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absence of necessity to examine "all witnesses who can say *anything* about a particular occurrence". In any case the learned Sessions Judge has clearly left it to the jury to say for themselves how far the failure of the prosecution to call Narayani's mother was so material as to raise in their minds a reasonable doubt as to the prosecution evidence.

The contentions raised on behalf of the appellant all fail, and there is no room for interference by this Court. The sentence does not seem to be excessive having regard to the circumstances of the case. I would accordingly affirm the conviction and sentence and dismiss this appeal.

Fazl Ali, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

MUSSAMMAT KISHUNI KUER

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July, 28.

v.

ANDU MAHTON.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 23, 23A, 46, 76 *and* 79—*raiyat, whether can make a valid testamentary disposition of occupancy holding.*

Section 23, *Chota Nagpur Tenancy Act,* 1908, *lays down* :—

"If a raiyat dies intestate in respect of a right of occupancy it shall, subject to any local custom to the contrary, descend in the same manner as other immoveable property........................"

*Appeal from Appellate Decree no. 516 of 1928, from a decision of Babu Narendra Nath Banarji, Additional Subordinate Judge of Ranchi, dated the 12th December, 1927, reversing a decision of Babu Ramesh Chandra Sur, Munsif of Giridih, dated the 12th January, 1927.

Section 46 of the Act provides:

"No transfer by a raiyat of his right in his holding or any portion thereof,—

(a) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or

(b) by sale, gift or any other contract or agreement, shall be valid to any extent............................"

Held (i) that section 46 has no application to testamentary disposition,

(ii) that a raiyat governed by the Chota Nagpur Tenancy Act, 1908, can make a valid testamentary disposition of his occupancy holding and such dispositions are valid against his heirs and all other persons except, perhaps, the landlord.

Amulya Ratan Sarkar v. *Tarini Nath Dey*(1), *Kunja Lal Roy* v. *Umesh Chandra Roy*(2), *Umesh Chandra Dutta* v. *Joy Nath Das*(3), *Daksha Bala Dasya* v. *Raja Mondal*(4) and *Jageshwar Misra* v. *Nath Koeri*(5), referred to.

Per *Macpherson, J.*—" Section 23 of the Chota Nagpur Tenancy Act, 1908, indicates that the legislature contemplated that a raiyat possessing a right of occupancy might die either testate or intestate in respect of that right. Indeed it actually implies that ' the right is not only property but also immoveable property ', and even suggests that the ordinary law prevails under which the owner is entitled to dispose of it by will, subject, perhaps, to any local custom."

Appeal by defendants 3 and 4.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

Baldeo Sahay, *Chowdhry Mathura Prasad* and *H. P. Sinha*, for the appellants.

S. Deyal and *K. Deyal*, for the respondents.

KULWANT SAHAY, J.—This is an appeal by the defendants 3 and 4 and it arises out of a suit brought by the plaintiffs for joint possession along with the defendant no. 5 of an occupancy holding, failing

(1) (1914) I. L. R. 42 Cal. 254.
(2) (1914) 18 Cal. W. N. 1294.
(3) (1917) 22 Cal. W. N. 474.
(4) (1928) 49 Cal. L. J. 122.
(5) (1922) 3 Pat. L. T. 205.

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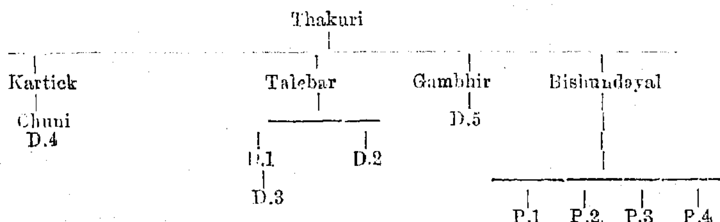
which for a declaration that they and defendant no. 5 are entitled on the death of defendant no. 4 to the holding as reversionary heirs of Chuni Mahto under the following circumstances:

The following genealogical table will be of help in understanding the facts of the case:—



There were four brothers, Kartik Mahto, Talebar Mahto, Gambhir Mahto and Bishundayal Mahto. Kartick Mahto died leaving a son Chuni, who died leaving a widow, Mussammat Kishuni Kumari, who is defendant no. 4 in the suit. Talebar died leaving two sons who are defendants nos. 1 and 2. The defendant no. 3 is the son of the defendant no. 1. Gambhir died leaving a son who is defendant no. 5. The plaintiffs are the sons of Bishundayal. The holding in dispute belonged to Chuni. The four brothers were separate; and the plaintiffs' case is that they are entitled to the holding of Chuni, notwithstanding the existence of his widow, on the ground that the widow has, as they allege, in collusion with the defendants nos. 1—3, set up a will alleged to have been executed by Chuni bequeathing the holding in dispute to the defendant no. 3.

