Before Mr. Justice Norman, Offg. Chief Justice and Mr. Justice Loch.

SHIBDAS BANDAPADHYA ONE OF THE (DEFENDANTS,) *v.* BAMANDAS MUKHAPADHYA (PLAINTIFF).* 1871 *April* 13.

Brick-built House, Removal of—Landlord and Tenant—Act VIII of 1865 *(B. C.) s.* 16.

The relation between landlord and tenant is that of parties to a contract. The contract is entire and single. If a portion of a tenure be sold either by the tenant, or in execution of a decree of the Civil Court against the tenant, in the absence of any consent by the zemindar, the only mode in which effect can be given to the alienation is to treat the purchaser as holding a rent-free tenure subordinate to that of the original tenant. See also 14 B.L.R. 204

A brick-built house is not an "encumbrance" on a tenure within the meaning of that word in section 16 of Act VIII of 1865 (B. C), which a purchaser at a sale for arrears of rent could remove.

In this country the ownership and right of possession in the soil does not necessarily carry with it a right to the possession of buildings erected thereon.

A tenant who held a piece of land on a lease, erected a brick-house upon the land, without the permission of, but without any objection by, his landlord. In execution of a decree of the Civil Court against the tenant in January 1865, the materials of the house and the site on which the house was built, were sold separately to two individuals from whom the defendant purchased both. on the 31st July 1866, the tenure itself was sold for arrears of rent to one N. from whom the plaintiff purchased it. The plaintiff brought this suit to recover possession of the land free from all incumbrance by the removal of the house. The Court refused to give the plaintiff a decree for possession.

THIS was a special appeal by the defendant from a decree of the Additional Judge of Nuddea awarding to the plaintiff possession of 7 katas, 6 chittaks of land on which a house was built, and directing the removal of the house.

The land in dispute was part of a piece of ground, consisting of 2 bigas and 13 katas, leased by Satish Chandra Roy, Maharaja of Nuddea, to one Rammohan, at a rent of Rs. 20-7.

Rammohan, with the sanction of the Maharaja, sold his tenure to Bankubehari. Bankubehari having allowed his rent to fall into arrear, a suit was brought against Bankubehari by the Maharaja for rent under Act X of 1859; and in execution

* Special Appeal, No. 1820 of 1870, from a decree of the Additional Judge of Nuddea, dated the 12th August 1870, reversing a decree of the Moonsiff of that district, dated the 29th September 1869.

1871

SHIBDAS BANDAPADHYA v. BAMANDAS MUKHAPADHYA

of a decree in that suit, on the 31st of July 1866, the tenure was sold to one Nandakumar, pursuant to the provisions of section 16 of Act VIII of 1865 (B. C.). The sale certificate bore date the 15th of September 1866. The plaintiff in the present suit, at a subsequent time, purchased the rights of Nandakumar in the tenure. The plaintiff brought this suit on the 21st July 1869 to recover possession of the land and to have the house removed. The defendant proved that, in execution of a decree obtained in the Civil Court against Bankubehari in January 1865, one Rambax bought the materials of the house built on the land by Bankubehari, and at the same time one Bipinbehari bought the *talkar* or site of the house as containing 4 katas. Bipinbehari subsequently sold the site of the house as 15 katas to Rambax who, on the 19th of October 1867, sold the site of the house, as 15 katas with the house upon it, to the present defendant Shib Das. The plaintiff brought the suit on the 21st of July 1869. The first Court gave plaintiff a deeree. The Additional Judge, on appeal, found that there was nothing to show that Bankubehari obtained the land otherwise than for purposes of cultivation, or at any time acquired a right or authority to erect buildings on it ; and in the absence of any patta or any separate and distinct authority, he thought that Bankubehari stood "in the position of a ryot who erects his own house on culturable land, and thereby acquires no separate and distinct rights, who, should he fail to pay the rent, must turn out to give place to some other tenant, and cannot lay claim to retain any part of the land in his possession under pretence of *bastu* or tenement, unless at the time of his lease he made a special provision for the same." The Judge added :—"This was Bankubehari's position, and the defendant does not lay claim to any other rights than those which he acquired from Bankubehari." He said:—"Bankubehari had no authority to subdivide his jumma. If the tenure was sold for any cause, it should have been sold entire, and could not be sold in parts without the authority of the landlord, and that sanction was not obtained. When Bankubehari's house was sold for debt, only so much was sold as he had a right to convey. But he had no right to convey a separate title of tenancy to part of the jumma.

Bankubehari does not appear at any time to have acquired the right to dispose of his tenure in parcels, or to sub-divide it into smaller jummas."

