

reunion of the family. The circumstances which the learned Judge has held to be sufficient to prove such a reunion, we have already held to be insufficient for that purpose. In these circumstances, we are unable to support the judgment and decree of the Court of Appeal below. We think that the view taken by the Court of first instance is correct. We, therefore, decree the appeal, set aside the judgment and decree of the lower Appellate Court, and restore those of the Court of first instance with costs.

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Appeal allowed.

s. c. g.

APPELLATE CIVIL.

Before Mr. Justice Woodroffe and Mr. Justice Richardson.

RAM LAL SUKUL

v.

BHELA GAZI.*

1910
April 29.

Landlord and Tenant—Occupancy right, extinguishment of—New occupancy right in the same holding—Acquisition of adverse rights in two capacities—Non-occupancy raiyat, if he can sub-let and create incumbrance—Incumbrance—Bengal Tenancy Act (VIII of 1885) ss. 22 cl. (2), 159, 160 cl. (g).

When an occupancy right is extinguished by the operation of section 22, cl. (2) of the Bengal Tenancy Act, a new occupancy right cannot be acquired in the same tenancy by the co-sharer proprietor by whose action the occupancy right has ceased to exist.

The owner of a holding cannot acquire a right adversely to himself in his other character as co-proprietor.

A non-occupancy *raiyyat* is a *raiyyat*, and the land held by him is a 'holding'; section 159 of the Bengal Tenancy Act applies to non-occupancy holdings also.

A non-occupancy *raiyyat* is not prohibited from sub-letting and may have an under-*raiyyat* under him, and may create a protected interest under section 160, cl. (g), if his landlord allows him so to do. An incumbrance may be created by a non-occupancy *raiyyat* on his holding, in limitation of his own interest, however limited, by way of sub-lease.

*Appeal from Appellate Decree, No. 1215 of 1908, against the decree of Srish Chandra Mukherji, Subordinate Judge of Tipperah, dated March 30, 1908, reversing the decree of Krishna Kumar Sen, Munsif of Comilla, dated March 27, 1907.

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SECOND APPEAL by the plaintiffs.

Certain persons, who were called Dichits, were co-sharer *maliks* of a certain *taluk*, within which one Golak Singh had a *jote* with rights of occupancy. In execution of a decree against Golak Singh the said *jote* was purchased in execution-sale by the said Dichits, who settled the land after their purchase with the principal defendants. In the Record-of-Rights prepared in 1898, the Dichits were recorded as settled *raiyats*, and the principal defendants as *under-raiyats*, in respect of Golak Singh's *jote*. The *taluk* was under the common managership for several years, and the common manager, on behalf of all the *maliks*, brought a suit for recovery of arrears of rent due for the said *jote* against the Dichits, and in execution of the decree obtained in that suit put the *jote* to sale. The *jote* was purchased by the plaintiffs in the sale. Within one year from their purchase, the plaintiffs served a notice under section 167 of the Bengal Tenancy Act upon the principal defendants for setting aside the incumbrance, *viz.*, the *under-raiyati* interest in the *jote*. The defendants refused to vacate, and the present suit was instituted for ejection.

The Munsif held that there was no evidence that, at the time of the purchase of Golak Singh's *jote*, the Dichits had any *maliki* interest in the *taluk*, and that, therefore, there was no merger of the occupancy right in the proprietary right. The suit was accordingly decreed by the Munsif. On appeal, the Subordinate Judge held that the Dichits were proprietors of the *taluk* at the time of their purchase of Golak Singh's *jote*, and that the occupancy right in respect of the said *jote*, therefore, ceased under section 22, sub-section (2) of the Bengal Tenancy Act, and that in consequence the Dichits must be held to have acquired a *raiyati* holding divested of the occupancy right. He further held that section 163, sub-section (2), clause (b), or section 166 of the Bengal Tenancy Act which related to occupancy holdings, had no application, and hence section 167 of the Bengal Tenancy Act could not also apply. In conclusion, he held that the *jotes* of the principal defendants must be regarded only as *under-raiyati*

interests and could be determined only by notice under section 49 of the Bengal Tenancy Act. The Subordinate Judge, therefore, declared the plaintiff's right to receive rent, but dismissed their claim for *khas* possession. Against this decree the plaintiffs preferred the present appeal.

