

mesne profits from the date of the suit. The plaint, however, contains an allegation that before the suit the plaintiffs had tendered the redemption money several times to the defendants. That allegation is not denied in the written statements and in the circumstances the plaintiffs are entitled to mesne profits which they assess at Rs. 10 from the date of the suit. The result, therefore, is that the appeal is dismissed with costs.

DAWSON MILLER, C.J.—I agree.

Appeal dismissed.

LETTERS PATENT.

Before Dawson Miller C. J. and Mullick, J.

W. H. MEYRICK

v.

DIPA PANDEY.*

1924.

SRI KANTA
PRASAD

v.

JAG SAH.

MULLICK, J.

1924.

April, 10.

Bengal Tenancy Act, 1885 (Act VIII of 1885), section 29—consolidation of holdings—enhancement of rent, limits of—payment of illegal enhancement for several years; whether operates to estop tenant from subsequently objecting.

Where two separate holdings at specific and definite rentals are consolidated into one holding the rent of the consolidated holding cannot be enhanced beyond what is permitted by section 29 of the Bengal Tenancy Act, 1885.

Raj Kumar Sarkar v. Faizuddi Tarafdar(1), distinguished.

A claim for rent being a recurring claim it is open to the tenant at any time to take objection on the ground that the claim contravenes the provisions of the law.

Appeal by the plaintiffs.

This appeal arose out of a suit for rent from the year 1324 to the 10-annas *kist* of 1327, *F.S.*, in respect

* Letters Patent Appeal no. 90 of 1923.

(1) (1915) 22 Cal. L. J. 81.

1924.
 W. H.
 MEYRICK
 v.
 DIPPA
 PANDEY.

of a holding measuring 3 *bighas* 3 *kattahs*. The facts found were that in 1308 the defendants took settlement from the plaintiffs or their predecessors of a parcel of 16 *kattahs* at a rent of Rs. 4 *per annum*. In 1309 they took settlement of another parcel of 2 *bighas* 7 *kattahs* at a rent of Rs. 11-12-0 for a term of seven years from 1309 to 1315. In 1316 the defendants took a settlement not only of the 2 *bighas* 7 *kattahs*, the lease in respect of which had expired in 1315, but also of the parcel of 16 *kattahs* the lease in respect of which had expired in 1310. The rent for this total area of 3 *bighas* 3 *kattahs* was 20 *maunds* 19 *seers* of grain per year. On the expiry of this lease the defendants again in 1323 contracted to pay rent for the 3 *bighas* 3 *kattahs* at 21 *maunds* 10½ *seers* of grain for the period 1323 to 1331, F.S. The present suit was instituted on the 22nd December, 1919, for the rent of the period between 1324 to 1326 and for a portion of the year 1327 as above stated.

The defence in the trial Court was that the defendants were occupancy-*raiyats* in respect of both parcels, namely the 16 *kattahs*' parcel and the 2 *bighas* 7 *kattahs*' parcel, and that the consolidated rental of 20 *maunds* 19 *seers* which they had agreed to pay by the *kabuliyat* of 1316 violated the provisions of section 29 of the Bengal Tenancy Act which requires that the money-rent of an occupancy-*raiyat* shall not be enhanced by more than 2-annas in the rupee. It is stated in the *kabuliyat* that the money-value of the grain was estimated at Rs. 61 and it was admitted that if the provisions of section 29 applied to the case then there had been an enhancement contrary to law.

The Munsif found that the defendants were occupancy-*raiyats* in respect of both parcels and that by consolidating the two parcels into one and by taking a *kabuliyat* for the total area of 3 *bighas* 3 *kattahs* the plaintiffs could not be allowed to take themselves out of the restrictions provided by section 29. He

accordingly decreed the suit for the admitted *jama*, that is to say, for a total rental of Rs. 15-12-0 *per annum*.

1924.

W. H.
MEYRICK

v.

DIPA

PANDEY.

The Subordinate Judge in appeal confirmed this decree.

There was then an appeal to the High Court which was heard by Foster, J., and he also took the same view as the Subordinate Judge and found that section 29 of the Bengal Tenancy Act was a bar.

Lachmi Narain Sinha and *R. B. B. Saran*, for the appellants.

Muhammad Hasan Jan, for the respondents.

