LETTERS PATENT APPEAL.

Before Rankin C. J. and C. C. Ghose J.

HARI MOHAN MANDAL SARKAR

v.

GOUR MOHAN SARKAR.*

1929.

Feb. 12.

Tenure-holder—Raiyat—*Status, presumption as to*—*Bengal Tenancy Act (VIII of 1885), s. 5 (5).*

Where, in a suit for ejectment against a person, who had been served with notice under section 49 of the Bengal Tenancy Act, a dispute arose as to the status of the plaintiff,

held that the presumption under section 5, clause 5, is primarily to discriminate between "tenure-holders" and "*raiyats*" by dividing the purpose for which the person in question has his right to hold the land.

Section 5, clause 5, does not contemplate an enquiry as to all the lands one may possess under the same landlord or otherwise. It leaves the court free to discover by ordinary means the purpose for which the right of tenancy was originally acquired, *viz.*, by the construction of a *kabuliyat* or a *patta* or, in the absence of evidence of that kind, by an investigation of all the relevant circumstances.

All that clause 5 of section 5 does is to render this assistance to the court, that where the area is over 100 *bighas* there is a presumption that the purpose is for collecting rents and so on.

Under the Bengal Tenancy Act, there is no presumption that where a holding is less than 100 *bighas*, the holding is to be a *raiyati*.

Balunki Rout v. *Sri Kunja Behari Deb* (1) doubted.

LETTERS PATENT APPEAL, by the defendant.

The facts are briefly as follows: The plaintiff's case is that he had a *raiyati* right over 88 *bighas* of land and that the defendant is an under-*raiyat* under him, and that the plaintiff had served upon the defendant a notice under section 49 of the Bengal Tenancy Act for ejectment.

The suit was brought before the Second Munsif of Malda. The main question in issue before him was —what was the status of the plaintiff—was he a

*Letters Patent Appeal, No. 55 of 1928, in Appeal from Appellate Decree, No. 897 of 1927, decided on May 22, 1928.

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tenure-holder or was he a *raiyat?* The learned Munsif, being of opinion that the plaintiff was a *raiyat*, decreed the suit of the plaintiff.

Against this decision, an appeal was taken before the Additional Subordinate Judge of Rajshahi, who reversed the decision of the lower court. An appeal was then taken to the High Court, and was heard by Mr. Justice Mitter sitting singly, and the learned Judge reversed the decision of the Additional Subordinate Judge.

Hence this Letters Patent Appeal.

Mr. Jatindramohan Chaudhuri, for the appellant.

Dr. Bijankumar Mukherji and *Mr. Hariprasanna Mukherji*, for the respondents.

Cur. adv. vult.

RANKIN C. J. In this case, the plaintiff sued for ejectment, on the footing that the plaintiff had *raiyati* right in some 88 *bighas* and that the defendant was an under-*raiyat* under him, who had been served with notice under section 49 of the Bengal Tenancy Act, and had not given up possession when the notice took effect. The defence of the defendant is that he is not an under-*raiyat*, because the plaintiff is a tenure-holder and is not a *raiyat*. Accordingly, it has to be decided whether the plaintiff's holding of 88 *bighas* is or is not a tenure. If it is, then the defendant is clearly a *raiyat* and these proceedings in ejectment are not effective as against him.

The court of the Munsif took the view that the plaintiff's case was made out. It held that the plaintiff was shown to be a *raiyat* and that consequently the defendant was an under-*raiyat*. The Additional Subordinate Judge of Rajshahi, on appeal, took another view, holding, in particular, that there was a presumption against the plaintiff under the Bengal Tenancy Act to the effect that he was a tenure-holder.

It appears that the defendant's case was to the effect that the plaintiff, in addition to the 88 *bighas*, held further land which would bring the amount of the land held by him up to and over 100 *bighas*. The

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case that these two lettings were originally one and were subsequently divided was not proved. I cannot say that I see a clear finding anywhere to the effect that under the same landlord the plaintiff now holds over 100 *bighas*, but I shall assume for the present purpose that that might be true. The main ground on which the court of the Munsif and the court of the Subordinate Judge disagree is that the Munsif has taken the view that the holding of the plaintiff under which the defendant claims is not itself as large as 100 *bighas*: consequently he thinks that there is no presumption to assist the defendant to make out the plaintiff to be a tenure-holder.

