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decisions is clearly applicable in the present case and that by the reliefs which he claimed in the suit of 1911 Barhamdeo Rai revived the equity of redemption in the original mortgagor.

The result is that the decision of the Munsif was right and the appeal must be decreed and the decree of the Subordinate Judge on remand set aside and the decree of the Munsif restored. The appellants are entitled to their costs of the appeal.

CHATTERJEE, J.—I agree.

Appeal decreed.

APPELLATE CIVIL.

Before Ross and Chatterjee, JJ.

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v.

AKHAJ SINGH.*

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July, 2, 3, 8.

Crown lands—whether Transfer of Property Act, 1882 (Act IV of 1882) applies to grant of Crown lands—Crown Grants Act, 1895 (Act XV of 1895)—21 and 22 Vict., C. 106, section 40—22 and 23 Vict., C. 41—deed, whether necessary in order to transfer the ownership of Crown lands.

Under section 40, 21 & 22 *Vict., C.* 106 the Secretary of State in Council was empowered to sell and dispose of all real and personal estate vested in Her Majesty under that Act; and any conveyance or assurance of or concerning any real estate to be made by the authority of Secretary of State in Council might be made under the hands and seals of three members of the Council. Doubts having arisen " as to the proper mode of the execution of contracts entered into by the Secretary of State in Council pursuant to the provision of

* Appeal from Appellate Decree no. 1078 of 1928, from a decision of Maulavi Amir Hamza, Subordinate Judge of Gaya, dated the 28th of May, 1928, setting aside a decision of Mr. Saiyid Raziuddin, Munsif of Jehanabad, dated the 22nd of April, 1927.

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section 40 of the said Act", an amending Act, 22 & 23 *Vict.*, C. 41 was passed, in which the officers are designated who are vested with powers to sell and dispose of all real and personal estate in India for the time being vested in Her Majesty.

Held, (*i*) that the Transfer of Property Act, 1882, does not apply to grants of Crown lands;

(*ii*) that a deed duly executed by the officers named in 22 & 23 *Vict.*, *C.* 41, is necessary in order to transfer the ownership of Crown lands.

Appeal by the defendants.

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

Manohar Lal, *A. K. Mitra* and *S. S. Prasad Singh*, for the appellants.

Sir Sultan Ahmed and *H. R. Kazimi*, for the respondents.

Ross, J.—The land with which this suit is concerned consists of 12 bighas 18 kathas 10 dhurs falling into two parts, one of 2 bighas 2 kathas and the other of 10 bighas 16 kathas 10 dhurs in mauza Hasanpur Pipra. This land formerly belonged to one Sansar Singh and others and was acquired by the Government in or about the year 1881 for the purposes of a road; but it was decided in 1891 to return it to the proprietors and notice was given to them of this intention. The plaintiffs are the descendants of Sansar Singh and their case is that he re-acquired the 2 bighas 2 kathas for Rs. 51-9-6 and that, as neither he nor the other proprietors took back the rest of the land, he obtained it on lease from 1892 to 1908. It is part of the plaintiffs' case that Sansar Singh settled the land with the plaintiffs as raiyats with a rent of Rs. 1-8-0 a bigha. In 1908 Sansar Singh surrendered his lease which was then taken up by one Budhan Lal; but according to the plaintiffs Budhan Lal never obtained direct possession of the land which was in their hands and eventually he transferred his

lease to them. That lease had been for a term of five years from 1908 to 1912, but the plaintiffs continued to hold the land paying rent to the Government from 1913 to 1923. On the 27th of March, 1923, 10 bighas and odd land was sold by public aution by the Collector of Gaya and purchased by the defendants. As the plaintiffs were unsuccessful in a case under section 144 of the Code of Criminal Procedure they brought this suit for a declaration that the 2 bighas 2 kathas aforesaid are their proprietary interest and that the 10 bighas 16 kathas and 10 dhurs are held by them in raiyati and kashtkari right at a rent of Rs. 1-8-0 a bigha, and for possession on these terms. There were other reliefs claimed with which we are no longer concerned. The defendants denied that the plaintiffs had either proprietary or raiyati interest in any of the lands which had been recorded in the record-of-rights as Crown land (Kaisari-Hind) and that they had acquired good title by their purchase from the Collector.

