Before Mr. Justice Tottenham and Mr. Justice Agnew.

1885 *June 25.*

RADHA GOBIND KOER (DEFENDANT) *v.* RAKHAL DAS MUKHERJI (PLAINTIFF).*

Landlord and Tenant—Ejectment—Notice to quit—Evidence—Title of auction-purchaser at sale for arrears of revenue—Proceedings in suit at instance of defaulting proprietor—Subsequent suit by auction-purchaser as against him—Right of occupancy—Effect of purchase of land by zemindar upon right of occupancy acquired by ryot.

There is no authority for the proposition that a notice to quit to a ryot other than an occupancy ryot must terminate at the end of a cultivating year or be a three months' notice. Such ryot is only entitled to a "reasonable" notice, and such as will enable him to reap his crop; what is a "reasonable" notice is a question of fact to be decided in each case, having regard to its particular circumstances, and the local customs as to reaping crops and letting land.

An auction-purchaser at a sale for arrears of Government revenue does not derive his title from the defaulting proprietor, and proceedings between the defaulting proprietor and third parties with respect to the title to the land are not admissible in evidence in a subsequent suit brought by the auction-purchaser as against him.

The right of occupancy is a right given to a ryot continuing only so long as the ryot pays rent for the land he holds, and though it cannot be affected by a wrongful eviction, still when the zemindar acquires the land by purchase and takes possession, even in the *benami* name of a third party, seeing that he cannot pay rent to himself, the right is gone and cannot subsequently be revived.

IN this case the plaintiff sued for *khas* possession of certain lands on establishing his *mal* title thereto, and at the same time offered to allow the defendant to occupy them as his tenant on payment of a proper amount of rent, and to grant him a *potta* in return for a *kabuliat*.

The lands in suit consisted of a zemindari called Nundipur, and the plaintiff alleged that it had been sold for arrears of Government revenue in 1281 (1874-75) under the provisions of Act XI of 1859, and purchased on the 4th Choitro (17th March

* Appeal from Appellate Decree No. 810 of 1884, against the decree of T. D. Beighton, Esq., Judge of Burdwan passed in review, dated the 8th of February 1884, reversing his own decree, dated the 9th of May 1883, and of Baboo Bhupati Rai, Subordinate Judge of that District, dated the 11th of March 1881.

1875) of that year, by the Maharajah of Burdwan who on the 3rd Assin 1283 (18th September 1876) granted him, the plaintiff, a *putni* lease. The plaint went on to state that the lands in suit had formerly been the zemindari of one Sham Lal Ghose, who had either let them out or cultivated them in *nij-jote*, and the defendant was in occupation of them without any right or title; that even if the defendant had any right to them, he the plaintiff was entitled to eject him, and with that object he had served a notice on the 26th Magh 1286 (8th February 1880) requiring him to give up possession or to take a *pottah* at a fair rent.

The defendant did not comply with the terms of that notice, and the plaintiff, therefore, instituted this suit on the 26th June 1880.

The defendant stated that the lands in suit consisted of 36 plots. As regards plots 1 to 19 he alleged that he was in possession of them by paying rent therefor inasmuch as the plaintiff on the 24th Pous 1284 (7th January 1878) served a notice on him for assessment of rent, and took certain money deposited by him on account of rent, and that, therefore, as regards those plots, the plaintiff was now estopped from suing to eject him. And he further alleged that the Maharajah of Burdwan had previously received rent from him for them and recognised him as tenant.

He further stated that plots 1 to 11 had formed a portion of the holding of his maternal great grandfather Kamala Kant Koer; on Kamala Kant Koer's death they came into the possession of Baidya Nath Koer his grandfather, who held them jointly with Nund Kumar Koer his brother while alive, and alone after his death, under right of inheritance, and on the death of Baidya Nath Koer his mother Jugut Monmohini Dasi got possession, and on her death he, the defendant, succeeded and had held possession since.

