APPELLATE CIVIL.

Before B. B. Ghose and Roy JJ.

RASH BEHARI MANDAL

1927 *v.*

Feb 9. HEMANTA KUMAR GHOSE.*

Incumbrance—Lease—Annulment—Khudkhast raiyat—Paikast raiyat—Jungle lands—Occupancy raiyat—Patni Regulation VIII of 1819, s. 11—Bengal Rent Recovery Act (VIII of 1885) s. 16—Bengal Tenancy Act (VIII of 1885) s. 25.

The third clause of section 11 of Regulation VIII of 1819 only provides certain restrictions on the right of an auction purchaser to eject certain persons, which right has been given by the previous clauses of that section.

If the right of the person in occupation does not come within the first or the second clause of that section, and if the occupier of the land is protected from ejectment by some other law, there is no reason to suppose that section 11 of that Regulation gives authority to the auction purchaser to eject that occupier of the land by virtue of his purchase.

The case of *Jogeshwar Mazumdar* (1) can only be reasonably construed as an authority for the proposition that a lease is an incumbrance. That case has been interpreted and doubted in various other cases.

Pradyote Kumar Tagore v. *Gopi Krishna Mandal* (2), *Tamizuddin Khan* v. *Khoda Nawaz Khan* (3) and *Bama Charan Gorai v. Ram Kanai Dubey* (4) cited.

The proviso in the third clause does not mean that persons in occupation not coming within the definition of *khudkhast* raiyats are liable to be ejected even if they have acquired occupancy rights under the Tenancy Law.

A *khudkhast* raiyat is a resident hereditary cultivator, in contradistinction to *paikast* raiyat, *i.e.*, a migratory tenant.

*Appeal from Original Decree No. 286 of 1924, against the decree of Pashupati Bose, Subordinate Judge of Khulna, dated Sep. 27, 1924.

(1) (1896) 3 C. W. N. 13.
(2) (1910) I. L. R. 37 Calc. 322.
(3) (1919) 14 C. W. N. 229.
(4) (1914) 19 C. W. N. 13.

Where the tenants were resident within a patni mahal, but outside a certain jungle tract (comprised within this patni) which did not form part of any village, and where no man could live, and this jungle tract was at the time of lease infested with tigers and other wild animals.

Held, that these tenants were *khudkhast* tenants although they were residents of contiguous villages within the patni.

Nubokishore Biswas v. *Jadub Chandra Sircar* (1), referred to.

Held, further, that having regard to the nature of the land, which was absolutely jungle, and the purpose for which the lease was granted, *i.e.*, for the purpose of reclaiming by these people, who were residents of villages close by, it was a *bonâ fide* lease given to the lessees by the then patnidars.

FIRST APPEAL by Rash Behari Mandal and others defendants.

The plaintiffs' (Hemanta Kumar Ghose and others) case was shortly to the effect that Babu Narendra Nath Basu and others of Sridharpur were owners of the Patni Taluk Lot No. II, Shahpur and others, under the Sayedpur Trust Estate, managed by the Collector of Khulna; that on 15th May 1914 the same was purchased at Court auction sale in the name of the deceased plaintiff No. I, under Regulations VIII of 1819; that the defendants were lessees, or successors in interest of the lessees, who in 1879 took a lease of 600 bighas of jungle lands situated within this Patni. The plaintiffs alleged that the defendants had no right to remain on the lands after the auction purchase of the plaintiffs, who had besides issued printed notices to all concerned annulling any incumbrances they might claim as well as requiring them to vacate. The defence was that they were *khudkhast*, resident, cultivating raiyats, though originally the lessees resided outside the jungle lease lands, and had acquired a right of occupancy and so could not be ejected. The plaintiffs' suit having been decreed by the learned Subor-

(1) (1873) 20 W R. 426.

1927

RASH BEHARI MANDAL. v. HEMANTA KUMAR GHOSE.

dinate Judge of Khulna, the defendants preferred this appeal to the High Court.

Mr. S. C. Bose, *Babu Saroj Kumar Chatterjee* and *Babu Jatis Chandra Guha*, for the appellants.

Dr. Sarat Chandra Basak, *Babu Bepin Chandra Bose* and *Babu Urukram Das Chakravarti*, for the respondents.

Babu Prafulla Chandra Chakravarti and *Babu Surjya Kumar Aich*, for the Deputy Registrar.

Cur. adv vult.

