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NARENDRA NARAYAN ROY CHOWDHRY v. ISHAN CHANDRA SEN

Taramonee Dossee v. *Birrsesur Mozoomdar* (1). The cases of *Juggut Chunder Roy* v. *Ramnarain Bhuttacharjee* (2), *Ajoodhia Persad* v. *Emambandee Begum* (3), and *Nunku Roy* v. *Mahabir Prasad* (4), have no bearing on the present point; still less have the cases of *Huro Chunder Goho* v. *Dunn* (5), *Kalee Kishore Chatterjee* v. *Ram Churn Shah* (6), *Haran Chandra Pal* v. *Mukta Sundari Chowdhrain* (7), and *Jamir Gazi* v. *Goneye Mundul* (8), which merely decide that a tenant having a right of occupancy does not forfeit it by sub-letting, as to which it may be observed that s. 6 of Beng. Act VIII of 1869 expressly recognizes the right to sub-let.

It is submitted that the second question does not arise in this suit, which is brought against the transferee alone. [COUCH, CJ.—It may possibly arise in this way,—if there is an existing right of occupancy, the plaintiff may not be entitled to recover possession of the land.] As to that see *Bibee Sohodwa* v. *Smith* (9). In *Buti Singh* v. *Murat Singh* (10), the rights of the occu-

(1) 1 W. R., 86.
(2) *Id.*, 126.
(3) B. L. R., Sup. Vol., 725.
(4) 3 B. L. R., App. 35.
(5) 5 W. R., Act X Rul., 55.
(6) 9 W. R., 344.
(7) 1 B. L. R., A. C., 81.
(8) *Ante*, p. 278.
(9) 12 B. L. R., 82.
(10) *Before Mr. Justice Phear and Mr. Justice Morris.*

The 20th September 1873.

BUTI SINGH (PLAINTIFF) *v.* MURAT SINGH AND OTHERS (DEFENDANTS).*

Right of Occupancy—*Abandonment*—*Transfer of Portion of Jote*—*Custom.*

Mr. *R. E. Twidale* and Baboo *Mohini Mohun Roy* for the appellants.

Mr. C. *Gregory* and Baboo *Nil Madhub Sen* for the respondents.

THE jndgmeut of the Court was delivered by

PHEAR, J.—We think that the jndgment of the Subordinate Judge is not entirely right upon the facts at which that Court arrived. Both the first Court and the lower Appellate Court were agreed in thinking that the defendants Nos. 1 and 2 had failed in proving that they had an old *gora-bandi* right to their jote; but the lower Appellate Court, upon the evidence which it refers to, was of opinion that these defendants had gained a right of occupancy under the rent law, and that such a right of occupancy was in their village or in their neighbourhood, recognized as a transferable right, irrespective of the will of the zemindar. It seems to us more than doubtful whether any

* Special Appeal, No, 1651 of 1872, against a decree of the Subordinate Judge of Zilla Bhaugulpore, dated the 26th July 1872, reversing a decree of the Munsif of Monghyr, dated the 7th June 1872.

pancy tenant had not been transferred. *Gorachand Mustafi* v. *Madan Mohan Sikdar* (1), it is submitted, was wrongly decided. [COUCH, C. J.—That case appears ta me to put the point on a wrong ground ; it is not a question of forfeiture, but of abandonment ; the tenant may abandon, and the landlord

evidence could establish that a bare right of occupancy under the Act was transferable, irrespective of the will of the zemindar. But, however this may be, we are quite clear that the evidence upon which the Subordinate Judge bases his opinion is insufficient for that purpose. All the transfers to which he refers are in terms transfers of a *gorabandi* right ; therefore the subject which was transferred by them was something very different from the bare occupancy right to this land, which was all that the Subordinate Judge found to be the right of the first two defendants. This being so, we think that the Subordinate Judge was wrong in holding that the transfer of the land in question from the first two defendants to the defendants of the second party was valid against the zemindar.