The learned Munsif held that the plaintiffs or the other reversionary heirs of Chuni were not entitled to possession of the estate left by Chuni during the lifetime of his widow, the defendant no. 4. He further held that the plaintiffs were not entitled to a declaration that they were the reversionary heirs of Chuni and entitled to take his estate on the death of his widow as it could not be said who would be the actual reversioners on the death of the widow.

As regards the will set up by the defendants nos. 3 and 4 the learned Munsif found that the will was a genuine document and it was operative and valid in law. The Munsif accordingly dismissed the suit.

On appeal the learned Subordinate Judge has agreed with the findings of the Munsif on the first points. On the question of the validity of the will, however, the learned Subordinate Judge has disagreed with the Munsif and has held that the will was invalid in law.

The sole question for decision in the present appeal by the defendants nos. 3 and 4 is, whether the will which has been found to be a genuine document is operative in law.

The learned Subordinate Judge is of opinion that an occupancy tenant in Chota Nagpur cannot bequeath his holding by a testamentary disposition. His first ground is that raiyati holdings were before 1924 absolutely inalienable and he refers to section 46 of the Chota Nagpur Tenancy Act, sub-section (*1*) whereof provides that

"no transfer by a raiyat of his right in his holding or any portion thereof—(*a*) by mortgage or lease, for any period, expressed or implied which exceeds or might in any possible event exceed five years, or (*b*) by sale, gift or any other contract or agreement, shall be valid to any extent."

He then refers to sub-section (*6*) and to a notification of the Government of Bihar and Orissa, dated the 29th June, 1924, published in the Bihar and Orissa Gazette on the 2nd July, 1924, which empowers a raiyat to transfer his entire holding, or, with the Deputy Commissioner's consent, a part of his holding to another person who is of the same tribe or caste as himself and resides in the same village or an adjoining village belonging to the same landlord, or, with the sanction of the Deputy Commissioner, to any person without limitation of residence, who is closely related to the transferor raiyat; and he holds that

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neither sub-section (*1*) of section 46 nor the notification published under sub-section (*6*) of section 46 empowers a raiyat to make a testamentary disposition of his occupancy holding. The learned Subordinate Judge, however, himself observes that the provisions contained in section 46 relate to transfers by sale, gift, or any other contract or agreement, or to mortgages or leases for any peirod in excess of five years and do not refer to wills. He says

> " the instances cited in the Act are cases of transfer *inter vivos* and cannot by any stretch of imagination refer to a will, because the transfer in such a case comes into operation after the death of the raiyat. After the death, the raiyat cannot sell, or make a gift, or make any contract. By a will, a raiyat can prevent the landlord from resuming the raiyati holding which lapses to the landlord ordinarily in case of no heirs being found alive."

He then observes that the law does not contemplate the devise of a non-transferable raiyati holding in Bengal and he refers to the decision of the Calcutta High Court in *Amulya Ratan Sircar* v. *Tarini Nath Dey*(1) and he says:

> " I see no reason why greater privileges should be conferred on raiyats in Chota Nagpur by implication."

According to him the limited power which raiyats have in Chota Nagpur is to make transfers in their own lifetime and even then it depends upon the person who is the transferee or the extent of the rights transferred or the consent of the Deputy Commissioner to make the transfer valid. The learned Subordinate Judge, therefore, held that the will in dispute in the present case was wholly invalid.

Very learned and able arguments were addressed to us by the learned Advocates on both sides, and after a consideration thereof and of the various provisions contained in the Chota Nagpur Tenancy Act as well as some of the provisions contained in the Bengal Tenancy Act referred to by the learned Advocates, I am of opinion that the view taken by

(1) (1914) I. L. R. 42 Cal. 254.

