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Prayer Ka merely asks the Court to determine the rights of the parties; but considering the whole plaint it is quite clear that such determination is required for the purpose of administration. I am satisfied that the suit cannot be regarded as a suit for land and I must dismiss the application with costs.

ADAMI, J.—I agree.

*Application dismissed.*

## APPELLATE CIVIL.

*Before Kulwant Sahay and Macpherson, J.J.*

UCHHAB JENA

v.

UPENDRA NAIK.\*

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 Dec., 14, 15,  
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*Orissa Tenancy Act, 1913 (Bihar and Orissa Act II of 1913), sections 16, 31 and 250 (e)—Occupancy holding, transfer of, not binding on landlord unless consent obtained—Purchaser at private sale, ejection of by fractional co-sharer landlords.*

Under the Orissa Tenancy Act, 1913, where an occupancy holding or a portion thereof, situated outside a permanently-settled estate, is transferred by private sale, the transfer is not binding on the landlord, and the transferee is a trespasser, unless the landlord has consented, or is deemed under the statute to have consented to the sale.

*Giridhari Naik v. Kashi Tindi*, (1) distinguished.

*Madhu Radhan v. Jagu Jena* (2) and *MacPherson v. Debibhusan Lal* (3) distinguished and declared to be overruled quoad hoc by *Jugeshar Misra v. Nath Koeri* (4).

Such a transferee is liable to be ejected at the instance of some of the co-sharer landlords to the extent of their share

\**Circuit Court, Cuttack*.—Appeal from Appellate Decree no. 85 of 1925, from a decision of Babu Jatindra Nath Ghosh, Additional Subordinate Judge of Cuttack, dated the 13th February, 1925, confirming a decision of Babu Ramesh Chandra Mitra, Munsif, 2nd Court of Puri, dated the 21st January, 1924.

(1) (1917) 2 Pat. L. J. 476.

(2) (1919) 4 Pat. L. J. 294.

(3) (1917) 2 Pat. L. J. 580.

(4) (1922) I. L. R. 1 Pat. 817.

even though he may, subsequently to his purchase of the raiyati interest, have purchased some interest of another co-sharer landlord.

*Gholam Mohiuddin v. Khairan* (1), distinguished.

*Hossain Mohomed v. Fakir Mahomed* (2) and *Kanchan Mandar v. Kamala Prasad* (3), followed.

Appeal by the defendants 2 and 3.

The suit out of which this second appeal arose was brought in 1923 by co-sharer landlords with an interest exceeding 14-annas to recover from defendants 1 to 4 possession, with mesne profits, of an area of a non-transferable occupancy holding proportionate to their interest, on the ground that defendants 1 to 3 and defendant 4, by separate sale-deeds, purchased in 1920 from the recorded raiyat the whole holding without the consent of the plaintiffs and, accordingly, were trespassers in possession. The defendants 1 to 3 and 4 pleaded that they had obtained the consent of the plaintiffs and the other landlords to the transfers. The other landlords, who were pro forma defendants, did not challenge the validity of the transfers. The Courts below held that the defence was not established and that the occupancy holding not being transferable without the consent of the landlords the plaintiffs were entitled to treat the defendants-appellants as trespassers and to recover possession from them. The trial Court decreed the plaintiffs' suit but the appellate court altered the decree to one for joint possession of the holding with defendants 1 to 4 in proportion to the landlord's interest of the plaintiffs.

The present appeal was preferred by defendants 2 and 3 who represent defendants 1 to 3.

• On behalf of the appellants the following three points were raised—

(1) Under the Orissa Tenancy Act an occupancy holding is transferable by private sale without the consent of the landlord;

(1) (1904) I. L. R. 81 Cal. 786.

(2) (1909) 10 Cal. L. J. 618.

(3) (1916) 21 Cal. L. J. 441.

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(2) Even if that be not so, the appellants having subsequently purchased a portion of the landlord's interest cannot be ejected from the holding : and

(3) A fractional landlord cannot evict a tenant.

*B. N. Das*, for the appellants.

*Cur. adv. vult.*

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

Chief stress is laid upon the first plea which, though often rejected, is persistently advanced afresh. In support of it the learned vakil refers (1) to section 250(e) of the Orissa Tenancy Act which lays down that the registration fee prescribed in section 31 shall be recoverable by the procedure for recovery of arrears of rent and to section 31; (2) to the decision in *Giridhari Naik v. Kashi Tindi* (1) and (3) to section 16 of the Act, as well as to the previous history of the question. To my mind these considerations do not avail the appellants.

