

APPELLATE CIVIL.

1937.

*Before Wort and Manohar Lall, JJ.*September,
23,MAHARAJADHIRAJ SIR KAMESHWAR SINGH
BAHADUR

v.

BIBI PATMA.*

Code of Civil Procedure, 1908 (Act V of 1908), Order 1, rule 9—nonjoinder of necessary party, whether fatal—suit framed under section 104-H of the Bengal Tenancy Act, 1885 (Act VIII of 1885)—prayer for declaration of defendant's status as that of occupancy tenant—persons recorded as occupancy raiyats not joined as defendants—suit, whether maintainable.

In a suit framed under the provisions of section 104-H of the Bengal Tenancy Act, 1885, the plaintiff alleged that the status of the defendants, who were entered in the record-of-rights as tenure-holders, was that of occupancy tenants, and the relief claimed was that

“after determining and declaring the correct status of the defendants let a decree be passed in favour of the plaintiff as against the defendants settling the proper annual rent payable by the defendants.....”

The plaintiff, however, failed to implead certain persons who, according to his allegation, were merely under-tenants, but who were recorded as occupancy raiyats in the record-of-rights in respect of a portion of the holding.

Held, that the so-called under-tenants were necessary parties to the suit and, therefore, that the suit was not maintainable in their absence.

Jogendra Nath Singh v. Secretary of State for India in Council(¹) and *Jogendra Mohan Das v. Janaki Nath Saha*(²), distinguished.

*Appeal from Appellate Decree no. 157 of 1935, from a decision of Babu Kshetra Mohan Kumar, Subordinate Judge of Bhagalpur, dated the 6th of September, 1934, confirming a decision of Babu Raghunandan Prasad, Munsif of Madbipura, dated the 6th of June, 1933.

(1) (1912) 16 Cal. L. J. 385.

(2) (1916) 21 Cal. W. N. 427.

Appeal by the plaintiff.

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

Murari Prasad, (with him *R. Misra* and *K. P. Upadhaya*), for the appellant.

Syed Ali Khan and *Syed Raza Imam*, for the respondents.

WORT, J.—The question in this appeal is whether the so called under-tenants were necessary as well as proper parties to the action. The learned Judge in the Court below has so held, and it is against that decision that this appeal is preferred. The question whether parties are both necessary and proper parties must of necessity depend upon the circumstances of the particular case.

Mr. Murari Prasad in this case contends that they are not necessary parties as the judgment, if pronounced in his favour, does not bind parties who are not joined. That is, if I may say so, trite law, but does not answer the contention in this case, that the under-tenants who have been recorded as occupancy raiyats are necessary parties. If the matter had been dependent upon contract, that is to say, had the rights as between the plaintiff and the defendants depended upon contract, or, to put it perhaps more precisely, had the matter concerned the general law of landlord and tenant in contradistinction to the law as provided by the Bengal Tenancy Act, something might have been said in support of the contention which Mr. Murari Prasad puts forward. It certainly would be the case there that any judgment pronounced as against the present defendants to the action would not have bound nor affected in any way the rights of the so called under-tenants. But here we are concerned with the question of status. In paragraph 7 the plaintiff alleges

“ that the defendant is an occupancy tenant and as such his status should be “ Kaimi ” or mokarrari nahin, etc. ”.

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1937. The plaintiff then proceeds to claim the relief that,

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“ after determining and declaring the correct status of the defendants let a decree be passed in favour of the plaintiff as against the defendants settling the proper annual rent payable by the defendants for the tenancy in suit in accordance with the instruction laid down by the Board of Revenue.”