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the learned Subordinate Judge is not correct. Section 46 of the Chota Nagpur Tenancy Act, to which the learned Subordinate Judge refers, only prohibits transfer by mortgage or lease for a term exceeding five years, or by sale, gift, or any other contract or agreement. The provisions of that section do not refer to testamentary dispositions, and it cannot be said by implication that, because section 46 prohibits transfer by mortgage, lease, sale, gift or any other contract or agreement, it also prohibits testamentary dispositions. In fact, on reading the provisions contained in sections 23, 23A, 46, 76 and 79 of the Chota Nagpur Tenancy Act and comparing the same with the provisions contained in sections 26, 178 and 183 of the Bengal Tenancy Act, it appears that the Legislature has deliberately abstained from making any provision in the Chota Nagpur Tenancy Act, either prohibiting or permitting testamentary dispositions of his occupancy holdings by a raiyat.

Section 23 of the Chota Nagpur Tenancy Act is verbatim the same as section 26 of the Bengal Tenancy Act. Both these sections provide that if a raiyat dies intestate in respect of a right of occupancy, it shall, subject to any local custom to the contrary, descend in the same manner as other immoveable property. Section 23A of the Chota Nagpur Tenancy Act provides that

"when an occupancy holding or any portion thereof is transferred in any way authorized by law, by succession, inheritance or sale, the transferee or his successor in title may cause the transfer to be registered in the office of the landlord to whom the rent of the holding or portion thereof, as the case may be, is payable."

Section 46 of the Chota Nagpur Tenancy Act, which has already been referred to, imposes restrictions on transfer of his rights by a raiyat by mortgage, lease, sale, gift, or any other contract or agreement. Section 76 of the Chota Nagpur Tenancy Act, which is verbatim the same as section 183 of the Bengal Tenancy Act, provides for saving of custom, usage or

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customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by the provisions of the two Acts. Section 79 of the Chota Nagpur Tenancy Act imposes restrictions on exclusion of the Act by agreement and provides that nothing in any contract between a landlord and a tenant shall, in any way, bar or affect certain rights which a raiyat has under the Act. Section 178 of the Bengal Tenancy Act which is similar to the provisions of section 79 of the Chota Nagpur Tenancy Act provides in clause (*d*) of sub-section (*3*) that

> " nothing in any contract made between a landlord and a tenant after the passing of this Act shall take away the right of a raiyat to transfer *or bequeath* his holding in accordance with local usage."

The corresponding provision in the Chota Nagpur Tenancy Act is contained in clause (*iii*) of sub-section (*3*) of section 79 which provides that

> " nothing in any contract made between a landlord and a tenant after the commencement of this Act shall take away the right of any occupancy-raiyat to transfer his holding or any portion thereof subject to, and in accordance with, the provisions of this Act;"

and it is remarkable that the provision saving the right of a raiyat to bequeath his holding contained in the Bengal Tenancy Act has been omitted from the Chota Nagpur Tenancy Act. On a consideration of these sections, therefore, it seems that the omission of any reference to testamentary dispositions in the Chota Nagpur Tenancy Act was deliberate and the Chota Nagpur Tenancy Act has made no provision one way or the other as regards such dispositions.

Reference is made by the learned Advocate for the appellants to section 23 of the Chota Nagpur Tenancy Act which provides that if a raiyat dies intestate in respect of a right of occupancy, it shall descend in the same manner as other immoveable property; and it is contended that by implication it provides that a raiyat can dispose of his property by a testamentary disposition. This argument was considered by a Bench of the Calcutta High Court

