LETTERS PATENT APPEAL.

Before Rankin C. J. and Mukerji J.

NAFARCHANDRA PAL CHAUDHURI
v.
JATINDRANATH DAS.*

1929

May 29.

*Tenancy—Fair and equitable rent—*Utbandi *tenant acquiring occupancy right—Bengal Tenancy Act (VIII of 1885), ss. 24, 180, 180A, 180B.*

An *utbandi* tenant acquiring an occupancy right would be liable to pay a fair and equitable rent, and a suit for such rent would be maintainable under section 24 of the Bengal Tenancy Act, although no proceedings had been taken under sections 180A and 180B for the purpose of fixing a uniform money rent.

LETTERS PATENT APPEAL by the plaintiffs.

The plaintiffs appellants, Nafarchandra Pal Chaudhuri and another, instituted this suit for recovery of rent alleging that they were 12 annas 16 *gandas* co-sharer landlords and the defendants were holding certain lands under them on *utbandi* basis. The plaintiffs claimed rent at uniform rates. The defence was that some of the lands were *patit* or *khicha* or *asha* lands and no rent was payable in respect of *patit* lands and the rate for *khicha* lands was 8 annas per *bigha* and for *asha* lands 6 pies per *bigha*. The learned Munsif who tried the case did not consider the plaintiffs' evidence as to rate satisfactory and, relying on the rates mentioned in the written statement of the defendant, gave a decree to the plaintiffs on the basis of those rates. The plaintiffs appealed against that to the Subordinate Judge, and he upheld the Munsif's decision. On that, appeal was preferred to the High Court and Mr. Justice Mitter hearing the appeal affirmed the judgments of the two lower courts. On that, this appeal was filed under the Letters Patent.

Mr. Amarendranath Bose and *Mr. Radhikaranjan Guha*, for the appellants.

*Letters Patent Appeal, No. 10 of 1929, under clause 15 of the Letters Patent, from a decision of Mitter J., dated Nov. 29, 1928, in S. A. 190 of 1928.

Mr. Panchanan Ghosh and *Mr. Sitangshubhushan Basu*, for the respondents.

MUKERJI J. This appeal has arisen out of a suit for rent. The plaintiffs landlords are the appellants in the appeal. In order to appreciate the contentions that have been urged in the case, it is necessary to set out the pleadings somewhat in detail.

The plaintiffs instituted the suit for recovery of rent on the allegation that they were 12 annas 16 *gandas* co-sharer landlords and that the defendants were holding certain lands under them in *utbandi* system. In the plaint, certain rates were mentioned as being the rates of rent payable by *utbandi* tenants in respect of different kinds of land and a decree for rent was prayed for on the footing that separate collections used to be made on behalf of the plaintiffs from these defendants. The main defence of the defendants was to the effect that some of the lands in suit were *patit*, *khicha* and *asha* lands, that no rent was payable for *patit* lands, that the rate for the *khicha* lands was 8 annas per *bigha* and that the rate for the *asha* lands was 6 pies per *bigha*. The trial court held that the evidence that was produced on behalf of the plaintiffs for the purpose of establishing the rates at which they claimed rent in respect of the lands in suit was not satisfactory; and, being of opinion that the defendants had succeeded in establishing that no rent was payable for the *patit* lands and that the rates for the *khicha* and the *asha* lands were what were stated in the written statement, the learned Munsif gave the plaintiffs a decree on the defendants' admission. This decree was upheld on appeal by the learned Subordinate Judge and, on a Second Appeal being preferred to this Court, my learned brother Mr. Justice Mitter has affirmed that decision. The plaintiffs have, thereupon, preferred the present appeal under the Letters Patent.

Of the two grounds that have been urged in support of the appeal, one is to the effect that the plaintiffs are entitled to a decree for fair and equitable rent as against the defendants, inasmuch as the

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defendants, by holding the lands for a continous period of twelve years, have acquired a right of occupancy and that, therefore, under the provisions of section 24 of the Bengal Tenancy Act, they are liable to pay a fair and equitable rent. This contention has been dealt with by my learned brother Mr. Justice Mitter as well as by the courts below, and has been held as being answered by the provisions of sections 180A and 180B of the Bengal Tenancy Act. It appears that the suit was not based upon an allegation to the effect that the plaintiffs were entitled to get fair and equitable rent from the defendants inasmuch as they were no longer *utbandi* tenants but had acquired a right of occupancy. Such a contention did not appear in the pleadings and it was only at the time of the argument in the trial court that it was put forward. The courts below, however, have dealt with this matter and, inasmuch as it has been argued before us, I may as well express my opinion upon it.

