APPELLATE CIVIL.

Before Mukherjea and Latifur Rahman JJ.

1939

April 21, 24.

ASHA MAYI BASU

v.

SARBA TOSH SEN.*

Revenue Sale—*Rights of the purchaser—Avoiding incumbrances—Exceptions* —"*Lease*" and "râiyat," *Meaning of—Bengal Land-revenue Sales Act (XI of 1859), s. 37.*

The word "lease" in the fourth exception to s. 37 of the Bengal Land-revenue Sales Act of 1859 includes a tenancy for which there is liability to pay rent, but the rent has neither been fixed nor paid.

The word "*râiyat*" in the proviso to s. 37 of the Bengal Land-revenue Sales Act, 1859, means a person who himself is a cultivator and has no application to a person who has purchased the interest of a cultivating *râiyat* but is not a cultivator himself.

Turner Morrison & Co., Ltd. v. *Manmohan Chaudhuri* (1) followed.

APPEAL FROM APPELLATE DECREE preferred by the plaintiff.

This appeal arises out of a suit in which the plaintiff as the successor-in-interest of a purchaser at a revenue-sale claimed *khâs* possession of the disputed lands on the allegation that incumbrance relating to the disputed land was annulled. The other material facts appear from the judgment.

Hira Lal Chakravarti and *Surendra Nath Basu* (*sr.*) for the appellant. The defendant is not an occupancy *râiyat*. He is the owner of a garden and not a *bona fide* agriculturist. As held by the Judicial

*Appeal from Appellate Decree, No. 1439 of 1937, against the decree of B. M. Mitra, Additional District Judge of 24-*Parganâs*, dated April 24, 1937, affirming the decree of Satish Chandra Chakrabarti, First Additional Subordinate Judge of 24-*Parganâs*, dated June 22, 1936.

(1) (1931) I. L. R. 59 Cal. 728; L. R. 58 I. A. 440.

Committee in the case of *Turner Morrison & Co., Ltd.* v. *Manmohan Chaudhuri* (1), a *râiyat* under the proviso to s. 37 of the Bengal Land-revenue Sales Act, 1859, means a person who is himself a cultivator and does not include the successor-in-interest of a *râiyat*, who is not a cultivator himself. Mere ownership of a garden does not convert a person into an agriculturist or a horticulturist. So the defendant cannot get the benefit of the proviso. As to the fourth exception, the defendant cannot get its benefit either. It is not a "lease" of land so far as the plaintiff is concerned. The disputed land appertains to three *tauzis*, *viz.*, 63, 163 and 166 of the collectorate of 24-*Parganâs*. Only *touzi* No. 166 was sold under the Bengal Land-revenue Sales Act, 1859. It is matter of no moment that the rent is said to have been paid to the proprietors of the *touzis* Nos. 63 and 163. The appellants are the owners of *touzi* No. 166 after the revenue-sale. In the settlement *khatiyân* of the land in suit no rent is even shown as fixed so far as the other proprietors are concerned. There is undoubtedly an entry therein that the land is assessible with rent. "Lease" is not synonymous with "tenancy". A lease presupposes a contract and payment of rent, which are wanting in this case so far as the proprietors of *touzi* No. 166 is concerned. I rely on the decision in the case of *Krishna Kalyani Dasi* v. *Braunfield* (2). In this case it was clearly held that the fourth exception to s. 37 of the Bengal Land-revenue Sales Act, 1859, does not protect land held without payment of rent upon which dwelling houses, manufactories or other permanent buildings have been erected or whereon gardens, plantations, *etc.*, have been made. Mere acquiescence is not lease. The facts of the case of *Sreemunt Ram Dey* v. *Kookoor Chand* (3) referred to by the trial Court are different from the facts of the present case. Again, the defendant cannot claim any protection in respect of those portions of the land in

(1) (1931) I. L. R. 59 Cal. 728; L. R. 58 I. A. 440.

(2) (1915) 20 C. W. N. 1028.

(3) (1871) 15 W. R. 481.

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suit which are not actually covered by garden, building, tank, *etc.*

Panchanan Ghose and *Bhabesh Narayan Bose* for the respondent. In the *kabâlâ* by which the predecessor of the defendant purchased the garden, to which the land in suit appertains, there is reference to a lease. The trial Court has found that the defendand is a *bona fide* agriculturist. The whole land is one tenancy. So it does not matter that no rent was paid to the proprietor of *touzi* No. 166. The decision reported in *Sreemunt Ram Dey* v. *Kookoor Chand* (1) is in favour of my contention.

The proprietor of *touzi* No. 166 acquiesced in the tenancy for a very long period.

Chakravarti, in reply.

MUKHERJEA J. This appeal is on behalf of the plaintiff and it arises out of a suit for establishment of the plaintiff's title to the extent of 7½ annas share of the land is suit and for recovery of possession of the same jointly with defendants Nos. 2 to 7.

The facts of the case lie within a narrow compass, and are for the most part undisputed. The land in suit, which is described as a garden land, is situated within *mouzâ* Dakshineswar and appertains to three *touzis*, *viz.*, *touzis* 63, 163 and 166 of the 24-*Parganâs* Collectorate. It is admitted that the lands of these three *touzis* are not demarcated and that the proprietors of *touzi* 166 have a proprietary right to an undivided 7½ annas share of the land in suit. This *touzi* No. 166 was put up to sale for non-payment of arrears of revenue and it was purchased by one Kazi Rashid Jaman on March 27, 1922, and he took possession on June 9, 1923. The legal representatives of Kazi Rashid sold the *touzi* to the present plaintiff by a registered *kabâlâ* on January

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26, 1925. The plaintiff asserts that after her purchase she annulled encumbrances and under-tenures under the *touzi* by issuing proclamations in the locality and giving notices to the holders of the various interests, and as defendant No. 1 did not give up possession of the land in dispute, she was obliged to bring the present suit.

