Harihar Prasad Singh and Another

Vs

Must. of Munshi Nath Prasad and Others

Civil Appeal No. 107 of 1953

(N. Chandrashekar Aiyar, Vivian Bose, T. L. Venkatarama Ayyar JJ)

16.01.1956

JUDGMENT

VENKATARAMA AYYAR J. -

The properties which are the subject-matter of this litigation are agricultural lands of the extent of 18 acres 23 cents situate in Mauza Chowki. They originally belonged to Khiran Rai, Firangi Rai and others, and were usufructuarily mortgaged by them on 10-8-1900 to Babunath Prasad and Babu Misri Lal under two sudbharna deeds, Exhibits 2 and 3, for a sum of Rs. 1,600. The defendants of the first party are the representatives of these mortgagees. In execution of a money decree passed against the mortgagors, 9 acres 6 cents out of the above lands were brought to sale on 11-6-1907 and purchased by Rameshwar Prasad Singh, the undivided uncle of the first plaintiff. On 23-12-1913 the remaining extent of 9 acres 17 cents was purchased by the first plaintiff from the mortgagors, and thus, the plaintiffs who were members of a joint Hindu family became entitled to all the interests of the mortgagors in the suit lands. In 1943 they deposited under section 83 of the Transfer of Property Act the amounts due on the mortgage deeds, Exhibits 2 and 3, in the court of the District Munsif, Monghyr. The defendants of the first party withdrew the amount, and the mortgages thus became redeemed. When the plaintiffs attempted to take khas or actual possession of the lands, they were obstructed by the defendants of the second party who claimed occupancy rights therein. The plaintiffs then instituted the suit out of which the present appeal arises, in the court of the Subordinate Judge, Monghyr, for recovery of possession of the lands from the second party defendants.

The plaintiffs alleged that the lands were 'kamat khudkast', which had been in the personal enjoyment of Khiran Rai and Firangi Rai and thereafter of the mortgagees and the defendants of the first party by virtue of the sudbharna deeds, Exhibits 2 and 3, that the second party defendants claimed rights as occupancy raiyats under a settlement by the mortgagees, that the settlement was not real or bona fide, and was not binding on the mortgagors. In the alternative, the plaintiffs claimed damages against the defendants of the first party, if it was found that the second party had acquired occupancy rights under a settlement from them. Both sets of defendants denied that the lands were kamat lands, or that the defendants of the first party settled the defendants of the second party as raiyats on the land. They pleaded that the latter had been in possession even prior to the mortgages, Exhibits 2 and 3, under a settlement with the mortgagors, and that accordingly the plaintiffs were entitled neither to possession from the second party nor damages from the first party.

The Subordinate Judge of Monghyr who tried the suit, held that the lands were private lands of the proprietors, that the defendants of the second party or their predecessors-in-title had not been inducted on the lands by the mortgagors, that they were put into possession by the mortgagees only

under the lease deed, Exhibit 2(a) dated 27th May 1905, that they were mere creatures of the first party, and that the settlement was not bona fide and not binding on the plaintiffs. He accordingly granted a decree in favour of the plaintiffs in ejectment. Against this judgment, there was an appeal by the defendants to the High Court of Patna, which agreed with the Subordinate Judge that the defendants of the second party were inducted into possession only in 1905 under the lease deed, Exhibit 2(a), and that they were not raiyats settled by the mortgagors prior to 1900. But the learned Judges held that the suit lands were not proved to be 'sir' or private lands, that the second party defendants were not the creatures of the first party, that the lease deed, Exhibit 2(a) was a bona fide transaction, and that the recognition of the defendants of the second party by the mortgagees as tenants would confer occupancy rights on them. In the result, the suit was dismissed. The plaintiffs appeal. It may be stated that the alternative claim for damages against the first party was abandoned by the plaintiffs, and the only relief now claimed is possession of lands as against the second party. Mr. Misra, counsel for the first party, had accordingly nothing to say about the merits of the controversy between the appellants and the second party defendants, and merely pressed for his costs being awarded. It was the second party appearing by counsel Mr. Tarachand Brijmohan Lal, that vigorously contested the appeal.

