

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Pargiter.

AMIRULLAH MAHOMED

v.

NAZIR MAHOMED.*

1905

Nov. 27.

Landlord and tenant—Ejectment—Right of occupancy—Merger—Sublease by occupancy raiyat—Under-raiyat—Notice to quit—Bengal Tenancy Act (VIII of 1885) ss. 22, 49, 85(1).

Where after an occupancy raiyat had sublet his holding the plaintiff, his landlord, purchased the holding from him at a private sale.

Held that, although by reason of such purchase the occupancy holding merged in the landlord's interest under s. 22 of the Bengal Tenancy Act and although under the provisions of s. 85(1) of the Act, the sublessee had not by reason of the sublease acquired any right as against the landlord, the plaintiff, having acquired the occupancy holding at a private sale, could not claim any higher right than the occupancy holder himself had and was not entitled to eject the sublessee without serving upon him a notice to quit under the provisions of s. 49 of the Bengal Tenancy Act.

Peary Mohun Mookerjee v. Badul Chandra Bagdi(1) distinguished.

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

This appeal was at first heard by Geidt and Mookerjee JJ., who delivered judgment on the 5th July 1904(2); this judgment was subsequently withdrawn by reason of no notice having been served upon the heirs of the respondent, who had died.

The plaintiff, Nazir Mahomed, instituted 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 tenureholder. Gomai sublet the lands comprised in the holding to the ancestor of the present defendants, but the sublease was not made

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

(1) (1900) I. L. R. 28 Calc. 205.

(2) (1904) I. L. R. 31 Calc. 982.

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-raiyats under Gomai; and that the 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.

1905
 AMIRULLAH
 MAHOMED
 v.
 NAZIR
 MAHOMED.

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-raiyats, but tenants having a right of occupancy; and that they were not entitled 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-raiyats under sub-section (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.

Babu Priya Nath Sen for the respondent.

Cur. adv. vult.

1905
 AMIRULLAH
 MAHOMED
 v.
 NAZIR
 MAHOMED.

GHOSE J. The facts of this case are shortly these:—One Gumai Nasya held an occupancy holding under Roop Mohun, a permanent tenureholder. Gumai sublet the lands comprised in his holding to the ancestor of the present defendants, but the sublease was not made under a registered instrument, nor was it made with the consent of the landlord. In the year 1887-88 the plaintiff purchased Roop Mohun's interest in the permanent tenure and subsequently acquired the occupancy holding of Gumai by a registered kabala. And he then instituted the present suit for establishment of his right to the disputed lands and for khas possession on the ground that by his purchase of the occupancy holding the right of occupancy had merged into the plaintiff's superior interest: that the defendants were under-raiyats under Gumai, and that, under the provisions of section 85(1) they were not entitled to remain in possession.

One of the questions raised between the parties in the Court below was whether the defendants were liable to be ejected without a notice to quit being served upon them under the provisions of section 49 of the Bengal Tenancy Act. The Lower Appellate Court has held that no such notice was necessary to be given to the defendants, because the sublease to the defendants by Gumai was invalid so far as the landlord is concerned, and the plaintiff being both the landlord and the purchaser of the occupancy holding of Gumai was entitled to eject the defendants. And the only question that we have to determine in this appeal is whether the defendants were entitled to notice before they could be ejected from the lands in suit.

No doubt under section 22 of the Bengal Tenancy Act, by reason of the purchase that was made by the plaintiff, the landlord, the occupancy holding has merged into his superior tenure; but it will be observed that it is only by reason of the plaintiff's purchase of such occupancy holding that he has acquired a right to bring a suit against the defendants. It is not a case of acquisition of an occupancy holding at a sale for arrears of rent under the Bengal Tenancy Act, as it was in the case of *Peary Mohun Mookerjee v. Badul Chandra Bagdi*(1). The plaintiff did not acquire the occupancy holding free of the incumbrances

(1) (1900) I. L. R. 28 Calc. 205.

created and engagements entered into by the occupancy holder, but he acquired such rights as the occupancy holder had at the time. That person had already sublet his holding to the defendants, and there can be no doubt that, if he had not sold his holding to the plaintiff but had still continued to hold the property, he could not have maintained an action for ejection without a notice to quit being served upon the defendants.

Section 22 of the Bengal Tenancy Act, after stating that when the immediate landlord of an occupancy holding is a proprietor or permanent tenureholder and the entire interest of the landlord and the raiyat became united in the same person, the occupancy right shall cease to exist, lays down that "nothing in that section shall prejudicially affect the rights of a third person." Though the defendants have not, by reason of the sublease executed by the occupancy holder, acquired any right as against the superior landlord, yet as between themselves and the occupancy holder, they acquired some interest in the property in question, which could only be put an end to by a notice to quit. It seems to me that the plaintiff having acquired the rights of the occupancy holder under a private sale could not claim any higher right than the occupancy holder himself had.

I may add that the question raised before us was fully discussed by Geidt and Mookerjee JJ. in the judgment which they delivered in this case on the 5th July 1904(1), but which they had to withdraw subsequently by reason of no notice having been served upon the heirs of the deceased respondent, and I may state, without committing myself to saying that I agree in all that they said, that I concur generally in the opinion that was then expressed by them.

For these reasons I am of opinion that the view taken by the Court below is not correct and that the suit must fail, no notice to quit having been given to the defendants.

The appellant will be entitled to his costs.

PARGITER J. I agree with the judgment delivered by my learned brother and would wish to add a few words. It seems

1905

AMIBULLAH
MAHOMEDv.
NAZIR
MAHOMED.

GHOSH J.

1905

AMIRULLAH
MAHOMED

vs.

NAZIR
MAHOMED.

PARGITER J.

to me that the position of the parties in this case differs materially from that of the parties in the case of *Peary Mohun Mookerjee v. Badul Chandra Bagdi*(1). First, as regards the landlord in the earlier case, the under-raiyat was brought face to face with the landlord by reason of the latter's exercising his rights as landlord over the occupancy holding. In the present case, the under-raiyat is not so brought face to face with the landlord, but only by reason of the landlord's privately acquiring the rights which belonged to the occupancy raiyat. Next, as regards the under-raiyat himself, in the earlier case he had an option, when the occupancy holding was put up to sale, to save his own rights by purchasing the occupancy holding. But in a case like this, where an occupancy holding is transferred by private sale to the landlord and the under-raiyat may know nothing whatever of the transfer, it is clear that his position would become one full of peril, if his rights were *ipso facto* destroyed by the private transaction.

Appeal allowed.

S. CH. B.

(1) (1900) I. L. R. 23 Cal. 205.