APPELLATE CIVIL.

Before Mr. Justice Braund.

1938

July 22.

MAUNG E MAUNG *v.* R.M.N.L.V. FIRM.*

Lower Burma Land and Revenue Act, s. 19—Rule 51—Permissive occupation of available land—"Eviction" by Government—Action amounting to eviction—Physical eviction—Former occupant of land—Refusal by Government to recognize him as occupant—Recognition of person de facto *in possession—Suit for possession.*

In virtue of rule 51 made in pursuance of the power given by s. 19 of the Lower Burma Land and Revenue Act the possession of an occupier of available land who has not obtained the status of a landholder is purely permissive, and he is liable to be evicted by Government at any time before he has become a landholder. Government may instal, instead of the original occupant, some one else, or may recognize the *de facto* occupation of some one else, who has come to occupy the land instead of the original occupier. And if the Government does anything which unequivocally points to its intention no longer to recognize the permissive occupation of any particular occupier, then it has "evicted" that occupier within the meaning of rule 51. In a given case no physical eviction may be necessary or even possible.

Maung Po Cho v. *Maung San Bwin*, I.L.R. 3 Ran. 171; *Upton* v. *Townend*, 17 C.B. 30, referred to.

Where the Deputy Commissioner had refused to recognize the plaintiff (who was at one time but no longer in possession) as the Government's permissive occupant of a piece of land and had recognized the defendant as the occupant, *held*, that such action amounted in substance and in fact to an "eviction" by the Government of the plaintiff under rule 51, and consequently the plaintiff having no right to possession could not file a suit for possession against the defendant.

Maung Kyaw v. *Maung On*, P.J. 484; *In re Maung Naw* v. *Ma Shwe Hmat*, 8 L.B.R. 227, referred to.

Ennoose for the appellant.

Kalyanvala for the respondent.

BRAUND, J.—This is a second appeal in a case which was originally tried in the Court of the Subdivisional Judge of Wakema. The facts out of which the suit arose are these. The plaintiff was a Chettyar Firm

* Special Civil Second Appeal No. 128 of 1938 from the judgment of the District Court of Myaungmya in Civil Appeal No. 1 of 1938.

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while the defendant was a cultivator who was in possession, at the time of the commencement of the suit, of a small parcel of paddy land comprising some 9 acres or so. This land was divided into two parts which are holdings Nos. 218 and 219. For the purpose of the judgment which I am about to deliver I need not distinguish between these two parts, although I note that in the Courts below there has been some argument as to what the history of the two individual parts has been. For my present purpose it is sufficient if I deal with the question as if there were one piece of land.

The land, from what I know about it, was originally a piece of jungle land uncultivated, lying waste ; and in that condition at some date prior to the year 1930 a man named Maung Po Han and his wife Ma Thein took possession of it. They seem to have cultivated it for two years or so, and on the 22nd October 1930 there is a record of a sale by Maung Po Han and Ma Thein of 4·33 acres, which represents, I think, holding No. 218, to the plaintiff. From 1930 onwards until 1935 or 1936 the plaintiff enjoyed the land. He did not himself cultivate it but he let it out to tenants. For the years 1930-31 and 1931-32 he let it to the persons who sold it to him, namely, Maung Po Han and Ma Thein. For the years 1932-33 and 1933-34 there was a lease, which is Exhibit G, to a person named Maung Ba In. For the year 1934-35 there was a lease of this land together with other land to three people, Saya Gale (*a*) Ko Ismanin, Hyder Ali and Ful Mahomed (Exhibit H). In 1935-36 there was a lease, which is Exhibit J, to Hyder Ali and Ismanin, and for the year 1936-37 there was a lease (Exhibit K) to the same persons. Up to the year 1934 there is no doubt that the plaintiff was the person who was entered upon the assessment roll and was assessed to and paid, Government land revenue in respect of the land. But in the

year 1934-35 it is equally plain, indeed I think it is conceded, that the land revenue at any rate was not paid by the plaintiff, although there has been some dispute of fact in the Courts below as to whether the tenants of the plaintiff in that year actually did cultivate this land together with other land they had leased or whether they did not.