The defendant No. 1 resisted the plaintiff's claim for eviction substantially on two grounds. In the first place he invoked the provisions of cl. (*4*) of s. 37 of Act XI of 1859, and contended that he could not be evicted as there are permanent structures, gardens and tanks on the land in suit. In the second place, his argument was that his interest was also protected under the proviso to s. 37 of the Revenue-sale Law, he being an occupancy *râiyat* and recorded as such in the Settlement Records.

The trial Court came to the conclusion that defendant No. 1 was protected under cl. (*4*) of s. 37, if not under the proviso to s. 37. The lower appellate Court has held that defendant No. 1 is entitled to protection both under cl. (*4*) of s. 37 and also the proviso to that section. It is against this decree of dismissal that the present Second Appeal has been preferred.

Mr. Chakravarti in support of the appeal has challenged the propriety of the decision of the lower appellate Court on two grounds. He has contended in the first place that defendant No. 1, who is not an agriculturist, cannot claim protection from ejectment under the proviso to s. 37 of the Revenue-sale Law. In the second place, he has argued that although there are buildings, gardens and tanks on the land in dispute, the provisions of cl. (*4*) of s. 37 are not applicable to the facts of the present case, inasmuch as defendant No. 1 did never hold the land under any lease with the proprietors of *touzi* 166.

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So far as the first point is concerned, the proviso to s. 37 of Act XI of 1859 lays down that nothing would entitle a purchaser of an entire estate to eject any *râiyat* having a right of occupancy at a fixed rate of rent or at a rent assessable according to fixed rules under the law in force. The Privy Council in *Turner Morrison & Co., Ltd.* s. *Manmohan Chaudhuri* (1) agreed with the High Court in holding that there being no definition of a *râiyat* in Act XI of 1859, it must be read in its ordinary sense of a cultivator, and the appellants in that case who were a limited company were held not to come within the definition, even though the holdings were *râiyati* holdings which they acquired by purchase. In the present case, defendant No. 1 is a wealthy inhabitant of the town who carries on business and his ancestors were obviously not people who cultivated the land, or could he said to have taken the land for purposes of cultivation. The defendant No. 1, in my opinion, is not therefore competent to invoke the proviso to s. 37 in his favour. The fact that fruits and flowers are grown on a portion of the land which is used as a garden house could not make the defendant a *bona fide* agriculturist as the learned Judge seems to have thought. The first contention of the appellant, in my opinion, succeeds.

The next question for determination is whether defendant No. 1 can claim protection under cl. (4) of s. 37. It it not disputed that there are dwelling house, garden and tanks on the plot of land in suit. Mr. Chakravarti contends that these are not enough to give defendant No. 1 any protection in law, as he did not hold the land as a lessee under the proprietors of the *touzi*. His argument is that the lease presupposes a contract between the landlord and the tenant, under which the tenant is let into exclusive possession of the land on certain terms regarding payment of rent, *etc.*, and there can be no lease unless there is a definite agreement to pay a certain amount

(1) (1931) I. L. R. 59 Cal. 728; L. R. 58 I. A. 440.

of rent. There is no lease here according to him, inasmuch as there is no evidence of any payment of rent or of a contract to pay. I do not think that this contention is sound. The word "lease" has been used, in my opinion, in the ordinary sense of a tenancy and though a tenancy must be based upon a contract either express or implied, I do not think that mere non-payment of rent is conclusive to show that there is no tenancy. It is well-known that agricultural tenancies do frequently come into existence in this part of the country without a definite stipulation as to the amount of rent payable, it being understood that the tenant would pay the amount of rent which is customary or which is fair and equitable. If a man holds land under another person with his consent either express or implied and is legally liable to pay rent to the latter for the land he holds, a tenancy, in my opinion, will be constituted, even if the amount of rent is not determined, and no rent is actually paid.

In this case the lands of the three *touzis* were not differentiated and each one of the proprietors has an undivided fractional share in the land which is the subject matter of this litigation. The defendant No. 1 is recorded as a *râiyat* under the three sets of proprietors in the Settlement Record and this means certainly one undivided tenancy under all the proprietors in respect of the land. There is no evidence undoubtedly that defendant No. 1 paid any rent to the proprietors of *touzi* 166, but his liability is not disputed, and has been definitely recognised in the record-of-rights. It is proved by the *kabâlâ*, Ex. A, that the predecessor of defendant No. 1 purchased this land as early as in the year 1862 and the recitals in the *kabâlâ* are that the vendor had acquired the land under two *mokarari pâttâs*, and also by auction purchase. There are buildings, garden and tanks on the land which have been in existence for more than seventy years, and they could not have been there without the consent of the landlords. Having regard to the circumstances, I am unable to hold that there

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was no tenancy held by defendant No. 1 under the proprietors of *touzi* 166.

In these circumstances, I hold that defendant No. 1 was holding the land as a lessee under the proprietors of *touzi* 166, even if there was no evidence of payment of rent, and as there is no dispute that the other conditions of cl. (*4*) of s. 37 of the Revenue-sale Law are complied with, he is protected from eviction. The result it that the appeal fails and is dismissed, but without costs.

LATIFUR RAHMAN J. I agree.

Appeal dismissed.

N. C. C.