As regards plots 12 to 19 he stated that they had formerly stood in the name of Gunga Gobind Koer, and had been acquired by purchase by Baidya Nath Koer on the 6th Falgun 1222 (1816) under a *kobala* in the name of one Madhub Chunder

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Koer, and that they had descended to him in the same manner as plots 1 to 11.

In respect of these two plots the defendant claimed to have acquired a right of occupancy, and that as the relationship of landlord and tenant existed between him and the plaintiff, the latter was not entitled to eject him.

As regards plots 20 to 36, the defendant claimed them as lakheraj, and alleged that they had descended to him from his grandfather Baidya Nath Koer. The defendant further alleged that in the year 1270, while he was a minor, one Sham Lal Ghose, a talukdar, had unjustly ousted his mother from the properties now in suit, and that on his mother's death his guardian Nobin Chunder Koer in 1873 brought a suit against Shama Sundari Dasi, guardian of Onath Bundhu Ghose, the minor heir of Sham Lal Ghose, then deceased; that such suit was referred to arbitration, and a decree was passed on the award of the arbitrators, by virtue of which the defendant recovered possession of the property. And he pleaded that the present suit was barred under s. 13 of the Civil Procedure Code, by reason of that suit having taken place between him and the predecessor in title of the plaintiff.

Lastly he pleaded that the notice of the 26th Magh 1286 (8th February 1880) served on him by the plaintiff was insufficient.

The first Court held that the auction-purchaser at a revenue sale does not represent the late proprietor, and therefore that the suit was not barred under s. 13 by reason of the arbitration proceedings and decree thereon; that the relationship of landlord and tenant existed between plaintiff and defendant as regards plots 1 to 19, and that the defendant had acquired a right of occupancy therein, and that consequently the plaintiff was not entitled to eject him and obtain *khas* possession.

As regards plots 20 to 36 the Court held that it was for the plaintiff to prove that the land was *mal*, that the decree upon the arbitrators' award, though not a bar, was still admissible in evidence against the plaintiff as to the character of the defendant's title to the land, and that the evidence, oral and documentary, in the case clearly proved that these plots were the defendant's

ancestral lakheraj property. Upon these findings the plaintiff's suit was dismissed.

The lower Appellate Court held that the decision in the arbitration proceedings was not a bar to the suit, and that the proceedings and decree were not admissible in evidence against the plaintiff upon the authority of the decisions in *Moonshee Buzlool Rahaman* v. *Pran Dhan Dutt* (1); *Goluck Monee Dossee* v. *Huro Chunder Ghose* (2); *Kooldeep Narain Singh* v. *Government of India* (3); and the Full Bench decision in *Gujju Lall* v. *Fatteh Lall* (4). And it reversed the decision of the lower Court upon the finding that the defendant had acquired a right of occupancy in plots 1 to 19. Upon the question as to whether plots 20 to 36 were or were not lakheraj, the lower Appellate Court confirmed the decision of the Court below.

The lower Appellate Court passed a decree declaring that the defendant had no right of occupancy in the lands claimed as *mal*; that the plaintiff was not, however, entitled summarily to eject him; and confirming the defendant's title to the lands described as lakheraj.

Subsequently the plaintiff applied for a review of that decree in order to have the words restricting his right to eject the defendant from the *mal* lands struck out of the decree, and upon that application the District Judge held that it was for the defendant to prove that the notice to quit was unreasonable; that no evidence had been offered as to the condition of the crops or custom of the country, but that the defendant had confined himself to setting up a right of occupancy in which he had failed; and that in the absence, therefore, of any evidence, he could not hold that the notice was unreasonable. The decree was accordingly amended.

Against that decree the defendant now preferred a special appeal to the High Court, upon the following grounds amongst others:—

That the notice to quit was insufficient and was bad, in that it did not terminate with the end of the year.

That the lower Court was wrong in throwing the onus of proving its insufficiency on him.

(1) 8 W. R., 222.
(2) 8 W. R., 62.
(3) 11 B. L. R., 71.
(4) I. L. R., 6 Calc., 171.

