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co-sharer sought to eject the tenant whom all the co-sharers had introduced. The decisions applicable to the present case are *Hossain Mahomed* v. *Fakir Mahomed* (1) and *Kanchan Mandar* v. *Kamala Prasad* (2). A purchaser of a non-transferable holding without the consent of the co-sharer landlords is not a tenant of the latter, any one of whom is entitled to eject him from the holding to the extent of his own share in the holding.

The appeal is accordingly without merits and I would dismiss it with costs.

KULWANT SAHAY, J.—I entirely agree.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, J.J

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v.

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Orissa Tenancy Act, 1913 (*Bihar and Orissa Act II of* 1913), *sections* 11, 13 *and* 193—*Transfer of non-transferable tenure without landlord's consent—suit by landlord to eject transferee, whether maintainable in civil court—Permanent tenure-holder, transfer of part of tenure at a nominal rent, nature of transaction.*

A suit by a landlord to eject a person who has purchased a non-transferable tenure without the landlord's consent is not governed by section 193 of the Orissa Tenancy Act, 1913, and, therefore, is maintainable in the civil court.

The ancestor of defendant no. 2 obtained from Government a grant of land in perpetuity at half-rent, the grantee being entitled to hold the land during good behaviour. In the settlement khatians of 1905 and 1920 the defendant was

**Circuit Court, Cuttack.* Second Appeal nos. 25 and 26 of 1925, from a decision of Babu Jatindra Nath Ghosh, Additional Subordinate Judge of Cuttack, dated the 19th December, 1924, reversing a decision of Babu Nidheswar Chandra Chandra, Additional Munsif of Cuttack, dated the 7th September, 1923.

(1) (1904) 10 Cal. L. J. 618. (2) (1915) 21 Cal. L. J. 441.

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described as a tenure-holder. The Secretary of State sued for khas possession on the grounds, (i) that defendant no. 2 had forfeited the grant by his misbehaviour and (ii) that he had sold a part of the land to defendant no. 1 without the consent of the grantor.

Held, (i) that the suit as against defendant no. 1 was cognizable by the civil court; (ii) but that, the defendant no. 2 being a tenure-holder, the suit against him was cognizable by the Collector and not by the civil court; (iii) that the civil court in which the suit had been instituted should not have dismissed the suit as against defendant no. 2 on the ground of its want of jurisdiction but should have returned the plaint under Order VII, rule 10, of the Code of Civil Procedure, 1908, for presentation to the Collector.

Where a permanent tenure-holder purports to lease in perpetuity a part of his tenure in consideration of a nominal rent which in fact represents a proportionate amount of the rent which he himself pays in respect of the tenure, the transaction amounts in effect to an out and out sale although it purports to be a lease.

Appeal by the plaintiff.

These appeals arose out of a suit instituted by the plaintiff-appellant against the defendants for a declaration that the tenures forming the subject-matter of the suit be declared forfeited to Government and that he be granted a decree for recovery of khas possession of the same.

The suit related to two parsels of land, one measuring 1.68 and odd acres in mauza Sahadapada and the other measuring 1.12 acres in mauza Patpur. These mauzas were situated within the Banki estate which was originally a feudatory state but which was forfeited to Government about 1840 on account of misbehaviour of the Raja. Before the territory was annexed by the British Government certain relatives and officers of the Raja were in possession of lands granted in jagir. After annexation the question arose as to whether these jagirdars should be allowed to hold the lands rent or revenue-free. It appeared from the Settlement memorandum of

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Mr. A. M. Mills, Superintendent of the Tributary Mahals, dated the 20th September, 1844, quotations from which have been made in the Banki Settlement report of 1892, that the Deputy Collector proposed that the right to engage for the tenures held by the late Raja's relatives and officers at half rates be conceded in perpetuity to the Raja's relatives and principal officers. Mr. Mills was of opinion that this indulgence might in all justice be conceded subject to forfeiture for misbehaviour. It appeared that an ancestor of the defendant no. 2 in the present suit was one of the officers or amlas referred to in this report, and the tenures in dispute in the present suit were granted to him and had in due course devolved upon the defendant no. 2. The defendant no. 2 transferred 1.48 and odd acres in mauza Sahadapada and 1.06 acres of land in mauza Patpur to the defendant no. 1 fixing a nominal rental of Rs. 1-0-3 for the first, and Re. 0-8-4 for the second piece of land, the original rental imposed upon them and paid by the defendant no. 2 being Rs. 1-9-3 and Re. 0-10-0 respectively. These transfers were effected under four istamrari leases executed by the defendant no. 2 on the 27th of May 1919, 2nd July 1919, 13th June 1919, and 8th June 1920.