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Dr. Sarat Chandra Basak, for the appellants. Section 159 of the Bengal Tenancy Act gives the purchaser the right to annul incumbrances. It applies to all kinds of holdings, whether occupancy or non-occupancy. The word 'holding' is defined in section 3, clause (9). In the Act, where the Legislature intended to refer to occupancy holdings only, it is said so in express terms: see section 163, sub-section (2), clause (b) and section 166. Section 159, proviso (b), refers generally to the procedure to be adopted in annulling the incumbrance, and this makes section 167 applicable to the present case. Sections 163 and 166 cannot control the general section 159, which gives right to annul. If the view of the lower Appellate Court be correct, a mortgage which is an incumbrance could never be set aside by a purchaser in the position of the plaintiffs. Assuming that section 22 applies to the case, section 22, clause (2) would no doubt extinguish the occupancy right that was subsisting at the date of the sale of Golak Singh's *jote*, and the Dichits must be held to have purchased a non-occupancy holding. But there is nothing to prevent fresh acquisition of occupancy rights under sections 20 and 21 of the Bengal Tenancy Act. A perpetual non-occupancy right is opposed to the Bengal Tenancy Act. Then, again, one co-sharer may hold as a *raiyyat* against other co-sharers: *Jawadul Huq v. Ram Das Saha* (1), affirmed by the Full Bench in *Ram Mohan Pal v. Sheikh Kachhu* (2). After their purchase, the Dichits were recognised by all the landlords as occupancy raiyats, and there is nothing in the Act to prevent such recognition. The Record-of-Rights cannot also be lightly discarded: *Kali Roy v. Pratap Narain* (3). Lastly, the doctrine of merger is not applicable

(1) (1896) I. L. R. 24 Calc. 143

(2) (1905) I. L. R. 32 Calc. 386.

(3) (1906) 5 C. L. J. 92.

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to lands in the mofussil. It was unknown to the country before the passing of the Bengal Tenancy Act: *Womesh Chunder Goopto v. Raj Narain Roy* (1), *Jibanti Nath Khan v. Gokool Chunder Chowdry* (2), *Lal Mahomed Sarkar v. Jagir Sheikh* (3). In the present case, purchase by the Dichits were made long before the passing of the Bengal Tenancy Act, hence section 22 cannot apply.

Babu Akshay Kumar Banerji, for the respondents. Section 49 of the Bengal Tenancy Act shows how an *under-raiyat* can be ejected. "Holding" in section 159 must mean holding at a fixed rate, or occupancy holding. If non-occupancy holdings were intended to be included in section 159, the procedure similar to sections 163 and 166 would have been given. A co-sharer who purchases an occupancy holding under section 22, clause (2), cannot acquire occupancy right under section 20, which is, in this respect, controlled by section 22. There is no authority for the contention of the appellant. As to the contention with regard to the date of the purchase by the Dichits, there is no finding that the purchase was made prior to the passing of the Bengal Tenancy Act, and the point was not taken in either of the Courts below. The doctrine of merger was not unknown to the country before the passing of the Bengal Tenancy Act. *Womesh Chunder Goopto v. Raj Narain Roy* (1) and *Lal Mahomed Sarkar v. Jagir Sheikh* (3) do not decide the point.

Dr. Sarat Chandra Basak, in reply.

Cur. adv. vult.

WOODROFFE J. It has been firstly argued that the Court of appeal should have held that the tenancy was an occupancy *raiya* holding, and that the tenancy having been in existence and purchased by the Dichits prior to the passing of the Bengal Tenancy Act in 1885, section 22, clause (2) of that Act did not apply, with the result that there was no merger of the occupancy right. This question, though raised by the grounds of

(1) (1868) 10 W. R. 15.

