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The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The evidence has been placed before us, and we think that the conclusion to which the lower Court has come on that evidence is right. As regards the question of law which has been argued, *viz.*, that the present case does not come within the purview of s. 210 of the Indian Penal Code, because the satisfaction of the decree was of such a nature as could not be recognized by the Court executing the decree, we do not think that that contention is valid. The words of the section are: "Whoever fraudulently causes a decree to be executed against any person after it has been satisfied, &c." The words "after it has been satisfied" indicate, in our opinion, the fact of its satisfaction. Merely because the satisfaction is of such a nature that the Court executing the decree could not recognise it would not take the case out of the purview of the section. We therefore dismiss this appeal.

H. T. H. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Beverley.

GUR BUKSH ROY *alias* GUR BUKSH SINGH (PLAINTIFF) *v.* JEOLAL ROY AND OTHERS (DEFENDANTS).* 1888 *December* 20.

Right of occupancy—Purchase by tenant of fractional share of proprietary interest, Effect of, on acquisition of right of occupancy—Beng. Act VIII of 1869, *s.* 6.

A tenant, who had commenced to occupy his holding on the 13th April 1871, acquired by purchase in the year 1878 a fractional share of the proprietary interest, and continued to occupy the holding as ryot till the 13th May 1885, when he was dispossessed. On the 30th March 1886 he instituted a suit to recover possession, alleging that he had acquired a right of occupancy. It was contended that owing to the purchase of the share of the proprietary interest he could not have acquired such right.

Held, that under Beng. Act VIII of 1869 there was nothing to prevent such right being acquired by the plaintiff if after his purchase he continued

* Appeal from Appellate Decree No. 1062 of 1888, against the decree of Baboo Upendro Chunder Mullick, Subordinate Judge of Bhaugulpore, dated the 24th of March 1888, affirming the decree of Baboo Bemola Churn Mozumdar, Munsiff of Beguserai, dated the 22nd of December 1886.

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to hold the land as a ryot, and if the relation of landlord and tenant existed between himself on the one hand and the proprietors on the other, and if the period for which he so held extended for twelve years from the date of the commencement of his holding.

IN this suit the plaintiff sought to recover possession of some 4½ bighas of land, alleging that he held the same as tenant and had acquired a right of occupancy therein, and that the defendants had illegally dispossessed him therefrom.

He alleged that 7 bighas—made up of the 4½, the subject of this suit, and 2½ bighas, the subject of an analogous suit against other defendants,—appertained to mouzah Madhurapur and lay in a four-anna *putti* which had been divided by metes and bounds from the other *putti*, and were held by him under a settlement from the former malik, which took place in 1277, taking effect from the 1st Bysack 1278 (13th April 1871). The only question decided in the suit by the lower Courts amongst those in issue on the pleadings was whether the plaintiff had acquired a right of occupancy or not as claimed by him, and the only witness examined by the Munsiff in the case was the plaintiff himself. Upon his evidence the Munsiff dismissed the suit, holding that the plaintiff had not acquired a right of occupancy and could not therefore succeed.

It appeared that in 1285 (1878) the plaintiff purchased a half share in the proprietary interest of the mouzah in the name of his son, and that he had been paying the rent of the entire *jumma* to the several maliks, the collections being made by the putwaris of Raghu Nath, the former proprietor, prior to the purchase of the 8-anna share by the plaintiff, and since such purchase to the putwaris of the purchaser of the other half share and himself, there being only one collection. The suit was instituted on the 30th March 1886, the dispossession complained of being stated to have taken place on the 1st Jeyt 1292 (13th May 1885). Upon the above facts the Munsiff, without going further into the case, held that, as the plaintiff had not acquired a right of occupancy at the date of his purchase of the half share in 1878, he could not be held to have acquired such right at all, as he could not acquire such right as against himself. He accordingly dismissed the suit.

The lower Appellate Court affirmed that decree, and the material portion of the judgment of the Subordinate Judge was as follows

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"There is no doubt that plaintiff could not acquire a right of occupancy from 1278 to 1285, *viz.*, within a period of about seven years, so that at the time of the purchase of the half share of the malik the plaintiff had no right of occupancy. The question next to be seen is whether after the purchase of the proprietary interest (8 annas) of the malik the plaintiff could reckon the subsequent portion of his occupancy for the purpose of creating such right. I think, regard being had to the clear provision of s. 22 of the Tenancy Act, the plaintiff could not tack the period for the purpose of a right of occupancy. A ryoti holding merges in the proprietary interest after the purchase of the latter. A man cannot occupy the double character of landlord and ryot, or make a pretence of paying rent to himself for the purpose of acquiring a right of occupancy—*Lal Bahadoor Singh* v. *Solano* (1). The same principle applies if the holder of the landlord's fractional interest acquires an occupancy right. It is to be determined now whether the plaintiff, having no right of occupancy, is entitled to succeed. I think not. The present suit is not of a possessory character brought within six months, as provided in the Specific Relief Act; he has undoubtedly brought this suit upon title, and failing which he is not entitled to recover—*Debi Churn Boido* v. *Issur Chunder Manjee* (2); see also s. 87, cl. 3, Act VIII of 1885. It is true that under s. 89 of the Act no tenant shall be ejected from his tenure except in execution of a decree; but if the tenant has been out of possession, either legally or illegally, by the admitted landlord, the former must make out a title or right to recover lands from the owner thereof, and in this case the plaintiff has failed."

The plaintiff appealed to the High Court.

Dr. *Rash Behary Ghose* for the appellant.

Mr. *C. Gregory* and Baboo *Mahabeer Sahai* for the respondents.

The judgment of the High Court (MITTER and BEVERLEY, JJ.) was as follows:—

The question that we have to decide in this case is whether, upon the facts found by the lower Courts, the plaintiff has acquired a right of occupancy in respect of the land in dispute.

