APPELLATE CIVIL.

Before Mukerji and Mitter JJ.

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June 16.

SANJUA URAO

v.

MATADIN AGARWALLA.*

Right of Occupancy—Durchukanidar—Bengal Tenancy Act (VIII of 1885)—Notification extending the Act to the Western Duars—"Fourth restriction and modification," meaning of—Present rights of Durchukanidars in the Western Duars—Considerations for determination.

After the introduction of the Bengal Tenancy Act in the Western Duars a tenant would not be debarred from acquiring the right of occupancy merely because his status under the former scheme of tenancy would be that of a *darchukanidar*, if he is a *raiyat* under the Bengal Tenancy Act and there is no restriction in the powers of the particular *jotedar* and the particular *chukanidar* under whom he holds. Proviso IV of the notification No. 964 T.—R., dated the 5th November 1898, does not provide for the rights of such tenants taken as a class and generally, but of each tenant individually under his special circumstances.

SECOND APPEAL by Sanjua Urao, the defendant.

The plaintiffs sued for *khas* possession and mesne profits of the lands of 2 *jotes* under which there were 2 *chukanis* held by one Chakali Bewa which were sold in execution of decrees for arreas of rent and purchased by the plaintiffs, the owners of the *jotes*. The plaintiffs gave notices to the defendants under s. 167 of the Bengal Tenancy Act for annulling their encumbrance, but as the defendants remained in possession, the plaintiffs brought the present two suits against the defendants. The defence which was

*Appeal from Appellate Decree, No. 101 of 1925, against the decree of Ram Chandra Das Gupta, Subordinate Judge of Dinajpur, dated Sept. 1, 1924, affirming the decree of Manmatha Chandra Bose, Munsif of Jalpaiguri, dated July 31, 1923.

the same in both the suits was in substance that the defendarts had acquired occupancy rights and therefore could not be ejected. The first Court decreed the suits which were confirmed on appeal. One of the defendants has preferred this second appeal which governed both the suits.

Babu Atul Chandra Gupta (with him *Babu Satish Chandra Sinha*), for the appellant. The notification of 1898 (proviso 4) provides for particular tenancies actually treated of in a settlement proceeding or a lease and not to general description of tenancies in settlement proceedings and leases in general. Otherwise there would be little meaning in extending the Act if all the old rights of the old description of tenants continued. If a particular *durchukanidar* is really a *raiyat* within the definition of the Bengal Tenancy Act and there is no settlement record or lease defining his present rights, accrual of occupancy rights is not barred. Anything in *chukanidar's* lease from the *jotedar* does not affect the question in view of s. 178, Bengal Tenancy Act.

The real thing to be determined is who was the actual cultivating tenant in this case—the *chukanidar* or the *darchukanidar*—for these descriptive names do not correspond to the classification of tenants in the Bengal Tenancy Act. see *Eastern Bengal and Assam Gazetteer* (1911) *Jalpaiguri*, p. 83 and p. 86 and *Hunter's Jalpaiguri*, pp. 286-288.

Babu Braja Lal Chakravarti (with him *Babu Asita Ranjan Ghose*), for the respondents. The arguments now pressed are new. There is no suggestion in the written statement that the Bengal Tenancy Act has introduced any change, and the question discussed in the Courts below was whether as *durchukanidars* the defendants have acquired occupancy

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rights. *The Eastern Bengal and Assam Gazetteer (Jalpaiguri)*, page 87 (bottom), destroys the defendants' case. The appellant's arguments in this Court proceed upon mere hypothesis for which there is no foundation in the case made in the Courts below.

MUKERJI AND MITTER J.J. This appeal has arisen from a suit which was instituted for recovery of khas possession. The plaintiffs were the holders of a jote in the Western Duars, under which there was a *chukani* tenancy held by one Chakli Bewa, under whom the defendants allege they were *darchukanidars*. The *chukani* was sold for arrears of rent and was purchased by the plaintiffs who served a notice on the defendant under sec. 167 of the Bengal Tenancy Act for annulling the encumbrance and thereafter commenced this action. The defence was that the defendants had occupancy rights in the lands and so was protected from eviction.

The suit has been decreed by both the Courts below. One of the defendants has appealed.

The appellant's contention, to put it quite shortly, is that the Courts below have misconceived the terms of the notification by which the Bengal Tenancy Act was extended to the Western Duars, and, upon an erroneous view thereof, have not tried to find out the incidents of the defendant's *darchukani* tenancy and have thus omitted to decide the real points that arise in the case.

One of the questions that were raised in the trial Court in defence to the suit was whether by reason of an order of the Deputy Commissioner, dated the 23rd October 1922, the status of the defendants was raised to that of *chukanidars*. It was pleaded that by reason of the purchase of the *chukani* by the plaintiffs, the defendants had acquired this higher

status. The contention is clearly unsupportable and it was over ruled by the trial Court and has not been pressed since then.