The substantial question that arises for our decision is whether the lands in dispute are private lands of the proprietor. Section 120(2) of the Bihar Tenancy Act VIII of 1885, hereinafter referred to as the Act, enacts a presumption that "land is not a proprietor's private land, until the contrary is shown". And further, there was a cadastral survey in 1908, and in the final notification published under section 103-A of the Act, the lands were recorded as in the possession of the second party defendants, whose status was described as 'kaimi' or settled raiyats. Under section 103-B(3), "every entry in a record of rights so published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect". The result of both these provisions is that the burden is on the proprietor clearly to establish that the lands are his private lands. Some oral evidence has been adduced by both sides as to the character of the lands, but it is too vague, recent and interested to be of much value, and the question therefore falls primarily to be decided on the documentary evidence in the case.

The earliest document bearing on the question is Exhibit 1, which is a mortgage deed executed by the previous owners, Firangi Rai and others, to Harbans Narain Singh on the 10th April, 1893 over a portion of the suit lands. Therein, it is recited that the mortgagors "mortgage, hypothecate and render liable the properties constituting the proprietory mukarri interest, with all the zamindari rights and claims including the khudkasht kamat lands". The word 'khudkasht' means personal cultivation, and that is a neutral expression, which might include both private lands and bakasht lands, that is to say, raiyati lands, which had come into the possession of the proprietor by surrender, abandonment or otherwise. But the word 'kamat' has a definite connotation, and means private lands. Vide section 116 of the Bihar Tenancy Act. If the recital in Exhibit 1 is to be accepted as correct, the lands were on that date in the personal cultivation of the proprietor as private lands. Exhibits 2 and 3 are the sudbharna deeds dated 10-8-1900 under which the first party defendants got into possession of the suit lands. They are in the same terms, and recite that the mortgagees are to enter into possession and occupation of lands, "cultivate or cause to be cultivated the same for their self-satisfaction", and that after the expiry of the period fixed for redemption, the mortgagors are to pay the mortgage amounts in one lump and take back the properties "in our sir and khas possession". The word 'sir' is synonymous with 'kamat' and 'ziraat', and means private lands of the proprietor. (Vide section 116). These recitals are of considerable importance, as they occur in deeds inter-parties. The respondents are right in contending that they cannot be regarded as admissions by the mortgagees as the deeds were executed by the mortgagors; but they are certainly admissible

under section 13 of the Evidence Act as assertions of title, and as it is under these documents that the first party defendants claim, their probative value as against them and as against the second party defendants who claim under them is high. Exhibit 1(b) is a simple mortgage executed by Firangi Rai and others on 21-12-1901 in favour of one Chhotu Singh over some properties forming part of the suit lands. It also contains the recital that these properties are kamat khudkasht lands. There is finally the lease deed executed in favour of the first party by the defendants of the second party, Exhibit 2(a) under which the latter came into possession of the lands. It recites that the lands had been in the exclusive cultivation of Babu Nath Prasad and Babu Misri Lal, that the lessees will give up possession of the lands at the end of the term which was a period of 2 years, and that the lessors will be "competent to bring the lands mentioned in this kabuliat under their exclusive cultivation". As these documents are ante litem motam, and as some of them, are inter-parties and extend over a considerable period of time, they form cogent and strong evidence that the lands are private lands.

Now, what is the evidence adduced by the defendants to rebut the inference to be drawn from them ? None. They simply trust to the presumptions in their favour enacted in sections 120(2) and 103-B of the Act to non-suit the plaintiffs. But these are rebuttable presumptions, and they have, in our opinion, been rebutted by the evidence in the suit, which is all one way.

It was argued for the respondents that even if the evidence referred to above was accepted, that would be insufficient under section 120 of the Act to support a finding that the lands were private lands. Section 120 runs as follows :

> " (1) The Revenue Officer shall record as a proprietor's private land -
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> (a) land, which is proved to have been cultivated as khamar, ziraat, sir, nij, nijjot or kamat by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and
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> (b) cultivated land which is recognised by village usage as proprietor's khamar, ziraat, sir, nij, nijjot or kamat.
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> (2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the second day of March, 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown.
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> (3) If any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in this section for the guidance of Revenue Officers".

