1934.

GULAB RAY GHUTGHUTIA v. MAHENDRA NATH SREEMANY.

AGARWALA, J.

circumstances. The effect of the repeal of that Act was merely to deprive the Courts of the power of granting the remedy in those circumstances. The Specific Relief Act of 1877 does not in terms expressly purport to re-enact the provisions of section 192 even for those parts of British India to which the Act applies, nor does it expressly purport to abolish the remedy by way of specific performance in any part of India to which it does not itself apply.

I, therefore, agree with my Lord the Chief Justice that the application in revision fails and should be dismissed with costs. We assess the hearing fee at ten gold mohurs.

Rule discharged.

FULL BENCH.

1934.

October, 29.
November, 16.

Before Macpherson, James and Varma, JJ.

BALARAM MAHATA

v.

LAHABAT MAHATA.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *section* 46—*sale of occupancy holding without the consent in writing of the landlord, whether binding on the landlord*—*section* 46(2), *scope and significance of.*

Section 46 of the Chota Nagpur Tenancy Act, 1908, lays down :—

" (1) No transfer by a raiyat of his right in his holding or any portion thereof,—

(a) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or

---

* Appeal from Appellate Decree no. 1298 of 1931, from a decision of Khan Bahadur Najabat Hussain, District Judge of Manbhum-Sambalpur, dated the 10th June, 1931, affirming a decision of Babu Nandkishore Choudhuri, Munsif of Purulia, dated the 24th May, 1928.

1934.

BALARAM MAHATA v. LAHABAT MAHATA.

(*b*) by sale, gift or any other contract or agreement, shall be valid to any extent:

(2) No transfer by a raiyat of his right in his holding or any portion thereof shall be binding on the landlord, unless it is made with his consent in writing.

(3) No transfer in contravention of sub-section (*1*) shall be registered, or shall be in any way recognised as valid by any court, whether in the exercise of civil, criminal or revenue jurisdiction.

(4) At any time within three years after the expiration of the period for which a raiyat has under this section, transferred his right in his holding or any portion thereof, the Deputy Commissioner may, in his discretion, on the application of the raiyat, put the raiyat into possession of such holding or portion in the prescribed manner.

.....

.....

(*6*) (*a*) With the previous sanction of the Governor-General in Council, the local Government may by rules declare that any specified class or classes of transfer (not being transfer by an aboriginal raiyat to a non-aboriginal transferee) in contravention of sub-section (*1*) may be validly made by a raiyat of such tribe, caste, group or community, or section thereof.....and thereupon nothing in sub-sections (*1*), (*3*) and (*4*) shall affect the validity of any such transfer so made by such raiyat after the date of publication of the rules in the Gazette or such later date as may be prescribed."

Held, (*i*) that sub-section (*2*) is not applicable to any but the temporary transfers which are not rendered invalid by sub-section (*1*) : the legislature merely signified that temporary transfers of part of his raiyati interest, though still valid against the raiyat, were not to be binding upon the landlord unless made with the consent in writing of the landlord;

(*ii*) that sub-section (*6*), which was introduced by the amending Act of 1920, is concerned only with transfers which were, apart from it, in contravention of sub-section (*1*) : the amendment leaves sub-section (*2*) undisturbed and covering the same ground as before—that is to say, the temporary transfers not declared in sub-section (*1*) to be not valid to any extent;

(*iii*) that, therefore, a sale by the raiyat of his occupancy holding which is valid under the terms of the notification issued by the local Government under the authority of section 46(*6*), is binding on the landlord although not made with his consent in writing.

Ram Oraon v. *Doman Kalal*(1), *Kishuni Kuar* v. *Andu Mahto*(2) and *Mohammad Hossain* v. *Mangi Lal Jaipuria*(3), distinguished.

Where the raiyat made a valid sale of his occupancy holding under section 46(*6*) of the Chota Nagpur Tenancy Act, 1908, without the consent in writing of the landlord and thereafter surrendered the land to the landlord who accepted the surrender and settled the land with the plaintiffs, and the latter, failing to obtain possession of the holding, sued for declaration of title to the land settled with them and for recovery of possession from the purchaser.

