APPELLATE CIVIL.

Before Rankin C. J. and Suhrawardy J.

GORAI MOLLAH

v.

PANCHU HALDAR.*

1929

July 18.

Occupancy right—Status of tenant settled by co-proprietor purchasing occupancy right—Merger—Full Bench decision—Binding effect of—Bengal Tenancy Act (VIII of 1885), s. 22.

Where the purchase of the superior interest was made in 1902, after the acquisition of the interest in the *raiyati*, the matter would come within the explanation of the original section 22 of the Bengal Tenancy Act.

Obiter. Where a co-proprietor purchased an occupancy right under himself and other proprietors before the amendment of section 22 of the Bengal Tenancy Act in 1907, the occupancy right ceased to exist, but not the tenancy or holding.

Ram Mohan Pal v. *Sheikh Kachu* (1) considered and followed.

Midnapore Zamindary Company, Ltd. v. *Naresh Narayan Roy* (2) explained.

Abhoy Charan Modak v. *Ram Sundar Shaha* (3) referred to.

The binding effect of a Full Bench decision considered.

Roshan Ali v. *Chandra Mohan Das* (4) considered.

SECOND APPEAL by Gorai Mollah and others, plaintiffs.

This appeal arose out of an action in ejectment. Plaintiffs' case was that plaintiff No. 1 and his brother, Lal Mahammad Mollah, predecessor of the other plaintiffs and defendant No. 11, purchased an occupancy holding in 1897 and let out these lands in under-*raiyati* right in 1898 to the predecessors of the defendants for a period of 9 years, that after the expiry of the period of the lease, they held over on the terms of the old lease, that these persons having died

*Appeal from Appellate Decree, No. 2268 of 1927, against the decree of Khagendra Nath Dutta, Subordinate Judge of Faridpur, dated May 27, 1927, affirming the decree of Benoy Bhusan Sen, Munsif of Chikandi, dated March 14, 1927.

(1) (1905) I. L. R. 32 Calc. 386.
(2) (1924) I. L. R. 51 Calc. 631 : L. R. 51 I, A. 293.
(3) (1929) 33 C. W. N. 1081.
(4) (1923) I. L. R 50 Calc. 749.

1929

GORAI MOLLAH v. PANCHU HALDAR.

and under-*raiyati* right not being heritable, plaintiffs were entitled to recover *khas* possession of the lands in suit. The defence *inter alia* was that the suit was barred by limitation, was bad for defect of parties, that under-*raiyati* right was heritable, that the suit was barred by estoppel and acquiescence and that the defendants had occupancy right in the lands in suit being *raiyats* and so could not be ejected. The lower appellate court, having confirmed the decision of the trial court dismissing this suit, the plaintiffs filed this Second Appeal in the High Court.

Mr. Asitaranjan Ghosh, for the appellants.

Mr. Janhabicharan Das Gupta and *Mr. Joyeshchandra Singha*, for the respondents.

RANKIN C. J. In this case, it appears that, in 1897, the plaintiff No. 1 purchased an occupancy *raiyati* interest under a certain *howla*. In 1898, he took a *kabuliyat* from the defendants' predecessors. That *kabuliyat* was to be in operation for nine years; but the tenants have held over upon the terms thereof. The plaintiffs sue in ejectment and the defence with which they are met is that these defendants are not under-*raiyats* but are *raiyats*. It is for the defendants to make that case good, particularly if they have to begin by admitting that their tenancy in origin was an under-*raiyati*. They claim to make that defence good in this way: They say that a six-anna share in the *howla*, superior to the occupancy *raiyati* interest, which the plaintiff No. 1 purchased in 1897, was bought by a brother of the plaintiff No. 1 and they further say that this transaction and also the acquisition of the occupancy right were transactions by the plaintiff No. 1 and his brother jointly. From this, they go on to maintain, first, that the purchase of the six annas share in the *howla* was *before* the purchase in 1897 of the occupancy right and, on that basis, they say that the case comes within clause (2) of section 22 of the Bengal Tenancy Act before it was amended in 1907. Now, before the trial court, the *kabala* representing the purchase of the six annas