The contention of the respondents is that under this section before lands could be held to be private, it must be shown that they had been cultivated as private lands for 12 years prior to the date of the Act, and that as the evidence in the case went back only to 1893, the requirements of the section were not satisfied. This argument proceeds on a misconception about the true scope of section 120. That section does not enact that no land shall be recorded as private, unless it is proved to have been

cultivated as private land for 12 years prior to the date of the Act. It only provides that when that is proved, it shall be recorded as private land. But when no such evidence is forthcoming, it does not preclude that fact from being established by "any other evidence that may be produced", if that is relevant and admissible under the provisions of the Evidence Act. That was the view taken in Maharaja Kesho Prasad Singh v. Parmeshri Prasad Singh [[1923] I. L. R. 2 Patna 414.], and on appeal, the Privy Council agreed with it in Bindeshwari Prasad Singh v. Maharaja Kesho Prasad Singh [[1926] 53 I. A. 164.]. The position, therefore, is that section 120 merely enacts certain rules of evidence to be followed in an enquiry as to whether a disputed land is 'ziraat'. When in such enquiry the facts mentioned in section 120(1) are established, the law raises a presumptio juris et de jure that the lands are private. But where such evidence is not available, that fact can still be established by other and satisfactory evidence. What has to be decided therefore is whether the evidence actually adduced by the plaintiffs in the present case is sufficient to discharge the burden which the law casts on them and to prove that the lands are 'kamat' or 'sir' lands. For the reasons already given, we are of opinion that it is sufficient to justify a finding in the affirmative.

Strong reliance was placed by the respondents on Exhibits F-1 and F-1(1) which are khatians relating to the suit lands published on 7-12-1909 recording them as in the possession of the defendants of the second party as 'kaimi' and on the presumption under section 103-B that that entry is correct. This presumption, it is contended, is particularly strong in the present case, because the predecessors-in-title of the plaintiffs were parties to the proceedings and contested the same, and that the record of rights was made after considering their objections. The plaintiffs, however, denied that they were parties to the proceedings, and contended that they were taken behind their back by the mortgagees and the second party defendants acting in collusion with a view to defeat their rights. Exhibits A-1 and A-1(1) are certified copies of the objection petitions stated to have been filed by the mortgagors under section 103-A of the Act, and they purport to have been signed by one Chulai Mahto as karpardaz of some of the mortgagors. The plaintiffs deny the genuineness of the signatures in Exhibits A-1 and A-1(1) and also the authority of Chulai Mahto to represent the mortgagors. There is no evidence that the signatures on Exhibits A-1 and A-1(1) are true, but the defendants rely on the presumption enacted in section 90 of the Evidence Act in favour of their genuineness. But Exhibits A-1 and A-1(1) are merely certified copies of the objection petitions filed before the Survey Officer and not the originals, and it was held in Basant v. Brijraj [[1935] 62 I. A. 180.] that the presumption enacted in the section can be raised only with reference to original documents and not to copies thereof. There is the further difficulty in the way of the respondents that the documents are signed by Chulai Mahto as agent, and there is no proof that he was an agent, and section 90 does not authorise the raising of a presumption as to the existence of authority on the part of Chulai Mahto to represent the mortgagors. It is again to be noted that the objection on the merits raised in Exhibits A-1 and A-1(1) that the lands are bakasht lands in the possession of mortgagees is not one which it was to the interests of the mortgagors to put forward, as, if accepted, it would preclude them from admitting tenants in respect of them, without conferring on them the status of settled raiyats and occupancy rights under section 21 of the Act. It was only if the lands were private lands that the proprietor would be entitled to cultivate them personally, and that was the claim which they had been making consistently from 1893 onwards. The claim put forward in Exhibits A-1 and A-1(1) is destructive of the rights claimed all along by the mortgagors, and amounts to an admission that the lands are not private and raises the doubt that the petitions were not really inspired by them. It should also be mentioned that at the hearing of the petition, no evidence was adduced by the mortgagors, and the decision of the Survey Officer was given practically ex parte. The mortgagees were parties to the proceedings, and they did not appear and produce the mortgage deeds, Exhibits 2 and 3, under which they got into possession, and which

described the lands as 'sir'. It was to the interests of the mortgagees that the lands should be held to be 'sir', and it was further their duty to defend the title of the mortgagors as against the claim made by the tenants that they were raiyati lands. Why then did they not produce Exhibits 2 and 3 at the hearing ? The recitals in the lease deed, Exhibit 2(a) which was executed by the defendants of the second party, were inconsistent with their claim that the lands were raiyati. Why did they not produce it at the hearing ? There is therefore much to be said for the contention of the appellants that the proceedings evidenced by Exhibits A-1 and A-1(1) were collusive in character.

