

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Banerjee.

PEARY MOHUN MOOKERJEE (PLAINTIFF) *v.* BADUL CHANDRA BAGDI AND OTHERS (DEFENDANTS.)^a

1900
Aug. 21.

Bengal Tenancy Act (VIII of 1885), s. 167—Landlord and underraiyat—Sub-lease given by a tenant without the landlord's consent—In a suit for khas possession by a landlord on purchase of a holding sold for arrears of rent whether necessary for the landlord to avoid the incumbrance so created—Bengal Tenancy Act, ss. 22, 85.

In a suit brought by the plaintiff (landlord) to recover khas possession of a holding on the allegation that he had purchased it at a sale held in execution of a decree for arrears of rent obtained against the tenant, the defendant pleaded that he was an undertenant with a right of occupancy, and that the plaintiff was not entitled to set aside the undertenancy inasmuch as he did not proceed in accordance with the provisions of s. 167 of the Bengal Tenancy Act.

Held, that inasmuch as the subletting was otherwise than by a registered instrument, and without the landlord's consent, it was invalid as against him, and therefore it was not necessary for him to follow the procedure prescribed by s. 167 of the Bengal Tenancy Act.

THIS appeal arose out of an action brought by the plaintiff (landlord) to recover khas possession of certain land. His allegation was that it formed part of an occupancy holding of one Mohesh, that it was sold in execution of a decree obtained against him for arrears of rent and was purchased by the plaintiff, and that therefore he was entitled to get a decree for khas possession. The defence was that the land was held by the defendant as an undertenant under Mohesh, and that the defendant had acquired a right of occupancy in the land.

The Court of First Instance having held that the defendant was an underraiyat, and that the plaintiff did not proceed in accordance with the provisions of s. 167 of the Bengal Tenancy Act, dismissed

^a Appeal under cl. 15 of the Letters Patent No. 28 of 1899, against the decree of the Hon'ble Charles Henry Hill one of the Judges of this Court, dated the 29th of March 1899, in Appeal from Appellate Decree No. 420 of 1898, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of Hooghly, dated the 12th of January 1898, affirming the decree of Babu Nalini Nath Mitter, Munsif of Howrah, dated the 31st of March 1897.

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the suit without going into the question whether the defendant acquired a right of occupancy in the disputed land or not.

On appeal the Subordinate Judge confirmed the decision of the First Court.

Against that decision the plaintiff appealed to the High Court. The appeal, coming on for hearing before Mr. Justice Hill, was dismissed on the 29th March 1899. The material portion of the judgment was as follows:—

"The question before this Court is whether the landlord having sued to eject the defendant is entitled to succeed. The main contention of the appellant turns on the provisions of s. 85 of the Bengal Tenancy Act. He contends that, by virtue of that section, the under-tenancy of the defendant not having been created by a registered instrument, or with the consent of the landlord, was void as against the latter, and that the landlord was entitled to treat the defendant as a trespasser in wrongful possession and to eject him without taking the regular proceedings necessary for the ejection of an under-tenant. On the other hand, it was contended that the plaintiff is an auction-purchaser, and accordingly if he desires to get rid of the sub-tenancy he must adopt the procedure prescribed by the Bengal Tenancy Act for the avoidance of incumbrances. But to this it is replied that, by the effect of s. 22 of the Act, since immediately on the purchase taking place the occupancy holding merged in the superior right of the plaintiff—the sub-tenancy being incidental to the occupancy holding went with it, and that the provisions of the Act relating to avoidance of incumbrances apply only to the case of a holding which continued to subsist.

On the whole I am of opinion that the contention of the respondent must prevail, and for this reason that, by s. 22 of the Act, notwithstanding the cessation of the occupancy right, the rights of the third person are expressly saved. It is conceded that the rights of sub-tenants are included within the rights so preserved. It seems to me, therefore, that the practical result of the section is that, in order to save the rights of sub-tenants of occupancy raiyats, the occupancy must be regarded as subsisting notwithstanding the fact that the purchaser was the sole and exclusive proprietor of the zemindari. It seems to me that he is not in a position to divest himself for purposes such as those now in question of his character as purchaser, and that he must, consequently, if he desires to remove the incumbrance constituted by the sub-tenancy, have recourse to the procedure prescribed by the Bengal Tenancy Act for that purpose. I confess there might be difficulty in reconciling this view with the provisions of s. 85, but clearly there may be cases of a kind different from the present in which the provisions of s. 85 would become applicable, such, for example, as the abandonment or surrender of the intermediate tenancy."

