Before Mr. Justice Jackson and Mr. Justice Markby.

PURNANUND ASRUM (PLAINTIFF) *v.* ROOKINEE GOOPTANI (DEFENDANT).*

1878 *Augt.* 29.

Claim to enhance under s. 37 of Act XI of 1859—Rent Law—Presumption in favor of Mokurari Tenures—Beng. Act VIII of 1869, ss. 4 and 17.

The procedure prescribed in Beng. Act VIII of 1869 applies to claims of enhancement by a purchaser at a revenue-sale, and the rights of any such purchaser are, therefore, subject to all the modifications contained in ss. 4 and 17, which form a presumption in favor of tenures of all classes held at an unchanged rent for a period of twenty years before the commencement of a suit, that such holdings have run on at the same rate from the time of the Permanent Settlement.

THE plaintiff, the purchaser of a certain mehal at an auction-sale for arrears of Government revenue, brought a suit under s. 37 of Act XI of 1859, against the defendant, the holder of a garden, bastu, oodbastu lands, and a tank situated in the said mehal, for enhancement of rent, after having served notice upon him for that purpose by registered post.

The Munsif dismissed the plaintiff's suit on the ground that the notice to enhance was not served through the Collector, nor was it served in the month of Pous (Decr.) as provided for by s. 14 of the Beng. Act VIII of 1869.

The plaintiff appealed to the Subordinate Judge, who found that the lands, &c., held by the defendant consisted in reality of a house and a compound; and that s. 14 of Beng. Act VIII of 1869 referred only to arable lands, and had no application to such a holding as that held by the defendant; and, therefore, the landlord was at liberty to serve a notice of enhancement at whatever time, and in whatever manner, he pleased. He, therefore, reversed the order of the Munsif, and remanded the case.

The Munsif, on the case coming again before him, held, that the plaintiff could not enhance the defendant's tenure under

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Ainslie, dated the 28th of March 1878, in Special Appeal, No. 1317 of 1877.

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s. 37 of Act XI of 1859, unless the rent at which the tenure was originally granted was unfair, and this not having been proved, he dismissed the plaintiff's suit.

On appeal by the plaintiff to the Subordinate Judge, it was held that the lands in question fell under cl. 4, s. 37 of Act XI of 1859, and that from the evidence of the defendant it was clear that she had been holding the land at a very inadequate and insufficient rate, and that although under the provisions of s. 37 the rent could not be enhanced, because there was no law in force prescribing the manner in which rents of lands specified in cl. 4, sched. ii, s. 37 of Act XI of 1859 could be enhanced, as s. 9 of Reg. V of 1812 had been repealed, and the existing Rent Law applied only to agricultural holdings, yet it was the duty of the Court to do justice between the parties, and although the rates claimed by the plaintiff were not established, he was entitled to receive at the rate of eight annas per biga which had been proved by the defendant's own witnesses, and on these grounds the plaintiff obtained a decree for enhancement at that rate.

The defendant appealed to the High Court.

Baboo *Hem Chunder Bannerjee* for the appellant.

Baboo *Anundo Gopal Paulit* for the respondent.

The judgment of the High Court was delivered by

AINSLIE, J.—This is a suit for rent at an enhanced rate after notice. It was dismissed in the first Court at the original trial, but the lower Appellate Court remanded it after deciding that the land, the rent of which the plaintiff seeks to enhance, is "a house and its compound," and that the provisions of Beng. Act VIII of 1869 do not apply to it.

It was again dismissed by the Munsif, but on appeal the District Judge gave the plaintiff a decree at the rate of eight annas per biga.

The special appeal is pressed on three grounds:—

(1.) That there is no authority in law for the enhancement of the rent of such a holding as that enjoyed by the defendant.

(2.) That the defendant is entitled to the presumption that the rent has been unchanged since the Permanent Settlement.

(3.) That the Judge has found the original rate of rent to be unfair on no evidence, and has not taken into account the improvement of the land by the defendant.

The defendant held seven bigas, thirteen cottahs of land at a rental of a fraction less than 13 annas. The plaintiff claims as an auction-purchaser at a revenue-sale to enhance under the provisions of cl. 4, s. 37 of Act XI of 1859, by which it is provided that in respect, *inter alia*, of leases of lands on which dwelling-houses have been erected or whereon gardens have been made, the purchaser shall he entitled to proceed in the manner prescribed by any law for the time being in force for the enhancement of the rent of any land coming within the fourth class of exceptions, if he can prove the same to have been held at what was originally an unfair rent, and if the same shall not have been held at a fixed rent equal to the rent of good arable land for a term exceeding twelve years, but not otherwise.

This requires, first, that the auction-purchaser shall proceed in the manner prescribed by law; and next, that he shall prove the rate of rent to have been unfair from the first, and even then he may be defeated by proof that the land has for twelve years been held at an unvaried rent equal to the rent of good arable land.

Sections 9 and 10, Reg. V of 1812, contained a procedure for enhancement of rents by an auction-purchaser, and s. 26 of Act I of 1845 specifically refers to the latter section as the rule of procedure to be followed.

