APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1882 *April* 14.

NARAIN ROY (DEFENDANT) *v.* OPNIT MISSER AND OTHERS (PLAINTIFFS).*

Right of Occupancy, Conditions necessary for acquiring—Non-payment of Rent—Beng. Act VIII of 1869, *ss.* 6, 22 *and* 52.

Two conditions only are necessary for the acquiring of a right of occupancy, *viz.*, (1), the cultivation or holding of land for a period of twelve years; and (2), that the person holding or cultivating the land should be a ryot.

The essential conditions of s. 6, Beng. Act VIII of 1869 are fulfilled without showing the payment of rent, that only being a condition necessary for the maintaining of the right when created.

In a suit brought to evict a tenant who had been in possession of certain land for a longer period than twelve years, when it was shown that rent had not been paid, and notice to quit had been given—

Held, that a right of occupancy had been acquired, and that the ryot had the power to prevent forfeiture under the provisions of s. 52, Beng. Act VIII of 1869.

THIS was a suit brought by the plaintiffs to evict the defendant and obtain khas possession of certain land after serving him with a notice to quit. The facts of the case are sufficiently stated in the judgment of the Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Shreesh Chunder Chowdhry* for the appellant.

Mr. *Branson*, Baboo *Chunder Madhub Ghose* and Baboo *Aubinash Chunder Banerjee* for the respondents.

The following judgments were delivered by the Court (MITTER and MACLEAN, JJ.)

MITTER, J.—The land in dispute in the possession of the defendant in this case amounts to 13 bighas out of an area of 78 bighas. The whole of the 78 bighas at the time of the thakbust in the year 1864, was the subject-matter of

* Appeal from Appellate Decree No. 1692 of 1880, against the decree of T. D. Beighton, Esq., Officiating District Judge of Shahabad, dated the 4th June 1880, affirming the decree of Baboo Bhugobutty Churn Mitter, First Munsiff of Arrah, dated the 7th February 1880.

a dispute between the Maharajah of Domraon on the one hand, and Dewan Ram Jewan Singh and Ram Coomar Singh on the other. The former claimed it as a part of Chuk Nowrunga, which is in the district of Gazeepore, and the latter as part of Baharwar in the district of Shahabad. The land in question was entered in the survey map as part of Baharwar.

The plaintiffs seek to evict the defendant after serving him with a notice to quit.

In September 1876 two suits were brought (one by the plaintiffs Nos. 1 to 4, and the other by the plaintiff No. 5), to recover possession of the whole of the aforesaid 78 bighas against the present defendant and several other persons. It was alleged by the plaintiffs that the defendants were trespassers, who had, under the color of some favorable orders passed by Criminal Courts, taken possession of the disputed land in the year 1283 (1876-77.)

The defendants took exception to the form of the suit on the ground that they were separately in possession of separate plots of land, and that they should not have been sued jointly in one suit. On the merits they alleged that they were in possession of the land as tenants and not as trespassers.

The plaintiffs obtained decrees in the lower Court which were confirmed on appeal. Two special appeals were preferred to this Court, and it was urged on behalf of the (defendants) appellants that the suits should have been dismissed both on the grounds of multifariousness as well as of limitation.

A Division Bench of this Court decreed these appeals. The learned Judges were of opinion that, although the suit, as framed, was bad on the ground of multifariousness, yet the defendants were not prejudiced thereby. They further held that as the defendants had held the land in dispute *as tenants* from 1265 (1858-59), limitation could not be set up against the landlords. But they dismissed the suits upon the ground that the defendants having been in possession as tenants could not be evicted by suits brought on the allegation that they were trespassers.

Then the plaintiffs joined together and brought this and five other suits giving to the defendants in Baisak 1286 (April-May 1879) notices to quit.

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The defendants contend that they are guzashta tenants, and therefore cannot be ejected otherwise than under the provisions of s. 52, Beng. Act VIII of 1869.

They allege that the whole of the 78 bighas is part and parcel of 200 bighas which formed their guzashta holding in Mouzah Sarenda, the property of the Maharajah of Domraon. That by the action of the river Ganges the 78 bighas remained submerged for a certain time. That when the land re-appeared Dewan Ram Jewan Singh and Ram Coomar Singh claimed it as appertaining to Baharwar, a mouzah contiguous to Sarenda. The Maharajah did not choose to claim it as part of Sarenda, but alleged that it appertained to Chuk Nowranga. The thakbust authorities ultimately decided the dispute in favor of the Dewans. That at the time of the settlement in the year 1868 it was treated as *towfir* land of Baharwar, and was settled with Dewan Ram Jewan and Ram Coomar, their (the defendants') rights as cultivators being recognized. They further alleged that they were always willing to pay to the settlement-holders the proper rent due, but it was not received, the landlords demanding higher rents. They admit that the rent was not deposited in Court as provided by law.

The Munsiff decreed the suits, holding that the defendants could not plead right of occupancy, as they, upon their own showing, had not paid any rent on account of the land in dispute either to the plaintiffs or to the *maliks*. The District Judge has upheld the decrees upon the ground that the defendants had failed to prove possession of the identical land now in dispute for more than twelve years.

It is clear that the ground taken by the District Judge is untenable. In the former suit this Court came to the conclusion that the defendants were, upon the judgments of the lower Courts, found to have been in possession of the land in dispute from 1265 (1858-59). Therefore the fact that they held the disputed land as tenants of the plaintiffs and their lessors for more than twelve years was conclusively found in the former litigation. The learned Counsel for the plaintiffs fairly admitted this; but he contended that the Munsiff's view of the law is correct, and that the payment of rent is a condition precedent to a ryot's acquiring a right of occupancy.