At the same time it appears to us that the zemindar has not in this case the right to eject the second defendant. These defendants have taken a small portion only of the jote which the first defendants held, and the first defendants are still remaining in possession of that part of their jote of which they did not affect to make a transfer to the second defendants : also they have not in any sense abandoned the part of the jote which they have transferred to the second defendants ; for we were told at the hearing of this case by the learned pleader who appeared for them that they were ready to take back or reassume possession of these very lands : their responsibility to their zemindar for the rent remains as it was before the pretended transfer and they are willing to take back the land. Under these circumstances the plaintiff has no right to eject all the defendants ; he could at the most eject the defendants of the second party for the purpose of putting in the defendants of the first party, which really is no ejectment at all. He has no right himself to recover possession. We think that the proper decree will be a declaration in favor of the plaintiff that the tenure of the defendants Nos. 1 and 2 was not a *gorabandi* tenure transferable, irrespective of the will of the zemindar ; and that the *kabala* which these defendants granted to the defendants of the second party is void and inoperative as regards the plaintiff. Further, we think that there should be an injunction against the defendants of the second party alone, restraining them from setting up against the plaintiff any title to this land as a jote based upon the footing of that *kabala*.

We therefore reverse the decision of the lower Appellate Court, and instead thereof make a declaratory order in terms which have just been mentioned. We also think that the appellant must have his costs of this appeal, and that each party should pay its own costs in the Courts below.

(1) *Ante* p. 279

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may accept the abandonment.] Here there was no abandonment or voluntary relinquishment. The tenant's rights were transferred in execution of a decree against him.

Baboo *Mohini Mohun Roy* on the same side.

Baboo *Gopal Lal Mitter* for the respondent.—The cases relied on by the appellant's pleaders do not decide the questions now raised. There is nothing in s. 6 of Beng. Act VIII of 1869 to show that the right is not alienable. [COUCH, C.J.—It is for you to show that the Act makes it alienable.] The right attaches to the tenure; it is a limitation of the zemindar's rights. [JACKSON, J.—The section begins:—"Every ryot who shall have cultivated or held land for twelve years shall have a right of occupancy."] Where a transferable tenure is held by one person at a fixed rent for eight years, and by his vendee at the same rent for twelve years, the vendee would doubtless be entitled to the benefit of the presumption created by s. 4 of the Act. [JACKSON, J.—You start with the assumption of transferability.]

Without calling on the appellant's pleaders to reply, the Full Bench delivered the following judgments:—

COUCH, C.J. (AINSLIE, J., concurring).—In the judgment, by which this case is referred to us, it is found that Krishna Das was a ryot, and that he continued to be so down to the time when he sold his tenure to the defendant. The way in which the case comes before us does not allow us to consider whether Krishna Das really was a ryot or not. We must take the fact as found by the two learned Judges. I wish to prevent its being assumed that, upon the facts which appear in this case, I should have found that he was a ryot.

The first question put to us is, whether the right of occupancy which Krishna Das had at the time of the sale to the defendant was transferred to him?

This is a question which must be considered and answered independently of any custom. In answering it I wish particularly to be understood as not giving any opinion respecting

rights of occupancy where there is a custom to transfer them. In these cases the landlord or zemindar may be supposed to have allowed the ryot to occupy according to the custom. If the ryot has by custom a right to transfer, the landlord may be supposed to have assented to the right of occupation which he gave to the ryot being transferred by him. There may be many cases in which a ryot may have a right by custom to transfer. We must exclude all these from consideration in answering this question,

In my opinion it is to be answered solely with reference to the words of s. 6 of Beng. Act VIII of 1869, by which the right is given, not for the first time, but on which it now depends. And whether, when Act X of 1859 was passed, this was the creation of a new right in a ryot, or the recognition by the Legislature of an existing custom to allow the ryot to continue to hold, does not make any difference in the construction of the Act. If the Act creates a new right, we must look at the words of it for what the right is, and if it recognizes a custom, it recognizes it only to the extent expressed, and the result is the same.

The words of the section are that "every ryot who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under potta or not, so long as he pays the rent payable on account of the same; but this rule does not apply to *khamar*, *nijjote*, or *seer* land belonging to the proprietor of the estate or tenure, and let by him on a lease for a term, or year by year, nor (as respects the actual cultivator) to lands sublet for a term, or year by year, by a ryot having a right of occupancy. The holding of the father or other person from whom a ryot inherits shall be deemed to be the holding of the ryot within the meaning of this section."