The position under the Orissa Tenancy Act of a purchaser by private sale of an occupancy holding or a portion thereof situated outside a permanently-settled estate, is simple. Under sub-section (4) of section 31 the transfer is not valid against the landlord of the holding unless and until he has consented thereto, save as otherwise provided in section 31. Sub-sections (1) to (3) of section 31 set out a procedure whereby the transferee can secure what may be styled a statutory consent of the landlord in certain cases. Consent is always necessary but it may be secured either without or by resort to sub-sections (1) to (3). In the former case the landlord signifies his consent by registering the transfer whereupon the transferee becomes his raiyat and also becomes liable to him for the registration fee payable on the transfer. Section 250(e) provides for the case in which the new raiyat fails to pay that fee—the landlord's suit for

(1) (1917) 2 Pat. L. J. 476.

recovery of it must be brought in the revenue court. There is no implication that his consent to the transfer is not required. Prior to 1913 a registration fee was payable by custom when and if the landlord registered the transfer and the provision in respect of it in section 31(1) only lays down a statutory maximum for that registration fee. If the landlord's consent is not obtained otherwise—and it has been found that it was not obtained in the present case—the transferee may resort to sub-sections (1) to (3). If, when he makes application for registration, which it is laid down he *must* make and that within one year, the landlord accepts the registration fee which he tenders and a maximum for which is prescribed, the landlord's consent to the transfer and to the requisite distribution of the rent is deemed to have been given. If the landlord does not accept the tender, the transferee may within one month of the refusal or within one year from the transfer whichever is later, deposit the fee with the Collector and apply for registration. The Collector may after inquiry declare that the transfer has been duly registered; if he does so, his declaration has the same effect as if the landlord had accepted the registration fee—that is, the landlord is deemed to have consented to the transfer. But if the landlord has not consented or is not deemed under the statute to have consented, the transfer is not valid against him and the transferee is not his raiyat but a trespasser.

Mr. B. N. Das complains that it is hard that because a transferee has not applied within one year for registration he should lose the land which he has purchased. The complaint even if it can be entertained is groundless—with full knowledge he purchases an interest which can only be perfected by securing the consent of the landlord; the procedure under sub-sections 1 to 3 is a concession designed to facilitate the securing of that consent by a diligent purchaser, and there is no hardship in requiring compliance with the comparatively easy conditions under which the concession is available. When an

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exceptional procedure is conceded to the transferee whereby he may obtain the consent of the landlord which might otherwise not have been forthcoming, he must comply strictly with the procedure.

It is convenient at this stage to refer briefly to the previous history of the matter on which the learned vakil has relied. Assuming that it may be at all taken into consideration where the statute is clear, it does not assist the appellants. In 1821 Mr. Sterling minuted that he could not discover any instance of sale or mortgage of his holding by a raiyat nor any claim to such a right. After Act X of 1859 came into operation transfers became more common and the position in Puri to which the litigation relates was, as set out by Mr. (afterwards Sir Hugh) McPherson in his Report (Maddox, Vol. II, paragraph 126) that in regard to thani lands there was always a tacit admission that the landlord's consent was legally necessary to such a transfer, and this was expressed in the shape of a fee, usually Rs. 2 per cent. (this is "2 as. per rupee" in paragraph 321 of Vol. I) of the purchase price, paid when the new purchaser applied to have his name entered in the zamindar's rent-roll while up to a very recent date pahi raiyats had never even claimed a right of transfer. At the date of Mr. Maddox's report on the settlement of 1890—1900 the position in Orissa was, as stated by him in paragraph 321 that occupancy holdings were freely transferred but that the zamindar did not record a voluntary sale without a large premium, usually one-fourth of the price and discharge of all arrears of rent. Mr. James in his Report of the Settlement of 1908—1912 reports a great increase in transfers and gave it as his view that there should be no restriction on transfers (beyond the fee of twenty-five per cent. long paid without grumbling) except that the landlords should be able to refuse a man of known bad character. The position throughout therefore was that the consent of the landlord was still required in law and practice to make a transfer binding upon him, but that

consent was usually secured, at least in the case of private sales, without much difficulty on payment of a fee. In section 31 of the Orissa Tenancy Act, 1913, the legislature broadly accepted this position in respect of private sales and maintaining the general principle that the landlord's consent was necessary in respect of all sales except sales in execution of a decree for arrears of rent, conceded in the case of private sale a special procedure on compliance with which the consent of the landlord will in normal cases be "deemed to have been given". I can discern no indication of any intention on the part of the legislature to make occupancy holdings transferable, even in the case of private sale, without the consent of the landlord subject only to payment of the registration fee or to recognise as valid an existing practice of that nature.

