APPELLATE CIVIL.

Before Dawson Miller, C. J. and Adami, J.

SARASWATI CHARAN PRASAD SINGH 1927.

v. Nov., 21.

SURAJDEO NARAIN SINGH.*

Bengal Tenancy Act, 1885, (Bengal Act VIII of 1885), sections 13 and 18—holding at fixed rates, sale of—landlord's fee not deposited—transfer, information of, not given to the landlord—recorded tenants, decree for rent against, effect of—estoppel.

Section 13, Bengal Tenancy Act, 1885, provides :

"When a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof..... the Court shall, before confirming the sale under section 312 of the Code of Civil Procedure, (Order XXI, rule 92, Act V of 1908)..... require the purchaser..... to pay into Court the landlord's fee prescribed by the last foregoing section together with the costs necessary for its transmission to the landlord, and such further fee for service of notice of the sale..... on the landlord as may be prescribed."

Section 18 lays down :

"a raiyat holding at a rent, or rate of rent, fixed in perpetuity,
(*a*) shall be subject to the same provisions with respect to the transfer of and succession to his holding as the holder of a permanent tenure....."

Where, therefore, *S* purchased a holding at fixed rates in execution of a decree against the recorded tenants and falsely represented to the Court that the holding was an occupancy holding, and, therefore, the provisions of section 13 which require certain things to be done before the sale can be confirmed (including the deposit of a fee for service of notice of the sale upon the landlord) were not complied with, and the landlords had no information as to the transaction, *held*, in a suit by the purchasers for recovery of possession of the holding which was subsequently purchased by the landlords in execution of a decree for arrears of rent against the recorded tenants, that, notwithstanding the purchase, the landlords

*Second Appeal no. 195 of 1925, from a decision of Babu Kamala Prasad, Subordinate Judge of Muzaffarpur, dated the 16th January, 1925, reversing a decision of Maulavi Muhammad Shamsuddin, Munsif of Hajipur, dated the 17th March, 1924.

1927.

SARASWATI CHARAN PRASAD SINGH v. SURAJDEO NARAIN SINGH.

could still sue the recorded tenants and the purchasers were estopped from contending that the rent suit against their transferors, the original tenants, was not properly constituted.

Surapati Roy v. *Ram Narayan Mukerji* (1), *Kristo Bullov Ghose* v. *Kristo Lal Singh* (2) and *Hamendra Nath Mukerji* v. *Kumar Nath Roy* (3), distinguished.

Appeal by defendants.

This was an appeal on behalf of the defendants second party in the suit against a decision of the Subordinate Judge of Muzaffarpur in favour of the plaintiffs dated the 16th January, 1925, reversing a decision of the Munsif of Hajipur which had dismissed the plaintiffs' suit.

In and before the year 1913 Dasrath Rai and certain other members of his family, who were represented by the defendants third party, were the tenants of a small holding measuring between 3 and 4 bighas of land in mauza Dighi Kalan in the Muzaffarpur district. It was held at a rate of rent fixed in perpetuity, commonly described as a saramoiyan, and was so recorded in the record-of-rights. By section 18 of the Bengal Tenancy Act, a raiyati holding at a rent or rate of rent fixed in perpetuity is subject to the same provisions with respect to the transfer of his holding as the holder of a permanent tenure. On the 10th June, 1913, the plaintiffs 1, 2 and 3, in execution of a money decree obtained by them against the defendants third party, put up for sale a fractional portion of the holding describing it in the sale proclamation as an occupancy holding and themselves purchased it. On the 13th September, in the same year the plaintiff no. 1, in execution of a similar decree obtained by him, put up for sale a further portion of the holding similarly described and himself purchased it. The portions so purchased at these two sales amounted together to approximately one bigha. At three later sales which took place on the 13th

(1) (1924) 39 Cal. L. J. 26 P. C. (2) (1889) I. L. R. 16 Cal. 642.
(3) (1907-08) 12 Cal. W. N. 478.

November, 1915, the 23rd January, 1917, and the 24th January, 1917, the plaintiffs or some one or more of them purchased the remainder of the holding. The first sale was in execution of a money decree and the other two were by kabala executed by the defendants third party.

On the 27th September, 1915, that is after the date of the first two sales above mentioned and before the remaining three, the landlords of the village, in whose sherista the names of the third party defendants were still registered as tenants, sued those defendants for arrears of rent, obtained a decree and put up the holding for sale on the 7th June, 1919. At that sale Jamna Prasad, deceased, the father of the defendants second party who represented him, was the purchaser, and he subsequently obtained delivery of possession by dispossessing the plaintiffs. The sale proclamation in that execution properly described the property as a saramoiyan interest.