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That the Court below had erred in holding that the arbitration proceedings and judgment therein were not admissible in evidence, and that the defendant had not acquired a right of occupancy in the *mal* land.

The plaintiff filed a cross-appeal against the findings that plots 20 to 36 were the defendant's lakheraj lands.

Baboo *Rashbehari Ghose*, Baboo *Jogesh Chunder Dey* and Baboo *Kali Charan Banerji*, for the appellant.

Baboo *Hem Chander Banerji*, Baboo *Bhairub Chunder Banerji*, and Baboo *Bassunt Coomar Bose*, for the respondent.

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

The plaintiff in this case is the *putnidar* of a taluk called Nundipur, from which he seeks to eject the defendant. It appears that the estate formerly belonged to one Ramlochun Ghose, who, in 1203 (1796), sold it by a *kobala* to one Komola Kant Koer. Komola Kant Koer was succeeded by Baidya Nath Koer, whose name was recorded as proprietor. The property remained in the possession of the Koers up to the year 1270 (1863), when it was sold for arrears of revenue, and purchased by one Sham Lal Ghose, and the Koers were ousted. The defendant was then a minor. His guardian Nobin Chunder Koer subsequently brought a suit to recover possession of the property against Shama Sundari Dasi, the guardian of Onath Bundhu Ghose, the heir of Sham Lal Ghose. This suit was referred to arbitration, and the arbitrators by their award found that six bighas of lakheraj land were excluded from the plaintiff's claim; but that the rest of the lakheraj land, including all the lands in dispute in the present suit, belonged to him, and that the *mal* lands also belonged to him, and in 1280 (1873) he was put into possession.

In 1283 (1876) the estate was again sold for arrears of revenue and was purchased, free from incumbrances, by the Maharajah of Burdwan, who let it in *putni* to the present plaintiff. The plaintiff alleges that the lands now in dispute are *mal* lands within the zemindari, and that they were held by Sham Lal in *nijjote* On the 26th Magh 1286 (8th February 1880) the plaintiff served the following notice to quit on the defendant:—

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"You are in possession of 43 bighas without any legal grounds. You have no right or title to occupy the said land, and I am entitled to eject you from it. You are therefore informed that you must within thirty days of the service of this notice on you, quit the land, or you may, if you like, enter into an engagement with me and execute a *kabuliat* with me, agreeing to pay a proper rent. If you do not do either, I shall institute a suit to eject you."

The present suit was instituted on the 13th Assar 1287 (26th June 1880).

The defendant stated that the zemindari consisted of 36 plots, of which plots 1 to 11 belonged to a holding in the name of Komola Kant Koer; that plots 12 to 19 were originally held by one Gunga Gobind Koer who sold them to Baidya Nath Koer on the 6th Falgun 1222 (1816) in the *benami* name of Madhub Chunder Koer. At that time it is alleged by the defendant that Gunga Gobind Koer had acquired a right of occupancy in these plots, and the defendant contended that, as he and his ancestors had held possession of these plots for more than twelve years, he had acquired a right of occupancy in them. Plots 20 to 36, the defendant stated, were lakheraj lands.

The Subordinate Judge dismissed the suit. He held that the decree in the arbitration suit did not operate under s. 13 of the Civil Procedure Code as a bar to the present suit, but he held that the plaintiff had recognized the relation of landlord and tenant existing between himself and the defendant as to plots 1 to 19, and that the defendant had a right of occupancy in those plots; and further that the plots 20 to 36 were the defendant's lakheraj.

The District Judge modified this decree. He held that the decision in the arbitration suit did not operate as *res judicata*, and was not admissible in evidence against the plaintiff. He further held that the defendant had not acquired a right of occupancy in the lands claimed by him as *mal*, and he reversed the Munsiff's decree on this point.