The decision in *Giridhari Naik v. Kashi Tindi* (1) which is relied upon on behalf of the appellants is clearly not an authority for the proposition that occupancy rights are transferable in Orissa without the consent of the landlord. What is actually decided in that case is no more than that a sale by the Court of an occupancy holding in execution of a decree upon a mortgage may proceed in spite of the objection of a co-sharer landlord that the holding is not transferable without his consent which he would not give. That was neither the time nor the forum at which a landlord who was a party in another capacity could advance the plea of non-transferability of the holding. Moreover a sale in execution of a mortgage decree such as was under discussion in that case even if it be a voluntary as opposed to an involuntary sale, is a public or Court sale and not a private sale within the meaning of section 31(1) to (3) and accordingly the only portion of section 31 applicable to that sale, is the provision in sub-section (4) which makes the consent of the landlord necessary to the validity

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of the transfer as against him. The learned vakil relies specially on the passage in the judgment in which the learned Judges say: "It is fallacious to say that occupancy rights are not transferable in Orissa without the consent of the landlords. They are transferable without the landlord's consent unless it can be shown to the satisfaction of the Collector that the landlord has good reasons for his objection." But for the reasons which I have just given, this expression of opinion was obiter and with all respect to the learned Judges, I am unable to regard it as a correct exposition of the law in respect even of a transfer of an occupancy holding by private sale in a temporarily-settled area such as is now in contest, and still less in regard to a transfer thereof by a Court sale (not being a sale in execution of a decree for arrears of rent) such as was then before the Court. Under section 31 the latter is not valid against the landlord without his consent, and that consent cannot be deemed to be given under the procedure set out in sub-sections (1) to (3).

Mr. B. N. Das in passing urges that the lower appellate Court was in error in relying upon *Madhu Padhan v. Jagu Jena* (1). The contention is sound, that ruling having no bearing on the validity, against a landlord, of a private sale made without his consent. What was decided there, following *Macpherson v. Debibhusan Lal* (2) a decision under the Bengal Tenancy Act, was that an occupancy raiyat is entitled to object to the sale of his holding in execution of a money decree on the ground that the holding is not transferable. But in view of the decision of the Full Bench in *Jugeshar Misra v. Nath Koeri* (3) that a raiyat can be made to do involuntarily on behalf of his creditor what he can do voluntarily, and accordingly that a non-transferable occupancy holding may be sold in execution of a money decree whether obtained by the landlord of the holding or by a person

(1) (1919) 4 Pat. L. J. 294.

(2) (1917) 2 Pat. L. J. 530.

(3) (1922) I. L. R. 1 Pat. 317.

who is not the landlord and who has not obtained the landlord's consent, both the decision relied upon and the decision on which it was based, are no longer good law. All these cases however related to public sales of the class which as already pointed out is always invalid against the landlord of the holding unless and until he gives his consent, which consent cannot be exacted from him under sub-sections (1) to (3) of section 31. All that is made out in this regard is that the lower appellate court cited in favour of its view, in itself sound, a decision which does not support that view.

Finally, the fact that in section 16, the legislature has penalised failure on the part of a purchaser of a tenure not covered by section 15 to apply for registration within the period named while there is no similar provision in section 31 as regards the purchaser of an occupancy holding, obviously does not throw any light on the subject of the transferability without restriction of the latter, since the concession available under section 31 is itself contingent upon an application for registration being made.

The first contention is therefore unsound and is negatived.

The second contention, which is now raised for the first time, is unfounded since the plaintiffs' cause of action accrued before the purchase by the appellants and the decision of a single judge in Civil Revision nos. 38 to 42 of 1924 on which alone reliance is placed on behalf of the appellants and which relates to the purchase of an occupancy holding by persons who were *at the time of purchase* co-sharer landlords is not applicable, even if that decision which is challenged before us be correct.

In support of the third point, which is feebly urged, reliance is placed on *Gholam Mohiuddin v. Khairan* (1). But that was a case where the fractional

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(1) (1904) I. L. R. 31 Cal. 786.



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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*

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

NATABAR MANGRAJ.\*

1926.

Dec., 16, 22.

*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.