By s. 1 of Act X of 1859 so much of s. 26 of Act I of 1845 as related to the enhancement of rents and the ejectments of tenants by the purchaser of an estate sold for arrears of Government revenue is declared subject to the following modifications, *i. e.*, to the rules contained in the Act severally.

Act XI of 1859 received the assent of the Governor-General only five days later. It repealed Act I of 1845, and it does not in s. 37 contain any directions for the procedure to be followed by a purchaser seeking to enforce the rights vested in him by that section, and it is contended that unless there be a statutory procedure there can be no enhancement. But it seems to me,

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that the words "entitled to proceed in the manner prescribed by any law for the time being in force" distinctly import the provisions for procedure on demand of enhanced rent contained in Act X of 1859: I do not read s. 37 of Act XI of 1859 as if the words "any law for the time being in force" were controlled by the words immediately following, *viz.*, "for the enhancement of the rent of any land coming within the class of exceptions;" it seems to me that this rule requires to be read with a transposition of the words in order to get its true meaning. I read it as declaring that the purchaser shall be entitled to proceed for the enhancement of the rent of any land coming within the fourth class of exceptions in the manner prescribed by any law for the time being in force, *i. e.*, for enhancement of rent generally.

But even if the rule is more special, and if the words are to be read without transposition, there was by Act X of 1859 a rule of procedure laid down for the enhancement of rents of lands of the specific class. Section 1 of that Act recognized the right of an auction-purchaser at a revenue-sale to enhance rents of such lands as are mentioned in cl. 4, s. 37 of Act XI of 1859 (the specification in cl. 4, s. 26 of Act I of 1845 corresponding sufficiently for the purpose of the present suit, if not entirely, with that in cl. 4, s. 37 of Act XI of 1859), and prescribed a procedure, *viz.*, that contained in the body of the Act and s. 13 in particular; and the fact that Act I of 1845 was repealed by Act XI of 1859, which was substituted for it, does not affect the provisions of Act X, which apply to all persons who under any law for the time being in force may have a right to enhance, and are not limited in respect of purchasers under the particular Act (I of 1845) which was then on the point of being repealed.

There is nothing in the words of s. 1 of Act X of 1859 indicating that the rules laid down in the Act were to apply to purchasers under Act I of 1845 only, and not to purchasers of an estate sold for arrears of Government revenue generally, under whatever Act they might purchase. On the contrary, the language of the last clause of that section seems to me to point in exactly the opposite direction.

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A procedure having been prescribed by Act X of 1859 for all cases governed by the Act in which a right to enhance existed, the supersession of that Act by Beng. Act VIII of 1869, which is entitled an Act to amend the procedure in suits between landlords and tenants, left matters in *statu quo* as far as regards the persons to whom the law applies. Thus it seems to me that there is a manner prescribed by law now in force in which a purchaser at a revenue-sale may proceed to enhance the rents of the particular class of lands mentioned in cl. 4, s. 37 of Act XI of 1859.

That this view appears at first sight to be in conflict with the opinions repeatedly expressed, that Act X of 1859 and Beng. Act VIII of 1869 apply only in the case of lands held for agricultural purposes, I may admit; but without in any way questioning those decisions, I would point out that as far as I know they do not touch the special case with which I have to deal, that of an auction-purchaser at a revenue-sale seeking to enhance rents of lands which are by a specific enactment made subject to the provisions of the Rent Law. In the well known case of *Ranee Shurno Moyee* v. *Blumhardt* (1) Mr. Justice Phear does, no doubt, say " the subject of s. 17 is a ryot having a right of occupancy only, and as far as I know there is no other part of Act X and no other enactment outside Act X of 1859 which expressly makes any tenure liable to enhancement of rent;" but it seems to me that the learned Judge was not adverting to the provisions of the last clause of s. 1 of Act X and of the sections of the Revenue Sale Law to which it refers, because, as far as the judgment shows, the plaintiff in that suit was not an auction-purchaser at a revenue-sale, and that he did not mean to declare that at the time he delivered his judgment the specific provisions of Act X in respect of auction-purchasers under Act I of 1845 had become inoperative by reason of the repeal of that law, and so in the other cases, in which it has been held that the operation of Act X is limited, it was not said and could not have been intended that, when the Act declares that its rules apply to a certian class of lands under special circumstances, they do not so apply.

(1) 9 W. R., 552.

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These rules may not apply in ordinary cases to the particular class of lands mentioned in s. 26 of Act I of 1845, cl. 4; but in the case of an auction-purchaser at a revenue-sale claiming to enhance, they certainly do apply subject to the special limitation in s. 37 of Act XI of 1859 noticed at the beginning of his judgment by which the tenant may defeat a claim for enhancement. I am, therefore, of opinion that the original judgment of the Munsif was correct.

