an occupancy raiyat at fixed rates would obviously be the rent which had been fixed for his holding.

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The result is that the appeal is dismissed, but without costs, as the respondents do not appear.

S. K. B. *Appeal dismissed.*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

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v.

JINNAT ALI.*

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July 29.

Under-raiyati Holding—Transferability—Transfer of Property Act (IV of 1882), s. 117—Agricultural lands—Relinquishment or abandonment, what constitutes.

An under-raiyati holding is not transferable. What is relinquishment or abandonment depends on the substantial effect of what has been done in each case. When a tenure or holding, apart from the Transfer of Property Act, is not transferable, it cannot become so unless it is expressly made so by some other statute.

If it had been intended to make holdings transferable which were before non-transferable, the Legislature in framing the Bengal Tenancy Act would have said so.

Section 117 of the Transfer of Property Act excludes agricultural lands from the operation of the rule which makes leasehold property transferable.

Hiramoti Dassya v. *Annoda Prosad Ghose* (1) followed.

SECOND APPEAL by Sreematee Aminnessa Bibi, the plaintiff.

* Appeal from Appellate Decree, No. 1539 of 1913, against the decree of T. K. Johnston, District Judge of Noakhali, dated April 22, 1913, modifying the decree of Hem Chandra Das Gupta, Munsif of Sudharam, dated April 30, 1912.

(1) (1908) 7 C. L. J. 555.

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This appeal arose out of a suit for declaration of plaintiff's raiyati right to the land and khas possession thereof on the ground that the defendant who held it as a *miyadi-osat-raiyat* under the plaintiff has sold the land to defendant No. 1 and given up possession thereof and that the said holding was not transferable according to law or custom. Both the defendants Nos. 1 and 2 contested the suit and filed separate written statements supporting each other's case.

They contended that the plaintiff was a minor and that the suit, therefore, could not proceed, that the story of the transfer was not true, that the *kabala* executed was a paper transaction and not a real sale, that the defendant No. 2 executed it with defendant No. 1's knowledge to create a *benami* for fear of creditors, and that the defendant No. 2 and not the defendant No. 1 was still in possession of the land. Defendant No. 2 further contended that he was an occupancy *raiyat* and that the plaintiff was merely a co-sharer landlord and a suit for ejectment was, therefore, not maintainable at her instance.

The Court of first instance decreed the suit with costs. The plaintiff's raiyati right to the land in suit was declared and she was ordered khas possession of the same. Against this order of the Munsif the defendants appealed to the District Judge of Noakhali who reversed the decision of the Munsif and allowed the appeal. Hence this second appeal on behalf of the plaintiff.

Babu Hit Lal Guha, for the appellant. These under-raiyati leases, being agricultural leases, are exempted from the operation of the general law under s. 117 of the Transfer of Property Act. As there is no provision for their transfer in the Bengal Tenancy Act, they cannot be transferred unless there is a valid

custom to that effect. The onus of proving such a custom was on the defendants and they have failed to do so. *Bonomali Bajadur* v. *Koylash Chunder Mojoomdar* (1) supports my contention, and though the ruling is based upon the old Rent Law of Bengal (Act X of 1869) still the Bengal Tenancy Act has not changed the law as laid down there. Further, the *obiter dictum* of Maclean C.J., in *Hiramoti Dassya* v. *Annoda Prosad Ghosh* (2), supports my contention.

The recent Full Bench ruling *Dayamayi* v. *Ananda Mohan Roy* (3) supports the same view.

Babu Hem Chandra Sen, for the respondent (defendant No. 2). The under-raiyati has not been really transferred. The whole transaction between defendants I and II is a *benami* one. I have an occupancy right which is transferable and as I have made ample provision for the due payment of rent, there could be no abandonment. There is nothing in the Bengal Tenancy Act which makes the transfer of an under-raiyati void or voidable: *Gozaffur Hossein* v. *E. Dablish* (4).

Babu Hit Lal Guha was not called upon to reply.

HOLMWOOD AND CHAPMAN JJ. This appeal arises out of a suit brought by the plaintiff for declaration of her raiyati right in the land in suit and khas possession thereof. It appears that the plaintiff became 16 annas tenant of an occupancy holding by purchase from her husband in the year 1314 and that she then found that the under-raiyat on the land who is defendant 2 had sold the under-raiyati to defendant No. 1 eight years before in 1306.

It is admitted that the lease was only for a term and it appears that now that lease must have expired,

(1) (1878) I. L. R. 4 Calc. 135.
(2) (1908) 7 C. L. J. 553.
(3) (1914) I. L. R. 42 Calc. 172.
(4) (1896) 1 C. W. N. 162.

