ALLAHABAD HIGH COURT

Tulshi Ram Sahu

Vs

Gur Dayal Singh

28.07.1910

(J Stanley,CJ. G Knox and Banerji, JJ.)

JUDGMENT

Stanley, C.J.

1. The plaintiffs are zamindars of the village of Karmanpur in the District of Ballia. There is a small cultivatory holding, which was held from the plaintiffs by one Ram Dhyan as a tenant at fixed rates, In the year 1870, he executed a usufructuary mortgage of this holding in favour of the respondents which contained a provision for redemption in any Jeth. Ram Dhyan is said to have disappeared a number of years ago, and according to the plaintiff, he has not been heard of for more than seven years and must be presumed to have died. It is also alleged that he died without heirs. The plaintiffs instituted the suit for redemption of the usufructuary mortgage out of which this appeal has arisen. The right of the plaintiffs to redeem is contested and the defendants further allege that Ram Dhyan is alive.

2. The lower appellate Court held, relying upon the decision of a Bench of this Court in the case of Ram Dihal Rai v. The Maharaja of Vizianagram 30 A. 488 : A.W.N. (1908) 210 : 5 A.L.J. 578, that the plaintiffs had no interest in the equity of redemption of the property and could not maintain a suit for redemption.

3. A second appeal was preferred to this Court and the learned Judge before whom it came for disposal dismissed it.

4. An appeal under the Letters Patent was then preferred and correctness of the decision in *Ram Dihal Rai v. The Maharaja of Vizianagram*[1] is challenged. My brother Banerji and myself, before whom the appeal came for hearing, were of opinion, that the question raised was one of importance and should be decided by a larger Bench. Accordingly the appeal has come before us.

5. The sole question for determination is whether or not the lower appellate Court and the learned

Judge of this Court were right in holding that the plaintiffs had no such interest in the mortgaged property as entitled them to maintain a suit for redemption of the defendant's mortgage. The contention on behalf of the appellants is that Ram Dhyan died without heirs and that thereupon his tenancy became extinguished and that the plaintiffs are entitled to possession of the holding, or at least to possession of it on redemption of the mortgage of 1870.

6. In *Ram Dihal Rai v. The Maharaja of Vizianagram*[2], the facts were these:--A zamindar brought a suit to redeem a mortgage made by a fixed rate tenant alleging that the fixed rate tenant had died without heirs and that his interest had there by lapsed to him. The Court of first instance held that in the event of the tenant having died childless, his interest went to the Crown and not to the plaintiff and dismissed the suit. His decision was reversed by the lower appellate Court and a second appeal was preferred to the High Court. The learned Judges, before whom it came for disposal, held that the tenancy did not lapse upon the death of the tenant without heirs but that the tenancy became vested in the Crown. They relied on the ruling of their Lordships of the Privy Council in *Ranee Sonet Koer v. Mirza Himmat Bahadur*[3] They further held that in order to redeem, the person seeking redemption must have an interest "in the mortgaged property" ; that the mortgaged property in that case was the interest of a fixed rate tenant and that the mere fact that the zamindar has a proprietary interest in the land out of which this interest is carved, does not give him an interest within the meaning of Section 91 of the Transfer of Property Act.

7. Let us see what was decided in *Ranee Sonet Koer v. Mirza Himmut Bahadur*[4] In that case the grantee from a Hindu zamindar of an ordinary mokurreree istimraree tenure died without heirs and it was held that the Crown by the general prerogative was entitled to the lease; that the mokurreree, though carved out of zamindari, being an absolute alienable interest therein, could not have reverted to the grantor and that there was no authority upon which the power of taking by escheat can be attributed to the grantor. In that case it will be observed that the mokureree was an absolute and alienable interest. It could not have been forfeited for the nonpayment of rent. The zamindar could only in the case of non-payment of rent have caused it to be seized, put up for sale and sold to the highest bidder. It was, therefore, property which might have passed to any purchaser, and having so passed, the estate would not have determined upon the death of the grantee without heirs if it had been sold in her life-time. The language of their Lordships is as follows:The mokurreree was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold as Mr. Doyne has shown under Act X of 1859, even in a suit for rent. It could not have been forfeited for the non-payment of rent, for in such a casethe zamindars could only have caused it to be Seized, put up for sale, and sold to the highest bidder. It is, therefore, property which like that in the case above cited might have passed to any purchaser whatever his nationality or by whatever law he was to be governed. It cannot, their Lordships think, be successfully argued that having so passed the estate would have determined upon the

death of Shurfoounissa (supposing it had been sold in her life-time) without heirs; for the grant contains no provision for the lessee of the estate created in such event.

8. The grant in this case was, it will be observed, that of an absolute interest and altogether unlike the interest of a fixed rate tenant. Let us see what is the nature of the interest of a fixed rate tenant.

