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RAMNATH SARANGI v. GOBARDHAN PANDEY.

MULLICK, J.

MULLICK, J.—I agree that the appeal should be decreed. In my opinion the judgment of the District Judge must be read together with the judgment of the trial Court and it is a reasonable interpretation of the judgment of the District Judge to say that having regard to the evidence of title given by the plaintiff and the evidence of possession given by both parties and having regard to the character of the land, the conclusion to be drawn is that the plaintiff was in possession of the land in suit within the statutory limit. That being so the learned District Judge was right in giving the plaintiff a decree for recovery of possession. In my opinion the facts of this case do not bring it within the rule laid down in the Full Bench case of *Raja Shiva Prasad Singh* v. *Hira Singh* (1). They come more nearly under the operation of the principles laid down by their Lordships of the Privy Council in *Kuthali Moothavar* v. *Peringati Kunharankutty* (2).

*Appeal allowed.*

## LETTERS PATENT.

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

1923.

December 4.

TILAKDHARI SINGH

*v.*

CHATURGUN BIND.*

*Bengal Tenancy Act*, 1885 (*Act VIII of* 1885), *sections* 4(3), 5 *and* 48—*Occupancy holding*, zarpeshgi-*mortgage of*—*subsequently* kabulyat *executed by mortgagor in favour of mortgagee*—*status of mortgagor.*

Where a *raiyat* executes an usufructuary mortgage of his holding and then takes a lease of the holding from the mortgagee, he does not cease to be a *raiyat* holding under the proprietor and is not an under-*raiyat*.

(1) (1921) 6 Pat. L. J. 473, F.B.

(2) (1921) I. L. R. 44 Mad. 833; L. R. 48 I. A. 395.

*Letters Patent Appeal No. 18 of 1923.

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*Per* Mullick, J.—Where a *zarpeshgi* transaction in respect of a holding is not merely a contract for the cultivation of the land but also constitutes a real and valid security to the transferee for the principal sum advanced by him and for the interest thereon, the position of the transferee is not merely that of a cultivator but of a creditor holding the land as security, and, therefore, he is not a *raiyat* within the meaning of section 5(3) of the Bengal Tenancy Act. Consequently a person holding under such a *zarpeshgidar* is not an under-*raiyat* within the meaning of section 4(3), and the amount of rent recoverable by the *zarpeshgidar* is not limited by section 48.

*Uttam Chandra Daw* v *Rajkrishna Dalal*(1), distinguished.

Appeal by the plaintiff.

Suit by an usufructuary mortgagee for recovery of rent from the mortgagor who held the land as tenant of the mortgagee.

The following are the material portions of the Bengal Tenancy Act, 1885, referred to in the judgments :—

*S. 4.* There shall be, for the purpose of this Act, the following classes of tenants, namely :

(1) * * * * *

(2) *raiyats*, and

(3) under-*raiyats*, that is to say, tenants holding, whether immediately or mediately, under *raiyats* ;

* * * * * *

*S. 5(1).* * * * * *

(2). " *Raiyat* " means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right.

*Explanation.*—Where a tenant of land has the right to bring it under cultivation he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it, or of grazing cattle on it.

(3) A person shall not be deemed to be a *raiyat* unless he holds land either immediately under a proprietor or immediately under a tenure-holder.

(1) (1920) I. L. R. 47 Cal. 377, F.B.

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*S. 48.* The landlord of an under-*raiyat* holding at a money-rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than the following percentage of the same (namely) :—

(*a*) when the rent payable by the under-*raiyat* is payable under a registered lease or agreement—fifty *per cent*; and

(*b*) in any other case—twenty five *per cent*.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C.J.

*Abani Bhushan Mukerji* and *Baikunatha Nath Mitter*, for the appellant.

*Jadubans Sahai*, for the respondents.

DAWSON MILLER, C. J.—This is an appeal on behalf of the plaintiff under the Letters Patent from a decision of Ross, J., reversing the decision of the District Judge and restoring that of the Munsif.

The facts out of which the suit arises are as follows : On the 16th January, 1917, Ram Piyar Bind, the father and predecessor in interest of the defendants, executed a *zarpeshgi* deed for a term of nine years, from 1324 *F.*, over 2 *bighas*, 7 *kathas*, 12 *dhurs* of his occupancy holding in favour of the plaintiff in consideration of an advance of Rs. 975. The plaintiff in lieu of interest on the loan was to enter into possession and take the profits arising out of the cultivation of the land after paying the proprietor's rent amounting to Rs. 16 odd. In the event of the principal sum not being paid off at the end of the term the *zarpeshgidar* was to remain in possession upon the considerations stipulated in the deed until repayment of the principal in *Jeyth* of any succeeding year. The property was also hypothecated to secure repayment of the principal sum advanced if the *zarpeshgidar* should be dispossessed. Two days later Ram Piyar Bind executed a *kabuliyat* in favour of his mortgagee. This document recites the previous *zarpeshgi* transaction and states that the *zarpeshgidar* has been in possession of the property and as the mortgagor wished to keep the property under his own cultivation paying the

*zarpeshgidar* Rs. 75-7-0 annually as rent the latter had acceded to his request and granted him a simple lease for nine years from 1324 to 1333 *F.* at the rent named. The rent so arrived at may be assumed to include the Rs. 16 odd payable to the landlord and interest amounting roughly to 6 *per cent.* on the principal sum advanced. In the year 1919 the rent was in arrears and Piyar Bind having died the plaintiff instituted the present suit against his sons, the defendants.

