

APPELLATE CIVIL.

Before Walmsley and B. B. Ghose JJ.

1923

BARADA PRASAD BANERJEE

March 14.

v.

BHUPENDRA NATH MUKHERJEE.*

Landlord and Tenant—Bengal Tenancy Act (VIII of 1885), s. 23—Tenant at fixed rent and permanent tenure-holders, if can excavate land for making bricks—Damages—Injunction.

Where the defendants held one tenancy at a fixed rate and another as permanent tenure-holders under the plaintiff and made excavations on some plots of the land for the purpose of making bricks :—

Held, (i) that s. 23 of the Bengal Tenancy Act did not apply ;

(ii) that there was nothing in the law which prevented tenants having permanent heritable rights at a fixed rent from using the land in any manner they thought fit so long as there was no risk to the right of the landlord to recover the rent payable and unless there were any reservations, the landlord had no right in the case of such tenures other than the right to receive the stipulated rent ;

(iii) that in the absence of any finding as to actual damage sustained by the landlord or anything having been done so as to affect the right of the landlord to obtain his rent, there could not be any order for damage or injunction.

Anund Coomar Mookerjee v. Bisso Nath Banerjee (1) and *Girish Chandra Chando v. Sirish Chandra Das* (2) not applicable.

SECOND APPEALS by Barada Prasad Banerjee and another, the defendants.

These two appeals arose out of two suits for declaration that the defendants were *garkaemi ticca* tenants

* Appeals from Appellate Decrees, Nos. 44 and 415 of 1921, against the decrees of Lal Behari Chatterjee, Subordinate Judge of Hooghly, dated Sep. 18, 1920, modifying the decree of Lutfur Rahman, Munsif of Serampore, dated Dec. 22, 1919.

at will, that they had no right to excavate lands for making bricks, for damages, for injunction and for restoration of the lands in their original condition. The defence was that the defendants were permanent tenure-holders and as such they could use the land in any manner they liked. The Munsif dismissed the suits. On appeal, by the plaintiff, the Subordinate Judge gave a partial decree for damages holding that some of the lands were held at a fixed rent and others were held as permanent tenure-holders and the defendants were permanently restrained from further excavating the lands for making bricks. The defendants appealed to the High Court.

1923

BARADA
PRASAD
BANERJEE
v.
BHUPENDRA
NATH
MUKHERJEE

Babu Narendra Kumar Bose (for *Dr. Dwarka Nath Mitter*) (with him *Babu Hari Charan Banerjee*), for the appellants. The provisions of the Bengal Tenancy Act do not apply to these cases. The object of the tenancies is not known. However the findings are that the defendants hold some lands at a fixed rate and some as permanent tenure-holders. Therefore they were entitled to excavate the land for the purpose of making bricks. No notice under s. 155 (a), (b) of the Bengal Tenancy Act was given to the tenants. The decisions in *Anund Coomar Mookerjee v. Bissonath Banerjee* (1) and *Girish Chandra Chando v. Sirish Chandra Das* (2) do not apply. In those cases there was likelihood of total destruction of the property. There is no such thing in the present cases.

Babu Sarat Chandra Roy Chowdhury (with him *Babu Haradhan Chatterjee*), for the respondent. The land is agricultural and the area is over 100 bighas. Therefore the presumption under s. 50 of the Bengal Tenancy Act should apply. A raiyat at a fixed rent

(1) (1872) 17 W. R. 416.

(2) (1904) 9 C. W. N 255.

1923
 BARADA
 PRASAD
 BANERJEE
 v.
 BHUPENDRA
 NATH
 MUKHERJEE.

will follow the incidents of s. 23 of the Bengal Tenancy Act. As to notice under s. 155, the tenants made a portion of the tenancy unfit for cultivation and therefore the landlord asked for compensation and not ejection. If the land is converted into some other form, the landlord may call upon the tenants to restore it to its original condition or to leave it. If the lands were taken for agricultural purposes and if they were excavated for making bricks, surely they have been damaged to such an extent that the rent is in jeopardy. Under the circumstances there ought to be a permanent injunction restraining the defendants from further damaging the property: *Anund Coomar Mookerjee v. Bissonath Banerjee* (1), *Girish Chandra Chandò v. Sirish Chandra Das* (2), *Hari Mohan Misser v. Surendra Narayan Singh* (3) and *Raj Kishore Mondal v. Btjani Kant Chuckarbutty* (4).

GHOSE J. These two appeals arise out of two suits brought by the plaintiff against the defendants. The principal prayer of the plaintiff is this:—
 “That it may be declared that, save and except *gar-kaemi* ordinary *ticca* jote right to terminate at will under the plaintiff in respect of the land and jama described in the schedule, the defendants have no right and power to make hollows and excavations and to manufacture bricks in the said land and jama and thus to change the features of the jote and to alter the character of the tenancy”. It is unnecessary to state any of the other prayers of which there is a large number, except that the plaintiff claims damages for certain excavations made by the defendants on the lands comprised in the tenancies. The Court of first instance dismissed the suits entirely. On

(1) (1872) 17 W. R. 415.

