[APPELLATE CIVIL.]

Before Mr Justice Kemp and Mr. Justice E Jackson.

1871
Nov. 24

SADDANANDO MAITI (DEFENDANT) *v.* NOWRATTAM MAITI AND OTHERS (PLAINTIFFS.)*

Act X of 1859, ss. 15 and 16—Permanent Settlement, Districts to which not extended—Surborakari Tenures in Cuttack.

The provisions of sections 15 and 16 of Act X of 1859 (2) apply to the whole of the provinces of Bengal, Behar, Orissa, and Benares. and not only to such of the districts in those provinces to which the Permanent Settlement has been extended.

Surborakari tenures in Cuttack are Permanent, hereditary, and transferable.

THIS was a suit arising out of a notice issued by the defendant upon the plaintiffs under Act X of 1859 to enhance the rent of their tenure. The plaintiffs, on receiving the notice, came into Court, under the provisions of section 14 of the Act, to contest the right of the defendant to enhance. The notice had described the plaintiffs as being tenants-at-will without any rights. The plaintiffs sought to contest the claim on the ground that they held the land which it was sought to have enhanced as a portion of a surborakari tenure ; that they held only a one-sixth share of that tenure ; that their family had held the tenure from the time of the Maharattas before the country had been annexed by the British Government, and that, consequently, the rent of the tenure was not enhanceable.

In answer to the suit the defendant alleged that the plaintiffs were common ryots-at-will ; that they had no surborakari rights whatever ; that other persons had held the tenure before the plaintiffs, and that even the plaintiffs' documents showed that there had been a variation of the rent.

(1) See sections 16 and 17, Act VIII of 1869, (B. C.) The words "in the provinces of Bengal, Behar, and Orissa," in section 15 of Act X of 1859, are omitted in section 16 of Act VIII of 1869, (B C

*Special Appeals, Nos. 481 and 482 of 1871, from the decrees of the Judge of Cuttack, dated the 6th and 7th December 1870, reversing the decrees of the Assistant Collector of that district, dated the 27th September 1870.

1871

SADDANANDO MAITI v. NOWRATTAM MAITI.

The Deputy Collector held that the plaintiffs had failed to prove that they had held the tenure at a fixed rate of rent from the time of the Permanent Settlement, and dismissed the suit.

The plaintiffs appealed to the District Judge. The Judge was satisfied that the plaintiffs had made out that their tenure had been long in existence and that they had for the last twenty years paid at the same rate of rent; that the plaintiffs were consequently entitled to the presumptions of sections 15 and 16 of Act X of 1859, and that the defendant was therefore unable to enhance the rent.

The defendant preferred a special appeal to the High Court.

Baboo *Hem Chandra Bannerjee* (with him Baboo *Mahendra Lal Mitter*) for the appellant.—The provisions of sections 15 and 16 of Act X of 1859 do not apply to Cuttack as there has been no Permanent Settlement in that district. Though Cuttack is a district in the province of Orissa, yet it is not a district where the Permanent Settlement has taken place. The presumption in favor of a ryot on proof of payment of rent for twenty years preceding the institution of the suit, at a fixed rate, only applies to ryots holding lands in permanently settled districts. The Judge was wrong in applying sections 15 and 16 of Act X of 1859 to the present case.

Baboo *Abhai Charan Bose* for the respondents.—Section 15 of Act X of 1859 clearly applies to the whole of the provinces of Bengal, Behar, Orissa, and Benares, and not simply to such of the districts in those provinces to which the Permanent Settlement has been extended. The words "from the time of the Permanent Settlement" in this section, do not limit the application of this section only to the permanently settled districts in the provinces named, but simply fix the time from which the payment of a fixed rent is to be calculated. Sections 15 and 16 therefore do apply to the present case.

In Mills and Ricketts' Reports (1), these tenures in Cuttack are declared to be of the same nature as mokurrari holdings in

(1) See pages 19 and 20 of Mills' Report on the Settelment of Cuttack. and page 65, part 9 of Ricketts' Reports on the Districts of Midnapore, including Hidelee and Cuttack.

