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there was nothing in the law to prevent him from transferring the case to another magistrate otherwise qualified to complete the proceedings. There the transfer was to a Magistrate of the first class competent to conduct proceedings under section 107 (1) of the Code. I do not think that Mr. Justice AIKMAN would have held that the District Magistrate was competent to transfer the case to a Magistrate of the third class. On both these grounds I hold that Captain Noel had no jurisdiction to pass an order requiring the applicants to give security for their good behaviour. I, therefore, set aside all the proceedings of Captain Noel and of the District Magistrate. Let the record be returned.

*Order set aside.*

## A PELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.*

BASDEO (PLAINTIFF) v. ULFAT RAI AND OTHERS (DEFENDANTS).  
*Adverse possession—Right acquired by—Expropriatory tenancy.*

*Semble* that although a lease-hold or an expropriatory interest can be acquired by adverse possession as against the person who is the lessee or the expropriatory tenant, yet where there never has been a lessee or an expropriatory tenant it is not possible to become such by adverse possession.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are fully stated in the judgement under appeal, which was as follows :—

“ This is a Second Appeal arising out of the following facts :—One Manik Chand died possessed of considerable landed property including one entire *mahal* in village Sarai Imilia. He died leaving a widow who held the property for her life-time. On her death Salik Ram, brother of Manik Chand, took possession of the whole ; but litigation followed between the said Salik Ram and the sons of two other brothers. The suit was referred to arbitration and resulted in a decree on an award passed on the 30th of January, 1891. By this decree the entire property of Manik Chand in Sarai Imilia was assigned to Ishri Prasad, the son of a third brother of Manik Chand. Ishri Prasad obtained formal possession under the decree. The present suit relates to certain plots of *sir* land appertaining to the *mahal* in question in Sarai Imilia. The plaintiff is the son of Ishri Prasad, the first defendant is the grandson of Sahk Ram, and along with him are impleaded as defendants certain persons

\* Appeal No. 9 of 1914 under section 10 of the Letters Patent.

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who are admittedly in actual cultivation of the land in suit as sub-tenants. The suit was brought for a determination of the nature of the tenancy and the amount of the rent. The latter portion of suit has failed under circumstances with which I am not now concerned. The dispute before me is between the plaintiff and the first defendant as to the nature of the tenancy. The latter has all along resisted the suit upon three alternative pleas :—

- (a) He says he has acquired proprietary rights in the land in suit by adverse possession for more than twelve years.
- (b) Failing this, he pleads that his possession has from the first been that of an exproprietary tenant by operation of law.
- (c) Failing this again, he pleads that by his long possession he has at least acquired the status of a tenant with rights of occupancy.

“The courts below have concurred in giving the plaintiff a decree that all the defendants (including defendant No. 1), hold as tenants-at-will without any kind of right of occupancy. The first defendant appeals to this Court, and I have also before me a cross-objection by the plaintiff challenging the propriety of the lower appellate courts’ order on the question of costs.

“The judgement of the lower appellate court is extremely unsatisfactory. The remark that, “Respondent (i.e., the plaintiff) does not now claim that they (i.e., the defendants) are mere trespassers,” can only be the result of some misunderstanding as to the precise nature of which I shall not hazard a conjecture. I do not find that the defendant appellant has ever abandoned any of the alternative pleas, as set forth above, upon which he all along contested the suit. Evidently the District Judge was not satisfied that this appellant continued in possession of the plots in suit claiming to be the proprietor of the same, and here perhaps I have before me something of the nature of a finding of fact which I ought to respect in second appeal. Moreover, such a finding seems to me correct on the evidence. The appellants and his predecessors in title, no doubt, continued in possession after the decree of 1891, in the sense that they continued to hold these plots of *sir* land and either to cultivate them personally or to sublet them. Ordinarily, exclusive possession is presumed to be adverse against the rightful owner to the fullest possible extent; but the circumstances of a case like this are peculiar. It was quite an arguable point whether the proceedings resulting in the delivery of formal possession under the arbitration decree did or did not operate so as to constitute Salik Ram an exproprietary tenant in respect of these *sir* plots. If Salik Ram and his descendants after him continued in occupation of these plots against the will of the plaintiff it is for them to make it clear what rights they were all along claiming in respect of the same, when they ask the court to hold that these rights, however disputable in their origin, have now ripened by prescription so that they are no longer assailable. I find that in 1907 Ishri Prasad called the attention of the Revenue Courts, on the mutation side, to the fact that the entries in the village papers, respecting the lands now in dispute were anomalous, and could not be correct as they stood. The Assistant Collector remarked that Gulab Rai (father of the defendant appellant) could have no proprietary rights in this land, and should be recorded as an exproprietary tenant of the same. Gulab Rai acquiesced in this order; it is the plaintiff

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(the son of Ishri Prasad) who is challenging it by means of this present suit. I have no doubt personally that if Ishri Prasad had at any time sued for the ejectment of Salik Ram or Gulab Rai as trespassers, he would have been met by a plea that they were exproprietary tenants. I accept, therefore, the finding of the courts below that the appellant has not acquired by adverse possession full proprietary rights in respect of this land.

