CIVIL RULE.

Before Greaves and Mukerji JJ.

PURNA CHANDRA KUNDU

v.

MANOBINI DEVI.*

1926

April 26.

Occupancy Holding, non transferable—Purchaser of whole—Representative of judgment-debtor—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 100.

The purchaser of the *whole* of an occupancy holding not transferable by custom is not a representative of the judgment-debtor : he is therefore entitled to maintain proceedings under Order XXI, rule 100, of the Code of Civil Procedure.

Panchratan Koeri v. *Ram Sahay Singh* (1) not followed.

A reference to the original record of *Dayamoyi's* case (2) shows that the decision of the Full Bench in that case referred not to the transfer of the whole of an occupancy holding (as erroneously reported in I. L. R. 42 Calc. 172 and followed in *Panchratan Koeri's* case), (1) but merely to a part : and one must read the first answer to the question propounded to the Full Bench as an answer to a reference with regard to the transfer of a *portion* only of a holding and not to the transfer of a whole.

Where the applicants under O. XXI, r 100 had been in possession for some 10 or 12 years by virtue of their purchase of a non-transferable occupancy holding, and but for the laches of the court clerk with regard to the injunction granted in their suit against the landlord (who was executing his *ex parte* rent decree against applicants' vendor) their possession would have remained unimpeached until their suit was decided.

Held, that the High Court ought in that case to exercise their jurisdiction under section 115 even if the result should be that the applicant's suit might be discontinued and the question raised by them never decided. But it was open to the landlord in that event to commence a suit to have the matter determined.

* Civil Rule No. 335 of 1926, against the order of M. P. Sinha, Esq. of Howrah, dated March 11, 1926.

(1) (1918) 3 Pat. L. J. 579.
(2) (1914) I. L. R. 42 Calc. 172 ; 18 C. W. N. 971, 974.

1926

PURNA CHANDRA KUNDU v. MANOBINI DEVI.

Civil Rule obtained under sec. 115, C. P. C., by Purna Chandra Kundu and another, applicants.

The facts of the case out of which this Rule arise are as follows:—

By a *kobala*, dated 8th May 1913, the applicants purchased for the sum of Rs. 3,000 from one Jotindra Nath Das four bighas ten cottahs of land situated within the Bally Municipality, which he held in *mourasi mokarari* right under the landladies, Sreemutty Lukshimoni and Susila Bala Debi: since the said purchase the applicants were in actual and uninterrupted possession of the said land and had built thereon a corrugated tin house with a pucca plinth, gate, etc., and had been paying rent therefor to the said landladies and rates and taxes to the Municipality, and since the said purchase the applicants' names had been registered in the assessment register of the Bally Municipality. On the 23rd April 1918 the applicants received a letter from the then landlady's Solicitor calling upon the applicants to give up possession of the aforesaid property, but they refused to do so stating they had been in undisturbed possession of this garden house and not the landlady, as stated in her Solicitor's letter. Since then she took no steps and the applicants were left in undisturbed possession of the property. However, on the 12th September 1925 the applicants came to learn that the landlady had obtained an *ex parte* decree against the aforesaid Jotindra Nath Das in execution whereof the aforesaid property of the applicants had been sold and purchased by the landlady.

Thereupon the applicants instituted a suit in the 1st Court of the Munsif of Howrah on the 1 September 1925 praying for a declaration that landlady had no right or title to the aforesaid lan

well as for a declaration that the decree obtained by the said landlady in her suit together with the sale held in execution thereof were collusive, fraudulent and inoperative against the applicants, and also praying that the said sale might be set aside.

On the 15th September 1925 the applicants made an application in the first Court of the Munsif of Howrah praying for an injunction against the landlady restraining her from taking possession of the property in pursuance of the aforesaid auction sale, whereupon the learned Munsif ordered notices to issue on the landlady to show cause why an injunction should not be granted as prayed for, and he further directed that the landlady should be restrained in the meantime from taking possession in the rent execution case and that *the clerk concerned was to note this.* But the landlady all along avoided service of this injunction order in spite of repeated attempts of the applicants to do so, and on the 9th February 1926 she took symbolical possession of the land in suit. In spite of the learned Munsif's order directing that the decree-holder should not take possession of the lands pending decision of the applicants' title suit the landlady's agent accompanied by a large number of men armed with *lathies* entered the aforesaid property, which had been entirely fenced in by the applicants with barbed wire and wire-netting, assaulted the applicants' servant and committed various acts of mischief and damage and forcibly remained in possession of the land and house which contained various articles belonging to the applicants, who, on 15th February 1926, made an application under Order XXI, rule 100, of the Code of Civil Procedure, objecting to this dispossession from their property in execution of the landlady's rent decree.

1926

PURNA CHANDRA KUNDU v. MANOBINI DEVI.