In this Court, on Second Appeal, Mr. Justice Mitter held as follows:—"It is argued on behalf of "the appellant that the presumption under section 5 "(5) would only apply where the area held by the "tenant under a single grant is in excess of 100 "*bighas*. It seems to me that that is the correct "interpretation which ought to be put "on the provisions of section 5 "(5) of the Bengal Tenancy Act. But, even assuming that the presumption applies to a case where "the tenant is shown to be in possession of the land "in excess of 100 standard *bighas*, that presumption "is rebutted by showing that, in respect of the "tenancy in question, the tenant was holding the "land not in excess of 100 *bighas* but a smaller area "and the tenancy in question along with other lands "constituted the 100 *bighas* in possession of the "tenant." It appears to me that the second or hypothetical part of the opinion there expressed by the learned Judge is subject to grave difficulties and I am not prepared to assent to it.

The first question is whether, for the purposes of clause 5 of section 5 of the Bengal Tenancy Act, one is to look to the holding or the letting in question or one is to look to all the lands that the person in question may be proved to possess either under the same landlord or otherwise. In my judgment, the main feature of section 5 of the Bengal Tenancy Act is to

discriminate between "tenure-holders" and "*raiyats*" by dividing the purpose for which the person in question has his right to hold the land. "Tenure-holder" means primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it. "*Raiyat*" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners. It is true that regard has to be had to "local custom" as the fourth clause says, but the important matter, apart from local custom, is "the "purpose for which the right of tenancy was origi- "nally acquired." The fifth clause is expressed as follows: "Where the area held by a tenant exceeds "one hundred standard *bighas*, the tenant shall be "presumed to be a tenure-holder until the contrary is "shown." The question is—does that mean that the court is to start an investigation as to all the lands under however many different titles the tenant holds, or is the clause to be understood as referring to the particular holding or letting or tenancy that comes into question in the case? It will be observed that the Act leaves the court free to discover by ordinary means the purpose for which the right of tenancy was originally acquired. It may discover it, for example, by the construction of a *kabuliyat* or a *patta*. In the absence of evidence of that kind, it may discover it by an investigation of all the relevant circumstances. But the purpose which is the subject-matter of the enquiry is the purpose of the lessor and the lessee, to use the English phrase, in the letting in question. One has to see whether their common purpose in respect of this land was that the land should be held for collecting rents and so forth or for cultivation by the tenant himself. While the Act leaves this question to be decided by proper evidence in the ordinary way, it does give one piece of assistance to the court in its endeavour to find out the purpose;

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that is to say, where the area is over 100 *bighas*, there is a presumption that the purpose is for collecting rents and so on. As the Privy Council has explained, the idea is that in the case of a holding as large as 100 *bighas* it is not probable that the intention is that the *raiyat* should cultivate it by himself or by members of his family. There is no presumption under the Act that where a holding is less than 100 *bighas* the holding is to be a *raiyati*. The only provision of the Act is that where a holding is over 100 *bighas* the presumption is that it is to be a tenure. It is quite possible, as indeed every body knows, that a person may hold land in one place for one purpose and land in another place for another purpose. I do not think it is safe or right to take it that the legislature means more than this that the court in each case has to discover the purpose, but that where, in a particular case, it is found that the letting or holding has reference to an area in excess of 100 *bighas*, then there is a presumption that the purpose was not that the person holding should cultivate himself but was a purpose which is characteristic of a tenure. I think, therefore, having regard to the language of the clause and to the scheme of the section, that the correct construction is, in applying clause 5, to apply it to the particular letting or holding with which we are concerned and that it is not right for the purpose of ascertaining whether the presumption applies to institute an enquiry as to whether the person who holds the land in question also holds other lands from the same landlord or otherwise in other parts of the province or in the same neighbourhood. That may perhaps be useful for other purposes, e.g., when considering whether the presumption is rebutted, or in a case in which there is no presumption. The language of the fifth clause is I think directed to the particular holding upon which the question arises. Therefore, I agree with the view expressed by Mr. Justice Mitter in deciding this case. I do not know whether it will be for every possible case a satisfactory expression to say that the question is whether " the area held by a

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" tenant under a single grant is in excess of 100 " *bighas*," but the learned Judge appears to me to mean what I have endeavoured to express. If this is in any way contrary to the decisions referred to in the High Court at Patna (1), I can only say that I disagree with those decisions and I know of no authority binding upon me which is contrary to my reading of the clause. If the view which I have taken is not correct, I have already said that I am not prepared to assent to what Mr. Justice Mitter thinks would be the consequences of a contrary view. That is a purely hypothetical question which it is not necessary to enter into.

I am satisfied that the learned Judge decided correctly the Second Appeal before him and I think this Letters Patent Appeal should be dismissed with costs.

GHOSE J. I agree.

Appeal dismissed.

O. U. A.

(1) (1927) I. L. R. 6 Pat. 698.