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BIJOY CHAND MAHTAB v. ASHUTOSH CHUCKERBUTTY.

We remit the case to the Court of first instance, so that the Lahiris who are not represented in this Court may have an opportunity of putting forward any defence which may be available to them, subject, however, to the decision which we have already given.

FLETCHER J. I agree.

N. G. *Appeal allowed.*

PRIVY COUNCIL.

*P.C. 1929

Dec. 7.

MIDNAPUR ZAMINDARI COMPANY, LD.

v.

NARESH NARAYAN ROY.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA]

Bengal Tenancy—Occupancy right—Construction of patta—Jote—Res judicata—Issue determined adversely to successful party—Civil Procedure Code (Act V of 1908), s. 11—Bengal Rent Act (X of 1859), s. 6.

In 1864 a zamindar granted to the appellants' predecessors in title an *ijara* settlement for eight years at an annual rent; the patta and kabuliyat provided as to part of the land, namely, chur land, for the possession of which the zamindar was then suing them, as follows: that the zamindar creating a jote of it and fixing Rs. 1,300 as the yearly rent should include it in the *ijara* rent; that after the expiry of eight years a fair rent should be settled in the zamindar's *nij* share; that, until a fair rent was settled, the yearly rent of Rs. 1,300 should continue. In 1912, occupation of the chur land having continued without a fresh rent being settled, the zamindar after notice to the appellants sued them for possession:—

Held, that upon the true construction of the *ijara* the appellants had not a permanent right of occupation of the chur land, and that the zamindar was entitled to possession.

**Present*: LORD DUNEDIN, LORD MOULTON and MR. AMEER ALI.

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Jardine, Skinner & Co. v. *Surut Soondari Debi* (1) followed.

A "jote" is a general term and is not necessarily equivalent to a raiyati jote ; it is little suited to the recognition of a pre-existing right.

In 1877 the zamindar had sued for possession of the chur land and the tenants had pleaded (i) an occupancy right, and (ii) that the suit was premature, no attempt having been made to settle a fresh rent. The trial Judge made a decree dismissing the suit ; he held that there was no occupancy right, but that the suit was premature. Upon an appeal by the zamindar to the High Court, the tenants filed a cross-objection to the finding that there was no occupancy right. The High Court affirmed the decree, on the ground that the suit was premature, and upon the cross-objection affirmed the finding that there was no occupancy right :

Held, that the absence of an occupancy right was not a *res judicata* against the appellants since the tenants had succeeded upon the other plea, but that it created a paramount duty on the appellants to replace the finding and that they had failed to perform that duty.

APPEAL from a judgment and decree of the High Court (June 13, 1917) affirming a decree of the Subordinate Judge of Murshidabad.

The respondent sued the appellants for possession with mesne profits of an undivided fractional share of certain chur land of which the appellants were in possession under the terms of a patta and kabuliyat of 1864. The respondent had given notice terminating the tenancy. The appellants pleaded that under the terms of the patta and kabuliyat they were entitled to remain in possession paying Rs. 1,300 a year rent so long as a new rent had not been settled. Other pleas were raised which are not material to this report.

The facts, including the terms of the kabuliyat, appear from the judgment of their Lordships.

The Subordinate Judge made a decree for khas possession and for mesne profits; that decree was affirmed upon an appeal to the High Court.

De Gruyther K. C. and *Kenworthy Brown*, for the appellants. The appellants had a permanent right of

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occupation. Their predecessors had possession for the purpose of cultivating the land; they were raiyats and under s. 6 of the Bengal Rent Act (X of 1859) an occupancy right was obtained by twelve years' continuous possession. [Reference was made to *Durga Prosunno Ghose* v. *Kalidas Dut* (1)]. They had a permanent right in the chur lands under the terms of the patta and kabuliyat of 1864. *Jardine, Skinner & Co.* v. *Surut Soondari Debi* (2) is distinguishable. First, because in 1864 the appellants' predecessors were in possession as jotedars; the *ijara* was ancillary to the suit for possession; it recognised their right and merely defined the rent payable. Secondly, because the terms of the *ijara* are not the same; in this case it was expressly provided that the tenancy was to continue at Rs. 1,300 a year until a fresh rent was settled. The use of the term "jote" shows that a raiyati tenure was created, though it is not conclusive. The finding of the Appellate Court in the suit of 1877 that there was no occupancy right did not constitute a *res judicata* under s. 11 of the Code of Civil Procedure, 1908, since the tenant succeeded upon the other plea. The finding was given upon a cross-objection by them under s. 561 of the Code of Civil Procedure, 1859; they could not appeal against the finding without appealing against the decree of the trial Judge. In any case the finding did not affect the question of the rights under the *ijara*. [Reference was made, on the *res judicata* point, to *Run Bahadur Singh* v. *Lachoo Koer* (3), *Magundeo* v. *Mahadeo Singh* (4), *Jamaitunnissa* v. *Lutfunnissa* (5), and *Ghela Ichhcram* v. *Sankalchand Jetha* (6)].