1871

SADDANANDO MAITI v. NOWRATTAM MAITI.

Bengal and Behar. The defendant never alleged surborakari tenures to be otherwise than permanent and transferable. This objection was never taken below. The plaintiffs' long and uninterrupted holding for successive generations is of itself quite sufficient to establish the hereditary and transferable nature of the tenure.

Baboo *Mahendra Lal Mitter* in reply.

JACKSON, J. (after stating the facts)—The special appeal to this Court was commenced by urging that as no Permanent Settlement had been carried out in the district of Cuttack, the provisions of Act X of 1859 did not apply to Cuttack. The express words of section 15, Act X of 1859, include any person possessing a permanent, transferable interest in land, intermediate between the proprietor of an estate and the ryots, who, in the provinces of Bengal, Behar, Orissa, and Benares, holds a talook or tenure (otherwise than under a terminable lease) at a fixed rent which has not been changed from the time of the Permanent Settlement. The word "Orissa" would include the district of Cuttack, under ordinary circumstances, but it is said that the words "from the time of the Permanent Settlement" must confine the operation of these provisions those districts of Orissa where a Permanent Settlement has taken place. An illustration was mentioned with reference to this argument from the Soonderbuns which have not been included in the permanent Settlement of Bengal: and it was urged that a ryot who held lands from the time of the Permanent Settlement in the Soonderbuns would not be entitled to the presumption of section 4, Act X of 1859. There can, however, be very little doubt that as regards the whole of the Province of Bengal the law applicable to all suits for enhancement of rent is Act X of 1859, and that any ryot, even in the Soonderbuns, might claim the benefit of the presumption of section 4 of that Act, or any under-tenure-holder might claim the benefit of the presumption of sections 15 and 16 of the Act. The law, Act X of 1859, is applicable to all the provinces mentioned in the law, and it is not necessary in suits coming under it to prove that the land to which the

1871

SADDANANDO MAITI v. NOWRATTAM MAITI.

suit relates has been the subject of a Permanent Settlement. It is said that it is impossible to ascertain when the Permanent Settlement of Cuttack took place, as in fact there has been no such settlement. We do not think it necessary in this case finally to decide this question, as the plaintiffs are fully entitled to a decree on the merits.

The next argument which has been put before us is, that even if the provisions of sections 15 and 16 of Act X of 1859 apply to this case, still the plaintiffs have not proved that they have a permanent transferrable tenure, and they have not proved that they have held that tenure at an unvaried rate for twenty years prior to the institution of the suit, but that one of their documents proved that there had been a change in the rent. There does not appear to have been any contention in the lower Court, that, if the plaintiffs could make out that they held a surborakari tenure, their tenure was one not coming within the provisions of section 15 of Act X. The plaintiffs have produced very good evidence to show that long before the defendant had any connection whatever with this land (he being a late purchaser and lease-holder), so far back as thirty years ago, their family put forward a claim to this surborakari tenure. The first documents in proof of this tenure produced by the plaintiffs are the records of the settlement of 1842. Claims were then put forward by the ancestor of the present plaintiffs who held these lands as surborakars. These claims were not enquired into, and no decision was come to upon them, but the mere fact that these claims were then put forward and recorded in the Survey record is strong corroboration of the then existence of the plaintiff's tenure. In addition to this, there is another document, namely, an arbitration award which was passed in a contest between the surborakars on the one hand and the landlord on the other. The question in dispute was the amount of rent which should be paid for this tenure in lieu of the kahans of cowris which had been fixed originally to be the rent. The very circumstances of the rent being fixed originally in cowris is very strong evidence that this tenure was a very old one. This arbitration award in 1251 (1843) can leave no doubt in any person's mind that there was admittedly a surborakari tenure, and that the rent which was formerly paid in

1871

SADDANANDO MAITI v. NOWRATTAM MAITI.

