APPELLATE CIVIL.

Before Das and Kulwant Sahay, JJ.

1929.

July, 3.

GULEY KUNJRA

v.

IMAM ALI.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 48, *scope of—raiyat and under-raiyat, lands held by, not co-extensive—section* 48, *whether applies.*

Section 48, Bengal Tenancy Act, 1885, provides :

" 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 of agreement—fifty per cent.; and

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

Held, that section 48 applies even to cases where the lands held by the under-raiyat and his landlord are not co-extensive, that is, where the under-raiyat holds a portion of the land comprised in the holding of the raiyat.

Where, therefore, the lands let out to the under-raiyat under an unregistered kabuliyat was only a portion of the lands held by the raiyat under the superior landlord,

Held, that the raiyat was not entitled to recover more than twenty-five per cent. of the rent which he himself had to pay to the superior landlord.

Natibulla Akanda v. *Badi* (1) and *Srijan Gazi* v. *Abdul Sattar* (2), followed.

Nim Chand Saha v. *Joy Chandra Nath* (3), not followed.

*Second Appeal no. 1417 of 1926, from a decision of Babu Nut Bihari Chatterji, Subordinate Judge of Shahabad, dated the 1st September, 1926, affirming a decision of Babu Umeshwar Prasad, 2nd Additional Munsif of Arrah, dated the 30th November, 1925.

(1) (1917) 42 Ind. Cas. 243.

(2) (1928) 32 Cal. W. N. 1050.

(3) (1912) I. L. R. 39 Cal. 839.

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Appeal by the defendants.

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

Sambhu Saran, for the appellants.

Syed Nuruddin, for the respondents.

KULWANT SAHAY, J.—The only point argued in this appeal is whether the plaintiffs are entitled to realize rent from the defendants in excess of 25 per cent. of the rent which the plaintiffs themselves pay to their landlord. The suit was for ejectment of the defendants from the land in dispute and for recovery of arrears of rent and for mesne-profits on the allegation that the land in dispute was the holding of one Abdulla Kunjra who died leaving his mother and his wife and a daughter, Musammat Sharifan. He had also left a son who died and whose interest was inherited by his mother and his sister. The plaintiffs' case is that the mother and the widow of Abdulla made a gift of all the properties inherited by them from Abdulla Kunjra in favour of Musammat Sharifan, that on the death of Musammat Sharifan the plaintiff no. 2, who is her daughter, inherited the property, and that the defendants were in possession of the land in dispute by virtue of a settlement as under-raiyat under a kabuliyat, dated the 2nd of March, 1921, at an annual rental of Rs. 49 for a term of three years 1329-31 F.S. The defendants, however, had during the survey proceedings denied the title of the plaintiffs and had set up a title of their own. The plaintiffs, therefore, brought the suit for declaration of their title and for ejectment of the defendants and for recovery of arrears of rent as well as mesne-profits for the period after the expiry of the term of the kabuliyat. The defence was that the land formed a part of the defendants' holding and they were not holding the land under the kabuliyat set up by the plaintiffs. Both the courts below have found that the plaintiffs have a

subsisting title as raiyats of the land in dispute and that the defendants are under-raiyats under them. Both the courts below have rejected the claim for ejectment for want of notice under section 49 of the Bengal Tenancy Act and they have made a decree for arrears of rent and for mesne-profits on the annual rental reserved in the kabuliyat.

The point for consideration in this appeal by the defendants is whether the plaintiffs are entitled to realize rent in excess of 25 per cent. of the rent they themselves paid to their superior landlord. Section 48 of the Bengal Tenancy Act provides:

> "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."

In the present case the kabuliyat was not registered. Therefore, it is contended that that the plaintiffs cannot recover more than 25 per cent. of the rent which they themselves pay. The learned Subordinate Judge has relied upon *Nim Chand Saha* v. *Joy Chandra Nath* (1), where it was held that section 48 of the Bengal Tenancy Act applies to cases in which the land held by the raiyat is co-extensive with the land held by the under-raiyat. In the present case the learned Subordinate Judge has found that the land held by the raiyats, viz., the plaintiffs was 16 kathas out of which only 10 kathas had been let out to the defendants and that as the lands let out were not co-extensive with the lands held by the plaintiffs section 48 did not apply. It is contended before us that the decision in *Nim Chand Saha* v. *Joy Chandra Nath* (1) is not correct. The correctness of this decision was doubted in two cases in the Calcutta High

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Court. In *Natibulla Akanda* v. *Badi* (1), Teunon and Shamsul Huda, JJ., observed that to hold that section 48 applies and can be applied only where the whole of the raiyat's holding is sublet would be to defeat the policy and intention of the Legislature. In *Srijan Gazi* v. *Abdul Sattar* (2), Rankin, C.J., in dealing with the decision in *Nim Chand Saha* v. *Joy Chandra Nath* (3) where it was held that section 48 applies to cases in which the land held by the raiyat is co-extensive with the land held by the under-raiyat, referred to the decision of Teunon and Shamsul Huda, JJ., in *Natibulla Akanda* v. *Badi* (1) and observed as follows: "There the learned Judges pointed out that the decision of Mr. Justice Harington and Mr. Justice Mookerjee in *Nim Chand Saha* v. *Joy Chandra Nath* (3) was perfectly right if it was understood with reference to the facts with which they had to deal, but that, if it was taken that only where the two plots were absolutely co-extensive was the section to be applied at all, that would be a consideration which would defeat the policy of the Legislature" and the learned Chief Justice observed: "I agree entirely with the judgment which was given therein," i.e., in *Natibulla Akanda* v. *Badi*(1).

Having regard to the wording of the section there seems hardly any justification for holding that the section would apply only in cases where the lands held by the raiyat and by the under-raiyat are co-extensive. All that the section provides is that the raiyat cannot recover from his under-raiyat a rent exceeding 50 per cent. or 25 per cent. of the rent which he himself pays to his landlord and, in my opinion, this is the only restriction which is placed upon the right of the raiyat to recover the rent from his under-raiyat. Even in cases where the lands are not co-extensive,

(1) (1917) 42 Ind. Cas. 243.
(2) (1928) 32 Cal. W. N. 1050.
(3) (1912) I. L. R. 39 Cal. 839.

that is, where the under-raiyat holds a portion of the land comprised in the holding of the raiyat, the restriction placed by section 48 is that he cannot recover more than 50 per cent. or 25 per cent., as the case may be, of the rent which he himself pays to his landlord. On a consideration of the terms of the section I would hold that even in cases where the lands are not co-extensive the raiyat is precluded from realising more than 50 or 25 per cent., as the case may be, from his under-raiyat. In the present case, therefore, the plaintiffs cannot recover more than 25 per cent. of the rent which they themselves pay to their landlord. There is nothing either in the pleadings of the parties or in the judgments of the two courts to indicate the amount of rent which the plaintiffs pay for their holding to their landlord. The decision of the learned Subordinate Judge on this point must, therefore, be set aside and the case remanded to him for a finding as regards the amount of rent payable by the plaintiffs to their landlord in respect of the holding, a part of which had been let out to the defendants, and to make a decree for rent in favour of the plaintiffs for a sum not exceeding 25 per cent. of the rent which they themselves pay to their landlord. In other respects the decree of the learned Subordinate Judge will stand.

There will be no order for costs in this appeal inasmuch as the title of the plaintiffs as found by the Subordinate Judge has not been challenged, and the question as regards the amount of rent recoverable by the plaintiffs does not appear to have been raised either in the written statement or during the trial of the case before the Munsif.

DAS, J.—I agree.

Appeal allowed.

Case remanded.