"I am, however, quite unable to concur in the finding that the appellant is a mere tenant-at-will. The first question is whether an exproprietary tenancy was created by operation of law when Ishri Prasad obtained formal possession of the *mahal* in 1891.

"The courts below concur in finding that this is impossible, because the litigation of that year established the fact that Salik Ram's possession had been that of a mere trespasser. This, at any rate, I hold to be clearly erroneous. Salik Ram had entered into possession as nearer reversioner to Manik Chand, and *prima facie* he was a nearer reversioner in law than his nephews. We do not know on what principles the arbitrators proceeded when they affirmed the rights of the nephews to share in Manik Chand's estate. The whole transaction was of the nature of a family settlement, and I cannot interpret it as necessarily implying that Salik Ram's possession prior to 1891, much less his possession over the particular lands which were by this settlement assigned to one of his nephews, was that of a mere trespasser. The point is, however, debatable on other grounds. If the transaction of 1891 be regarded as in effect a partition of family property by mutual consent, I think the balance of authority in this Court would be against holding that exproprietary rights accrued in respect of the *sir* lands in suit, when the entire *mahal* was assigned to a single co-sharer. If the case turned on this point, it might be necessary for me either to remit an issue, or to enter into a more detailed examination of the evidence.

"I think it sufficient, however, to note that Salik Ram had, at any rate, some sort of an arguable claim to the status of an exproprietary tenant, and so proceed to consider what rights, if any, have accrued by prescription to Salik Ram and his descendants in virtue of their uninterrupted possession from 1891 onwards. A case very similar to the present was before this Court in *Maha Singh v. Khoshi Ram* (1). That case would be authority for holding that the appellant now before me has acquired at least the status of an occupancy tenant. It is objected on behalf of the plaintiff respondent that the land in suit is *sir*, and that occupancy rights cannot be acquired in *sir* land: and this point either did not arise or was not considered in *Maha Singh v. Khoshi Ram* (1). My own opinion is that the appellant in the present case must be held to have acquired the status of an exproprietary tenant by adverse possession for twelve years and more. I take it to be settled law that it is possible to acquire by adverse possession a right short of full proprietorship. If it be conceded, as I have conceded in favour of the plaintiff, that Salik Ram and his descendants are not proved to have held possession of this land under a clear claim to adverse proprietary title, I do not think it can be denied that they have all along claimed to be at least exproprietary tenants. I do not think the plaintiff is

(1) L. P. A., 38, of 1911, decided on the 7th of May, 1912.

entitled, after some twenty years, to ask the court to go back and hunt for a flaw in their original title to this status.

"For these reasons I accept this appeal, and setting aside the decrees of both the courts below, give the plaintiff a decree declaring that Ulfat Rai, (defendant No. 1) holds the land in suit with occupancy rights as an exproprietary tenant, and that the remaining defendants are sub-tenants with no right of occupancy.

"The question of costs is a little difficult. The suit has substantially failed: yet Ulfat Rai has complicated the case and put himself partly in the wrong by setting up his claim to adverse proprietary possession. I order that all parties do bear their own costs throughout: this order disposes of also the plaintiffs' cross-objection."

The plaintiff appealed.

Mr. *M. L. Agarwala*, for the appellant.

Babu *Girdhari Lal Agarwala*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—We are not prepared to endorse as a matter of law that the defendants became under the circumstances exproprietary tenants by reason of being in possession of the property. We are inclined to think that the defendants acquired an absolute title to the property. They have admittedly been in possession ever since the year 1891 and such possession has been without any title. This *prima facie* would give the defendants an absolute title by adverse possession and it would be upon the persons who were entitled to possession to explain and show that the possession of the defendants was not adverse. The learned Judge of this Court says:—"My own opinion is that the appellant in the present case must be held to have acquired the status of an exproprietary tenant by adverse possession for twelve years and more." We do not think that a person can acquire the "status" of an exproprietary tenant by adverse possession. True it is that a lease-hold or an exproprietary interest can be acquired by adverse possession as against the person who is the lessee or the exproprietary tenant. But we do not think that where there never has been a lessee or exproprietary tenant that it is possible to become such by adverse possession. The respondents have filed no objection to the decision and have not claimed to be proprietors, and therefore we cannot interfere with the decree of this Court. The result is that the appeal fails and is dismissed with costs.

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*Appeal dismissed.*