

District Magistrate to show cause why the conviction of the petitioner under section 408 of the Indian Penal Code should not be set aside, the first ground being that the trial should have been confined to three instances of alleged misappropriation occurring within the period of one year.

The charge recites that the accused realized by certain rent receipts, 23 in number, the sum of Rs. 103, of which the accused misappropriated the sum of Rs. 67. We think such a charge comes clearly within the provisions of clause (2) of section 222 of the Code of Criminal Procedure. By specifying the rent receipts the charge went beyond what was necessary, and was to this extent favourable to the accused, because it gave him an opportunity of meeting the accusation regarding the misappropriation of a gross sum of Rs. 67. The case of *Empress v. Gulzari Lall* (1) is in point and supports this view of the matter.

The second ground is that the Sessions Judge does not appear to have given due consideration to the allegations of the accused that the rent receipts were tampered with by the ryots and to the fact that only one witness gave evidence regarding each receipt.

It now appears that the rent receipts bear no sign of being tampered with, and that they are supported by other evidence besides that of the tenants to whom the receipts were granted. As has been pointed out by the Deputy Magistrate in his explanation, the witness Bholanath proved certain receipts. Sheriatulla Munshi, who knows the handwriting of the accused, proves it upon ten of the receipts.

Under the circumstances we see no reason to interfere. The Rule is discharged, and the prisoner must surrender to his bail in order to serve out the remainder of his sentence.

*Rule discharged.*

31 C. 932.

[932] APPELLATE CIVIL.

*Before Mr. Justice Geidt and Mr. Justice Mookerjee.*

AMIRULLAH MAHOMED v. NAZIR MAHOMED.\*

[24th, 28th June and 5th July 1904.]

*Ejection—Under-ryat—Notice—Trespass—Right of occupancy—Bengal Tenancy Act (VIII of 1885), ss. 49 (b), 167.*

An under tenant, who is not an occupancy ryat, cannot be ejected by the land-lord without the notice prescribed by s. 49 (b) of the Bengal Tenancy Act in order to take *khas* possession of the holding.

*Peary Mohun Mookerjee v. Badul Chandra Bagdi* (2) distinguished.

[Appr. 34 C. 104=3 C. L. J. 155; 13 C. W. N. 913=2 I. C. 654; Dist. 2 C. L. J. 570; 25 I. C. 741; Foll. 17 C. W. N. 781=18 I. C. 249; Ref. 46 Cal. 766; 19 C. W. N. 1077.]

SECOND APPEAL by Amirullah Mahomed, the defendant No. 1.

The plaintiff, Nazir Mahomed, brought this suit for recovery of *khas* possession of the disputed lands by evicting the defendants Amirullah Mahomed and others. One Gomai Nassya held an occupancy holding under Roop Mohan, a permanent tenure-holder. Gomai sublet the lands comprised in the holding to the ancestor of the present defendants, but

\* Appeal from Appellate Decree No. 1326 of 1903, against the decree of Akhoy Kumar Chatterjee, Subordinate Judge of Jalpaiguri, dated May 18, 1903, reversing the decree of Satish Chandra Biswas, Munsif of Jalpaiguri, dated June 14, 1902.

(1) (1902) I. L. R. 24 All. 254.

(2) (1900) I. L. R. 28 Cal. 205.

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the sub-lease was not made under a registered instrument, nor was it effected with the consent of the landlord. In 1294 B.S. (1887-88) the plaintiff purchased Roop Mohan's interest in the permanent tenure, and also the occupancy holding of Gomai Nassya by a registered *kobala* in the following year, and instituted this suit for establishment of his right to the disputed lands and for *khas* possession, on the allegations that by his purchase of the occupancy holding, the right of occupancy had merged in the plaintiff's superior interest; that the defendants were under-rayats under Gomai; and that the [933] sub-lease being invalid under the provisions of s. 85 (1) of the Bengal Tenancy Act the defendants were not entitled to remain in possession.

The defendant No. 1 contested the suit and alleged that there could be no merger to the prejudice of the defendants; that they were not under-rayats, but tenants having rights of occupancy; and that they were not liable to be ejected without a notice to quit.

