Surjokanto Acharjee Chowdhry (1), *Hyder Buksh* v. *Bhubindro* 1874

NARENDRA NARAYAN ROY CHOWDHRY v. ISHAN CHANDRA SEN

(1) *Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.*

The 14th February 1871.

TARAPRASAD ROY AND OTHERS (DEFENDANTS) *v.* SURJOKANTO ACHARJEE CHOWDHRY (PLAINTIFF).*

Right of Occuppancy— Transfer—Consent of Zemindar—Act X of 1859. *s.* 6.

Baboo *Chunder Madhub Ghose* and *Romesh Chunder Mitter* for the appellants.

Baboos *Hem Chunder Banerjee* and *Srinath Doss* for the respondent.

THE following judgments were delivered :—

E. JACKSON, J.—THIS was a suit under cl. 6, s. 23, Act X of 1859. The plaintiff, alleging himself to be the owner of a tenure consisting of 69 bigas and odd katas in the zemindari of the defendants, stated that he had been illegally dispossessed from that tenure by the defendants on the 27th Chaitra 1274 (8th April 1868), and he therefore sought to recover possession. The defendants in their answer denied that the plaintiff had been dispossessed in Chaitra 1274, denied that he had been in possession for three years previous to that time and urged that consequently the law of limitation barred the suit; they urged also that the suit would not lie under Act X of 1859. And the plaintiff having alleged that he held a right of occupancy in this land the defendants contended that no such right existed in him.

Both the lower Courts have found in favor of the plaintiff on the question of limitation; they have found that he was in possession. The lower Appellate Court, concurring in the decision of the first Court, has found that the plaintiff was dispossessed in Chaitra 1274; and on the question of the right of occupancy of the plaintiff, the Appellate Court seems to be of opinion that whether he held a right of occupancy or not, still the transfer of the jote to the present plaintiff was a legal transfer, and consequently the plaintiff was entitled to recover.

The first point taken before us in special appeal is that the lower Appellate Court has not properly decided the question of limitation. I cetainly think that it would be better if the Appellate Court had given its own reasons for coming to the conclusion at which it has arrived. Looking back however to the facts found by the Deputy Collector, there seems to have been ample evidence to the effect that the plaintiff had been in possession and that he was dispossessed on the date alleged. The first Court goes very carefully into the evidence on the point, and considers that the dispossession did take place on the date alleged. There is also the fact that a few years before the alleged dispossession, there had been an Act IV decree passed in favor of the plaintiff, and that the plaintiff had actually sought to be put in possession, and orders had been passed to put him in possession. Coupling this fact with the

* Special Appeal, No. 1731 of 1870, against a decree of the Judge of Zilla Dacca, dated the 20th May 1870, affirming a decree of the Deputy Collector of Moonsheegunge, dated the 11th August 1869.

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evidence of dispossession subsequently, it seems to me that the Courts were of opinion that the plaintiff had been in possession until he was dispossessed as alleged, and that there was ample evidence to support that finding.

The second point which has been taken before us is that even taking the plaintiff's statements as detailed in his plaint to be correct, the plaintiff cannot obtain a decree; that it is for the plaintiff, who brings a suit of this sort, to show that his tenancy was still subsisting when he was dispossessed.

The plaintiff claims his tenancy to be subsisting solely on one ground, namely, that he held a right of occupancy; he does not claim to hold under any terminable lease the term of which has not expired; he does not claim for his tenure any particular rights, his claim is that he holds a right of occupancy. It is argued before us for the defendant that this right of occupancy did not exist, and for the plaintiff that the plaintiff had made out such a right. We are not satisfied upon this point that the plaintiff has any right of occupancy. The plaintiff's allegation is that this tenure was formerly held by Mr. Lamb; that he purchased it from Mr. Lamb in the year 1267; and that the was dispossesssed in the year 1274. It is admitted then that between the year 1267 and 1274, he himself could not have acquired a right of occupancy, but that right is claimed as having been obtained by transfer from Mr. Lamb. It is argued that as the zemindar consented to the transfer of the rights which Mr. Lamb possessed to the present plaintiff, the conduct of the zemindar, in allowing the sale to take place, was sufficient evidence of his consent to the transfer of the right of occupancy, as well as of the jote. We think that the right of occupancy stated in s. 6, Act X of 1859, is not a right which can be transferred except as laid down in the Act. It is a right which is attended with certain privileges which are stated in Act X of 1859; those privileges can only be acquired under the distinct circumstances stated in that Act. There is nothing to show that in the original jote, which was stated to have been held by Mr. Lamb, there were any such terms as would make the tenure a perpetual one. As far as we can see it was only a yearly holding. Even if the defendant consented to the transfer, it seems to me that the plaintiff thereby merely acquired a new jote on the same terms as the original tenure was held. He might in time acquire a right of occupancy but he is not entitled, to make up his right of occupancy, to add the time during which his predecessor Mr. Lamb held it.