(1) I. L. R., 10 Calc., 45. (2) I. L. R., 9 Calc., 39.

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The facts of the case are these: The land in dispute lies within a four-anna divided *putti*. It lies wholly within that *putti*, that *putti* being divided by metes and bounds from the other *putti*. It is not stated in the plaint, but it appears from the deposition of the plaintiff who was the only witness examined by the Munsiff, that the land in dispute was let out to him from the beginning of the year 1278 or 1871. It further appears from that deposition that in the year 1878 he acquired by purchase a fractional share in the proprietary right of the *putti* itself. The present suit was brought on the 30th of March 1886, the plaintiff alleging dispossession by the defendants on the 1st Jeyt 1292, that is, some time in May 1885. Upon these facts the Munsiff, accepting them as established for the purpose of raising this question of law, decided that the plaintiff, after his purchase of a fractional share in 1878, could not acquire a right of occupancy. It is clear that if the Munsiff's view is not right the right of occupancy would be deemed to have been acquired by the plaintiff on the completion of twelve years possession, that is to say, some time in the year 1883.

The lower Appellate Court has referred to the provisions of s. 22 of the Bengal Tenancy Act; but, as shown above, if the Munsiff's view was not right, the right must have been acquired by the plaintiff under the old Act, namely, Beng. Act VIII of 1869. If after the Bengal Tenancy Act came into operation there was no such dealing with the property as would bring the present case within any of the clauses of s. 22, the provisions of that section would not be applicable; and there is no such case established by either party. Therefore we may put aside s. 22 altogether from our consideration. The question therefore is, whether under s. 6 of the old Act, namely, Beng. Act VIII of 1869, after the purchase by the plaintiff of a share in the zemindari, he could acquire a right of occupancy in the land in dispute if he continued to hold it after his purchase for twelve years from the date of the commencement of his holding. If after his purchase he was legally in possession of the whole of the disputed land as a ryot, and if the relation of landlord and tenant existed between himself on the one hand and the proprietors on the other, we see

no reason why, in the express words of s. 6, he should not be considered to have acquired a right of occupancy after completing his occupancy as a ryot for twelve years. The question of merger does not arise at all in this case. If he had been the proprietor of the entire zemindari, no doubt then in that case the question of merger would have arisen. But here the only right under which he held that share of the disputed land, which is not covered by the share of the zemindari interest which he purchased, was his ryoti title in respect of it. And therefore it must be considered that, unless that title was extinguished by operation of law, he continued to be a ryot in respect of the whole disputed land. We are not aware of any provision of law according to which his ryoti interest in respect of the whole of the disputed land would be extinguished by his purchase of a fractional share of the zemindari. In the case of *Jardine, Skinner & Co.* v. *Sarut Soondari Debi* (1) this question was considered both by the High Court (2) and their Lordships of the Judicial Committee. That was a suit brought by Rani Sarut Soondari to recover possession of a two annas eleven gundas share of upwards of 20,000 bighas of chur land. She was the owner of that fractional share of the zemindari in which the land in dispute in that case was situated. The claim in the suit was resisted upon two grounds: *First*, that under an ijara lease the defendants were entitled to retain possession of the land; and, *secondly*, that they had acquired a right of occupancy in the land because they held it as jotedars before the ijara was granted to them. The High Court was of opinion that the defendants' possession of the land in suit was not that of jotedars, but that they were in possession of it as ijaradars; and that Court further held that as ijaradars they could not create in themselves a right of occupancy. But the Court added that, "even if that were not so, it is impossible to say how the defendants could have acquired either a right of occupancy or a jotedari right in respect of an undivided share of an estate," that is to say, the Court was of opinion that, as the defendants were the ijaradars of a fractional share, and thus represented the zemindar as regards that share,

(1) L. R., 5 I. A., 164; 3 C. L. R., 140.
(2) 25 W. R., 347.

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their possession as jotedars, even if it be accepted as true as against the owners of an undivided fractional share, could not confer upon them a right of occupancy. But the Judicial Committee on appeal were of opinion that this view was not correct. They said: "Their Lordships do not concur in the view thus expressed by the High Court to the effect that a right of occupancy cannot be acquired in respect of an undivided share of an estate."

We are, therefore, of opinion that, if the plaintiff's case as stated in the plaint and supplemented by his deposition be established, he would be entitled to a decree on the ground that he has a right of occupancy in the land in suit. But the Munsiff did not take the other evidence of the plaintiff or any evidence on behalf of the defendants. We, therefore, set aside the decrees of the lower Courts and remand this case to the Court of first instance for completion of the trial.

Costs will abide the result.

H. T. H. *Appeal allowed and case remanded.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

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SHEONATH DOSS (DECREE-HOLDER) *v.* JANKI PROSAD SINGH AND OTHERS (JUDGMENT-DEBTORS.)*

Sale in execution of decree—Civil Procedure Code, 1882, *s.* 294—*Decree-holder Purchase by—Satisfaction pro tanto—Mortgagee not trustee for mortgagor in sale proceeds—Leave to bid at sale in execution when granted—Permission of the Court to decree-holder to buy—Practice.*

A mortgagee who has obtained a mortgage decree, and after obtaining permission to bid at the sale held in execution of such decree has become the purchaser, does not stand in a fiduciary position towards his mortgagor *Hart* v. *Tara Prasanna Mukherji* (1) distinguished. A mortgagee in such a position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court.

* Appeal from Order No. 360 of 1888, against the order of J. Tweedie, Esq., Judge of Shahabad, dated the 22nd of June 1888, modifying the order of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 24th of January 1888.

(1) I. L. R., 11 Calc., 718.