in relation to the corresponding provision in the Bengal Tenancy Act in the case of *Amulya Ratan Sircar* v. *Tarini Nath Dey*(1), referred to by the learned Subordinate Judge, where it was held that a non-transferable occupancy holding cannot be the subject of a valid testamentary disposition. That decision was followed in the Calcutta High Court in *Kunja Lal Roy* v. *Umesh Chandra Roy*(2) and in *Umesh Chandra Dutta* v. *Joy Nath Das*(3). All these cases were considered in a recent case by a Division Bench of the Calcutta High Court in *Daksha Bala Dasya* v. *Raja Mondal*(4) where the learned Judges dissented from the view taken in *Amulya Ratan Sircar* v. *Tarini Nath Day*(1) and held that an occupancy raiyat has the right to make a testamentary disposition of a non-transferable holding as he has to transfer it subject to the limitation mentioned in the Bengal Tenancy Act. It has been held by a Full Bench of this Court in *Jageshwar Misra* v. *Nath Koeri*(5) that the right of an occupancy raiyat in his holding is an interest in land and not merely a personal right and is, as such, saleable in execution as any other property of the judgment-debtor over which he has disposing power. This decision was no doubt with reference to the provisions of the Bengal Tenancy Act; but I am of opinion that it applies equally to the rights of an occupancy raiyat under the Chota Nagpur Tenancy Act and the interest of an occupancy raiyat there in his holding is an interest in land and the raiyat has the same rights in respect thereof as he has in any other property. A person of sound mind and not labouring under any disqualification referred to in the Succession Act can make a valid testamentary disposition of his property and,

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(1) (1914) I. L. R. 42 Cal. 254.

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if an occupancy right is a property, there is no reason why a raiyat should be held to be debarred from making a testamentary disposition of his occupancy holding. The provisions of the Bengal Tenancy Act as well as those of the Chota Nagpur Tenancy Act are provisions which primarily affect and regulate the relationship between the landlord and the tenant. Those provisions do not ordinarily affect the rights of tenants in relation to third persons and, although testamentary disposition by a raiyat in respect of his occupancy holding may or may not be binding upon the landlord, there seems to be nothing in the provisions of the Chota Nagpur Tenancy Act which would prohibit such disposition in relation to third persons.

I am, therefore, of opinion that a raiyat governed by the Chota Nagpur Tenancy Act can make a valid testamentary disposition of his occupancy holding and such disposition cannot be challenged by persons other than the landlord. It is not necessary in this case to consider whether the landlord can question the validity thereof.

I have already observed that sub-section (*1*) of section 46 of the Chota Nagpur Tenancy Act does not prohibit a testamentary disposition; but assuming that it does, it is clear that in the present case the disposition being in favour of the son of a cousin of the testator would be valid under the notification of the Government of Bihar and Orissa referred to above.

The result is that this appeal must be allowed and the decision of the learned Subordinate Judge in so far as it holds the will to be invalid must be set aside. The rest of his decision will stand The appellants are entitled to the costs of this appeal.

MACPHERSON, J.—I agree. Section 23 of the Chota Nagpur Tenancy Act indicates that the legislature contemplated that a raiyat possessing a right of occupancy might die either testate or intestate

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in respect of that right. Indeed it actually implies that the right is not only property but also immoveable property, and even suggests that the ordinary law prevails under which the owner is entitled to dispose of it by will (subject, perhaps, to any local custom of which there is no evidence in this case). The legislature, it is true, thought fit to provide in the Tenancy Act only for the case of intestacy. But a will would itself indicate the testator's wishes in respect of the right of occupancy. Apart from section 23 there is no reference in the Act, direct or indirect, to testamentary disposition. It may well be that from the rarity of wills (we have not been referred to any reported decision) or from the fact that unlike transfers inter vivos they had not by 1903, prior to which transfer by sale was prevalent in numerous portions of the Division, or by 1908 given and were hardly likely (since the bequest will in a majority of cases be to an agriculturist and a member of the testator's own tribe or caste) to give rise to grave agrarian and quasi political issues, it was considered unnecessary to enact special provisions in regard to them in a measure which deals mainly with the relationship between landlord and tenant. Further, a testator who took the trouble to deviate from the ordinary rule of succession, might well be left to make his own arrangements with the landlord and so it would also not be necessary to make in 1920 provision in section 23A for the case of bequest. It may thus be that, in the absence of statutory provision on the point, a raiyat's bequest of his right of occupancy to persons other than the body of natural heirs to his other immoveable property, may not [whether such bequest is or is not a transfer within the purview of section 46(*2*)] be binding on the landlord but that question does not concern us here and there is, in my judgment, no doubt that in the present state of the law such bequest is valid as against the natural heirs.

Appeal allowed.