From this decision the plaintiff appealed under cl. 15 of the Letters Patent.

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Babu *Shyma Prosonno Mazumdar* for the appellant.

Babu *Boidya Nath Dutta* for the respondent.

1900, AUGUST 21. The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

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BANERJEE, J.—This is an appeal under cl. 15 of the Letters Patent against a decision of Mr. Justice Hill confirming the judgment of the Courts below, by which the plaintiff's suit for *khas* possession of some land has been dismissed. The plaintiff sued for *khas* possession of the land in dispute, on the allegation that it formed part of the occupancy holding of one Mohesh Chandra Ghose under the plaintiff, that that holding having been sold in execution of a decree for arrears of rent was purchased by the plaintiff, and that the plaintiff was entitled to *khas* possession of the land as the defendant had no right to the same.

The defence, so far as it is necessary to consider it now, was that the land was held by the defendant as an under-raiyat under Mohesh, and that the defendant had acquired a right of occupancy in the same.

Both the First Court, and the learned Subordinate Judge on appeal, held that the suit was liable to dismissal, as the plaintiff even if he was entitled to set aside the undertenancy of the defendant, could not succeed in this suit as he did not proceed in accordance with the provisions of s. 167 of the Bengal Tenancy Act; and Mr. Justice Hill has confirmed their judgments holding that, though by s. 85 of the Bengal Tenancy Act, the sublease granted by Mohesh to the defendant was invalid, and though by s. 22 of the Act, upon the purchase of the occupancy holding by the plaintiff who was the sole landlord, the occupancy holding became merged in the plaintiff's zemindari right, still such merger could not affect the rights of the defendant, and that it was, therefore, necessary for the plaintiff, if he wanted to annul those rights, to proceed in accordance with the procedure prescribed by the Bengal Tenancy Act.

It is contended on behalf of the plaintiff appellant that this view is incorrect, and that the effect of s. 85 of the Bengal

think that effect ought to be given to this contention on behalf of the respondent. The result is that the judgments and decrees appealed against must be set aside, and the case sent back to the First Court in order that it may determine the question whether the defendant has acquired a right of occupancy. The parties will be at liberty to adduce fresh evidence upon that question. The costs will abide the result.

MACLEAN, C. J.—I have only one word to add. The appeal might, to my mind, be disposed of upon this short ground. It is clear that the defendant was claiming as a sub-lessee not as an occupancy raiyat; but as the instrument creating the sub-tenancy was not registered, it was not valid under s. 85 of the Bengal Tenancy Act as against the landlord. That ought to end the case. Then it is said that, inasmuch as here the interest of the landlord and of his tenant became united in the same person, *viz.*, the superior landlord, the defendant's rights are saved under s. 22 of the Bengal Tenancy Act. The answer is that he had no rights and there was nothing to be saved.

S. C. G.

Appeal allowed, case remanded.

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Before Mr. Justice Stanley,

BARLOW *v.* CHUNI LALL NEOGHI AND ANOTHER.*

Evidence—Account sales—Evidence Act 1 of 1872, s. 32.

1901
 Jan. 3.

In a suit to recover loss sustained on the sale by the plaintiffs of goods consigned to them by the defendant for sale by their London firm, account sales are good *prima facie* evidence to prove the loss, unless and until displaced by substantive evidence put forward by the defendants.

THE defendants in Calcutta consigned mica through the plaintiffs for sale by the plaintiffs' London firm in London. The mica so consigned was sold at a loss. The plaintiffs thereupon instituted this suit in Calcutta to recover the loss, and desired to

* Small Cause Court Transfer Suit No. 15 of 1899.