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KAYASTHA TRADING AND BANKING CORPORATION, GORAKHPUR v. JAI KARAN LAL.

ROSS, J.

learned Advocate for the appellants is correct, then section 200 would be swept away altogether. It seems to me therefore that the learned District Judge is right.

It is then contended that as the case is now before this Court, it may be sent back in order that the District Judge may enforce the decree. But this is to ignore the procedure laid down by the Companies Act which must be strictly followed.

Finally it was argued that the third proviso to section 3 validates these proceedings. But all that that proviso allows is that nothing in the section shall invalidate a proceeding by reason of its being taken in a wrong court. But where the objection is taken at the very beginning, the objection must be decided according to law; and the objection has been correctly decided in this case, and there is nothing to validate.

These appeals are dismissed. Appeal no. 8 without costs and Appeal no. 9 with costs.

DAS, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Ross, JJ.

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July, 5.

RAJA KIRTYA NAND SINHA BAHADUR
v.
RAM LAL JUBE.*

Bengal Tenancy Act, 1885 (Bengal Act VIII of 1885), section 22(2)—Purchase of occupancy right by co-sharer landlord—settlement with tenant—partition—part of holding allotted to purchaser and remainder to the other co-sharer—status of purchaser in share allotted to other co-sharer.

Under section 22(2), Bengal Tenancy Act, 1885, "If the occupancy right in land is transferred to a person jointly

*Appeal from Appellate Decree no: 566 of 1924, from a decision of H. R. Meredith Esq., I.C.S., District Judge of Purnea, dated the 13th February 1924, confirming a decision of Babu Gajadhar Prashad, Munsif of Purnea, dated the 15th January 1923.

interested in the land as proprietor.....he shall be entitled to hold the land subject to the payment to his co-proprietors.....of the share of the rent which may be from time to time payable to them; and if such transferee sublets the land to a third person, such third person shall be deemed to be a.....raiyat.....in respect of the land ".

Held, (*i*) that where, after a purchase by a co-sharer, there is a partition between the co-sharers and part of the holding is allotted to the purchaser co-sharer and the remainder to the other co-sharers, the status of the purchaser co-sharer in the part allotted to the other co-sharers is not affected; (*ii*) that the interest conferred by section 22(2) on a transferee co-sharer is not affected merely by his making a settlement with a tenant.

Jhapsi Sao v. *Musammat Bibi Aliman*(1), *Nandkishore Singh* v. *Mathura Sahu* (2), and *Basudeo Narain* v. *Radha Kishun* (3), referred to.

Appeal by the plaintiffs.

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

S. N. Palit and *G. P. Das*, for the appellants.

Ram Prasad, for the respondents.

Ross, J.—The plaintiffs who will be hereafter referred to as the Banaili Raj represent 13-annas 3-pies interest in mauza Parora; the defendants first party who will be hereafter referred to as the Srinagar Raj represent the remaining 2-annas 9-pies interest; the defendant second party is the receiver of the Srinagar estate; the defendant third party, Ramlal Durbey, is the son of Subaklal Durbey, who was the tenant of a holding of 153 bighas 5 cottahs and 17 dhurs in the village. He sold this holding to Dwarkanath Thakur and Bikan Thakur and in the record-of-rights, prepared somewhere about 1890, the name of Subaklal as vendor and Dwarkanath and another as vendees were both entered in respect of this holding. The plaintiffs brought a suit for rent in

(1) (1926) 7 Pat. L. T. 170. (2) (1922) 3 Pat. L. T. 13.
(3) (1922) 3 Pat. L. T. 22.

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1897 against these vendees and sold the holding in execution of the decree in 1898 and purchased it themselves. They settled the land with different tenants from time to time and, eventually, the defendant fourth party became the tenant in 1911. Subsequently there was a partition of mauza Parora between the Banaili Raj and the Srinagar Raj and, by partition, 71 bighas 15 cottahs and 7 dhurs of that holding was allotted to the Banaili Raj and 81 bighas 10 cottahs and 10 dhurs to the Srinagar Raj; but, in the partition papers, the record-of-rights was used with the result that the name of the recorded tenant was given as Subaklal Durbey. Even after the partition the Banaili Raj continued to pay to the Srinagar Raj the rent of that portion of the holding which had fallen to their takhta and received rent receipts. Notwithstanding this the Srinagar Raj, in 1917, instituted a suit for rent of the 81 bighas against the defendant third party and obtained a decree and took proceedings for sale of the holding. This suit was therefore brought by the Banaili Raj for a declaration that the defendant third party had no connection with the land; that the Srinagar Raj was only entitled to the proportionate rent of the 81 bighas; that the rent decree was null and void; and that the property could not be sold in execution thereof.

The suit was defended only by Ramlal Durbey, defendant third party; and his contention was that since the partition the Banaili Raj had no concern with this holding and that they had no right to maintain the suit.

