suggested that the landlord is not entitled to raise the question of legal necessity? The argument of Mr. S. M. Mullick that no one but the reversionary heir is entitled to raise the question of legal necessity is negatived by the decision of the Judicial Committee to which I have just referred. No other principle is suggested to us, and I can see no ground whatever for holding that the right of the landlord to take possession of the holding can be defeated by the limited owner executing a conveyance in respect of the holding in question.

It will be sufficient for me to decide the case on this footing; but I may point out that there is no allegation in the written statement that there is a custom of transferability of occupancy holdings.

Now occupancy holdings are *prima facie* not transferable unless a custom to the contrary is established; and it is difficult to see how any argument can be advanced in favour of the transferee since it is not even alleged in the written statement that there is a custom of transferability of occupancy holdings.

In my opinion the decision of the Court below must be affirmed. I would dismiss this appeal with costs.

JAMES, J.—I agree.

*Appeal dismissed.*

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## APPELLATE CIVIL.

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*Before Jwala Prasad and Dharle, JJ.*

CHANDI CHARAN CHAKRAVARTI

*v.*

PANCHANAN PANDIT.\*

*Execution—judgment-debtor's objection on ground of payment made within ninety days—petition of objection, whether can be treated as an application under Order XXI, rule 2(2), Code of Civil Procedure, 1908 (Act V of 1908).*

Where a judgment-debtor contests an application for execution on the ground of a payment which had been made less than ninety days previously, it is not only permissible but incumbent upon the court to treat the petition of objection as an application under Order XXI, rule 2(2), Code of Civil Procedure, 1908, and, if the application succeeds, the bar imposed by sub-rule (3) will not come into operation.

*Radhakant Lal v. Mussammat Parbati Kuer*(1) and *Mehbunnissa Begum v. Mehdunnissa Begum*(2), referred to.

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\*Appeal from Appellate Order no. I of 1929, from a decision of Rai Bahadur A. N. Mitter, District Judge of Manbhum, dated the 24th of July, 1928, reversing an order of Babu Manindra Nath Mitra, Munsif of Raghunathpur, dated the 20th of September, 1927.

(1) (1921) 6 Pat. L. J. 337.

(2) (1925) I. L. R. 49 Bom. 548 (553).

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