At that point I think perhaps I had better consider, by reference to the Lower Burma Land Revenue Manual, what is the position of a person who occupies waste land for purposes of cultivation in the manner in which this land was first occupied by Maung Po Han and his wife Ma Thein. The Lower Burma Land and Revenue Act, 1876, by section 19 gives power to the Local Government from time to time to make rules to regulate temporary occupation of waste land and to empower any Revenue Officer to eject any person occupying, or continuing to occupy, such land in contravention of such rules. By rules made by the Local Government the provisions were brought into force relating to temporary occupation of available land. That is in Chapter IX of the Lower Burma Land Revenue Manual, 1911, at page 54. It is rule 51 that is the relevant rule for the present purpose. It says :

"51. (1) Any person entering for purposes of cultivation upon any land over which no person has any rights specified in section 6 or which has not been allotted by Government under section 20 or section 21 or reserved for any purpose under any provision of law (hereinafter referred to as 'available land'), or the successor of such person, shall ordinarily be permitted to occupy such land on payment of land revenue, but shall be liable to eviction so long as he has not obtained the status of a landholder"

I should say that an occupier does not obtain the status of a landholder until he has been in occupation for

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12 years. As I read rule 51, the possession of an occupier of available land, who has not yet become a "landholder", is purely permissive : he holds at the pleasure of the Government for so long as, and no longer than, the Government is pleased to leave him in possession and any moment the Government may dispossess him. And I think it follows that the Government may instal, instead of the original occupant, some one else, or may recognize the *de facto* occupation of some one else, who has come to occupy the land instead of the original owner. It is abundantly clear that as between the occupier and the Government at any rate the occupier has no right or interest in the land ; he has a merely permissive foothold from which, to use the words of rule 51, he is liable to be evicted at any time before he has become a landholder.

I may perhaps now consider, because something may turn upon it, what is meant by eviction. Eviction in a narrow sense may mean the physical turning of a person out of possession of property. But the meaning to be put upon the word in this rule must of course be governed by its context. I am sure that it does not refer merely to a purely physical eviction. Indeed, that cannot be so, because it does not follow that the occupier need be in physical occupation. He may, as in this case, have let it out to a tenant. What I think eviction really means is the termination by the Government of that permissive relationship which I have described as arising under rule 51. In my judgment, if the Government does anything which unequivocally points to its intention no longer to recognize the permissive occupation of any particular occupier, then I think it has "evicted" that particular occupier within the meaning of rule 51. As I have already pointed out, no physical eviction may be necessary, or even possible. If the occupier is already *de facto* out

of physical possession then no eviction in that sense is either necessary or possible. In the case of *Upton* v. *Townend* (1) Jervis C.J. in dealing with the word "eviction" gave this—I will not say definition—explanation. The facts of this case can have no bearing on ours but I refer to it merely for the purpose of showing that the word "eviction" need not necessarily have a limited sense :

"It is extremely difficult at the present day to define with technical accuracy what is an eviction. Latterly, the word has been used to denote that which formerly it was not intended to express. In the language of pleading, the party evicted was said to be expelled, amoved, and put out. The word eviction,—from evincere, to evict, to dispossess by a judicial course,—was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent, because it is now well settled, that, if the tenant loses the benefit of the enjoyment of any protion of the demised premises, by the act of the landlord, the rent is thereby suspended. The term 'eviction' is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction I think it may now be taken to mean this,—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises. If that may in law amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character and done with that intention."

That leads me to think, as I have said, that anything done by the Government with the intention no longer of recognizing the occupier as the permissive occupier of the Government amounts to an "eviction" within the meaning of rule 51. I have dealt with that, I am afraid, at some length; but having done so, it is necessary for me now to return to the facts of the case.

(1) 17 C.B. 30.

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On the 28th May 1935 a revenue proceeding was opened in the Myaungmya district at the instance of the present plaintiff. I have already said that the revenue for 1934-35 was not assessed in the plaintiff's name. He, accordingly, applied to be assessed for that year. An enquiry was held by the Township Officer of Moulmeingyun at which he heard evidence as to who had worked the land—that of course is not evidence in these proceedings—and eventually he made a report which finally found its way to the Deputy Commissioner; and the Deputy Commissioner in those proceedings made a final order on the 26th November, 1935, in these words:

> "Paragraph 539, Land Records Manual justifies the treatment of this holding as abandoned. I see no reason to differ from my predecessor's order, which indeed I doubt if I have any right to review. The applicant may be informed."