These words appear to me to point to a ryot having the right in land cultivated or held by him, and so long as he pays the rent, and to the right not being one which can be transferred to some other person. It is a right to be enjoyed only by the person who holds or cultivates and pays the rent, and has done so for a period of twelve years. It does not speak of his acquir-

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ing a right which he might, having acquired it, transfer or make use of as a subject of property, but it seems intended to secure to a ryot who has cultivated or held for twelve years a continuance of his cultivation or holding so long as he pays the rent. And the provision at the end of the section by which the holding of a father or other person from whom the ryot inherits is to be deemed the holding of the ryot, supports this construction, for it appears to show that, except in that particular case, the holding must be entirely by the person who claims the right. This is a law which imposes a restriction upon the proprietary rights of the zemindar or landlord, and a ryot cannot claim under it any thing more than the words clearly give to him. There are not here, in my opinion, words of so doubtful a meaning that we should consider whether it would be just or equitable that the ryot should have the power to transfer. The ordinary construction of the words appears to me to be, that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property which could be transferred. I would therefore answer the first question by saying that the right which Krishna Das had at the time of the sale was not transferable. The question, as I have said, is solely upon the Act, and independent of the existence of any custom.

The second question is, whether, if it was not transferred, is it still in existence in Krishna Das or his heirs, and being in existence will it prevent the plaintiff from ejecting the defendant?

Now, if a ryot having a right of occupancy endeavours to transfer it to another person, and, in fact, quits his occupation, and ceases himself to cultivate or hold the land, it appears to me that he may be rightly considered to have abandoned his right, and that nothing is left in him which would prevent the zemindar from recovering the possession from the person who claims under the transfer. And not only may he be considered to have abandoned it, but if the right which is given by the law is one which exists only so long as he holds or cultivates the land, when he ceases to do that, by selling his supposed right and putting another in his place, his right is gone and cannot stand in the way of the landlord's recovering possession. If it were not

so, the law would become nugatory. The position of things would be that the transfer by the ryot is invalid, and gives the transferee no right to the possession, but the ryot could not recover possession from the transferee as he would be bound by his act of transfer; nor could the landlord recover possession because the outstanding right in the ryot would be in his way. The result would be that, although the transfer is invalid, the transferee would be able to keep possession and to set the landlord at defiance. I think in this case it may be considered either that the ryot has abandoned his right altogether, and therefore it cannot be set up as an answer to the suit by the landlord for possession, or that his right has ceased, has been put an end to, because it existed only so long as the ryot himself continued to hold or cultivate the land. I would therefore in answer to the second question say that any supposed right which may be in existence in Krishna Das or his heirs will not prevent the plaintiff from ejecting the defendant.

JACKSON, J.—I entirely concur in the judgment which has just been delivered, and have very few words to add. I should be inclined to describe the right, whether created or recognized by s. 6 of the Rent Act, as being a right resulting from the connexion between the occupying tenant and the land which he occupies for a space of twelve years. The Act expressly declares that the holding of the father or other person from whom a ryot inherits shall be deemed to be the holding of the ryot; and there I think one may say that the well-known maxim *inclusio unius*, &c., would apply.

As to the second question, the answer appears to me to be very clear, for by the sale out and out to another person, the ryot voluntarily terminates that connexion between himself and the land which he had occupied, which is necessary to the existence of the right of occupancy. The law allows a subletting by a ryot who has a right of occupancy, though it does not permit the growth of a right of occupancy within a right of occupancy. So long as the ryot having a right of occupancy merely sublets the land, he maintains that connexion between himself and the land which

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is essential to the existence of the right; but when he has transferred his right to another, he no longer maintains that connexion.

I wish also to say that I expressly concur in the observations which the Chief Justice made at the outset of his judgment, namely, that we are dealing with this case on the facts found by the learned Judges who referred it, and by that we are limited.

There is only one other observation which I wish to make as to the case of *Bibee Sokodwa* v. *Smith* (1). I do not apprehend that the learned Judges who decided that case meant to suggest that, after a ryot having a right of occupancy had parted with his right by transfer, and the zemindar had evicted the transferee as having no right to occupy the land, the ryot might afterwards come in and insist upon the right he had voluntarily parted with as entitling him to enter upon the land. If, however, any such claim should hereafter be set up in any other case, it will doubtless have to be considered.