The plaintiffs sued to recover possession together with mesne profits from the defendants second party. The landlords and the original tenants were also impleaded as first and third parties respectively. The suit was contested by the second party defendants only. One of the main questions at the trial was whether, as the plaintiffs in their plaint alleged, the holding was held at a fixed rate of rent or whether it was merely an occupancy holding. In the former case under the provisions of section 11 of the Bengal Tenancy Act, the holding would be transferable without the consent of the landlord, and it would, ordinarily, be incumbent upon the landlord to sue all the actual tenants in whom the property vested, in order to enable him to obtain a decree having the force of a rent decree. In the latter case, unless there was a custom of transferability in the village, which was not the case here, the holding would be non-transferable and the landlord could properly sue the registered tenants unless he had recognised the transfer, which was not the case.

1927.

SARASWATI CHARAN PRASAD SINGH v. SURAJDEO NARAIN SINGH.

The Munsif of Hajipur, before whom the case came for trial, held that the presumption attaching to the entry in the survey khatian describing the holding as saramoiyan was rebutted by the evidence and that it was in fact an ordinary occupancy holding, and, as there was no custom of transferability, the plaintiffs by their purchase acquired no right to possession against the landlords or those who purchased in execution of the rent decree obtained by the landlords.

The Subordinate Judge on appeal differed from the Munsif on this point and found that the holding was one held at a fixed rate of rent and was freely transferable. He further held that the two purchases by the plaintiffs in execution of money decrees against the defendants third party in 1913 vested in them the portions so purchased and, therefore, the decree obtained by the landlords in the rent suit brought in 1915 against the defendants third party without impleading their transferees, the plaintiffs, did not create a charge upon the property as those defendants did not, when the suit was instituted, represent the entire tenancy and the decree must be regarded as a money decree only. From this it followed that the holding which had entirely passed out of the hands of the third party defendants by the 24th January 1917 could not be attached and sold in execution of the so-called rent decree, the execution proceedings having been instituted after that date. It was contended, however, on behalf of the defendants second party that as no notice of the transfer to the plaintiffs was given to the landlords, as prescribed by section 13 of the Bengal Tenancy Act, the landlords were not bound to recognise the transferees as tenants and might still sue the registered tenants. The Subordinate Judge considered that this point was concluded by the decision of the Judicial Committee in *Surapati Roy* v. *Ram Narayan Mukerji* (1)

(1) (1924) 39 Cal. L. J. 26 P. C.

which decided that under section 12 of the Bengal Tenancy Act, a transfer of a permanent tenure is complete as soon as the instrument of transfer is registered, as therein prescribed, and the transferors are not thereafter liable for rent to the landlord. He accordingly reversed the decision of the Munsif and passed a decree in favour of the plaintiffs for possession and mesne profits.

From that decision the defendants second party appealed to the High Court.

Hasan Imam (with him *Hasan Jan*) for the appellants:—A landlord who has no notice of the sale of a holding at a fixed rate of rent is not bound to implead the transferee of the holding in the rent suit. Admittedly the purchasers did not comply with the provisions of section 13, Bengal Tenancy Act, which lays down that before a sale can be confirmed they must deposit the landlord's fee and the Court has to send it on to the Collector for transmission to the landlord with a notice that the sale has taken place. The reason why this course was not adopted is that the purchasers described the holding as an occupancy holding. If they had not done so, the Court would have made the purchasers deposit the fee and the landlord would have in ordinary course got the information. In the absence of any such notice I was bound to sue the recorded tenants. I rely on *Ramoyi Dasi* v. *Rupai Parmanick* (1), and *Fazar Ali Mistri* v. *Amir Buksh Mian* (2). The learned Subordinate Judge is wrong in thinking that these two cases are no longer good law in view of the decision of the Judicial Committee in *Surapati Roy* v. *Ram Narayan Mukerji* (3).

[CHIEF JUSTICE.—It is not in conflict with the other cases; it proceeds on the assumption that notice has to be issued.]

(1) (1911) 13 Cal. L. J. 267. (2) (1918) 47 Ind. Cas. 334.
(3) (1924) 39 Cal. L. J. 26 P. C.

1927.

SARASWATI CHARAN PRASAD SINGH v. SURAJDEO NARAIN SINGH.

Yes. This case is not an authority for the proposition that if notices have not been issued the transfer is perfect.

Profulla Kumar Sen v. *Nawab Sir Salimulla Bahadur* (1) is a case where the purchaser did not take any steps to have his name recorded in the landlord's sherishta and it was there held that the entire tenure passed by the sale in execution of a decree for arrears of rent against the recorded tenant.