But even assuming that they were real, that would not materially affect the result, as the true effect of a record of rights under section 103-A is not to create rights where none existed but simply to raise a presumption under section 103-B that such rights exist, and that presumption is one liable to be rebutted. There is a long line of authorities that a person who attacks a record made under section 103-A as incorrect discharges the burden which the law casts on him under section 103-B by showing that it was not justified on the materials on which it is based. Vide Bogha Mower v. Ram Lakhan [[1917] 27 Cal. L. J. 107.] and Eakub Ali v. Muhammad Ali [[1928] 49 Cal. L. J. 352.]. And where, as here, no evidence was placed before the authorities who made the record, he has only to produce evidence which satisfies the court that the entry is erroneous. Whether the question is considered with reference to the presumption under section 120(2) or section 103-B, the position is the same. The plaintiffs who claim that the lands are kamat have to establish it by clear and satisfactory evidence. If the evidence adduced by them is sufficient, as we have held it is, to establish it, the presumption under section 103-B equally with that under section 120(2) becomes displaced. In the result, we are of opinion that the suit lands are the private lands of the proprietor.

It was next contended that even if the lands were private lands, that would not prevent the acquisition of occupancy rights by the tenants under Chapter V, as the restriction provided in section 116 in that behalf did not apply on the facts of the present case, and that in consequence no relief in ejectment could be granted. Section 116 enacts, omitting what is not material, that "nothing in Chapter V shall confer a right of occupancy in a proprietor's private land where any such land is held under a lease for a term of years or under a lease from year to year". In the present case, the tenants got into possession under Exhibit 2(a), which was a lease for two years, and they would therefore be precluded from acquiring occupancy rights by virtue of that demise. But it is argued that the tenants continued in possession of the holdings even after the expiry of the term under Exhibit 2(a), paid the rent to the mortgagees who recognised them as tenants, and that their status therefore was not that of tenants holding under a lease for a term or from year to year, and that accordingly there was no impediment to their acquiring occupancy rights under Chapter V. The point has not been argued whether, as Exhibit 2(a) is an agricultural lease, the tenants who held over after the expiry of the period fixed therein, should not be considered to hold as tenants from year to year, on the principle enacted in sections 106 and 116 of the Transfer of Property Act.

We shall proceed on the footing that on the findings of the High Court that the tenants were not the creatures or servants of the mortgagees, and that they had been in continuous possession paying rent to them, section 116 did not debar them from acquiring rights under Chapter V. But the question is whether they acquired such rights under that Chapter. Section 21 provides that every person who is a settled raiyat in a village shall have a right of occupancy in all land for the time being held by him as a raiyat in that village. Section 20 defines a settled raiyat as a person who holds continuously land for a period of 12 years in any village, section 5(2) defines 'raiyat' as a person who has acquired a right to hold land for the purpose of cultivating it by himself or members of his family or servants or partners, and section 5(3) provides that "a person shall not be deemed to be a raiyat unless he holds land either immediately under a proprietor or immediately under a tenure-holder". The

position therefore is that before a person can claim occupancy rights under section 21, he must establish that he is a raiyat as defined in sections 5(2) and 5(3), and as the defendants of the second party acquired the right to hold the lands for the purpose of cultivation from the first party mortgagees and not under the mortgagors, they are not raiyats as defined in section 5(3), and can claim no rights under section 21. On behalf of the tenants, it was contended that as under section 58 of the Transfer of Property Act a mortgage is a transfer of interest in land, the mortgagee is the owner of that interest and therefore a proprietor for the purpose of section 5(3). Section 3(2) defines a proprietor as meaning a person owning whether in trust or for his own benefit an estate or part of an estate. A mortgagee is no doubt the transferee of an interest in immovable property, and may in a loose sense be said to be the owner of that interest. But the definition of a proprietor requires that he should own the estate or part thereof and not merely an interest therein. It would be a contradiction in terms to say of a mortgagee that he owns the estate over which he owns an interest. As observed in Ghose on the Law of Mortgage in India, Volume I, page 77,

> "Interest which passes to the mortgagee is not the ownership or dominion which, notwithstanding the mortgage, resides in the mortgagor".

The question whether for purposes of section 21 of the Act a tenant from a mortgagee can be held to be a raiyat as defined in section 5(3) was considered by this Court in Mahabir Gope and others v. Harbans Narain Singh and others [[1952] S. C. R. 775, 781.], and it was held that a mortgagee is neither a proprietor nor a tenure-holder, and a tenant inducted by him on the lands is not a raiyat within the definition of those terms under the Act. That decision governs this case.