(1) (1881) 9 C. L. R. 450.
(2) (1878) L. R. 5 I. A. 164.
(3) (1884) I. L. R. 11 Calc. 301; L. R. 12 I. A. 23.
(4) (1891) I. L. R. 18 Calc. 647.
(5) (1885) I. L. R. 7 All. 606.
(6) (1890) I. L. R. 18 Bom. 597.

Dunne K. C. and *Dube*, for the respondent. The former decision of the Board relied on by the High Court is not distinguishable. The provision that the rent of Rs. 1,300 was to continue until a fair rent was settled merely expressed that which the law would have implied. The appellants, by their written statement, and throughout, have relied upon the *ijara* of 1864 as creating a jote; no antecedent right was alleged. Earlier litigation precluded the appellants from setting up an occupancy right independently of the *ijara*. [With regard to the decision at 9 Calc. L. R. 449 reference was made to *Rajani Kanta Ghose* v. *Secretary of State for India*. (1)] The question of occupancy right was a *res judicata* in the suit of 1877. There was an issue raised with regard to it, and that issue was finally decided within the meaning of s. 11 of the Code of Civil Procedure, 1908. [Reference was made to *Krishna Behari Roy* v. *Brojeswari Chowdranee* (2), *Ashgar Ali Khan* v. *Ganesh Dass* (3) being distinguished.]

De Gruyther K. C. replied.

The judgment of their Lordships was delivered by

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LORD DUNEDIN. This is an appeal from the judgment of the High Court at Calcutta, affirming a judgment of the Subordinate Judge, by which he decreed khas possession of certain reformed and accreted chur lands in favour of the plaintiff. The plaintiff is a zamindar, and the lands in question are admittedly within his zamindari. The existent lease of the lands having, as he contended, expired, he gave the necessary notice to terminate the tenancy. The appellants plead that they are occupancy tenants and as such

(1) (1918) I. L. R. 46 Calc. 90, 102; L. R. 45 I. A. 190, 194.

(2) (1875) L. R. 2 I. A. 283.

(3) (1917) L. R. 44 I. A. 213.

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entitled to maintain possession under the terms of Act X of 1859 (the Bengal Rent Act).

The appellants are the successors by transfer to the firm of Jardine, Skinner & Co., who were, prior to 1864, in occupancy of the lands, the zamindar at that time being the respondent's father, to whom he has succeeded. In that year the respondent's father raised an action against Jardine, Skinner & Co., claiming the lands in question. That suit was compromised. At the same time Jardine, Skinner & Co. took a lease of the whole taluk within which the lands were situated. Patta and kabuliyat were executed.

The kabuliyat executed by the manager of Jardine. Skinner & Co. bears as follows: "I having applied for a temporary *ijara* settlement of all the mahals, etc., appertaining to your zamindari and putni taluk . . . . you grant me an *ijara* settlement and *ijara* patta for a term of eight years from 1271 to 1278 B.S., fixing Rs. 7,500 as the annual rent, exclusive of collection charges." The kabuliyat then proceeds to incorporate the settlement as follows: "You have instituted against me a suit, No. 19 of 1864, in the Sudder Amin Adalat of the district of Murshidabad, claiming a 4 annas 13 gundahs 1 kara 1 krant share of the reformed and accreted chur lands of Bajupur, Krishnapur, Dinurpara *alias* Manick Chuck, appertaining to taraf Bangsibadanpur, and a 7 annas share of the reformed and accreted chur land of Ashariadaha appertaining to pergunnah Kazirhatta. Creating a jote of the same and fixing Rs. 1,300 as its yearly rent, you include the same also in the aforesaid *ijara* rent. In respect of the same, the stipulation is that after the expiry of the term of this *ijara*, patta and kabuliyat will be given and taken, settling the rent of the aforesaid chur land in your

nij share, at a fair rate, according to the proper rate prevailing in the villages, either amicably and (or) by suit; that until you settle the rent in the aforesaid method, according to the proper rate prevailing in the villages, I will pay up to that time the aforesaid yearly rent of Rs. 1,300 in twelve monthly instalments as per kistbandi, and in default of any kist, I will pay interest at Re. 1 per cent. per month, and that if after the fair rent is settled according to the proper rate prevailing in the villages I refuse to pay that rent, then you will bring the lands under your khas possession by evicting me therefrom; and I shall not be able to make any objection to the same."

