

Before Mr. Justice Mitter and Mr. Justice Maclean.

1884

March 18.

FAKIR CHAND (PLAINTIFF) v. FOUZDAR MISSER (DEFENDANT)*

Landlord and Tenant—Suit for arrears of rent—Ejection—Transferable tenure—Bengal Act VIII of 1869, ss. 22, 59.

In a suit for arrears of rent and for ejection by a landlord against a tenant who had a right of occupancy in the holding transferable by sale,

Held (MITTER, J., doubting), that the tenant was not liable to ejection, and that the landlord's only remedy was to sell the holding under the provisions of s. 59, Beng. Act VIII of 1869. *Krishtendra Roy v. Ansa Bewa* (1) followed.

Per MITTER, J.—*Quære*, whether having regard to the provisions of s. 22, Act VIII of 1869, which is not controlled or modified by any subsequent section of the Act, all ryots, whether they have a right of occupancy or not, and whether such right of occupancy be saleable by the custom of country or not, are not liable to ejection if an arrear of rent remains due at the end of the year.

THE plaintiff in this suit sought to recover the sum of Rs. 24-5-9, being principal and interest for arrears of rent in respect of some 32 bighas of land situate in mouza Parasim Pranpore at the annual jama of Rs. 141-1-3 for the year 1288 F.S. He also sought to eject the defendant from the land.

The defendant, while admitting that he held the land, contended that the jama payable by him was only Rs. 138-5-3 per annum; and that out of this amount the plaintiff allowed a remission of Rs. 5-12; that he had already paid Rs. 118, and that only Rs. 14 were due from him. He further contended that he was not liable to be ejected from his holding.

The following issues were framed :—

- (1.) What is the annual jama payable by the defendant to the plaintiff?
- (2.) What amount of rent is the defendant entitled to by way of remission?
- (3.) Is the defendant liable to be ejected?

The first Court found the two first issues in favor of the plaintiff,

*Appeal from Appellate Decree No. 2772 of 1882, against the decree of J. Tweedie, Esq., Judge of Shahabnd, dated September 12th 1882, affirming the decree of Bahoo Dwarka Nath Bhattacharji, Second Munsiff of Arrah, dated January 19th, 1882.

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and on the third issue, upon the evidence, found that the defendant's jote was transferable, and that the plaintiff was not entitled to a decree for ejectment.

The plaintiff then appealed against that portion of the decree which declared that the defendant was not liable to be ejected, but the lower Appellate Court confirmed the decision of the lower Court, holding that an order for ejectment could not be passed in the case of such a tenure, and that it must be brought to sale.

The plaintiff thereupon specially appealed to the High Court on the same grounds as those upon which his original appeal was based.

Baboo *Aubinash Chunder Bannerjee* for the appellant.

Baboo *Rash Behary Ghose* and Baboo *Ragnundun Pershad* for the respondent.

The judgment of the High Court (MITTER and MACLEAN, JJ.) was as follows :—

MACLEAN, J.—The lower Appellate Court has found, affirming the finding of the first Court, that the defendant-respondent holds a transferable tenure and therefore cannot be ejected under the provision of s. 52, Beng. Act VIII of 1869.

The question submitted for our decision is whether a landlord is precluded from ejecting such a tenant, *viz.*, a tenant with a right of occupancy, such right being transferable by sale, and is confined to the course laid down in s. 59 of the Act.

In the case of *Tirbhobun Sing v. Jhono Lall* (1) it was explained that sale, and not ejectment, was the landlord's proper remedy. In the later case of *Krishtendra Roy Chowdhry v. Anna Bewa* (2) the very question now raised seems to have been discussed, and the decision was against the right of the landlord to eject. The decision under appeal now is in accordance with the cases I have quoted, and should, in my opinion, be confirmed. I would, therefore, dismiss the appeal.

MITTER, J.—If the question for decision in this case were *res-integra*, I should hesitate much to adopt the conclusion to which the lower Courts have come. Section 22 of Beng. Act VIII

(1) 18 W. R., 206. (2) I. L. R., 8, Cal., 675; 10 C. L. R., 399.

of 1869 says: "When an arrear of rent remains due from any ryot at the end of the Bengalee year or at the end of the month of Jayt of the Fuslee or Willayuttee year, as the case may be, such ryot shall be liable to be ejected from the land in respect of which the arrear is due: provided that no ryot having a right of occupancy or holding under a pottah, the term of which has not expired, shall be ejected otherwise than in execution of a decree, or order under the provisions of this Act."

It is clear, therefore, that all ryots, whether having a right of occupancy or not, and whether such right of occupancy be saleable by the usage of the country or not, are liable to ejection if an arrear of rent remains due at the end of the year. This provision is not controlled or modified by any subsequent section. Upon the Act itself, therefore, the soundness of the conclusion to which the lower Courts have come is open to doubt. But as there is no conflict of authority on this point, and as it has been understood that the law has been settled in the way in which the lower Court's decision goes, I concur in dismissing the appeal with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

FAZAL IMAM AND OTHERS (DECREE-HOLDERS) v. METTA SINGH
(JUDGMENT-DEBTOR).*

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March 20.

Decree—Execution—Step in aid of execution—Limitation—Limitation Act XV of 1877, Sch. II Art. 179, Cl. 4.

An application made by a judgment-creditor to take out of Court certain monies, the sale proceeds realized by the sales of certain properties of his judgment-debtor in a previous execution, cannot be considered to be an application to the Court to take a "step in aid of execution," and is not therefore within the meaning of cl. 4, Art. 179, Sch. II of Act XV of 1877.

Hem Chunder Chowdhry v. Brojo Soondury Debts (1); Venkatarayalu v. Narasimha (2) dissented from.

* Appeal from Appellate Order No. 409 of 1883, against the order of G. B. Garret, Esq., Judge of Patna, dated 26th of September 1883, affirming the order of Baboo Sharoda Pershad Ghose, Munsiff of Behar, dated the 17th of July 1883.

(1) I. L. R., 8 Calc., 89.

(2) I. L. R., 2 And., 174.