The contention of the respondents that the mortgagees could be considered as tenure-holders within section 5(3) is equally untenable. Section 5(1) defines a tenure-holder as meaning a person who has acquired a right to hold lands for collecting rents or for bringing them into cultivation by establishing tenants thereon. In the present case, the lands were under the personal cultivation of the mortgagors at the time when they were mortgaged under Exhibits 2 and 3. There were then no raiyats on the land and no question of transferring the right to collect rent from them. The respondents relied on the terms in Exhibits 2 and 3 that the mortgagees might cultivate the lands or cause them to be cultivated at their pleasure, as authorising the establishment of tenants. But that clause would apply only if the lands had to be brought afresh under cultivation, and that was not the position here. As the mortgagees are neither proprietors nor tenure-holders as defined in the Act, the tenants holding under them could not claim to be raiyats as defined in sections 5(2) and 5(3), and no occupancy rights could therefore be acquired by them under section 21 of the Act.

It was next contended that the mortgagees had the power under section 76 of the Transfer of Property Act to induct tenants on the land for purposes of cultivation, that such a transaction would be binding on the mortgagors, and that its effect would be to confer on the tenants the status of raiyats and that they would get occupancy rights under section 21 of the Act. The decisions in Manjhil Lal Biswa Nath Sah Deo v. Mahiuddin [[1926] 97 I. C. 852.], Rajendra Nath v. Dinu Prodhan [A. I. R. 1930 Cal. 738.] and Pramatha Nath v. Sashi Bhusan [A. I. R. 1937 Cal. 763.] were relied on in support of this contention. This argument proceeds on a confusion of two wholly independent concepts distinct in their origin and different in their legal incidents. The law is that a person cannot confer on another any right higher than what he himself possesses, and therefore, a lease created by a usufructuary mortgagee would normally terminate on the redemption of the mortgage. Section 76(a) enacts an exception to this rule. If the lease is one which could have been made by the owner in the course of prudent management, it would be binding on the mortgagors, notwithstanding that the mortgage has been redeemed. Even in such a case, the operation of the

lease cannot extend beyond the period for which it was granted. In the present case, assuming that the mortgagees had the power under section 76(a) of the Transfer of Property Act to continue the lessees under Exhibit 2(a) as tenants on the lands after the termination of the period fixed therein, that would confer on them at best the status of tenants from year to year and not give them the right to continue in possession after the termination of the agricultural year during which the redemption takes place. In this view, the power of the mortgagee under section 76(a) of the Transfer of Property Act to induct tenants in the usual course of management would not avail the respondents to claim occupancy rights over the lands.

Turning next to the provisions of the Bihar Tenancy Act, section 21 confers on settled raiyats a permanent right of occupancy, provided the conditions mentioned in that section are satisfied. But this right is a creature of the statute, and cannot be claimed apart from its provisions. A mortgagee is, as already stated, neither a proprietor nor a tenure-holder, and a person settled by him on the land does not enjoy the status of a raiyat under sections 5(2) and 5(3). He is therefore not a person entitled under the terms of the statute to any occupancy rights. Thus, if the respondents cannot resist the suit for ejectment either by reason of section 76(a) of the Transfer of Property Act or section 21 of the Bihar Tenancy Act, it is difficult to see how they could get such a right as the result of the interaction of both those sections.

In Manjhil Lal Biswa Nath Sah Deo v. Mahiuddin [[1926] 97 I. C. 852.], the suit was by a mortgagor after redemption to recover possession of lands, which had been leased by the mortgagee. The proprietor claimed that the lands were zirait; but the finding, however, was that they were raiyat lands, and that the mortgagee had inducted tenants into possession in the usual course of management. It was held that the tenants could not be ejected. The decision was expressly based on the fact that the lands were raiyati lands, and the learned Judges distinguished the cases in Mahadeo Prasad Sahu v. Gajadhar Prasad Sahu [[1922] 73 I. C. 359.] and Jogeshwar Mazumdar v. Abed Mahomed Sirkar [[1896] 3 C. W. N. 13.] on the ground that the lands which were the subject of mortgage therein were zerait lands. This decision does not support the broad proposition for which the respondents contend, and is really against them, as the mortgage in the present case is of 'kamat' lands.

