

the defendants. It is shocking to think that the administration of justice should ever have been entrusted to such a Judge.

Only one gleam of light relieves the gloom of this miserable story. I refer to the rise of a party of reform amongst the younger and educated members of the Karan caste and the courageous exhibition of that reforming spirit by the defendant no. 2, Nanda Kishore Das. Pioneers of better ideals in a land of social darkness must expect to incur suffering for their cause and their upward path is necessarily stony and difficult. Appeals based on the ideals of humanity have little hope of success among a servile backward people whose customs show little care for the health and happiness of their daughters. For the time being doubtless attempts must be limited to arousing some sense of caste dignity.

In conclusion I would recommend to the authorities that a close watch be kept upon the Raja of Aul and others of his kind by officers of a thoroughly trustworthy character.

For the reasons given above we on the 16th day of December, 1937, made an order allowing this appeal with costs to the appellants throughout and such costs will be borne by the Raja of Aul.

KHAJA MOHAMAD NOOR, J.—I agree entirely.

J. K.

*Appeal allowed.*

## LETTERS PATENT.

*Before Courtney Terrell, C. J. and James, J.*

RAJA RAM RAI

*v.*

NIRANJAN RAI.\*

*Landlord and tenant—co-sharer mortgaging his proprietary share to another co-sharer—mortgagor cultivating certain plots on payment of produce rent to mortgagee—*

\*Letters Patent Appeal no. 2 of 1937, from a decision of the Hon'ble Mr. Justice Khaja Mohamad Noor, dated the 18th December, 1936.

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*twelve years' continuous possession—co-sharer mortgagor, whether acquires occupancy rights—Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 20 and 21—partition—plots in cultivating possession of mortgagor allotted to mortgagee—mortgagee or his representative, whether entitled to eject mortgagor or his transferee.*

*R* a co-sharer landlord along with others gave certain shares in a village in usufructuary mortgage to *A* another co-sharer landlord and thereafter continued to cultivate specific plots of land which were in his possession from before and to divide half the produce to *A*. *R* subsequently sold his right in the land to *D* and *A* accepted *D* as tenant and received his share of the produce from him. *A* subsequently assigned his mortgage interest to another person who also accepted the produce from *D*. Thereafter there was a partition and the plots held by *D* were allotted to the patti of *A*.

*Held*, that *D* had acquired the status of a tenant and in course of time he had acquired occupancy right and could not be ejected.

*Held*, also that the representatives of *A* were estopped and could in no circumstance eject *D*.

*Obiter*: In the application of section 99 of the Estates Partition Act it is clear that some distinction is to be drawn between occupancy rights which are the creation of statute, and the rights of a lessee or tenure-holder which are the result of a contract between a single co-sharer and the person in possession.

*Thakur Raghunandan Sahai Singh v. Thakur Dripa Nath Sahai Singh*(1), referred to.

Appeal by the defendants.

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

*Sunder Lall*, for the appellants.

*Tarkeshwar Nath*, for the respondents.

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(1) (1928) I. L. R. 8 Pat. 258.

JAMES, J.—Bechan Singh, Brijmohan, Rajkumar and Ramkumar possessed a share of 6 pies and 13 karants in the estate bearing tauzi no. 6787 on the revenue roll of Shahabad. In 1895 they gave a usufructuary mortgage of their share to Jaimangal; and ultimately the area with which we are here concerned came into possession of Achhaibar Singh, another co-sharer landlord of the village, as usufructuary mortgagee. This area of 3.04 acres had apparently been in the khas possession of Raj Kumar Singh before the mortgage; and after the mortgage of the proprietary interest Rajkumar continued to cultivate the land, delivering half the produce to the mortgagee Achhaibar Singh. Rajkumar Singh conceived that in thus cultivating under the mortgagee he had some kind of tenancy right, and in 1910 he executed a sale deed, whereby he conveyed to the ancestors of the defendant-appellants his right to cultivate this land describing it as *sharah moyyan bhaoli kasht*. The ancestors of the defendants thereupon entered upon this land, paying half the produce to the mortgagee Achhaibar Singh, and in subsequent years, after Achhaibar Singh had assigned his mortgage interest, paying rent to the assignee. In 1924 the whole estate came under partition, with the result that this area of 3.04 acres became a part of a new estate which was allotted to Achhaibar Singh and defendants nos. 9 to 11 of this suit. In 1926 this mortgage was redeemed by Ram Sarup Tewari to whom Rajkumar had conveyed the equity of redemption; but we are not concerned here with that transaction; and it is sufficient to say that the proprietary interest unencumbered by the mortgage is in possession of the plaintiffs and defendants 9 to 11. The representatives in interest of Achhaibar Singh instituted this suit for the ejectment of these defendant-tenants, impleading as co-defendants their co-sharers in the new estate. The other co-sharers do not support the representatives of Achhaibar Singh in their claim to eject the defendants, so that we are

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here only concerned with the representatives of Achhaibar Singh and the representatives of the cultivators who were paying bhaoli rent to Achhaibar Singh in 1910.

