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as to the rights of the parties being made in an award cannot be held to amount to mere recital of facts but becomes the basis of the title of the parties in the sense that whatever the previous rights of the parties may have been, if the award is valid and can be enforced in a court of law, the rights of the parties as declared by the award can also be enforced. This being so, I think that the award should have been registered and as section 49 of the Registration Act lays down in clear terms that no document which is required to be registered shall be received as evidence of any transaction affecting such property, or affecting any immoveable property comprised therein, the award in question was not admissible in evidence. The mere fact that the defendant did not raise any objection to the admissibility of the award in the trial court will not affect the question, because section 49 is mandatory.

In this view the appeal will be allowed and the award will be set aside in its entirety. In the circumstances of the case, however, the parties will bear their own costs throughout.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

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March, 3, 4.

Before Wort and Fazl Ali, JJ.

KALI SINGH

v.

MATRU SINGH.*

Revenue Sales Act, 1859 (Act XI of 1859), section 37—purchaser at revenue sale, if can avoid the raiyati interest of a mukarraridar which he held before the grant of the mukarrari lease—grant of mukarrari right to a raiyat, effect of.

* Appeal from Original Decree no. 151 of 1933, from a decision of Babu Anjani K. Sahay, Subordinate Judge of Monghyr, dated the 31st of July, 1933.

A grant of a permanent lease to a raiyat has not the effect of extinguishing the right of occupancy possessed by him. It is inconceivable to ascribe to the tenant an intention of foregoing a right so highly prized as the occupancy right on the acquisition of the right of an intermediate holder.

Jogendra Krishna Roy v. *Shafar Ali*(1), relied on.

A purchaser at a revenue sale cannot get khas possession of the lands which a mukarraridar held as a raiyat prior to the creation of the mukarrari right and independent of the mukarrari lease.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

M. N. Pal, for the appellant.

Ganesh Sharma (with him *L. K. Chowdhry* and *B. N. Rai*), for the respondents.

FAZL ALI, J.—The only question to be decided in this appeal is whether the plaintiff is entitled to recover possession of the lands of khatas nos. 71, 95 and 96 from the contesting respondents. This question arises upon the following facts.

Sometime in June, 1926, tauzi no. 2940 in village Kaith was sold for arrears of revenue and purchased by one Azizul Hakim, a pleader practising in Monghyr. On the 9th of November, 1926, the plaintiff purchased an eight-annas share out of the proprietary interest in this tauzi and the remaining eight annas was purchased sometime later by defendants 47 and 48. The plaintiff, after his purchase, served a notice upon the contesting respondents intimating to them of his intention of cancelling the mukarrari deed which had been executed by a co-sharer proprietor in July, 1878. The plaintiff's case was that this mukarrari constituted an encumbrance on the proprietary right and, as a purchaser at a revenue sale, he was entitled under the

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Revenue Sale law to avoid it. Sometime afterwards the plaintiff brought the present suit in which one of the reliefs claimed by him was that he was entitled to possession of the lands of the disputed khatas inasmuch as these lands were the bakasht lands of the malik, and, the mukarrari interest being liable to be avoided, the defendants could also be compelled to give up possession of these lands to the plaintiff. The case of the contesting respondents in this respect was that the lands were in their origin raiyati lands of the ancestors of these respondents and that they were accordingly entitled to retain possession of them even though the mukarrari interest might be avoided.

Thus the question which the Court below had to decide was a two-fold one: (*1*) whether the lands in dispute were in their origin raiyati lands in possession of the ancestors of the contesting respondents; and (*2*) whether, even if they were such raiyati lands, by the operation of the law of merger they had not become merged in the mukarrari interest upon that interest coming into existence, and, as such, were liable to be restored to the plaintiff on the annihilation of the mukarrari interest. The learned Subordinate Judge has held that the lands were raiyati in origin and that there was no merger. His decision upon both these points has been challenged by the appellant in this appeal.