The main question in the case is whether the defendants who are *darchukanidars* have acquired a right of occupancy. The trial Court held that under the terms of the lease granted to the plaintiffs the latter were not entitled to create any tenancy in the lands excepting *chukani* tenancies, that the defendants' alleged tenancy was created not by the plaintiffs or their predecessors but by the *chukanidars*, the predecessors of Chakli Bewa, that the *darchukani* tenancy of the defendants was not created with the consent of the plaintiffs or their predecessors and that a *darchukanidar* in Western Duars had no right whatsoever in the lands. The Subordinate Judge, on appeal, has endorsed more or less the same view. He has held that the *jotedar* in Western Duars is in no way bound to recognise *darchukanidars*, and that according to the settlement proceedings which were approved by the Government and according to the forms approved for granting leases to *chukanidars* the latter are expressly debarred from letting out in *darchukani* lands granted to them, and so the *darchukanidar* could not acquire a right of occupancy.

The Bengal Tenancy Act (VIII of 1885) was extended to the Western Duars with effect from the 1st of January 1899, by notification No. 964 T.—R., dated the 5th of November 1898, subject to the restrictions and modifications specified in four clauses, of which clause (*iv*) which only is relevant, ran in those words :—

"Where there is anything in the said Bengal "Tenancy Act which is inconsistent with any rights or "obligations of a *jotedar*, *chukanidar*, *darchukanidar* "or other tenant of agricultural land as defined in

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"settlement proceedings, heretofore approved by "Government or with the terms of a lease heretofore "granted by Government to *jotedar*, *chukanidar*, "*darchukanidar*, *adhiar* or other tenants of agricul- "tural land, such rights, obligations or terms shall "be enforceable notwithstanding anything contained "in the said Act". The clause is not very happily worded, but its meaning is plain enough. The *darchukanidars* in the Western Duars prior to the introduction of the Bengal Tenancy Act had no recognised status; the creation of *darchukani* tenancies has been expressly forbidden in the lease granted by Government to the *jotedars* as well as in the form approved by Government to be used for granting leases to *chukanidars*, and their tenancies were altogether ignored in the settlement proceedings that were had at the instance of the Government. Prior to the introduction of the Bengal Tenancy Act in the Western Duars, the rights of the tenants were regulated almost entirely by the contracts under which they held and there could be no question of any right of occupancy accruing under any statute. The forms of leases used ever since 1888 appear to have forbidden the creation of any sub-lease by a sub-tenant under the *jotedar*. A *darchukani* tenancy created by a *chukanidar* who had no right to create the same would not be recognized by law and would not be binding on the *jotedar*. There may, however, be conceivable cases where the sub-lease in favour of a *darchukanidar* was a good and valid one, by reason of there having been no restriction in the powers of the *chukanidar* or *jotedar* as regards the creation of the *darchukani* tenancy, and to the case of such a *darchukanidar* the provisions of the Bengal Tenancy Act having applied from the 1st of January 1899, the rights and privileges of an occupancy raiyat

may have accrued. In the case of such a *darchukanidar*, the question may arise whether, notwithstanding that he holds under a *chukanidar*, he is not a raiyat, rather than an under-raiyat, and being a raiyat whether he has not acquired a right of occupancy just as any other raiyat to whom the Bengal Tenancy Act applies. On this question, the way in which the jote has been recorded in the settlement proceedings that took place prior to the Notification of 1898 would be relevant. If his tenancy has been ignored in the settlement proceedings he will have to account for the omission or prove a valid tenancy subsequent to the said proceedings. If it has been recorded in some shape or other he will obviously be in a better position.

The Courts below appear to have gone mainly, if not entirely, upon the rights of *darchukanidars* in general as recognized or rather ignored in the settlement proceedings. In so far as they have done so, they appear to have misconceived the true meaning and effect of clause (*iv*) of the Notification. For this, however, in all probability it was not the Courts but the appellant himself, who was to blame, and it is exceedingly likely that the superior ingenuity of his legal advisers in this Court has given his defence a shape in which it was not presented before. As far as can be gathered from the materials on the record the appellant seems to have heretofore contented himself with casting his lot in common with all *darchukanidars* in Western Duars and did not attempt to make out a special case for himself. It is also true that the chances of the appellant being successful in establishing a special case for himself are rather slender. But it is not possible to say that the case that is now put forward is one that is inconsistent with the averments in the written statement or one that may not be allowed to be established upon those averments.

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We are accordingly of opinion that the appellant should have a chance of establishing that he is a tenant whose tenancy is fit to be recognised in law and that as such tenant he has acquired a right of occupancy which protects him from eviction. For this purpose the origin and incidents of the appellant's alleged tenancy will have to be enquired into. The onus of proving the necessary facts will be on the appellant. Both parties will be allowed to adduce such further evidence or place before the Court such further materials as they may desire to do on this question.

As it will be convenient to have the matter decided by the lower Appellate Court having regard to the nature of the further evidence or materials, if any, that are likely to be forthcoming, we merely set aside the decision of that Court and send down the case to it for being dealt with as above.

Costs of this appeal will follow the event of the decision by the lower Appellate Court.

R. K. C.