The Munsif held that the plaintiff's purchase of the occupancy right of Gomai Nassya did not affect the title of the under-rayats under subsection (2) of s. 22 of the Bengal Tenancy Act; that although the occupancy right had ceased the holding existed, and the defendants would be tenants of the plaintiff, and could not be treated as trespassers; and that the defendants, as tenants, were entitled to a notice from the plaintiff before they could be ejected: and he accordingly dismissed the suit.

The Subordinate Judge, on appeal, held that the sub-lease not having been executed with the landlord's consent was invalid; that the defendants having no valid right to the holding were trespassers and liable to be ejected; and that, as trespassers, they were not entitled to any notice under s. 49 (b) of the Bengal Tenancy Act. And he accordingly decreed the plaintiff's suit, reversing the judgment of the Court of first instance.

The defendant appealed to the High Court.

Babu *Jnanendra Nath Bose*, for the appellant. By purchasing the occupancy holding, the plaintiff has acquired a combined right of landlord and tenant, the effect of the purchase being a merger and extinction of the occupancy character of the holding: see s. 22 (i) of the Bengal Tenancy Act. But the holding itself exists in the landlord divested of the right of occupancy, and co-exists with the landlord's superior right as of a permanent tenure-holder: See *Sitanath Panda v. Pelaram Tripati* (1), *Jawadul Huq v. Ram Das Saha* (2), *Miajan v. Minnat Ali* (3). A sub-lease by a tenant otherwise than by a registered instrument and made without the landlord's consent is not valid as against the landlord [934] but is valid as against the tenant himself: see *Gopal Mandal v. Eshan Chunder Banerjee* (4). The plaintiff is bound to recognise the interests of the defendants as under-rayats, and cannot eject them summarily.

The right of the defendant No. 1 is perfectly valid as against his lessor, Gomai Nassya; and whatever rights and remedies this defendant had against Gomai Nassya, he has against the present plaintiff. Under s. 22 cl. (i) of the Bengal Tenancy Act these rights cannot be prejudicially affected by the plaintiff's purchase of the occupancy holding. It is clear that Gomai Nassya could not summarily eject the defendant No. 1; the

(1) (1894) I. L. R. 21 Cal. 869.  
 (2) (1896) I. L. R. 24 Cal. 143.

(3) (1896) I. L. R. 24 Cal. 521  
 (4) (1901) I. L. R. 29 Cal. 148.

plaintiff's suit to evict the defendant without notice is therefore not maintainable.

Babu *Prosanna Gopal Roy*, for the respondent. The rights and interests of the defendant as an under-rayat are not valid as against the landlord under s. 85, cl. (i) of the Bengal Tenancy Act, and cannot be protected by s. 22, cl. (i) of the Act. The plaintiff has sued in his character and capacity of a landlord and is entitled to, succeed under the provisions of s. 85 (i). It has been held in the case of *Peary Mohan Mookerjee v. Badul Chandra Bagdi* (1), that where a sub-lease is created otherwise than by a registered instrument and without the landlord's consent, it is not necessary for the landlord to follow the procedure prescribed by s. 167 of the Bengal Tenancy Act in order to recover *khas* possession of the holding by ejecting the under-rayat; and I submit that the principle laid down in that case governs the present, and that the decree of the Lower Appellate Court should be upheld.

Babu *Jnanendra Nath Bose*, in reply. The case of *Peary Mohan Mookerjee v. Badul Chandra Bagdi* (1) is distinguishable. The precise point taken in this appeal was neither raised nor decided in that case.

*Cur. adv. vult.*

GEIDT AND MOOKERJEE, JJ. One Gomai Nassya, who had an occupancy holding under the plaintiff, sublet the land comprised in the holding to the predecessors of the defendants. Subsequently [935] the plaintiff purchased Gomai Nassya's holding, and thereupon brought the present suit to eject the defendants. The defendants pleaded that they had occupancy rights in the land, but that plea was overruled by both the lower Courts. The Munsif held that the defendants being tenants could not be ejected without notice. The Subordinate Judge, on appeal, has found that the defendants are mere trespassers, and has therefore decreed the plaintiff's suit. The ground of his decision was that on plaintiff's purchase of Gomai Nassya's holding, the occupancy right of the latter ceased to exist under the provisions of section 22 of the Bengal Tenancy Act. Moreover, as the sub-lease by Gomai Nassya was not made under a registered instrument and was not shown to have been effected with the landlord's consent, it is not valid against the plaintiff, the landlord.