What is contended is that section 180 of the Bengal Tenancy Act states—and here I read only that part of the section which is relevant—"notwith-"standing anything in this Act, a *raiyat* who in any "part of the country where the custom of *utbandi* "prevails holds land ordinarily let under that custom "and for the time being let under that custom, shall not "acquire a right of occupancy until he has held the "land in question for twelve continuous years and, "until he acquires a right of occupancy in the land, "he shall be liable to pay such rent for his holding as "may be agreed on between him and his landlord." It is contended that the section provides that an *utbandi raiyat* shall not acquire a right of occupancy until he has held the land in question for twelve continuous years and that it further provides that, until he acquires a right of occupancy in the land, he shall be liable to pay such rent for his holding as may be agreed on between him and his landlord; and it is said that from this it follows, in the absence of any other provision in the Act, that, when a right of occupancy is acquired by a *raiyat* who had been an

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utbandi tenant, his status as well as all the other incidents of the tenancy are to be governed by those provisions of the Act, which deal with occupancy *raiyats*. This, in substance, is the contention that is urged on behalf of the appellants and, in support of this, what is stated is that, prior to the amendment introduced by Bengal Act X of 1923, which for the first time inserted section 180A to section 180C in the Tenancy Act, there was no provision in the Act, which could regulate the rent, *etc.*, in respect of *utbandi raiyats* who had acquired a right of occupancy. Section 180, it is said, limits the liability to pay the agreed rent until such time as the right of occupancy is acquired by an *utbandi raiyat*. Now, the courts below appear to have been of the view that, inasmuch as section 180A provides for an application to be made for the fixing of uniform annual money rent in respect of *utbandi* lands either by the landlord or by the *raiyat* and inasmuch as section 180B says that whenever an order under section 180A is passed determining a uniform annual money rent for any lands, such lands shall cease to be held as *utbandi* lands with effect from the date from which the new rent takes effect and the tenant shall hold them as an occupancy *raiyat* from the date of the order, the effect of these provisions is to lay down that, although under section 180 a right of occupancy may be acquired by an *utbandi raiyat*, he is not liable to pay a uniform money rent or a fair and equitable rent until proceedings have been taken in accordance with the provisions of sections 180A and 180B of the Act. I am of opinion that this view is not sustainable. In my opinion, there is nothing in section 180A or section 180B, which takes away the rights which are conferred by section 180 upon an *utbandi raiyat*, who has acquired a right of occupancy and, even if resort is not made to the provisions of section 180A and section 180B for the purpose of fixing a uniform annual money rent in respect of *utbandi* lands, the general liability of an occupancy *raiyat* to pay a fair and equitable rent for the lands that he holds will accrue to a person, who

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was in the position of an *utbandi raiyat* and has acquired a right of occupancy under the provisions of section 180. This view, however, would not help the appellants in the present case, inasmuch as the suit that they instituted was not one for recovery of rent in accordance with the provisions of section 24 of the Bengal Tenancy Act, but a suit for recovery of rent at rates agreed upon by all *utbandi* tenants. To have a decree for rent at fair and equitable rates, the plaintiffs will have to ask first of all for assessment of rent in a properly constituted suit with their co-sharers as parties. In view of the nature of the claim that they have put forward, the question whether they are entitled to recover a fair and equitable rent is a question which cannot arise in the present case. Although, therefore, I am not prepared to agree with the view that the courts below have taken as regards sections 180A and 180B of the Bengal Tenancy Act, I am clearly of opinion that the decree that has been passed in the present case is correct.

Another argument has been put forward to the effect that, in the judgment of my learned brother Mr. Justice Mitter, there is a passage indicating that the plaintiffs are not entitled to get any rent on account of the *patit* lands, as it has been established that by custom such rent is not payable. It has been argued before us that there is no evidence of a custom properly so-called and that the question as to whether there has been a custom to the above effect is a question which was not gone into in any of the courts below. What appears, however, is that my learned brother Mr. Justice Mitter intended to mean that there was evidence to that effect and that it was proved by the plaintiffs' evidence that no rent was, in point of fact, realized on account of the *patit* lands. I am of opinion, therefore, that there is no substance in this contention.

The result is that the appeal fails and is dismissed with costs.

RANKIN C. J. I agree

N. G.