The Munsif found that Subaklal Durbey had parted with his interest in the holding and that Dwarkanath Thakur and Bikan Thakur were in possession as purchasers. He further held that the Banaili Raj had obtained possession of the holding and had paid rent to the Srinagar Raj both before and after the partition; and that the Banaili Raj

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had been realizing from the persons in actual possession and had been paying rent to the Srinagar Raj. He held, however, that inasmuch as the defendant fourth party must be deemed to be raiyat of the land under section 22(2) of the Bengal Tenancy Act, he became a raiyat under all the proprietors and, therefore, since the partition, the plaintiffs have no interest now in the land in suit. He therefore dismissed the suit. The learned District Judge agreed with this view and dismissed the appeal of the plaintiffs.

It is now contended in second appeal that the partition did not affect the rights of the Banaili Raj in this land except to this extent that the Srinagar Raj became entitled to the entire rent of 81 bighas instead of a proportionate rent in the entire 153 bighas; that the Banaili Raj is still in possession through the defendant fourth party; and that they have been recognized by the Srinagar Raj who have accepted rent from them subsequently to the partition. Reference was made to the decisions of this Court in *Jhapsi Sao* v. *Musammat Bibi Aliman* (1), *Nandikishore Singh* v. *Mathura Sahu* (2) and *Basudeo Narain* v. *Radha Kishun* (3). The learned advocate for the respondents sought to distinguish these last-mentioned cases on the ground that they deal with a case where an entire holding has fallen to a co-sharer other than the purchasing co-sharer, whereas in the present case the purchasing co-sharer has in fact obtained 71 bighas and odd cottahs out of the holding already and is therefore not entitled to claim any interest in the remainder which has fallen to the other takhta. This distinction does not seem to me to proceed on any principle. The fact that the proprietary right of part of a holding after partition has fallen to the co-sharer who purchased the entire holding will not affect the question of his status with regard to that portion of the holding which falls in

(1) (1926) 7 Pat. L. T. 170. (2) (1922) 3 Pat. L. T. 13.
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the takhta of another landlord. The first mentioned decision is sought to be distinguished on the ground that it was a case between co-sharers, whereas the present case is a case between a co-sharer and a person alleging himself to be a tenant. That, however, would be no ground for distinguishing the decision so far as it deals with the effect of a partition upon the interest of a purchasing co-sharer. It was further contended that the Banaili Raj ought to have set up this right in the partition proceedings; but, on the contrary, they allowed the name of the contesting defendant to be recorded in respect of this holding. In my opinion, nothing turns on this. It is stated in the plaint that the partition was made according to the survey papers and that statement has not been controverted. If, for the purposes of the partition, the name of a tenant who had long ceased to have any interest in the holding was recorded, that cannot affect the real rights of the parties.

The main contention, however, on behalf of the respondent is that inasmuch as when the purchasing co-sharer settles the land, the tenant becomes a raiyat under section 22(*2*), the position of the purchasing co-sharer then becomes that of landlord and consequently, on partition, this interest ceases when the holding falls to the takhta of another landlord; when the purchaser makes a settlement, he is not himself a tenant nor a tenure-holder and must therefore be a proprietor. The question is not free from difficulty; but it is important to observe the exact language of section 22(*2*). It is not enacted that if the transferee sublets the land to a third person, such person shall be a tenure-holder or a raiyat, as the case may be, in respect of the land, but that such person shall be deemed to be a tenure-holder or a raiyat; that is to say, the section itself recognizes the relationship as artificial and, by implication suggests that, by making such a settlement, the transferee is not a landlord, but that the peculiar status conferred upon him by the section [as held in *Bambahadur Lal* v.

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Musammat Gungora Kuar (1)] still continues notwithstanding the settlement. Nor is it apparent on principle why the interest of the transferee co-sharer should be affected merely by his making a settlement with a tenant. It has been held in many decisions in this Court that he is entitled to hold the land which he has acquired, after partition, and I do not see how it can make any difference to this right that he has settled it with a person who is deemed to be a raiyat. The position is certainly anomalous; but the anomaly is the creation of section 22(*2*).

In my opinion, therefore, this appeal must be decreed with costs and the decrees of the Courts below set aside and the suit of the plaintiffs decreed with costs throughout against the defendant third party.

DAS, J.—I agree.

PRIVY COUNCIL.

1926.

July, 6.

NILADRI SAHU

v.

MAHANT CHATURBHUJ DAS.

Hindu Law—Religious Endowment—Mortgage of Math Property—Necessity—Discharge of onerous Debt—Debt not for Necessity—Receiver—Realization of Mahant's Interest in Endowment.

The mahant of a math mortgaged certain of the endowed properties at 1 per cent. per mensem in order to discharge loans at 2 per cent. per mensem which were an accumulating burden upon the endowment; he also covenanted personally to pay. The original loans had been incurred mainly for the purpose of constructing pakka buildings for the accommodation of wealthy devotees visiting the math, and in part for the ordinary expenses of the worship. In a suit to enforce the mortgage against the mahant personally and against the

**Present*: VISCOUNT DUNEDIN, LORD ATKINSON and MR. AMEER ALI.

(1) (1926) 7 Pat. L. T. 87.