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before they acquired title, they might have by enquiry from the Municipal authorities ascertained the precise period for which the rates were in arrears. We hold accordingly that the appellants are not entitled to protection as purchasers for value without notice.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BEACHCROFT J. I agree.

G. S. *Appeal dismissed.*

APPELLATE CIVIL.

Before N. R. Chatterjea and Beachcroft JJ.

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June 10.

SAHADORA MUDIALI

v.

NABIN CHAND BORAL.*

Homestead Land—Suit for rent—Jurisdiction—Protected under-tenure—Revenue Sale Act (XI of 1859) s. 37, cl. (4)—Garden—Incumbrances annulment of, on sale of taluk for arrears of revenue—Provincial Small Cause Courts Act (IX of 1887) Sch. II, Art 8—Second appeal—Civil Procedure Code (Act V of 1908) s. 102.

Section 102 of the Civil Procedure Code is no bar to second appeals in suits for rent other than house rent although the value thereof does not exceed Rs. 500 : *vide* Art. 8 of Schedule II of the Provincial Small Cause Courts Act.

Soundaram Ayyar v. *Sennia Naickan*(1) distinguished.

*Appeal from appellate decree, No. 1125 of 1912, against the decree of H. P. Duval, Additional District Judge of 24-Parganas, dated Feb. 19, 1912, reversing the decree of Surendra Krishna Ghose, Munsif of Sealdah, dated April 26, 1911.

(1) (1900) I. L. R. 23 Mad. 547.

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When land ceased to be garden land about a quarter of a century ago, and tenants have been settled on the land since then, the tenure is not protected and does not fall within the 4th exception to section 37 of the Revenue Sale Act (XI of 1859) and is liable to be annulled.

The effect of a sale is not *ipso facto* to avoid under-tenures; the purchaser has the option of avoiding them or keeping them intact.

Titu Bibi v. *Mohesh Chunder Bagchi* (1) followed.

It is necessary therefore that the purchaser must by some unequivocal act indicate his intention to avoid under-tenures if he desires to do so and the election of the purchaser to avoid must be brought to the knowledge of the under-tenure holder.

A formal written notice is not essential.

Dursan Singh v *Bhawani Koer* (2) followed and explained.

The facts, that the purchaser demanded rents from the tenants to the knowledge of the under-tenure holder, sued the tenants for rent, took out warrants of attachment in execution of decrees, and realized rents from the tenants in repudiation of the under-tenure-holder's title, go to show that the under-tenure-holder had not only notice of unequivocal acts on the part of the purchaser indicating his election to avoid the *mokarrari*, but the purchaser had in fact obtained possession of the estate.

Mir Waziruddin v. *Deoki Nandan* (3) distinguished.

Per N. R. CHATTERJEA J. The mere fact that a garden was made on a piece of land a quarter of a century before the sale would not make it land on which a garden has been made for all time to come.

Per BEACHCROFT J. No particular method of expressing an intention to annul an under-tenure is necessary. There must be established (i) a definite intention to annul, (ii) an indication of that intention to the under-tenure-holder.

To afford protection the work must *still be in existence* or the land be used for the purpose of the work. The perfect tense in "leases of land whereon . . . gardens *have* been made" denotes a present state.

Obiter: If the *busti* land is covered by the lease of the land on which the mill stands, or if the *busti* is an integral part of the mill and exists only for the purposes of the mill, it is possible that it might be protected.

SECOND APPEAL by Sahadora Mudiali, the defendant.

This appeal (second appeal No. 1125 of 1912) and

(1) (1883) I. L. R. 9 Calc. 683. (2) (1913) 17 C. W. N. 984, 987.
(3) (1907) 6 C. L. J. 472, 488.

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appeals from Appellate Decrees Nos. 1264 to 1268 of 1912 are similar. The facts are briefly as follows:—

In 1893 Gobinda Lal Seal purchased 10 bighas of partly garden and partly tenanted land in Titaghar for Rs. 3,500 from one Panchanan Banerji who held this land under various permanent leases executed between 1874 and 1880. The Seals held possession by realizing rent from the tenants, the rate of rent being one rupee a cottah a month as the land is very valuable owing to its proximity to several mills.