No doubt it was the duty of the Court to send the notice but if it is proved that the landlord's fee was never paid, how could the Court inform the landlord?

Shivanandan Rai, (with him *Susil Madhab Mullick*), for the respondents:—If there are some tenants who have a valid interest in the tenancy and a suit for rent is brought without impleading them as defendants, a decree obtained in that suit will have the effect of a money decree and only the right, title and interest of the judgment-debtors will pass by the execution sale. This raises the question whether I had acquired a valid title in the holding at the date of the suit. The Bengal Tenancy Validating and Amending Act (B. C. Act 1 of 1903) set at rest the conflicting of opinion on this point, and enacted that the non-payment of the landlord's fee under sections 12 and 13 would not invalidate the sale.

[ADAMI, J.—But the Act does not say anything about the notice to the landlord.]

My point is that the purchasers acquired a valid title from the date of the purchase and the non-compliance with the provisions of section 13 would not affect that title.

[CHIEF JUSTICE.—Your title may be valid, but how can you demand of the landlord to implead you in the suit unless you give him notice of the purchase?]

(1) (1918-19) 23 Cal. W. N. 590.

The finding of the Court below is that the plaintiff knew of the purchase. I rely on *Hamendra Nath Mukerji* v. *Kumar Nath Roy* (1) and *Beradar Singh* v. *Bacha Mahto* (2). The case of *Profulla Kumar Sen* v. *Nawab Sir Salimulla Bahadur* (3) is distinguishable as it relates to a permanent tenure. *Surapati Roy* v. *Ram Narayan Mukerji* (4) is on all fours with the present case. It decides that the title becomes perfect on registration under section 12.

Here, if it be held, as should be held, that the title had become vested in me at the date of the purchase, I was a necessary party to the suit for rent.

Hasan Jan, in reply:—The position in this case would have been different if the purchaser had objected at the time of the suit and had intervened with a prayer to be impleaded as a defendant.

[CHIEF JUSTICE.—What have you got to say about the amending Act 1 of 1903?].

The amending Act was intended to afford protection to the transferee against the transferor and not against the landlord. In *Surapati Roy* v. *Ram Narayan Mukerji* (4) there is no finding that the landlord's fee had not been paid.

[CHIEF JUSTICE.—In *Hamendra Nath Mukerji* v. *Kumar Nath Roy* (1), the property had been transferred and there had been a registration too; therefore presumably the landlord had notice of the purchase.]

That is exactly my submission.

S. A. K.

Cur. Adv. Vult.

(1) (1907-08) 12 Cal. W. N. 478. (2) (1920) 5 Pat. L. J. 32.

(3) (1918-19) 23 Cal. W. N. 590. (4) (1924) 39 Cal. L. J. 26 P. C.

1927.

SARASWATI CHARAN PRASAD SINGH v. SURAJDEO NARAIN SINGH.

DAWSON MILLER, C.J.

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

In my opinon the decision in *Surapati Roy* v. *Ram Narayan Mukerji* (1) is not conclusive of this case nor are the facts at all similar. There the *patnidar* as landlord sued 15 defendants as *darpatnidars* for rent, alleging that they were all jointly interested in the under tenure and jointly and severally liable for the whole rent. Some of the defendants denied liability on the ground that before suit they had transferred their interest to their co-sharers, the remaining defendants, by a deed of relinquishment properly registered as prescribed in section 12 of the Bengal Tenancy Act, and that from the date of registration they ceased to have any interest in the property and were not liable for the subsequent rent. The contention which had found favour in the High Court at Calcutta, whose judgment was then under appeal, was that there was no consideration for the transfer which was, therefore, inoperative. Their Lordships of the Judicial Committee appear to have agreed with the Subordinate Judge, whose judgment they quote, that the question of consideration was a matter between the transferors and transferees and did not concern the plaintiffs, and held that a transfer of a permanent tenure by a registered document was complete under section 12 of the Bengal Tenancy Act as soon as the document was registered, following the earlier decisions of the Calcutta High Court in *Kristo Bullun Ghose* v. *Kristo Lal Singh* (2) and *Hemendra Nath Mukerji* v. *Kumar Nath Roy*. (3). In the last cited case it was held that a relinquishment in favour of co-sharer tenure holders was complete and the liability of the transferors ceased on registration under section 12 notwithstanding that the landlord's fee required by

(1) (1924) 39 Cal. L. J. 26 P. C.