In Rajendra Nath v. Dinu Prodhan [A. I. R. 1930 Cal. 738.], the facts were similar to those in Manjhil Lal Biswa Nath Sah Deo v. Mahiuddin [[1926] 97 I. C. 852.], except that the lands do not appear to have been raiyati lands. In holding that the mortgagor was not entitled to possession, Guha, J. observed that the mortgage deed did not stand in the way of the tenants being settled by the mortgagee, and that when they were so settled, they had well defined rights under the Act, and could not be ejected. If section 5(3) of the Act did not apply - and it would not, unless the letting was by the proprietor or tenureholder - it is not stated what other provision of law operated to confer occupancy rights on the tenant. The learned Judge then referred to Binad Lal Pakrashi v. Kalu Pramanik [[1893] I. L. R. 20 Cal. 708.] as furnishing the principle on which the decision should rest. There, a tenant was put into possession by a person who claimed to be the proprietor, and though it subsequently turned out that he was not, it was held that the letting by him conferred on the tenant the status of a raiyat. As pointed out in Peary Mohun Mondal v. Radhika Mohun Hazra [[1903] 8 C. W. N. 315.] and Krishna Nath Chakrabarty v. Mahomed Wafiz [[1916] 21 C. W. N. 93.], the basis of the decision in Binad Lal Pakrashi v. Kalu Pramanik [[1893] I. L. R. 20 Cal. 708.] was that the word "proprietor" in section 5(3) would include a de facto as well as a de jure proprietor, and a tenant who is bona fide inducted into possession by him would have the status of a raiyat. This decision makes an inroad on the general principle that no one can confer a better right than what he has got, and later decisions have generally shown a disposition to confine its

application within narrow limits. But even on its own ground, it can have no application when the person who admits a tenant is not, as required by section 5(3), a proprietor de facto or de jure, but a mortgagee. The principle of the decision in Binad Lal Pakrashi v. Kalu Pramanik [[1893] I. L. R. 20 Cal. 708.] does not therefore support the conclusion in Rajendra Nath v. Dinu Prodhan [[A. I. R. 1930 Cal. 738.] that a tenant admitted by a mortgagee into possession acquires the status of a raiyat.

In Pramatha Nath v. Sashi Bhusan [A. I. R. 1937 Cal. 763.], a permanent lease was granted by a mortgagee after he had obtained a decree for foreclosure. Subsequently, that decree was recalled in a suit the Official Receiver representing one of the mortgagors and a fresh decree for redemption was passed. After redemption, the Official Receiver received rent from the lessee treating him as a tenant on the land. A transferee from the Official Receiver having subsequently instituted a suit in ejectment against the tenant, it was held that the latter had acquired a right of occupancy under section 21 of the Act, and that the relief for khas possession could not be granted as against him. Notwithstanding that some of the observations in the judgment are widely expressed, the ground of the decision really is that when the Official Receiver accepted rent from the tenant, that amounted to an affirmance of the lease by him, and that would have the effect of bringing section 5(3) directly into play and conferring on the tenant the status of a raiyat. The decisions discussed above do not lay down any acceptable principle that a lease by a mortgagee which is protected by section 76(a) of the Transfer of Property Act, operates by itself to confer a right of occupancy on the tenant under section 21 of the Act.

Some argument was founded by the respondents on the clause in Exhibits 2 and 3 that the mortgagee could get the lands cultivated. It was contended that this clause conferred authority on the mortgagee to settle raiyats on the lands, and that the tenants admitted in pursuance of this authority would be in the same position as if they had been admitted by the proprietor and the conditions of section 5(3) would be satisfied. But then, the lands are private lands, and the clause in question is followed by the provision that on redemption the mortgagors would be entitled to resume "sir and khas possession", and that would be rendered nugatory if the deed is construed as authorising the mortgagees to settle tenants on the lands with the status of raiyats. The authority to get lands cultivated can only mean getting them cultivated through hired labour as contemplated in the definition of 'private lands'. We are clearly of opinion that the mortgage deed conferred no authority on the mortgagees to admit tenants so as to confer on them rights of occupancy.

In the result, we must hold that the defendants of the second party have failed to establish that they have any rights of occupancy over the suit lands, and that the plaintiffs are accordingly entitled to a decree in ejectment, with future mesne profits as claimed in the plaint. This appeal is allowed, the decree of the lower court is set aside, and that of the Subordinate Judge of Monghyr restored as against 2nd party defendants with costs throughout. The suit as against the first party defendants is dismissed, but in the circumstances, there will be no order as to costs.

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