APPELLATE CIVIL.

Before Walmsley and B. B. Ghose JJ.

ROSHAN ALI 1923

v. *March 28.*

CHANDRA MOHAN DAS.*

Landlord and Tenant—Occupancy right, extinguishment of—Status of tenant settled by co-proprietor purchasing occupancy right—Bengal Tenancy Act (VIII of 1885), s. 22 (2) before amendment in 1907.

A co-proprietor purchasing an occupancy right under himself and the other proprietors is not a raiyat with regard to the land after his purchase of the occupancy right.

Ram Lal Sukul v. *Bhela Gazi* (1) followed.

The person to whom such a co-proprietor settles the land is a raiyat or a tenure-holder as the case may be.

SECOND APPEAL by Roshan Ali and another, the defendants.

This appeal arose out of an action in ejectment. The case of the plaintiff-respondent was that he was a raiyat in respect of the disputed land and the defendants are under-raiyats and that notice to quit had been served on defendants but that they had refused to do so. The defence of both the defendants raised a number of points and in the main they questioned the service and validity of the notice as also the raiyati status of the plaintiff. The Court of first instance found the defendants to be under-raiyats, but dismissed the suit on the ground of unsatisfactory service of notice

* Appeal from Appellate Decree, No 685 of 1921, against the decree of Sarada Kumar Sen Gupta, Subordinate Judge of Tipperah, dated Dec. 15, 1920, reversing the decree of Gobinda Chandra Chakravarti, Munsif of Comilla, dated May 27, 1920.

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to quit. Thereupon the plaintiff appealed and the defendants filed a cross-objection. The Court of Appeal below held on his construction of the kabuliyat that as the defendants were to get merely a certain share of crops for labour they had acquired no right to the land either as raiyats or under-raiyats, that the registered kabuliyat rebutted the presumption of the record-of-rights the other way, that as the defendants were neither raiyats nor under-raiyats it was quite immaterial to determine the status of the defendants, that the plaintiff, a co-sharer landlord, having purchased the non-transferable raiyati right before the Bengal Tenancy Act was amended in 1907, the occupancy right subsisted and that notice had been duly served. He accordingly decreed the appeal and dismissed the cross-objections. The suit was therefore decreed.

The defendants, thereupon, preferred this second appeal to the High Court.

Babu Jatindra Mohan Ghose, for the appellants. We hold independently of the lease. Plaint describes our status as under-raiyats under the plaintiff, who being a co-sharer landlord has purchased the raiyati interest The raiyati was non-transferable. Whether it was before or after the amendment of the Bengal Tenancy Act in 1907, the purchase annihilated the raiyati interest, for the simple reason that the holding could never have been divorced from its raiyati character. The co-sharer landlord was holding the land by payment of his share of the rent due to other co-sharers, but that did not and could not possibly make him a raiyat. As regards the appellants being mere labourers as held by the Subordinate Judge on appeal, the learned Judge had no right to traverse or ignore the admissions of title made by the plaintiff in the plaint.

Babu Upendra Kumar Roy, for the respondent. The position of a co-sharer landlord purchasing occupancy holding before the amendment of section 22 of the Bengal Tenancy Act in 1907 was that of a non-occupancy raiyat. By such purchase, the occupancy right ceased to exist, but the holding remained: *Jawadul Huq* v. *Ram Das Saha* (1), *Ram Mohan Pal* v. *Kachu* (2). The question of transferability or non-transferability of the holding did not affect the question and the purchaser could at least acquire the right of a non-occupancy raiyat, as held in the case cited last and in *Nabin Chandra Pal* v. *Banga Chandra Chowdhury* (3), *Alimaddin* v. *Ainaddin Majumdar* (4) and *Abinash Chandar Bhattacharjee* v. *Amar Chandra De* (5), decided by Mookerjee and Chotzner JJ. In the present case, the plaintiff purchaser has been paying rent to his co-sharers and I contend that, even in respect of his own share, he is a raiyat under himself. The principle of merger is not applicable in the mofussil in this country and it is always a question of intention to keep the superior and the inferior interests separate, except where statute forbids. In the present case the intention is clear and the plaintiff has asserted his raiyati right throughout. Previous to this suit, he recovered price of *burga* crops by suit in assertion of the raiyati right.

I submit next that it was to counteract the effect of the law laid down in *Jawadul Huq's case* (1) and the Full Bench decision cited above (2) that the amendment was made in 1907. The very wording of section 22 coupled with the illustrations thereto clearly show the distinction between the position of a co-sharer purchaser before and after the amendment

(1) (1896) I. L. R. 24 Calc. 143. (3) (1912) 15 Ind. Cas. 705.
(2) (1905) I. L. R. 32 Calc. 396. (4) (1917) 38 Ind. Cas. 534.
(5) (1922) S. A. No. 1488 of 1920.

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The plaintiff is a raiyat under his co-sharers and the defendants cannot but be under-raiyats in respect of their shares and his position would be similar even in respect of his own share. As regards notice, a valid notice under section 49 (*b*) is sufficient to eject the defendants.

