APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra.

1928 *February*, 8.

PAYAG SINGH AND ANOTHER (DEFENDANTS-APPELLANTS) v. BABU MANOHAR LAL (PLAINTIFF-RESPONDENT).*

Occupancy rights in Oudh—Oudh Rent Act (XXII of 1886), section 5—Essential elements to be established to prove occupancy rights.

Held, that in order to establish occupancy rights in Oudh, a claimant must establish:—(1) that he has lost all proprietary rights, whether superior or subordinate in the land of which he is at present in cultivation; (2) that he has been in possession either by himself or through some other person from whom he has inherited, as proprietor, within thirty years prior to the 13th of February, 1856; (3) that he was in possession of those lands on the 24th of August, 1866; and (4) that the lands have not come into his possession or the possession of the person from whom he has inherited for the first time since the 13th of February, 1856.

Where, therefore, it has been clearly established that the ancestors of the claimants to occupancy rights were at no time the proprietors of the village, their occupancy rights cannot consequently be considered to have been established under section 5 of the Oudh Rent Act.

Held further, that where a claimant had lost his proprietary rights within the period of thirty years just preceding the 13th of February, 1856, or after that period so long as he can establish that he had lost his proprietary rights before the 24th of August, 1866, and had become a tenant of those lands before that date he satisfies the conditions laid down in section 5 of the Oudh Rent Act. *Akbari Begam* v. *Badri Prasad* (1), *Mata Prasad* v. *Sheo Raj Kuer* (2), and *Lal Bahadur Singh* v. *Thakur Tirbhawan Bahadur Singh* (3), relied upon. *Bhondu Das* v. *Khanjan Singh* (4), and *Suraj Bakhsh* v. *Bhagwan Din* (5), dissented from.

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*Second Rent Appeal No. 27 of the 1927, against the decree of E. M. Nanavutty, District Judge of Fyzabad, dated the 27th of April, 1927 upholding the decree of Syed Haider Husain, Assistant Collector, 1st Class of Sultanpur, dated the 4th of March, 1927.

(1) (1902) 5 O.C., 176.
(2) (1915) 29 I.C., 401.
(3) S.D. No. 7 of 1919.
(4) R. A. R., No. 43.
(5) S.D. No. 7 of 1903.

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Mr. *Radha Krishna Srivastava*, for the appellants.

Mr. *Daya Krishna Seth* for the respondent.

MISRA, J. :—This is a second appeal in a rent case. The suit was originally brought by the plaintiff, Babu Manohar Lal, in the Court of the Assistant Collector, Sultanpur, for recovery of arrears of rent against one Payag Singh and five others, of whom only two viz., Payag Singh and one other person, viz., Bikramajit Singh are now the appellants before this Court. The rent claimed amounted to Rs. 116-4-0; principal and interest for the years 1331 *fasli*, 1332 *fasli* and 1333 *fasli* in respect of 7 bighas, 4 biswas land situate in village Umarpur, pargana Aldemau, district Sultanpur.

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The plaintiff alleged in his plaint that one Musammat Ilaichi Kuar was the tenant of this land and paid Rs. 15 as rent therefor. After the death of Musammat Ilaichi Kuar, it was alleged, Musammat Sahdei's name was entered in the papers to which the defendants objected and insisted that their names should be recorded in the papers. Their application was, however, dismissed by the Revenue Court on the 21st of June, 1923, and the land was ordered to be recorded as *khalsa*. The defendants, however, continued to remain in possession of the land against the consent of the plaintiff, and were thus trespassers of the said land and liable to pay a rent at the rate of Rs. 35 per annum, which the plaintiff alleged was the fair amount of rent for the land in dispute. The plaintiff, therefore, treating the defendants as tenants under section 127 of the Oudh Rent Act (XXII of 1886) claimed to recover Rs. 105 as rent for the three years in dispute. He also claimed Rs. 11-4-0 as interest on the arrears, thus the total amount claimed was Rs. 116-4-0. The defendants urged in defence that they were the occupancy tenants of the land in suit. Their contention was that Musammat Ilaichi Kuar was an occupancy tenant of this land, that she died in 1923 and

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that after her death they succeeded to the said land as collateral heirs of her husband.

The learned Assistant Collector who tried the suit came to the conclusion that the occupancy rights of the defendants had not been established and that the defendants were in possession of the land without the consent of the plaintiff. He therefore treated them as tenants under section 127 of the Oudh Rent Act, and proceeded to determine the fair rent for the land in dispute which he found to be Rs. 19-2-4 per annum, according to which rate he passed a decree in favour of the plaintiff.