The first question that arises is as to the sufficiency of the notice. For the plaintiff it was contended in the first place that the defendant was a trespasser, and that therefore no notice at all was necessary. Apparently before the *putni* was granted the

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Maharajah received rent from the defendant. And after the *putni* was granted the plaintiff served the defendant with notice of enhancement, but nothing further was done. The District Judge finds that the defendant never attorned to the plaintiff or paid him rent. We think however that the tenancy acknowledged by the Maharajah continued, and that the defendant cannot now be treated as a trespasser.

We were not referred to any precise authority on the question as to what notice a tenant not having a right of occupancy is entitled to. It was argued for the defendant that three months' notice must be given, and that the notice must be to quit at the end of the month of Cheyt. We do not think that the cases to which we have been referred bear out this argument. In *Janoo Mundur* v. *Brijo Singh* (1) all that was decided was that such a tenant is entitled to a reasonable notice to quit, and that the notice served being a three months' notice was reasonable. But it does not decide that a less notice is unreasonable. And in *Surjomonee Dossee* v. *Pearee Mohun Mookerji* (2), it was decided that where the holding of a ryot is of such a nature that he cannot be ejected without a reasonable notice to quit at the end of the year, he is entitled to have a suit for ejectment dismissed on the ground that he has had no such notice. This case also does not decide what is a reasonable notice.

In *Jubraj Roy* v. *Mackenzie* (3) the notice was to quit within thirty days at a time when the crops were ripening. The Subordinate Judge held that the notice had been given at an improper time and his decision was affirmed. Sir Richard Garth, C.J., said: "I think the notice should have been a reasonable one to terminate the tenancy at the end of the fresh year. The Subordinate Judge probably knows better than we do what would be a reasonable notice to quit in that part of the country." Prinsep, J., said: "It is unfortunate that the law should not have defined when a tenant, having no permanent right, can be called upon to vacate his holding, and what notice should be given to him; but I think that, following the rule for notices of enhancement, the notice served on the 25th February and giving thirty

(1) 22 W. R., 548. (2) 25 W. R., 331.

(3) 5 C. L. R., 231.

days notice has neither been served at a proper time of the year, nor has it given a sufficient time. I do not mean to say that a notice to quit may not be served at any time during the year, but it must give a sufficient interval to the tenant to vacate, and if served in the middle of the year when it would disturb all cultivation, it would not be a proper notice, unless it gave a time for leaving the tenure when the cultivation shall have come to an end." In *Ram Rutton Mundul* v. *Netro Kally Dassee* (1) a ten days' notice was held to be insufficient. The question was also considered in the cases of *Prosunno Coomaree Debea* v. *Rutton Bepary* (2) and *Jugat Chunder Rai* v. *Rup Chand Chango* (3), and in both of these cases the Court abstained from laying down any precise rule. In the first case Sir Richard Garth, C.J., says: "The truth is, that the terms of a holding as between landlord and tenant must always be matter of contract either express or implied. If they enter into an express agreement of tenancy either written or verbal, such agreement generally defines the terms of his holding. If, on the other hand, a tenant is let into possession without any express agreement, and pays rent, he becomes a tenant-at-will, or, from year to year; or in other words, holds by the landlord's permission upon what may be the usual terms of such a holding by the general law, or by local custom, and in such a case he is, of course, liable to be ejected by a reasonable notice to quit." In the other case the Court (McDonell and Field, JJ.) said: "What is reasonable is a question of fact which must be decided in each case according to the particular circumstances, and the local customs as to reaping crops and letting land." In this last mentioned case the notice expired within seven days of the close of the year, and it was not held to be bad upon that account.

There is not, therefore, so far as we are aware, any authority for the proposition that a notice to quit to a ryot other than an occupancy ryot must terminate at the end of the cultivating year, and must be a three months' notice. The cases do not, it seems to us, go further than this, that such a ryot is entitled to a

(1) I. L. R., 4 Calc., 339.
(2) I. L. R., 3 Calc., 696.
(3) I. L. R., 9 Calc., 48; 11 C. L. R., 143.

