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RAS BEHARI LAL v. KING-EMPEROR.

LORD ATKIN.

Solicitors for appellants: *Hy. S. L. Polak and Co.*

Solicitor for respondent: *Solicitor, India Office.*

APPELLATE CIVIL.

Before Macpherson and Agarwala, JJ.

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July, 25, 26.
August, 8.

JUGESWAR PRASAD

v.

RAMDHARI MAHTO.*

Revenue Sales Act, 1859 (*Act XI of* 1859), *section* 37—*proviso, significance and scope of—circumstances protecting raiyat having occupancy right at a fixed rent.*

Section 37 of the Revenue Sales Act, 1859, provides :—

"The purchaser of an entire estate in the permanently settled districts of Bengal, Bihar and Orissa sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures, and forthwith to eject all under-tenants with the following exceptions :.....

.....

Provided always that nothing in this section contained shall be construed to entitle any such purchaser as aforesaid to eject any raiyat, having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such raiyat otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do."

Held, (*i*) that the important circumstance which distinguishes the right of the new proprietor to enhancement from that of the previous defaulting proprietor is that the new proprietor is entitled to enhance "irrespectively of all engagements made since the time of settlement" and the expression

* Appeal from Appellate Decree no. 291 of 1930, from a decision of Babu Radha Krishna Prasad, Subordinate Judge of Patna, dated the 28th June 1929, confirming a decision of Babu Jugal Kishore Narayan, Munsif of Patna, dated the 16th July, 1928.

" since the time of settlement " ordinarily means " subsequent to the Permanent Settlement ";

(*ii*) that the proviso does not save from enhancement of rent all raiyats even of the first class (raiyats having a right of occupancy at a fixed rent) whom it protects from ejectment, but only those of that class whose fixity of rent is founded upon an engagement *not* made after the Permanent Settlement;

(*iii*) that the right of the new proprietor to enhancement is not subject, as in the case of raiyats of under-tenures which are sold up under Act VIII of 1865, to proof that a higher rent would have been demandable at the date of the engagement.

Sarbeswar Patra v. *Maharaj Sir Bejoy Chand Mahatab*(1), followed.

Abdul Gani v. *Makbul Ali*(2) and *Sarat Chandra* v. *Asiman Bibi*(3), observation of Mitra, J., not followed.

Where the raiyat agreed to an enhancement of rent on condition that the enhanced rent was fixed in perpetuity but the condition of fixity failed after a revenue sale and the new proprietor applied for enhancement of the rent.

Held, that the provisions of section 35 of the Bengal Tenancy Act were specially applicable.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Macpherson, J.

The case originally came on for hearing before Jwala Prasad, J. who referred it to a Division Bench.

B. C. Sinha, for the appellant.

No one for the respondents.

MACPHERSON, J.—This second appeal arises out of a suit for arrears of rent of a holding of 8.99 acres at an annual rental of Rs. 95-15-0 which is described as occupancy kaimi, and for an enhancement of that rent under the provisions of section 30(*b*) of the Bengal

(1) (1921) 26 Cal. W. N. 15.
(2) (1914) 20 Cal. W. N. 185.
(3) (1904) I. L. R. 31 Cal. 725.

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Tenancy Act which is claimed in one place in the plaint at eight annas a bigha and at another place at eight annas a bigha or at a rate found after the usual calculations.

The defence to the claim for enhancement was that the holding is held at a fixed rate under a patta of 1901.

The Courts below having decreed the claim for rent only, the landlord appeals against the rejection of the application for enhancement.

The facts found are these. The tenancy was a kaimi occupancy holding not found to have been created before the date of the Permanent Settlement. When the landlord sought enhancement of rent in 1901, the raiyat agreed to the present rent on condition that he should be granted a *doami* patta, the meaning of which is that the rent of the holding was to be fixed and not subject to diminution or enhancement. In 1911 the entry 'kaimi' was made in the record-of-rights. In 1914 the estate in which the holding is situated, was purchased by the plaintiff at revenue sale.