Several cases were cited in the course of the arguments; but it seems to us that none of them contain any authoritative ruling upon this point. They contain mere expressions of opinion supporting either the one or the other view of the question.

Neither have we been able ourselves to find any case in point. The question, therefore, comes on for decision for the first time before us.

We are of opinion that the decision of the Munsiff upon this point is not correct. Section 6, Act VIII of 1869, says: "Every ryot who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same." It is clear from the language of the section that for the acquiring of the right of occupancy two conditions only are necessary, *viz.*, (1), the cultivation or holding of land for a period of twelve years; and (2), that the person holding or cultivating the land should be a ryot. No doubt in many cases the fact of non-payment of rent would be a valid ground for holding that the land was held not as a *ryot* but as a trespasser. But where, notwithstanding non-payment of rent, the holding or cultivation as a ryot is established for twelve years, the essential conditions of the section are fulfilled. The Munsiff was of opinion that the words "so long as he pays the rent payable on account of the same" show that the payment of the rent is an essential requisite for the acquiring of the right of occupancy. But he is mistaken in this, because the section says that a ryot, &c., shall have a right of occupancy so long as he pays the rent, &c., *i.e.*, a ryot who fulfils the two conditions mentioned above shall have a *right to occupy* the land (which means he cannot be evicted against his will) so long as he pays rent, &c. Therefore, the acquiring of a right of occupancy is dependent only upon the two conditions mentioned above, but the *maintaining* of it is further dependent upon another condition, *viz.*, payment of rent.

It was contended that it would be anomalous to hold that, although a right of occupancy may be acquired by a ryot who has not paid any rent, yet the moment it is acquired it would be extinguished if the payment of the rent be withheld. But

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reading s. 6 along with ss. 22 and 52 of the Rent Act, it would appear that the construction we adopt is not open to this objection. No doubt non-payment of rent works as a forfeiture of the rights of occupancy and renders a ryot, whether he has a right of occupancy or not, liable to be evicted (see s. 22). But a ryot having a right of occupancy cannot be evicted otherwise than in execution of a decree or order under the provisions of the Rent Act. Therefore, before a landlord can really reap the benefit of the forfeiture of a right of occupancy incurred by non-payment of rent, he must bring a suit to eject the ryot, and whenever such a suit is brought, the ryot will have the power to prevent the forfeiture by paying the arrears of rent under the provisions of s. 52. In this respect s. 52 makes no difference between an occupant and non-occupant ryot. Both have the same privilege of preventing eviction by the payment of the arrears of rent within a certain time.

For these reasons we are of opinion that the defendants are ryots possessing a right of occupancy. The decrees of the lower Courts are, therefore, set aside, and the plaintiffs' suit dismissed with costs throughout.

This judgment governs Ap. Ap. Decrees Nos. 1693 to 1697.

MACLEAN J.—I concur in dismissing the plaintiff's suits.

The position of the defendants as tenants since 1265 (1858-59) is conclusively established by the decision of this Court, dated 23rd July 1877; and, although there are some passages in that decision which may have led the plaintiffs to suppose that the defendants could not successfully set up a right of occupancy, I am unable to find authority for the proposition that an occupancy tenant (ryot) who, from any cause, has not paid his rent during his occupancy, can be ejected save under a decree for arrears. It seems clear to me that an occupancy right is "the right resulting from the connexion between the occupying tenant and the land which he occupies for a space of twelve years." *Narendra Narayan Roy Chowdhry* v. *Ishan Chandra Sen* (1). It is no doubt true that the right which is *acquired* by occupation as a tenant must be *maintained* by payment of rent, and

(1) 13 B. L. R., 274, see p. 289 per Jackson, J.

that on "the tenant failing to do so either from inability or from unwillingness the possession returns to the proprietor, the contract between him and his tenant being no longer in force; *Prosono Koomar Tagore* v. *Rammohun Doss* (1). But the law provides for the re-entry of the landlord in a particular manner, *viz.*, by ejectment upon a decree for arrears under the provisions of s. 22, Beng. Act VIII of 1869, subject however to the occupying tenant's privilege of avoiding the ejectment by payment within fifteen days of (s. 52, Beng. Act VIII of 1869.)

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In this view of the law I find that the defendants are not liable to be ejected under notice.

Appeal allowed.

Before Mr. Justice Wilson and Mr. Justice Field.

FUTTEHMA BEGUM AND OTHERS (PLAINTIFFS) *v.* MOHAMED AUSUR AND OTHERS (DEFENDANTS).*

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August 1.

Second Appeal—Findings of fact—Procedure of the High Court—Interest—Mortgage bond.

Where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere incidental mistake, but totally to misconceive the case, the High Court will interfere in second appeal, though it is not the ordinary course of procedure for it to interfere in such cases with any findings of fact which have been arrived at by the lower Appellate Court.

In a suit on a mortgage bond the plaintiffs are entitled to recover the agreed rate of interest without any deduction.

THIS was a suit for the recovery of Rs. 1,000 as principal, and a further sum as interset due on a bond executed by defendant No. 1, Mohamed Ausur, and his deceased wife Shurifunnissa Bibi on the 29th Choitro 1274, corresponding with the 10th April

* Appeal from Appellate Decree No. 496 of 1881, against the decree of T. M. Kirkwood, Esq., Judge of Mymensing, dated the 29th December 1880, reversing the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of that district, dated the 29th March 1880.

(1) S. D. A., 1855, p. 14.