An application was put in before the court on behalf of the plaintiff on the 5th of February, 1927, asking the Court to eject the defendants from the land in suit. This prayer was not, however, acceeded to by the Court as would appear from its judgment, dated the 14th of March, 1927, and also from the decree prepared in the case.

The plaintiff did not, however, appeal against the order of the Assistant Collector refusing to eject the defendants from the land in suit. But the defendants appealed to the learned District Judge of Fyzabad who by his decree, dated the 27th of April, 1927, dismissed the appeal and confirmed the decree passed by the Assistant Collector.

The plaintiff instead of appealing from the decree passed by the Assistant Collector filed another application before him on the 21st of March, 1927, for the ejectment of the defendants appellants, which the said officer granted on the 2nd of May, 1927, after the decision of the case in appeal. It appears to me that the learned Assistant Collector was then left with no jurisdiction to pass this decree.

The defendants have filed the present appeal in this Court and the main point which has been argued before

me in appeal on their behalf is that the occupancy rights of the appellants in the land in suit have been fully established; that they should not have been treated as tenants under section 127 of the Oudh Rent Act and that no decree should have been passed against them treating them as such tenants of the land in dispute.

Misra, J.

I have heard the case at great length and have also sent for the settlement file in order to satisfy myself whether there was really any ground in support of the contention raised before me by the appellants.

Section 5 of the Oudh Rent Act (XXII of 1886) runs as follows :—

> "Tenants who have lost all proprietary right, whether superior or subordinate, in the lands which they hold or cultivate, shall, so long as they pay the rent payable for those lands according to the provision of this Act, have a right of occupancy under the following rule :—
>
> Every such tenant who, within thirty years next before the thirteenth day of February, 1856, has been, either by himself, or by himself and some other person from whom he has inherited, in possession as proprietor in a village or estate, shall be deemed to possess a heritable but not a transferable right of occupancy in the land which he cultivated or held in such village or estate on the twenty-fourth day of August, 1866 : provided that such land has not come into his occupation, or the occupation of the person from whom he has inherited, for the first time since the said thirteenth day of February, 1856; provided also that no such tenant shall have a right of occupancy in any village or

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estate in which he or any co-sharer with him possesses any under-proprietary right."

From the above quoted section it would appear that in order to establish occupancy rights, a claimant must establish the following conditions :—

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(1) that he has lost all proprietary rights, whether superior or subordinate in the lands of which he is at present in cultivation;

(2) that he has been in possession either by himself or through some other person from whom he has inherited as proprietor within thirty years prior to the 13th of February, 1856;

(3) that he must be in possession of those lands on the 24th of August, 1866; and

(4) that the lands have not come into his possession or of the person from whom he has inherited for the first time since the 13th of February, 1856.

From the evidence on the record it appears that the land in suit was in possession of the ancestors of the appellants at the time of the Regular Settlement. I, therefore, feel justified in holding that the appellants' ancestors were in possession of the said land on the 24th of August, 1866. The settlement in pargana Aldemau, which was then in the district of Fyzabad, ended in November, 1870, as would appear from the date of the *wajib-ul-arz* of the village Umarpur, which is to be found on the settlement record which is now before me. There is no evidence led by the plaintiff to prove that this land came into the possession of the ancestors of the appellants for the first time after the 13th of February, 1856, the burden of proving which lies clearly upon him; *vide Mohammad Ishaq Khan* v. *Lallu Singh* (1). The last two elements have, therefore, been established in favour of the appellants.

(1) S.D. No. 12 of 1910.

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Regarding the other two elements it was contended before me that they had also been made out, but on a consideration of the evidence on the record I am afraid I cannot agree with the contention urged on behalf of the appellants.

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The learned pleader for the appellants contended that the first Summary Settlement of village Umarpur was effected with Bali Singh, Daljit Singh and Ram Prasad Singh who were the ancestors of the appellants. It appears from exhibit A2 that the First Summary Settlement was actually effected with these persons on the 3rd of August, 1856. The settlement was for three years, namely, 1856-1857, 1857-1858 and 1858-1859 and also for *rabi* 1860. It, however, appears that subsequent to the Mutiny (1857-58) at the time of the Second Summary Settlement this village was included in the *qabuliat* of one Babu Ishrat Singh, taluqdar, and a *sanad* granted to him in respect thereof. On this ground it was urged that the proprietary rights of the ancestors of the defendants-appellants had been made out and also that they had lost their proprietary rights prior to the 24th of August, 1866.

The reply to this contention given by the learned pleader for the plaintiff was that the mere fact that the first Summary Settlement was made in favour of the ancestors of the defendants-appellants, could not be a proof of the fact that they were the proprietors of the village and that the proprietary rights of the ancestors of the defendants-appellants having been lost after the 13th of February, 1856, they could not be considered to be entitled to any occupancy rights.