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since more than 9 years have elapsed from the time when it was sold to defendant No. 1. Be that as it may, it is conceded that the learned Judge's finding that all leasehold property is saleable and that there is nothing in the Bengal Tenancy Act to prevent the sale of an under-raiyati is not a correct view of the law. That is a rule of English law and it is incorporated in the Transfer of Property Act. But the Transfer of Property Act by section 117 clearly excludes all agricultural lands from that rule, and the true rule is, as was laid down by the late Sir Francis Maclean in the case of *Hira Moti Dassya* v. *Annoda Prosad Ghose* (1), that when a tenure or holding, apart from the Transfer of Property Act, is not transferable it cannot become so unless it is expressly made so by some other statute. The learned Chief Justice pointed out, if it had been intended to make holdings transferable which were before non-transferable we might have expected the Legislature in framing the Bengal Tenancy Act to have said so. It was clearly laid down in 1878 by Chief Justice Garth and Jackson, J., that *jummaie* rights of a *korpha* under-tenant are not transferable without the consent of the raiyat landlord. Mr. Justice Jackson goes so far as to say, "I would only add that I never heard before that the question as to the possibility of selling a *korpha* tenant's right could be raised, and it appears to me to be contrary to the nature of things that such a thing could happen." The Tenancy Act has not made any change in the law as laid down there; and it must be held as a matter of law contrary to what has been said by the learned Judge in the Court below that an under-raiyati is not transferable.

That being so and the plaintiff being the landlord of the entire 16 annas and the defendant having

(1) (1908) 7 C. L. J. 553, 555.

transferred the whole holding to defendant No. 1, the case falls within the second heading of the recent Full Bench ruling,—where the transfer of the whole holding has been made the landlord is ordinarily entitled to enter on the holding, and such a relinquishment as the relinquishment of the whole 16 annas without any proof of payment of rent or any arrangement made to pay the rent is certainly a relinquishment in fact which would entitle the plaintiff to eject the defendant.

It is sought to be argued that an under-raiyat cannot be ejected except under section 49 of Bengal Tenancy Act. But the answer to that is that the defendant No. 2 has by his own acts ceased to be an under-raiyat, and defendant No. 1 has never obtained the status of an under-raiyat, therefore section 49 does not apply. It has further been contended that every transfer does not operate as an abandonment or as forfeiture. But the transfer which is found as a fact by the Munsif in the first Court and has not been set aside by the Judge in this case is certainly such a transfer as would, in our opinion, constitute a complete abandonment in fact, and what is reliquishment or abandonment has been held by the Full Bench to depend on the substantial effect of what has been done in each case. The substantial effect of what has been done in this case appears to be that the recent purchaser has deprived the plaintiff of the tenant to whom alone she could look for her rent and to whom alone she could look for the proper cultivation of her holding; and we do not know who the defendant No. 1 may be or whether he is in any way a proper person to cultivate her land. It does not appear that any rent has been paid since the year 1306, at any rate, that it has been paid to the plaintiff.

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The appeal must, therefore, be decreed. The judgment and decree of the lower Appellate Court are set aside and those of the Munsif restored with costs in all Courts to the plaintiff.

S. K. B. *Appeal allowed.*

CRIMINAL REFERENCE.

Before Sharfuddin and Teunon JJ.

1914

Aug. 19.

EMPEROR

v.

SABAR AKUNJI.*

Pardon—Withdrawal by Magistrate not granting the pardon—Omission to state grounds of forfeiture—Necessity of formal withdrawal or declaration of forfeiture—Plea of pardon to be raised at the trial—Trial of issues of forfeiture of pardon and guilt of accused—Criminal Procedure Code (Act V of 1898), ss. 337, 339.

Under the present law no formal withdrawal of pardon nor formal declaration of its forfeiture are required. If the approver be subsequently proceeded against, it is open to him to plead at his trial that the pardon has not, in fact, been forfeited, that is, that he has not violated its conditions. The two questions of forfeiture of pardon and of his guilt of the offence in respect of which he received the same, may be heard and determined together, under the circumstance.

Emperor v. *Kothia* (1), *Kullan* v. *Emperor* (2), and *Emperor* v. *Abani Bhushan Chuckerbutty* (3) referred to.

ON the 29th October 1913 a dacoity was committed in the house of one Madan Mandal at the village of Gandamani in the Khulna district. A conditional

*Criminal Reference No. 129 of 1914 by J. H. A. Street, Officiating Sessions Judge of Khulna, dated May 26, 1914.

(1) (1906) I. L. R. 30 Bom. 611. (2) (1908) I. L. R. 32 Mad. 173.
(3) (1910) I. L. R. 37 Calc. 845, 851.