GHOSE J. This appeal arises out of an action in ejectment, and is on behalf of some of the defendants in the Suit No. 55 tried by the Subordinate Judge of Khulna. The facts are these :—There is a Sayedpur Trust Estate, which has got the zemindari interest. A patni was created consisting of certain mouzahs within that estate in 1821 in favour of two persons named Gopi Roy and Kali Roy. Within the patni there was a large tract of jungle and apparently it was not included within any of the mouzahs. In 1843 some of the persons, who held the property in darpatni interest, executed a lease of about 600 bighas of jungle land under certain terms in favour of two persons, named Ramjiban Jotedar and Ram Sundar Mandal. Sometime after that the patni interest appears to have come into the possession of certain Boses. On the 9th of October 1879 these Boses granted a lease of 600 bighas of *patit* and jungle lands excluding 400 bighas of *dhap* lands in favour of four persons, who may be called Jotedars and Mandals. There was also a stipulation that the 400 bighas excluded, which was described as *dhap* lands, might be taken possession of by the lessees after reclaiming those lands at a certain rate of rent. The provision

with regard to rent was in the usual manner of progressive rent from time to time, and stipulating that the rent would be at a certain rate from the year 1304, that is 1897. This patni was put up to sale under regulation VIII of 1819 on the 15th of May 1914, and was purchased by the plaintiffs. After their purchase they served notice on all persons, who were the descendants of the original lessees under the lease of 1879, and all those who had derived title under these lessees or their representatives. A large number of persons was impleaded as defendents. Most of them came to an agreement with the plaintiffs and compromised the suit. The appellants before us fought out the suit in the Court below, and a decree for ejectment has been made as against them.

The case of the plaintiffs was that under the provisions of section 11 of Regulation VIII of 1819, they were entitled to eject the defendants, and to recover khas possession of the lands in question. Various pleas were taken in defence, but the main defence was that the lessees under the lease of 1879 were *khudkhast* raiyats and therefore protected under the third clause of section 11 of the Regulation. Secondly, even if it be considered that they were not *khudkhast* raiyats, they acquired right of occupancy as raiyats by holding the lands for more than 12 years, and consequently they are protected from ejectment under the provisions of the Bengal Tenancy Act, notwithstanding the provisions of section 11 of Regulation VIII of 1819. Another plea was sought to be raised that the plaintiffs had acquired no right by virtue of the Regulation sale, as certain steps were not taken under the Regulation. Besides those pleas, other pleas were taken and a large number of issues was raised in the Court below. It is unnecessary to mention these as they are absolutely immaterial for the purposes of the

1927

RASH BEHARI MANDAL v. HEMANTA KUMAR GHOSE.

GHOSE J.

appeal. The Subordinate Judge held that the defendants were not *khudkhast* raiyats. Secondly, he held that not being *khudkhast* raiyats, they are liable to ejectment, as clause 3 of section 11 of the Regulation does not protect them. He further held that the defendants were tenure-holders, and their interest was an incumbrance coming under the first clause of section 11 of the Regulation, and therefore they have no right to remain on the land after the patni sale. He also held that the defendants could not challenge the validity of the patni sale collaterally by way of defence in the present suit. On these findings he made his decree in ejectment. Twelve of the defendants have appealed to this Court. One of them, defendant No. 18, is one of the representatives of the original lessees under the lease of 1879. Others claimed under various sub-leases from the lessees or from the sub-lessees under those lessees. It is unnecessary for our purpose to state the origin of the title of those subordinate holders.

Three main questions have been argued on behalf of the appellants before us. It is stated firstly, that the predecessors of defendant No 18 were *khudkhast* raiyats and the lease being a *bonâ fide* lease in their favour the plaintiffs are not entitled to eject him, and consequently the plaintiffs are not entitled to eject the tenants holding under rights subordinate to the lessees under the lease of 1879. The second point was that the defendants have, by their cultivation of the lands, themselves acquired occupancy rights under Act X of 1859 as well as under the Bengal Tenancy Act and are, therefore, not liable to be ejected. The third point taken was that the Collector had no jurisdiction to sell the patni under Regulation VIII of 1819 on account of certain circumstances, one of which was that he was the manager of the Sayedpur Trust Estate.

The third point may be taken up first and disposed of, on the ground that this plea was not taken in the lower Court, nor does it appear in the issues raised in that Court. The question not having been discussed in the lower Court, we are not inclined to allow that question to be raised for the first time in this Court. The other facts upon which they rely as to the invalidity of the sale are not such as would make the sale void, and therefore in my judgment there is no substance in that point raised.