The defendants challenged the genuineness of the *kabuliyat* and pleaded payment of a smaller rent amounting to Rs. 24-7-0 which they contended was all that was payable according to the survey *khatian*. They further pleaded that their father was an old man with a disordered brain and was incapable of understanding the terms of the *kabuliyat*. The genuineness of the *zarpeshgi* executed two days earlier was not challenged in the written statement.

The Munsif rejected the plea of payment. He held that the only rent recoverable was that recorded in the survey *khatian*, namely, Rs. 24-7-0, and stated that he thought the plaintiff had succeeded in getting the *kabuliyat* executed but he had great doubt as to the genuineness of the transaction. It appears that at the recent revisional survey the assistant settlement officer had entered the rent in the record-of-rights as Rs. 24-7-0 being of opinion that the plaintiff was the *raiyat* and Piyar Bind his under-*raiyat* and that under section 48 of the Bengal Tenancy Act the plaintiff could not recover from his under-*raiyat* more than 50 *per cent.* in excess of the rent payable by him to his superior landlord.

The plaintiff appealed to the District Judge who considered that the Assistant Settlement Officer and the Munsif had proceeded upon an incorrect application of section 48 of the Bengal Tenancy Act and that Piyar Bind by executing the *zarpeshgi* did not lose his original status of a *raiyat*. He accordingly varied

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the decree of the trial Court and entered judgment for the plaintiff for the amount claimed with costs in both Courts.

The defendants preferred a second appeal to the High Court which came before Ross, J. The learned Judge was of opinion that the *zarpeshgi* deed was both a lease and a mortgage and that the plaintiff by this transaction held directly under the landlord and not by way of sub-lease under the *raiyat* and that Piyar Bind ceased to be a *raiyat* as long as the lease was outstanding against him. He further considered that the *kabuliyat* did not create a lease of the *raiyati* interest of the land in the original *raiyat* but that he was an under-*raiyat* of the plaintiff and that section 48 of the Bengal Tenancy Act was applicable in the circumstances of the case. He accordingly set aside the decree of the District Judge with costs and restored that of the Munsif.

From that decision the present appeal has been preferred under the Letters Patent by the plaintiff.

In my opinion the *zarpeshgi* was an instrument of mortgage and not a lease. The sum advanced was not paid by the *zarpeshgidar* as rent payable in advance for a certain period at the end of which the land was to be delivered up to the lessor. The profits, after deducting the proportionate amount of rent payable to the landlord, were to be taken as interest on the principal sum and even at the end of the term the *zarpeshgidar* was to remain in possession upon the same conditions until the principal sum should be repaid, and the property was hypothecated for repayment of the loan in the event of the *zarpeshgidar* being dispossessed. I think it is well established that a mortgagee, which I consider the *zarpeshgidar* was in this case, is not the tenant of his mortgagor. In fact in argument before us it was conceded that the mortgagee is not a *raiyat*. It was contended, however, that Piyar Bind and consequently the defendants were

under-*raiyats* within the meaning of the definition of that term in section 4 (*3*) of the Bengal Tenancy Act which defines under-*raiyats* as :

" Tenants holding whether immediately or mediately under *raiyats*."

It was argued that Piyar Bind held if not immediately at least mediately under himself as a *raiyat* and was therefore an under-*raiyat*. I am unable to accede to the view that a person who is a *raiyat* can also be his own under-*raiyat*. I agree with the view of the District Judge that the mortgagor by the *zarpeshgi* transaction never ceased to be the *raiyat* holding under the landlord and he cannot, in such circumstances, be said to be an under-*raiyat* holding indirectly under himself.

A further point was raised that Piyar Bind was found to be incapable of understanding the effect of the *kabuliyat*. There is no definite finding by the Munsif upon this point and the matter does not appear to have been urged in appeal before the District Judge as a defence to the suit. Moreover the defendants having remained in possession of the land under the *kabuliyat* cannot now be heard to say that it was not a genuine transaction. In my opinion the appeal should be allowed, the decree of Ross, J., should be set aside and that of the District Judge restored. The appellants are entitled to their costs of this appeal and of the appeal before Ross, J.

MULLICK, J. (after stating the facts proceeded as follows) : Now the first question is what was the effect of the *zarpeshgi* deed of the 16th January, 1917. If it was a lease and not a mortgage, then the plaintiff became an under-*raiyat* of the first degree under Ram Piyar Bind who in turn by the *kabuliyat* of the 18th January became an under-*raiyat* of the second degree under the plaintiff. In that case section 48 of the Bengal Tenancy Act would operate to preclude the plaintiff from recovering from his under-*raiyat* more than 50 *per cent.* in excess of the rent payable by him

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to his superior landlord, that is to say more than a total rent of Rs. 24-7-0, as recorded by the Settlement Officer.

