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## APPELLATE CIVIL.

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

HARJAS AND OTHERS (DEFENDANTS) v. RADHA KISHAN (PLAINTIFF). \*

*Sir-land—Ex-proprietary tenancy—Act XII of 1881 (N.-W. P. Rent Act), s. 7.*

The words "held by him as *sir*" in s. 7 of Act XII of 1881 (N.-W. P. Rent Act) must be construed to mean land belonging to him, or to which he was entitled, as *sir*; and as literal an interpretation should be placed upon these words as is consistent with the canons of construction.

In 1879, one of the defendants sold a one-third share of certain *sir-land* in a village to the plaintiff, who, at that time, was in cultivatory possession thereof under a deed of mortgage executed in his favour by the same defendant in 1877. The plaintiff alleged that, after the sale, he continued in possession of the *sir-land* till 1884, when he was dispossessed thereof by the defendants. He sued for recovery of possession of the land.

*Held* that the defendants, being ex-proprietary tenants of the land in dispute, were entitled to hold possession thereof, by operation of law, with reference to the terms of s. 7 of the N.-W. P. Rent Act; and the plaintiff's contention that because for four or five years the defendants failed to assert their ex-proprietary tenant rights, they were debarred from doing so, could only be well founded if there had been any provision either in the Limitation Act or the Rent Act creating such a disability.

*Held* also that, notwithstanding the fact that the plaintiff was in possession of the land in dispute as mortgagee at the time of the sale, and continued in possession afterwards, his vendor must be taken to have "held" the land as his *sir* at the time of the sale of his proprietary interest, within the meaning of s. 7 of the Rent Act.

THE plaintiff in this suit, on the 29th July, 1879, purchased from Didari, defendant, a one-third share of 39 bighas and 10 biswas of *sir-land* situate in manza Tawaya, which jointly belonged to Didari and his two brothers, Hazari and Harjas. These two persons were defendants in the Court of first instance. Hazari died subsequently to the passing of the decree of that Court, as likewise Didari. It appeared that at the time of this sale the plaintiff was in cultivatory possession of the land representing Didari's share under a mortgage from the latter, dated the 3rd September, 1877. The plaintiff alleged that he continued in possession till July, 1884, when Didari wrongfully dispossessed him at the

\* Second Appeal No. 990 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 27th March, 1885, modifying a decree of Munshi Gauga Saran, Munsif of Saharanpur, dated the 6th December, 1884.

instigation of the other defendants, and he claimed, by reason of such dispossession, to recover the land and mesne profits. The defendant Didari set up as a defence that under s. 7 of the N.-W. P. Rent Act he was entitled to possession of the land as an ex-proprietary tenant.

The Court of first instance (Munsif of Saháranpur) held that although the plaintiff had been allowed to remain in possession after the sale, his dispossession and Didari's entry on the land was not wrongful, inasmuch as the plaintiff had not acquired possession by virtue of the sale, and as Didari was entitled to possession as an ex-proprietary tenant from the date of the sale. It found that "there was nothing to show that Didari surrendered or relinquished such right"; and that it was in all probability because he was ignorant of his right, that he did not at once avail himself of it, but allowed the plaintiff to remain in possession. It therefore dismissed the suit.

On appeal by the plaintiff, the District Judge of Saháranpur held that the defendant Didari was not justified in dispossessing the plaintiff, notwithstanding that he might have acquired the right of an ex-proprietary tenant, and from the time of the sale, inasmuch as the plaintiff had remained in possession for four or five years after the sale, and that Didari's proper course was to apply to the Revenue Court to have it determined that he was an ex-proprietary tenant, and to have his rent fixed, and to recover possession. For these reasons the District Judge gave the plaintiff a decree for possession of the land.

The heirs of Didari and Hazari and the defendant Harjas appealed to the High Court.

Munshis *Hanuman Prasad* and *Madho Prasad*, for the appellants.

*Shah Asad Ali*, for the respondent.