The case accordingly depends upon the proper interpretation of this clause in the *ijara*. The learned Judges of the Appellate Court have held that the clause is practically indistinguishable from the clause which was the subject of decision by this Board in the case of *Jardine, Skinner & Co.* v. *Surut Soondari Debi*. (1) There, as here, there was a lease of other lands besides the lands in question, and the words of the kabuliyat are as follows: "Having fixed a yearly rent of Rs. 609 4a. for your *nij* share of 20,950 bighas, describing them as per boundaries given in the schedule below, you have included it in the aforesaid *ijara* rent of Rs. 4,417 9a. 5p. I shall be in possession of the said chur as a jote. Upon the expiration of the term of the *ijara* of the said mahals, a patta and kabuliyat will be respectively given and taken in respect of the jote, regard being had to the quantity of land and amount of rent that shall be determined to belong to your *nij* share in accordance with the productive power of the land within the area determined by a measurement of the said chur. If I do not take a patta and give a kabuliyat within two months

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after the fixing of the rate of that land, you will make a settlement with others."

In that case, as here, Messrs. Jardine, Skinner & Co. claimed to be occupancy tenants, but the High Court and this Board negatived that contention, and held that the agreement merely amounted to a right of renewal, and did not create either an occupancy right or vest in the defendants a new term of years.

Now if the clause in that case be compared with the clause in this it will be seen that it is for all practical purposes identical. The clause employs the term "jote," and speaks of a "nij" share. "Jote" is a general term, and it is not necessarily equivalent to "raiyati jote." In the present case it is shown in another place that the term "raiyati jote" is used when an undoubted right of occupancy is being dealt with. The only distinction that can be drawn between the clause in that case and in this is that a special covenant is inserted in this case fixing the old rent of Rs. 1,300 as the rent to be paid on holding over till such time as a new rent is fixed, while in the other case there is silence as to this. But this covenant is nothing more than an expression of what the law would hold without it and cannot, in their Lordships' opinion, alter the general construction of the document.

The appellants' counsel further urged that the present case was not ruled by the other because he said that in this case there was an antecedent occupancy right, whereas there was no such in the other case, and that in the light of that fact the agreement must receive a different interpretation. To make good such an argument the onus is obviously on the appellants to prove such an antecedent right. In their Lordships' view they fail to do so, for several reasons. In the first place, they bring no clear proof on the

subject. But, further, there is a very significant proceeding in a litigation which arose between the parties in 1877. That was after the expiry of eight years from 1864, and the respondent's father sued for khas possession. The defendants, Jardine, Skinner & Co. pleaded (i) an occupancy right, and (ii) that the suit was premature, no attempt having been made to settle the terms of a new lease under the right to get a renewal for one more term. The Subordinate Judge held that there was no occupancy right, but that the suit was premature. Appeal was taken to the High Court, and they, in affirming the judgment, said as follows, after expressing the view that the action was premature: "If the respondents (defendants) had been satisfied with this judgment, we should have been inclined to dismiss the appeal with costs, but notwithstanding the suggestion of the Court, the Government pleader who appears for the tenants thought it advisable to lay before us a cross-appeal. That cross-appeal is against the finding of the lower Court that the defendants had not a right of occupancy in this land. It was contended that they had such right of occupancy, because the land leased to them is called a jote, and because from the date of the lease granting them that jote down to the present time they have occupied it for twelve years and upwards, and consequently must be regarded as having a right of occupancy. It seems to us that if there is anything clear in regard to a right of occupancy as defined by Act X of 1859, it is a right accruing to a raiyat and not to persons who are middlemen. It would be, we think, a monstrous straining of the law to apply the term "right of occupancy, to such an estate as this."

Their Lordships do not consider that this will found an actual plea of *res judicata*, for the defendants,

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having succeeded on the other plea, had no occasion to go further as to the finding against them : but it is the finding of a Court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform.

Lastly, there is the internal evidence from the *ijara* itself, where the jote is said to be created—an expression little suited to the recognition of a pre-existing right.

On the whole matter their Lordships agree in all points with the judgment of the learned Judges of the Appellate Court, and they will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Burton, Yeats & Hart.*
Solicitors for respondent: *W. W. Box & Co.*

A. M. T.