Needless to say that the defendants in this case are recorded as tenure-holders. Now, assuming for the purpose of argument that the plaintiff succeeded in this action, he would succeed in varying or amending the entry in the record-of-rights in this way that the defendants would be recorded as occupancy raiyats. But as we know the under-tenants are already recorded as such. It is not possible for there to be two occupancy raiyats of the same holding and the contention of Mr. Murari Prasad is that their occupancy rights may be not as occupancy raiyats but as under-tenants with occupancy rights. It does not in the circumstances in my judgment meet the point about their being recorded as occupancy raiyats. Shortly stated therefore such a judgment, as I have indicated, would not only affect the status of the defendants but would affect the status of the so called under-tenants who have not been joined as parties to the suit. In the course of the argument the case of *Jogendra Nath Singh v. Secretary of State for India in Council*⁽¹⁾ was referred to. That case was discussed in the course of the judgment in a later case, *Jogendra Mohan Das. v. Janaki Nath Saha*⁽²⁾, where in a case not dissimilar in certain respects from the present it was held that it was not necessary to join an under-tenant, in other words the under-tenant was not a necessary party. But it is to be noted that in *Jogendra Nath's* case⁽¹⁾ there was no contest as between the under-tenant and the defendant in the action and the judgment pronounced against the defendant in the action in no way affected the status of the under-tenant although, as it was

(1) (1912) 16 Cal. L. J. 385.

(2) (1916) 21 Cal. W. N. 427.

stated, he might have been interested in the matter and possibly therefore was a proper party although not a necessary party.

In my judgment in this case the learned Judge was clearly right, having regard to the fact which I have already stated that the under-tenant's status was affected, in holding that he was a necessary party. For those reasons in my opinion the appeal fails and must be dismissed with costs.

I should have added in my observation that neither in the Courts below nor in this Court was any request made that the under-tenant be joined as a party.

The appeal is dismissed with costs.

MANOHAR LALL, J.—I agree. In my opinion the reliefs claimed in the plaint must determine the question whether the under-tenants are or are not necessary parties in the action framed under the provisions of section 104-H of the Bengal Tenancy Act. Mr. Murari Prasad strongly relied upon the observation of the Calcutta High Court in the case of *Jogendra Nath Singh v. Secretary of State for India in Council*(¹). It is to be noted that the suit as framed in that case was not allowed to be proceeded with in the Calcutta High Court where Sir Rash Behary Ghosh for the appellant deleted the first two prayers in the plaint, with the result that after the amendment of the plaint the suit stood as asking for a mere declaration that the amount of rent settled under the settlement record should be altered. It is obvious that for such a prayer an under-tenant was not a necessary party. The other case relied upon, viz., *Jogendra Mohan Das v. Janki Nath Saha*(²), was also a case in which no declaration was sought for as to the status of the plaintiff. The only relief claimed was that the Court would settle a fair and

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1937. equitable rent. In the present case the declaration asked for in the plaint is very clear and specific: the plaintiff asks for a declaration that the status of the defendant should be altered. Such a suit in my opinion is not maintainable in the absence of the persons who have been recorded as occupancy raiyats of a portion of the same holding. I find another difficulty also in the way of the plaintiff and that is this. The plaintiff sued for a declaration that the entry regarding a portion of the holding is incorrect although in my view he is aggrieved by the entry in respect of the whole holding. For those reasons I agree that the appeal fails and should be dismissed with costs.

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Appeal dismissed.

APPELLATE CIVIL.

Before Wort and Rowland, JJ.

ABU MOHAMMAD MIAN

v.

BABU DEODULI.*

Mortgage—subrogation—purchaser of equity of redemption—arrangement with mortgagor by which portion of purchase money retained by purchaser for payment of prior mortgage—purchaser, whether entitled to benefit of subrogation—intention to keep alive to be presumed.

Where a purchaser of the equity of redemption pays off a prior mortgage under an arrangement with the mortgagor by which a portion of the purchase money was left in the hands of the purchaser for such payment, *held*, that, in the absence of any indication of a contrary intention, the purchaser must be presumed to have kept alive the mortgage,

*Appeal from Appellate Decree no. 229 of 1935, from a decision of Babu K. N. Singh, Subordinate Judge of Muzaffarpur, dated the 6th of July, 1934, modifying a decision of Babu Uma Shanker Prasad, Munsif of Hajipur, dated the 17th of May, 1933.

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