Among the leases which Panchanan had taken was one for 1 bigah 16 cottahs (old measurement) from one Aptabuddi in Taluk No. 1678. This taluk consisted only of one plot of land which was identified as being plot No. 196 of the *chitta* of 1846. This plot was originally *lakheraj* and was resumed in that year and settled permanently with Aptabuddi's father, Golapdi Mistri, on a land revenue of Re. 1-3-3.

This taluk having fallen into arrears of land revenue was put up to sale by the Collector, and purchased on 29th March 1908 by one Mahendra Nath Mallik who obtained symbolical possession from the Collectorate peon. As there was some trouble in finding the estate the Kanungo, who had to go and demarcate it, identified the estate as an area of 2 bigahs 14 cottahs by the present style of measurement on the extreme west of the Seal's garden and the purchaser (Mahendra) though he was well aware of the nature of the Seal's claim as permanent lessees, began to try to realize rents and warned the tenants not to pay the rents to Babu Nabin Chand Boral one of the plaintiffs, who was the executor of the estate of the late Manik Lal Seal, successor in interest of Gobinda Lal Seal, the original lessee. As the tenants did not pay the Seals, Babu Nabin Chand Boral sued them for rent.

The tenants in all these six analagous suits set up

the claim of the purchaser Mahendra Nath Mallik as their superior landlord, confessing the Seal's title but avoiding it by matter *ex post facto* as the purchaser had repudiated the status of the incumbrancer standing between the *taluki* interest and the tenants.

The Commissioner appointed by the primary Court to survey the lands came to the same finding as the Collector's Kanungo had arrived at, viz., that the lands for which Nabin Chand Boral was claiming rent appertained to the Estate No. 1678.

On the 26th April 1911, the Munsif of Sealdah, dismissed the plaintiff's suit holding that the purchaser Mahendra Nath Mallik had annulled the incumbrance (*i.e.*, the lease of the Seals) and in consequence the plaintiff had no further interest in the lands, and he could not recover rent.

This decision was reversed on appeal to the Additional District Judge of the 24-Parganas, by his judgment dated 19th February 1912, wherein he held that the relation of landlord and tenant still existed between the plaintiff and the defendants.

Hence the defendants preferred these analogous appeals to the High Court.

Babu Dwarkanath Chakravarti (with him *Babu Mahendra Nath Roy*, *Babu Biraj Mohan Majumdar* and *Babu Harendra Kumar Sarbadhikari*), for the appellants. These are six analagous appeals in rent suits.

[*Mr. B. Chakravarti*, for the respondents. I have a preliminary objection as to the competency of these appeals as they arise out of suits for recovery of arrears of rent of homestead lands valued at less than Rs. 500. Section 102 of the new Civil Procedure Code is a bar to these second appeals, because these rent suits are of the nature cognizable by Courts of

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Small Causes: *Soundaram Ayyar* v. *Sennia Naickan* (1).]

Babu Dwarka Nath Chakravarti, for the appellants. [Reads article 8 of the 2nd Schedule of the Provincial Small Cause Courts Acts.] I submit that these appeals are not incompetent, as suits for the recovery of arrears of rent of homestead lands do not come within the jurisdiction of the Provincial Small Cause Courts. Further, no notification has been made and published by the Local Government vesting Small Cause Court Judges in Bengal in general or the trial Judge in these particular cases, with powers to try rent suits on their Small Cause Court side as in Madras. The opinion of the Full Bench of the Madras High Court in *Soundaram* v. *Sennia* (1) that all suits for rent are of the nature cognizable by the Small Cause Court is, therefore, untenable in Bengal.

Although a sale for arrears of revenue does not *ipso facto* render all incumbrances void, they are voidable at the option of the purchaser. A formal written notice is not necessary in law to annul incumbrances, and the incumbrancer becomes a trespasser from the date of institution of a suit against him. But it is not necessary that a suit should be instituted, when the purchaser, as in the present case, succeeds in realizing rents direct from tenants: that is a sufficient indication (to the under-tenure-holder) of the purchaser's intention to annul the incumbrance. Refers to the observations in *Dursan Singh* v. *Bhawani Koer* (2).

[CHATTERJEA J. A demand for rent from tenants, to the under-tenure-holder's knowledge may amount to notice.]