Now section 22 (1) of the Bengal Tenancy Act, which lays down that in a case like the present the occupancy right of a holding purchased by the landlord shall cease to exist, goes on to enact that "nothing in this sub-section shall prejudicially affect the rights of any third person." The Subordinate Judge is of opinion that an under-tenant is not included in the expression "any third person." It appears to us that there is neither reason nor authority for the interpretation, and that an under-tenant would have as against a landlord, who purchased the occupancy holding, any rights which he had as against the occupancy rayat. It is true that the defendants's sub-lease is under section 85 (1) of the Bengal Tenancy Act not valid as against the plaintiff, the landlord; but as Gomai Nassya could not have ejected the defendants without a notice under section 49 (b) of that Act, it would follow that the defendants, before they are ejected, are entitled to a similar notice from the plaintiff before he can eject them.

The learned pleader for the respondents however has called our attention to the decision of this Court in *Peary Mohan Mookerjee v. Badul*

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*Chandra Bagdi* (1), where it was held that the expression "the rights of any third person" can only mean such rights as are valid; and that as a sub-tenant, to whom a sub-lease had been granted without a registered instrument and without the landlord's consent, had no valid right as against a landlord [936] who had purchased at an execution sale for arrears of rent the occupancy holding in which the sub-tenancy was situated. In that case the defendant resisted the suit for ejectment on the ground that the landlord after his purchase had not complied with the provision of section 167 of the Tenancy Act by serving a notice annulling the incumbrance of the sub-lease. The Court decided that a notice of that kind was not necessary to entitle the plaintiff to succeed in his suit for ejectment as the sub-lease was under section 85 (1) invalid as against him. The defendant in that case put forward a claim which, if it had succeeded, would have entitled him to hold the land in perpetuity, because the plaintiff had not within one year from his auction purchase served a notice of the kind required by section 167. It would have been a strange result, if the sub-tenant could in this way establish as against the landlord a right which he could not have maintained against the occupancy rayat, and establish that right too in the face of section 85 (1) by which his sub-lease was invalid as against the landlord. The question whether the defendant was entitled to the same notice under section 49 (b) from the purchaser of the occupancy holding as he would have been entitled to from his lessor was not discussed in that case and apparently no such plea was raised as the defendant claimed to hold in perpetuity. Here the appellant, now that he is found to have no occupancy right, disclaims any title to hold the land against the landlord's will, but insists that, until that will is communicated to him in the manner provided by law, he must be regarded as a tenant and not as a trespasser. We are of opinion that this claim is well founded, and that there is nothing in section 22 (1) of the Bengal Tenancy Act by which on the plaintiff's purchase the defendants were converted *ipso facto* from tenants into trespassers.

We accordingly hold that they cannot be ejected without the notice prescribed by section 49 (b), and we therefore reverse the judgment of the Subordinate Judge, and restore that of the Munsif, dismissing the suit. The defendants are entitled to their costs in all the Courts.

*Appeal allowed.*

31 C. 937 (=3 C. W. N. 804.)

[937] APPELLATE CIVIL.

*Before Mr. Justice Geidt and Mr. Justice Mookerjee.*

\*MAHANANDA CHAKRAVARTI v. MONGALA KEOTANI.\*

[5th July, 1904.]

*Jurisdiction—Revenue Court—Rent of tank, suit for—"Land"—Fishery, right of—Act X of 1859, ss. 6, 23, cl. (4).*

A suit for recovery of arrears of rent of a tank, which is not a part of an agricultural holding, but is used for rearing and preserving fish, is not main-

\* Appeal from Appellate Decree, No. 1883 of 1902, against the decree of R. R. Pope, Judicial Commissioner of Chota Nagpur, dated May 6, 1902, affirming the decree of Ram Niranjan Prosad, Deputy Collector of Manbhum, dated July 17, 1901.

(1) (1900) I. L. B. 28 Cal. 205.