

FULL BENCH.

1874
April 22.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice L. S. Jackson,
Mr. Justice Phear, Mr. Justice Ainslie, and Mr. Justice Morris.

NARENDRA NARAYAN ROY CHOWDHRY (PLAINTIFF). v. ISHAN
CHANDRA SEN (DEFENDANT).*

Right of Occupancy—Transfer—Abandonment—Beng. Act VIII of 1869, s. 6.

A *mukarrari mauzusi potta* was granted in 1838 to A, who was found to have held thereunder as a ryot till 1859, when his right, title, and interest were sold in execution of a decree, and purchased by B, and the latter was accepted as tenant by, and paid rent to, the zemindar for nearly twelve years. The zemindari being sold in 1871 for arrears of Government revenue was purchased by the plaintiff, who gave B notice to quit, and on his refusal^s brought the present suit to eject him. *Held*, that the right of occupancy which A had acquired under s. 6 of Beng. Act VIII of 1869, at the time of the sale to B, was not transferable. *Held*, further, that, by ceasing himself to hold or cultivate the land, it might be considered that A had abandoned his right, or that the right had ceased. No right therefore, remained in A or his heirs such as would prevent the plaintiff from ejecting B.

THE facts of this case as it came before the Full Bench were stated as follows in the order of reference by

MARKBY, J.—In this case it appears that, on the 31st March 1838, the zemindar granted to one Krishna Chandra Das a potta of 301 bigas of *banjar* waste land at a yearly rent of Sa. Rs. 18-13, to hold the same by raising bunds and excavating tanks in, and by cultivating, the said land himself or by means of tenants, from generation to generation as a *mukarrari* tenure: and there was a stipulation that the rate of rent should never be changed. Krishna Chandra held under the potta until the 5th December 1859, when the defendant purchased and got into possession and was accepted by the zemindar as his tenant under the potta in the place of Krishna Das. On the 6th May 1871 the zemindari was sold for arrears of Government revenue and purchased by the plaintiff, and on the 22nd September 1871 the plaintiff delivered to the defendant a notice to quit.

* Regular Appeal, No. 27 of 1873, against a decree of the Subordinate Judge of Zilla Beerbhoom, dated the 18th November 1872.

Several objections were taken by the defendant which have been found to be untenable ; the only substantial question being that which we reserved for consideration, namely, whether the defendant is protected from being turned out by the proviso of s. 37 of Act XI of 1859 ; in other words whether he is a " ryot having a right of occupancy." If he is, although his rent may be enhanced according to law, he cannot be ejected.

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This question was raised in the lower Court by the fifth issue in a somewhat inaccurate form, and I cannot say that either the evidence or the finding of the Subordinate Judge is quite as clear and as full as it might be ; but upon the whole I think we may take it as established that the land, when the potta was originally granted, was waste land without any tenant upon it ; that Krishna Chandra entered upon the occupation himself ; and that he brought a portion of the land into cultivation himself, and prepared the way for cultivating the remainder by excavating a large tank, and bringing tenants on to the land, by whom a further portion was brought into cultivation. About two-thirds of the land appears to be now under cultivation, and all, or very nearly all, of this is held by tenants under the defendant. The tenants appear to hold what are called *bhag-jotes*, that is to say the defendant is entitled to a share in the produce.

Under these circumstances I think that the tenure of Krishna Das was in its inception a ryotti tenure. It was certainly not the tenure of what has been called a middleman, for he was the immediate occupier of the soil. Nor could it, in my opinion, be rightly called the tenure of a talookdar. The potta confers no privileges upon the grantee other than those of an ordinary ryots, and contemplates that the grantee will bring the land into cultivation by his own personal exertions, as was actually the case. I, therefore, think that Krishna Das was a ryot, and continued to be so down to the time when he sold his tenure to the defendant.

It seems to me also that defendant is a ryot ; he succeeded to a ryot, and there was nothing to change his status ; if therefore he acquired a right of occupancy from Krishna Chandra, he is within the protection of the section. He had only been in occupation 11 years 9 months and 17 days, when the notice was served

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upon him ; he had, therefore, gained no right of occupancy himself, and there are many decisions of this Court that the possession of the transferee cannot be added to the possession of the transferor. The last of these decisions is *Hyder Buksh v. Bhubindro Deb Cowar* (1), and the only decision to the contrary, *Huro Chunder Goho v. Dunn* (2), must, I think, be considered to be over-ruled.

The questions to be decided are, therefore, reduced to these two :—(i) Whether the right of occupancy which Krishna Das had at the time of the sale to the defendant was transferred to the defendant ? And (ii) whether, if it was not so transferred

(1) *Before Mr. Justice Bayley and Mr. Justice Mitter.*
The 1st February 1872.

HYDERBUKSH AND ANOTHER (DEFENDANTS) v. BHUBINDRO DEB COWAR PLAINTIFF)*

Right of Occupancy—Transfer—Act X of 1859, s. 6.

Baboo *Debendro Narayan Bose* for the appellants.

Baboos *Doorga Mohan Doss* and *Bishen Doyal Roy* for the respondent.

THE judgment of the Court was delivered by

MITTER, J.—We are of opinion that this special appeal ought to be dismissed. In order to establish a right of occupancy, it was necessary for the defendants to prove that they had been in possession of the disputed land continuously for a period of 12 years. The Judge in the Court below has found that they had been in possession for 11 years and 3 months only. It has been argued that the defendants are entitled to add to their own possession the possession of one *Jesraj* from whom they purchased the land in question. But under the provisions of s. 6, Act X of 1859, it appears to

be clear that they are not entitled to do so. "The possession of a father or other ancestor from whom a ryot inherits may be added" in this manner ; but not the possession of a vendor. It is true that the zemindar consented to the transfer, but such consent cannot give to the defenants any right higher than that possessed by their vendor, and as it appears from the facts of this case that the vendor was a mere tenant-at-will, and as, under the provisions of the section referred to, the defendants are not entitled to add to their own possession the possession of their vendor, this ground of appeal must fail.

The other ground as to the extent of the jote of *Midni Bewa* does not appear to be made out. It is clear from the *jama-wasil-baki* papers of the time of the Court of Wards which have been put in by the plaintiff, as well as from other evidence, that *Midni Bewa* and *Kadir Baksh* held two distinct jotes, although the former had originally purchased from the latter an undivided half share of his jote.

We therefore dismiss this appeal with costs.

(2) 5 W. R., Act X Rul., 55.

* Special Appeal, No. 1252 of 1871, against a decree of the Judge of Zilla Rungpore, dated the 31st May 1871, reversing a decree of the subordinate Judge of that district, dated the 15 May 1869.