APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

ABDUL GANI CHOWDHURY 1914

v. *July* 28.

MAKBUL ALI.*

Occupancy Holding—Revenue Sale Law (Act XI of 1859), s. 37—Occupancy raiyats at fixed rates—Purchaser—Doctrine of Protection—Its extension.

The protection of occupancy raiyats at fixed rates, referred to in s. 37 of the Revenue Sale Law (Act XI of 1859) is not one of the ordinary exceptions in that section. It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation of the soil and are cultivating it.

This doctrine of protection has recently been extended to ordinary occupancy raiyats.

Sarat Chandra Roy v. *Asiman Bibi* (1) referred to.

Bhut Nath Naskar v. *Surendra Nath Dutt* (2) distinguished.

SECOND APPEAL by Abdul Gani Chowdhury, the plaintiff.

This appeal arises out of a suit brought by the plaintiff for recovery of about 4 kanis of land in the defendant's possession and for declaration of the said land as a holding which can be annulled under s. 37 of the Revenue Sale Law. It was alleged in the plaint that the land in question was sold for arrears of revenue and was purchased by the defendant No. 5 who obtained sale certificate and took possession according to law; that thereafter defendant No. 5 sold the entire land to the plaintiff; that defendants Nos. 1

* Appeal from Appellate Decree, No. 636 of 1912, against the decree of Rajani Kanta Chatterjee, Subordinate Judge of Chittagong, dated Jan. 11, 1912, reversing the decree of Rasik Mohan Bhattacharjee, Munsif of Chittagong, dated July 10, 1911.

(1) (1904) I. L. R. 31 Calc. 725. (2) (1909) 13 C. W. N. 1025.

1914

ABDUL GANI CHOWDHURY v. MAKBUL ALI

to 4 were in possession of the same and that they, though they had no protected rights to the same, yet refused to make over possession to the plaintiff.

Before the Munsif, only defendants Nos. 1 and 2 appeared and contested the suit. The contesting defendant set up ancestral right to the lands under a *pottah*, dated 1st Bhadra 1257. The Munsif held that the right of the defendants was not protected under s. 37 of the Revenue Sale Law and therefore decreed the suit against the defendants. On appeal, the Court below found that the defendants were holding the lands for over 30 years and had permanent raiyati right by virtue of a *pottah*, dated 1257 M.E. and decreed the appeal with costs.

Babu Prabodh Kumar Dass (*with him Babu Khitish Chandra Chuckerbutty*), for the appellant, submitted that the Subordinate Judge had erred in law. Raiyats holding at fixed rents or permanent lease-holders do not become occupancy raiyats after the lapse of 12 years. The distinction has been clearly explained by Mookerjee J. in the case of *Bhut Nath Naskar* v. *Surendra Nath Dutt* (1). The rights of a permanent lessee created by virtue of a *maurusi mokarrari* lease are often held to be of the nature of a permanent tenure-holder. The protection to persons, contemplated by the proviso to s. 37 of the Revenue Sale Law, has been extended to ordinary occupancy raiyats. Mr. Justice Mitter's judgment in *Sarat Chandra Roy* v. *Asiman Bibi* (2) is an authority for that proposition. But that judgment does not go so far as to protect *maurusi mokarrari* raiyati holding at fixed rates.

The distinction between occupancy raiyats at fixed rents and raiyats holding at fixed rates is that while

(1) (1909) 13 C. W. N. 1025. (2) (1904) I. L. R. 31 Calc. 725.

one may be created by the proprietor by grant of leases to that effect, the other is a creature of law, pure and simple, with certain disabilities and controlled by certain defined rules.

Moreover, if the judgment of the Subordinate Judge is upheld, great difficulties may arise in the way of the proper realisation of Government revenue.

The preamble of Act XI of 1859 shows that the purchaser of an estate at a sale should be placed in the same position as the original proprietor at the time of the settlement.

No one appeared for the respondents.

HOLMWOOD AND CHAPMAN, JJ. This second appeal arises out of a suit brought by the plaintiff to have the holding of the defendant declared such a holding as can be annulled under section 37 of Act XI of 1859.

It appears that the plaintiff is the purchaser of the rights of defendant No. 5 who purchased the *taraf* at a sale for arrears of revenue. The defendants Nos. 1 and 2 are persons whom the Judge found to have cultivated the land themselves for 30 years before 1895 when they obtained *pottah* as raiyats at fixed rates. That *pottah* of course conferred upon them higher privileges than that of ordinary occupancy raiyats, but it certainly did not take away the occupancy right which they had already acquired, for they must have acquired that right prior to the Bengal Tenancy Act, not that in our opinion it would make any difference. The protection of occupancy raiyats at fixed rates which is referred to in section 37 of Act XI of 1859 is not one of the ordinary exceptions in that section. It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation

1914

ABDUL GANI CHOWDHURY v. MAKBUL ALI.

of the soil and are cultivating it. The term "rights of occupancy at fixed rent" meant in the year 1859 apparently the successors of *khademi khud khast* raiyats in the Regulations, while the ordinary *khud khast* raiyats became occupancy raiyats. The intention of the Legislature therefore was that these *khademi khud khast* raiyats should not only not be liable to ejectment but should not be liable to any enhancement of rent; and to these persons have succeeded what the Bengal Tenancy Act now classes as "raiyats holding at fixed rates." Raiyats holding at fixed rates therefore are primarily the persons referred to in the proviso to section 37 of Act XI of 1859. But this doctrine of protection has been extended by recent rulings of this Court to ordinary occupancy raiyats, and the judgment of Mr. Justice Mitra, which is the leading case [*Sarat Chandra Roy Chowdhry* v. *Asiman Bibi*(1)] on this point, is frequently followed in this Court and has never been dissented from. The protection therefore is extended under the Bengal Tenancy Act from these *khademi khud khast* raiyats or raiyats at fixed rates to all classes of occupancy raiyats; and the decision of Mr. Justice Mookerjee, upon which the Chief Justice did not express any opinion, in the case of *Bhut Nath Naskar* v. *Surendra Nath Dutt*(2), which is based upon a technical interpretation of section 160 of the Bengal Tenancy Act, can have nothing whatever to do with the question before us.

