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IN THE MATTER OF BASHARAT ALI CHOWDHRY.

probably created unnecessary friction. The guardian was not subordinate to the manager, and many of the orders, which were very peremptory, did not even purport to be in the Judge's name, although it was doubtless known that they emanated from him. The manager also sent him a letter containing serious reflections on his character, which certainly ought not to have been sent.

It is argued that the order for suspension was illegal and that the guardian has been greatly prejudiced, as, if there had been an order for removal properly communicated, he would have had a right of appeal. We do not think he is entitled to any consideration on this account. He was, when suspended, acting in contempt of the Judge's authority, and he has never since made submission to it. He has not attempted to account to the Judge for his conduct or asked to be reinstated, and he cannot, under the circumstances, gain anything by the omission to make a final order for his removal. He wants, indeed, now to be reinstated on his own terms, which are, apparently, that he is to remain in Calcutta, and that the lunatic ward is to be brought from Tipperah and made over to his care here. This cannot be allowed.

The rule is discharged. We make no order as to costs.

H. W. *Rule discharged.*

Before Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Gordon.

JAWADUL HUQ (PLAINTIFF) *v.* RAM DAS SAHA (DEFENDANT). *

1896
July 1.

Bengal Tenancy Act (VIII of 1885), section 22, clause (2)—Co-owner's purchase of occupancy right, Effect of.

There is no law which prevents one of several co-proprietors from holding the status of a tenant under the other co-proprietors of land which appertains to the common estate.

The effect of the purchase, by one co-owner of land, of the occupancy right, is, not that the holding ceases to exist, but only the occupancy right which is an incident of the holding.

Sitanath Panda v. *Pelaram Tripati* (1) referred to.

* Appeal under section 15 of the Letters Patent No. 50 of 1894, against the Decree of the Hon'ble Henry Beverley, one of the Judges of this Court, dated the 12th of June 1894, in appeal from Appellate Decree No. 1927 of 1893.

(1) I. L. R., 21 Calc., 869.

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THE plaintiff owned an 8-annas share of a certain taluk, and the defendant No. 1 owned the remaining 8-annas share. The latter brought a suit against his tenant for his share of the arrears of rent; and in execution of the decree which he obtained, he put up the holding for sale and purchased it himself. The plaintiff then sued the defendant for *khas* possession to the extent of his share in the *jote*, alleging that under section 22, clause 2 of the Bengal Tenancy Act, the holding was extinguished by the defendant's purchase. The Munsif, however, held that although the occupancy right had merged, the holding was not extinguished, and that therefore the defendant was entitled to hold on as a tenant. The suit was accordingly dismissed. On appeal to the Subordinate Judge, that decision was reversed on the ground that the defendant purchased nothing, the only effect of the purchase being to extinguish the entire tenancy.

The defendant appealed to the High Court; and on the 12th June, BEVERLEY, J. set aside the judgment and decree of the Subordinate Judge and restored those of the Munsif. The valuation of the appeal did not exceed Rs. 50.

The judgment of BEVERLEY, J., was as follows:—

This was a suit brought by the plaintiff to obtain *khas* possession to the extent of his share in a certain *jote* of five bighas of land in which the principal defendant had put up to sale and purchased the occupancy right of the tenant, the principal defendant being the plaintiff's co-sharer in the taluk in which the said *jote* is situated. The plaintiff based his suit upon the provisions of section 22, clause (2) of the Bengal Tenancy Act.

The Munsif held that although the clause in question declares that in a case like the present the occupancy right transferred to the defendant has ceased to exist, there is nothing in the section to warrant the proposition that the holding itself is extinguished. He held, therefore, that the principal defendant who had purchased the *jote* was entitled to hold it as a tenant, and that the plaintiff was not entitled to obtain *khas* possession of his share. He accordingly dismissed the plaintiff's suit. That decision was reversed by the Subordinate Judge, who has held that under the clause in question the principal defendant purchased nothing, the effect of that purchase being to extinguish the entire tenancy. He

says: "If the right of occupancy fails, it is difficult to make out what other right remains; certainly the defendant cannot claim the status of an ordinary tenant against the will of the co-sharers, and if he is once allowed to hold on as a tenant, the result will be that he will continue to do so for ever until partition, for the other co-parceners will have no right to turn him out, and the provisions of section 22, clause (2) in that case will become nugatory."

