

APPELLATE CIVIL.

Before Duval and Mitter JJ.

MIDNAPORE ZEMINDARY Co., LTD.

v.

SADHUMONI DASL.*

1926
Dec. 21.

*Protected Interest—Right of a raiyat at fixed rent, if protected interest
—Bengal Tenancy Act (VIII of 1885), ss. 160, 167.*

The right of an occupancy *raiyat* who subsequently acquires right to hold at fixed rent continues to be a protected interest under section 160 of the Bengal Tenancy Act.

Sarbeswar Patra v. Bijay Chand Mahtab (1) followed.

Dictum of Mookerjee J. in *Bhut Nath Naskar v. Surendra Nath Dutt* (2) not followed.

Abdul Gani Chowdhury v. Makbul Ali (3), *Lakhi Charan Saha v. Hamid Ali* (4) referred to.

SECOND APPEALS by the plaintiffs.

These five analogous appeals arose out of five analogous suits for *khas* possession and *wasilat* upon establishment of plaintiffs' right to the plaint lands by auction-purchase and after ejecting the defendants therefrom on notices under section 167 of the Bengal Tenancy Act. The plaintiffs' case was that they had purchased a tenure in auction-sale on the 24th June, 1921 and the sale having been confirmed on the 3rd August, 1921, they took possession through Court on the 5th September following. The defendants were *mokarari raiyats* in respect of the plaint lands under

*Appeals from Appellate Decrees, Nos. 2001 to 2005 of 1924, against the decrees of A. L. Mukerjee, Additional District Judge of Midnapore, dated May 30, 1924, confirming the decrees of Charu Chandra Bose, Munsif, Jhargram, dated December 6, 1923.

(1) (1924) I. L. R. 49 Calc. 280.

(3) (1914) I. L. R. 42 Calc. 745.

(2) (1909) 13 C. W. N. 1025.

(4) (1917) 27 C. L. J. 284.

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the tenure-holder. Thus the defendants' tenancies were incumbrances liable to annulment. The plaintiffs served notices on defendants under section 167 of the Bengal Tenancy Act on the 14th August, 1922. But the defendants did not vacate the lands. Hence the suits.

The defence was that they were occupancy *raiyats* and as such they were protected from ejection and the plaintiffs were not entitled to any relief.

The Munsif dismissed the suits, giving effect to the defendants' contentions. The appeal by the plaintiffs was dismissed.

Hence these Second Appeals.

Mr. U. N. Sen Gupta (with him *Babu Apurba Charan Mukerji* and *Babu Shamadas Bhattacharya* for *Babu Prabod Kumar Das*), for the appellants. The record-of-rights shews the defendants as *raiyats* at fixed rents. The effect of the entry in the record is that the tenants must be presumed to have been *mokarari raiyats* from the beginning. The right of a *raiyat* at fixed rent, although in some respects higher than that of a *raiyat* with right of occupancy, is not a protected interest within the meaning of section 160 of the Bengal Tenancy Act. If, however, the tenants were occupancy *raiyats*, as found by the lower appellate Court and subsequently acquired the status of *raiyats* at fixed rents, the right of occupancy merged in the higher right and the tenants ceased to have rights of occupancy: *Bhut Nath Naskar v. Surendra Nath Dutt* (1). This does not mean any diminution of rights of tenants, for, as regards permanency of occupation and enhancibility of rents, the tenants stand on a higher footing. A contrary view has been expressed in *Sarbeswar*

Patra v. Bijay Chand Mahtab (1), but having regard to the observations of Sir Lancelot Sanderson in his judgment that the opinion of Mr. Justice Mookerjee in *Bhut Nath Naskar's case* (2), is entitled to considerable respect and that he would like to have the matter settled by a Full Bench, your Lordships should have the matter decided once for all by referring the matter to the Full Bench. The cases of *Abdul Guni Chowdhury v. Makbul Ali* (3) and *Lakhi Charan Saha v. Hamid Ali* (4) relied on by the learned Additional District Judge are not really against me. They are not cases under the Bengal Tenancy Act and turn on the meaning of section 37 of Act XI of 1859.

Babu Bijoy Kumar Bhattacharya for the respondents was not called upon.

DUVAL J. In these cases the plaintiff-appellant brought five analogous suits. The allegation was that on the 24th June, 1921, he purchased a tenure in an auction-sale and subsequently took possession through Court. The defendants were *mokarari raiyats* under the tenure-holder and so their tenancies not being protected interests were liable to be annulled and accordingly notices were issued under section 167 of the Bengal Tenancy Act in August, 1922. The defendants not having vacated the land, these suits were brought. The first Court dismissed the suits and so has the Additional District Judge on appeal. The finding of fact of the lower appellate Court is that these holdings came into existence many years ago, but not before the Permanent Settlement. They were occupancy holdings and were recognised as such. But at the time of the last record-of-rights they were recorded as holdings of

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(1) (1921) L. L. R. 49 Calc. 280.

(3) (1914) L. L. R. 42 Calc. 745.

(2) (1909) 13 C. W. N. 1025.