Held, that the landlord secured nothing by accepting the surrender of his holding by the raiyat who had already made a valid and binding sale under section 46(*6*), and that, therefore, the plaintiffs obtained no title by the settlement from the landlord so as to entitle them to eject the purchaser.

Appeal by the defendants.

The case was in the first instance heard by Agarwala and Saunders, JJ., who referred it to a Full Bench.

The facts of the case material to this report are set out in the judgment of Macpherson, J.

S. C. Mazumdar, for the appellants.

S. N. Banarji (for *S. Biswas*), for the respondents.

MACPHERSON, J.—The question for decision in this second appeal is whether a person taking settlement from a landlord in Chota Nagpur of land surrendered by an occupancy raiyat after the latter has made a valid sale thereof under section 46(*6*) of the Chota Nagpur Tenancy Act, 1908, obtains title to the land settled so as to be entitled to eject the vendee.

On 15th November, 1927, an occupancy raiyat in Manbhum of the Kurmi-Mahto tribe sold to his

(1) (1923) I. L. R. 2 Pat. 898.
(2) (1929) 10 Pat. L. T. 595.
(3) (1931) 13 Pat. L. T. 328.

1934.

BALARAM MAHATA v. LAHABAT MAHATA.

MACPHERSON, J.

agnates residing in his own village his entire holding as it stood after a previous surrender of plot 1430 to the landlord. The sale is admittedly valid under the terms of notification no. 310 of 1924 issued by the local Government under the authority of section 46(*6*) of the Chota Nagpur Tenancy Act, 1908. Shortly after the sale the raiyat surrendered to the landlord the occupancy holding which he had thus sold, and the landlord settled the whole of the original holding, including plot 1430, with the plaintiffs, the deeds of surrender and of new settlement being both registered on the 1st March, 1928. Failing to obtain possession of the holding, the plaintiffs sued for declaration of right to the lands settled with them, excluding plot 1430, and for recovery of possession from the purchasers, and were successful in both the Courts below, whereupon the vendees have preferred the present second appeal in respect of the land in suit The landlord defendant has not appeared at any stage.

On behalf of the appellants the contention substantially is that after the sale to them the raiyat had nothing to surrender to the landlord who, therefore, had nothing to settle with the plaintiffs except plot 1430. On behalf of the plaintiffs-respondents the decision is supported on the view which found favour in the Courts below, that the sale in spite of being valid under section 46(*6*), was not binding on the landlord since it was not made with his consent in writing and, therefore, there was nothing to prevent the landlord from accepting the surrender by the vendor-raiyat and from making settlement with the plaintiffs as section 72(*4*) provides. Support is claimed for the contention from the decision of a single Judge of this Court in *Mohammad Hossain* v. *Mangi Lal Jaipuria*[1], but the view there expressed was obiter since the case was actually decided on compromise.

(1) (1931) 13 Pat. L. T. 328.

The decision mainly depends upon the construction of section 46 of the Chota Nagpur Tenancy Act, 1908. The first two sub-sections are :—

" (*1*) No transfer by a raiyat of his right in his holding or any portion thereof,—

(*a*) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or

(*b*) by sale, gift or any other contract or agreement, shall be valid to any extent.

(*2*) No transfer by a raiyat of his right in his holding or any portion thereof shall be binding on the landlord, unless it is made with his consent in writing ".

Sub-section (*3*) provides that no transfer in contravention of sub-section (*1*) should be registered or be in any way recognized by the courts as valid. Sub-section (*4*) empowers the Deputy Commissioner to replace in possession a raiyat who has made a transfer under section 46, that is to say, one of the transfers for a period which are legally admissible, to wit, a mortgage or lease not exceeding five years or a bhugut-bandha for a period not exceeding seven years, if the raiyat applies within three years of the expiration of the period of the transfer. Sub-section (*5*) saves transfers not otherwise invalid made *bona fide* before 1903 and sub-section (*6*), so far as material, authorizes the local Government by rules to declare that any specified class or classes of transfer (not being transfer by an aboriginal raiyat to a non-aboriginal transferee) may be validly made by a raiyat of such tribe,.....of such class, (section 4) in such area or areas, and subject to such restrictions.....as may be specified :

" and thereupon nothing in sub-sections (*1*), (*3*) and (*4*) shall affect the validity of any such transfer so made by such raiyat, after the date of publication of the rules....."