(2) (1889) I. L. R. 16 Cal. 642. (3) (1907-08) 12 Cal. W. N. 478.

the section had not been paid to him. It seems clear that non-payment of the landlord's fee would not invalidate the transfer in view of section 1 of Bengal Act I of 1903 (The Bengal Tenancy Validation and Amending Act), and the Court relied on that section. In the former case the objection taken by the landlords was that the transferor remained liable because the notice required by section 12 to be served on the landlords had been served on one only of them although registration had been effected, and the transferee's name had in fact been duly registered in the landlord's sherista in place of the previous tenants. Again it was held that the property passed on registration and that thenceforward the transferor was not liable for rent. It will be observed that in those cases there is nothing to indicate that the transferees omitted to do anything that was required to be done by them before registration under the section, and it does not appear that it was through any fault of theirs that the fee was not transmitted to the landlord in the one case or that the notice was not served on each of the landlords in the other. I do not question the correctness of the decisions in those cases, but the question for decision which there arose was not whether the suit against the tenants was properly constituted but whether some of the defendants who had transferred their interest by a document properly registered under the Act remained liable for the rent accruing due after the registration.

In the present case no question of registration arises for section 12 has no application to the case of a sale in execution of a decree. In this case the relevant section, assuming that the plaintiffs acquired an interest in a holding at fixed rates, is section 13 which applies to a sale of a permanent tenure in execution of a decree other than a rent decree and provides that the Court shall, before confirming the sale under section 312 (now Order XXI, rule 92) of the Code of Civil Procedure, require the purchaser to pay, in addition to the landlord's fee and the cost of transmission

1927.

SARASWATI CHARAN PRASAD SINGH v. SURAJDEO NARAIN SINGH.

DAWSON MILLER, C.J.

prescribed in the earlier section, such further fee for service of notice on the landlord as may be prescribed. Under section 17 the earlier provisions relating to transfer of a permanent tenure apply equally, subject to section 88, to a transfer of a share in a permanent tenure. Now the provisions of section 13 which require certain things to be done before the sale can be confirmed, including the deposit of a fee for service of notice, of the sale upon the landlord, were not complied with and therefore the landlords had no information as to the transactions whereby the plaintiffs purchased a portion of the holding in 1913. The landlords accordingly sued the registered tenants for the rent, and it is not contended that the rent was not due or that the plaintiffs, had they been joined as defendants in that suit, could have successfully resisted the claim. Had the execution Court in 1913 been informed, before confirmation of the sale, that the property purchased was a portion of a holding at fixed rates it would have required the plaintiffs to conform with the provisions of section 13, and it may be presumed that in due course the landlords would have been informed through the Collector of the transaction as provided in sub-section (2) of section 13. It is unnecessary to determine whether, if the plaintiffs had done all that was required by them and still the landlord had not received notice, they could then have contended that the rent suit was not properly constituted, but in the present case they did nothing by way of informing the Court before confirmation of the sale that the property was a holding at fixed rates. The reason they assign for their omission is that the property which they put up for sale and purchased in execution of their decrees in 1913 was not described in the sale proclamation as a portion of a holding at fixed rates but a portion of an occupancy holding and, therefore, section 13 had no application. The plaintiffs, however, were themselves the decree-holders and they are responsible for the description in the sale

proclamation of the property they attached and sold in execution of their money decrees. Their case now is that the property was in fact a tenancy at fixed rates, although not so described by them when they purchased it. They know best why they falsely described the property as an occupancy holding; and it was through their own omission that the landlords were not informed of the transaction. In such circumstances I think there would be good ground for holding that they are estopped from contending that the rent suit against their transferors, the original tenants, was not properly constituted; but there is another aspect of the case which, in my opinion, is fatal to the plaintiffs' claim. They never in fact purchased a share in a saramoiyan interest in 1913 in execution of their decrees. What they purported to purchase at those sales was a share in an ordinary occupancy holding and the saramoiyan right was not transferred to them. It follows, therefore, that the third party defendants were not divested of that right at that time and legally remained tenants holding at a fixed rate of rent and the rent suit against them was properly constituted and the sale in execution of the rent decree passed the interest to the appellants and forms a first charge upon the property. It may be urged that this is a somewhat technical point, but those who rely upon technicalities— and the plaintiffs' claim is clearly unsupportable on the merits—cannot complain if they are resisted by their own weapons. In my opinion the appeal should be allowed with costs here and in the Courts below against the plaintiffs-respondents. The decree of the Subordinate Judge will be set aside and that of the Munsif restored.

ADAMI, J.—I agree.

Appeal allowed.

Decree set aside.