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reasonable notice to quit, to such a notice as will enable him to reap his crop; and that what is a reasonable notice is a question to be decided in each case upon a consideration of the particular circumstances, and the local customs as to reaping crops and letting land.

In this case an issue was raised as to whether the notice was reasonable. The Subordinate Judge did not come to any finding on the issue, but the District Judge says that no evidence was given to prove that the condition of the crops on the land or the custom of the country was such that the defendant was entitled to a longer notice, and he finds that the notice was reasonable. Under these circumstances we do not think we should interfere with his decision on this point.

The next ground of appeal was that the lower Court was in error in refusing to admit as evidence against the plaintiff, the judgment and award in the arbitration suit. In order that a decree in a previous suit may operate in a subsequent suit as *res judicata* the previous suit must have been between the same parties or persons through whom they claim. Then the question is whether an auction-purchaser at a sale for arrears of revenue can be said to claim through the defaulting proprietor? The case of *Tara Prasad Mittra* v. *Ram Nrisingh Mittra* (1) to which we were referred on behalf of the appellant, is not we think an authority to show that he does. It is an authority for saying that the purchaser of a *putni* tenure sold at the suit of the landlord is not entitled to set at naught all decisions arrived at against the defaulting *putnidar*, and that he can only acquire rights higher than an ordinary purchaser by private contract to the precise extent to which such privileges are conferred by express terms of law. That is to say, he is not entitled to claim the extraordinary privileges conferred by the Revenue Sale Law upon an auction-purchaser at a sale for arrears of revenue. And the case of *Moonshee Buzlool Rahaman* v. *Pran Dhan Dutt* (2) is a distinct authority against the appellant. There the Court said: "The plaintiff, as purchaser of the rights of Government in the taluk, is not privy in estate to the defaulting

(1) 6 B. L. R., Ap., 5; 14 W. R., 283.
(2) 8 W. R., 222.

proprietor. He does not derive his title from him, and is bound neither by his acts nor by his laches. This is the doctrine, which, with reference to the sale laws and to public policy as regards the Government revenue, our Courts have invariably enforced and adopted in all these cases. The plaintiff, as auction-purchaser, is bound by no limitation which would not bind or affect the Government." We think, therefore, that the District Judge was right in refusing to admit the proceedings in the arbitration suit as evidence against the plaintiff.

Then it was argued that the District Judge was wrong in holding that the defendant had not acquired a right of occupancy in the lands claimed as *mal, viz.*, plots 1 to 19. As to plots 1 to 11, which were purchased by Komola Kant Koer in 1203, it was argued that the defendants had been wrongfully evicted in 1270 by Sham Lal Ghose, and that on the authority of *Luteefunissa Bibee* v. *Pulin Behari Sein* (1), and *Mahomed Gazee Chowdry* v. *Noor Mahomed* (2), the period during which he was so evicted would not be such an interruption of his possession as would prevent him from acquiring a right of occupancy, and that he was entitled to compute such period towards the twelve years required to establish the rights. And as to plots 12 to 19 which had been sold in 1222 by Gunga Gobind Koer to Baidya Nath Koer in the *benami* name of Madhub Chunder Koer, it was argued that Gunga Gobind Koer had acquired a right of occupancy before the sale to Baidya Nath who was the proprietor, and that this right of occupancy remained in abeyance, and came into force again after the sale to the Maharajah of Burdwan in 1283.

Now as to plots 1 to 11 it is clear that any right acquired by the occupant of land cannot be affected by a wrongful eviction. The question then is, whether the defendant was occupying as ryot at any time before the purchase by the Maharajah. In 1283 Komola Kant Koer became the zemindar of these plots. He was not a ryot. And the case of *Boolchand Jha* v. *Luthoo Moodee* (3) shows that a zemindar cannot, by cultivating his own land, acquire right of occupancy. That right is given to

(1) W. R., F. B. 91. (2) 24 W. R., 324.
(3) 23 W. R., 387.

