

Before Mr. Justice Glover and Mr. Justice Mitter.

1869
Aug. 5.

GAURHARI SING (DEFENDANT) v. BIHARI RAUT (PLAINTIFF)*

Act X. of 1859, s 6—*Nij Jote Land*—*Right of Occupancy.*

A cultivator of *nij jote* land may acquire a right of occupancy under section 6, Act X of 1859, when it had not been let under a lease for a term of years, or year by year.

Baboo Mahendra Nath Mitter for appellant.

Baboo Nilmadhab Sen for respondent.

GLOVER, J.—There is no ground for interference with the lower Appellate Court's decision in this case. The plaintiff sued under clause 6, section 24 Act X. of 1859, to recover possession of 2 bigas 6 katas and 10 chittaks of land, from which he alleged himself to have been illegally dispossessed by the trustee of a religious endowment. He claimed to have held this land from the time of the permanent settlement at a fixed rate, and his cause of action was the letting of the land by the trustee to a third party.

The defence was that the land was the *nij jote* of the temple; that it had never been let to the plaintiff, as alleged by him, from the date of the permanent settlement, although it had occasionally been let for short periods to the plaintiff's father; that no agreement had ever been come to as to a lease and that the plaintiff at last left the land uncultivated, and then the defendant leased it to a third party.

The first Court dismissed the plaintiff's claim, considering it not proved that he had been holding this land from the time of the permanent settlement at fixed rates. The Court of Appeal took up the question as to whether plaintiff had or had not a right of occupancy, and finding on the evidence that he had, gave him a decree to recover possession of the land.

The ground is, that as the disputed land is the *nij jote* land of the temple, no cultivator of that land can obtain a right of occupancy with reference to the terms of section 6, Act X. of 1859.

This appears to be a mistake. Although that section does exclude *khamar*, *nij jote*, and *seer* lands belonging to the proprietor of an estate, it only does so when such lands have been let by him on a lease for a term of years, or year by year. In this case there is no evidence to show that the land was let to the defendant for a special term, or that he was only a yearly tenant of the same. There is nothing *per se* in the fact of the land being *nij jote*, which prevents a cultivator from acquiring rights of occupancy in it; and in this case it has been found by the Judge on the evidence, as a fact, that the plain-

* Special Appeal, No. 870 of 1869, from a decree of the Judge of Orissa, dated the 1st February 1869, reversing the decree of the Assistant Collector of that district, dated the 24th July 1868.

tiff has been for more than twelve years in possession of the land paying rent to the trustee of the endowment, and that he has therefore acquired a right of occupancy.

There appears therefore no ground for interfering with this decision. The special appeal must be dismissed with costs.

MITTER, J.—I concur.

1869
GAURHABI
SING
v.
BEHARI RAUT

Before Mr. Justice Glover and Mr. Justice Mitter.

BHAIRO SING AND ANTOHER (PLAINTIFFS) v. UDIKARAN SING
(DEFENDANT.) *

1869
Aug. 6.¹

Act X of 1859, s. 23—Suit for Declaration of Title—Act VIII of 1859, s. 2.

In a suit for declaration of title to land, from which a ryot has been ejected at the suit of his zemindar, by the order of a Collector, under section 23, Act X. of 1859, and wherein the genuineness of the patta upon which the suit is brought is at issue, the order of the Collector cannot be pleaded in bar

Mr. C. Gregory for appellants.

Baboo Chandra Madhab Ghose for respondent.

GLOVER, J.—The plaintiff in this case sued for confirmation of possession and for a declaration of his title in 8 bigas 10 katas of *jerat* land; his cause of action being the slur cast upon his title by the decision of the Collector in a suit brought by the defendant under clause 6, section 23, Act X of 1859, in which the defendant was declared to have been illegally ejected by the zemindar.

In that suit the defendant got a decree on the strength of a patta said to have been given to him by the plaintiff's vendor. The Judge on appeal has held that the present suit is identical with the one already decided by the Collector, inasmuch as in both the genuineness of the patta was the point at issue, and has dismissed plaintiff's suit as barred by section 2, Act VIII. of 1859.

There is no doubt a decision of this Court in the case of *Ram Bhujjun Bhuggut v. Ketai Ram Chowdree* (1) in favor of this position, but the decision has been subsequently overruled by the Full Bench in the case of *Gooroo Doss Rai v. Ramnarayan Mitter* (2), in which it was laid down that clause 6, section 23, Act X. of 1859, refers only to possessory actions against the persons entitled to receive the rent, and not to suits in which the plaintiff sets out his title and seeks to have his right declared and possession given in pursuance of that title. "Full meaning," the learned Judges say, "may, and we think must, be given to the words 'illegally ejected' without treating them as giving a wider sense

See SUP.
VOL F B R

* Special Appeal, No. 1160 of 1869, from a decree of the Judge of Tirhoot, dated the 15th March 1869, reversing a decree of the Moonsiff of that district, dated the 28th. August 1868.

(1) 6 W. R., Act X. Rul., 22. (2) Case No. 137 of 1864; Feb. 22nd, 1867.