There are decrees which were obtained by the purchaser before the present rent suits were brought,

(1) (1900) I. L. R. 23 Mad. 547. (2) (1913) 17 C. W. N. 984, 987.

viz., on 3rd August 1909. In clause (*4*) of section 37 Act XI of 1859, the words "*have* been made" indicates (in the use of the present perfect tense) that they must be in existence at the time of sale; the right accrues at the time of the sale when the protection is claimed.

It is the existence of that class of improvements that gives the protection. The land in question being *busti* land does not fall under any of the exceptions mentioned in section 37 of the Land Revenue Sale Act: *Sagore Nath Bose* v. *Rakhal Dasi Debi* (1). These huts do not come within the description of dwelling-houses, which must be of a permanent nature to claim this protection: *Makar Ali* v. *Shyama Charan Das* (2). All the cases proceed on the assumption that the existing state of things *is* a garden and not that it has been a garden.

Mr. B. Chakravarti (with him *Babu Atul Krishna Roy*), for the respondents. I am not going to contend that a formal written notice is necessary, but there must be notice to the under-tenure-holder whose tenure is to be avoided, and that by the auction-purchaser showing by an unequivocal act that he wants to avoid the tenure. He is a trespasser if he approaches the land without notice. It is fraudulent to get at the tenants on the land and win them over, without the knowledge of the under-tenure-holder. He must institute a suit or convey his intention to the incumbrancer or under-tenure-holder of annulling the incumbrance: *Mir Waziruddin* v. *Lala Deoki Nandan* (3). Instead of fighting six cases (as at present) what is there to prevent the auction-purchaser from filing one suit against the incumbrancer alone. My further submission is, that this being a second appeal we must

(1) (1910) 7 Ind. Cas. 912. (2) (1898) 3 C. W. N. 212.
(3) (1907) 6 C. L. J. 472, 488.

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accept the finding of fact arrived at by the lower Appellate Court.

These six suits have been brought by me for rent, and it is for the tenants to show that the relation of landlord and tenant between them and me had been put an end to. What is the date from which they say the under-tenure was annulled? See *Ramtaran Kapali* v. *Aswini Kumar Dutt* (1). This decision will not bind the auction-purchaser. He should file a title suit. The notice is not sufficient. The sale does not *ipso facto* make void all incumbrances but they become voidable only at the option of the purchaser, which must be clear and unequivocal: *Titu Bibi* v. *Mohesh Chunder Bagchi* (2). The effect of the auction-purchaser's action may be a strong desire only. We do not as yet know the actual quantity of land covered by these suits. The defence of *jus tertii* must be proved with regard to the whole tenure: *Bhago Bibee* v. *Ram Kant Roy* (3). Leases of lands which may not have been expressly leased for the purpose of making gardens thereon, but on which gardens have subsequently been made, are excepted under clause (4) of section 37 of Act XI of 1859, and it does not matter if there are some huts on some portion of the garden: *Gobind Chandra Sen* v. *Joy Chandra Das* (4).

[BEACHCROFT J. Do you say that, if it has been a garden at any time, it is protected for ever?]

I say that this provision is for the protection of the Government revenue.

[CHATTERJEA J. Do not the words "have been mean "are in existence up to the time of the sale?"

No.

(1) (1910) L. R. 37 Calc. 559, 566.
(2) (1883) I. L. R. 9 Calc. 683.
(3) (1877) I. L. R. 3 Calc. 293.
(4) (1885) I. L. R. 12 Calc. 327.

Babu Dwarkanath Chakravarti, in reply.

Cur. adv. vult.

N. R. CHATTERJEA J. These appeals arise out of suits for recovery of rent of homestead lands comprised in a *maurusi mokarrari* tenure which belonged to the plaintiffs. The defence was that the tenure held by the plaintiffs had been extinguished by the sale of the estate, within which it is situated, for arrears of revenue under the provisions of Act XI of 1859, that the purchaser had entered into possession of the estate and that the defendants had paid the rents to the purchaser.