(3) (1907) I. L. R. 34 Calc. 718.

(2) (1904) 9 C. W. N. 255.

(4) (1915) 24 C. L. J. 85.

appeal, by the plaintiff, the Subordinate Judge had made a partial decree in his favour. With regard to Appeal No. 5, arising out of one of the suits, his order runs thus: "The plaintiff's suit is decreed in terms of prayers *ka* and *kha* of the plaint and that he do recover from the defendants Nos. 1 to 3 Rs. 6-4 as damage and that the other prayers be dismissed. So far as *ka* prayer is concerned, the first part of the prayer that the defendants are *garkaemi ticca* tenants-at-will be dismissed, but it will be declared that they have no right to make excavations and to alter the nature of the tenancy". In Appeal No. 6, the only relief allowed is this: "The plaintiff will get a declaration that the defendants have no right to make excavations for brick making and that they are permanently restrained from doing so in future so as to extend the excavation"; and the other prayers were rejected. The findings of the learned Subordinate Judge as to the nature of the tenancies are as follows: "The land in Appeal No. 6 is not agricultural. It comprises *bastu* and *bagan*. The evidence so far as it can be traced leads us to a very old date and the rent never changed and there were inheritances and transfers recognised". From this, he comes to the conclusion that it is a tenancy at a fixed rate, although he makes use of the words "holding at a fixed rate". The result is that it is a permanent tenancy not governed by the Bengal Tenancy Act. With regard to the other tenancy which was the subject of the Appeal No. 5 before him, he holds that the defendants are permanent tenure-holders. This tenure consists of about 133 bighas of land and the act complained of is that some excavations have been made for the purpose of making bricks on two plots to the extent of about 24 feet x 21 feet. The Subordinate Judge says, "having regard to the circumstances, I allow only nominal

1923

BARADA
PRASAD
BANERJEE
v.
BHUPENDRA
NATH
MUKHERJEE
GROSE J.

1923

BARADA
PRASAD
BANERJEE
v.
BHUPENDEA
NATH
MUKHERJEE.
GHOSE J.

“damage, that is, one-fourth of the amount claimed “just to vindicate the right of the plaintiff”. As to the other land, the Subordinate Judge has found that there was no material alteration of the land and the excavation was acquiesced in. The question, therefore, is whether the defendants are entitled to make the excavation complained of and whether the plaintiff is entitled to any damages. Obviously, the provisions of section 23 of the Bengal Tenancy Act to which reference was made in the course of the argument do not apply. There is nothing in the law which prevents tenants having permanent heritable rights at a fixed rent from using the land in any manner they think fit so long as there is no risk to the right of the landlord to recover the rent payable, and, I think, it is now settled that unless there are any reservations, the landlord has no right in the case of such tenures other than the right to receive the stipulated rent. There is no actual damage found in these cases for which the landlord is entitled to any relief. There does not appear to be any justification for the ground on which the Subordinate Judge has allowed nominal damages. Reliance has been placed on behalf of the respondents on the case of *Anund Coomar Mookerjee v. Bisso Nath Banerji* (1) as supporting the contention that even if a mukraridar makes an excavation on the land, he is liable to damages. But it will be found that, in that case, the excavations were considerable and it was remarked that, “if the “landlord wanted to bring a suit for enhancement “against the defendant on the ground that the value of “the produce or that the productive power of the land “had increased, he would find it extremely difficult to “make out any case at all in consequence of the soil “having been excavated and taken away by the

(1) (1872) 17 W. R. 416.

“defendants for the purpose of making bricks”. That case has, therefore, no application to the circumstances before us. Then, as to the question of injunction, there is no finding that anything has been done so as to affect the right of the landlord to obtain his rent. In my judgment the case of *Girish Chandra Chando v. Sirish Chandra Das* (1), relied on by the Subordinate Judge and also by the learned vakil for the respondents, is not of any assistance to the plaintiff. In that case, it was held that, if the excavations by the tenant were such as would cause the total destruction of the property, he might be restrained from making them. Here the plaintiff did not charge the defendants with any such act of waste as would be detrimental to his interest. The ground on which an injunction was asked for is that the defendants are *garkaemi* ordinary *ticca 'ote* tenants whose rights are terminable at will and that they have no right to use the land in the way alleged. That has been found against the plaintiff. In my opinion, the plaintiff has not made out any case for an injunction. The plaintiff is not, therefore, entitled to any of the reliefs granted by the Subordinate Judge and his suits must fail. The appeals are accordingly decreed and the suits dismissed with costs in all Courts.

1923

BARADA
PRASAD
BANERJEE
v.
BHUPENDRA
NATH
MUKHERJEE.
GHOSE J.

WALMSLEY J. I agree.

B. M. S.

Appeals allowed.

(1) (1904) 9 C. W. N. 255.