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respondents to that portion of the property which was purchased by the appellants, and to the extent of the claim which has been successfully resisted by defendants, the plaintiffs will pay costs in all the Courts. The plaintiffs will be entitled to a decree in respect of the share purchased by Bali against the vendor-defendant and Bali, defendant, with costs, to that extent, incurred in the Court of first instance, on condition of the plaintiffs depositing in that Court the sum of Rs. 46 for payment to Bali, defendant, within one month from the date when this decision reaches that Court, otherwise the suit in this respect also will stand dismissed with costs.

The decree will be prepared in the above terms with reference to s. 214 of the Civil Procedure Code.

OLDFIELD, J.—I concur.

*Appeal allowed.*

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*May* 26.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*

DEOKI NANDAN (DEFENDANT) *v.* DHIAN SINGH (PLAINTIFF). *

*Sir land—Ex-proprietary tenant—Nature of the right of occupancy—Act XII of* 1881 *(N.-W. P. Rent Act), s. 7—Trees.*

In a suit for recovery of possession of zamindari property conveyed by a sale deed, including certain plots of land which were the defendant-vendor's *sir*, the lower Courts held, with reference to s. 7 of the North-West Provinces Rent Act (XII of 1881), that the defendant was entitled to hold possession of the said plots as ex-proprietary tenant, but as it appeared that they had fruit and other trees upon them, the Courts awarded the plaintiff possession of these trees on the ground that the nature of an ex-proprietary tenure did not entitle the holder to resist a claim of this kind as to the trees upon the land forming the area of such tenure.

*Held* that this decision was erroneous, and that the plaintiff's claim to possession of the trees upon the plots in question must be dismissed.

*Per* MAHMOOD, J., that the principle of the maxim *cujus est solum ejus est usque ad cœlum* was applicable to the case by way of analogy, and that an ex-proprietary tenant had all the rights and incidents assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy-tenure by the statute which created it, and that hence he would be entitled to the trees on the land, and to use them as long as the tenure existed. *Bibee Sohodwa* v. *Smith* (1), *Narendra Narain Roy Chowdhry* v. *Ishan Chandra Sen* (2), *Gopal Pandey* v.

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* Second Appeal No. 1632 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 12th June, 1885, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 5th November, 1884.

(1) 12 B. L. R. 82. (2) 13 B. L. R. 274.

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*Parsotam Das* (1), *Goluck Ram* v. *Nuba Soondurce Dassee* (2), *Shaikh Mahomed Ali* v. *Bolakee Bhuggut* (3), *Ram Baran Ram* v. *Salig Ram Singh* (4), and *Debi Prasad* v. *Har Dyal* (5), referred to.

Also *per* MAHMOOD, J., that it would be impossible to give effect to the lower Courts' decrees without disturbing the ex-proprietary tenant's rights, for if the plaintiff were entitled to possession of the trees, he would be entitled to enter upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect.

THE plaintiff in this case sued the defendant for *inter alia* possession of three plots of garden land and the trees thereon situated in a village called Thawan. These plots were numbered in the village papers 1021, 1024, and 1039. He claimed by virtue of the purchase from the defendant, under a sale-deed, dated the 13th September, 1883, of the defendant's proprietary rights in the village to the extent of an 8 gandas share, together with the trees, groves, and all the rights and interests thereto appertaining. The defence to the suit was that the land was the defendant's *sir*-land at the time of the sale to the plaintiff, and he was entitled to retain possession of it, as also of the trees, as an ex-proprietary tenant, under the provisions of s. 7 of the North-Western Provinces Rent Act (XII of 1881). The Court of first instance (Munsif of Allahabad) held that plots Nos. 1021 and 1039 were the defendant's *sir*-land at the time of the sale, and that therefore he was entitled to the possession of these plots, as an ex-proprietary tenant, under the law mentioned above, but that the plaintiff was entitled to the possession of the trees, as the defendant had sold all the trees, and trees did not come within the operation of s. 7 of the Rent Act. The Court accordingly dismissed the plaintiff's claim for possession of lands Nos. 1021 and 1039, but directed that "the plaintiff should be put in possession of the trees."

The defendant appealed, and the lower appellate Court (District Judge of Allahabad) held that the defendant was not entitled to retain the trees, having sold them to the plaintiff.

The defendant preferred this second appeal on the ground that the land being *sir*, and being occupied by the trees in dispute, he was entitled to retain possession of such trees as long as they existed.