The appellant relies upon the provisions of section 37 of the Revenue Sales Act, XI of 1859, under which the purchaser of a permanently settled estate sold under the Act for the recovery of arrears due on its own account is entitled, except in four cases set out, to avoid and annul all under-tenures and forthwith to eject all under-tenants, subject to the following proviso:

"Nothing in this section contained shall be construed to entitle any such purchaser as aforesaid to eject any raiyat having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such raiyat otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do."

The respondents are not represented. Mr. B. C. Sinha on behalf of the appellant urges that under this

provision the landlord who purchased at revenue sale in 1914, is entitled to enhance the rent of the defendants-respondents in spite of their *doami* patta of 1901.

In my judgment, on the above proviso construed both as it stands and in the light of the previous revenue enactments, the contention cannot be gainsaid. The proviso first saves from ejectment to which section 37 makes all save the excepted under-tenants liable, raiyats having a right of occupancy at a fixed rent, or at a rent which though not fixed, is not subject to arbitrary enhancement but is assessable according to fixed rules under the laws in force. These two classes were clear while Act X of 1859 was in force. Though Act X came into force shortly after Act XI, it is evident that section 37 of the latter, here refers to it and that the second class is the new class of raiyat having a right of occupancy (a new expression), which comprised the old class of the khudkasht raiyats and such of the pahikasht raiyats as could prove occupation for twelve years—to whom the privilege of permanence or right of occupancy hitherto peculiar to khudkast raiyats was now extended. The Bengal Tenancy Act, 1885, greatly widened the right of occupancy, but it has been held that this extended occupancy right must now be equated with that of the proviso under discussion [*Sarat Chandra* v. *Asiman*(1)].

The proviso then goes on substantially to prohibit enhancement of " the rent of any such raiyat ", (meaning a raiyat of either of the two classes referred to) otherwise than in the manner prescribed by the laws in force, an expression signifying ' by the laws for the time being in force ', or, with an important exception, otherwise than in the circumstances in which the former proprietor was entitled to secure an enhancement. Now the procedure of the Bengal Tenancy Act in respect of application for enhancement

(1) (1904) I. L. R. 31 Cal. 725

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is the manner prescribed by the laws at present in force. The important circumstance which distinguishes the right of the new proprietor to enhancement from that of the previous defaulting proprietor is that the new proprietor is entitled to enhance "irrespectively of all engagements made since the time of settlement", and the expression "since the time of settlement" means "subsequent to the Permanent Settlement". The result is that if any such raiyat held at a fixed rent prior to the Permanent Settlement, he has under the proviso a good answer to a suit by the new proprietor for an enhancement of rent, but if the fixity was based upon an engagement subsequent to that settlement, it is to be no answer to the claim. And reasonably so, since the new proprietor having purchased at revenue sale, is not the successor in interest of the defaulting proprietor and so has no privity with the raiyat quoad fixity of the rent. In short, the proviso does not save from enhancement of rent all raiyats even of the first class whom it protects from ejectment, but only those of that class whose fixity of rent is founded upon an engagement *not* made after the Permanent Settlement.

The lease at a fixed rent in perpetuity which since Regulations V and XVIII of 1812, a proprietor of an estate has been competent to grant so as to bind himself, his heirs and assigns, has never been held binding upon a purchaser under a sale for an arrear of revenue of the estate [*see* per Sir Barnes Peacock in *Isshur Ghose* v. *Hills*(1)].

Again in the case of patni taluks and other saleable under-tenures transferable by sale or otherwise for recovery of arrears of rent due in respect thereof, it is provided in Regulation VIII of 1819 by paragraph 11 *Third*, and in section 16 of the Bengal Rent Recovery (Under-tenures) Act VIII of 1865 (which followed it, without taking any notice of the new provisions in Act X of 1859 or of the new language in

(1) (1864) W. R. (F. B.) 148, 153.

