

CIVIL RULE.

Before Mukerji and Mitter JJ.

BADARADDIN MANDAL

v.

NAZIR HOSSAIN JOADDAR.*

1929.
Feb. 1.

Under-raiyat—Registered lease—Occupancy holding—Sale—Incumbrance—Void—Voidable—Deposit—Bengal Tenancy Act (VIII of 1885), s. 85, sub-s. (2); ss. 159, 167, 170, cl. (3).

Where an under-tenancy had not been created by a registered instrument or with the consent of the landlord, it is only invalid against the landlord, unless it was created by a lease which was in contravention of section 85 (2) of the Bengal Tenancy Act and so void. Where in a case of the former kind, a landlord sought to put up to sale the holding of the occupancy *raiyat* under whom the under-*raiyat* held, and the under-*raiyat* thereupon applied to make a deposit under clause (3) of section 170, and there was no knowing who would, if the sale did actually take place, be the purchaser therein,

held that the interest of such an under-*raiyat* was one which was voidable at the sale and he was therefore entitled to make the deposit.

Bhuban Mohan Guha v. Sheikh Badan (1) and *Jharu Mandal v. Khetra Mohan Bera* (2) distinguished.

Jnavendra Chandra Ghosh v. Ryman Sheikh (3) referred to.

CIVIL RULE obtained by Badaraddin Mandal, 3rd party, petitioner.

The facts of the case, out of which this Civil Revision Case arose, appear fully from the order of the Munsif of Chuadanga passed in Rent Execution Case No. 790 of 1928, which was as follows:—

“Pleaders for both parties (decree-holder and 3rd party petitioner) are heard. In this case, the landlord decree-holder, seeks to sell an occupancy *raiyati* holding in execution of a decree for arrears of rents of that holding. The petitioner claims to be an under-*raiyat* under the occupancy holding that is sought to be sold. So the petitioner wants to deposit the decree-holder’s dues under section 170, clause (3) of the Bengal Tenancy Act. The decree-holder objects to that, pleading want of *locus standi* of the petitioner to make the deposit. It is not the case of the petitioner that the sub-tenancy held by him was created under any registered instrument or with the consent of the landlord (who is the decree-holder of the present case). Therefore, I hold under section 85 of the Bengal Tenancy Act that the petitioner has not acquired any valid interest in the sub-tenancy

*Civil Rule, No. 1055 of 1928, against the order of M. N. Bhanja, Munsif of Chuadanga, dated Aug. 8, 1928.

(1) (1919) I. L. R. 46 Calc. 766. (2) (1926) I. L. R. 54 Calc. 15.
(3) (1927) 31 C. W. N. 580.

“against the present decree-holder. So in the present case, the interest of the petitioner is invalid and void as against the decree-holder, and is not a voidable one. In view of all the above, and in the light of the ruling in *Bhuban Mohan Guha v. Sheikh Badan* (1). I decide that the petitioner has no *locus standi* to make the deposit as prayed for in the present case. Therefore, I reject his petition.”

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Thereupon, the under-*raiyat*, third party petitioner, moved the High Court and obtained this Rule.

Mr. Mohinimohan Bhattacharya and *Mr. Jatindranath Bagchi*, for the petitioner.

Mr. Panchanan Ghoshal, for the opposite party

MUKERJI AND MITTER JJ. In this case an under-*raiyat* applied to make a deposit under section 170, clause (3) of the Bengal Tenancy Act, when the landlord decree-holder sought to put up to sale the holding of the occupancy *raiyat* under whom he held. The Munsif held that the under-*raiyat* had no *locus standi* to make the deposit, as his under-tenancy was not created by a registered instrument or with the consent of the landlord. The under-*raiyat* has then obtained this Rule.

The learned Munsif has referred to and proceeded upon the authority of the case of *Bhuban Mohan Guha v. Sheikh Badan* (1). That was a case where the landlord, who had purchased an occupancy holding at a rent sale, proceeded to sue the under-*raiyat* for *khas* possession without annulling the under-tenancy under section 167 or serving notice under section 49 of the Bengal Tenancy Act. It was held that as the under-*raiyati* holding was not created by a registered lease or with the landlord's consent, there was no subsisting sub-tenancy which stood good against the landlord and which required to be put an end to either under section 167 or under section 49. That case, in our opinion, has little bearing upon the question which arises in the present case, where a sale has not yet taken place, and there is no knowing who will, if a sale does take place, be the purchaser therein. In a recent decision of this Court, in the case of *Jnanendra Chandra Ghosh v. Royman Sheikh* (2), it

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has been held that the interest of an under-*raiyat*, which was created by a registered lease in contravention of section 85, sub-section (2), and which purported to be a perpetual lease, is not an interest which the law recognises and consequently is not an interest coming within the description of "incumbrance," which, unless steps are taken to avoid it, subsists after the sale. Following the decision of the Full Bench in the case of *Jharu Mandal v. Khetra Mohan Bera* (1), it has been held that such an under-*raiyat* cannot be held to have an interest voidable at the sale and so is not entitled to make a deposit under section 170, clause (3). That case again is distinguishable, because the lease in that case, having been in contravention of sub-section (2) of section 85, was void, while, in the present case, the lease is only invalid against the landlord. It is an interest which would amount to an incumbrance and would have to be annulled by every purchaser except the landlord himself before it would cease to exist. The rights of a purchaser, who purchases in execution of a decree under Chapter XIV of the Act, are regulated by section 159 and not section 85 of the Act. We are of opinion that the interest of the under-*raiyat* in the present case is one which is voidable at the sale and the under-*raiyat*, therefore, is entitled to make the deposit.

The Rule is made absolute and the order of the learned Munsif being set aside, it is ordered that the petitioner be allowed to make the deposit. There will be no order as to costs in this Rule.

G.S.

Rule made absolute.

(1) (1926) I. L. R. 54 Calc. 15.