The learned Munsif dismissed the plaintiffs' suit He held, as to the 2 bighas, that the documentary evidence was insufficient to prove the plaintiffs' title; and, as to the 10 bighas and odd, he observed as follows:

> "But at the time of arguments the plaintiffs saw the impossibility of proving this issue inasmuch as the survey khatian does not record the plaintiffs as occupancy tenants for any portion of the disputed area. Moreover when the entire land had once become khas mahal acquired by Government for a public purpose the plaintiffs could not acquire occupancy right against the wish of the Collector of Gaya. For these obvious reasons as well as for want of sufficient evidence, the plaintiffs at the time of arguments gave up this issue and confessed that in fact they had acquired no occupancy right in the 10 bighas 16½ kathas out of the disputed area."

The Subordinate Judge reversed the findings of the Munsif on both points. He held, with regard to the 2 bighas, that the notice (Exhibit 2) went to show that this land had already been sold to Sansar Singh and the chalan, dated the 16th of January, 1892, (Ext. 2 *a*) proved that Sansar Singh had paid the price of these 2 bighas. He also held that the

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witnesses proved the possession of Sansar Singh over this land from that time onwards and he was of opinion that no deed of sale was necessary, because the value of the land was less than Rs. 100. As to 10 bighas odd he referred to the receipts produced by the plaintiffs and in his opinion they went to prove that the Government accepted rent for the disputed 10 bighas from the plaintiffs. He also took in evidence, in appeal, two judgments (Exts. 6 *a* and 6 *b*) showing that Budhan Lal had sued the plaintiffs for rent of 2 bighas 1 katha 12 dhurs in 1909. He differed from the Munsif on the question of law and held that section 116 of the Bengal Tenancy Act did not apply to these lands which were acquired before the passing of the Land Acquisition Act of 1894; that there was no legal obstacle to the acquisition of occupancy rights and, as it was proved that the plaintiffs had all along been in cultivating possession from 1892, he held that they had acquired a right of occupancy. His decree was a decree for the whole area of 12 bighas and odd as raiyati land on a rent of Rs. 1-8-0 a bigha. The defendants have appealed against this decision and there is a cross-objection by the plaintiffs with regard to the 2 bighas on the ground that as the Subordinate Judge had found that Sansar Singh had re-acquired the proprietary right, the plaintiffs could not be held to be raiyats under an obligation to pay rent for this portion of the land.

I shall deal first with the 2 bighas of the plot. Learned Counsel for the appellants contended that the notice (Ext. 2) and the chalan (Ext. 2 *a*) did not constitute a deed of title and that the learned Subordinate Judge has not given effect to the presumption arising out of the entry in the record-of-rights and has overlooked altogether the fact that in a proceeding under section 103 of the Bengal Tenancy Act and in the case under section 144 of the Code of Criminal Procedure the plaintiffs made no claim to this land as proprietors. He also contended that the evidence of possession is immaterial, because this

was Crown land and title by prescription could not be obtained in less than sixty years. In my opinion these arguments are substantial; but the case is concluded against the plaintiffs by the absence of any document of title. It was not contended for the plaintiffs that the notice (Ext. 2) was such a document, nor could it be, because it merely states that Sansar Singh had applied for this 2 bighas and the notice which was given to one Khelawan Singh, informed him that unless he applied to get back the remaining land Sansar Singh had prayed either for its purchase or its settlement. The learned Subordinate Judge was in my opinion in error in saying that no deed was necessary because of the terms of the Transfer of Property Act. The Transfer of Property Act has no application to grants of Crown land: Act XV of 1895. Under section 40 of *21 & 22 Vict., C.* 106 (The Government of India Act then in force) the Secretary of State in Council was empowered to sell and dispose of all Real and Personal estate vested in Her Majesty under that Act; and any conveyance or assurance of or concerning any real estate to be made by the authority of Secretary of State in Council might be made under the hands and seals of three members of the Council. Doubts having arisen " as to the proper mode of the execution of contracts entered into by the Secretary of State in Council pursuant to the provision of section 40 of the said Act ", an Amending Act *22 & 23 Vict., C.* 41 was passed in which the officers are designated who are vested with powers to sell and dispose of all real and personal estate in India for the time being vested in Her Majesty. These officers include any officer for the time being entrusted with the Government charge or care of any district in India; and the proper officer in the present case was the Collector of Gaya. It seems to follow from this provision that a deed was necessary, duly executed by the Collector of Gaya, in order to transfer the ownership of this land. No such deed was executed and on the contrary we find that the Collector sold the land in 1923 to the

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defendants. It seems to me, therefore, that the plaintiffs have failed to prove their title to the 2 bighas.