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section 37 of Act XI of 1859) that the under-tenure is acquired free from all encumbrances which may have accrued thereon by any act of a holder unless the right of making the encumbrance shall have been expressly vested in the holder, and the following proviso is added:

"Provided that nothing herein contained shall be held to entitle the purchaser to eject khudkasht raiyats or resident and hereditary cultivators, nor to cancel bona fide engagements made with such class of raiyats or cultivators aforesaid by the late incumbent of the under-tenure or his representatives, except it be proved, in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rent would have been demandable at the time such engagements were contracted by his predecessor."

Something similar is found in respect of the fourth exception to section 37 now under consideration where though certain leases are protected from annulment, yet enhancement is allowable on proof that the original rent was unfair and the land has not been held for over twelve years at a fixed rent equal to the rent of good arable land. From the general policy of the legislating authority which never vested in or acknowledged in the proprietor of an estate a right of making indiscriminate encumbrances which might imperil the revenue, it is natural that the position accorded to subordinate interests, including those of raiyats, would be more favourable in the case of a sale of an under-tenure than in the case of a sale of an estate for arrears of its land revenue. The favour to raiyats in such under-tenures is shown in making bonafides the test of the engagement or contract—the new under-tenureholder has to accept a bonafide engagement and all he can do is to sue for enhancement of the rent fixed therein on the ground that a higher rent would have been demandable at the date of the engagement. I cannot find that even this concession was ever made applicable to the case of a purchase at revenue sale.

It is also reasonable to suppose, as Richardson, J. suggests, that the proviso to section 37, reflected the provisions contained in sections 3 to 6 of Act X of

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1859. In *Sarbeswar Patra* v. *Maharaja Sir Bejoy Chand Mahatab*(1) the learned Judge observes: "All raiyats having a right of occupancy under that Act were protected from ejectment. Where the rent of a holding had not been changed since 1793, it was protected from enhancement but the rent of occupancy raiyats including occupancy raiyats at a fixed rate holding under "engagements made since the time of settlement" became liable to enhancement under the laws in force, irrespective of those engagements. That result was also consistent with the state of things brought about by Regulation V of 1812 referred to above". At a later point the learned Judge, considering the case of a settled raiyat of a village, who in respect of the holding in connection with which the question arises, is a raiyat at a fixed rate, says: "Such a raiyat would be protected from ejectment but might be liable under the laws in force to enhancement of rent on the ground that he holds 'under an engagement made since the time of settlement'."

The decisions which have been cited before us are *Abdul Gani* v. *Makbul Ali*(2) and *Sarbeswar Patra* v. *Maharaja Sir Bejoy Chand Mahatab*(1) and the decisions mentioned in those cases. Of these *Abdul Gani* v. *Makbul Ali*(2) is the only case where the facts are similar. It was held there that the raiyat could not be ejected. But it was also held that the further prayer for assessment of fair and equitable rent would not arise, inasmuch as the very basis of the protection offered by that section is against any enhancement and enhancement was really what the plaintiff was seeking. The learned Judges added—"It is not within the scope of the suit; if it were, fair and equitable rent of an occupancy raiyat at fixed rates would obviously be the rent which had been fixed for his holding". These observations, though obiter, are entitled to respect. Apparently they also coincide with the view

(1) (1921) 26 Cal. W. N. 15, 28.
(2) (1914) 20 Cal. W. N. 185.

of Mitra, J. in *Sarat Chandra* v. *Asiman Bibi*(1) where he says of the proviso under discussion "Speaking of enhancement of rent, *where that is possible*, i.e. of the second class" (that is, raiyats whose rents are not fixed as opposed to the first class, consisting of raiyats having rights of occupancy at fixed rents). The point now in controversy did not then really arise for decision, and the senior judge did not deal with it at all. The view indicated in those two cases was clearly not accepted by Richardson, J. in *Sarbeswar Patra* v. *Maharaja Sir Bejoy Chand Mahatab*(2) quoted above. In my judgment while the proviso to section 37 affords complete protection against ejectment to a raiyat holding at a fixed rent, it affords protection to such raiyat against enhancement of rent only in certain circumstances, among which is *not* an engagement for fixity of the rent made between the raiyat and the previous proprietor subsequent to the Permanent Settlement even though valid against such previous proprietor, as it is specially excluded. With the views indicated upon the point before us by Richardson, J. in the last-mentioned case, I would respectfully concur.

