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of the rule which provides for such disputes between the members inter se. In my opinion the order of the Registrar was not without jurisdiction and I would accordingly dismiss the appeal with costs.

SAUNDERS, J.

VERMA, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

1934.

October, 6, 9.

Before Khaja Mohamad Noor and Luby, JJ.

SREE SATYANARAIN SAMI

v.

JAMUNA BAI.*

Landlord and Tenant—purchase of non-transferable occupancy holding by ijaradar, effect of—Bengal Tenancy Act, 1885 *(Act VIII of* 1885*), section* 22(3)*—Bengal Tenancy (Amendment) Act,* 1907 *(Act I of* 1907*)—ijaradar, whether could acquire occupancy right by purchase before the amendment—occupancy holding, transfer of, by ijaradar after purchase—effect—ijaradar must be taken to have given consent.*

A thikedar during the period of his lease stands in the place of the landlord and as such can give consent to the transfer of a non-transferable occupancy holding even when he himself is the transferee.

L. J. Harrington v. *Dwarka Prasad Chaudhury*(1), followed.

Prior to the amending Act of 1907 the acquisition by a thikedar of an occupancy right by purchase was not barred by section 22(3) of the Bengal Tenancy Act, 1885.

*Appeal from Appellate Decree no. 1439 of 1930, from a decision of F. F. Madan, Esq., I.C.S., District Judge of Muzaffarpur, dated the 31st July, 1930, reversing a decision of Babu Nidheshwar Chandra Chandra, Subordinate Judge of Motihari, dated the 20th December, 1929.

(1) (1919) 1 Pat. L. T. 533.

L. J. Harrington v. *Dwarka Prasad Chaudhury*(1), *John Pierpont Morgan* v. *Babu Ramjee Ram*(2), followed.

Raghubar Mahto v. *H. Manners*(3), dissented from.

Where an ijaradar, during the continuance of his lease, purchased a non-transferable occupancy holding in 1906, and later, in the year 1909, when his lease was still subsisting, he made a transfer of the same in favour of the idol and the landlord sought to sell the holding in execution of his money decree obtained against the ijaradar,

Held (*i*) that the amending Act of 1907 not being retrospective, the ijaradar acquired the occupancy right by purchase and that in taking a transfer to himself he would be taken to have given consent to it.

(*ii*) that likewise in making the transfer of 1909 in favour of the idol the ijaradar would be deemed to have recognised the transfer;

Sri Chandra Churdeo v. *Laldhari Prasad Singh*(4), followed.

(*iii*) that, therefore, the title having validly vested in the idol, the landlord could not proceed against the holding in execution of his decree against the ijaradar.

Appeal by the defendants.

The facts of the case material to this report are set out in the Judgment of Khaja Mohamad Noor, J.

S. M. Mullick (with him *L. K. Jha* and *P. Jha*), for the appellants.

B. N. Mitter and *M. N. Ray*, for the respondents.

KHAJA MOHAMAD NOOR, J.—The suit out of which this second appeal arises was instituted by the plaintiff-respondents under Order XXI, rule 63, of the Code of Civil Procedure for a declaration that about 12 bighas of land situated in village Kharhat Golapur is liable to be sold in execution of their decree against

(1) (1919) 1 Pat. L. T. 533.
(2) (1920) 5 Pat. L. J. 302.
(3) (1911) 13 Cal. L. J. 568.
(4) (1932) 14 Pat. L. T. 57, P. C.

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defendants nos. 2 and 3 and that the claim of defendant no. 1 an idol, was wrongly allowed. The suit was dismissed by the trial court but has been decreed by the court of appeal below. Defendant no. 1 has preferred this second appeal.

The facts are these: The defendants nos. 2 and 3 obtained a temporary lease of the village from the plaintiffs and in 1906 during its continuance acquired by purchase the occupancy right of the land which is the subject matter of the present litigation. Later, in 1909, they dedicated this land in favour of the idol, defendant no. 1. Their lease expired in the year 1320 (corresponding to 1913). By that time their financial conditions became bad and they defaulted in payment of the rent. The plaintiffs obtained a decree for rent, and in execution of it sought to sell the land as the property of defendants nos. 2 and 3. A claim was preferred on behalf of defendant no. 1 on the basis of the dedication made in the year 1909, which was allowed. Hence the present suit. The learned Subordinate Judge found the dedication valid and *bona fide*.

The learned District Judge has decreed the suit relying mainly upon the fact that just about a year before the expiry of the thika lease defendant no. 3 executed on his own behalf a kabuliat in respect of the land in suit in favour of the plaintiff (Exhibit 3) in which it is stated that the purchase of the occupancy right in 1906 was invalid as there was no custom of transferability of the holding in the village and, therefore, he (defendant no. 3) was taking the settlement from the proprietors. The kabuliat does not purport to be on behalf of the idol.

It has been contended before us that if by the purchase of the year 1906 the property was legally vested in defendants 2 and 3 and thereafter defendants 2 and 3 legally dedicated it in favour of defendant no. 1 in 1909 the execution of the kabuliat by the defendant no. 3 who was the shebait of the idol would

not take away the vested interest of the idol and the kabuliat executed by defendant no. 3 must be taken to have been executed for the benefit of the idol.