A preliminary objection has been taken to the hearing of the appeals on behalf of the respondents under section 102 of the Civil Procedure Code. It has been contended that a suit for rent is of a nature cognizable by the Small Cause Court, and reliance is placed on the case of *Soundaram Ayyar* v. *Semnia Naickan* (1). Now, Article 8 of the second Schedule of the Provincial Small Cause Courts Act expressly exempts suits for rent other than house rent from the cognizance of Small Cause Courts unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto. But the majority of the Judges constituting the above Full Bench of the Madras High Court, were of opinion that a suit for rent is of the nature of a suit cognizable by the Small Cause Court. It appears that by a notification the Madras Government has invested all Subordinate Judges and District Munsifs, within the Presidency, with jurisdiction to try on their Small Cause

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Court side all suits for rent falling within the pecuniary limits of their special jurisdiction. No such notification has been issued by the Local Government in this Presidency and so far as this Court is concerned second appeals in suits for rent (other than house rent), although the value thereof does not exceed Rs. 500 have always been entertained. I accordingly overrule the preliminary objection.

Two questions have been raised in these appeals. The *first* is whether the tenure of the plaintiffs is protected under the provisions of clause (*4*) of section 37, Act XI of 1859; and, *secondly*, whether the tenure has been annulled.

As regards the first question it appears that the estate consists only of 2 bighas, 14 cottas of *busti* land. The learned District Judge, however, has held the land is one on which a garden has been made because it formed part of 10 bighas of land which was once a garden and is called Seal's garden. I am of opinion that he is wrong in this view. The land ceased to be garden about a quarter of a century ago, and tenants have been settled on the lands since then. The mere fact that a garden was made on a piece of land a quarter of a century before the sale would not make it land "on which a garden has been made" for all time to come. The land comprised in estate No. 1678 for a very long time has been, and at the time of the sale was *busti* land. In the plaints themselves, the lands are described as homestead lands. I am accordingly of opinion that the tenure does not fall within the exception to section 37 of Act XI of 1859 and is liable to be annulled.

The next question is, whether the tenure has been annulled. It is no doubt true that a sale for arrears of revenue does not *ipso facto* avoid incumbrances or under-tenures, but only renders them voidable at the

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option of the purchaser. See *Titu Bibi* v. *Mohesh Chunder Bagchi* (1). But the purchaser may annul an under-tenure not only by the institution of a suit against the under-tenure-holder, but can do so by any suitable means. It has been contended on behalf of the appellant that it is not necessary to give any notice to the under-tenure-holder for avoiding the tenure, and reliance is placed on an observation in the judgment in the case of *Dursan Singh* v. *Bhawani Koer* (2), *viz.* that "the purchaser may elect to annul an under-tenure not only by institution of a suit, or by giving a notice to vacate, but may indicate it by other means." In that case a notice was in fact given to the under-tenure-holder, and all that was meant to be said was that a formal written notice was not essential. The effect of a sale is not *ipso facto* to avoid under-tenures; the purchaser has the option of avoiding them or keeping them intact. It is necessary therefore that the purchaser must by some unequivocal act indicate his intention to avoid under-tenures if he desires to do so. A formal written notice to the tenure-holder would certainly be the most convenient mode of doing it and this litigation demonstrates the difficulties in which the purchaser may be placed, if he omits to serve a written notice on the tenure-holder. But I do not think that a formal notice is essential and although the election of the purchaser to avoid must be brought to the knowledge of the tenure-holder, a written notice is not the only mode in which it can be done.

The learned District Judge has held that the verbal notice said to have been given to the plaintiff was not proved, and that "the purchaser did nothing to avoid the incumbrance, but only started collecting rent on his own account which I hold cannot be sufficient

(1) (1883) I. L. R. 9 Calc. 683. (2) (1913) 17 C. W. N. 984, 987.

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notice to the plaintiff." But the Court of first instance found that on the purchaser's demanding rent from the tenants, they informed the plaintiff of it, but that he declined to assist them, unless they paid off the arrears of rent due from them, that the purchaser sued the tenants for rent, took out warrant of attachment in execution of decrees and realised rents from the tenants in repudiation of the plaintiff's title, and that Court came to the conclusion that the purchaser is in actual possession of the taluk through the tenants. These findings have not been displaced on appeal. If these findings are correct, they show that the plaintiff had not only notice of unequivocal acts on the part of the purchaser indicating his election to avoid the *mokararri* but that the purchaser had in fact obtained possession of the estate.