At the trial of the suit the tenant-defendants endeavoured to demonstrate that Rajkumar before he acquired his proprietary interest had possessed a raiyati interest which had been transferred to them by the sale of 1910 (and Rajkumar may have made some such representation to them before the sale); but they were unable to prove that Rajkumar had any such raiyati interest to transfer and that claim has now been abandoned. The Subordinate Judge who heard the appeal of the defendant-tenants has found that the area of 3.04 acres was in possession of Rajkumar as a tenant-at-will on behalf of the mortgagee, that is to say, under the mortgagee; and he has found that the right which Rajkumar transferred to the ancestors of the appellants was the right of cultivating the land on behalf of the mortgagee Achhaibar Singh, and that they have been quietly in possession since that time delivering half of the produce to the mortgagee.

Mr. Sunder Lal on behalf of the defendant-appellants argues that on these facts it should be found that the defendants have acquired an occupancy right in this land. It is argued on behalf of the respondents that the defendants could not by the transfer from Rajkumar obtain a higher right than that which was enjoyed by Rajkumar himself; and indeed it appears that more attention has been given by the courts in this case to the rights which were enjoyed and transferred by Rajkumar than to the question of what might be the effect of the new relationship, established after the transfer, between the mortgagee of the proprietary right and the tenants who were paying the produce rent. It may be difficult to define the status of Rajkumar in terms of the definitions contained in the Bengal Tenancy

Act; and possibly the learned Subordinate Judge is right in considering that his status under the mortgagees was that of a tenant-at-will, because of his peculiar position as a proprietor in the village and as mortgagor of the proprietary interest by virtue of which he had cultivated the land before the mortgage. But Rajkumar did not necessarily confer his own status on his transferees by the sale deed of 1910 and he did not convey any interest in the equity of redemption or in the proprietary rights. For practical purposes the effect of that sale should be regarded as merely that Rajkumar for consideration stepped out of the way, and the purchasers were permitted to enter and cultivate this land on produce rent under the mortgagee. The learned Subordinate Judge based his decision on his view that, stepping into the shoes of Rajkumar Singh, these defendants in some way or other entered into the position of a mortgagor who was cultivating land under his own mortgagee in spite of the fact that no interest in the equity of redemption had been conveyed to them. This was apparently the view taken by the Settlement Officer when the record-of-rights was under preparation, but as Mr. Sunder Lal points out, this view does not take properly into account the relationship between the new cultivating tenants and the mortgagee. These cultivators acquired no proprietary right; they did not acquire any interest in the equity of redemption of the mortgage. Thus this conveyance of 1910 did not convert the new cultivators into mortgagors: it did not confer upon them the status, whatever it may have been, of Rajkumar Singh; and the real effect of this so-called conveyance was merely to eliminate Rajkumar Singh from the picture as cultivator of the land, and to clear the way for the new tenants. All that they acquired by this deed, which purports to convey to them certain rights, was the power of cultivating this land without obstruction from Rajkumar Singh, but this right was only against Rajkumar Singh and it was a right which could not be

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We come now to the effect of the partition. Section 99 of the Estates Partition Act provides that if any proprietor of an estate held in common tenancy has given his share in lease, or has created an encumbrance thereon, the lease or encumbrance shall hold good as regards the lands finally allotted to the share of such proprietor, and only as to such lands. In *Mahadeo Prasad Singh v. Jagarnath Prasad*(<sup>1</sup>) co-sharers to whom an estate had been allotted wherein a mukarraridar was holding on a tenure created by a single co-sharer were held to be entitled to eject the mukarraridar. In that case the decision in *Thakur Raghunandan Singh v. Thakur Dripa Nath Sahai Singh*(<sup>2</sup>) was cited with approval, but there the interest concerned was a thika doami tenure and the learned Judges remarked that if the disputed land had been rated as raiyati land the plaintiff must have had greater difficulty in succeeding in his suit. In the application of the provisions of section 99 of

(1) (1933) I. L. R. 13 Pat. 303.

(2) (1928) I. L. R. 8 Pat. 258.

the Estates Partition Act it is clear that some distinction is to be drawn between occupancy rights which are the creation of statute, and the rights of a lessee or a tenure-holder which are the result of a contract between the single co-sharer and the person in possession, and it may be doubted whether after occupancy rights have accrued by twelve years' continuous possession by virtue of the provisions of sections 20 and 21 of the Bengal Tenancy Act any other co-sharer would be entitled to eject the raiyat by the application of the provisions of section 99 of the Act. The provisions of section 25 of the Bengal Tenancy Act would appear to bar such a possibility. In the present case that question strictly speaking does not arise, because the persons who are seeking to apply the provisions of section 99 of the Estates Partition Act represent the person who first admitted these raiyats to occupation; and under the terms of section 99 itself, whatever tenure or lease Achhaibar Singh might have created while he was usufructuary mortgagee would be binding on his representatives in respect of this land. The co-sharers other than the members of Achhaibar Singh's family accept these defendants as raiyats; and since it is only the members of Achhaibar Singh's family who object, no advantage can be taken of the provisions of section 99. In that view of the matter, since the defendant-appellants acquired raiyati interest when they were accepted as tenants by Achhaibar Singh, and they have enjoyed this interest for twelve years, they cannot now be ejected except under the provisions of section 25 of the Bengal Tenancy Act and the plaintiffs' suit must fail.

I would, therefore, allow this appeal and set aside the decrees of the Judge of this Court and the courts below. The plaintiffs' suit will be dismissed with costs throughout to defendants 1 to 8.

COURTNEY TERRELL, C. J.—I agree.

J. K.

*Appeal allowed.*

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