The plaintiff based his right to recover khas possession of these lands on two grounds: first, that the tenures were held on condition of the tenure-holder being of good behaviour, that the defendant no. 2 was guilty of misbehaviour by being an active non-co-operator and by giving shelter to outside agitators of the non-co-operation propaganda in Banki, and that in spite of repeated warnings he had defied the authority of Government and had rendered himself liable to forfeiture of the tenures. The second ground stated was, that the tenures were non-transferable, and that the transfer by the defendant no. 2 to the defendant no. 1 without the consent of the plaintiff or his agents entitled the plaintiff to eject the defendants.

The defence was that the tenures were permanent tenures granted in perpetuity by the plaintiff, that there was no condition of non-transferability attached to these tenures, that such tenures were freely transferred and the transferees were recognized by the plaintiff, and that the defendant no. 2 was not guilty of any misbehaviour. In the written-statement of the defendant no. 2 a question was distinctly raised as regards longstanding customs in Banki under which such tenures were transferable bl sales, mortgages and leases without the consent of the plaintiff or his agents.

The Munsif held that the tenures were half-rented-amla-jagir tenures, that under the provisions of sections 11 and 13 of the Orissa Tenancy Act the tenures could be resumed only on the ground of a breach of a condition on the breach of which under the terms of the contract between the parties they were resumable. He held that the tenures were inalienable, that the defendant no. 2 was guilty of misbehaviour, and that under the terms of the settlement he was liable to ejectment. But, so far as the defendant no. 2 was concerned, he held that the Civil Court had no jurisdiction to entertain the suit, and that under the provisions of section 193 of the Orissa Tenancy Act the suit was cognizable by the Collector and was not cognizable by any other Court. He further held that the claim of the plaintiff for ejectment of the defendant no. 2 from the non-transferred portion of the tenures which were still in the possession of the defendant no. 2 was barred by limitation under Article 1(*1*) of Schedule III of the Orissa Tenancy Act. He accordingly dismissed the suit in so far as it related to the portion of the tenures which were still in possession of the defendant no. 2. As regards the portions transferred to the defendant no. 1, he held that the suit was cognizable in the Civil Court, and that as hte tenures were non-transferable the plaintiff was entitled to possession as against the defendant no. 1. He accordingly made a decree for possession in

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favour of the plaintiff in respect of the transferred portions of the tenures.

Two appeals were preferred against this decree of the Munsif: one by the defendants, which was appeal no. 330 of 1923 and the other by the plaintiff which was appeal no. 331 of 1923. Both the appeals were heard together by the Subordinate Judge of Cuttack. He allowed the appeal of the defendants and dismissed the appeal of the plaintiff. He held that the suit as against both the defendants was cognizable by the Collector and it was not cognizable in the Civil Court. He further held that the claim of the plaintiff was barred by limitation. As regards the breach of the condition of good behaviour, the learned Subordinate Judge held that the defendant no. 2 was not guilty of misbehaviour by joining the non-co-operation movement and that the plaintiff was not entitled to possession on that ground. He further held that so far as the defendant no. 1 was concerned the leases granted to him by the defendant no. 2 did not amount to a transfer of the tenure so as to give rise to the landlords' right of re-entry, and further that the tenures were not non-transferable. He accordingly dismissed the entire suit.

The plaintiff preferred the present second appeal to the High Court against the decrees made in the two appeals by the Subordinate Judge.

Cur adv. vult.

22nd Dec. 1926.

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

The first question for determination is whether the suit was cognizable in the Civil Court. The suit really consists of two parts—one against the defendant no. 1 and the other against the defendant no. 2. In so far as the claim against the defendant no. 1 is concerned it is based on the transfer of a non-transferable tenure without the consent of the landlord. Such a claim is clearly cognizable in a Civil Court. A suit of this nature is not a suit contemplated or

provided for in the Orissa Tenancy Act, and section 193 of the Act does not apply to such a suit. I am, therefore, of opinion that the claim of the plaintiff as against the defendant no. 1 was rightly brought in the Civil Court and that the Munsif had jurisdiction to entertain it.