There is one decision of this Court quoted against this view of the law,—in the case of *Huro Chunder Goho* v. *Dunn* (*a*),—and there is no doubt it is to some extent in point. There is an allusion there to some consent to the transfer having been given, but whether it was a direct consent or one presumed only from the receipt of rent, is not very clear upon the facts. In this case now before us there was no direct consent, and consent is only presumed from the receipt of rent by some shareholder of the estate. The two cases may therefore not have been

(*a*) 5 W. R., Act X Rul., 55.

(1) *Ante*, p. 276.

(2) *Post*, p. 284.

The only case opposed to the above cases is *Mussamut* analogous. There is a subsequent Full Bench decision of this Court, to be found in the case of *Ajoodhia Persad* v. *Emambandee Begum* (a), which to some extent set aside that former decision. It may be said that that also is not directly in point. It was there contended that every tenure in which a right of occupancy was acquired became a transferable tenure, but it was held "that there is nothing in s. 6, Act X of 1859, which shows that it was the intention of the Legislature to alter the nature of a jote, and to convert a non-transferable jote into a transferable one, merely because a ryot who held it for twelve years had thereby gained a right of occupancy under Act X of 1859."

I am of opinion then that the plaintiff has not acquired in this jote by his seven years' holding, or by the transfer from Mr. Lamb, any right of occupancy; and the plaintiff's tenure must therefore be held to be a yearly tenure subsisting from year to year, and he is liable accordingly to be dispossessed at the end of each year, when his tenure is liable to be determined.

There was at one time some question whether a Court should, in trying a case under cl 6, s. 23, Act X of 1859, go into the question as to the plaintiff's tenure being still subsisting or not. But this has been set at rest by the Full Bench decision of this Court, to be found in the case of *Jonardun Acharjee* v. *Haradun Acharjee* (b). It was there held that in a suit under cl. 6, s. 23, Act X of 1859, where a ryot alleged that he had been illegally ejected, it was a proper question open for determination whether the tenancy was at an end or not;—"the question is open as to whether the tenancy was at an end or not, and if at an end the ryot must fail in his suit."

Looking then to the plaintiff's case as regards his own tenancy, it seems to us that he has altogether failed to make out his right of occupancy. He was therefore only a yearly tenant. His own statement that he was dispossessed at the end of the year is, under these circumstances, sufficient to throw him out of Court. The dispossession was on the 27th Chaitra 1274. It is true that two or three days existed beyond that up to the end of the year. But we think in fact that the dispossession was at the end of the year, and at a time when the defendant was entitled to dispossess him because his yearly tenure had ceased.

The plaintiff, therefore upon the facts stated in the plaint, and upon the facts found in this case, cannot, we think, recover his jote. The only point upon which there might be some case made out for him is if the original jote was a perpetual jote. But there is no allegation of that sort. It is only alleged here that the plaintiff has a right of occupancy, and that the jote is transferable. That it is transferable with the consent of the zemindar is undoubted, and such consent has been made out in this case, but there is no evidence, and indeed no allegation that the original tenure of Mr. Lamb was of a perpetual nature.

We reverse the decisions of the lower Courts, and dismiss the plaintiff's suit with costs in all the Courts

MOOKERJEE, J.—I concur in dismissing the suit of the plaintiff with costs.

(a) B.L. R., Sup. Vol., 725.

(b) B. L. R., Sup. Vol. 1020.

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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.