Baboos *Kali Mohan Das, Girish Chandra Mookerjee,* and *Mohini Mohan Roy* for the appellant.

Baboo *Tarak Nath Dutt* for the respondent.

The argument of the pleaders appear sufficiently from the decision of the Court.

NORMAN, J. (after stating the facts as above).—The appellants first attempted to argue that the tenure in question consisted of land in a town ; that, under Act X of 1859, the Collector had no jurisdiction to entertain a suit for the rent of such land ; and that therefore the sale of the tenure, under the decree of the Collector's Court against Bankubehari for rent, could not affect the rights of the appellant. But as the suit was a suit for the rent of land and nothing more, we think the argument quite untenable.

They next argued that, by the sale of a portion of the tenure to Bipinbehari in January 1865, the tenure had been divided, and that the rights of the purchasers at that sale could not be affected by any sale of the tenure in a suit for rent against Bankubehari alone.

I think it convenient to consider in the first place what is the effect of a sale by a tenant of a portion of his tenure. The relation between landlord and tenant is that of parties to a contract. The contract is entire and single. Except so far as he may be empowered by a provision in the contract, or by some special law or custom, one party to such a contract cannot withdraw from it and introduce a stranger as a party. There are many instances in which tenures are transferable, either by express provision to that effect in the contract, or by the custom of the district, which the Court would treat as incorporated as an implied condition in contracts for the letting of land. But a zemindar is not bound to recognise the sale of a tenure which is not transferable, or to accept the purchaser as a tenant. A zemindar is not bound to allow a sub-division of a tenure.

1871

SHIBDAS BANDAPADHYA v. BAMANDAS MUKHAPADHYA.

There is no provision in any of the Acts relating to this subject which compels a zemindar to accept as his tenants the alienees of portions of the tenure. The rule that a zemindar is entitled to his rent as an entire demand upon a liability which cannot be sub-divided or distributed, without his consent, is clearly recognized in section 27 of Act X of 1859. If therefore a piece of land constituting a portion of a tenure be sold either by the tenant or in execution of the decree of a Civil Court against the tenant, in the absence of any consent by the zemindar, the only mode in which effect can be given to the alienation is to treat the purchaser as holding a rent-free tenure subordinate to that of the original tenant. The position of a purchaser under such circumstances was considered by Mr. Justice Phear in *Srinath Chuckerbutty* v. *Srimanto Lashkar* (1).

(1) *Before Mr. Justice Phear and Mr. Justice Hobhouse.*

The 17th December 1868.

SRINATH CHUCKERBUTTY (ONE OF THE DEFENDANTS) *v.* SRIMANTO LASHKAR AND OTHERS (PLAINTIFFS.)*

Baboos *Chandra Madhab Ghose* and *Ramesh Chandra Mitter* for the appellant

Baboo *Purna Chandra Shome* for the respondents.

THE judgment of the Court, was delivered by

PHEAR, J.—We think that the decision of the lower Appellate Court is wrong. There is nothing in the facts found by that Court which goes at all to show that the decree obtained by the zemindar against Balak Ram was not a valid decree, a decree made in an actual suit. It therefore follows that any process for execution of this decree issued against the property of Balak Ram would be a good foundation for the sale by the Court of that property as against any one who claimed through or under Balak Ram. It appears also, from the judgment of the lower Appellate Court, that the tenure which has been sold in execution of the decree was certainly at one time, in its entirety, the property of Balak Ram; and even if the contention of the plaintiffs is correct, a portion of it still remains Balak Ram's property.

Further, the plaintiffs' claim at the utmost makes them shareholders with Balak Ram, and, therefore, primarily liable with him to the zemindar for the rent of the tenure, unless the zemindar has come to a separate agreement with them for the payment of their share. If they were shareholders with Balak Ram, and liable with him for the payment of the rent, it might be that the zemindar's suit ought to have failed for want of making them defendants with Balak Ram; but that of itself does not vitiate the decree as it stands. It seems to us that the evidence to which the lower Appellate Court refers, as showing that the zemindar recognized the assignment by Balak Ram to the plaintiffs, really does not amount to evidence of their having, with the sanction of the zemindar, a separate holding. It may be that he was well aware that they were in some respect or other holding under Balak Ram or through him; but this would be matter of no consequence to him. He

* Special Appeal, No. 2406 of 1868, from a decree of the Subordinate Judge of 24-Pergunnahs, dated the 16th June 1868, affirming a decree of the Moonsiff of that district, dated the 31st October 1867.