On the 11th March 1926 the learned Munsif passed an order to the effect that the applicants were entitled to recover possession of the aforesaid property in dispute, but, on an erroneous supposition that it was a non-transferable occupancy holding, held that the applicants were representatives of the judgment debtor, and as such were not entitled to make the application under Order XXI, rule 100. On the 19th March 1926 the landlady filed a written statement in the applicants' aforesaid title suit pleading therein that, as they had not been in possession of the property, the suit was not maintainable in view of section 42 of the Specific Relief Act. The applicants thereupon moved the Hon'ble High Court under section 115 of the Code of Civil Procedure and obtained this Rule.

Mr. G. C. Sen, *Mr. S. K. Basu*, advocates, and *Babu Arun Kumar Roy*, for the petitioners. The purchaser of an entire non-transferable occupancy holding is not the representative of his vendor until his purchase is recognised by the landlord. The contrary view taken by the Patna High Court in *Panchratan Koeri* v. *Ram Sahay Singh* (1) is based upon an erroneous reading of the judgment in the Full Bench case of *Dayamayi* (2) as reported in the I. L. R. From the report of that Full Bench case in 18 C. W. N., at p. 974 it appears that the question originally referred to the Full Bench was amended by the omission of the words "the whole or". The answer given by the Full Bench should, therefore, be read as meaning that it is the purchaser of a *portion* of a non-transferable occupancy holding who is the representative of the original raiyat. This follows

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(2) (1914) I. L. R. 42 Calc. 172 ; 18 C. W. N. 971, 974.

from the general principles laid down by the Full Bench. The amendment made by the Full Beneh to the question referred is not noticed in the official report which is cited by the Patna High Court. The learned Munsif relies upon the decision of the Patna High Court, and is, therefore, wrong in thinking that my clients are not "a person other than the judgment-debtor" within the meaning of Order XXI, rule 100, C. P. C., although the learned Munsif holds that my clients were in possession and are entitled to possession.

Interference under section 115, C. P. C., is discretionary: but here is a case of serious prejudice and my clients want relief from an injury which was caused to them as the learned Munsif himself says "by laches on the part of the Court's officer in not "issuing the injunction ordered against the opposite "party restraining the execution of their decree." My clients were in possession for at least 11 years, and the opposite party never got any rent from me. In my client's suit they have not asked for possession as they were in possession on the date of their suit, so they will now have to change the entire frame of their suit. Why should they be put to all this trouble and expense and be kept out of possession if they have made out a clear case of refusal of jurisdiction by the learned Munsif? [Their Lordships sent for the High Court file of *Dayamayi's* Full Bench case (1), before delivering judgment, and found that the question referred to the Full Bench was amended as stated in the above arguments].

Babu Dwarkanath Chakravarti (with him *Babu Panchanan Ghose* and *Babu Durga Das Roy*), for the opposite party, submitted that this was not a fit case for interference under section 115, and cited the

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1926

PURNA CHANDRA KUNDU v. MANOHINI DEVI.

unreported decision in Civil Rule No. 540 of 1921 where although no suit had been instituted the High Court refused to interfere under the provisions of section 115 because there was a further remedy by suit. In the present case such a suit was pending and if this Court were to interfere now the petitioners would drop that suit and the question in dispute might never be decided.

GREAVES J. This Rule was issued calling on the opposite party to show cause why a certain order of the Munsif of the 11th March 1926 dismissing an application on the ground that it was not maintainable under the provisions of Order XXI, rule 100, C. P. C., should not be set aside or varied on the ground that the petitioners were entitled to maintain the application on the facts set out in the Munsif's order. The facts are as follows:—The petitioners commenced a title suit impeaching a sale in which the landlord decree-holder had purchased the land and they asked for confirmation of their possession. In that suit the petitioners applied for an injunction restraining delivery of the land to the decree-holder. Owing to the laches of the clerks in the Munsif's office the injunction order was not shown to the clerk who issued the writ of possession, so the writ of possession was issued and symbolical possession was delivered to the decree-holder in due course. The decree-holder took actual possession as he had received no notice of the injunction that had been passed. Thereupon the petitioners applied to the Munsif under the provisions of Order XXI, rule 100, C. P. C. asking that they should be restored to possession. The Munsif has found that the petitioners were in possession of the disputed land and property for many years and that the judgment-debtor against whom the opposite party had obtained

a rent decree *ex parte* had not been in possession for a long time. The petitioners had obtained a transfer of the holding from the judgment-debtor some time previously. The Munsif then went on to hold that under the provisions of Order XXI, rule 100, the petitioners on the facts were entitled to recover possession as they had been in possession until the decree-holder obtained possession under the order to which I have referred. But the Munsif further held that in spite of this there were difficulties in the way of the petitioners as the holding according to the Munsif was a non-transferable occupancy holding, and the Munsif then held that the petitioners are representatives of the judgment-debtor and as such are not entitled to make the application under the provisions of Order XXI, rule 100, C. P. C. Now the petitioners' case is that the holding is a *mourasi mokarari* holding. This question we cannot go into for the purposes of this Rule, and we must accept the Munsif's finding that the holding is a non-transferable occupancy holding for the purpose of the present application. Order XXI, rule 100, provides that where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for possession of such property, the Court shall fix a day for investigating the matter, and rule 101 provides that, when the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property. If therefore the Munsif was right in holding that the petitioners obtained title through the judgment-debtor then clearly they would not be entitled to maintain the application under the provisions of Order XXI, rule 100. But the holding was a non-transferable