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one who occupies as a ryot only; *Woomanath Tewarie* v. *Koondun Tewarie* (1). Therefore up to 1270, when the zemindari was first sold for arrears of revenue, no right of occupancy could have been acquired in respect of those plots. In 1280 the defendant was restored to possession, and could only have been restored to the rights which he had when dispossessed, namely, those of a zemindar. If he had not begun to acquire a right of occupancy when dispossessed, the period during which he was evicted cannot be counted towards the acquisition of such a right.

Then as to plots 12 to 19, the District Judge held that the alleged right of occupancy acquired by Gunga Gobind Koer merged in the zemindari right when Gunga Gobind sold to Baidya Nath in 1222. It was argued on the authority of *Woomesh Chunder Goopto* v. *Rajnarain Roy* (2) that the doctrine of merger does not apply in this country.

It is not, however, necessary to consider this point. It is not clear that what Gunga Gobind sold was a right of occupancy. But assuming that it was, we think that upon the sale it came to an end. The sale was to the zemindar. The right of occupancy is one given to a ryot only, and it continues only so long as the ryot pays rent on account of the land he holds. The zemindar cannot pay rent to himself, and if, as already pointed out, a zemindar cannot by cultivating his own land acquire a right of occupancy, it is difficult to see how such a right can be kept alive when the zemindar obtains possession of the land in respect of which the right accrued.

Then it was argued that the tenure was kept alive as the purchase was made in the *benami* name of Madhub Chunder Koer. But the reasons already given for coming to the conclusion that a right of occupancy cannot be kept alive unless there is some person occupying the land and paying rent to the zemindar, apply, we think, equally to a *benami* purchase. There is no evidence to show that Madhub Chunder Koer was more than a mere *benamidar*, that he ever occupied the land and cultivated it, and paid rent to the zemindar. We think, there-

(1) 19 W. R., 177. (2) 10 W. R., 15.

fore, that the defendant has failed to prove that he has any occupancy rights in the lands claimed as *mal*.

The appeal must therefore be dismissed with costs.

The cross appeal is dismissed without costs.

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Appeal dismissed.

Cross appeal dismissed without costs.

Before Mr. Justice Wilson and Mr. Justice Beverley.

BIDHUMUKHI DABEA CHOWDHRAIN AND ANOTHER (PLAINTIFFS) v. KEFYUTULLAH (DEFENDANT.)*

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Landlord and Tenant—Ejectment—Notice to quit, what is reasonable—Second appeal, what constitutes a question of law open upon.

It is not necessary that the period allowed in a notice to quit by a landlord to his tenant should terminate at the end of the year, but the notice must be in respect of the date of determination of the tenancy as well as in other respects a reasonable notice.

A notice to quit served on the 26th of Pous, and allowing two months to the tenant to vacate his holding, such period thus expiring on the 26th Falgun, when it appeared that cultivation began in the months of Magh and Falgun, and that they were the months for letting out land in the district, *held* not to be a reasonable notice.

It is a question of law for the Court to decide on second appeal, whether there is evidence before the Court, on which a Court could properly arrive at any given conclusion of fact.

IN this case the plaintiff sought to eject the defendant, who was a tenant-at-will, from his holding after service on him of a notice to quit.

The notice was served on the 26th Pous (9th January), and allowed the defendant two months' time in which to give up his jote. The defendant pleaded that the notice was illegal and served at an improper time, and that it was the practice in that part of the country to commence the work of cultivation from the month of Falgun.

The first Court found that the notice was served, but inasmuch as the time fixed by it did not expire at the end of the year, it was not served according to law, and that the defendant

* Appeal from Appellate Decree No. 2126 of 1884, against the decree of Baboo Ram Coomar Pal, Rai Bahadur, Subordinate Judge of Sylhet, dated the 21st of July 1884, affirming the decree of Baboo Kalipada Mukherji, Munsiff of Habigunge, dated the 21st of January 1884.