

defendant be made to the Collector under letter (c), s. 95, and s. 30, Act XVIII of 1873, for the same reason. It is not a claim to recover a rent-free grant as being one of those declared by the Regulation to be null and void, nor is it a claim to assess the rent on the land.

The plaintiff wishes the defendant to give up the land or pay rent. The defendant repudiates the plaintiff's superior title, and claims that he has acquired a proprietary right in the plot which has been in the possession of himself and his family for two hundred years. Clearly there is a dispute between the parties which it is the special duty of the Civil Courts to determine. The plaintiff now regards the defendant, who is no longer watchman, as a trespasser; the latter asserts his full proprietary right in the plot. The Courts below are bound to determine the party to whom the right belongs and to decide the case on all its merits.

I would therefore decree the appeal, reverse the decision of the lower appellate Court, and remand the case for trial on the merits by that Court, should it find materials on the record to enable it to do so; but if it should appear that the first Court has excluded evidence of fact essential to the determination of the rights of the parties, the lower appellate Court is at liberty to reverse the decree of the first Court. Costs to abide the result of a new trial.

STRAIGHT, J.—I concur fully in the above judgment of my honorable colleague.

Cause remanded

Before Mr. Justice Spankie and Mr Justice Straight.

MARKUNDI DIAL (PLAINTIFF) v. RAMBARAN RAI AND ANOTHER
(DEFENDANTS),*

Sale of proprietary rights in a Mahál—Right of occupancy—Ex-proprietary tenant—Act XVIII of 1873 (N.-W. P. Rent Act), ss. 7, 9.

The right of occupancy which a person losing or parting with his proprietary rights in a mahál acquires, under s. 7 of Act XVIII of 1873, in the land held by him as sfr in such mahál at the date of such loss or parting, is a saleable interest.

* Second Appeal, No. 997 of 1879, from a decree of Maulvi Muhammad Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 22nd May, 1879, modifying a decree of Maulvi Mir Badshah, Munsif of Saidpur, dated the 17th February, 1879.

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Held, where such a right was sold by private sale, that it was transferable, s. 9 of Act XVIII of 1873 notwithstanding. *Umruo Begam v. The Land Mortgage Bank of India* (1) followed.

A deed executed by a village proprietor purporting to transfer his share in the village including his sir-land and ex-proprietary right divests such proprietor of the ex-proprietary right conferred by s. 7 of Act XVIII of 1873.

THE plaintiff claimed nineteen bighas, two biswas, of land, under a deed of sale dated the 9th April, 1878. At the time of the sale this land was held by the defendants as sir-land. The deed of sale purported to transfer the share of the defendants in a certain mahál including their "sir-land" and their "ex-proprietary rights." The plaintiff alleged that the defendants were holding the land as trespassers. The defendants set up as a defence to the suit that they held the land under a right of occupancy in virtue of the provisions of Act XVIII of 1873; that they did not acquire such right until after the date of the sale to the plaintiff, and therefore such right did not pass under that sale; that, under s. 9 of Act XVIII of 1873, such right was not transferable; and that the suit was not cognizable by the Civil Courts. The Court of first instance allowed their contention, and, holding that the suit was not cognizable by the Civil Courts, returned the plaint to the plaintiff to be presented in a Court of Revenue. On appeal by the plaintiff the lower appellate Court held that the suit was cognizable by the Civil Courts, but dismissed it on the ground that the defendants held the land as occupancy-tenants and not as trespassers, and could not be dispossessed, holding that, inasmuch as the defendants only acquired the right of occupancy under s. 7 of Act XVIII of 1873 after the date of the sale of their share, that right did not pass under that sale to the plaintiff, and further that that right, under s. 9 of that Act, was not transferable.

The plaintiff appealed to the High Court, contending that the defendants were competent to transfer their occupancy-rights as ex-proprietary tenants, and having transferred such rights to her, she was entitled to the possession of the land in suit.

Munshi Hanuman Prasad, for the appellant.

The *Senior Government Pleader* (Lala Juala Prasad), for the respondents.

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The following judgments were delivered by the Court :

SPANKIE, J.—The defendant, as lambardar, sold his share including the “sír” and “ex-proprietary rights” to the plaintiff. The lower appellate Court holds that he could not dispose of the ex-proprietary right, as it had not accrued until the defendant had transferred his share in the estate to the plaintiff.

The wording of s. 7, Act XVIII of 1873, is to the following effect, “that every person who may hereafter lose or part with his proprietary rights in any mahál shall have a right of occupancy in the land held by him as sír in such mahál at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants at will for land of similar advantages.” The second paragraph goes on to say that “persons having such rights of occupancy shall be called ex-proprietary tenants and shall have all the rights of occupancy-tenants.”

It is true that the general rule is that the subject of sale must belong to the vendor and that he can sell no more than the interest which he legally possesses. But it appears to me that s. 7 of the Act recognizes from the date of its passing that a proprietor has a right of occupancy in land held by him as “sír,” and reserves it to him, if he pleases, upon the terms provided by the section. The vendor was at liberty to sell his sír-land, and I do not think that s. 7 debars him from selling the interest reserved to him by the Act, namely, the right to occupy the land at a favourable rate of rent. This seems to me to be an interest created from the date of the passing of Act XVIII of 1873, and an expectancy which he might dispose of along with the sír and his proprietary share. It also seems to me that it is erroneous to refer to the right as that of an “ex-proprietary tenant.” Persons who have such rights of occupancy as those described in s. 7 *shall be*, the Act says, *called* ex-proprietary tenants and shall have all the rights of occupancy tenants. They are so called to distinguish them from the occupancy-tenants described in s. 8. What s. 7 recognizes is a right

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of occupancy that has always perhaps been inherent in the proprietor of a share, a right to occupy a portion of the lands as his sîr, either for his own cultivation, or to sublet them to others. Whether this be so or not, that he has a recognized interest in the right to occupy the land held by him as sîr, in the event of his losing or parting with his proprietary rights in the mahâl, would appear to be quite clear. How far the second paragraph of s. 9 of the Rent Act would invalidate such a sale of the occupancy-right, as being contrary to law and policy, is another matter, which might have required fuller consideration. But I feel myself bound by the ruling of the Full Bench in *Umrao Begam v. The Land Mortgage Bank of India* (1), from which, however, I dissented. I am of opinion that the appeal should be decreed and that the case should go back to the lower appellate Court to be tried on the merits.

STRAIGHT, J.—I have had some doubt as to the proper construction to be put upon s. 7 of the Rent Act, but after very careful consideration, I agree with the view of Mr. Justice Spankie as stated in his judgment. I may add, that like him I feel bound by the decision of the Full Bench (1) referred to, though were the matter still an open one, I should hold the prohibition of s. 9 of the Rent Act to apply strictly.

Cause remanded.

Before Mr. Justice Pearson and Mr. Justice Straight.

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NARAINI KUAR (DEFENDANT) v. DURJAN KUAR AND OTHERS (PLAINTIFFS)*

NARAINI KUAR (DEFENDANT) v. PIAREY LAL AND OTHERS (PLAINTIFFS)*

Addition of parties—Act X of 1877 (Civil Procedure Code), s. 32.

Held, reading ss. 28, 29, and 32 of Act X of 1877 together, that, where an application is made under s. 32 for the addition of a person whether as plaintiff or defendant, such person should, as a general rule, be added, only where there are questions directly arising out of and incidental to the original cause of action, in which such person has an identity or community of interest with the original plaintiff or defendant.

(1) I. L. R., 2 All., 451.

* First Appeals, Nos. 101 and 102 of 1879, from orders of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 4th July, 1879.