As regards the claim against the defendant no. 2, the question as to whether the suit was cognizable in the Civil Court would depend upon the nature of the title under which the defendant no. 2 held the lands in dispute. It appears from the Settlement memorandum of Mr. Mills of the year 1844 (referred to above) that there was a grant in perpetuity to the ancestor of the defendant no. 2 at half rent to be held during good behaviour. The Settlement khatians of 1905 and 1920 described the status of the defendant no. 2 is that of a tenure-holder. The Settlement khewat of 1920 described the tenures as non-transferable interests resumable for misbehaviour. Having regard to the findings arrived at by the Courts below, it seems clear that the status of the defendant no. 2 is that of a tenure-holder. If that is so, then the relation between the parties must be governed by the provisions of the Orissa Tenancy Act, and the suit as agains the defendant no. 2 was cognizable by the Collector and not in the Civil Court. The Subordinate Judge was therefore right in holding that the suit against the defendant no. 2 was not cognizable in the Civil Court. Having come to this finding the proper procedure to adopt in the case was to return the plaint for presentation to the proper Court. Instead of doing that he dismissed the suit. In this he was clearly wrong. The provisions of Order VII, rule 10, of the Civil Procedure Code are clear. The plaint therefore must be returned to the plaintiff under Order VII, rule 10, Civil Procedure Code. In this view of the case it is not necessary to express

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any opinion on the other issues raised in the case in so far as the defendant no. 2 is concerned.

As regards the claim against the defendant no. 1, I am of opinion that the transfers in question, although in the garb of permanent leases, are really out and out sales. The interest reserved to the defendant no. 2 is the receipt of a nominal rent which appears to be the proportionate amount of rent which the defendant no. 2 himself had to pay in respect of the tenures. I am of opinion that the Munsif was right in his view that the transfers to the defendant no. 1 were transfers which would entitle the plaintiff to eject the defendant no. 1. The learned Subordinate Judge, however, has found that the tenures were transferable. In coming to this finding the learned Subordinate Judge merely referred to the terms of the grant as evidenced by the rubakari of 1844 (Exhibit B). This rubakari makes no mention of the fact as to whether the tenures were or were not transferable. The learned Munsif, however, considered the question in his decision on issue no. 3 and he relied on the Settlement Reports of 1917—1920. He found that the transferees of tenures, like the one under consideration, were treated by the plaintiff as new tenants and only on their agreeing to give up their right as tenure-holders and accepting the status of a raiyat assessed with double the rent the transferor used to pay, that is to say, there was invariably imposition of a new status and new terms. The finding of the learned Munsif was, therefore, based on custom. The learned Subordinate Judge has not considered this aspect of the case. No doubt, under section 12 of the Orissa Tenancy Act every permanent tenure is capable of being transferred and bequeathed, subject to the provisions of the Act, in the same manner and to the same extent as other immovable property; but under section 13 the right of the landlord to resume a resumable tenure is not affected, nor

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do sections 11 and 12 of the Act validate the transfer of a tenure or portion thereof which by the terms upon which they are held or by local custom are not transferable. The learned Munsif held in effect that by local custom the tenures were not transferable. If that is so, then the plaintiff was entitled to eject the defendant no. 1. The learned Subordinate Judge however, has not considered the evidence of custom of non-transferability of the tenures. The question must therefore be considered by the learned Subordinate Judge.

The result is that in so far as the defendant no. 2 is concerned the plaint must be returned for presentation to the proper Court. As regards the claim of the plaintiff against the defendant no. 1, it must be held that the transfers in question are transfers of a nature which would entitle the plaintiff to eject the defendant no. 1, provided the tenures are non-transferable, and the learned Subordinate Judge must decide the question as regards the non-transferability of the tenures on a consideration of the evidence of custom produced in the case. Appeal no. 25 of 1925 is allowed and the decree of the Subordinate Judge is set aside and the case remanded to him for decision on the question of custom of non-transferability and disposal according to law. Costs will abide the result.

Appeal no. 26 of 1925 is allowed in part, the decree of the Subordinate Judge is set aside and it is ordered that the plaint be returned under Order VII, rule 10, Civil Procedure Code. As there is only one plaint against both the defendants, a copy thereof will be retained on the record of the suit and the original will be returned with the necessary endorsement. There will be no order for costs in appeal no. 26.

MACPHERSON, J.—I agree.

Appeal no. 25 allowed.
Appeal no. 26 allowed in part.