This leads us to the consideration of whether the purchase by defendants 2 and 3 of occupancy right of the land and its later dedication was valid, as the holding was non-transferable without the consent of the landlord. It was contended by the appellant before us as well as before the learned District Judge that in spite of the fact that the land was a non-transferable occupancy holding, the transfer to the defendants 2 and 3 was valid as it was a transfer to persons who were entitled to give consent and recognise that transfer. The case of *L. J. Harrington* v. *Dwarka Prasad Chaudhury*(1) was relied upon before the learned District Judge. He seems to have accepted this contention so far as the transfer was in favour of defendants 2 and 3 as it was prior to the year 1907, when the Bengal Tenancy Act was amended by enacting that an ijaradar or a lessee was not entitled to acquire occupancy right even by purchase during the continuance of the lease. He, however, seems, to be of opinion that as the dedication in 1909 was after the amendment of the Act in 1907 it was not valid. Here the learned District Judge is clearly in error. If by virtue of the purchase in the year 1906 the occupancy right became vested in defendants 2 and 3, as has been held in the case of *L. J. Harrington*(1) above referred to, they were entitled to deal with it in any way they liked. The amendment of the Act in 1907 did not affect a right which had already become vested in them prior to the amendment which has no retrospective effect. Therefore, when in 1909 they dedicated the land to the idol, the dedication was perfectly valid. Assuming that the land dedicated was a non-transferable occupancy holding, defendants 2 and 3 as transferors did consent to it by the dedication itself as they in 1906 consented

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to and recognised the transfer to themselves. It was held in the case of *L. J. Harrington* v. *Dwarka Prasad Chaudhury*(1) that a thikedar during the period of the lease stood in the place of the landlord for that period and was the landlord of the raiyat and as such could give consent to the transfer of a non-transferable occupancy right and could consent to a transfer to himself. We must, therefore, hold that in taking a transfer to himself in 1906 he consented to it and in making the transfer by himself in 1909 he again gave consent to it. Perhaps the learned District Judge did not consider that in the year 1909 when the dedication was made the defendants 2 and 3 were still the lessees of the village and as such they could recognise that transfer. The principle has also been laid down by their Lordships of the Judicial Committee in the case of *Sri Chandra Churdeo* v. *Laldhari Prasad Singh*(2).

Mr. B. N. Mitter who appears on behalf of the respondents has relied upon *Raghubar Mahto* v. *H. Manners*(3) for the proposition that even before 1907 a lessee could not during the term of his lease acquire occupancy right by purchase. We are unable to follow it in view of the clear decision of this Court in *L. J. Harrington* v. *Dwarka Prasad Chaudhury*(1) The case relied upon by Mr. Mitter seems to have been dissented from in this Court in *John Pierpont Morgan* v. *Babu Ramjee Ram*(4) where their Lordships observed:

"We must hold that prior to the Act of 1907 the acquisition by a thikadar of an occupancy right by purchase was not barred by section 22(*3*)".

We must follow the two Division Bench decisions of this Court; and hold that the defendants 2 and 3 acquired a valid right in the lands in question by

(1) (1919) 1 Pat. L. T. 533.
(2) (1932) 14 Pat. L. T. 57, P. C.
(3) (1911) 13 Cal. L. J. 568.
(4) (1920) 5 Pat. L. J. 302.

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purchase in the year 1906 and validly transferred it to the idol in the year 1909. Once we hold that the property was validly transferred to the idol and vested in it, the kabuliat (Exhibit 3) executed by defendant no. 3 in favour of the plaintiffs will be of no avail, and we must construe it as having been executed by the shebait for the benefit of the idol. The view taken by the learned Subordinate Judge was correct. Apart from the validity of the transfer, I am of opinion that the question cannot be raised by the plaintiff in the present suit. A transfer of a non-transferable occupancy holding is not void but voidable. The suit to avoid it had become barred when the present suit was instituted, nor is the suit framed on that basis.

I would allow this appeal with costs, reverse the decree of the learned District Judge and restore that of the learned Subordinate Judge. The plaintiffs will pay the costs of defendant no. 1 of the lower appellate court also.

LUBY, J.—I agree.

Appeal allowed.

CRIMINAL REFERENCE.

1934.

October, 1, 9.

Before Khaja Muhamad Noor and Luby, JJ.

RAM SINGH

v.

S. A RIZVI.*

Code of Criminal Procedure, 1898 (Act V of 1898), section 197—Criminal Procedure (Amendment) Act, 1923 (Act XVIII of 1923)—amendment, effect of—scope of protection widened—offence must be so connected with the official act as to form part of the same transaction—accused summoned—proceeding subsequently quashed—order, whether amounts to one of discharge.

*Criminal Reference no. 45 of 1934, made by Abdush Shakur, Esq., Sessions Judge, Monghyr, in his letter no. 3127/X-1, dated the 14th August 1934.