The question which arises in this suit has recently been considered by me in several cases. No doubt the wording of the section in question is somewhat obscure and not altogether free from doubt, but having further considered the matter, I am still of opinion that the view taken by the Munsif in this case is the right one. Section 22, clause (1) declares that when an occupancy holding is held immediately under a proprietor or permanent tenure-holder, and the entire interest of the landlord and the raiyat, meaning the occupancy raiyat, in the holding become united in the same person by transfer, succession or otherwise, the occupancy right shall cease to exist; but nothing in this clause is to affect prejudicially the rights of any third person. By this clause, therefore, as I understand it, when an occupancy holding is purchased by a full proprietor or permanent tenure-holder, such proprietor would be at liberty to deal with the land as though the occupancy right had ceased to exist, in other words, he would be at liberty to let the land again unfettered by any occupancy right, subject to the rights of any under-tenant, who may be on the land. If there are under-tenants, this condition would seem to show that the holding is not extinguished by the transfer.

Clause (2) then goes on to say: "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it shall cease to exist, but nothing in this sub-section shall prejudicially affect the rights of any third person."

Here, again, it is the occupancy right and not the holding which the section says is extinguished by the transfer; and just as in the former case, the saving of the rights of under-tenants would seem to shew that the holding itself is not extinguished by the transfer. Nor is it reasonable to suppose that the Legislature intended that the purchase of an occupancy holding by one co-sharer should enure to the benefit of the other co-sharers

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who had paid nothing for it. It is not unusual for one co-sharer to hold land as a raiyat under himself and the other co-sharers, and the saving of the rights of third parties would appear to extend to the right of the co-sharers to their share of the rent.

It seems to me, therefore, from these considerations, that the effect of the clause in question is not to extinguish the holding altogether but merely to divest it of the incidents attached to an occupancy holding; in other words, the purchaser will continue to hold it divested of those incidents. Whether or not the consequences will be those stated by the Subordinate Judge seems to me to be an immaterial consideration. The principal defendant in this case, having purchased the holding, is entitled, in my opinion, to the benefit of his purchase and whatever rights the plaintiff may have against him. I do not think that section gives him the right to eject him from any portion of the land or to obtain direct possession of the land jointly with the defendant.

It seems to me, therefore, that the plaintiff's suit was properly dismissed, and this appeal must be allowed. The decree of the lower Appellate Court will be reversed, and that of the first Court restored, the suit being dismissed with costs in all Courts.

From this decision the plaintiff appealed under section 15 of the Letters Patent. The case was heard by PETHERAM, C. J., and RAMPINI, J., who, after hearing the pleader on each side, sent the appeal to be heard before a Bench of five Judges.

Moulvie *Seraj-ul-Islam* for the appellant.—The view of the law taken by Beverley, J., is not correct. The effect of such a purchase as the present could not be to make the landlord-purchaser a raiyat in relation to his co-owners. The judgment seems to contemplate the right of occupancy as consisting of two things,—(1) the tenant's right, and (2) that portion of the right by which the right of occupancy is perfected; and that this latter portion, if taken away, leaves something on the strength of which the purchaser may retain possession of the land. A non-occupancy right may develop into an occupancy right. [TREVELYAN, J.—That only means that new incidents are added to the tenure, not that

it becomes a new tenure. GHOSE, J.—In that case does the non-occupancy right come to an end?] It is perfected in that way. The question is what is it that has ceased to exist? The proviso to section 22 means that if, for instance, the occupancy tenant has sub-let his land, then a sale of the land does not affect the sub-lessees. [TREVELYAN, J.—By your argument, not only does the purchaser get nothing by his purchase, but, by the very act of purchasing, he destroys what he has purchased. GHOSE, J.—And for the benefit of the other co-owners. Suppose the occupancy raiyat mortgaged his interest. What would be the position of the mortgagee?] He would not be affected. [GHOSE, J.—Suppose he afterwards sells the right under a decree?] It is only the right of the landlord-purchaser that is affected; that is clear from the saving clause of the section. If this judgment is correct, then a co-proprietor becomes a non-occupancy raiyat under the other co-proprietors, without their consent; and that he cannot be. [GHOSE, J.—Suppose a third party made the purchase; he would become your tenant without your consent.] Yes; but a co-proprietor cannot. Otherwise the occupancy right having ceased to exist the non-occupancy right would become transferable; but such a right is not transferable directly or indirectly. The very definition of a non-occupancy raiyat shows that by such a purchase a proprietor cannot become one.

The fact that the other co-owners benefit by the defendant's purchase is not to be considered in determining the question before the Court. If this judgment stands, one co-owner can deprive the others of their rights by purchasing the occupancy rights of the tenants; and such a result could not have been intended by the Legislature.