I am not quite sure what his predecessor's order had been, but the effect of that order was that, to my mind, the Deputy Commissioner declined to recognize the plaintiff as any longer the permissive occupier from the Government of this land. I may say in passing that there was no appeal from that decision to the Commissioner, as there might have been if the plaintiff had desired. At some date during 1935 or 1936 we know as a fact that the present defendant went into actual occupation of this land. There is a dispute as to the exact date upon which he did so but it is conceded that by June 1936 the defendant was in physical occupation of the land. And on the 24th June 1936 the defendant Maung E Maung filed a revenue proceeding by which he asked to be assessed to land revenue in respect of this land upon the ground that he was the permissive occupier of it under the Government. That again was enquired into: evidence was taken and finally on the 14th June 1937 a

final order was made by the Deputy Commissioner in which he found that the land was being worked by E Maung and that E Maung's name should be entered in the register as the assessee of this land.

To my mind these two events, first of all the refusal by the Deputy Commissioner to recognize the plaintiff any more as the Government's permissive occupant of the land and, secondly, the Deputy Commissioner's definite recognition of the defendant as the Government's permissive occupant of this land, amount in substance and in fact to an eviction by the Government of the plaintiff under rule 51. The Government has, in short, expressly recognized and acted upon a condition of affairs which is inconsistent with any further recognition of the plaintiff as the Government's permissive occupier. In these circumstances I feel no doubt myself but that there has been a constructive eviction in this case. I say constructive eviction because, as I have already pointed out, no physical eviction was possible, the plaintiff being already out of possession.

In the case of *Maung Po Chc* v. *Maung San Bwin* (1) a two Judge Bench of this Court seems also to have been willing to adopt a liberal construction of the word "evict." They say this :

"But if section 19 of the Act and rules 51 and 52 be read together, we think that a broader construction must be put on the provisions of these rules. It is quite clear from section 19 and rule 51 that the intention of the legislature and of the Local Government was that the temporary occupier should be in the position of what is known in England as a tenant-at-will, and that the duly constituted Revenue Officer should have the power to evict such tenant if the land were required for other purposes. In the present case the Deputy Commissioner passed orders that the plaintiffs should leave the land after the conclusion of the cultivation season. That being so, and having regard to the clause in rule 51 to the

(1) (1925) I.L.R. 3 Ran. 171.

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effect that the temporary cultivator is liable to eviction, we are of opinion that if the cultivator had at the end of the cultivating season refused to leave the land he would have been occupying the land in contravention of rule 51, and would therefore have made himself liable to eviction under rule 52. We do not think that it is open to the Civil Courts to consider the propriety of the order of the Revenue Officer in such a case. The plaintiffs had no right as against Government beyond that of temporary occupation. That is clear from the clause in rule 51 as to liability to eviction. And that liability exists independently of any reason there may be for evicting them. If the plaintiffs were dissatisfied with the order of the Revenue Officer, their remedy was to apply to the Commissioner, which they did actually do."

The difference between this case and that is that in the case before me the occupier was already out of possession, while in that case he was still in possession. No order by the Deputy Commissioner for him to leave was either possible or proper in the case before me, because he had already left; but nonetheless, in my view, the order of the Deputy Commissioner is not consistent with a state of affairs which any longer recognizes the permissive occupancy of the plaintiff. If that be right, then the position in this suit is as follows. I do not propose at this stage to embark upon an analysis of what the legal characteristics are of the permissive occupancy conferred upon a cultivator under rule 51. But it is quite clear, if the view I take is the right view, that in this case the plaintiff is a person who no longer has even the status of a permissive occupier. On the contrary, upon the view I have taken of the effect of the Deputy Commissioner's order in 1936, the defendant is the person who now occupies the position of permissive occupier under rule 51. For that reason it seems to me to be clear that there is not at the present moment even a right to possession upon which the present plaintiff can base his cause of action.

For the present purpose I am quite prepared to accept the rulings in *Maung Kyaw* v. *Maung An* (1) and *In re Maung Naw* v. *Ma Shwe Hmat* (2). Both those cases have decided that a suit for possession may be founded upon the mere fact of possession without any actual title. Possession alone is sufficient to support a suit. And if, indeed, this plaintiff were in that type of permissive occupation that I have endeavoured to describe in relation to this land, it is quite clear upon these two authorities that he would be enabled to maintain his suit against another person who endeavoured to dispossess him. But of course it is an entirely different thing when it is found, as I have found, that the right to permissive occupation in this case rests not with the plaintiff but with the defendant. Upon that view of the matter I think that this appeal must succeed.

The Subdivisional Judge who tried this case, although on grounds somewhat different from those upon which I have rested my judgment, dismissed the plaintiff's suit for possession. I shall accordingly order that the decree of the Subdivisional Court be restored. The appellant, I think, is entitled to costs in this Court and in the District Court and I shall assess the costs in this Court at five gold mohurs.

(1) P.J. 484. (2) 8 L.B.R. 227.