As regards the second point, the Subordinate Judge seems to have been of opinion that even if the defendants had acquired the right of occupancy under the Bengal Tenancy Act they were liable to be ejected under the provisions of section 11 of Regulation VIII of 1819. His view apparently was that under the third clause of that section, only *khudkhast* raiyats or resident and hereditary cultivators are protected, and whoever does not come within the description of that class of raiyats, is liable to be ejected at the instance of a purchaser at a patni sale. He apparently relies in support of that contention on the case of *Jageshwar Mazumdar* v. *Abed Mahomed Sirkar* (1). In my judgment that view of the Subordinate Judge is erroneous. Apart from authority, if the third clause of section 11 is examined, it will be apparent that it only provides certain restrictions on the right of an auction-purchaser to eject certain persons, which right has been given by the previous clauses of that section. Under the first clause certain incumbrances, which had accrued upon the taluk, were liable to be cancelled. The second clause deals with leases creative of a middle interest between the resident-cultivator and the late proprietor, and the third clause mentions an exception to the right of the purchaser. If the right

(1) (1896) 3 C. W. N. 13.

1927

RASH BEHARI MANDAL v. HEMANTA KUMAR GHOSE.

GHOSE J.

of the person in occupation does not come within the first or the second clause of that section, and if the occupier of the land is protected from ejectment by some other law, there is no reason to suppose that section 11 of the Regulation gives authority to the auction-purchaser to eject that occupier of the land by virtue of his purchase. The case of *Jageshwar Mazumdar* (1) can only be reasonably construed as an authority for the proposition that a lease is an incumbrance. If it be construed as an authority for laying down the proposition that even an occupancy raiyat is liable to be ejected by an auction purchaser because he does not come within clause 3 of section 11 of the Regulation, with all respect I must say that I am unable to accept that proposition. That case has been interpreted and doubted in various other cases. See *Pradyote Kumar Tagore* v. *Gopi Krishna Mandal* (2), *Tamizuddin Khan* v. *Khoda Nawaz Khan* (3), and also the case of *Bama Charan Gorai* v. *Ram Kanai Dubey* (4). In the last case, the learned Judges observed that the case of *Jageshwar Mazumdar* (1) did not lay down that an occupancy right is an incumbrance, and as a matter of fact it could not have been so laid down as an incumbrance as contemplated in the first clause of section 11 of the Regulation. There is ample authority for the proposition that the proviso in the third clause does not mean that persons in occupation not coming within the definition of *khudkhast* raiyats, are liable to be ejected, even if they have acquired occupancy rights under the tenancy law. I have not been able to find any authority with regard to patni sales, but the cases with reference to section 16 of Act VIII of 1865, where the proviso is in the same terms as the proviso in the third clause of

(1) (1896) 3 C. W. N. 13.
(2) (1910) I. L. R. 37 Calc. 322.
(3) (1919) 14 C. W. N. 229.
(4) (1914) 19 C. W. N. 13.

section 11 of Regulation VIII of 1819, support the proposition. Those cases are *Pureeag Singh* v. *Purtap Narain Singh* (1), *Nil Madhub Karmokar* v. *Shiboo Paul* (2), *Emam Ali Mistry* v. *Ator Ali Khan* (3), and *Bama Charan Gorai* v. *Ram Kanai Dubey* (4).

The second proposition therefore on behalf of the appellants ought to be accepted. But the question is whether the defendants had acquired a right of occupancy by remaining in possession of the disputed land for the requisite period under the Bengal Tenancy Act. It is not necessary for me to examine the evidence or the terms of the lease in detail having regard to the view I have taken with regard to the first question. The learned Advocate for the respondents has argued with considerable stress, that the lease of 1879 was the grant of a tenure and if the lessees were tenure-holders they could not under the provisions of the law, acquire a right of occupancy as raiyats with regard to lands which they had themselves cultivated within their own tenure. That proposition seems to me to be unassailable. It is unnecessary for me to discuss the question whether the lease should be construed as the grant of a tenure or whether it should be considered as a mere raiyati lease, as is contended for equally strenuously on behalf of the appellants by their learned Advocate. It is sufficient for my purpose to state that these lessees were illiterate people and actual cultivators themselves. They belong to the caste of Pode, one of that class of people who are considered to be untouchables. It can hardly be supposed that they were to act the part of landlords or tenure holders. The only point that can be urged against their being raiyats is

(1) (1869) 11 W. R. 253.
(2) (1870) 13 W. R. 410.
(3) (1874) 22 W. R. 133.
(4) (1914) 19 C. W. N. 858.