It was pointed out on behalf of the respondents that in the case of *Mir Waziruddin* v. *Lala Deoki Nandan*(1) the forcible taking away of crops of the tenants by the purchaser and the institution of rent suits which must be taken to be strong indications of the purchaser's intention to avoid under-tenures were held not to be sufficient. But in that case the purchaser sought to annul under-tenures and recover possession more than 12 years after the date of the sale, and those facts were considered by the learned Judges as bearing upon the question of limitation. The rent suits instituted against some of the tenants were withdrawn, as soon as the latter denied the plaintiff's title, and no further attempt was made to enforce the right to realise any rent from any of the tenants of the property. The only attempt at possession consisted in an endeavour by a servant to take away crops grown by one of the many tenants of the estate and the learned Judges held that an entry upon the

(1) (1907) 6 C. L. J. 472, 488.

land for this purpose, an entry which resulted in a conviction for theft and criminal trespass did not constitute possession much less possession of the entire estate for the purposes of limitation.

In the present case there is no question of limitation. Had the purchaser instituted a suit for annulment of the plaintiff's *mokarrari*, they could have no possible defence to the action, and if the purchaser has succeeded in obtaining possession of the estate peacefully and openly and is in possession of the estate by receipt of rent through the tenants the *mokarrari* of the plaintiff must be held to have been annulled. The lower Appellate Court has, however, not come to a clear finding upon the facts found by the Court of first instance. The decrees of the lower Appellate Court are accordingly set aside and the cases sent back to that Court. That Court will come to clear findings upon the facts found by the Munsif indicated above, and dispose of the appeals according to law. Costs to abide the result.

BEACHCROFT J. All civil suits, the value of which does not exceed Rs. 500, are cognizable by Courts of Small Causes, subject to the exceptions contained in the second schedule of the Provincial Small Cause Courts' Act, and to the provisions of any special Act. Suits for rent, other than house rent, are included in the second schedule of the Provincial Small Cause Courts' Act. But the Local Government has authority to vest Judges of Small Cause Courts with powers to try rent suits. No notification has been made vesting Small Cause Court Judges in Bengal in general, or the Judge of first instance in this particular case, with such powers. I am, therefore, of opinion that this appeal is not incompetent.

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As regards the question of annulment of an under-tenure, I agree with my learned brother in thinking that no particular method of expressing an intention to annul an under-tenure is necessary, but that any unequivocal act is sufficient which indicates the intention to annul and which brings that intention to the knowledge of the under-tenure-holder. The learned Judge has found against the story that definite notice was given by the purchaser to the under-tenure-holder. There remains the question of the collection of rent from the tenants. In my opinion it is impossible to lay down any hard and fast rule as to how far collection from tenants may be taken not only to indicate the intention to annul but also to establish the fact that that intention was brought to the knowledge of the under-tenure-holder. Collection from so large a majority of the tenants as to amount to obtaining possession of the estate would probably be sufficient to indicate the intention to annul to the under-tenure-holder. But other considerations might come in, *e.g.*, whether the number of tenants was large or small, and whether collections were made openly or secretly. It is needless to multiply examples. It is sufficient to say that two things must be established (i) a definite intention to annul, (ii) an indication of that intention to the under-tenure-holder.

As the learned Judge has dealt with this part of the case apparently with the idea that a definite notice was necessary I agree in the proposed order of remand.

As regards the remaining question whether the under-tenure was protected under clause (4) of section 37 of Act XI of 1859, it is clear that in so far as protection is claimed on the ground that the land is garden land, the claim must fail. It is apparently now a mill *busti* but the learned Judge held it was

protected because it was part of a larger area on which a garden was once made. Now, the 4th clause of section 37 clearly contemplates improvements or works of a permanent character. These are protected irrespective of whether the lease was or was not given for the purpose of the work in question. But to afford protection the work must still be in existence or the land be used for the purpose of the work. The wording of the clause is "leases of land whereon . . . gardens have been made." The perfect tense denotes a present state. If the garden has ceased to exist, the fact that there was once a garden on the land will not protect it.

Whether the land would be protected as part of a mill *busti* would depend on a variety of circumstances. Land on which there are merely temporary huts is not of course on that account protected, but if the *busti* land is covered by the lease of land on which the mill stands, or if the *busti* is an integral part of the mill and exists only for the purposes of the mill, it is possible that it might be protected. It is not, however, necessary to pursue this point further as protection has not been sought on this ground.

G. S. *Appeal allowed: case remanded.*