It may be argued that a person who takes the tenancy originally as a raiyat at fixed rates does not thereby acquire an occupancy right. But that does not imply that a man who has already obtained occupancy rights can by obtaining a grant of fixed rent lose that occupancy right. That appears to us to be neither

(1) (1904) I. L. R. 31 Calc. 725. (2) (1909) 13 C. W. N. 1025.

in accordance with equity or common sense or the wording of the law.

We must therefore hold that the defendants were precisely in the position of those tenants who are mentioned in the proviso to section 37 and that not only are they protected but nothing in the law can be construed to entitle the purchaser to eject them or to enhance their rent. That is the law, and to argue that the purchaser loses a valuable right, namely, the right of enhancement which he would have in the case of ordinary occupancy rights, is to misconstrue the whole effect of the section itself, which is in terms directed against enhancement. If the ruling of Mr. Justice Mitra is correct, an occupancy raiyat in the ordinary sense of the word is also protected by that section and it is doubtful whether in that case the purchaser can enhance his rent, although the Bengal Tenancy Act itself provides for the enhancement of the rent of an ordinary occupancy raiyat. However, this is not the question which we have to deal with here.

Another question which was argued was with regard to the Judge's view of the *khatian* of 1898 in which the defendants are recorded as *kaimi madhya satyadhikari*, or intermediate tenure-holders, at fixed rent. It was faintly urged that the presumption arising from this record could not be rebutted by evidence of what happened before the record was made. It appears to us that the findings of the Judge as to what happened before the record was made prove conclusively that the record was wrong; for these men had been cultivating this land with their own hands for 30 years when they obtained the *pottah* describing them as *kaimi* raiyats. The area of the land was only 4 kanis and odd and there was no indication whatever that this holding was a tenure. It can only be a tenure if it is proved that it was demised

1914

ABDUL GANI CHOWDHURY v. MAKBUL ALI.

for the purpose of settling cultivators upon it and for collecting rent, and not for the purpose of being cultivated by the raiyat or his family and servants. The facts of the case which extend up to 1895 and are not altered in any way by the *pottah* of that date except in respect of giving the defendants fixed rent conclusively prove that at the time of the settlement they could not have been tenure-holders within the meaning of section 5 (*1*), Chapter III of the Bengal Tenancy Act.

The third contention was that we ought to have the *pottah* before us to construe it. As the defendants have not chosen to appear in answer to this appeal, it is suggested that we ought to give the appellant further time to get this *pottah* produced. We have always understood that when a decree has been passed against a person who desires to appeal, it is for him to put forward all necessary materials for the purpose of getting the presumption which is against him on the lower Court's judgment set aside. He could easily have made a prayer in the petition of appeal that the defendants be called upon to produce this pottah or that the lower Court be directed to obtain it and forward it to this Court. We cannot either wait for it now or construe it. The finding, however, of the learned Judge and the arguments of the learned vakil indicate quite sufficiently what were its contents and the arguments which are based upon it with which we have already dealt.

As regards the plaintiff's prayer for assessment of fair and equitable rent, we cannot see how that can arise in a suit under section 37 of Act XI of 1859 since the very basis of the protection offered by that section is against any enhancement, and enhancement is really what the plaintiff is seeking for. It is not within the scope of the suit; if it were, fair and equitable rent of

an occupancy raiyat at fixed rates would obviously be the rent which had been fixed for his holding.

The result is that the appeal is dismissed, but without costs, as the respondents do not appear.

S. K. B. *Appeal dismissed.*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

AMINNESSA

v.

JINNAT ALI.*

Under-raiyati Holding—Transferability—Transfer of Property Act (IV of 1882), s. 117—Agricultural lands—Relinquishment or abandonment, what constitutes.

An under-raiyati holding is not transferable. What is relinquishment or abandonment depends on the substantial effect of what has been done in each case. When a tenure or holding, apart from the Transfer of Property Act, is not transferable, it cannot become so unless it is expressly made so by some other statute.

If it had been intended to make holdings transferable which were before non-transferable, the Legislature in framing the Bengal Tenancy Act would have said so.

Section 117 of the Transfer of Property Act excludes agricultural lands from the operation of the rule which makes leasehold property transferable.

Hiramoti Dassya v. *Annoda Prosad Ghose* (1) followed.

SECOND APPEAL by Sreematee Aminnessa Bibi, the plaintiff.

* Appeal from Appellate Decree, No. 1539 of 1913, against the decree of T. K. Johnston, District Judge of Noakhali, dated April 22, 1913, modifying the decree of Hem Chandra Das Gupta, Munsif of Sudharam, dated April 30, 1912.

(1) (1908) 7 C. L. J. 555.