(1) I. L. R., 5 All., 121.
(2) 21 W. R. 344.
(3) 24 W. R. 330.
(4) I. L. R., 2 All. 896.
(5) I. L. R., 7 All. 691.

Lala *Jokhu Lal*, for the appellant.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the respondent.

MAHMOOD, J.—In this case I think it is necessary to recapitulate the essential facts in order to indicate the point of law which we are called upon to determine.

The defendant was the owner of a twelve-ganda share of the zamindari interests in a village. Out of that property he, on the 13th September, 1883, executed a sale-deed as to an eight-ganda share, which he conveyed to the present plaintiff with all rights appertaining thereto, including *sir*-lands and *sayar* items, in consideration of Rs. 800. It appears, as stated by the plaintiff, that the latter, under the sale-deed, obtained possession on the 30th March, 1884. It is alleged that after this the defendant ousted the plaintiff, this being the cause of the present suit. The object of the suit was the recovery of possession of the whole property conveyed by the deed, including three plots, Nos. 1021, 1026, and 1039, on the ground that these also were included in and covered by the deed.

The Court of first instance framed two issues as to these plots in reference to a plea by the defendant to the effect that these plots were his *sir*, and that he was entitled, under s. 7 of the Rent Act, to hold them as an ex-proprietary tenant. The Court held that out of the three plots, Nos. 1021 and 1039 were found to be the defendant's *sir*-lands, and that, as such, the defendant was entitled to hold possession of them as an ex-proprietary tenant. With respect to the remainder, *i.e.*, the larger portion of the suit, the Court decreed the claim; but with respect to the two plots I have mentioned, the provisions of the statute prevailed, and the plaintiff was held not entitled to oust the defendant from possession. At the same time, as it appeared that these two plots had fruit and other trees upon them, the Court decreed the claim in such a manner as to award the plaintiff possession of those trees. The plaintiff does not appear to have appealed, but the defendant did so to the District Judge. The lower appellate Court has upheld the findings of the first Court upon grounds stated in the judgment, namely, that the nature of an ex-proprietary tenure

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does not entitle the holder to resist a claim of this kind as to the trees on the land which forms the area of that tenure. The lower appellate Court, therefore, affirmed the first Court's decree, and hence this second appeal has been preferred on the ground thus stated in the memorandum of appeal:—"The decision of the learned Judge is against the principle of ex-proprietary tenancy-right, inasmuch as when the land in suit is *sir*, and is occupied by trees, the appellant had a right to retain possession of them while the trees exist." The case, as it has been argued, rests upon this single question, and my conclusion is that the contention has force and the appeal should prevail. It seems to me that the question in the case is one of first impression; that is to say, I am not aware of any decision of this or any other Court in which there is a specific ruling on the subject. I consider it my duty, therefore, to express my views as fully as may be necessary for the purpose of settling the law. In the first place, it is necessary to bear in mind the exact nature of the right of occupancy held by an ex-proprietary tenant in these Provinces. That right is regulated by s. 7 of the Rent Act, which provides as follows:—"Every person who may hereafter lose or part with his proprietary rights in any mahal, shall have a right of occupancy in the land held by him as *sir* in such mahal, 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 quality and with similar advantages. Persons having such rights of occupancy shall be called 'ex-proprietary tenants.'" Here then is a statement in clear terms of what are to be the rights of those who, having once been owners of a mahal in whole or in part, cease to be so; and the section ends by saying that these rights in their *sir*-lands are to be those which are enjoyed by occupancy-tenants. At this point I think it will be useful to trace the history of the occupancy-tenure in the Bengal Presidency. I may first refer to the judgment of Phear, J., in *Bibee Sohodwa* v. *Smith* (1) in which a question having arisen as to the nature of the occupancy-right, that learned Judge said:—"This right, resting upon legislation and custom alone, is not derived from the general proprietary right given to the zamindar by the Legislature, but is, as I

(1) 12 B. L. R. 82.