1926

PURNA CHANDRA KUNDU v. MANOHINI DEVI

GREAVES J.

occupancy holding, or so we must take it to be for the purpose of this rule. The landlord has never consented to the transfer nor has he recognised the petitioner. Consequently the petitioners are trespassers so far as he is concerned and obtained no title by virtue of the transfer to them of the property by the original tenant. This being so it seems to me that they cannot be taken to be representatives of the judgment-debtors as they are merely trespassers and obtained no title from him. This being so it seems to me that they are entitled to maintain the application under the provisions of Order XXI, rule 100. But the Munsif relied on a case to which we have been referred this morning, *Panchratan Koeri* v. *Ram Sahay Singh* (1). The head note is as follows:—"The purchaser of the whole or part of an occupancy holding not transferable by custom is a representative of the judgment-debtor and entitled to object under section 47 to a sale. He is therefore not entitled to maintain proceedings under Order XXI, rule 100." The learned Judges in delivering their judgment referred to *Dayamoyi's* case (2) in support of their decision. Now reference to *Dayamoyi's* case (2) shows that the decision in that case referred not to the transfer of the whole of an occupancy holding but merely to a part, and one must read the first answer to the question propounded as an answer to a reference with regard to the transfer of a portion only of a holding and not to the transfer of a whole. Accordingly I feel some doubt as to the correctness of the decision in *Panchratan Koeri* v. *Ram Sahay Singh* (1), and to the construction put upon *Dayamoyi's* case (2) on which the decision was founded. The result therefore is that I think the Munsif was not entitled to rely on that ca

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as an authority for refusing to exercise jurisdiction which he had under the provisions of Order XXI. rule 100. Consequently for the reasons which I have indicated and on the facts and circumstances which I have stated the petitioners are entitled to the Order which they asked for in the circumstances here stated unless we think we ought not to interfere at the present stage having regard to the fact that a suit has already been instituted in which the question will be decided and having regard to the fact that if there is a remedy by suit open, the Courts are loath to interfere under the provisions of section 115, C. P. C.; and we were referred by the learned Government pleader, who appeared to show cause, to the Civil Rule 540 of 1921 where the facts are very similar to the facts now before us. Although no suit had there been instituted the Court refused to interfere under the provisions of section 115 having regard to the fact that there was a remedy by suit. The present case of course is a stronger case. Here a suit has been instituted and it might be said that accordingly we ought not to interfere as the question, as I have already stated, will be ultimately decided in that suit. But we think we have got to bear in mind the facts before us, namely, that the petitioners have been in possession for some 10 or 12 years by virtue of the transfer, that, but for the mistake which arose with regard to the injunction granted by the Munsif, their possession would have remained unimpaired until the suit was decided. Consequently I think that we ought in this case to exercise the jurisdiction vested in us under the provisions of section 115 and make the rule absolute. I am not unmindful of the fact, which was pressed upon us by the learned Government pleader, that the result may be that the suit may now be discontinued and the question never decided. But after all if that

1926

PURNA CHANDRA KUNDU v. MANOBINI DEVI

GREAVES J.

result does occur, I mean the discontinuance of the suit, it is open to the landlord himself to commence a suit to have the matter determined.

Under the circumstances which I have indicated we make the Rule absolute.

The matter will go back to the Munsif in order that a formal order may be passed.

The petitioners are entitled to costs of this rule,

MUKERJI J. I agree.

G. S. *Rule absolute.*

APPELLATE CIVIL.

Before Cuming and Page JJ.

1926

May 6.

JIBAN KRISHNA MULLIK

v.

NIRUPAMA GUPTA.*

Agreement—Patni—Patnidar created darpatni and darpatnidar created sepatni, if there is valid agreement between patnidar and sepatnidar to sue for rent—Equitable rule.

A, a *patnidar* created a *darpatni* in favour of B for Rs. 244 per annum. B created a *sepatni* by an instrument in favour of C for Rs. 344 per annum, out of which Rs. 244 was to be paid to A for the *darpatni* rent, and Rs. 100 was to be paid to B, the *darpatnidar*. C paid the Rs. 244 to A for some time, and then fell in arrear. A sued C for rent :—

Held, that mere payment of a sum of money by C to A could not be made the foundation of a legal obligation on the part of C to pay to A a like sum in like circumstances in the future. Moreover, there was no consideration passing to C from A to bind any such agreement.

*Appeal from Appellate Decree, No. 457 of 1924, against the decree of Maulvi Osman Ali, Subordinate Judge of Nadia, dated Jan. 30, 1924, reversing the decree of Bama Charan Chakravarti, Munsif of Meherpur dated March 29, 1923.