Upon this view the appellant is entitled to an enhancement of the rent of the holding in suit, if he can bring the case within section 30(*b*) of the Bengal Tenancy Act. His right is not subject, as in the case of raiyats of under-tenures which are sold up under the Act of 1865, to proof that a higher rent would have been demandable in 1901.

But materials are not available on the present record for a decision as to whether any and if so what enhancement is to be given. The suit was tried with two others in which an enhancement of three annas in

(1) (1904) I. L. R. 31 Cal. 725, 732.
(2) (1921) 26 Cal. W. N. 15.

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the rupee was allowed, but the question of fixed rent did not arise in them. Moreover these holdings appear to have contained bhit as well as dhanhar whereas the defendants' holding consists entirely of dhanhar. There is nothing on the record to show that the maximum rate of enhancement for dhanhar is as much as three annas in the rupee. Indeed on the record of the trial court, as it has been sent up to us, there are no calculations at all showing the maximum enhancement allowable under section 30(*b*). Then another point of importance arises in this case. Manifestly section 35 may be applicable. The enhancement made in 1901 was submitted to by the raiyat in return for a consideration, to wit, a fixed rent in perpetuity. That consideration having failed in and from 1914, it will be a reasonable claim on the part of the raiyat that in the complicated situation which has arisen, the rise in the price of staple food crops is by no means the only matter to be considered. To enable it to do justice a court would at least require to have before it the rent payable in 1901 and the enhancement then made in return for the consideration that has failed, and all relevant matters must be considered together.

Accordingly the decision of the courts below is reversed on the preliminary point, the appeal is allowed and the suit is remanded to the trial court, which will decide what enhancement, if any, can be allowed under section 30(*b*) of the Bengal Tenancy Act, subject to the provisions of section 35 that it may not decree a rent which under the circumstances of the case is unfair or inequitable. For a proper decision it is necessary that the parties should be allowed to adduce such additional evidence as they may desire, and it is so ordered. It should be mentioned that Mr. B. C. Sinha did not challenge the decision that under the engagement of 1901 the raiyat was entitled to hold at a fixed rent under the defaulting proprietor.

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The costs in this Court and the court below, so far as the point in issue in the appeal is concerned, will follow the result.

Let the papers be sent down forthwith and the hearing be expedited.

AGARWALA, J.—I agree.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

Before Macpherson and Agarwala, JJ.

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July, 14, 17, 18, 19, 20, 24, 25.
August, 9.

SATYA CHARAN SREEMANI

v.

SHIB CHARAN TRIGUNAIT.*

Chota Nagpur Tenancy Act, 1908 (Beng. Act VI of 1908), sections 80 and 84(3)—presumption of correctness, whether attaches to an entry in the record-of-rights with respect to non-agricultural lands—evidence of rebuttal, sufficiency of—incorrectness of entry, whether can be established by reference to the state of things existing before final publication.

Section 80 of the Chota Nagpur Tenancy Act, 1908, provides :

"(1) The Local Government may make an order directing that a survey be made and a record-of-rights be prepared by a Revenue officer, in respect of the lands in any local area, estate, or tenure or part thereof.

(2) A notification in the *Calcutta Gazette* of an order under sub-section (1) shall be conclusive evidence that the order has been duly made.

(3) The survey shall be made and the record-of-rights shall be prepared in the prescribed manner."

Held, that unless the notification expressly excludes non-agricultural lands there is nothing in the section to indicate

* Appeal from Original Decree no. 105 of 1930, from a decision of Babu Gajadhar Prasad, Subordinate Judge of Dhanbad, dated the 16th of August, 1929.