Baboo *Jasodanandan Paramanick* for the respondent.—The only reported authority on the point is the case of *Sitanath Panda* v. *Pelaram Tripati* (1) which is clearly in my favour. The doctrine of merger—in the sense of total extinction of the right of occupancy—is unknown to the law of this country,—*Womesh Chunder Goopto* v. *Rajnarain Roy* (2), *Mokoondy Lall Doobey* v. *Crowdy* (3), *Savi* v. *Punchanun Roy* (4). What happens in the event of two rights existing

(1) I. L. R., 21 Calc., 869.
(2) 10 W. R., 15.
(3) 17 W. R., 274.
(4) 25 W. R., 503.

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in the same person is, that the lesser right is in abeyance. A co-owner may hold land as a tenant under himself and the other co-owners,—*Lal Bahadoor Singh* v. *Solano* (1); *Gur Buksh Roy* v. *Jeolal Roy* (2). The question of merger was considered in *Jibanti Nath Khan* v. *Gokool Chunder Chowdry* (3), and the Court held that a *putni* interest did not merge in the larger estate when both fell into the same hands. In *Maseyk* v. *Bhagabati Barmanya* (4) it was held that, although a raiyat may have acquired an *izara* of a portion of the estate, still he is entitled to compute in his favour the period during which he held the right of occupancy, and thereby complete the statutory period of twelve years and so acquire the right of occupancy. Lastly, nothing is more common than for one joint landlord to hold land under the general body of proprietors. If this Court decides that proprietors are forbidden to buy holdings, vested interests will be seriously prejudiced. (Two unreported cases, —Appeals from Appellate Decrees 1139 and 1140 of 1895 decided by Hill, J., on the 18th March 1895, and *Ram Mohun Chuckerbutty* v. *Huro Sundari Debya*, Appeal from Appellate Decree 37 of 1893 were also cited.)

The following judgments were delivered by the Court (MACPHERSON, TREVELYAN, GHOSE, HILL and GORDON, JJ.):—

MACPHERSON, J.—In my opinion the decision of Mr. Justice Beverley is right. There is no law in this country which prevents one of several co-proprietors holding the status of a tenant under the other co-proprietors of land which appertains to the common estate. In the reported cases many instances will be found in which lands have been so held and in which the possession of the co-proprietor as a tenant has been recognised. Sub-section 2 of section 22 of the present Tenancy Act does, however, provide that if an occupancy-right is transferred to a person jointly interested in the land as proprietor, the occupancy-right shall cease to exist. It is not said, and the sub-section cannot be understood to mean, that the holding shall cease to exist, but that the occupancy right, which is an incident to the holding, will cease to exist; and there is nothing in the sub-section inconsist-

(1) I. L. R., 10 Calc., 45. (2) I. L. R., 16 Calc., 127.
(3) I. L. R., 19 Calc., 760. (4) I. L. R., 18 Calc., 121.

ent with the continuance of the holding divested of this right of occupancy which attached to it. The saving clause in the sub-section "that nothing in it shall prejudicially affect the right of any third person," indicates also that the holding would, for some purposes at all events, continue to exist. This view of the construction of the section was taken in an unreported case, appeal from Appellate Decree No. 37, decided by Mr. Justice Norris and Mr. Justice Banerjee on the 30th March 1894; and the same view was also taken in the case of *Sitanath Panda* v. *Pelaram Tripati* (1). Although the facts of those cases are not precisely similar to the facts of the present case, the view taken of the provisions of sub-section 2, section 22 of the Bengal Tenancy Act was the same as that which I have expressed. I, therefore, think that the appeal must be dismissed with costs.

TREVELYAN, J.—I entirely agree with Mr. Justice Macpherson.

GHOSE, J.—I am of the same opinion.

HILL, J.—I am also of the same opinion.

GORDON, J.—I also agree.

H. W.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

LALOO SINGH (DEFENDANT) *v.* PURNA CHANDER BANERJEE AND OTHERS (PLAINTIFFS). *

1896 *August* 25.

Limitation Act (XV of 1877), schedule II, Article 14—Estates Partition Act (Bengal Act VIII of 1876), sections 116, 150—Right of Suit—Suit for possession.

A suit for possession of lands of which the owners have been dispossessed in pursuance of an order of the Collector under section 116 of the Estates Partition Act (Bengal Act VIII of 1876) will lie, even though no suit is brought to set aside the Collector's order under section 150.

Article 14 of Schedule II of the Limitation Act (XV of 1877) does not bar such a suit.

THIS was one of seven cases tried together by consent of parties. The plaintiffs were proprietors of mouzas Nathudoar and

* Appeal from Appellate Decree No. 1872 of 1894, against the decree of Babu Jaggadduriabh Mozumdar, Additional Subordinate Judge of Tirhoot, dated the 27th of June 1894, affirming the decree of Moulvie Ali Ahmed, Munsif of Samastipur, dated the 18th of May 1893.

(1) I. L. R., 21 Calc., 869.