cowris was by that arbitration award changed into a money rent. The fact then, of the surborakari tenure has been found by the Judge upon this evidence, and it does not appear that the defendant, the landlord, has given any evidence which could satisfy the Judge that the plaintiffs were holding a new and lately acquired tenure which had formerly been in the possession of other persons; indeed, the landlord has not attempted to give the usual evidence to prove such facts, and there can be no reason to interfere in any way with the decision of the Judge on the question that this was a surborakari tenure. But it is said that this tenure is not one of the tenures mentioned in section 15 of Act X. In the first place there appears to have been no contest of this kind in the lower Court, and no such question was raised. Surborakari tenures are well known tenures in Cuttack. The reports of Messrs. Mills and Ricketts, two officers of Government who had perhaps a more intimate acquaintance with the tenures of Cuttack than any other Civilians, have been produced in Court, and in them these suborakari tenures are alluded to amongst the other mokurrari tenures of the Province. It is not said that a surborakari tenure cannot be enhanced, but there seems to be no doubt that they are permanent and transferable tenures which can, if proper measures are taken at the proper time, have their rents enhanced. There is every reason to believe that this tenure has descended from the ancestors of the present plaintiffs for some generations down to the present holders of it. It is undoubtedly a permanent hereditary tenure, and there seems, as it stands at present, every reason to conclude that such a tenure, would be transferable, and certainly on the other hand the defendant not only has not attempted to object that a surborakari tenure is not transferable, but also has not attempted to prove the fact. In addition to this, however, the very circumstance that the defendant is here seeking to enhance a two-anna share of a surborakari tenure instead of enhancing the whole of the tenure, is sufficient ground for decreeing the plaintiffs' suit. If the defendant had proved that the plaintiffs were pahi ryots, *i. e.*, ryots-at-will, of course this objection as regards the surborakari would have been of no avail, but the plaintiffs having

1871

SADDANANDO MAITI v. NOWRATTAM MAITI.

proved that they hold a portion only of a surborakari tenure, the Judge was quite right to dismiss the suit to enhance the rent of a portion of the tenure.

The special appeal to this Court is dismissed with costs.

Appeal dismissed.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear and Mr. Justice Macpherson.

1871
June 5.

A. B. MILLER (ASSIGNEE OF MADHAB CHANDRA RUDRA AND OTHERS, (DEFENDANTS) *v.* THE GOURIPORE COMPANY LIMITED (PLAINTIFFS).

Contract—Difference between Articles contracted for and those tendered—Action for Non-acceptance—Costs.

The plaintiffs contracted to supply the defendants with from 2,75,000 to 3,00,000 of gunny bags described as No. 6 quality, size 40 by 28 inches, "the defendants to have the option of taking bags of a longer or shorter length at proportionat e prices, duly giving a fortnight's notice to the plaintiffs, delivery to be taken in August 1870." The defendants, after taking delivery of 11,600 of the bags, found that the bags tendered were mixed in size, some being longer, and some being shorter than the contract size, and refused to take delivery of the remainder. In an action for breach of contract in not accepting the bags, the Court below found on the evidence that out of 2,000 bags which were examined, 100 were shorter by from ¼ to ½ an inch but that the bags which were really short were very few out of a large quantity which came up to contract size, and *held* therefore that there had been a substantial performance of the contract on the part of the plaintiffs. On appeal the Court found that the parties did not complete any large margin of difference in the size of the bags, and that the proportion of those which differed was large enough to justify the defendants in refusing to take delivery, and *held* that the tender of such bags by the plaintiffs was not a substantial performance of the contract.

THIS was an appeal from a decision of Mr. Justice Paul, dated 31st January 1871. The suit was brought to recover damages for breach of contract in not accepting certain gunny bags. The plaintiffs were a Joint Stock Company Limited, under the provisions of the Indian Companies Act, 1866, and carrying on business in Calcutta, through their agents, Messrs. Jardine, Skinner and Co. The defendants, Madhab Chandra Rudra,