share of the *howla* was not produced. The entry in the *khatiyan* relating to the purchase was the evidence upon which the matter was discussed and it would seem then to have been agreed by both the parties and assumed by the trial court, as well as by the lower appellate court, that the purchase of the interest in the *howla* was prior to 1897. If the defendants were to succeed in making out their defence and were to do so by bringing the case within the second clause of section 22 of the Bengal Tenancy Act, the burden of proof was entirely upon them to show that, at the time this occupancy *raiyati* was acquired, the purchasers were co-sharers in the *howla*. Strictly speaking, therefore, it was for the defendants to show the date of the purchase of the *howla* interest; but it seems to have been a matter of no controversy in the courts below and the assumption was made in favour of the defendants on that point. In this Court, Mr. Ghosh, on behalf of the plaintiffs-appellants, has produced a registered *kabala* of the year 1902, which purports to satisfy the description of the deed by which Lal Mahammad—brother of the plaintiff No. 1—purchased the six annas interest in the *howla*. It looks very much, therefore, as if the real facts of the case were that the purchase of the superior interest was made *after* the acquisition of the interest in the *raiyati*. If that be true, then it is clear that there is no defence to the plaintiffs' claim, because the matter would come within the explanation of the original section 22. Assuming, however, the facts to be as the courts below thought, the position is that the case would come within the second clause of section 22. That clause was as follows:—"If the occupancy "right in land is transferred to a person jointly "interested in the land as proprietor or permanent "tenure-holder, it shall cease to exist." Many years ago, a question arose, first, whether this meant that the tenancy or holding should cease to exist or merely the occupancy right should cease to exist and that matter was decided in favour of the latter alternative in many cases. I will refer to the case of *Jawadul*

1929

GORAI MOLLAH v. PANCHU HALDAR.

RANKIN C. J.

Huq v. *Ram Das Saha* (1), a decision of a Special Bench and to the Full Bench decision in *Ram Mohan Pal* v. *Sheikh Kachu* (2). There is another decision *Prafulla Nath Tagore* v. *The Secretary of State for India in Council* (3), and also the decision *Abinash Ch. Bhattacherjee* v. *Amar Chandra De* (4). Again, there is a decision in *Ram Lal Sukul* v. *Bhela Gazi* (5). These decisions, it appears to me, are binding on this Court, because there is a decision, amongst others, of a Full Bench supported by a strong current of authority. The Full Bench decision in *Ram Mohan Pal* v. *Sheikh Kachu* (2) is further supported by this circumstance that the legislature being minded to change the rule of law as laid down by the Full Bench altered the statute in 1907 and did not alter it with retrospective effect. In these circumstances, it appears to me that, while I do not doubt that in the observations of my learned brother Mr. Justice B. B. Ghose in the case of *Roshan Ali* v. *Chandra Mohan Das* (6) there is very forceful reason, it is nevertheless quite impossible for a Division Bench of this Court to ignore, in the circumstances which I have mentioned, the decision of the Full Bench in *Ram Mohan Pal* v. *Sheikh Kachu* (2). If the matter were worth while, it might be a matter for consideration of the Chief Justice whether to constitute a Special Bench of seven Judges to reconsider at this time of the day the decision of the Full Bench to which I have referred. There is no reason to think, however, that, after all these years, such a course has become necessary. But if that decision of the Full Bench is to be changed, it must be changed in that way. In the present case, we are bound by the Full Bench decision (2); and, in that view, this appeal will have, in any event, to be allowed. In my judgment, the present appeal must be allowed with costs and a decree for ejectment must be passed for the plaintiffs.

I should like to add that the judgment of Sir John Edge, in *Midnapore Zamindary Company, Ltd.* v.

(1) (1896) I. L. R. 24 Calc. 143.
(2) (1905) I. L. R. 32 Calc. 386.
(3) (1921) 26 C. W. N. 100.
(4) (1922) 27 C. W. N. 760.
(5) (1910) I. L R. 37 Calc. 709.
(6) (1923) I. L. R. 50 Calc. 749.

1929

GORAI MOLLAH v. PANCHU HALDAR.

RANKIN C. J.

Naresh Narayan Roy (1), does not seem to me to be directed to the construction of section 22 of the old Bengal Tenancy Act. The law as laid down by him was to the effect that a landlord co-sharer purchaser of a tenancy was a trustee for all the other co-sharers and that in that way there was an extinction of the *jote* right. That does not seem to me to be in point on the present question.

SUHRAWARDY J. I agree. I have given my reasons fully in support of the view taken by the learned Chief Justice in my judgment in the case of *Abhoy Charan Modak* v. *Ram Sundar Shaha* (2), decided on the 2nd May, 1929.

Appeal allowed; suit decreed.

G. S.

(1) (1924) I. L. R. 51 Calc. 631; L. R. 51. I. A. 293.

(2) (1929) 33 C. W. N. 1081.