(2) (1891) I. L. R. 19 Cal. 760.

(3) (1909) 13 C. W. N. 913, 918.

appeal before us, was not raised in the lower Court and cannot be now gone into. There is nothing in the paper book on this point which is sought to be established by reference to a passage in the evidence. But, then, it is said that assuming section 22 does not apply, and that under section 22, clause (2), the occupancy right then existing was extinguished by the transfer of the right of Golak Singh to the Dichits, the lower Appellate Court should have held that by reason of Dichits subsequently continuously holding the land as *raiyats* for a period of twelve years and more from the date of their purchase they acquired a new occupancy right. It is contended that the occupancy right, which is extinguished by the section, is only the right which existed at the date of the transfer, and that there is nothing to prevent the acquisition of a new occupancy right. To hold this would, I think, defeat the policy of the section. And, further, the owner of the holding could not acquire a right adversely to himself in his other character as co-proprietor. The lower Appellate Court, therefore, correctly held that the properties purchased by the plaintiffs in execution of the decree for arrears of rent are a *raiyati* holding without occupancy right. The question then arises whether the plaintiffs under section 159 have power to annul under-tenancies as incumbrances. It has been contended that they cannot, that the provisions of Chapter XIV do not apply to purchasers of non-occupancy holdings, and that the only remedy open to a purchaser of such a holding is under section 49 by ejectment. I think, however, this is not so. A non-occupancy *raiyat* is a *raiyat*, and the land held by him is a 'holding.' Chapter XIV is general in its terms and refers to "sale for arrears under decree." Section 159 speaks of a holding, and where the Act intends to refer to occupancy holdings, it so qualifies the terms. The latter section provides that a sale of a holding for arrears will pass the holding subject to protected interests and with power to annul incumbrances. Then, is that which it is sought to annul an incumbrance? I think that (on the case made by the defendants here) it is. It may be observed that a non-occupancy *raiyat* is not prohibited from sub-letting and may

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have an *under-raiyat* under him and may create a protected interest under section 160, clause (g), if his landlord allows him so to do. An incumbrance may be created by a non-occupancy *raiyat* on his holding in limitation of his own interest, however limited, by way of sub-lease. I am of opinion, therefore, that there was an incumbrance which plaintiffs had power to annul, and the appeal must therefore be allowed with costs and the decree of the first Court restored.

RICHARDSON J. I agree.

Appeal allowed.

S. M.

ORIGINAL CIVIL.

Before Mr. Justice Pugh.

RAMADHIN BANIA

v.

SEWBALAK SINGH.*

1910
 May 2.

High Court, Original Side, jurisdiction of—Revisional jurisdiction over Presidency Small Cause Court—Civil Procedure Code (Act V of 1908) s. 115—“Appeal”—Practice—Sanction to prosecute—Code of Criminal Procedure (Act V of 1898) ss. 195, 195 (6), 439.

A Judge of the Presidency Small Cause Court, Calcutta, had summarily refused an application for sanction to prosecute the plaintiff for making a false claim in a suit before him. On an application to the High Court under section 115 of the Code of Civil Procedure, to set aside this order and to compel the Judge to determine the application :—

Held, that the jurisdiction of the High Court in all such revisional applications, whether in respect of suits or other matters, is vested in a single Judge sitting on the Original Side.

Sansher Mundul v. Ganendra Narain Mitter (1), *Sarat Chandra Singh v. Brojo Lal Mukerjee* (2) followed. *Haladhar Maiti v. Choytonna Maiti* (3) referred to.

A civil Court, when acting under section 195 of the Criminal Procedure Code, is not in any way exercising criminal jurisdiction, and is subject to the revisional jurisdiction of the High Court under section 115 of the Code of Civil Procedure.

*Application in Original Civil Suit No. 7½ of 1910.

(1) (1902) I. L. R. 29 Calc. 498.

(2) (1903) I. L. R. 30 Calc. 986.

(3) (1903) I. L. R. 30 Calc. 588.