The first five sub-sections are based upon the Act of 1903 amending Bengal Act I of 1879 which was then in force in Chota Nagpur except Manbhum. For reasons of public policy restrictions were thereby placed upon transfers by raiyats such as had till then been freely entered into without the consent of the

1934.

BALARAM MAHATA v. LAHABAT MAHATA.

MACPHERSON, J.

landlord. Under sub-section (*1*) all absolute disposals of a holding or a portion thereof, by contract or agreement, including sale or gift, are declared not to be valid to any extent but certain temporary leases and mortgages are saved. Sub-section (*2*) declares such transfer not to be binding on the landlord unless made with his consent in writing. Manifestly the temporary transfers excepted from invalidity under that provision are meant, since there could be no point in enacting that a transfer declared not to be valid to any extent and directed not to be registered or to be treated as valid by any court, should not be binding on a particular person. The legislature merely signified that temporary transfers of part of his raiyati interest though still valid against the raiyat himself, were not to be binding upon the landlord unless made with the consent in writing of the landlord. This view obtains confirmation from sub-section (*4*) which, as indicated above, also refers to the transfers for a period excepted from invalidity under the section. It is on the expiration of the period of a transfer for a period valid against the maker himself that he can on application within three years obtain from the Deputy Commissioner reinstatement in his holding or portion thereof so transferred.

The Chota Nagpur Tenancy Act, 1908, was in 1909 extended to Manbhum where all manner of transfers had hitherto been freely made without the consent of the landlord and where a transfer by sale of a complete holding (at least) had bound him.

Sub-section (*6*) was introduced by the amending Act of 1920. Under this new provision read with the rules contained in the notification of the local Government the transfer under discussion is "validly made" though, apart from the new provision, it would under sub-section (*1*) not have been "valid to any extent". Sub-section (*6*) while specifically enacting that sub-sections (*1*), (*3*) and (*4*) shall not affect the validity of the transfer, fails to mention sub-section (*2*) and it is

accordingly urged that that provision must be applicable to transfers thereunder. But, as indicated above, sub-section (*2*) was never applicable to any but the temporary transfers which are not rendered invalid by sub-section (*1*), and it could hardly have been intended to bring other transfers which are expressly declared valid, under sub-section (*2*) by implication and without direct enactment to that effect. Indeed, sub-section (*2*) does not refer to validity at all, as sub-sections (*1*), (*3*) and (*4*) do, sub-sections (*1*) and (*3*) in terms and sub-section (*4*) by implication. Actually the amendment of 1920 leaves sub-section (*2*) undisturbed: it covers the same ground as before—that is to say, the temporary transfers not declared in sub-section (*1*) to be not valid to any extent. Such temporary transfers were not in contravention of sub-section (*1*) whereas it is only with transfers which were, apart from it, in contravention of sub-section (*1*) that sub-section (*6*) is concerned.

It cannot be contended that this result, so far as the landlord is concerned, at all conflicts with the equity which the Courts will attribute to legislation or the acts of the executive government under the authorization of the legislature. The legislative restrictions on sales and other transfers of a raiyati holding were due solely to considerations of public policy, that is to say, in the present instance, of the real interest of the raiyat. An indirect result not contemplated was that in certain instances (comparatively few, perhaps) of attempted evasion the landlord found himself enjoying an unearned and unanticipated advantage. As direct sale no longer passed any title, the raiyat secured a private purchaser and then surrendered to the landlord, dividing with this *tertius gaudens* the sale-price of the holding on the understanding that the latter then settled it with the private purchaser. The landlord could have no grievance when the local Government found it consistent with the public policy of preserving the raiyat from becoming a landless serf

1934.

BALARAM MAHATA v. LAHABAT MAHATA.

MACPHERSON, J.

to avail itself of the authorization of the legislature to retransfer the whole saleable value of certain holdings to the raiyat—morally the landlord's position could only be one of thankfulness that he had so long enjoyed a windfall. It is incredible that the legislature could contemplate a permanent endowment of the landlord in this regard.