PHEAR, J.—I entirely concur with the Chief Justice. I understand the questions which are put to us to have reference solely to that peculiar right of occupancy which I may call the creature of s. 6 of the Rent law, and that in the matter which is now before us, we are entirely disembarrassed, as the Chief Justice has said, of all considerations which might affect, or enter into questions relative to the alienation of the right to hold and occupy land, founded on the element of custom, or otherwise. And it seems to me that under this hypothesis the questions which have been put to us in this reference are both immediately answered in the negative, when the view is taken of s. 6 as I think it ought to be, to the effect that the right of occupancy, which is the subject of this section, is rather of the nature of a personal privilege than a substantive proprietary right. I think that there can be no right of occupancy under the terms of this section other than in a person who is cultivating or holding the land as a ryot in the situation which is mentioned in this section; and that therefore a person can only have this right who is actually cultivating or holding the land, and then only if he has cultivated or held the land as a ryot for a period of twelve years,

(1) 12 B. L. R., 82.

according to the rule for estimating that time which is prescribed in the section; and that rule is that only the actual cultivation or holding of the person who sets up the right, and in the case where he has taken the cultivation or the holding of the land by inheritance from a predecessor, then, constructively, the cultivating or holding of that predecessor counts. The section does not give to any one other than the person who has actually held or cultivated land for the period of twelve years either by himself alone, or by himself and his predecessor from whom he has taken by inheritance, together, the right of occupation which is the subject of the section. And if this be so, then it seems to be plain upon the facts which the reference brings before us that Ishan Chandra Sen, the defendant in the case, has not a right of occupancy in the land which is the subject of suit, because he has himself only cultivated or held it as a ryot for a period of a little more than eleven years, and the person who preceded him in the cultivation or holding thereof was not one from whom he took it by inheritance. His predecessor in the cultivation or holding was Krishna Das, from whom he took by purchase. In that state of things he is not entitled by the words of s. 6 to add any years of Krishna Das's holding to the years of his own holding. And certainly Krishna Das, in the view that I have taken of the section, can have no right of occupancy in the land, because he is not now cultivating or holding it, but on the contrary has long been out of the occupation of it; he has not cultivated it; he has not held it in any sense whatever during the period of the last eleven years and upwards. To use the words of the section, he is not a person who is occupying or holding the land.

The second branch, also, of the second question which has been referred to us, seems to be answered in the negative by the decision in *Bibee Sohodwa* v. *Smith* (1), a decision, the correctness of which has not yet been impeached—supported by the decision in *Buti Singh* v. *Murat Singh* (2).

I concur in the judgment which has been delivered by the learned Chief Justice, and have nothing substantial to add to it.

(1) 12 B. L. R., 82. (2) *Ante*, p. 284.

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I ought, however, perhaps to remark with regard to an observation which has been made on the case of *Bibee Sohodwa* v. *Smith* (1), that it was obviously not the intention of the Bench which passed that decision to say anything judicially as to whether or not the grantors or transferors of the jote in that case still had, in the events which had happened, any right to require possession of the land at the hands of the zemindar. All that that decision decided was that whatever the rights of the transferors as against the zemindar might be, those rights did not prevent the zemindar, under the circumstances of the case, from recovering possession of the land from a stranger.

MORRIS, J.—I concur with the Chief Justice in thinking that both the questions referred to us should be answered in the negative.

PRIVY COUNCIL.

MAHOMED BAHADUR KHAN AND ANOTHER (PLAINTIFFS) *v.* THE COLLECTOR OF BAREILLY AND OTHERS (DEFENDANTS).

P. C.*
1874
Feb. 26 & 27

[On appeal from the High Court of Judicature, North-Western Provinces Agra.]

Limitation—Act IX of 1859, s. 20—Forfeiture of Rebel's Property.

Certain property, in the actual possession of a rebel, was confiscated by the Government in 1858. In a suit brought on 1st May 1865 to recover the property, it appeared that the plaintiffs were the sons and heirs of one *M*, who died in 1854, legally entitled to, though not in possession of, the property in question; that at the date of his death, and at the date of the confiscation, the plaintiffs were minors, and that they came of age in 1861 and February 1864, respectively. *Held*, that the suit not having been brought within one year from the date of the confiscation was barred by s. 20, Act IX of 1859.

There is no saving clause in Act IX of 1859 with respect to minors or parties under disability to sue, and such saving cannot be held to be implied upon any principle of equitable construction; nor can the saving clauses,

(1) I2 B. L. R., 82.

* *Present* :—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.