If, on the other hand, the *zarpeshgi* transaction was not a lease but a mortgage then the *kabuliyat* of the 18th January, 1917, operated to create a *raiyati* tenancy and section 48 would have no application.

The view taken by the learned Judge of this Court is that the transaction was both a lease and a mortgage. It seems to me that even in that case the transferee would be neither a *raiyat* nor an under-*raiyat*.

I am, however, of opinion that the document does not create any *raiyati* tenancy at all. The transfer in this case was for the purpose of securing the payment of money advanced and was not consideration for a price paid. The sum of Rs. 975 did not represent, either wholly or in part, an advance payment for the rent of the land. The deed recites that the transferee is to pay to the superior landlord the rental due from the *raiyat* which was a sum of Rs. 16-6-0 and that he was to pay himself the interest upon the mortgage money out of the proceeds of the land, and it is very similar to a *zar-i-peshgi* deed which was the subject of *Ram Khelwan Roy* v. *Sambhoo Roy* (1). In that case the whole of the rent for a period of five years was to be taken by the *zarpeshgidars* on account of the profits of their *zarpeshgi* excepting one rupee which was to be paid yearly by them to the proprietors (the grantors), and if the *zarpeshgi* money was not paid at the end of the five years the *zarpeshgidars* were to remain in possession until payment. The decision was that the deed did not create a *raiyati* tenancy.

On the other hand it was held in *Ramdhari Singh* v. *M. H. Mackenzie* (2) that where the *raiyat* was already previously in possession as a *raiyat* he

(1) (1898-99) 2 Cal. W. N. 758. (2) (1905-06) 10 Cal. W. N. 351.

does not divest himself of his right to acquire a right of occupancy in the land by taking a *zarpeshgi* lease of the land.

Again, in *Damodar Narain Chowdhury* v. *Dalgliesh* (1), it was held that a *zarpeshgi* lease which merely provided for a part of the rent to be paid in advance, there being no stipulation for the payment of interest on the money so advanced, did not create the relationship of mortgagor and mortgagee.

In the present case the contract was not merely for the cultivation of the land but also constituted a real and valid security to the transferee for the principal sum advanced by him and for the interest thereon and his possession was not merely that of a cultivator but of a creditor holding the land as security. In these circumstances the transferee was a mortgagee and not a *raiyat* within the meaning of section 5, clause (*3*), of the Bengal Tenancy Act. It follows, therefore, that by executing the *kabuliyat* of the 18th January, 1917, Ram Piyar Bind did not become a tenant holding immediately or mediately under a *raiyat*, and section 48 of the Bengal Tenancy Act is not applicable.

For the purposes of this case it is immaterial whether the *zarpeshgi* and the *kabuliyat* constituted one transaction or two separate transactions and *Chiman Lal* v. *Bahadur Singh* (2) has no application to the present case.

Nor does the decision in *Uttam Chandra Daw* v. *Rajkrishna Dalal* (3) on which the learned Judge of this Court relies assist the defendants. In this last mentioned case a proprietor executed a *zarpeshgi* mortgage in favour of the defendants who on the same day resettled the land with the proprietor as tenants. The mortgagor having defaulted in payment of rent

(1) (1910-11) 15 Cal. W. N. 345, P.C. (2) (1901) I. L. R. 23 All. 338.
(3) (1920) I. L. R. 47 Cal. 377, F.B.

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the mortgagee sued for it, obtained a decree and in execution purchased the equity of redemption and took possession of the property. The plaintiffs alleged that they were purchasers of the equity of redemption from the mortgagors and filed a suit for redemption. The principal point decided in that case by a Full Bench was that the sale was not void but voidable and that although the mortgagee had purchased the equity of redemption in contravention of the terms of section 99 of the Transfer of Property Act the sale was not a nullity and must be duly avoided and that the plaintiffs were not entitled to redeem so long as it subsisted. One of the points in the case was whether the sale was held in execution of a rent decree or whether it was merely a sale in execution of a decree for arrears of interest upon the mortgage money. Chatterjea, J., in the course of his judgment, observed that by executing the *kabuliyat* in favour of the mortgagee the mortgagor had become the tenant of the mortgagee within the meaning of the Bengal Tenancy Act. If I may say so the facts found in that case entirely supported this view and the mortgagor became a *raiyat* by reason of the terms of section 5 of the Bengal Tenancy Act, when read together with the definition of proprietor in the Act which includes a trustee. But a mortgagee from an occupancy *raiyat* is not in any sense a *raiyat* or under-*raiyat* and a sub-tenant under him cannot be an under-*raiyat*.

A point was taken in the trial Court that there had been no intelligent execution of the *kabuliyat* by Ram Piyar Bind. This defence does not appear to have been repeated before the District Judge and the point is no longer open.

The result is that the judgment of Ross, J., must be set aside and that of the District Judge restored. The appellant will be entitled to his costs in this Court.

*Appeal allowed.*