But one may go further in the present case. Manifestly the raiyat had after the sale to the appellants which is by statute valid, no property at all in the holding sold by him. There was therefore, as the appellants contend, nothing which he could surrender and there was nothing of which to accept surrender so that the landlord had nothing to settle with the plaintiffs except plot 1430 which had previous to the sale been validly surrendered to him. The cases cited on behalf of the respondents, to wit, *Ram Oraon* v. *Doman Kalal*(1) and *Musammat Kishuni Kuer* v. *Andu Mahto*(2) are of no assistance to them. The first not only related to a mortgage, but the decision therein was really based on the substantial ground that the mortgagee could not question the surrender after he had held the mortgaged land for the full period of his mortgage. No doubt the learned Judge remarked that from the absence of a provision similar to section 86(*6*) of the Bengal Tenancy Act it follows " that in spite of a prior sale or mortgage by a raiyat, he is free to exercise his right of surrender of the holding in favour of the landlord, for under clause (*2*) of section 46, no transfer by a raiyat of his right in his holding or any portion thereof is binding on the landlord unless it is made with his consent in writing ", but the question of a *sale* was not under consideration, still less the question of a sale ' validly made ' under the statute, since the only sale which could arise, prior to the notification of 1924 was one not " valid to any extent ". The second case cited has no bearing since it is merely stated at one place that it was not necessary to consider whether the landlord

(1) (1923) I. L. R. 2 Pat. 893.
(2) (1929) 10 Pat. L. T. 595.

could question the validity of a testamentary disposition of an occupancy holding and at another place that the question did not in that case concern the Court whether such a disposition in favour of other than the natural heirs would bind the landlord.

Reference has been confidently made on behalf of the appellants to section 23-A also inserted by the amending Act of 1920, which enacts that when an occupancy holding or any portion thereof is transferred in *any way authorized by law*, by succession, inheritance *or sale*, the transferee or his successor in title may cause the transfer to be registered in the office of the landlord to whom the rent of the holding or portion thereof, as the case may be, is payable, and the landlord shall, in the absence of sufficient reason to the contrary, allow the registration of all such transfers, and shall not be entitled to levy any registration fee. This provision is, however, perhaps not in itself conclusive since while a sale under section 46(*6*) is certainly one authorized by law, there are other instances of such sales, for example under the provisions of section 47 and of section 49. The decision must rest upon the considerations already set out.

In my opinion the question for decision must for the reasons given above be answered in the negative. Section 46(*2*) is not applicable. The landlord secures nothing by accepting the surrender of his holding by a raiyat who has made a valid sale of it under section 46(*6*) and so has nothing to surrender. The landlord therefore confers no title on the person with whom he settles such a holding. In this instance the plaintiffs obtained no title by the settlement from the landlord except in respect of the tenancy of plot 1430 which had previous to the sale been validly surrendered to him.

I would allow this appeal with costs and dismiss the suit, and I would direct that the present appellants do receive from the respondents their costs of

1934.

BALARAM MAHATA v. LAHABAT MAHATA. MACPHERSON, J.

both the Courts below and that the latter bear their own costs throughout.

JAMES, J.—I agree.

VARMA, J.— I agree.

Appeal allowed.

PRIVY COUNCIL.

J. C.* 1934.

November, 27.

RAM NARAIN CHAUDHURY

v.

PAN KUER.

On Appeal from the High Court at Patna.

Hindu Law—Partition—Reunion—Who may reunite—Agreement to inherit from one another—Claim by heir of party to enforce agreement—Mitakshara, ch. 2, s. 9(2) (3).

In a Hindu family governed by the Mitakshara a reunion after partition is valid under ch. 2. s. 9 (2) (3) only if it is with a father, brother or paternal uncle, and only if it is between parties to the partition.

Basanta Kumar Singha v. *Jogendra Nath Singha*(1), approved.

Where three members of a divided Hindu family have agreed that if any of the three dies without a son, then his property is to devolve upon that one who has an heir, the agreement can be enforced only by those who were parties to it; an heir of one of the parties, though he was alive when it was made, cannot claim its benefit.

Decree of the High Court affirmed.

Consolidated Appeal (no. 22 of 1931) from four decrees of the High Court (January 30, 1929) which reversed two decrees of the Subordinate Judge of Patna (February 26, 1927).

* *Present*: Lord Blanesburgh, Lord Thankerton, and Sir Shadi Lal.

(1) (1905) I. L. R. 33 Cal. 371.