(4) (1917) 27 C. L. J. 284.

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raiyats holding at fixed rents. It is also found that the plaintiff recognised the defendants as *raiyats* at fixed rents, and that the defendants, though they were originally occupancy *raiyats*, had acquired the rights of *raiyats* at fixed rents by the conduct of the landlord.

The only point which is urged before us is the question as to whether the interest of the *raiyats* at fixed rent is a protected interest under section 160 of the Bengal Tenancy Act. Now these rights were at their inception occupancy rights and the right to hold at fixed rents subsequently accrued to them. It is argued for the appellant that this Court should follow the opinion expressed by Mr. Justice Mookerjee in the case of *Bhut Nath Naskir v. Surendra Nath Dutt* (1). In that case that learned Judge observed that the Bengal Tenancy Act made a well-defined distinction between a *raiyat* holding at a fixed rate of rent and an occupancy *raiyat*; and that in section 160 reference has been made expressly to a right of occupancy and the right of a non-occupancy *raiyat*, but that no mention is made of the right of a *raiyat* at a fixed rate of rent and that the inference, therefore, seems to be reasonable that the intention of the Legislature in section 160 was to protect from ejectment a *raiyat* who possesses a right of occupancy as also a *raiyat* who possesses the right of a non-occupancy *raiyat* and not to protect from ejectment a *raiyat* holding at a fixed rate of rent. This *dictum* of Mr. Justice Mookerjee, however, was not concurred in by the late learned Chief Justice with whom he sat. This is not, therefore, a ruling by which we are bound and which we shall show has not been followed. The next case is of *Abdul Gani Chowdhury v. Makbul Ali* (2). In that case the chief

(1) (1909) 13 C. W. N. 1025.

(2) (1914) I. L. R. 42 Cal. 745.

consideration was the proviso (3) to section 37 of Act XI of 1859, which says that nothing in that section should be construed to entitle a purchaser as aforesaid to eject any *raiyat* having a right of occupancy at a fixed rate. But it was held in that case that a person who has obtained an occupancy right does not, by obtaining a grant of fixed rate, lose that right and, though that ruling may in one way be distinguished on the ground that it was passed without reference to the wording of section 160 of the Bengal Tenancy Act, this statement shows that the mere fact that an occupancy *raiyat* obtained a grant at a fixed rent shall not make him cease to have the right of occupancy. In the case of *Lakhi Charan Saha v. Hamid Ali* (1), which also came up under section 37 of the Revenue Sale Law, the same view was expressed and the case of *Abdul Gani Chowdhury v. Makbul Ali* (2) was followed.

Lastly, we have the case of *Sarbeswar Patra v. Bijay Chand Mahtab* (3) and there it was held that the interest of a *raiyat* at a fixed rent who had occupied his holding for a continued period of more than 12 years is a protected interest within the meaning of section 160 of the Bengal Tenancy Act and cannot be annulled by notice under section 167 and that the status of a *raiyat* at fixed rent can be combined with that of an occupancy *raiyat*. This last decision at any rate is clearly binding on us. The point, however, urged on behalf of the appellant is that either we should follow the *dictum* of Mr. Justice Mookerjee in the case of *Bhut Nath Naskar v. Surendra Nath Dutt* (4) or, in view of the observation of the late learned Chief Justice in the case of *Sarbeswar Patra v. Bijay Chand Mahtab* (3) that he would rather like

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(1) (1917) 27 C. L. J. 284.

(3) (1921) I. L. R. 49 Calc. 280.

(2) (1914) I. L. R. 42 Calc. 745.

(4) (1909) 13 C. W. N. 1025.

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to have the matter referred to a Full Bench, we should now refer the matter to a Full Bench.

As we have pointed out the *dictum* of Mr. Justice Mookerjee was not endorsed by the learned Judge sitting with him and so it cannot be binding on us, though it must be treated with great respect against a subsequent decision of two Judges of this Court forming a Division Bench.

The result, therefore, is that these *raiyats* at fixed rent are protected under section 160 of the Bengal Tenancy Act and as such the appeal must be dismissed with costs.

MITTER J. I agree with my learned brother in dismissing the appeal. I only desire to add that the defendants in this case, who were originally occupancy *raiyats*, could not lose their status as such, when their rent at a subsequent period became fixed and was rendered not liable to enhancement. I may refer in this connection to section 37 of Act XI of 1859, where the interest of an occupancy *raiyat* at fixed rent as well as of an ordinary occupancy *raiyat* is protected and is not affected by a sale for arrears of revenue. In my opinion, the interest of a *raiyat* at a fixed rent, who was originally an occupancy *raiyat*, is not a smaller interest but a higher interest than that of a *raiyat* with a right of occupancy and if the Legislature intended that a tenant with an inferior status is to be protected by enacting the provisions of section 160, it follows *a fortiori* that a tenant with a higher interest is also protected. I entirely agree with the decision of the learned Chief Justice, Sir Lancelot Sanderson, in the case of *Sarbeswar Patra v. Bijay Chand Mahtab* (1).

S. M.

Appeal dismissed.