understand, in derogation of, and has the effect of cutting down and qualifying, that right. I may say that in my conception of the matter, the relation between the zamindar's right and the occupancy-ryot's right is pretty much the same as that which ob tains between the right of ownership of land in England and the servitude or easement which is termed *profit à prendre.* It appears to me that the ryot's is the dominant and the zamindar's the servient right. Whatever the ryot has, the zamindar has all the rest which is necessary to complete ownership of the land, subject to the occupancy-ryot's right, and the right of the village, if any, to the occupation and cultivation of the soil, to whatever extent these rights may in any given case reach. When these rights are ascertained, there must remain to the zamindar all rights and privileges of ownership which are not inconsistent with or obstructive of them." These observations are fully applicable in principle and by way of analogy to the occupancy-rights existing in these Provinces. The next case I wish to refer to is the decision of the Full Bench of the Calcutta High Court in *Narendra Narain Roy Chowdhry* v. *Ishan Chandra Sen* (1) in which, though in some respects differing from the conclusions of Phear, J., in the case I have quoted, his *ratio decidendi,* and his views as to the nature of the occupancy-right in Bengal were generally adopted. These rulings are important, because the right of occupancy in these Provinces was created at the same time and by the same legislation as in Bengal. The next case is *Gopal Pandey* v. *Parsotam Das* (2). I refer to my judgment in that case, because I was in a minority of one, and my observations have not been summarized in the head-note of the report. After referring to the two cases cited above, I said (at p. 131) that "in the case of an occupancy-tenant the right which the Legislature has conferred upon him is such as subject to the limitation prescribed by the statute, prevails against all the world. The subject of the right is the land held by the tenant, and whatever changes the ownership of that land may undergo, the occupancy-right subsists in, and goes with, the land."

Then, after referring to a ruling of the Sudder Board of Revenue, I went on to say:—"I confess I am unable to take any such view. It seems to me to be based upon what, I cannot help feel-

(1) 13 B. L. R., 274. (2) I. L. R., 5 All., 121.

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ing, is a misconception of the nature of the occupancy-right. I have already endeavoured to show, by introducing a comparison between the occupancy-right of an Indian cultivator and the *emphyteusis* of the Romans, that the right, as now defined by the statute, is, subject to its own limitations, as much a real and subsisting right as any other kind of estate carved out of the full ownership of land." The rest of the judgment refers to other matters with which we are not now concerned. I still adhere to the views which I then expressed, and I incorporate them in my present judgment because, in dealing with questions of this kind, I understand that the Mufassal Courts suppose my judgment to have been dissented from, upon all points, by the other members of the Full Bench. My view, as I was not at that time aware, is also supported by the decision in *Goluck Ram* v. *Nuba Soonduree Dassee* (1), where the Judges again compared one kind of tenure in Bengal to the *emphyteusis* of Roman law. Again, there is the case of *Shaikh Mahomed Ali* v. *Bolakee Bhuggut* (2) in which the *ratio* of the judgment of Mitter, J., is in keeping with the view which I entertain, for it was there held that the trees were included in the lease relating to the land on which they stood. Again, I may refer to *Ram Baran Ram* v. *Salig Ram Singh* (3) where the Judges of this Court expressed the view that, by virtue of one incident of the occupancy-right, the trees acceded to the soil, and were liable to be dealt with by the occupancy-tenant, unless something happened to bring his tenure to an end.

No ruling upon the exact point here has been cited before us. The question after all depends mainly upon the interpretation to be placed upon the word "land" in s. 7 of the Rent Act. This is a word which has a very specific legal signification. In the first place, I refer to a passage on p. 420 of Maxwell's work on the "Interpretation of Statutes," where it is said :—"The word 'land' includes messuages, tenements and hereditaments, houses, and buildings of any tenure unless there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure." In India, we have a definition of the expression "immoveable property" in s. 3 of the Transfer of Property Act, in which timber

(1) 21 W. R. 344. (2) 24 W. R. 330.
(3) I. L. R., 2 All. 896.

is excluded from the notion of land—an interpretation which is special to the Act, and which would go to show, if anything, that the word "land" was of wider meaning than the framers of the Act intended should be attached to the term "immoveable property." In the Oudh Rent Act, s. 13, the word "land" is again defined very broadly. Again, s. 2, cl. 5 of the General Clauses Act, defines the term "immoveable property" in a manner which, though it tends to support my view, is not conclusive on the question. This being so, I think myself entitled to decide the question by reference to first principles. At p. 293 of Broom's "Legal Maxims," the following remarks occur:—"Not only has land in its legal specification an indefinite extent upwards, but in contemplation of law it extends also downwards, so that whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface; and hence the word 'land', which is *nomen generalissimum*, includes not only the face of the earth but everything under it or over it; and, therefore, if a man grants all his lands, he grants thereby all his mines, his woods, his waters, and his houses, as well as his fields and meadows." The author proceeds to say that this general meaning may be varied by special circumstances, such as the terms of a grant, and, I suppose, equally by the provisions of a statute. The maxim is *cujus est solum ejus est usque ad cœlum.* It appears to me that this maxim is based on sound principles, which are fully applicable to this country.