The argument with regard to the 10 bighas was that the learned Subordinate Judge has failed to consider the capacity in which the plaintiffs were in possession of this land. The learned Government Advocate, for the respondents, argued that the plaintiffs had been in continuous possession ever since 1892; that as Sansar Singh was thicadar the plaintiffs were tenants from 1892 to 1908; that they paid rent also to Budhan Lal and that they had, therefore, acquired an occupancy right. It seems to me that this is a complete misapprehension of what has been proved in the case. The learned Subordinate Judge rested his decision mainly on the receipts. He referred to a number of receipts for rent paid by Sansar Singh and also to a number of receipts of rent paid by the plaintiffs for the years 1920 and 1921. Now Sansar Singh was admittedly not a tenant but a thicadar of this land. It is not the plaintiffs' case that he was the tenant. The plaintiffs' case is that he settled the land with them, but of this there is no proof whatsoever, documentary or otherwise; and it is difficult to understand how, if Sansar Singh took this land as thicadar, members of his joint family could be tenants thereof. Now Sansar Singh surrendered his lease in 1908 and, therefore, all rights in this land so far as he was concerned came to an end. There is no proof that plaintiffs paid rent to Budhan Lal at the rate of Rs. 1-8-0 a bigha. The judgments (Exts. 6 and 6 *a*) on the contrary show that a decree was passed against them in respect of 2 bighas and odd for produce rent. However that may be, it is the plaintiffs' case that they took over Budhan Lal's lease and they have continued ever since in the capacity of lessees and have paid rent at the leasehold rate. There is nothing in the evidence to indicate that the plaintiffs held this land as raiyats at a rent of Rs. 1-8-0 a bigha and the only evidence that they held any of the lands as raiyats is the judgments

(Exts. 6 and 6 *a*) which relate only to 2 bighas and odd and are inconsistent with the plaintiffs' present case. Learned Counsel objected to the admission of these documents in appeal on the ground that the defendants were given no opportunity to produce rebutting evidence. This is a serious objection; but nothing very much turns on these judgments which help the defendants as much as the plaintiffs. The evidence upon which the Subordinate Judge relied, therefore, does not lead to any legal conclusion that the plaintiffs were raiyats; nor indeed is there any finding that they cultivated the land as raiyats and no ground is disclosed in the judgments for the conclusion that occupancy rights had been acquired. On the contrary the documents relied upon by the Subordinate Judge merely show that the plaintiffs and their predecessors had this land in lease from the Collector of Gaya. The lease came to an end and the Collector sold the land. It seems to me that the plaintiffs have no title whatsoever to remain in occupation. This conclusion is consistent with the entry in the record-of-rights and with the admission made by the plaintiffs' pleader at the trial. It was contended by the learned Government Advocate that that admission rested ultimately on an erroneous view of section 116 of the Bengal Tenancy Act or, at all events, that that view was so interwoven with the question of the effect of the evidence that the admission cannot be taken to be an admission on a question of fact. I have quoted what the Munsif says on this point in his judgment; and it seems to me that the admission rested as much on the record-of-rights and the insufficiency of the evidence as on the pleader's view of section 116, and that this admission was an admission of fact as well as an admission on a point of law.

On both these grounds then I think that the decision of the Subordinate Judge with regard to the 10 bighas odd is wrong. The result is that the appeal must be decreed with costs and the plaintiffs' suit

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dismissed with costs throughout. The cross-objection is also dismissed.

CHATTERJEE, J.—I agree.

Appeal decreed.

Cross-objection dismissed.

Ross, J.

APPELLATE CIVIL.

Before Ross and Scroope, JJ.

FOODENI SAH

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v.

July, 8, 9.

AZHAR HUSSAIN KHAN.*

Mortgage—suit for redemption of usufructuary mortgage—plea of absolute title on the basis of purchase—alternative plea for being re-imbursed for payments of rent payable by plaintiff—suit decreed—mortgagee, whether forfeits his statutory right—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 72.

In a suit for redemption of a usufructuary mortgage, the defendant contended first, that although he had originally been a usufructuary mortgagee, he had become absolute owner of the mortgaged property and secondly, that even if the plaintiff be deemed entitled to redeem the mortgage, he could only redeem on the terms of repaying not only the original loan but the amount that the defendant had paid as rent which, under the terms of the bond, the plaintiff was to pay. The first plea failed and a decree was passed for redemption on repayment of the original loan and the amount of rent paid by the defendant with interest.

Held, that the mere fact that the defendant set up an absolute title in himself in repudiation of the title as mortgagee, could not take away his statutory right under section 72, Transfer of Property Act, 1882, to be re-imbursed for

* Appeal from Appellate Decree no. 881 of 1928, from a decision of Babu Phanindra Lal Sen, Additional District Judge of Muzaffarpur, dated the 2nd of March, 1928, modifying a decision of Babu Sachindra Nath Ganguly, Munsiff of Hajipur, dated the 11th of March, 1927.