Dealing first with the question of fact, that is to say, whether the lands were originally raiyati lands it seems to me to be clear that the decision of the trial court upon this question is correct and ought to be upheld. The trial court, in dealing with this matter, has referred both to oral and documentary evidence and particularly to certain admissions made by the plaintiff's own witnesses to the effect that the ancestors of the contesting respondents were raiyats and held some jote lands in the village before they became mukarraridars. The learned Subordinate Judge has pointed out in this connection that no

attempt has been made on behalf of the plaintiff to show that the ancestors of the contesting respondents held any lands other than the disputed lands. This fact by itself might not be regarded as conclusive; but the learned Subordinate Judge has also referred to the khasras prepared in certain old partition proceedings of 1871, 1882 and 1886 which show that the disputed lands were the raiyati lands of persons who have been proved to be the ancestors of the present respondents. In my opinion this is the strongest argument against the plaintiff; and it is noteworthy that the only way in which the plaintiff has tried to get over it was by contending that the khasras are not admissible in evidence. The learned Subordinate Judge, however, has elaborately dealt with this question, and, after a review of certain decisions has expressed the view that the khasras are admissible in evidence at least as showing the history of the plots in question before the creation of the mukarrari. There is another point which though not referred to by the learned Subordinate Judge is raised on behalf of the respondents and it is that as these khasras were prepared in proceedings to which old proprietors were parties, the plaintiff who claims now to be one of the proprietors is bound by admissions contained in them as those made by his predecessors in interest. Mr. Pal who appears for the plaintiff contends that the plaintiff being a purchaser at a revenue sale is not bound by all the actions of the previous proprietors. In my opinion, even though Mr. Pal may be correct in this last contention of his, there is no doubt that the batwara khasras were admissible in evidence as showing the previous history of the lands, and the learned Subordinate Judge was justified in basing his decision upon them. Mr. Pal contended that the disputed lands being recorded in the record-of-rights as bakasht, it should have been inferred that they were the lands of the proprietors and not of the mukarraridars. In my opinion, however, this contention cannot be accepted, because it is well known that even the

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lands in possession of mukarraridars are sometimes loosely described as bakasht and a mere entry in the record-of-rights which was prepared sometime in 1910 describing the lands as the bakasht of the mukarridars is by no means conclusive to show that the lands were originally the lands of the proprietors and that they were never the raiyati lands of the respondents' ancestors. I think therefore that the learned Subordinate Judge has rightly found that the disputed lands were the raiyati lands of the ancestors of the respondents.

The next question is whether there was any merger upon the acquisition of the mukarrari right by the respondents' ancestors in the year 1878. It is clear that there could not have been any merger in 1878, because at that time the mukarrari deed was obtained in respect of a small share in the proprietary interest from a fractional co-sharer. This much is practically conceded by the learned Advocate appearing on behalf of the appellant; but he contends that the merger took place in 1886 when the share of the fractional co-sharer who had created the mukarrari was converted into a separate and independent tauzi. But the authority cited before us is against such a contention. A Division Bench of the Calcutta High Court held in *Jogendra Krishna Roy* v. *Shafar Ali*(1) that "Where the proprietor of an estate grants an occupancy raiyat thereof a permanent lease, such grant has not under the general law the effect of extinguishing the right of occupancy possessed by the raiyat, and so render him liable to eviction as it is inconceivable in such a case to ascribe to the tenant an intention of foregoing a right so highly prized as the occupancy right on the acquisition of the right of an intermediate holder."

With this view I respectfully agree, and I wish also to add that on no principle can the purchaser at a revenue sale be held to be entitled to possession of a piece of

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property which belonged to the tenants before they became mukarraridars. If the mukarrari right was annihilated the person in whose interest it is annihilated is entitled to get the proprietary interest free from the mukarrari right, but he cannot get the lands which the mukarraridars held prior to the creation of the mukarrari right and independently of the mukarrari lease.

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In these circumstances, in my opinion, the appeal fails and it should be dismissed with costs to defendants 1 to 9 and 11 to 26 and 49. It may be mentioned here that although defendant no. 47 was impleaded as a respondent in this case, the appeal was not pressed against him. It will, therefore, also be dismissed as against him with costs.

WORT, J.—I agree.

Appeal dismissed.

SPECIAL BENCH.

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February, 17, 18. March, 11.

Before Courtney Terrell, C.J., Macpherson and Fazl Ali, JJ.

DHANU PATHAK

v.

SONA KOERI.*

Estoppel—representation by plaintiff that he was a tenure-holder—plaintiff, whether can plead that he was a raiyat and not tenure-holder—estoppel against statute—Evidence Act, 1872 (*Act I of* 1872), *section* 115.

Where the plaintiffs brought a suit to eject the defendant on the ground that they were raiyats and the defendant was an under-raiyat and the defence *inter alia* was that the plaintiffs having represented themselves as tenure-holders were estopped from pleading that they were raiyats and the

* Letters Patent Appeal no. 13 of 1935, from a decision of the Hon'ble Mr. Justice Khaja Mohamad Noor, dated the 17th December, 1934.