1927

RANI BEHARI MANDAL v. HEMANTA KUMAR GHOSE.

GHOSE J.

that the area of the demised premises exceeds by far 100 bighas of land.

I next come to the first point urged, and it is this, that the defendants are *khudkhast* raiyats. The Subordinate Judge has found that the appellants have no dwelling house within the village in which the lands in question are situate. His finding is that some of them have got mere *chalas* where they stayed during the time of cultivation. He further relies upon the vakalatnamas filed by some of these defendants in which their residences have been described as in another village. He therefore does not believe the evidence given by the defendants' witnesses, that they are resident hereditary cultivators. I may mention that the description in the vakalatnamas do not amount to anything. These people are illiterate. Their vakalatnamas must have been written by the clerks of their pleaders, and the clerks of their pleaders must have written their residence from the copy of the summons that was served upon the defendants, and their residence in the copy of the summons must have been taken from the plaint in which the plaintiffs chose to describe the defendants as being residents of a different village. That being so, the only evidence that remains is the evidence of those defendants as to their place of residence. But that also is not decisive of the question, because at the time when the lease was granted it was not known within which village the jungle land was situate. In the description of the property in the lease of 1879, it was described as in Mouzah Sahapur Bil, where the details of the *kistibundi* as regards the payment of rent was given. In the schedule of boundaries it is described as in the Bil southwest of Ramkrishnapur Ghona, within Taraf Sahapur. In paragraph 4 of the plaint the plaintiffs described it as situated on the

south of the thak map that was prepared with respect to Ramkrishnapur and Ghona Mouzahs jointly. From this it appears that the property was not actually situated within the village of Ramkrishnapur or Ghona. The lessees in 1879 were all residents of Ruprampur and Madhavkati, which villages, it appears, are within the patni mahal which has been purchased by the plaintiffs at the auction sale. What is the meaning of *khudkhast* raiyat? It is resident, hereditary cultivator in contradistinction to *Paikast* raiyat, that is a migratory tenant. If the tenants were resident within the patni mehal but outside the jungle tract, which did not form part of any village, and where no man could live,—and it is in evidence that the land in question was at that time infested with tigers and other wild animals—would it be reasonable to say that these tenants were not khudkhast tenants although they were residents of contiguous villages within the patni? I think not. There is ample evidence on the record to show that these jotedars and mandals were raiyats of the villages in which they lived, and as I have already stated, they belong to a class whose only mode of life is by cultivation. That these men may be considered to be *khudkhast* raiyats is supported by the observations of Mr. Justice Markby in the case of *Nubokishore Biswas* v. *Jadub Chunder Sircar* (1). I may state in passing that the Subordinate Judge is clearly wrong in observing that that case was not followed in the later cases mentioned by him. Now, if the tenants to whom the lease was given in 1879 were *khudkhast* raiyats, then their case falls within the third clause of section 11 of the Patni Regulation; and that clause lays down that the purchaser is not entitled to eject the *khudkhast* raiyats, nor to cancel *bonâ'fide* engagements made with such tenants by the

(1) (1873) 20 W. R. 426.

1927

RASH BEHARI MANDAL v. HEMANTA KUMAR GHOSE.

GHOSE J.

late incumbent, except it be proved in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rate would have been demandable at the time such engagements were contracted by his predecessor. Now the only ground on which the plaintiffs might bring this action, as it seems to me, is that this was not a *bonâ fide* engagement. That has not been stated in the plaint, and having regard to the nature of the land, which was absolutely jungle and the purpose for which the lease was granted, that is, for the purpose of reclaiming by these people, who were residents of villages close by, it can hardly be said that it was not a *bonâfide* lease given to the lessees by the then patnidars. No attempt has been made to show that the rent then fixed was not the proper rent demandable. The representatives of the lessees under the lease of 1879 cannot therefore be ejected by the plaintiffs, and consequently the persons claiming under them or their representatives are also not liable to be ejected. In this view as I have already stated, it is unnecessary for me to determine whether the lease created a tenure or a raiyati interest. Whether it is an incumbrance falling within the first clause of the section or not, need not also be determined having regard to my finding that the lessees were *khudkhast* raiyats and the lease was a *bonâfide* lease for the purpose of reclaiming jungle lands.

The result therefore is that this appeal must be allowed, and the suit for ejectment against these defendants appellants must be dismissed with costs.

The costs in this Court will be given to the appellants other than appellants Nos. 8, 9 and 12.

The applications are not pressed and are dismissed without costs.

ROY J. I agree.

G. S. *Appeal allowed.*