9. Section 5 of the Agra Tenancy Act, II of 1901, prescribes that when any land in a district which is permanently settled has been held by tenant and his predecessors-in-title from the time of the permanent settlement at the same rate of rent, such tenant shall have a right of occupaucy at that rate." A fixed rate tenant, therefore, is a tenant who has a right of occupancy at a fixed rate. Section 18 prescribes that a right of occupancy shall be extinguished when amongst other cases a tenant dies having no heir entitled under the Act to inherit the right of occupancy. A fixed rate tenant is liable to ejectment for non-payment of rent or breach of conditions (Section 57). It appeals to me, therefore, that a fixed rate tenancy is but a limited interest which cannot be the subject of escheat to the Crown. In fact the Act provides that on the death of the tenant without heirs, the interest of such a tenant described in the Act as a right of occupancy shall be extinguished. With all deference to the learned Judges, who decided the case of Ram Dihal Rai v. The Maharaja of Vizianagram 30 A. 488 : A.W.N. (1908) 210 : 5 A.L.J. 578(Supra). I am of opinion that that case was wrongly decided. If then it be the case that Ram Dhyan is dead without leaving an heir as defined in Section 22 of the Act, the plaintiffs are clearly entitled to redeem the mortgage held by the respondents if they are not entitled to possession of the holding without redemption. The question whether the plaintiffs are bound to discharge the mortgage debt does not arise because they are willing and have offered to do so. The first Court found that Ram Dhyan was still alive. If this be so, the plaintiff's suit must fail. The lower appellate Court, however, dismissed the appeal to it on the sole ground that the plaintiffs could not be regarded as having any interest in the equity of redemption of the holding and this is the view which seems to have commended itself to the learned Judge of this Court. I would allow the appeal and set aside the decree of the learned Judge of this Court; and as the lower appellate Court decided the appeal on a preliminary point, I would remand the appeal to that Court with directions that that Court determine the appeal on the merits.

Knox, C.J.

10. I have nothing to add to the judgment of the learned Chief Justice. I fully agree with the view taken by him.

Banerji, J.

11. I also concur with the learned Chief Justice. The view taken in Ram Dihal Rai v. The

Maharaja of Vizianagram 30 A. 488 : A.W.N. (1908) 210 : 5 A.L.J. 578(Supra), was never adopted, as far as I am aware, in any other case and seems to me to be inconsistent with the nature of a tenancy at fixed rates. Such a tenancy is carved out to the land-holder's interest in the land to which it relates and a fixed rate tenant has no absolute interest in it. If the tenancy comes to an end, it necessarily goes back to the estate which it was carved out of and lapses to the land-holder. It is true that a fixed rate tenant has a heritable and transferable interest in his holding, under Section 20 of the Agra Tenancy Act, but if he does not transfer the holding and dies leaving no heirs entitled to inherit it, the tenancy becomes extinct and reverts to the landlord who created it. The landlord has in certain cases a right to determine the tenancy, eject the tenant and re-enter into possession. For example, under Section 57 of the Act, a tenant not being a permanent tenure-holder may be ejected for any of the reasons mentioned in the several clauses of the section, and as a fixed rate tenant is not a permanent tenure-holder, he may be ejected for any of those reasons. His interest in his holding is thus of a limited character and differs in material respects from an absolute hereditary mokurrari tenure, which formed the subject of consideration by their Lordships of the Privy Council in Sonet Koer v. Himmat Bahadur[5]. As pointed out by. their Lordships, such a mukarrari is an absolute interest and could not have been forfeited to the zamindar. Such is not the case with a fixed rate tenancy. The ruling of their Lordships, therefore, does not support the decision in the case of Ram Dihal Rai v. The Maharaja of Vizianagram 30 A. 488 : A.W.N. (1908) 210 : 5 A.L.J. 578(Supra). Having regard to the incidents of a fixed rate tenancy, I am unable, with great respect, to agree with that decision and to hold that a tenancy in these provinces escheats to the Crown.

12. The order of the Court is that the appeal be allowed and the decree of the learned Judge of this Court and of the lower appellate Court be set aside and as the case was decided by the lower appellate Court on a preliminary point and we have overruled this Court on that point, we remand this case under Order XLI, Rule 23 to the lower appellate Court with directions to readmit this appeal under its original number in the register of Civil Appeals and proceed to determine this appeal.

Cases Referred.

130 A. 488 : A.W.N. (1908) 210 : 5 A.L.J.578
30 A. 488 : A.W.N. (1908) 210 : 5 A.L.J. 578
3 3 I.A. 92 : 25 W.R. 239 : 1. C .391
4 3 I.A. 92 : 25 W.R. 239 : 1. C. 391
53 I.A. 92 : 25 W.R. 239 : 1 C. 391