As to the latter contention I am of opinion that it has no force. The wording of section 5 of the Oudh Rent Act does not lay down anywhere any condition to the effect that the proprietary rights must have been

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lost within the specified period of thirty years mentioned in the section, i.e. between the 13th of February, 1826, and the 13th of February, 1856. The only condition which is insisted on in this section is that a claimant in order to establish his occupancy rights must show that he or his ancestors were in possession of the village in which the lands in suit are situate as proprietors within the said period. It may be that their proprietary rights may have been lost within this very period or it may be that those rights may have been lost after this period. In my opinion as long as the claimant can establish that he had lost his proprietary rights before the 24th of August, 1866, and had become a tenant of those lands before that date he satisfies the conditions laid down in section 5. In earlier years a contrary view seems to have been taken, though not very clearly, by Dr. DUTHOIT, J. C. in *Bhondu Das* v. *Khanjan Singh* (1). But latterly Mr. CHAMIER, A. J. C. (now Sir EDWARD CHAMIER) dissented from this view and clearly laid down in *Akbari Begum* v. *Badri Prasad* (2) that section 5 of the Oudh Rent Act was intended to apply to those ex-proprietors who had become mere tenants by the 24th of August, 1866; but could not apply to those who had lost their proprietary rights after the said date. It would be useful to quote the following passage from his judgment in the said case :—

> "The section provides that under certain conditions a tenant shall have a right of occupancy in the land which he cultivated or held in the village on the twenty-fourth day of August, 1866. This date is extremely significant. It is the date on which Sir JOHN STRACHEY'S rules as to tenants' right of occupancy in Oudh were approved by the Governor General in Council. Unless the whole history of

(1) R.A.R., No. 43. (2) (1902) 5 O.C., 176.

the recognition of tenant's rights of occupancy in Oudh is to be disregarded (a brief account is given in chapter IV of Sykes' Compendium of Oudh Taluqdari Law) it is clear that section 5 was intended to apply only to ex-proprietors who had become mere tenants by the 24th of August, 1866. I think also that apart from its history the section itself is quite plain. On the face of it it applies only to tenants who or whose predecessors had been in possession as proprietors at some time within thirty years next before the 13th of February, 1856, but who had lost their proprietary rights and had become mere tenants by the 24th of August, 1866."

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The Board of Revenue (Messrs. HOOPER and ROBERTS) however took a different view in *Suraj Bakhsh* v. *Bhagwan Din* (1). They, however, subsequently in 1915 reconsidered their former decision, and in *Mata Prasad* v. *Sheo Raj Kuar* (2) Messrs. HOLMES and CAMPBELL agreed with the view taken by Sir EDWARD CHAMIER in 5 O. C., 176 and over-ruled the Selected Decision No. 7 of 1903. The matter again came up before the Board of Revenue in 1919 and Messrs. FERARD and HOPKINS held in *Lal Bahadur Singh* v. *Thakur Tirbhawan Bahadur Singh* (3) that section 5 of the Oudh Rent Act did not limit occupancy rights only to those persons who lost the position of proprietors before the annexation of Oudh, but extended them also to those persons who continued to be proprietors for sometime even after the annexation but lost their proprietary rights prior to the 24th of August, 1866. The learned Mem-

(1) S.D. No. 7 of 1903. (2) (1915) 29 I.C., 401.

(3) S.D. No. 7 of 1919: s.c. 8 O.L.J., 64.

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bers followed the case of *Mata Prasad* v. *Sheo Raj Kuar* (1) and disagreed with the case of *Suraj Bakhsh* v. *Bhagwan Din* (2). Since the decision of that case it has been a settled rule of law in the province of Oudh that persons who have lost their proprietary rights after the annexation of the said province in 1856, are also entitled to occupancy rights in the lands in their cultivation on the 24th of August, 1866, if they have lost their proprietary rights prior to that date and have by then become tenants. I am in entire agreement with this view of the law; and I cannot agree with the contention raised by the learned pleader for the respondent that the appellants should not be allowed occupancy rights on the ground that their ancestors lost their proprietary rights after 1856 by the village having been included in the taluqa of B. Ishrat Singh, which as a result of a series of transactions has now become the property of the plaintiff-respondent.

The only point, therefore, which I have to see is whether the defendants-appellants have established their proprietary rights in respect of the village Umarpur within the period specified in section 5, i.e., between the 13th of February, 1826, and 13th of February, 1856.