STRAIGHT, Offg. C. J.—This is a suit brought by the plaintiff-respondent upon the strength of a deed of sale dated the 29th July, 1879, to recover possession of one-third of a ten-biswansis share, which had been conveyed to him by the sale-deed executed by Didari, who was one of the three sharers who owned that ten bis-

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wansis share. The defence to the suit was that the land claimed by the plaintiff was the *sir*-land of the defendant, and that at the time of the sale of the one-third biswansis share he held it as his *sir*, and that by the operation of law he became the ex-proprietary tenant of the land. Now it is conceded that the defendants are the ex-proprietary tenants of the land in suit, and apparently the only contention seriously put forward on behalf of the plaintiff is, that because for four or five years the defendant failed to assert his ex-proprietary tenant rights, he is debarred from doing so now. But such a contention could only be a well-founded one had there been any provision either in the Limitation Act or the Rent Act creating such a disability. It has also been urged for the plaintiff that, inasmuch as he was in possession of this land as mortgagee at the time of sale, and continued to hold it afterwards, Didari, his vendor, did not "*hold*" the land as his *sir* at the time of the sale of his proprietary interest within the meaning of s. 7 of Act XII of 1881. I do not concur in the construction which the learned pleader for the respondent places upon this section. I think that the words "*held by him as sir*" must be construed to mean land belonging to him, or to which he was entitled, as *sir*. In my opinion, we ought to give as liberal an interpretation as is consistent with the canons of construction to these words. Otherwise it is easy to foresee how the door may be opened to the very mischief at which the Act aimed, by sales in future being preceded by a possessory mortgage of the land subsequently conveyed, so that the purchaser should be in possession of the *sir* at the date of sale, and thus be able to say that he and not the ex-proprietor held it at that time. Thus the provisions of the statute would be easily evaded. I think that this appeal must be decreed, and the decree of the first Court restored with costs in all Courts.

MAHMOOD, J.—I entirely concur in the order proposed by the learned Chief Justice, but I wish to add a few words. It is admitted by the plaintiff that the defendants are in possession of the land, which is the subject-matter of the suit. It is also granted that the only title on the basis of which the plaintiff claims this land, is the sale-deed dated the 29th July, 1879. It seems to me that upon this state of things much less depends upon what the defendants can show than upon the title which the plaintiff can show.

The learned District Judge seems to take it for granted that Didari was an occupancy-tenant, but had ceased to be so by the operation of some rule of law, of which I am not aware, and which the learned Judge does not mention in his judgment. If we were to allow the judgment of the learned Judge to stand, we would be turning out of possession a person who is entitled to hold possession of the land sold by the operation of law. I entirely concur in, and fully accept, the interpretation placed by the learned Chief Justice upon s. 7 of Act XII of 1831. It seems to me that the plaintiff's title to the possession of the land fails, and his case must therefore fail.

*Appeal allowed.*

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

HAZARI AND OTHERS (DEFENDANTS) v. CHUNNI LAL (PLAINTIFF).

*Surety—Act IX of 1872 (Contract Act), ss. 134, 137, 139, and 141.*

A decree-holder, in execution-proceedings, agreed to accept payment of the decretal amount by the judgment-debtors in annual instalments. He also accepted from certain other persons a surety-bond in the following terms:—"In case of default of paying the instalments, the whole decretal money, with costs and interest at 8 annas per cent., shall be executed after one month; and for the satisfaction of the decree-holder we, the executants, stand as sureties of the judgment-debtors." The judgment-debtors paid five instalments and then made default. The decree-holder omitted to apply for execution, and the decree became time-barred. He then sued the sureties to recover the amount of the decree.

*Held* that the terms of the bond requiring the creditor to execute his decree within one month were peremptory, and imported much more than the usual agreement under such circumstances, that the decree-holder might execute his decree, if he pleased, on a default; that the legal consequence of his omission to execute the decree being the discharge of the principal debtors, the sureties would, under s. 134 of the Contract Act, stand discharged likewise; that his action was much more serious than "mere forbearance" in favour of his debtors, in the sense of s. 137; that he had done an act inconsistent with the equities of the sureties and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired (s. 139); that he had deprived the sureties of the benefit of the security constituted by the decree; that they were therefore discharged to the extent of the value of that security (s. 141); and that the suit must consequently be dismissed.

\* Second Appeal No. 1162 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 22nd May, 1885, reversing a decree of Maulvi Muhammad Nasirullah Khan, Subordinate Judge of Jaunpur, dated the 15th January, 1885.

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