I must not be understood as holding that the occupancy-rights of an ex-proprietary tenant is such as to render that maxim, which is of peculiar importance in England, fully applicable in a matter of this kind. All I say is that the principle underlying the maxim is applicable to a case like this by way of analogy; and I am prepared to hold that an ex-proprietary tenant has all the rights assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy-tenure by the statute which creates it. The Rent Act, in s. 34, cl. (c) (1) provides that no tenant (and, *á fortiori,* no occupancy-tenant) is to be ejected from his holding for any act or omission "which is not detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let." Then s. 93 (*b*) provides for

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"suits to eject a tenant for any act or omission detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let," implying that even a tenant who has an occupancy-right may be ejected. Further, s. 149 provides that "whenever a decree is given for the ejectment of a tenant, or the cancelment of his lease, on account of any act or omission by which the land in his occupation has been damaged or which is inconsistent with the purpose for which the land has been let, the Court may, if it think fit, allow him to repair such damage within one month from the date of the decree, or order him to pay such compensation within such time, or make such compensation within such time, or make such other order in the case as the Court thinks fit; and if such damage be so repaired or compensation so paid, or order obeyed, the decree shall not be executed." So that even if the occupancy-tenant perverts the land, he is not liable to ejectment if he gives compensation.

I refer to these provisions in order to show that the intention of the Legislature was to make the occupancy-tenure as near as possible to full ownership. In support of this view I may refer to my own judgment in *Debi Prasad* v. *Har Dyal* (1), in which I said that a mortgage of his holding by an occupancy-tenant was not in defeasance of the occupancy-tenure, the words of the statute referring not to dealings of this kind, but to physical misuse of the property. Subject to these restrictions, I hold that the occupancy-tenant practically enjoys the incidents of the ownership of the land, and if so he is entitled to the trees on the land, and to use them as long as the tenure exists.

In the present case, the defendant pretended to convey his *sir*-land. Under s. 9 of the Rent Act the sale would be void so far as it purported to operate in defeasance of the occupancy-right. Under the circumstances the Courts below were wrong in holding that the trees did not form part of his tenure, and in saying that possession might be given to the plaintiff-vendee as proprietor of the trees without disturbing the defendant's ex-proprietary tenure. It would be impossible to give effect to such decree without disturbing the ex-proprietary tenant's rights, because if the plaintiff was entitled to possession of the trees, he would be entitled to enter

(1) I. L. R., 7 All. 691.

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upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect. Supposing the whole of this land were covered by trees, and possession of the trees was given to the plaintiff, the ex-proprietary tenure would practically be defeated.

For these reasons I would decree the appeal, and direct that the decrees of both Courts be so modified as to dismiss the plaintiff's claim, so far as it seeks possession of the trees within the two plots Nos. 1021 and 1039, which have been found to be *sir*, and that costs in all Courts, as regards this particular part of the subject-matter, be allowed to the defendant-appellant in proportion to the amount involved. Beyond this I would not disturb the first Court's decree.

STRAIGHT, Offg. C. J.—I concur in my brother Mahmood's conclusions as to the proper order to be passed in this case.

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1886 May 27.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*

MANGU LAL AND OTHERS (DEFENDANTS) v. KANDHAI LAL AND ANOTHER (PLAINTIFFS). *

*Act XV of 1877 (Limitation Act), s. 14—"Prosecuting"—"Good faith"—"Other cause of a like nature"—Limitation Act, construction of.*

In October, 1881, an account was struck between *K* and *M*, and a sum of Rs. 1,457 was agreed between them to be the correct balance then due by the latter to the former. Of this amount, a sum of Rs. 885 was paid. In March, 1885, *K* sued *M* for the balance of Rs. 600 then due on the account stated. The plaintiff claimed the benefit of s. 14 of the Limitation Act (XV of 1877) as suspending the running of limitation during the pendency of a former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain zamindari property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October, 1881.

*Held* that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court which, for want of jurisdiction, or other cause of a like nature, was unable to entertain it; that the provisions of s. 14 of the Limitation Act therefore were not applicable; and that the suit was barred by limitation.

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* Second Appeal No. 1636 of 1885, from a decree of Mirza Abid Ali Khan, Subordinate Judge of Sháhjahánpur, dated the 17th June, 1885, reversing a decree of Rai Bahal Rai, Munsif of Shahjahánpur, dated the 18th April, 1885.