MULLICK, J. (after stating the facts, as set out above, proceeded as follows) :—

The first point urged in this Letters Patent appeal is that there has not in fact been any enhancement in respect of a holding. It is urged that by the consolidation of 1316 the two separate parcels of 16 *kattahs* and 2 *bighas* 7 *kattahs* lost their identity and that there was in this case no enhancement in respect of a holding. The plaintiffs rely upon a judgment of the Calcutta High Court in *Raj Kumar Sarkar v. Faizuddi Tarafdar* (1). In that case some additional land was added to a holding and the whole was assessed at an enhanced rental. The new *kabuliyat* specified the rental assessed upon the old land as well as the rental assessed upon the new land and it was urged that a new holding had been created and that there was no enhancement of rent in respect of an old holding which could attract the operation of section 29 of the Bengal Tenancy Act. The learned Judges of the Calcutta High Court held that the question must be answered with reference to the circumstances of each individual case and the matter was one of substance and not of form. The Court must determine whether a new holding has been created

(1) (1915) 22 Cal. L. J. 81.

1924.

W. H.
MEFRICK
v.
DIPA
PANDEY.
MULLICK, J.

though it may include the land of the original holding or whether the parties had recourse to a colourable device to evade the provisions of section 29. In this case it is quite clear that the defendants held two separate holdings at specific and definite rentals which were consolidated into one holding at an enhanced rental very much beyond what is permissible under section 29. I cannot see that any case is made out which would permit us to hold that there was some unassessed land added to the 2 *bighas* 7 *kattahs* and that a new holding was created which had no reference to the rentals of the lands held under the previous contracts.

It has been urged that the 16-*kattah* parcel was not in the possession of the defendants at the time of the lease of 1316 and that between 1311 and 1315 the landlords were in possession of it. It is suggested that the defendants had no occupancy right in this parcel and that it was *khas* land upon which no rent had been assessed and which was added to the 2 *bighas* 7 *kattahs* in which the defendants had an occupancy right at the time of the lease of 1316. If that were so there might be some justification for urging that a new holding was formed and that the rental of Rs. 61 assessed upon the area of 3 *bighas* 3 *kattahs* was not an enhancement of the rent of any original holding in the possession of the defendants. But the fact seems to be, and it has been found by the learned Subordinate Judge that the defendants were settled *raiyats* of the village and that at each successive lease they at once acquired occupancy rights in the parcels covered by the lease. Therefore in 1308 they became occupancy-*raiyats* of the 16-*kattah* plot and in 1309 they became occupancy-*raiyats* of the 2 *bighas* 7 *kattahs* plot. A rental of Rs. 61 is clearly an enhancement of more than 2 annas in the rupee on the consolidated rental of these two holdings. The contention, therefore, that the plaintiffs are debarred from claiming more than 2 annas in the rupee must be accepted.

Then it is urged that the defendants by acquiescing in the payment of rent at the rate of 20 *maunds* 19 *seers per annum* for the years 1316 to 1322 have precluded themselves from raising any objection under section 29 of the Act. There is no justification for this contention. A claim for rent is a recurring claim and it is open to the tenant at any time to take an objection on the ground that the claim contravenes the provisions of the law.

1924.

W. H.
MEYBRICK
v.
DIPA
PANDEY.

MULLICK, J.

It is also suggested, though somewhat faintly, that although the tenant may not surrender his occupancy right he may agree with his landlord that he will not object to pay a rent which is contrary to the provisions of the law. For this proposition also there is no foundation.

The result is that the judgments of the Courts below must be affirmed and the appeal dismissed with costs.

DAWSON MILLER, C.J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Kulwant Sahay, J. J.

PARMESHWAR PANDEY

1924.

April, 11.

v.

RAJ KISHORE PRASAD NARAYAN SINGH.*

Civil Procedure Code, 1908, (Act V of 1908), Order XXXIV, rule 2—Transfer of Property Act, 1882, (Act IV of 1882), section 61—Two mortgages with respect to certain property and third mortgage with respect to same property and additional property—decree for consolidated amount of the three mortgages illegal—Hindu Law—Joint family—karta, execution of mortgage by—suit on mortgage—parties—legal necessity—high rate of interest.

* Appeal from Original Decree no. 317 of 1921, from a decision of B. Raj Narayan, Additional Subordinate Judge of Gaya, dated the 10th August, 1921.