Lastly, I submit that the lower Appellate Court was justified, on a construction of the kabuliyat, in holding that it conveyed no interest in the lands to the defendants and they were mere labourers. The question of construction of a document—where no further investigation into facts is necessary, as here—is a pure question of law and can be gone into in second appeal. Plaintiff cannot be blamed if in his plaint he did not take up a better position by describing the defendants as mere labourers. It is no question of prejudice to the defendants. A kabuliyat almost similar in its terms to the present one was construed as the lower Appellate Court did in this case: *Pokhan* v. *Rajani Kamal Chuckerbutty* (1).

GHOSE J. This appeal arises out of a suit for recovery of khas possession on declaration of the raiyati right of the plaintiff after evicting the defendants who are under-raiyats under the plaintiff and who hold under a kabulyiat the term of which has expired. This is how the plaintiff frames his suit. It was dismissed by the Munsif who held that the defendants were under-raiyats, but that no notice had been served under section 49 of the Bengal Tenancy Act on them and, therefore, the plaintiff was not entitled to a decree for ejectment. On appeal by the plaintiff, the learned Subordinate Judge holds that the defendants are not in possession of the land as tenants

(1) (1919) 23 C. W. N. 614.

but as labourers. This view I think it was not open to the Subordinate Judge to take, because the plaintiff comes to Court on the allegation that the defendants are under-raiyats. The facts, shortly stated, are these:—The plaintiff was a co-sharer landlord with regard to a certain occupancy holding which has been found to be non-transferable. He purchased the occupancy holding and then let it out to the defendants under a kabuliyat dated 2nd Pous 1317 B.S. for a term of one year only which expired in Pous 1318 B.S. With regard to the meaning of this kabuliyat there is some dispute which I shall state later on. The defendants continued in possession after the expiry of the term of that kabuliyat and the present suit was brought in May 1919 which corresponds with sometime in Jeyt 1326 B.S. The question is what is the status of the defendants. The learned Subordinate Judge, as I have said, holds that, under the kabuliyat, the defendants are mere labourers. Whatever may be the true construction of the document, the defendants did not hold the land at the time of the suit under the terms of the kabuliyat. The plaintiff mentions in his plaint that the defendants have been "holding over" and that they are korfa raiyats under the plaintiff. There cannot be any question, therefore, that the defendants hold the land as tenants under the plaintiff whatever their status may be. The learned Subordinate Judge next says that the occupancy right of the raiyat prior to the purchase of the plaintiff not being transferable, section 22, sub-section (2) of the Bengal Tenancy Act has no application, and he seems to have held that the right of occupancy subsisted in the plaintiff and there could not be any merger. This, evidently, is a misconstruction of the effect of section 22, sub-section (2) of the Bengal Tenancy Act. The question of transferability or

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non-transferability of occupancy right is only relevant with regard to the position of the co-sharer landlords when one of them purchases the occupancy right, that is, whether the other co-sharers would be entitled to joint possession with the purchaser or would be entitled only to receive rent from the purchaser according to their shares in the property. In this case that question does not arise, because the other co-sharers did not ask for joint possession and they have accepted the position that the plaintiff is entitled to possession by payment of their share of the rent to them. The question, then, is what is the position of the plaintiff with regard to this land? The learned vakil for the respondent does not contend that the occupancy right purchased by the plaintiff subsists as has been observed by the Subordinate Judge, but he contends that the plaintiff would be a non-occupancy raiyat with regard to the land. That position cannot be supported as it would lead to anomalies. Why should the plaintiff be considered to be only a non-occupancy raiyat? If the plaintiff is a settled raiyat of the village and if the contention of the plaintiff be accepted, then by the purchase he would acquire a right of occupancy and he would be an occupancy raiyat under himself and his co-sharers. Therefore, although section 22, sub-section (2) of the Bengal Tenancy Act (before the amendment in 1907, as that applies to this case) lays down that the occupancy right will cease to exist by such purchase, a new occupancy right would accrue to the plaintiff. Then supposing that he would be a non-occupancy raiyat, would he be an occupancy raiyat by twelve years' possession of the land? It seems to me that it cannot be so. This question was discussed in one of the many cases which have clustered round section 22 of the Bengal Tenancy Act. In the case of

Ram Lal Sukul v. *Bhela Gazi* (1), it was observed that a purchaser in the position of the plaintiff could not acquire a new occupancy right under himself and his co-sharers. Mr. Justice Woodroffe, in delivering the judgment of the Court, says: "To hold this," that is, that such purchaser acquires a new occupancy right, "would, I think, defeat the policy of the section. "And, further, the owner of the holding could not "acquire a right adversely to himself in his other "character as co-proprietor." It seems to me, therefore, that the plaintiff was not a raiyat with regard to the land after his purchase of the occupancy right, but was holding it in his right as a co-proprietor. What then would be the position of the person to whom he lets out the land? He would, in my judgment, be a raiyat or a tenure-holder as has now been made clear by the provisions of section 22, sub-section (*2*) of the Bengal Tenancy Act after the amendment in 1907, which says "if such transferee sublets the land to a third person, such person shall be deemed to be a tenure-holder or a raiyat, as the case may be, in respect of the land." The defendants, therefore, would be raiyats and not under-raiyats as is contended for by the learned vakil for the respondents. If that is so, they are not liable to be ejected by service of notice under section 49 of the Tenancy Act. The appeal is, therefore, allowed and the suit dismissed with costs in all the Courts.

WALMSLEY J. I agree.

Appeal allowed.

S. M.

(1) (1910) I. L. R. 37 Calc. 709.