On this point the evidence afforded by the settlement record, which is now before me, is very clear and leaves no doubt in my mind. It appears that in the year 1864 one of the ancestors of the appellants had put in a claim to under-proprietary rights with regard to village Umarpur and an inquiry was made by Mr. CARNEGY, the Settlement Officer, who came to the conclusion that the village in dispute, although it had remained for a long time with the ancestors of the defendants-appellants (plaintiffs in that case) by virtue of a lease, had never been their property, but had been the property of the taluqdar. This conclusion was based on the evidence

(1) (1915) 29 I.C., 401. (2) S.D. No. 7 of 1903.

given by one Harihar Bakhsh, qanungo, who deposed in 1864 to the effect that the village had for the last forty years been included in the taluqa and a lease of the same had been continually executed by the taluqdar in favour of a member of the family of the defendants-appellants (plaintiffs in that case), whoever happened to be in the taluqdar's service. This evidence shows clearly that since 1824 the village Umarpur had been the property of the taluqdar and not of the ancestors of the defendants-appellants, and that they were not the proprietors of the village between 1826 and 1856.

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It was also contended by the learned pleader for the defendants-appellants that the first Summary Settlement which was effected in August, 1856, in favour of the ancestors of the appellants should be considered as proof of the proprietary rights of their family in respect of the village in suit. I regret that I am unable to take that view. It is a matter of common history that at the time of the annexation of the province of Oudh by the British Government, the policy of the said Government was to effect a Summary Settlement with the occupants of the soil. Indeed this was remarked as one of the causes of the Mutiny of 1857. The policy of the Government as laid down in the letter, dated the 4th of February, 1856, by the Governor General, Lord DALHOUSIE, to General OUTRAM, the then Resident of Oudh, was to the effect that a Summary Settlement of the land revenue of the Province of Oudh for a period of three years from the 1st of May, 1856, be made without the interposition of a middle man as taluqdar with the parties in possession without any recognition either formal or indirect of their proprietary rights. It is thus clear that this first Summary Settlement effected with the ancestors of the defendants-appellants can be no proof of the recognition of their proprietary rights in respect of this village. I

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am supported in this view by the observations of Mr. WELLS, A. J. C. in *Maharaja Jagatjit Singh Bahadur* v. *Suraj Bakhsh Singh* (1) where he observed as follows :—

> "Now it is also a matter of general history that one of the causes which led up to the Mutiny in Oudh was the wholesale disregard of the rights of the taluqdars and the making of the Summary Settlement with any persons of a somewhat superior status who were found in the villages. No inference therefore as to proprietary right can be drawn from the mere fact that the Summary Settlement was made with defendant's family."

I am, therefore, of opinion that it has been clearly established that the ancestors of the appellants were at no time the proprietors of village Umarpur; and their occupancy rights in respect of the land in suit cannot consequently be considered to have been established under section 5 of the Oudh Rent Act.

It was also urged before me on behalf of the defendants-appellants that the plaintiff-respondent had accepted rent from the appellant Payag Singh and consequently they could not be considered as tenants under section 127 of the Oudh Rent Act. It certainly appears from the evidence on the record that the plaintiff-respondent has accepted rent from the appellants in respect of the land in suit. Indeed there is a receipt (exhibit A8) on the record which shows that on the 16th of December, 1923, after the decision of the Revenue Courts in June, 1923, the appellant Payag Singh paid rent and it was accepted on behalf of the plaintiff-respondent. I fail to see how under those circumstances the plaintiff could treat the appellants as tenants holding land without his consent under section 127 of the

(1) (1905) 8 O.C., 145.

Oudh Rent Act. In my opinion the plaintiff has by his conduct in accepting rent treated the appellants as ordinary tenants of the land in suit. The learned Assistant Collector, however, at first refused to pass a decree for ejectment against the defendants but seems to have subsequently passed an order to that effect on the 2nd of May, 1927. In the view of the case which I have taken the order of that date directing the ejectment of the appellants will be deemed to have been unjustified. I also cancel it on the ground that it was passed without jurisdiction and was *ultra vires*. Under section 127(2) when a court passes a decree for arrears of rent it should also, if the plaintiff applies to that effect, pass a decree for the ejectment of the defendant from the land. The plaintiff had already applied to the court on the 5th of February, 1927, asking for the ejectment of the defendant but it appears from the order sheet, dated the 4th of March, 1927, that that relief was not granted to the plaintiff. It was not open to the learned Assistant Collector to have subsequently modified his decree and specially after that decree had been confirmed in appeal.

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As to the rent decreed by the learned Assistant Collector nothing was urged before me challenging it to be unfair or excessive. I, therefore, maintain the decree for rent passed by the courts below as a correct and proper decree.

The appeal, therefore, fails and is dismissed with costs, except the modification of the first court's order as to the ejectment of the appellants.

Appeal dismissed.