If this view, that the procedure prescribed in Beng. Act VIII of 1869 does apply to claims of enhancement by a purchaser at a revenue-sale, is correct, it establishes the second objection urged by the special appellant, who in support of it cited the judgment of a Full Bench in *Hurryhur Mookerjee* v. *Puddo Lochun Dey* (1), which was a suit by the representative of an auction-purchaser at a revenue-sale, and the Court held that the rule in Act I of 1845, s. 26,—*i. e.*, the procedure laid down in s. 10, Reg. V of 1812, was subject to the modifications contained in Act VIII of 1859, and in the particular case to the modification contained in s. 3. This obviously decides that the right of the purchaser is subject to all the modifications contained in Act X. Now one of these modifications is that contained in ss. 4 and 17 of Act VIII of 1869 (ss. 4 and 16 of Act X of 1859), which taken together form a presumption in favor of such tenures of all classes held at an unchanged rent for a period of twenty years before the commencement of a suit, that such holding has run on at the same rate from the time of the Permanent Settlement, and that the tenant is protected by the provisions of s. 3 (in both Acts). The Judge, although he admits that there are receipts showing payment of rent at an uniform rate for about thirty years, sufficient to establish the presumption under the ordinary Rent Law, has overruled the plea on the ground that such presumption does not arise against a purchaser at a revenue-sale, the law contemplating that such purchaser shall obtain the estate free from all incumbrances. Any presumption under the Rent Law would not be valid against an auction-purchaser, for it is quite possible that the presumption may have arisen from the laches or collusion of the defaulting zemindar. As to this last remark,

(1) 7 W. R., 176.

I do not think it necessary to say more than that proof of fraud or laches would be in fact proof that the tenure is of later creation than the Permanent Settlement, and, therefore, would rebut the presumption. The Full Bench decision determines that the presumption may be pleaded, and until the presumption is rebutted it removes the case from cl. 4 to cl. 1, s. 37, of Act XI of 1859, under which the protection of the tenant is absolute. I am, therefore, of opinion that the lower Appellate Court came to a wrong conclusion in this part of the case, and that the suit should have been dismissed.

The plaintiff appealed under s. 15 of the Letters Patent.

Baboo *Sreenath Das* and Baboo *Anund Gopal Paulit* for the appellant.—As the right to enhance the rent of the land of the description held by the defendant is governed by a special enactment, *i. e.*, cl. 4, s. 37 of Act XI of 1859, the Judge should not have allowed the defendant the benefit of the presumption arising out of twenty years' uniform payment of rent. The circumstance that the law of procedure in cases for enhancement referred to in cl. 4, s. 37 of Act XI of 1859, is the same as that contained in Act VIII of 1869, cannot affect the rights of any party created by any special enactment.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Hem Chunder Bannerjee* for the respondent.

The judgment of the Court was delivered by

JACKSON, J. (MARKBY, J., concurring).—It appears to me that the judgment of Mr. Justice Ainslie was right. The plaintiff, who was an auction-purchaser, and claimed the privileges of s. 37 of Act XI of 1859, sued, not to eject but to enhance the rent of the defendant, alleging him to be a person holding a lease of land whereon a dwelling-house had been erected, and to have held the same at what was originally an unfair rent, and not to have been holding at a fixed rent equal to the rent of good arable land for a term exceeding twelve years.

The defendant, however, stated that he was a person com-

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ing under the first exception of the 37th section, that is to say, that he was the holder of an istemrari or mokurari tenure, which had been held at a fixed rent from the time of the Permanent Settlement.

The question arose, as I understand, in this case, in what manner the defendant was to make out his claim of exemption, and the opinion of Mr. Justice Ainslie was, that in cases of this sort, when the plaintiff seeks to enhance being bound by the provisions of s. 37 to proceed in the manner prescribed by any law for the time being in force, that is to say, the present Beng. Act VIII of 1869, all the sections of that Act relating to the procedure apply on the part of the defendant as well as the plaintiff, and amongst others, s. 4, which enables the ryot to give evidence that the rent of his land has not been changed for a period of twenty years before the commencement of the suit, and thereupon the presumption arises. It appears to me that that conclusion is correct. Whether we regard the terms of s. 37 taken together, or the particular language of the last proviso of that section, it seems clear that when a purchaser under the Revenue Sale Law seeks to enhance, he must enhance the person whose tenure is the subject of suit in the manner prescribed by the law in force for the time being in regard to enhancement. It seems to me that the word 'ryot' really makes no difference, because if the defendant does not come within the description of ryot, then there is no power given by this section to enhance at all. He can only be enhanced according to that section if he comes within the fourth class of exceptions, and if a person holding under that class of exceptions be not a ryot, then there is no power to enhance him; and I also think that the legislature, in passing these two enactments almost in the same breath, and conferring upon purchasers of estates the powers granted by s. 37 at the same time that they recognized in old ryots the rights which are declared by Act X of 1859, must have intended to give to ryots holding ancient tenures the same means of protecting themselves against persons claiming to enhance under the Revenue Sale Law as against other enhancing or ejecting landlords. The appeal is dismissed with costs.

Appeal dismissed.